2015 IL App (1st) 132087-U

FIRST DIVISION
May 26, 2015

No. 1-13-2087

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTHONY DINGUS, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 02 CR 15836 Honorable John J. Hynes, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶1 ***Held:*** We affirm the second stage dismissal of defendant's postconviction petition because he failed to make a substantial showing of a constitutional violation.

¶2 Defendant Anthony Dingus appeals from the second stage dismissal of his petition for relief under the Post–Conviction Hearing Act. 725 ILCS 5/122–1 *et seq.* (West 2012) (Act). On appeal, defendant contends that he made a substantial showing that his constitutional rights to the effective assistance of trial and appellate counsel were violated. We affirm.

¶3 BACKGROUND

¶4 Defendant was charged with first degree murder, aggravated unlawful use of a weapon, and reckless discharge of a firearm in connection with the May 25, 2002 shooting death of Raymond Delgado. Defendant's jury trial commenced on May 17, 2005. Jason Soto, Delgado's cousin, testified that at 8 p.m. on May 24, 2002, he and Delgado went to their grandmother's house near 72nd Street and Nottingham Avenue in Bridgeview to meet some friends for a party. Two hours later, Delgado and a friend named Sara left to purchase some liquor. When they returned, Soto met them outside and noticed an individual named Francisco Perez standing outside with some young kids. Soto told Perez to leave the kids and come to the party.

¶5 Around 2:30 a.m. on the morning of May 25, Soto and Delgado went outside and heard one of their friends named Dante exchange words with an individual in a car. Soto did not hear what was said, except that one of the car's occupants yelled "Ambrose" and threw a bottle as the car drove away. Soto explained that "Ambrose" was the name of a local gang.

¶6 Delgado and Soto then ran towards the front of the house. Soto saw an individual walking towards Delgado. When Delgado and the individual were approximately 5 to 10 feet apart, Soto saw a flash of light and heard "two pops." Delgado jumped back, covered his face and turned to the side. Soto initially ran past Delgado to continue pursuing the individual, but returned to Delgado after hearing he had been shot. After another friend called 9-1-1, Soto moved Delgado behind a car and stayed with him until paramedics arrived.

¶7 Officers Brian Nowacyk and Percy Taylor testified that they, along with a third officer, responded to a call of shots fired near 72nd Street and Nottingham Avenue around 2:45 a.m. on May 25, 2002. When they arrived, they observed Delgado lying on the ground, Soto on the

ground next to Delgado, and two other individuals standing nearby. None of the individuals had a weapon, and Officer Taylor did not see a weapon on or near Delgado.

¶8 Joseph Lopez testified that in the early morning hours of May 25, he was drinking in Francisco Perez's backyard with Perez, defendant, Michael Radovick, George Villies and Pablo Medina. According to Lopez, "something" caused them to leave Perez's backyard. Lopez saw Perez holding a chrome gun with a pink handle. Lopez then observed Delgado walking towards Lopez's group with his hand near his stomach. He then saw Perez hold his arm at a 45-degree angle and fire two shots. Delgado continued walking towards Lopez's group, and Perez gave the gun to defendant. Defendant pointed the gun at Delgado and fired two shots. Delgado grabbed his stomach and fell to the ground. Lopez did not hear defendant and Delgado say anything to each other before defendant fired the gun. After defendant fired the gun, he handed it to Lopez. Lopez testified that he did not recall whether defendant said anything to him.

¶9 Lopez was then impeached with testimony he provided to the grand jury. Before the grand jury, Lopez testified defendant told him to get rid of the gun and that he hid the gun in a bush. Lopez then retrieved the gun and hid it in a pile of logs behind a garage because he was afraid that defendant would be arrested if the gun were found. Lopez also testified to the grand jury that defendant stated that he "tapped him, got him, got him" and "I got him Maldonado." Lopez explained that "Maldonado" is a member of the Ambrose gang.

