

NOTICE

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FILED

December 13, 2016
Carla Bender
4th District Appellate
Court, IL

2016 IL App (4th) 150032-U

NO. 4-15-0032

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Adams County
AARON D. HORTON,)	No. 10CF50
Defendant-Appellant.)	
)	Honorable
)	Scott H. Walden,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* It would be impossible to argue, in good faith, that the trial court’s decision in the third stage of this postconviction proceeding is manifestly erroneous, and therefore appellate counsel’s motion to withdraw is granted, and the trial court’s judgment is affirmed.

¶ 2 A jury found defendant, Aaron D. Horton, guilty of counts I and VII of the second amended information. Count I charged him with home invasion (720 ILCS 5/12-11(a)(3) (West 2010)), for which the trial court sentenced him to 22 years’ imprisonment, and count VII charged him with residential burglary (720 ILCS 5/19-3(a) (West 2010)), for which the court sentenced him to a concurrent term of 10 years’ imprisonment.

¶ 3 Defendant afterward sought postconviction relief. He appeals from the trial court’s decision, after an evidentiary hearing, to deny his second amended petition for

postconviction relief. The office of the State Appellate Defender (appellate counsel) has moved to withdraw from representing him in this appeal, because in the opinion of appellate counsel, this appeal is so clearly unmeritorious that any argument made in support of it would be frivolous and hence unethical. See *People v. Brown*, 2016 IL App (2d) 140458, ¶ 10; *People v. Meeks*, 2016 IL App (2d) 140509, ¶ 8; *People v. Lee*, 251 Ill. App. 3d 63, 65 (1993). We notified defendant of his right to file additional points and authorities by a certain date, but he has not done so. After carefully reviewing the record, we conclude that appellate counsel is correct in its assessment of the merits of this appeal. It would be impossible to argue, in good faith, that the trial court's decision in the third stage of this postconviction proceeding was manifestly erroneous. Therefore, we grant appellate counsel's motion to withdraw, and we affirm the trial court's judgment.

¶ 4

I. BACKGROUND

¶ 5

A. The Jury Trial

¶ 6

1. *The Testimony of Gregory Freels*

¶ 7

a. Josh Turnbaugh's Attempt To Break Into Freels's House in October 2009

¶ 8

Freels testified he used and sold cannabis while residing at 1220 Koettters Lane in Quincy, Illinois, and that Josh Turnbaugh was one of his customers. One day, in October 2009, Turnbaugh approached Freels and offered to trade methamphetamine for cannabis. Freels refused because he wanted cash.

¶ 9

Later that evening, Jeremy Hinkamper, who also lived at 1220 Koettters Lane, came home and found Turnbaugh knocking on the front door (as Hinkamper testified).

might know something about the burglary was Turnbaugh.

¶ 15 At some point, the police became aware of some contraband in Freels's house: a set of scales, clipped-off corners of Baggies, and cannabis. He never was charged, however, with delivering or intending to deliver cannabis. Instead, in return for the dismissal of a charge of possessing cannabis, he pleaded guilty to possessing drug paraphernalia. He was sentenced to a fine and costs.

¶ 16 *2. The Testimony of Jocelyn Reid*

¶ 17 Reid testified that during the night of January 25 to 26, 2010, she was awakened by the sound of scuffling in the living room. She was aware that Freels used cannabis and that he sold it out of the house. When she came out of the bedroom and into the living room, she saw Freels struggling with a man, who was beating Freels with a pistol. She ran over and shoved the man away from Freels.

¶ 18 The living room was illuminated with floor lamps, enabling Reid to see the intruder. She did not recognize him but estimated he was about 5 feet 9 inches or 5 feet 10 inches tall—about Freels's height—and that he weighed between 160 and 175 pounds (she had told the police 150 to 160 pounds). He wore black jeans, a black jacket, and a stocking cap. The man did not speak at all while he was in the house.

¶ 19 Like Freels, Reid had looked at photographic arrays without seeing anyone who resembled the intruder. According to Reid, however, defendant—the only black man in the courtroom—looked “very similar” to the intruder. Reid described the intruder's gun as a black pistol, which he held by the barrel, using it as a club. It seemed to her he was holding the pistol

as “a sort of prop,” not as if he intended to shoot anyone with it. Unknowledgeable about guns, she had no idea what the make or model of the pistol was. She had no doubt, though, that it was a handgun; it looked like a real gun to her.

