2012 IL App (1st) 112690-U

FIFTH DIVISION
February 1, 2013

No. 1-11-2690

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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 Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	07 CR 13167
	)	
MALCOLM HOWARD,	)	
	)	Honorable
Defendant-Appellant.	)	Thomas M. Davy,
	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

O R D E R

¶ 1 HELD: Where defendant alleged ineffective assistance of appellate counsel for failing to raise claims on direct appeal, but each claim lacked merit and the evidence at trial was so overwhelming that defendant could not show he was prejudiced by appellate counsel's performance, the trial court properly dismissed defendant's postconviction petition.

¶ 2 Defendant Malcolm Howard appeals from the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2010). On appeal, defendant contends that the trial court erred in dismissing his petition because his

appellate counsel was ineffective for failing to argue on direct appeal that: (1) the weapon recovered from the crime scene did not match the weapon introduced against him at trial; (2) he was not timely tendered discovery relating to the forensic witnesses' testimony; and (3) portions of the State's closing argument in rebuttal were improper. We affirm.

¶ 3 Defendant was charged with aggravated kidnaping and unlawful possession of a weapon by a felon based on his holding Ricardo Sosa at gunpoint for approximately 28 hours, from June 12-13, 2007, and his holding Jennelle Owens at gunpoint for a period of time within those 28 hours in the same apartment where defendant held Sosa.. Ultimately, defendant was apprehended after crashing Sosa's car while fleeing from the police. The police recovered a firearm from the area near where defendant was arrested.

¶ 4 Defendant represented himself at trial. Before trial began, when discussing discovery on March 10, 2008, the State explained to the court that there was still outstanding lab work. Defendant informed the court that he was demanding a speedy trial. The court asked defendant whether he wanted to look at the evidence, and defendant responded, "[o]f course, I would like to see what the evidence is, your Honor, but I mean I couldn't do so within the time limit that the speedy trial gives me." At the next court date, the State once again said it was still waiting to hear from the forensics laboratory, but when the court asked defendant if he wanted another status date to wait on discovery, defendant said, "I don't agree to any continuance, your Honor, I would like to carry forward with a speedy trial." Defendant continued to demand a speedy trial before the trial court despite outstanding lab reports throughout May, June, and July 2008. On July 11, 2008, the State informed the trial court that they did not have the paperwork for the

latent print examination, but had received verbal confirmation that one of the latent impressions matched defendant's print. Defendant said the information about the latent print analysis report did not change his decision to demand trial.

¶ 5 On July 14, 2008, just before voir dire began, defendant told the trial court he had "black and white evidence that a gun ha[d] been manufactured" against him. In support, defendant relied on a report from evidence technician Elizabeth Vera, a firearms trace summary from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF report), and two pages of lab reports from forensic scientist Caryn Tucker. Defendant claimed that Tucker's lab report indicated Tucker analyzed a gun with obliterated serial numbers and that the restoration techniques she used revealed a serial number different from the serial number used in the ATF report. Defendant argued that Tucker received and analyzed a gun different than the one recovered from the crime scene and asked the trial court to "look at it as far as a malice [*sic*] error was committed" and dismiss the case. The trial court denied the motion to dismiss and told defendant that he would have to question the witnesses in support of his arguments.

¶ 6 At trial, Ricardo Sosa testified that, in June 2007, he was the assistant property manager for the Fine Living Association Group (FLAG), a company owned and managed by Phil Joseph. FLAG owned an apartment building at 8118-8126 South Drexel Avenue, as well as apartment buildings on South Loomis and South Ellis Avenues. On June 12, 2007, at around 3 p.m., Sosa was collecting rent from the Drexel building residents. While he was standing in the courtyard area, Sosa approached a man, identified by Sosa as defendant, who insisted on seeing an apartment. Sosa took defendant to see unit 3N on the third floor of 8122 South Drexel. Once