¶10 Pablo Medina testified that he and defendant, Perez, Villies, and Lopez—a group whom Medina referred to as "the Nottingham Boys"—were drinking in Perez's backyard with Tiffany Rynkiewicz at 2:30 a.m. on May 25, 2002. Around that time, everyone except Perez left the yard and began walking down Nottingham Avenue towards 71st Place. Perez went inside his house, retrieved his gun, and rejoined the group outside. Medina heard shots fired and ran towards

Perez's house. Perez told Medina that he fired the gun. Medina then saw defendant running towards Perez's house, but he denied that he heard defendant say anything to Perez. According to Medina, defendant then left the area and said "Ambrose killer." After Medina heard defendant say "Ambrose," he heard four gunshots. However, Medina testified that he did not see defendant point the gun at anyone.

¶11 Medina was then impeached with testimony he provided to the grand jury. Before the grand jury, Medina testified that defendant asked Perez for his gun as the group was running back to Perez's house. Medina also told the grand jury that defendant's nickname was "Steel Dog" and that defendant yelled "Steel Dog, 73rd, Ambrose Killer," to which Delgado replied "Ambrose crazy."[1]

¶12 The parties then stipulated that if called to testify, Assistant State's Attorney Edward Barrett would testify that he prepared a handwritten statement after he and detective Roger Shelton interviewed Medina on May 30, 2002. In the statement, Medina admitted that Perez got his gun after he heard that the Ambrose were outside. Defendant then told Perez to give him the gun, and after defendant got the gun, he said "Steel Dog 73rd," raised the gun and fired it four times.

¶13 The parties next stipulated that if called to testify, Assistant State's Attorney Margaret Ogarek would testify that she appeared before the grand jury with Medina on May 31, 2002. At that time, Medina testified that Perez left his house carrying a chrome gun with a pink handle. Perez told Medina that he fired shots and that defendant asked Perez for the gun. Defendant then walked towards Delgado while yelling "Steel Dog, 73rd, Ambrose killer." Medina explained to the grand jury that Steel Dog is defendant's nickname. Defendant then raised the gun and fired

[1] Medina explained that the Ambrose and Nottingham Boys are rival gangs and that a person may indicate his membership in the Ambrose by saying "Ambrose crazy" in response to the statement "Ambrose killer."

four shots in Delgado's direction when defendant and Delgado were five feet apart. After defendant fired the shots, Delgado held his stomach with his right hand and fell to the ground.

¶14 Defendant testified that on May 25, 2002, he was in Perez's backyard with Perez, Tiffany Rynkiewicz, Terry Derkets, Medina, Lopez, and George Villies. According to defendant, the group heard a commotion and went to the driveway, where they saw a group of people down the street. Perez went to get his gun, and defendant and his friends began walking towards the group. Perez then returned with his gun, ran down the street and fired two shots at Delgado. After he fired the shots, Perez turned, began to run, and shoved the gun into defendant's chest. Defendant grabbed the gun and then saw Delgado walking towards him. Delgado reached under his shirt towards his belt and said "Ambrose crazy," at which point defendant turned to run and fired two shots. Defendant testified he fired the shots because he thought Delgado was "going to pull out a gun" and kill defendant.

¶15 On cross-examination, defendant testified that after he fired the gun, he gave it to Lopez. Defendant denied telling Lopez to get rid of the gun and saying "Ambrose killer" before firing the shots. Defendant was also questioned by State regarding tear drop tattoos on his face:

> "Q. [The State]: Incidentally, what's on the left side of your eye there?
>
> A. [Defendant]: Two tear drops.
>
> Q. Two tear drops. What's the significance of two tear drops on your eye?
>
> A. Well, my cousin died and so did my friend.
>
> Q. Does it have any other significance?
>
> A. Not mine.

