

of the State Appellate Defender (OSAD), has filed in this court a motion to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court gave the defendant an opportunity to submit a brief, etc., responding to OSAD's motion and arguing the merits of his appeal, but he has not filed anything with this court. An examination of the record reveals that this appeal does not present any issue of arguable merit and that the circuit court did not err in denying the amended postconviction petition. Accordingly, OSAD's motion to withdraw as counsel is granted, and the judgment of the circuit court is affirmed.

¶ 3

BACKGROUND

¶ 4

The Defendant's Trial and Direct Appeal

¶ 5 In January 2009, a jury found the defendant guilty of aggravated fleeing or attempting to elude a peace officer and driving while license revoked, and not guilty of two other traffic offenses. Here follows a summary of the evidence presented at trial.

¶ 6 Starr McPherson, a police officer in the village of Tilden, testified that on July 6, 2008, at approximately 6 p.m., she was on routine patrol near the village hall when she saw the defendant driving a blue Cadillac on Centre Street. McPherson was familiar with the defendant and was confident that he did not have a valid driver's license. She also knew that the Cadillac belonged to Tabitha Cole, who lived with the defendant. The defendant was alone in the Cadillac. Upon seeing the defendant driving, McPherson activated her overhead lights. The defendant turned right onto Vine Street and then turned south onto South Minnie Avenue, as McPherson followed him. The defendant proceeded to drive "out into the country" on that roadway, as McPherson continued to pursue him. When the defendant increased his speed, McPherson turned on her squad car's siren, but the defendant increased his speed even more. They drove no more than "maybe 5 miles" out of Tilden. No other cars were on the road. For some period during the chase, the defendant and McPherson

were driving in a 25-mile-per-hour zone; McPherson was driving at approximately 72 miles per hour and was "right on him." However, the defendant increased his speed and pulled away from McPherson. At a T-intersection, the Cadillac crashed. The defendant "backed out of that accident" and "drove down the road. *** [H]e had another accident off into a field", possibly a cornfield. After the second accident, the defendant "jumped out" of the Cadillac and started to run. The defendant was wearing blue jean shorts and an ankle bracelet, with no shirt. McPherson got out of her car and ran after him. She yelled, "'T. J., stop,'" and the defendant turned around and looked at her. However, he resumed running toward some woods and jumped or climbed over a fence, at which point McPherson "lost him." McPherson could not estimate how much time the car chase lasted. "Everything happened pretty quick."

¶ 7 McPherson radioed dispatch and informed them that the driver, whom she identified as "T. J. Young," had run away from her and that he was on parole and was wearing an ankle bracelet. McPherson arranged to have the Cadillac towed. McPherson asked another officer to stand by while she went to the defendant's trailer court in order to arrest the defendant. McPherson went to trailer 4, park 1 in Tilden, the residence of the defendant and Tabitha Cole. She and other police officers went into the trailer and arrested the defendant. At that time, the defendant was dressed in black jeans and a green sweatshirt, and he was sweating profusely.

¶ 8 During cross-examination by defense counsel, McPherson was shown records from the defendant's parole officer. She acknowledged that the document showed that at 6:16 p.m., the defendant's transmitter was within range. During redirect examination by the prosecutor, McPherson testified that she would not be surprised if the records showed that the defendant's transmitter was out of range at 5:55 p.m.

¶ 9 Gerald and Patricia Hock, a married couple residing in rural Sparta, both testified at

trial. Their testimonies were not inconsistent, and together they indicated the following. On July 6, 2008, at approximately 6 p.m., the defendant banged on the door of the Hock residence. Neither Gerald nor Patricia ever had seen him before. The defendant said that he had run out of gasoline and needed to get home due to his ankle monitor, and he asked for a ride home to Tilden. The Hocks agreed to drive the defendant to Tilden. During the drive, between a quarter-mile and a half-mile away from their house, the Hocks saw a car in the ditch and police officers near it. They continued on to Tilden, and dropped off the defendant at a trailer park. The distance from the Hock residence to the trailer park was approximately two miles, requiring a drive of only four or five minutes. On the way back to their residence, the Hocks stopped near the car in the ditch. They spoke with a female Tilden police officer who described the subject she was trying to locate, and the Hocks told her that the description fit the man they had dropped off in Tilden. The female officer immediately sent somebody to arrest the man.

