2016 IL App (2d) 140603-U
No. 2-14-0603
Order filed September 8, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellee, v. WILLIAM C. KEENE, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Stephenson County. No. 93-CF-186 Honorable Val Gunnarsson, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Following a stage-three evidentiary hearing, the trial court properly denied petitioner's postconviction petition, wherein he alleged that he likely would not have been found eligible for the death penalty (and, therefore, his current natural life sentence) had his trial attorneys provided effective assistance of counsel by investigating/discovering a statement implicating a co-defendant in the crime. We uphold the trial court's finding that the statement was not made. Affirmed.

¶ 2 This case arose out of a 1992 armed robbery of a gun shop by respondent, William C. Keene, and two co-defendants, Anthony Ehlers and Michael Hoover, during which the shop owner, Bob Peters, was killed by gunshot (by Ehlers) and, thereafter, had his throat slit (by Keene). In October 12, 1993, a jury found Keene guilty of armed robbery (720 ILCS 5/18-2

(West 2004)) and murder (720 ILCS 5/9-1 (West 2004)) and, the next day, found him eligible for the death penalty. On October 14, 1993, Keene was sentenced to death, a sentence that was later commuted to natural life imprisonment.[1] On November 2, 1995, on direct appeal, the supreme court affirmed Keene's convictions and sentence. *People v. Keene*, 169 Ill. 2d 1, 6-7 (1995).

¶ 3 Subsequently, Keene commenced postconviction proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)) and later appealed the trial court's dismissal of his third amended postconviction petition. In his postconviction petition, Keene did not contest his guilt, but sought an evidentiary hearing on the basis that he would not have been found eligible for the death penalty (and, therefore, for his commuted sentence of natural life), absent the State's *Brady* violations (*Brady v. Maryland*, 373 U.S. 83, 87 (1963)), the State's elicitation of perjured testimony, and ineffective assistance of trial counsel. This court remanded for an evidentiary hearing on Keene's claims. *People v. Keene*, No. 2-08-0778 (2010) (unpublished order under Supreme Court Rule 23). On remand, the parties presented evidence on all claims and the trial court denied Keene's petition.

¶ 4 Here, Keene appeals from the trial court's denial of his third amended postconviction petition following the third-stage evidentiary hearing, challenging only the trial court's findings related to his ineffective-assistance-of-trial-counsel claim. Again, Keene challenges his natural life sentence, not the guilty verdicts; he seeks resentencing for a term of years. Keene was found eligible for the death penalty based on the single factual finding that he personally inflicted injury to Peters—by cutting Peters' throat—during the course of the armed robbery and contemporaneous with the fatal shot fired by Ehlers.

[1] On January 3, 2003, the Governor of Illinois commuted Keene's death sentence to a term of natural life imprisonment.

¶ 5 Keene argues that he established that, had his trial attorneys provided effective assistance of counsel, he likely would not have been found eligible for the death penalty and, therefore, for his current commuted natural life sentence.[2] For the following reasons, we affirm.

¶ 6 I. BACKGROUND

¶ 7 The evidence at trial (as summarized by our supreme court on direct appeal) showed:

> "[T]hat Keene and two others, Larry [*sic*] Ehlers and Michael Hoover, planned to rob Bob Peters' gun shop in Freeport, Illinois. On November 11, 1992, the three left [Audrey] Krueger's home in Tinley Park, Illinois, traveling to Freeport in a rented vehicle. They spent the night in a motel room which Ehlers had registered for under an alias.
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> Early the next morning, Keene, Ehlers, and Hoover drove to the gun shop. Biding their time until Peters was alone, the three entered. Ehlers was armed with a handgun. To distract Peters, Hoover asked to see one of the knives for sale. Ehlers then shot Peters in the chest. Peters did not immediately fall, and Ehlers shot him again in the head. Peters collapsed between the sales counter and a cabinet behind it. While Peters was on the floor, incapacitated but still alive, his throat was slit. After collecting guns, knives, and money from Peters' wallet, Keene, Ehlers, and Hoover drove back to Tinley Park.
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> The jury determined Keene to be eligible for death, finding that he had slit Peters' throat. The primary evidence of that was supplied by Hoover, who had agreed to testify against Ehlers and Keene in a plea bargain with the State. Hoover told the jury that,

[2] Despite his commuted sentence, Keene remains entitled to challenge the aggravating factor that qualified him for the death penalty and, therefore, for a commuted sentence of natural life. See *People v. Mata*, 217 Ill. 2d 535, 548 (2005).

> during the drive back to Tinley Park, the three had recounted what had happened in the gun shop. Hoover said that Keene admitted to having slit Peters' throat, though Hoover admitted that he had not actually seen Keene do so. Hoover said, however, that he had seen Keene behind the counter where Peters collapsed.
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> Other evidence corroborated Hoover's testimony. Keene had admitted to police that he was left-handed. Hoover and Ehlers were right-handed. Larry Blum, a pathologist, believed that whoever had slit Peters' throat had likely held the knife in his left hand. Blum based his opinion on how the cut looked to have been formed and the position of Peters' body." *Keene*, 169 Ill. 2d at 6-7.

The court further noted that "[t]he core of the State's case was Hoover's testimony that Keene had admitted complicity." *Id.* at 9.

¶ 8 Krueger testified at trial that, at the time of the murder, Krueger and Ehlers, her boyfriend, lived together in Tinley Park. On November 11, 1992, at Ehlers' and Hoover's request, Krueger rented a white Bravada van. Keene, Ehlers, and Hoover departed from Krueger's house that same day in the van and returned the following day with several guns and knives. Krueger explained that, prior to this time, Ehlers habitually carried a particular handgun, and she identified photographs depicting Ehlers with his gun. The bullets removed from Peters' body were .38-caliber bullets. Another witness, the victim's son, testified that the gun depicted in the photographs could fire .38-caliber bullets. Krueger further testified that, about one week after the murder, she was with Ehlers when he threw his gun into a dumpster.

¶ 9 As relevant here, Keene argued on direct appeal that trial counsel provided ineffective assistance at the first (*i.e.*, eligibility) phase of the capital sentencing hearing for failing to

present (not *discover* as he has alleged in postconviction proceedings[3]) a statement made by Krueger to Freeport police detective David Snyders regarding a statement that Ehlers made to her. Specifically, during trial (apparently immediately after Krueger's direct examination), the State notified the court that Snyders had prepared a report summarizing a June 16, 1993, interview he had conducted with Krueger, but that the report was missing and, therefore, had not been disclosed to Keene. The State represented that Krueger's statement to Snyders concerned her observation of Ehlers' disposal of the gun used in the murder and that it did not address any specific actions taken by Keene. Keene moved for a mistrial, and his motion was denied. According to the supreme court, "the trial judge determined that there had been no deliberate attempt to preclude the defense from seeing the report." *Id.* at 28.

¶ 10 Trial transcripts reflected that, prior to cross-examining Krueger, defense counsel was provided an opportunity to interview Snyders and examine the notes he had used to prepare the lost report. Afterward, counsel informed the court that it wished to review a tape recording of another interview Snyders conducted of Krueger on May 14, 1993, that was both taped and transcribed. "There is one statement. It's a statement of Audrey Krueger, and it covers a few items, but there is a statement on there that she says is attributable to Tony Ehlers. Now, it may or may not be admissible, but from my review of it, it is fairly significant, and I think at a minimum, I would prefer a little time to be able to determine what, if anything, we want to do with regard to that legally." The State suggested that defense counsel cross-examine Krueger, listen to the tape after trial adjourned for the day, and, if more cross-examination were needed, it

[3] See *People v. Keene*, No. 2-08-0778 (2010) (unpublished order under Supreme Court Rule 23) (concluding that *res judicata* did not bar ineffective-assistance claim because information supporting the claim was discovered only after direct appeal).

would not object to the defense re-calling Krueger for further cross-examination. The supreme court summarized:

> "In the absence of the report, the defense wanted to learn whether Krueger had related a particular statement which she had attributed to Ehlers. The statement, revealed at the hearing on Keene's post-trial motion, would have diverged from Krueger's direct testimony. Snyders remembered Krueger's having said that Ehlers had told her that he, Ehlers, was responsible for *both* the shooting *and* the throat slitting of Peters." (Emphases added.) *Id.* at 28.