Q. No. You just put tear drops on your eyes in memory of - -

A. Yes.

Q. - - two individuals that passed away?

A. Yes.

Q. Do you know if there is any other meaning for those tear drops?

A. There could be.

Q. What do you know about someone tattooing a tear drop by their eye?

A. Means they are involved with a gang or something.

Q. And what specifically does a tear drop mean when you are involved with a gang?

A. That's what it means.

Mr. Pechter [Defense Counsel]: Objection, Judge. He testified to what his means.

The Court: It is overruled.

Q. How about the tear drop, in particular - -what does that mean when you get a tear drop tattooed by your eye when you are in a gang?

A. That you are in a gang.

Q. It means that you've done something for that gang; right?

A. No, it doesn't.

Q. Doesn't it have a meaning that you've avenged someone's death - - that you've committed - - you've taken care of someone else's --

A. When they are colored in.

Q. Oh. Okay. What does it mean when they are empty?

A. Just what I told you.

Q. That you belong to a gang?

A. No. That my cousin and my friend died.

Q. There is another meaning for that right - - that you belong to a gang?

A. It could, yes.

Q. And when those tear drops are filled in, it means you've avenged another individual's death; right?

A. I think."

¶16 After the close of evidence and closing arguments, the jury found defendant guilty of first degree murder. The trial court sentenced defendant 50 years' imprisonment. This court upheld defendant's conviction and sentence on direct appeal. *People v. Dingus*, No. 05-2144 (unpublished order under Illinois Supreme Court Rule 23). Defendant filed a petition for leave to appeal, which was denied on November 29, 2007. *People v. Dingus*, 226 Ill. 2d 593 (2007).

¶17 On March 9, 2008, defendant, through private counsel Fred Cohn, filed a postconviction petition. On November 21, 2008, defendant filed an amended postconviction petition. On July 15, 2009, defendant filed a second amended postconviction petition. On December 11, 2009,

Cohn was granted leave to withdraw and attorney Dean Morask filed his appearance on defendant's behalf.

¶18 On May 11, 2012, defendant, through attorney Morask, filed an amended and supplemental postconviction petition. The petition raised numerous arguments, though only five are germane to this appeal. First, defendant alleged that he received ineffective assistance of trial counsel due to trial counsel's purported failure to (1) object during the State's questioning of defendant regarding his tear drop tattoos; (2) conduct a proper direct examination of defendant; (3) cross-examine Medina regarding the fact that his written statement and grand jury testimony were the product of coercion; and (4) call Villies and Radovick as witnesses. Second, defendant contended that he received ineffective assistance of appellate counsel due to appellate counsel's purported failure to argue on direct appeal that trial counsel's performance was constitutionally deficient due to trial counsel's alleged failure to object during the State's cross-examination of defendant regarding his tear drop tattoos.

¶19 Defendant's petition was supported by affidavits submitted by Medina, Villies, Radovick, and defendant. Medina testified in his affidavit that his written statement and grand jury testimony were coerced. He explained that the detectives "told me that I don't want to ruin my life and go to jail for a long time. They kept bringing me back for questioning until they got the statement that they wanted." He stated that he was scared during the interview and that he told the detectives that he "didn't hear or see anything." With respect to his grand jury testimony, he stated that "the detectives and states attorney made me say not what I wanted to say. They refused to listen to me when I did tell the truth." According to Medina, defendant's trial counsel told him to testify at trial that defendant said "Ambrose killer" and that Delgado said "Ambrose crazy" so defendant could "get a self defense plea."

¶20 Medina provided his account of the events leading up to Delgado's death. He explained that he was in Perez's backyard with friends. Fifteen minutes after defendant arrived, a car drove by. The car's horn was sounding and its occupants were yelling. Everyone ran out of the yard, at which point Medina saw the car pull into an alley between 71st Street and 71st Place. Medina and some friends ran towards the alley and saw some people who began chasing his group. As Medina ran back towards Perez's house, shots were fired so he "jumped into the gangway and hid." Medina stated that he "didn't hear or see anything because I was hiding."

