

No. 1-11-0409

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 16902
	)	
DERRICK NEAL,	)	Honorable
	)	Clayton J. Crane,
Petitioner-Appellant.	)	Judge Presiding.

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JUSTICE GORDON delivered the judgment of the court.  
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirm the trial court which dismissed defendant's postconviction petition at the second stage for failing to make a substantial showing that his trial counsel was ineffective for not investigating or calling three witnesses, where the affidavit of one of the three witnesses contradicted defendant's own admissions at trial, and where the other two claimed witnesses failed to present affidavits.

¶ 2 Defendant Derrick Neal was convicted by a jury of one count of first-degree murder, and two counts of aggravated battery with a firearm; and sentenced to 80 years for the first-degree murder, which included a firearm enhancement of 40 years, and 15 years for each count of aggravated battery. The sentences for aggravated battery to run concurrently to each other, but

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consecutively to the murder sentence. Defendant thus received a total of 95 years in the Illinois Department of Corrections (IDOC).

¶ 3 On direct appeal, defendant argued that the trial court erred in imposing consecutive sentences for his convictions for aggravated battery with a firearm. This court affirmed the sentence for the count pertaining to Shaun Walker, and remanded the count pertaining to Diane Walker for a new sentencing hearing to determine whether Diane Walker's injuries constituted severe bodily injury. On remand, the trial court again sentenced defendant to 15 years, but ordered that it be served concurrently with the other sentences.

¶ 4 Defendant now appeals the dismissal of his postconviction petition at the second stage of the postconviction process. He claims that his petition did make a substantial showing of a constitutional violation, namely, the ineffective assistance of his trial counsel. Therefore, he asks us to remand his petition to the trial court for a third-stage evidentiary hearing. Specially, he claims that his trial counsel was ineffective for failing to call or investigate the testimony of three witnesses. However, the affidavit of one of the three witnesses contradicted defendant's admission at trial that he shot first into a crowd of people, and the other two witnesses did not provide affidavits, only brief statements in a police report which also contradicts defendant's admission that he shot first. For the following reasons, we affirm.

¶ 5 BACKGROUND

¶ 6 I. Indictment

¶ 7 On July 11, 2000, a grand jury returned a thirty-seven count indictment against defendant pertaining to the shooting and killing of Phillip Hardnick and the shooting and wounding of

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Diane Walker, Shaun Walker and Jimmie Walker on May 2, 2000. The indictment charges defendant with: (1) the first degree murder of Phillip Hardnick (720 ILCS 5/9-1(A)(1) (West 2000)), (2) the attempt first degree murder of Shaun Walker, Diane Walker and Jimmie Walker (720 ILCS 5/8-4 (West 2000)), (3) the aggravated battery with a firearm of Shaun Walker, Diane Walker and Jimmie Walker (720 ILCS 5/12-4.2-5(a)(1) (West 2000)), (4) the aggravated discharge of a firearm against Phillip Hardnick, Shaun Walker, Diane Walker and Jimmie Walker (720 ILCS 5/24-1.2(a)(2) (West 2000)), and (5) the aggravated battery of Shaun Walker, Diane Walker and Jimmie Walker (720 ILCS 5/12-4(a) (West 2000)).

¶ 8 Jimmie Walker, one of the victims, is also one of the two eyewitnesses described in the police reports whom defendant claims that his trial counsel failed to investigate as a witness for the defense. Even though Jimmie Walker was named in the indictment as a victim, the State did not proceed on those charges at trial.

¶ 9 On August 23, 2001, defendant moved to dismiss the indictment contending that the 15-20-25 to life sentencing enhancement of Public Act 91- 404 (720 ILCS 5/8-4 (West 2000)) was unconstitutional. Specifically, defendant claimed: (1) the newly amended sentencing provision of attempt first-degree murder (720 ILCS 5/8-4 (West 2000)) violated both the Illinois and United States Constitutions' separation of powers clause (Ill. Const. 1970, art. II, § 1; U.S. Const., art. II, § 1); (2) created disproportionate penalties in violation of the Illinois Constitution (Ill. Const. 1970, art. I, § 11); (3) amounted to cruel and unusual punishment in violation of the eighth amendment of the United States Constitution (U.S. Const., amend. VIII); (4) violated the fourth, fifth, and fourteenth amendments to the United States Constitution (U.S. Const., amend. IV, V,

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XIV), and Article I, Section 2 of the Illinois Constitution (Ill. Const. 1970, art. I, § 2) by violating protections against due process and equal protection; and (5) was a violation of the law against double enhancement.

¶ 10 On December 18, 2001, the trial court denied in part and granted in part defendant's motion to dismiss. The court found that the amended sentencing enhancement of Public Act 91-404 (720 ILCS 5/8-4 (West 2000)) was constitutional as it pertains to the offense of first-degree murder, but found that the amended sentencing provisions of the attempted first-degree murder was unconstitutional. Accordingly, the court denied defendant's motion to dismiss the indictment as it pertained to the first-degree murder charge and granted his motion as it related to the enhanced sentencing provisions for attempt first-degree murder.

