

No. 1-10-1242

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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. 89 CR 447
)	Honorable
RICHARD ZUNIGA,)	Jorge Luis Alonso and
)	Maura Slattery-Boyle,
Defendant-Appellant.)	Judges Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the denial of defendant's motion seeking fingerprint comparison filed during remanded postconviction proceedings; the motion was not within this court's mandate. Additionally, we affirm the denial of postconviction relief after third-stage evidentiary hearing and found no error in limiting the evidence where the court heard testimony regarding associate counsel's qualifications and abilities, despite the order *in limine* to the contrary; the evidence showed trial counsel was not absent from trial and the associate had little participation in trial.

¶ 2 Following a 1992 bench trial, defendant, Richard Zuniga, was convicted of two counts of first degree murder and sentenced to natural-life imprisonment. We affirmed on direct appeal. *People v. Zuniga*, No. 1-93-0002 (1995) (unpublished order under Supreme Court Rule 23). Defendant now appeals from the denial of his postconviction petition following a third-stage evidentiary hearing ordered by this court. Defendant contends the circuit court, during the postconviction proceeding: (1) abused its discretion in denying his request for a comparison of a fingerprint on a shotgun where his conviction for the first of the two murders was based on possession of this weapon; and (2) erred

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in granting the State's motion *in limine*, which limited the scope of the evidentiary hearing on his claim that trial counsel was absent during trial and, therefore, was ineffective. We affirm.

¶ 3 BACKGROUND

¶ 4 Trial Proceedings

¶ 5 Defendant, and codefendant, Joseph Bravieri, were charged with first degree murder in the deaths of Joanne Gasic and Carmen Sarlo. The indictment alleged that, on or about December 18, 1988, defendant and codefendant shot Ms. Gasic and shot and stabbed Mr. Sarlo. Defendant and codefendant were tried simultaneously in bench trials before Judge Ralph Reyna. Attorney Nicholas De John represented defendant at trial.

¶ 6 Ms. Sandra Ault testified that on the morning in question, she was playing cards and using cocaine with defendant, codefendant, and Mr. Sarlo in the dining room of the apartment she shared with Ms. Gasic. During this time, Ms. Gasic was asleep on the living room sofa. When defendant, codefendant, and Mr. Sarlo arrived at the apartment, codefendant was holding defendant's coat in front of him, extending his right arm, which Ms. Ault considered "kind of strange." Codefendant then left the coat in one of the bedrooms.

¶ 7 At one point, codefendant left the card game, went to the living room, and shot Ms. Gasic twice with a shotgun. When codefendant returned to the dining room pointing a shotgun at Ms. Ault, she heard another gunshot, and fell to the floor and "played dead." Ms. Ault heard defendant, codefendant and Mr. Sarlo go to the kitchen, where Mr. Sarlo said they "got to get out of here," to which codefendant replied, "no, you got to go." Ms. Ault heard a scuffle between defendant, codefendant, and Mr. Sarlo in the living room.

¶ 8 Codefendant then returned to the dining room, turned over Ms. Ault, and discovered she had not been shot. Codefendant then went to the kitchen, where Ms. Ault heard someone rifling through the silverware drawer, then heard codefendant tell defendant to "shoot him in the head." Ms. Ault fled the apartment, running to a neighbor's home. As she fled, she saw a silver pistol sitting on the

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bar in the dining room. While she did not see anyone put the gun on the bar that day, Ms. Ault recalled seeing defendant carrying that gun on other occasions.

¶ 9 Ms. Gasic died of two shotgun wounds. Mr. Sarlo had been shot twice with two .38-caliber bullets fired from the same gun and suffered numerous stab wounds and blunt-force lacerations, as well as defensive wounds on his hands. Multiple dents in Mr. Sarlo's skull were consistent with a .38-caliber pistol magazine clip found at the scene, which also had Mr. Sarlo's hair on it. Mr. Sarlo's blood tested positive for alcohol and cocaine, while Ms. Gasic's blood did not.

