

NOTICE
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2011 IL App (4th) 100579-U

Filed 12/30/11

NO. 4-10-0579

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
TORREY L. SIMPSON,)	No. 05CF1424
Defendant-Appellant.)	
)	Honorable
)	James R. Coryell,
)	Judge Presiding.

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

ORDER

- ¶ 1 *Held:* (1) Given the appellate court's repeated holding that a claim of ineffective assistance of counsel is best adjudicated in a postconviction proceeding, omitting to raise such a claim on direct appeal does not result in the claim's being barred by the doctrines of *res judicata* or procedural forfeiture in the postconviction proceeding.
- ¶ 2 (2) In order for a hearsay statement to be admissible under the exception for declarations by a coconspirator, the statement had to be made during the pendency of the conspiracy, and the statement had to further the conspiracy; if the statement merely revealed the conspiracy without furthering it in any way, the statement is not admissible under this exception to the hearsay rule.
- ¶ 3 (3) Quite apart from the question of its ultimate merit, if a claim in a postconviction petition is arguable, the petition is not frivolous or patently without merit, or at least not entirely so, and a summary dismissal of the petition is unauthorized.
- ¶ 4 (4) A claim omitted from the postconviction petition is not properly before the reviewing court in an appeal from the summary dismissal of the petition.

¶ 5 (5) When appellate counsel refrained from arguing, on direct appeal, that the trial court should have granted a motion for mistrial on the ground of an inadvertent reference to defendant's previous incarceration, no arguable prejudice resulted to defendant's appeal, considering that other, properly admitted evidence suggested the same thing that the previous incarceration suggested, namely, that defendant had engaged in criminal misconduct.

¶ 6 Defendant, Torrey L. Simpson, who is serving consecutive 15-year terms of imprisonment for armed robbery (720 ILCS 5/18-2(a)(2) (West 2004)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2004)), appeals from the summary dismissal of his petition for postconviction relief. In our *de novo* review (*People v. Brown*, 236 Ill. 2d 175, 184-85 (2010)), we conclude that the petition is not, in its entirety, "frivolous or *** patently without merit" (725 ILCS 5/122-2.1(a)(2) (West 2010)). One of its claims is "arguable": the claim that trial counsel rendered ineffective assistance by failing to plead, in the posttrial motion, that the trial court erred by overruling a hearsay objection to a statement implicating defendant in the armed robbery. See *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). This claim cannot accurately be characterized as "*indisputably* meritless." (Emphasis added.) *Id.* Therefore, we reverse the trial court's judgment and remand this case for further proceedings.

¶ 7 I. BACKGROUND

¶ 8 The State charged defendant with armed robbery (720 ILCS 5/18-2(a)(2) (West 2004)), attempt (first-degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2004)), and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2004)). The jury trial occurred on April 10 and 11, 2007.

¶ 9 The State called Dean Richardson as its first witness, and he testified substantially as follows. He was 36. He was acquainted with defendant. They both lived in Decatur and used to "hang out" together. On October 11, 2005, Richardson decided he wanted to do some early

Christmas shopping at White Oaks Mall in Springfield. Because he lacked a driver's license, he requested defendant to give him a ride there. Defendant acceded to this request, and around 6:45 p.m., they set out for Springfield in a four-door automobile belonging to defendant's girlfriend. Defendant drove.

¶ 10 Richardson had about \$790 in cash on his person, having withdrawn this money from his savings account. Ultimately, it came from the Social Security Administration: he was receiving disability benefits for schizoaffective disorder and a heart condition. Before they left Decatur, defendant requested a loan, and Richardson gave him \$10 or \$20, trying to avoid showing him how much money was in his wallet. Richardson intended to give him some gas money, anyway.

¶ 11 Upon arriving in Springfield, they agreed to put off going to the mall and went directly to Déjà Vu, a strip club. As they were walking in, defendant mentioned he had a friend who wanted to buy some cannabis. They stayed at Déjà Vu about an hour and 15 or 30 minutes, and then defendant received a call on his cell phone. He told Richardson they had to return to Decatur because his girlfriend was having an emergency. They got back in the car and headed back to Decatur without stopping at White Oaks Mall.

¶ 12 On the way back to Decatur, defendant received another call on his cell phone. He asked Richardson if he knew where a friend of his could obtain some cannabis. Richardson answered he had some at his residence that he was willing to sell.

¶ 13 Upon arriving in Decatur, they went to Kroger and bought some groceries. They exited the store at the same time and got back in the car to await the arrival of the prospective buyer of cannabis. Defendant sat in the driver's seat, and Richardson in the front passenger's seat.

¶ 14 Someone approached on foot, a black man about 24 years old and 5 feet 4 or 6 inches

tall. Defendant said, " 'Well, this is the guy [who] wants to buy the marijuana[,] so I'm going to let him in the car.' " He opened the left rear passenger door, and the man got in and sat down behind defendant. The man asked, " 'Well, can you sell me some marijuana?' " Richardson answered yes and asked him how much he wanted to buy. The man said an eighth of an ounce. Richardson offered to sell him an eighth of an ounce, of good quality, for \$25—it was at his residence, only two or three minutes away. The man then pulled out a black 22-caliber automatic pistol, aimed it at Richardson's left side, and said, " 'Give me all your money.' " Richardson took out his wallet and gave the man approximately \$760. Then the man shot Richardson—without provocation, it would appear from Richardson's testimony; Richardson did not remember grabbing for the gun. The bullet tore through his left arm and pierced his chest. Then the man got out of the car and ran. He never aimed the pistol at defendant or demanded money from him, and defendant never gave him any money.

¶ 15 Richardson had brought along his own cell phone but could not seem to lay his hands on it. It was somewhere in the car; perhaps he had dropped it. He asked defendant if he could use his phone. Defendant handed him his phone, and Richardson dialed 9-1-1 and then his mother.

¶ 16 Defendant pulled out of the parking lot of Kroger. At first, Richardson thought he was taking him to Decatur Memorial Hospital, but, instead, defendant drove to Walgreens; Richardson did not know why. Defendant told Richardson to get out of the car while he went inside Walgreens to use the phone (even though defendant had brought along a cell phone). Richardson got out and sat on the sidewalk. An ambulance arrived.

¶ 17 Richardson was in the hospital for about eight weeks. The police came and showed him "photographic lineups" or arrays. In some of the arrays, he recognized no one, but the day after

the shooting, he identified a man in one of the photographs. Even though he was weak at the time and going in and out of consciousness, he was 90% sure that the man in the photograph was the shooter. Before that night in the Kroger parking lot, he had never seen this man. As he later learned, the man's name was John Ward.

¶ 18 On cross-examination, Richardson testified he remembered being interviewed on October 11, 2005, by a Decatur police officer named Harris. It was "quite possible" he told Harris that he and defendant had been gambling and playing pool in Springfield. Because of the injury and surgeries, he had difficulty recalling many things. He did not remember gambling that night. He had been told that currency was recovered from his person and that one of the bills "was taped together with some kind of tape." He did not remember having this bill with tape on it and could not surmise its purpose. He denied using the bill "to slip into those gambling machines and then rack up the points and then get the bill back without having to leave the bill in the machine." He remembered speaking with another police officer, named Hendricks, who told him he knew the bill was used to cheat gambling machines. But Richardson did not remember going to any bars or pool halls or anywhere else in Springfield besides Déjà Vu on October 11, 2005. He did not remember telling the police that the shooter arrived at Kroger in a car.