¶ 11 II. Evidence at Trial

¶ 12 At trial, the only issues presented to the jury were: whether to acquit on a theory of self-defense; and if the answer to that first question was no, whether to convict defendant of second or first-degree murder. The State's evidence showed that defendant fired 16 shots into a crowd of 30 to 50 people. Defendant took the stand and admitted that he fired into a crowd of about 50 people. He also admitted that he fired first before anyone had fired at him. However, defendant testified that he reasonably believed in the need for self-defense because he feared an approaching crowd that was armed with sticks, bats, and at least one person with a gun in a waistband, who were angered by a prior fight involving a woman who was standing next to him.

¶ 13 Police officer Michael Ferguson testified for the State that he was working in uniform with his partner near the LeClaire Courts area on 43rd street in the south side of Chicago on May

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2, 2000. He heard about 15 gunshots at about 5:25 p.m. and observed approximately 40 to 50 people “scattering” from the west. He was driving westbound in a motor vehicle, and noticed a crowd of people about 10-15 seconds after he heard the gunshots. However, he did not notice any of these individuals carrying a weapon, such as a stick, bat, or gun. He next observed Diane Walker, one of the victims, limping down the street. Diane told Ferguson that she had been shot and he observed a gunshot wound to her leg. Ferguson called for assistance and then approached Shaun Walker, another victim, who was lying on his back. Officer Ferguson obtained medical assistance for Shaun as well. He then approached Phillip Hardnick, the third victim, who was also lying on his back. He next proceeded to a parking lot inside the LeClaire Courts complex and observed several shell casings on the ground.

¶ 14 The State’s next witness, sixteen-year-old Annette Stewart, known as “Netta Pooh,” testified that she lives in LeClaire Courts with her siblings and her mother, Valerie Stewart. On May 2, 2000, she was coming home from school at around 5:30 p.m. and an altercation erupted between her and Nickia Carlvin over a boy. Annette went back home and told her mother that she had been involved in a fight. She and her mother Valerie went to talk to their neighbor, Gloria Hentz, who lived with Nickia. After Valerie and Gloria talked about the altercation, Valerie and Annette returned to the back of their home. On cross-examination, Annette initially denied walking around the neighborhood for 10 minutes after returning from Gloria’s house, but later admitted that she did, after her recollection was refreshed from a handwritten statement she had provided to the State. However, she denied that she was walking around attempting to find people who would help her fight Nickia.

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¶ 15 Annette further testified that she ultimately walked toward the parking lot on LaPorte Avenue and engaged in a second altercation with a group of girls that included Nickia. Annette's sister, Shalonda Stewart, joined her, and they continued arguing with Nickia, when defendant walked up, pulled a gun from his waistband, and started shooting. Annette recounted that she heard 9 or 10 shots. There were about 40 to 50 people in the parking lot when the shooting started, and many scattered and started running. A day or two later, Annette went to the police station, and talked to the police about the incident, and identified defendant as the shooter from a photograph.

¶ 16 The State's next witness, Valerie Stewart, Annette's mother, testified that she lives in LeClaire Courts with her children. On May 2, 2000, at around 5:30 p.m., Annette came into their residence crying about an altercation with Nickia that occurred near Gloria's house. Valerie went to Gloria's residence and spoke with Gloria about the altercation, and then returned home. Valerie and Annette left her residence, and returned to the parking lot with her daughter Shalonda, and Valerie next observed a crowd of 30 to 40 people between the ages of 15 to 20 years old, heading for the parking lot. She went to the end of the parking lot and noticed a man five to ten feet from her with a gun who started shooting at the crowd. Valerie heard 10 to 12 shots, and then observed the man run from the area, jump into a vehicle and drive toward Cicero Avenue. The police arrived and she told them the direction in which the vehicle was traveling. Two days later, Valerie went to the police station and identified defendant as the shooter from a photo array.

¶ 17 The State's next witness, fifteen-year-old, Diane Walker testified that she lives in

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LeClarie Court with her mother and aunt. On May 2, 2000, at 5:00 p.m., she was walking down LaPorte Avenue with her relatives. There was also a baby in a stroller with them. She observed 30 to 50 people in the parking lot, noticed that they were fighting, and then heard about 6 shots coming from the parking lot. Everyone started running. Diane then observed defendant running across LaPorte, towards her and her cousin, holding a gun and shooting. She did not know why defendant was shooting at her, but she observed defendant shoot at her about 10 times while she ran toward some row houses. After she realized that she was shot in the left leg, she sat on the ground and noticed her cousin, Shaun, lying on the ground nearby. She and Shaun were later transported to Mt. Sinai Hospital. Diane remained in the emergency room of the hospital for 4 to 5 hours while the medical staff treated her injury; and was hospitalized for nine days.