¶21 Villies testified in his affidavit that he was brought to the police station for questioning. During the interview, he "tried telling the detectives what happened that night but they kept saying NO didn't it happen this way." He explained that the detectives became angry and threatened to charge him with first degree murder and "going to jail for life if I told the story the way I wanted it to be." According to Villies, the State wanted him to testify against defendant, but after he insisted on "tell[ing] the truth of what really happened that night[,]" the state's attorney became angry and decided not to call him as a witness.

¶22 Villies also provided his account of the events leading up to Delgado's death. According to Villies, he was hanging out with defendant in Perez's backyard around 2:30 a.m. on May 25, 2002, when the group heard a car driving down the street "yelling and blowing there [*sic*] horn." The car pulled into Perez's driveway, backed out, and drove away. The group went out to the driveway. A few minutes later, the group saw several individuals approaching on the sidewalk. Perez then came out of his house with a gun and fired two shots at the approaching individuals. One of the individuals who was wearing a baby blue shirt grabbed his right side and continued approaching. Perez then gave the gun to defendant. Defendant turned to run, when the individual wearing the blue shirt "started yelling Ambros crazy and lifting his shirt reaching for a

gun." Defendant, who was already turning and running away and was twenty feet from the individual, fired two shots and then gave the gun to Lopez. As the group continued running, Villies heard "a couple of more shots."

¶23 In a supplemental affidavit executed on May 4, 2012, Villies clarified that the detectives threatened to charge him with first degree murder and life in prison unless he "told the story the way the police wanted [him] to describe it." He also stated that earlier in the day, he was present during a physical altercation between Delgado and Derkets at a restaurant. Delgado had a knife, slapped Derkets, and said "we would need guns the next time we saw him."

¶24 Radovick testified in his affidavit that earlier in the day, he and his friends got into an argument with Delgado and his friends at a restaurant. According to Radovick, Delgado told Terry Derkets to "turn his hat to the right, which means Ambros." Later in the day, Radovick left Perez's backyard with David Lenoci to go for a drive around the neighborhood. While in an alley on 71st Place, they got into an argument with a man named Dante who was friends with Delgado and Soto. After exchanging words, Lenoci and Radovick started to get out of their car. Dante went back to his car and retrieved what looked like a gun. Radovick and Lenoci got back in their car and said they would be back. Dante told them they "better have guns" and threw a bottle at the car.

¶25 Radovick then went back to Perez's house. Shortly thereafter, defendant arrived. A few minutes later the group heard a car coming down the street. Radovick looked over a fence and saw a car approaching. The car was swerving, sounding its horn, driving without its headlights on, and its occupants were "yelling gang stuff out of the window." The car pulled into Perez's driveway, at which point Radovick observed Dante, Delgado, Soto, and several unidentified people inside. The car pulled out of the driveway, and Radovick's group ran out of Perez's

backyard. Once outside the yard, Radovick saw some people on the sidewalk approaching his group. Radovick then heard "a couple of guns shots" so he ran away and hid behind a garage.

¶26 In a supplemental affidavit executed on May 4, 2012, Radovick stated that he met with defendant's trial attorney and that he was "ready and willing and prepared to" testify on defendant's behalf.

¶27 Defendant testified in his affidavit that he was 25 to 30 feet from Delgado when he fired the gun. He explained that his tear drop tattoos are in memory of two deceased friends, and he clarified that the tattoos "were not filled in and did not signify in any way that I had accomplished acts of vengeance on members of any opposing gang." Defendant noted that he was aware of the incident which took place earlier in the day between Derkets and Delgado. Finally, defendant stated that he told trial counsel the names of witnesses who could testify on his behalf, including Derkets, Radovick, and Villies.

¶28 On October 12, 2012, the State filed a motion to dismiss defendant's petition. The trial court heard arguments on defendant's petition on March 8, 2013. On June 21, 2013, the trial court granted the State's motion to dismiss. This appeal followed.

