

No. 1-10-1188

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THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	
v.)	No. 97 CR 29109
)	
TOMMY CLARK,)	Honorable
)	Maura Slattery-Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court did not err in dismissing defendant's postconviction petition because defendant failed to make a substantial showing of a constitutional violation. Dismissal of defendant's post-conviction petition is affirmed.

¶ 2 Defendant, Tommy Clark, appeals from the third-stage dismissal of his petition for relief pursuant to the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq.* (West 2000).

On appeal, defendant argues that (1) his rights to an impartial jury and the effective assistance of counsel were violated by the trial court's and trial and appellate counsels' failure to pursue the issue of potential gang bias during *voir dire*; (2) his trial and appellate counsel rendered constitutionally defective assistance in failing to request an accomplice witness instruction or raise the issue on direct appeal; (3) his appellate counsel rendered ineffective assistance in failing

to challenge on direct appeal the admission of hearsay; and (4) trial counsel provided constitutionally deficient advice concerning a plea offer for a 20-year sentence. We affirm.

¶ 3

I. BACKGROUND

¶ 4 This case arises from the August 1997 strangulation murders of Kevin Martin and Julio Meza. Following a jury trial in July and August of 1999, defendant was found guilty of two counts of first-degree murder (720 ILCS 5/9-1(a)(1) (West 1996)) and one count of robbery (720 ILCS 5/18-1(a) (West 1996)). He was sentenced to natural life in prison for the murder convictions and seven years' imprisonment for the robbery conviction, to run concurrently.¹ Defendant's trial was severed from that of his two codefendants, Amos Chairs and Traye Booker, whose joint trial with separate juries occurred before defendant's trial. Chairs was convicted of the murders, but Booker was acquitted.

¶ 5 This court affirmed defendant's convictions on direct appeal over his challenges that he was convicted upon insufficient evidence and he was denied a fair trial by prosecutorial misconduct during rebuttal closing argument. *People v Clark*, No. 1-99-4094 (2003) (unpublished order under Supreme Court Rule 23), (J., Reid, dissenting), *leave denied*, 207 Ill. 2d 609 (2004). The facts of the trial and defendant's convictions are presented fully in this court's prior order. We discuss the evidence presented at the jury trial to the extent necessary for consideration of the issues on appeal.

¶ 6 At trial, Chicago Police Department Detective Edward Winstead testified that he was

¹The state decided not to pursue the death penalty against defendant.

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called at approximately 11:15 a.m. on August 22, 1997, to John's Club, a tavern located at 7052 S. Western Avenue in Chicago, to investigate a double homicide. The tavern showed no signs of forced entry. About 40 feet into the bar, there was a swinging wood door with a small window which led to a hallway. At the end of the hallway was the rear exit door of the tavern. In the hallway to the left, there was a washroom and a janitor's closet, and on the other side was a door leading to a narrow kitchen. A few steps into the kitchen and off to the right, there was a bedroom that was approximately 15 feet by 15 feet.

¶ 7 Kevin Martin was lying face down on the double bed in the bedroom, with a gag in his mouth and a ligature mark across his neck. Martin was "hog-tied" with a blue electrical cord binding his hands behind his back and also wrapped around his feet. He did not have a wallet or anything of value on his body. A few feet from the doorway, Meza lay on his stomach and was also bound and gagged; his hands were tied behind his back with an electrical cord and his feet were bound with a strip of light blue cloth. Similar cloth was used to gag his mouth. His pockets were turned inside-out. Winstead observed two irons with the cords removed, and he believed that the cords were used to bind the victims.

¶ 8 Winstead learned that Booker was at the scene in a police car; Booker was wearing several items of jewelry belonging to Martin. One month later, Meza's car was recovered, and two shoelaces that had been tied together were found in the car. No fingerprints matching defendant or his codefendants were found inside the tavern.

¶ 9 According to the medical examiner, Meza and Martin died from ligature strangulation. Ligature marks around their necks were consistent with the shoelaces found in Meza's car. Both

victims showed signs of blunt force trauma to the head, i.e., being hit by a fist or a foot.

¶ 10 Stacey Lynn Jones, called to testify by the State, was the girlfriend of Chairs, or "Billy Clyde," at the time of the murders, and she had been dating him for about five years. He was also called "Gov" because he held the rank of governor in the Gangster Disciples gang and he controlled a specific area of the city. In June 1997, Chairs introduced her to defendant, whom she knew as "Fruit." Chairs indicated that defendant was his assistant governor and his "right-hand man." Jones testified that gang members were called "folks" and that the Gangster Disciples was a big organization. She also met Martin in August 1997 through Chairs, who told her that Martin had a bar for sale. Jones testified that she and Chairs went to Martin's tavern a few times to meet with him about buying a bar; defendant accompanied them a couple of times.

¶ 11 Jones testified that in August of 1997, she was renting a Plymouth Breeze and also let Chairs drive the car. One evening that August, she was in the car with Chairs and defendant; Chairs was driving, Jones was in the front passenger seat, and defendant sat in the back. Jones testified that Chairs was looking at defendant in the mirror and talking about Martin knowing a Mexican who had 50 pounds of "bud," or marijuana. Chairs talked about taking the marijuana so that he could distribute it to the Gangster Disciples, and then it could be sold for \$800 a pound and make a lot of money. Jones testified that Chairs never turned and looked at her.

¶ 12 About one week before August 21, 1997, Chairs drove her and defendant in the rental car to a tavern on 59th Street. Chairs stated that he "was going to meet [Martin] so [Martin] could introduce him to the Mexican." Defendant was in the backseat at the time, and Jones testified that Chairs was talking to defendant and could not have been talking to her because she was

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"something to make them look low key in the car." Chairs again talked about meeting "the Mexican that had all of this bud that they can sell." Chairs pulled up to the tavern and got out and went inside for 10 to 15 minutes while Jones and defendant waited in the car. They did not talk while Chairs was gone; Jones and defendant "rarely spoke, but [defendant] was with [Chairs] like glue."

¶ 13 When Chairs returned, he stated that Martin was not there "but the Mexican was," and that "the Mexican had a key of cocaine upstairs right now, and [Chairs] was like, 'We ought to go take that, man,' and Fruit [defendant] basically just is listening, and Clyde [Chairs] is like, 'We ought to go take it.'" Chairs also wondered aloud how "would 30 thousand look with a bunch of ones in the middle, hundreds on the top, hundreds on the bottom?" When Chairs asked this, he was looking at Jones, but until that point, he had been talking to defendant. Jones testified that "[t]hey realized they couldn't take it at the time. They didn't have the ones to stack up," so Chairs dropped defendant off and Chairs and Jones went home.

¶ 14 Jones testified that on August 21, 1997, shortly before noon, she went to 74th Street and Parnell with defendant and Chairs. Chairs drove the rental car again and they picked defendant up along the way. Chairs stated, "We are getting ready to go take the bud; I am fixin' to drop you off" and, 'we are going to take the bud from the Mexican and [Martin]." Jones indicated that they said they were "getting ready to meet them in the shoe shop and they w[ere] going to take the bud." Chairs dropped Jones off and defendant got in the front seat of the car and they left. Chairs later picked Jones up alone at about 5 or 6 p.m. that evening. Chairs told Jones, "The motherfucker wouldn't give it up." He stated, "He wouldn't give up the bud." Jones asked him

what happened, and Chairs stated, "Don't worry about it. Folks took care of it. Make sure you get rid of your phone, and I will get rid of the beeper." Chairs told her to do this because he "had paged [Martin] from my phone." Jones testified that she got rid of her telephone.