inside, while Sosa was showing defendant the apartment, Sosa turned to see defendant pointing a gun at Sosa's head. At defendant's instruction, Sosa laid face-down on the floor while defendant shut the door. Defendant took Sosa's business and personal cell phones, keys, and the recently collected rent checks. Defendant told Sosa to put a pillowcase over Sosa's head. Sosa felt the gun at the back of his head while defendant explained that defendant was part of an elite organization that was holding Sosa for ransom. Sosa feared for his life. Defendant soon guided Sosa to the kitchen while holding the gun at Sosa's back and ordered him to write a ransom letter, stating, among other things, that Sosa owed "some people" approximately $6,000 or $8,000. Over the next several hours, defendant moved Sosa between the bedroom and bathroom of the apartment, always holding the gun to Sosa's back. Several times, defendant threatened to kill Sosa if Sosa failed to obtain the ransom money. Defendant also hit Sosa in the back of the head with the gun barrel multiple times. When Sosa was left alone, he heard footsteps outside the room and believed there were more people inside the apartment involved in the kidnaping. Defendant kept Sosa in the apartment overnight, occasionally entering the bedroom to hit Sosa in the back of the head with the gun barrel.

¶ 7 The next morning, Sosa told defendant that he would write defendant a check if defendant brought Sosa the checkbook from Joseph's office. While defendant was gone, Sosa did not try to run because he again heard footsteps in the apartment. Defendant came back once without the checkbook and threatened to kill Sosa if Sosa had lied about the checkbook's location. Defendant left again then returned with the checkbook and told Sosa to get rid of Joseph. With defendant holding the gun to his back, Sosa called and told Joseph that the

building on Loomis had been ransacked, causing Joseph to leave and check on it. When Joseph called Sosa shortly after, explaining that no ransacking had occurred, Sosa told Joseph that Sosa was taking his fiancee to the hospital, a story Sosa made up at defendant's instruction. Defendant again left Sosa lying on the bedroom floor. Sometime between noon and 1 p.m., defendant brought Jennelle Owens, Joseph's secretary, into the bedroom. Defendant guided Sosa to the kitchen with the gun at Sosa's back and left Owens in the bedroom. Then there was a knock on the apartment door, and defendant ordered Sosa to get rid of whoever it was. Sosa opened the door to Kenneth and Louis Williams, both of whom did odd jobs around the building. They had work to do in the apartment, so defendant immediately walked Sosa down the stairs into the alley and to Sosa's car, a blue Honda with Texas license plates. Defendant drove with one hand on the steering wheel and the other holding the gun pointed toward Sosa in the passenger seat. Defendant eventually parked Sosa's car in an alley, then gave Sosa his cell phone back and ordered Sosa to make the first of numerous calls to Joseph, informing Joseph that Sosa was being held for ransom. Sosa later learned that nine of his calls with Joseph had been recorded. These calls were played for the jury and Sosa identified his own voice, Joseph's voice, and defendant's voice on the recordings. At defendant's instruction, Sosa told Joseph to leave the ransom money in a dumpster, then to leave the area. After the last phone call to Joseph, a police car drove up and stopped next to Sosa's car. When the officers asked defendant and Sosa to exit the car, defendant "[t]ook off" through the alley at about 50 miles per hour and soon lost control of Sosa's car, striking another car. Sosa opened the door and ran to nearby police officers. Sosa was soon brought back to the alley where he and defendant had been parked, and identified defendant, who

had been apprehended, as the man who had held him hostage for the previous 28 hours. Sosa identified the State's Exhibit No. 8 (Exhibit No. 8) as the gun defendant used during the kidnaping.

¶ 8 Phil Joseph substantially corroborated Sosa's testimony. Joseph was familiar with defendant, who had been an employee of the Drexel building before Joseph purchased it. Defendant completed one paint job for Joseph, but Joseph was unsatisfied with the work and did not hire defendant again. On the morning of June 13, 2007, after checking on the Loomis building, Joseph called Sosa and Sosa explained that he was taking his fiancee to the hospital. Upon returning to the office, Joseph noticed his checkbook was missing. Owens told Joseph that a man had come in and taken something from Joseph's desk. Joseph called the police after Sosa told Joseph he had been kidnaped. Joseph continued to have phone contact with Sosa, and was told that for $8000, the kidnapers would let Sosa free. Later the ransom was reduced to $4000. The FBI became involved and recorded the phone calls. At trial, Joseph identified the voice of himself, Sosa, and defendant on the recordings.

