THIRD DIVISION
March 23, 2016

No. 1-14-1806

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 8965
	)	
BRYAN ESTRADA,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Dismissal of post-conviction petition affirmed; defendant failed to make substantial showing of ineffective assistance of trial counsel for not calling a certain witness at trial.

¶ 2 Following a jury trial, defendant Bryan Estrada was convicted of first degree murder and attempted first degree murder, committed by personally discharging a firearm, and sentenced to consecutive prison terms of 50 and 30 years respectively. We affirmed the judgment on direct appeal. *People v. Estrada*, No. 1-10-0265 (2012)(unpublished order under Supreme Court Rule 23). Defendant now appeals from a 2014 circuit court order granting the State's motion to

dismiss his 2013 counsel-filed post-conviction petition as amended. On appeal, he contends that he has presented a meritorious claim that trial counsel rendered ineffective assistance by not presenting a certain witness at trial. For the reasons stated below, we affirm.

¶ 3 Defendant and codefendant Rufino Castillo (codefendant) were charged with first degree murder, attempted first degree murder, and aggravated discharge of a firearm in that, on or about March 25, 2007, defendant personally discharged a firearm towards Edgar Martinez and caused the death of Jose Luis Villegas by personally discharging a firearm. Defendant and codefendant were tried simultaneously by two juries in 2009.

¶ 4 Martinez testified at trial that, on the afternoon in question, he was driving a Chevrolet Tahoe with his father and his friend Villegas as passengers when, at the intersection of Avers and Leland Avenues in Chicago, he saw a red car containing codefendant and codefendant's brother James Castillo (James) among others. Martinez knew codefendant and James to be in the Imperial Gangsters gang while Martinez and Villegas were members of the rival Spanish Gangster Disciples. After leaving Martinez's father at their home, Martinez and Villegas searched the neighborhood for the red car "to mess with" codefendant and James even though Martinez was not armed. As Martinez came to a T-intersection of two alleys just south of Lawrence Avenue (4800 North) and just east of Lawndale Avenue at about 3:20 p.m., he saw the red car and stopped the Tahoe in the middle of the intersection; James was driving the red car, codefendant was in the front seat, and defendant and another man were in the back seat. Villegas began "throwing gang signs," and the people in the red car responded similarly. Defendant exited the red car from the driver's side – nobody else exited the red car or the Tahoe – and fired several shots towards the Tahoe, striking Villegas in the head. Martinez quickly drove the Tahoe away

from the scene and called 911 after driving a few blocks. Martinez described the shooter to police, and identified codefendant and James from a photographic array, on the day of the shooting. The next day, he identified defendant as the shooter from another photographic array and identified codefendant from a lineup; he did not know how a photograph in the array came to be marked "IG Chino" and had not identified that photograph as depicting the shooter. A "couple of days later," he viewed another lineup and identified defendant as the shooter. Martinez admitted to knowing defendant (though not by name) and Carlos Vasquez.

¶ 5 Police detective Steven Suvada testified to responding at about 3:30 p.m. on the day in question to the 4900 block of north Bernard Street (Bernard is five blocks east of Lawndale) where there was a black Chevrolet Tahoe with an apparent bullet hole and an apparently-dead passenger; police officers and ambulances were already at the scene. Detective Suvada and his partner interviewed Martinez at the scene and as a result of the interview went to a T-intersection of alleys in the 4700 block of north Monticello Avenue (Monticello is the next street east of Lawndale) where Martinez said the shooting occurred. Detective Suvada further interviewed Martinez, conducted photographic arrays and a lineup viewed by Martinez, and testified to Martinez making his aforesaid identifications. Detective Suvada did not know who marked a photograph in the first array with "IG Chino" as he did not, nor did he see his partner or Martinez do so. (His partner, Detective Mark Pawelski, testified that he also did not know how the photograph came to be marked "IG Chino.") Detective Suvada recovered a red car, and codefendant was arrested, at a home on the morning of March 26. Defendant and then Vasquez were arrested in the midday of March 28, at homes several miles apart, and the ensuing lineup containing defendant also contained Vasquez but Martinez identified only defendant. Detective

Suvada had information from his investigation that Vasquez was the fourth man in the red car but he was released and not charged in this case.

¶ 6 Officers found no weapons in the Tahoe, recovered four fired shell casings and a metal fragment at the alley location, and recovered a shell casing from an impounded red Ford car on March 26. Forensic testing found that the shell casings from the scene and the red car were all .380 caliber and had been fired from one gun while the fragment was of a .380 caliber bullet.

