

2013 IL App (2d) 111249-U  
No. 2-11-1249  
Order filed November 4, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Respondent-Appellee,	)	
	)	
v.	)	No. 04-CF-2014
	)	
WINFORD BRYANT,	)	Honorable
	)	Theodore S. Potkonjak,
Petitioner-Appellant.	)	Judge, Presiding.

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

**ORDER**

¶ 1 *Held:* Following a third-stage evidentiary hearing on defendant's postconviction petition, the trial court's determination that defendant had not received ineffective assistance of trial or appellate counsel was not against the manifest weight of the evidence.

¶ 2 Petitioner, Winford Bryant, appeals the judgment of the circuit court of Lake County, denying his postconviction petition after holding a third-stage evidentiary hearing. Petitioner contends that the trial court erred in holding that petitioner's trial and appellate counsels did not render ineffective assistance even though the evidence in the record and at the hearing demonstrated that the photographic lineup used to identify petitioner as the offender was improperly suggestive and neither

trial nor appellate counsel raised the issue of an impermissibly suggestive photo lineup. We disagree and affirm.

¶ 3

### I. BACKGROUND

¶ 4 We briefly summarize the events leading to petitioner's conviction of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2004)), along with the facts pertinent to the issues raised in the postconviction petition.

¶ 5 On May 30, 2004, Gregory Baptiste, his then-girlfriend, Shirley Hart, and petitioner were all attending a Memorial Day barbecue at the home of petitioner's mother, Marie Taylor. The women attending the barbecue gravitated into Taylor's kitchen; the men attending the barbecue remained in the backyard, attending the grill. At some point in the afternoon, petitioner got into a fight with his girlfriend and slapped her. After slapping her, three men (none of whom were Baptiste) tackled and restrained petitioner. Baptiste stated that everyone needed to "chill" because, with the fighting, they were ruining the relaxed mood of the barbecue. Petitioner left the backyard and, presumably, the area. Baptiste remained with the grill, flipping some of the meat. As he sat down near the grill, Baptiste noticed that the backyard had emptied, and he was the only person there. To his left, he heard petitioner say, "Bitch, I told you to stay out of my business," whereupon, he was shot in the neck with what appeared to be a .22-caliber revolver. Baptiste testified that he stood up in disbelief that petitioner had shot him, and then realized that, if he did not want to bleed to death, he himself should "chill," so he laid down until police and other emergency personnel transported him to the hospital. When the police arrived, he informed the officer that petitioner had been the one to shoot him.

¶ 6 Fortunately, while painful, Baptiste's neck wound was not life-threatening, but was a through-and-through wound that involved only some muscles in the neck and shoulder area of Baptiste's left side. Baptiste was joined at the hospital by Hart, his then-girlfriend. While in the treatment bay, Sergeant Frederick Diez approached and interviewed them both, separately, and showed them both, separately, photographic lineups in the hopes of providing a positive identification of the offender. Diez expressly testified that he asked Hart to leave the treatment bay while he interviewed Baptiste; similarly, Diez specifically testified that he interviewed Hart in the treatment bay after Baptiste had been removed and sent to undergo radiographical imaging to confirm the extent of his injury.

¶ 7 Baptiste testified that he was able to pick out petitioner on the photographic lineup, essentially immediately. Baptiste testified that petitioner's picture was in the No. 1 position, top left of the six-person array. Baptiste was then shown the lineup, and he realized that petitioner's picture occupied the No. 3 position, top right of the six-person array. Baptiste first stated that he thought petitioner's picture had been moved on the trial exhibit, but then he explained he had been mistaken about the position of the picture, and that petitioner's picture occupied the No. 3 position, top right spot.

¶ 8 Hart testified that she was in the kitchen, cooking, when she heard a disturbance in the backyard. Because it was none of her concern, she did not go down to the backyard or otherwise investigate. She did hear one of the children say, "Daddy hit Mommy." She did not hear Baptiste tell people to chill. When everyone had left the kitchen, she looked out of the window and saw that the men were still in the backyard, but she did not see a group restraining petitioner.

¶ 9 Hart testified that, some time later, she looked out of the window into the backyard again, and the only people in the backyard were petitioner and Baptiste. Hart testified that petitioner was standing behind Baptiste and waving a gun around. Hart testified that she started to run down the stairs when she heard a gunshot, followed by a number of people fleeing up the stairs. She made room for them to pass and eventually made it to the backyard, where she saw Baptiste lying down on the ground and bleeding. She did not see petitioner. Hart testified that she gave the police a written statement, and she acknowledged that, in the statement, she had stated that the gun was “placed at Baptiste’s neck.”

