FOURTH DIVISION
March 31, 2016

No. 1-14-0354

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 5903
	)	
QUINHON DOUGLAS,	)	Honorable
	)	Kevin M. Sheehan,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant alleged postconviction counsel did not notarize his affidavit, which was attached to his postconviction petition, and thereby failed to comply with Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012), we do not need to remand for compliance with that rule where the trial court and this court considered his allegations in the affidavit as if notarized and found that the allegations failed to present a substantial case to support his claims. Where the record contained a basis for trial counsel's strategic decision not to call certain witnesses at trial, and where there was no evidence in the record that the State

> knowingly used perjured testimony to convict defendant, defendant failed to make a substantial showing on his ineffective assistance of trial counsel claim and his perjured testimony claim in his postconviction petition, respectively, and those postconviction claims were properly dismissed by the trial court at the second stage in the postconviction proceedings.

¶ 2 After the trial court summarily dismissed petitioner Douglas' postconviction petition, we remanded the matter for second-stage proceedings after finding that Douglas' petition established the gist of an ineffective assistance of counsel claim. Following the second-stage proceedings, the trial court dismissed the supplemental amended postconviction petition filed by Douglas' postconviction counsel. Douglas now appeals the dismissal of his postconviction petition at the second stage in the postconviction proceedings arguing that: (1) his postconviction counsel provided unreasonable assistance, (2) the trial court erred in dismissing his petition where he made a substantial showing of an ineffective assistance of trial counsel claim, and (3) the trial court erred in dismissing his petition where he made a substantial showing that the State knowingly solicited perjured testimony. For the reasons below, we affirm the trial court's dismissal of Douglas' postconviction claims.

¶ 3 BACKGROUND

¶ 4 In March of 2003, the State charged Douglas with several counts of first-degree murder and unlawful use of a weapon alleging that he caused the shooting death of Rodney Campbell. The State proceeded to trial on four counts of murder, with the intent to prove that Douglas personally discharged the firearm that proximately caused Campbell's death.

¶ 5 The following facts were elicited at trial. About midnight or 1 a.m. on December 15, 2002, Rodney Campbell was fatally shot in the alley behind Tarina Montgomery's apartment building at 8324 South Buffalo Avenue, where Montgomery had held a birthday party for Terrance Cannon. At trial, Cannon testified that he saw defendant shoot the victim.

Montgomery testified that she saw defendant point a gun at the victim but she walked away and then heard gunshots. The defense theory at trial was that neither Cannon nor Montgomery was present when the shooting occurred. The sole defense witness, Tawana Lewis, testified that Cannon was at her apartment building at 8326 South Brandon Avenue when the victim was shot.

¶ 6 At trial, Terrance Cannon testified that around midnight, Cannon left the birthday party with several other guests through the back door, which leads to a backyard and an alley. He saw the victim and defendant in the alley, talking and standing two or three feet apart. Cannon then saw defendant pull a gun from his pocket and shoot the victim four or five times. After the victim fell, defendant went toward a green minivan that was parked across the alley. Before he got into the van, he fired the gun about three times toward Cannon and the other guests. Cannon ran and did not see defendant leave.

¶ 7 The first time Cannon spoke with police a few days later, he told them he did not know anything because he left the party between 11 p.m. and 1 a.m. and went with Lewis' cousin Titaaboo to Lewis' apartment. He did not tell them the truth because "I ain't [*sic*] know what was going on, *** and I was scared with that." On December 18, 2002, Cannon identified defendant as the shooter from a photo array. No one told Cannon what to say when he testified at trial. Cannon has three previous felony convictions.

¶ 8 Tarina Montgomery testified that her party ended around 12:30 or 1 a.m. She then noticed that 8 or 10 guests were standing by the back door. She heard defendant and the victim arguing then saw defendant pull out a gun and point it at the victim. Montgomery walked toward the front of her building. She heard three or four gunshots but did not see who fired the shots. Montgomery did not speak with the police until several days later, and did not tell them the truth

the first time because she did not want to be involved. The police did not tell her what to say at trial.

¶ 9 Testimony from forensic experts revealed that four fired shell casings and six empty beer bottles were recovered as evidence from the alley. Fingerprints found on the bottles did not match defendant. It was unclear whether the shell casings came from the same weapon, but two bullets that were recovered from the victim's body were fired from the same weapon.

¶ 10 Detective Eileen Heffernan testified that during the course of her investigation she learned defendant was a possible offender. She spoke with Shakeeta Taylor, Lewis' neighbor. Heffernan also interviewed Cannon, who told her that he witnessed defendant shoot the victim. When she showed Cannon a photo array, he identified defendant as the shooter.

¶ 11 The defense then stipulated that Detective Shebish would testify that during an interview, Cannon told the detective that he left Montgomery's party between 11 p.m. and midnight and went to Brandon Avenue with Titaaboo. Cannon went back to the scene after someone came there later and told them the victim had been shot.

¶ 12 Tawana Lewis testified that she went to Montgomery's party with Tashawna Malone and Titaaboo. They left the party around 11 p.m. and met Cannon on the way home. He joined them and stayed at Lewis' apartment for an hour and a half or two hours, until someone came to the door and told Cannon someone had been killed. Cannon left but came back to the building around 1 a.m. with Taylor. He told Lewis a man had been killed at the party. Lewis knew defendant from high school. Taylor, the mother of defendant's child, drove Lewis to court to testify, though they did not discuss her testimony.

¶ 13 The jury found Douglas guilty of first-degree murder and personally discharging the firearm that caused Campbell's death, and the trial court sentenced Douglas to 55 year in prison.

Defendant appealed and this court affirmed defendant's conviction. *People v. Douglas*, No. 1-06-3186 (2008) (unpublished order under Supreme Court Rule 23). Douglas then filed a petition for leave to appeal to the Illinois supreme court, which was rejected.

