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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Respondent-Appellee,)	
)	
v.)	No. 93-CR-15469
)	
MAURICE BOWEN,)	Honorable
)	Angela Munari Petrone,
Petitioner-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment of the court.

ORDER

¶ 1 *Held:* The circuit court's judgment denying the defendant's third-stage postconviction petition alleging ineffective assistance of trial counsel is affirmed, where the evidence failed to establish that counsel's decision not to call four alleged alibi witnesses amounted to defective performance rather than sound trial strategy.

¶ 2 The defendant, Maurice Bowen, appeals from the circuit court order which dismissed his third-stage postconviction petition filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq.* (West 2006)). His petition alleged, *inter alia*, that his trial counsel was ineffective for failing to present four known alibi witnesses in his defense. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 3 Following a bench trial, the defendant was found guilty of first-degree murder arising from the shooting death of the victim, James Nance, and sentenced to 60 years' imprisonment. His conviction and sentence were affirmed by this court on direct appeal (*People v. Bowen*, 298 Ill. App. 3d 829 (1998)). The evidence underlying the defendant's conviction was detailed in our prior opinion, and we therefore summarize only those facts necessary to provide background for the issues in this appeal.

¶ 4 At trial, witness testimony established that around 9 p.m. on the evening of February 28, 1993, Nance was standing near the intersection of 50th and Elizabeth Streets, when a tall, thin individual, dressed in black and wearing a hooded jacket, approached him and fired shots at his face and chest. Lamont Brown, the State's primary witness and an admitted gang member, resided in an apartment near the intersection of 50th and Elizabeth and was home at the time of the shooting. Brown testified that, earlier that day, he had seen a blue Chevy Malibu drive through the area on two occasions, and recognized the occupants of the car as "Bam" (Terrance Pouncey), "Ricardo," and "Maurice," who were members of a rival gang to that of Brown. Brown stated that, later that night, the Blue Malibu again drove down Elizabeth Street, stopping a few houses away from where Nance was standing. Brown then saw Maurice exit the passenger's side, approach Nance with his hood covering his head, and fire several shots at Nance. *Bowen*, 298 Ill. App. 3d at 831.

¶ 5 According to Brown's account at trial, the "Maurice" who shot Nance was not the defendant, but rather, a different individual whom Brown knew by the same name. However, this testimony was impeached by that of Officer Cliff Gehrke, who established that, in the months following the shooting, Brown had identified the defendant as the shooter both from a photo

array and in a physical lineup. Officer Gehrke testified that both he and Brown signed the back of the photograph of the defendant that was used in the photo array.

¶ 6 At the conclusion of the State's case, the defendant moved for a directed finding of acquittal, on the basis that there was no substantive evidence that he fired the weapon at Nance, because as he was never identified as the shooter in open court. The defendant also pointed to evidence that the apartment window from which Brown claimed to have observed the shooting was obscured by plastic covering and a wooden board across the top portion. The circuit court denied the motion. The defense then presented the testimony of Brown's mother and sister, that Brown's apartment window was covered by black plastic at the bottom and a board at the top. The parties also stipulated to a statement by Brown that, while he was being held at the courthouse on the day prior to trial, the defendant and some of his "buddies" walked past Brown's cell and stared at him so they would be able to recall his face. Relying upon Brown's prior identifications of the defendant, the circuit court subsequently convicted the defendant of the murder of Nance.

¶ 7 On March 26, 1999, the defendant filed a *pro se* postconviction petition under the Act, alleging that his trial counsel was ineffective for telling him that he did not need to testify and for failing to call additional defense witnesses at trial. Counsel was appointed to represent the defendant, and on October 5, 2007, he filed the supplemental petition underlying this appeal (petition). The petition alleged claims of actual innocence, ineffective assistance of trial and appellate counsel, the denial of the defendant's right to testify at trial, and "cumulative error." In support of his claim of ineffective assistance of trial counsel, the defendant argued that his attorney failed to call four alibi witnesses on his behalf, namely, Betty Townsend, her sons Ricardo and Willie Townsend, and their aunt Coraliss Thomas. The petition was supported by

the affidavits of each of these alleged witnesses, all of whom attested that the defendant was in the Townsend apartment at the time of the shooting and that they were willing to testify to that fact at trial. In addition, both Ricardo and Betty Townsend attested that they had provided this information to the defendant's attorney prior to trial. Willie Townsend's affidavit stated that defense counsel had not interviewed him. The petition was further supported by the defendant's own affidavit, in which he averred that his attorney was aware of these alibi witnesses prior to trial, but had advised him that those witnesses were "not necessary" and would not be called because the State had "a weak case."

