2012 IL App (1st) 093581-U

FOURTH DIVISION
March 8, 2012

No. 1-09-3581

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 96CR30301
	)	
JERMAINE DANIELS,	)	The Honorable
	)	John J. Fleming
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justice Fitzgerald Smith and Sterba concurred in the judgment.

ORDER

Held: The trial court properly dismissed defendant's postconviction petition without an evidentiary hearing where he failed to demonstrate that he was not culpably negligent for the untimely filing of the petition as to the majority of his claims and otherwise failed to make a substantial showing of a due process violation resulting from the State's failure to disclose evidence regarding an alleged agreement between the State and its witness. The mittimus was ordered to be corrected to reflect one conviction for home invasion where both counts were based on a single entry.

¶ 1 This appeal arises from the trial court's order dismissing defendant Jermaine Daniels' petition filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West

2002)) without an evidentiary hearing. On appeal, defendant asserts he was not culpably negligent for the untimely filing of the petition and he made a substantial showing of constitutional claims that (1) trial counsel was ineffective for failing to advise him of his right to testify at the hearing on his motion to suppress; (2) appellate counsel was ineffective for failing to assert that the statute requiring him to be sentenced to life in prison is unconstitutional as applied; and (3) the State violated due process by failing to disclose an agreement with its witness. The parties also agree that the mittimus should be corrected to reflect a single conviction for home invasion. For the following reasons, we affirm the trial court's dismissal of defendant's petition and order the mittimus to be corrected.

¶ 2 I. BACKGROUND

¶ 3 Defendant, codefendant Maurice Hardaway and codefendant Derwin Wright were charged with multiple counts arising from a triple shooting which occurred at 626 East 71st Street in Chicago in the early morning hours of October 21, 1996. As a result of the shooting, 34-year-old James Scott died from a gunshot wound to the head. Ronald Goodwin, who was 28 years old, died after sustaining 15 gunshot wounds, 5 of which were from the neck up. Arlene Owens was shot in the head but survived. Following his simultaneous, but separate, jury trial in 1999, defendant was convicted of the first degree murder of Goodwin, the first degree murder of Scott, two counts of home invasion, in which the same two individuals were the victims, and the attempted murder of Owens.

¶ 4 At trial, Assistant State's Attorney (ASA) Frank Vasquez testified that after being assigned to this case, he spoke to defendant. Defendant, then 22 years old, initially expressed his

belief that he needed an attorney but ultimately decided to speak to the police without one. Defendant first told ASA Vasquez that on October 21, 1996, defendant was walking toward Green's apartment when he encountered a woman and asked her where his friends were. She directed him toward Green's second-floor apartment. In Green's bedroom, defendant saw a large heavy set man, another man and a woman. The larger man was apparently demanding money. Defendant heard, but did not see, gunshots being fired. He then fled to the Roberts Motel where he told his girlfriend that "something bad happened" and that some of his "folks" were involved in a shooting.

¶ 5 After speaking to defendant's girlfriend, ASA Vasquez spoke to defendant again. ASA Vasquez told defendant that according to his girlfriend, defendant said that he and "his boys" had gone to 71st Street, something bad happened, there was a shooting and they fled. Defendant then told ASA Vasquez that defendant had not been near Green's bedroom but had stayed at the top of the staircase, where he held on to Green. When ASA Vasquez told defendant it was not possible to see into the bedroom from the top of the stairs, defendant said he was in the kitchen area, the first room by the rear bedroom where the murders occurred. Defendant subsequently provided ASA Vasquez with a different account of events and gave a court reported statement.

¶ 6 According to defendant's statement, at about 12:30 a.m. on October 21, 1996, Brian Willis and codefendants, defendant's fellow Gangster Disciples, approached him and said he had to come with them to obtain funds for the gang. Willis also said that Ron, apparently referring to Ronald Goodwin, owed codefendant Wright money. The four men went to an abandoned apartment where Willis told defendant to guard Green while the others "violated" Goodwin.

Defendant believed that meant only that Goodwin would be punched. When they did not find Goodwin at that location, codefendant Wright exited the apartment and called out to a woman named Doris, apparently referring to Doris McCarty, who was standing on the corner.[1] Codefendant Wright approached McCarty, grabbed her by the neck and told her she had to accompany them to Green's apartment, which was located on the second floor of a building at 71st Street and St. Lawrence Avenue. Codefendant Wright told McCarty that if she did not get Green's door open for them, codefendant Wright would beat her too. McCarty called toward the second floor for Green to open the door. When Green opened the door, codefendant Wright pushed his way into the apartment and ran upstairs, accompanied by defendant, codefendant Hardaway and Green. Willis stayed downstairs to watch for rival gangs and the police.

