SECOND DIVISION
June 18, 2013

No. 1-11-2356

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. 98 CR 25753
	)	
MARCUS BARRY,	)	Honorable
	)	Gilbert J. Grossi,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: The second-stage dismissal of defendant's postconviction petition is affirmed where defendant failed to make a substantial showing of a constitutional violation.

¶ 2 Defendant Marcus Barry appeals the trial court's dismissal, on motion of the State, of his petition for postconviction relief. On appeal, defendant contends that his petition should not have been dismissed because it made a substantial showing of three constitutional violations. First, he asserts that his trial counsel was ineffective for failing to consult with him about testifying prior to trial, informing the jury in opening statement that defendant would testify and disclosing his prior felony conviction, and then advising him not to testify. Second, defendant

argues that he was denied his right to due process where the prosecution failed to correct testimony it knew to be false. Third, defendant claims appellate counsel was ineffective for failing to raise the issue of faulty jury instructions regarding eyewitness identification.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the 1998 shooting deaths of Darrico Holloway and Zachary Peavy in Maywood, Illinois. Following a jury trial, defendant was convicted of two counts of first degree murder and sentenced to a mandatory life term in prison. We affirmed defendant's conviction and sentence on direct appeal. *People v. Barry*, No. 1-00-2412 (2002) (unpublished order under Supreme Court Rule 23).

¶ 5 The underlying facts of the case are set forth at length in our order on direct appeal, but will be repeated here to some extent due to the nature of defendant's postconviction claims.

¶ 6 At trial, Mariscio Holt testified that about 8:30 p.m. on January 18, 1998, he and two friends, Malikah James and a woman he knew only as Beverly, drove to a convenience store on the corner of 5th and Lexington in Maywood. The store was run by a man named Roy, whose truck was parked outside. Holt described the lighting in the convenience store's parking lot as "pretty good" and explained that there was a light on top of the store that shined down into the parking lot. While Beverly was inside the store, Holt, who was sitting in the backseat on the driver's side of the car, saw a black car pull within a couple of feet of him. Of the three people in the black car, Holt recognized Semeyone Booker and Melvin Williams, both of whom he had known for a few years and seen over a hundred times.

¶ 7 Williams went into the convenience store. Holt rolled down his car window and was asked by Booker, who was in the front passenger seat, if he had seen a man by the name of June. Holt testified that he informed Booker he knew June had previously shot at Booker and he knew Booker was looking for revenge. Booker said, "he was going to do what he wanted to do."

During this conversation, which lasted about five minutes, Holt was looking at the driver of the car Booker was in. In court, he identified the driver as the defendant. Holt had never seen defendant prior to the night in question. When Williams returned from the store, he spoke to Holt and then left with defendant and Booker.

¶ 8 After Holt and the two women he was with left the area, they proceeded to another convenience store located at Roosevelt and 9th. Once there, the women went into the store and Holt left to see a woman named Johanna, who was a fiend of June's and lived nearby, to find out if she had seen June. While walking to see Johanna, Holt saw Zachary Peavy's white car on the street. The car had its lights off and was not running. Two people were inside the car.

¶ 9 In an alley that enters onto 9th Street across from Peavy's car, Holt saw Booker, Williams, and defendant in the same black car he had seen them in previously. Defendant was still in the driver's seat. When questioned about the lighting in the area, Holt stated that there was a "big light" directly above the mouth of the alley. While Holt was looking at the three men, he saw defendant and Booker place black masks over their faces and Williams place a white mask over his face. After putting on the masks, the lights of the car turned on and the car headed northbound on 9th Street toward Peavy's vehicle. Holt then saw the two people on the passenger side of the car defendant was driving place guns outside the car and begin firing into Peavy's car.

¶ 10 After hearing about 20 gunshots in rapid succession, Holt saw the car defendant was driving leave the scene. When Holt moved closer, he saw Peavy and Holloway, who had been shot and later died as a result of their injuries, lying on the ground. Holt heard sirens approaching and left the area because he was scared. He did not go to the police, but after being contacted by them about a week later, told them what he had witnessed.

¶ 11 Holt subsequently identified Williams and Booker in photo arrays and police lineups as being the shooters on the night in question. Regarding the driver of the car, Holt testified that he

informed police that he did not know the driver's name and had never seen him prior to the night of the shootings. On January 26, 1998, Holt was shown a photo array and identified a man named Reginald Washington as looking like the driver. Holt viewed a police lineup on February 4, 1998, but did not identify anyone as being the driver, even though Reginald Washington was in the lineup. On March 23, 1998, Holt viewed more police photos at which time he recognized the driver. In open court, Holt identified defendant as the same person he identified as the driver in the March 1998 photo array. Holt admitted to being convicted of two felonies subsequent to witnessing the shootings of Peavy and Holloway.

