

No. 1-09-2100

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 92 CR 21601
)	
LEANEL DEERE,)	Honorable
)	Victoria Stewart,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *HELD:* The circuit court did not err in dismissing the successive postconviction petition at the second stage where defendant did not satisfy the cause-and-prejudice test for either claim in the petition. For defendant's claim that he was denied his right to testify, he has not shown prejudice where the evidence placing defendant at the scene and establishing his participation in the shooting was much more compelling than the evidence against his codefendant who testified and was subsequently acquitted. For defendant's claim that the jury received erroneous instructions on eyewitness identification, he has not shown prejudice where multiple factors weighed in favor of reliability for the identification of

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defendant and he was known to the eyewitnesses who placed him at the scene and verified his participation.

¶ 2 Defendant Leanel Deere was charged with first degree murder in the shooting death of Michael Payton, together with codefendants Tyris Brunt and Kenneth Washington. Following a simultaneous jury trial in which each defendant was represented by a separate attorney, Deere was convicted and sentenced to 60 years in prison. On direct appeal, this court affirmed the conviction (*People v. Deere*, No. 1-94-3539 (1999) (unpublished order under Supreme Court Rule 23)). Deere's attorney filed a postconviction petition in 2002, but it was dismissed as untimely and this court granted Deere's motion to dismiss his appeal in that case. Deere filed a second postconviction petition *pro se* in 2005. The State's motion to dismiss was granted. On appeal, Deere contends that the circuit court erred in dismissing his petition where he made a substantial showing that he was denied his right to testify, and that his jury received an erroneous eyewitness identification instruction. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 **BACKGROUND**

¶ 4 In 1994, Deere and codefendant Brunt were convicted of first degree murder in the shooting death of Payton. Codefendant Washington was acquitted. At trial, Quincy Mabrey testified that at the time of Payton's death, he was in the seventh grade at Richard Wright Elementary School. On November 20, 1991, he had an altercation during school hours with Antonio Hughes, Deere's son. After school, Quincy stated that Hughes approached him at a store near the school and asked him if he was ready to fight. Hughes then pushed Quincy, who punched Hughes in the jaw. They both started hitting each other and then Quincy tripped Hughes

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and, while he was on the ground, "stomped" him. That evening, Quincy was with two of his friends at a pool hall in his neighborhood when Terrell Wolfe came into the pool hall, looked at them, and then left. Wolfe returned with Deere a short time later. Deere asked the three boys to step outside, where he asked which one of them had jumped on his son. He then told them that he would be at their school the following day and that if his son pointed out any of them, he would break their legs. Quincy testified that Deere pulled a gun out of his pocket, handed it to Wolfe, and told him to "go put it up." At home that evening, Quincy told his brother, Johnny Mabrey, what had happened. Johnny left for school as usual the next morning, but Quincy decided to stay home because he was afraid of Deere.

¶ 5 Johnny testified that at the time of the incident, he was a junior at Orr High School, which was located a block away from the elementary school. Johnny thought that Quincy had gone to school the day after his fight with Hughes, so Johnny left the high school before school was out that day and went to the elementary school to pick up his brother. Johnny identified Deere and his codefendants and testified that he saw the three of them standing outside the school when he arrived. He also saw Wolfe and Hughes standing with them. He then saw Wolfe chase a boy behind the school. Johnny did not see Quincy and when another student told him Quincy had not come to school that day, he started to leave to return to the high school.

¶ 6 As Johnny crossed the street, he looked back and saw Wolfe pointing him out to Deere and Brunt. Johnny said that Deere and Brunt approached him, followed by Wolfe and another man, and Deere asked him why he came to the school. He told them he was there to pick up his little brother and one of the men hit him in the face and others joined in. Johnny fell to the

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ground and tried to protect himself. While he was on the ground, someone hit him on the head with a bottle. He then heard someone tell the men to stop beating him up. Johnny said that this person, whom he identified as Payton, then bent down and tried to pick him up. As Payton was lifting him, Johnny heard a gunshot. Payton dropped him and he fell back to the ground. When he looked up, Payton was running. Johnny stayed on the ground, pretending that he had been shot, and then heard more gunshots.