¶ 10 A document from the Secretary of State showed that the defendant's driver's license had been revoked and the revocation was in effect on July 6, 2008.

¶ 11 Steve Hood, a friend of the defendant, testified that during the evening of July 6, 2008, he was barbecuing in the front yard of his house on South Minnie Avenue in Tilden. Sometime between 6 and 6:30 p.m., Hood observed on his street "a high-speed chase" involving a "big blue" car. Hood could not identify the driver of the big blue car, but he was sure that the defendant was not the driver, for the driver had dark hair, and both the defendant and Hood had shaved their heads just two days earlier.

¶ 12 Courtney Durham, the defendant's fiancée, was not present for any of the relevant events of July 6, 2008. However, one week afterward she was at the Tilden residence of the defendant's father, Michael Young, when "Starr" arrived. Durham, the defendant, their baby, and the defendant's father were outside the house. Starr asked "where T.J. was", and

the defendant replied, " 'Right here.' " The defendant's father also said, " 'Right here,' " and pointed toward the defendant. Starr asked, " 'Which one?' " At that point, Durham picked up the baby and walked toward the back yard.

¶ 13 Hood and Durham were the only defense witnesses at the defendant's trial. The defendant did not testify.

¶ 14 In the midst of its deliberations, the jury was called back to the courtroom. In response to the judge's queries, the jury foreperson opined that the jury, given more time to deliberate, could reach a verdict on some of the counts. The judge read to the jury the *Prim* instruction. See *People v. Prim*, 53 Ill. 2d 62 (1972). Approximately 20 minutes later, the jury returned verdicts of guilty as to aggravated fleeing or attempting to elude a peace officer, and driving while license revoked, and verdicts of not guilty as to two other traffic offenses.

¶ 15 For the offense of aggravated fleeing or attempting to elude a peace officer, the circuit court sentenced the defendant to imprisonment for an extended term of six years. On the charge of driving while license revoked, the court sentenced him to incarceration for a concurrent term of 364 days.

¶ 16 The defendant appealed from the judgment of conviction. Before this court, his sole argument was that the trial court committed plain and reversible error by giving the jury the *Prim* instruction. This court rejected the argument and affirmed the judgment of conviction. *People v. Young*, No. 5-09-0060 (Aug. 30, 2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 17 *The Defendant's Section 2-1401 Petition and the Appeal From Its Dismissal*

¶ 18 In February 2010, while the direct appeal was still pending, the defendant filed *pro se* a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). The petition included a variety of claims, but the

principal claim was that State's witness Starr McPherson committed perjury at the defendant's trial. As to the perjury claim, the defendant alleged, *inter alia*, that McPherson testified that she initiated the stop when she first saw the defendant on Centre Street but the "call log" showed that she did not initiate the stop until she was on South Minnie Avenue. The circuit court entered a written order dismissing *sua sponte* the section 2-1401 petition. The defendant appealed. This court affirmed the judgment. *People v. Young*, 2012 IL App (5th) 100467-U.

¶ 19 *The Defendant's Postconviction Petition*

¶ 20 On December 17, 2010, the defendant filed *pro se* a petition for postconviction relief. He claimed that: trial counsel provided constitutionally ineffective assistance by (i) "failing to interview and call alibi witnesses" and (ii) "failing to impeach the states [*sic*] only witness for the purjured [*sic*] testimony made." The circuit court appointed counsel to represent the defendant in postconviction proceedings.