¶ 15 Jones testified that a few days later on a Saturday, in the early morning hours, she and Chairs went to 79th Street and Vincennes. When a fellow gang member flagged Chairs down, Chairs pulled up and the gang member asked Chairs if he had "something to do with what happened on 71st where they found them duct-taped and in the garbage can?" Chairs responded that he had nothing to do with it. Jones told Chairs that fingerprints could be found on duct tape, but Chairs responded, "It wasn't no duct tape, and they wasn't in no garbage can." Chairs told her that if the police asked about his whereabouts, to "say he was with me and everything will be alright[.]" When Jones told him that he was not with her, he responded, "Just say I was with you and everything will be alright."

¶ 16 Jones testified that she received \$1,500 to relocate. She wanted to be relocated because she "felt like [Chairs] was dangerous." She did not directly receive any money for testifying.

¶ 17 The State also presented the testimony of Tanya Robinson, who occasionally worked as a barmaid at John's Club and who had known Martin for several years. She had also met Chairs, Booker, and defendant, and knew that they were members of the Gangster Disciples and that Chairs was a governor and defendant was an assistant governor. Robinson testified that on August 21, 1997, she was at the bar at approximately 7 p.m., and Martin, defendant, Chairs, Booker, and another individual were sitting at the bar. Robinson testified that she sat at the back of the bar and drank a half of a can of beer and then left, and the other individual also left at that

time. She testified that she went to a girlfriend's house nearby and returned to the bar a couple of hours later. She conceded that in her grand jury testimony, she had testified that she left for a couple of minutes. Robinson indicated that she did not have a watch.

¶ 18 According to Robinson, she knocked on the door and Martin unlocked the door and let her inside. Robinson saw defendant, Chairs, and Booker, get up from the bar and walk toward the bedroom in the back of the bar. She testified that she could see the hallway leading to the bedroom from the bar area. Martin put money in the jukebox, turned the volume up, and then also went into the back.

¶ 19 Robinson testified that she sat and listened to the music for awhile, and then went to use the restroom, which was across from the bedroom. When she stepped out of the restroom, she paused to fix her clothing and then heard voices coming from the bedroom. Robinson testified that she heard Chairs say, "Where's the stuff at, where's the shit at?" She heard a voice that she did not recognize with a Mexican accent state, "please don't do this, please don't do this."

Robinson then heard another voice, which she could not identify, state, "He knows where it's at. He knows where it's at." According to Robinson, this voice was a male voice but did not belong to Chairs, Booker, or Martin, and it did not have a Mexican accent. She then heard Martin state, "tell him what they want to know, tell them what they want to hear."

¶ 20 Robinson testified that she returned to the bar and quietly sat and drank her beer. Booker came out from the back and looked startled to see her. He went up to her and put his hands on her shoulder, looked her directly in the eyes, and pressed a ring into her hand. He told her that "if this ring get back to the police, we'll know you told. And if you tell them anything that you heard

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tonight, he says, I'll kill you." Booker then turned and left through the rear door of the bar.

Robinson indicated that the ring belonged to Martin. Robinson testified that right before Booker came out from the back, she heard the screen door that led to the alley behind the bar close; she had not heard that door open or close before that. Robinson sat at the bar until the music stopped, and then she went to the back bedroom, calling for Martin. She found Martin lying on the bed and "the Mexican" lying on the floor; they appeared to be deceased, so she ran home.

¶ 21 Robinson testified that she did not initially tell police what she knew because she was afraid. She at first told police that she had not seen Martin since August 20, then she told them that she went to the bar and Martin passed out on the pool table and then later had sexual relations with her. She later identified Chairs and Booker in a lineup and defendant in a photographic array. Robinson admitted that she was doing heroin during that time period and tried cocaine. She admitted that she was given money to relocate and to pay for a drug rehabilitation program. She also admitted to having sexual relations with Chairs and Booker and not disclosing this to the police.

¶ 22 Assistant State's Attorney Patrick Kelly testified that on October 2, 1997, he was working in felony review and interviewed defendant. After advising defendant of his rights, Kelly questioned defendant, but defendant indicated that he did not know anything about any murders and had never been to John's Club. Defendant admitted that he knew "Gov" and "Scoop" (Booker) and identified them in photographs, along with their rank in the Gangster Disciples, and admitted that he was an assistant governor in the gang. Defendant told Kelly that on the date of the murders, he was with his girlfriend, Shawna, at her house from about 2:30 or 3 p.m. until 9

p.m., when he went for a ride with Chairs for half an hour. Kelly returned to defendant a few hours later, and informed defendant that he would be standing in a lineup shortly. Defendant indicated that he wanted to speak with Kelly, and Kelly re-advised him of his rights. Defendant stated that when he went for a ride with Chairs, they went to 71st Street and Western and saw Booker on the corner; Booker wore a bumpy gold watch and when defendant asked where he got it, Booker smirked and stated, "it's mine." When Kelly asked if defendant had been inside John's Club, defendant stated that he had been there three times in the past. Kelly then inquired if defendant was stating that he had been to the tavern, and defendant replied that "if anybody says that I was in the bar the night of the murder, they are wrong." Defendant stated that he was in the club the night before the murders. Defendant also indicated that his girlfriend took her children to the park at 4 p.m. for about 30 minutes.

¶ 23 Kelly testified that later that night, he again approached defendant and reminded him of his rights, and "informed [defendant] that I had talked to Shawna, and *** Shawna was not supporting his version of the events that day, that she didn't leave at 4:00 o'clock with the kids, and she was not only gone for 30 minutes, but much longer." Kelly testified that defendant became agitated and "said that Shawn[a] is lying, and everyone else is lying, and this is just a conspiracy." Kelly ended the conversation.

¶ 24 After the jury convicted defendant, he unsuccessfully moved for new trial. As stated, this court affirmed his convictions on November 7, 2003.

¶ 25 On May 19, 2004, defendant filed a *pro se* petition seeking relief under the Act and appointment of counsel. Defendant argued that the trial court failed to question potential jurors

regarding gang bias, his trial and appellate counsel failed to raise the gang bias issue, and hearsay was improperly admitted into evidence at trial. On July 14, 2004, Cook County Circuit Judge Kathleen Pantle found that his petition stated the gist of a meritorious claim and allowed the petition to advance to second-stage postconviction proceedings.

