



ineffective assistance of counsel. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3

### BACKGROUND

¶ 4 The facts reproduced below are summarized from the factual background set forth in this court's August 10, 2010 order, which affirmed the defendant's conviction and sentence on direct appeal. See *People v. Cervantes*, No. 1-08-2683 (2010) (unpublished order under Supreme Court Rule 23). On September 6, 2004, at approximately 8 p.m., Crystal Mustafov (Crystal) was shot and killed in the parking lot of a Dominick's grocery store (Dominick's) located at 3318 West Belmont Avenue in Chicago, Illinois. During the same incident, Jose Ramirez (Jose) suffered a gunshot wound which caused permanent paralysis.

¶ 5 Subsequently, the defendant and codefendant Adam Alicea (codefendant Alicea) were arrested. The defendant was charged with multiple offenses, including first-degree murder of Crystal and attempted first-degree murder of Jose, John Bernal (John) and Stephanie Fedro (Stephanie).

¶ 6 On October 11, 2006, the defendant filed a motion to suppress statements he made in the course of police interrogation, alleging that they were made involuntarily. Following a hearing, the trial court denied the motion to suppress.

¶ 7 Beginning on July 21, 2008, the defendant and codefendant Alicea were tried in a severed but simultaneous bench trial. Jose testified that on the evening of September 6, 2004, he, Crystal, Stephanie and John drove to the Dominick's. He characterized the lighting conditions in the store parking lot as "fair." Jose and John entered the Dominick's to make a purchase while Crystal and Stephanie waited in the car in the parking lot. Inside the store, Jose noticed the defendant and codefendant Alicea giving them a "dirty look." As Jose and John exited the store,

the defendant and codefendant Alicea followed them. Codefendant Alicea then made derogatory remarks at Jose, and "represent[ed] his gang," the Maniacs, which Jose interpreted to mean the "Maniac Latin Disciples." Codefendant Alicea then asked Jose about his gang affiliation, to which he replied that he was not involved in a gang. While responding to codefendant Alicea's questions, Jose walked backwards toward the car and was approximately 5 to 7 feet away from codefendant Alicea. The defendant walked behind codefendant Alicea, but did not make any remarks. By the time Jose reached the trunk of the car, he observed the defendant and codefendant Alicea "walking away," at which point Jose entered the driver's seat of the vehicle while John entered the back of the car behind the driver's seat. Crystal was seated in the front passenger seat of the vehicle, and Stephanie was seated in a backseat. As Jose put the keys into the ignition of the car, he heard "two loud gunshots" from the passenger side of the vehicle—the direction in which he had last observed the defendant and codefendant Alicea walk away. One bullet penetrated Jose's spine, which consequently caused permanent paralysis. A second bullet struck Crystal in the neck and killed her. On September 8, 2004, police officers interviewed Jose at the hospital about the incident and he identified both the defendant and codefendant Alicea in a photograph taken from the Dominick's surveillance camera as the two suspects who approached him at the store. On September 11, 2004, Jose viewed a photographic array of six pictures from which he identified the defendant as one of the perpetrators.

¶ 8 Stephanie testified that on September 6, 2004, she and Crystal waited in Crystal's car in the parking lot of the Dominick's while Jose and John went into the store. Crystal was seated in the front passenger seat of her vehicle while Stephanie sat in the backseat behind the driver's seat. The store parking lot was lit at all times. About 10 to 15 minutes after Jose and John left the vehicle, Stephanie observed them walking back towards the car from a distance of 40 feet

away. She observed two other men walking behind Jose and John. One of the men made a gang sign with his hand. At trial, Stephanie made an in-court identification of the defendant and codefendant Alicea as the two men who were following and talking to Jose and John in the parking lot. After John entered the back of the car and Jose got into the driver's seat, the defendant and codefendant Alicea walked away toward Belmont Avenue. She noted at that time, a car occupied the parking space next to Crystal's vehicle, and the defendant and codefendant Alicea had walked to the "space on the opposite side of the car next to [Crystal's car]." The defendant "turned around and shot three to four times" at Crystal's car. Although she could not clearly see the gun in the defendant's hand, who was then about 15 feet away, Stephanie saw sparks coming from the defendant's hand and could clearly see his facial features. Both Jose and Crystal were shot and Stephanie began performing CPR on Crystal until an ambulance arrived. Shortly after the shooting, Stephanie accompanied officers to the police station where she identified the defendant and codefendant Alicea on the Dominick's surveillance video as the individuals who confronted Jose and John that night. On September 10, 2004, she identified the defendant in a photographic array as the shooter. On September 11, 2004, she identified the defendant and codefendant in a police line-up as the two suspects involved in the crime. On cross-examination, Stephanie testified that both the defendant and codefendant Alicea wore black t-shirts and had similar hairstyles. However, when shown a still photograph of the store surveillance video, she noted that they wore dark shirts underneath white t-shirts and that both men wore jeans. She testified that, after the incident, she informed the police that the suspects wore white t-shirts.

