2013 IL App (2d) 121391-U
No. 2-12-1391
Order filed December 6, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 04-CF-846
BILLY J. COX,	)	Honorable Joseph P. Condon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing defendant's postconviction petition at the second stage of the proceedings. Taking defendant's claims as true, he did not: (1) sufficiently allege his actual innocence based on newly discovered evidence; (2) make a substantial showing of ineffective assistance of counsel as to a lesser-included-offense jury instruction; or (3) sufficiently allege ineffective assistance of trial and appellate counsel as to alleged cumulative errors and the "synergy" between trial and appellate counsel. Affirmed.

¶ 2 Defendant, Billy J. Cox, appeals the second-stage dismissal of his postconviction petition. He argues that a third-stage evidentiary hearing is necessary to resolve issues concerning: (1) his actual innocence; (2) his ineffective-assistance-of-counsel claim concerning the failure to tender a

reckless conduct jury instruction; and (3) various other matters that cumulatively deprived him of effective assistance of trial and appellate counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by indictment with: (1) two counts of attempt first-degree murder (one count charged that, on or about September 13, 2004, he intentionally struck his wife Carolyn multiple times on the head and face with a blunt object, with the intent to cause her death, and another count charged that he intentionally placed Carolyn, who was physically injured, in an unventilated, enclosed, five-car garage with two running vehicles, intentionally exposing her to exhaust fumes with the intent to cause her death) (720 ILCS 5/9-1(a)(1) (West 2004)); and (2) one count of aggravated domestic battery (which charged that he caused great bodily harm to Carolyn by knowingly striking her on the head and face with a blunt object and, thereby, fractured her skull) (720 ILCS 5/12-3.3(a) (West 2004)).

¶ 5 A. Trial

¶ 6 At a jury trial, the State's theory was that, on September 13, 2004, defendant attempted to kill Carolyn over the course of six hours in their 15,000-square-foot home in Bull Valley by striking her at least three times with a blunt object. The State alleged that defendant was angry with his wife of 43 years because she had dinner with a male friend about one month earlier. According to the State, defendant struck Carolyn the first time in their master bedroom, dragged her on a rug down their home's hallway and into the garage, put her in the garage's fourth bay, which contained a ladder, and then took her back inside after she asked to see a doctor. Defendant then placed Carolyn in the foyer, gave her a pillow and overalls, claimed that he called an ambulance, and struck her again. Carolyn opened her eyes, saw defendant, and asked for a bowl because she was nauseated.

She crawled to the bathroom and vomited into the toilet. After Carolyn crawled into the hallway, defendant took her to the garage and placed her in the back of the SUV, where he struck her a third time and left. Carolyn crawled back into the house and possibly fell asleep or became unconscious. The State alleged that defendant was out of the house, cleaning up evidence at this time. Family members and friends had started to call, attempting to reach defendant and Carolyn, who were due to leave for France later that day. Defendant returned to the house, carried Carolyn to the garage, and placed her under the tailpipe of a running SUV. He then locked the doors to the house and disabled the garage doors. Eventually, Carolyn crawled to the front of the SUV and shut it off; she also heard the pickup truck running. She crawled to the truck and breathed in the air conditioning before the police arrived.

¶ 7 Defendant denied the allegations, arguing that Carolyn sustained her injuries when she fell off of a ladder in the garage (near a cement block) while he was outdoors on the couple's 11-acre property doing yard work. He asserted that Carolyn was manipulated by their son, Kenneth, to testify against defendant. Defendant also noted that Carolyn had a history of falls and that no blood was found on the clothing that he was wearing that day, whereas Carolyn's nightgown was saturated with it.

¶ 8 The State presented the testimony of Dr. Arun Gosain, the surgeon who operated on Carolyn. He opined that Carolyn's injuries were caused by (at least three) direct blows, not a fall, in part because there were no injuries to the rest of her body. Dr. Daniel Campagna, the emergency room physician, also opined that Carolyn's injuries were caused by an assault with a blunt object. Carolyn sustained a shattered left cheek, a blowout fracture of the bony socket that houses the eyeball, a left temporal bone fracture, a left supraorbital rim fracture, a left basilar skull fracture, and cerebral

spinal fluid leakage through the ear. (The emergency room doctors diagnosed facial contusion, facial laceration, scalp laceration, concussion, and an open skull fracture.) Dr. Campagna also testified that Carolyn initially stated that she may have fallen out of bed, but later stated that she could not remember what happened and was not sure why she would have gone into the garage and turned on the car with the garage door closed. She made these statements before she was administered morphine (at 3 p.m.).

¶ 9 Police officers testified that they first arrived at the Cox residence at 12:32 p.m. They entered through a window and observed blood in the long hallway leading to the garage and in a bathroom. In the hallway, there was a rolled up rug with blood stains on it and, next to it, a yellow plastic bowl with blood on the inside and outside of it. At the end of the rug was a gold pillow that was saturated with blood. On top of the pillow were a pile of clothes, including a reddish shirt, denim overalls, and women's sandals. In the garage, which was warm and filled with exhaust fumes, they discovered Carolyn in the pickup truck. The garage doors would not open electronically, and there was a bloody carpet and blood on the concrete floor in front of the stairs. In the back of the SUV, there were a drop cloth, sleeping bag, and hand towel, which were bloodstained. Norbert Sauers, the Bull Valley police chief, testified that Carolyn's head was swollen to the size of a soccer ball. Carolyn stated to Sauers that she must have fallen out of bed. (Sheriff's detective David Mullen, the lead detective on the case, testified that Carolyn had two lacerations to her left eye, two black eyes, her head was "significantly" swollen, and she had a three-inch laceration to the back left portion of her head. He also observed injuries to the left side of her face and head.) Defendant told police that he had left the house at 6 a.m. To Sauers, defendant appeared "quite clean" for someone who had been working on the property for over six hours. The temperature was about 80 degrees that day,

and Sauers did not notice any blood, dirt, or sweat on defendant. (Other officers at the scene also testified that defendant did not appear dirty.) Defendant wore jeans, a blue or brown sweater vest, an orange shirt, brown loafers, and rawhide gloves. Sauers observed the patio area off of the basement and noticed a wet area about two feet by two feet large.

¶ 10 William Umbenhower, a sheriff's detective, drew up the crime scene diagram. He testified that no physical evidence at the crime scene linked defendant to the scene. There was also no evidence of forced entry or ransacking. The breaker switches for the garage were turned off. There were dry blood stains in the hallway, laundry room, on the foyer doorway, the balusters of the stairs leading to the basement, and in the bathroom off of the foyer. There was no blood in the master bedroom, nor in the hallway from that bedroom, except in the area outside the bathroom. There were blood stains on the rails and stairs leading to the garage and on the garage floor, including behind the SUV. The garage contained a bent aluminum ladder, which was not taken into evidence because investigators found no evidence on it (and it was subsequently disposed of by the family). There was no blood on the wood boards in the garage. Umbenhower testified that he observed a hose reel at the back of the house and a wet spot on the patio that was no larger than a garbage can lid.

¶ 11 Kimberly Cox, Kenneth's wife, testified that, on the day Carolyn sustained her injuries, Kenneth left their home at 10 a.m. to attend a 10:30 a.m. tennis lesson. Kenneth testified that, at the hospital after the incident, defendant told him (after learning that Carolyn was okay) that "we had a long run" or "a good run." Kenneth testified that he wanted defendant to be convicted. Kenneth is 50% owner of Exacto, the family company; his parents owned the other half. Kenneth had control of the company in September 2004; he owned all of the voting stock. He was also a trustee of Carolyn's trust.