¶ 7 Tasha Mosby testified that she was a friend of Payton's and was with him on the day of the incident. She said that Payton had picked her up in his car and they were driving to his mother's house. Their route took them past the elementary school. As they approached the school, they noticed that a fight was in progress across the street from the school. Mosby identified Deere and his codefendants as participants in the fight. Mosby testified that she and Payton were looking at the fight and she could see that one person was on the ground being beaten. Payton stopped the car in the middle of the street, got out, and went over to the fight. Mosby remained seated in the car, approximately five or six feet from the fight. She testified that the passenger window was open approximately six inches. Mosby saw Deere kicking Johnny and Brunt hitting and kicking Johnny. She saw Washington standing there but he was not doing anything at that time. Mosby watched Payton make his way through the crowd surrounding Johnny and heard him asking them to stop hitting and "stomping" Johnny. She then heard a woman in the crowd say, "Who the fuck is he, he doesn't have shit to do with it." She also heard Deere shout, "Take the motherfucker out." Deere was facing Mosby at the time and she was looking at his face when he said the words.

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¶ 8 Mosby saw Payton bend down to pick Johnny up and then she heard a gunshot. She saw Payton drop Johnny and reach for his back. Payton then started running toward a vacant lot and Mosby saw Brunt run behind him. She saw Brunt holding a gun and pointing it toward Payton. She saw Washington running behind Brunt and she also saw him holding a gun. Deere was walking behind them. Mosby heard another gunshot and saw Payton grab his thigh and keep running. When he reached the vacant lot, he fell to the ground, face first. As he hit the ground, he rolled over and Mosby saw Brunt walk up to Payton, point the gun down at him, and continue shooting. She heard a click that sounded like the gun was empty and then saw Brunt and Washington run off. Mosby started screaming for help and ran to Payton. He told her that he had been shot in the back. Payton then stopped talking and closed his eyes. A woman started doing CPR and then the paramedics arrived. The police questioned Mosby about the incident a short time later.

¶ 9 On cross-examination, Mosby stated that she knew Deere from seeing him around the neighborhood and because, at one point in time, he lived in the building where her aunt lived. Mosby stated that the day of the incident was the first time she had seen Brunt. Mosby further acknowledged that she had known Washington for several years but that she did not immediately identify him to the police as a participant. She agreed that she initially only described him and the clothes he was wearing. She said that he was wearing a blue jean stonewashed suit. On redirect, she explained that when the police initially talked to her she was still extremely upset about Payton's death. She further explained that she did not immediately put Washington's name together with the person she saw at the scene wearing the stonewashed blue jean outfit because

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she had only seen a side profile of that individual.

¶ 10 James Randle testified that he was working as a security guard at Richard Wright Elementary School on the date of the incident in question. Randle was standing by the main entrance to the school and saw a group of adults and teenagers standing near the north end of the building. Randle identified Deere and his codefendants as members of the group he saw that day. When Hughes came out of the school, Randle told him he could go to Deere, his father. Randle was called away to break up a fight in the back of the school between a student and Wolfe. As Randle walked down the hallway toward the fight, he saw Washington inside the school. Randle testified that Washington was wearing a stonewashed blue jean outfit that day and it "stuck out" in his mind. When Washington saw Randle coming, he turned and walked out the back door of the school. Randle testified that when he returned to the main entrance, he saw the beating of Johnny in progress. He saw a group of older people kicking and punching Johnny, and he saw someone throw a bottle at him. Randle identified Deere, Washington and Brunt as some of the people he saw punching and kicking Johnny. Randle approached Washington and pushed him away, just as Payton pulled up and got out of his car. Randle saw Washington take out a gun and fire the weapon at Payton. When Payton started running toward the vacant lot, Randle saw Brunt run after him, firing a gun as he ran. He also saw Washington following behind Payton and firing his weapon. Randle saw Payton go down. Brunt then went up to Payton while he was on the ground and fired three or four more shots. Randle saw Washington go up behind Brunt and stand by Payton, and then saw the two of them get into a truck that was parked nearby.