¶ 20 As the man beat Freels with the pistol, Reid pushed the man toward the open door, which was six to eight feet away. The man made eye contact with her and hit her once in the back of the head with the butt of the pistol. She muscled him into the doorway and hit him with the door as she tried to close it. Freels helped her push the door completely shut—in so doing, pushing the man outdoors.

¶ 21 After the intruder was ejected from the house, Reid heard voices outside. It sounded like two men conferring in the front yard. The conversation went on for a minute or two (she told the police five minutes). She heard no car leaving. After checking on Freels, she dialed 9-1-1.

¶ 22 Both Reid and Freels suspected that Turnbaugh was somehow involved in the burglary. The frame of the front door had sustained damage when Turnbaugh tried to kick the door down in October 2009. Obviously, though, Turnbaugh was not the actual intruder on this occasion, because Turnbaugh was white and the intruder was black.

¶ 23 *3. The Testimony of Ruth Kipping*

¶ 24 Deputy Sheriff Ruth Kipping testified she was dispatched to 1220 Koettters Lane at 1:55 a.m. on January 26, 2010. Reid, who was about 5 feet 7 inches tall, described the intruder as a black man about 5 feet 10 inches tall, weighing about 160 pounds, and armed with a black handgun. Freels stated his belief that Turnbaugh might have been involved in the burglary. The

front door of the house was damaged from a prior attempted break-in. At that time, the police did not search the house, and they noticed no cannabis.

¶ 25 *4. The Testimony of Josh Turnbaugh*

¶ 26 The State called Turnbaugh. He testified he was awaiting trial on a charge of attempt (residential burglary) because of his attempt to break into Freels's residence in October 2009.

¶ 27 Turnbaugh testified that at 1:26 a.m. on January 26, 2010, Tiffany Robinson called him on his cell phone. He had known her ever since they were children. (He denied knowing either defendant or another man, Termass Pleasant.) Robinson asked Turnbaugh if he knew where she could obtain some cannabis. He replied that Freels might have some. Robinson knew where Freels lived.

¶ 28 The afternoon of January 26, 2010, Turnbaugh received a visit from the police, who accused him of breaking into Freels's house the night before. Turnbaugh denied any involvement, and he gave the police Robinson's name. To clear himself of suspicion, he agreed to go to Robinson's house that day and talk with her while wearing a wire. He carried out this agreement. He went to her house and talked with her about the burglary of Freels's house, which had occurred the previous night. Their conversation was secretly recorded.

¶ 29 *5. The Testimony of Sam Smith*

¶ 30 An investigator with the sheriff's department, Sam Smith, coordinated the investigation of the burglary. As far as he knew, nothing was stolen from Freels's house in the

burglary.

¶ 31 After the police were given Turnbaugh's name, some police officers spoke with him, and he in turn gave them the name of Garth Myers—but this turned out to be false information; Myers was not involved. When Reid complained to the police that Turnbaugh was calling her and asking her if she knew who might have been involved in the burglary, the police brought Turnbaugh back to the police station and questioned him further. This time, Turnbaugh divulged that Robinson called him the night of the burglary and asked him where she might buy some cannabis. The police asked Turnbaugh to talk with Robinson at her house while wearing a wire. He agreed to do so. The police obtained an overhear order, and they recorded Turnbaugh's conversation with her.

¶ 32 On the basis of this recorded conversation, the police arrested Robinson around midnight on January 26 to 27, 2010, and questioned her. At first, she denied any involvement in the burglary. The police told her they did not believe her. After she changed her story two or three times, the police revealed to her they had recorded her conversation with Turnbaugh. She then told the police what she had told Turnbaugh: that defendant was the one who entered Freels's residence during the early morning of January 26, 2010. Her statement was videotaped. She explained that, initially, she lied out of fear that defendant would beat her up.

¶ 33 The police then went looking for defendant and Termass Pleasant. They found the two men at the residence of Bridget Gholston, 727 Kentucky Street, in Quincy, and arrested them. Gholston was Pleasant's girlfriend and the mother of one of his children.

¶ 34 At the time of the arrest, defendant was dressed all in black, and Pleasant was wearing pajama pants and a gray T-shirt. People's exhibit No. 4 was the clothing that defendant

was wearing: a black T-shirt, black sweat pants, shoes, and a gray jacket that was black when turned inside out.