¶ 19 On the way back to Decatur, Richardson heard defendant say on the phone, "I know someone [who has] marijuana to sell if you want some." He did not recall hearing defendant say, "And when you come pick up that marijuana, you could rob this guy." Richardson agreed that a comment like that, if it had been made, surely would have stood out and stuck in his memory.

¶ 20 On redirect examination, Richardson insisted he knew, to within \$10, the amount of money he had on him when Ward robbed him. He identified People's exhibit No. 6 as his wallet and

People's exhibit No. 5 as the quantity of bills he had with him when he was robbed. He identified People's exhibit No. 2 as his cell phone.

¶ 21 The State next called Zeth Giles, a Decatur police officer. He testified that at 11:39 p.m. on October 11, 2005, he was dispatched to Walgreen's to investigate a shooting. When Giles arrived, Richardson was sitting inside a Saturn automobile. He was bleeding, and paramedics were attending to him. As soon as Richardson was taken away in an ambulance, police officers "secured" the Saturn (that is, stood by it and allowed no one in). Eventually, detectives arrived and "processed" the vehicle.

¶ 22 Giles testified he spoke with defendant at Walgreen's. Defendant was "pretty excitable" at the time, but he gave Giles the following account. He and Richardson had gone that night to Déjà Vu and a couple of other bars in Springfield. Defendant could not remember the names of the other bars, but in one of them, Richardson won money from a man in a game of billiards, and the man had become upset at losing. It was a verbal altercation, nothing more. At about 10:45 p.m., upon returning to Decatur, defendant and Richardson stopped at a gas station to use the bathroom. Defendant could not remember the name of the gas station. From there, they went to Kroger to buy groceries. As they approached a stop sign at Fairview Plaza, which led onto Fairview Avenue, a young black man in black pants and a black shirt approached the car. Richardson urged defendant to stop and " '[I]et the brother in.' " Defendant did so. The man climbed into the rear passenger seat, behind the driver's seat. Defendant pulled out of the parking lot of Kroger, onto Fairview Avenue, and headed south. Then the man in the backseat pulled out a pistol—a black revolver with a long barrel—and pointed it at both defendant and Richardson, demanding their money. Defendant gave him the money in his wallet—some \$80—and Richardson

handed over his entire wallet. Giles testified: "He said *** the suspect either took the wallet and the money, or he could have [taken] the money and left the wallet inside the car." Then Richardson grabbed for the gun. There was a loud bang. Defendant threw the vehicle into park and got out. They were at about the 500 block of North Fairview Avenue. The man got out and ran south. Richardson's shirt was soaked with blood. Defendant drove toward Decatur Memorial Hospital but stopped short of their destination. He pulled into Walgreen's parking lot, ran into the store, and asked for help. Giles testified he took defendant to the Kroger parking lot in the hope of finding a spent shell casing but defendant could not point out exactly where the shooting had occurred.

¶ 23 The State next called Martin St. Pierre, who testified that at 11:55 p.m. on October 11, 2005, he was dispatched to Walgreen's to secure a Saturn automobile. He stood guard at the vehicle until detectives arrived at approximately 3 a.m. on October 12, 2005. During that time, nobody entered the vehicle or tampered with its contents.

¶ 24 The next witness for the State was Scott Cline, a detective with the Decatur police department. He testified that on October 12, 2005, he, along with Detective Randall Chaney, executed a search warrant on a 1992 silver Saturn four-door vehicle parked by Walgreen's. Cline identified People's exhibit No. 1 as a silver and black Kyocera cell phone they found on the back passenger's seat. He identified People's exhibit No. 2 as a photograph of a gray Nokia cell phone that they found on the dashboard on the front passenger side. People's exhibit Nos. 3A through 3F were photographs of the interior and exterior of the Saturn. They showed bloodstains on the side of the driver's seat, the front passenger's seat, the console, and the pavement outside the front passenger's seat.

¶ 25 Chaney testified that at approximately midnight on October 12, 2005, he went to

Walgreen's to investigate a crime scene. He was the officer who did all the fingerprint comparisons for the Decatur police department. He found that the fingerprints on People's exhibit No. 1 were smeared and unsuitable for comparison.

¶ 26 On cross-examination, Chaney explained the difference between an automatic pistol and a revolver. An automatic pistol ejected the spent shell casing when the pistol was fired (unless the pistol jammed). In a revolver, the spent shell casing remained in the cylinder and had to be ejected by hand. In their search of the Saturn, Chaney and Cline found no shell casing. The trial went into recess.

¶ 27 On the next day of the trial, April 11, 2007, the State called Marlon Williams. He testified he was 22 years old and that he knew a man named John Lavell Ward. He and Ward had been friends for some seven years, but they lost contact with one another when Ward moved. They were still in contact, however, in October 2005. The prosecutor handed Williams some photographic arrays, People's exhibit Nos. 8 and 11, and Williams identified the photographs of Ward. Williams admitted having felony convictions for domestic battery as well as a misdemeanor conviction for retail theft. On October 11, 2005, he lived with his grandmother on West Waggoner Street in Decatur, and around 7 or 8 p.m. that day, Ward picked Williams up at his grandmother's house, and they went to Ward's cousin's house on Center Street and smoked some cannabis.

¶ 28 Ward had a gray cell phone with him that evening. The phone was in Williams's name, but he had obtained it for Ward, and Ward had reimbursed him. While they were at the cousin's house, Ward received two or three calls on this cell phone. The prosecutor asked Williams:

"Q. Did you have any conversation with or talk to Mr. Ward

after he received these phone calls?

A. Yes.

Q. *** [W]hat did he say to you?

MR. RUETER [(Defense counsel)]: Objection, Your Honor.

THE COURT: Objection to what Ward said to him.

Sustained. Hearsay."

¶ 29 The jury then left the courtroom, and the prosecutor made the following offer of proof:

"Q. What did Mr. Ward say to you?

A. Said that he's going to go pick up his girlfriend from work, that he's going to go get up with this guy, and he was going to go hit a lick."

¶ 30 The attorneys then made their arguments on this evidentiary question. The prosecutor invoked the exception to the hearsay rule for statements by coconspirators. He argued that Ward's statement to Williams was a statement by a coconspirator: Ward and defendant had an agreement (or they had conspired together) to rob Richardson. The prosecutor expected to present evidence that telephone calls "were made back and forth between the phone of the defendant and Mr. Ward during this time period." The prosecutor argued the conspiracy was still ongoing when Ward made the statement to Williams (*i.e.*, "that [he was] going to go get up with this guy[] and *** hit a lick") and that Ward made the statement in furtherance of the conspiracy.

¶ 31 The trial court asked the prosecutor:

"THE COURT: *** Have you established the existence of a conspiracy yet?

MR. SCOTT: Well, I don't think I have to. According to the case law, it says you can do it afterward[], but[,] yes, I think the totality of the evidence is going to establish there was a conspiracy here.

*** [T]here are the numerous phone contacts. We're also going to be introducing statements that were made by the defendant where he initially and repeatedly denied knowing who the person in the car was—uh—having anything to do with this[] and then, at the very end, admitting that he knew who the person was. Uh—he had a different explanation as far as what happened and why they were meeting there. He said it was going to be a cannabis deal. That was his final statement—uh—but[,] circumstantially—uh—we believe that it's going to establish conspiracy.