¶ 9 Kyle Steffen (Steffen) testified that at about 8:20 p.m. on the night in question, he was in the Dominick's parking lot when he heard a few loud bangs and saw "two young men run out

from behind a maroon van" toward him at about 15 to 20 feet away. He described them as "Latino, about 17 to 22 years of age." One of the suspects wore a white t-shirt and a white headband, while the other suspect "had a white [t-shirt] thrown over his shoulder." He observed that the taller suspect had "what appeared to be a handgun in his hand" and was "trying to put it in his pocket." As the suspects ran, the taller individual "almost got hit by a taxicab." The two suspects then ran across the street and drove away in a car. After the shooting, Steffen went to the police station where he identified the defendant and codefendant Alicea on still photographs taken from the store surveillance video as the suspects he saw running in the parking lot. Steffen also made an in-court identification of the defendant and codefendant Alicea as the two suspects he saw on the night of the shooting. On September 11, 2004, he identified the defendant in a police line-up as the suspect who appeared to have a gun in his hand after the shooting.

¶ 10 ASA Robertson testified that on September 10, 2004, he spoke with the defendant's mother, Arcelia Cervantes (Arcelia), at the police station. On September 11, 2004, he interviewed the defendant for about 45 minutes in the presence of Sergeant Wojcik. Prior to interviewing the defendant, ASA Robertson advised him of his *Miranda* rights, which the defendant understood, waived, and made the following incriminating statements. The defendant told ASA Robertson that he was a member of the Maniac Latin Disciples gang (MLD), and that, on September 6, 2004, he was at a barbecue with codefendant Alicea and his friend, Joanna, when they decided to go to the Dominick's to replenish supplies for the party. Joanna drove the car, a four-door Honda, while he sat in the front passenger seat and codefendant Alicea sat in the backseat. Once the trio arrived at the store, the defendant and codefendant Alicea went inside and Joanna waited in the car. The defendant indicated to ASA Robertson that codefendant Alicea "must have left the gun in the car because he didn't take it with him into the Dominick's."

Once inside the Dominick's, codefendant Alicea drew his attention to two male individuals, whom they believed to be members of a rival gang—the OAs. The defendant told ASA Robertson that codefendant Alicea "kept pointing out those guys to him, telling him how they were OAs and that he knew that there were problems between the MLDs and OAs at that time." At the checkout counter, codefendant Alicea continued to point out the individuals to the defendant and stated that they should "check them." After placing the groceries in Joanna's car, the defendant and codefendant Alicea instructed Joanna to move her car down the block and to wait while they went to "check these guys." The defendant told ASA Robertson that codefendant Alicea "must have gotten the gun from the car" when they placed the groceries into Joanna's car. They then waited on the side of the Dominick's building. As they waited, codefendant Alicea passed the gun to the defendant, who then tucked it into his waistband. Once the two individuals emerged from the store, the defendant and codefendant Alicea followed them. Codefendant Alicea confronted the two men about their gang membership while the two men tried to walk away to a parked vehicle in which two women sat. The two men then started to get into their car, at which point the defendant and codefendant Alicea "began to turn and walk away, but that [the defendant] turned back, ran towards the car [and] started to fire—pulled the gun and started to fire aiming towards the driver of the vehicle." He admitted to firing three shots at the driver of the car. After the shooting, the defendant and codefendant Alicea fled as the defendant tried to put the gun back into his waistband. Subsequently, they ran back to Joanna's car and returned to the barbecue party. En route to the party from the Dominick's, the defendant passed the gun back to codefendant Alicea. ASA Robertson noted that during the September 11, 2004 interview, he inquired into the defendant's prior statements to the police. The defendant had initially informed the police that he was not present at the scene of the

shooting, and then later informed the police that he was present at the scene of the shooting but that he had "very minimal involvement." The defendant also told the police that he fired the gun because he saw one of the two men "putting down [a] bottle" and that "[the man] could have possibly been reaching for something." In response to ASA Robertson's inquiry regarding why he fired the gun and lied to the police, the defendant began to cry and informed ASA Robertson that he fired the gun because of "stupid gang [expletive]" and that he "wanted to basically man up, be a man about it and tell the truth." On cross-examination, ASA Robertson noted that the defendant had denied being the shooter prior to ASA Robertson's interview with him.