¶ 21 By appointed counsel, the defendant filed an amended petition for postconviction relief. The defendant claimed that: (1) trial counsel Jeremy R. Walker provided ineffective assistance by (i) failing to properly impeach State's witness Starr McPherson, even after the defendant informed counsel that McPherson was lying, and failing to "adequately question" McPherson; (ii) failing to move for a continuance after the State turned over a "call log" minutes before trial began, thus losing the opportunity to examine a piece of evidence that would have indicated the use of perjury against the defendant at trial; (iii) failing to call witnesses Tabitha Cole, Mike Young, and Flora Young to testify at trial, even though they had knowledge "that the vehicle in question was reported stolen"; (iv) failing "to tender instruction of lesser included charge" despite the defendant's request that he do so; (2) perjured testimony was used to convict the defendant, but the trial transcripts did not reveal the perjury because they were inaccurate; and (3) the defendant's counsel on direct appeal

provided ineffective assistance by failing to raise the issue of the trial judge's improper admonishment of the defendant as to extended term sentencing. The amended petition was accompanied by an affidavit wherein the defendant essentially restated the claims made in the amended petition. Counsel filed a certificate of compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

¶ 22 *The Evidentiary Hearing on the Postconviction Petition*

¶ 23 In January 2012, the court held an evidentiary hearing on the defendant's amended petition. The defendant's trial attorney, Randolph County public defender Jeremy Walker, testified that the defendant, prior to trial, asked him to obtain the "call log" because it would establish that McPherson's police report was inaccurate or untruthful. The prosecutor did not turn over the call log until shortly before trial began on a Monday morning. Walker and the defendant both examined the call log. The log was only two or three pages long, and took less than a minute to read. It showed that "the first call" occurred at "about 5:57." Walker did not see anything in the call log that contradicted McPherson's police report or that otherwise "stood out." The defendant did not ask Walker to seek a continuance in regard to the call log.

¶ 24 Walker further testified that the defendant, during his trial, never suggested that McPherson was committing perjury. The defendant did not raise the notion of perjury until sometime after sentencing. From prison, the defendant mailed Walker a paper listing 15 points of disagreement between the call log and McPherson's trial testimony. During the trial, the defendant never mentioned any of those points. Walker never understood the basis of the defendant's claim that McPherson perjured herself. Also, Walker read the transcript of McPherson's trial testimony and did not find anything amiss.

¶ 25 During his cross-examination of McPherson at trial, Walker focused on the issue of timing. He had obtained from "the parole office" records showing that the defendant and

his electronic monitor were "out of range" at 6 but back in range at 6:16. His goal in cross-examining McPherson was to show that the defendant could not possibly have done all that McPherson described during her testimony and still returned home by 6:16.

¶ 26 Prior to trial, the defendant asked Walker to call five witnesses at his trial—Courtney Durham, Flora Young, Michael Young, Terri Rolen, and Steve Hood. Through the defendant, Walker asked those five to write statements describing what their testimony would be, and each of the five complied. The defendant never asked Walker to contact Tabitha Cole. Walker did not call Michael Young or Flora Young to testify at trial because he thought that their testimony would have been cumulative to that of Courtney Durham and Steve Hood, and because he thought that the jury would be skeptical of their testimony since they were the defendant's father and stepmother. Walker thought that Durham and Hood would make the best witnesses, and the defendant was satisfied with calling only those two.

¶ 27 Walker did not offer a "lesser included" instruction; he did not see any basis for one, and the defendant never mentioned proffering one. "[O]ur whole case was based upon the fact that he wasn't driving the automobile," Walker explained. "So there was no reason for a lesser included. If he wasn't driving, he wasn't driving."