¶ 10 Defendant and codefendant also had wounds on their hands when they were arrested later on the day of the murders. Defendant and codefendant had left their bloodstained clothing at the home where they were arrested. When it was recovered by police, a coat worn by defendant had Mr. Sarlo's blood on it. An officer who arrested defendant, and a resident of the home where defendant and codefendant left their clothing, corroborated that the coat in question belonged to defendant.

¶ 11 Fingerprints of defendant and Ms. Gasic were found on a can of soda left on the dining room table at the scene. The three spent shells found at the scene were fired by the shotgun also found at the scene. No useable fingerprints were found on the shotgun.

¶ 12 After his arrest, defendant gave a statement that implicated only codefendant in the killings. However, defendant also corroborated that he carried a .38-caliber pistol and would leave it on the bar in the dining room when visiting the apartment of Ms. Gasic and Ms. Ault. Defendant later gave a statement to the effect that he heard but did not see the shotgun firing, then came upon codefendant and Mr. Sarlo struggling for the shotgun. Defendant also stated that when Mr. Sarlo pointed the shotgun at codefendant, defendant shot Mr. Sarlo with his pistol, then defendant and codefendant left the apartment. However, in his statement, defendant did not account for Mr. Sarlo's stab wounds.

¶ 13 While defendant did not testify at trial, codefendant did testify. Codefendant testified that he, defendant, and Mr. Sarlo played cards and used cocaine with Ms. Ault on the morning in

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question. Codefendant denied bringing the shotgun to the apartment and, further, testified that Ms. Gasic previously had taken the shotgun as collateral in a drug sale. Codefendant testified that it was Mr. Sarlo who left the card game, shot Ms. Gasic with the shotgun, then approached defendant and codefendant with the shotgun still in hand. Codefendant further testified he struggled with Mr. Sarlo in self-defense and stabbed him in the chest and back with three knives while defendant shot and struck Mr. Sarlo. Codefendant attributed Mr. Sarlo's actions to his being angry with defendant and codefendant for not helping Mr. Sarlo take over Ms. Gasic's cocaine trade.

¶ 14 Judge Reyna found defendant and codefendant guilty of the murders of Ms. Gasic and Mr. Sarlo. After the trial, Mr. De John was given leave to withdraw as counsel for defendant, and attorney Sally Barnes filed an appearance on behalf of defendant. Judge Reyna sentenced both defendant and codefendant to natural-life imprisonment. Ms. Barnes represented defendant at the posttrial motion and sentencing stages of the proceedings.

¶ 15 Direct Appeal

¶ 16 On direct appeal, this court affirmed defendant's conviction and sentence against the following contentions: (1) the trial evidence was insufficient; (2) trial counsel was ineffective for not pursuing already-filed motions to suppress and for making statements allegedly conceding defendant's guilt; and (3) the trial court erred in denying his posttrial motion.

¶ 17 Postconviction Proceedings

¶ 18 In a March 1996 postconviction petition filed by attorney Allen Ackerman, defendant argued that his trial counsel, Mr. De John, rendered ineffective assistance. Specifically defendant claimed Mr. De John, before and during trial, was under psychiatric care, taking both psychiatric and pain medications, and was involved in tax disputes and a foreclosure action against his home. Defendant alleged he was unaware of these potentially impairing circumstances until after his trial. Additionally, defendant alleged Mr. De John "failed to perform an adequate pretrial investigation," and neglected to pursue motions to quash or suppress. Finally, defendant alleged Mr. De John

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"frequently left the courtroom during the presentation of trial evidence; particularly during the [S]tate's case-in-chief."

¶ 19 The postconviction petition was supported by affidavits from defendant, defendant's father, Joseph Zuniga, and a private investigator, John Rea. Mr. Rea averred, in part, that Mr. De John "apparently committed suicide" in 1994. The affidavits referred to Ms. Barnes as an attorney who assisted Mr. De John during trial.

¶ 20 As to Mr. De John's absences from trial, defendant averred, "attorney De John left the courtroom for ten or fifteen minutes at a time, several times during trial. *** These absences were so frequent that affiant was alarmed because attorney De John was missing testimony from witnesses he was scheduled to cross-examine." Defendant complained that Mr. De John cross-examined a witness after being absent from the courtroom when Ms. Barnes was "scheduled" to do so and was "better prepared." Defendant's father also stated that during trial Mr. De John, on at "least a dozen or more" occasions, left the courtroom "for five or ten or fifteen minutes."