¶ 14 On July 9, 2009, defendant filed a *pro se* postconviction petition alleging, in pertinent part, that he was denied the effective assistance of trial counsel and the right to a fair trial. Specifically, defendant alleged that based on Lewis' trial testimony, his attorney should have interviewed Taylor, Malone, and Titaaboo, and presented them as witnesses to corroborate Lewis and discredit the State's witnesses. In support of this claim, defendant attached his own statement and the affidavit of Taylor. Defendant also alleged that the State knowingly used the false testimony of Cannon and Montgomery. Defendant supported this claim with Taylor's affidavit as well as the affidavit of Shenia Swanega, Lorenzo Lee's mother.

¶ 15 In his purported affidavit, which was not notarized, defendant alleged that in 2008 he learned Malone and Titaaboo would be willing to sign sworn statements but he was unable to contact them because they moved. He claimed that they would have said they were with Cannon and Montgomery at around 11:30 p.m. on December 14, 2002, and that they went to Tashawna Lewis' apartment. About 45 minutes later, "some guy" told Cannon that someone had been shot at the party. Cannon and Montgomery asked Taylor to drive them back to Montgomery's building.

¶ 16 In a 2006 notarized affidavit, Shakeeta Taylor attested that around midnight on December 15, 2002, she saw Montgomery outside Taylor's apartment building. Montgomery was looking for Cannon, who had left the party with Taylor's neighbors earlier. Taylor and Montgomery joined Cannon at Lewis' apartment, along with Lewis, Malone, and Titaaboo. Between 30 and 60 minutes later, someone told Cannon that there had been a shooting outside Montgomery's

place, and Cannon asked Taylor to drive him and Montgomery back to her building. When they arrived, Cannon got out of the car, then returned to tell them the victim was dead. Taylor told the police and defense counsel what she knew but defense counsel never returned her calls. Taylor is the mother of one of defendant's children, but they were no longer in a relationship at the time of the shooting.

¶ 17 Shenia Swanega attested that her son, Lorenzo Lee, was taken into custody by detectives in December 2002. Lee was one of the persons present at the party at Montgomery's apartment. About a week later, Lee told Swanega that the detectives threatened to charge him with murder. Lee said he was placed in a locked room with Cannon and Montgomery and they were all told they would face charges if they did not make statements implicating defendant. Both Cannon and Montgomery told Lee they did not see who shot the victim and they did not see defendant with a gun.

¶ 18 The trial court summarily dismissed Douglas' postconviction petition, and Douglas appealed that summary dismissal. On appeal, we found that Douglas had stated the gist of an ineffective assistance of counsel claim and remanded the matter back to the trial court for second-stage proceedings. Specifically, we found that although "defendant's purported affidavit, in which he avers to the statements of both Malone and Titaaboo, may not be considered because it was not notarized * * * defendant's ineffective assistance of counsel claim, alleged in his petition and supported by Taylor's properly notarized affidavit, was based on neither fanciful factual allegations nor meritless legal theory." We went on to note that,

> "According to defendant's allegations, had Taylor been called she would have testified that she saw Cannon and Montgomery at her own apartment building when they received the news that someone

had been killed at the party, and she drove both back to Montgomery's, where Cannon learned of the victim's death. In her affidavit Taylor attests to the same, and specifically states that Cannon was at Lewis'[] apartment at the time of the shooting. Defendant's allegations are further supported by Lewis'[] testimony at trial, and Cannon and Montgomery's admissions that they did not initially tell the police the truth about what happened. Based on the record, defendant's factual allegations are not fanciful.

Additionally, defendant's theory that his counsel was ineffective for failing to call Taylor is not completely contradicted by the record. Had defense counsel called Taylor as a witness, she would have contradicted the testimony of both Cannon and Montgomery, as in her affidavit she attested she saw both at Lewis'[] apartment from around midnight until they received news of the shooting. More importantly, Taylor would have corroborated the testimony of the sole defense witness. Particularly because the State presented no conclusive physical evidence, its case relied heavily on the testimony of Cannon and Montgomery, and defendant presented only one witness to contradict the State's two eyewitnesses at trial. Therefore, it is certainly arguable that defendant was prejudiced by counsel's failure to call a witness to corroborate Lewis'[] testimony and further undermine the State's witnesses. [Citations.] Finally,

> defense counsel was aware of Taylor as she attested that she told him what she knew and attempted to contact him on numerous occasions. We find defendant's theory that his counsel was ineffective for failing to call Taylor as a witness was not meritless."

¶ 19 Following our remand, postconviction counsel for Douglas filed a Supplemental Petition for Postconviction Relief along with a 651(c) affidavit. The supplemental petition incorporated Douglas' *pro se* claims, and amended several of them, including Douglas' claim that trial counsel was ineffective for failing to investigate and present known witnesses. Postconviction counsel attached three affidavits to the supplemental petition, Douglas' unnotarized 2009 affidavit, Shenia Swanega's 2009 affidavit, and a newly-obtained 2013 affidavit from Shakeeta Taylor.

¶ 20 In Taylor's 2013 affidavit, Taylor averred that she was returning home from a work party on the night of the shooting, and that she saw Cannon and Titaaboo in the gangway of her apartment building. Cannon and Titaaboo had come from Lewis' apartment, which was in the same building as Taylor's apartment. Taylor could not enter her own apartment because someone named Theresa had her keys. Taylor called Theresa, but she was at Montgomery's party. Taylor drove to Montgomery's apartment with Cannon, where Montgomery told her something had happened to Campbell, and that she heard gunshots in her back yard. Taylor drove Cannon, Montgomery, and Titaaboo back to her apartment. When they arrived, Titaaboo went to a neighbor's apartment and Cannon and Montgomery entered her apartment. Taylor alleged that Cannon lied at trial by testifying he saw the shooting because "he was somewhere else at the time." She later told trial counsel "who was with [her] at the time of the shooting and

when we got the news that [Campbell] had been shot." Counsel said he would phone Taylor, but he never did. He also did not return any of Taylor's messages.