¶ 7 Mevludin Ibrisevic testified that he resided at 4737 North Lawndale on the day in question. At about 3 p.m. that day, he was in his garage facing the alley when he saw a red Ford car containing four men pass by in the alley twice within a 5-10 minute period. After the second time it passed, he heard several gunshots.

¶ 8 James testified that he was initially charged with first degree murder regarding this shooting but those charges were "dropped" and he pled guilty to aiding a fugitive with a sentence of probation in exchange for testifying against defendant. On the day in question, codefendant was driving a red Ford car, taking James to a train station to return to Lake County where he lived with a friend, when defendant phoned James and invited him to go "cruising" as the weather was pleasant. Codefendant and James met defendant at a car wash near Lawrence and Cicero Avenues where they were joined by a man James knew only as Carlos. With codefendant and James, defendant, and Carlos riding in three different vehicles, they found themselves at some point in Albany Park, the neighborhood where codefendant and James had once lived and where the shooting later occurred. Defendant and Carlos parked their vehicles and joined codefendant and James in the red car; James drove, codefendant was front passenger, defendant sat behind James, and Carlos sat behind codefendant. They continued cruising for about 30-45

minutes, without incident and without driving along the same street or alley twice, until they reached a T intersection where the alley between Lawndale and Monticello met the alley behind Lawrence. There, a dark truck blocked the T intersection, the passenger door of the truck opened slightly, and James heard several gunshots from behind him. When the car door behind James closed and defendant yelled for him to "get *** out of here," James knew that defendant fired the shots. James did not see a gun, did not see anyone in either his car or the black truck "flashing" gang signs, and did not see anyone but the shooter exit either vehicle. After James drove them away from the scene, defendant asked to be dropped off; James left him and Carlos "somewhere on Fullerton" and then codefendant dropped off James at a train station. James admitted to having been in the Insane Disciples gang when young, denied ever being in the Imperial Gangsters, and had known that defendant was in a gang albeit not which one.

¶ 9 Upon this evidence, defendant's jury found him guilty of all three charges and that he personally discharged a firearm in the course of first degree murder and attempted first degree murder.[1] The court sentenced defendant to prison terms of 50 years for first degree murder including a 25-year firearm enhancement and 30 years for attempted first degree murder including a 20-year firearm enhancement, to be served consecutively for a total of 80 years.

¶ 10 On direct appeal, defendant contended in relevant part that the evidence was insufficient to convict him "where the only evidence linking defendant to the crimes consisted of testimony from two eyewitnesses who provided conflicting, impeached and wholly unbelievable testimony" (*Estrada*, No. 1-10-0265, ¶ 2) and that the court had not complied with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) during *voir dire*. On the insufficiency claim, we

[1] Codefendant's jury found him not guilty of all charges.

acknowledged various conflicts in the evidence but held that the jury was fully aware of the conflicts while "on the central issue of identification, the testimony of the two eyewitnesses, who allegedly were rival gang members, was not in conflict." *Id*., ¶ 34. The evidence was sufficient to convict but "not overwhelming." *Id.* As to the Rule 431(b) claim, it was considered under plain error as defendant admittedly did not preserve it at trial or in his post-trial motion. *Id*., ¶ 35. We found that there was a Rule 431(b) error but it was not plain error as the evidence was not closely balanced. *Id*., ¶¶ 38, 41, 43.

> "Only two eyewitnesses testified, and both of them identified defendant as the shooter. The mere fact that the jury must determine whether the identification witnesses were credible does not, by itself, lead to a conclusion that the evidence was closely balanced. [Citation.] There was no witness who provided a conflicting identification, therefore, the jury was not asked to determine the relative credibility of witnesses who testified to competing identifications. Moreover, there was no evidence presented that called into question the identification of defendant as the shooter, but rather mere speculation regarding a seeming discrepancy related to the initial description in the investigating detective's notes, and a photo in an array that appeared to match the alleged initial description but that was not selected by the State's primary witness." *Id*., ¶ 43.

¶ 11 Defendant, through counsel, filed the instant petition in March 2013 and amended it in April 2013. He alleged that trial counsel rendered ineffective assistance by not interviewing, investigating, or presenting a witness – Vasquez – who "would have completely discredited the [S]tate's two witnesses who claimed [defendant] was the offender." He alleged that "Vasquez was arrested at approximately the same time as [defendant] and each gave consistent reasonable

statements as to their activities on March 25, 2007." He alleged that "client communication and discovery alerted trial counsel to [Vasquez's] existence," that Vasquez would testify consistent with his attached affidavit, and that Vasquez was outside the courtroom during trial but never called as a defense witness. Defendant alleged a reasonable probability of a different outcome at a trial with Vasquez's testimony "particularly in light of the fact that the [S]tate's whole cause was premised on the inconsistent testimony and conflicting identification of two witnesses who were admitted gang members."

