

and (2) appellate counsel rendered ineffective assistance on direct appeal by failing to raise this ineffective assistance by trial counsel. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). In our *de novo* review, we find both claims to be patently unmeritorious. Therefore, we affirm the trial court's judgment.

¶ 3

I. BACKGROUND

¶ 4

A. The Jury Trial

¶ 5

During the jury trial, which took place in July 2008, the witnesses testified substantially as follows.

¶ 6

1. *Alissa Perillo*

¶ 7

Alissa Perillo was a clerk in a Colonial Pantry convenience store in Champaign. At about 12:50 a.m. on November 21, 2007, she was alone in the store when someone came in: a tall, skinny man in his late twenties or early thirties, wearing a navy blue or black hooded sweatshirt and white baggy pants. He told her he wanted to buy cigarettes. She asked him for his date of birth, because to open the cash register, she had to key in that information. He told her August 12, 1968.

¶ 8

The man then grabbed her sweatshirt, held a box cutter against her side, and told her this was a robbery and to give him the money. She opened the cash register, and he reached over the counter and took the money out of the cash drawer. Then, leaving the box cutter and cigarettes on the counter, he walked out of the store.

¶ 9

Perillo did not remember the robber's face. She was not wearing her glasses at the time of the incident, so her vision was a little fuzzy. On November 27, 2007, the police showed her a photographic array. She chose photograph No. 2 and told the police that if the person in that photograph was not the robber, it could have been the person in photograph No. 1. Neither person,

however, was defendant. When defendant was asked to stand up in the courtroom, Perillo testified she thought that he and the robber were of about the same height and weight. But she could not positively identify defendant as the robber, even after, upon request, he approached her in the courtroom and grabbed her by the sweatshirt.

¶ 10 *2. Michelle Ortiz-Standifer*

¶ 11 At 12:20 a.m. on November 21, 2007, a University of Illinois police officer, Michelle Ortiz-Standifer, was parked in the parking lot of the Colonial Pantry when a man dressed in white or light gray cargo pants and a black hooded sweatshirt or coat walked in front of her car. The parking lot was well-lit. The man looked her in the eye, stopped, turned around, and paced back and forth. Then he looked at her again, turned away, and walked to the sidewalk, where he stood for about five minutes. This behavior struck Ortiz-Standifer as suspicious.

¶ 12 Ortiz-Standifer was dispatched to another part of the campus, and she drove out of the parking lot. Later, she heard over the radio that the Colonial Pantry had been robbed. She returned to the store and watched a surveillance video of the robbery. She recognized the robber as the man she had seen in the parking lot. In court, she identified defendant as the man.

¶ 13 *3. Douglas Wendt*

¶ 14 A Champaign police officer, Douglas Wendt, looked for fingerprints inside the store. He lifted prints from inside the southwest door after watching the robber, in the video, exit the store through that door.

¶ 15 *4. Gary Harvey*

¶ 16 The parties stipulated that if called as a witness, a forensic scientist, Gary Harvey would testify that he found no prints suitable for comparison on either the cigarette package or the

box cutter. He compared defendant's prints, however, to the prints lifted from the southwest door, and defendant's palm print matched one of the prints lifted from the door.

¶ 17

5. John Vernon

¶ 18 At the time of defendant's trial, John Vernon was serving a sentence of 4 1/2 years' imprisonment for felony domestic battery. In December 2007, when Vernon was still a free man, a Champaign detective, Donald Shephard, questioned him about a robbery of the Colonial Pantry. Vernon was under the impression that the robbery happened in December 2007.

¶ 19

On some occasion around the time of December 2007, Vernon, a cocaine addict, was smoking crack cocaine at "Hot Papa's House" on Tremont Street, a place that people frequented for the purpose of using or selling drugs. A man he knew only as "Mike" was there smoking crack cocaine with him. He identified defendant, in court, as the man he knew as "Mike." At some point in the evening, defendant disappeared and returned with money. Vernon asked him where he had obtained the money, and defendant replied it was none of Vernon's business. Vernon did not know if defendant had any money on his person before he disappeared. He added that crack addicts would do anything to get money with which to buy more cocaine.

¶ 20

When Shephard showed Vernon the video of the robbery, Vernon told Shephard the robber in the video was the man whom he knew as "Mike."

¶ 21

6. Thomas Petrilli

¶ 22

A Champaign police officer, Thomas Petrilli, was familiar with "Hot Papa's House." It was a well-known meeting place for the use and sale of drugs. Harry Ezra Johnson was its owner, and the police had arrested him several times for drug offenses. Petrilli had participated in the execution of at least three warrants at the house.