¶ 21 The 2009 affidavit from Swanega stated that, in December of 2002, Lee told her Cannon and Montgomery gave false statements to the police. According to Swanega, Lee said that both Cannon and Montgomery, while detained in an interrogation room with Lee, told him that they did not see the shooter and did not see Douglas with a gun. Swanega spoke to trial counsel before trial regarding the substance of Lee's statement. Counsel told Swanega he would contact her, but he never did.

¶ 22 Douglas' unnotarized 2009 affidavit states that he told trial counsel he was in Justice, Illinois at the time of the shooting, and that "more witnesses" would corroborate his version of events. Douglas alleged that he learned from friends and family, in 2008, that Malone and Titaaboo would testify they were in Lewis' apartment with Cannon at the time of the shooting. Douglas was unable to obtain affidavits from Malone and Titaaboo due to his incarceration and because both women had moved.

¶ 23 The State filed a motion to dismiss Douglas' postconviction petition on July 17, 2013, arguing, in relevant part, that: (1) the pleadings were not properly verified where his 2009 affidavit and verification certificate were unnotarized; (2) his allegation of the knowing use of perjured testimony was meritless; and (3) trial counsel and appellate counsel were not ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, and of relevance to this appeal, the State argued that trial counsel's decision not to call additional witnesses at trial was a matter of trial strategy, and argued:

> "Petitioner alleges that his trial counsel failed to investigate and call witnesses, specifically, Shakeeta Taylor, Tashawna Malone,

> and Tittapoo [*sic*], all who would have corroborated Tawana Lewis' testimony. The petitioner's initial complaint is that counsel did not investigate these witnesses; however, per Taylor's own affidavit she did speak with trial counsel. It is trial strategy not to call additional witnesses. It is apparent that counsel made a decision based on that conversation and one with Shenia Suarez [*sic*]. Trial counsel determined that Ms. Lewis was the person to call in order to facilitate his impeachment of Cannon and Montgomery. In addition, there were no affidavits attached as to what Malone and Tittapoo [*sic*] would have testified too [*sic*]. All the court has at this time is the speculation of the petitioner as to what they would have said at trial. Further, it is the petitioner's burden to overcome the presumption that trial counsel acted as a matter of trial strategy."

¶ 24 In his response, filed on September 12, 2013, Douglas argued that: (1) the pleadings were properly verified where Douglas' *pro se* postconviction petition included a verification of certification, a penalty of perjury statement, and affidavits in support of his claims; (2) Douglas' ineffective assistance of counsel claims were supported by Swanega's 2009 affidavit and Taylor's 2013 affidavit; and (3) Douglas' actual-innocence claim was supported by Taylor's 2013 affidavit and Swanega's 2009 affidavit, where both affiants confirmed Douglas was not present at the crime scene and that he was incorrectly identified as the shooter.

¶ 25 The trial court heard arguments on the State's motion to dismiss on December 4, 2013, and then continued the case without ruling.

¶ 26 On December 19, 2013, postconviction counsel indicated that she had just received an additional affidavit from Lorenzo Lee. Lee's 2013 affidavit states that he went to Montgomery's party in December 2002, and that he left around midnight. Lee did not see Douglas with a gun, nor did he see who shot Campbell. About a week after the shooting, on December 14, 2002, police showed up at Lee's house, put him in a squad car, and drove him to the police station. The officers told Lee's mother they were going to ask Lee some questions and then bring him home. However, the detectives started threatening Lee, who was 16 years old at the time, when he arrived at the station. Lee was forcibly detained in a locked interrogation room for three days. He was not allowed to contact his mother and police told him he would receive a 30-year prison sentence unless he signed a statement falsely implicating Douglas. Lee signed the statement because he was exhausted and scared. Cannon and Montgomery were at the station, too, and they both told Lee that they did not see the shooting. Detectives forced Cannon and Montgomery to sign statements falsely implicating Douglas. A few days after he was released, Lee told his mother, Swanega, what happened at the station, and Swanega called trial counsel, who never returned her call. Lee decided to come forward because he is no longer afraid of the police and wanted to set the record straight that Cannon and Montgomery did not see the shooting and were pressured into implicating Douglas.

¶ 27 Based on the allegations in Lee's affidavit, as mentioned above, Douglas' postconviction counsel filed an Amended Supplemental Petition for Post-Conviction Relief with a new 651(c) certificate. The amended petition alleged that Lee's 2013 affidavit supported Douglas' actual-innocence claim by establishing Cannon and Montgomery were pressured into falsely implicating Douglas. It further alleged that Lee's averment that trial counsel failed to contact

him after Swanega told counsel that Lee could offer testimony favorable to the defense supported Douglas' claim that counsel was ineffective.

¶ 28 The trial court granted the State's motion to dismiss. In doing so, the trial court judge began his oral ruling by stating:

> "The first thing the State points out as a general argument that the petition filed by petitioner is not verified, it's required to be verified. The court will proceed though. That State is quite right about that, that the petition is not verified as a whole, that alone in some judges' eyes could knock the petition out and the court could grant a Motion To Dismiss. However, assuming arguendo the appellate court would not agree with that the court will address each and every claim of the state's attorney asking to dismiss the petition."

The judge went on to find that Douglas' actual-innocence claim was not based on "newly-discovered evidence" and was not a "free-standing" claim because it "bootstapped other claims," including "perjured testimony, *Brady* allegations and incompetent counsel" claims. Further, the judge noted that Taylor and Swanega's affidavits are based upon hearsay, and Taylor's affidavit does not mention Douglas' whereabouts on the night of the shooting. The judge also found that Douglas' perjury allegation was baseless where Douglas failed to allege and show that the State "knowingly" used perjured testimony, and that Douglas failed to prove appellate counsel and trial counsel were ineffective under Strickland. With respect to its ruling on Douglas' ineffective assistance of trial counsel claim, the trial court judge stated:

> "Point 7, alleges ineffective assistance of trial counsel, that does not meet the *Strickland* standard and should be dismissed. Everybody here is clear on the *Strickland* standard, a key case in incompetence and ineffective assistance of counsel where the petitioner must show counsel's performance was deficient, et cetera, and he suffered prejudice for it. The State, as they point out and the court agrees, believes this standard was not met."