¶ 10 Hart went to the hospital. She testified that she was in the treatment bay with Baptiste when Diez arrived. Hart testified that Diez showed her a photographic lineup and that she picked out petitioner’s photo, which was in the No. 6 position. Hart thought that Baptiste remained in the room when she was viewing the photographic lineup. Hart was not asked if she was present when Baptiste viewed his photographic lineup.

¶ 11 Diez testified that, when he arrived at the hospital to interview Baptiste, Hart was with him. Diez testified that he asked her to step outside so that he could speak with Baptiste alone. Diez testified that she did so, and he showed Baptiste the photographic lineup. Baptiste selected petitioner as the person who shot him, and then signed the back of the lineup. Diez then spoke to Hart alone. He showed her another photographic lineup, and she identified petitioner as the offender. Hart, too, signed the back of the lineup card.

¶ 12 The matter progressed to trial and petitioner was convicted of attempted first degree murder and aggravated battery with a firearm. Petitioner’s timely motion for a new trial was denied, and petitioner was sentenced to a 15-year term of imprisonment for attempted murder plus a 20-year add-

on based on his personal discharge of a firearm during the offense, for a total term of imprisonment of 35 years. Petitioner was also sentenced to a concurrent 15-year term for the aggravated battery with a firearm conviction. Petitioner's motion to reduce his sentence was denied and petitioner timely appealed.

¶ 13 On direct appeal, petitioner argued that his speedy-trial rights had been violated, his aggravated battery with a firearm conviction could not stand under one-act, one-crime principles, and his sentencing credit was short by eight days. In *People v. Bryant*, No. 2-07-0155 (Dec. 16, 2009) (unpublished order under Supreme Court Rule 23) (*Bryant I*), we held that there had not been a speedy-trial term violation; we agreed that the aggravated battery with a firearm conviction could not stand under applicable one-act, one-crime principles, and that we would not disturb petitioner's sentencing credit, but we did instruct the Department of Corrections to make sure that the contested eight-day period was counted and counted only once in petitioner's sentencing credit, reasoning that this court's ignorance of the Department of Corrections' procedures could result in our intervention in the issue causing more problems than it fixed, but, if there were still an error in the sentencing-credit calculation, it would be brought to the attention of the trial court or, eventually, this court.

¶ 14 On December 14, 2009, petitioner filed a *pro se* postconviction petition. On February 4, 2010, petitioner filed a *pro se* supplement to his postconviction petition adding specific complaints about his trial counsel's performance. On March 15, 2010, the postconviction petition was advanced to the second stage, and counsel was appointed to represent petitioner in his postconviction proceedings. On September 7, 2010, postconviction counsel adopted the *pro se* postconviction petition and filed a supplemental petition arguing that trial and appellate counsel provided ineffective assistance, petitioner's sentence was improperly enhanced, and petitioner's sentence was excessive.

The State moved to dismiss petitioner's postconviction petition and its supplements, and, on July 28, 2011, the trial court denied the State's motion to dismiss it and scheduled the matter for an evidentiary hearing.

¶ 15 On November 18, 2011, the evidentiary hearing was held. Gillian Gosch, petitioner's trial counsel, testified that, in her opinion, the identification issue of who shot Baptiste, was a key issue at trial. Gosch testified that she argued, in petitioner's motion for a new trial, that the photographic lineup procedure in this case was unduly suggestive because the lineups were given to Baptiste and Hart in each other's presence. Gosch acknowledged that she did not pursue a motion to suppress the identification based on the suggestiveness of the photographic lineups, even though a previous trial counsel had filed a generic motion to suppress identification that did not appear to have been ruled on. The trial court rejected petitioner's arguments, holding that trial counsel was not ineffective for failing to attempt to suppress the identification because both Baptiste and Hart had known petitioner before the shooting. The trial court dismissed the postconviction petition after the conclusion of the evidentiary hearing, and petitioner timely appeals.