¶ 12 Carolyn testified that her first memory of that day is of being outside the master bedroom with defendant's hands under her arms. She asked defendant what he was doing, and he told her that she had fallen out of bed and hit her head and that he was taking her to the doctor. Her head felt horrible, and she was aware that it was swollen. Defendant took Carolyn down the hallway on a rug, and she noticed that it was between 6 and 7 a.m. They went into the garage, and defendant laid Carolyn down on her back on the concrete floor. After she told defendant that she could not be there, she asked for an ambulance. Defendant wore a white t-shirt with a "Twin Lakes" emblem on it and dark shorts. He helped Carolyn back into the house, and she lay on the hall floor by the bathroom. Defendant brought her a pillow she had requested and then denim overalls. Carolyn continued to ask for an ambulance and then closed her eyes. She was struck on the left side of her face and bled "like it was a faucet." She also flopped on the floor as if her body was out of control. Carolyn opened her eyes, and defendant "was right there near my head." She asked what had hit her, and defendant told her that he did not see anything. Carolyn felt like she was going to vomit, and defendant brought her a beige bowl. She crawled to the bathroom, but cannot recall if she vomited. She crawled out of the bathroom and told defendant that she thought she was dying; he "just looked at me."

¶ 13 After the bleeding subsided, defendant picked up Carolyn and took her into the garage, stating that he was taking her to the hospital. Carolyn testified that he carried her with his arms outstretched and his palms facing upward. He laid her on a tarp in the back of the SUV, which was backed into the garage and open. She closed her eyes and was struck again. When Carolyn opened her eyes, defendant was "right there." When she asked "what was that," he did not reply. Defendant

told her that he was going to change his clothes and take her to the doctor. The car was running, the garage was hot, and the garage doors were closed.

¶ 14 Carolyn further testified that she slid out of the car and crawled partially into the foyer area, where she possibly fell asleep. Defendant returned and told her that she could not be there, but had to be in the garage on the rug. He still wore the dark shorts and "Twin Lakes" t-shirt. He took Carolyn to the garage and placed her under the running SUV's tailpipe. He went back inside and closed the door. Carolyn crawled to the house doors, but they were locked. She then went to the pickup truck, which was running, and climbed inside. She felt the air conditioning and laid her head. Carolyn's next memory was of the police arriving.

¶ 15 Carolyn testified that she never observed a weapon in defendant's hands on September 13, 2004. She also stated that, although she believed that she was struck with an object while in bed, she has no specific recollection of it. Carolyn denied that she has ever fallen out of bed. She did not see defendant in the bedroom that day. Carolyn did not recall being in the area of the garage with the cement block. Carolyn also testified that it was not defendant's custom at their Bull Valley residence to turn off the circuit breakers before going on vacation. She related a history of domestic violence in her marriage, which she denied when she initially spoke to the police. Some of her memories of the incident have become clearer over time.

¶ 16 None of Carolyn's blood was found on defendant's work gloves, shoes, t-shirt, or blue shorts. The blood stains on the cement blocks in the garage were Carolyn's.

¶ 17 During defendant's case, Julia Morawski, an emergency room nurse, testified that Carolyn told hospital personnel that she fell out of bed and that she felt safe at home.

¶ 18 David Mullen, the lead detective on the case, testified that he spoke to Carolyn at 1:22 p.m. on September 13, 2004, and that she told him that defendant did not cause her injuries, unless he "freaked out;" that defendant told her that she fell out of bed, but she did not remember falling, and that she never before had fallen out of bed. Carolyn also told Mullen that she did not understand why defendant left her laying in the garage; that no one else was in the home; and that defendant was going to take her to the doctor, but did not. The next day, Mullen twice interviewed Carolyn. During the first interview, at 2 p.m., she did not tell Mullen that defendant caused her injuries. During the second interview, which was conducted at 7:15 p.m. after Kenneth (who spent considerable time with Carolyn at the hospital) contacted him, Carolyn told Mullen that defendant caused her injuries. She was, according to Mullen, more coherent and alert during the second interview.

¶ 19 The defense also called Dexter Bartlett, a forensic consultant, who opined that Carolyn's injuries were caused by an accidental fall from a ladder and from a 2 x 10 wood board falling on her face. He testified that he believed that Carolyn fell backwards off the ladder, fell to the right, grabbed a 2 x 10 and 2 x 4 to her left to attempt to stable herself, the lumber fell on her, and she struck the back of her head on a cement block. She then went into the foyer. Bartlett testified that there were no blood impact spatters (which occur when blood has flowed to the body's surface) at the scene, but only a hair transfer pattern on the cement block in the garage. He agreed, however, that, if Carolyn was struck in a different place the second time, there would only be spatter in the foyer if a bloody surface was struck. Bartlett testified that there was no blood in the kitchen, even though kitchen items were found in the hallway and blood was found in the bathroom and foyer areas. As to the absence of blood in the bedroom, Bartlett conceded that, if Carolyn were struck and

she was picked up and placed onto a rug, transfer stains would possibly, but not necessarily, result. A second blow could have caused impact spatter, even though it was in a different location than the first blow, depending on how the blood flowed; if Carolyn rolled over, the blood could have come around to the front of her face and impact spatter would result if she was struck there. Addressing the absence of blood on the "Twin Lakes" t-shirt, Bartlett testified that it would not be possible for there to be no blood on it based on Carolyn's description of being carried in and out of the home on three occasions and the way that defendant carried her. This was also true about the shorts she claimed defendant wore.

¶ 20 Bartlett noted that, if defendant moved through the house as Carolyn described, there should have been blood in those areas. However, he conceded that both Chief Sauers and defendant walked through the doorway area of the foyer and that neither man left a footprint on the day of the incident. Addressing the absence of blood in the drains and sink traps, Bartlett testified that it takes about three gallons of water to wash away traces of blood out of a drainpipe. He also agreed that, in an attack that lasted over six hours, there is no guarantee that bloody clothes would be on the property by the time the police arrived. Addressing the absence of blood on defendant, he agreed that, if Carolyn was facing down and defendant walked up and grabbed her by the shoulders for a time and put her down, he would get blood on his hands, but not his clothing. Further, if defendant, who weighed 190 pounds, was able to lift Carolyn, who weighed 143 pounds, and hold her away from his body, he could have set her into the SUV without getting blood on himself.

¶ 21 Bartlett opined that the measurements of the edge of the 2 x 10 board in the garage matched the corner wounds on Carolyn's face. There was also a bloody hair transfer on the cement block, along with two other marks, that are consistent with the wound to the back of Carolyn's head.

Addressing the absence of blood on the wood board, Bartlett opined that bleeding does not start instantaneously after impact. In his view, the two cuts that Carolyn sustained to the left side of her face would not have produced a significant amount of blood as compared to the back of the head.

¶ 22 Dr. Larry Blum, a forensic pathologist, opined that Carolyn sustained her injuries from an accidental fall from a height in the garage. The laceration on the back of her head was low and it would have been unusual for it to have been inflicted by a second party because it would have required an upward swing. Dr. Blum testified that the only cause of her right black eye was a fall, as was the linear fracture of the occipital bone beneath the scalp laceration. The cement block could have cause the scalp laceration and a falling board can cause a cheek injury. The edge of the board could have caused one of the left eye injuries, but not both top and bottom. The injuries on Carolyn's face would not necessarily have bled.

¶ 23 Dr. Blum further testified that he did not give much credence to Dr. Campagna's (the emergency room physician's) opinion because Campagna did not view the crime scene and the literature suggests that one-half of emergency room opinions are incorrect. As for Dr. Gosain's (the surgeon's) opinion, Dr. Blum could not recall if he reviewed it, but testified that he did not give it much credence because the surgeon did not have forensic training and did not view the crime scene photographs.

¶ 24 Defendant testified that he has a chronic disease of the back and had rotator cuff surgery on his right arm in 2003. He is 6 feet 1 inch tall and weighs about 190 pounds. He generally denied Carolyn's allegations of physical abuse during their marriage and conceded only that, in the heat of arguments, both he and Carolyn would put up their hands and shove each other; however, they never pushed each other down.

