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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Stephenson County.
)	
Plaintiff-Appellee,)	
)	
v.)	Nos. 05-CF-94
)	05-CF-95
)	
HUNDLEY L. FORD, JR.,)	Honorable
)	Michael P. Bald,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Schostok and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court’s judgment denying defendant’s petition for postconviction relief following a third-stage hearing would be affirmed where: (1) defendant’s claim that appellate counsel misquoted the record was waived and, in any event, was not supported by the record; (2) defendant’s allegations that appellate counsel failed to raise certain issues on direct appeal were premised on an issue that was previously addressed on direct appeal and found to lack merit; and (3) defendant’s claims that the trial court abused its discretion by allegedly admitting “perjured” testimony and falsified evidence was waived, and, in any event, was premised on an issue rejected on direct appeal.

¶ 2 Defendant, Hundley L. Ford, Jr., appeals from an order of the circuit court of Stephenson County denying his *pro se* petition for postconviction relief following a third-stage hearing. See 725 ILCS 5/122-1 *et seq.* (West 2010). For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 We have previously set forth the facts of this case in our decision on defendant's direct appeal. See *People v. Ford*, No. 2-07-0678 (2009) (unpublished order under Supreme Court Rule 23). We restate them here, along with any additional relevant facts, only as necessary to place defendant's postconviction claims in context.

¶ 5 In August 2006, defendant was charged by amended information with one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2004)), two counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2004)), one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2004)), and seven counts of attempted first-degree murder (720 ILCS 5/8-4, 9-1(a)(1) (West 2004)). The charges stemmed from a shooting incident involving defendant, Wanda Ford (defendant's estranged wife), Jacqueline McAfee (Wanda's sister), and Alonzo Weekly (McAfee's boyfriend). The matter proceeded to a jury trial in January 2007.

¶ 6 At defendant's trial, the State presented evidence that Wanda and defendant are the parents of two children. The shooting occurred on March 28, 2005, when Wanda went to pick up the children from defendant's apartment. Wanda gave varying accounts of the circumstances surrounding the shooting, including the number of gunshots fired. At defendant's trial, Wanda testified on direct examination that she became upset when she discovered that defendant did not have the children ready when she came to pick them up. As Wanda prepared the children to leave, she observed defendant remove a gun from a pair of pants on the living room floor. At

that point, Wanda “charged” at defendant and a physical struggle ensued. The struggle eventually moved to the bedroom where, according to Wanda, defendant threatened to kill her. Wanda testified that as she and defendant continued to wrestle, they fell onto a box spring and the gun discharged. Wanda ran out of the apartment after she discovered she had been struck by a bullet. Once outside, Wanda heard another gunshot. She proceeded to an awaiting car in which McAfee was the driver and Weekly was a passenger. Weekly opened the rear door from inside the car, and Wanda entered head first. Wanda then noticed defendant exiting the apartment. The next thing Wanda remembered was that the car had disappeared and she was lying in the street. Wanda then heard defendant call her name followed by a “click.” Wanda testified that she “play[ed] dead” as she observed defendant flee the scene. Wanda also heard Weekly yell that he had been shot, and she saw the car with McAfee and Weekly crash into a nearby house.

¶ 7 Wanda further testified that she spoke to Officer Jennifer Manus of the Freeport police department on March 30, 2005. After being shown a transcript of the audio-taped interview with Manus, Wanda stated that she did not recall making the statements on the transcript. According to Wanda, Manus did not write down her answers correctly. Wanda did admit to testifying at a preliminary hearing in April 2005. She identified State’s exhibit PH13 as a hand-drawn diagram of defendant’s apartment used at the preliminary hearing. At the preliminary hearing, Wanda testified that the gun discharged four times in defendant’s apartment. The State marked exhibit PH13 where Wanda indicated those gunshots took place—two while Wanda was in the bedroom, one as she attempted to grab her daughter in the hallway outside the bedroom, and one as Wanda was descending the stairs on her way out of the apartment. Wanda also indicated at the preliminary hearing that two gunshots were fired when she was outside. Exhibit PH13 was

admitted at defendant's trial without objection. At defendant's trial, Wanda testified that she did not recall testifying at the preliminary hearing that four shots were fired inside the apartment. In addition, Wanda did not recall the State marking exhibit PH13 with the location of the gunshots. Nevertheless, after reviewing a portion of the transcript of the preliminary hearing, Wanda testified that two shots were fired while she and defendant were wrestling in the bedroom and that she got up after being hit by the second shot. Upon further questioning at trial, Wanda testified that there were two or three shots fired in the apartment: two in the bedroom and one while she was going down the stairs as she ran out the door. An audiotape of Wanda's preliminary hearing testimony was played for the jury.

