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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 03—CF—890
	)	
JIMMY A. BOYD,	)	Honorable
	)	Daniel Guerin,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justices Zenoff and Schostok concurred in the judgment.

**ORDER**

*Held:* Where defendant failed to adequately allege claims of ineffective assistance of trial counsel and appellate counsel, the postconviction court did not err in summarily dismissing the postconviction petition as frivolous and patently without merit.

Two men broke into the home of Ernesto Quiles and Martha Zinda on the morning of January 12, 2003. One of the men repeatedly “pistol-whipped” Quiles and Zinda in the head and also shot Quiles twice. After Quiles was released from the hospital, he and Zinda reluctantly identified defendant, Jimmy A. Boyd, as the assailant who inflicted their injuries. Following a jury trial and two appeals, defendant eventually was sentenced to consecutive terms of 25 years’ imprisonment

for aggravated battery with a firearm (720 ILCS 5/12—4.2(a)(1) (2002), a Class X felony, and an extended term of 8 years' imprisonment for aggravated battery (720 ILCS 5/12—4(a) West 2002)), a Class 3 felony.

Defendant filed a postconviction petition alleging that trial counsel rendered ineffective assistance by (1) failing to file an answer to discovery, (2) failing to present certain evidence of defendant's innocence, (3) failing to object to the State's delayed disclosure that Quiles had admitted to selling drugs and serving as a police informant, (4) allowing the jury to hear prejudicial evidence of defendant's gang membership, and (5) failing to object to an incomplete jury instruction regarding eyewitness identification testimony. The postconviction petition further alleges that appellate counsel was ineffective for failing to raise the issues regarding the jury instruction, the tardy disclosure of Quiles' drug dealing, and the evidence of defendant's gang membership. The trial court summarily dismissed the postconviction petition as frivolous and patently without merit, and defendant appeals. We affirm.

#### FACTS

A jury found defendant guilty of one count of aggravated battery (720 ILCS 5/12—4(a) (West 2002)), one count of aggravated battery with a firearm (720 ILCS 5/12—4.2(a)(1) (West 2002)), and four counts of home invasion (720 ILCS 5/12—11(a)(3), (a)(5) (West 2002)). The trial court merged the charges into two counts of home invasion and imposed concurrent terms of 55 and 45 years' imprisonment (720 ILCS 5/12—11(c) (West 2002)). Defendant was acquitted of two counts of armed robbery (720 ILCS 5/18—2(a) (West 2002)).

On direct appeal to this court, defendant argued that (1) the delayed filing of the home invasion charges violated his speedy-trial rights and therefore his trial attorney was ineffective for

failing to move for their dismissal; (2) the State failed to prove him guilty beyond a reasonable doubt; (3) the trial court incorrectly instructed the jury regarding eyewitness identification testimony; (4) the two convictions of home invasion violate one-act, one-crime principles; and (5) the 15-year sentencing enhancement for committing home invasion while possessing a firearm is unconstitutionally disproportionate to the penalty for aggravated battery with a firearm. The State conceded that one of defendant's home invasion convictions must be vacated on one-act, one-crime grounds, but the State disputed defendant's remaining claims.

We held that (1) the home invasion counts must be dismissed because trial counsel was ineffective for failing to invoke defendant's right to a speedy trial on those counts; (2) the evidence supported the guilty verdict on the lesser-included offenses of aggravated battery and aggravated battery with a firearm and that the trial court did not commit plain error in instructing the jury; and (3) defendant's remaining allegations of error were moot. We reversed defendant's convictions of home invasion and remanded the cause for the trial court to sentence defendant on the counts of aggravated battery and aggravated battery with a firearm. *People v. Boyd (Boyd I)*, 363 Ill. App. 3d 1027, 1030 (2006).

On remand, defendant was sentenced to consecutive terms of 25 years' imprisonment for aggravated battery with a firearm (720 ILCS 5/12—4.2(a)(1) (2002)), a Class X felony, and an extended term of 8 years' imprisonment for aggravated battery (720 ILCS 5/12—4(a) West 2002)), a Class 3 felony. Defendant appealed again, challenging the imposition of an extended-term sentence on the aggravated battery conviction and the imposition of consecutive sentences. We affirmed the sentences. *People v. Boyd (Boyd II)*, No. 2—07—0792 (Ill. App. May 21, 2009).