¶ 23 On December 14, 2007, about four houses from Johnson's house, Petrilli stopped a car for failure to use a turn signal. He identified defendant, in court, as the driver of the car. At the time of this traffic stop, defendant was wearing white carpenter's or painter's pants, and two box cutters were inside his car. Defendant denied using drugs and told Petrilli he was self-employed as a painter.

¶ 24 *7. Donald Shephard*

¶ 25 Shephard testified that defendant's birth date was August 12, 1968—the same birth date the robber had given Perillo—and he believed that defendant was 6 feet 2 inches tall and that he weighed 175 pounds.

¶ 26 Shephard interviewed defendant on February 14, 2008. During the interview, defendant was wearing a black pullover coat, white painter's pants, and tennis shoes. Shephard thought the pants and shoes were similar to those the robber had worn in the video. Defendant told Shephard he probably had been inside the Colonial Pantry, although he could not remember when. He explained he had gone to "Hot Papa's House" only to visit a cousin who lived there; he denied using cocaine.

¶ 27 The prosecution rested, and then the defense rested without presenting any evidence.

¶ 28 The jury returned a verdict finding defendant guilty of armed robbery.

¶ 29 After hearing and denying defendant's motion for a new trial, the trial court sentenced him to life imprisonment.

¶ 30 *B. The Direct Appeal*

¶ 31 Defendant filed a timely notice of appeal, and the Office of the State Appellate Defender (OSAD) for the Fourth District represented him in the direct appeal (OSAD for the Third

District represents him in the present appeal). We affirmed the trial court's judgment. *People v. Smith*, No. 4-08-0742, slip order at 1 (Dec. 7, 2009) (unpublished order under Supreme Court Rule 23). In so doing, we rejected defendant's challenge to the sufficiency of the evidence, the only issue he raised in the direct appeal. *Id.*

¶ 32 C. The Postconviction Proceeding

¶ 33 On December 10, 2010, defendant filed his petition for postconviction relief, and on December 21, 2010, the trial court summarily dismissed the petition as frivolous and patently without merit. In its order, the court remarked that "[t]he evidence [ad]duced at trial against the defendant was overwhelming." The court summarized the evidence as follows:

"Defendant's actions in committing the robbery were captured in a video the jury was able to see and make an identification from. He was positively identified at trial by a police officer as the individual acting suspiciously outside the store robbed just before the crime, and as the individual depicted on the video. He was described as wearing the same clothing seen on the video. The video shows the robber putting his hand on a glass door on the way out from the robbery; defendant's palm print was found in the identical location. The robber was asked by the store clerk for his birthdate when he asked to purchase cigarettes, as she could not sell them otherwise; without hesitation, the man gave defendant's actual date of birth. To be sure, the store clerk could not identify the defendant; however, this does little to diminish the quality of the evidence as she has poor eyesight

and was not wearing her glasses.

The other crimes evidence came from the testimony of a convicted felon named John Vernon who claimed to have smoked crack with defendant at a well known local crack house on the night of the robbery. Vernon claimed that at some point defendant left, and returned later with a wad of money. Vernon also said that defendant claimed he had 'hit a lick' (street slang for committing a robbery)."

¶ 34 Because of all this incriminating evidence, the trial court concluded that defendant "[could not] meet the second prong of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) requiring a showing that the performance of counsel prejudiced the defendant to such an extent that he was deprived of a fair trial." The court "[found] that the defendant ha[d] not made a preliminary showing of a substantial denial of a constitutional right," and therefore the court summarily dismissed his petition.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 Defendant considers the trial court's dismissal order to be problematic for two reasons. First, he argues the court misstated the evidence when recounting Vernon's testimony. According to the dismissal order, Vernon testified that (a) he smoked crack cocaine with defendant "on the night of the robbery" and (b) defendant said he had " 'hit a lick' " (street slang for committing a robbery). As for (a), defendant points out that, in actuality, Vernon thought defendant was with him in "Hot Papa's House" in December 2007, whereas the robbery of the Colonial Pantry took place on November 21, 2007—and Vernon was not even sure that the incident in "Hot Papa's House"

occurred in December; all he could recall with certainty was that it was cold out at the time. Defendant contends that unless the incident at "Hot Papa's House" occurred on the same day as the robbery—and it is unclear from Vernon's testimony that it did—Vernon's testimony is worthless. As for (b), defendant points out that, contrary to the dismissal order, Vernon never testified that he heard defendant say he had "hit a lick." Rather, Vernon testified merely that defendant had told him it was none of his business where defendant had obtained the money. During the trial, the prosecution attempted to elicit testimony from Shephard that defendant had told Vernon he had "hit a lick," but the trial court sustained defendant's hearsay objection, and consequently the jury never heard such testimony.