¶ 28 Michael E. Young, Sr., the defendant's father, testified that early in the day of the defendant's trial, he sat outside the courtroom and expected to be called to testify. Attorney Walker told him to wait to be called. Young knew that the defendant wanted him to testify. At some point, though, Walker told him that his testimony would not be needed. If he had been called as a witness at trial, Young would have testified that he and Steve Hood were in Young's yard when "a car flew by." The car was "big," and Young recognized it "because it come [*sic*] from [the defendant's] way." Approximately five minutes afterward, "a Rescue squad went by." Young went inside his house and suggested to his wife that they "go look at this car, see who was driving it." Young and his wife "drove out there" and saw the car

"out in a field," along with "a bunch of cops." Young and his wife "turned around and came back", and then drove to the defendant's house. The defendant answered the door. At that point, Young "knew it wasn't him" because there was "no way" that the defendant could have gotten from the car to his residence in so short a time. Young returned home. One-half hour later, via telephone, he learned that the defendant was being arrested. Young "couldn't understand" how the defendant could have gotten from the car to his residence "that fast." One week later, after the defendant was released from jail, Young and the defendant were "standing side by side right in the driveway" when "the same lady that was supposed to have seen him driving this car rolls her window down, asked if we've seen [the defendant]." This experience caused Young to wonder, "If she *** couldn't recognize him standing right next to the driveway, how could she tell that was him driving a car?" Sometime prior to the defendant's trial, Young wrote a statement and gave it to the defendant, with the understanding that the defendant would forward it to attorney Walker. The statement concerned the matters at issue at trial, but Young did not include in his statements any specific times or time estimates. For example, he merely wrote that he went to the defendant's house "shortly after" he saw the car pass by. Young also acknowledged that in his written statement, he did not state that he and Steve Hood were standing in his yard as the car passed by.

¶ 29 Kelly Epplin testified that she served as the court reporter at the defendant's trial. She checked her transcript of the trial against the audio recording of the trial, and found that the transcript was accurate.

¶ 30 The defendant testified that while McPherson was testifying at his criminal trial, he told attorney Walker that the testimony was false and did not "match up with the police report or the call log." The defendant elaborated as follows:

"[L]ike she said that she initiated—called in the plates and initiated a stop on Century

Avenue. She never called in the plates and, and according to the call log, she never initiated a stop until South Minnie. She repeatedly, repeatedly kept on saying she was doing things, and she didn't.

And she never clocked the speed like she—she said she did. According to the call logs, she said she did, but she didn't.

She gave testimony as to the vehicle wrecking at a T and then backing up and going into a cornfield, but—even though other witnesses testified that the car was crashed at a T, it was not in a cornfield."

¶ 31 During his testimony at the evidentiary hearing, the defendant proffered a 5-page list of 16 points on which McPherson allegedly perjured herself or testified in a manner inconsistent with "the call logs and other reports." According to the defendant, he informed Walker during the trial about each of these 16 points, but he did not type the list itself until after trial. The court admitted the list into evidence at the evidentiary hearing, but the list is not included in the record on appeal.

¶ 32 The defendant further testified that the prosecutor did not turn over the call log until the morning of trial. At that time, the defendant examined it and told Walker that the log mentioned "other people" about whom they were unaware. The defendant asked Walker to seek a continuance so that they would have more time to prepare a defense, but Walker refused to seek a continuance. The defendant asked Walker to call Tabitha Cole and Mike Young as witnesses at the trial, but Walker refused to do so. According to the defendant, Tabitha Cole had reported her car stolen, and at the time of the defendant's arrest she told police that the defendant was not the driver. The police report also noted that Tabitha Cole had reported the car stolen. As for the trial transcript, the defendant estimated that "almost half" of McPherson's testimony was missing from it. During the trial, the defendant asked Walker to have the jury instructed on a lesser included offense "for the simple fact that ***

there was no proof of speed at all anywhere," but Walker refused to seek such an instruction.

¶ 33 At the close of the evidentiary hearing, the court took the matter under advisement. On February 7, 2012, the court entered a written order denying the amended postconviction petition. The court noted that neither Tabitha Cole nor Flora Young was called to testify at the postconviction hearing, and neither submitted an affidavit. The court also stated that the trial transcript belied the postconviction claim that trial counsel failed to conduct meaningful adversarial testing of the State's case.