¶ 8 On cross-examination, Wanda testified that at the beginning of the investigation, she lied about two aspects of the shooting to "get back" at defendant. Wanda originally related that (1) her hand was not on the gun when she and defendant were struggling in the apartment and (2) defendant shot at her as she reached for her daughter in the hallway. At defendant's trial, however, Wanda indicated that both she and defendant had their hands on the gun while they wrestled and that defendant did not discharge the gun as she reached for her daughter. Nevertheless, Wanda acknowledged that everything else she said at the preliminary hearing was true, and she reiterated that the gun discharged twice in the bedroom. Moreover, Wanda testified that she was still in love with defendant, she has forgiven him for his actions on the night of the shooting, and she would like to get back together with him.

¶ 9 Officer Manus testified that she interviewed Wanda shortly after the shooting. During that interview, Wanda told Manus that she was struck by the second gunshot as she was getting off the bed. Wanda stated that defendant fired a third shot as she was fleeing and two more shots by the time she reached McAfee's car. The tape of Manus's interview with Wanda was played

for the jury. Officer Jeff Mastroianni and Jean Thompson, a crime scene investigator with the Illinois State Police, assisted in processing defendant's apartment after the shooting. Mastroianni noticed what appeared to be bullet holes in the front door to defendant's apartment. Thompson testified that one projectile was recovered from inside defendant's apartment and two projectiles were recovered from McAfee's car. Manus related that the projectile recovered from inside defendant's apartment was found between the walls separating the bedroom from the hallway. Thompson also testified that she searched for a projectile in front of defendant's residence, but did not find one. She related, however, that, based on her crime scene experience, not all bullets related to a particular crime scene are recovered. Mastroianni also testified that he has been to crime scenes where the police are unable to recover bullets.

¶ 10 Defendant testified that the gun used in the shooting had only four bullets. He acknowledged that the gun "went off" once as he and Wanda were wrestling in the apartment. Defendant further testified that he discharged the gun once as he was exiting the apartment. He testified that the last two shots were fired outside of the apartment when he "panicked," raised his gun, and discharged the weapon towards the car with McAfee and Weekly.

¶ 11 Following closing arguments, the jurors began deliberations. The jury returned verdicts finding defendant guilty of aggravated battery with a firearm, both counts of aggravated discharge of a firearm, unlawful possession of a weapon by a felon, and two counts of attempted first-degree murder. After denying defendant's motion for a new trial, the court sentenced defendant to concurrent terms of imprisonment of 35 years for attempted first-degree murder, 25 years for aggravated battery of a firearm, 12 years for unlawful use of a weapon by a felon, and 10 years for aggravated discharge of a firearm. Following the denial of his motion to reconsider sentence, defendant filed a notice of appeal.

¶ 12 On direct appeal, we affirmed defendant's convictions and sentences. *People v. Ford*, No. 2-07-0678 (2009) (unpublished order under Supreme Court Rule 23). Relevant here, one of the issues defendant raised on direct appeal was that the State's "repeated use of Wanda Ford's prior claims that three shots were fired by the defendant inside the apartment, which its own police and forensic witnesses refuted, denied defendant due process." Specifically, defendant alleged that Wanda's prior claims that three shots were fired inside his apartment were contradicted by the State's witnesses who testified that only one bullet was recovered from inside defendant's apartment. As a result, defendant argued that the State knowingly used false evidence to obtain his convictions, depriving him of a fair trial. Moreover, defendant suggested that the fact that only one projectile was recovered from his apartment supported his theory of the case, *i.e.*, he did not intentionally discharge the gun, but rather the gun inexplicably fired once while he and Wanda were wrestling over control of the firearm in the bedroom.