Next, we summarize the evidence presented at trial as it relates to defendant's claims of ineffective assistance of counsel. Quiles testified that, in January 2003, he resided in a basement apartment in Addison with Zinda and the couple's daughter. Quiles had met defendant through a mutual friend, Tony Ogle, and had known defendant for approximately one year. Ogle and defendant lived together. At least once, defendant had the opportunity to overhear Quiles discussing cocaine dealing.

On January 9, 2003, defendant, Ogle, and a man named "Dave" helped Quiles move a couch and wide-screen television in Quiles's apartment. After the move, Quiles retrieved \$500 from a safe in his bedroom to repay a loan to Dave. Defendant saw the transaction. While in the bedroom, Quiles showed defendant an aquarium containing exotic frogs.

Three days later, at approximately 7 a.m. on January 12, 2003, Quiles awoke to a loud crash in the living room. Quiles exited his bedroom and saw a person, whom he identified as defendant, holding a handgun to Zinda's head. An Hispanic man was also present, but Quiles did not recognize him. Defendant was wearing dark pants and a pullover sweatshirt with a "hood that kind of cover[ed his] eyebrows in a way." Defendant ordered Zinda and Quiles to the floor and asked for the location of "the safe." Quiles claimed that he did not own a safe, and defendant struck Zinda and Quiles in the head with the gun while demanding the location of the safe. Defendant's partner unsuccessfully searched for the safe in the bedroom and repeatedly reported that he could not find "the money." While standing in the hallway, defendant directed his partner to turn on a light that sat on the bedroom dresser.

Defendant and his partner grew frustrated, and defendant threatened to rape Zinda in Quiles's presence if the safe was not disclosed. Quiles explained that he did not disclose the location of the

safe because it contained a gun as well as money, and Quiles feared getting shot. Quiles grabbed defendant's arm but "freaked out" and released him. Quiles testified that he "got a very good look" at defendant's face and recognized his voice and unique "sunken" eyes. Defendant again struck Quiles in the head with the gun, and defendant's partner exited the bedroom. Quiles heard two gunshots, felt his stomach burn, and felt something pass through his leg. Defendant and the Hispanic man left.

Before the paramedics arrived, Quiles directed Zinda "to tell the police that [Ogle's] boys did it." Ogle and defendant were members of the Simon City Royals street gang, which was affiliated with the Folks nation. Quiles had been a member of the Latin Kings gang when he was younger. Quiles was treated for several days in intensive care for the two gunshot wounds. Ogle visited Quiles in the hospital, and Quiles feared that Ogle was involved in the attack. Quiles also feared for the safety of his daughter and Zinda because they still resided in the apartment.

The police interviewed Quiles several times in the hospital. When Quiles was shown a photographic lineup that included defendant, Quiles did not identify defendant as the attacker but stated that he "might have been involved." At that time, Quiles was "100%" certain that defendant was involved, but he did not tell the police because he and his family felt vulnerable. At the start of one interview, Quiles asked an officer whether defendant was in custody. However, Quiles never requested police protection. Quiles assisted in the creation of a police sketch of the intruder, but he was not "up front" with the police about the intruder's identity because he was scared. Quiles told the police that Ogle's friends might have been involved but that defendant was an "okay friend."

On the date Quiles was released from the hospital, he telephoned the police and told them that defendant was the attacker. Quiles stated that he felt safe to discuss the incident only after he

could walk and his family had moved and changed telephone numbers. Defendant was arrested. The police subsequently informed Quiles that he had been “caught on tape dealing cocaine.” Quiles agreed to serve as an informant in drug investigations, but he insisted that his testimony was not influenced by any threats or promises of leniency. Quiles admitted to dealing approximately one ounce of cocaine per week during the previous year, but he denied any personal use. At trial, the parties stipulated that a metabolite of cocaine was detected in Quiles’s urine at the hospital.