¶ 8 On June 26, 2008, the State filed an amended motion to dismiss the petition, which was granted by the circuit court. The defendant appealed, and this court remanded the case for a third-stage evidentiary hearing on the sole question of whether trial counsel was ineffective for not calling the Townsends and Coraliss Thomas at trial. The dismissal of the remaining claims in the petition was affirmed. *People v. Bowen*, No. 08-3194, slip order at 18 (Nov. 22, 2010) (unpublished order pursuant to Illinois Supreme Court Rule 23).

¶ 9 Upon remand, Ricardo, Willie, and Betty Townsend provided testimony. Ricardo testified that, on February 28, 1993, he was with the defendant in the bedroom of his first-floor apartment at 4950 South Racine, which is a block from the intersection of 50th and Elizabeth. He stated that he and the defendant had been alone in the bedroom for awhile when they heard gunshots. According to Ricardo, Betty, Willie, his father, and Coraliss Thomas were also present in other areas of the house at the time of the shooting. Ricardo testified that he and the defendant heard sirens five to twenty minutes later, and shortly thereafter, they left the bedroom and went outside to see what had happened. Ricardo testified that Willie walked to the corner and returned, stating that someone had been shot.

¶ 10 Ricardo further testified that he learned that the defendant had been charged with the crime in September or October 1993, when the defendant's attorney came to interview him while he was in Cook County Jail. Ricardo testified that the attorney wrote down his statement, but did not contact him again. According to Ricardo, had he been called to testify at the defendant's 1996 trial, he would have testified consistently with his hearing testimony.

¶ 11 On cross-examination, Ricardo admitted that he had never contacted the police on the defendant's behalf, even though the defendant was a fellow gang member and frequently visited his home. Ricardo also acknowledged that he had five felony convictions and that he was incarcerated at the time of the hearing.

¶ 12 Willie Townsend testified that, on February 28, 1993, he was in his house with Betty, Ricardo's father, Ricardo, Coraliss Thomas, and the defendant, when he heard nearby gunshots. Contrary to Ricardo's account, however, Willie testified that he also was in Ricardo's bedroom with Ricardo and the defendant when they heard the shots, and that he was the only one who left the bedroom to go outside after hearing the sirens. Willie stated that he walked to the corner alone, observed the scene, and then returned to his home. When he returned, Ricardo and the defendant were still in the bedroom and he told them, "you know, they will think y'all did this."

¶ 13 Willie testified that he did not speak to any attorney about the defendant's case until 2007, when someone representing the defendant visited him in jail and he signed the affidavit in connection with the defendant's petition. He admitted that, since 1990, he had been convicted of burglary, delivery of narcotics, aggravated possession of a stolen vehicle, possession of a controlled substance with the intent to deliver, and robbery. He acknowledged that he was incarcerated at the time of the defendant's trial.

¶ 14 Betty Townsend testified that, at the time of the shooting, she was with Coraliss Thomas and Willie in the front living room of her apartment and that Ricardo and the defendant were in the back bedroom. She testified that Ricardo and the defendant entered the apartment before shots were fired and that she sent them to the bedroom because they appeared “high.” However, at another point during questioning, Betty contradicted herself, stating that she had not seen the defendant on the day of the shooting. Betty’s testimony was also unclear as to when she learned that the defendant was charged with Nance’s murder. She stated that she spoke to an attorney about the defendant’s case, but she could not recall when that conversation took place. Further, she admitted that, although she thought of the defendant as one of her children, she did not go to the police with this information, even after finding out that the defendant was facing trial. Rather, Betty stated that she spoke to the defendant’s grandmother and told her that the defendant had been at her home at the time of the murder.