¶ 13 In rejecting defendant's claim, we noted that Wanda gave various, conflicting accounts of the number of shots discharged in defendant's apartment. *People v. Ford*, No. 2-07-0678 (2009) (unpublished order under Supreme Court Rule 23). Because these accounts included a version that defendant discharged the gun three times in the apartment, we reasoned that the State's repeated reference to a three-gunshot theory could not be categorized as false. *People v. Ford*, No. 2-07-0678 (2009) (unpublished order under Supreme Court Rule 23). Rather, it constituted "a reasonable inference from the evidence presented at trial." *People v. Ford*, No. 2-07-0678 (2009) (unpublished order under Supreme Court Rule 23). In so holding, we noted that defense counsel acknowledged at trial that the number of shots fired in the bedroom was a "gray area." *People v. Ford*, No. 2-07-0678 (2009) (unpublished order under Supreme Court Rule 23). We also noted that while the police only recovered one bullet from defendant's apartment, there was

evidence that not every projectile discharged at a crime scene is always found. *People v. Ford*, No. 2-07-0678 (2009) (unpublished order under Supreme Court Rule 23). Thereafter, defendant filed a petition for leave to appeal which was denied by the supreme court. *People v. Ford*, 236 Ill. 2d 518 (2010).

¶ 14 On or about February 16, 2010, defendant filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). In his petition, defendant raised the following four claims: (1) he was denied due process and equal protection because the State fabricated gunshot evidence and knowingly used this perjured testimony to secure the charges and convictions against him; (2) he was denied due process and equal protection because the trial court abused its discretion by allowing the State to “mechanistically apply the Rules of Impeachment” to knowingly present to the jury as substantive evidence the gunshot evidence fabricated by the State; (3) he was denied the right to effective assistance of trial counsel because his attorney “failed to put the State’s Case-in-Chief to any meaningful adversarial testing to uncover” the gunshot evidence fabricated and knowingly used by the State to secure the charges against him and his convictions; and (4) he was denied the right to effective assistance of appellate counsel because appellate counsel failed to raise both “a Highly Meritorious Prosecutorial Misconduct issue” and the “meritorious issues” set forth in the first three sections of his postconviction petition.

¶ 15 On March 18, 2010, the trial court summarily dismissed defendant’s petition. Subsequently, the trial court granted defendant’s amended motion to reconsider and appointed counsel to represent defendant. Thereafter, defendant filed a motion to dismiss counsel and proceed *pro se*, which the trial court granted. The State then filed a motion to dismiss the

postconviction petition. The trial court denied the State's motion, and the matter proceeded to a third-stage hearing.

¶ 16 No oral testimony was presented at the third-stage hearing, but both defendant and the State argued their respective positions. Relevant here, defendant argued that the locations of the gunshots shown on exhibit PH13 were falsified. Defendant focused on the bedroom area, emphasizing that because only one bullet had been recovered from the bedroom, the physical evidence established that only one gunshot had been fired in that room. Defendant therefore claimed that exhibit PH13, which showed four gunshot locations in the whole apartment, including three in the bedroom area, was falsified. Defendant added that the State perpetuated this fraud by introducing Wanda's perjured testimony from the preliminary hearing. Defendant also claimed that the argument he was making was different from the issues raised on direct appeal because he was not focusing on Wanda's testimony, but rather on exhibit PH13.

¶ 17 On June 24, 2011, the trial court entered an order denying defendant's petition for postconviction relief. Initially, the court rejected defendant's claim that exhibit PH13 was a falsified document. The court noted that the locations of the gunshots depicted on the exhibit were based in part on Wanda's testimony, and, therefore, the State's position was a reasonable inference based on the evidence presented at trial. The court also found that defendant's claim that he was denied due process and equal protection because the State fabricated gunshot evidence and knowingly used this perjured testimony to secure the charges and convictions against him was already raised on direct appeal and therefore barred by *res judicata*. Next, the court rejected defendant's claim that the court allowed the State to misapply the rules of impeachment and knowingly present to the jury as substantive evidence the fabricated gunshot evidence. The court interpreted this allegation to be a claim that the forensic evidence presented

at trial refuted the State's theory regarding the number of gunshots fired in the apartment. The court noted, however, that the State presented evidence that not every projectile discharged at a crime scene is recovered. In addition, the court found that this issue was already raised on direct appeal and therefore barred by *res judicata*.