¶ 38 The second problem that defendant sees in the dismissal order, in addition to misstatements of evidence, is the use of an incorrect legal standard. The trial court found that defendant "ha[d] not made a preliminary showing of a substantial denial of a constitutional right" because he "[could not] meet the second prong of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) requiring a showing that the performance of counsel prejudiced the defendant to such an extent that he was deprived of a fair trial." Defendant points out, however, that only in the second and third stages of the postconviction proceeding is he required to make a "substantial showing of a constitutional violation" (*People v. Pendleton*, 223 Ill. 2d 458, 473 (2006)) whereas in the first stage, all that is necessary is that his petition not be "frivolous or *** patently without merit" (725 ILCS 5/122-2.1(a)(2) (West 2010)).

¶ 39 The State does not appear to contest defendant's arguments that the trial court misstated the evidence and used the wrong legal standard. Instead, the State argues that "[t]he trial judge's alleged misstatement of facts and alleged use of an incorrect standard *** provides no basis

to reverse the trial court's judgment" because the judgment itself is correct even if the court's rationale for the judgment is flawed. The ultimate question on appeal is whether the trial court's judgment passes legal muster, not whether its reasons for the judgment do so. *People v. Munoz*, 406 Ill. App. 3d 844, 850 (2010). If, in our *de novo* review, we find a basis in the record for affirming the judgment, we should affirm, regardless of any flaws in the trial court's rationale. *Id.*

¶ 40 The State maintains that, regardless of the trial court's rationale, the court was correct to find the claim of ineffective assistance of trial counsel to be "frivolous or patently without merit." According to the State, the claim met that description because defendant had forfeited the claim by omitting it from his direct appeal. Similarly, the State observes, the supreme court held in *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010), that the defendant in that case had forfeited his claim of ineffective assistance of trial counsel because the alleged ineffective assistance was based entirely on facts in the record and he could have, but did not, raise the claim on direct appeal. In this case, the claim of ineffective assistance likewise is based entirely on facts appearing in the trial transcript, namely, trial counsel's failure to object to other-crimes evidence in Vernon's testimony. The record enabled defendant to raise the claim on direct appeal. He did not do so. Hence, under *Petrenko*, he should be considered to have forfeited the claim. See *id.*

¶ 41 That leaves the claim of ineffective assistance of appellate counsel, which, of course, defendant could not have raised on direct appeal. "To succeed on a claim of ineffective assistance of appellate counsel, defendant must show that the failure to raise a particular issue was objectively unreasonable and that the decision prejudiced the defendant. [Citation.] Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the

merits is patently wrong." (Internal quotation marks omitted.) *People v. Jackson*, 205 Ill. 2d 247, 267 (2001). Therefore, we ask whether it is "arguable" that appellate counsel made an objectively unreasonable, patently wrong decision when appellate counsel decided not to raise the issue, on direct appeal, that trial counsel had rendered ineffective assistance by failing to object to the other-crimes evidence in Vernon's testimony. *Hodges*, 234 Ill. 2d at 16. From an objective point of view, it is not arguable that appellate counsel's decision was *patently* wrong. A reasonable appellate counsel could decide that establishing prejudice from the other-crimes evidence—that is, establishing a reasonable probability that the verdict would have been different but for the other-crimes evidence—was impossible, given the overwhelming evidence of defendant's guilt. See *People v. McLaurin*, 235 Ill. 2d 478, 502 (2009) ("[A] defendant must show that counsel's performance fell below an objective standard of reasonableness and that there exists a reasonable probability that the substandard performance resulted in prejudice to the defendant."); *People v. Houston*, 226 Ill. 2d 135, 149 (2007) ("[A] defendant establishes prejudice by showing that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Defendant was videotaped robbing the convenience store. Two witnesses identified him as the person in the video, and evidently the jury did, too. Even more damning, his palm print was found on the door, on the precise spot where the video showed him placing his hand to push the door open after rifling the cash register, and the birth date the robber gave Perillo was defendant's birth date.

¶ 42

III. CONCLUSION

¶ 43

For the foregoing reasons, we affirm the trial court's judgment, and we award the

State \$50 in costs.

¶ 44 Affirmed.