Zinda corroborated Quiles’s testimony. She testified that, on the morning of the incident, a babysitter was watching the couple’s daughter. Zinda and some friends had been out for early morning drinks and breakfast after work, and Zinda arrived home at 7 a.m. Zinda was sitting at her computer when she heard someone break the living room window. She “got a good look” at the intruder as he jumped through the window and walked toward her. He wore a dark blue jacket with a loose hood covering his head, and he carried a flat, dark gun. Zinda recognized the attacker as defendant, whom she met during the television move a few days earlier. Defendant grabbed Zinda’s hair and neck and dragged her into the hallway while holding a handgun to her head. Zinda was “100%” certain that defendant was the attacker. Defendant asked Zinda, “Where is your boyfriend?” By that time, Quiles was standing in the hallway. Defendant struck Zinda and Quiles in the head several times with the gun after ordering them to lie prone on the floor. Photographs introduced into evidence showed that Quiles suffered two gunshot wounds and that Zinda’s head injuries required several stitches.

Zinda stated that Quiles directed her to be vague when describing the man with the gun because they feared defendant’s retaliation. Zinda identified defendant in the photographic lineup

and told the police that the attacker with the gun appeared to be “[Ogle’s] friend” who had “helped move the couch.”

Addison police detective Brian Goss testified that he spoke with defendant at the police station about the incident. Defendant volunteered that he knew Quiles had been shot and that they had “part[ied] together” at Ogle’s home in the past. Defendant said that Quiles often flaunted his wealth and bragged about his belongings. Defendant appeared jealous of Quiles. Defendant further asserted that Zinda had told him that people routinely stopped at the apartment’s living room window, but she was unsure why. At trial, Zinda denied making any such statement to defendant.

Goss testified that, when he interviewed Quiles at the hospital, he was responsive and specific and had a good recollection of the incident, but struggled to answer questions because he was in pain. Upon his release from the hospital, Quiles positively identified defendant, explaining to Goss that he did not feel safe to do so until he and his family had moved into his mother’s home. Quiles also told Goss that he believed the morphine he had taken at the hospital had adversely affected his memory. Zinda similarly explained to Goss that her delay in identifying defendant was caused by the trauma of the event.

Defendant introduced the testimony of Officers John Beeman, Roger Saran, and John Sinkule, who each testified to the victims’ equivocal identification of the attacker. On the morning of the incident, Zinda stated that she had never seen the offenders before, and Quiles did not indicate that he knew either of them. However, Quiles disclosed that they chanted “let’s go Folks” before leaving the apartment. Zinda told Sinkule that the offenders were “[m]ale white or male Hispanic, in their 20’s, [and] possible gang bangers,” but that she could not provide a better description because they directed her to look at the floor the entire time. Officer Saran testified that, while searching the

apartment for evidence, he found \$10,000 in the safe, \$2,500 in a shoe, \$700 in a kitchen drawer, and drug paraphernalia including smoking pipes, rolling papers, and an electronic scale.

Defendant's postconviction petition alleges that trial counsel and appellate counsel rendered ineffective assistance. Specifically, the petition alleges that trial counsel failed to file an answer to discovery, failed to present certain evidence of defendant's innocence, failed to object to the State's delayed disclosure that Quiles had admitted to selling drugs and serving as a police informant, allowed the jury to hear prejudicial evidence of defendant's gang membership, and failed to object to an incomplete jury instruction regarding eyewitness identification testimony. The petition further alleges that appellate counsel failed to raise on direct appeal the issues regarding the jury instruction, the tardy disclosure of Quiles' drug dealing, and the evidence of defendant's gang membership.

On June 11, 2010, the trial court summarily dismissed the postconviction petition as frivolous and patently without merit. This timely appeal followed.