¶ 25 Defendant denied that, on September 13, 2004, he attacked Carolyn or tried to kill her. He awoke about 5 a.m. that day, exercised, checked the utility room, got dressed, and turned off the circuit breakers to the garage, as was his custom before a vacation. He wore blue jeans, a red polo shirt, old shoes, and socks. It was about 83 degrees outside. Defendant went to the recreation room to play a game of solitaire. At about 6 or 6:30 a.m., he exited the exercise room in the basement and went to the woods, where he pulled weeds, sawed, and dug. He did not burn anything. Defendant testified that he returned to the house at 12:30 p.m., entering through the exercise room. He called out for Carolyn, but did not hear a response. He checked telephone messages, and heard some that sounded anxious. He went upstairs to the bedroom and then the hallway, where he saw blood. Defendant also saw blood in the bathroom. He heard a noise from the garage, opened the door, and saw Carolyn lying between the pickup truck and SUV. As he walked toward her, Chief Sauers told him to get out. Defendant heard Sauers say that Carolyn had stated that she had fallen; when the police asked defendant if Carolyn had ever fallen, he told them that she had recently done so at the golf club. He consented to a search of the home and subsequently had chest pains and was transported to the hospital.

¶ 26 Defendant further testified that, when the police told him the following day that they had completely ruled out a fall, he stated "damn." He did not inquire if there were any other suspects. Defendant was arrested.

¶ 27 Defendant denied using a garden hose near the back patio on September 13, 2004, explaining that the standing water in the area was due to his watering plants there the day before, in the afternoon. Defendant never told the police that the circuit breakers were turned off because they never asked.

¶ 28 During the State's rebuttal, four canine handlers testified that their dogs searched the Cox premises one day after the incident and indicated at various points for decomposing human remains: at the tool shed, on the edge of the creek, at a brush pile, and at a hose reel by the patio. Also, one dog alerted at the stones below the patio door. However, no objects were recovered.

¶ 29 Dr. Nancy Jones, a forensic pathologist, testified that Carolyn was assaulted with an implement. Her injuries (to the left facial region, side of head, and back of head) were not consistent with a fall because of their severity and geographic separation from one another and because injuries to other body parts would be expected. Also, Carolyn's CT-scan did not show evidence of blighting contusions, which occur when an individual falls. Carolyn sustained a minimum of four blows. Dr. Jones further opined that Carolyn's injuries were not consistent with falling four feet from a ladder, hitting her head on a cement block, and having the ladder fall on her. Her injuries are "far more severe" than those from a four-foot fall and there were no injuries to other parts of her body. There was little blood on the cement block, even though head wounds bleed profusely. Because the laceration is toward the left side of Carolyn's head, if she fell onto the cement block, the left side of her head would have been facing down and the falling boards could not possibly have caused the other injuries to her left side.

¶ 30 David Carter, a blood stain analyst with the state police, testified as to several hypothetical scenarios. He stated that, if someone was struck on the back of the head, on the left side, while lying on her right side and was shortly thereafter removed from the bed and placed on a carpet runner, there would be no impact spatter and there might not be blood stains on the bed if there was no breach of an artery or if the individual was quickly removed. Being dragged down the hall would not cause spatter patterns because it would not involve forceful impact; there would be only stains

on the floor or wall if there was contact with those surfaces or if the blood soaked all of the way through the runner. If a person was moved into the garage and then back into the foyer and struck in the face (and assuming that the blood on the back of the head soaked into clothes or other material), there would not be spatter. Carter also opined that it is not possible to tell how much time elapsed before blood appeared from the scalp wound.

¶ 31 B. Verdict and Direct Appeal

¶ 32 Following the jury trial, defendant was convicted of one count of attempt murder (exhaust fumes) and aggravated domestic battery (blunt object). Defendant was sentenced to consecutive terms of 14 and 6 years' imprisonment, respectively.

¶ 33 On direct appeal, defendant challenged the sufficiency of the evidence to sustain his convictions, argued that there were errors in the admission and exclusion of certain evidence, that he was prejudiced by alleged discovery violations, and that a hearing was required concerning alleged juror misconduct. This court affirmed. *People v. Cox*, No. 2-08-0028 (2010) (unpublished order under Supreme Court Rule 23).

¶ 34 C. Postconviction Allegations

¶ 35 On May 12, 2011, defendant filed a *pro se* postconviction petition, which the trial court ruled, on May 31, 2011, stated the gist of a constitutional claim. On July 18, 2011, the State moved to dismiss defendant's petition on the bases of *res judicata* and waiver. Defendant filed, both *pro se* and by counsel, numerous amendments, motions, and supplements to his original postconviction petition (including a 54-page supplement and a 19-page second supplement, detailing his allegations).

¶ 36 Defendant raised the following issues in his postconviction filings. First, he alleged that his constitutional rights were violated in that Carolyn's testimony was unbelievable on its face because her claims concerning how 63-year-old defendant, who had physical infirmities, allegedly carried her from the foyer to the garage (with his arms outstretched) were physically impossible. Specifically, defendant argued that it was physically impossible for defendant to lift Carolyn's "143-pound body out of bed with his arms extended out away from his chest and carry her upright as she is looking him in the face, his hands under her armpits, him walking backwards about 130 feet from bed to bay 4 of the garage." He was "a 63-year-old man with a heart aneurysm, back and arthritis problems, and he had undergone rotator cuff surgery and was not fully recovered."

¶ 37 Second, defendant alleged that he was actually innocent based on newly discovered evidence (specifically, evidence that Carolyn was actively persuaded by others to falsely testify,[1] that she had a motive to do so, that others—Kenneth— had motives to persuade Carolyn that defendant caused her injuries, that the McHenry County State's Attorney was remunerated for interjecting his office into the Cox's civil divorce proceedings and that the State's Attorney's former employer was used

[1]Defendant attached to his petition sworn affidavits from friends William and Sharon Johnson, who averred that, two weeks after the incident, while visiting Carolyn in the hospital, Carolyn (who was with Kenneth) stated that she was hit, Kenneth took notes, and reminded her " 'that it had to be Dad.' " Carolyn, according to the Johnsons, did not respond to this statement. Defendant also attached a copy of the Cox's dissolution judgment, which reflected that Carolyn received all of the marital shares of Exacto. According to defendant, Carolyn transferred back the shares to the company, which resulted in Kenneth becoming the company's sole owner.

to maximize Carolyn's divorce settlement,[2] and that one alternative viable suspect—Kenneth—could

[2]Defendant attached to his petition: a copy of a campaign flyer, wherein Carolyn encouraged voters to re-elect Louis Bianchi as the McHenry County State's Attorney on February 5, 2008; a printout from the website of the Illinois State Board of Elections reflecting that Exacto (Kenneth) contributed $2,500 on December 31, 2007, to the Committee to Re-Elect Louis Bianchi; and a copy of defendant's February 21, 2008, filing with the Attorney Registration and Disciplinary Commission (during the pendency of his direct appeal) of a Request for Investigation of a Lawyer, wherein he complained about the flyer mailing, stated that the flyer had also been reprinted as a newspaper advertisement in the Northwest Herald newspaper, that Carolyn had recorded telephone messages for the campaign, and that her voice was played in radio ads for the campaign during the week preceding the election. Defendant argued that he could not receive a fair trial due to the media attention on Bianchi and that certain trial and sentencing delays were intentional and designed to coincide with the election. He also stated that Carolyn's personal injury suit against him was pending (and used as a threat to gain the "lion's share" of the marital assets) and that the suit was filed by attorney Thomas Popovich, whose firm employed Bianchi before he was elected the McHenry County State's Attorney in 2004. Defendant argued that he did not believe that he would receive a fair trial in the civil case or in his criminal case (if it was reversed and remanded). He also argued that Bianchi had violated Rules 3.6 (trial publicity) and 3.8 (special responsibilities of a prosecutor) of the Illinois Rules of Professional Conduct by making "these statements" and that their sole purpose was to gain political advantage to defendant's detriment. Ill. R. Prof. Conduct Rs. 3.6, 3.8 (eff. Jan. 1, 2010).

have been present at the crime scene that morning because his alibi was proven invalid and that he profited greatly from defendant's conviction).

¶ 38 Third, defendant alleged that Carolyn perjured herself "by deliberately deceiving the court by planning and designing her story changes," prejudicing the jury, and concealing evidence (*e.g.*, defendant pointed to the absence of blood in the bedroom, where Carolyn claimed she was struck, and her attempts to "evade prior inconsistent statements" that she felt on her head dried blood in the hallway, where head wounds bleed profusely). Defendant argued that Carolyn changed her "story" and that the information changes (including testifying that she could not recall earlier interviews or statements contradicting earlier interviews) were not provided during discovery. These included that Carolyn provided false testimony when she testified that her bedroom hit was not on her face, but to the back of her head and that she told detectives three times that she backed the SUV into the garage, but "flipped her testimony in order to incriminate her husband."