¶ 11 John's testimony paralleled that of Jose's testimony, with the exception of a few differences. John stated that as he and Jose exited the Dominick's, both the defendant and codefendant Alicea confronted them about their gang affiliation. The defendant and codefendant Alicea also confronted Jose about his brother's gang affiliation. At that time, John noticed codefendant Alicea with his hand "underneath his shirt" on what appeared to be a pistol. John recalled seeing a pistol handle underneath codefendant Alicea's shirt. Once Jose and John entered Crystal's car, John observed, through his peripheral vision, the defendant "run[ning] up [and] shooting" at them from a distance of about 40 to 45 feet away and heard three or four shots being fired. On cross-examination, John asserted that he had an unobstructed view of the defendant during the shooting. He informed the police officers on the night of the shooting that the defendant was the actual shooter. On September 11, 2004, John identified the defendant and codefendant Alicea from a police line-up. John further noted that on the night of the shooting, both suspects wore "white shirts with black shirts underneath" and blue jeans. Although the defendant and codefendant Alicea had similar hairstyles, there was a "big height difference" between them.

¶ 12 Joanna Venzor (Joanna) testified on behalf of the State that on September 6, 2004, she attended a barbecue party during which the host asked her to go to a grocery store for supplies. Joanna then drove the defendant and codefendant Alicea to the Dominick's, while the defendant sat in the front passenger seat and codefendant Alicea sat in the back of the car. Once they arrived at the store, the defendant and codefendant Alicea went inside while she waited in her parked car. A few minutes later, they returned and placed the groceries inside Joanna's car. She stated that either the defendant or codefendant Alicea told her they had to "take care of something" and instructed her to move her car. As Joanna waited across the street on Belmont Avenue, she heard two or three gunshots. Once the gunfire subsided, she observed the defendant and codefendant Alicea running toward her car. The defendant then entered the front passenger seat, while codefendant Alicea sat in the backseat. The defendant and codefendant Alicea were laughing after they reentered the car and one of the two men commented that "it was some crazy [expletive]" and the two men "shook up" their MLD gang sign. The trio then returned to the barbecue party. The next night, on September 7, 2004, codefendant Alicea visited Joanna at her home and told her that "if he got arrested, there were two people that knew what happened and he'd figure that it was either [Joanna] or [the defendant] that said something" and that he would "handle his business" if that happened. On cross-examination, Joanna noted that the defendant and codefendant Alicea dressed almost identically, that they had the same physical size and had the same haircuts on the night of the incident. Joanna did not see the defendant with a gun at any point during that night.

¶ 13 At trial, after the State rested, defense counsel proceeded by way of stipulation that an FBI report authored on November 15, 2006 "details a debriefing conversation with \*\*\* Edward Rivera, in which he implicates [codefendant Alicea] as the shooter." By stipulation, a November

16, 2006 letter from Assistant U.S. Attorney Julie Peters Pekron (AUSA Pekron) "details [Rivera] as a confidential informant" with a criminal history.

¶ 14 The parties then also stipulated to certain impeachment issues. They stipulated that John never told the police that he observed the defendant shoot or possess a gun, nor did he identify the shooter. The State and defense counsel further stipulated that if called to testify, Detective Amato would state that Steffen "did not tell [him] that he observed anyone, including [the defendant] with a gun that day," and that Steffen told Detective Amato that "he observed one of the subject[s] wearing a dark blue [t]-shirt and was trying to place an unknown object in his pants pocket as he ran." Detective Amato would further testify that Steffen identified the defendant in a police line-up as "the person who ran past him after the shooting attempting to place an object into his pants," but that Steffen "never told [Detective Amato] that the object was a gun based on his observation." Detective Amato would testify that John did not tell him that John observed anyone, including the defendant, with a gun on the night of the shooting. Detective Amato would further state that John "never told him that he saw [the defendant] fire a weapon" at Crystal's vehicle. Detective Amato would testify that John identified the defendant and codefendant Alicea from a still photograph from the Dominick's security camera, but that John never told him that either the defendant or codefendant Alicea discharged a gun. Detective Amato would further testify that on September 11, 2004, John identified the defendant and codefendant Alicea as the offenders, but could not determine who was the actual shooter.