¶ 9 Jennelle Owens and Kenneth Williams both substantially corroborated Sosa and Joseph's testimony. While Joseph was gone, defendant came into the office and took something from Joseph's desk. Later, when Owens went to unit 3N to unlock the door for the Williams, defendant pulled her into the apartment, held a gun to her head, and guided her to the bedroom. Owens identified defendant as the man that had taken Joseph's checkbook and held her at gunpoint in the apartment. Owens also identified Exhibit No. 8 as the gun defendant had used. Williams saw a man behind Sosa in unit 3N when he knocked on the door, but did not observe

the man closely enough to identify him.

¶ 10 Officer Jonathan Newsome testified that at approximately 7 p.m. on June 13, 2007, he and his partner drove past an alley on the 7200 block of South Emerald and noticed a blue car parked halfway down. Newsome observed two occupants in the car, a black man in the driver seat and a Hispanic man in the passenger seat. The officers drove up to and stopped next to the car. Newsome identified defendant as the driver. As soon as the officers attempted to exit their vehicle, defendant "took off *** heading northbound from the alley." Newsome reported the blue Honda with Texas plates over the radio. He lost sight of the blue Honda, but Newsome and his partner continued looking for it. Soon, they located the Honda, which had crashed into another car, and secured the scene.

¶ 11 Officer Kevin Rake testified that at about 7 p.m. on June 13, 2007, he heard a dispatch reporting a black male fleeing into an alley near the 7200 block of South Emerald Avenue, from a car that officers had been chasing on Green Street. Rake arrived at the alley and saw an individual running into a backyard in the middle of the block. Rake exited the car and ran into the yard at 7222 South Emerald. He saw defendant lying down in the stairwell of 7224 South Emerald and placed defendant under arrest.

¶ 12 Officer Mark Hein testified that at approximately 7 p.m. on June 13, 2007, he went to the 7200 block of South Emerald Avenue and learned defendant was in custody. Hein located a semi-automatic firearm in the backyard of 7222 South Emerald and notified his supervisor. He did not touch or move the firearm in any way and did not inspect it for a serial number. Hein identified Exhibit No. 8 as the gun he discovered. On cross-examination, Hein read the serial

number off of the gun as 1788380.

¶ 13 Officer Elizabeth Vera, an evidence technician, testified that on June 13, 2007, she was assigned to process two locations related to an aggravated kidnaping. First, she processed a vehicle that had crashed near 7224 South Green Street. Vera dusted the vehicle for prints and lifted a partial palm print from the driver's side window of the vehicle, which she preserved for testing. Vera then processed the scene at 7222 and 7224 South Emerald. She photographed and then recovered a weapon that was being guarded by another officer at 7222 South Emerald, which she identified as Exhibit No. 8. The night she recovered the weapon, "[i]t was obliterated and really, really dirty." She wrote the serial number she saw that night on her inventory report dated June 13, 2007. At trial, Vera read the number from her report as 1723360. On cross-examination, defendant had the following exchange with Vera:

> "DEFENDANT: Can you recall the serial numbers off the gun?
>
> VERA: It's the one I wrote down here. Do you want me to look at it and read the serial numbers off that gun?
>
> DEFENDANT: You say the gun - well, that's the serial number as far as off the gun. Can you recall the serial number off the gun in which - well, read it.
>
> VERA: No, I can't read it. It's been worked on. I can't read that very well.
>
> DEFENDANT: You can't make no determination as to the

serial number?

VERA: It's whatever I wrote down here. It's been worked on. It's been cleaned up. (Reading) - 360 is the last three numbers I can see there."

¶ 14 After the lunch break on July 16, 2008, the second day of trial, the State informed the court that the forensic scientists who were testifying had arrived, and they had given copies of their lab notes to the State. The State also indicated it had tendered copies of the notes to defendant during the lunch break and defendant made no objection.

¶ 15 Sheila Daugherty, a forensic scientist and expert in latent fingerprint and palm print identification, testified that she was able to analyze the latent palm print lift taken from Sosa's car. After examination, she concluded, within a reasonable degree of scientific certainty, that the palm print belonged to defendant. Daugherty also testified that, after running numerous tests, she was unable to find any suitable latent impressions for print comparison on Exhibit No. 8. On cross-examination, Daugherty read the serial number on Exhibit No. 8 as 1788380.