¶ 35 No one corroborated Robinson's statement that defendant and Pleasant were with her around 1:30 a.m. on January 26, 2010. Gholston told the police, however, that defendant and Pleasant were at her residence when she went to bed at 10 p.m. on January 25, 2010.

¶ 36 *6. The Testimony of Tiffany Robinson*

¶ 37 The State called Tiffany Robinson. She testified she had pleaded guilty to attempt (burglary). The basis of that charge was her participation in Turnbaugh's attempt to break into Freels's house in October 2009. On that occasion, she drove Turnbaugh to Freels's house, knowing he intended to break in and steal cannabis and electronic items. The plan was for Turnbaugh to steal a PlayStation system and a laptop for himself and a television for Robinson. When she and Turnbaugh got out of the car, they found that the door of Freels's house was locked. Freels's roommate, Hinkamper, came onto the scene, and Turnbaugh sprayed him with Mace.

¶ 38 Also, in response to what happened at Freels's house the early morning of January 26, 2010, the State charged Robinson with home invasion, a Class X felony carrying a mandatory minimum prison sentence of six years. She had been allowed, however, to plead guilty to burglary, a Class 2 felony, and this opened up the possibility that she could receive probation instead of a prison sentence. There was no agreement, however, as to a specific sentence. The sole benefit of the bargain for her was being allowed to plead guilty to the lesser offense, burglary, in lieu of being convicted of home invasion. Her part of the agreement was to

testify truthfully against her two codefendants, defendant and Pleasant.

¶ 39 Robinson admitted that when the police arrested her, she initially lied to them, denying she had anything to do with the burglary. She lied (she explained in her testimony) because she was afraid that members of defendant's family would beat her up. Then the police revealed to her that the conversation between herself and Turnbaugh, conducted in the apparent privacy of her bedroom, had been recorded. That prompted her to level with the police. She testified: "I'm thinking that I was pretty much going to get in trouble, that I was caught." She told the police what she had told Turnbaugh: that defendant was the one who actually went into Freels's house.

¶ 40 Robinson testified that the night of January 25 to 26, 2010, she was driving her car around. Her ex-boyfriend, defendant, was with her, as was Termass Pleasant, the father of her two-year-old son. Defendant was wearing "a black hoodie" and "dark sweatpants," and he had on "a wave cap," something in between a stocking cap and a skull cap. She never saw defendant carrying a gun that night, and she did not know, one way or the other, whether he had a gun on him. She estimated that her other passenger, Pleasant, was 5 feet 6 inches or 5 feet 7 inches tall and that he weighed 125 to 130 pounds. She could not remember what Pleasant was wearing, but he probably was wearing sweatpants, his typical attire.

¶ 41 Robinson had picked up defendant and Pleasant around 10 p.m. or 10:30 p.m. on January 25, 2010, from Bridget Gholston's house. (Pleasant, who recently had been released from jail, was in a relationship with Gholston at the time.) The three of them—Robinson, defendant, and Pleasant—were smoking cannabis in her car (she did not know where the cannabis had come from), and they wanted to buy more cannabis.

¶ 42 So, Robinson telephoned Turnbaugh and asked him if he knew where she might obtain some cannabis. He told her Freels would have some. She passed this information on to her two passengers. The prosecutor asked her:

“Q. What then, Ms. Robinson, does [defendant] say in the car there with you and Termass Pleasant about what he intends to do?

A. He tells me that was a lick and that he would do it.”

Robinson explained the meaning of the phrase “that was a lick”: it meant that defendant would run inside Freels’s house and steal the cannabis.

¶ 43 The prosecutor asked Robinson:

“Q. Was there any question from the conversation inside the car after you shared that information with them about what that intent was?

A. Well, I was going to show them the house, and they was supposed to do it by themselves, but he—Well, go ahead.

Q. That’s all right. I didn’t mean to interrupt you.

A. But he decided he was going to go ahead and do it that night.”

¶ 44 Robinson drove to 1220 Koettters Lane and pulled into the driveway. Defendant and Pleasant were in the car with her. Defendant got out, and Pleasant remained in the car. Defendant walked over to a window of the house, and then he checked the front door: it was unlocked. He came back to the car and told Robinson the door was unlocked and that he was

going to enter the house. Robinson pulled out of the driveway of 1220 Koettters Lane and “kind of into another little driveway next door,” about 20 feet away from Freels’s house. Pleasant stayed in the car with her. Defendant headed back toward the house and picked up a two-by-four that was about three feet long. Robinson testified: “I know he grabbed [the board]. I’m not sure if he took it into the house with him or what he did with it.”