¶ 18 Another State's witness, Detective John Murray, testified that he was assigned to investigate the LeClaire Courts shootings. When he arrived at the crime scene at around 6 p.m., the areas had already been taped off and the victims had been removed. He talked to other officers at the scene and then proceeded to Christ Hospital, where Hardnick had been transported. However, by the time he arrived at the hospital, Hardnick had already passed away from his gunshot wounds. Murray went back to the police station, interviewed some witnesses and, as a result of those interviews, began searching for defendant. Murray attempted to locate defendant at a couple of different addresses but was not successful. Murray also interviewed Gloria that evening at the police station and transported her back to her residence. When they arrived at Gloria's residence at around 2 or 3 a.m. on May 3, her house had been set on fire. Murray also interviewed Annette and Valerie Stewart. They both identified defendant as the

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shooter, from photo arrays. Murray obtained an arrest warrant for defendant. On June 6, he learned that defendant has been admitted to Northwestern Hospital, so he went there and arrested defendant.

¶ 19 The parties stipulated that 16 nine millimeter shell casings were recovered from the scene of the shooting, and that no fingerprints were found on the casings. They further stipulated that all the ballistic evidence recovered from the scene came from the same gun. The evidence at trial revealed that the bullets that killed Hardnick and injured the others went through them and did not lodge in their person.

¶ 20 The State rested. Gloria Hentz, who was under subpoena by both the State and the defense, then testified for the defense. She testified that at the time of the shooting she was having a barbeque at her house located in LeClaire Courts, and that defendant was one of the guests. At that time, she heard Nickia Carlvn and Annette Stewart engaging in an altercation in front of her house. Gloria went outside and broke up the fight and Annette ran around the back of Gloria's house. At the time of the altercation, defendant was sitting in a vehicle in a parking lot that is about 30 feet from Gloria's house, and was not involved in the altercation. Gloria then returned to her house. About 30 seconds later, Gloria heard another altercation in front of her house. She ran towards the front and observed an altercation between Nickia, Annette and Valerie, Annette's mother and Bernice Stanley, the grandmother of Nickia's children. Gloria broke up the fight again and then walked to the back of her house with Valerie to discuss what had happened, but, Annette angrily ran away.

¶ 21 Gloria further testified that she next noticed an angry, hostile mob of people with sticks

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coming towards the parking lot close to her house. The crowd walked towards a vehicle in the parking lot where defendant and Nickia were standing and stood next to defendant. Shalonda ran towards Nickia with her fist in the air asking if anyone wanted to fight. Nickia ran around the vehicle where she had been standing and ran around another vehicle, and then came back to the front of the first vehicle near where defendant was standing and stood next to defendant.

Defendant pulled a gun from his waistband and started shooting, then ran into a nearby vehicle and drove off. Gloria did not testify to observing any other shooters or people with guns.

¶ 22 Gloria testified that she then went inside her home and told her children to stay away from the windows because she was frightened of what the mob would do. A bike without a rider then crashed through her living room window. Gloria called the police, and then went to the police station and told the police that she observed defendant shooting at a crowd of people. When the police brought her home, her house was on fire. After an investigation, the police found that the fire was a result of arson. Gloria provided a written statement to the police the next day. She also testified before a grand jury. She was later placed into a witness protection program. Gloria testified that she believes defendant saved her life from the angry mob.

¶ 23 Donna Williams, 33 years old, also testified on behalf of the defense. She had been Gloria's friend for 20 years and was at the barbeque on May 2, 2000. She witnessed the altercation between the two girls, who she knew as "Nene and Brebre."<sup>1</sup> Williams was standing in front of Gloria's house, about two to three feet away from the fight. At that time, defendant was standing in front of his vehicle in a parking lot about five feet from Gloria's house. One of

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<sup>1</sup> Nickia Calvin is also known as "NeNe," and "Brebe" appears to refer to Annette Stewart.

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the girls ran off, and returned with a mob of about 50 people with sticks and appeared “hostile and ready to fight.” Shalonda Stewart was part of the mob and was chasing Nickia with a box cutter. Nickia ran around a vehicle in the parking lot and stood by defendant.<sup>2</sup> The mob proceeded towards them and defendant pulled out a gun. Williams did not observe him shoot because she ran into Gloria’s house. The bike without a rider then crashed through Gloria’s picture window, and the police arrived.

¶ 24 Defendant took the stand in his own defense and testified that Nickia invited him to a barbeque at the LeClaire Courts complex on May 2, 2000. When he arrived he was hungry, but the food was not ready, so he drove to Popeye’s Chicken and then to a liquor store to purchase some beer. Then he went back to LeClaire Courts, parked, exited and leaned against his vehicle drinking beer and chatting. He parked about 30 feet from Gloria’s house. He noticed an altercation between Nickia and a “little girl.” Two adults were trying to stop the fight, and the “little girl” left. About 15 minutes later, a crowd of about 50 people arrived and was coming toward him. Some people in the crowd had sticks, bottles and weapons. At that time, Nickia was standing next to defendant, and defendant felt “afraid.”