¶ 11 Betty Davis testified that she was working as a school community representative at the

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elementary school on the day of the incident. Outside of the presence of the jury, it was disclosed that Davis had ignored a subpoena and the court had to sign a warrant in order for her to appear. After her testimony began, it was noted for the record that Davis appeared physically shaken and was crying. She acknowledged that she was scared and did not want to testify. Her duties on the day of the incident included standing at the north door at the end of the school day to make sure the children got out safely and there were no fights. On that day, Davis noticed a group of men coming down the street. She identified Deere, whom she knew, as being part of the group. Deere approached Davis and she asked him what was up. He told her to "get the fuck out of his face." Davis then headed for the front door to let Randle know that there might be a problem. Davis saw Hughes, Deere's son, come out of the school and heard Deere ask him whether any of the boys who had jumped on him were there. Hughes pointed out another student and Deere told Hughes to "get him." Hughes and Wolfe chased the boy behind the school and inside the back door of the school. Davis then went inside the school and saw them beating up on the student. She and some of the aids at the school were able to break up the fight.

¶ 12 Davis went back outside and saw Deere with a group of men. She also saw Johnny coming down the street, and heard someone shout, "There goes Quincy's brother." Deere and some of the other men approached Johnny and started beating him. Davis also identified Brunt as one of the men who was beating Johnny. Davis did not know Brunt's name at the time, but testified that she knew he was related to the Deere family. Davis testified that she then saw a car pull up and a man got out of the car and tried to help Johnny. Then she heard someone say that "it wasn't his fucking business" and heard someone else say, "Take him out." Davis stated that

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she saw Deere's sister pass a gun to someone in the crowd, so she grabbed a student who was standing there and got under a car. She heard gunshots and noise and people running. From her vantage point under the car, she could see people in the vacant lot from the knees down. Davis saw Brunt with a gun hanging down in his hand. She testified that she was able to identify him because of the blue-green windbreaker outfit he was wearing that day. After the shooting, Davis ran back into the school.

¶ 13 Officer Tony Dicristosano testified that he was on duty in the area at the time of the shooting and was the first officer to arrive at the scene. He said that Payton was still breathing when he arrived but was not responsive. Officer Dicristosano called for an ambulance and called for backup to assist in preserving the crime scene. Randle approached him and they had a brief conversation. Officer Dicristosano testified that Randle was trembling and appeared to be very nervous and scared. He then attempted to speak with Mosby. He described Mosby as hysterical and stated that he could barely understand her. He spoke with two other witnesses at the scene. Officer Dicristosano testified that he did not take notes and that he prepared his report approximately two hours later. He confirmed that his report summarized the information he received from the various witnesses.

¶ 14 Wolfe testified that he was a student at Orr High School at the time of the incident. He had gone to the elementary school that day with Washington. He said that when he arrived at the school, his younger brother got into a fight with someone else at the school so he joined the fight inside the school to help his brother. After the security guard broke up the fight, Wolfe said he left the school. When he got back outside, Wolfe said that he saw Johnny. Wolfe testified that

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Johnny asked him what he was doing there and if he had come to jump on Johnny's brother. Wolfe said that he and Johnny then started fighting in the vacant lot across the street and some other people joined in and helped him beat Johnny up. Wolfe did not know the identity of the two people who helped him, but said that they were not adults and were around his age. A car pulled up and Payton got out and started helping Johnny. Wolfe said that one of the young men who had been helping him beat up Johnny fired a shot at Payton, who then started running and more shots were fired. Wolfe testified that the man who was firing the shots was wearing a stonewashed jean outfit. Wolfe then ran back across the street where he saw Deere and Washington. He said that Washington was shielding his younger sister and another girl. Wolfe testified that Washington was wearing an expensive black leather coat, which he described as a "Pelle Pelle" jacket. Wolfe said that he did not see Brunt at the school that day and that he had never seen him before. He also testified that neither Deere nor Washington participated in the beating of Johnny. Wolfe explained that there had been an ongoing rivalry in the neighborhood between himself and Johnny's brother. Wolfe acknowledged that he had a previous conviction for the unlawful use of a weapon.