¶ 39 Fourth, defendant alleged that the State knowingly utilized perjured testimony, given the "exceedingly large number of false statements made by Carolyn" (including an outdated life insurance policy to allegedly show motive for attempt murder) and that it used perjured testimony from Kenneth and Dr. Jones.

¶ 40 Defendant's fifth allegation was that the State violated the *Brady* rule (see *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("the prosecution must disclose evidence that is favorable to the accused and material either to guilt or to punishment")) by knowingly using perjured testimony and failing to disclose certain information available to the State and items of evidence found at the scene and shown in police photographs. Defendant argued that the detectives and the State did not take the blue rug and the SUV key into evidence and failed to check and document the door locks

between the house and garage. The fact that there was no blood on the door knobs, according to defendant, reflects that "the doors were unlocked, and Carolyn's story is false." Defendant also asserted that the State's contention that nothing was memorialized from its six pretrial planning sessions with Carolyn was "unbelievable on its face."

¶ 41 Sixth, defendant alleged that trial counsel was ineffective for failing to raise several issues (*i.e.*, that Carolyn's three claimed hits—in bed, in the foyer, and in the SUV—cannot account for the facial injuries she sustained, as described by Dr. Gosain; it was physically impossible for defendant to carry her as Carolyn described; and, as a result of mental impairment or perjury, Carolyn claimed that her memory of the assault became clear on September 14, 2004, but she could not recall any events that occurred on September 14), did not effectively investigate other viable suspects, namely, Kenneth, or his alibi, and did not present defendant with the option of asking for a lesser-included reckless-conduct jury instruction.

¶ 42 Seventh, defendant alleged that appellate counsel was ineffective in several respects (*i.e.*, failing to appeal defendant's "excessive" sentence (taking into account his age, medical condition, lack of criminal history, lack of physical evidence linking him to the crimes, Carolyn's lack of credibility, and the physical impossibility of actions she described); disregarding numerous memoranda from defendant stressing and instructing on the crucial issues in the case; failing to raise trial counsel's ineffectiveness; arbitrarily omitting four of the eight issues presented to the appellate court when counsel filed a petition for leave to appeal to the supreme court and against defendant's directions; and failing to raise "fundamental issues such as the physical impossibilities of Carolyn's claims, as 'a matter of law' ").

¶ 43 In a supplemental petition filed by appointed counsel, defendant also argued that: (1) trial counsel was ineffective for failing to present to defendant the option of a lesser included offense of reckless conduct (to the attempt-murder-by-carbon-monoxide-poisoning count) (and that, given that the jury found defendant guilty on the lesser included offense of aggravated battery when compared to the count of attempt murder based on battery, it is likely the jury would have done the same on the carbon monoxide attempt murder count); (2) trial counsel was ineffective in failing to attack the State's refusal to preserve critical exculpatory evidence, which was a *Brady* violation; and (3) appellate counsel was ineffective for failing to attack trial counsel's errors in not asking for a jury instruction, not adequately attacking the police's failure to preserve evidence, due, ultimately, to trial counsel's relationship with appellate counsel.

¶ 44 D. Second-Stage Postconviction Proceedings

¶ 45 The State moved to dismiss defendant's petition. In support of its motion (as to all but the ineffective-assistance-of-appellate-counsel claim), the State argued that defendant's claims should be dismissed because they were either raised on direct appeal (*res judicata*) or because they could have been raised on direct appeal, but were not (forfeiture). Further, the State argued that, if defendant's theory was that Carolyn accidentally fell and injured herself, then it is inconsistent (and not part of the defense strategy) to ask for a lesser-included reckless-conduct instruction.

¶ 46 Defendant replied that his filings set forth adequate claims and that the relationship between his trial counsel and appellate counsel prevented his trial counsel's ineffectiveness from being considered. He also argued that newly discovered evidence stemmed from Carolyn's testimony (under oath) in judicial proceedings conducted after the trial in this case. Defendant also argued that the issue of his ability to request a lesser-included jury instruction could not have been brought up

on appeal because the fact that his attorney never discussed it was a matter outside the record, never inquired about by the trial court, and not subject to being included on direct appeal (and, if it could have been, appellate counsel was ineffective for not properly contesting it).

¶ 47 On November 30, 2012, the trial court, in a written ruling, granted the State's motion and dismissed defendant's petition. As to trial counsel's performance, the court found that his "handling of the evidence preservation issue" was nothing "other than a tactical decision he was entitled to make." Similarly, the court found that appellate counsel's decisions concerning the evidence preservation issue were tactical decisions that "she was entitled to make." As to defendant's jury instruction argument, the court found that the issue of trial counsel's alleged ineffective assistance could have been raised on direct appeal and that nothing in the record supported the assertion that appellate counsel could not raise the issue of trial counsel's effectiveness. The court noted that defendant was represented by different attorneys at trial (Mark Gummerson) and on appeal (Phyllis Perko) and that they were from different law firms. The trial court noted that, if she could make a good faith argument supported by the record, appellate counsel "could be expected to argue trial counsel's ineffective assistance." The court found that the record did not demonstrate that appellate counsel's decisions concerning trial counsel's performance were "anything other than tactical decisions she was entitled to make." Finally, the court determined that defendant's remaining arguments addressed witness credibility and the weight to be given to evidence. As the jury resolved those issues against defendant, they could not be re-litigated in a postconviction proceeding.

¶ 48 Defendant appeals.

¶ 49 II. ANALYSIS

¶ 50 Defendant argues that the trial court erred in dismissing his postconviction petition, where his constitutional violations were neither forfeited nor barred by *res judicata*. Specifically, he argues that: (1) the evidentiary claims supporting his actual innocence are based upon newly discovered evidence not contained in the record on direct appeal and, therefore, are not forfeited; (2) the court erred in failing to consider that defendant was not permitted to decide if he should seek a lesser-included jury instruction, where that issue is dependent upon facts outside the record on direct appeal; and (3) the cumulative errors of trial and appellate counsel and the "synergy" between them deprived him of his constitutionally guaranteed right to effective representation. For the following reasons, we reject defendant's arguments.

¶ 51 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)) provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); *People v. Peeples*, 205 Ill. 2d 480, 509 (2002). A postconviction action is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. *People v. Tate*, 2012 IL 112214, ¶ 8. Thus, issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited. *Id.* However, the doctrines of *res judicata* and forfeiture are relaxed where: (1) fundamental fairness so requires; (2) the alleged forfeiture stems from the ineffective assistance of appellate counsel; or (3) the facts relating to the issue do not appear on the face of the original appellate record. *People v. Williams*, 209 Ill. 2d 227, 233 (2004).

¶ 52 In a noncapital case, a postconviction proceeding contains three stages. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine

whether " 'the petition is frivolous or is patently without merit.' " *Hodges*, 234 Ill. 2d at 10 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11-12. This first stage in the proceeding allows the circuit court "to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit." *People v. Rivera*, 198 Ill. 2d 364, 373 (2001). "Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low. At this initial stage of the proceeding, there is no involvement by the State." *People v. Tate*, 2012 IL 112214, ¶ 9.

¶ 53 If the circuit court does not dismiss the petition as "frivolous or *** patently without merit" (725 ILCS 5/122-2.1(a)(2) (West 2004)), the petition advances to the second stage (as defendant's petition did here), where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2004)), and where the State, as respondent, enters the litigation (725 ILCS 5/ 122-5 (West 2004)). It is at this point, not the first stage, where the postconviction petition can be said to be at issue, with both sides engaged and represented by counsel. See 725 ILCS 5/122-4, 122-5, 122-6 (West 2004). At this second stage, the circuit court must determine whether the petition and any accompanying documentation make "a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). If no such showing is made, the petition is dismissed. *Id.* If, however, a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. *Id.*; 725 ILCS 5/122-6 (West 2008). A circuit court's ruling on the sufficiency of the allegations in a postconviction petition is a legal determination. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998). We review *de*

novo the circuit court's dismissal of a petition at the second stage. *People v. Pendleton*, 223 Ill.2d 458, 473 (2006).