¶ 18 Likewise, the trial court rejected defendant's claims of ineffective assistance of counsel. The court interpreted defendant's claim of ineffective assistance of trial counsel to be that his attorney failed to conduct a pre-trial investigation of the allegedly fabricated gunshot evidence. While acknowledging that the failure to adequately prepare for trial could form the basis for an ineffective assistance claim, the court determined that defendant failed to show any prejudice. In support, the court reasoned that there was pre-trial testimony and statements from Wanda that would support the State's position and defendant presented no additional evidence at the third-stage hearing to support his allegation that the State fabricated evidence about the number of gunshots fired. Finally, the court found defendant's claim of ineffective assistance of appellate counsel to be without merit because the issues that appellate counsel allegedly failed to raise were, in fact, raised on direct appeal.

¶ 19 Subsequently, defendant filed a motion to reconsider the trial court's ruling. The trial court refused to entertain defendant's motion, finding that there were no "provisions within the law to have a reconsideration of that." Defendant appealed the ruling to this court. We found that defendant was entitled to move for reconsideration pursuant to Illinois Supreme Court Rule 606(b) (eff. March 20, 2009). *People v. Ford*, 2012 IL App (2d) 110908-U, ¶ 3. Given the pendency of defendant's motion to reconsider in the trial court, we determined that we lacked jurisdiction over the appeal. *People v. Ford*, 2012 IL App (2d) 110908-U, ¶¶ 3-4. Nevertheless, we noted that the effect of our dismissal was to return the matter to the trial court to assess

defendant's motion to reconsider. *People v. Ford*, 2012 IL App (2d) 110908-U, ¶ 4. Upon remand, the trial court denied the motion to reconsider, after which defendant filed a timely notice of appeal.

¶ 20

II. ANALYSIS

¶ 21 A postconviction petition does not act as a direct appeal of the underlying judgment. *People v. Johnson*, 206 Ill. 2d 348, 356 (2002). Rather, it is a collateral action, limited to federal or state constitutional claims that were not raised on direct appeal and that could not have been raised on direct appeal. *Johnson*, 206 Ill. 2d at 356. As a result, issues that were raised and decided on direct appeal are barred by *res judicata* while issues that could have been raised but were not are considered waived. *Johnson*, 206 Ill. 2d at 356.

¶ 22 Postconviction proceedings are governed by the three-stage process set forth in the Act. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Pendleton*, 223 Ill. 2d 458, 471-73 (2006). In this case, defendant's petition advanced to the third-stage of the postconviction process. At the third stage, the trial court conducts a hearing. See 725 ILCS 5/122-6 (West 2010); *Pendleton*, 223 Ill. 2d at 472-73. 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 the third-stage hearing, the trial court "may receive proof by affidavit, depositions, oral testimony, or other evidence." 725 ILCS 5/122-6 (West 2010).

¶ 23 Where fact-finding and credibility determinations are made during a third-stage hearing, the reviewing court will not reverse a trial 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. Gonzalez*, 407 Ill. App. 3d 1026, 1034 (2011). However, if no new evidence is presented at the third-stage hearing and the issues presented are pure questions of

law, a reviewing court applies a *de novo* standard of review “unless the judge presiding over 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; see also *People v. English*, 2013 IL 112890, ¶ 24. In this case, the parties did not present any new evidence at the third-stage hearing. However, the judge who presided over defendant’s postconviction proceeding also presided over defendant’s underlying trial and therefore had some “special expertise or familiarity” with this case. Therefore, to the extent that the trial court’s familiarity with the underlying trial had some bearing upon the disposition of defendant’s postconviction petition, we will review its rulings for manifest error. In contrast, where the trial court’s familiarity with the case had no bearing upon the disposition of defendant’s petition, we will review the issues *de novo*. With these principles in mind, we turn to defendant’s claims of error.

¶ 24 In this appeal, defendant, a *pro se* litigant, raises five issues arising from the trial court’s denial of his postconviction petition. The first four issues are couched as claims of ineffective assistance of appellate counsel. To establish that appellate counsel was ineffective, defendant must satisfy the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 685-87 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 536-37 (1984). See *English*, 2013 IL 112890, ¶ 33. Under the *Strickland* standard, a defendant must show both that (1) counsel’s performance fell below an objective standard of reasonableness and (2) this substandard performance prejudiced the defendant. *People v. Johnson*, 205 Ill. 2d 381, 399 (2002). To establish that appellate counsel’s performance fell below an objective standard of reasonableness, the defendant must overcome the strong presumption that, under the circumstances, the challenged action or inaction was the product of sound appellate strategy. See