¶ 7 Upstairs, defendant stood by the kitchen door with Green. Goodwin, another man and a woman were in Green's bedroom, located toward the rear of the floor. Codefendant Wright held Goodwin by the collar and said, "you better give me my motherfucking money that you owe." Goodwin said he would do so when he had the money. Codefendant Wright responded however, that Goodwin had been saying that for "too fuckin' long" and fired gunshots into the wall and the bed. Codefendant Hardaway then took out his gun, said "we got to give everybody head shots," and shot the man and woman who were with Goodwin. Green ran away and as defendant ran down the stairs, he heard more gunshots coming from Green's bedroom. When Willis asked where defendant was going, he responded, "I'm not with this shit." Defendant went to the

[1] Our record contains references to several aliases for Doris McCarty, such as Doris McCarthy, Doris Clark and Debra Jones. We exclusively refer to her as McCarty.

intersection of 69th Street and Calumet Avenue, where he met with his three companions. When defendant asked why they had killed innocent people, codefendant Wright responded, "fuck them. He owed me money."

¶ 8 Jordan Yancy, nicknamed "Green," testified that on October 20, 1996, he and Owens were in his apartment, located at the rear of the floor. Early in the day, they had consumed a small amount of crack. Goodwin, who Yancy knew from the neighborhood, came over that afternoon. At about 10:30 p.m., Goodwin left and returned a couple of hours later with Scott. About an hour later, Yancy heard his friend McCarty calling to him from outside. When Yancy opened the door downstairs, he briefly saw McCarty. Someone then stuck a pistol in Yancy's eye and forced him back inside. The individual continued to hold the pistol in Yancy's eye as he was forced up the stairs and he could see only the pistol. Upstairs, Yancy was walked toward the restroom and instructed to face the wall. He heard someone say to shoot "him" or "them" in the head. As Yancy heard gunshots, the person holding the pistol to his eye walked away and Yancy stepped into the restroom, shutting the door. Yancy heard additional shots as well as people running past the restroom door and leaving. Following a lull in the commotion, Yancy heard another person pass the door and leave. When he and his neighbor Annette Harris had both come out of their rooms, he had her go downstairs to flag down a policeman. In his apartment, he saw that Goodwin and Scott were dead, but Owens was moving.

¶ 9 Harris testified that on the day of the shooting, she and Yancy lived on the same floor. At about 1 a.m., she was awaken by the sound of pounding on the front door. Her own door was closed. She subsequently heard a woman call to Yancy and then heard someone whom she

presumed to be Yancy walk down the hall and go down the stairs. She also heard the footsteps of multiple people come up the stairs, pass her room and go to the rear of the floor. In addition, she heard a man say, "you want to keep fucking with my money." Harris then heard multiple gunshots being fired and a man repeatedly say, "shoot him in the head." After hearing people leave, Harris eventually came out when she heard Owens call her name. When Harris saw that Owens had been injured in the head, Harris flagged down a police officer.

¶ 10 Doris McCarty testified that at about 1:30 a.m. on October 21, 1996, she saw four men standing in the vestibule of a house but could not see their faces because the house was dark. She had turned to walk away when one of the men called her name and inquired whether she wanted drugs. She declined. Although McCarty had generally used cocaine around that period, she had not used drugs that night. McCarty began walking to Yancy's home, but the four men ran after her. Codefendant Wright, whom McCarty had purchased drugs from, said they needed her to do something for them. McCarty had also purchased drugs from defendant and recognized codefendant Hardaway.

¶ 11 Codefendant Wright said he wanted McCarty to get Yancy to open his door. She knocked on the door but no one answered. Codefendant Wright pulled out a gun, grabbed McCarty and said, "bitch, if [you] don't get this door open I'm going to blow your brains out." Codefendant Hardaway told her to cooperate and codefendant Wright would not hurt her. McCarty then walked to the side of the building, yelled Yancy's name and asked him to let her in. When McCarty returned to the front of the building and Yancy opened the door, the four men rushed up the stairs. Yancy also went upstairs. After the door closed, McCarty heard multiple

gunshots being fired upstairs where Yancy lived and she fled. She did not call the police because she was scared. Three days later, detectives brought McCarty to the police station. She subsequently identified codefendant Wright from photographs and a lineup. On October 30, 1996, detectives drove McCarty around the neighborhood in an unmarked van. She saw defendant and pointed him out to the detectives. She later identified codefendant Hardaway from photographs and a lineup. Detective Steven Bradley and Detective Cornelius Longstreet substantially corroborated McCarty's identification testimony.