* * *

THE COURT: You're going to establish the conspiracy?

MR. SCOTT: Yes, through further evidence. In which—the case law is pretty clear. It can be circumstantial. We don't have to have direct evidence.

THE COURT: Right. But, right now, you don't have any. Or, you don't have much.

MR. SCOTT: Not much at this point, no."

defendant: the telephone calls between them were for the purpose of arranging a cannabis deal, and there was no evidence that defendant and Ward had an agreement that Ward would rob Richardson.

¶ 33 The prosecutor added that once the police told defendant, at the police station, that he no longer was free to leave, defendant revealed that he had Richardson's wallet with him, along with the amount of cash Richardson said had been taken from him.

¶ 34 The trial court told the prosecutor: "At this point, *** there hasn't been a conspiracy established. What I'm going to do is, I'm going to let you put this evidence on, and if you don't connect it up, you're going to have a mistrial."

¶ 35 The jury returned to the courtroom, and the prosecutor resumed his direct examination of Williams:

"Q. Mr. Williams, what did John L[a]vell Ward say to you after this phone conversation?

A. That he was going to go pick up his girl from work and then go get up with this guy and that he was going to go hit a lick.

* * *

Q. Are you familiar with what 'hit a lick' refers to?

A. Yeah.

Q. What is that?

A. Taking something from somebody.

* * *

Q. Uh—what did you do then?

A. Uh—he asked me where I was going to, and I told him I

was going to go home, and he dropped me off [at my grandmother's house]."

¶ 36 The State next called Carl Carpenter. He testified he was a detective with the Decatur police department and that he was assigned to the street-crimes unit. He identified People's exhibit No. 4 as a Sprint cell phone that Sergeant Cody Moore delivered to him on October 12, 2005. Carpenter had retrieved the number for this phone: it was 217-520-1661. The phone also contained a list of contacts. He identified People's exhibit No. 4B as a report he prepared listing all the contacts stored in the phone. The third name on the list of contacts was "Vell" at 217-201-0799. Carpenter further testified he had accessed the database in the telephone listing the incoming and outgoing calls. The last incoming call on October 11, 2005, was at 11:28 p.m., and it was from Vell. The last outgoing call was at 11:29 p.m., and it was to Vell.

¶ 37 Next, the State presented a stipulation of evidence, People's exhibit No. 12, signed by the prosecutor and defense counsel. The stipulation was as follows:

"The parties stipulate and agree as follows:

1. That telephone records were retrieved from the database of U.S. Cellular for the cellular telephone assigned the number of 217-201-0799[,] which has been identified as 'People's [e]xhibit N[o.] 1'[,] and from the database of Sprint for the cellular phone assigned the number[] 217-520-1661, which has been identified as 'People's [e]xhibit N[o.] 4.'

2. That service for People's [e]xhibit N[o.] 1 was obtained in the name of Marlon A. Williams from U.S. Cellular on October 3[],

2005.

3. That service for People's [e]xhibit N[o.] 4 was held in the name of Torrey L. Simpson.

4. That People's [e]xhibit N[o.] 1A is an accurate list as to time and duration of telephone calls placed from People's [e]xhibit N[o.] 1 to People's [e]xhibit N[o.] 4 on October 11, 2005, appearing in the records of U.S. Cellular.

5. That People's [e]xhibit N[o.] 4A is an accurate list as to time and duration of telephone calls placed from People's [e]xhibit N[o.] 4 to People's [e]xhibit N[o.] 1 on October 11, 2005, appearing in the records of Sprint.

6. That the telephone calls set forth in People's [e]xhibit[] N[os.] 1A and 4A do not include all telephone calls appearing in the records of the representative telephone service providers for People's [e]xhibit[] N[os.] 1 and 4."

¶ 38 People's exhibit No. 1A is entitled "U.S. Cellular Call Records for October 11[], 2005, Calls from People's Exhibit N[o.] 1, 217-201-0799, to People's Exhibit N[o.] 4, 217-520-1661," and it lists the following times and durations:

10:15:05 p.m., 18 seconds

10:15:37 p.m., 33 seconds

10:18:03 p.m., 32 seconds

10:18:43 p.m., 30 seconds

10:26:11 p.m., 30 seconds
10:26:55 p.m., 23 seconds
10:28:01 p.m., 41 seconds
10:31:16 p.m., 7 seconds
10:31:31 p.m., 6 seconds
10:35:50 p.m., 1 second
10:36:50 p.m., 95 seconds
10:38:46 p.m., 18 seconds
11:04:17 p.m., 97 seconds
11:07:37 p.m., 1 second
11:07:45 p.m., 162 seconds
11:19:44 p.m., 26 seconds
11:23:36 p.m., 36 seconds
11:25:30 p.m., 1 second
11:27:07 p.m., 29 seconds
11:28:17 p.m., 15 seconds
11:29:04 p.m., 13 seconds
11:29:29 p.m., 7 seconds.

¶ 39 People's exhibit No. 4A is entitled "Sprint Call Records for October 11[], 2005, Calls from People's Exhibit N[o.] 4[,] 217-520-1661, to People's Exhibit N[o.] 1, 217-201-0799," and it lists the following times and durations:

10:13 p.m., 1 minute

10:14 p.m., 1 minute
10:16 p.m., 1 minute
10:17 p.m., 1 minute
10:25 p.m., 1 minute
10:26 p.m., 1 minute
10:37 p.m., 1 minute
10:39 p.m., 1 minute
11:06 p.m., 1 minute
11:18 p.m., 1 minute
11:25 p.m., 1 minute
11:27 p.m., 1 minute
11:28 p.m., 1 minute.

¶ 40 The State next called Charles Hendricks, a detective with the Decatur police department. He testified that around midnight on October 11, 2005, he was called into police headquarters to investigate a shooting. On October 12, 2005, he interviewed defendant at police headquarters. Hendricks identified People's exhibit No. 15 as a digital video disk (DVD) on which he recorded the interview. Without objection, the prosecutor played it for the jury.

¶ 41 The DVD, People's exhibit No. 15, is in the record. And before we summarize the content of this video, something should be noted. The State points out in its brief that, during the trial, the State stopped the video, and fast-forwarded it, some 20 times in order to prevent the jury from hearing any reference to defendant's previously being in custody. Apparently, though, one such reference inadvertently slipped through the on-the-spot editing process. The record does not

reveal which references were successfully concealed and which one was revealed.

¶ 42 The video begins with defendant sitting at a table, alone in a room. About 3 minutes and 17 seconds into the video, he gets up from the table, goes to the door, tries the door handle, and finds the door to be locked. He knocks on the door, and almost immediately, Hendricks comes to the door. He asks defendant to step back (because the door opens into the room), and he enters the room. (In this video, whenever a police officer enters the room, before letting the door close behind him, he unlocks it by pressing a mechanism on the edge of the door, near the latch. That way, the officer can exit the room freely, without calling someone to open the door from the outside. Before exiting the room, the officer presses the mechanism again, thereby locking the door behind him—and locking defendant in.) Hendricks introduces himself, and defendant says he is tired and would like to get the interview over with. Hendricks says he understands, and he thanks defendant for his patience. He says he needs defendant's help figuring out who shot Richardson, for it could have just as easily been defendant who got shot. During the interview, defendant acknowledges he came to the police station voluntarily.