¶ 16 Caryn Tucker, an expert in the field of firearm identification, testified that the recovered firearm was a Raven Arms gun, model MP-25. Upon her initial examination, Tucker was only able to determine a partial serial number due to "obliteration." She explained that she could see the first two numbers were a "1" and a "7." The next two characters were "partial" but each looked like an "8." The last three numbers were "380." Tucker then polished the obliterated area and applied chemicals to "visualize" the numbers. After, she was able to read the serial number as 1788380. On cross-examination, Tucker stated that the sixth character was "a visible 8." She

explained it "does happen" that the serial number can be a number different than one the police initially wrote down. Tucker read the serial number on Exhibit No. 8 as 1788380.

¶ 17 Detective James Carlassare testified that when he interviewed defendant on July 3, 2008, defendant asked if aggravated kidnaping was a federal offense and whether it would be on the news.

¶ 18 The parties stipulated that defendant had a prior felony conviction, relating only to the count of unlawful possession of a firearm by a felon.

¶ 19 Before the jury deliberated, defendant objected to the admission of Exhibit No. 8 into evidence. He argued that the trial court and jury "pretty much heard evidence of a manufactured gun, one after the next, testifying that they can recall the serial number being this and - you know - you got someone else saying different." The trial court overruled the objection.

¶ 20 In closing, defendant began by saying that there were three things the jury needed to "keep into consideration: fabrication, corruption, and implausible, those three words, fabrication, corruption, and implausible." Defendant then proceeded to go through the testimony of each witness pointing out inconsistencies, and accusing them of "fabrication" and presenting "implausible" stories. Defendant also accused the police of "corruption" in reference to his theory that the gun introduced at trial was a different than the gun recovered from the crime scene. In rebuttal, the State said, "[y]ou heard about conspiracy. Well, twelve different people took that witness stand and conspired against [defendant]." The State then proceeded to list each witness, then argued:

"Twelve different people putting together this vast

> conspiracy of lies against Malcolm Howard, and why? Why would all these people get together and do this? They have nothing better to do with their lives? The Chicago Police Department, the FBI, the Illinois State Crime Lab, the Cook County State's Attorney's Office, Phil Joseph, Jenelle [*sic*] Owens, none of these people, Ricardo Sosa, all these people are out to get Malcolm Howard.
>
> And what a poor job they did of it I guess, huh? What a bunch of poor, bad, corrupt police officers and civilians these people are, because they just couldn't get their corruption right."

¶ 21 The jury found defendant guilty of the aggravated kidnaping of Sosa based upon a ransom demand, the aggravated kidnaping of both Sosa and Owens based upon the use of a firearm, and unlawful possession of a weapon by a felon.

¶ 22 Defendant filed several posttrial motions including a motion to vacate the guilty verdicts and dismiss the indictment, a motion requesting an evidentiary hearing, and a motion for a new trial. Defendant argued that he had objected to the use of the firearm identified by serial number 1788380 being used at trial because it was not the firearm that was recovered from the crime scene. Defendant further asserted that the police acted in bad faith, as supported by Vera's report referring to a firearm with serial number 1723360, the four-page ATF report for serial number 1723360 and Tucker's report in regard to serial number 1788380.

¶ 23 In denying defendant's motions, the trial court observed, "[i]n the great scheme of things, the production, or non-production of the weapon really has very little to do with the return of the

guilty verdict, and the overwhelming testimony against Mr. Howard that has been introduced."

¶ 24 The trial court sentenced defendant to two concurrent 65-year extended-term sentences for the kidnaping of both Sosa and Owens while armed with a firearm. The court indicated it was not imposing a sentence on the conviction for aggravated kidnaping Sosa for the purpose of obtaining a ransom or unlawful possession of a weapon by a felon.

¶ 25 On direct appeal, this court affirmed defendant's convictions and remanded for resentencing. *People v. Howard*, No. 1-09-0129 (unpublished order under Supreme Court Rule 23). Upon remand, defendant was resentenced to a 60-year prison term.