¶ 11 Contrary to the State's representation, Krueger's statement that Ehlers told her that he was responsible for both shooting and slitting Peters' throat was not transcribed from Krueger's taped May 14, 1993, statement. Defense counsel cross-examined Krueger regarding her testimony on direct-examination, and did not inquire about any additional statement she made to Snyders on June 16, 1993. Krueger was not re-called for further cross-examination.

¶ 12 On October 13, 1993, the eligibility phase of the capital sentencing hearing was held before the same jury that convicted Keene. Only the State presented testimony—from Snyders—and defense counsel did not conduct any cross-examination. Defense counsel argued that the State had not proven Keene's eligibility beyond a reasonable doubt because: (1) no witness personally observed him inflict any injury on Peters; (2) Hoover's testimony was not credible because he was an accomplice; and (3) Dr. Blum conceded that Peters' injury could have been inflicted by a right-handed person holding the knife in his or her left hand. The jury found Keene eligible for a death sentence based on its finding that Keene stabbed Peters substantially contemporaneously with Ehlers' shooting of the victim. The following day, the aggravation/mitigation phase of the sentencing hearing was held. At Keene's request, defense

counsel presented no mitigating evidence. The jury issued a verdict finding that there were no mitigating factors precluding imposition of a death sentence, and the trial court sentenced Keene to death.

¶ 13 On direct appeal, Keene argued that trial counsel was ineffective for failing to *present* the statement in the eligibility phase of the capital sentencing hearing, but the supreme court rejected this claim on the basis that trial counsel's performance could not have been deficient if Krueger's statement was inadmissible. *Id.* at 29. As such, the court noted, and Keene acknowledged, that the question turned on whether sufficient indicia of reliability existed to satisfy the statement-against-penal-interest exception to the hearsay rule. *Id.* The four factors considered to determine the trustworthiness of a statement (self-incriminating, made close in time to the crime, corroborated by other evidence, and declarant's availability for cross-examination) need not all be present; however, the court concluded that the record reflected that Ehlers' statement to Krueger satisfied only the self-incriminating-nature factor. *Id.* The court noted that "no time frame was established for when Ehlers supposedly made the statement to her. There might be reason as Keene suggests, to fault defense counsel for that failure. But larger problems are present in the remaining factors making further scrutiny of the point unnecessary." *Id.* The court rejected Keene's argument that Ehlers' statement was corroborated by Hoover's testimony, and noted that even Keene conceded that Ehlers was unlikely to be available for cross-examination because, as a codefendant, he almost certainly would have invoked his fifth amendment right against self-incrimination. *Id.* at 30. The court concluded that Keene's ineffective-assistance claim based on Ehlers' purported statement to Krueger failed because: (1) there was little indicia of trustworthiness in the statement; (2) as a result, there was an insufficient basis for applying an exception to the hearsay rule to make the statement admissible; and (3) without a basis for

admissibility, there was "no ground to argue that counsel should have challenged Krueger on cross-examination as to whether she had made the statement or otherwise sought to present it." *Id.* at 29.

¶ 14 B. Third-Stage Evidentiary Hearing

¶ 15 The third-stage evidentiary hearing occurred in February and May of 2013. Keene alleged that he had received ineffective assistance of trial co-counsel, where his attorneys failed to interview Krueger, Snyders, or detective Jerry Whitmore or make any strategic decisions concerning Krueger's statement to Snyders. He asserted that, had they done so, trial counsel would have learned of Ehler's admission that he shot and stabbed Peters and could have used it to defeat the State's effort to qualify Keene for the death penalty.

¶ 16 1. Detective David Snyders

¶ 17 Keene supported his petition with Snyders' June 28, 2001, deposition, wherein Snyders testified that, after defense counsel learned that his original report of his June 16, 1993, interview of Krueger was lost, he met with counsel and provided them with notes he had used to prepare his report. Also, on the same day the issue was raised in court—October 7, 1993—he prepared a replacement report. In that report, Snyders stated that: "Audrey [Krueger] also stated that Tony [Ehlers] told her that he was the one who shot 'the guy' in the gun shop and he also told her that he ws [*sic*] the one who stabbed him. This conversation took place at about the same time when the pistol was disposed of." At his deposition, Snyders testified that Krueger told him that Ehlers made his statement about shooting and stabbing Peters some time after the disposal of the gun "at some other point during their relationship." He could not recall what Krueger said she and Ehlers were doing at the time Ehlers made the statement to her.

¶ 18 2. Detective Jerry Whitmore

¶ 19 Keene also supported his petition with detective Whitmore's deposition, dated June 19, 2001. Whitmore witnessed Snyders' June 16, 1993, interview of Krueger and recalled that Krueger told the officers about Ehlers' disposal of his gun. According to Whitmore, Krueger related that, while she and Ehlers were in bed, he "made a comment to her about the murder in Freeport and he told her that he was the one who shot the guy in the gun shop and that he was also the one who stabbed the guy." She stated that this admission was made "within a few days after the murder."

¶ 20 Whitmore also testified that, prior to his deposition, he had not read Snyders' replacement report. Had he done so, he would have corrected Snyders on "some ambiguousness" in his report, specifically, that Whitmore recalled Krueger stating that she and Ehlers were in bed together when he made the statement; Snyders omitted this fact.

¶ 21 3. Postconviction Investigator Appolon Beaudouin

¶ 22 Between 1994 and 2003, Appolon Beaudouin was an investigator for the Capital Litigation Division of the Office of the State Appellate Defender. His testimony centered on three interviews he and Keene's postconviction counsel, John Greenlees, conducted in 2000: two of Krueger in Memphis about Ehlers' statement, and one of trial co-counsel, John Vogt and Neil Brown, in Freeport.

¶ 23 In his affidavit, Beaudouin stated that, initially during the first interview, on April 7, 2000, Krueger did not want to speak to them and refused to sign an affidavit (although he did not bring one for her to sign), claiming that she feared for her life because Ehlers had repeatedly told her that he would kill her or have her killed for testifying and providing information to the State. She believed that he would "make good" on his threat. Ehlers had been given a life sentence, and Krueger believed that, because he was in daily contact with inmates who would be getting

paroled, he would one day arrange for a recently-paroled inmate to locate and kill her. Accordingly, Krueger did not want to provide a statement or become further involved in the case.

¶ 24 However, later, Krueger stated that, one night during sexual relations, Ehlers told her about " 'what went down' " at the gun shop. She stated that she remembered this incident because, during the sex act, Ehlers held a loaded cocked pistol to her head. She did not further elaborate.

¶ 25 At the hearing, Beaudouin testified that Krueger told him and Greenlees that Ehlers told her "how it went down." She agreed ("[s]he nodded") that she had told Snyders that, around the time he disposed of the gun, Ehlers stated that he shot *and* stabbed Peters, but Krueger refused to sign an affidavit to this effect.

¶ 26 During his testimony, Beaudouin mentioned reading to Krueger from Snyders' replacement report to ask her about the circumstances of Ehlers' statement. He had trouble recalling what he and Greenlees told Krueger and stated that, if he saw the report, he could testify about what he read to Krueger. Counsel showed Beaudouin exhibit A (Snyders' replacement report, referred to as "the police report from Detective Snyders that contains the statements" Ehlers made to her), but Beaudouin stated that it was *not* the report he recalled that he and Greenlees used when they interviewed Krueger.

¶ 27 On or about November 20 or 21, 2000, Beaudouin and Greenlees again traveled to Memphis to speak to Krueger. She refused to sign an affidavit, stating again that she feared that Ehlers, who was no longer on death row and was serving a life sentence, would send someone to kill her. At the hearing, Beaudouin testified that Krueger agreed ("[s]he said yes") that Ehlers stated that he both shot and stabbed Peters.