¶ 54 Again, in this case, defendant's petition was dismissed at the second stage. At both the second and third stages of postconviction proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *Id.* At the second stage of the proceedings, all well-pleaded facts not positively rebutted by the trial record are taken as true. *Id.* The circuit court does not engage in fact-finding or credibility determinations at the second stage; rather, such determinations are made at the third, or evidentiary, stage. *Coleman*, 183 Ill. 2d at 385. "The second stage of postconviction review tests the legal sufficiency of the petition. Unless the petitioner's allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish or 'show' a constitutional violation." *People v. Domagala*, 2013 IL 113688, ¶ 35.

¶ 55 A. Actual Innocence Based on Newly Discovered Evidence

¶ 56 Defendant argues first that, in his petition, he made a substantial showing of a constitutional violation where he raised an actual innocence claim based on newly discovered evidence. He contends that the trial court erred in dismissing his petition on this basis, where it found that defendant's arguments addressed witness credibility and the weight to be given to the evidence and, thus, could not be re-litigated in a postconviction proceeding.

¶ 57 Claims of actual innocence based on newly discovered evidence may be brought under the Act as a potential violation of State-guaranteed due process. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). The standard "is extraordinarily difficult to meet." *People v. Coleman*, 2013 IL 113307, ¶ 94 (further noting that reviewing courts had granted relief on this basis in only three reported cases

since 1996—the year *Washington* was decided). To succeed on a claim of actual innocence, a defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. *Id.*

> "New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result." *Id.* ¶ 96.

See also *Edwards*, 2012 IL 111711, ¶ 33 (documentation must set forth a colorable claim of actual innocence, *i.e.*, they must raise the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence").

¶ 58 The supreme court recently noted in *Coleman*, which involved a *third-stage* proceeding, that the trial court: (1) first determines whether the evidence is new, material, and noncumulative; and (2) if it is, then the court next considers whether that evidence places the trial evidence "in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict." *Coleman*, 2013 IL 113307, ¶ 97. In making these assessments, which involve credibility determinations at the third stage, the trial court "should not redecide the defendant's guilt" utilizing the reasonable-doubt standard (which would warrant an acquittal, not a new trial). *Id.* Rather, "[p]robability, not certainty, is the key as the trial court in effect predicts what another jury would do, considering all the evidence, both new and old, together." *Id.*

¶ 59 Here, in assessing the propriety of the *second-stage* dismissal of defendant's postconviction petition, the inquiry is whether defendant has made a substantial showing of a constitutional

violation (namely, violation of his due process rights due to his alleged actual innocence). That is, whether defendant's allegations, which are taken as true unless affirmatively refuted by the record, raise new, material, noncumulative evidence and, if so, whether that evidence is so conclusive it would probably change the result on retrial. We conclude that it would not.

¶ 60 Defendant argues that his claims supporting his actual innocence are based on newly discovered evidence not contained in the record on direct appeal. He contends that the newly discovered evidence consists of evidence showing that Carolyn was actively persuaded to believe that defendant caused her injuries and had a substantial motive to testify falsely against him. He also contends that the new evidence shows that other witnesses, namely, Kenneth, had motives to encourage Carolyn to falsely testify. Further, defendant contends that his petition reflects that it was not until 2008 that Kenneth's "motive was proven as he ascended to sole control of his father's multi-million dollar corporation." Defendant notes that much of this evidence came to light in the 2011 family law proceedings; specifically, that Carolyn was found in contempt of court for failing to turn over about $70,000 to defendant from an account awarded to him in the dissolution proceedings. Defendant argues that this evidence shows Carolyn's irrational vindictiveness toward him.

¶ 61 Defendant also points to Louis Bianchi, the McHenry County State's Attorney, arguing that he injected his office into defendant's and Carolyn's divorce proceedings (which occurred after defendant's criminal trial). Defendant argues that the prosecutor was remunerated for his services for interjecting his office into the divorce proceedings and obtaining a conviction of defendant. Defendant notes that his other arguments also support his actual innocence, including his claim

concerning the physical impossibility of the assault as related by Carolyn (further supporting his claim that Carolyn perjured herself and that the State knowingly used this testimony).

¶ 62 The State responds that defendant's allegations and the documents he filed in support thereof, would merely serve to impeach Carolyn, not exonerate defendant. According to the State, none of defendant's allegations address the facts of the underlying offense and they do not undermine the jury's verdict nor this court's determination on direct appeal that the evidence supported that verdict.

¶ 63 In *People v. Green*, 2012 IL App (4th) 101034, upon which the State relies, the defendant was convicted of first-degree murder and aggravated criminal sexual assault of his six-month-old daughter. Following direct appeal and several collateral attacks, the defendant filed a second, successive, postconviction petition, raising, *inter alia*, a claim of actual innocence based upon newly discovered evidence. The defendant argued that a memorandum from a private investigator hired by postconviction counsel and summarizing an interview he conducted with the defendant's fellow inmate (who had testified at the defendant's trial that the defendant had confessed to him, but denied that he received any promises or bargains in exchange for his testimony) constituted newly discovered evidence establishing his innocence. The memorandum recounted that the fellow inmate told the investigator that he received a deal in exchange for his testimony. The defendant argued that this established that the inmate falsely testified at his trial and that the State possessed this information at the time of trial, but did not turn it over to defense counsel. The trial court dismissed the petition. On appeal, the defendant argued that his petition stated a claim of actual innocence because the memorandum showed that the inmate lied under oath, which was critical to the jury's credibility determination. The appellate court rejected this argument, holding that the allegedly-withheld evidence concerning plea negotiations between the State and the inmate did not exonerate

the defendant; at best, it could have impeached the inmate's credibility. *Id.* ¶ 32. The court further noted that, perhaps, the memorandum "would provide a basis to assert a reasonable doubt argument, but that is not the standard; the standard is *actual innocence*." (Emphasis in original.) *Id.* ¶ 36. The appellate court stated that the newly discovered evidence, if accepted by the jury, would merely contradict the inmate's testimony through impeachment. *Id.* It would not contradict the other evidence of the defendant's guilt, including that: he was alone with his daughter at the time her injuries occurred; he had inconsistent stories explaining her injuries; the nature and extent of the injuries were consistent with sexual assault; and the defendant's admissions to police officers that he had shaken his daughter. *Id.*

¶ 64 Here, defendant responds that his claims of newly discovered evidence are not issues of witness credibility. He further asserts that the evidence was outside the record and he could not have raised it at trial because the evidence came to light years after the criminal proceedings. Defendant also argues that the evidence would likely have affected the verdict, where the prosecutor's political motives and Kenneth's financial motives to have defendant convicted "further muddy the murky waters in a case in which no physical evidence link[ed]" defendant to the crime. He urges that the case rested on Carolyn's words and that the newly discovered evidence would change the original result. *Green*, he argues, is distinguishable because the petition therein focused on the credibility of a single, nonoccurrence witness to a statement, whereas, here, defendant's petition includes several arguments directed at a "host of witnesses," including the sole occurrence witness. Defendant also argues that the State failed to address that his actual innocence claims also raise claims other than those related to the impeachment of witnesses: namely, first, newly discovered evidence of a million-dollar motive and an alternative suspect—Kenneth— who had access to the

crime scene and whose alibi was allegedly invalid, and, second, the alleged improprieties of the State's Attorney's office.