¶29 ANALYSIS

¶30 On appeal, defendant contends that he made a substantial showing that his constitutional rights were violated. First, he contends that he received ineffective assistance of trial counsel due to trial counsel's purported failure to (1) object during the State's cross-examination of defendant; (2) conduct a proper direct examination of defendant; (3) cross-examine Medina regarding the circumstances under which he gave his written statement and grand jury testimony; and (4) call Villies and Radovick as witnesses. Second, defendant contends that he received

ineffective assistance of appellate counsel due to appellate counsel's failure to argue that trial counsel was ineffective for failing to object during the State's cross-examination of defendant.

¶31 *A. The Post-Conviction Hearing Act*

¶32 "The Post–Conviction Hearing Act provides a procedural mechanism through which a criminal defendant can assert that his federal or state constitutional rights were substantially violated in his original trial or sentencing hearing." *People v. Davis*, 2014 IL 115595, ¶ 13. A proceeding initiated pursuant the Act is "not a substitute for a direct appeal, but rather is a collateral attack on a prior conviction and sentence." *Id.* The Act allows inquiry into constitutional issues arising in the original proceeding which have not been raised, and could not have been adjudicated, on direct appeal. *Id.* Issues raised and decided on direct appeal are therefore barred by the doctrine of *res judicata*, and issues that could have been raised on direct appeal are forfeited. *Id*.

¶33 Proceedings under the Act are divided into three stages. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). At the first stage, a petition may be summarily dismissed if the trial court finds that it is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If, however, the petition states the "gist of a constitutional claim" or if the trial court does not rule on the petition within 90 days of filing, then the petition proceeds to the second stage. *People v. Ligon*, 239 Ill. 2d 94, 104 (2010); *Pendleton*, 223 Ill. 2d at 472; see also 725 ILCS 5/122-2.1(b) (West 2012).

¶34 At the second stage, "the circuit court must determine whether the petition and any accompanying documentation make 'a substantial showing of a constitutional violation.' " *People v. Tate*, 2012 IL 112214, ¶ 10 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). In making that determination, the trial court must take as true "all well-pleaded facts that are not

positively rebutted by the trial record." *Pendleton*, 223 Ill. 2d at 473. We review a trial court's second stage dismissal of a postconviction petition *de novo*. *Id.*

¶35 *B. Ineffective Assistance of Counsel*

¶36 Ineffective assistance of counsel claims are governed by standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, a criminal defendant must show that trial counsel's performance was objectively deficient and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687-88, 694; *People v. Stewart*, 141 Ill. 2d 107, 118 (1990).

¶37 Ineffective assistance of appellate counsel claims are also governed by *Strickland*. *People v. Griffin*, 178 Ill. 2d 65, 74 (1997). "A defendant who contends that appellate counsel rendered ineffective assistance, *e.g.*, by failing to argue an issue, must show that the failure to raise that issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have been reversed." *Id.*

¶38 *1. Failure to Object to Cross-Examination Regarding Defendant's Tattoos*

¶39 We first consider whether defendant made a substantial showing that trial counsel rendered ineffective assistance by failing to object when the State cross-examined defendant regarding his tear drop tattoos.

¶40 "Trial counsel's decision to object to testimony is generally a matter of trial strategy that is entitled to great deference and does not amount to ineffective assistance." *People v. Smith*, 2012 IL App (1st) 102354, ¶ 71; see also *People v. Fields*, 202 Ill. App. 3d 910, 915 (1990) ("Incompetency of trial counsel is not established by the mere failure to object to evidence."). Here, defendant's argument fails because he cannot show that that counsel's performance was deficient or that he suffered prejudice.