¶ 15 The defendant testified that Mike King of the Public Defender’s Office began representing him after he was arraigned in 1993. The defendant informed King that he was in the Townsend home on the day of the shooting, along with Betty, Willie, Ricardo’s father, and Coraliss Thomas. According to the defendant, he told King that he had given the police this alibi, and King promised to check into the matter; however, prior to trial, King told him that he had spoken to the witnesses and did not think they needed to testify. King advised the defendant that the State’s case was weak because Brown was being uncooperative. The defendant then testified that, after the State rested its case in chief, King told him that his motion for a directed finding should be granted. When that motion was denied, King told the defendant not to worry, as he planned to further discredit Brown’s testimony by calling Brown’s family members to establish that he could not clearly have seen the shooting from his apartment windows. The

defendant stated that, when he spoke to King after trial, King told him the judge must have “had it in” for him and that King did not expect a guilty verdict.

¶ 16 Phillip Mullane testified that, in 1993, he was King’s supervisor and assisted him with the defendant’s case. According to Mullane, King’s strategy was to attack Brown’s credibility, because Brown was the only State witness, and had been uncooperative with the prosecutors. Mullane believed that the defense did not present the alibi witnesses because they were convinced that the defendant would be acquitted based upon the State’s weak case. He testified that everybody was surprised by the guilty verdict.

¶ 17 Officer Gehrke testified that, after the shooting, the defendant had given a statement that he was with “Bam” (Terrence Pouncey), Rick (Bam’s nephew), and “Black” in Bam’s Cadillac at the time of the shooting. The defendant told Officer Gehrke that they were on their way to see Bam’s sister at 4848 State and, when they returned to the area of the shooting, they saw an ambulance taking Nance’s body away. Officer Gehrke testified, however, that Bam’s sister was unable to corroborate this account.

¶ 18 On June 7, 2012, the circuit court denied the defendant’s petition for postconviction relief. The trial court found that Ricardo, Betty, Willie, and the defendant lacked credibility, as the witnesses contradicted each other and themselves. The court further noted that Betty appeared at the hearing with an oxygen tank and had a poor memory of events. The court determined that the trial strategy used by King was sound, noting that Mullane was a credible witness.

¶ 19 The court further stated that:

“[t]o win relief under a claim of actual innocence, the evidence must be of such conclusive character that it would probably change the result on retrial. Actual innocence

is not within the rubric of whether a defendant has been proved guilty beyond a reasonable doubt. Rather, the hallmark of actual innocence means total vindication or exoneration.

[F]or all of the above reasons, I cannot say that the trial attorney's failure to call the Townsends and Corliss Thomas was objectively unreasonable. I cannot say that the incredible and contradictory testimony of the alibi witnesses was of such conclusive character that it would probably change the result on retrial. Therefore, respectfully to counsels, the petition for postconviction relief based on actual innocence is denied.”

¶ 20 This appeal followed.

¶ 21 The Post-Conviction Hearing Act provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). At the third stage of postconviction proceedings, the defendant advances to a hearing wherein he may present evidence in support of his petition. 725 ILCS 5/122-6 (West 2012). Throughout the third stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill.2d 261, 277 (2002). At an evidentiary hearing, the circuit court “may receive proof by affidavit, depositions, oral testimony, or other evidence.” 725 ILCS 5/122-6 (West 2012).

¶ 22 Where fact-finding and credibility determinations are made during a third-stage evidentiary hearing, the reviewing court will not reverse a circuit court's decision unless it is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473. Manifest error is that which is “clearly evident, plain, and indisputable.” *People v. Johnson*, 206 Ill. 2d 348, 360 (2002). If no such determinations are necessary at the third stage, *i.e.*, if no new evidence is presented and the

issues presented are pure questions of law, the court will apply a *de novo* standard of review, unless the judge presiding over the postconviction proceedings has some “special expertise or familiarity” with the trial or sentencing of the defendant and that “familiarity” has some bearing upon disposition of the postconviction petition. *Pendleton*, 223 Ill. 2d at 473. In this case, where the circuit court conducted an evidentiary hearing on petitioner’s ineffective-assistance of counsel claim and made credibility determinations, we review for manifest error.