¶ 15 Following closing arguments, the trial court found the defendant guilty of first-degree murder of Crystal, attempted first-degree murder of Jose, John and Stephanie, and aggravated unlawful use of a weapon. The trial court specifically found the defendant to be the shooter.

¶ 16 On September 17, 2008, the trial court denied the defendant's motion for a new trial and sentenced him to 135 years of imprisonment. On August 10, 2010, this court affirmed the defendant's conviction and sentence on direct appeal. *People v. Cervantes*, No. 1-08-2683 (2010) (unpublished order under Supreme Court Rule 23).

¶ 17 On May 23, 2011, the defendant filed a petition for postconviction relief (postconviction petition), alleging that he was denied effective assistance of counsel because defense trial counsel failed to interview witnesses; failed to file pretrial motions regarding police line-up identifications made by witnesses; failed to conduct a thorough investigation of the case; failed to allow him to review discovery materials; failed to properly advise him of the consequences of choosing to testify; and failed to inform him of all the evidence against him so as to allow him to make an informed decision in waiving a trial by jury. Thereafter, the postconviction proceedings advanced to the second stage, and the State filed a motion to dismiss the petition on February 9, 2012. On July 16, 2012, a hearing on the postconviction petition was held. On October 2, 2012, the trial court granted the State's motion to dismiss the defendant's postconviction petition, finding that he failed to make a substantial showing of a violation of his constitutional rights.

¶ 18 On October 19, 2012, the defendant filed a notice of appeal.

¶ 19 ANALYSIS

¶ 20 We determine whether the trial court erred in dismissing the defendant's postconviction petition at the second stage of the postconviction proceedings, which we review *de novo*. See *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 21 The defendant argues that the trial court erred in dismissing his postconviction petition at the second stage of the proceedings, where he made a substantial showing that his constitutional right to effective assistance of counsel had been violated. Specifically, he contends that defense

trial counsel failed to file pretrial motions regarding the police line-up identifications of the defendant by the witnesses; improperly advised him of the consequences of exercising his right to testify; failed to conduct a thorough investigation of the case; and failed to inform him of all the evidence against him so as to allow him to make an informed decision in waiving a trial by jury. He further argues that the cumulative effect of defense counsel's alleged deficiencies deprived him of his due process rights and his right to effective assistance of counsel.

¶ 22 The State counters that the trial court correctly dismissed the defendant's postconviction petition where he failed to make a substantial showing that he was denied effective assistance of counsel at trial. Specifically, the State contends that filing pretrial motions regarding the police line-up identification of the defendant would have been futile; that he could not establish prejudice by defense counsel's allegedly erroneous advice to him of the consequences of exercising his right to testify; that the defendant failed to make a substantial showing of any alleged deficiency by defense counsel in his preparation for trial or any prejudice suffered as a result thereof; and that the defendant's jury waiver was knowing and voluntary.

¶ 23 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-step procedural mechanism by which a convicted defendant can assert that there was a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. *People v. Harris*, 224 Ill. 2d 115 (2007). A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Consequently, issues that could have been raised on direct appeal but were not are forfeited. *Id.* Under the Act, a defendant bears the burden of establishing that a substantial deprivation of his constitutional rights occurred. *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004). At the first stage, a postconviction petition may be

summarily dismissed if the claims in the petition are frivolous and patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009); see 725 ILCS 5/122-2.1(a)(2) (West 2010)). However, if the petition survives initial review, the process moves to the second stage, where the circuit court appoints counsel for the defendant when the defendant cannot afford counsel. 725 ILCS 5/122-4 (West 2010). The State may then file a motion to dismiss or an answer to the postconviction petition. 725 ILCS 5/122-5 (West 2010). At the second stage of the proceedings, if the State moves to dismiss the petition, the circuit court may hold a dismissal hearing, which is still part of the second stage. *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009). 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). However, the circuit court is foreclosed from engaging in any fact-finding because all well-pleaded facts are to be taken as true at this point in the proceedings. *Wheeler*, 392 Ill. App. 3d at 308. If a substantial showing of a constitutional violation is set forth, the petition advances to the third stage for an evidentiary hearing. *Edwards*, 197 Ill. 2d at 246. A "substantial showing" of a constitutional violation is "a measure of the legal sufficiency of the petition's well-pleaded allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief." *People v. Domagala*, 2013 IL 113688, ¶ 35.