#### ANALYSIS

Defendant appeals from the summary dismissal of his postconviction petition. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122—1 *et seq.* (West 2008)) provides a method by which persons under criminal sentence can assert that their convictions were the result of a substantial denial of their rights under the United States or the Illinois Constitution or both. 725 ILCS 5/122—1 *et seq.* (West 2008); *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010). A postconviction proceeding is civil in nature (*People v. Johnson*, 191 Ill. 2d 257, 270 (2000)) and is a collateral attack on the prior conviction or sentence that does not relitigate a defendant's innocence or guilt (*People v. Evans*, 186 Ill. 2d 83, 89 (1999)). Therefore, any issues considered by the court on direct appeal are barred by the doctrine of *res judicata*, and issues which could have been

considered on direct appeal are deemed procedurally defaulted. *People v. West*, 187 Ill. 2d 418, 425 (1999).

Proceedings under the Act are commenced by the filing of a petition in the circuit court in which the original proceeding took place. *People v. Jones*, 213 Ill. 2d 498, 503 (2004). The Act contemplates a three-stage process for non-death-penalty cases. *Jones*, 213 Ill. 2d at 503. A circuit court may summarily dismiss a postconviction petition at the first stage if it determines that the petition is “frivolous or is patently without merit.” 725 ILCS 5/122—2.1(a)(2) (West 2008). Moreover, any claim of substantial denial of constitutional rights not raised in the original or amended petition is deemed waived. 725 ILCS 5/122—3 (West 2008). The summary dismissal of a postconviction petition poses a legal question that is subject to *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

Defendant’s postconviction petition alleges that trial counsel and appellate counsel rendered ineffective assistance. Both the United States and Illinois Constitutions guarantee a defendant the right to effective assistance of counsel. See U.S. Const., amend. VI; Ill. Const. 1970, art. I, §8. The purpose of this guarantee is to ensure that the defendant receives a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). The ultimate focus of the inquiry is on the fundamental fairness of the challenged proceedings. *Strickland*, 466 U.S. at 696. However, there is a strong presumption of outcome reliability, so to prevail, a defendant must show that counsel’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. Under *Strickland*, defense counsel is ineffective only if (1) counsel’s performance fell below an objective standard of reasonableness; and (2) counsel’s error prejudiced the defendant. Failure to establish either prong defeats the claim.

*Strickland*, 466 U.S. at 687. A court need not decide whether counsel’s performance was deficient before analyzing whether the defendant was prejudiced. *People v. Cortes*, 181 Ill. 2d 249, 295-96 (1998).

The burden is on the defendant to affirmatively prove prejudice. *Strickland*, 466 U.S. at 693. To establish prejudice, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The prejudice component of *Strickland* entails more than an “outcome-determinative test”; rather, the defendant must show that deficient performance of counsel rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000).

#### A. The Composite Police Sketch

First, defendant contends that the jury should have seen the composite sketch of the offender. Defendant believes the sketch resembles Sam Reeves, whom defendant alleges committed the offense. In his opening brief, defendant argues that the summary dismissal of the postconviction petition must be reversed because the court failed to consider the sketch as evidence of his actual innocence. However, in his reply brief, defendant accurately states that the postconviction petition does not assert a claim of actual innocence, but rather a claim that trial counsel was ineffective for failing to introduce the sketch at trial. In support of his claim, defendant cites “confidential information” that he allegedly told defense counsel before trial, including “that defendant had gone to the scene with two others, one of whom was Sam Reeves; that the two others had gone inside Quiles’ apartment; that defendant believed they had gone in only to purchase drugs; that defendant

remained in the car and had no knowledge of and did not participate in what the other two did inside the home.”

The State argues that defendant has waived the issue, but waiver aside, trial counsel’s failure to ask for the sketch to be given to the jury is a strategic trial decision. Counsel’s decisions on what evidence to present and what witnesses to call are routinely considered matters of trial strategy. *People v. Munson*, 206 Ill. 2d 104, 139 (2002). Such decisions are generally cloaked with immunity from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999). Further, counsel’s strategic decisions will not be second-guessed, “the fact that another attorney might have pursued a different strategy is not a factor in the competency determination.” *People v. Palmer*, 162 Ill. 2d 465, 476 (1994) (citing *People v. Hillenbrand*, 121 Ill. 2d 537, 548-49 (1988)). Trial counsel’s decision to not show the sketch to the jury did not fall below an objective standard of reasonableness.

