SECOND DIVISION
June 7, 2016

No. 13-0010

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Respondent-Appellee,	)	
	)	
v.	)	05 CR 9216 (02)
	)	
RUSSEL ARMFIELD,	)	
	)	Honorable Lawrence Edward Flood
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing petitioner's second stage postconviction petition. Petitioner failed to make a substantial showing of constitutional violations. Petitioner failed to establish that he was prejudiced by counsel's alleged deficient performance. Postconviction counsel provided reasonable assistance to petitioner.

¶ 2 Petitioner Russell Armfield appeals from a judgment of the Circuit Court of Cook County denying his postconviction petition at the second stage proceedings. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Following a jury trial, petitioner was charged and convicted of first degree murder and sentenced to 33 years in the Illinois Department of Corrections.[1] Petitioner's conviction and sentence were affirmed on direct appeal. *People v. Russell Armfield and Kimothy Randall*, No. 1-07-2902 & No. 1-07-2903 (2009). The factual background underlying petitioner's conviction was recounted in our previous decision on direct appeal. *Id.*

¶ 5 In relevant part, the following evidence was presented at petitioner's trial. Al Copeland was shot and killed on August 17, 2004. Calshaun Vinson testified that he was a friend of Al Copeland and also knew petitioner and codefendants Kimothy Randall and Tyrene Nelson. At about 9 p.m., Vinson saw Copeland driving with his girlfriend and their children near 47th Street and Cicero Avenue. Vinson also saw a car driven by a woman he knew as "Ride" and occupied by petitioner and codefendants. A short time later, Ride's vehicle stopped, petitioner and Nelson got out and ran towards 46th and Leclaire Avenue. Vinson heard several gunshots from that direction and saw petitioner and Nelson firing at Copeland's vehicle. Vinson spoke with the police later that night, although he did not recall what he told the officers.

¶ 6 Vinson admitted that he was arrested on March 19, 2005, on a weapons charge that was dismissed at the preliminary hearing. Following his arrest, he spoke with the police about Copeland's murder. Vinson denied that he had been promised anything regarding his weapons charge in exchange for his cooperation. On cross-examination, Vinson stated that he had not spoken with the police about the instant case between the night of his murder and his own arrest.

¶ 7 Kawana Jenkins testified that she was Copeland's girlfriend. At about 9 p.m. on august 7, 2004, Copeland dropped her and her children off at her home near 46th and Leclair. Copeland

[1] Codefendant Kimothy Randall was tried jointly with defendant, while codefendant Tyrene Nelson was tried simultaneously but by a separate jury. Both codefendants were also convicted of first degree murder.

had driven a short distance when a man flagged him down. When Copeland stopped, Jenkins heard gunshots and saw Copeland speed away. When Copeland's vehicle reached the corner, another man fired several shots at Copeland's car and ran into a parked car. Jenkins found Copeland slumped over the steering wheel, motionless. Copeland died before he reached the hospital. The cause of death was determined to be from five gunshot wounds.

¶ 8 Ayeshia Floyd testified that she was also known as "Ride" and she knew petitioner and codefendants. Floyd testified she was riding aimlessly around in her vehicle, smoking marijuana with petitioner and the codefendants. She specifically denied being in the area of 45th and Leclaire until late in the evening. However, Floyd could not recall when the group returned because she was under the influence of marijuana.

¶ 9 Floyd admitted that she spoke to police in March 2005 but denied telling them that codefendant Randall saw a man "had gotten into it with" earlier in the day and told petitioner and Nelson to "take care of business." Floyd denied telling police that Nelson and petitioner later left her car and walked toward Leclaire and that she heard gunshots from that direction. She also denied telling police that petitioner and Nelson were carrying guns when they returned to her car. Floyd also denied and could not recall that she so testified before the grand jury. Floyd also testified that during her police interview, she was threatened with imprisonment for murder on a pending narcotics case if she did not cooperate.