Douglas timely filed this appeal arguing that the trial court erred when it dismissed his postconviction petition at the second stage in the postconviction proceedings. For the reasons that follow, we affirm the trial court's ruling.

¶ 29 ANALYSIS

¶ 30 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction action is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. *People v. Tate*, 2012 IL 112214, ¶ 8. Thus, issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited. *Id*.

¶ 31 In a noncapital case, a postconviction proceeding contains three stages. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether " 'the petition is frivolous or is patently without merit.' " *Hodges*, 234 Ill. 2d at 10 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). A petition may be summarily dismissed

as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Id*. at 11-12. This first stage in the proceeding allows the circuit court "to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit." *People v. Rivera*, 198 Ill. 2d 364, 373 (2001).

¶ 32 If the circuit court does not dismiss the petition as "frivolous or * * * patently without merit" (725 ILCS 5/122-2.1(a)(2) (West 2012)), the petition advances to the second stage, where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2012)), and where the State, as respondent, enters the litigation (725 ILCS 5/122-5 (West 2012)). It is at this point, not the first stage, where the postconviction petition can be said to be at issue, with both sides engaged and represented by counsel. See 725 ILCS 5/122-4, 122-5, 122-6 (West 2012). At this second stage, the circuit court must determine whether the petition and any accompanying documentation make "a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239 (2001) (citing *People v. Coleman*, 183 Ill. 2d 366, 381 (1998)). If no such showing is made, the petition is dismissed. *Id*. at 246. If, however, a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. *Id*.; 725 ILCS 5/122-6 (West 2012). Fact-finding and credibility determinations are to be made at the third stage of postconviction proceedings. *Coleman*, 183 Ill. 2d at 385.

¶ 33 Here, we are being asked to review the trial court's dismissal of Douglas' postconviction petition at the second stage in the postconviction proceedings. At the second stage of postconviction proceedings, counsel may be appointed for defendant, if defendant is indigent. 725 ILCS 5/122-4 (West 2012). The right to counsel in postconviction proceedings is wholly statutory. *People v. Lander*, 215 Ill. 2d 577, 583 (2005). Therefore, a petitioner is entitled only

to the level of assistance required by the Act. *Id*. The Act provides for a "reasonable" level of assistance. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). To assure the reasonable assistance required by the Act, Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012) imposes specific duties on postconviction counsel. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). Illinois Supreme Court Rule 651(c) states, in relevant part,

> "Upon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it shall order that a transcript of the record of the post-conviction proceedings, including a transcript of the evidence, if any, be prepared and filed with the clerk of the court to which the appeal is taken and shall appoint counsel on appeal, both without cost to the petitioner. The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012).

Compliance with the duties set forth in Rule 651(c) is mandatory. *Lander*, 215 Ill. 2d at 584. Fulfillment of the last obligation does not require counsel to advance frivolous or spurious claims on defendant's behalf. *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 34 Ineffective Assistance of Postconviction Counsel

¶ 35 Douglas argues that postconviction counsel provided him unreasonable assistance where postconviction counsel failed to have Douglas' affidavit and verification certificate notarized in violation of Rule 651(c). See Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012). Here, Douglas does not argue that postconviction counsel failed to consult with him or that postconviction counsel failed to review the trial proceedings, and there is no dispute that Douglas' postconviction counsel filed a 651(c) affidavit with the amended postconviction petitions at issue in this case. "The filing of a Rule 651(c) certificate gives rise to a presumption that postconviction counsel provided reasonable assistance during second-stage proceedings under the Act." *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23; see *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009) (upon the filing of a certificate in accordance with Rule 651(c), the presumption exists that postconviction counsel "adequately investigated, amended and properly presented those claims contained within petitioner's successive postconviction petition"); *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. It falls on the defendant to overcome that presumption by demonstrating counsel's failure to substantially comply with the duties mandated by Rule 651(c). See *People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008) ("counsel substantially complied with her specific duties under Rule 651(c)").

¶ 36 Defendant argues that postconviction counsel failed to: (1) amend his petition to include his notarized affidavit and certification; or (2) attach affidavits from Malone and Titaaboo or, at a minimum, provide an explanation for the absence of their affidavits. Douglas further argues that postconviction counsel's representation was unreasonable where counsel failed to address several refutable arguments in the State's motion to dismiss. The State, in turn, argues that: (1) "the petition was not dismissed for a lack of verification"; and (2) the trial court judge "substantively

addressed each and every one of defendant's post-conviction claims" and therefore "[d]efendant cannot demonstrate any prejudice in which his post-conviction counsel handled the post-conviction proceedings."

¶ 37 Rule 651(c) requires: "that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012); *Turner*, 187 Ill. 2d at 412 ("Rule 651(c) plainly requires that appointed post-conviction counsel make 'any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions.'") (Internal citation omitted).

¶ 38 Our review of an attorney's compliance with Rule 651(c) is *de novo*. *Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 39 Defendant argues that postconviction counsel failed to comply with the duties required in Rule 651(c) by failing to amend the postconviction petition to include a notarized affidavit of Douglas. Initially, we note that we found in the prior appeal that the *pro se* postconviction petition filed by Douglas was not notarized but that the notarized affidavit from Taylor was sufficient to support his claims for ineffective assistance of trial counsel for purposes of surviving a first-stage dismissal. We believe that to comply with Rule 651(c), postconviction counsel was required to amend the petition to attach Douglas' notarized affidavit if the allegations in his affidavit supported a substantial claim. Where, as in the present case, the presumption of reasonable assistance is present, "the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended

petition." *Profit*, 2012 IL App (1st) 101307, ¶ 23. That is because "[f]ulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf." *Id*. Therefore, in this case, we must determine whether the *pro se* allegations contained in Douglas' petition that were supported by Douglas' unnotarized affidavit amounted to meritorious claims. Defendant argues that the following averments in his affidavit were crucial to the allegations in his postconviction petition: "The unnotarized affidavit also states that, in 2008, he discovered that Tashawna Malone and Titaaboo would testify they were with Cannon and Montgomery in Tawana Lewis'[] apartment at the time of the shooting. *** Because counsel failed to notarize Douglas'[] affidavit, the judge had no reason to believe his allegations regarding the nature of Malone and Titaaboo's potential testimony."