¶ 25 Defendant observed a girl near Nickia about to attack her with a box cutter. Defendant also observed a gun in the waistband of one of the crowd members fifteen feet from defendant. The man with the gun began to approach defendant and began to pull out his gun, and this observation was what prompted defendant to start firing into the crowd. He fired into the crowd

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<sup>2</sup> Gloria testified that Nickia ran around two vehicles before she came back and stood next to defendant.

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first. Defendant also observed a man behind him and to the right with a gun. A shootout resulted, with two members of the crowd firing back at defendant. After defendant and the two shooters exchanged fire, defendant then ran to his vehicle and left the area. He went to an apartment building and threw his nine-millimeter, semi-automatic gun into an incinerator. He did not turn himself in to the police because he was “afraid.”

¶ 26 The defense rested and moved for a directed verdict, which was denied. In rebuttal, the State called Assistant State’s Attorney (ASA) Thomas Driscoll who testified that he interviewed Gloria Hentz on May 3, 2000, and that he memorialized her oral statement in writing. Gloria initialed several corrections to her statement and signed it. However, Gloria did not mention that an angry mob with sticks and bats were approaching prior to the shooting, that she feared for her life at the time of the shooting, or that defendant saved her life.

¶ 27 The State also called ASA Jennifer Coleman in rebuttal. ASA Coleman testified that she met with Gloria Hentz on May 4, 2000, and interviewed her prior to presenting her as a witness to the grand jury. Similarly, Gloria did not inform ASA Coleman that there was an angry mob armed with sticks or weapons approaching prior to the shooting, nor did she mention that defendant saved her life.

¶ 28 The State next called Detective Murray in rebuttal. He interviewed defendant at Northwestern Hospital in the presence of his partner and an ASA. After being *Mirandized*, defendant told Murray that he did not know anything about the shooting in question because he was not there. Murray located Donna Williams on May 4, when she was staying at a hotel with Gloria. Williams provided an oral statement about the shooting, and he prepared a typewritten

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memorandum that same day which memorialized the statement. Murray testified that Williams never told him that she observed people approaching the parking lot with sticks, bats, or any other kinds of weapon.

¶ 29 Defense counsel asked Murray on cross-examination whether someone else told him that there were two other people, aside from defendant, at the scene of the shooting with guns. He responded that no one provided that information. Defense counsel then referred to a police report concerning Murray's interview with Jimmie Walker which indicated that Jimmie Walker told Murray that "somebody else had a gun." Murray testified that: "[Jimmie Walker] said that \*\*\* the woman that was with your client also had a gun. \*\*\* He stated that he believed the female was also shooting, but was not certain."

¶ 30 On redirect examination, the State asked Detective Murray whether the only mention of anyone other than the defendant having a gun were people with defendant who also had guns. Murray answered affirmatively and then clarified that Jimmie Walker and Shalonda Stewart did not describe any kind of "shoot out" between defendant and other people in the parking lot. Rather, their statements suggested that the people who were shooting were people with defendant, and those people all ran off toward Gloria's house together after the incident.

¶ 31 III. Conviction, Sentence and Direct Appeal

¶ 32 After hearing all the evidence and arguments of counsel, a jury convicted defendant on May 22, 2002, of (1) the first degree murder of Phillip Hardnick, (2) the aggravated battery with a firearm of Diane Walker and (3) the aggravated battery with a firearm of Shaun Walker. On June 21, 2002, after hearing factors in aggravation and mitigation, the trial court sentenced

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defendant to 80 years for the first-degree murder, which included a firearm enhancement of 40 years. In addition, he was sentenced to 15 years for the aggravated battery of Diane Walker, and 15 years for the aggravated battery of Shaun Walker. The trial court ordered all sentences to run consecutively, resulting in a total sentence of 110 years with IDOC.

¶ 33 On direct appeal, the only issue was a challenge to the consecutive sentences imposed for both counts of aggravated battery. Defendant claimed that the trial court erred in imposing consecutive sentences because the evidence was insufficient to show that Diane Walker and Shaun Walker suffered severe bodily injury. On August 13, 2004, the appellate court vacated the sentence imposed for the aggravated battery of Diane Walker and remanded the case to the trial court for resentencing with directions that the trial court consider whether Diane Walker's injuries constituted severe bodily injury. *People v. Neal*, No. 1-02-2347 (2004) (unpublished order under Supreme Court Rule 23).

¶ 34 On May 6, 2005, on remand, the trial court again imposed 15 years for the aggravated battery of Diane Walker, but ordered that the sentence be served concurrently to defendant's other sentences, thereby reducing defendant's total time from 110 to 95 years.