¶ 10 The parties stipulated that Floyd's testimony before the grand jury was substantially as she denied at trial, and also that she denied in that that testimony that she had been coerced or promised anything in exchange for her testimony. Floyd's claim that she was coerced was rebutted by Detective Walter Chudzik and Detective Michael O'Donnell who testified that they did not threaten or promise her anything in exchange for her statement. Former Assistant States

Attorney Bryant Hofeld testified that he met with Floyd at the police station but did not take a statement from her because she was taken directly to the grand jury. Hofeld testified that he did not threaten or promise Floyd anything in exchange for her testimony, nor hear anyone else make such a threat or promise, nor did Floyd tell him that she had been threatened.

¶ 11 Willie Williams testified that about 6:00 p.m. on August 17, 2004, he was walking near 45th and Lavergne Avenue when he saw Nelson pushing Randall in a wheelchair. As a gray vehicle and another vehicle passed them, Nelson handed Randall a pistol which Randall fired at the vehicles. Williams did not report the shooting to the police but did speak to them within a week of the incident. Williams testified that petitioner was also in the area near an alley. Williams admitted that he gave a statement at the police station in April 2005 where he told the police that he thought petitioner was acting as a lookout. Williams denied using heroin at the time of the shooting or during his statement to police, but admitted he had taken heroin on the day of trial.

¶ 12 Yakirah Robinson testified that, at about 6 p.m. on August 17, 2004, she saw petitioner and codefendants as she was driving near 45th and Lavergne with her fiancé and 1-year-old daughter in the car. She saw Nelson pushing Randall in his wheelchair, while petitioner was standing nearby. Robinson heard several gunshots and drove away. She went around the corner, parked her car, got out and saw that her car had been shot on the passenger side near her baby's car seat. She ran with her baby into her grandmother's house. When she came back, she saw that Al Copeland was talking with the police because his car had also been shot. Robinson made a police report at that time, but later signed a refusal to prosecute.

¶ 13 Sinquis Prosper, codefendant Randall's sister, testified that on August 17, 2004, between 8:00 and 9:00 p.m., she received a call from Randall, requesting that she get a hoody and two

"pee bags" that he needed for his medical condition. Prosper retrieved the items and brought them out front to Randall, who was sitting in his girlfriend's car outside of their grandmother's house. Randall's girlfriend, also known as "Ride," codefendant Nelson, and petitioner were with Randall in the car.

¶ 14 At trial, Prosper testified that there was nothing unusual about the hoody that she gave to her brother. She also testified that about an hour later, she stepped outside of her house with her neighbor Chris, when she heard a car crash, but denied going down the street to check it out. She did not recall whether Chris got shot. Prosper admitted that she spoke with the police and ASA Brian Hofeld in March 2005. Prosper admitted that she told them that: they were hard, heavy objects in the hoody that she gave to her brother; she and her neighbor went down the street after the crash; that she helped a woman pull a boy out of the car; that the boy had blood on him and she thought he had been shot; that somebody started shooting in their direction while she and Chris were by the car, and Chris got shot in the leg; and that Randall later asked her if Chris got shot. Prosper testified that her grandmother was present when she spoke with the police and ASA Hofeld and that both of them signed her handwritten statement that memorialized her interview with them. Prosper testified at trial that everything she told the police and ASA Hofeld other than giving Randall his hoodie and pee bags was a lie.

¶ 15 Prosper also admitted that she testified before the grand jury in March 2005. Her testimony before the grand jury was consistent with her statements made to the police. Prosper claimed that she lied before the grand jury because the ASA and the police threatened her that if she did not cooperate with them she would go to jail. ASA Hofeld and Michelle Papa testified that nobody threatened Prosper.

¶ 16 The State introduced testimony regarding another shooting that involved codefendant Nelson. Tykima Walker testified that she was driving to the county jail on March 18, 2005, to visit her boyfriend Gregory Wright. She noticed she was being followed by a Pontiac Grand Prix containing Nelson and three other men. Nelson and one of the other men fired shots at her vehicle.