¶ 43 Defendant gives Hendricks the following account of what happened the evening of October 11, 2005. At 5 p.m., defendant picked up Richardson at Decatur Indoor Sports Center (DISC), near Milliken University. Richardson was on foot, and defendant was driving a car belonging to his girlfriend, Karen Kearns. Defendant's car had been totaled in a vehicular accident, for which he had received \$1,200 in an insurance settlement, half of which he had with him to spend that night. He told Richardson he had a little money, and he suggested they go to Déjà Vu in Springfield. Recently, they had been running around together, going mostly to Champaign. They customarily went to pool halls and played for small money, \$10 or \$20 a game. Richardson climbed

into the car, and they went to Springfield.

¶ 44 They first went to a bar. Defendant could not be certain of the name of the bar, but he thought it was the Curve Inn. Richardson shot pool and played slot machines—but not for money; they did no gambling at that bar. Defendant bought Richardson some drinks. They stayed an hour and a half and then left.

¶ 45 Then they went to Déjà Vu and watched the show. It was 2 dances for \$20. Defendant watched four dances. Richardson had some money. Hendricks asks defendant how much money Richardson had, and defendant answers he does not know.

¶ 46 They stayed at Déjà Vu for about an hour and a half and then went to another bar, the name of which defendant cannot recall. They both drank, and Richardson played the slot machines there, too. Then Richardson played a game of pool with a black man. At first, they did not play for money. Then defendant bet Richardson \$10 that the man would beat him, and Richardson in turn bet the man \$10. Richardson won the game and returned to the slot machines. The man tried to talk Richardson into playing another game of pool, but Richardson was doing well on the slot machines and did not want to quit. The two men began "talking trash" to one another in a rough, jovial way. The man said he was part owner of the bar and was glad Richardson was feeding money into those slot machines. Richardson said he would play another game of pool if the man bet everything in his pocket. Richardson wanted to cash in his points on the slot machines, but the bartender, a woman, refused to do so, saying the machines were merely for amusement. Richardson became irate. He also was very drunk. He asked, " 'What if I had lost \$500 in these machines—would *that* be for my amusement?' " He threatened to call the police and report the tavern for having gambling machines. The part-owner in turn threatened to call the police and report Richardson for trying to gamble.

Defendant then exited the bar and urged Richardson to come along. Defendant was on parole for a drug conviction from 2000, and he had a midnight curfew. They left the bar at about 10:30 p.m. and headed back to Decatur. Defendant did not notice anyone following them.

¶ 47 Upon arriving in Decatur, they stopped at a gas station on Eldorado Street to use the bathroom. Richardson also bought cigarettes.

¶ 48 Then they stopped at Kroger to buy groceries. Richardson bought two TV dinners, and defendant bought soda, three pot pies, and milk. They paid in cash. At this point in the interview, Hendricks asks defendant how much he spent in Springfield. Defendant answers that he does not know but he estimates between \$150 and \$200, mostly at Déjà Vu.

¶ 49 They exited Kroger, and as they were walking back to the car, Richardson made a call on his cell phone. Defendant does not know whom Richardson called. He did not hear the conversation. They pulled out of the Kroger parking lot and turned onto South Fairview Avenue, going in the direction of Milliken University. Just as they were pulling past the first stop sign, Richardson said, " 'Let the brother in, let the brother in!' " Defendant looked up and put his foot on the brake. A man was running toward the car. He was approaching from behind, from the direction of the Kroger parking lot. The man climbed into the backseat, behind the driver's seat. Assuming that Richardson knew the man, defendant resumed driving.

¶ 50 They went under a railroad trestle and past a bowling alley, and the man in the backseat said, " 'Don't y'all move.' " Defendant looked over, and the man was pointing a pistol at Richardson's head. It was a black long-barreled revolver like a cowboy six-shooter. Defendant braked suddenly and threw the car into park. The car lurched, and then the man pointed the pistol at defendant. Defendant grabbed his wallet, took out \$80, and handed the cash to the man.

Richardson took the money out of his wallet and handed it over. At this point in the interview, defendant tells Hendricks that Richardson had some money on him when they left for Springfield—a "few hundred" dollars but not as much money as defendant had with him. Richardson won only \$20 that night playing pool.

¶ 51 Richardson handed over his cash to the man with the revolver, and then, according to defendant, Richardson reached over his left shoulder with his right hand and tried to grab the robber's pistol. Defendant heard a loud bang, whereupon he got out of the car and started running. When he saw, however, that the robber also had exited the car and was running away, he returned to the car. Richardson got out and started fumbling with a cell phone. Then he got back in the car and made a call. Defendant heard him say to someone on the phone, " 'Tell my Mom I got shot.' " Until then, defendant was unaware Richardson had been shot. Now he noticed that the side of Richardson's shirt was bloody. Richardson told defendant to take him to the hospital. Defendant, however, was so flustered and scared he just pulled over at Walgreen's, ran in, and asked for help.

¶ 52 Repeatedly in this recorded interview with Hendricks, defendant insists, quite passionately, that he has no idea who the shooter is. He describes the shooter as a black man around 18 years old, dressed all in black, approximately 5 feet 8 inches tall, and weighing about 180 pounds, with little braids of hair hanging out of the back of his hat.

¶ 53 Hendricks requests to see defendant's wallet. Defendant takes it out, and it contains \$35 in cash. Hendricks takes the identification card out of the wallet and hands the wallet back to defendant.

¶ 54 It is now about 56 minutes into the video, and Hendricks tells defendant, "Let me go talk to my boss," whereupon he leaves the interview room, taking defendant's identification card

with him. About four minutes later, Hendricks returns to the room, gives defendant back his identification card, and suggests that defendant has not been telling the truth. Defendant insists he has been telling the whole truth. Richardson, Hendricks says, has told the police the whole story, and parking-lot surveillance at Kroger reveals that the shooter arrived in a car. Hendricks asks defendant, "Did something happen beyond your control?" Defendant responds, "Are you going to charge me or let me go? I am intoxicated and would like to go." Hendricks answers, "If you want to walk out of here, that's fine." He says he merely is giving defendant a chance to come clean and "make things right." Defendant remains seated at the table and asks again, "Are you going to let me go? I want to leave, please, sir."

¶ 55 Another police officer now enters the room and introduces himself as Sergeant Moore. He wants to know whom defendant called at Kroger. Moore tells defendant, "Dean [Richardson] said you called someone and met somebody." Defendant answers vehemently, "I didn't call nobody. *He* met somebody in the parking lot." At this point, Moore tells defendant, "You're not free to go," and directs Hendricks to give defendant the *Miranda* warnings. See *Miranda v. Arizona*, 384 U.S. 436 (1966). Hendricks does so.

¶ 56 The interview continues. Moore represents to defendant that the police have spoken with Richardson and that Richardson has told them two things: (1) he had \$700 on him when he was robbed and (2) not to let the driver go because the driver was in on it. Defendant asserts, to the contrary, that Richardson did not have \$700 on him and that defendant knows for a fact that Richardson did not have \$700 on him because defendant, right now, has Richardson's wallet—whereupon defendant pulls a wallet out of his coat pocket and throws it on the table. He adds that he told a police officer, at the crime scene, that he had Richardson's wallet. Hendricks

denies that defendant said any such thing and expresses wonder that defendant waited so long in the interview before divulging that he had Richardson's wallet.