¶ 40 In order to support a claim of ineffective assistance of counsel for failure to investigate and call a witness, a defendant must tender an affidavit from the individual who would have testified. *People v. Johnson*, 183 Ill. 2d 176, 191 (1998). Without such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided any information or testimony favorable to defendant. *Id*.; *People v. Guest*, 166 Ill. 2d 381, 402 (1995); *People v. Enis*, 194 Ill. 2d 361, 380 (2000) (Absent such an affidavit, "a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary."). In *Johnson*, the defendant argued that trial counsel failed to call and investigate an alibi witness, Dennis Taylor. *Johnson*, 183 Ill. 2d at 191. The defendant supported his claim with an affidavit of Darlene Taylor, the defendant's girlfriend and Dennis' sister. *Id*. In her affidavit, Darlene stated that Dennis was at her apartment the day of the murder and could have testified to essentially the same facts that she did at trial. *Id*. at 191-92. Darlene further averred that counsel never interviewed her brother,

who had since died. *Id*. at 192. Accordingly, the court held that "[b]ecause defendant has failed to provide an affidavit from Dennis Taylor, further consideration of his purported testimony is unnecessary." *Id*.

¶ 41 Here, even if Douglas' affidavit was notarized, his earnest belief in the allegations contained in his affidavit—that Malone and Titaaboo would testify that the State's witnesses could not have seen the shooting—cannot substitute for the requirement of attaching affidavits from Malone and Titaaboo containing the substance of their testimony before we can order a third-stage hearing. Therefore, we are unable to consider the purported testimony from Malone and Titaaboo. See *Johnson*, 183 Ill. 2d at 191; see also *Enis*, 194 Ill. 2d at 379-81. Because Douglas' affidavit would not support a substantial claim of a constitutional violation under the facts of this case, even if it was notarized, we find no violation of Rule 651(c) for failure to notarize Douglas' affidavit.

¶ 42 We note that Douglas argued in the trial court that the allegations in his affidavit also support his claim of actual innocence. However, Douglas did not raise his actual innocence claim in this appeal and, therefore, it has been waived. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Waiver aside, because the statements in Douglas' affidavit were that he was in another place at the time of the shooting, we would find those statements to be self-serving and, given that witnesses testified that they saw Douglas at the party, contradicted by other evidence in the record. Therefore, even if Douglas had raised his actual-innocence claim on appeal, we would find that the allegations in his affidavit, if notarized, did not amount to a substantial showing of an actual-innocence claim. See *People v. Edwards*, 2012 IL 111711, ¶ 32 ("The elements of a claim of actual innocence are that the evidence in support of the claim must

be 'newly discovered'; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial.").

¶ 43 Douglas also argues that postconviction counsel provided unreasonable assistance because she "had a duty to try and obtain affidavits from Malone and Titaaboo, or to explain why she was unable to obtain them." When the defendant provides counsel with the names of potential witnesses, counsel has an obligation to at least attempt to contact the named witnesses. See *People v. Johnson*, 154 Ill. 2d 227, 247-48 (noting that, while postconviction counsel had no obligation to conduct an independent investigation as to potential witness, where the defendant identified witnesses by name, counsel should have attempted to contact them).

¶ 44 "In the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so." *Id*. at 241. However, where the presumption is "flatly contradicted" by the record, postconviction counsel's representation has been found to fall below a reasonable level of assistance. In *People v. Waldrop*, the appellate court reversed the second-stage dismissal of the defendant's postconviction petition, holding that postconviction counsel provided unreasonable assistance. *People v. Waldrop*, 353 Ill. App. 3d 244, 251 (2004). In amending the defendant's *pro se* petition, counsel did not attach an affidavit from an eyewitness named by the defendant to support his claim of ineffective assistance of trial counsel. *Id*. at 248. The court acknowledged the presumption that counsel had made a concerted effort to obtain an affidavit but was unable to do so; however, the court concluded that the record "flatly contradicted" the presumption. *Id*. at 250. At the hearing on the State's motion to dismiss, postconviction counsel represented to the trial court that he did not believe that evidentiary

support was generally necessary at the second stage of the proceedings. *Id*. Noting that counsel misapprehended the law, the court reasoned that the presumption that he had made a concerted effort to obtain a supporting affidavit was flatly contradicted because counsel did not even think that such effort was necessary. *Id*. at 249-50. Therefore, the question in this matter becomes whether the record flatly contradicts the presumption that postconviction counsel made a concerted effort to obtain an affidavit but was unable to do so.

¶ 45 We find that the record here does not flatly contradict the presumption that postconviction counsel made a concerted effort to obtain an affidavit but was unable to do so. After postconviction counsel was assigned to Douglas' case, the record shows that: (1) on February 15, 2012, counsel indicated that she would need to retain an investigator "due to the allegations in this case"; (2) as of March 28, 2012, counsel had retained an investigator; (3) as of June 28, 2012, the investigator had "picked up a list of individuals to talk to, and is working on that"; (4) on July 25, 2012, counsel indicated that she met with Douglas who disclosed "some other individuals he wants us to talk to. Of that list there are two I [*sic*] they had we need to speak with"; (5) as of October 29, 2012, counsel contacted "two out of the three witnesses that we want to talk to"; (6) as of January 10, 2013, counsel was still unable to contact the third witness, but wanted to make one more effort to contact that witness, who was a woman in Indiana; and (7) as of February 21, 2013, counsel's investigation was complete. Also from the record, we know that when postconviction counsel filed Douglas' amended postconviction petition, she attached three affidavits to the supplemental petition; Douglas' unnotarized 2009 affidavit, Shenia Swanega's 2009 affidavit, and a newly-obtained affidavit from Shakeeta Taylor. Postconviction counsel later amended the supplemental petition again to attach the affidavit from Lee. Based on the record before us, it is not clear what witnesses postconviction counsel