¶ 15 Jeffrey Bates testified that he was walking past the school at the time of the incident. He saw some fighting and then a car pulled up and a man got out and tried to stop the fight. He saw someone else walk over and ask, "Who is this punk?" Bates heard someone else say they did not know and then he heard a lot of gunfire. Bates saw someone with a gun but did not know who he was. Bates said that he saw Washington by the school, stooped down and shielding his younger sister and another girl. He also said that Deere was just a few feet away from Washington. Bates

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testified that he did not know Brunt and had never seen him before. Bates said that he knew Deere, Hughes, and Deere's sister. He testified that Deere was not involved in the fight. Bates further testified that Washington was wearing a black leather jacket with "Pelle Pelle" across the back in big letters. On cross-examination, Bates said that he had seen Wolfe at the school that day, and that Wolfe was one of the individuals fighting with Johnny.

¶ 16 Rachel Washington testified that she was a student at the elementary school at the time of the incident. When she came out of the school that day, she saw Washington, who is her brother, standing with her friend Erica at the back gate. As she walked toward them, someone started shooting and Washington grabbed her and Erica and they got down on the ground. Rachel testified that Washington was wearing a black jacket. She further testified that she did not see anyone standing with Washington except for Erica, and that she did not know Deere. Erica Franklin testified that when she left school that day, she saw Washington standing by the gate and walked over to him to wait for Rachel. When Rachel came out of the school, Erica heard gunshots and then Washington grabbed both girls and held them close to the ground. After the gunfire stopped, the three of them got up and ran home. Erica testified that Washington was wearing a black "Pelle Pelle" jacket and black pants. Erica further testified that she did not know who Deere was and that she did not remember seeing either Deere or Brunt that day.

¶ 17 Washington testified that he went to the elementary school on the day of the incident to pick up his sister. He waited by the back door and saw Erica come out, so he asked her where Rachel was. Erica waited with him until Rachel came out. Washington said that he saw Wolfe and Johnny start pushing each other in the street and they then moved to the other side of the

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street. Washington said he never went to the other side of the street, but it appeared that more people were fighting than just Johnny and Wolfe. Washington saw Payton drive up and get out of his car. He saw Payton pick Johnny up and then heard someone say, "Who is this M.F.," and someone else said, "What does he got to do with it." Then Washington heard shots so he grabbed Rachel and Erica and got down next to a car. When the shots stopped, he got up and ran down the street with the girls.

¶ 18 Washington testified that he knew Deere and that he saw him at the school that day. He explained that when the fight started, it was just Johnny and Wolfe, but after Johnny fell to the ground, more people joined in. He did not recognize the other people, but testified that the person who fired the first shot was wearing a light blue stonewashed jean outfit. Washington said that he saw Deere standing in the street, close to the curb, at the time of the shooting. He also testified that he did not know Brunt and that he had not seen him at the school on the day of the shooting.

¶ 19 Lorraine Deere testified that she is the defendant's sister. She went to the elementary school on the day of the incident to pick up her two children. She stated that while she was waiting for her children, she heard gunshots. She ducked behind a car and after the gunfire stopped, she was able to locate her children. Lorraine testified that she saw her brother and Washington standing next to a fence at the school. She stated that Brunt is her cousin and that she did not see him at the school that day. Lorraine acknowledged that she knew Davis and that she frequently spoke to her when she went to the school. Detective Keane, who had previously testified, was recalled as a rebuttal witness. He testified that he interviewed Lorraine after the

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incident and she told him that she could not say where Deere was at the time of the shooting because she has poor eyesight and was not wearing her glasses.

¶ 20 The jury returned a verdict of not guilty for Washington and guilty verdicts for both Brunt and Deere. The court entered judgment on the verdict and, on September 7, 1994, sentenced Deere to 60 years in prison. On appeal, Deere argued that the State did not prove him guilty beyond a reasonable doubt. This court affirmed Deere's conviction (*People v. Deere*, No. 1-94-3539 (1999) (unpublished order under Supreme Court Rule 23)). The attorney who represented Deere on direct appeal filed a postconviction petition in 2002, alleging ineffective assistance of trial counsel for failure to challenge the sufficiency of the indictment, failure to call witnesses at the sentencing hearing, failure to object to the testimony of a witness in aggravation at the sentencing hearing, and for telling defendant not to testify on his own behalf. The State filed a motion to dismiss, arguing that the petition was untimely and defendant failed to allege any facts showing that the delay was not due to his culpable negligence. The circuit court determined that the petition was barred by the statute of limitations and granted the motion to dismiss.