¶ 21 In June 1996, Judge Reyna dismissed defendant's petition as frivolous and patently without merit. On review, we found defendant's petition stated the gist of a meritorious claim that trial counsel failed to investigate, prepare for, or appear at the trial. We, therefore, remanded the cause for further proceedings. *People v. Zuniga*, No. 1-96-2253 (1997) (unpublished order under Supreme Court Rule 23).

¶ 22 In January 1998, following remand of defendant's petition, codefendant filed a postconviction petition alleging ineffective assistance of trial counsel. Codefendant alleged, in relevant part, that his trial counsel agreed with defendant's trial counsel, Mr. De John, and that the latter would conduct the pretrial investigation of forensic evidence. However, Mr. De John failed to investigate the source of the fingerprint on the shotgun. Codefendant argued that the question of who shot Ms. Gasic and who was in possession of the shotgun just prior to her shooting, was key to his case. Thus, the failure to investigate the fingerprint was prejudicial.

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¶ 23 In January 2002, Judge Reyna granted the State's motions to dismiss both petitions at the second stage without an evidentiary hearing.

¶ 24 On appeal, we reviewed codefendant's and defendant's claims of ineffectiveness of counsel under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires both a showing of deficient performance of counsel and resulting prejudice to defendant. We affirmed the dismissal of codefendant's petition and affirmed the dismissal of defendant's claims of inadequate preparation, but we reversed the dismissal of defendant's petition only as to his claim that trial counsel was absent from the courtroom during trial. *People v. Bravieri*, Nos. 1-02-0442, 1-02-0443 cons. (2004) (unpublished order under Supreme Court Rule 23).

¶ 25 In affirming the dismissal of codefendant's petition claiming ineffectiveness of trial counsel, we found codefendant had not established prejudice resulting from the failure of both trial counsels to investigate a single unextracted fingerprint on the shotgun. We held: "Whether that fingerprint belonged to [codefendant] or Sarlo did not determine who killed Gasic" because "[t]here was ample opportunity for the fingerprints of both men to get on the shotgun, regardless of who was the aggressor and who was defending himself," and "as there was only one fingerprint on the shotgun, which had been shot three times, it is obvious that every finger that touched the shotgun was not leaving an extractable fingerprint." *Id.* at 15.

¶ 26 As to defendant's petition, we addressed defendant's claims that trial counsel failed to investigate or prepare for trial. We concluded that because defendant had not shown what useful evidence would have been discovered through further investigation, and there was strong evidence establishing defendant's guilt, the prejudice prong of *Strickland* had not been met. We affirmed the dismissal of defendant's claims as to trial counsel's failure to investigate. *Id.* at 9-10.

¶ 27 However, we found the *Strickland* two-prong test, which presumes the presence of trial counsel, would not be applicable to the claim that Mr. De John was *absent* at times during trial. We cited *United States v. Cronin*, 466 U.S. 648 (1984), where the Supreme Court stated that a

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constitutional error occurs "when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic* 466 U.S. at 659, n. 25. In these instances, prejudice is presumed. *Cronic* 466 U.S. at 660. We cited cases holding that where a defendant is without any counsel during trial, ineffectiveness of counsel exists under *Cronic*. However, we also found that a harmless-error analysis applies to counsel's absence from trial except under certain circumstances such as absence during the presentation of inculpatory testimony. *Bravieri*, Nos. 1-02-0442, 1-02-0443 cons. at 11-13.

¶ 28 We could not determine from the record when, if ever, Mr. De John may have been absent from the courtroom during trial, or what testimony or proceedings he may have missed. Further, we could not "glean from the record that [Mr. De John's] associate was present to represent [defendant] whenever his attorney may have left the courtroom." *Id.* at 14. We believed that an evidentiary hearing was necessary so that the circuit court could "make factual determinations based on the testimony of the people who were present for the trial, apply the legal framework we set out above, and explain its decision on the record." *Id.* The cause was remanded "for an evidentiary hearing on the issue of his attorney's alleged absences at trial." *Id.* at 16.