¶ 17 Officer Frank Ramaglia testified that on the early afternoon of March 18, 2005, he responded to call of a man with a gun in a Pontiac Grand Prix in the vicinity of the county jail. When he arrived, Officer Ramaglia saw the sole occupant of the car with a submachine gun at his feet. Following the occupant's arrest, a 9 millimeter and .40 caliber pistols were also recovered from the car. Forensic scientist Melissa Nally, who processed the weapons, testified that she compared tests shots from the guns recovered from the Grand Prix to the fired evidence from Copeland's murder scene. The 9 millimeter cartridge cases from Copeland's murder scene were fired from the 9 millimeter pistol recovered from the Grand Prix.

¶ 18 The jury found petitioner guilty of first degree murder. The trial court sentenced petitioner to 33 years of imprisonment. Petitioner's convictions and sentence were affirmed on direct appeal. *People v. Russell Armfield and Kimothy Randall,* No. 1-07-2902 & No. 1-07-2903 (2009).

¶ 19 On March 23, 2010, a typewritten petition was filed bearing petitioner's name and that of codefendant Randall. Petitioner raised numerous allegations of ineffective assistance of counsel, claims of trial court errors and prosecutorial misconduct. On March 29, 2010, petitioner filed another handwritten post-conviction petition raising various claims of ineffective assistance of trial counsel and appellate counsel, claims of trial court's errors, and prosecutorial misconduct.

¶ 20 On July 27, 2011, postconviction appointed counsel filed a certificate indicating his compliance with Supreme Court Rule 651(c). Postconviction counsel did not amend or supplement the *pro se* pleadings. On August 22, 2012, the State filed a motion to dismiss petitioner's postconviction petition. Following the hearing on the State's motion to dismiss, the trial court granted the State's motion denying petitioner's claims. This appeal follows.

¶ 21 ANALYSIS

¶ 22 The Illinois Post–Conviction Hearing Act (Act) provides a process by which a criminal defendant may challenge his or her conviction. 725 ILCS 5/122–1 *et seq.* (West 2012). A postconviction action is a collateral attack on a prior conviction and sentence, "not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis,* 159 Ill. 2d 325, 328 (1994). To be accorded relief under the Act, a defendant must show there was a substantial deprivation of his or her constitutional rights in the proceedings that produced the conviction. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). The Act "provides for postconviction proceedings that may consist of as many as three stages." *Id.* at 472. During the first stage, the trial court has 90 days to summarily dismiss any "frivolous" petitions. *Id*. If not dismissed, the petition advances to the second stage. *Id*. During second-stage proceedings, counsel may be appointed for the defendant and the State may move to dismiss the petition or answer its allegations. *Id*. If the petition is not dismissed at the second stage, it advances to the third stage and an evidentiary hearing is held. *Id*. at 472-73.

¶ 23 A second-stage dismissal of a defendant's petition presents a legal question we review *de novo. People v. Whitfield,* 217 Ill. 2d 177, 182 (2005). The relevant question raised during a second-stage postconviction proceeding is whether the petition's allegations, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional

deprivation, which requires an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). All well-pled facts in the petition and affidavits are taken as true, but assertions that are really conclusions add nothing to the required showing to trigger an evidentiary hearing under the Act. *Id*. The Act does not provide a defendant with an opportunity to retry the case. *People v. Evan*s, 186 Ill. 2d 83, 89 (1999). Issues that could have been raised on direct appeal, but were not, are procedurally defaulted. *People v. Williams*, 209 Ill. 2d 227, 233 (2004). As a reviewing court, we can "affirm the trial court on any basis supported by the record." *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003). We review the trial court's judgment, not its reasoning. *Id.*