¶ 16

## II. ANALYSIS

¶ 17 On appeal, petitioner argues that the photographic lineups shown to Baptiste and Hart were unduly suggestive because the evidence in the record shows that they viewed the lineups while in each other's presence. Petitioner argues that the tainted identification rendered his trial counsel's representation ineffective because she did not pursue a motion to suppress the unduly suggestive identification. Petitioner concludes that the trial court's judgment on his postconviction petition was in error, and that he demonstrated that he received ineffective assistance from both trial and appellate counsel for failing to pursue and raise the meritorious identification issue.

¶ 18 As an initial matter, we briefly review the standards governing the consideration of postconviction petitions. The Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)) provides a mechanism whereby a criminal defendant can vindicate his constitutional rights where they were substantially violated at trial or during sentencing. *People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 58. The adjudication of a postconviction petition in a non-death-penalty case proceeds in three stages. *Id.* In the first stage, the defendant must file a petition presenting the gist of a constitutional claim. *Id.* Once the defendant has filed the petition, the trial court has 90 days in which to conduct an independent review of the petition; if the trial court determines that the petition does not present a gist of a constitutional claim, it will summarily dismiss the petition as frivolous or patently without merit. *Id.* If the petition survives the first stage, it advances to the second stage where counsel is appointed to represent the defendant and the State is allowed to answer the petition or move to dismiss the petition. *Id.* The petition will be dismissed on the State's motion if the petition fails to make a substantial showing of a constitutional violation. *Id.* Finally, if the petition does make the required showing, it will be advanced to the third stage, where the trial court will conduct an evidentiary hearing on its allegations. *Id.* We review the trial court's denial of a postconviction petition following an evidentiary hearing for manifest error. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1034 (2011).

¶ 19 Here, defendant's postconviction petition survived the first two stages, and an evidentiary hearing was held before the trial court denied the petition. Accordingly, we review the trial court's determination deferentially to determine whether it was against the manifest weight of the evidence. *Id.*

¶ 20 Preliminarily, we note that, in this appeal, petitioner contends only that he received ineffective assistance from trial and appellate counsel for not pursuing a motion to suppress the identifications of Baptiste and Hart because, he argues, the procedures used were unduly suggestive because Baptiste and Hart were in each other's presence when Diez showed them the photographic lineup containing petitioner's picture. We thus concern ourselves with two issues: whether trial or appellate counsel provided ineffective assistance of counsel, and whether the trial court's determination that the identification process was not unduly suggestive was against the manifest weight of the evidence. Petitioner argues no other issues on appeal, despite the fact that, in his *pro se* postconviction petition and its supplement, petitioner raised roughly 10 other issues. It is a fundamental rule that issues not raised and argued on appeal are waived or forfeited. *People v. Chaban*, 2013 IL App (1st) 112588, ¶ 50 n.2.

¶ 21 Petitioner contends that both trial and appellate counsel provided ineffective assistance. In order to establish a claim of ineffective assistance, a defendant must show both that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that counsel's deficient performance resulted in prejudice to the defendant. *Gonzalez*, 407 Ill. App. 3d at 1038. The defendant's failure to make a sufficient showing of prejudice or deficient performance will defeat his ineffective assistance claim. *Id.* With these principles in mind, we turn to petitioner's specific contentions.

¶ 22 Petitioner's substantive contention is that the trial court's determination, that the identification process was not unduly suggestive, was against the manifest weight of the evidence. We disagree. It is the defendant's burden to demonstrate that a pretrial confrontation was unduly suggestive. *People v. McTush*, 81 Ill. 2d 513, 520 (1980). Once the defendant has made the

necessary showing, the burden then shifts to the State to show, by clear and convincing evidence, based on the totality of the circumstances, that the witness is identifying the defendant based on his or her memory of the events at the time of the crime. *Id.*

¶ 23 In other words, our chief concern when confronted with a challenge to the propriety of a witness's identification of a defendant is whether the suggestive procedure created a substantial risk of misidentification, without a sufficient, separate basis of reliability for the witness's identification. *Id.* at 521. The factors to consider in determining whether the witness's identification of the defendant is reliable include: (1) the witness's opportunity to view the defendant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the defendant; (4) the level of certainty demonstrated by the witness at the time of the identification; (5) the length of time between the incident and the identification; and (6) the witness's acquaintance with the defendant before the incident. *Id.*

¶ 24 The foregoing principles suggest that our review should proceed in a two-step process. First, we should evaluate whether the defendant has made a sufficient showing that the identification procedure was unduly suggestive. If the defendant has done so, we then evaluate the witness's identification using the factors identified in *McTush*, mindful that, now, the State has the burden of persuasion. We therefore turn to the issue of whether petitioner has made a sufficient demonstration that the lineup procedure was unduly suggestive.