¶ 45 Defendant had been out of Robinson’s sight for about two minutes when Pleasant called out to him, from inside the car, “ ‘Come on, Aaron,’ ” or “ ‘Let’s go, Aaron.’ ” Defendant returned to the car, and he appeared to be angry. The prosecutor asked Robinson:

“Q. In that regard, what does he say when he gets back to the car?

A. That he didn't find any weed, they didn't have any, and he says that he had hit the white girl and the white boy.

Q. Let me stop you there. He was specific to describe at least to the extent of the sex and the race of two people, right?

A. Right.

Q. ‘White girl,’ right?

A. Right.

Q. ‘White boy’ were the words he used.

A. Yes.

Q. What did he say that he did to the white boy?

A. He said that he was laying on the couch and he hit him, and then the white girl came from the hallway and he had struck her also.

Q. What did he have to say or what did he—When he comes back, you know, what kind of fight either of them put up?

A. He said the white girl had more heart than the boy did.

Q. Those were the words that he used?

A. Yes, meaning that the white girl gave more of a fight than the boy did.”

¶ 46 After defendant got back in the car, Robinson drove Pleasant back to Gholston’s house and dropped defendant off at a house at Fifth and Cedar Streets.

¶ 47 *7. The Testimony of Shane Williams*

¶ 48 The defense called Shane Williams, who had two felony convictions. He testified that in January 2010, he and Heaven Schuette were defendant’s roommates in an apartment at 537 Grant Street. Although Williams could not remember any specific dates, he testified that defendant most likely was home by 9 p.m. on January 25, 2010, playing video games, drinking, and smoking cannabis, because those generally were his activities every evening.

¶ 49 *8. The Testimony of Kamilah Hawkins*

¶ 50 Kamilah Hawkins testified she had been defendant’s girlfriend for about two years and that he was with her on January 25, 2010, until about 6 p.m., when she went to work.

Hawkins further testified that according to her cell phone records, she received a call at 10:09 p.m., while she was at work. The call was from Termass Pleasant, who was using Bridget Gholston's cell phone. Hawkins told Pleasant he was "crazy" and that she did not know where defendant was.

¶ 51 *9. The Testimony of Chandra Bridget Gholston*

¶ 52 Chandra Bridget Gholston testified she knew defendant through Pleasant, who was the father of one of her children. According to Gholston, defendant and Pleasant were in her residence at 10 p.m. or 10:30 p.m. on January 25, 2010, when she went to bed. As far as she knew, they did not leave while she was asleep. At 6:15 a.m. on January 26, 2010, she left for work, and when passing through the living room, she saw Pleasant asleep on a bed and defendant asleep on a couch.

¶ 53 *10. Defendant's Testimony*

¶ 54 Defendant testified he was between 6 feet 1 inch and 6 feet 2 inches tall and that he weighed 180 pounds. Pleasant, by contrast, was 5 feet 6 inches or 5 feet 7 inches tall, and he weighed 150 pounds.

¶ 55 Defendant knew who Gregory Freels was, but he did not know Jocelyn Reid. He was puzzled that Turnbaugh denied knowing him, considering that he and Turnbaugh had been in some of the same classes together in high school. Defendant denied riding around with Robinson and Pleasant in the late evening of January 25, 2010. He also denied going inside Freels's house in the early morning of January 26, 2010.

¶ 56 In January 2010, defendant was living with Shane Williams and Heaven Schuette. Around 4 p.m. on January 25, 2010, he went to Bridget Gholston's house to visit his younger brother, Anthony, who was living there. At that time, defendant was wearing a green hoodie, blue jeans, and white tennis shoes. Pleasant also was at Gholston's house, and defendant drank, smoked, and looked up rap beats on the computer.

¶ 57 Around 8 p.m. on January 25, 2010, Pleasant left with Robinson, in her car. (Pleasant was the father of Robinson's child.) Defendant did not know where Robinson and Pleasant went, and he did not see them again the rest of that evening. After Pleasant left, defendant remained at Gholston's house for less than a half hour. Then he telephoned Schuette to come pick him up and take him home.