¶ 24 The defendant seeks a third-stage evidentiary hearing on his postconviction petition, arguing that he made a substantial showing that he was deprived of his right to effective assistance of counsel at trial. To prevail on a claim of ineffective assistance of counsel, the defendant: (1) must prove that counsel's performance fell below an objective standard of reasonableness so as to deprive him of the right to counsel under the sixth amendment (performance prong); and (2) that this substandard performance resulted in prejudice (prejudice

prong). *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). To establish the performance prong, the defendant must overcome a strong presumption that, under the circumstances, the challenged action or inaction was sound trial strategy. *People v. Lopez*, 371 Ill. App. 3d 920, 929 (2007). Because effective assistance of counsel refers to competent, not perfect, representation, "matters relating to trial strategy are generally immune from claims of ineffective assistance of counsel." *Id.* at 929. Further, in determining the adequacy of counsel's representation, "a reviewing court will not consider isolated instances of misconduct, but rather the totality of the circumstances." *Id.* To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *People v. King*, 316 Ill. App. 3d 901, 913 (2000). A reasonable probability is one that sufficiently undermines confidence in the outcome. *Id.* The defendant must satisfy both prongs to prevail on his claim of ineffective assistance of counsel. However, a reviewing court may analyze the facts of the case under either prong first, and if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

¶ 25 We examine the defendant's arguments in turn. The defendant first argues that defense trial counsel should have filed pretrial motions regarding witness identifications of the defendant, where the police failed to include any other male subjects in the still photographs taken from the Dominick's surveillance video or in the video itself. Specifically, he contends that showing the witnesses still photographs of the defendant and codefendant from the Dominick's surveillance video first "would most certainly have tainted and impermissibly suggested" who the perpetrators were in the subsequent photograph arrays and police line-ups that the witnesses viewed. He argues that defense counsel had a duty to further investigate the propriety of these

police line-ups and photographic arrays and to file pretrial motions to suppress them as improper and suggestive, and that he suffered prejudice by counsel's failure to challenge these identifications.

¶ 26 The State counters that the defendant has forfeited his claim of ineffective assistance of counsel on this basis because it was not, but could have been, raised and adjudicated on direct appeal. Even if not forfeited, the State argues, the defendant has not made a substantial showing that he was deprived of effective counsel because the filing of a pretrial motion to suppress the witness identifications would have been futile, and the defendant cannot establish prejudice where the evidence against him was overwhelming.

¶ 27 We agree with the State that the defendant forfeited this issue, because he could have, but did not, raise it in his direct appeal. See *Petrenko*, 237 Ill. 2d at 499 (a postconviction proceeding is a collateral attack on the trial court proceedings and not an appeal from the judgment of conviction; thus, issues that could have been raised on direct appeal, but were not, are forfeited). Further, the defendant does not make any claims of ineffective assistance of *appellate* counsel. However, the forfeiture rule "is not a jurisdictional or absolute bar to review of procedurally defaulted claims, but rather is a rule of administrative convenience"; thus, the forfeiture rule will be relaxed in postconviction proceedings where "fundamental fairness" so requires. (Internal quotation marks omitted.) *People v. Moore*, 177 Ill. 2d 421, 427-28 (1997). We find that, even if not forfeited, the defendant cannot make a substantial showing that he received ineffective assistance of counsel so as to warrant a third-stage evidentiary hearing on his postconviction petition. In the instant case, defense counsel filed a pretrial motion to suppress the defendant's incriminating statements to the police, which the trial court denied, but did not file any pretrial motions to suppress witness identifications of the defendant, as the defendant

now suggests should have been filed. We find that, even assuming that defense counsel erred in not filing any pretrial motions to suppress witness identifications, the defendant cannot establish that such error resulted in any prejudice, where the evidence against him at trial was overwhelming. Testimonial evidence was presented at trial that the defendant told ASA Robertson and Sergeant Wojcik during the course of police interrogation that on September 6, 2004, he and codefendant Alicea confronted Jose and John about their gang affiliation outside the Dominick's in question, and the defendant ran and fired three shots at Jose and John as they entered Crystal's vehicle in the parking lot. Apart from identifying the defendant as the shooter at a photographic array on September 10, 2004 and identifying the defendant as one of the suspects in a police line-up on September 11, 2004, Stephanie's trial testimony revealed that, during the incident, she observed the defendant "turn around and [shoot] three to four times" at them, observed sparks coming from the defendant's hand, and that she clearly saw his facial features at the time of the shooting. John also testified at trial that he observed the defendant fire several shots at him, Jose, Crystal and Stephanie from a distance of about 40 to 45 feet away. See *People v. Slim*, 127 Ill. 2d 302, 307 (1989) (a single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification). Thus, the defendant has not established that, but for defense counsel's alleged error in not filing pretrial motions to suppress witness identifications, there was a reasonable probability that the result of the trial would have been different. Therefore, we find that the defendant failed to make a substantial showing of ineffective assistance of counsel on this basis. Accordingly, the defendant was not entitled to a third-stage postconviction evidentiary hearing on this basis.