¶ 25 Petitioner argues that the pretrial identification was unduly suggestive because Hart's testimony suggested that she may have been present with Baptiste during the photographic lineup process. Hart testified that she believed that she was present when Baptiste was shown the photo lineup. From this petitioner infers that Hart's presence impermissibly influenced Baptiste's

selection, as evidenced by Baptiste's testimony that he selected the photo in the first position even though petitioner's photo was actually in the third position. If this were the extent of the evidence of record, we might be inclined to agree with petitioner that a sufficient showing had been made that the pretrial identification procedure had been unduly suggestive. However, petitioner overlooks important evidence and draws tenuous inferences in his attempt to demonstrate that the pretrial identification procedure here was unduly suggestive.

¶ 26 First, petitioner completely overlooks the testimony of Diez. Diez expressly testified that he showed one photo lineup to Hart and a different photo lineup to Baptiste. Diez also expressly testified that he asked Hart to leave the room when he was going to show a photo lineup to Baptiste, and he expressly testified that he was alone with Hart when he showed her a photo lineup. Diez testified in detail about the procedure that he employed and the cautions he gave to Hart and Baptiste when he showed each of them a photo lineup. Diez was clear and emphatic that each Hart and Baptiste viewed their lineups alone; similarly, from Diez's testimony, it could be inferred that he showed the lineups one after the other, and that he did not allow Hart and Baptiste to talk with each other after he began the identification process.

¶ 27 Petitioner also completely overlooks the testimony of Baptiste and Officer Geryol that, when Geryol arrived at the scene of the shooting, Baptiste told him that petitioner (by name) had shot him. Thus, there is evidence that Baptiste made a positive identification of petitioner even before Diez began with the photo lineups and identification procedures with Hart and Baptiste.

¶ 28 Second, petitioner minimizes the fact that Hart's testimony was unclear concerning the sequence of events regarding Diez's administration of the photo lineups. It is unclear whether she was shown a lineup before or after Baptiste, and it is unclear whether she was with Baptiste when

she was shown her lineup. Hart testified only that she thought she was with Baptiste when the photo lineup was displayed. This is somewhat of a meaningless issue with respect to Hart, because she testified that petitioner was the son of her best friend, from which it can be reasonably inferred she was familiar with petitioner and had a clearly independent basis for being able to recognize him other than the purported suggestiveness of the identification procedure. However, this also leads into another important flaw in petitioner's argument. Baptiste, too, testified that he had met petitioner at least twice before the shooting. There was also abundant testimony that, at the barbecue, petitioner called attention to himself when he got into the altercation with his girlfriend. Thus, even though he had only met petitioner only a couple of times before the shooting, on the day of the shooting, Baptiste was fully aware of petitioner's presence at the barbecue. This is further evidenced by the fact that Baptiste informed Officer Geryol, the first officer to respond, that it was petitioner, by name, who had shot him.

¶ 29 Petitioner attempts to dispose of Hart's identification by noting that, while she testified that she saw him with a gun pointed at Baptiste's neck, she rushed down the stairs and did not actually witness Baptiste being shot. Instead, Hart testified that she only heard the shot, and then she stepped aside on the stairs as people fled upward from the backyard. Some indeterminate amount of time later, she reached the backyard and observed that Baptiste had been shot, and was being tended by another woman, and no one else was present in the backyard. Petitioner effectively argues that, because she did not see the actual shot fired, Hart's identification is meaningless, because she cannot know who shot Baptiste.

¶ 30 While petitioner is literally correct, it is nevertheless a reasonable inference that the person Hart observed pointing a gun at Baptiste was the same person who fired the shot she heard as she

was rushing down the stairs. Hart's testimony was that she was rushing down the stairs, was momentarily impeded by the upflow of people fleeing the backyard, and then she reached the backyard. The timing of the sequence of events was not given, but the events were described as occurring directly, and it is reasonable to infer that they took only a short amount of time. Nevertheless, we agree that, if Hart's were the only testimony, it probably would be insufficient to show beyond a reasonable doubt that petitioner shot Baptiste.