¶ 34 The defendant filed a timely notice of appeal. The circuit court appointed OSAD to represent the defendant on appeal. As previously noted, OSAD has filed a *Finley* motion to withdraw as counsel.

¶ 35

ANALYSIS

¶ 36 The Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)) provides a three-stage means by which a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the third stage of a postconviction proceeding, the circuit court holds an evidentiary hearing, at which the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). Where the circuit court makes a decision after a third-stage evidentiary hearing, and fact-finding and credibility determinations are involved, a reviewing court will not reverse the decision unless it is manifestly erroneous. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). Manifest error is error that is clearly evident, plain, and indisputable. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

¶ 37 Claims of ineffective assistance of counsel are assessed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance under *Strickland*, a defendant must show both (1) that counsel's performance "fell

below an objective standard of reasonableness" and (2) that the deficient performance prejudiced the defense. *Id.* at 687-88. See also *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984) (adopting the *Strickland* standard). As to the first prong of the standard, there is a strong presumption that the challenged action of counsel was the product of sound trial strategy and not of incompetence. *Strickland*, 466 U.S. at 689. As to the second prong of the standard, a defendant must demonstrate that, but for defense counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 694. Courts may resolve ineffectiveness claims by reaching only the prejudice prong, for lack of prejudice renders irrelevant the issue of counsel's performance. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998).

¶ 38 In his postconviction petition, the defendant accused trial counsel of various failures, including the failure to impeach or "adequately question" State's witness McPherson. The trial transcript reveals that Walker competently cross-examined McPherson. The cross-examination focused on the timing of events, and was clearly intended to cast doubt on McPherson's identification of the defendant as the driver of the blue Cadillac. Through his questioning, Walker clearly tried to create the impression that it would have been physically impossible for the defendant to drive near the village hall at 6 p.m., lead McPherson on a chase into the country, and return home by 6:16 p.m. Counsel's approach was sensible and strategically sound. After all, McPherson positively identified the defendant as the driver, and she testified that she was familiar with him prior to the events at issue. Her familiarity with the defendant added to the reliability of her identification. See, e.g., *People v. Williams*, 137 Ill. App. 3d 736, 746 (1985) (State's witness's testimony, including identification of defendant as murderer, "was bolstered by the fact that he knew defendant prior to the commission of the crime."). Confronted with this very strong eyewitness testimony, trial counsel was wise to defend on the ground that the described scenario was

a temporal-spatial impossibility and the defendant could not possibly have been the driver, no matter how reliable McPherson's testimony may otherwise have seemed.

¶ 39 At the evidentiary hearing, the defendant testified about a few points that he wanted Walker to raise during the cross-examination of McPherson. See ¶ 30 *supra*. Contrary to the defendant's apparent belief, these points were not major. They concerned trivialities such as the specific street on which McPherson initiated the attempted traffic stop, and whether the driver crashed into a cornfield in particular. Questions about these minor points would not have improved the cross-examination of McPherson and would not have altered the trial's outcome.

¶ 40 The defendant also faulted Walker for not seeking a continuance on the morning of trial so as to garner more time to examine the call log. At the evidentiary hearing, Walker testified that the log could be read in less than one minute, and that he did not see anything unusual in its contents. It is impossible to imagine how the defendant may have benefitted from a lengthier examination of a short and inconsiderable document.