¶ 58 Pleasant telephoned defendant the next day, January 26, 2010, around 11 a.m. or noon, and defendant went back over to Gholston's house. He and Pleasant got on the computer again, but defendant left when Pleasant and Gholston began arguing.

¶ 59 Later, in the evening of January 26, 2010, Pleasant telephoned defendant again, and defendant went back over to Gholston's to watch a movie. Defendant liked the movie enough to watch it twice. Once again, Robinson arrived and picked up Pleasant, leaving defendant there at Gholston's. Defendant fell asleep at Gholston's and returned to his (and Schuette's) apartment at 10 p.m.

¶ 60 When asked about Gholston's testimony that she saw him in her residence at 6:30 a.m. on January 26, 2010, defendant testified that they all had been drinking and that Gholston was a "light drinker" who did not need much alcohol to become intoxicated.

¶ 61 When the police arrested him, defendant was wearing the clothing subsequently

seized by the police: black sweatpants, a black T-shirt, red and clear Nike shoes, and a gray jacket. The inside of the jacket, where the label was located, was black with gray trim. Defendant denied ever wearing the jacket inside out.

¶ 62 Defendant remembered he was arrested in Gholston's house, but he did not recall what time it was when he was arrested. He thought he was arrested in the late evening of January 27, 2010, rather than in the early morning of that day.

¶ 63 *11. The State's Case in Rebuttal*

¶ 64 In its case in rebuttal, the State called Smith, who testified that defendant was arrested at 2:59 a.m. on January 27, 2010, about 26 hours after the burglary of 1220 Koettters Lane.

¶ 65 *12. The Verdicts*

¶ 66 The jury acquitted defendant of one of the counts of home invasion (the count alleging injury to Reid) but found him guilty of the other count of home invasion (the count alleging injury to Freels) and guilty also of residential burglary.

¶ 67 *B. The Evidentiary (or Third-Stage) Hearing
in This Postconviction Proceeding*

¶ 68 In December 2010, defendant filed a *pro se* petition for postconviction relief, in which he alleged that his trial counsel, Edward K. Downey, had rendered ineffective assistance by omitting to call Heaven Schuette as a witness in the jury trial. According to the *pro se* petition, Schuette would have testified that she and defendant were home, in their residence,

when Freels's house was burglarized.

¶ 69 The petition, amended twice by appointed counsel, advanced to the third stage of the postconviction proceeding. See *People v. Harris*, 2013 IL App (1st) 111351, ¶¶ 46-47 (describing the three stages of a postconviction proceeding). In January 2015, the trial court held an evidentiary hearing on the second amended petition. Three witnesses testified in this third-stage hearing: defendant, Schuette, and Downey.

¶ 70 *1. The Testimony of Defendant*

¶ 71 Defendant testified that his appointed attorney, Edward K. Downey, had two or three face-to-face meetings with him before the trial. They discussed what he would say on the stand, and they discussed witnesses. Defendant told him that, at the time of the burglary, Kamilah Hawkins was his girlfriend but that he lived with Heaven Schuette. He also told Downey he was with Schuette at the time of the burglary. He denied telling Downey he was with Hawkins at that time. He was unaware of the notice of alibi, filed on March 30, 2010, in which Downey listed Hawkins, instead of Schuette, as an alibi witness. He knew that Downey spent a lot of time talking with Hawkins in his office, but he did not know what they discussed.

¶ 72 Postconviction counsel asked defendant:

“Q. Okay. Now, do you recall when you provided Heaven Schuette's name to Mr. Downey?

A. When he would come up there to see me and ask me about the witnesses, and I asked him if he would get in contact with Heaven Schuette.

Q. And were you able to provide Mr. Downey with a phone number or an

address or any way to contact her?

A. I think it was a phone number at the time. I think it was an address, too. I know it was like five-something Grant. I don't know. I know it was in Indian Hills, and I told him the whereabouts of her where [sic] apartment was located.

Q. So, you gave him a general direction of Indian Hills and it was an apartment somewhere there?

A. And the phone number.

Q. And it was her phone number?

A. Yes.”

Defendant did not know if Downey ever spoke with Schuette. She never testified in the trial.

¶ 73 The trial occurred in May 2010, and it was not until 2011 that defendant was able to get in contact with Schuette, through his sister, Kheashaun Woodson. As it happened, Schuette and Woodson worked at the same place. He wrote an affidavit for Schuette to sign and asked Woodson to pass it on to her. Later, his postconviction counsel revised the affidavit.

¶ 74 On cross-examination, the assistant State's Attorney asked defendant:

“Q. In your testimony [in the jury trial], Mr. Horton, who did you testify to—who did you testify you were with, if anyone, at the time of the crime on January 26th about 1:00 a.m.?”

A. I don't recall my whole testimony word-for-word.

Q. Who did you testify you were with at the time of the crime?

A. At the time of the crime, I don't recall on the paper.

Q. And who were you with at the time on January 26th, 2010 at

approximately 1:00 a.m.?

A. I was at Heaven Schuette's apartment.

Q. And you don't recall whether that's what you testified to at trial?

A. I don't recall the words I exactly said. At this moment, you know, I got short-term memory loss.

* * *

Q. I don't need to know the exact words. I want to know the person and the place you were at, you testified to you were at—

A. I don't recall.

Q. —at the time of the crime.”

¶ 75

2. The Testimony of Heaven Schuette

¶ 76

Heaven Schuette testified that in January 2010 she lived at 537 Grant Drive, Quincy, Illinois, and that, as of that time, defendant had been living with her for a couple of months. They had no romantic relationship; they were merely friends. She met him in approximately October 2009 through a mutual friend, who told her that defendant needed a place in which to live. So, she let defendant move in with her and her child. He slept on the couch.

¶ 77

Shane Williams likewise lived with Schuette sometime during 2010. She could not recall, however, if it was the same time when defendant lived with her.

¶ 78

In addition to allowing defendant to live with her and her child in her apartment, Schuette provided him transportation, picking him up and driving him around in her car. She picked him up in the mid-afternoon or early evening of January 25, 2010, somewhere in Quincy.

She did not remember exactly where. It was at a house to which he had given her directions. They then drove to the west side of Quincy to get gas. Then they went directly home, to her apartment, where they remained for the rest of the night and the following morning. Pleasant called her on her cell phone around 2 or 3 a.m., wanting defendant to pick him up in her car. Both she and defendant were awake in the living room at the time. She told Pleasant no. She told defendant about this conversation. Around 4 a.m., she went to bed, and she supposed that defendant did, too. From the evening of Monday, January 25, 2010, to the afternoon of January 26, 2010, defendant was at her apartment, never leaving during that time.

¶ 79 Later in the week of January 25, 2010, Schuette received a telephone call from Hawkins, who informed her that defendant had been arrested for a burglary that occurred during the early morning hours of January 26, 2010. Schuette told Hawkins she knew defendant was innocent because he was with her, in her apartment, during the early morning hours of January 26, and she was willing to testify to that fact. Hawkins said she would tell defendant's lawyer. Schuette never heard anything further. She did not know the trial was scheduled for May 2010. She never went and talked with the authorities, even though she knew where the Quincy police station was and knew where the sheriff's department was. It was not until two or three months after the trial that she found out defendant had been convicted.

¶ 80 In 2014 Schuette was working at Sycamore Healthcare, where defendant's sister also worked. One day, at Sycamore Healthcare, defendant's name happened to come up in a conversation between Schuette and Ashley Plunk—they were just talking about him in general, not about his conviction—and defendant's sister overheard them talking and told Schuette that defendant was trying to get in contact with her. That is how Schuette at last became involved in

the case. From May 2010 until 2014, Schuette never contacted anyone to say she was with defendant during the burglary of which he was convicted.

¶ 81 *3. The Testimony of Edward K. Downey*

¶ 82 Edward K. Downey testified he was the chief public defender in Adams County until his retirement in 2012 and that, other than reviewing documents and transcripts in the court file, he had to rely on his memory because his own file for the case was nowhere to be found in the public defender's office.

¶ 83 He recalled that in March 2010, he filed a notice of alibi, in which he listed Kamilah Hawkins as an alibi witness. He did so because defendant had told him he was with Hawkins at the time of the burglary. At no time did defendant tell him this was a mistake and that he instead was with Heaven Schuette at the time of the burglary.

¶ 84 On May 10, 2010, a few minutes before jury selection, defendant gave Downey the names of some additional witnesses, including Schuette, telling Downey these witnesses might be helpful to the defense, but not explaining to him how they would be helpful. Downey added the names to the witness list, which was to be used in jury selection to make sure the prospective jurors did not know anyone who might be called to testify in the trial.

¶ 85 Defendant did not provide Downey a phone number or address for any of these additional witnesses. The secretary at the public defender's office tried to locate Schuette but was unsuccessful. She was able to locate one of the additional witnesses, Shane Williams, but could not locate Schuette.

¶ 86 Thus, when the case went to trial, Hawkins was still the alibi witness. Indeed,

when Downey interviewed her in preparation for the trial, she told him she was with defendant at the time of the offense. In the witness stand, however, she gave a different account, as alibi witnesses not uncommonly did in Downey’s long experience as a public defender. She testified she was with defendant only until 6 p.m. on January 25, 2010. Downey tried to fill in the gap with Gholston’s testimony, but she testified merely that defendant was at her house when she went to bed at 10 p.m. on January 25, 2010, and that he was there when she got up at 6 a.m. on January 26, 2010, leaving the early morning hours of January 26 (when she was asleep) unaccounted for.

¶ 87

4. *The Trial Court’s Decision*

¶ 88 After hearing the testimony of these witnesses and after hearing arguments, the trial court denied the second amended petition for postconviction relief. The court found that Downey had told the truth in his testimony but that defendant and Schuette had not told the truth in their testimony.

¶ 89

II. ANALYSIS

¶ 90 The question is whether the record discloses any “arguably meritorious basis” for challenging the trial court’s decision in the third stage of this postconviction proceeding. *Brown*, 2016 IL App (2d) 140458, ¶ 10. To challenge the decision, appellate counsel would have to be able to make a reasonable argument that the decision is “manifestly erroneous.” *People v. Gacho*, 2016 IL App (1st) 133492, ¶ 15. A decision is “manifestly erroneous” only if its error is “clearly evident, plain, and indisputable.” (Internal quotation marks omitted.) *Id.*

¶ 91 It would be impossible to argue, in good faith, that the trial court's decision was manifestly erroneous. For one thing, a reasonable trier of fact would not have *had* to believe defendant over Downey. Granted, Downey no longer had his file from the case and hence was relying heavily on his memory, but defendant could not even remember, in the most general way, what he had said on the witness stand during the trial. Thus, the court had good cause to disbelieve him when he claimed to remember telling Downey he was with Schuette at the time of the burglary.

¶ 92 Maybe, if Downey had managed to locate Schuette, she would have given him the account she gave in the postconviction hearing, but according to Downey's testimony, defendant waited until jury selection to give him her name, and Downey could not locate her. Defendant *thought* he gave Downey Schuette's phone number and address, but Downey was positive he did not do so, because he remembered his secretary's trying to locate her, without success. Omitting to interview and subpoena a witness cannot be characterized as ineffective assistance if the attorney cannot find the witness. *People v. Lewis*, 97 Ill. App. 3d 982, 992 (1981). Defendant presented no evidence that, in May 2010, merely knowing Schuette's name should have enabled Downey, through reasonable efforts, to find her.

¶ 93 Should Downey have hired an investigator, or should he have requested funds from the trial court to hire one? He did not have anything specific to tell the court to justify hiring one. Again, as far as he knew, Schuette was not an alibi witness. She could not have been an alibi witness, as far as he was concerned, because defendant had told him that Hawkins was his alibi witness. Defendant could not have been in Schuette's residence and in Hawkins's residence at the same time. Downey had no incentive to find Schuette *for purposes of an alibi*,

because defendant had told him he was with Hawkins, not with Schuette. “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.” *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

¶ 94 Granted, in the postconviction hearing, defendant testified it was the other way around—he told Downey he was with Schuette, not with Hawkins—but it would be untenable to argue that defendant *had* to be believed. Downey’s conduct in listing Hawkins as an alibi witness, interviewing her extensively, and calling her as an alibi witness was inexplicable unless defendant and she had in fact told him defendant was with her at the time of the burglary. It is difficult to imagine what else could have induced Downey to do those things.

¶ 95 In sum, then, because we find that the first element of a claim of ineffective assistance, *i.e.*, performance that fell below “an objective standard of reasonableness,” is inarguable on the record before us, we grant appellate counsel’s motion to withdraw, and we affirm the trial court’s judgment. *Id.* at 695.

¶ 96

III. CONCLUSION

¶ 97

For the foregoing reasons, we affirm the trial court’s judgment.

¶ 98

Affirmed.