¶ 12 McCarty testified that she had several theft convictions stemming from her chronic drug use. In addition, she had previously given the police aliases and differing birth dates in her theft cases so they would not be connected. Around this time, McCarty went to prison, stopped using cocaine and received treatment. During McCarty's testimony, ASA Alesia asked McCarty whether the six-year prison term she had been serving was reduced to three years in prison "through [her] attorney." McCarty confirmed this was correct and that she was currently serving her mandatory supervised release term. She further testified that the State's Attorney's Office paid for her to stay in a hotel for a couple of days and to be relocated.

¶ 13 The jury found defendant guilty of the first degree murders of Goodwin and Scott, the attempted first degree murder of Owens and two counts of home invasion, in which Goodwin and Scott were the victims. Defendant was sentenced to life in prison for first degree murder and received concurrent 30-year prison terms for the remaining offenses. On direct appeal, we affirmed the trial court's judgment, rejecting defendant's assertion that the trial court erred in denying his motion to suppress statements made to the police. *People v. Daniels*, No. 1-00-0299

(August 24, 2001) (unpublished order under Supreme Court Rule 23).

¶ 14 Approximately 14 months later, on October 21, 2002, defendant filed a *pro se* petition under the Act arguing, in pertinent part, that his mandatory life sentence was unconstitutional and one of his home invasion convictions must be vacated pursuant to the one-act, one-crime doctrine. In July 2006, appointed counsel filed a supplemental petition, adding that trial counsel was ineffective for failing to advise defendant that if he did not testify at the hearing on his motion to suppress his statements, his version of events would not be presented. The petition further alleged that defendant was denied due process when the State failed to disclose an agreement pursuant to which McCarty received a sentence reduction in exchange for her testimony at defendant's trial, in violation of *Brady v Maryland*, 373 U.S. 83 (1963). The attached records from McCarty's criminal cases show that on August 28, 1998, McCarty appeared before Judge John Moran (case Nos. 97 CR 12570 and 97 CR 13409), the same judge who subsequently presided over defendant's trial. Following a pretrial conference, the court stated that if McCarty pled guilty in these two cases, which apparently involved a violation of probation that had been imposed for retail theft and another retail theft offense, the court would sentence McCarty to two concurrent six-year prison terms. The court was unpersuaded by McCarty's concern that six years was too long because she had seven children. McCarty then pled guilty pursuant to the agreement.

¶ 15 Months later, McCarty filed a motion to reduce her sentences in the same two cases and, on February 5, 1999, she again appeared before Judge Moran. The transcript indicates that ASA Fabio Valentini was present but did not participate. When McCarty's case was called, the

following colloquy ensued:

"MR. STUDENROTH [Defense Counsel]: Your Honor, can you pass that case until the Assistant State's Attorney, Joe Aleshia [*sic*], gets here?

THE COURT: Did he handle the case?

MR. STUDENROTH: He is the State's Attorney for the double homicide.

THE COURT: Pass it."

When the case was recalled, Studenroth stated he was ready to proceed. ASA Alesia, the prosecutor in defendant's case, was not present. The following colloquy ensued:

"THE COURT: [T]he State that is handling the matter isn't here, so I don't know what the agreement between the parties is or not agreement with the parties is [*sic*].

MR. STUDENROTH: I don't know if there's an agreement with the parties. The State is not objecting to the reduction of the sentence. I was going to make my argument and leave it up to your Honor."

After the court passed the case again, ASA Alesia had not appeared and the court reduced McCarty's sentence in case No. 97 CR 13409 to three years in prison. It appears that her sentence in case No. 97 CR 12570 may also have been reduced to three years on a prior date.