¶ 65 We reject defendant's arguments, but for reasons other than those raised by the State. Taking his allegations as true, we cannot conclude that they were necessarily new, material, and not cumulative and, thus, we cannot further conclude that the evidence is so conclusive that it would probably change the result on retrial. Defendant's assertions that Carolyn and Kenneth had financial motives to have defendant convicted and that Kenneth persuaded Carolyn to testify falsely are not new, material, and noncumulative. At trial, defendant's theory was that Carolyn was manipulated by Kenneth to testify against defendant. Kenneth himself testified that he wanted to see defendant convicted and that he had control of Exacto, the family company, in September 2004. Kimberly, Kenneth's wife, testified at trial that, in December 2004, she and Kenneth sold their home for $425,000 and purchased a new home for $1.7 million and that Carolyn signed the loan guarantee for that purchase. Also at trial, Kimberly Jo Malczynski, the Cox's daughter, testified that, after the Cox residence was released to the family members, she and Kenneth removed all of defendant's personal financial documents from the home and that Kimberly subsequently gave them to Carolyn. Kenneth's influence over his mother was also brought out at trial. He testified that he was continuously with Carolyn at the hospital and in constant contact with police officers during the week following the incident. He took notes of conversations with Carolyn and took actions with respect to Exacto and defendant's finances with the intent to protect Carolyn and their estate. Kenneth also became a trustee of Carolyn's trust and met with a divorce attorney at her request. During closing argument, defense counsel repeatedly challenged Carolyn's version of the events and raised the issue of Kenneth's influence over, and manipulation of, his mother, including that he

supplied elements of the account of the incident that she related to the police and at trial. Further, we note that defendant's petition allegation that Kenneth's alibi was invalid is not supported by affidavit or otherwise in the record (other than, apparently, defendant's self-serving, unsupported statement in his own affidavit).

¶ 66 As to defendant's claim concerning the State's Attorney, we reject it outright as not raising any allegations of wrongdoing and, thus, not being material to the case. His pleadings, taken as true, do not sufficiently plead any ethical or other violations by the prosecutor's office that could have affected his *criminal trial*. Defendant, for example, argued in his petition that he could not receive a fair trial due to the media attention on the State's Attorney. He fails to mention that his criminal trial occurred in March 2007 and that the election for which Carolyn volunteered her endorsement was on February 5, 2008. Defendant fails to tie these post-criminal-trial actions to alleged wrongdoing at the time of his criminal trial. Somewhat confusingly, he also mentions later in his filings that the trials to which he refers are his civil case and any retrial of his criminal case (if it was reversed, which it was not), which are not relevant to our inquiry.

¶ 67 Finally, defendant's claim concerning the alleged physical impossibility of the assault as related by Carolyn is barred by *res judicata* because it was raised at trial; it is not new evidence. Carolyn was questioned about the manner in which defendant held and carried her. Further, at closing argument, defense counsel argued:

> "[Carolyn] tries to describe that [defendant] is allegedly holding a five foot five woman that is limp that weighs 143 pounds. Ladies and Gentlemen, common sense. Every day experience. You can't do it. And the reason she was trying to describe it that way is, well, I didn't—he didn't get any blood on him. That's why she was trying to describe it that way.

Did not happen. You could not do that. Common sense. Every day experience. Not what I say. Not what they say. It is what comes from the witness stand."

¶ 68 In summary, the trial court did not err in dismissing defendant's claim asserting his actual innocence based on alleged newly discovered evidence.

¶ 69 B. Ineffective Assistance of Trial and Appellate Counsel - Jury Instruction

¶ 70 Next, defendant argues that the trial court erred in dismissing his claim (on the basis that it was forfeited because it could have been raised on direct appeal) that trial counsel was ineffective for failing to tender a jury instruction on the lesser offense of reckless conduct and that appellate counsel was ineffective for failing to challenge trial counsel's performance in this respect. He contends that consideration of that issue is dependent upon facts outside the record on direct appeal. For the following reasons, we conclude that, although defendant has shown that counsel erred, defendant fails to show that he was prejudiced by counsel's error and, accordingly, we reject his argument.

¶ 71 Ineffective assistance of counsel claims are measured against the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000). To prevail on a claim of ineffective assistance, a defendant must show both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687-88, 694; see also *People v. Edwards*, 195 Ill. 2d 142, 162-63 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Because a defendant must establish both prongs for a successful ineffective assistance claim, a court

considering such a claim need not determine the reasonableness of counsel's performance before considering whether defendant suffered prejudice as a result of the alleged deficiency. *Id.* at 697; *Edwards*, 195 Ill. 2d at 163.

¶ 72 A defendant in a criminal prosecution has a fundamental due process right to notice of the charges brought against him or her and may not be convicted of an offense he or she has not been charged with committing. *People v. DiLorenzo*, 169 Ill. 2d 318, 321 (1996); *People v. Baldwin*, 199 Ill. 2d 1, 6 (2002). However, a defendant may be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense. *People v. Kolton*, 219 Ill. 2d 353, 360 (2006). A "court may not give an instruction on a lesser uncharged offense unless it is a lesser included offense of the offense charged." *People v. Baney*, 229 Ill. App. 3d 770, 773 (1992).

¶ 73 A defendant has the exclusive right to decide *whether to submit or tender* a lesser-included offense instruction at the conclusion of the evidence. *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994); see also *People v. Wilmington*, 2013 IL 112938, ¶ 46. However, in order for a defendant to be *entitled* to a lesser-included offense instruction, "the evidence at trial [must be] such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him [or her] of the greater." *People v. Medina*, 221 Ill.2d 394, 405 (2006). Where the defendant chooses to submit a lesser-included offense instruction, he or she is acknowledging that the evidence is such that a rational jury could convict him or her of the lesser-included offense. *Id.*

¶ 74 Where defense counsel, rather than the defendant, makes the ultimate decision to submit or tender the lesser-included offense instruction, the defendant's conviction on the lesser-included

offense is reversible. See *People v. Brocksmith*, 162 Ill. 2d 224, 230 (1994). However, our supreme court has noted:

> "In order to make an intelligent and informed decision in that regard, the defendant obviously requires the advice of counsel to aid the defendant in evaluating the evidence and to apprise the defendant of any potential conflicts with the defense strategy pursued to that point in the trial, functions that a trial judge cannot perform for the defendant. As members of this court have observed, the decision whether to tender a lesser-included offense instruction partakes of, and is unavoidably intertwined with, strategic trial calculations, matters within the sphere of trial counsel." *Medina*, 221 Ill. 2d at 406 (citing *Brocksmith*, 162 Ill. 2d at 230-34 (Freeman, J., concurring, joined by Bilandic, C.J.)).

¶ 75 Here, defendant was charged with two counts of attempt first-degree murder and one count of aggravated domestic battery. The first count of attempt murder alleged that defendant struck Carolyn with a blunt object with the intent to cause her death. The aggravated domestic battery charge alleged that defendant knowingly caused Carolyn great bodily harm by knowingly striking her in the head and face with a blunt object, thereby fracturing her skull. The second attempt murder count charged that defendant intentionally placed Carolyn, who was physically injured, in an unventilated, enclosed, five-car garage with two running vehicles, intentionally exposing her to exhaust fumes with the intent to cause her death. Defendant was acquitted of the first count of attempt murder (blunt object), but was found guilty of the second count (carbon monoxide) and of aggravated domestic battery (blunt object).

¶ 76 At the time of the offense, "[a] person who causes bodily harm to or endangers the bodily safety of an individual by any means, commits reckless conduct if he performs recklessly the acts

which cause the harm or endanger safety, whether they otherwise are lawful or unlawful." 720 ILCS 5/12-5 (West 2004). Reckless conduct, defendant asserts, may be a lesser-included offense to attempt murder, and the State, here, does not argue otherwise. See *People v. Smith*, 402 Ill. App. 3d 538, 546 (2010); but see *People v. Smith*, 90 Ill. App. 3d 83, 86 (1980) (reckless conduct is not a lesser included offense of attempt murder because specific intent is not an element of reckless conduct as it is of attempt murder; where there was no evidence of reckless conduct by the defendant, the trial court did not err in refusing the defendant's proposed jury instruction on reckless conduct).

¶ 77 Defendant attached to his postconviction filings an affidavit wherein he averred that "[a]t no time did my trial attorneys inform me that I could maintain my innocence and still seek jury instructions on a lesser included charge" and that "[h]ad I been so informed, I would have requested the court to instruct the jury on a lesser included charge for the offense of Attempt Murder by Carbon monoxide poisoning." The trial court determined that the issue of trial counsel's alleged ineffective assistance could have been raised on direct appeal and that nothing in the record supported the assertion that appellate counsel could not have raised the issue of trial counsel's effectiveness. Defendant urges that he could not have raised the jury instruction issue on direct appeal because the facts concerning it were not of record.