¶ 28 On or about June 9, 2000, Beaudouin accompanied Greenlees to Freeport to interview trial co-counsel, John Vogt and Neil Brown. They met at Vogt's office and, together, reviewed the trial file and some trial transcripts. In an affidavit, Beaudouin averred that Vogt and Brown stated that they did not intentionally fail to introduce statements to Snyders by Krueger concerning Ehlers' admissions to causing the knife wounds. (Co-counsel later disputed Beaudouin's affidavit statements, as we relate below.) They also stated that they did not have any strategic purpose in failing to attempt to introduce the statements and that their re-introduction was merely "overlooked since it was disclosed during trial." Counsel further stated that they intended to research the admissibility issue, but were not able to due to the late disclosure. According to Beaudouin, they also intended, regardless of whether they were able to get it admitted at trial, to introduce the statement at sentencing, "but did not do so." Counsel also stated that they did not investigate Krueger's statements after disclosure, and the trial file contained no notes regarding the statements. They were not provided copies of Snyders' notes, and counsel did not believe that they reviewed the taped statement after the disclosure.

¶ 29 At the hearing, Beaudouin testified that he stated in his affidavit that the date was on or about June 9, 2000, because he could not recall the precise date they visited trial co-counsel. He executed his affidavit about six months after meeting with Vogt and Brown.

¶ 30 4. Audrey Krueger

¶ 31 Krueger stated that she testified at Keene's and Ehlers' trials. Addressing her May 14, 1993, interview with Snyders and Whitmore, Krueger *denied* stating that Ehlers told her that he was the one who shot *and* stabbed Peters. Rather, Ehlers told her that Peters was shot twice and stabbed once, not that he himself had inflicted both wounds.

¶ 32 In June 1993, Krueger, on her own initiative, went to speak to Snyders about what

happened to Ehlers' gun. Reviewing Snyders' replacement report, she *denied* the statement therein that she also told Snyders that Ehlers told her that he shot *and* stabbed Peters.

¶ 33 Reviewing Beaudouin's affidavit concerning the 2000 meetings with Krueger, Krueger denied stating or agreeing that Ehlers admitted shooting and stabbing Peters. Otherwise, the affidavit stated true events, including that, one night during sexual relations and while holding a cocked pistol to her head, Ehlers told her about what went down at the gun shop. She agreed that, prior to Keene's trial, his investigators had tried to locate and speak to her. As to the November 2000 interview by Beaudouin and Greenlees, Krueger denied that she told Greenlees that Ehlers told her he shot and stabbed Peters. She also denied that she nodded in agreement to such an assertion by the police.

¶ 34 5. Lieutenant Robert Smith

¶ 35 Robert Smith testified that, from 1991 to 1999, he was a lieutenant in the Freeport police department, overseeing the detective bureau, and he was the lead investigator in the Peters murder. In March 1993, Smith interviewed Hoover, who was in custody. Hoover provided a detailed account of the murder, including that, while Hoover was rifling through a safe in the gun shop after Peters was shot, he overheard one of the others state that Peters was not yet dead. Hoover turned toward Peters and saw Keene remove a knife from a cabinet. He then observed Keene's arm moving up and down in a thrusting motion around Peters' head and inflicting additional injuries. According to Smith, Hoover did not tell Smith that he specifically saw what injuries Keene was inflicting, but he only told him that he saw Keene's arm thrusting up and down in the vicinity of Peters' head and that, immediately before this, he observed Keene remove a knife from a glass case.

¶ 36 Smith could not recall if Hoover told him about any conversations with Keene during the

ride back to Tinley Park. Nor did he recall whether or not Hoover stated that Keene said that he was the one who stabbed Peters.

¶ 37 Addressing Snyders' report, Smith believed that no original report was submitted to him. During trial, when it came to light that the report was lost, Smith directed Snyders to prepare a replacement report.

¶ 38 6. Trial Co-Counsel John Vogt

¶ 39 Keene supported his petition by his trial co-counsel's, John Vogt's, 2000 affidavit and 2012 deposition.

¶ 40 In his affidavit, Vogt averred that he was initially appointed as stand-by counsel for Keene, who was proceeding *pro se*. However, immediately prior to trial, Keene decided that he desired representation by counsel, and Vogt and Brown were appointed as trial co-counsel.

¶ 41 Vogt averred that, prior to trial, he and Brown were not able to interview Krueger or Dr. Blum. During trial, immediately prior to Krueger's cross-examination, the State disclosed the Snyder-Krueger interviews and the fact that a report containing Krueger's statements had been lost. The trial court allowed Vogt and Brown to interview Snyders prior to Krueger's cross-examination.

¶ 42 During the interview, they learned for the first time that Krueger had made statements implicating Ehlers as responsible for the knife wounds. As this occurred in the middle of trial, counsel requested time to analyze the information. "We intended to evaluate the statements for admissibility at trial and/or at sentencing, and we intended to attempt to introduce the statements, at a minimum at sentencing. Because these statements were disclosed, orally, in the middle of trial, there was not enough time to evaluate the material and it was not further presented to the Court."

¶ 43 Vogt averred that they did not intentionally fail to introduce, or attempt to introduce, the statements, nor did they intentionally fail to question Krueger or Snyders about the statements. They also, he stated, did not intentionally fail to recall Krueger to the witness stand. Vogt further averred that he and Brown did not make any strategic decisions concerning the use of Krueger's statements that Ehlers admitted to stabbing Peters.

¶ 44 The parties deposed Vogt on September 18, 2012, and the deposition transcript was admitted into evidence. There, Vogt testified that he was currently the Stephenson County State's Attorney. In 1993, after his role changed from stand-by to trial co-counsel for Keene, an investigator was hired to interview individuals on Keene's behalf. Reviewing the investigative summary report, Vogt testified that it related that the investigator made five attempts to interview Krueger, and she would not speak to the investigator. After the disclosure of the Snyders-Krueger interview, the State sought a continuance that Keene instructed Vogt to oppose, and the State's motion was denied.

¶ 45 In preparing for his deposition, Vogt found a document that appeared to be notes he took during his mid-trial interview of Snyders. He had written, " 'Tony did shooting *or* stabbing,' " (emphasis added) and "admission of a co-defendant." This was the first time since the trial that he had reviewed the trial file. Vogt acknowledged that co-counsel Brown wrote in his notes "shooting *and* stabbing" (emphasis added), a difference he acknowledged was salient. However, as he sat at his deposition, he did not recall which phrase Snyders actually spoke.

¶ 46 Vogt also reviewed the trial transcripts in preparing for the deposition. He came to believe that, at the time of trial, he felt that Krueger's statement would not make any difference. Although he could not specifically remember, he believed that he had discussed admissibility problems with Keene (noting at the hearing that it was a co-defendant's statement to another

person who then, per Snyders, related it to him, who subsequently told trial counsel; thus, it was an admission of someone else, or double hearsay). After reading the transcripts, Vogt now believed that, because he was challenging Krueger on cross-examination, vouching for her credibility regarding the statement would have directly contradicted his closing argument in which he called her "unbelievable," "incredible," and a liar.

¶ 47 Addressing investigator Beaudouin's affidavit, Vogt testified that any statements he made to Beaudouin would have been made without having reviewed the trial transcripts. Now that he had reviewed the trial transcript, Vogt believed that a decision *had* been made that the statement was not admissible and that using it would have been inconsistent with their trial strategy that Krueger was not credible. As to sentencing, Vogt stated that, at the eligibility stage, the evidentiary rules are the same as at trial and he believed the statement would have also been inadmissible at that stage. As to the aggravation and mitigation stage, although the rules are more liberal, it was not as important because the jury would have already found that Keene did something that qualified him for the death penalty; the statement was not as important because it addressed something the jury had already decided.