¶ 16 Based on the attached records, defendant argued that the following circumstances indicated an undisclosed agreement existed: (1) the judge had previously been unsympathetic to McCarty's request for a shorter sentence; (2) the case was passed for ASA Alesia to be present; (3) a proper challenge to her sentence required her to file a motion to vacate the guilty plea

within 30 days of being sentenced; (4) there was no basis for the sentence reduction; (5) the State did not object to McCarty's motion; and (6) McCarty's attorney could not definitively say whether an agreement existed.

¶ 17 On April 26, 2007, the State moved to dismiss defendant's petition as untimely and argued that his claims lacked merit. Specifically, the State argued that defendant could not demonstrate a deal existed between McCarty and the State or that evidence of a deal would have affected the outcome at trial. The State conceded however, that the mittimus should be corrected to reflect a single home invasion conviction. In response, defendant acknowledged that the Act required him to file his petition by the earliest of two dates: six months from the date for filing a petition for leave to appeal or three years from the date of sentencing. See 725 ILCS 5/122-1(c) (West 2002). He did not dispute that the former deadline applied in his case or that his petition was untimely but argued that he was not culpably negligent for the untimely filing because inmate law clerks in the law libraries at the Stateville Correctional Center and Menard Correctional Center had informed him that he had three years after he was sentenced to file his petition. He also alleged that non-inmate library employees would not give legal advice, that a legal memorandum represented that a three-year deadline applied and that many inmates believed this was the deadline. In addition, defendant argued he was not culpably negligent as to his *Brady* claim because it was first discovered when appointed counsel ordered the transcripts in McCarty's criminal cases.

¶ 18 Defendant subsequently filed an additional submission regarding his lack of culpable negligence, in which he added that he was functionally illiterate. Specifically, he alleged that

achievement tests administered by the prison revealed he was at a fifth grade educational level, as indicated by attached documentation, and argued that prison procedures did not permit him to participate in educational courses. He argued that under United States standards, an individual with fifth grade reading skills is functionally illiterate and thus, it was reasonable for him to rely on other inmates for assistance.

¶ 19 On December 17, 2009, the trial court dismissed defendant's petition, finding that he failed to show he was not culpably negligent for the late filing of his petition. The court also found he failed to make a substantial showing of a constitutional violation based on the State's failure to disclose an alleged agreement between McCarty and the State because he could show neither that an agreement existed nor that such evidence was material.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant first asserts the trial court erroneously determined he failed to demonstrate he was not culpably negligent for the untimely filing of his petition. Specifically, defendant contends that as a functionally illiterate inmate, he reasonably relied on the advice of prison law clerks, who were assigned to assist inmates, that the deadline for filing his petition was three years from the date of his conviction.

¶ 22 Under the version of the Act that was in place when defendant filed his petition, section 122-1(c) provided, in pertinent part, as follows:

> "No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed *** or 3 years from the date of conviction, *whichever is sooner*,

unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." (Emphasis added.) 725 ILCS 5/122-1(c) (West 2002).

The parties agree that the applicable deadline in this instance was six months from the time for filing a petition for leave to appeal. This court's decision on direct appeal was entered on August 24, 2001. In addition, Illinois Supreme Court Rule 315(b) provides, in pertinent part, that a petition for leave to appeal must be filed within 21 days of the appellate court's judgment or within 35 days of the judgment where a timely affidavit of intent has been filed. Ill. S. Ct. R. 315(b) (eff. Oct. 1, 1997); see also *People v. Wallace*, 406 Ill. App. 3d 172, 175-76 (2010) (observing that cases calculating deadlines under section 122-1(c) have applied both the 21-day period and the 35-day period). In any event, defendant's petition was due in March 2002 and the parties correctly agree that his petition, mailed on October 21, 2002, was approximately seven months late. Defendant nonetheless contends that he was not culpably negligent for the untimely filing.

¶ 23 An untimely petition will not be dismissed if the defendant can prove that his delay in filing was not due to his culpable negligence. *People v. Stoecker*, 384 Ill. App. 3d 289, 292 (2008). Culpable negligence has been defined as unintentional yet negligent conduct which involves a disregard of consequences which are likely to result from a person's actions. *People v. Boclair*, 202 Ill. 2d 89, 106 (2002). In addition, culpable negligence is akin to recklessness and requires something more than ordinary negligence. *Boclair*, 202 Ill. 2d at 107. Nonetheless, all citizens are presumed to know the law. *Stoecker*, 384 Ill. App. 3d at 292. It is the defendant's obligation to know the Act's time requirements (*People v. Lander*, 215 Ill. 2d 577, 588-89

(2005)) and it is well settled that a defendant's unfamiliarity with those requirements does not demonstrate a lack of culpable negligence (*People v. Hampton*, 349 Ill. App. 3d 824, 829 (2004)). We review *de novo* the ultimate conclusion as to whether the defendant can demonstrate he was not culpably negligent. *People v. Davis*, 382 Ill. App. 3d 701, 710 (2008).