¶ 29 Proceedings After Remand for Third-Stage Hearing

¶ 30 Motion for Fingerprint Comparison

¶ 31 In June 2009 following remand, defendant filed a motion for comparison of the latent fingerprint on the shotgun with the fingerprints of codefendant and of the decedents, Ms. Gasic and Mr. Sarlo, which had not been performed prior to trial. Defendant argued that advances in forensic science may have rendered suitable for comparison a fingerprint that was unsuitable in 1989, when the Gasic-Sarlo homicides were being investigated. Defendant conceded that trial-level discovery rules do not apply in postconviction proceedings, but argued that a court presiding over such proceedings has the discretion to permit limited discovery. The State responded that defendant's motion for fingerprint comparison was not within the scope of our mandate on remand and irrelevant

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to the issue of whether Mr. De John was absent during trial. Judge Jorge L. Alonso denied the motion in August 2009.

¶ 32 State's Answer and Motion *In Limine*

¶ 33 The State filed an answer generally denying all allegations of defendant's postconviction petition. The State asserted that the petition was remanded for an evidentiary hearing limited to the issue of Mr. De John's alleged absences from trial and that the hearing would show defendant's claim, as to Mr. De John's absences from trial, was meritless.

¶ 34 On a date scheduled for the third-stage hearing, the State made an oral motion for an *in limine* order before Judge Maura Slattery-Boyle that would limit the evidentiary hearing to the questions of whether Mr. De John was absent from the trial at any time and, if so, whether his associate Ms. Barnes was present during any absences. The State argued that this court's order and mandate were to the effect that if Ms. Barnes was present when Mr. De John was absent, she was there to protect defendant's rights. Defendant argued that evidence of Ms. Barnes' experience and ability to take over as defense counsel in Mr. De John's absences was relevant to the claim that Mr. De John rendered ineffective assistance by leaving court during the trial. At that time, Judge Slattery-Boyle indicated she would grant the State's motion, but continued the matter to give defendant's postconviction counsel additional time to further review the issue.

¶ 35 On the next court date, additional arguments were presented as to the State's motion *in limine*. The following discussion between the court and defendant's postconviction counsel, attorney Evelyn Baniewicz, took place:

"THE COURT: Miss Baniewicz, was it ever—ever in any of the preceding post-convictions ever filed or asserted before this Court or the Appellate Court in regards to Miss Barnes' lack of inexperience?

MS. BANIEWICZ: No, your Honor. The—the opening brief that was filed on the direct appeal, the post-conviction petition, the first appeal from the [19]96 dismissal of the

post-conviction, the last appeal in 2006, they all refer to ineffective assistance of trial counsel and the only name that they mention in connection with that is Nicholas [De John].

THE COURT: Okay. But—okay. So I guess my question is this: If you're now asserting or attempting to assert that Miss Barnes was not at the skill required or in your belief required for that, that is basically a new assertion under the post-conviction, correct? I'm asking you was that presented, that issue presented about Miss Barnes and her limited skill at the time?

MS. BANIEWICZ: No. I would say it would be a fair reading of the petition that it was not phrased in that language."

Judge Slattery-Boyle granted the motion *in limine*, stating:

"I'm going to follow the directives as the Appellate Court has indicated to me that is in the written opinion on Page 16 that this case is remanded for an evidentiary hearing on the issue of the attorney Mr. [De John's] alleged absence at trial."

Judge Slattery-Boyle denied defendant's request to make an offer of proof as to what the associate's testimony would be regarding her experience and qualifications at the time of defendant's trial.

¶ 36 Evidentiary Hearing

¶ 37 At the evidentiary hearing, Sally Barnes testified that she received her law license in May 1991, and was employed by the office of the Cook County Public Defender. She began working with Mr. De John during her third year of law school. Ms. Barnes became involved with defendant's case "pretty quickly" after becoming licensed, and was present at the trial. She was ten months out of law school. She testified that on the first day of defendant's April 1992 trial, Mr. De John left the court room to smoke a cigarette, leaving no instructions for Ms. Barnes. Upon his return, Mr. De John did not ask Ms. Barnes what happened while he was gone. Ms. Barnes recalled that after this first instance, Mr. De John "left *** through the entire trial approximately about every 15 minutes." To the best of Ms. Barnes recollection, she did not leave the courtroom when Mr. De John was

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absent. She could not recall any instance where she left the courtroom and Mr. De John was absent upon her return. Ms. Barnes did not ask Mr. De John to explain his absences because he "had a very violent temper and I was half-afraid to question him."