contacted, what witnesses postconviction counsel was unable to contact, and what witnesses postconviction counsel decided not to contact. However, the record is clear that postconviction counsel met with Douglas to discuss other witnesses that he believed should be contacted, that postconviction counsel conducted an investigation and attempted to contact at least three witnesses, and that ultimately postconviction counsel provided affidavits from two new witnesses during the second-stage proceedings. Based on this information, we cannot say that the presumption that counsel made a concerted effort to obtain affidavits and other supporting documentation was flatly contradicted as it was in *Waldrop* where postconviction counsel represented to the trial court that he did not believe evidentiary support was necessary. *Waldrop*, 353 Ill. App. 3d at 250. Rather, "the record here is not so clear, and therefore the presumption that defendant's postconviction counsel made a concerted effort to obtain affidavits in support of the claims is not rebutted." *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 22. Accordingly, we reject Douglas' argument that he was denied reasonable assistance of postconviction counsel under Rule 651(c).

¶ 46 While we recognize that defendant cites to *People v. Nitz*, *People v. Turner*, and *People v. Suarez* in support of his argument that postconviction counsel provided unreasonable assistance, we find those cases to be distinguishable from the case at bar. In those cases, the courts found postconviction counsel completely failed to comply with Rule 651(c) and, therefore, a presumption that counsel provided reasonable assistance had never arisen. See *People v. Suarez*, 224 Ill. 2d 37 (2007) (unreasonable assistance found where postconviction counsel failed to file a 651(c) affidavit and the record failed to show compliance with 651(c)); *People v. Turner*, 187 Ill. 2d 406, 415-16 (1999) (where postconviction counsel had not consulted with petitioner, examined pertinent portions of the record, or amended the *pro se*

petition, the court found "that postconviction counsel's performance was so deficient that it amounts to virtually no representation at all"); *People v. Nitz,* 2011 IL App (2d) 100031 (finding unreasonable assistance where postconviction counsel amended the defendant's petition, but failed to attach any new affidavits or supporting documents, and instead attached the affidavits and documents attached to the defendant's *pro se* petition, which included an unnotarized affidavit). Here, postconviction counsel did file a proper 651(c) affidavit, thereby giving rise to the presumption that she provided reasonable assistance. *Nitz* is further distinguishable from this case because, in that case, the allegations in the defendant's affidavit were needed to support the defendant's claims that his trial counsel was ineffective for allowing him to enter into a guilty plea when he was suffering from mental illness and then failing to withdraw that guilty plea based on his mental illness. *Nitz,* 2011 IL App (2d) 100031, ¶ 7. Here, the allegations in Douglas' affidavit could not have supported a substantial claim of ineffective assistance of trial counsel.

¶ 47 Douglas also argues that postconviction counsel failed to rebut the State's argument that he failed to plead that the State "knowingly" use perjured testimony in its case because Douglas did sufficiently plead this. We find this argument to be without merit. The trial court is presumed to know the law. *People v. Rubalcava,* 2013 IL App (2d) 120396, ¶ 35. Here, in its ruling, the trial court judge stated: "The defendant must allege and show that it was knowing use of false testimony, petitioner failed to do so." (Emphasis added.) As such, the judge's own statement shows that he was not solely ruling on the pleadings. Further, postconviction counsel filed a response to the State's motion to dismiss, which she was not required to do. Therefore, we find defendant's argument that postconviction counsel failed to rebut the State's argument that

he failed to plead that the State "knowingly" use perjured testimony is without merit.

¶ 48 State's Alleged Use of Perjured Testimony

¶ 49 Douglas argues that the trial court erred in dismissing his postconviction petition at the second stage in the postconviction proceedings where he presented a substantial showing that the State knowingly solicited perjured testimony in support of his conviction. Specifically, Douglas argues that the State solicited perjured testimony from its witnesses, Cannon and Montgomery.

¶ 50 A defendant is not entitled to an evidentiary hearing on his postconviction petition as a matter of right. *People v. Whitehead*, 169 Ill. 2d 355, 370-71 (1996). A defendant is entitled to an evidentiary hearing on a postconviction claim only if he has made a substantial showing, based on the record and supporting affidavits, that his constitutional rights were violated. *Coleman*, 168 Ill. 2d at 382; *People v. Pecoraro*, 175 Ill. 2d 294, 304 (1997). This court reviews whether a postconviction petition made a substantial showing of a constitutional violation *de novo*. *Coleman*, 168 Ill. 2d at 389.

¶ 51 It is well established that the State's knowing use of perjured testimony in order to obtain a criminal conviction constitutes a violation of due process of law. *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). A conviction obtained through the knowing use of perjured testimony must be set aside. *Id*. Where the State allows false testimony to go uncorrected, the same principles apply. *Id*. "However, the State's obligation to correct false testimony does not amount to an obligation to impeach its witnesses with any and all evidence bearing upon their credibility." *People v. Simpson*, 204 Ill. 2d 536, 552 (2001); see *Pecoraro*, 175 Ill. 2d at 312-14.

¶ 52 Here, the testimony of Lee and Swanega is clearly hearsay. Swanega testifies as to what Lee allegedly told her; Lee testifies as to what Montgomery and Cannon allegedly told him while in police custody. Such statements are classic examples of hearsay, which would be

inadmissible at trial. *People v. Brown*, 2014 IL App (1st) 122549, ¶ 58 ("Affidavits containing hearsay are insufficient to support a claim under the Act.").