¶ 48 7. Trial Co-Counsel W. Neil Brown

¶ 49 On September 18, 2012, the parties deposed trial co-counsel W. Neil Brown, and the deposition was admitted into evidence. Brown testified that he has been practicing law for about 35 years, including as a part-time public defender and a part-time assistant State's Attorney. In 1993, about one-half of his practice was in criminal law, including capital cases. At that time, he had been appointed as counsel for a defendant in a capital case about three or four times. Also, at that time, no special training was required to be a part of the capital litigation bar.

¶ 50 Addressing Keene's case, Brown testified that, at some point during trial, he became

aware that an investigator had attempted five times to interview Krueger. During trial, when they became aware of the missing police report discussing Ehlers' statement to Krueger, they objected and were permitted to interview Snyders over the lunch hour. During the interview, Brown wrote a note stating that Ehlers " 'said that he did shooting *and* stabbing according to Audrey.' " (Emphasis added.) Brown was certain that he wrote down exactly what Snyders stated at the meeting: " 'This was what was said at the meeting. That was the important statement at the meeting and what I based my motion for a mistrial on.' " They discussed with Keene that the statement was complicated and was double hearsay and that they would need an exception to get it into evidence. When the hearing resumed, Brown moved for a mistrial (because they had not received the report prior to trial), and the trial court denied the motion.

¶ 51 When asked whether he recalled discussing the statement again with Vogt at any time after this, Brown stated that he did not recall "because we were doing the trial. We just kind of come in at the—right at the beginning and we were just trying to get ready for the next day's trial or the next day's hearing because it was just one day right after another so we were getting ready for the next day's hearing."

¶ 52 Addressing Beaudouin's affidavit, Brown testified that he did not recall having a June 9, 2000, meeting with Beaudouin and Greenlees, noting that his calendar contained a note that he was out of town that day. Brown generally disagreed with Beaudouin's affidavit statement that Brown and Vogt stated that they did not intentionally fail to introduce the statements. Brown explained that they spoke to Keene and discussed "the possibility," and that they believed the statement was hearsay. According to Brown, they received the statement in the middle of trial, they discussed it, they did not have a lot of time to do any research because they were in the middle of trial. As to whether they intended to introduce the statement at sentencing, they

"didn't have time to research the issue because we were continually going through these hearings to get the information we needed to try to get that in." Also, the fact that it was double hearsay was a factor.

¶ 53 8. Co-defendant Michael Hoover

¶ 54 Co-defendant Hoover's June 1999 affidavit was admitted into evidence. There, Hoover averred that he was pressured and coerced into implicating Keene in the murder. He denied that Keene told him that he stabbed Peters and averred that he lied to Smith about Keene's involvement in the case because he felt pressured and coerced to do so. According to Hoover, Smith told him that someone was going to die for the murder and that he could not believe that one person murdered Peters. Hoover stated that Smith also told him that, if he could not tell him who murdered Peters, then Hoover would be charged with the murder. Thus, he had no choice but to implicate Keene.

¶ 55 In a 2011 letter to his appellate attorney, which was also admitted into evidence, Hoover asked his counsel to contact the Attorney General to explain that his 1999 affidavit was false. He explained that, while in prison, he had been confronted by Latin Kings gang members, who told him that Keene was also affiliated with the gang and that they knew that it was Hoover's testimony at trial that had put Keene on death row. According to Hoover, the gang members gave him a choice to either submit an affidavit (the 1999 affidavit) and be protected by the gang, or not cooperate and be killed. Thus, he signed a "fraudulent affidavit."

¶ 56 Hoover also stated that he received a letter in 2011, presumably from Keene, that dictated to him his testimony at Keene's postconviction evidentiary hearing. Also, he asked his appellate counsel to offer to reinstate the plea agreement he made, but then rejected, in 1993 (a 40-year sentence on the murder with a concurrent 15 years on the armed robbery) in exchange for his

testimony at Keene's third-stage evidentiary hearing. Hoover stated that, without an agreement, he would invoke his fifth amendment privilege because he also had a pending postconviction petition. Finally, Hoover asked that, if he was writted back to Stephenson County to testify at the hearing, that he be kept a safe distance from Keene.

¶ 57 9. Trial Court's Ruling

¶ 58 On May 14, 2014, over one year after the third-stage evidentiary hearing, the trial court issued a 64-page order, denying Keene's petition.

¶ 59 (a) Factual Findings

¶ 60 The court's extensive factual findings were as follows. Smith was a "very credible witness," his account of his interview of Hoover was truthful, and the contrary statements in Hoover's 1999 affidavit (that he was pressured into implicating Keene) were false. The court determined that Hoover was "likely pressured into giving" the false affidavit by inmates who approached him in prison, as he stated in his letter to his appellate attorney.

¶ 61 As to Krueger, the trial court found her "very believable" in *denying* that Ehlers told her, while in bed, that he had both shot *and* stabbed Peters and further found that she feared all three offenders. The court noted:

> "The revolting experience of being spoken to by Ehlers about the murder while they are engaging in a sexual act and while Ehlers held a gun to her head is not likely to have been forgotten by Krueger. Krueger's responses to questions of the subject of what Ehlers told her and what she told the detectives were firm and offered no hint of uncertainty that was visible to the court."

¶ 62 Noting that what Ehlers told Krueger and what she told Snyders "are at the heart of this proceeding," the court further noted that many reports were generated by detectives around the

time of Krueger's June 16, 1993, interview "and the detectives were heavy into the investigation and there would likely have been pressure on the investigating officers to generate reports quickly."

¶ 63 The court found that Keene's claim that Ehlers both shot and stabbed Peters and then bragged to Krueger about it was unpersuasive "in part" because Peters had not actually been stabbed; rather, his throat was slashed about five times. The court found it unlikely that a killer would mis-describe his act as stabbing; he would more likely brag that he had slit the man's throat.

¶ 64 The trial court also found that Keene failed to establish any accurate time frame for the making of Ehlers' statement. It noted that, at one point (in his replacement report), Snyders stated that Krueger told him that the statement was made after the gun's disposal. At another point (his deposition), Snyders stated that Krueger stated the statement was made a couple of days after the murder. At yet another point (again at his deposition), Snyders stated that the statement was made at some point in their relationship other than when the gun was disposed of. Whitmore recalled that the statement was made a few days after the murder.

¶ 65 The court determined that Keene did not establish that Ehlers told Krueger that he both shot and stabbed Peters. Rather, the court found that Ehlers did *not* make the statement to Krueger. It found that, "most likely," Ehlers told Krueger that he and the others shot and stabbed Peters. The trial court noted that, if Ehlers had made the statement as Keene suggests, Krueger would have no reason to deny it at the third-stage hearing. She "surely would have seen that such testimony would make no difference to" Ehlers' sentence and that it would benefit Keene. However, the testimony she gave "required courage" on her part. Krueger was "very convincing to the court" and was "adamant" that she had not said that to the detectives.

¶ 66 Next, the trial court addressed how the detectives could have misunderstood Krueger. It found that Beaudouin, Keene's postconviction investigator, was "wrong," and "impeached," noting that his affidavit was prepared several months after his meeting with Vogt and Brown; his testimony that Krueger nodded in agreement when he reviewed Keene's version of Ehlers' statement to her differed from his affidavit, which did not mention any nod; and his affidavit incorrectly stated that he met with trial co-counsel on a certain date, when Brown's office calendar showed him as being out of town on that date.

¶ 67 Turning to the trial, the court noted that Keene initially proceeded *pro se*. Then, just six days before jury selection was to begin, Vogt and Brown were appointed to serve as trial counsel. When the State moved to continue (and when Vogt and Brown needed additional time to prepare for trial, considering their changed status from standby counsel to trial counsel), defendant instructed them to oppose any continuance and proceed to trial. The trial court denied the State's motion, and trial commenced. The court found that Snyders did originally prepare a report of his and Whitmore's June 16, 1993, interview of Krueger, but that it was lost, even though lead detective Smith was "very clear" that no original report had been submitted to him.