¶ 28 The defendant next argues that he was denied effective assistance of counsel when his counsel improperly advised him of the consequences of exercising his right to testify at trial. Specifically, he contends that defense counsel erroneously told him that should he elect to testify in his own defense at trial, he would be subjected to cross-examination by codefendant Alicea's attorney, who would "tear him apart on the witness stand." The defendant asserts that this misapprehension of law caused him to waive his constitutional right to testify, that defense counsel's performance fell below an objective standard of reasonableness, and that he was prejudiced as a result of defense counsel's deficient performance.

¶ 29 The State acknowledges that had defense counsel advised the defendant that he would be cross-examined by codefendant Alicea's attorney, that advice would have indeed been incorrect. However, the State argues that the defendant cannot establish prejudice where the evidence against the defendant was so substantial and he cannot show that testifying on his own behalf could have changed the outcome of the trial.

¶ 30 A defendant's decision to testify on his own behalf, or not testify at all, is a fundamental constitutional right. *People v. Patrick*, 233 Ill. 2d 62, 69 (2009). "The decision to testify ultimately belongs to the defendant but is generally made after consultation with counsel." *Id.*

¶ 31 Taking as true the defendant's allegation that defense counsel told him that codefendant Alicea's attorney would cross-examine him and "tear him apart on the witness stand" if he chose to testify, we find that defense counsel's advice to the defendant was erroneous because codefendant Alicea's attorney had no right to cross-examine the defendant where the defendant and codefendant Alicea were tried in severed but simultaneous trial. See *People v. Crossley*, 236 Ill. App. 3d 207 (1992) (where codefendants were tried in severed but simultaneous trials, a defendant's testimony is considered only in his own case; defense counsel had no right or

obligation to cross-examine or impeach codefendant); see also *Wheeler*, 392 Ill. App. 3d at 308 (at the second stage of the postconviction proceedings, courts are foreclosed from engaging in fact-finding because all well-pleaded facts are to be taken as true).

¶ 32 However, we find that the defendant cannot establish that there was a reasonable probability that the outcome of the trial would have been different had he elected to testify. The defendant argues that had he elected to testify, he would have had the opportunity to explain to the court his mental and emotional state while he was in police custody and the circumstances surrounding his confession, and he would have been able to tell the court that codefendant Alicea was the actual shooter while the defendant was merely present at the scene of the crime. We find that the defendant's trial testimony could not have changed the outcome, where the evidence was overwhelming and cumulative against the defendant, notwithstanding that confidential informant, Rivera, implicated codefendant Alicea as the shooter. Moreover, the record shows that, at the hearing on his motion to suppress his incriminating statements to the police, the trial court did not find credible the defendant's explanation of the circumstances surrounding his confession; thus, there is no reason to believe that the court would have found his testimony regarding police coercion to be credible during the bench trial. Further, the defendant's contention that he was not the actual shooter was directly contradicted by eyewitness testimony at trial and his own confession to the police. While the defendant asserts that the witnesses' identification testimony was impeached at trial, it was within the trial court's province, as trier of fact, to weigh the evidence, determine the credibility of the witnesses, draw reasonable inferences, and resolve any conflicts in the evidence. See *People v. Austin*, 328 Ill. App. 3d 798, 804 (2002). We also reject the defendant's blanket assertion that "all of the eyewitnesses' testimony suggests that the first time they identified the defendant as the shooter was at trial."

Evidence was presented at trial that Stephanie first identified the defendant as the shooter from a photographic array she viewed four days after the shooting. Nonetheless, apart from identifying the defendant as the shooter at a photographic array and identifying the defendant as one of the suspects in a police line-up, Stephanie testified at trial that, at the time of the incident, she personally observed the defendant fire the handgun three or four times and observed sparks emanating from his hand. Thus, the defendant has failed to establish that he suffered any prejudice from his counsel's erroneous advice. Therefore, we find that the defendant failed to make a substantial showing of ineffective assistance of counsel on this basis.