¶ 26 On May 10, 2007, defendant's postconviction counsel filed a supplemental petition raising the following issues: (1) ineffective assistance of trial and appellate counsel for failing to *voir dire* potential jurors regarding gang bias or raise this issue on direct appeal, in addition to the trial court's failure to *sua sponte* make such inquiries;² (2) ineffective assistance of trial and appellate counsel for failing to *voir dire* on racial prejudice or raise the issue on direct appeal; (3) ineffective assistance of trial and appellate counsel regarding the failure to request an accomplice witness jury instruction for Jones; (4) ineffective assistance of counsel for failing to challenge the admission of hearsay evidence through Kelly's testimony; (5) ineffective assistance of appellate counsel for failing to challenge on direct appeal the admission of Chairs's statements; (6) ineffective assistance of counsel for failing to object to the eyewitness identification instruction; (7) ineffective assistance of appellate counsel for failing to challenge on appeal the trial court's erroneous response to a jury question; (8) ineffective assistance of counsel during the plea bargaining process, resulting in the rejection of a favorable offer; (9) reasserting any constitutional issues raised on direct appeal; (10) defendant's mandatory natural life sentence was

²In support of this claim, counsel attached numerous articles about federal prosecutions of members of the Gangster Disciples that were occurring around the time period of defendant's trial, and a portion of the transcript from Booker's trial showing that some prospective jurors were asked about gang bias.

unconstitutional; and (11) cumulative error.

¶ 27 On June 10, 2008, the State moved to dismiss defendant's supplemental petition. After hearing oral arguments on October 22, 2008, Cook County Circuit Judge Jorge Alonso dismissed all of defendant's claims except for issues seven and eight, regarding the trial court's response to a jury question and counsel's assistance regarding a plea offer. The judge later dismissed issue seven after a second hearing on March 10, 2009, but the court granted a third-stage evidentiary hearing regarding the plea offer issue.

¶ 28 The case was then transferred to Cook County Circuit Judge Maura Slattery Boyle. At the evidentiary hearing on March 4, 2010,³ defendant testified that his father hired Larry Sommers to represent him. According to defendant, Sommers informed him of a plea offer for the first time on March 19, 1999, for a 20-year sentence, which Sommers told him was an offer from lead prosecutor Robert Hovey. Sommers told him that Hovey stated, "If your boy don't take the 20 years, that he was going to send him down for life." Defendant testified that he was willing to take the offer because his case was initially a capital case, but Sommers told him that he did not have to take the offer, the State's evidence was insufficient, and Robinson had made inconsistent statements. Defendant testified that they again discussed plea offers on April 2, 1999, when defendant brought it up; he asked if his gang affiliation would bolster the State's case, and Sommers told him that it would not prevent him from prevailing. He believed that Sommers approached the State again and asked for a plea to a reduced charge, but the State

³Defendant offered into evidence the trial record from his trial and the transcripts from the trials of Chairs and Booker.

would not agree. Defendant testified that Sommers told him that he personally would not accept an offer unless it was for a reduced charge that resulted in immediate release from prison.

According to defendant, Sommers stated that he had a 90% chance of acquittal, although defendant acknowledged that this also meant a 10% chance of conviction. Defendant testified that on April 2, 1999, his attorney told the court on the record that he spoke with Hovey about a possible non-trial disposition; Hovey was not in court at the time and defendant did not know when exactly Hovey and Sommers spoke. Defendant testified that a Supreme Court Rule 402 conference was never held.

¶ 29 According to defendant, the next time he and Sommers discussed an offer was on the day of jury selection in his trial. Defendant testified that Sommers came to the judge's bullpen and informed him that the offer for a 20-year sentence was "still open," but Sommers had told the State that they were going ahead with trial. Defendant denied telling Sommers to tell the prosecutor "to go screw themselves." Sommers did not give him any reasons as to why he should not accept the offer. Defendant testified that if Sommers had advised him to accept the offer, he would have taken it. He also would have accepted the offer if Sommers would have told him that his chances of acquittal were "50/50," or if Sommers had been "neutral" about the offer. Defendant testified that if he had taken the offer, he would have only served eight additional years after accounting for good time credit. Defendant testified he was made a plea offer after the trials of his codefendants and knew the results of their trials.

¶ 30 Defendant testified that he is a law clerk in prison and is familiar with writing postconviction petitions, but he did not include the plea offer issue in his *pro se* petition; it was

not raised as an issue until the supplemental petition in 2007, although he mentioned it in his *pro se* petition in the context of another issue. He was not a law clerk at the time he filed his *pro se* petition.

¶ 31 Horace Moore, defendant's step-father, testified that he paid Sommers approximately \$10,000. Sommers told him that the case "shouldn't be a problem, everything seemed to be going pretty good" and that "there was no evidence connecting [defendant] to the case," and it "should be an open and shut case." According to Moore, Sommers told him that "one of the offenders was released because of lack of evidence, so it should end up pretty good with my son." He never discussed a possible guilty plea with Sommers.

¶ 32 Diane Ward, defendant's aunt, testified that she came to the courthouse on three occasions before trial and spoke with Sommers. Ward testified that Sommers told her that he thought the case was going well, he was "going to plead it just like the other [d]efendant's lawyer did," and that he thought he "had a good chance of getting him off."

¶ 33 Shashona Moore, defendant's sister, testified that she spoke with Sommers five or six times before trial. On one occasion, Sommers stated that "he got a plea, but he was recommending against it." She could not remember the details of the offer. She testified that Sommers told her that "the case was looking real nice."

¶ 34 The State presented the testimony of Mercedes Luque-Rosales, the Chief of the Narcotics Prosecutions Bureau for the Cook County State's Attorney's Office. She had been assigned to the Felony Trial Division during defendant's trial and was part of the team who prosecuted defendant's and the codefendants' cases; Hovey was the lead prosecutor and Mark Ostrowski also

assisted with the cases. They were initially death penalty cases, but the State's Attorney's office decided not to pursue the death penalty, and she believed this decision was announced on March 15, 1999.

¶ 35 Luque-Rosales testified that on the day of jury selection, July 30, 1999, Hovey waived Sommers over from the defense table in the courtroom and stated, "See if your client will take 20." Luque-Rosales testified that Sommers "immediately perked up. It was a low offer. He went right to the back where the lockup area is" to talk to defendant. Sommers returned to the State's table in the courtroom about ten minutes later, and "relayed to us that the offer had been rejected." Luque-Rosales testified that Sommers appeared dejected, sullen, and disappointed. Sommers stated that "the Defendant—if you are giving an offer like that on either game day or the day of trial, he believes there must be something wrong with your case" and that the defendant said "for us to either go screw ourselves or go 'F' ourselves, something to that point." Luque-Rosales indicated that to her recollection, since she became involved in the case, no other offers were made to defendant, although one could have been made without her knowledge.⁴

¶ 36 Sommers, called by the State, testified that he had been licensed to practice law in Illinois since 1987 and did mostly criminal defense work. He testified that he did not receive an offer from the State during the pendency of the case. Sommers explained that he had a system of

⁴The State stipulated that Luque-Rosales was not in court on April 2 or 6, or May 7, 1999, and Hovey was not in court on April 2, 1999, and the transcript from the April 2 court date indicated that Sommers stated that he had a conversation with Hovey. The record reflects that Sommers stated, "[Hovey] is unavailable this morning however he has—we have spoken about a possible non-trial disposition."

documenting any offers he received in his cases; he would record on his file jackets what happened in court on a particular day, and any offers received or orders entered. He did this for all of his cases and had been doing so since he started his own practice in 1992. Sommers testified that he would put offers on the file jacket because it was his practice; he "learned a long time ago from a mentor *** that it is important to document that so that—because all offers *** have to be communicated to that client." Viewing a photocopy of his file jacket in defendant's case, Sommers testified that there was no entry regarding an offer for anything less than natural life, and if the State had made such an offer, he would have recorded it on the file jacket.⁵

¶ 37 Sommers further testified that, in his representation of defendant, he presented motions to suppress defendant's statements and the identification lineup, for a severance, and to declare the death penalty unconstitutional. He understood that the sentence would be natural life if the death penalty was not pursued. Sommers denied ever telling defendant that he had a 90% chance of acquittal. He testified that he never gave percentages to his clients; "I tell the client, 'I am not Nick the Greek, I don't give percentages and odds, I just don't do that.'" Sommers testified that he does not give clients numerical odds concerning the likelihood of success at trial, but he would offer a recommendation "based upon my review of the case and all the factors considered."