¶ 57 Moore notes that someone named "Vell" is listed as a contact in defendant's cell phone and the phone indicates that defendant called Vell around the time of the shooting. Defendant replies that he called Vell just to see what Vell wanted; Vell had called defendant, but the signal went out, so defendant called him back. He and Richardson were probably at Kroger at the time of these calls. Defendant insists he does not know Vell's actual name. He has known Vell for only about a month. Vell does not know defendant's real name, either; he knows defendant only as "T."

¶ 58 Moore asks defendant how much money he started out with when leaving Decatur. Defendant answers \$600. Moore asks him how much he spent in Springfield. He answers \$150 to \$200. Moore asks what happened to the remaining \$400, noting that his wallet contains only \$35. Defendant answers he does not keep all his money in his wallet; he keeps some in his pocket, whereupon he pulls out \$701 in cash.

¶ 59 Defendant explains this is not all Richardson's money. They made much of it from slot machines that night. Defendant invites Hendricks and Moore to observe that some of the bills have tape on them. The purpose of the tape, he explains, was to enable Richardson and him to cheat the slot machines by feeding the bill in, racking up whatever points they could, and then pulling the bill back out. Altogether, they probably made \$600 off the gambling machines that evening. Defendant argues it is ludicrous to suspect him of setting Richardson up because he would have been stealing his own money: he and Richardson were partners. At Walgreens, defendant says, Richardson urged him to take his wallet, along with the cash, so that the police would not find the taped bills and discover they had been going around swindling taverns.

¶ 60 Again, defendant insists that Richardson was the one who made arrangements to meet someone at Kroger and that he, defendant, does not know the identity of the shooter. While Richardson and the man transacted business, defendant stepped out of the car because it was none of his concern. "Whatever happened," defendant says, "I was not in the car." Still incredulous, Moore informs him he is under arrest for armed robbery and attempted murder. The two officers leave.

¶ 61 After a while, Hendricks reenters the room, shows defendant a photograph, and asks him if it is Vell. Defendant answers that he does not know the man in the photograph.

¶ 62 After this video recording of the interview of October 12, 2005, was played to the jury, the prosecutor resumed his direct examination of Hendricks. Hendricks identified some exhibits. People's exhibit No. 5 was the \$701 in currency that defendant pulled out of his pocket during the interview. One of the bills had tape on it. People's exhibit No. 6 was Richardson's black leather wallet, which defendant also produced during the interview. People's exhibit No. 6A was a photograph of the \$60 in currency that was in Richardson's wallet. One of these bills also had tape on it. People's exhibit No. 7 was the \$35 that defendant had in his own wallet.

¶ 63 Hendricks testified that at 4:10 p.m. on October 12, 2005, he visited Richardson in the intensive-care unit of the hospital and showed him an array of six photographs, the first page of People's exhibit No. 8. One of the photographs was of Ward. Richardson could identify none of them. Hendricks then showed him a second photographic array, the second page of People's exhibit No. 8, and Richardson said one of the photographs therein resembled the shooter but he did not know if the man was the shooter. The man in this photograph was not Ward.

¶ 64 Later, on October 30, 2005, Hendricks saw Ward face to face and spoke with him.

Ward appeared to weigh less and to have longer hair than when his photograph in the first page of People's exhibit No. 8 was taken.

¶ 65 Hendricks returned to the hospital on November 1, 2005, and showed Richardson a third photographic array, People's exhibit No. 11. This array included a different photograph of Ward, showing him with longer hair, short braids, and a somewhat thinner face. According to Hendricks, this photograph more accurately showed the way Ward looked in October 2005. This time, Richardson identified the photograph of Ward. He said he was pretty sure this was the man who had shot him but he was not 100% sure.

¶ 66 Hendricks identified People's exhibit No. 13 as Ward's birth certificate. It indicated his name was John Lavell Ward.

¶ 67 On cross-examination, Hendricks testified that the photograph of Ward in the first photographic array was the same photograph he showed defendant in the interview room on October 12, 2005. Of the \$701 that defendant pulled out of his pocket during the interview, at least one of the \$20 bills had tape on it: plastic tape on the reverse side of the bill and another strip of plastic tape hanging off it. One of the \$20 bills in Richardson's wallet also had tape on it.

¶ 68 The State next called David Pruitt, a detective with the Decatur police department. He testified that on October 13, 2005, he went to the intensive-care unit of the hospital and showed Richardson the photographic array marked as People's exhibit No. 10. This array included a photograph of Williams but not of Ward. Richardson said one of the men in the photographs, someone other than Williams, had some of the physical characteristics of the shooter but that he was not the shooter.

¶ 69 Pruitt testified that later that day, October 13, 2005, he showed People's exhibit No.

10 to defendant in the Macon County jail. Defendant said the shooter was not pictured in that array but that, earlier, a different detective had showed him a photograph and that he wanted to speak with Moore and Pruitt downstairs. Pruitt signed defendant out of jail and took him to the interview room. Pruitt identified People's exhibit No. 16 as a video recording of the second interview of defendant. It was played to the jury.

¶ 70 This video also is in the record, and at the beginning of the interview, defendant explains to Pruitt and Moore that the photograph Hendricks showed him in the previous interview did not look like the shooter because the shooter had a different hairstyle—but that, in any event, the shooter was indeed Vell. Moore asks defendant if the shooter really was Vell. Moore says he has found out that the number defendant dialed the night of the shooting, although it was to the contact named Vell, was actually to a cell phone belonging to someone named Marlon Williams. Defendant replies that he does not know Williams and that Vell must have had Williams's phone. Defendant says that Vell (whose full real name he does not know) called him while he and Richardson were in Springfield. Vell wanted to buy some cannabis. Richardson overheard the conversation and said he had some cannabis he could sell to this person. Defendant and Richardson stopped at a gas station, where they bought cigarettes and used the restroom. Then they went to Kroger, where they bought groceries and met Vell in the parking lot. Vell got in the car, and defendant got out, letting them transact their business. As the three men were on their way to Richardson's house, Richardson told defendant not to drive all the way there but to pull over. Richardson said he would walk the rest of the way and return with the cannabis. It was then that Vell pulled the revolver on them. Defendant gave Vell the money out of his wallet. Richardson took some money out of his wallet and held out the money. Vell saw that defendant had more

money in his wallet, and he snatched the wallet. Richardson grabbed the pistol and got shot. Moore shows defendant a photographic array, and defendant identifies Vell in one of the photographs, describing him as having short braids.

¶ 71 After this video was played, the direct examination of Pruitt resumed. He testified that defendant identified photograph No. 5 in People's exhibit No. 8 as the man who had robbed him and shot Richardson. That man was Ward. The State rested.

¶ 72 Defense counsel moved for a mistrial on the ground that the State had failed to prove a conspiracy between Ward and defendant and, therefore, Williams's testimony of what Ward had told him regarding hitting a lick was inadmissible hearsay. Defense counsel also moved for a directed verdict. The trial court denied both motions.