People v. Barrow, 133 Ill. 2d 226, 247 (1989). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's errors, the appeal would have succeeded. *English*, 2013 IL 112890, ¶ 33. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *People v. King*, 316 Ill. App. 3d 901, 913 (2000). Because a defendant's failure to satisfy either part of the *Strickland* test will defeat a claim of ineffective assistance, a court is not required to address both prongs of the inquiry if the defendant makes an insufficient showing as to one. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 25 Defendant first claims that the trial court erred in denying his postconviction petition because the evidence adduced at the third-stage hearing established that his attorney on direct appeal "briefed a knowing use of perjured testimony regarding Wanda Ford, but misquoted the record." In support of this claim, defendant cites what he categorizes as two inaccuracies in the brief filed by appellate counsel in his direct appeal. Specifically, defendant asserts that, on direct appeal, appellate counsel argued that he was denied due process because the State's "repeated use of Wanda Ford's prior claim that *three* shots were fired by the defendant inside the apartment" was refuted by the State's own witnesses. (Emphasis in original.) According to defendant, appellate counsel's representation of the State advancing a three-gunshot theory was inaccurate because the State impeached Wanda with her testimony from the preliminary hearing at which she indicated that *four* shots were fired inside the apartment. Defendant also asserts that appellate counsel misquoted the record with respect to Manus's testimony. On direct appeal, appellate counsel acknowledged that Manus found one bullet in the wall between the bedroom and the hallway, but added that "[Manus] found no other bullets or bullet holes inside the

apartment.” According to defendant, appellate counsel’s latter representation was inaccurate because there was evidence of a bullet hole in the front door of his apartment.

¶ 26 Defendant claims that appellate counsel’s failure to provide an accurate account of the record rendered this court unable to make an “informed decision based on the actual facts.” Defendant contends that an accurate depiction of the gunshot locations inside the apartment was “vital” to his theory of defense at trial that the shooting was not intentional. Defendant suggests that appellate counsel’s conduct was deficient and that had appellate counsel provided this court with an accurate account of the record, “it would be entirely reasonable to believe that the outcome on direct appeal would more likely than not have been in defendant’s favor.”

¶ 27 Initially, we note that this issue is not properly before us. Defendant did not raise this issue in the postconviction petition he filed with the trial court. The Act provides that “[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended [postconviction] petition is waived.” 725 ILCS 5/122-3 (West 2010). Moreover, a claim not raised in the original or amended postconviction petition cannot be raised for the first time on appeal. *Pendleton*, 223 Ill. 2d at 475; *People v. Jones*, 213 Ill. 2d 498, 505 (2004).

¶ 28 Even absent waiver, however, we disagree with defendant’s claim that appellate counsel misquoted the record in his brief on appeal. First, appellate counsel’s representation that the State repeatedly used Wanda’s prior claim that three shots were fired by defendant inside the apartment is grounded in the evidence presented at trial. As noted in our order in defendant’s direct appeal, Wanda provided various, conflicting accounts regarding the number of shots fired inside defendant’s apartment. *People v. Ford*, No. 2—07—0678 (2009) (unpublished order under Supreme Court Rule 23). Among these accounts was evidence from the preliminary hearing that the gun discharged four times in the apartment. However, there was also ample

evidence to support appellate counsel's allegation that the State repeatedly used Wanda's claim that three shots were fired by defendant inside the apartment. In this regard, we note that Wanda initially testified that two shots were fired in the apartment—one in the bedroom and one as she was fleeing the apartment. The State later directed Wanda to her testimony at the preliminary hearing, where Wanda indicated that the gun discharged twice while Wanda was in the bedroom, once as she attempted to grab her daughter in the hallway outside the bedroom, and once as Wanda was descending the stairs on her way out of the apartment. Wanda testified that she could not recall her testimony at the preliminary hearing. She later related, however, that she lied at the preliminary hearing when she testified that defendant fired the gun as she attempted to grab her daughter. In other words, Wanda indicated that the gun discharged three times in the apartment. Moreover, upon further questioning at trial, Wanda testified that there were two or three shots fired in the apartment: two in the bedroom and one while she was going down the stairs as she ran out the door. Further, Manus interviewed Wanda shortly after the shooting. The State elicited testimony from Manus that, during that interview, Wanda referenced three gunshots in the apartment. Audio of Manus's interview with Wanda was played in open court. This evidence supports appellate counsel's argument that the State repeatedly used Wanda's prior claim that *three* shots were fired by the defendant inside the apartment.