¶ 38 Sommers denied telling defendant's family that defendant's case was an "open and shut case"; he testified that he would never say that because "that is not my practice to do." He also

⁵The copy of the file jacket was admitted into evidence.

denied telling his family that defendant would "probably get off"; Sommers indicated that he would not say this to anyone about a case. Sommers explained that he "often t[old] clients, 'You have a tryable case, you have an argument,' but I would never indicate that a case was open and shut, slam dunk, in the bag, whatever."

¶ 39 Sommers testified that he consulted with defendant concerning the strengths and weaknesses of his case and the fact that Booker was acquitted and Chairs convicted. Sommers spoke with defendant every time the case was called in court and he met with him in jail about three to five times. He testified that he never recommended that defendant plead guilty because no offers were made. Sommers testified that he never told defendant that Hovey told him that if defendant did not take a 20-year offer, defendant would "be going downstate for life," because such an offer was not made. Although Sommers recalled being in court on April 2, 1999, without Hovey present, and telling the court that he spoke with Hovey about a possible non-trial disposition, Sommers testified that there was never a non-trial disposition given and he did not recall actually speaking with Hovey about it. He would have written it down in his file if that had occurred.

¶ 40 Sommers testified that the Sunday before trial, he met with defendant for a couple of hours at the jail and reviewed the case's strengths and weaknesses, but they did not discuss an offer because one did not exist. Sommers also did not recall Hovey offering a 20-year sentence on the day of jury selection; he testified that it was possible that it happened, but that "it is a long time ago. I don't recall that happening, no." Sommers acknowledged sending a letter to postconviction counsel in which he stated, "Perhaps Bob Hovey has some record of offers made

in his records at the State's Attorney's Office."

¶ 41 Postconviction counsel argued that Sommers overestimated the likelihood of acquittal in defendant's case and provided unreasonable advice regarding the offer, and requested specific performance of the plea offer. The State argued that Luque-Rosales and Sommers were credible witnesses and defendant had not shown that Sommers' actions were objectively unreasonable.

¶ 42 On April 15, 2010, the court reviewed the testimonial evidence at length on the record. The court indicated that the fact that one codefendant was acquitted and the other convicted did not necessarily indicate that Sommers rendered ineffective assistance of counsel. The court held that "Sommers testified very credibly, was not impeached, not from his file jacket or from what he testified to." The court found "from the documentation that he was rather very effective, very organized, and very dedicated to this case and to his client." The court reasoned that, "[f]or the sake of the argument, even if—even if Mr. Sommers used the analogy 90 percent, there is still 10 percent. There is still the possibility. There was no 100 percent guarantee." The court also indicated that defendant and his family testified "very credibly. But the question being is they weren't impeached in that they don't recall specifics on how many times they talked to Mr. Sommers, whether Mr. Sommers dealt in percentages." The court observed that defendant's not-guilty plea was clear on the record. Ultimately, the court concluded that Sommers did not act "in any way ineffective, so therefore there is no substantial showing of a constitutional violation[.]" and therefore dismissed defendant's postconviction petition.

¶ 43

II. ANALYSIS

¶ 44 Pursuant to the Act, a criminal defendant may pursue a three-stage process to collaterally

attack his convictions based on substantial violations of his constitutional rights. *People v. Bocclair*, 202 Ill. 2d 89, 99–100 (2002). At the second stage of review, the circuit court is tasked with determining whether the defendant has made a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998). The court takes as true all well-pled factual allegations which are not positively rebutted by the record. *People v. Pendleton*, 223 Ill.2d 458, 473 (2006). If a petition is dismissed at the second stage, the dismissal is reviewed *de novo* on appeal. *Id.*

¶ 45 If the matter advances to a third stage evidentiary hearing, the defendant may present evidence and the circuit court serves as a fact-finder in weighing and assessing the evidence. *Pendleton*, 223 Ill.2d at 473. If defendant's petition is dismissed following a third stage evidentiary hearing in which fact-finding and credibility determinations were made, the dismissal is reviewed for manifest error. *Id.* "Manifest error is that which is 'clearly evident, plain, and indisputable.'" *People v. Johnson*, 206 Ill. 2d 348, 360 (2002), quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997). In reviewing the circuit court's dismissal, we may affirm the dismissal on any basis contained in the record, even if the circuit court relied on different grounds. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003).

¶ 46 On appeal, defendant raises several ineffective assistance of counsel claims. To prevail on such a claim, defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011), citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Defendant must overcome the strong presumption that his counsel's conduct "might have been the product of sound trial strategy." *People v. Evans*, 186 Ill. 2d 83, 93 (1999).

¶ 47 The same *Strickland* analysis applies to a claim of ineffective assistance of appellate counsel. *People v. Easley*, 192 Ill. 2d 307, 328-29 (2000). Appellate counsel need not raise every possible issue on appeal, and may exercise professional judgment in deciding whether an issue lacks merit, unless counsel's determination is patently wrong. *Id.* at 329. "Accordingly, unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal." *Id.*

¶ 48 A. Voir Dire

¶ 49 Defendant argues that his rights to an impartial jury and the effective assistance of counsel were violated by the trial court's and his trial and appellate counsels' failure to pursue the issue of gang bias among potential jurors or on direct appeal.

¶ 50 Preliminarily, we observe that defendant has waived his claim that the trial court erred in failing to *sua sponte* question jurors regarding gang bias, in addition to his claim that his trial counsel was ineffective for failing to pursue this inquiry. "In an initial postconviction proceeding, the common law doctrines of res judicata and waiver operate to bar the raising of claims that were or could have been adjudicated on direct appeal." *People v. Blair*, 215 Ill. 2d 427, 444 (2005). Here, the jury bias issue was a matter of record which defendant could have raised for the first time on appeal. However, defendant also claims that his appellate counsel was ineffective for failing to raise the issue on direct appeal, and "[i]t has long been held that *** forfeiture do[es] not apply *** where the alleged forfeiture stems from the incompetence of

appellate counsel." *Id.* at 450-51. Thus, we review that aspect of his claim.