¶ 24 On appeal, petitioner argues that the trial court erred in dismissing his second stage postconviction petition because he made a substantial showing that his trial counsel provided ineffective assistance of counsel for (1) failing to request the redaction of Ayeshia Floyd's grand jury testimony, which identified petitioner as an alleged gang member; (2) failing to move to exclude the prejudicial testimony of another shooting not involving petitioner but involving codefendant Nelson which led to the recovery, among others, of the weapon used in Copeland's murder; and (3) for failing to object to the State's improper closing argument, which, according to petitioner, was inflammatory and prejudicial. In addition, petitioner argues that his postconviction counsel provided him with ineffective assistance for failing to amend petitioner's postconviction petition to allege that his appellate counsel was ineffective. Petitioner claims that appellate counsel should have raised on appeal the trial court's error in denying his motion for mistrial based on the prosecutor's inflammatory and prejudicial closing argument.

¶ 25 Generally, the failure to raise a claim of ineffectiveness of trial counsel in the direct appeal renders the issue waived in post-conviction proceedings. *People v. Wilson*, 307 Ill. App. 3d 140, 145 (1999). However, a claim of incompetence of counsel in a post-conviction

proceeding will not be barred where, as here, the attorney who represented the defendant at trial also represented the defendant on direct appeal. See *id*.

¶ 26 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, "a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). We apply the two-pronged *Strickland* test where the trial court has entered a second-stage dismissal of an ineffective assistance of counsel claim. *People v. Alberts*, 383 Ill. App. 3d 374, 377 (2008); *Coleman*, 183 Ill. 2d at 400.

¶ 27 Unless the defendant makes both showings under *Strickland*, we cannot conclude that he received ineffective assistance. See *People v. Munson*, 171 Ill. 2d 158, 184 (1996). Courts may resolve ineffectiveness claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance. *People v. Coleman*, 183 Ill. 2d 366, 397-98, (1998)*; Graham*, 206 Ill. 2d at 476 ("[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient."); *People v. Hale*, 2013 IL 113140, ¶ 17.

¶ 28 Here, petitioner's ineffective assistance of trial counsel claims fail because he cannot show that he was prejudiced by counsel's alleged deficient performance. In order to establish the prejudice prong, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Graham*,

206 Ill. 2d at 476. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Enis*, 194 Ill. 2d 361, 376 (2000).

¶ 29 Here, the State presented overwhelming evidence of petitioner's guilt and even assuming that trial counsel's performance was unreasonable for the reasons argued by petitioner, petitioner failed to establish that there is a reasonable probability that the result of his trial would have been different. Eyewitness Vinson testified that he was in the area and he saw petitioner, codefendant Nelson, and codefendant Randall in a car before the shooting. Vinson then testified that he saw petitioner and Nelson get out of Floyd's car and shoot at Copeland's vehicle. Venison's testimony was substantially corroborated by Jenkins, Copeland's girlfriend, who testified that she saw two people shooting at Copeland's vehicle.

¶ 30 Floyd also corroborated Vinson's account in her statement and grand jury testimony although she recanted her statements at trial. Floyd testified that petitioner, Randall, and Nelson were together in her car in the evening hours of the day of the shooting. Floyd testified before the grand jury that: she was driving Randall around the neighborhood when Randall saw someone he had "been into it with" referring to Copeland; petitioner and Nelson were also passengers in her car; she drove them all to Randall's house; they drove back to Leclair where she saw Copeland and his girlfriend; petitioner and Nelson exited the car after Nelson told them to "take care of business" which Floyd understood to mean that they should shoot Copeland; after petitioner and Nelson got out of the car, she heard gunshots and she and Randall drove away; Randall ordered her at gunpoint to return to the alley where petitioner and Nelson had left the car; she saw petitioner and Nelson armed with handguns when they returned to the alley; petitioner admitted that he fired his gun, but complained that Nelson did not shoot until after petitioner did; she drove off from the alley with all three of them and headed toward the

expressway; Randall apologized to her for involving her in the incident and instructed her to tell the police, if they asked, that she had let him use her car; during the ride Randall told Nelson not to involve Floyd if the police asked about what had happed.