¶ 78 The State responds that: (1) defendant could have raised the jury instruction issue on direct appeal and that, therefore, it is forfeited; and (2) defendant points to no evidence that would have supported giving the instruction. It contends that the evidence that defendant struck Carolyn at least three times and placed her on the floor in the locked garage with two running vehicles reflects nothing less than an intent to kill her. Thus, counsel could not have been ineffective for failing to

develop a theory or to submit an instruction that had no factual support. The State further asserts that defendant's claim that the fact that he was found guilty on the lesser offense of aggravated battery on the charges concerning the blunt object makes it likely that the jury would have done the same if presented with the option on the attempt murder charge involving carbon monoxide poisoning is "blatant speculation." Finally, the State argues that defendant failed to show any basis for challenging appellate counsel's effectiveness, where counsel chose not to raise issues that she believed had no merit.

¶ 79 We conclude that the trial court did not err in dismissing defendant's jury instruction claim. The State does not assert that the record affirmatively rebuts defendant's affidavit allegations (and we cannot conclude so based on our own review of the record). Thus, taking as true defendant's claims that his trial counsel at no time presented to him the option of instructing the jury on the lesser included offense of reckless conduct and that he would have instructed counsel to do so had he been presented with the option, defendant has substantially shown a constitutional violation—deprivation of effective assistance of counsel. Although our supreme court has stated that a defendant's decision whether to tender a lesser-included offense instruction is intertwined with trial counsel's strategic calculations (*Medina*, 221 Ill. 2d at 406), this does not alter the fact that, here, taking defendant's allegations as true, defendant was never even informed of his right to do so. Defendant has sufficiently alleged that trial counsel failed to inform him of his exclusive right to decide whether to tender the instruction.

¶ 80 We turn next to consider whether the denial of this exclusive right, *i.e.*, counsel's deficient performance, would have prejudiced defendant. A defendant is entitled to have the jury instructed on defense theories, including lesser-included offenses, about which there is at least very slight

evidence. See *People v. Davis*, 213 Ill. 2d 459, 478 (2004); *People v. Jones*, 175 Ill. 2d 126, 132 (1997). However, "an included-offense instruction is required only in cases where the jury could rationally find the defendant guilty of the lesser offense and not guilty of the greater offense." *People v. Perez*, 108 Ill. 2d 70, 81 (1985).

¶ 81 "A person is reckless or acts recklessly when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2004). A person commits an attempt when, with the intent to commit a specific offense, he or she does any act that constitutes a substantial step towards the commission of that offense. 720 ILCS 5/8-4(a) (West 2004). Proof of specific intent to kill is necessary to support a conviction of attempt murder. Specific intent may be inferred from the character or nature of the assault, the accompanying circumstances, and the use of a deadly weapon. *People v. Burdine*, 57 Ill. App. 3d 677, 683 (1978). There is a presumption of intent to kill where one voluntarily and willfully commits an act, the natural tendency of which is to destroy another's life. *People v. Bell*, 113 Ill. App. 3d 588, 594 (1983).

¶ 82 We reject defendant's argument that this error is not "harmless." He contends that, given that the jury found him guilty of the other lesser included offense—battery with a blunt object—when given the opportunity, "it is not unlikely the jury would have done the same" on the carbon monoxide count. Defendant ignores the evidence presented at trial. Again, he was charged with (and the jury determined that the evidence showed) intentionally placing Carolyn, who was physically injured, in an unventilated, enclosed, five-car garage with two running vehicles and

intentionally exposing her to exhaust fumes with the intent to cause her death. There was no evidence presented from which a rational trier of fact could find that defendant acted recklessly in placing Carolyn in the garage. There was no evidence that Carolyn was, for example, accidentally placed in the garage. Defendant's own theory was that she fell off of a ladder. If defendant was indeed trying to assist her, this does not explain why the cars were running, why he did not open the garage doors, and why he was not still present in the garage when police arrived (Sauers testified that defendant appeared a short while after Sauers discovered Carolyn in the garage). Finally, we note that the fact that, on the blunt object counts, defendant was acquitted of attempt murder and convicted of only aggravated domestic battery is of no import. Aggravated domestic battery required a higher mental state—specifically, at least knowledge—than reckless conduct, and, thus, a comparison is not easily made. See 720 ILCS 5/12-3.3 (West 2004) (aggravated domestic battery occurs when a person who, in committing domestic battery, "intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement").

¶ 83 Accordingly, even though defendant was not presented with the opportunity to decide whether to tender a lesser-included offense instruction, under the evidence presented at trial, he was not prejudiced by this error. See *People v. Hughes*, 2012 IL 112817, ¶ 44 (to advance to a third-stage evidentiary hearing on a postconviction claim of ineffective assistance of counsel, the defendant must make a substantial showing that, but for counsel's errors, the result of the proceeding would have been different). Defendant was not entitled to have the jury instructed on the lesser included offense because he did not make a substantial showing that there was an evidentiary basis, not even slight evidence, to warrant the giving of the reckless conduct instruction. We further conclude that,

because he has not sufficiently asserted error on trial counsel's part, his claim that appellate counsel was ineffective for not raising trial counsel's ineffectiveness also fails.

¶ 84 In summary, the trial court did not err in dismissing defendant's jury instruction claim.

¶ 85 C. Ineffective Assistance of Trial and Appellate Counsel - Other Claims

¶ 86 Defendant's final argument is that he made a substantial showing that: (1) his trial counsel was ineffective based on certain cumulative errors; and (2) appellate counsel was ineffective due to the "synergy" between appellate and trial counsel. For the following reasons, we reject these arguments.

¶ 87 Again, we review these claims under the *Strickland* standard. Decisions, such as which witnesses to call at trial, come with the strong presumption that they are a product of sound trial strategy and are generally immune from claims of ineffective assistance of counsel. *Enis,* 194 Ill. 2d at 378. Still, an attorney may be deemed ineffective for failing to present exculpatory evidence, such as failing to call witnesses to support an otherwise uncorroborated defense theory. *People v. Redmond*, 341 Ill. App. 3d 498, 516 (2003). Further, counsel has a duty to conduct both factual and legal investigations in the case. *People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001). Whether the failure to investigate constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial. *Id.* at 185. As to appellate counsel's performance, appellate counsel is not obligated to raise "every conceivable issue on appeal," but, rather, is expected to "exercise professional judgment to select from the many potential claims of error that might be asserted on appeal." *Williams*, 209 Ill. 2d at 243.

¶ 88 Defendant argues that an evidentiary hearing is warranted on his claims concerning trial counsel's effectiveness, where trial counsel: (1) failed to investigate defendant's physical impossibility theory or show that Carolyn's testimony did not support Dr. Gosain's opinion as to the source of her injuries; (2) ineffectively cross-examined Carolyn concerning her memories of the morning of September 13, 2004, in light of the fact that she had no recall of events on September 14, 2004, and her general lack of credibility; (3) did not investigate other viable suspects, namely, Kenneth; and (4) failed to properly preserve Carolyn's "ordered destruction of the ladder as a potential *Brady* issue [where] the ladder was critical to [defendant's] theory of Carolyn's injuries being caused by an accidental fall."

¶ 89 However, defendant also concedes in his appellate brief that the foregoing matters *were contained in the record on appeal*. Nevertheless, he asserts that "the synergy between trial and appellate counsel prevented adequate review of the issue[s]" and that they are, therefore, not forfeited. Defendant notes that he alleged that trial counsel hired appellate counsel and facilitated communication between himself and appellate counsel. Also, appellate counsel hired trial counsel as "of counsel" for the appeal, and trial counsel attended oral argument for defendant's appeal, conferred with appellate counsel regarding appellate court matters, and reviewed documents and billed for appeal-related matters. Defendant urges that his petition makes a substantial showing of ineffective assistance of counsel and that these matters are not forfeited because, due to trial counsel's involvement in his direct appeal, appellate counsel could not reasonably have been expected to argue trial counsel's ineffectiveness.