¶ 51 A criminal defendant has the right to be tried by an impartial jury. *People v. Strain*, 194 Ill. 2d 467, 475 (2000). "[T]he trial court is given the primary responsibility of conducting the *voir dire* examination, and the extent and scope of the examination rests within its discretion." *Id.* at 476. Pursuant to Supreme Court Rule 431 (177 Ill. 2d R. 431 (eff. May 1, 1997)), the trial court shall ask prospective jurors "questions it thinks appropriate, touching upon their qualifications to serve as jurors[.]" the court may allow the parties to submit additional questions, and it "shall permit the parties to supplement the examination by such direct inquiry as the court deems proper[.]" The purpose of *voir dire* is to screen prospective jurors' beliefs and opinions in order to remove potentially biased or prejudiced jurors who would be unable to follow the law and their oath. *Strain*, 194 Ill. 2d at 476.

¶ 52 As our supreme court has acknowledged, "street gangs are regarded with considerable disfavor by other segments of our society" and "there may be strong prejudice against street gangs." *Strain*, 194 Ill. 2d at 477. Therefore, "when testimony regarding gang membership and gang-related activity is to be an integral part of the defendant's trial, the defendant must be afforded an opportunity to question the prospective jurors, either directly or through questions submitted to the trial court, concerning gang bias." *Id.* at 477.

¶ 53 We conclude that appellate counsel did not render constitutionally deficient performance in failing to raise on direct appeal defendant's claim that the trial court erred in failing to question the venire about gang bias. Courts have concluded that a trial court has no duty to *sua sponte* question potential jurors regarding gang bias. *People v. Campbell*, 2012 IL App (1st) 101249, ¶

29, citing *People v. Macias*, 371 Ill. App. 3d 632, 640 (2007). While defendant argues that the jurors were potentially tainted because of media coverage of federal trials against members of the Gangster Disciples around the same time as defendant's trial, we find the trial court's *voir dire* was adequate to screen the potential jurors for bias and prejudice and allow the parties to intelligently exercise their challenges.

¶ 54 During *voir dire*, the trial court informed the prospective jurors that defendant was presumed innocent and the State had the burden of proving guilt beyond a reasonable doubt, they must determine the facts only from the evidence presented, and they should not allow prejudice or sympathy to influence their verdict. The trial court questioned the prospective jurors at length regarding their occupations, family, newspapers they read, previous jury experience or lawsuits, and whether they or someone they knew had ever been involved in a criminal case or knew anyone in law enforcement. The court inquired whether they could base their verdict on the evidence, understood the burden of proof, would not hold it against defendant if he did not testify, had heard or read anything about the case, and whether there was any reason they could not be fair and impartial. The court followed up with additional questions if a prospective juror answered a question in the affirmative. When one potential juror indicated that he thought he had seen something on the television about the case, the court and the attorneys questioned him in chambers, and defense counsel later exercised a peremptory challenge against the juror. Ultimately, the parties dismissed several jurors during *voir dire* as a result of the trial court's questioning.

¶ 55 As to defendant's reliance on *Strain*, that case is distinguishable from the present

circumstances. In *Strain*, the trial court inquired in defendant's double murder trial whether the prospective jurors knew anyone in a gang or were involved in a gang and if they could be fair to each side, but it refused defense counsel's request to specifically ask the venire if they would find the defendant less believable if he was a gang member. *Strain*, 194 Ill. 2d at 470-474. Our supreme court reversed the defendant's convictions, concluding that the trial court abused its discretion in refusing counsel's request because gang-related evidence permeated the trial, and the State's theory was that the murder resulted from a rivalry between two gangs and defendant's actions were an act of revenge against the rival gang. *Id.* at 477.

¶ 56 In contrast, the trial court here did not refuse defendant the opportunity to question potential jurors about possible gang bias. Rather, the trial court posed numerous questions to the venire and gave the parties ample opportunity to pursue other inquiries, but the defense never requested an inquiry into gang bias.⁶ Defendant does not contend that any potential juror displayed gang bias and overlooks the fact that the jurors all agreed that they could decide the case fairly based on the evidence. Because the underlying issue was not meritorious, we conclude that appellate counsel did not render deficient representation by not challenging the trial court's *voir dire* on appeal. *Easley*, 192 Ill. 2d at 328-29

⁶ The trial court asked whether the attorneys wanted the court to question jurors about *People v. Zehr*, 103 Ill.2d 472, 477 (1984), principles and inform the jury that it was a non-capital case, and defense counsel indicated that he did. The trial court also asked whether counsel wanted the jurors to be instructed on the defense of compulsion, and counsel affirmed that he had indicated that he would pursue the defense of compulsion, but he asked the trial court to instruct the jury that defendant denied the allegations. The court invited the attorneys to request a sidebar if they had any additional questions they would like asked during *voir dire*.

¶ 57 Defendant also contends that his appellate counsel should have challenged on direct appeal trial counsel's failure to inquire about gang bias. In general, "whether to question potential jurors on a particular subject is considered to be one of trial strategy, which has no bearing on the competency of counsel." *People v. Furdge*, 332 Ill. App. 3d 1019, 1026 (2002). The totality of the circumstances and of counsel's conduct must be considered when examining counsel's performance and any prejudice to defendant. *Id.* at 1028. In making this inquiry, this court is "mindful that a defendant is entitled to competent, not perfect, representation." *Id.*

¶ 58 Again, as to defendant's reliance on *Strain*, that case did not involve a claim of ineffective assistance of counsel. *Strain* does not stand for the proposition that counsel renders constitutionally deficient assistance where he fails to request that the trial court question the venire concerning gang bias.⁷ See also, *Furdge*, 332 Ill. App. 3d at 1026, *People v. Benford*, 349 Ill. App. 3d 721, 733-34 (2004), and *Macias*, 371 Ill. App. 3d at 641 (distinguishing *Strain* on this ground).

¶ 59 Strategically using gang evidence and forgoing an inquiry into gang bias during *voir dire* may fall under the umbrella of sound trial strategy. For example, in *People v. Powell*, 355 Ill. App. 3d 124, 141-144 (2004), trial counsel was not ineffective for failing to inquire about gang bias during *voir dire* where the defendant and the victim were members of rival gangs, the jurors

⁷Moreover, in contrast to the victim in *Strain*, 194 Ill. 2d at 469, the victims here were not merely innocent bystanders caught in the crosshairs of gang violence. In *Strain*, the victim was an innocent bystander shot by the defendant as the defendant was attempting to retaliate against a rival gang for a prior shooting. Even though the victims here were not gang members, the evidence indicated that they were attempting to broker a drug deal for a large quantity marijuana with defendant and his codefendants.

expressed their ability to fairly apply the law to the facts, and gang evidence permeated the trial but the defendant used it to advance his theory of the case.