¶ 24 In *Lander*, our supreme court found that the defendant, who had been imprisoned in two different correctional centers, did not allege sufficient facts to show he reasonably relied on the advice of a prison law clerk, jailhouse lawyers, and a law librarian where the defendant did not allege that such individuals were trained in postconviction matters and were hired to assist inmates with such matters. *Lander*, 215 Ill. 2d at 587-88. The court found that in the absence of facts showing such individuals had specialized knowledge in postconviction matters, defendant's reliance on their advice was not reasonable. *Id.* at 588. The court also found that defendant clearly questioned the advice he was given at the first prison because he again sought advice concerning the deadline for filing his petition after being transferred to the second prison. *Id.* As a result, his actions indicated his reliance on those individuals was unreasonable. *Id.*

¶ 25 Likewise, defendant here has not alleged that the inmate law clerks upon whom he relied were specially trained in postconviction proccedings. In addition, under the reasoning in *Lander*, defendant's decision to consult inmate law clerks following his transfer to Menard indicates that he questioned the advice he was given at Stateville. Thus, defendant has not demonstrated that it was reasonable to rely on these individuals, as required to show a lack of culpable negligence.

¶ 26 Defendant contends that unlike *Lander*, defendant relied on law clerks who were specifically assigned to assist inmates. This assignment alone however, does not grant them any

expertise upon which defendant could reasonably rely. For the same reason, we reject his argument that he was not culpably negligent because a memorandum by an unidentified author stated the deadline for filing was three years from conviction. In addition, defendant argues that unlike *Lander*, his reliance on inmate law clerks was reasonable because he was functionally illiterate. Even assuming defendant is functionally illiterate, it remains his burden to demonstrate that he was not culpably negligent. *Stoecker*, 384 Ill. App. 3d at 292. Defendant has cited no cases excusing a defendant's untimeliness based on his lack of reading skills. In light of the sheer number of inmates who have less than desirable reading skills, we find defendant's argument is insufficient to place him within the exception to the timeliness requirements of the Act or meaningfully distinguish his circumstances from those in *Lander*. See *People v. Turner*, 337 Ill. App. 3d 80, 86 (2004) (observing that it is very difficult to establish a lack of culpable negligence).

¶ 27 Our determination renders it unnecessary to consider defendant's claims that trial counsel was ineffective for failing to advise him of his right to testify at the hearing on his motion to suppress and that appellate counsel was ineffective for failing to assert that the statute requiring a mandatory life sentence was unconstitutional as applied to him. We nonetheless find defendant's claim that due process was violated when the State failed to disclose an agreement between McCarty and the State warrants consideration.[2]

[2] We note that to the extent defendant's reply brief has characterized as perjury McCarty's trial testimony that she received a sentence reduction through her attorney, points not raised in an appellant's brief are waived and cannot be raised in the reply brief. *People v. Snow*, 2012 IL App (4th) 110415 ¶11; Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006).

¶ 28 In the trial court, defendant argued that he was not culpably negligent as to the specific claim that the State failed to disclose an agreement between McCarty and the State because he learned of this claim only when appointed postconviction counsel was able to obtain the transcripts from McCarty's criminal cases. The State does not dispute that it did not inform defendant's trial counsel of such an agreement, but rather, maintains that no agreement existed. Defendant similarly argues on appeal that "[e]ven if this Court finds that Daniels was culpably negligent, this Court should nevertheless address the *Brady* violation *** on the bases of judicial efficiency and fundamental fairness." He reiterates that we should review this claim because it was not and could not have been discovered until counsel was appointed and obtained transcripts from McCarty's cases. Defendant further argues it would be a waste of judicial resources to require him to file a successive petition raising this claim. See 725 ILCS 5/122-1(f) (West 2010). The State has not responded to this argument.