¶41 As to deficient performance, as the State points out and our review of the trial record confirms, trial counsel objected when the State cross-examined defendant about his tear drop tattoos. Moreover, trial counsel's failure to renew his objection as the questioning continued, as well as trial counsel's decision not to conduct any redirect examination on this topic, may have been trial strategy. Trial counsel could have believed that lodging multiple objections or asking additional questions about defendant's tear drop tattoos would have led the jury to believe that evidence regarding defendant's tattoos was especially prejudicial to defendant's case and thus caused the jury to give that evidence undue weight. See, *e.g.*, *People v. Love*, 285 Ill. App. 3d 784, 793 (1996); *Fields*, 202 Ill. App. 3d at 915; *People v. Campbell*, 163 Ill. App. 3d 1023, 1031 (1987) (trial counsel not ineffective for failing to move to strike potentially improper testimony where trial counsel may have made strategic decision to ignore testimony "in order to avoid unduly emphasizing it to the jury").

¶42 In addition, as defendant tacitly concedes in his brief, evidence regarding defendant's tear drop tattoos was admissible to corroborate that he was a gang member, a fact which was central to the State's theory of the case. See, *e.g.*, *People v. Suastegui*, 374 Ill. App. 3d 635, 645 (2007) (photographs of defendant's tattoos admissible to show that he was a member of Spanish Cobras street gang); *People v. James*, 348 Ill. App. 3d 498, 509-10 (2004) (evidence that codefendant had tattoos relevant to show that defendant shot victim in retaliation for injuries inflicted upon defendant by rival gang members). Thus, it is unlikely that the trial court would have sustained any additional objections.

¶43 Defendant nonetheless argues that he was trial counsel's performance was objectively deficient by contending that evidence regarding his tattoos constituted improper other crime

evidence which the State used to suggest to the jury that defendant had a propensity to commit murder. This argument is based upon a flawed factual premise, and we therefore reject it.

¶44 To be sure, "[e]vidence regarding other crimes is generally inadmissible to demonstrate propensity to commit the charged crime." *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). Evidence of a criminal defendant's prior criminal acts is admissible "to prove intent, *modus operandi*, identity, motive, absence of mistake, and any material fact other than propensity that is relevant to the case." *Id.* To be implicated, however, the State must introduce evidence of an actual specific past crime. *People v. Quintero*, 394 Ill. App. 3d 716 (2009), cited by defendant, is illustrative. There, in a murder trial, the State introduced evidence that the defendant had committed a prior murder. *Id.* at 716-17. Here, by contrast, the State did not introduce evidence that the defendant committed any specific prior crime. Thus, defendant's contention that the State's questioning of defendant regarding the meaning of his tattoos constituted improper other crime evidence is factually baseless.

¶45 Defendant also suggests that the State's line of questioning was objectionable pursuant to *People v. Lefler*, 294 Ill. App. 3d 305 (1998). *Lefler* is distinguishable, however, because that case dealt with an attorney's failure to object to the admissibility of bloodhound evidence, which is never admissible in criminal cases. *Id.* at 310; see *People v. Cruz*, 162 Ill. 2d 314, 368 (1994) ("We continue to adhere to the principle that bloodhound evidence is inadmissible to establish any factual proposition in a criminal proceeding in Illinois."). Here, by contrast, evidence regarding defendant's tattoos was admissible to establish his membership in a gang.

¶*46* As to prejudice, we find that the evidence in this case was not closely balanced. Defendant admitted that he fired the gun, albeit purportedly in self-defense. The jury heard and observed Lopez and Medina, both of whom were at Perez's party with defendant, impeached

with testimony they gave before the grand jury which strongly incriminated defendant. Notable among this testimony was Medina's account that defendant asked Perez for the gun and said "Steel Dog, 73rd, Ambrose killer," and Lopez's account that defendant stated after the shooting that he "got him Maldonado," which Lopez explained referred to a member of the Ambrose. The jury was presented with stipulations from Assistant State's Attorneys Barrett and Ogarek describing incriminating testimony Medina provided in his written statement and before the grand jury. Accordingly, even assuming that (1) the State's questioning regarding defendant's tattoos was improper and (2) trial counsel's failure to prevent the jury from hearing this testimony was objectively deficient, defendant cannot show that he suffered prejudice as a result.