¶ 60 Similarly, in *Furdge*, the victim and the defendant were members of rival gangs and gang evidence was used to show motive. *Furdge*, 332 Ill. App. 3d at 1026. Therefore, trial counsel reasonably decided to avoid questions about gang bias because they "would serve no purpose since both the victim and defendant were similarly situated" and would have only "unduly emphasize[d] the gang issue[.]" *Id.* The court distinguished *Strain* because it did not involve a claim of ineffective assistance of counsel and the gang evidence in *Furdge* was not pervasive; it was limited to one witness and to proving motive. *Id.* at 1026-27.⁸

¶ 61 Although we are mindful that these cases involved circumstances where both the defendant and the victim were gang members, we do not believe that this distinction is sufficient to establish that counsel rendered constitutionally defective assistance when considering the present case and counsel's performance as a whole. We note that trial counsel competently defended the case. Despite being given the opportunity to question jurors further, he decided not

⁸See also, *People v. Benford*, 349 Ill. App. 3d 721, 733-34 (2004) (failure to question venire about gang bias was a matter of trial strategy and not objectively unreasonable where the defendant and the victim were members of the same gang and gang evidence was used to show motive, there was no indication that the defendant was prejudiced, and inquiring about gang bias risked unduly emphasizing the issue), and *People v. Macias*, 371 Ill. App. 3d 632, 634-41 (trial counsel's failure to question prospective jurors about gang bias was not objectively unreasonable where the defendant and the victim were members of rival gangs, the evidence suggested that the victim was shot in retaliation for an earlier shooting death, counsel could have decided that the trial court's inquiry regarding whether the jurors could be fair and impartial was sufficient to ensure a fair trial and did not wish to further highlight the gang evidence, and there was no prejudice given the evidence against the defendant.)

to request an inquiry into gang bias. Counsel made several pretrial motions, objected to the State's pretrial motions, exercised several challenges to prospective jurors and objected to some of the prosecutor's *voir dire* questions, presented a defense at trial, made numerous objections during trial, cross-examined witnesses, and made post-trial motions. The trial court's *voir dire* adequately probed for bias and prejudice, and the jurors agreed that they could decide the case fairly based on the evidence.

¶ 62 Further, defense counsel referred to the gang issue during his opening statement and closing argument, and he initially indicated that he would present a defense of compulsion. This shows that he intended to use the gang aspect as part of his defense. In response to the prosecution's opening remark that defendant and his codefendants arranged to steal the drugs to make money for their gang, defense counsel asserted that there was insufficient evidence to link defendant to the crimes, the State's witnesses were not credible, and although the State emphasized the structure of the Gangster Disciples, counsel asked the jury to look "very careful[ly]" at the structure of the gang and the evidence would show that it was a large organization and defendant was not the only one who served under Chairs. In closing, counsel reiterated that the Gangster Disciples was a big organization with many members, and emphasized defendant's lack of participation the planning or commission of the offenses.

¶ 63 Considering the totality of the circumstances, we conclude that defendant has failed to demonstrate that appellate counsel's decision not to raise this issue on appeal was objectively unreasonable, or that, but for the failure to raise the issue, his conviction would have been reversed. *Easley*, 192 Ill. 2d at 328-29. Defendant has failed to overcome the strong

presumption that counsel's decisions constituted trial strategy. *Furdge*, 332 Ill. App. 3d at 1026; *Evans*, 186 Ill. 2d at 93.

¶ 64 B. Accomplice Witness Instruction

¶ 65 Defendant contends that his trial counsel was ineffective for failing to request an accomplice witness instruction with respect to Jones's testimony and that his appellate counsel was ineffective for failing to raise a related ineffective assistance of trial counsel claim on direct appeal. Defendant waived his claim that his trial counsel rendered ineffective assistance in failing to tender this instruction to the trial court because he did not raise it on direct appeal. *Blair*, 215 Ill. 2d at 444. We nevertheless review his claim that appellate counsel's performance was constitutionally deficient for failing to raise a related ineffective assistance of trial counsel claim on direct appeal. *Id.* at 450-51.

¶ 66 The test for determining if a witness constitutes an accomplice and requires an accomplice witness instruction is "whether there is probable cause to believe that [the witness] was guilty either as a principal, or on the theory of accountability." *People v. Cobb*, 97 Ill. 2d 465, 476 (1983), quoting *People v. Robinson*, 59 Ill. 2d 184, 191 (1974).⁹ That is, the evidence must show probable cause to believe that the witness was not just merely present "and failed to disprove of the crime, but that he participated in the planning or commission of the crime[.]"

⁹The instruction provides:

"When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." Illinois Pattern Jury Instructions, Criminal No. 3.17 (3d ed. 1992).

People v. Kirchner, 194 Ill. 2d 502, 541 (2000), quoting *People v. Henderson*, 142 Ill. 2d 258, 315 (1990). An individual's presence at the scene of the crime, knowledge that the crime is being committed, close affiliation to the defendant before and after the crime, failing to report the crime, and fleeing from the scene of the crime may be considered in determining whether the individual may be accountable for the crime or shared a common criminal plan or agreement with the principal. *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995).

¶ 67 We conclude that Jones did not qualify as an accomplice for purposes of the instruction. Although defendant likens this case to the circumstances in *Cobb*, 97 Ill. 2d 465, and *People v. Baker*, 110 Ill. App. 3d 1015 (1982), those cases are distinguishable from the present case. In *Cobb*, the witness drove around with the defendant and his cohorts for hours before the murders were committed, she heard him discuss how he wanted to get money and "get back at the Feds," the defendant told her that if she would do him a favor he would take care of her problems, she followed his instructions to park across from the scene of the crime and keep the motor running, she aided his escape by driving the getaway car after watching the defendant hurriedly flee the restaurant, she heard him express disappointment over obtaining only a small amount of money, and she failed to disclose what she knew to the police until three weeks after the crime. *Cobb*, 97 Ill. 2d at 471-73.

¶ 68 In *Baker*, 110 Ill. App. 3d at 1017, the witness, who was living with the defendant, had expressed a desire for a fur coat. *Id.* at 1017. One night while she was driving with defendant, he asked whether she liked the coat a woman who was walking down the street was wearing, and she told him that she did. *Id.* The defendant then told the witness to stop the car; he got out,

approached the woman, struck her, took her coat, ran back to the car, and ordered the witness to drive away. *Id.* The witness and other witnesses testified that she wore the coat after the robbery. *Id.* at 1017-18.

¶ 69 In contrast, in the present case, the evidence did not establish probable cause to believe that Jones was an accomplice. Jones was not present at all during the robbery and murders. When Chairs discussed his desire and plans to obtain the marijuana, he was speaking directly to defendant, not her. The intention was to make money for the gang, and there was no evidence that she was also a gang member. In the discussions she was present for, there was no mention of a plan to steal jewelry or commit murder. She hardly spoke to defendant, and she was not present during Chairs's meetings with Martin or Meza when the proposed narcotics transaction was discussed. Although she disposed of her cellular telephone as requested by Chairs and she delayed reporting to the police, there was no evidence that she was to share in, or ever shared in, any proceeds from the crime. She did not wait at the scene of the crime in a getaway car or drive them away after the murders.

¶ 70 The record also supports that defendant's trial counsel chose to use Jones's testimony to his advantage as part of his defense. He therefore had a sound strategic reason for not requesting an instruction that would have undermined her testimony. *Evans*, 186 Ill. 2d at 93. Trial counsel elicited on cross-examination of Jones that the Gangster Disciples was a big organization with many members, and that there was no mention of a plan to steal jewelry or kill someone before the incident. Instead of attacking her character, counsel bolstered Jones's testimony during closing arguments, using it to argue that the State had failed to show that defendant aided or

abetted in the murders and robbery. Indeed, defense counsel argued that Jones had no reason to lie. Counsel relied on her testimony in arguing that the gang was a large organization; that defendant was supposedly always with Chairs, but Chairs left defendant in the car for the meeting with Meza and defendant was not present when Chairs picked Jones up after the murders; that defendant never responded to Chairs in the conversations in the car about getting the marijuana; and that Chairs never mentioned specifically that defendant was one of the "folks" who "took care of it."