¶ 68 When the existence of the interview and likelihood of a police report came to light during trial, Vogt and Brown interviewed Snyders. In their notes, Vogt wrote that Snyders said that Krueger stated that Ehlers said she shot *or* stabbed Peters, whereas Brown wrote that Snyders related that Krueger stated that Ehlers said she shot *and* stabbed Peters. Smith directed Snyders to prepare a replacement report from his interview notes, but that replacement report (stating that Ehlers told Krueger he shot *and* stabbed Peters and that he made this statement at about the time of the pistol disposal) was not provided to either the State or defense counsel until some time after Keene's trial and sentencing.

¶ 69 The trial court found that, given that Snyders used the same set of notes to prepare his two reports and given that he used his notes when he spoke to trial co-counsel, he was consistent in his recital of Krueger's statement to him.

¶ 70 Turning to Vogt and Brown, the court found that they made a deliberate and strategic decision *not* to use the Krueger statement, believing that it was inadmissible as hearsay and that their defense required that they attack Krueger's credibility. "Krueger's credibility in describing the three men leaving her house together on the day before the murder and then returning the next day with duffle bags full of stolen firearms had to be challenged if the defense were to prevail. The attorneys believed the statement would be hearsay and inadmissible at the eligibility phase of sentencing."

¶ 71 Addressing Vogt's 2000 affidavit in which he stated he made no strategic decision concerning the statement, the trial court found that this did not undermine the foregoing findings because the affidavit was prepared seven years after trial and with Vogt not having access to his trial notes. The court placed more weight on Vogt's 2012 deposition testimony, which he gave after having reviewed his trial file and where he stated that he concluded that the statement would be inadmissible hearsay and undercut their trial strategy. Addressing the mitigation phase of sentencing, the court noted that Keene directed Vogt and Brown not to present any evidence.

¶ 72 (b) Conclusions of Law

¶ 73 Preliminarily, although Keene does not challenge in this appeal the court's findings on the *Brady* issue, we review the court's findings because they are relevant. On the *Brady* issue, the court determined that the claim failed because: (1) to the extent it relied on Keene's ability to present Krueger's testimony, the court found that Krueger did *not* make the statement to Snyders that Ehlers said he both shot and stabbed Peters; thus, the statement could not have been

favorable to the defense and, no *Brady* violation occurred; and (2) in any event, Krueger's testimony would not have been admissible at trial or at the eligibility phase because it was hearsay and, thus, there could have been no *Brady* violation. On the second point, the trial court determined that the statement would not have been admissible either as a statement against penal interest (although incriminating, no time frame was established for the statement, it was not corroborated, and there would have been no opportunity to cross-examine Ehlers) or as a non-hearsay statement of a co-conspirator (conspiracy was complete, any statement would not be in furtherance of the conspiracy, and the statement would not have been part of the concealment phase of the conspiracy).

¶ 74 The trial court's conclusions of law concerning the ineffective-assistance-of-trial-counsel claim that is the subject of this appeal addressed two sub-issues, that: (1) after learning of Krueger's statement, Vogt and Brown failed to interview Krueger, Snyders, and Whitmore and that they, therefore, failed to discover the exculpatory or mitigating nature of Krueger's evidence; and (2) Vogt and Brown thereafter failed to determine whether Krueger's statement would be admissible or to make any strategic decision regarding its use.

¶ 75 First, the court determined that Keene did not establish that his attorneys had failed to interview Snyders to learn from him what Krueger had stated and that, while they did not speak to Whitmore, Whitmore's account would have been substantially the same as Snyders' account. It found that, now that it had a complete record after the evidentiary hearing, it was clear that Vogt and Brown did interview Snyders immediately after learning of the missing report. The court found that they obtained from Snyders everything that was ultimately placed into the replacement report, "as uncertain as that was." It also found that co-counsel had already been

making attempts to contact and interview Krueger, who, likely due to fear, avoided them. Thus, Keene did not show that his attorneys failed to make efforts to contact and interview Krueger.

¶ 76 Turning to the second issue, the court determined that trial co-counsel's efforts to interview Krueger, their immediate interview of Snyders upon discovery of the missing report, and their conclusion that the Krueger statement would not be admissible and would have undercut their trial strategy in any event, did not fall below an objective standard of professional competence and did not prejudice Keene in any way. As to Snyders, the court found that co-counsel likely learned the same information from him that was later placed in the replacement report, which "most certainly accurately reflected the information contained in the original lost report because both were generated from the same notes." The information was minimal concerning the stabbing because the focus of the interview and of the report was Ehlers' possession of a revolver and his disposal of it. The trial court determined that co-counsel believed the statement was hearsay if Krueger was to testify and that it would be double hearsay if it was to be testified to by Snyders. The court found that the statement would not be admissible through Krueger as Ehlers' statement against penal interest, and no basis had been identified that would allow the statement to be presented through the double hearsay of Snyders repeating what Krueger said to him. Also, the court found that the statement would not aid Keene's case during the guilt/innocence phase of trial because Keene was in immediate jeopardy of being convicted of murder at least under an accountability theory (largely through Krueger's incriminating testimony describing the three co-defendants leaving her home and returning the next day with the duffle bags of stolen firearms) and they correctly concluded that their best trial defense was to attack Krueger's (and Hoover's) credibility.

¶ 77 Turning to sentencing, as to the eligibility phase, during which the same rules of evidence apply as at the guilt/innocence phase, the court found that co-counsel were confronted with the same hearsay and double hearsay issues and the testimony would not have been admissible.

¶ 78 As to the aggravation and mitigation phase, the court found that Keene made his own election, which he has never challenged, not to present any evidence.

¶ 79 Finally, the court noted that co-counsel's performance had to be considered in the context of the circumstances that Keene created, specifically, his change of mind to be represented by counsel six days before trial commenced and his direction that co-counsel oppose any continuance. These actions imposed burdens on his attorneys, the court noted, "not otherwise experienced by trial counsel."

¶ 80 II. ANALYSIS

¶ 81 Keene argues that the trial court erred in denying his postconviction petition, asserting that he established that he was found eligible for the death penalty in proceedings held in violation of his constitutional right to the effective assistance of counsel. For the following reasons, we reject Keene's arguments.

¶ 82 The Act provides a means by which a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). To be entitled to postconviction relief, a defendant must show that he or she has suffered a substantial deprivation of his or her federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5/122-1(a)(1) (West 2004); *Pendleton*, 223 Ill. 2d at 471. At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. *Id.* at 473. At a third-stage evidentiary hearing, "the circuit court serves as the fact finder, and, therefore, it is the

court's function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts." *People v. Domagala*, 2013 IL 113688, ¶ 34. When a petition is advanced to a third-stage evidentiary hearing, where fact-finding and credibility determinations are involved, we will not reverse a circuit court's decision unless it is manifestly erroneous. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). Manifest error is error that is clearly evident, plain, and indisputable. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

¶ 83 To review, at trial and on direct appeal, the parties knew only that Snyders' report of his interview with Krueger (where she stated that Ehlers told her he shot and stabbed Peters) had been lost. On direct appeal, Keene argued that trial counsel was ineffective for failing to present Krueger's statement during the eligibility phase of the capital sentencing hearing. The supreme court rejected this argument on the basis that counsel's performance could not be deficient where Krueger's statement was inadmissible. *Keene*, 169 Ill. 2d at 29. The court found it inadmissible because, although the statement was certainly incriminating, there was little indicia of its trustworthiness, including that no time frame was established for the statement, it was not corroborated, and it was unlikely that Ehlers could have been cross-examined (because he would likely have invoked the fifth amendment). *Id.* at 29-30.

¶ 84 In his postconviction petition, Keene asserted that trial counsel was ineffective for failing to timely investigate/discover Krueger's statement. He asserted that, had co-counsel interviewed Krueger, Snyders, and Whitmore prior to trial, they would have learned of the statement and could have used it to defeat the State's effort to qualify Keene for the death penalty. He supported his petition with trial counsel's investigator's activity report (which did not mention any interviews of the three witnesses), Vogt's December 2000 affidavit (wherein he stated the defense had not been able to interview Krueger prior to trial and that the defense's failure to use

Krueger's statement at trial and sentencing was not intentional defense strategy, but resulted from a lack of time to evaluate the material), and Beaudouin's affidavits (wherein Krueger stated that, during sexual relations, Ehlers told her what went down at the gun shop and where Vogt and Brown admitted that they did not interview Krueger or Snyders before trial and that their failure to introduce the statement was not for any strategic purpose, but resulted from oversight and the late disclosure of the information).