¶ 21 Deere filed a second postconviction petition *pro se* in 2005. The Public Defender's office filed a certificate pursuant to Supreme Court Rule 651(c), stating that the *pro se* petition adequately set forth Deere's claims and no supplemental petition for relief would be filed. The State then filed a motion to dismiss on the grounds that the allegations in Deere's petition were either waived, without merit, or barred by the doctrine of *res judicata*. The circuit court found that assistance of counsel was not ineffective and that matters had been fully litigated at the time of the initial postconviction petition. The court further concluded that the law defendant relied

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upon for the jury instruction error did not go into effect until 2001. Finally, the court found that defendant was barred by *res judicata* from raising issues that were not raised in the initial petition. Deere timely filed this appeal.

¶ 22

ANALYSIS

¶ 23 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122–1 *et seq.* (West 2004)) provides a procedural mechanism by which any person imprisoned in the penitentiary may assert that there was a substantial denial of a federal or state constitutional right in the proceeding which resulted in his or her conviction. 725 ILCS 5/122–1(a) (West 2004); *People v. Harris*, 224 Ill. 2d 115, 124 (2007). Proceedings are commenced by the filing of a petition, verified by affidavit, in the circuit court in which the conviction took place. 725 ILCS 5/122–1(b) (West 2004). A postconviction proceeding is limited to constitutional issues that have not been, nor could they have been, previously adjudicated. *Harris*, 224 Ill. 2d at 124.

¶ 24 Postconviction proceedings may consist of up to three stages in cases that do not involve the death penalty. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the circuit court reviews the petition to determine whether the petition is frivolous and patently without merit. *Harris*, 224 Ill. 2d at 125-26. A petition must present "the gist of a constitutional claim" to survive beyond the first stage. *Id.* at 126. The circuit court is required to dismiss petitions that are frivolous and patently without merit, and such dismissals are final orders. *Id.* At stage two, the circuit court may appoint counsel for the defendant and the State may move to dismiss the petition. *Id.* At the second stage, the relevant inquiry is whether the petition establishes a substantial showing of a constitutional violation. *Id.* (citing 725 ILCS 5/122-6

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(West 2004)). A petition that is not dismissed at the second stage proceeds to the third stage where the circuit court conducts an evidentiary hearing. *Id.*

¶ 25 At both the second and third stages of postconviction proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. At the second stage of the proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *Id.* The circuit court does not engage in fact-finding or credibility determinations at the dismissal stage; rather, such determinations are made at the evidentiary stage. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). Here, Deere's petition was dismissed at the second stage. We review a circuit court's dismissal of a postconviction petition at the second stage *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 26 The Act generally contemplates the filing of only one postconviction petition. 725 ILCS 5/122-3 (West 2004); *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002); *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). However, our supreme court held in *Pitsonbarger* that fundamental fairness allows the filing of a successive petition where the petition complies with the cause-and-prejudice test. *Pitsonbarger*, 205 Ill. 2d at 459. “ ‘[C]ause’ in this context refers to any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial post-conviction proceeding.” *Id.* at 462. “ ‘Prejudice’ exists where the defendant can show that the claimed constitutional error so infected his trial that the resulting conviction violated due process.” *Morgan*, 212 Ill. 2d at 154. Moreover, the cause-and-prejudice test is to be applied to individual claims, not to the petition as a whole. *Pitsonbarger*, 205 Ill. 2d at 462. In 2004, our legislature amended the Act to adopt the cause-and-prejudice test. 725 ILCS 5/122-

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1(f) (West 2004); *People v. Anderson*, 375 Ill. App. 3d 121, 135 (2007).