¶ 35 IV. Postconviction Proceedings

¶ 36 A. *Pro Se* Petition

¶ 37 On September 7, 2005, defendant filed a *pro se* postconviction petition claiming ineffective assistance of trial counsel. In support of his claim of ineffective assistance, he claimed that his trial counsel should have contacted two potential eyewitnesses, Jimmie Walker and Shalonda Stewart, whose names appeared in police reports. Defendant claimed that the police

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reports indicated that an interview of Jimmie Walker and Shalonda Stewart disclosed that they had observed other shooters at the scene in addition to defendant.

¶ 38 Section 122-2 of the Postconviction Hearing Act (the Act) provides that a petition must have attached “affidavits, records, or other evidence supporting its allegation or shall state why the same are not attached.” 725 ILCS 5/122-2 (West 2004); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). However, defendant failed to attach affidavits from either Jimmie Walker or Shalonda Stewart to his postconviction petition and failed to state why affidavits were not attached.

¶ 39 Defendant only provided police reports concerning interviews with Jimmie and Shalonda with his postconviction petition. In the police report, Jimmie Walker’s statement was reported as follows:

“[M]y girlfriend had an argument with some girls from Stateway—Shalonda, her boyfriend Melvin Lemon from the Courts + Annette[;] the girls walk up to Δ’s[;] Δ (1) braided M/1/18-19yrs 5’10” pulled out a B/S automatic[.] I turned to run back to house—(2) F/1/17yrs blond-brownish hair upped a gun + shot.”

¶ 40 Jimmie Walker’s statement is clear and unequivocal and parts of it were testified to by Detective Murray. The statement indicates that Walker’s girlfriend engaged in an altercation with (1) Annette Stewart; (2) Annette Stewart’s sister, Shalonda Stewart; and (3) Shalonda Stewart’s boyfriend, Melvin Lemon. The girls walked up to defendant, who was 18 to 19 years old, 5’10” tall with braided hair, and he pulled out a “B/S” automatic gun. Jimmie Walker then turned to

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run back to the house. A 17-year-old woman with blond-brownish hair also “upped a gun” and shot.

¶ 41 In the police report, Shalonda Stewart’s statement was reported as follows:

“My sister Annette had an argument with F/1/18yrs standing with a group of 4 boys + 3 girls—Annette left and came + got me—I was outside—me and Annette went back to girls to see what the dispute was about—(1) M/1/19-20 yrs braided hair 5’7”/150 lbs med comp—red + black l/s shirt—upped B/S automatic fired Phillip who was standing around—(2) M/1/19-20 yrs shaved head med comp—pulled out a gun—shot @ Jimmie Walker—one through shirt—(3) F/1/18 yrs feathered pony tail light comp pulled out a gun +shot—Δ ran back to Toody’s house—Δ = “Gangster Disciples[.]””

¶ 42 Shalonda Stewart’s statement in the police report is also clear and unequivocal and parts of it were also testified to by Detective Murray. The statement indicates that Shalonda's sister, Annette Stewart, engaged in an altercation with an 18-year-old woman standing with a group of four boys and three girls. Annette Stewart left to retrieve Shalonda Stewart, and they went back to the girls to determine what the dispute was about. Shalonda Stewart was outside and observed the events. A man, who was 19 to 20 years old, 5’7” tall, 150 lbs, medium complexion, with braided hair, and a red and black shirt, “upped” a “B/S” automatic gun, and fired at Phillip Hardnick, who was standing nearby. Another man, who was 19 to 20 years old, medium

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complexion, with a shaved head, also pulled out a gun, and shot at Jimmie Walker one time through his shirt. A woman, who was 18 years old, light complexion, with a feathered ponytail, also pulled out a gun and "shot." Defendant, who was a "gangster disciple" gang member, ran back to Gloria's house.

¶ 43 B. Supplemental Postconviction Petition

¶ 44 On October 7, 2005, at the first stage of the postconviction proceedings, the trial court found that defendant's *pro se* petition stated the gist of a constitutional claim. The court docketed the petition and appointed counsel, and the case was then continued numerous times.

¶ 45 On May 25, 2009, defendant's public defender filed a supplemental postconviction petition. She adopted all of the claims raised in defendant's *pro se* petition, and also alleged that trial counsel was ineffective for failing to call another witness, April Davis, to testify. April's affidavit was attached to the supplemental postconviction petition, and it states: April would testify that she attended the barbeque with defendant; that she witnessed the altercation between her sister, Nickia Carlvin, and another girl, Annette Stewart; that she observed the mob approach with sticks and poles; that she noticed that a girl in the crowd had a box cutter; and that she further observed a man named "Main" with an object that looked like a black gun under his shirt. April would further testify that defendant pulled out his gun, but did not fire, until Main and two other men started shooting first, and defendant fired back in self-defense.