¶47 *2. Failure to Present Testimony of Villies and Radovick*

¶48 We next consider whether defendant made a substantial showing that trial counsel rendered ineffective assistance by failing to call Villies and Radovick as witnesses.

¶49 "The decision whether to call particular witnesses is a matter of trial strategy and thus will not ordinarily support an ineffective-assistance-of-counsel claim." *People v. Patterson*, 217 Ill. 2d 407, 442 (2005). Trial counsel's "tactical decisions may be deemed ineffective when they result in counsel's failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense." *People v. King*, 316 Ill. App. 3d 901, 913 (2000). However, trial counsel does not render ineffective assistance by failing to call a witness where "the circumstances show that the individual's testimony would likely have been harmful to the defendant or would have had no probative value to a determination of guilt or innocence." *People v. Ashford*, 121 Ill. 2d 55, 74-75 (1988). Likewise, courts have held that trial counsel does not render ineffective assistance by

declining to call witnesses who would be subject to damaging impeachment during cross-examination. See *People v. Guest*, 166 Ill. 2d 381, 400 (1995).

¶50 Defendant argues that trial counsel was aware that Villies was a potential witness because Villies was questioned by the police and defendant advised trial counsel of Villies' name and address. In response, the State argues that Villies' affidavit does not allege that he informed trial counsel that he could provide exculpatory testimony. In reply, defendant merely reiterates that trial counsel was generally aware that Villies existed and was interviewed by the police.

¶51 Upon review of Villies' affidavit, we find it is clear that he never stated that he told trial counsel that he could provide exculpatory testimony for defendant. This is fatal to defendant's argument. It is axiomatic that trial counsel does not render ineffective assistance by failing to elicit testimony of which he is unaware. See *People v. Humphries*, 257 Ill. App. 3d 1034, 1043 (1994) ("Defendant *** has submitted nothing to indicate that George Gilletly would have testified, or that trial counsel even knew of Gilletly or his potential testimony. *** An attorney cannot be said to be ineffective for failing to call a witness whose identity and potential testimony are, through no fault of the attorney, unknown to him or her."); see also *People v. Newell*, 48 Ill. 2d 382, 386 (1971) (no ineffective assistance of counsel for failing to call impeachment witness where trial counsel did not become aware of potential impeachment evidence until after trial).

¶52 Moreover, Villies' affidavit supports the inference that trial counsel's decision not to call him was the result of reasonable trial strategy. In his affidavit, Villies testified that he was interviewed by the police. During the interview, Villies provided the detectives with a written statement and also created a map. He also testified, however, that his answers to the detectives' questions were coerced. Although Villies did not attest to what he told the detectives, it is

reasonable to infer that he incriminated defendant during his interview, since it makes no sense for the State to coerce exculpatory testimony. Thus, trial counsel likely chose not to call Villies based on a reasonable belief that his testimony would incriminate defendant.

¶53 We next consider whether trial counsel was ineffective for failing to call Radovick. Defendant contends that Radovick's affidavit establishes that he would have been able to provide testimony pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984), showing that Delgado was the aggressor. However, even assuming that Radovick could have offered testimony admissible under *Lynch*, his affidavit fails to establish that trial counsel was aware prior to trial that he could provide such testimony. Accordingly, trial counsel's performance in this respect was not constitutionally deficient.

¶*54* Moreover, Radovick's testimony would have likely had no effect on the outcome at trial. Radovick's affidavit testimony regarding the events immediately preceding Delgado's shooting did not corroborate defendant's testimony because Radovick merely stated that his group left Perez's yard after hearing a car drive down the street, after which he saw some individuals approaching, heard gunshots and hide behind a garage. As such, defendant cannot show that he suffered prejudice by the absence of Radovick's testimony.