¶ 29 The late discovery of a preexisting claim does not preclude a defendant from filing his petition after the deadline set forth in section 122-1(c) has passed, but rather, the means for discovering the claim is a factor to consider in determining whether the defendant was culpably negligent for the late filing. *People v. Marino*, 397 Ill. App. 3d 1030-31 (2010). Whether a defendant was culpably negligent depends on not only when the defendant discovered the claim, but how promptly he took action following the discovery. *People v. Davis*, 351 Ill. App. 3d 215, 218 (2004). In addition, postconviction counsel may amend a petition to include additional claims. *People v. Rials*, 345 Ill. App. 3d 636, 641 (2003).

¶ 30 Here, defendant alleged that he learned of this claim when appointed postconviction

counsel ordered the transcripts in McCarty's case. Although the record does not indicate what prompted appointed postconviction counsel to obtain McCarty's transcripts, we find nothing in the record that would necessarily prompt an attorney or a *pro se* litigant to do so. In addition, the State does not assert that defendant or his appointed counsel delayed in raising this claim after obtaining McCarty's transcripts. Accordingly, we find defendant was not culpably negligent for the untimeliness of this particular claim, which we now consider.

¶ 31 We review the second-stage dismissal of a postconviction petition *de novo*. *People v. Garcia*, 405 Ill. App. 3d 608, 614 (2010). Thus, we may affirm on any basis appearing in the record. *Stoecker*, 384 Ill. App. 3d at 292. To withstand a motion to dismiss, a defendant must make a substantial showing of a constitutional violation. *People v. Demitro*, 406 Ill. App. 3d 954, 956 (2010). At this stage, we must accept all well-pled allegations in the petition as true, unless positively rebutted by the record. *Garcia*, 405 Ill. App. 3d at 614.

¶ 32 Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the State violates a defendant's right to due process by failing to disclose evidence that is favorable to the defense and material to either guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). A *Brady* claim requires a defendant to demonstrate that (1) the undisclosed evidence is favorable to the defense because it is either exculpatory or impeaching; (2) the evidence was wilfully or inadvertently suppressed by the State; and (3) the accused was prejudiced as a result because the evidence was material to guilt or punishment. *Beaman*, 229 Ill. 2d at 73-74. Thus, this rule encompasses impeachment evidence and applies regardless of whether a discovery request has been made. *Strickler v. Greene*, 527 U.S. 263, 280 (1999). In addition, evidence of an understanding between a witness

and the State regarding future prosecution is relevant to that witness' credibility and constitutes information of which the jury should be informed. *People v. Thurman*, 337 Ill. App. 3d 1029, 1032 (2003); see also *People v. Diaz*, 297 Ill. App. 3d 362, 371-72 (1998) (an agreement need not be so specific that it comports with the requirements for an enforceable contract and an implicit agreement may be found even where a deal has not been voiced). Furthermore, evidence is material where a reasonable probability exists that had the evidence been disclosed, the outcome of the proceeding would have been different. *Smith v. Cain*, No. 10-8145, 2012 WL 43512, at *2 (U.S. Jan. 10, 2010). A reasonable probability does not require it to be more likely than not that the defendant would have received a different verdict with the additional evidence, but rather, the likelihood of a different result must be great enough to undermine confidence in the verdict. *Smith*, No. 10-8145, 2012 WL 43512, at *2. This is not a sufficiency of the evidence test. *People v. Coleman*, 183 Ill. 2d 366, 393 (1998). Nonetheless, impeachment evidence may not be material where the State's remaining evidence is strong enough to preserve confidence in the verdict. *Smith*, No. 10-8145, 2012 WL 43512, at *2.

¶ 33 Here, defendant does not offer proof of a *Brady* violation, but, at best, has presented circumstantial evidence of a possible deal between the State and McCarty that was not disclosed. Were we to assume that the State indeed failed to disclose that McCarty's sentence was reduced after an agreement with the State and that the State suborned perjury, which is a bit of a leap on this record, defendant still must show that this evidence was material in order to demonstrate that his right to due process was violated. This he cannot do. Based on this record, we find it unlikely that the jury would find the entirety of McCarty's testimony to be incredible due to the

State's assistance in procuring a sentence reduction. The jury was aware that McCarty cooperated with police at all times and that the information she provided to the police, well before her sentence was reduced, was consistent with her trial testimony. This strongly suggests that the contents of McCarty's testimony did not depend on the State's leniency. Assuming further still that this evidence would lead the jury to find McCarty's testimony to be incredible, no reasonable likelihood exists that the outcome of defendant's trial would have been different.