Moreover, as the postconviction court noted, the sketch was rejected at trial because defense counsel successfully objected to its admission. The State had attempted to introduce the sketch because it resembles defendant’s photograph and would be further proof that defendant was the offender. The State’s determination that the sketch would strengthen the prosecution reinforces our conclusion that defense counsel’s decision to object to it was prudent and did not prejudice defendant.

#### B. Ernesto Quiles

Second, defendant argues that trial counsel was ineffective for failing to investigate and introduce evidence of Quiles’ activities as a drug dealer and a police informant. Defendant argues

the related point that appellate counsel was ineffective for failing to allege that trial counsel was ineffective for not investigating and emphasizing Quiles' background at trial.

The petition alleges that, during discovery, defense counsel received a "mug shot" of Quiles showing an arrest on February 28, 2003, by Officer Goss, who also was the lead detective and arresting officer in this case. Defense counsel allegedly failed to conduct any investigation of the arrest to determine the offense or the disposition of the prosecution. During cross-examination of Quiles, defense counsel did not inquire about Quiles' arrest. A week before trial, the State tendered information that Quiles had been taped dealing drugs nine days before the incident in this case. The State claimed that, after being confronted in April 2003 about the drug deal, Quiles had started acting as a police informant. Defense counsel allegedly failed to investigate Quiles further and did not cross-examine him on any benefits he received as a police informant. Defendant allegedly did not learn of the information until after the trial.

Whether defense counsel was ineffective for failing to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. Attorneys have an obligation to explore all readily available sources of evidence that might benefit their clients, and defense counsel has a professional obligation, both legal and ethical, to explore and investigate a client's defense. *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002). However, "a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

We agree with the postconviction court that defendant has failed to establish a claim of ineffective assistance regarding an investigation into Quiles' background. Defendant is unable to

show that substantial prejudice resulted and that there is a reasonable probability that the final result would have been different had counsel investigated Quiles.

Defendant argues that the postconviction court engaged in improper fact finding at the first stage of postconviction review in determining that defendant was not prejudiced by counsel's failure to investigate. The postconviction court commented that, during direct examination of Quiles, the State "fully and completely" elicited the information about Quiles' prior drug dealing and the timing and circumstances of his decision to act as a drug informant. We agree with defendant that fact finding is inappropriate at the first stage of postconviction proceedings, but a review of the record establishes that the evidence was adequately disclosed to the jury.

The jury heard evidence that the police confronted Quiles with video surveillance of his cocaine dealing. Quiles testified that he agreed to serve as an informant in drug investigations, but he insisted that his testimony was not influenced by any threats or promises of leniency. Quiles admitted to dealing approximately one ounce of cocaine per week during the previous year, but he denied any personal use. At trial, the parties stipulated that a metabolite of cocaine was detected in Quiles's urine at the hospital.

During closing argument, trial counsel argued repeatedly that Quiles was a "selfish" drug dealer who falsely denied personal use of drugs, which made him not credible. Trial counsel also argued at length that Zinda was a "pawn" in Quiles' scheme to falsely identify defendant as the offender.

Defendant has not alleged any information outside the record to support his ineffective assistance claim regarding investigation, and he has not demonstrated how a further investigation into the narrow issue of bias would increase the probability that the result would have been different.

We have already concluded that the State introduced overwhelming evidence of defendant's guilt, rejecting defendant's assertion that some other person committed the crimes and that the victims' alleged drug use and dealing rendered them not credible on the identification issue. *Boyd I*, 363 Ill. App. 3d at 1042.

Moreover, the examination or impeachment of a witness generally is considered to be trial strategy, which does not support a claim of ineffective assistance of counsel. *People v. Smith*, 177 Ill. 2d 53, 92 (1997); *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court." *Pecoraro*, 175 Ill. 2d at 326-27. The only way for a defendant to prevail on his ineffectiveness claim is by "showing that counsel's approach to cross-examination was objectively unreasonable." *Pecoraro*, 175 Ill. 2d at 327. Defendant cannot make such a showing here.