¶ 27 We note that a determination of whether or not the cause-and-prejudice test has been satisfied is necessary in order to determine whether a claim raised in a successive petition may be considered on its merits. See *Pitsonbarger*, 205 Ill. 2d at 459. Thus, if the cause-and-prejudice test applies and is not satisfied, the claim is statutorily barred and the merits of the claim will not be considered. There is no evidence in the record that the circuit court considered whether the cause-and-prejudice test had been satisfied. Deere raised two claims of ineffective assistance in his petition. His first claim involved ineffective assistance of trial counsel because Deere wanted to testify and counsel told him it was not his choice. His second claim involved ineffective assistance of appellate counsel for failing to raise the issue of ineffective assistance of trial counsel for not objecting to an erroneous jury instruction. Deere's first claim was included in his initial postconviction petition while the second claim was not. "A defendant must demonstrate both cause and prejudice with respect to each claim raised in his successive petition." *People v. Smith*, 341 Ill. App. 3d 530, 536 (2003).

¶ 28 We first address Deere's claim that he was denied his right to testify. Deere contends that the cause element has been satisfied because of his postconviction counsel's unreasonable assistance in filing an untimely petition. Although Deere acknowledges that this claim was included in his first postconviction petition, it was not considered on its merits because the initial petition was dismissed as untimely. Deere's postconviction counsel did not allege any facts to establish a lack of culpable negligence in filing the petition after the statute of limitations had run. The State argues that Deere has not established cause because he has not pointed to any

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reasons that should have been included in his initial petition to excuse the late filing.

¶ 29 We note that Deere's second postconviction counsel attempted to contact the first attorney but was unable to obtain an answer as to why the first petition was filed late. The record also discloses that the first attorney's response at the hearing on the motion to dismiss the petition was unintelligible. After acknowledging that the petition had not been filed until 2002, postconviction counsel stated, "[h]owever, as I indicated, we do believe that the issues raised would lend towards the evidence of insurance, your Honor, and as such, the Court should deny the State's motion to dismiss." Deere's current counsel has no way to force his first postconviction counsel to explain why the petition was filed late and, therefore, cannot offer any reasons that should have been included in the first petition. Because Deere relied on his counsel to adequately represent him in his initial postconviction petition and his claim was not considered due to his counsel's failure to adequately represent him, we conclude that he has sufficiently shown an objective factor, external to the defense, that impeded his ability to have the merits of this claim considered in his initial petition.

¶ 30 Deere contends that he has satisfied the prejudice element because competing accounts of the incident were given at trial and his codefendant who testified was acquitted. Deere argues that because he was convicted on an accountability theory based on conflicting evidence regarding whether he encouraged the shooting of Payton, the outcome of the trial could have been different if he had not been deprived of his constitutional right to testify.

¶ 31 The record discloses that very different evidence was presented regarding Deere's involvement in the shooting and that of his codefendant, Washington, who was acquitted. First,

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the evidence established that the entire incident was the result of Deere's desire to retaliate against the students who beat up his son, while no motive for Washington's alleged involvement was ever suggested. More importantly, Deere was placed in the group of people who were attacking Johnny by Davis, Randle and Mosby, who all knew Deere. In contrast, Davis did not even mention Washington in her testimony, Randle identified him as the individual who had been wearing the stonewashed blue jean outfit but did not appear to have known him prior to the day of the incident, and Mosby, who knew Washington and did not identify him initially, stated that she did not recognize him at first as the person she saw wearing the stonewashed blue jean outfit because she only saw a side profile of that individual. Multiple witnesses testified that Washington was wearing a black leather designer jacket that day, not a stonewashed blue jean outfit, and his sister and her friend both testified that Washington was with them on the opposite side of the street and used his body to shield them when the shots were fired.

¶ 32 Although three other witnesses stated that Deere was standing near Washington at the time the shots were fired, neither Washington's sister nor her friend could remember seeing him there. Moreover, one of the witnesses who stated that Deere was with Washington and was not involved in the fight had been seen with Deere the previous evening when Deere confronted Quincy, witnesses placed him with Deere when Deere arrived at the school the next day, and he admitted to being the one who started the fight with Johnny. Finally, Deere's sister's testimony that Deere was standing near Washington next to the school at the time of the incident was impeached by her earlier admission to a detective that she had not been wearing her glasses that day and did not know where Deere was at the time of the shooting. Mosby, who was not

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impeached and was viewing the incident from a distance of five or six feet from an open car window, testified that she heard Deere say the words "take the motherfucker out." When asked how she knew Deere was the one who said those words, Mosby testified that Deere was facing her and she was looking at his face when he said it.