¶ 12 The petition as amended was supported by defendant's evidentiary and verifying affidavits and by post-conviction counsel's certification pursuant to Supreme Court Rule 604(d) (eff. Dec. 3, 2015). Defendant averred that trial counsel told him a few days before trial that Vazquez was willing to testify for defendant, and that Vazquez told defendant after trial that he was outside the courtroom during defendant's trial because he had told trial counsel that he was willing to testify. The petition was also supported by Vasquez's affidavits and by a copy of a police report. In relevant part, the police report described the arrests of defendant and Vasquez on March 28, 2007, defendant's post-arrest statement that "on Sunday March 25, he was with his friend [Vasquez] and that the two of them drove around on the south side all afternoon," and Vasquez's post-arrest invocation of his right to counsel so that he was not interviewed.

¶ 13 Vasquez averred that he was eating at Belmont and Western Avenues on March 25, 2007, when defendant called to invite him to join him at a car wash at Lawrence and Cicero where they would go to meet with "a couple of girls *** on the south side." When Vasquez went to the car wash, defendant told him that codefendant and James had called him to ask him to "hang out" with them. "We were all in the same gang together." Vasquez told defendant that he did not want

to go with codefendant and James, and defendant said that he would rather meet the girls. Codefendant and James arrived at the car wash in a red Ford car, "highly intoxicated" though it was only 1 p.m.; defendant told them he would not join them, and codefendant and James left the car wash. Vasquez parked next to the car wash and left with defendant in his car for his sister's home at 37th Street and Keating Avenue, where they stayed for 45-60 minutes. They then went to 62nd Street and St. Louis Avenue to meet the girls, but the girls told them by phone that they were unable to meet. Vasquez and defendant stopped at a restaurant near 47th Street and Cicero Avenue, bought food, and brought it back to the home of defendant's sister to eat outside. They then returned at about 4:30-5 p.m. to the car wash where Vasquez was parked. They drove together in their two vehicles to their neighborhood (near Logan Square), where they saw codefendant and James fighting and "still drunk." Codefendant left in the red Ford and James told defendant and Vasquez that they "got into some shit" but defendant and Vasquez should not worry. Vasquez averred that he and defendant went to school with codefendant and James and "were used to [codefendant] and James fighting" as "James was the school bully" who "beat up" various children including defendant so that defendant feared James.

¶ 14 The State filed a motion to dismiss the petition in September 2013, arguing that the ineffective assistance claim was meritless because not calling Vasquez as a witness was sound trial strategy. The State argued that trial counsel's strategy was to create reasonable doubt by challenging the credibility of and discrepancies in the State's evidence. The State noted that the petition itself contradicted the claim that counsel did not interview or investigate Vasquez and argued that the failure to call a witness of whom counsel is aware is presumed to be the result of trial strategy. The State argued in detail that Vasquez's account does not preclude defendant

having been the shooter or Vasquez the fourth man in the red car during the shooting. The State argued that defendant and Vasquez did not give consistent post-arrest statements reasonably explaining their movements around the time of the shooting, as defendant claims in his petition, because Vasquez exercised his right to remain silent.

¶ 15 Defendant responded to the motion to dismiss, arguing that Vasquez's affidavit is consistent with defendant's post-arrest statement and does preclude defendant from being the shooter, and that trial counsel's strategy should have been alibi when Vasquez's testimony was available. Defendant conceded that trial counsel interviewed Vasquez but argued that this did not affect the claim that counsel should have presented him as a trial witness. Defendant argued that the petition and Vasquez's affidavit are of arguable merit and not fantastic or delusional.

¶ 16 The State replied in support of its motion to dismiss, arguing that a claim that counsel failed to call an interviewed or investigated witness is subject to the presumption of sound trial strategy and that this case was at the second stage where a defendant must make a substantial rather than a merely arguable showing.

¶ 17 The court heard argument on the motion to dismiss in April 2014 and then granted the motion on May 29, 2014. The court noted that on direct appeal we found the trial evidence to not be closely balanced and also noted that Vasquez was a known witness interviewed by trial counsel. The court reviewed Vasquez's affidavit in detail, noting that he did not state or estimate times for various events and finding that he left a "time gap" for the time of the shooting so that "I don't know if it is an alibi. And if it is some type of alibi, this court believes that the prosecution could have poked major holes in it." The court rejected defendant's argument that not calling Vasquez as a witness was tantamount to not presenting a defense, finding that trial

counsel pointed out inconsistencies in the State evidence and challenged the credibility of the State witnesses. This appeal timely followed.