¶ 85 During the stage-three evidentiary hearing, the record, as detailed above, was even further developed concerning the timing and circumstances of Krueger's statement and trial co-counsel's performance.

¶ 86 A. Factual Findings

¶ 87 Turning to the first and key issue, Keene contends that the trial court's factual findings were erroneous. Specifically, he challenges the court's findings that: (1) Ehlers never made the statement admitting personal responsibility for Peters' knife wounds, or, if he did, he actually said "we" stabbed Peters; (2) Beaudouin was not credible; and (3) Krueger had no reason to deny that Ehlers admitted stabbing Peters.

¶ 88 (1) Ehlers' Statement

¶ 89 The trial court found that Ehlers did *not* make the statement to Krueger that he both shot and stabbed Peters. This finding was tied to the court's additional finding that Krueger's denial of Ehlers' alleged statement was "very believable" because Ehlers' general comments about the murder occurred during sexual relations and while Ehlers held a gun to Krueger's head. It was also tied to its finding that Krueger's testimony was "firm and offered no hint of uncertainty that was visible to the court," "required courage," was "very convincing," and that she was "adamant" that she had not said that to the detectives. In finding that Ehlers did not make the

statement, the court also determined that, "most likely," Ehlers told Krueger that he *and the others* shot and stabbed Peters. It noted that, if Ehlers had made the statement as Keene suggested, then Krueger would have no reason to deny it at the third-stage hearing because such testimony would not make any difference to Ehlers' sentence (because he was serving a life sentence) and it would benefit Keene. The trial court also found it unlikely that the actual killer would mis-describe a slashing as a stabbing.

¶ 90 Keene argues that the evidence overwhelmingly showed that Ehlers stated, and Krueger conveyed to Snyders and Whitmore, that Ehlers personally stabbed the victim. For support, he first takes issue with the court's comment that it was unlikely that the killer would mis-describe the act as "stabbing" and that he would more likely brag that he had "slit" Peters' throat. We reject this outright. Even if the court's findings on the description of the act were erroneous, and Keene's argument that the terms stabbing, slashing, and slicing were used interchangeably by the parties and some witnesses is compelling, it was not the court's *sole* basis for finding that Ehlers did not state that he stabbed Peters.

¶ 91 Next, Keene contends that the court's speculation that Ehlers must have stated that "we" stabbed Peters was unreasonable. Keene argues that, at the hearing, both Snyders and Whitmore stated that Krueger told them that Ehlers admitted to personally shooting and stabbing Peters. Whitmore's independent recollection, Keene urges, corroborates Snyders' version of Krueger's statement. We reject this argument. In fact, the court's finding was that, "most likely," Ehlers told Krueger that he and the others shot and stabbed Peters. Indeed, Krueger testified that Ehlers told her that Peters was shot twice and stabbed once and that he told her what went down at the gun shop. Keene ignores that the court's core finding and the one most critical to this appeal was that Ehlers did *not* make the statement that he shot and stabbed Peters. He also ignores that

Krueger's denial and Hoover's testimony that Keene admitted to the stabbing countered Snyders' and Whitmore's testimony.

¶ 92 Keene also notes that Whitmore testified about the circumstances surrounding Ehlers' statement, specifically, that it was made while he and Krueger were having sexual relations and while he held a gun to her head. He also notes that, although Snyders did not mention this, investigator Beaudouin did. According to Keene, common sense dictates that it is highly unlikely that Beaudouin and Whitmore would both conjure up a story about Ehlers describing the offense during a sex act. In Keene's view, Beaudouin's statement about the circumstances surrounding the statement corroborate Whitmore's recollection, which, in turn, corroborates Snyders' recollection of the statement and, therefore, overwhelmingly points to Ehlers' having made the statement. We find this argument unavailing. The fact that Whitmore recalled the *circumstances* of Ehlers' making a statement (*i.e.*, that they were in bed together) does not go to the issue of what, *precisely*, he stated to Krueger concerning the stabbing: whether he stated that he stabbed Peters, or not, or that "we" shot and stabbed the victim. To be clear, we do not conclude that it is of no evidentiary value, but it does not, as Keene suggests, render unreasonable the trial court's finding that Ehlers did not make the statement.

¶ 93 (2) Beaudouin's Credibility

¶ 94 Next, Keene argues that the trial court erred in discounting Beaudouin's testimony. The trial court found that Beaudouin's testimony and affidavit were not credible because: (1) he testified that Krueger nodded in agreement with a statement, but did not write that in his affidavit; (2) he testified that he asked Krueger to sign an affidavit, but admitted that he had not brought her an affidavit to sign; (3) in court, Beaudouin looked at Snyders' replacement report and stated that was not the report he reviewed with Krueger, when "surely," the court noted, it

was; and (4) he stated in his affidavit that he met with Vogt and Brown on a certain date, but Brown's office calendar showed him as being out of town on that date.

¶ 95 Keene argues that the court's rejection of Beaudouin's testimony and affidavit is against the manifest weight of the evidence. First, Keene agrees that the affidavit does not state that Krueger nodded her head in agreement, but it does say that Krueger "confirmed the statements she had made previously, but refused to further elaborate on Ehlers' involvement in the killings." In Keene's view, the court drew an arbitrary distinction because Krueger could have confirmed the statements by nodding her head or by saying so verbally. Second, Keene argues that no negative inference can reasonably be drawn from the fact that Beaudouin did not have a preprinted affidavit with him on the two occasions he spoke with Krueger. Until he had spoken to her, Keene urges, he could not have known what to put into an affidavit. Third, Keene points to Beaudouin's comment that the report he was presented in court was not actually Snyders' replacement report. The trial court found that "surely" it was the replacement report and further found that this demonstrated Beaudouin's faulty memory. Keene, however, notes that, on cross-examination, Beaudouin explained that he had a piece of paper that was not any document that he had been shown during the evidentiary hearing and that it contained Ehlers' statement wherein he admitted shooting and stabbing Peters. Keene complains that it was unreasonable for the court to find that the document Beaudouin was shown could only have been the replacement report. Keene speculates that it could have been an investigative report, notes someone had taken, a page from Keene's postconviction petition, or some other work product that Beaudouin and Greenlees had brought with them while conducting their out-of-state interview of Krueger. Finally, Keene argues that the trial court's finding crediting Brown's calendar entry over Beaudouin's affidavit was erroneous. He notes that the affidavit states that the interview

occurred "on or about" June 6, 2000, and that Beaudouin testified that he used the "on or about" language because he was not certain of the precise date. Also, Vogt agreed that he met with Greenlees and an investigator, but was not certain that the meeting occurred on June 6, 2000. Brown did not recall the meeting, and his calendar reflected that he was out of town that day. Keene asserts that the reasonable conclusion from this evidence is that the meeting did occur, but on a date other than, but around, June 6, 2000.

¶ 96 We find Keene's argument unavailing. The trial court found that it was "not persuaded *** by any of the testimony of" Beaudouin, who personally testified at the hearing. It noted the foregoing issues it had with his testimony and affidavit and resolved them against Beaudouin. The circuit court is in a superior position to determine and weigh witness credibility, observe the witnesses' demeanor, and resolve conflicts in their testimony." *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). We cannot conclude that its findings were unreasonable. The court did not find any one aspect of Beaudouin's testimony or affidavit necessarily determinative, but its assessment of his overall credibility was not unreasonable in light of the fact that the affidavit was prepared months after the interviews, his testimony was given years later, and in light of his confusion when presented with Snyders' replacement report. Further, its findings with respect to Beaudouin must be assessed in light of the court's finding that Krueger was very credible. Viewed in this light, we uphold the trial court's findings.