¶ 41 The defendant accused trial counsel of ineffectiveness for not calling Michael Young, Flora Young, and Tabitha Cole to testify at trial. The defendant did not call Tabitha Cole or Flora Young to testify at the third-stage evidentiary hearing, and therefore there is no way of knowing how they might have testified at trial. In regard to those two witnesses, the defendant did not even attempt to meet his burden of making a substantial showing of a constitutional violation. The defendant did call Michael Young, his father. In all likelihood, Michael Young's testimony would not have improved the defendant's chances for success at trial. The defense at trial was all about timing. The defense theory was that the defendant could not possibly have driven near the village hall, led McPherson on a car chase, and gotten back home all within a period of 15 to 20 minutes. However, Michael Young did not attach any specific times to the events he described, a failure that minimized the potential

usefulness of his testimony. In addition, Michael Young was the defendant's father, which creates a bias that the jury could have considered when weighing his credibility. See, e.g., *People v. Anderson*, 403 Ill. 128, 131 (1949) ("The jury may well have considered it significant that no person other than his relatives testified on defendant's behalf as to his whereabouts on the evening in question."). There is little or no likelihood that Michael Young's testimony would have made a difference at the defendant's trial.

¶ 42 The defendant accused trial counsel of ineffectiveness for not offering an instruction on a lesser included offense. Deciding whether to request a particular jury instruction can be a matter of trial strategy. See *People v. Mims*, 403 Ill. App. 3d 884, 890 (2010) (attorney for defendant charged with sexual assault was not ineffective for not requesting jury instruction on defense of consent). The defendant here was on trial for aggravated fleeing or attempting to elude a peace officer, under section 11-204.1(a)(1) of the Illinois Vehicle Code, an offense that involves fleeing or attempting to elude "at a rate of speed at least 21 miles per hour over the legal speed limit." 625 ILCS 5/11-204.1(a)(1) (West 2010). The defendant as postconviction petitioner apparently came to think that trial counsel should have offered an instruction on (nonaggravated) fleeing or attempting to elude a peace officer under section 11-204 of the Illinois Vehicle Code (625 ILCS 5/11-204 (West 2010)), which does not include a speed component. In the estimation of this court, there was essentially no chance that this tactic would have allowed the defendant to avoid a verdict of guilty as to the aggravated offense. McPherson plainly testified at the defendant's trial that for some period of time during the chase, she was driving at approximately 72 miles per hour in a 25-mile-per-hour zone and was "right on [the defendant]", but the defendant then accelerated and pulled away from her squad car. No witness contradicted McPherson's testimony regarding the defendant's speed. So long as the jury found that the defendant was the Cadillac's driver (and it surely did so), it was going to find him guilty of the aggravated

offense, given the state of the evidence. A lesser-included-offense instruction is proper only where the jury could rationally find the defendant guilty of the lesser offense yet acquit him of the greater. *People v. Stewart*, 406 Ill. App. 3d 518, 536 (2010). The defendant surely was not prejudiced by trial counsel's not offering an instruction on the lesser, nonaggravated offense.

¶ 43 The defendant claimed that the trial transcript was inaccurate and that an accurate transcript would have revealed the perjurious nature of McPherson's testimony. This claim never was developed. The defendant never even suggested what specifically was missing from the transcript of McPherson's testimony. On this point, the defendant failed to make any showing of a constitutional violation, let alone a substantial showing.

¶ 44 The final claim in the amended petition is that the defendant's counsel on direct appeal provided ineffective assistance by failing to argue that the trial judge improperly admonished him as to extended sentencing. At the evidentiary hearing, nobody even mentioned this claim. Challenges to the effectiveness of counsel on direct appeal are judged under the two-pronged *Strickland* standard. *People v. Winsett*, 153 Ill. 2d 335, 347 (1992). The record does not establish that the defendant was improperly admonished. Furthermore, this court refuses to speculate as to how this issue could have been framed on direct appeal or how it possibly could have resulted in an appellate victory for the defendant. This reviewing court is a jurist, not an advocate. See *People v. Givens*, 237 Ill. 2d 311, 323-24 (2010).

¶ 45 Every potential issue in this case is frivolous. Accordingly, appointed counsel's motion for leave to withdraw is granted, and the judgment of the circuit court is affirmed.

¶ 46 Motion granted; judgment affirmed.