¶ 31 Based on the strength of Diez's testimony and the fact that Hart's testimony was ambiguous at best about the timing of the administration of the photo lineups, plus the prior associations with petitioner by Baptiste and Hart, we conclude that, if the trial court based its judgment on a determination that petitioner had not sufficiently demonstrated that the pretrial identification procedure was unduly suggestive, its judgment was not against the manifest weight of the evidence. This is particularly true because Diez's testimony was not impeached or particularly contradicted by Hart's testimony (in fact, Hart's testimony, due to its ambiguity in the timing and order of events, can actually be harmonized with Diez's testimony). Thus, there is ample evidence in the record to support the possible finding that petitioner did not show that the identification procedures used here were unduly suggestive.

¶ 32 Nevertheless, our conclusion on this point is somewhat problematic because the trial court did not specify the manner in which it resolved the issue of suggestive identification. It is not entirely clear whether the trial court's decision was based solely on the determination that the identification procedures were not suggestive (*i.e.*, petitioner did not meet his burden of demonstrating suggestiveness), or whether it accepted that petitioner had sufficiently demonstrated the suggestiveness (and, based on the evidence recited by petitioner, under our standard of review,

we would have to conclude that such a determination is also not against the manifest weight of the evidence as petitioner was able to point to ample evidence to support such a conclusion) and proceeded to the next step and determined that the State had sufficiently demonstrated an independent basis for the identification other than the improperly suggestive photo lineups. Accordingly, we will also analyze the record in light of the factors identified in *McTush* and discussed above.

¶ 33 To recap, once the defendant has made the requisite showing of suggestiveness, the State must demonstrate by clear and convincing evidence that there was an independent basis for the witness's identification of the defendant. *McTush*, 81 Ill. 2d at 520. The factors a court uses to determine if that independent basis exists include: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; (5) the length of time between the crime and the confrontation; and (6) any previous acquaintance the witness had with the criminal. *Id.* at 521. With these principles in mind, we proceed to a consideration of each.

¶ 34 Baptiste had a clear and excellent opportunity to view petitioner at the time of the offense. the record shows that the offense occurred at a close distance during the daytime, although it was overcast and began to rain. Baptiste testified that he stood almost simultaneously with the shot; and he clearly indicated that he saw petitioner shoot him. This factor weighs in favor of an independent basis.

¶ 35 Baptiste may have been distracted by the firearm used in the shooting. Additionally, the evidence indicates that Baptiste had been drinking alcohol, and he had a blood-alcohol-content level

of 0.2 when he was tested at the hospital after the shooting, somewhat contradicting Baptiste's testimony that he was not intoxicated (although there was no testimony describing the effect of a traumatic shock, such as a gunshot wound, and the concomitant loss of blood on a person's blood-alcohol-content). After being shot, Baptiste was in pain, and it is unclear whether he was medicated for pain and how much that might have been at the hospital. On the other hand, Baptiste denied being intoxicated, and was clear and positive in his identification of the shooter as petitioner. Indeed, Baptiste informed Geryol that it was petitioner who shot him, well before being taken to the hospital and given the photo lineup. While the alcohol consumption might lessen our confidence in the identification, the evidence does not show that Baptiste was in a black-out or had consumed so much as to cast significant doubt as to the reliability of the identification. Further, his immediate identification of petitioner as the shooter to the first-responding police officer dispels much of the concern over the reliability of his identification. Finally, Baptiste's description of the shooting implied a clear identification of the shooter at the time of the offense, and Baptiste was unable to believe that the shooter had shot him. Based on the totality of the circumstances, this factor is at worst neutral and perhaps slightly favors the independent basis.

¶ 36 Baptiste did not give a description of petitioner, so the third factor is not in play. Baptiste, however, did identify petitioner by name as the shooter to the police when they first arrived at the scene and was consistent in his identification throughout. Thus, although he did not provide a correct description of petitioner, he did provide the offender's name, which is in favor of the independence of the identification.

¶ 37 Baptiste was positive of his identification throughout all the procedures and proceedings of this matter, and especially in his initial identification when he immediately picked out petitioner's

photo as being that of the shooter. That is not necessarily a compelling point where studies have cast doubt upon the significance of a witness's certainty-of-identification. *E.g.*, *Newsome v. McCabe*, 319 F.3d 301, 305 (7th Cir. 2003) (citing cases and studies demonstrating that certainty does not equate with accuracy in an identification). Nevertheless, Baptiste was consistent and certain of the identity of the shooter throughout all of the procedures and proceedings in this matter, immediately identifying the photo in the photo lineup, and giving petitioner's name to the first police officer he encountered. This factor weighs in favor of independence.