¶ 97 (3) Krueger's Motivation

¶ 98 Keene next argues that the trial court's finding that Krueger had no reason to deny her prior statements that Ehlers admitted shooting and stabbing Peters (if they were true) and that her denials at the hearing were credible because she was firm and adamant are against the manifest weight of the evidence. Keene contends that Krueger's denial at the evidentiary hearing that she

told Snyders and Whitmore that Ehlers admitted shooting and stabbing Peters was motivated by her fear that Ehlers would have her killed and was, therefore, not credible. We disagree.

¶ 99 The trial court's findings were not unreasonable. The court observed the witnesses and resolved conflicts in the testimony. *Id.* The court noted the unique circumstances surrounding Ehlers' statement to Krueger (*i.e.*, while in bed, having sex, and with a gun to her head) and found that she would not have forgotten the statement as a result. That statement, that he told her what went down at the gun shop, did not also include that he both shot and stabbed Peters.

¶ 100 Keene argues that Krueger's evidentiary hearing testimony was not credible because she feared Ehlers and, due to this fear, she denied making that statement that further incriminated Ehlers. We disagree. The trial court acknowledged Krueger's fear of Ehlers and the others. The court determined that Krueger would have no reason to deny that Ehlers made the statement to her because it would make no difference to Ehlers' sentence and could only benefit Keene, whom she also feared. The court found that her denial of making the statement was "very convincing" and "required courage" on her part. Ehlers is sentenced to life imprisonment, and Krueger's testimony clearly would not have impacted his sentence. We disagree with Keene that the court's findings were erroneous because they were contrary to the "unequivocal evidence" provided by Snyders, Whitmore, and Beaudouin. Keene ignores that Hoover's testimony implicated Keene.

¶ 101 B. Ineffective Assistance of Trial Counsel – Deficient Performance

¶ 102 Next, Keene argues that he established that he was denied effective assistance of trial counsel. He asserts that trial co-counsel failed to present or investigate the admissibility of known evidence that called into question his eligibility for the death penalty. Specifically, he contends that counsel failed to investigate or present Krueger's statement at the eligibility phase

of the capital sentencing hearing. The State sought the death penalty based on its theory that Keene was responsible for the knife wounds Peters received. According to Keene, the importance of the evidence that co-defendant Ehlers admitted to both shooting and stabbing Peters made trial counsel's failure to investigate the admissibility of such evidence all the more egregious. Keene concedes that, to demonstrate that counsel's performance was deficient, he must show that the statement would have been admissible.

¶ 103 To support a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and, furthermore, that counsel's actions resulted in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to interview a known witness can indicate incompetence if the testimony of the witness may exonerate defendant. *People v. Steidl*, 177 Ill. 2d 239, 256 (1997). However, whether a failure to investigate the testimony of a potential witness amounts to incompetence depends on the value of the evidence to the case. *Id.* See *People v. Guest*, 166 Ill. 2d 381, 400 (1995) (counsel may exercise discretion and reasonably decline to call a witness if testimony would be harmful to defendant, *e.g.*, subject to damaging impeachment).

¶ 104 We hold that, because we found no error above with the trial court's finding that the statement was not made, there was no statement that trial counsel could have investigated/discovered at the eligibility phase of the sentencing hearing and, therefore, that Keene did not show that trial co-counsel provided ineffective assistance.

¶ 105 However, because resolution of the trial court's factual finding concerning Ehlers' statement is close, we address his ineffective-assistance claim and, for the following reasons, we hold that, *even if* Ehlers made the statement, Keene's ineffective-assistance claim fails because:

(1) Krueger's statement was not admissible; (2) counsel did not fail to investigate/discover the statement; and (3) Keene did not establish any prejudice.

¶ 106 (1) Admissibility of Krueger's Statement

¶ 107 Keene argues that co-counsel's performance was deficient because Ehlers' statement to Krueger was admissible under the statement-against-penal-interest exception to the hearsay rule.

¶ 108 Addressing the exception, the supreme court has explained:

> "The general rule is that a third party's out-of-court statement that he [or she] committed a crime is hearsay and is inadmissible, even though the statement is against the declarant's penal interest. *People v. Tate*, 87 Ill. 2d 134, 143 (1981). However, where justice requires, and where there are sufficient indicia of reliability, such statements may be admitted under the statements-against-penal-interest exception to the hearsay rule. *People v. Bowel*, 111 Ill. 2d 58, 66 (1986) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)). To determine whether a statement contains sufficient indicia of reliability, we look foremost to whether the statement is self-incriminating and against the declarant's interest. *People v. Keene*, 169 Ill. 2d 1, 29 (1995). We also look to whether the statement was made spontaneously to a close acquaintance shortly after the crime occurred; whether the statement was corroborated by other evidence; and whether there was adequate opportunity for cross-examination of the declarant. These latter factors "are indicia, not hard and fast requirements," and they need not all be present for a statement to be admitted. *People v. House*, 141 Ill. 2d 323, 390 (1990) (citing *Bowel*, 111 Ill. 2d at 67; *Keene*, 169 Ill. 2d at 29). Ultimately, the question to be considered in deciding the admissibility of the statement is whether it was "made under circumstances that provide 'considerable assurance' of its reliability by objective indicia of

trustworthiness." *Bowel*, 111 Ill. 2d at 67 (quoting *Chambers*, 410 U.S. at 300-01). Whether a statement is admissible under the statement-against-penal-interest exception to the hearsay rule is within the sound discretion of the trial court. *Id.* at 68." *People v. Williams*, 193 Ill. 2d 1, 19-20 (2000).

¶ 109 Here, Ehlers' admission, *if made*, to both shooting and stabbing Peters is incriminating, so, that factor is satisfied. (Indeed, on direct appeal, the supreme court, resolving the ineffective-assistance claim on the deficient-performance prong, held that only the primary factor was present, *i.e.*, that Ehlers' statement was incriminating. *Keene*, 169 Ill. 2d at 29.)

¶ 110 As to the first *Chambers* factor, courts have held that a spontaneous statement made to a close acquaintance is more likely to be trustworthy. See, *e.g.*, *People v. Black*, 80 Ill. App. 3d 116, 121 (1980) (spontaneous admissions to friend or confidant more likely reliable than calculated statements made to a police officer). On direct appeal, the supreme court concluded that, although Krueger was a close acquaintance, Keene did not establish a time frame for when Ehlers made the statement to her. *Keene*, 169 Ill. 2d at 29-30. And, after the third-stage evidentiary hearing, the trial court found likewise. The trial court relied on the evidence that, at various points, Snyders stated that Krueger told him that the statement was made: after the gun's disposal, a couple of days after the murder, and at some other point in their relationship other than when the gun was disposed of. The court also noted Whitmore's testimony that the statement was made a few days after the murder.

¶ 111 Keene argues that the evidence reflected that the statement was made some time between a few days and one week after the murder. He contends that the trial court erred in determining that he established "no definite time frame" because this is an incorrect statement of the law and the evidence. He contends that the law does not require a *definite* time frame, but, rather that it

be made "shortly" after the offense. *Chambers*, 410 U.S. at 300; *Bowel*, 111 Ill. 2d at 67; *contra People v. Rice*, 166 Ill. 2d 35, 44-45 (1995) (testimony elicited 22 months after seizure did not satisfy *Chambers*); *People v. Tate*, 87 Ill. 2d 134, 144 (1981) (admission occurring two months after offense was not "shortly" after the crime). Keene notes that Krueger testified at trial that she was with Ehlers about one week after the murder, when he threw away the gun he used in the offense. Snyders' replacement report stated that Ehlers told Krueger that he was the one who shot and stabbed Peters "at about the same time when the pistol was disposed of." Further, at his deposition, Snyders explained that Krueger did not say Ehlers made his statement while they were actually throwing away the gun, but "at some other point during their relationship." Addressing Whitmore's testimony, Keene notes that Whitmore testified at his deposition that Krueger told them about being with Ehlers when he dismantled the gun and about a time when they were in bed and Ehlers told her about the murder and that he shot and stabbed Peters. When asked for a time frame, Whitmore stated that both the disposal and the statement occurred "in a time period within a few days after when the murder occurred." Keene further notes that Beaudouin stated that Krueger affirmed that, about the time when Ehlers disposed of the gun and while they were in bed, he told her about the murder and his involvement in it.