¶ 29 Likewise, we disagree that appellate counsel misquoted Manus's testimony. Although the police located a bullet hole in the front door of defendant's apartment, defendant does not cite any portion of the record where *Manus herself* testified about the bullet hole in the front door. Thus, appellate counsel's statement that "[Manus] found no other bullets or bullet holes inside the apartment" was an accurate representation of her testimony. In short, the record does not support defendant's claim that appellate counsel misquoted the record. Thus, defendant has

failed to establish that appellate counsel's representations were not the product of sound appellate strategy or that they resulted in prejudice. Thus, his first claim of ineffective assistance of appellate counsel lacks merit.

¶ 30 Defendant's next three claims of ineffective assistance involve allegations that appellate counsel "failed to brief" certain issues on appeal. A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must show that the failure to raise the issue was objectively unreasonable and that this decision prejudiced the defendant. *Johnson*, 205 Ill. 2d at 405-06. As a general rule, appellate counsel's choices concerning which issues to pursue are entitled to substantial deference. *Johnson*, 205 Ill. 2d at 406. Appellate counsel need not brief every conceivable issue and may refrain from developing nonmeritorious issues without violating *Strickland* since a defendant suffers no prejudice unless the underlying issue is meritorious. *Johnson*, 205 Ill. 2d at 406; *People v. Childress*, 191 Ill. 2d 168, 175 (2000).

¶ 31 Defendant first contends that the trial court erred in denying his postconviction petition because the evidence adduced at the third-stage hearing established that appellate counsel "failed to brief for review that the prosecution fabricated evidence in [exhibit] PH13 and [then] knowingly used" the fabricated evidence to secure the charges and convictions against defendant. Specifically, defendant contends that the State's evidence showed that only two gunshots were discharged in his apartment—one in the bedroom and one at the front door. Nevertheless, defendant argues, the State "fraudulently drew *four* gunshot locations [on exhibit PH13], represented as 3 in [the] bedroom area and the fourth at the front door to support their theory because the real evidence *did not* [support the State's theory]." (Emphasis in original.) Defendant further contends that the State's "misconduct" transformed "a [*sic*] accident into a [*sic*] intentional act, and [constituted] a flagrant violation of due process."

¶ 32 The trial court rejected this claim, in part, on *res judicata* grounds. See *Johnson*, 206 Ill. 2d at 356 (noting that issues that were raised and decided on direct appeal are barred by *res judicata*). Nevertheless, defendant suggests that this argument is different from the issue raised on direct appeal because appellate counsel focused on Wanda's testimony whereas he emphasizes exhibit PH13. Moreover, defendant contends that he suffered prejudice as a result of appellate counsel's failure to raise the issue since "the record demonstrates that the prosecution falsified PH13 by drawing *four gunshot locations*" (emphasis in original) and then knowingly used this fraudulent evidence to file charges against him and ultimately secure his convictions. We conclude that the trial court's ruling with respect to this issue is not manifestly erroneous.

¶ 33 Defendant essentially maintains that the State fabricated the theory that he discharged the gun four times in his apartment and then supported this theory by presenting to the jury exhibit PH13 and Wanda's preliminary hearing testimony. Defendant asserts, however, that this theory was refuted by the State's own evidence at trial. Thus, defendant reasons, the State knowingly used false testimony to secure the charges and convictions against him. However, we rejected an almost identical argument on direct appeal. As noted above, on direct appeal, appellate counsel argued that defendant was denied due process and a fair trial because the State repeatedly referred to Wanda's claim that three gunshots were fired inside defendant's apartment, knowing that such evidence was false. We rejected this argument, finding that the State's position was a reasonable inference from the evidence presented at trial and, therefore, the record did not support defendant's claim that the State knowingly used false evidence to obtain his convictions. *People v. Ford*, 2-07-0678 (2009) (unpublished order under Supreme Court Rule 23). We reasoned that Wanda gave various, conflicting accounts of the number of shots fired. Given the conflicting testimony Wanda gave regarding the number of shots fired in defendant's apartment,

we were unable to categorize as false a theory that defendant discharged the gun three times in his apartment. We also rejected appellate counsel's claim that the forensic evidence presented at defendant's trial refuted a three-shot theory. We acknowledged that the police recovered only one bullet from the apartment and observed only one other bullet hole at defendant's front door. We noted, however, that the State presented evidence that the police are not always able to recover every projectile discharged at a crime scene.