¶*55* *3. Failure to Cross-Examine Medina About Whether His Written Statement and Grand Jury Testimony Were Coerced*

¶56 We next consider whether defendant made a substantial showing that trial counsel rendered ineffective assistance by failing to cross-examine Medina about whether his written statement and grand jury testimony were coerced. We find that he did not, for two reasons. First, Medina's declaration in his affidavit that his written statement and grand jury testimony were coerced is contradicted by his grand jury testimony, wherein he testified that his written

statement was not the product any threats or promises by the State. Accordingly, we need not take as true defendant's allegations that Medina's testimony was coerced. See *People v. Barnslater*, 373 Ill. App. 3d 512, 519 (2007) ("[W]e will not credit allegations positively rebutted by the record."); *Pendleton*, 223 Ill. 2d at 458; *People v. Phyfiher*, 361 Ill. App. 3d 881, 883-84 (2005) ("[A]ll well-pleaded facts not rebutted by the record are to be taken as true at stage one and stage two of the post-conviction process.").

¶57 Second, even when construed broadly, defendant's petition and supporting affidavits do not contain any factual allegations that trial counsel was aware of the allegedly coercive circumstances under which Medina's written statement and grand jury testimony were procured. An attorney does not render constitutionally deficient counsel by failing to examine a witness about facts which the attorney, by no fault of his own, was unaware. See *Humphries*, 257 Ill. App. 3d at 1043; *Newell*, 48 Ill. 2d at 386. Accordingly, defendant cannot show that trial counsel's performance was deficient.

¶58 *4. Failure to Conduct Proper Direct Examination of Defendant*

¶59 We next consider whether defendant made a substantial showing that trial counsel rendered ineffective assistance of counsel by failing to conduct a proper direct examination of defendant. Defendant specifically argues that trial counsel was ineffective for failing to ask defendant how far he was from Delgado when he fired the gun. In response, the State argues that defendant cannot show prejudice because he testified about the distance between himself and Delgado during cross-examination.

¶60 Defendant's argument fails because he cannot show prejudice. During cross-examination, defendant testified that he was 10 feet away from Delgado when he fired the gun.

We fail to see how defendant was prejudiced by the State, as opposed to trial counsel, eliciting this testimony from defendant.

¶61 Defendant finally contends that he was prejudiced by the cumulative effect of his purportedly defective direct examination and trial counsel's other alleged errors. We reject this argument. See *People v. Lacy*, 407 Ill. App. 3d 442, 467 (2011) (rejecting claim that cumulative effect of errors which individually do not rise to level of ineffective assistance of counsel collectively constitute ineffective assistance); see also *People v. Sullivan*, 366 Ill. App. 3d 770, 786-87 (2006) (citing *People v. Albanese*, 102 Ill. 2d 54, 82-83 (1984), *abrogated on other grounds in People v. Gacho*, 122 Ill. 2d 221, 262-63 (1988)) ("A new trial is not warranted where a defendant presents a myriad of arguments but fails to demonstrate any single reversible error because '[t]he whole can be no greater than the sum of its parts.' ").

¶62 *5. Ineffective Assistance of Appellate Counsel*

¶63 Finally, we consider whether defendant made a substantial showing that appellate counsel rendered ineffective assistance by failing to raise in defendant's direct appeal the issue of whether trial counsel was ineffective for failing to object during the State's cross-examination of defendant regarding his teardrop tattoos. Since trial counsel was not ineffective for failing to object to this testimony, it follows *a fortiori* that appellate counsel was not ineffective for failing to raise this issue in defendant's direct appeal.

¶64 CONCLUSION

¶65 We find that defendant has failed to make a substantial showing that his constitutional rights to the effective assistance of trial and appellate counsel were violated. Accordingly, we affirm the judgment of the circuit court dismissing defendant's petition.

¶66 Affirmed.