¶ 112 We conclude that, although this issue is close, the trial court erred in assessing this factor and that it leans in Keene's favor. We believe that the trial court was more likely troubled by the lack of *consistency* in the witnesses' *recollection* of Krueger's statement, not that the statement was not made sufficiently close in time to the crime, which is the focus of the case law upon which Keene relies. However, we find unreasonable the trial court's finding that the lack of consistency leaned against Keene.

¶ 113 However, we hold that the second *Chambers* factor—whether the statement was corroborated by other evidence—is not met here. On direct appeal, the supreme court rejected Keene's argument that Ehlers' statement was corroborated by Hoover's testimony, noting that only part of Ehlers' statement (that he shot Peters) was corroborated by Hoover's testimony and that Hoover also testified that Keene had stated that he slit Peters' throat, which was *contradictory*. *Id.* at 30. Keene argues here that the record contains "some" evidence that corroborates Krueger's hearsay statement. Specifically, he notes, Krueger, who was not present at the crime scene, told Snyders and Whitmore that Ehlers stated that he was the one who shot "the guy" in the gun shop and that he was also the one who stabbed him. Keene further notes that, at trial, the State presented evidence that Peters was shot and stabbed and that the knife was actually still embedded in Peters' throat when his body was discovered. As further corroboration, Keene points to evidence at trial that established that the crime was committed in a gun shop. Also, Krueger told Snyders that Ehlers confessed his involvement in the crime around the same time she witnessed him dispose of his gun. At trial, Krueger testified that she was with Ehlers when he threw his gun in a dumpster. We disagree that this evidence is corroborating.

¶ 114 We conclude that the second factor is not met because there was not sufficient corroboration for Krueger's statement. The evidence to which Keene points does not address whether Ehlers stabbed Peters, but concerns the circumstances of the gun's disposal and other details about the crime.

¶ 115 As to the third *Chambers* factor, whether there existed an adequate opportunity to cross-examine the declarant, we conclude that it is not satisfied. "[A] declarant who asserts his or her fifth amendment right not to testify is not available for cross-examination in the context of the

fourth *Chambers* factor." *People v. Caffey*, 205 Ill. 2d 52, 99 (2002). On direct appeal, the supreme court held that it was unlikely that Ehlers could have been cross-examined because, as a co-defendant (who had not yet been tried), he "almost certainly would have invoked his fifth amendment right not to incriminate himself." *Id.* Keene appears to concede this point, but urges that this is but one factor in determining trustworthiness.

¶ 116 In all, we conclude that there was not sufficient indicia of trustworthiness in the statement Ehlers made to Krueger, if made, for the statement to be admissible under the statement-against-penal-interest exception to the hearsay rule. Other than the fact that it was, if made, incriminating, the only factor in Keene's favor is that it was made a short time after the murder. Under the circumstances here, we are troubled by the lack of corroboration and the inability to cross-examine Ehlers. Assessing the factors as a whole, we conclude that this was not sufficient to show that the statement was trustworthy.

¶ 117 (2) Counsel's Failure to Investigate Krueger's Statement

¶ 118 Next, Keene argues that trial co-counsel's failure to investigate the admissibility of Ehlers' statement was objectively unreasonable and cannot be excused as trial strategy. He contends that Brown and Vogt failed to investigate whether the statement could be admissible under any hearsay exception and failed to seek additional information about the statement; thus, they were in no position to reasonably decide whether the statement was admissible.

¶ 119 The supreme court has stated that:

> "[C]ounsel has a duty to investigate potential sources of mitigating evidence to present at the capital sentencing hear, or must have a sound reason for not making the investigation. [Citations.] Although courts are highly deferential in reviewing counsel's strategic decisions whether to present certain mitigating evidence, such deference is not warranted

where the lack of mitigation evidence presented stems not from strategy, but from counsel's failure to properly investigate and prepare the defense." *People v. Thompkins,* 191 Ill. 2d 438, 469-71 (2000) (further noting that where counsel failed to uncover what potential witnesses would say, counsel could not make a reasoned decision whether the testimony would have impacted the case).

¶ 120 Keene points to Vogt's and Brown's statements that they intended to research the admissibility of the statement, but that they never did. Brown explained that they were busy preparing for the next day's hearings. Keene attempts to cast doubt on the veracity of Vogt's deposition testimony (that he *had* a strategic purpose in *not* trying to admit the evidence), arguing that: the law is skeptical of recantation; he was the State's Attorney when his deposition was taken and had some "perhaps subliminal" motivation in maintaining Keene's conviction and sentence; and that his deposition testimony, given after he had reviewed the trial file, was given through the distorting lens of hindsight. Also, Keene argues that there was no point in maintaining that Krueger was a liar at sentencing because the jury, in convicting Keene, showed that it accepted her testimony as true.

¶ 121 We conclude that Keene has not shown deficient performance based on his argument that co-counsel failed to investigate the statement, if made. The trial court found Vogt's deposition testimony credible, and we cannot conclude that this finding was unreasonable. There, Vogt explained that, after having reviewed the trial file (which he had not done prior to signing his affidavit), he recalled that he and Brown made a strategic decision not to use the statement because it would be inconsistent with their trial strategy to cast doubt on Krueger's credibility. We cannot question a consistent strategy. Also, they believed (and we agree) that the statement was inadmissible. Given this testimony and the absence of any evidence that Vogt was actually

motivated by improper considerations, we cannot conclude that Keene has shown deficient performance by his trial attorneys.

¶ 122 C. Ineffective Assistance - Prejudice

¶ 123 Although our conclusion that Keene has failed to establish deficient performance disposes of his ineffective-assistance claim, we briefly address the prejudice prong.

¶ 124 It is the defendant's burden to affirmatively prove prejudice. *Strickland*, 466 U.S. at 693. In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The supreme court has observed that the prejudice component of *Strickland* "entails more than an 'outcome-determinative' test"; rather, "[t]he defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). Moreover, the Supreme Court stated in *Strickland* that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694. Therefore, the defendant must show that he or she was denied a fair trial due to [his or] her counsel's alleged ineffectiveness, not that the result of [his or] her trial was affected." *People v. Marshall*, 375 Ill. App. 3d 670, 675-76 (2007). "The failure to investigate alone can constitute ineffective assistance if it was prejudicial and did not conform to minimal professional standards." *People v. Kelley*, 304 Ill. App. 3d 628, 635 (1999).

¶ 125 We conclude that Keene failed to show that, had Krueger's statement, if made, been introduced at the eligibility phase, the jury would have found him ineligible for death. As the

supreme court noted on direct appeal, the State's case rested primarily on Hoover's testimony that Keene admitted to stabbing Peters. *Keene*, 169 Ill. 2d at 9. This evidence was corroborated by Blum's testimony that Peters' throat was likely slit by someone who held the knife in his left hand and evidence that, of the three co-defendants, only Keene was left-handed. *Id.* In addition to this evidence, trial co-counsel attacked Krueger's credibility during trial. Given this evidence, we cannot conclude that there is a reasonable probability that the jury, after having found Keene guilty of murder (based on Hoover's and Blum's testimony), would have decided at sentencing to discredit Hoover and Blum and, after hearing defense counsel's argument at the guilt/innocence phase that Krueger was not credible, find convincing defense counsel's argument that Krueger *was* credible during sentencing. Keene essentially asks us to find reasonable a jury's inconsistent credibility determinations. We decline to do so.

¶ 126 III. CONCLUSION

¶ 127 For the reasons stated, the judgment of the circuit court of Stephenson County is affirmed.

¶ 128 Affirmed.