¶ 38 On cross-examination, Ms. Barnes detailed her legal experience and qualifications. She testified that she worked for Mr. De John for approximately one year, and during that time she attended only one trial other than defendant's—a jury trial on a murder charge—which she mostly observed, except for arguing "a few objections." She left Mr. De John's firm to start her own practice and approximately one year later, was hired by the Public Defender. She began with the Public Defender's office representing defendants in misdemeanor cases, and at the time of the hearing 17 years later, continued to be assigned to misdemeanor cases. Ms. Barnes "sporadically" handled felony cases. Regarding defendant's case, she testified that she "asked a few questions of a serologist."

¶ 39 The circuit court allowed into evidence the common law record and trial transcript, the affidavits of defendant and his father that were attached to the postconviction petition, and the certified copy of the death certificate of defendant's father.

¶ 40 In response, the State presented the affidavit of Judge Reyna, who was then retired from the bench. In his affidavit, Judge Reyna stated defendant "was never left alone without one of his attorneys present with him at counsel's table and at all times during the trial proceedings."

¶ 41 Patrick O'Brien¹, one of the prosecutors in defendant's trial, testified that he attended the entire trial and never saw defendant without counsel "when the trial was in session with witnesses testifying or arguments." Because of the small size of the courtroom—Mr. O'Brien referred to it as a "fishbowl"—it would not have been possible for Mr. De John to leave during proceedings without Mr. O'Brien noticing and requesting a recess. After reviewing the trial transcripts, Mr. O'Brien could find no occasion where Mr. De John left the courtroom, although Mr. O'Brien noted that Mr. De

¹Patrick O'Brien, at the time of his testimony, was a circuit court judge.

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John was late one day, and the trial was delayed until he arrived. When asked if Mr. De John left approximately every 15 minutes during the trial as stated by Ms. Barnes, Mr. O'Brien replied, "that did not occur."

¶ 42 At the end of the hearing, postconviction counsel argued: "The record in this case shows that Mr. De John, even while present in the courtroom, was not functioning as competent counsel [and that his absences from the courtroom] affected his performance." As a result, defendant did not receive a fair trial.

¶ 43 Following arguments of both sides, Judge Slattery-Boyle denied defendant postconviction relief. The court reviewed the entire trial transcript and found:

"By examining the record, it is clear Mr. De John was present. Mr. De John did not leave the courtroom every 15 minutes for a cigarette break.

What indicates that is several things. One, it's the independent court record. The black and white of the record. He was here. He was in there representing Mr. Zuniga." The circuit court also found, based on the testimony as to the small layout of the courtroom, that it was improbable Mr. De John was continuously leaving the trial. The court found Ms. Barnes' memory of the trial was clouded and, perhaps, affected by the hostility of her work relationship with Mr. De John. The court specifically noted it "allowed [postconviction counsel] a wide opportunity to discuss not only whether or not Mr. De John was present but whether Ms. Barnes was qualified or had the ability to represent" defendant. In sum, the court found Mr. De John "was in court," and that Ms. Barnes was present but played "a very limited role." This appeal timely followed.

¶ 44 Analysis

¶ 45 On appeal, defendant first contends that the circuit court abused its discretion in denying his request for a fingerprint comparison where he was found accountable for the murders of Ms. Gasic based on his possession of the shotgun. Defendant argues that if Ms. Gasic's fingerprint was on the

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shotgun, "it [would] mean[] that the shotgun was in her apartment prior to the night of the killing," and such evidence would be relevant to a claim of ineffectiveness of counsel.