¶ 23 In order to establish that trial counsel was ineffective, the defendant must satisfy the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). Under this standard, a defendant must show that: (1) counsel’s performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. A defendant must satisfy both prongs of the *Strickland* test in order to prevail on a claim of ineffective assistance of counsel; accordingly, if the defendant’s claim may be disposed of for failing to satisfy either prong, the court need not address the other prong. *Strickland*, 466 U.S. at 697. In this case, the circuit court determined that the defendant failed to establish the first prong--that his trial counsel’s performance was deficient--and we agree.

¶ 24 Since the right to effective assistance of counsel refers to competent, not perfect, representation, mistakes in trial strategy or tactics in judgment do not, in themselves, equate to incompetent representation. *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). Under *Strickland*, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary,” and strategic choices made by counsel after having made a thorough investigation are “virtually unchallengeable.” *Id.* at 691. Thus, claims of failing

to call witnesses will generally not support a claim of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 319 (2010); *People v. Hobley*, 159 Ill. 2d 272, 305 (1994).

¶ 25 In this case, the defendant and Mullane testified that King consciously made the strategic choice not to present the alibi witnesses. The trial court determined that King's strategy was sound, and the record supports this conclusion. First, the alleged alibi defense likely would have been contradicted by Officer Gehrke's testimony, as stated at the postconviction hearing, that the defendant gave him a different alibi at the time he originally interviewed him. Specifically, at the time of the defendant's first statement, he told Officer Gehrke that he was with "Bam" and "Black" in Bam's Cadillac at the time of the shooting, and that he did not go to Ricardo's house until *after* he saw the paramedics taking away Nance's body. Further, according to Officer Gehrke, the defendant never told him that he was at the Townsends' house before the shooting.

¶ 26 Additionally, this case boiled down to the credibility of the witnesses. The circuit court determined that the potential testimony of the alibi witnesses lacked credibility as their testimony was contradictory. At the evidentiary hearing, Ricardo testified that he and the defendant were alone in his bedroom when they heard the gunshots; whereas, Willie stated that he was also present in the bedroom. Ricardo also testified that, after hearing the gunshots, everyone who was in the house went outside, Willie walked to the corner, and then returned and told them someone had been shot. In contrast, Willie testified that he alone went outside and walked to the corner. According to Willie, he returned to the bedroom, where Ricardo and the defendant were still sitting and told them about the shooting. Additionally, the court noted that Betty's testimony was internally inconsistent, and she seemed to have a poor memory. The postconviction court is in the best position to assess the credibility of the witnesses, resolve any inconsistencies or conflicts in their testimony, to assess the proper weight given to their testimony, and to draw reasonable

inferences from all of the evidence. *People v. Cochran*, 323 Ill.App.3d 669, 679 (2001). Considering the alibi witnesses' lack of credibility, along with the testimony of Officer Gehrke and Mullane, the record supports the circuit court's finding that counsel's decision not to present the defendant's alibi at trial was a matter of sound trial strategy. Accordingly, we cannot say that the court's decision to deny the defendant's post-conviction petition was manifestly erroneous.

¶ 27 In so holding, we address the defendant's argument that the circuit court used the improper standard when ruling on his petition. While we agree that the court erred when it stated the standard used in evaluating claims of actual innocence when ruling on the defendant's ineffective assistance of counsel claim, such error was harmless. The record reflects that the judge clarified her ruling when she stated, "I cannot say that the trial attorney's failure to call the Townsends and Corliss Thomas was objectively unreasonable," which is the correct standard used to review ineffective assistance claims under *Strickland*. Likewise, the court stated, "[a]nd just to make the record clear, I did state [that] I specifically found that the trial counsel was not ineffective for the reasons stated." Based on the reading of the entirety of the trial court's comments, it is clear that the court applied the proper standard when it ruled on the defendant's ineffective assistance of counsel claim, despite its misstatements.

¶ 28 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.