¶ 26 On November 24, 2010, defendant filed a section 2-1401 petition, alleging that the gun presented as evidence against him at trial was not the gun recovered from the crime scene. The trial court denied defendant's section 2-1401 petition on March 25, 2011, and the denial was affirmed on appeal. *People v. Howard*, 2012 IL App (1st) 111253-U.

¶ 27 On May 27, 2011, while the appeal from his section 2-1401 petition was pending, defendant filed a postconviction petition alleging he had received ineffective assistance of appellate counsel based on counsel's failure to argue, on direct appeal, that: (1) the gun introduced as evidence against him at trial was not the gun recovered from the crime scene; (2) he was improperly tendered discovery during trial; and (3) the State made improper arguments during their rebuttal in closing arguments.

¶ 28 Defendant attached several documents in support of his petition, including:

> (1) a June 13, 2007, crime scene processing report from Vera indicating that the recovered weapon was a Raven Arms MP-25,

with serial number 1723360 and inventoried under number 11005450;

(2) a June 2007 CPD inventory form listing a Raven Arms MP25 with serial number 1723360 and inventory number 11005450, completed by Vera and approved with an electronic signature;

(3) a July 25, 2007, Chicago Police Department (CPD) inventory report listing a recovered firearm under inventory number 11005450, with serial number 1723360;

(4) a July 24, 2007, preliminary firearm examination report indicating that Melissa Nally from the ISP crime lab examined a "Raven/MP-25," with inventory number 11005450 and an "oblit" serial number, and found it to be functioning properly;

(5) an August 15, 2007, ATF trace request report for a Raven Arms MP-25 with serial number 1723360;

(6) a firearm receipt and worksheet for a Raven Arms MP-25 with serial number 1723360 and inventory number 11005450, indicating the serial number was obliterated and the weapon was being forwarded to the ISP for serial number restoration;

(7) a CPD evidence submission form requesting restoration of the obliterated serial number on a Raven Arms MP-25 firearm;

(8) a June 12, 2008, ISP firearm worksheet, completed by Caryn

Tucker, indicating that the firearm received under inventory number 11005450 had an obliterated serial number which, prior to restoration, showed the first digit as a 1, the second digit as a 7, the fifth digit at an 8, and the sixth digit as a 0;

(9) a July 10, 2008, Illinois State Police (ISP) report from forensic scientist Caryn Tucker indicating that she had received a Raven Arms MP-25 under inventory number 11005450 with an obliterated serial number, revealed to be number 1788380 after using standard restoration techniques;

(10) a form from the ISP asking that a "Ravens Arms 25 caliber semi-automatic" weapon with inventory number 11005450 be examined for latent prints;

(11) a May 27, 2008, report from the ISP crime lab that the firearm received with inventory number 11005450 revealed no latent fingerprints suitable for comparison;

(12) a July 14, 2009, letter from appellate counsel to defendant, indicating she had received documents from defendant pertaining to the "firearm issue" and "police corruption" and included them in his file.

¶ 29 On July 29, 2011, the trial court summarily dismissed defendant's postconviction petition in a written order. In its written order, the court observed that:

"The evidence in this case was so strong that, even if a

> weapon had not been recovered, the jury would have had no trouble finding the use of a firearm by the defendant. In this case, however, a weapon was recovered and witness testimony regarding the issue of the two different serial numbers explained the difference."

¶ 30 On appeal, defendant contends that he received ineffective assistance of appellate counsel due to counsel's failure to raise three claims on direct appeal, that : (1) the weapon recovered from the crime scene did not match the weapon introduced against him at trial; (2) he was not timely tendered discovery relating to the forensic witnesses' testimony; and (3) portions of the State's closing argument in rebuttal were improper.

¶ 31 The summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Summary dismissal is proper if the allegations in the petition are positively rebutted by the record. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001).

¶ 32 At the first stage of proceedings, a petition will only be dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008); *People v. Brown*, 236 Ill. 2d 175, 184 (2010). A petition is considered frivolous or without merit only if it has "no arguable basis either in law or fact." *Hodges*, 234 Ill. 2d at 11-12. Petitions based on meritless legal theory or fanciful factual allegations will be dismissed. *Hodges*, 234 Ill. 2d at 16.