¶ 46 On remand, the circuit court has no authority to act beyond the scope of the appellate mandate. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1036 (2011). Where, as in this case, the direction of our mandate is to proceed in conformity with our opinion or order, then the opinion or order must be consulted to determine the appropriate course of action. *Id.* This court may enforce the mandate and determine whether the circuit court has complied with it. *Id.*

¶ 47 In our order remanding for the proceedings now being appealed, we found that the circuit court had properly dismissed defendant's (and codefendant's) postconviction claims of ineffective assistance of trial counsel for failure to conduct pre-trial preparation or investigation. This matter was remanded for an evidentiary hearing on the single claim that defendant's trial counsel rendered ineffective assistance by absenting himself from the courtroom during trial. Defendant's request for fingerprint comparison bore no relationship to the remanded issue. Moreover, while fingerprint testing or comparison would arguably be relevant to the issue of whether trial counsel was ineffective for not preparing for trial or investigating the case, we had affirmed the dismissal of this claim. As the ineffectiveness of counsel claim as to the fingerprint was outside the circuit court's authority to consider and not relevant to the issue of trial counsel's absences from trial, the motion was properly granted.

¶ 48 We now turn to the circuit court's denial of the postconviction petition after a third-stage evidentiary hearing as to Mr. De John's alleged absences from the courtroom during trial proceedings.

¶ 49 "In a non-capital case, the Post-Conviction Hearing Act [citation] provides a three-stage process for postconviction relief." *People v. Logan*, 2011 IL App (1st) 093582, ¶ 30 (citation omitted). A petition that advances to the third stage is subject to an evidentiary hearing. *Id.* At a third-stage evidentiary hearing, the circuit court "may receive proof by affidavits, depositions, oral

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testimony, or other evidence [and] *** may order the petitioner brought before the court." 725 ILCS 5/122-6 (West 2010). During the third-stage proceeding, a defendant has the burden to demonstrate the existence of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). During an evidentiary hearing, the circuit court has the responsibility for determining the credibility of the witnesses, weighing the evidence, resolving any conflicts in the testimony, and drawing reasonable inferences from the evidence. *People v. Rovito*, 327 Ill. App. 3d 164, 172 (2001).

¶ 50 "Following a third-stage evidentiary hearing where fact-finding and credibility determinations are made, the circuit court's decision will not be reversed unless it is manifestly erroneous." *Logan*, 2011 IL App (1st) 093582, ¶ 30. "Manifest error is error that is 'clearly evident, plain and indisputable.'" *People v. Beaman*, 229 Ill. 2d 56, 73 (2008) (quoting *People v. Morgan*, 212 Ill. 2d 148, 155 (2004)). This deferential standard of review reflects the understanding that the circuit court is in the best position to observe and weigh the credibility of the witnesses. *People v. Coleman*, 183 Ill. 2d 366, 384-85 (1998).

¶ 51 We remanded this case for hearing as to the issue of the ineffectiveness of Mr. De John based on defendant's contention that Mr. De John had been absent from the courtroom during the trial, leaving defendant unrepresented by counsel. We could not determine from the record whether Mr. De John had indeed been absent and, if he was absent, whether it was during critical parts of the trial. The record was also unclear as to whether Ms. Barnes was present at the times Mr. De John may have been absent from the courtroom and, therefore, whether defendant had representation throughout the trial.

¶ 52 We discussed the law applicable to deciding such issues in our earlier decision remanding the claim for an evidentiary hearing as set forth above and further discuss it now. In determining whether a defendant was denied his right to effective assistance of counsel, we generally apply the two-prong test set forth in *Strickland*. A defendant must first establish that counsel's representation fell below an objective standard of reasonableness (*Strickland*, 466 U.S. at 688) and second, that he

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was prejudiced such 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.

¶ 53 In *Cronic*, the United States Supreme Court recognized a narrow exception to the *Strickland* two-prong test when " 'circumstances [exist] that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' " *Wright v. Van Patten*, 552 U.S. 120, 124 (2008) (quoting *Cronic*, 466 U.S. at 658). Prejudice will be presumed when there has been a "complete denial of counsel,' that is when 'counsel [is] either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.' " *Wright*, 552 U.S. at 124-25 (quoting *Cronic*, 466 U.S. at 659).