¶ 73 Defendant called Tammy Lyons as his first witness. She testified she was an assistant manager at the Walgreens store located at the intersection of Oakland Avenue and Grand Street in Decatur. She worked the third shift from the late-night hours of October 11, 2005, to the early-morning hours of October 12, 2005. She was operating the front cash register when defendant ran into the store and asked for help because his friend had been shot. She dialed 9-1-1. She then went to the front door. Company policy prohibited her from exiting the store during her shift. Defendant was outside pacing back and forth. A woman was trying to stop the victim from bleeding, applying pressure to the wound with a gray shirt defendant had been wearing. The man who was bleeding never got out of the car.

¶ 74 The defense next called Stephanie Cruse. She testified she worked the third shift at Kroger from October 11 to 12, 2005. A white man and a black man came into the store together (Richardson was white, and defendant was black). The white man checked out in her lane, and he

was rambling on about not getting his money.

¶ 75 Karen Kearns was the next witness for the defense. She testified that defendant was her boyfriend and she was at work the night he and Richardson went to Springfield. She denied calling defendant that night and requesting him to return to Decatur. Rather, defendant called her, told her he could not pick her up that night, and suggested she call someone to give her a ride home.

¶ 76 The defense next called Detective Cline, who testified that on October 12, 2005, he went to the emergency room of the hospital and attempted to interview Richardson, who was awaiting surgery and appeared to be under the influence of medication. Sometimes Richardson was awake, and sometimes he was not, but when he was awake, Richardson appeared to understand the questions Cline was asking him, and he gave answers corresponding to the questions.

¶ 77 Richardson told Cline he had been to Springfield that evening with a man named Terry and that he had played pool. He never told Cline their purpose had been to go Christmas shopping at White Oaks Mall. Terry was supposed to take him home after they went to Kroger, but a vehicle, of a make and color Richardson did not know, pulled up alongside them. A black woman was driving the vehicle, and a black man got out and kissed her. The man then climbed into the backseat of defendant's vehicle, pulled out a pistol, and said, " 'Give me your money.' " Richardson never mentioned to Cline that any conversation occurred from the time the man got in the car to the time he demanded money. Richardson told Cline there had been \$700 in his wallet, some of which had come from gambling but most of which consisted of disability benefits.

¶ 78 The defense next called Thomas Harris, a patrol officer for the Decatur police department. He testified he followed the ambulance when it took Richardson to the hospital and that he spoke with Richardson in the emergency room. He was the first police officer to speak with

Richardson. Because of the pain he was in, Richardson had difficulty answering in complete sentences, but he appeared to understand the questions, and he gave answers corresponding to the questions. He said he and defendant had been in Springfield gambling and playing pool. He and defendant exited Kroger, and defendant used his cell phone to call a friend to meet them in the parking lot. They waited in the parking lot for the man's arrival. After a while, a four-door vehicle pulled up. Richardson did not remember the make, model, or color of this vehicle. After shooting Richardson, the man ran from the location instead of getting back in the car in which he had arrived. Richardson told Harris that at the time of the shooting, he had a black wallet containing \$700 in currency. He repeatedly expressed concern about this money. He never said that he and defendant ever intended to go Christmas shopping or that they had stopped at Déjà Vu or that the shooter had come for a drug deal.

¶ 79 The defense next called Hendricks, who testified he interviewed Richardson at about 4 p.m. on October 12, 2005, at the hospital. Richardson was out of surgery by then. Repeatedly, Richardson expressed interest in his \$700. In fact, the first thing Richardson did was ask about his \$700. He also mentioned that some of the currency in his wallet might have tape on it and the purpose of the tape was to enable him and defendant to pull the money back out of the gambling machines. Before Hendricks showed him the photographic arrays, Richardson told him he believed he could recognize the man who had shot him if he saw him again. Hendricks showed him two arrays, and Richardson did not identify Ward. Richardson remarked that he thought he had seen the shooter with defendant before the day of the shooting. He recalled going with defendant to bars in Springfield. He recalled a bartender's refusal to pay out on a gambling machine, saying it was for amusement only. Richardson never mentioned going Christmas shopping at White Oaks Mall or

going to Déjà Vu. In a phone conversation on October 25, 2005, Richardson revealed, for the first time, that the shooting was a drug deal gone bad.

¶ 80 Defendant called Pruitt as his final witness. He testified that on October 13, 2005, he interviewed Richardson at the hospital. Richardson never told him he went to Springfield on October 11, 2005, for the purpose of going Christmas shopping at White Oaks Mall. He said they went to Springfield to shoot pool. After returning to Decatur, they went to Kroger, where Richardson bought cigarettes. While he and defendant were sitting in the Kroger parking lot, a black man arrived in another vehicle with a black woman driving. The man climbed into the vehicle, leaned up between the front passenger seat and the driver's seat, and asked Richardson if he was going to get some good stuff. Richardson reassured the man that the cannabis would be good. The man then said, " 'Give me your money.' " Richardson saw defendant give the man some money, and he noticed the man had the pistol pointed down, in between him and defendant. Richardson grabbed the pistol with his left hand and pulled it toward him, consequently getting shot. He said that while in Decatur, he had about \$755 in his wallet. He also mentioned that defendant had warned him, before meeting this man, to " 'be careful around this dude.' " The defense rested.

¶ 81 On April 12, 2007, the jury found defendant guilty of count I, armed robbery (720 ILCS 5/18-2(a)(2) (West 2004)), and count III, aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2004)), and the jury found him not guilty of count II, attempt (first-degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2004)).

¶ 82 On May 14, 2007, defense counsel filed a motion for a new trial on two grounds: (1) "[d]efendant was not proved guilty beyond a reasonable doubt," and (2) "the [c]ourt erred in denying [d]efendant's motion for a mistrial based upon the disclosure to the jury of [d]efendant's prior

incarceration."

¶ 83 On October 22, 2007, the trial court denied the motion for a new trial and sentenced defendant to 15 years' imprisonment for count I and 15 years' imprisonment for count III, ordering that the sentences run consecutively. The court gave him credit for 402 days in presentence custody.

¶ 84 Defendant took a direct appeal, in which he made two arguments: (1) trial counsel rendered ineffective assistance by failing to move for suppression of defendant's statements to the police on the ground that the police had violated *Miranda*, and (2) the trial court erred by admitting Williams's hearsay testimony as to what Ward had told him ("That he was going to go pick up his girl from work and then go get up with this guy and that he was going to go hit a lick"). *People v. Simpson*, No. 4-08-0265, slip order at 1 (July 9, 2009) (unpublished order under Supreme Court Rule 23). We disagreed with the first argument, and we held the second argument to be forfeited because of its omission from the posttrial motion. *Id.* at 1-2. Thus, on direct appeal, we affirmed the trial court's judgment. *Id.* at 2.

¶ 85 On April 15, 2010, defendant filed a postconviction petition, which the trial court summarily dismissed on July 1, 2010.

¶ 86 This appeal followed.