¶ 53 More importantly, and setting aside any hearsay issues, Swanega and Lee's testimony is that Montgomery and Cannon admitted to Lee that they did not see the shooting and that they lied to the police when they implicated Douglas in the shooting. Neither Montgomery nor Cannon have come forward to say that their trial testimony was untrue in any way, and Douglas has not presented any evidence that the State or any of its agents knew that Cannon and Montgomery lied during their trial testimony, if in fact that was the case. Instead, the testimony of Swanega and Lee impeaches the State's witnesses by calling into question the veracity of their testimony at trial; it does not show, or substantially show, that Cannon or Montgomery lied at trial or that the State, through any of its agents, knew that Cannon and Montgomery perjured themselves at trial and they used that testimony anyway to convict Douglas. Thus, because the testimony of Lee and Swanega merely attacks the veracity of Cannon and Montgomery's statements, we cannot say that Douglas made a substantial showing that the State used perjured testimony to convict him. *Simpson*, 204 Ill. 2d at 552 ("However, the State's obligation to correct false testimony does not amount to an obligation to impeach its witnesses with any and all evidence bearing upon their credibility."); *People v. Nowicki*, 385 Ill. App. 3d 53, 97 (2008) (the State cannot be charged with the obligation to correct the false testimony of a witness when it does not know that the witness' testimony is false).

¶ 54 Ineffective Assistance of Trial Counsel

¶ 55 Douglas argues that the trial court erred in dismissing his postconviction petition at the second stage in the postconviction proceedings where he presented a substantial showing that his trial counsel provided ineffective assistance. Specifically, Douglas argues that trial counsel was

ineffective because he should have investigated and called as witnesses: Malone, Titaaboo, Taylor, Swanega and Lee. Douglas argues that these witnesses would have bolstered the testimony of Lewis, the defense's sole witness, and called into question the testimony of the State's witnesses, Cannon and Montgomery.

¶ 56 Claims of ineffective assistance of counsel based on deficient representation of a criminal defendant are evaluated in accordance with the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must demonstrate both a deficiency in counsel's performance and prejudice resulting from the deficiency. *People v. Edwards*, 195 Ill. 2d 142, 162 (2001).

¶ 57 To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *Id*. at 163. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Judicial scrutiny of counsel's performance is highly deferential and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" *Id*. at 689. The reasonableness of counsel's actions must be evaluated from counsel's perspective at the time of the alleged error, and without hindsight, in light of the totality of circumstances, and not just on the basis of isolated acts. *Nowicki*, 385 Ill. App. 3d at 81-82. Because effective assistance refers to competent and not perfect representation (*People v. Odle*, 151 Ill. 2d 168, 173 (1992)), mistakes in trial strategy or judgment will not, of themselves, render the representation incompetent. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

¶ 58 Decisions concerning whether to call certain witnesses on a defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999). Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence [citation], and are, therefore, generally immune from claims of ineffective assistance of counsel. [Citation.]" *Enis*, 194 Ill. 2d at 378. Counsel may be deemed ineffective for failure to present exculpatory evidence of which he or she is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense. *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999).

¶ 59 Even where deficient performance is shown, the defendant must also show prejudice in order to establish an ineffective-assistance claim. *Pecoraro*, 175 Ill. 2d at 320. Prejudice is demonstrated if there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Enis*, 194 Ill. 2d at 376-77. The defendant must overcome a "strong presumption" that his lawyer's conduct falls within the wide range of reasonable professional assistance and that the challenged conduct constitutes sound trial strategy. *People v. Makiel*, 358 Ill. App. 3d 102, 106 (2005); *Strickland*, 466 U.S. at 689.

¶ 60 During the second stage of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Childress*, 191 Ill. 2d 168, 174 (2000); *Coleman*, 206 Ill. 2d at 277. Because defendant's petition here was dismissed at the second stage in the postconviction proceedings, "the relevant question is whether the allegations of the petition, supported by the trial record and the accompanying affidavits,

demonstrate a substantial constitutional deprivation which requires an evidentiary hearing." *Makiel*, 358 Ill. App. 3d at 106; see *Coleman*, 183 Ill. 2d at 381. Further, defendant has the burden of overcoming the presumption that a decision to not call a witness is within the realm of trial strategy. *People v. Whittaker*, 199 Ill. App. 3d 621, 628 (1990). We review the dismissal of a petition at the second stage in the proceedings *de novo*. *Pendleton*, 223 Ill. 2d at 473; *Childress*, 191 Ill. 2d at 174.

¶ 61 In the instant case, Douglas argues that trial counsel was ineffective for failing to investigate and call as witnesses the following people: Malone, Titaaboo, Taylor, Swanega and Lee. We address each of the witnesses in turn below.

¶ 62 Malone and Titaaboo

¶ 63 Douglas argues that trial counsel was ineffective for failing to investigate and call as witnesses Malone and Titaaboo because Malone and Titaaboo could have corroborated the testimony of the sole defense witness, Lewis. The basis for this argument is found in Douglas' unnotarized affidavit, wherein he states that he told trial counsel that there were "more witnesses" who would corroborate his version of events. It further alleged that Douglas learned from friends and family, in 2008, that Malone and Titaaboo would testify they were in Lewis' apartment with Cannon at the time of the shooting; however, Douglas was unable to obtain affidavits from Malone and Titaaboo due to his incarceration and because both women had moved.

¶ 64 As stated earlier, in order to support a claim of ineffective assistance of counsel for failure to investigate and call a witness, a defendant must tender an affidavit from the individual who would have testified. *Johnson*, 183 Ill. 2d at 191. Without such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided any information or

testimony favorable to defendant. *Id*.; *Guest*, 166 Ill. 2d at 402; *Enis*, 194 Ill. 2d at 380 (Absent such an affidavit, "a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary.").