¶ 31 Floyd's recanted statements corroborated the eyewitness testimony in the case because it placed petitioner and codefendants at the crime scene, it established that they were armed and it indicated the sequence of events leading up to Copeland's shootings. Despite her recantation at trial, her previous inconsistent statement, her grand jury testimony, was admitted into evidence. Moreover, as we noted in our previous order, Floyd's recantation at trial was reasonably explained by the fact that codefendant Randall had been her boyfriend and she knew petitioner and codefendant Nelson as well. See *People v. Russell Armfield and Kimothy Randall*, No. 1-07-2902 & No. 1-07-2903 (2009). Similarly, Prosper's recanted grand jury testimony corroborated the eyewitness testimony in the case and her recantation was most likely due to the fact that she is codefendant Randall's sister. In addition, the evidence established that petitioner and codefendants were involved in an earlier shooting of Copeland's and Robinson's cars just hours before Copeland's murder, and one of the weapons used in the murder was found in a car occupied by codefendant Nelson.

¶ 32 As we previously held on direct appeal, and upon reviewing the record, we find that the evidence of petitioner's guilt was substantial. See *People v. Russell Armfield and Kimothy Randall*, No. 1-07-2902 & No. 1-07-2903 (2009). Even if trial counsel's performance was unreasonable for the failing to request the redaction of Floyd's grand jury testimony, for failing to move to exclude the testimony of a substantive shooting involving codefendant Nelson, and for failing to object to the State's alleged improper closing argument, petitioner cannot establish that there is a reasonable probability that the outcome of his trial would have been different.

Accordingly, petitioner did not establish that his trial counsel provided ineffective assistance of counsel.

¶ 33 Petitioner next argues that postconviction counsel provided him with ineffective assistance by failing to amend his postconviction petition to include a claim of ineffective assistance of appellate counsel for failing to argue on direct appeal that the trial court erred in denying petitioner's motion for mistrial based on the prosecutor's inflammatory and prejudicial closing argument.

¶ 34 Under the Act, petitioners are entitled to a "reasonable" level of assistance of counsel. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18; *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To ensure this level of assistance, Rule 651(c) imposes three duties on appointed postconviction counsel. *Perkins*, 229 Ill. 2d at 42. Pursuant to the rule, either the record or a certificate filed by the attorney must show that counsel (1) consulted with the petitioner to ascertain his contentions of constitutional deprivations; (2) examined the record of the trial proceedings; and (3) made any amendments to the filed *pro se* petitions necessary to adequately present the petitioner's contentions. Ill. S.Ct. R. 651(c) (eff. Dec. 1, 1984); *Perkins*, 229 Ill. 2d at 42. The purpose of the rule is to ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court. *Perkins*, 229 Ill. 2d at 44. Substantial compliance with Rule 651(c) is sufficient. *People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008).

¶ 35 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that post-conviction counsel provided reasonable assistance. In the instant case, counsel filed a Rule 651(c) certificate. Thus, the presumption exists that petitioner received the representation required by the rule. It is defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with the duties mandated by Rule 651(c). *Id.*

¶ 36 Petitioner does not argue that postconviction counsel failed to consult with him about allegations contained in his petition or failed to read those portions of the record relevant to his claims. Rather, petitioner contends that postconviction counsel should have amended the petition to include a claim of ineffective assistance of appellate counsel to save the issue from forfeiture. Petitioner claims that appellate counsel should have raised on appeal the claim that the trial court erred in denying his motion for mistrial when the prosecution made improper, prejudicial comments that deprived him of a fair trial. According to petitioner, the State made improper comments in closing and rebuttal that petitioner and his codefendants invoked fear and terror in their neighborhood causing several witnesses to be reluctant to come forward and testify at trial.