As discussed, the State elicited the information about Quiles' prior drug dealing. Also, the State agreed to make available to the defense a detective who could serve as an impeachment witness if Quiles' were to make inconsistent statements. Trial counsel could have made the strategic decision that cross-examining Quiles on his drug dealing would have prejudiced defendant by opening the door to previously-excluded evidence that defendant had sold drugs to Quiles in the past. Such cross-examination on these points also would have given Quiles the opportunity to explain or minimize them.

### C. Defendant's Gang Membership

Third, defendant argues that trial counsel was ineffective for allowing the jury to hear evidence of his gang membership after such evidence had been ruled inadmissible on a motion *in*

*limine*. We disagree. The trial court, while finding that trial counsel's examination of Quiles had opened the door to the challenged evidence, instructed the jury to consider defendant's alleged gang membership only for the purpose of identification. The evidence of defendant's gang membership was relevant to determining the identity of the offender because it explained the victims' delay in identifying defendant. The victims explained that they were reluctant to identify defendant for fear of gang retaliation, and thus waited until Quiles left the hospital. Identification was the central issue in the case, and trial counsel's decision to emphasize the victims' delay in identifying defendant, and thus open the door to evidence of defendant's gang membership, was a matter of strategy that did not fall below an objective standard of reasonableness.

Moreover, we agree with the postconviction court that the evidence of defendant's gang membership was superfluous in light of the overwhelming evidence that defendant was the offender. Both Quiles and Zinda had the opportunity to view the assailant, whom they immediately recognized as defendant, the person who had been in their home only three days earlier. The offender showed a familiarity with the home that would be expected of a person whom Quiles had known for a year. Upon entering the home, the offender asked Zinda about the whereabouts of her boyfriend, and he later directed his partner to a lamp that was out of view in another room. *Boyd I*, 363 Ill. App. 3d at 1042-43. Defendant was not prejudiced either by trial counsel opening the door to the evidence of his gang membership or by appellate counsel failing to raise the issue on direct appeal.

#### D. Jury Instruction

Fourth, defendant argues that trial counsel was ineffective for failing to challenge the jury instruction regarding eyewitness testimony and that appellate counsel was ineffective for failing to allege trial counsel's ineffectiveness.

In *Boyd I*, we reversed defendant's convictions of home invasion and determined that he still could be convicted of aggravated battery and aggravated battery with a firearm, two counts on which the jury returned guilty verdicts. We rejected defendant's argument that he was entitled to a new trial on those counts on the ground that the trial court incorrectly instructed the jury regarding identification testimony. Engaging in a plain-error analysis based on defendant's procedural default of the jury instruction issue at trial, we concluded that any error in the challenged jury instruction was minimal and that defendant could not obtain relief under the plain-error doctrine because the evidence was not closely balanced. *Boyd I*, 363 Ill. App. 3d at 1041-42. We concluded that the State had introduced overwhelming evidence to prove defendant guilty beyond a reasonable doubt of aggravated battery and aggravated battery with a firearm. *Boyd I*, 363 Ill. App. 3d at 1042.

Consistent with our plain-error analysis in *Boyd I*, we conclude that defendant was not prejudiced by trial counsel's failure to challenge the identification instruction. The overwhelming proof of defendant's guilt likely would have been enhanced by the use of the pattern jury instruction, drawing attention to the omitted factors. The victims were unquestionably focused on their attacker during the prolonged encounter, and thus had a good opportunity to observe him. Although the victim's earlier descriptions of the offender were vague when compared to their unequivocal identification of defendant at trial, their descriptions were never inconsistent and the vagueness was explained by their fear of another attack. Also, only nine months passed between the offenses and the trial, making it more likely that the witnesses' recollections at trial were accurate. *Boyd I*, 363 Ill. App. 3d at 1041. Under these circumstances, defendant was prejudiced neither by trial counsel failing to challenge the non-IPI jury instruction on identification at trial nor by appellate counsel failing to raise the issue on direct appeal.

For the preceding reasons, the summary dismissal of the postconviction petition in the circuit court of Du Page County is affirmed.

Affirmed.