¶ 65 Here, even if Douglas' affidavit was notarized, the allegations contained in his affidavit—that Malone and Titaaboo would testify that the State's witnesses could not have seen the shooting—did not come from Malone and Titaaboo and, therefore, we are unable to consider the purported testimony from them. See *Johnson*, 183 Ill. 2d at 191; see also *Enis*, 194 Ill. 2d at 379-81. As such, given that affidavits from Malone and Titaaboo were never made part of the record, we cannot hypothesize what their testimony would have been and, therefore, we have no basis upon which to find that trial counsel was ineffective for failing to investigate and/or call them as witnesses.

¶ 66 Lee and Swanega

¶ 67 Douglas also argues that trial counsel was ineffective for failing to investigate and call as witnesses at trial Lee and Swanega because their testimony called into question the testimony from the State's witnesses, Montgomery and Cannon, and showed that the State used perjured testimony to convict Douglas. Preliminarily, we note that Swanega's affidavit states that she made trial counsel aware of her testimony and the testimony of her son, Lee. The fact that counsel is aware of what a witness' testimony would be before making a decision whether to call the witness at trial "lends support to the inference that his decision to not call [a witness] was simply a tactical one." *Whittaker*, 199 Ill. App. 3d at 629. Therefore, the issue with respect to the testimony of Lee and Swanega is whether Douglas has overcome the presumption that trial

counsel's decision to not call these witnesses was anything but a tactical choice made on the basis of strategic considerations. We find that Douglas has failed to overcome this presumption.

¶ 68 With respect to calling into question the testimony of the State's witnesses, we again note that the testimony within Lee and Swanega's affidavits relating to the claims that the State's witnesses lied at trial and could not have seen the shooting, was hearsay. Such hearsay would not have been admissible at trial, and Douglas does not cite any authority which would allow for the admission of such hearsay statements at trial.

¶ 69 With respect to Douglas' claim of the State knowingly using perjured testimony, the testimony of Lee and Swanega was that Montgomery and Cannon admitted to Lee that they did not see the shooting and that they lied to the police when they implicated Douglas in the shooting. These statements, however, setting aside the fact that they are hearsay, do not show, or substantially show, that the State knowingly used perjured testimony in convicting Douglas. Notably, since testifying at trial, neither Cannon nor Montgomery has come forward stating that they lied at trial. Further, there is no evidence that the State, through any of its agents, knew that Cannon and Montgomery gave them perjured testimony and that they used it anyway to convict Douglas. Such evidence is lacking. Rather, the statements of Lee and Swanega merely impeach the State's witnesses by calling into question the veracity of the testimony they gave at trial. Therefore, because Lee and Swanega's testimony merely attacks the veracity of Cannon and Montgomery's statements, we cannot say that trial counsel was ineffective for failing to call them as witnesses. *Simpson*, 204 Ill. 2d at 552 ("However, the State's obligation to correct false testimony does not amount to an obligation to impeach its witnesses with any and all evidence bearing upon their credibility."); see *Pecoraro*, 175 Ill. 2d at 312-14.

¶ 70 Taylor

¶ 71 Next, Douglas argues that trial counsel was ineffective for failing to investigate and call Shakeeta Taylor as a witness because she would have corroborated Lewis' testimony and called into question the testimony of the State's witnesses, Cannon and Montgomery. Preliminarily, we note that Taylor's affidavit states that she made trial counsel aware of her testimony. The fact that counsel is aware of what a witness' testimony would be before making a decision whether to call the witness at trial "lends support to the inference that his decision to not call [a witness] was simply a tactical one." *Whittaker*, 199 Ill. App. 3d at 629. Therefore, the issue with respect to the testimony of Taylor is whether Douglas has overcome the presumption that trial counsel's decision to not call this witness was anything but a tactical choice made on the basis of strategic considerations. We find that Douglas has failed to overcome this presumption for the following reasons.

¶ 72 First, Taylor's affidavit states that she has one child with Douglas. Therefore, trial counsel's decision not to call Taylor as a witness could have been trial strategy because the fact that she had a child with Douglas creates a bias in favor of Douglas. See *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992) (finding that decision not to call alibi witnesses was trial strategy because all three may have been relatives of defendant and their testimony would thus be afforded little weight). Second, beyond this obvious bias, the record further indicates that certain portions of Taylor's testimony contained in her 2013 affidavit contradict the testimony of the defense witness, Lewis. While Lewis testified that Cannon was at her apartment for about two hours before learning that the victim had been shot, at which time he ran out of the apartment and returned after a few hours saying that someone had been shot at the party, Taylor's 2013 affidavit avers that she drove with Cannon to Montgomery's apartment to get her keys from another woman and it was at that time that they learned about the shooting. Therefore, Taylor's

2013 affidavit contradicts Lewis' testimony regarding how Cannon learned of the shooting, which could have adversely hurt Lewis' credibility. See *People v. Lacy*, 407 Ill. App. 3d 442, 467 (2011) (finding counsel was not ineffective for failing to call an alibi witness where the alibi witness' affidavit included testimony that contradicted the evidence in the case). Last, Taylor submitted two affidavits during these proceedings—one in 2006 and one in 2013. In her 2006 affidavit, Taylor never stated that she was locked out of her apartment and needed to get the keys from someone at Montgomery's party. Rather, it stated that she had been home for about an hour when she heard two people tell Cannon that someone had been shot outside Montgomery's apartment, at which time, she drove herself, Cannon and Montgomery back to Montgomery's apartment where they saw the victim's body. This contradicts some of the testimony in her 2013 affidavit. As such, given that Taylor had an obvious bias to give testimony favorable to Douglas, gave testimony that contradicted Lewis, and gave testimony in 2013 that did not comport with the testimony she gave in 2006, we cannot say that defendant overcame the presumption that trial counsel's decision not to call Taylor at trial was trial strategy. *Whittaker*, 199 Ill. App. 3d at 628 (defendant has the burden of overcoming the presumption that a decision to not call a witness is within the realm of trial strategy).

¶ 73 CONCLUSION

¶ 74 For the reasons stated above, we affirm the trial court's ruling dismissing Douglas' petition at the second stage of the postconviction proceedings.

¶ 75 Affirmed.