¶ 38 On the other hand, petitioner emphasizes Baptiste's testimony that the shooter's position in the photo lineup was in the third position whereas petitioner's photo appeared in the first position. Petitioner contends that this demonstrates that Baptiste did not identify petitioner as the shooter and it completely undermines Baptiste's identification of petitioner as the shooter. We disagree. Baptiste did testify as petitioner notes, but Baptiste also ultimately explained that he must have been mistaken when he testified that the shooter was in the third position and was confronted at trial with the photo lineup showing petitioner in the first position. Nothing on photo lineup appeared to have been changed from the time it was shown to Baptiste. Baptiste acknowledged that he had made a mistake when shown the lineup, and we do not believe that this mistake undermines Baptiste's certainty or the effect to be given this factor. Notwithstanding Baptiste's error, then, we maintain that this factor favors independence, even if only slightly.

¶ 39 The amount of time between the offense and the identification was a matter of minutes or hours. Baptiste identified petitioner by name to the police when they arrived. Baptiste also identified petitioner in the photo lineup while he was being treated at the hospital, a short time after

the shooting. By any measure, there was no significant lapse of time during which Baptiste's memory of the incident could be expected to fade. This factor favors independence.

¶ 40 Last, the evidence showed that Baptiste had met petitioner at least twice before the day of the shooting, and that petitioner drew everyone's attention to himself during the barbecue when he physically confronted his girlfriend and was physically restrained by several of the partygoers. This previous acquaintance strongly favors the existence of an independent basis for the identification. Indeed, this was the primary factor upon which the trial court relied in holding that the identification was not, in fact, unduly suggestive.

¶ 41 Based on the foregoing comparison of the evidence of record to the factors, we conclude that, if the trial court based its determination on the existence of an independent basis for identification, that determination was not against the manifest weight of the evidence. Of particular note are the facts that Baptiste knew petitioner before the shooting and he identified petitioner by name as the shooter to the first police officer he encountered. Under either branch of the analysis, then, we conclude that the trial court's judgment is amply supported by the evidence of record and was not against the manifest weight of the evidence.

¶ 42 Petitioner takes exception with our evaluation of the evidence of record with regard for each of the factors. For example, petitioner posits that the shooting incident itself was a shocking event that occurred very quickly, thus diminishing Baptiste's ability to observe and pay attention to the shooter as the incident unfolded. While it is true that the incident occurred quickly and was a shocking and potentially disorienting event, Baptiste testified that he stood and faced the shooter as the shot was fired. He realized that he had been shot, and he could not believe that "he shot me." The context of the testimony makes it plain that it was petitioner to whom Baptiste was referring

throughout. The context of the testimony also further suggests that Baptiste was surprised that it was specifically petitioner who shot him, rather than he was surprised to be shot. This testimony coupled with the clear viewing conditions refutes petitioner's construction of the events and his analysis of this factor.

¶ 43 Petitioner's arguments regarding the first factor carry into the second factor. Petitioner adds that Baptiste's consumption of alcohol lessened his ability to pay attention to the shocking and stressful events of the shooting. Again, we acknowledge that Baptiste had consumed alcohol and had a blood-alcohol content of 0.2 a short time after the shooting when he was being treated at the hospital. While the blood-alcohol-content is certainly consistent with alcohol consumption, it does not necessarily mean that Baptiste was rendered insensible or otherwise unable to observe and pay attention. Baptiste's own testimony disputes petitioner's conclusion that he was inebriated. Undoubtedly, Baptiste had consumed alcohol and was unfit to drive a motor vehicle. However, by his own testimony, Baptiste retained the ability to observe, attend, and comprehend the events occurring around him. He clearly testified that he was seated in a chair next to the grill, heard the shooter say something, saw the shooter peripherally, stood, was shot and recognized the shooter to be petitioner, and registered disbelief that *petitioner* shot him. Further, Baptiste's actions after being shot suggest that his mind was functioning adequately and calmly despite the shocking and stressful situation. Baptiste testified that he recognized that he was bleeding and determined to immediately lay down and cease activity until he had been assisted, because he was worried about the severity of his wound and bleeding to death. This demonstration of presence-of-mind belies petitioner's construction and analysis of the second factor. Accordingly we reject petitioner's arguments regarding the first two factors.