¶ 54 After considering the testimony and evidence presented at the third-stage hearing and reviewing the trial record as a whole, the circuit court found that Mr. De John had not been absent from the trial proceedings and that Ms. Barnes was present but had a limited role in the conduct of the trial. In so finding, the court rejected Ms. Barnes' testimony that Mr. De John was absent from the court room "every fifteen minutes." This finding, as to lack of credibility, was well within the circuit court's authority and not contrary to the evidence.

¶ 55 Our own review of the trial transcript shows that on each day of trial, defendant was shown to be represented by Mr. De John and Ms. Barnes. Mr. De John, throughout the trial, participated in the proceedings, examined witnesses, made objections and motions and presented arguments. There is nothing in the trial transcript supporting the contention that Mr. De John was continuously absent.

¶ 56 The trial transcript does show that on one day of trial, Mr. De John arrived late before the trial had even begun. The following discussion took place just after a State witness was called to the stand:

"MR. FORGUE [Prosecutor]: Your Honor, do you want me to wait until Mr. De John comes out, or may I proceed?"

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THE COURT: You better wait.

MS. BARNES You can go ahead.

Mr. FORGUE: For the record, his co-counsel, Miss Barnes, is still here.

THE COURT: Go ahead."

However, the record then shows Mr. De John participated in a discussion about this witness relating to chain of custody shortly after the direct examination began, and later conducted cross-examination of the witness. The record contains no other evidence of Mr. De John's absence from the courtroom. The trial record supports the circuit court's conclusions that Mr. De John was not absent continuously from trial, as claimed by defendant, and that Ms. Barnes' active participation in trial was limited. The testimony of Mr. O'Brien and the affidavit of Judge Reyna corroborate the court's conclusions that defendant was represented by counsel throughout trial and that Mr. De John was not absent *continuously*. We find the court's conclusions and findings were not manifestly erroneous.

¶ 57 Defendant failed to demonstrate a constitutional error occurred, and the denial of postconviction relief was "not manifestly erroneous."

¶ 58 Defendant also contends that the circuit court erred in limiting the scope of the third-stage evidentiary hearing and in preventing him from showing "Ms. Barnes was not able to adequately represent Mr. Zuniga in her employer's absence."

¶ 59 "The rules of evidence are not abandoned during an evidentiary hearing on a postconviction petition. Whether or not evidence is admitted during any hearing is within the sound discretion of the trial court." *People v. Jones* 2012 IL App (1st) 093180, ¶ 52. A ruling on evidence will be reversed only upon a "clear showing of abuse of discretion by the trial court." *Id.* (citing *People v. Tenney*, 205 Ill. 2d 411, 436 (2002)).

¶ 60 We first note that though the court granted the State's motion *in limine*, it then heard extensive evidence during the hearing regarding Ms. Barnes' qualifications and experience. Therefore, defendant was not prejudiced by the *in limine* order.

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¶ 61 The State argued below, and the circuit court agreed, that the issue remanded for hearing did not include a determination of whether Ms. Barnes was qualified to represent defendant during any absences of Mr. De John. The postconviction petition does not make a claim as to the qualifications of Ms. Barnes. The order remanding the case for a third-stage hearing remanded for a determination of whether Mr. De John had been absent from the courtroom as alleged in the postconviction petition and, also, whether Ms. Barnes was present when Mr. De John may have been absent. Our order does not refer to Ms. Barnes' qualifications. Defendant, citing *People v. Ruiz*, 177 Ill. 2d 368 (1997), contends a circuit court has "wide latitude" to "receive proof" during a third-stage evidentiary hearing and, therefore, should have allowed this evidence and claim to be heard. Even assuming the issue was within the scope of our mandate, Ms. Barnes' experience and background would be relevant—if at all—had defendant established Mr. De John had been absent from the courtroom during the trial and, in particular, during critical parts of the trial.

¶ 62 However, as discussed, the circuit court found that Mr. De John was not absent during any significant portion of the trial, that Ms. Barnes had a very limited active role in the trial proceedings and, that Ms. Barnes' ability to represent defendant was not a central factor in the conduct of his trial. These findings were not manifestly erroneous. We, therefore, find there was no reversible error in the issuance of the order *in limine*.

¶ 63 Accordingly, the judgment of the circuit court is affirmed.

¶ 64 Affirmed.