¶ 87 II. ANALYSIS

¶ 88 A. The Claim That Trial Counsel Rendered Ineffective Assistance By Omitting a Hearsay Objection From the Motion for a New Trial

¶ 89 1. *The State's Invocation of Res Judicata and Forfeiture*

¶ 90 To preserve an issue for appellate review, it is not enough to object during the jury trial; the defendant also must allege, in a posttrial motion, that the trial court erred by overruling the objection. *People v. Enoch*, 122 Ill. 2d 176, 185-86 (1988). In the jury trial in this case, defense

counsel made a hearsay objection to Williams's testimony as to what Ward had told him, namely, "[t]hat [Ward] was going to pick up his girl from work and then go get up with this guy and that he was going to go hit a lick." Nevertheless, although defense counsel made this hearsay objection at trial, he did not subsequently plead, in the posttrial motion, that the court had erred by overruling the objection and that this error was one of the reasons why defendant should be granted a new trial. Consequently, on direct appeal, we held that this particular contention of error was forfeited. *Simpson*, slip order at 2, 39.

¶ 91 In his postconviction petition, defendant faults his trial counsel for this forfeiture. He claims his trial counsel rendered ineffective assistance by failing to follow through with the hearsay objection by alleging, in the posttrial motion, that the erroneous overruling of the objection was grounds for granting a new trial.

¶ 92 The State argues, however, that *res judicata* and forfeiture bar this claim of ineffective assistance. In support of that argument, the State cites *People v. Blair*, 215 Ill. 2d 427, 443 (2005), in which the supreme court said: "In an initial postconviction proceeding, the common law doctrines of *res judicata* and waiver [(i.e., forfeiture)] operate to bar the raising of claims that were or could have been adjudicated on direct appeal."

¶ 93 In the direct appeal in this case, defendant never raised the claim that his trial counsel rendered ineffective assistance by omitting the overruling of the hearsay objection from the motion for a new trial. Consequently, that claim (having not been raised) was not adjudicated on direct appeal.

¶ 94 The remaining question, then, is whether the claim "could have been adjudicated on direct appeal." *Blair*, 215 Ill. 2d at 443. By holding that the claim of ineffective assistance could

have been adjudicated on direct appeal, we effectively would hold that defendant *should* have raised the claim on direct appeal. Such a holding would conflict with cases in which we have held that "an adjudication of a claim for ineffective assistance of counsel is better made in proceedings on a petition for postconviction relief, where a complete record can be made." *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006). A defendant should not be penalized for following our suggestion to wait until the postconviction proceeding to raise a claim of ineffective assistance. So, we disagree with the State's argument that *res judicata* and forfeiture bar defendant's claim that trial counsel rendered ineffective assistance by omitting the overruling of the hearsay objection from the motion for a new trial.

¶ 95 2. *The Question of Whether This Claim of Ineffective Assistance
By Trial Counsel Is "Frivolous or *** Patently Without Merit"*

¶ 96 a. The Merit of the Hearsay Objection

¶ 97 Because an attorney does not render ineffective assistance by abandoning an unmeritorious objection (see *People v. Nieves*, 193 Ill. 2d 513, 527 (2000)), we first should consider whether trial counsel's hearsay objection to Williams's testimony had any merit and therefore was worth preserving. See *People v. Segoviano*, 189 Ill. 2d 228, 246 (2000) ("If the claims were without merit[,] [the] defendant could not show prejudice even if they were waived [(i.e., forfeited)], and he thus would be entitled to no relief on this claim of ineffective assistance.").

¶ 98 Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted in the statement and depending for its value on the credibility of the out-of-court asserter. *People v. Carpenter*, 28 Ill. 2d 116, 121 (1963). Williams's testimony as to what Ward told him meets this description. When Williams testified that Ward had told him he "was going to go get up with this guy and that he was going to go hit a lick," Williams testified to an out-of-court statement

by Ward. One must infer that the State offered this out-of-court statement by Ward to prove the truth of the matter asserted in the statement: that Ward really intended to get together with a guy (defendant) and hit a lick (rob Richardson). The value of the statement depended on whether the out-of-court asserter, Ward, truthfully stated his intention to Williams. Hence, this portion of Williams's testimony was hearsay. See *id at 121-22*.

¶ 99 The hearsay rule bars the admission of hearsay as evidence at trial, but the rule has exceptions, and hearsay is admissible if it falls within an exception. *People v. Tenney*, 205 Ill. 2d 411, 432-33 (2002). One such exception allows the admission of declarations by coconspirators. *People v. Kliner*, 185 Ill. 2d 81, 141 (1998). The State invoked this exception at trial, in response to defense counsel's hearsay objection, and in its brief, the State continues to rely on this exception.

¶ 100 Here is what the exception says. "Any declaration by one coconspirator," though hearsay, "is admissible against all conspirators where the declaration was made during the pendency of and in furtherance of the conspiracy." *Kliner*, 185 Ill. 2d at 141. "Statements made in furtherance of a conspiracy include those that have the effect of advising, encouraging, aiding or abetting its perpetration." *Id.*

¶ 101 Thus, if all that can be said is that the hearsay statement revealed the conspiracy, the statement is not admissible under the exception for declarations by coconspirators. "Declarations, that are merely narrative as to what has been done or will be done, are incompetent and should not be admitted except as against the defendant making them, or in whose presence they are made." *Spies v. People*, 122 Ill. 1, 237 (1887). In other words, the mere out-of-court disclosure of the conspiracy by someone other than the defendant, outside the defendant's presence, is not admissible under the exception for declarations by coconspirators, because the mere narrative did nothing to

further the conspiracy.

¶ 102 To be admissible under this exception, the statement had to somehow further the conspiracy, move it forward, or contribute to its accomplishment. *Kliner*, 185 Ill. 2d at 141. For this reason, defendant argues that Ward's statement to Williams does not fall within the hearsay exception for declarations by coconspirators—because the statement did nothing to further the conspiracy to rob Richardson.

¶ 103 The State argues, on the other hand, that Ward's out-of-court statement did further the conspiracy, by getting Ward out of his cousin's house. The State reasons as follows:

**** Ward's statement [to Williams] *** had the effect of aiding and abetting [the] perpetration. [Citation.] Ward had to make preparations to rob Mr. Richardson by leaving his cousin's house, dropping off Mr. Williams, picking up his girlfriend, and meeting defendant. His statement to Mr. Williams reflects these preparations, which aided and abetted the conspiracy and clearly furthered the conspiracy. [Citation.] Simply put, co-conspirator Ward could not rob Mr. Richardson while he was sitting at his cousin's house with Mr. Williams. He had to take actions to further the conspiracy. He laid out these actions to Mr. Williams."

¶ 104 But the "[laying] out [of] these actions to Mr. Williams" and the "statement to Mr. Williams reflect[ing] these preparations" were merely a revelation of the conspiracy, and it is unclear how the revelation of the conspiracy was a furtherance of the conspiracy. Ward had loose lips. He provided incriminating information to Williams, who had nothing to do with the conspiracy

and who contributed nothing—and was expected to contribute nothing—to its accomplishment. This gratuitous provision of information to Williams did not *help* the conspiracy in any way. If anything, it hindered the conspiracy, considering that concealment of the crime is one of the ways of furthering a conspiracy. See *Kliner*, 185 Ill. 2d at 141.

¶ 105 To be sure, as the State says, Ward could not have robbed Richardson while sitting in his cousin's house with Williams. But the record appears to give no reasonable basis for supposing that informing Williams of the conspiracy was a precondition of Ward's leaving his cousin's house. Ward did not have to tell Williams he intended to hit a lick, and his telling Williams he intended to hit a lick had no tendency to help him hit the lick. Therefore, we conclude, for purposes of the claim of ineffective assistance, that trial counsel's hearsay objection had merit and that overruling the objection was an abuse of discretion. See *People v. Santos*, 211 Ill. 2d 395, 401 (2004).