¶ 46 The State moved to dismiss defendant's petition, stating that defendant's claims of ineffective assistance of trial counsel regarding Jimmie Walker and Shalonda Stewart were supported only by police reports, not by affidavits, and thus were improper for consideration at

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the second stage of a postconviction review. The State further argued that defendant was not prejudiced by counsel's failure to call these witnesses because the evidence in question was presented to the jury through Detective Murray's testimony, and that the evidence against defendant in this case was overwhelming while defendant's theory of self-defense lacked support. With respect to April, the State argued that trial counsel's decision not to call her as a witness was a reasonable trial strategy, since her testimony would have contradicted defendant's own testimony that he fired first.

¶ 47 The defense contended that the Postconviction Act provides that a postconviction petition must have attached "affidavits, records, or other evidence supporting its allegations or state why the same are not attached," and that a police report is a document or other evidence that the court can consider. After reviewing defendant's petition, the supporting affidavits and the existing record, the trial court dismissed the supplemental petition at the second stage as frivolous and without merit, and this appeal followed.

¶ 48 ANALYSIS

¶ 49 Defendant appeals the second-stage dismissal of his postconviction petition and asks us to remand for a third-stage evidentiary hearing. He claims that his supplemental petition did make a substantial showing of a constitutional violation, namely, the ineffective assistance of his trial counsel. For the following reasons, we affirm the decision of the trial court.

¶ 50 I. Standard of Review

¶ 51 The propriety of a dismissal at the second stage of a postconviction proceeding is a question of law that we review *de novo*. *People v. Simpson*, 204 Ill. 2d 536, 547 (2001). *De novo*

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consideration means we perform the same analysis that a trial judge would perform; in other words, we accept all well-pleaded facts in the complaint as true while disregarding legal or factual conclusions unsupported by allegations of fact. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 52 II. Stages of Postconviction Proceeding

¶ 53 The Postconviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)) provides a means by which a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). To be entitled to postconviction relief, a defendant must show that he or she has suffered substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5/122-1(a) (West 2000); *Pendleton*, 223 Ill. 2d at 471 (citing *Whitfield*, 217 Ill. 2d at 183).

¶ 54 The Act provides for three stages, in noncapital cases. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it, if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2000); *Pendleton*, 223 Ill. 2d at 472. If the trial court does not dismiss the petition within that 90-day period, the trial court must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2000); *Pendleton*, 223 Ill. 2d at 472.

¶ 55 The Illinois Supreme Court has held that, at this first stage, the trial court evaluates only the merits of the petition's substantive claim, and not its compliance with procedural rules.

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*People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The issue at this first stage is whether the petition presents " ' 'the gist of a constitutional claim." ' ' *Perkins*, 229 Ill. 2d at 42 (quoting *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002), quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). As a result, "[t]he petition may not be dismissed as untimely at the first stage of the proceedings." *Perkins*, 229 Ill. 2d at 42.

¶ 56 In the case at bar, defendant's position was dismissed at the second stage. The Act provides that counsel may be appointed for defendant at the second stage, if defendant is indigent. 725 ILCS 5/122-4 (West 2000); *Pendleton*, 223 Ill. 2d at 472. Here, counsel was appointed for defendant. After an appointment, Illinois Supreme Court Rule 651(c) requires the appointed counsel: (1) to consult with petitioner by mail or in person; (2) to examine the record of the challenged proceedings; and (3) to make any amendments "that are necessary" to the petition previously filed by the *pro se* defendant. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Perkins*, 229 Ill. 2d at 42.

¶ 57 The Act provides that, after defense counsel has made any necessary amendments to the petition, the State may move to dismiss it. *Pendleton*, 223 Ill. 2d at 472 (discussing 725 ILCS 5/122-5 (West 2000)). See also *Perkins*, 229 Ill. 2d at 43. If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). A trial court is foreclosed "from engaging in any fact-finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding." *Coleman*, 183 Ill. 2d at 380-81.

¶ 58 At a third-stage evidentiary hearing, the trial court "may receive proof by affidavits,

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depositions, oral testimony, or other evidence," and "may order the petitioner brought before the court." 725 ILCS 5/122-6 (West 2000). In the case at bar, defendant asks us to reverse the trial court's dismissal of his petition at the second stage as frivolous and remand for a third stage evidentiary proceeding.

¶ 59 Our supreme court has held that a trial court may summarily dismiss a petition as frivolous only if it has no arguable basis either: (1) in law; or (2) in fact. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010) (citing *People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). Our supreme court has explained that (1) a petition lacks an arguable basis in law "if it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record"; and that (2) it lacks an arguable basis in fact "if it is based upon a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional." *Petrenko*, 237 Ill. 2d at 496 (citing *Hodges*, 234 Ill. 2d at 16-17).