¶ 71 Given this record, not only was an accomplice witness instruction not warranted, counsel made a strategic decision to bolster Jones's testimony and use it to defendant's advantage. Accordingly, because defendant has not shown that trial counsel's performance was deficient, defendant's appellate counsel similarly did not render ineffective assistance in failing to raise this issue on direct appeal. *Easley*, 192 Ill. 2d at 328-29.

¶ 72 In ruling, we note that defendant also has not shown that the instruction would have affected the probable outcome of his trial. The jury was presented with reasons to doubt Jones's testimony, and the trial court gave the general instruction on witness credibility, which "may be considered as one factor, among others, which establishes that defendant was not prejudiced by his trial counsel's failure to tender the accomplice witness instruction." *People v. McCallister*, 193 Ill. 2d 63, 97 (2000) (emphasis omitted).

¶ 73 C. Hearsay Evidence

¶ 74 Defendant next contends that his appellate counsel was ineffective for failing to challenge on direct appeal the trial court's admission of Chairs's statements under the coconspirator

exception to the hearsay rule and Kelly's testimony that defendant's non-testifying girlfriend did not corroborate his alibi.

¶ 75

1. Coconspirator Statements

¶ 76 Before trial, the State moved to admit the codefendants' statements, including Chairs's statement to Jones, under the hearsay exception for coconspirator statements. Over trial counsel's objection, the trial court held that the statements were admissible. Defendant also unsuccessfully raised this issue in his motion for a new trial. During postconviction proceedings, the circuit court dismissed defendant's claim that appellate counsel was ineffective for failing to challenge the admission of the coconspirator statements on direct appeal, finding that the statements were admissible.

¶ 77 Hearsay is an out of court statement offered to prove the truth of the matter asserted, and it is generally inadmissible unless it falls within an exception. *People v. Spears*, 256 Ill. App. 3d 374, 380 (1993). Exceptions exist for declarations by coconspirators and "statements that are offered to prove the resulting effect on the listener's state of mind or to explain why the listener acted." *Id.* Declarations of coconspirators are admissible as exceptions to the hearsay rule:

"upon an independent, *prima facie* evidentiary showing of a conspiracy or joint venture between the declarant and one of the other defendants, insofar as such declarations are made in furtherance of and during the pendency of the conspiracy, even in the absence of a conspiracy indictment." *People v. Steidl*, 142 Ill. 2d 204, 234 (1991), quoting *People v. Goodman*, 81 Ill. 2d 278, 283 (1980).

A coconspirator's statement is admissible if it was "made in an effort to conceal the crime and impress the seriousness of the crime upon someone," even if it was made after the principal object of the conspiracy was achieved. *Spears*, 256 Ill. App. 3d at 380.

¶ 78 A statement is made in furtherance of the conspiracy when it has "the effect of advising, encouraging, aiding, or abetting" the perpetration of the conspiracy. *People v. Ervin*, 297 Ill. App. 3d 586, 592 (1998). In order to admit such statements into evidence, the State must show *prima facie* evidence of the conspiracy and defendant's involvement that is sufficient, substantial, and independent of the declarations made. *Id.* Direct evidence is not required, as the conspiracy may be inferred based on all the facts and circumstances, including the defendant's actions and declarations. *Id.* The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v. Becker*, 239 Ill.2d 215, 234 (2010).

¶ 79 We conclude that the trial court did not abuse its discretion in admitting into evidence Chairs's statements in this case. Independent evidence established a *prima facie* showing that a conspiracy existed between defendant, Chairs, and Booker. In addition to being members of the same gang, defendant and Chairs held high ranks and defendant was frequently with Chairs. Chairs and defendant had previously been to the bar together. Jones saw Chairs and defendant together shortly before the murders. Robinson saw defendant, Chairs, Booker, and Martin in the bar immediately before the murders. Chairs, defendant, and Booker got up from the bar stools and walked toward the bedroom in the back of the bar together, and Martin turned the music in the jukebox on and turned the volume up before heading back there. Robinson heard the statements of Chairs, Martin, a man with a Mexican accent, and a male voice she did not

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recognize coming from the bedroom after the men went back there. Booker later came out and gave her a ring, which belonged to Martin, and she heard the screen door in the back of the bar close. She subsequently went into the bedroom and found the victims' bodies. Defendant's own statements to the police conceded his rank in the gang, presence at the bar on prior occasions, and cast suspicion on his whereabouts.

¶ 80 Defendant argues that the voice Robinson did not recognize could have belonged to an unknown person guarding Meza, but there is no evidence to support this contention. Rather, the evidence indicated that Robinson identified the voices of Chairs, Martin, and someone with a "Mexican accent." The voice she could not identify was a male voice, did not have a Mexican accent, and did not belong to Chairs, Martin, or Booker, and she had seen defendant walk to the back room with the other men. Defendant argues that he could have left through the rear door of the bar immediately after Robinson saw him head to the back room with the other men, but Robinson testified that she did not hear the rear screen door open or close until right before Booker came out of the back bedroom and approached her.

¶ 81 We further conclude that the trial court did not abuse its discretion in admitting into evidence Chairs's statements to Jones after the murders occurred that "the Mexican" "wouldn't give up the bud" and "folks took care of it," and that "it wasn't no duct tape and they wasn't in no garbage can." Although the coconspirator hearsay exception does not cover statements merely narrating past occurrences that serve no objective of the conspiracy, "[s]tatements relating to attempts at concealment further the objective of the conspiracy, which implicitly includes escaping punishment. Moreover, subsequent efforts at concealment of the crime, where

sufficiently proximate in time to the offense, are considered as occurring during the course of the conspiracy." *People v. Kliner*, 185 Ill. 2d 81, 141 (1998).

¶ 82 The first challenged statement occurred on the same day as the murders, when Chairs picked Jones up, and the second challenged statement was made only a couple days later. Both statements involved Chairs's attempt to conceal the crimes, first by instructing Jones to dispose of evidence connecting him to the murders by getting rid of her cellular telephone and pager, and then attempting to have Jones provide an alibi and discussing whether his fingerprints would be found in connection with the murders.

¶ 83 Defendant briefly argues that admission of the statements violated *Bruton v. United States*, 391 U.S. 123 (1968). We find that no *Bruton* violation occurred because the statements here did not involve a custodial confession by a codefendant and they were admissible under the coconspirator hearsay exception. The statements also contained indicia of reliability considering that they were not custodial confessions, the testimony came from personal knowledge, they were against the penal interest of the maker, they did not contain a direct assertion of defendant's guilt, and defendant was able to cross-examine both witnesses who claimed the statements were made, Jones and Robinson. *Kliner*, 185 Ill. 2d at 144.

¶ 84 Because defendant has not shown that the underlying issue regarding the admission of this evidence was meritorious, he has failed to establish that his appellate counsel rendered deficient assistance or that he suffered any prejudice when the issue was not raised on direct appeal. *Easley*, 192 Ill. 2d at 328-29.