¶ 90 On this claim, the trial court found that both trial counsel's and appellate counsel's treatment of the potential *Brady* issue were "tactical decisions" they were entitled to make. As to defendant's

"synergy" argument, the trial court found that trial and appellate counsel were from different law firms and that appellate counsel would have made a good faith argument if the record supported it; however, the court found that the record did not demonstrate that appellate counsel's decisions as to trial counsel's performance were "anything other than tactical decisions she was entitled to make."

¶ 91 The State responds that the underlying issues defendant raises are not meritorious and, thus, counsel was not ineffective. First, the State notes that defendant fails to address as to Carolyn's credibility how counsel's performance was unreasonable or how he was prejudiced by counsel's performance or to even place the claims in the context of the evidence as a whole. The State argues that both trial counsel used Carolyn's earlier statements to impeach her before the jury and that appellate counsel raised her inconsistent statements as issues to this court on direct appeal. Accordingly, the State concludes, defendant has met neither *Strickland*'s performance, nor the prejudice, prongs.

¶ 92 We conclude that defendant failed to make a substantial showing that he was denied effective assistance of trial or appellate counsel. Turning first to trial counsel's performance, we reject defendant's argument that he made the requisite showing that trial counsel's cumulative errors deprived him of his constitutional right to effective representation. First and foremost, defendant's briefing on this matter, which amounts to 11/2 pages, consists of conclusory allegations without any analysis or factual support. For example, defendant alleges that trial counsel did not "effectively" investigate other viable suspects, namely, Kenneth, but does not explain (or specify what specific petition allegations he made concerning) what, if any actions, counsel did take, and what actions counsel should have taken and, further, how this prejudiced him. Defendant notes that he "filed hundreds of pages outlining" trial counsel's errors, but, in his briefs to this court, fails to develop the

arguments he chooses to emphasize from his filings. Because defendant fails to specifically address how trial counsel's performance fell below an objective standard of reasonableness and how this prejudiced him, we find defendant's arguments forfeited. Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) requires that the appellant's brief include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Further, an appellant must present clearly defined issues to the court, supported by relevant authority: this court is "not simply a repository in which appellants may dump the burden of argument and research." *People v. Chatman*, 357 Ill. App. 3d 695, 703 (2005).

¶ 93 Second and in any event, the underlying issues defendant raises are unavailing, primarily because they were raised below and are barred by *res judicata*; thus, defendant has not made a substantial showing that counsel's performance fell below an objective standard of reasonableness. Defendant argues that trial counsel did not effectively impeach Carolyn's credibility. However, the record affirmatively rebuts this assertion. The record reflects that trial counsel, who cross-examined Carolyn for eight hours, did question Carolyn on her prior statements (and, furthermore, that appellate counsel raised this issue on direct appeal). Furthermore, during closing argument, defense counsel strongly questioned Carolyn's credibility, noted her prior inconsistent statements (*e.g.*, concerning whether or not she backed into the garage the SUV), argued that Kenneth was influencing her recollection of the incident, and noted that Kenneth was in control of her estate plan two months after the incident.

¶ 94 As to defendant's assertion that trial counsel "failed to show that Carolyn's testimony did not support Dr. Gosain's [Carolyn's surgeon's] opinion [that she sustained at least three blows, not a fall] as to the source of Carolyn's injuries," we reject this because, again, it is affirmatively rebutted

by the record. Trial counsel called into doubt Dr. Gosain's opinion by presenting testimony from Dr. Blum, who testified that he gave the surgeon's opinion little credence because the surgeon did not have forensic training and did not view scene photographs. Furthermore, during closing argument, defense counsel argued that Dr. Gosain was "not qualified" to render an opinion as to whether Carolyn's injuries were accidental or the result of an assault:

> "He repairs injuries. He didn't look at any crime scenes. He didn't look at any boards. How could he possibly say as to what caused this if he had no knowledge as to what instruments were in the vicinity of where Mrs. Cox would have been? How can you make that statement?
>
> And I disagree with what the prosecutor said. My recollection of [what] Dr. Gosain said, [i]t could have been caused by a board. Once again, it's not what I say. It's not what they say. It's what you heard come from that witness stand."

¶ 95 As to defendant's physical impossibility theory, we rejected it above as barred by *res judicata*. Thus, defendant had not sufficiently pleaded deficient performance on trial counsel's part as to this issue.

¶ 96 Finally, we reject defendant's claim as to the potential *Brady* issue concerning the ladder destruction. See *Brady*, 373 U.S. at 87 ("the prosecution must disclose evidence that is favorable to the accused and material either to guilt or to punishment"). Defendant's theory at trial was that Carolyn had a history of falls and fell off of a ladder in the garage, thereby, sustaining her injuries. During closing argument, defense counsel argued that Umbenhower did not collect the ladder into evidence, because "[i]t doesn't fit with what—They already arrested Billy Cox at this point as they're processing any of the evidence. They've arrested him. It doesn't fit with what they're saying at this

point in time." Counsel further argued that Carolyn designed her testimony such that she distanced herself from the area of the garage that contained the ladder: "she's been manipulated by the prosecutor to now distance herself from the fourth bay, which is clearly where she was at." Finally, counsel, again arguing that detectives and prosecutors did not adequately investigate the crime scene, noted "Nobody ever asked [Carolyn] about the ladder until this trial started." The foregoing reflect that the ladder theory was presented and argued at trial. We cannot conclude that defendant has made a substantial showing of ineffective assistance (for failing to raise a potential *Brady* violation). Police took crime scene photos of the ladder that were used at trial. In his petition filings, defendant does not allege facts connecting the ladder destruction to intentional acts by Carolyn to destroy evidence and the prosecution's collusion (*at the time of the ladder's destruction*) in this plan. Defendant's allegations are far from well-pleaded and are merely conclusory and speculative; they do not substantially show deficient performance by trial counsel.

¶ 97 Turning next to appellate counsel's performance, as defendant admits, the underlying claims about which he complains were contained in the record on direct appeal. Thus, they could have been raised on direct appeal and ordinarily, if they were not, are forfeited. *Tate*, 2012 IL 112214, ¶ 8. The inquiry here, therefore, hinges on whether defendant made a substantial showing that trial and appellate counsel had a "synergy" such that appellate counsel was ineffective in failing to raise the claims. *Williams*, 209 Ill. 2d at 233 (*res judicata* and forfeiture doctrines are relaxed where the alleged forfeiture stems from the ineffective assistance of appellate counsel). We conclude that he has not made such a showing. Defendant's allegations, taken as true, are that trial counsel hired appellate counsel and facilitated communication between defendant and appellate counsel. These actions, on their own, do not reasonably reflect any undue influence by trial counsel or appellate

counsel. Defendant also alleged that appellate counsel considered trial counsel to be "of counsel" for appellate matters. Again, this designation does not reflect any improper relationship or "synergy" and defendant does not cite to any ethical rule or law that reflects that such a designation is improper. See Black's Law Dictionary (9th ed. 2009) (the term "of counsel" is used to refer to an attorney who is not the principal attorney or attorney of record for a party or to someone "who is affiliated with a law firm, though not as a member, partner, or associate."). Next, defendant alleged that trial counsel attended oral argument, conferred with appellate counsel concerning appellate court matters, and reviewed court documents and billed defendant for appellate matters. These actions, without more, do not reflect any improper relationship. We further conclude that, taken as true, defendant's allegations, collectively, do not do so. If anything, defendant's allegations of trial and appellate counsel's conduct reflect communications designed to promote effective advocacy. Accordingly, we reject defendant's assertion that "appellate counsel could not reasonably have been expected to argue trial counsel's effectiveness." As defendant has failed to make the requisite showing that appellate counsel was ineffective, his claims are: forfeited because they could have been raised on direct appeal; barred by *res judicata* because they were raised on direct appeal (and he admits that they were contained in the record on direct appeal); or insufficiently pleaded.

¶ 98 In summary, the trial court did not err in dismissing defendant's claim that he was denied effective assistance of trial and appellate counsel based on cumulative errors and the "synergy" between his trial and appellate attorneys.

¶ 99 III. CONCLUSION

¶ 100 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 101 Affirmed.