¶ 33 Claims of ineffective assistance of appellate counsel are considered under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Scott*, 2011 IL App (1st) 100122, ¶ 27 (citing *People v. Rogers*, 197 Ill. 2d 216, 223 (2001)). Under the *Strickland*

standard, a defendant must show both that appellate counsel's performance fell below an objective standard of reasonableness, and that the defendant was prejudiced as a result of appellate counsel's deficient performance. *People v. Golden*, 229 Ill. 2d 277, 283 (2008); *Scott*, 2011 IL App (1st) 100122, ¶ 27. In other words, to show prejudice, defendant must be able to demonstrate that, but for the alleged errors of appellate counsel, there is a reasonable probability that the appeal would have been successful. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010); *Golden*, 229 Ill. 2d at 283. Appellate counsel is not obligated to brief every conceivable issue on appeal and will not be considered incompetent for not raising issues that lack merit. *People v. Coleman*, 2011 IL App (1st) 091005, ¶ 42.

¶ 34 We find that defendant is unable to show appellate counsel was ineffective for failing to raise any of his present claims on direct appeal because each claim lacks merit. First, defendant's claim that the gun recovered from the crime scene did not match the gun introduced against defendant at trial has no merit. At trial, the State's witnesses gave extensive testimony about the gun. Sosa and Owens both identified Exhibit No. 8 as the gun defendant used during the kidnaping. Officer Hein identified Exhibit No. 8 as the gun he discovered in the yard of 7222 South Emerald, near where defendant was apprehended. Vera identified Exhibit No. 8 as the gun she recovered from the back yard of 7222 South Emerald, which was being guarded by an officer. Daugherty and Tucker identified Exhibit No. 8 as the gun they had analyzed. Extensive testimony was also given in regard to the two different serial numbers on the gun testified to at trial. Vera said that, on the night she recovered the gun, the serial number was obliterated and "very, very dirty." Vera also explained that the serial number written on her report, 1723360,

was the number she saw that night. At trial, Vera was unable to read the number because the gun had been worked on, but saw the last three digits as "360." Tucker testified that when she received Exhibit No. 8 for testing, the serial number was partially obliterated. Tucker polished the gun and applied chemicals in order to fully identify the number as 1788380. At trial, Hein, Daugherty, and Tucker were able to read the serial number on Exhibit No. 8 as 1788380. Additionally, defendant attached several reports to his petition showing that the same inventory number, 11005450, was used for the gun throughout the forensic analysis process, despite the different serial numbers. In light of the record before us, it is clear that defendant's allegation that the gun introduced against him at trial was different than the gun recovered from the crime scene is without any merit. Notably, defendant presented this claim before the trial court, both before trial and in posttrial motions, and to the jury during trial, and both the trial court and the jury rejected his claim. Because defendant's claim lacks merit, appellate counsel was not arguably incompetent for not raising it on appeal.

¶ 35 Next, defendant's claim that he was improperly tendered late discovery is similarly meritless. Defendant contends that appellate counsel should have argued on direct appeal that the State committed a discovery violation by tendering lab reports from Daugherty and Tucker in the midst of trial, just before they testified. Defendant, however, requested a speedy trial on several court dates despite being informed by the State that matters in the crime lab were still outstanding. On July 11, 2008, the Friday before jury selection began, defendant was specifically told that the State did not have the written report from the latent print examiner, Daugherty. Nonetheless, defendant elected to proceed to trial without the written report. Having demanded

trial with knowledge that discovery was outstanding, defendant cannot now complain about receiving late discovery. See *People v. Schickel*, 347 Ill. App. 3d 889, 896-97 (2004) (the doctrine of invited error states that " 'an accused may not request to proceed in one manner and then later contend on appeal that the court of action was in error' ") (quoting *People v. Villarreal*, 198 Ill. 2d 209, 227-28). Defendant received the reports from Daugherty and Tucker the same day the State received the reports, the second day of trial. The reports included Tucker's forensic worksheets and police requests that the recovered firearm be tested for fingerprints. Notably, in his appellate brief, defendant states that at the time the "late" reports were tendered, he had "already been previously tendered discovery concluding both scientist's final opinion concerning the evidence they were assigned to examine." In light of the record before us, we find that appellate counsel was not incompetent for failing to raise defendant's claim that he received late discovery, since defendant agreed to proceed to trial in this fashion.