¶ 60 III. Ineffective Assistance of Trial Counsel

¶ 61 Defendant claims that his petition, as amended by counsel, did make a substantial showing of ineffective assistance of trial counsel. Specially, he claims that his trial counsel was ineffective for failing to call or investigate three witnesses. "A claim of ineffective assistance of counsel is judged according to the two-prong, performance-prejudice test established in *Strickland v. Washington*, 466 U.S. 668 [(1984)]." *People v. Albanese*, 104 Ill. 2d. 504, 526 (1984) (adopting *Strickland*). To meet the *Strickland* test as it applies to the second stage of the postconviction proceedings, defendant must demonstrate ineffective assistance of counsel by showing that (1) his counsel's performance was deficient, and (2) that this deficient performance

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prejudiced the defense. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998) (citing *Strickland*, 446 U.S. at 687-88).

¶ 62 Under the deficient performance prong of the *Strickland* test, defendant must prove that his counsel's performance fell below an objective standard of reasonableness "under prevailing professional norms." *People v. Colon*, 225 Ill.2d 125, 135 (2007); *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Under the prejudice prong, defendant must show that "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsels deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220.

¶ 63 To prevail, a defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill.2d at 135; *Evans*, 209 Ill. 2d at 220. "[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 64 Defendant contends that it would have increased his "chance of acquittal, " if the three potential witnesses all testified that defendant was not the only shooter at the scene, and if April Davis testified, she would have testified that defendant fired as a result of others shooting at him. Defendant further contends that April's testimony would corroborate defendant's testimony that there were other people shooting at him, and would "raise a doubt" as to whether it was

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defendant's bullets that hit the victims.

¶ 65 Based on the record before us, we are not persuaded by defendant's arguments that his trial counsel's failure to interview or call the three potential witnesses was objectively unreasonable and constituted deficient performance or that he was prejudiced by counsel's failure to call the three potential witnesses. "In general, whether to call a particular witness is a matter of trial strategy \*\*\* and our decisions have held that an ineffective assistance of counsel claim 'which arises from a matter of defense strategy will not \*\*\* support a claim of ineffective representation.'" *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989) (quoting *People v. Ashford*, 121 Ill. 2d 55, 74 (1988)).

¶ 66 In reviewing defendant's arguments that Jimmie Walker and Shalonda Stewart would support defendant's theory of self-defense, we have trouble in analyzing what they could testify to that could help defendant. Defendant failed to attach affidavits from either of them to his postconviction petition. Section 122-2 of the Act provides that a postconviction petition must have attached "affidavits, records or other evidence supporting its allegations or shall state why the same are not attached." (725 ILCS 5/122-2 (West 2004)). The purpose of the "affidavits, records, or other evidence" requirement in section 122-2 of the Act (725 ILCS 5/122-2 (West 2004)) is to establish that an allegation in a postconviction petition is capable of " 'objective or independent corroboration.' " *People v. Delton*, 227 Ill. Ed 247, 254 (2008) (quoting *People v. Hall*, 217 Ill. 2d 324, 333 (2005), citing *People v. Collins*, 202 Ill. 2d 59, 67 (2002)). The statements by the two witnesses in the police report are not capable of "objective or independent corroboration." To support a claim of ineffective assistance of counsel for failure to present a

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witness, a defendant must tender a valid affidavit from the individual who would have testified. *People v. Enis*, 194 Ill. 2d 361, 380 (2000) (citing *People v. Johnson*, 183 Ill. 2d 176, 192 (1998), and *People v. Thompkins*, 161 Ill. 2d 148, 163 (1994)). Without a valid affidavit, a reviewing court cannot determine whether the proposed witness could have provided information or testimony favorable to defendant. *Johnson*, 183 Ill. 2d at 192 (citing *People v. Guest*, 166 Ill. 2d 381, 402 (1995), and *People v. Ashford*, 121 Ill. 2d 55, 77 (1988)).

¶ 67 Here, we cannot consider the information in the police reports without affidavits from Jimmie Walker and Shalonda Stewart. Without affidavits from Jimmie and Shalonda, we cannot determine whether they could have provided testimony at trial that would have supported defendant's theory of self-defense.

¶ 68 Moreover, even if we consider the information in the police reports, it indicates that Jimmie and Shalonda stated that these additional shooters were people with defendant, according to the testimony of Detective Murray, people who also were shooting at the crowd, rather than people in the crowd shooting at defendant. Thus, we cannot say that Jimmie's and Shalonda's statements as reported in the police reports support defendant's theory of self-defense. In addition, the police report information is completely contradicted by the record in this case. *Petrenko*, 237 Ill. 2d at 496 (citing *Hodges*, 234 Ill. 2d at 16-17).

¶ 69 Defendant testified that he shot first because he was in fear of the mob that was approaching. All of the shell recovered casings were from the same gun. It would make no sense for defendant to admit that he shot first, if he was not sure of that fact. He was not motivated to shoot because others were shooting at him. His theory of self-defense under the

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circumstances of this case was based on his fear of the approaching mob. The information provided by the witnesses did not support defendant's theory and each witness made statements about people who were shooting that did not support each other's observations. Jimmie Walker's statement indicates that a 17-year-old woman with blond-brownish hair shot, and that defendant pulled out a gun. He did not indicate who shot first. Shalonda Stewart's statement indicates that defendant shot Phillip Hardnick who was standing nearby, while a man with a shaved head shot Jimmie Walker.