¶ 33 The defendant next argues that defense counsel was ineffective for failing to conduct a thorough investigation of the case. He points out that Jose, Stephanie, Steffen and John at trial presented varying conflicting accounts of the incident, which were clearly exaggerated and embellished "to place the gun in the hands of the defendant." Because these witnesses did not initially tell the police shortly after the incident that the defendant was the shooter, he asserts that had defense counsel interviewed these witnesses before trial, he would have been able to "lock" them into the initial versions of what they actually saw or knew and would have been able to discover "what, if anything, the police said to these witnesses prior to showing them the photographs or line-ups and explain why their testimony was different than what was said to the police initially regarding the events that night." He contends that this would have further undermined their credibility at trial, and as such, the outcome of the trial would likely have been different. The State counters that the defendant's claim of ineffective assistance of counsel on this basis fails because he cannot demonstrate that he was prejudiced by the breadth of defense counsel's investigation.

¶ 34 We find the defendant's claim of ineffective assistance on this basis must fail, where he cannot establish that he was prejudiced by any alleged deficiency in defense counsel's conduct in preparing for trial. First, we note that the defendant has not adduced any evidence as to whether defense counsel made any efforts to interview the witnesses in question. See *People v. Kelley*, 304 Ill. App. 3d 628, 635 (1999). Even assuming that defense counsel had not interviewed the witnesses but should have, we decline to speculate what additional information he could have obtained with which to impeach them at trial. Rather, impeachment evidence that the witnesses did not initially tell the police that the defendant was the shooter would have been cumulative of the evidence already presented at trial. The record reveals that Stephanie was impeached at trial by defense counsel when she admitted on cross-examination that she did not tell the police that the defendant was the shooter on the day of the incident. Although John testified that he observed the defendant firing the gun, stipulated evidence was presented at trial that John never told the police that he saw the defendant discharge the weapon and that John had identified the defendant as one of the offenders but could not determine the identity of the actual shooter. Jose's testimony revealed that he had not specifically identified the defendant as the actual shooter, but had only identified the defendant in a still photograph from the Dominick's surveillance camera and in the photographic array as one of the perpetrators. Likewise, while Steffen testified that he identified the defendant in a police line-up as the suspect who appeared to have a gun in his hand after the shooting, stipulated evidence was presented at trial that Steffen never told the police that the object he saw in the defendant's hand was a gun. In light of the defendant's confession to the police and ASA Robertson that he discharged the firearm that killed Crystal and injured Jose, as well as witness testimony that the defendant was the shooter and other circumstantial evidence, we cannot conclude that, but for defense counsel's alleged

errors, there was a reasonable probability that the outcome of the trial would have been different. See generally *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007) (evidence which "merely impeaches a witness" will typically not be of such conclusive character as to justify postconviction relief).

¶ 35 Nor do we find persuasive the defendant's arguments that he was denied effective assistance of counsel on the basis that defense counsel did not call his uncle, Roger Guzman (Roger); his mother, Arcelia; and his sister, Jessica Cervantes (Jessica) to testify at trial. The defendant contends that Roger's and Arcelia's testimony would have revealed that the defendant recanted his incriminating statements to the police and ASA Robertson almost immediately after police interrogation, and that Roger was present when Arcelia told the police not to interview the defendant without an attorney, whom she had hired on the defendant's behalf. The defendant argues that had defense counsel called Jessica to testify, she would have been able to impeach the credibility of Joanna. We find that, even if Roger and Arcelia had testified at trial that the defendant recanted his incriminating statements to the police and ASA Robertson, such evidence would not have sufficiently undermined other trial testimony and confidence in the outcome of the trial. Neither Roger nor Arcelia was present when the defendant was interrogated and their testimony would not have provided any additional evidence as to whether police coerced the defendant into confessing. The defendant asserts that Roger's testimony would also have corroborated Arcelia's testimony at the pretrial hearing on the motion to suppress that she had told Sergeant Wojcik that she had hired an attorney for her son. However, Roger's affidavit, which was attached to the defendant's postconviction petition, stated only that he was present when Arcelia told Sergeant Wojcik that she had retained counsel and that police should not attempt to interview *her*. Regardless of this discrepancy, even if Roger had testified at trial that