¶ 33 Thus, the evidence placing Deere at the scene and establishing his participation in the shooting was much more compelling than the evidence against Washington, even without Washington's testimony. The suggestion that Washington was acquitted just because he testified is pure speculation and ignores the quality, or lack thereof, of the evidence against him. The suggestion that Deere would have been acquitted if he had testified is even more speculative and is highly improbable given the evidence against him. Even taking as true Deere's allegation that his trial counsel told him he could not testify, Deere has not established that this "constitutional error so infected his trial that the resulting conviction violated due process." *Morgan*, 212 Ill. 2d at 154. Thus, the circuit court properly dismissed Deere's first claim.

¶ 34 Deere's second claim is that he received ineffective assistance of counsel when trial counsel failed to object to erroneous jury instructions and appellate counsel failed to raise the issue on direct appeal. At trial, when giving the jury instructions on factors to consider in evaluating eyewitness testimony, the trial court erroneously inserted the word "or" between each factor. Deere contends that he has demonstrated cause for his failure to raise this claim in his initial petition because his first postconviction counsel also represented him on appeal and thus, it would be unreasonable to expect him to raise and argue his own incompetence. Deere also asks this court to relax the forfeiture doctrine where his failure to raise the issue in the first

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petition cannot be attributed to an intentional decision by counsel made in pursuit of his client's interests, citing *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991) and *Reed v. Ross*, 468 U.S. 1, 14 (1984). However, even if this court were to agree that Deere has satisfied the cause element, he cannot demonstrate prejudice.

¶ 35 Deere argues that because the evidence was closely balanced and relied solely on eyewitness testimony, he has demonstrated that the improper jury instruction on eyewitness identification denied him his right to a fair trial. As previously discussed, we do not agree that the evidence in this case was closely balanced. Deere was identified as being in the group of people who were beating Johnny by the school security guard and the school community representative, both of whom knew Deere and his son. Deere was also identified by Mosby, who knew him and heard him shout, "Take the motherfucker out." Although Davis did not know who said those words, her testimony that she heard them spoken independently corroborates Mosby's testimony, and Mosby was looking at Deere when he said those words.

¶ 36 At trial, the jury was given Illinois Pattern Jury Instructions, Criminal, No. 3.15 (3d ed. 1992), which includes the following factors: (1) the opportunity the witness had to view the offender at the time of the offense, (2) the witness's degree of attention at the time of the offense, (3) the witness's earlier description of the offender, (4) the level of certainty shown by the witness when confronting the defendant, and (5) the length of time between the offense and the identification confrontation. The error in using the word "or" between each factor is that it implies "that the identification testimony of an eyewitness may be deemed reliable if just one of the five factors listed weighs in favor of reliability." *People v. Gonzalez*, 326 Ill. App. 3d 629,

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640 (2001). Thus, the concern in a case based primarily on eyewitness identification where only one of the factors weighs in favor of reliability is that the jury's verdict could have been based on that one factor. Here, all of the factors weighed in favor of reliability for the identification of Deere by Mosby, Davis and Randle. Therefore, even if the jury had misunderstood the instructions, there is no danger that the jury based its verdict on the presence of just one factor. Moreover, unlike cases in which the reliability of the identification is an issue because the person who has been identified is a stranger to the eyewitness, all three of these witnesses knew Deere. Thus, Deere has not demonstrated that this "constitutional error so infected his trial that the resulting conviction violated due process" (*Morgan*, 212 Ill. 2d at 154), and the circuit court properly dismissed his second claim.

¶ 37 On review of a second stage dismissal of a postconviction petition, this court may affirm the decision of the circuit court on any grounds substantiated by the record, regardless of the circuit court's reasoning. *People v. Demitro*, 406 Ill. App. 3d 954, 956 (2010). Because Deere has failed to satisfy the cause-and-prejudice test for either of the claims in his postconviction petition, we affirm the judgment of the circuit court.

¶ 38 Affirmed.