¶ 37 In assessing claims of ineffective assistance of appellate counsel, the court follows the two-pronged test of *Strickland v. Washington*, 466 U.S. 668. To succeed on a claim of ineffective assistance of appellate counsel, petitioner must show that the failure to raise a particular issue was objectively unreasonable and that his appeal was prejudiced by the omission. *People v. Williams*, 209 Ill. 2d 227, 243 (2004). "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Easley*, 192 Ill. 2d 307, 329 (2000). Thus, a petitioner has not suffered prejudice from appellate counsel's decision not to raise certain issues on appeal unless such issues were meritorious. *Easley*, 192 Ill. 2d at 329.

¶ 38 In presenting a closing argument, the prosecutor is allowed a great deal of latitude and is entitled to argue all reasonable inferences from the evidence. *People v. Jones*, 2014 IL App (3d) 121016, ¶ 37. The prosecutor is allowed to comment on the evidence and reasonable inferences

from the evidence, including a defendant's credibility or the credibility of the defense's theory of the case. *Id*. We review a trial court's denial of a motion for mistrial for abuse of discretion. *People v. Walker*, 386 Ill. App. 3d 1025, 1030 (2008).

¶ 39 The trial court did not abuse its discretion in denying petitioner's motion for mistrial. Upon reviewing the record, we note that the State never argued that petitioner individually or the defendants threatened any witness in particular. Rather, the State argued that petitioner's actions in the neighborhood on the night of the shooting, along with that of codefendants created a general fear in the community which caused several witnesses to be reluctant to come forward and testify. The terror and fear in the neighborhood comments were, however, based on the evidence at trial. Specifically, the evidence established at 6:00 on the night when the crime occurred, a few hours before the shooting murder of Al Copeland occurred, petitioner was in close proximity with codefendants, acting as a lookout for codefendants who shot at Copeland's and Robinson's cars. Notably, the shootings did occur on a public street during daylight hours and it is certainly reasonable to infer that being shot at, as witness Robinson was, with a 1-year-old child in the car, is an intimidating and fearful event.

¶ 40 In addition, petitioner claims that the State made improper comments to install fear in the jurors when arguing that defendants shoot at people in broad daylight close to the courthouse. However, the comments were based entirely on the evidence introduced at petitioner's trial when Walker testified that codefendant Nelson and three others shot at her while she was driving to Cook County jail in the vicinity of the criminal courthouse. Accordingly, the comments were based on the evidence and reasonable inferences drawn therefrom were proper. See *People v. Cox*, 377 Ill. App. 3d 690, 708 (2007) (not an error for the State to argue that two witnesses and

their families "still lived in the area where the shooting occurred and that the kind of violence that defendant perpetrated out there impacts the community").

¶ 41 Moreover, even if the State's comments, or some of them, were improper, they were cured by the trial court's sustaining several defense objections, informing the jury that arguments are not evidence and must be disregarded if not supported by the evidence, or giving the jury proper instructions on the law to be applied. See *People v. Simms*, 192 Ill. 2d 348, 398 (2000). Furthermore, in the light of the overwhelming evidence of his guilt, petitioner did not establish that he was substantially prejudiced by the remarks such that it is impossible to say whether or not a verdict of guilt resulted from those comments. See *People v. Henderson*, 142 Ill. 2d 258, 323 (1990). Therefore, the trial court did not abuse its discretion when it denied petitioner's motion for mistrial based on such remarks and appellate counsel was not ineffective for failing to raise this issue when it was not meritorious. We conclude that defendant did not show that postconviction counsel was ineffective in failing to preserve the alleged error for review, or that appellate counsel was ineffective in failing to challenge the remarks on appeal.

¶ 42 In sum, we find that the circuit court did not err in dismissing petitioner's second stage potconviction petition when petitioner did not make a substantial showing of constitutional violation for his claims of ineffective assistance of trial, appellate and postconviction counsel.

¶ 43 CONCLUSION

¶ 44 Based on the foregoing, we affirm.

¶ 45 Affirmed.