¶ 70 Second, with respect to April Davis, we cannot say that, had counsel called her as a witness at trial, the result would have been different because her testimony also would have contradicted defendant's admission at trial that he shot first, and would not have supported defendant's theory of self-defense. "[I]n order to prove that he was acting in self-defense, defendant was required to establish evidence of several factors, including that he was not the aggressor." *People v. Hodges*, 234 Ill. 2d 1, 20 (2009). However, the record in this case shows that defendant acted as the aggressor when he opened fire into the crowd before anyone actually attempted to attack him, and he ran toward the crowd and chased the victims. Specifically, defendant admitted that he fired four shots into the crowd before anyone pulled out a gun. In contrast, April's affidavit which was attached to defendant's supplemental postconviction petition indicates that, had she testified, her testimony would show that three members from the crowd started shooting first, and defendant fired back as a result of those people shooting at him. Thus, had April testified, her testimony would not have supported defendant's admission at trial that he shot first.

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¶ 71 Furthermore, April's testimony also would not have supported defendant's theory of self-defense because the ballistics evidence in this case does not support her testimony since all of the recovered shell casings came from the same gun. Thus, April's potential testimony is not supported by the record and taken together with the statements by Jimmie Walker and Shalonda Stewart they could be described as "based upon a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional." *Petrenko*, 237 Ill. 2d at 496 (citing *Hodges*, 234 Ill. 2d at 16-17).

¶ 72 In *Hodges*, our supreme court held that a postconviction petition is considered frivolous or patently without merit if it "has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. A petition lacking an arguable basis in law or in fact is one "based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. A claim completely contradicted by the record is an example of an indisputably meritless legal theory. *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations include those that are fantastic or delusional. *Hodges*, 234 Ill. 2d at 17.

¶ 73 In *Hodges*, our supreme court concluded that even if the jury had heard the testimony of three witnesses not called by the defense relating that the victim also had a weapon, the evidence that "all six of the gunshot entry wounds were to the back of [the victim's] body" would have demonstrated that defendant was the aggressor against the victim, and did not act in self-defense. *Hodges*, 234 Ill. 2d at 20. Similarly, in the case at bar, even if the jury heard April's testimony, defendant's admission that he fired first would have demonstrated that he was the aggressor, and April's testimony would not have supported defendant's theory of self-defense. Where

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defendant's own admission at trial precludes the very defense that he tries to raise, and April's testimony would have been contradicted by the record and would not have supported defendant's theory of self-defense, we cannot say that he is prejudiced by his trial counsel's failing to call April or that his lawyer's failure to call her was not sound trial strategy

¶ 74 The same logic would pertain to the statements that Jimmie Walker and Shalonda Stewart made to the police. In their statements, they both claim that the other shooter or shooters were standing near defendant. Jimmie Walker told the police that a woman fired at him who was standing with defendant. Shalonda Stewart told the police that a man and a woman were near defendant and a man with a shaved head shot Walker. The police report does not mention defendant by name, only by description. The evidence at trial shows that defendant was identified in a photo array and at trial by Annette, Valerie, and Diane, who observed him shooting at a crowd of people. Diane further testified that defendant was the aggressor in the shooting and described how defendant "chased" her and Shaun while shooting at them. Her testimony was corroborated by defendant's own witness, Gloria, who admitted on cross-examination that defendant ran toward the crowd while shooting. The State's witnesses were corroborated by the physical evidence, and completely discredited defendant's theory of self-defense.

¶ 75 At trial, Valerie specifically testified that she watched defendant shoot, and she did not observe anyone else in the area with a weapon. Her testimony was corroborated by Officer Ferguson, who was on routine patrol in the area and observed the mob scattering some 10 to 15 seconds after he heard shots fired. He testified that he did not observe anyone with any kind of

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weapon running away from the scene, and he further testified that the only evidence recovered at the scene was 16 nine-millimeter cartridge casings. The parties stipulated that the casings were fired from the same handgun. As a result, we cannot say that defense counsel's performance was deficient, and was not sound legal strategy. In addition, the evidence was overwhelming that defendant shot first and was the aggressor. Detective Murray testified to the statements made by Jimmie Walker and Shalonda Stewart. We cannot say that defendant was prejudiced as a result of his attorney's trial strategy. Thus, we cannot conclude that defense counsel was ineffective by not calling any of these people as witnesses.

¶ 76

#### CONCLUSION

¶ 77 For the foregoing reasons, defendant fails to make a substantial showing of ineffective assistance of trial counsel. Accordingly, we affirm the trial court's dismissal of defendant's postconviction petition at the second stage.

¶ 78 Affirmed.