¶ 18 On appeal, defendant contends that his petition as amended was erroneously dismissed because it presented a meritorious claim that trial counsel rendered ineffective assistance by not presenting Vasquez as a trial witness.

¶ 19 A post-conviction petition may be dismissed upon the State's motion if, taking as true all well-pled facts not positively rebutted by the record, the petition and supporting documentation do not make a substantial showing of a constitutional violation. *People v. Hatchett*, 2015 IL App (1st) 130127, ¶ 27. Because all well-pled and unrebutted factual allegations are accepted as true at this stage, the circuit court does not engage in fact-finding in ruling on a dismissal motion and we review its ruling *de novo*. *Id.*; *People v. Minniefield*, 2014 IL App (1st) 130535, ¶ 58.

¶ 20 To prevail on a claim of ineffective assistance, a defendant must show that counsel's performance was both deficient and prejudicial to defendant. *Hatchett*, ¶ 28. Performance is deficient when it is objectively unreasonable, and we exercise a strong presumption that counsel's decision to act or refrain from acting was the product of sound trial strategy. *Id*. Counsel must provide representation that is competent, not perfect, and counsel's reasonable decision on strategy does not fall below prevailing norms of performance merely because the strategy did not succeed. *Id.*; *Minniefield*, ¶ 89. Prejudice is a reasonable probability that the result of the proceeding would have been different absent the deficiency; that is, the deficiency undermines confidence in the proceeding's outcome. *Hatchett*, ¶ 28.

¶ 21 " 'It is well established that decisions concerning whether to call certain witnesses for the defense are matters of trial strategy left to the discretion of trial counsel.' " *People v. Hotwagner*,

2015 IL App (5th) 130525, ¶ 48, quoting *People v. Banks*, 237 Ill. 2d 154, 215 (2010). Thus, failure to call a particular witness is not the basis for an ineffective assistance claim unless counsel's strategy is so unsound that counsel entirely failed to conduct meaningful adversarial testing of the State's case. *Hotwagner*, ¶ 48. It is sound strategy to not call a witness whose testimony would be of questionable value – who could be subject to severe impeachment – or could potentially harm the defendant's case. *Id.*, ¶¶ 48, 50.

¶ 22 Here, we note initially that Vasquez's affidavit, taken on its face, presents an alibi. He avers that he and defendant met codefendant and James at about 1 p.m. at the car wash at Lawrence and Cicero but codefendant and James left without defendant and Vasquez. The latter then went to various locations on the south side of Chicago (in contrast to the location of the car wash, shooting, and emergency response on the north side): defendant's sister's home, 62nd and St. Louis, the restaurant near 47th and Cicero, back to defendant's sister's home, and then back to the car wash at about 4:30 p.m. Only after that did Vasquez and defendant again meet James and codefendant. While Vasquez was generally vague about the times of his movements on the day in question, so were Martinez and James at trial. Nonetheless, Vasquez's affidavit is to the effect that he and defendant were not with codefendant or James in the red Ford on the north side between about 1 p.m. and about 4:30 p.m. when the shooting occurred at about 3 p.m.

¶ 23 However, the court dismissed defendant's petition on various grounds: that Vasquez's account did not appear to present an alibi, but also that his account could be impeached at trial and that counsel presented a trial defense without Vasquez's evidence. Since trial counsel was aware of Vasquez, as shown in pre-trial discovery and defendant's petition, we apply a strong presumption that counsel's decision not to call him as a witness was the result of sound trial

strategy. We agree with the circuit court that the potential of impeachment – Vasquez admits to being in the same gang as defendant as well as codefendant and James – and particularly the presentation of a trial defense fail to overcome the trial-strategy presumption. The trial record shows that counsel subjected the State's case to meaningful adversarial testing, challenging the credibility of State witnesses and raising discrepancies in their testimony. For example, trial counsel's examinations raised issues with Martinez's description of the shooter and the array photograph marked "IG Chino" in an effort to show that Martinez had described and identified someone other than defendant as the shooter. Similarly, we noted on direct appeal that "defense counsel demonstrated a clear bias and motive [for James] to shift attention away from himself and his brother," codefendant. *Estrada*, No. 1-10-0265, ¶ 41. The fact that this defense did not result in defendant's acquittal does not negate that the defense was presented. We conclude that defendant has failed to make a substantial showing of ineffective assistance from not presenting Vasquez as a trial witness.

¶ 24 Accordingly, the judgment of the circuit court is affirmed.

¶ 25 Affirmed.