¶ 106 b. Is This Claim of Ineffective Assistance By Trial Counsel "Arguable"?

¶ 107 In the first stage of a postconviction proceeding, "the petition's allegations, construed liberally and taken as true, need only present the gist of a constitutional claim." *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 20. The supreme court has said, however: "[O]ur use of the term 'gist' describes what the defendant must allege at the first stage; it is not the legal standard used by the circuit court to evaluate the petition, under section 122-2.1 of the [Post-Conviction Hearing] Act, which deals with summary dismissals. Under that section, the 'gist' of the constitutional claim alleged by the defendant is to be viewed within the framework of the 'frivolous or *** patently without merit' test." *Hodges*, 234 Ill. 2d at 11 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)).

¶ 108 A trial court may summarily dismiss a postconviction petition only if the petition "is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). Consequently, summarily dismissing a postconviction petition for the reason that it *lacks merit* would be erroneous; the petition has to be "*patently* without merit," or "frivolous," in order for summary dismissal to be justified. (Emphasis added.) *Id.* The shortcut of summary dismissal is unauthorized unless the petition has "*no basis*"—at all—"in law or fact and [is] *obviously* without legal significance." (Emphases added.) *Blair*, 215 Ill. 2d at 445. Quite apart from the question of ultimate merit, if a petition is arguable on its merits—if a reasonable argument can be made in support of a claim in the petition—the petition is not frivolous, and the court may not dispense with the safeguards of the second stage of the postconviction proceeding. *People v. Boclair*, 202 Ill. 2d 89, 101-02 (2002).

¶ 109 Not ultimate merit but being "arguable" is the touchstone here. "At the first stage of postconviction proceedings under the [Post-Conviction Hearing] Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 110 We consider those two points, (i) and (ii), to be *arguable* in this case, although we express no opinion, one way or the other, on what the ultimate conclusion should be with respect to those two points. Suffice it to say, a reasonable argument could be made that, because Williams's testimony as to what Ward had told him was inadmissible hearsay, trial counsel's performance fell below an objective standard of reasonableness when he omitted the hearsay issue from the posttrial motion, resulting in a forfeiture of the issue on direct appeal.

¶ 111 Prejudice also is arguable. An argument could be made that if the trial court had

sustained trial counsel's hearsay objection to what Ward had told Williams, there is a "reasonable probability" that "the result of the proceeding would have been different," that the jury would have acquitted defendant of armed robbery and aggravated battery with a firearm. *Segoviano*, 189 Ill. 2d at 246. Defense counsel's position at trial was that defendant had no idea Ward intended to rob Richardson. Defendant had "innocent" explanations for his phone calls to Ward and for his possession of Richardson's wallet: he telephoned Ward to make arrangements for him to buy cannabis from Richardson, not for Ward to rob Richardson; and he possessed Richardson's wallet because, before being taken away in the ambulance, Richardson handed the wallet over to him for safekeeping, so that the police would not discover the bills therein with tape on them, by which he and Richardson had been cheating the slot machines (an explanation that would make sense if Richardson handed over to the robber only some of his money from the wallet, not all of it). Arguably, Williams's hearsay testimony as to what Ward had told Williams led the jury to reject defendant's explanations because Ward's statement strongly implied that he and defendant actually did have an arrangement to rob Richardson: Ward was going to "get up with this guy and *** he was going to hit a lick." Granted, this statement does not explicitly say that the "guy" would hit the lick along with Ward, but that is the implication.

¶ 112 In short, without suggesting how the trial court ultimately should decide this case, we are convinced it would be worthwhile for the trial court to hear and consider an argument that the forfeiture of the hearsay issue "rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Segoviano*, 189 Ill. 2d at 246.

¶ 113 B. The Claim That Counsel on Direct Appeal Rendered Ineffective Assistance With Regard to Williams's Hearsay Testimony

¶ 114 In his brief, defendant states that given the forfeiture of the hearsay issue as a result

of its omission from the posttrial motion, "the issue could only have been considered on [direct] appeal by means of the plain-error rule, Supreme Court Rule 615(a)[] [citations] or as a matter of ineffective assistance by trial counsel[] [citation], but appellate counsel failed to argue either alternative." Defendant claims that this failure constituted ineffective assistance by appellate counsel.

¶ 115 This claim is not properly before us, because defendant did not make this claim in his postconviction petition. See 725 ILCS 5/122-3 (West 2010).

¶ 116 C. The Claim That Counsel on Direct Appeal Rendered Ineffective Assistance With Regard to the Disclosure of Defendant's Criminal History

At trial, while playing the video recording of the police interview of defendant, the State inadvertently allowed the jury to hear a mention of defendant's previously being in custody. For that reason, after the video was over, defense counsel moved for a mistrial, arguing that the reference to defendant's having been in "the joint" posed a risk that the jury would find defendant guilty because the jury thought he was a bad person. See *People v. Lindgren*, 79 Ill. 2d 129, 141 (1980). The trial court responded that it had heard only the words " [']how long you've been out['] " and that it had not heard the word "joint." In any event, because the reference to defendant's previous incarceration was fleeting and indistinct and because it was an isolated reference in more than two hours of video, the court denied the motion for a new trial. The court offered, however, to give the jury a curative instruction. Defense counsel declined that offer.

¶ 117 Subsequently, in the posttrial motion, defense counsel alleged that the reference to defendant's previous incarceration was propensity evidence that had made the trial unfair. Even though this issue was preserved by its inclusion in the posttrial motion, appellate counsel did not raise this issue on direct appeal. Defendant claims that, in that respect, appellate counsel rendered

ineffective assistance.

¶ 118 The two-pronged test in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to all claims of ineffective assistance of counsel, regardless of whether the counsel was trial counsel or appellate counsel. *People v. Golden*, 229 Ill. 2d 277, 283 (2008). "A petitioner must show that appellate counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused prejudice, *i.e.*, there is a reasonable probability that, but for appellate counsel's errors, the appeal would have been successful." *Id.* When evaluating a claim of ineffective assistance, a court may proceed directly to the question of prejudice, because without resulting prejudice, the purportedly substandard performance of defense counsel entitles the defendant to no relief. *Strickland*, 466 U.S. at 697.

¶ 119 We find no arguable prejudice for purposes of this claim. In other words, we do not consider it arguable that if counsel on direct appeal had raised the reference to defendant's previous incarceration, there would have been a reasonable probability that defendant's conviction would be reversed. See *Golden*, 229 Ill. 2d at 283. Even apart from hearing that defendant had previously been incarcerated, the jury was aware, by defendant's own admissions and behavior in the police interview, that he was capable of committing crimes: he told the police he had arranged for Ward to buy cannabis from Richardson; also, he told one lie after another to the police—telling them, for example, that he did not know the shooter and that the shooter was a stranger who just happened to appear on the scene and whom Richardson, on the spur of the moment, invited into the vehicle. Given this misconduct that the jury saw and heard on the video, the fleeting reference to defendant's previous incarceration added nothing of significance.

¶ 120

III. CONCLUSION

¶ 121 For the foregoing reasons, we reverse the trial court's judgment and remand this case for further proceedings.

¶ 122 Reversed and remanded.