¶ 44 Petitioner argues that Baptiste exhibited false confidence in his identification. Petitioner points to Baptiste's purported inebriation and the fact that he testified that petitioner's photo appeared in position three of the lineup instead of the correct first position. We agree that there is authority to support the view that a witness's confidence and certainty do not equate to accuracy. We further agree that petitioner testified that he believed that petitioner's photo was in the third position of the photo lineup rather than the first. We remain unconvinced, however, for the reasons stated above. Petitioner's argument on appeal is that Baptiste identified the shooter as the person in the third position, but at trial, when shown the lineup array with his own markings on it, he decided to lie and say that it was actually petitioner who shot him. Further, this argument also supposes that Diez faked the markings and the lineup to place blame on petitioner, rather than to seek the actual shooter. Petitioner's argument overlooks Baptiste's verbal identification of petitioner by name to the first police officer to arrive at the scene, the fact that Baptiste had met petitioner prior to the shooting, and Baptiste's acknowledgment that he must have been wrong about the position petitioner's photo occupied in the lineup array when he was confronted with the array. We find that petitioner's testimony that he misremembered the position to be more convincing than petitioner's construction and analysis of this factor, and we therefore reject petitioner's argument.

¶ 45 Petitioner next misinterprets the length-of-elapsed-time factor, arguing, counterintuitively, that the very brevity of the time between the shooting and the photo lineup identification suggests improper taint, because he made the identification after Hart and in her presence. This argument conflates the fifth factor with the first branch of the analysis, namely, that defendant had to establish that the procedure was suggestive in the first place, before proceeding to consider the various factors identified in *McTush*. Petitioner's argument completely ignores Diez's uncontradicted testimony,

to the extent that it is as if Diez did not testify at all. This, of course, petitioner cannot do. See *People v. Richardson*, 234 Ill. 2d 233, 264 (2009) (a court cannot ignore the State's uncontroverted testimony establishing the voluntariness of a confession even where the defendant has claimed coercion where the claim is not supported by the record); *Watson v. South Shore Nursing & Rehabilitation Center, LLC*, 2012 IL App (1st) 103730, ¶39 (the fact finder cannot ignore the testimony of an unimpeached witness; rather, where the testimony of a witness is not contradicted, is not inherently improbable, and is not impeached, it cannot be disregarded). Petitioner does not otherwise explain Diez's testimony, except to ignore it. Diez's testimony is clear and not inherently improbable. Hart's testimony, because it is unclear and ambiguous, does not necessarily contradict Diez's testimony and, in fact, may be harmonized with it. Accordingly, we reject petitioner's construction and analysis of the evidence on this factor.

¶ 46 Petitioner also argues that Baptiste's acquaintance with petitioner cuts against the reliability of the identification and the existence of an independent basis for that identification. According to petitioner, it was the brief encounters that made it more likely that petitioner recognized him and determined that he was the shooter in spite of being shot by someone else. Petitioner's contention here is not plausible or even particularly well reasoned. The evidence of record showed that petitioner was the son of the best friend of Baptiste's girlfriend, of whom one might normally expect Baptiste to take careful notice as someone important to his girlfriend. The argument and analysis further fail to deal with the fact that Baptiste identified petitioner by name to the first police officer to respond (and this is how petitioner's photo came to be included in the photo lineup). This factor is especially weighty and cuts very strongly in favor of reliability and the existence of an independent basis for the identification. We reject petitioner's contention on this point.

¶ 47 In sum, then, substantively, whether the trial court's judgment was based on a lack of suggestiveness, or an independent basis for the identification, the trial court's determination was not against the manifest weight of the evidence. Because the identification was not improperly suggestive or unreliable, a motion to suppress identification would necessarily been unsuccessful, and it would have been futile for trial counsel to raise it before the trial court and for appellate counsel to argue it on the substantive appeal. Because there could have been no success on the issue, petitioner experienced no prejudice arising from trial or appellate counsels' failure to raise the issue. Because there is no prejudice accruing from trial or appellate counsels' actions, petitioner cannot succeed on his claim of ineffective assistance. *Gonzalez*, 407 Ill. App. 3d at 1038 (to prevail on a claim of ineffective assistance, a defendant must show both that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced by counsel's deficient performance; the defendant's failure to show either prejudice or deficient performance defeats his ineffective-assistance claim).

¶ 48

### III. CONCLUSION

¶ 49 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 50 Affirmed.