¶ 85 *2. ASA Kelly's Testimony*

¶ 86 At trial, defense counsel objected to ASA Kelly's testimony regarding statements by defendant's girlfriend, but the trial court allowed the testimony "for the limited purpose of what this witness did next, not for the truth of the matter asserted," and issued a limiting instruction to the jury. In moving for a new trial, defendant asserted that the trial court erred in overruling his numerous objections to inadmissible evidence. During postconviction proceedings, the circuit court held that the trial court properly admitted the testimony to show the effect on the listener.

¶ 87 We conclude that this issue was previously raised and decided in defendant's direct appeal, and review is therefore barred by res judicata. *Blair*, 215 Ill. 2d at 444; *People v. Garner*, 146 Ill. App. 3d 743, 748 (1986).¹⁰ Even if we were to find that this issue was not precluded by res judicata, we would nonetheless conclude that Kelly's testimony was properly admitted. The testimony was offered not for its truth, but to show defendant's reaction to Kelly's statements and how defendant continued to change his original story as Kelly continued speaking with him. See *People v. Ivory*, 333 Ill. App. 3d 505, 515 (2002) (Detective's testimony that he provided the defendant with an overview of facts from statements by out-of-court declarants was admissible to show why the defendant changed his story and confessed). As decided in defendant's direct

¹⁰This court's opinion in defendant's direct appeal provides:

"Defendant also contends that these statements *** were argued beyond the scope of their limited admission. We disagree.

Defendant contends that the statements made by defendant's girlfriend constitute inadmissible hearsay evidence. Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and is generally inadmissible unless it falls within an exception. *People v. Lawler*, 142 Ill. 2d 548, 557 (1991). In this case, the trial court allowed reference to defendant's girlfriend's statements in order to show defendant's reaction to them, in that he changed his story again, rather than the truth of the statements." *Clark*, at 20 (emphasis added).

appeal, the prosecution did not use this evidence improperly to argue that it was evidence of defendant's guilt. Moreover, the trial court immediately issued a limiting instruction at the time of the challenged testimony, advising the jury to limit its consideration of this evidence. Because the testimony was admissible, defendant has not made out a claim of ineffective assistance of appellate counsel. *Easley*, 192 Ill. 2d at 328-29.

¶ 88

D. Plea Offer

¶ 89 In his final claim on appeal, defendant argues that the trial court manifestly erred in dismissing his claim, following a third-stage evidentiary hearing, that his trial counsel was ineffective with respect to his advice regarding a plea offer.

¶ 90 "It has been well established that the right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial." *People v. Curry*, 178 Ill.2d 509, 518 (1997). "A criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer." *Id.* at 528 (emphasis in original). In general, a defendant must establish that (1) counsel's performance was objectively unreasonable regarding the plea offer, and (2) that there is a reasonable probability that he would have accepted the offer and that it would not have been withdrawn by the State or refused acceptance by the trial court, and that the conviction or sentence would have been less severe under the plea. *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 1385-88 (2012); *Curry*, 178 Ill. 2d at 531; *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 9. "The decision whether to enter a plea is ultimately the defendant's. [Citation.] However, such a decision must be knowingly made after being fully and fairly informed of the consequences of

pleading." *People v. Blommaert*, 237 Ill. App. 3d 811, 816 (1992).

¶ 91 After reviewing the evidence presented at the third stage hearing, we conclude that the circuit court did not manifestly err in dismissing defendant's claim that he received constitutionally deficient advice regarding a plea offer. *Pendleton*, 223 Ill.2d at 473. Contrary to defendant's argument, it does not appear that counsel misjudged defendant's case or gave erroneous advice. Although defendant's family testified that Sommers stated that defendant's case was "open and shut" and defendant testified that Sommers estimated a 90% chance of acquittal, this testimony was contradicted by Sommers' testimony that he never gives numerical odds or tells clients that they have an "open and shut" case, but instead discusses the strengths and weaknesses of the case and may offer a recommendation about a plea "based upon my review of the case and all the factors considered." Defendant was the only witness who testified that Sommers provided him with a numerical percentage chance of acquittal.

¶ 92 Although Sommers did not recall any offer being made, we do not find that rendered his testimony incredible, as Sommers testified that the case happened "a long time ago" and it appears he had a lack of memory about it; he testified that it was possible that one was made. His file jacket also did not contain anything about a plea offer for a 20-year sentence. Sommers testified that he met with defendant several times and reviewed his case, and considered the fact that one codefendant was acquitted and one was convicted. According to Luque-Rosales, Sommers communicated Hovey's trial-day offer for a 20-year sentence to defendant, but defendant rejected it.

¶ 93 Defendant contends that trial counsel should have counseled him to plead guilty because

his case was more similar to Chairs's case than to Booker's case, but we note that there was substantial incriminating evidence against Booker. He was observed going into the back room of the bar along with Chairs, defendant, and Martin, and then leaving the back room of the bar shortly after the murders occurred. He gave Martin's ring to Robinson, threatening to kill her if she gave the ring to the police or disclosed anything. On the other hand, Robinson did not see defendant after he went to the back room, and there was no evidence that he had proceeds of the robbery or threatened any witnesses.

¶ 94 Although defendant cites several cases in support of his argument, we find these cases distinguishable. In *Blommaert*, trial counsel gave the defendant incorrect legal advice regarding the possible sentences that he could receive. *Blommaert*, 327 Ill. App. 3d at 817. The court in *Blommaert* contrasted the defendant's situation where he received incorrect legal advice and thus ineffective assistance, with a situation where counsel may provide accurate legal advice about the range of possible sentences, but then merely incorrectly predict "that a certain sentence would be imposed." *Id.* In contrast to *Blommaert*, counsel here did not give defendant any legally erroneous advice.

¶ 95 Defendant also relies on *Lafler*, 132 S.Ct. 1376, and *Missouri v. Frye*, ___ U.S. ___, 132 S.Ct. 1399 (2012). In *Lafler*, the defendant rejected a favorable plea offer after counsel erroneously advised him that the prosecution would not be able to prove intent to murder because the defendant shot the victim below the waist. *Lafler*, 132 S.Ct. at 1383-88. On appeal, the parties agreed that counsel's performance was deficient, and the only issue to be decided was how to apply the prejudice prong of the *Strickland* test. *Id.* at 1383-84. In contrast to *Lafler*, the

parties here have not stipulated that counsel's performance was deficient, and, regardless, we do not find that counsel provided legally erroneous advice.

¶ 96 In *Frye*, the defendant's attorney rendered deficient performance when he failed to inform the defendant of a formal, favorable plea offer before the offer expired, and the defendant established that there was a reasonable probability that he would have accepted the offer had it been presented to him. *Frye*, 132 S.Ct. at 1410–11. Unlike in *Frye*, defendant is not contending here that his attorney failed to inform him of an offer.

¶ 97 On the record, defendant has failed to show that his trial counsel rendered ineffective assistance by making a poor assessment of his case and giving deficient advice. The circuit court's conclusions did not contain clearly evident, plain, or indisputable error. *Johnson*, 206 Ill. 2d at 360.

¶ 98 III. CONCLUSION

¶ 99 Based on the forgoing reasons, we find that defendant failed to make a substantial showing of a constitutional violation. Accordingly, we affirm the trial court's dismissal of his postconviction petition at the third stage.

¶ 100 Affirmed.