¶ 34 As noted above, defendant insists that the claim he now presents differs from the issue raised on direct appeal because he focuses on exhibit PH13 whereas appellate counsel focused on Wanda's testimony. Nevertheless, the premise underlying defendant's claim was raised by appellate counsel and considered by this court on direct appeal. Like appellate counsel in the direct appeal, defendant suggests that the evidence supports the theory that only two gunshots were fired in his apartment—one in the bedroom area and one near the front door. Thus, defendant reasons, the State fabricated any theory that more than two gunshots were fired in the apartment. We rejected this theory when presented by appellate counsel, who argued that the State's theory that three gunshots were fired in the apartment had been fabricated. We find this argument no more persuasive in the context advanced by defendant in this appeal, *i.e.*, that the State's theory that four gunshots were fired in the apartment, as depicted in exhibit PH13, had been fabricated. As the trial court correctly pointed out, exhibit PH13 was based, in part, on Wanda's testimony. Thus, defendant's claim that the State fabricated this evidence is refuted by the record. Moreover, defendant points to no evidence developed at the third-stage hearing that supports his theory that the State fabricated evidence that four gunshots were fired. Accordingly, we hold that defendant's claim that appellate counsel "failed to brief for review that the prosecution fabricated evidence in [exhibit] PH13 and [then] knowingly used" the fabricated

evidence to secure the charges and convictions against defendant lacks merit. Thus, defendant has failed to show that the dismissal of his petition on this basis was manifest error.

¶ 35 Defendant's next two issues focus on allegations that appellate counsel was ineffective for "failing to brief" two claims of ineffective assistance of trial counsel. Specifically, defendant asserts that the trial court erred in denying his postconviction petition because appellate counsel did not challenge on direct appeal the ineffectiveness of trial counsel for: (1) "failing to challenge that the prosecution knowingly used Wanda Ford's perjured testimony that four shots were fired inside the apartment which it's [*sic*] own evidence refuted" and (2) "fail[ing] to challenge that the prosecution fabricated four gunshot locations in PH13 and knowingly used it to obtain informations [*sic*] and conviction." These allegations, which are merely reiterations of defendant's principal claim of ineffective assistance of appellate counsel, lack merit. As noted above, the four gunshot locations depicted on exhibit PH13 were based on Wanda's testimony at the preliminary hearing. Further, while the police recovered only one bullet from the apartment and observed only one other bullet hole at defendant's front door, the State presented evidence that the police are not always able to recover every projectile discharged at a crime scene. Thus, defendant's claim that the State fabricated evidence that four gunshots were discharged in his apartment is refuted by the record. As a result, these claims lack merit. Given that these issues are not meritorious, defendant suffered no prejudice. *Johnson*, 205 Ill. 2d at 406; *Childress*, 191 Ill. 2d at 175. Accordingly, defendant has failed to show that the dismissal of his petition on this basis was manifest error.

¶ 36 Defendant's final assignment of error is that the trial court improperly denied his postconviction petition because the evidence adduced at the third-stage hearing established that the trial court abused its discretion by (1) knowingly admitting Wanda's "perjured" testimony at

the preliminary hearing that there were four gunshot locations in the apartment and (2) knowingly admitting the falsified document (PH13) on which the prosecution drew four gunshot locations in support of their theory because the physical evidence did not support their theory. These arguments are directed at the conduct of the trial court. As such, they could have been raised on direct appeal. Defendant's failure to do so results in waiver. *Johnson*, 206 Ill. 2d at 356. Even absent waiver, however, we note that these issues are merely restatements of defendant's underlying claim that the State knowingly used fabricated evidence to secure the charges and convictions against him, an issue raised and decided on direct appeal. We previously found that they lack merit, and we find them no more persuasive in the context presented here.

¶ 37

III. CONCLUSION

¶ 38 For the reasons set forth above, we affirm the judgment of the circuit court of Stephenson County, which denied defendant's postconviction petition following a third-stage hearing. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 39 Affirmed.