Arcelia informed the police that she had retained counsel for her son and told the police not to interview her son without counsel, we find that such testimony would not have shed any light on whether the defendant invoked his right to counsel during police interrogation or whether his confession was a product of police coercion. See *People v. Young*, 365 Ill. App. 3d 753, 768-69 (2006) (the right to counsel is personal and may only be invoked by the suspect; parents have no legal standing to invoke the right to counsel for their adult children). We further reject the defendant's speculative arguments that "there was no logical reason [he] would not have requested an attorney, knowing his mother had one prepared to represent him, and specifically told him to request an attorney." The defendant also claims that defense counsel should have presented the testimony of Jessica, who stated in her affidavit attached to the defendant's postconviction petition that Joanna informed her that codefendant Alicea, rather than the defendant, was the actual shooter. He contends that Jessica's testimony would have impeached Joanna's testimony and corroborated the fact that the still photograph from the store's surveillance video showed that Joanna was inside the store with the defendant and codefendant Alicea and "most likely saw much more of the incident." However, we find that any testimony from Jessica that Joanna told her codefendant Alicea was the actual shooter would have been cumulative of the stipulated evidence in which confidential informant, Rivera, implicated codefendant Alicea as the shooter. Moreover, because Joanna's trial testimony revealed that she did not witness the shooting, and none of the eyewitnesses testified to seeing Joanna at the time of the shooting, any impeaching evidence from Jessica that Joanna may have been inside the Dominick's prior to the shooting had no bearing on the defendant's guilt or innocence. Thus, we find that the defendant has not shown a reasonable probability that, but for defense counsel's alleged error in failing to call Roger, Arcelia and Jessica to testify at trial, the result of the

proceedings would have been different. Therefore, the defendant's ineffective assistance of counsel claim on this basis must fail.

¶ 36 The defendant next contends that he was denied his right to effective assistance of counsel when defense counsel failed to provide him with the State's discovery materials for review and failed to inform him of all the evidence against him so as to allow him to make an informed decision in waiving a trial by jury. In an affidavit accompanying his postconviction petition, the defendant averred that defense counsel had only provided him with a copy of his and codefendant Alicea's incriminating statements to the police, but failed to provide him with copies of police reports. He further averred that had defense counsel informed him that several witnesses had identified him as the shooter during police line-ups, he would have insisted on a jury trial.

¶ 37 The State counters that the defendant was not denied effective assistance of counsel, arguing that the defendant could not satisfy either prong under the *Strickland* standard.

¶ 38 In Illinois, a criminal defendant's right to a trial by jury includes the right to waive a jury trial. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). However, a jury waiver is only valid if the defendant makes it knowingly and voluntarily. *Id.*

¶ 39 We find that defense counsel's decision as to whether to provide the defendant with discovery materials constituted a matter of trial strategy and judgment that ultimately rested within counsel's discretion. See *People v. Davison*, 292 Ill. App. 3d 981, 988-89 (1997); *but cf. People v. Smith*, 268 Ill. App. 3d 574 (1994) (counsel deficient for depriving defendant of opportunity to view potentially exculpatory police reports). Even assuming, *arguendo*, that defense counsel's performance in not providing him with the State's discovery materials and in not informing him of all evidence against him was deficient, the defendant cannot demonstrate

that he suffered any prejudice from his decision to waive a jury trial. Here, it is unlikely that the defendant would have been acquitted in a jury trial, where the jury would have heard testimony regarding the defendant's statements to the police and ASA Robertson implicating himself as the shooter, as well as the eyewitness testimony of Stephanie and John that the defendant was the shooter. See *People v. Hobson*, 386 Ill. App. 3d 221, 240 (2008) (defense counsel's failure to provide defendant with discovery materials and failure to inform him of the State's evidence against him, did not prejudice defendant and thus, defendant was not entitled to a third-stage evidentiary hearing on the issue). Nor could we conclude that all of defense counsel's alleged deficient performance, cumulatively, deprived the defendant of his right to effective assistance of counsel in light of the overwhelming evidence of the defendant's guilt. Moreover, we cannot conclude that the defendant's waiver of his jury right was not made knowingly or intelligently, where the record indicates that, prior to accepting his jury trial waiver, the trial court duly admonished the defendant about his right to a jury trial and the defendant indicated he understood that right and asked for a bench trial. Therefore, we find that the defendant failed to make a substantial showing of ineffective assistance of counsel on this basis. Accordingly, because the defendant cannot make a substantial showing of a violation of his constitutional right to effective assistance of counsel, we hold that the trial court did not err in dismissing the defendant's postconviction petition at the second stage of the proceedings.

¶ 40 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed.