2017 IL App (2d) 141013-U
No. 2-14-1013
Order filed April 18, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TORRENCE D. DuPREE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 10-CF-1138 Honorable Daniel B. Shanes, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition: appellate counsel was not ineffective for failing to contest the admission of a witness's prior consistent statements, which were admissible to rebut defendant's allegation that the witness's plea agreement, which postdated the statements, gave him a motive to testify falsely; as to his claim that trial counsel was ineffective for failing to call a witness, defendant did not comply with section 122-2.

¶ 2 Defendant, Torrence D. DuPree, appeals from an order of the circuit court of Lake County granting the State's motion to dismiss his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) seeking relief from his convictions of armed

robbery (720 ILCS 5/18-2(a)(1) (West 2010)) and aggravated robbery (720 ILCS 5/18-5 (West 2010)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant's convictions were based on the following evidence, which was presented at a jury trial. Kiernan Collins testified that, on the evening of February 16, 2010, he was in the back seat of a two-door Honda Civic in the parking lot of an apartment complex, with Matt Morrison in the driver's seat, when Steven Nowell entered the car and sat in the passenger seat. Morrison was planning on selling drugs to Nowell. Morrison drove out of the parking lot to conduct the drug deal elsewhere, and, as he did so, Nowell said that he had forgotten something, so Morrison returned to the parking lot. Nowell left the car and then returned to the car with another man following him. The man pushed Nowell into the car and pulled out a gun. The gunman asked Morrison where the "stuff" was and patted down Morrison and Collins. At some point, Nowell exited the car, while the gunman remained in the car, kneeling on the front passenger seat and pointing the gun at Collins and Morrison. Collins testified that gun was a "[l]arge-caliber chrome pistol revolver." Collins further testified that the gunman was wearing a black hooded sweatshirt. The hood was over the gunman's head and pulled down to his eyebrows. The sides of his face were covered. The gunman's face was about a foot and a half away from Collins. Collins testified that the gunman was taller than he, maybe 6'1" or 6'2". After taking money from Collins and a backpack from Morrison, the gunman left.

¶ 5 According to Collins, he was contacted by the police two days after the robbery. Collins went to the police station and provided a description of the gunman. Collins described the gunman as a black male with a dark complexion, who was between the ages of 20 and 25. In addition, he stated that the gunman had a thin to average build and short hair. Collins was shown

a photographic lineup containing six photos, and he circled defendant's photo, stating that he was "seventy percent sure" that defendant was the gunman.

¶ 6 Collins further testified that the present trial was initially scheduled to start on July 26, 2010. On July 23, 2010, Collins received on his cell phone a collect phone call from the county jail. When he heard that the call was from "Torrence," he hung up, without speaking to the caller.

¶ 7 Nowell testified that he had been charged with armed robbery, aggravated robbery, and robbery in connection with the present offense and placed in jail. In exchange for a reduction in the charges, Nowell agreed to testify truthfully about what happened on the evening in question. Nowell testified that, on the evening of the robbery, he was at his girlfriend's apartment with two other friends, when defendant arrived. Nowell had seen defendant earlier that day driving a black Jeep, which belonged to defendant's cousin. Nowell had known defendant for about a year and a half. Defendant asked Nowell if he was "getting weed from Matt." Nowell lied and told defendant "no," and defendant left. After defendant left, Nowell went outside to meet Morrison, with whom he had made arrangements earlier in the day to buy marijuana. Nowell entered Morrison's car and they drove off. Collins was in the back seat. According to Nowell, his girlfriend called him and told him that he had forgotten his money. The men returned to the parking lot. Nowell went to the apartment to get his money. When he returned to the car, defendant also walked up to the car. Defendant pointed a revolver at Nowell's head and told Nowell that, if he did not go through the men's pockets, defendant would shoot. By the time Nowell put his hands up to go through the men's pockets, Collins and Morrison already had their money out, so defendant told Nowell to grab the men's phones. Nowell took Morrison's phone and kept it. At that point, Morrison attempted to leave, putting the car in reverse. Defendant

threw Nowell out of the car and put the car in park. Nowell, not wanting to leave Morrison, got back into the car and took Morrison's backpack. He handed the backpack to defendant, exited the car, and began walking to the apartment. Defendant followed Nowell. Nowell did not have keys to enter the building, so defendant got into a van and drove away. Defendant was wearing a black hooded sweatshirt with the hood pulled over his head. Nowell never looked at defendant's face during the robbery, but he recognized defendant's voice. Nowell had seen defendant's face 15 minutes earlier when defendant had first arrived at the apartment. Nowell turned himself in to the police the next day. Prior to turning himself in, he received several threatening calls from defendant. Defendant told Nowell what he was going to do to him if he told on defendant.

¶ 8 Nowell testified on cross-examination that, when he turned himself in, he spoke with police officer Steven Kueber. Kueber told Nowell that he was a suspect. Nowell spoke with Kueber off and on for about two hours. Nowell initially told Kueber that he did not know the identity of the gunman. Nowell testified that that was a lie. After about 20 minutes, Kueber accused Nowell of being the mastermind behind the crime, and Nowell asked for a lawyer. Kueber also told him that if he did not "give up the other guy," he would be the one "to take the fall," that he was "a big fish now, but [could] become a smaller fish," that "the light's shining on [him]," and that he needed "to make it shine on someone else." Kueber told Nowell: "I know you know it was Torrence Dupree." Kueber showed Nowell an arrest warrant, and Nowell withdrew his request for a lawyer.

¶ 9 Defense counsel asked Nowell if he knew, while he was "sitting in jail," that he faced 6 to 30 years in prison for armed robbery and that it was a nonprobationable offense. Nowell indicated that he did. Counsel pointed out that, while in jail, Nowell was facing additional

charges of aggravated robbery and robbery. Nowell agreed. Counsel then referred to an "offer" that was presented "to avoid all that." The following colloquy took place:

"Q. Okay. After how many days of jail you decide you are going to work that deal; do you know?

A. First time they came.

Q. You took it right away?

A. Yes, sir.

Q. You have been in jail about 150 days or something; right?

A. Yes, sir.

Q. You would have taken it sooner if they would have offered it to you sooner?

A. No, sir.

Q. Why not?

A. I could have beaten the case. I had nothing to do with the case.

Q. Why didn't you go to trial?

A. Because my lawyer told me I can get out earlier.

Q. So to get out earlier is better than admitting to something you didn't do. That's what you choose?

A. Yes, sir.

Q. Because it's important to get out of custody; right?

A. Yes, sir.

Q. Take responsibility even though you are innocent just to get out of that jail; right?

A. For my baby.

Q. But the deal requires that you come here today; right?

A. Yes, sir.

Q. Because if you don't come here today, if you took off, they would revoke that deal; right?

A. Yes, sir.

Q. You'd be back to where you started, armed robbery and all those other charges; right?

A. Yes.

Q. You don't want that; right?

A. No.

Q. Because you want to stay out?

A. Yes.

Q. But you had to come here and had to say [defendant] was that other guy?

A. Yes.

Q. If you say anything different what's going to happen?

A. I go back.

Q. That's right. You knew from the very first time you met Detective Kueber in that interview room it was [defendant] that they wanted you to say?

A. Yes, sir.

Q. That's what you are saying today; right?

A. Yes."

¶ 10 On redirect examination, Nowell agreed that he had spoken with Kueber for four hours and that the interview had been recorded. In the early hours of the interview, Nowell repeatedly

told Kueber that defendant was not the gunman, because he did not want to get defendant into trouble. By the end of the interview, Nowell told Kueber that defendant was the gunman. He also told Kueber that, after identifying defendant, he was afraid for his life.

¶ 11 The State sought to admit into evidence Nowell's handwritten police statement, identifying defendant as the gunman. The State argued that it was a prior consistent statement admissible as an exception to the hearsay rule because defense counsel stressed on cross-examination that Nowell was fabricating testimony based on what the State wanted him to say. Defense counsel objected, arguing that Nowell had identified defendant after a lengthy interrogation and that "[i]t was not a new statement between the arrest and plea bargain." The court agreed with the State, finding that defense counsel's questioning implied that Nowell was fabricating testimony as a result of his plea agreement with the State. The court stated that the plea negotiation "could give the witness motive to change his story or at least a version of the previous story." The court permitted the State to question Nowell about whether he made a handwritten statement on February 17, 2010, at the conclusion of his interview with Kueber, but it did not allow the entire statement into evidence. Thereafter, Nowell agreed that, in the handwritten statement, he stated that defendant was the gunman. Nowell also agreed that he wrote the statement long before he had reached any agreement with the State.

¶ 12 Kenyana Whiteside testified that she was Nowell's girlfriend and that they had a child. On the evening of February 16, 2010, she was at her apartment with Nowell. Defendant came over and asked to use her cellphone. She gave it to him and he stepped outside the door to use it. He returned about five minutes later and gave her the phone. Nowell and defendant then left together. She went to her friend Lynda's apartment, which was about a minute away. About 15 minutes later, Lynda received a phone call and handed the phone to Whiteside. Whiteside

testified that it was Nowell on the phone. Over objection, Whiteside testified that Nowell told her that defendant had just robbed somebody. The trial court found that the statement was admissible as a prior consistent statement. The court noted that prior consistent statements are admissible "under the narrow circumstances of rebutting an inference of recent fabrication or motive to lie." The court stated that there was "evidence brought out on cross that defendant [*sic*] changed his story to the police with the implication that it's because the police got him to do it, and then also, his testimony is what it is because he got the sweetheart deal to flip." The court found:

> "The evidence that the State is seeking to offer now predates literally all of those statements. Because of that, it is a prior consistent statement, because it is before the suggestion that he has a motive to lie or fabricate from the flip deal and also before he had any police interaction at all."

¶ 13 Prior to allowing Whiteside's testimony about Nowell's statement, the court had asked defense counsel if he wanted a limiting instruction and, if so, how he wanted the instruction to read. The court ordered a recess so that defense counsel could draft an instruction. Thereafter, the following transpired:

> "THE COURT: [Defense counsel], have you had a chance to think about your preference for a limiting instruction from the bench at the appropriate time?
>
> [DEFENSE COUNSEL]: I have, Judge. I think while I am going to object to this evidence coming in, preserving my record, I am going to recommend in the alternative, should you deny my objection, that that limiting instruction—
>
> THE COURT: And you handed me some language that reads along the lines of since Nowell is not on the witness stand to be cross examined, I will not allow the jury to

consider the truth of the words but I will allow this witness to testify that the words were spoken to her for the purpose of your weighing Mr. Nowell's prior statements. It is for you to determine whether the statements were made, and, if so, what weight should be given to the statements.

In determining the weight to be given to a statement, you should consider all the circumstances under which it was made.

That's the language you are proposing?

[DEFENSE COUNSEL]: Correct."

The jury was instructed in accordance with defense counsel's proposed limiting instruction.

¶ 14 Kueber testified that he interviewed Nowell. He stated that, during the first two hours of the interview, Nowell repeatedly denied that defendant was the gunman, but Nowell would hint toward a specific person who committed the robbery. For instance, Nowell described the person and stated that he had just gotten out of jail. Eventually, near the end of the interview, Nowell stated that defendant was the gunman. Kueber identified a 50-second-long video clip of the end of his interview with Nowell, where Nowell identified defendant as the gunman. Over objection, the video was played for the jury. In the video, Kueber asks defendant, "Who's the guy that pulled a gun on you and has been threatening you not to say a damn thing about what happened in that car?" Nowell asks, "For real? For real?" Then he states, "I know for a fact it was [defendant]." Nowell also states, "He's gonna get out. I should of just kept my mouth closed." He also tells Kueber, "You're gonna get me killed." He also states, "He know where we staying too."

¶ 15 Kueber also identified an audio recording of a phone call on July 15, 2010 (and a transcript thereof) between defendant and his cousin, Leon Hudson. The call was recorded by a

system at the Lake County jail and played for the jury. During the call, defendant said that he saw the person who was going to be testifying against him get out of jail in return for a deal and that Hudson should "let everybody know, man, I want his head on a platter." In another call recorded by the jail, defendant told a woman that he "called one of the white boys," "but he didn't accept the call."

¶ 16 On cross-examination, Kueber testified that, when he spoke with Nowell, Nowell indicated that he knew that Kueber believed that Nowell had set up the robbery. For the first two hours of the interview, Nowell acted as if he were the victim of the robbery. Nowell stated multiple times that he did not know who the gunman was. Nowell told him that it could not have been defendant because defendant was "long gone" before the robbery occurred and because defendant was not as tall as the gunman. Kueber agreed that he told Nowell that "he needed to help himself," that he had already been charged and would be the only one if he did not provide the name of the other offender, that he was "getting jammed up on this thing," and that he was "going to be the only one that goes down." Nowell still stated that defendant was not the gunman. Nowell told Kueber that defendant was short and the gunman was really tall. When Kueber told Nowell that he was "on the hook for this," Nowell got upset and asked for a lawyer. Kueber stood up, told Nowell that he was going to spend the night in jail, and showed him an arrest warrant for armed robbery, aggravated robbery, and robbery. Kueber told him that if he cooperated Kueber would "go to bat with him with the State's Attorney's Office." Nowell asked Kueber whom he needed to point out. Kueber told him that he needed to identify the gunman. Kueber told Nowell several times that he knew that the gunman was defendant based on his description. Nowell told him that he could not say that it was defendant, because he did not want to see an innocent person locked up. At one point, Nowell said that it could have been

defendant's cousin, because his cousin was tall. At the end of the interview, Nowell said that he did not see the gunman's face but heard the gunman's voice and it was defendant's voice.

¶ 17 Hudson testified for the defense. Hudson stated that defendant was 5'7" or 5'8," a little shorter than Hudson. He also testified that, although he had owned a black Jeep, it was not in his possession on the day of the incident, as it had been repossessed on January 26.

¶ 18 The jury found defendant guilty of two counts of armed robbery and two counts of aggravated robbery.

¶ 19 On September 23, 2010, defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Defendant contended, *inter alia*, that the trial court erred in admitting the video clip of Kueber's interview of Nowell and Whiteside's statement that Nowell told her that defendant robbed someone. In support, defendant argued:

> "The video was especially prejudicial as it included a reference by Nowell that he feared the Defendant would kill him should he identify Defendant as a suspect. The State played the video to the jury multiple times and argued that it was evidence of Defendant attempting to intimidate or threaten a witness. Said evidence was highly prejudicial and had no bearing on the issues before the jury."

With respect to Whiteside's statement, defendant argued:

> "The testimony was only disclosed to Defendant on the final day of testimony, after Nowell and various witnesses had testified. The evidence was hearsay and should not have been allowed."

¶ 20 Following arguments, the trial court denied defendant's posttrial motion. Thereafter, the court sentenced defendant to 22 years in prison. Defendant's subsequent motion for reconsideration of his sentence was denied, and defendant appealed.

¶ 21 Defendant raised two issues on appeal: (1) whether the trial court abused its discretion by refusing to allow into evidence a letter written by defendant to Nowell; and (2) whether the trial court erroneously added a 15-year sentencing enhancement. *People v. DuPree*, 2012 IL App (2d) 101247-U, ¶ 1. We affirmed defendant's convictions but, because it was unclear whether the trial court added the enhancement (which the State conceded should not have been added), we remanded for the court to clarify its sentence. *Id.* ¶¶ 42-48.

¶ 22 On August 24, 2012, the State indicated that it and defendant had negotiated a 15-year sentence, and the trial court imposed that sentence.

¶ 23 On January 14, 2013, defendant filed a *pro se* postconviction petition. Private postconviction counsel filed an amended petition on April 5, 2013, a second amended petition on July 3, 2013, and finally a third amended petition on October 1, 2013. In his third amended petition, defendant argued, *inter alia*, that he was denied his right to a fair trial when the State was allowed to introduce into evidence Nowell's prior consistent statements, specifically, Nowell's testimony that he made a statement to the police identifying defendant, the video recording of Nowell identifying defendant during his police interview, and Whiteside's testimony about what Nowell told her. Defendant argued that prior consistent statements are admissible to rebut suggestions that a witness had recently fabricated the testimony or had a motive to lie but only where the statements were made before the motive arose. According to defendant, Nowell's motive to testify falsely "was present immediately after Nowell participated in the armed robbery," as he was "motivated to cover-up his participation in the crime." He also argued that, Nowell's "motivation to testify falsely arose during a long and coercive custodial interrogation" and that "Nowell was motivated to appease the police interrogator." Defendant

argued generally that, although this issue was not raised on direct appeal, it is not forfeited, because appellate counsel was ineffective for failing to raise it.

¶ 24 Defendant also argued in his third amended petition that trial counsel was ineffective for failing to present exculpatory testimony from Morrison. According to the petition, Morrison reported the robbery to the police the day after the incident, failed to identify defendant in a photo lineup, identified someone else in the lineup, and indicated that the gunman was much taller than defendant. In support, defendant attached three statements written by Morrison at the Grayslake police department on February 16, 17, and 18, 2010, and three Grayslake police department case reports. According to defendant, there was no reasonable strategic purpose in counsel's failing to call Morrison.

¶ 25 On March 4, 2013, the State filed its motion to dismiss defendant's petition. The trial court granted the State's motion in a written order on September 10, 2014. Defendant timely appealed.

¶ 26 II. ANALYSIS

¶ 27 Defendant argues that the trial court erred in dismissing his postconviction petition, because it made a substantial showing of the following constitutional violations: (1) ineffective assistance of appellate counsel for failing to challenge the admission of Nowell's prior consistent statements; and (2) ineffective assistance of trial counsel for failing to call Morrison as a witness.

¶ 28 The Act allows criminal defendants to assert that their convictions or sentences resulted from substantial denials of their federal or state constitutional rights. 725 ILCS 5/122-1 *et seq*. (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction proceeding has three stages. At the first stage, the defendant files a petition and the trial court determines whether it is frivolous or patently without merit. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If the trial

court does not dismiss the petition at the first stage, it is then docketed for further consideration. *Id.*

¶ 29 At the second stage, the trial court may appoint counsel for the defendant. 725 ILCS 5/122-4 (West 2014). After counsel has made any necessary amendments to the petition, the State may move to dismiss it. 725 ILCS 5/122-5 (West 2014). At the second stage, all well-pleaded facts not positively rebutted by the trial record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). The relevant question raised during a second-stage postconviction proceeding is whether the petition's allegations, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which requires an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the petition is not dismissed at the second stage, it advances to the third stage and an evidentiary hearing is held. *Pendleton*, 223 Ill. 2d at 472-473. Here, the petition was dismissed at the second stage. We review a second-stage dismissal *de novo*. *Id.*

¶ 30 Defendant first argues that his postconviction petition made a substantial showing that appellate counsel was ineffective for failing to challenge the admission of three prior consistent statements on appeal: (1) Nowell's testimony that he made a handwritten statement to the police, identifying defendant as the gunman; (2) Nowell's verbal statement to the police (via video) identifying defendant as the gunman; and (3) Whiteside's testimony that Nowell called her very shortly after the robbery and told her that defendant had just robbed somebody.

¶ 31 In assessing claims of ineffective assistance of appellate counsel, a court follows the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on a claim of ineffective assistance of appellate counsel, a petitioner must show that the failure to raise a particular issue was objectively unreasonable and that, absent this failure, his conviction would

have been reversed. *People v. Williams*, 209 Ill. 2d 227, 243 (2004). "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Easley*, 192 Ill. 2d 307, 329 (2000). Thus, a petitioner has not suffered prejudice from appellate counsel's decision not to raise certain issues on appeal unless such issues were meritorious. *Id.*

¶ 32 We note that, although defendant objected at trial to the admission of Nowell's testimony that he identified defendant in a handwritten police statement and to the admission of Nowell's video statement identifying defendant, he did not raise those issues in his posttrial motion. Defendant concedes that he did not raise the issue as to the handwritten statement, but he claims that he did raise the issue as to Nowell's video statement. We disagree. A review of the posttrial motion shows that, although defendant argued that the video statement was improperly admitted, he argued only that it was "highly prejudicial and had no bearing on the issues before the jury"; he made no argument that the video statement was an inadmissible prior consistent statement. Given defendant's failure to raise the issues in his posttrial motion, they are forfeited. See *People v. Naylor*, 229 Ill. 2d 584, 592 (2008). Thus, had appellate counsel raised the issues with respect to those two statements on direct appeal, counsel would have had to establish plain error. (We note that the issue as to the admissibility of Whiteside's testimony regarding Nowell's statement was properly preserved.)

¶ 33 Plain error is a limited and narrow exception to the general forfeiture rule. *People v. Hampton*, 149 Ill. 2d 71, 100 (1992). To obtain such relief, a defendant must show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). If a court determines that no error occurred, it need not apply any further plain-error analysis. *People v. Moreira*, 378 Ill.

App. 3d 120, 131 (2007). Only if an error occurred must a court determine if: (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant, irrespective of the seriousness of the error; or (2) the error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Naylor*, 229 Ill. 2d at 593. The present case involves the first prong, because claims that prior consistent statements were used improperly to bolster a witness's credibility do not implicate a substantial right. *People v Keene*, 169 Ill. 2d 1, 18-19 (1995). A defendant bears the burden of persuasion under either prong. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 34 It is with the above principles in mind that we consider whether defendant made a substantial showing that, absent appellate counsel's failure to raise the issue of the admissibility of Nowell's prior consistent statements, we would have reversed.

¶ 35 To succeed on appeal, appellate counsel would have had to first establish that an error occurred, *i.e.*, that the trial court abused its discretion in admitting Nowell's prior consistent statements. See *People v. Short*, 2014 IL App (1st) 121262, ¶ 102 (we review the trial court's evidentiary rulings for an abuse of discretion). The threshold for finding an abuse of discretion is high and will not be overcome unless the trial court's ruling was arbitrary, fanciful, or unreasonable, or no reasonable person would have taken the view adopted by the trial court. *People v. Donoho*, 204 Ill. 2d 159, 186 (2003). Under the abuse-of-discretion standard, reasonable minds can disagree about whether certain evidence is admissible without requiring a reversal of a trial court's ruling. *Id.*

¶ 36 Generally, statements made by a witness before trial are inadmissible for the purpose of corroborating the witness's trial testimony or rehabilitating a witness. *People v. Cuadrado*, 214

Ill. 2d 79, 90 (2005). "This is because the trier of fact is likely to unfairly enhance a witness's credibility simply because the statement has been repeated." *People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010). However, there are two exceptions to this rule. Illinois Rule of Evidence Rule 613(c) (eff. Jan. 1, 2011), which governs prior consistent statements of a witness, provides as follows:

> "A prior statement that is consistent with the declarant-witness's testimony is admissible, for rehabilitation purposes only and not substantively as a hearsay exception or exclusion, when the declarant testifies at the trial or hearing and is available to the opposing party for examination concerning the statement, and the statement is offered to rebut an express or implied charge that:
>
> (i) the witness acted from an improper influence or motive to testify falsely, if that influence or motive did not exist when the statement was made; or
>
> (ii) the witness's testimony was recently fabricated, if the statement was made before the alleged fabrication occurred."

The party seeking to introduce the prior consistent statement has the burden of establishing that the statement predates the alleged recent fabrication or predates the existence of the motive to testify falsely. *Short*, 2014 IL App (1st) 121262, ¶ 102.

¶ 37 Defendant argues that Nowell's three prior consistent statements were inadmissible because the statements did not predate Nowell's motive to testify falsely. According to defendant, Nowell had a motive to testify falsely immediately after the robbery and when he was interrogated by the police, in order to shift blame to someone else and obtain leniency. In response, the State argues that Nowell's statements were admissible to rebut defense counsel's separate allegation that Nowell had a motive to testify falsely in order to get the benefit of the

plea agreement. The State asserts that defendant's argument ignores the differences between Nowell's alleged motives to testify falsely.

¶ 38 In support of its argument, the State relies on *People v. Antczak*, 251 Ill. App. 3d 709 (1993). In *Antczak*, we considered whether a prior consistent statement could be admitted to rebut a charge of recent fabrication, where it could not be admitted to rebut a separate charge of motive to testify falsely, because it was made after the motive to falsify arose. *Id.* at 714-15. We concluded that "charges of recent fabrication" and "charges of motive to falsify" are technically "separate exceptions" to the rule against prior consistent statements and that, where a witness faces separate charges of both recent fabrication and motive to falsify, a prior consistent statement can be admitted to rebut a recent fabrication, even if a motive to falsify existed when the statement was made. *Id.* at 716. According to the State, under *Antczak*, notwithstanding any motive on the part of Nowell to placate Kueber during the interrogation, the prior consistent statements were admissible to rebut the separate charge that Nowell's trial testimony was fabricated because of the plea agreement reached before trial.

¶ 39 Defendant responds that *Antczak* does not support the State's argument, because he made no claim that Nowell's testimony was recently fabricated. We disagree. During defense counsel's cross-examination of Nowell, defense counsel implied that the plea agreement entered into shortly before trial was the motivation for Nowell's testimony. The trial court specifically noted as much when considering the argument with respect to Whiteside's testimony. The court stated that there was "evidence brought out on cross that defendant [*sic*] changed his story to the police with the implication that it's because the police got him to do it, and then also, his testimony is what it is because he got the sweetheart deal to flip." The court found that the prior

consistent statements were admissible "under the narrow circumstances of rebutting an inference of recent fabrication or motive to lie."

¶ 40 The court's conclusion finds support in *People v. Richardson*, 348 Ill. App. 3d 796 (2004). In *Richardson*, the defendant was on trial for murder. A witness, Parker, testified that he saw the defendant shoot the victim on November 5, 1996. *Id.* at 800. Parker was arrested on November 9, 1996, and denied any involvement in the shooting. *Id.* On November 10, 1996, Parker identified the defendant as the shooter. *Id.* On cross-examination, Parker testified that, while in police custody, he had been handcuffed to a wall, was not permitted to use the bathroom, and was not allowed to make any calls. *Id.* at 801. Eventually, he was allowed to speak to his mother and thereafter agreed to speak to the police. *Id.* Parker testified that he was charged with first-degree murder but later entered into a plea agreement where he would be sentenced to four years for conspiracy to commit first-degree murder, in exchange for his testimony against the defendant. *Id.* The State argued that, in light of the testimony regarding the plea agreement, it should be permitted to use Parker's prior consistent statement to rebut the defendant's allegation of recent fabrication. *Id.* The defendant denied that he made any such allegation, pointing out that Parker told the same story prior to entering the plea agreement. *Id.* The trial court ruled that the plea agreement created the inference that Parker changed his testimony and permitted the State to use the prior consistent statement. *Id.* The defendant appealed.

¶ 41 On appeal, the defendant argued that the trial court erred in allowing the State to use Parker's November 10 statement, because when he gave the statement "Parker was prompted to lie about the shooter's identity in order to alleviate his treatment by the police and thus his motive to lie was present prior to his making the *** statement." *Id.* at 802. The court, relying

on *Antczak*, found that it was the "charge-of-recent-fabrication exception" that applied. *Id.* The court stated:

> "In his cross-examination of Mr. Parker, defense counsel touched on the circumstances surrounding Mr. Parker's initial denial of any involvement in the shooting and his subsequent naming of the defendant as the shooter. However, defense counsel extensively cross-examined Mr. Parker as to his plea agreement with the State. There is no dispute that the plea agreement was entered into subsequent to Mr. Parker's November 10, 1996, statement.
>
> Thus, regardless of any motive to lie, the defendant's November 10, 1996, statement was admissible to rehabilitate Mr. Parker's testimony that the defendant was the shooter against any charge that he fabricated his story in exchange for the plea agreement." *Id.* at 803-04.

¶ 42 Nevertheless, defendant argues that Nowell's prior consistent statements to the police were not admissible to rebut a motive to testify falsely based on the plea agreement, because, according to defendant, there had been a suggestion of leniency and plea bargaining by Kueber when Nowell made his statements. See Michael H. Graham, Graham's Handbook of Illinois Evidence § 801.12, at 800-01 (10th ed. 2010) ("On balance, it appears that a statement to a police officer or a government attorney will be admitted as a prior consistent statement to rebut an implied or express charge of improper motive or influence arising from plea bargaining when made under circumstances indicating that neither a suggestion of a plea bargain or leniency nor a threat by the police existed at the time of the making of the prior consistent statement.").

¶ 43 We reject defendant's argument. We find *People v. Lambert*, 288 Ill App. 3d 450 (1997), instructive. In *Lambert*, a State's eyewitness, Flores, testified during the defendant's murder trial

that he had given a written statement to the police concerning the murder. *Id.* at 452. Flores also testified that, in exchange for his trial testimony, the State had agreed to reduce the charges against him and sentence him to probation. *Id.* Defense counsel cross-examined Flores concerning his expectations of leniency for his involvement in the victim's death, in light of a plea agreement. *Id.* at 456. The officer who took the statement testified that no deal had been made in exchange for the statement when it was given. *Id.* at 457. The State was allowed to read Flores's statement to the jury. *Id.* at 452.

¶ 44 On appeal, we found that Flores's statement was not admissible under the recent-fabrication exception, because defense counsel's examination did not raise such a charge. *Id.* at 455. Nevertheless, we found that the statement was properly admitted under the improper-motive exception. *Id.* We framed the issue as whether Flores's alleged motive to testify falsely, *i.e.*, expectations of leniency in light of a plea agreement, existed when he made the statement. *Id.* at 456. We found that it did not. *Id.* We noted that Flores specifically denied that there were any agreements with the police or the State's Attorney's office prior to his making the statement. *Id.* at 457. We also noted that the officer who took the statement also denied that any deals had been made in exchange for the statement. *Id.*

¶ 45 Here, although Kueber testified that he told defendant that he would "help him in the charges" and that he would "go to bat with him with the State's Attorney's Office," no deals had been made. Nowell's testimony makes clear that, when he made the statements, he had no intention of entering into a plea agreement. Nowell testified that he agreed to the plea offer only after he had been in jail for about 150 days. When asked whether he would have taken the offer sooner had it been made sooner, he testified that he would not have, because he "could have beaten the case." He testified that the only reason he took the plea offer was to get out of

custody. He knew that, in order to stay out of custody, he had to testify against defendant; otherwise, he would be taken back to jail. Given this testimony, we cannot say that the trial court abused its discretion in ruling that the statements were admissible to rebut defense counsel's separate implication that Nowell was motivated to fabricate his testimony as a result of his recent plea agreement with the State.

¶ 46 Defendant's reliance on *People v. Wiggins*, 2015 Il App (1st) 133033, and *People v. Matthews*, 2012 IL App (1st) 102540, does not warrant a different conclusion, because neither case concerned whether the witness was motivated to testify falsely by a plea agreement entered into well after the statement had been given. For instance, in *Wiggins*, a key witness, Clark, testified that he saw the defendant pull out a gun and start shooting and that he did not hear "Swift" say anything to the defendant before the shooting. *Id.* ¶ 16. Clark admitted that, at the police station, he signed a written statement asserting that he heard Swift tell the defendant to " 'handle this.' " *Id.* The trial court allowed the State to read the entirety of Clark's written statement to the jury because of the " 'inconsistency.' " *Id.* However, the majority of the statement was consistent with the trial testimony the witness had just given.

¶ 47 On appeal, the court found that the trial court abused its discretion when it permitted the State to read the entirety of the statement to the jury, given that the majority of the statement was consistent with Clark's trial testimony. *Id.* at 36. The court rejected the dissent's conclusion that the statement was properly admitted as a prior consistent statement to rebut a charge that the statement had been recently fabricated. The court found that neither the State nor the trial court advanced such a theory. The court further found that the statement could not be admitted to rebut an allegation that Clark had a motive to testify falsely. Clark had testified that he had signed the written statement identifying the defendant as the shooter only after he was taken to

the police station, kept in a small windowless room for several hours, and told that another person had identified him in connection with the shooting. *Id.* ¶ 38. The court found that, since Clark "signed the statement after the motive to lie arose, the narrow exception" to the rule against prior consistent statements was not met. *Id.* ¶ 40.

¶ 48 In *Matthews*, the evidence established that the defendant killed the victim, leaving his body in his bedroom, and that, later, she and her friend, Dillon, stole the victim's TV. *Matthews*, 2012 IL App (1st) 102540, ¶¶ 3-9. The victim's body was discovered, and Dillon was arrested for theft. *Id.* ¶ 6. In a police statement, Dillon stated that the defendant claimed to have killed the victim. *Id.* Dillon remained in custody for the weekend and testified before the grand jury on the following Monday. *Id.* At trial, Dillon testified that, while on the way to the victim's apartment to steal the TV, the defendant told her that she killed the victim. *Id.* ¶ 7. The defendant's mother testified that Dillon told her that she was told that, if she did not give a statement against the defendant, she would be charged with the murder and that the reason she was released without being charged with a crime was that she agreed to testify before the grand jury. *Id.* ¶ 8.

¶ 49 On appeal, the defendant argued that Dillon's written statement and her grand jury testimony were improperly admitted. *Id.* ¶ 23. The court agreed. The court rejected the State's argument that, because the statements were used to rebut an allegation that Dillon had a motive to testify falsely, they were properly admitted as prior consistent statements. *Id.* ¶ 25. The court stated:

> "The State, however, ignores the other critical component of the exception—that the statements must have been made before the motive to fabricate arose. Instead, the statements used here were made after any purported coercion took place, not before." *Id.*

¶ 50 Here, unlike in *Wiggins* and *Matthews*, the statements at issue were made before the alleged motive to fabricate, *i.e.*, the plea agreement, arose. Defense counsel questioned Nowell about the plea agreement, emphasizing that Nowell was required to testify against defendant in order to get released from jail. The clear implication was that Nowell was testifying falsely as a result of the plea agreement.

¶ 51 Based on the foregoing, we cannot say that no reasonable person would have taken the view adopted by the trial court, and thus we find no abuse of discretion in the admission of the prior consistent statements. Given this conclusion, we find that, had appellate counsel raised the issues on direct appeal, the result would not have been different.

¶ 52 Defendant also argues that, even if Whiteside's testimony was properly admitted, the limiting instruction given by the court when Whiteside testified was improper. However, we note that the instruction was actually written and approved by defense counsel. Thus, any alleged error on this basis was invited and, had counsel raised the issue on appeal, it would not have been considered. See *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004) ("[A] party cannot complain of error which that party induced the court to make or to which that party consented. The rationale behind this well-established rule is that it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings.").

¶ 53 Defendant's second argument is that he made a substantial showing that trial counsel was ineffective for failing to call Morrison as a witness. According to the petition, Morrison reported the robbery to the police the day after the incident, failed to identify defendant in a photo lineup, identified someone else in the lineup, and indicated that the gunman was much taller than defendant.

¶ 54 This claim was properly dismissed because it was not supported by an affidavit from Morrison. Section 122-2 of the Act provides that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2014). In *People v. Enis*, 194 Ill. 2d 361, 380 (2000), our supreme court stated that "[a postconviction] claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." The court explained that, "[i]n the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *Id.*

¶ 55 Defendant argues that *Enis* is "easily distinguished," because in that case the attached " 'investigation notes' " did not sufficiently corroborate the defendant's claim and, moreover, the court specifically noted that there was no reasonable probability of a different outcome because the evidence of the defendant's guilt was overwhelming. According to defendant, here the attached police reports support his claim and the evidence is not similarly overwhelming.

¶ 56 Defendant's attempts to distinguish *Enis* are unpersuasive. Very recently, this court found that, notwithstanding the *Enis* court's rejection of the defendant's ineffective-assistance claim on the merits, the court made clear that "in the absence of the requisite affidavit, the defendant's claim would not have survived review even if otherwise meritorious." *People v. Spivey*, 2017 IL App (2d) 140941, ¶ 15.

¶ 57 In *Spivey*, the defendant filed a *pro se* postconviction petition alleging that his counsel was ineffective for failing to investigate a potential witness, Fleming. *Id.* ¶ 10. The defendant submitted an unnotarized declaration stating that, after his *pro se* motion for a new trial was denied, he learned from his brother that Fleming had been trying to contact the defendant's

lawyer to recant his testimony. *Id.* He also alleged that another witness would have testified that the defendant was not with Fleming and another individual who had been charged along with the defendant. *Id.* The petition was advanced to the second stage and counsel was appointed. *Id.* ¶ 11. The trial court granted the State's motion to dismiss and the defendant appealed. *Id.* On appeal, we held that, because the defendant did not attach affidavits from the witnesses or explain their absence, as required by section 122-2 of the Act, dismissal was proper under *Enis,* and we rejected the defendant's argument that we should consider his claim on the merits. *Id.* ¶¶ 15-17. Here, as in *Spivey*, defendant failed to comply with section 122-2 of the Act. Accordingly, this claim was properly dismissed.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm the order of the circuit court of Lake County granting the State's motion to dismiss defendant's postconviction petition. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 60 Affirmed.