¶ 36 Finally, defendant cannot show that appellate counsel was incompetent for failing to raise the claim that the State's rebuttal argument was improper, because his claim is also without merit. The State is given wide latitude during closing and rebuttal arguments and may comment on the relevant evidence and any fair or reasonable inferences drawn from the evidence. *People v. Vargas*, 409 Ill. App. 3d 790, 797 (2011). Furthermore, closing arguments must be viewed in their entirety and the put in context. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 40. Comments from the State during rebuttal argument will not be considered improper if they were invited or provoked by the defense. *People v. Evans*, 209 Ill. 2d 194, 225 (2004). The State's argument will only be considered improper if " 'the improper remarks constituted a material

factor in a defendant's conviction.' " *Jones*, 2011 IL App (1st) 092529, ¶ 40 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007)).

¶ 37 Here, defendant argues that the State's "rebuttal conspiracy close" went "far and beyond" what was proper. Defendant addressed each witness individually and claimed that they were fabricating testimony and presenting an "implausible" story. The State responded by presenting each witness and asking why all twelve witnesses would conspire to fabricate their testimony. The State's rebuttal argument was clearly responding directly to defendant's closing argument. In posttrial motions, defendant claimed the State's rebuttal argument was improper as well, and in rejecting the argument, the trial court observed that "defendant's three theories, as they were presented, gave ample basis for the State to argue, that while the defendant did not use the magic word, conspiracy, that basically is what he was arguing." We agree and find defendant's claim was positively rebutted by the record. See *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 58 (if the defendant's allegations are positively rebutted by the record, summary dismissal of his petition is proper). Furthermore, the State presented overwhelming evidence of defendant's guilt at trial through multiple eyewitnesses. Based on the trial testimony, it is evident that there is no possibility the State's rebuttal argument played a material factor in defendant's conviction. Because defendant's claim that the State's rebuttal argument was improper is without merit, defendant is unable to show that appellate counsel's failure to raise the claim was incompetent.

¶ 38 Although we have already concluded that defendant's appellate lawyer was not ineffective for failing to raise these nonmeritorious issues, defendant would still be unable to establish that he was prejudiced as a result of appellate counsel's actions. In this case, the evidence was so

overwhelming, defendant cannot show that, but for appellate counsel's ineffectiveness, the outcome of his appeal would have been different. Three eyewitnesses, Sosa, Joseph, and Owens, testified that defendant was the kidnaper and substantially corroborated each other's testimony. Sosa and Owens both credibly testified that they were kidnaped at gunpoint by defendant, identifying defendant as the kidnaper and the gun he used against them in open court. Their testimony was further corroborated by Williams. Sosa and Joseph both identified defendant's voice from the recorded phone conversations. In addition, Joseph recognized defendant from having previously hired defendant to do some work for him. Officer Newsome identified defendant as the man he saw in the driver's seat of Sosa's car and Officer Rake identified defendant as the man he apprehended after seeing defendant flee into a nearby backyard. Sosa also identified defendant as the kidnaper shortly after defendant was arrested. Finally, the palm print recovered from Sosa's car matched defendant's palm print. No evidence was presented to contradict the State's case.

¶ 39 We also note that the State was not required to present a weapon at trial in order to prove defendant committed aggravated kidnaping. See *People v. Washington*, 2012 IL 107993, ¶¶ 35-37 (where the victim of an aggravated kidnaping testified that defendant abducted him while pointing a gun at him and that defendant held a gun to the victim's head, the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt even though no weapon was recovered). The credible testimony of Sosa and Owens, that defendant kidnaped them at gun point, was sufficient to convict defendant of aggravated kidnaping. Under these circumstances, defendant cannot show that the result of his direct appeal would have been different but for his

appellate counsel's actions, and therefore cannot show that he was prejudiced by counsel's performance. Accordingly, the trial court properly dismissed defendant's petition.

¶ 40 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 41 Affirmed.