¶ 34 The evidence presented at trial was more than sufficient. Although defendant contends McCarty was the only witness to identify him, the State presented the testimony of ASA Vasquez regarding defendant's own inculpatory statement in which defendant acknowledged accompanying codefendants and Willis to "violate" Goodwin. Defendant also acknowledged in his statement that he and his companions forcibly used McCarty and Yancy to gain entry into Yancy's home, where Goodwin was present. In addition, defendant acknowledged that codefendant Wright fired shots into the wall and the bed. Defendant, rather than leaving immediately, remained present when codefendant Hardaway took out his gun and said that everyone in the room had to be shot in the head. *Cf. Diaz*, 297 Ill. App. 3d at 364-67, 373-74 (new trial required where the inculpatory nature of the defendant's statement was equivocal in light of the defense theory and a crucial witness presented perjured testimony that he had no agreement with the State). Defendant fled only after codefendant Hardaway began to act on his statement and shot Goodwin's companions. ASA Vasquez's testimony regarding defendant's statement was not substantially impeached. *Cf. Coleman*, 183 Ill. 2d at 395-96 (*Brady* claim was remanded for an evidentiary hearing where four witnesses testified that the defendant told them

about the killings in great detail but two of the witnesses were under police suspicion, the third witness was a sister of one of those witnesses and the fourth witness was a jailhouse informer whose credibility was severely challenged).

¶ 35 Defendant contends however, that the truthfulness of his confession was suspect because when he expressed his belief that he needed an attorney, he was not offered access to a telephone to contact one. Notwithstanding any alleged impropriety, the jury clearly found that his confession was truthful. Even if the jury were to reject McCarty's corroborating testimony in its entirety, we find it extremely unlikely that the jury would find defendant's inculpatory statement to be completely untruthful, as the statement was also corroborated by Yancy and Harris.

¶ 36 Yancy corroborated defendant's statement that Yancy opened the door to the building after McCarty called to him and that Goodwin had been in Yancy's apartment with another man and a woman. In addition, Yancy's testimony that one of the intruders guarded him somewhat corroborated defendant's testimony that he held onto Yancy. Yancy's testimony that he heard individuals passing the bathroom door at separate times also corroborated defendant's testimony that he and his companions did not leave the scene together. Furthermore, Harris corroborated defendant's statement that Yancy went downstairs after his name had been shouted and that money had been discussed after additional people came upstairs. Moreover, both Yancy and Harris testified, consistent with defendant's statement, that they heard an order to shoot someone in the head. Neither Yancy nor Harris were substantially impeached.

¶ 37 The outcome of defendant's trial resulted from the jury's determination that defendant's inculpatory statement was truthful. In light of Yancy and Harris' corroborating testimony, even

if the jury were to reject McCarty's entire testimony, it is unlikely that the jury would have determined defendant's statement was untruthful. Because the outcome of the trial did not depend on McCarty's testimony, no reasonable probability exists that any undisclosed evidence of a deal between McCarty and the State would have resulted in a different verdict. For the same reason, no reasonable probability exists that the State's references to McCarty's testimony during closing arguments would have affected the verdict. Defendant has failed to demonstrate that the evidence in question is material as required to make a substantial showing that his right to due process was violated. Accordingly, the trial court properly dismissed his petition.

¶ 38 Finally, defendant asserts and the State concedes that we must correct the mittimus to indicate that he was convicted of a single count of home invasion. The parties correctly observe that defendant was found guilty of two counts of home invasion but that both counts were based on a single entry, which can support only one conviction. See *People v. Cole*, 172 Ill. 2d 85, 102 (1996) (holding that a single entry can support only a single conviction for home invasion, regardless of the quantity of occupants); see also *People v. McCurry*, 2011 IL App (1st) 093411 ¶9 (ordering the mittimus to be corrected to reflect convictions comporting with the one-act, one-crime doctrine). This court has the authority to correct the mittimus at any time. *People v. Harper*, 387 Ill. App. 3d 240, 244 (2009); see *People v. Petero*, 384 Ill. App. 3d 594, 600-601 (ordering the mittimus to be corrected on appeal from the dismissal of a postconviction petition). Accordingly, we order the mittimus to be corrected to reflect one conviction for home invasion.

¶ 39 For the foregoing reasons, we affirm the dismissal of defendant's petition and order the mittimus to be corrected.

¶ 40 Affirmed; mittimus corrected.