¶ 12 Maywood police detective Luther Samuel testified that after Holt positively identified defendant in the photo array, several addresses for defendant were obtained and placed under surveillance. Investigators arrested defendant on September 6, 1998.

¶ 13 Detective Samuel testified that the next evening, after defendant was advised of his *Miranda* rights and indicated that he understood them, defendant agreed to give a statement written in his own handwriting. In the statement, which was admitted at trial, defendant stated that on the night in question, he was the driver of a car carrying "Slow" and "another guy," who defendant identified in photographs as Williams and Booker, respectively. While near Roosevelt and 9th, defendant's two passengers began firing out of the car. Defendant stated that he heard a lot of shooting, but "did not even know what was going on." Defendant further stated that at the time he picked up his two passengers, he did not know they had guns in their possession. After the shooting, defendant drove down the block and everyone exited the car and went their separate ways.

¶ 14 Russell Baker, an Assistant State's Attorney, testified that about 1 a.m. on September 8, 1998, he met with defendant at the Maywood police station. Baker interviewed defendant after explaining that he was not defendant's attorney and advising defendant of his *Miranda* rights,

which defendant indicated he understood. During the interview, defendant stated that he had borrowed the car he was driving on the night of the shootings from a drug dealer. After picking up Williams and Booker at a carwash, the three proceeded to Maywood because Booker had indicated that he had a "problem with a guy" there. Once in Maywood, defendant, who was driving, stopped at a corner store, and Williams went into the store. Baker stated that the three then went to the area of 9th and Roosevelt, where Williams and Booker left the car for a short time before returning, while defendant remained in the car. Defendant told Booker that Williams was in the front passenger seat and Booker was in the rear passenger seat. As defendant slowly approached some parked cars containing people on 9th, his two passengers put ski masks over their faces. Booker and Williams then pulled out guns and fired about 20 shots into a car in front of where defendant had stopped. After the shootings, defendant accelerated from the area, before "ditching" the car.

¶ 15 After the State rested, defense counsel made a motion for a directed verdict, which was denied. The defense then called Maywood police detective Fortenberry. Fortenberry testified that on January 27, 1998, Holt identified a man known as Reginald Washington in a photo array as being involved in the shootings at issue. On cross-examination, Fortenberry stated that Washington was later placed in a lineup viewed by Holt, and that Holt stated the driver of the car was not one of the participants in the lineup.

¶ 16 Following Fortenberry's testimony, the trial court and the attorneys participated in a jury instruction conference. During the conference, the trial court spoke with defendant regarding his right to testify, and defendant indicated he would not be taking the stand. Details of the exchanges between the court and defendant are set out below, as relevant.

¶ 17 After the defense rested, closing arguments were had and the jury received its instructions. Following deliberations, the jury found defendant guilty of two counts of first

degree murder. The trial court entered judgment on the verdict and subsequently imposed a sentence of life in prison.

¶ 18 This court affirmed defendant's conviction and sentence. On direct appeal, defendant raised several contentions, including an argument that trial counsel was ineffective because the record failed to indicate that counsel had consulted with him, that he had agreed to testify, or that he had defied the advice of his attorney and refused to testify. We concluded that because the issue involved matters outside the record, the argument could not form a basis for finding error on direct appeal. *People v. Barry*, No. 1-00-2412 (2002) (unpublished order under Supreme Court Rule 23).

¶ 19 In 2003, defendant filed a *pro se* postconviction petition. The trial court appointed counsel, who filed a Rule 651© certificate and a supplemental petition. The State filed a motion to dismiss. Following a hearing, the trial court granted the State's motion. Defendant appeals.

¶ 20 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2010)) provides a three-stage process by which defendants may assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). The instant case involves the second stage of the post-conviction process. At this stage, dismissal is warranted when the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 382. A defendant is entitled to proceed to a third-stage evidentiary hearing on his petition only if the allegations in the petition, supported by the trial record and affidavits, make a substantial showing of a violation of constitutional rights. *Coleman*, 183 Ill. 2d at 381; *Franklin*, 167 Ill. 2d at 9. At second-stage proceedings, all factual allegations not positively rebutted by the record are considered to be true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Our review at the second stage is *de novo*. *Coleman*, 183 Ill. 2d at 388, 389.

¶ 21 On appeal, defendant's first contention is that he was denied the effective assistance of counsel where his attorney failed to consult with him about testifying prior to trial, then informed the jury in opening statement that he would testify and disclosed his prior felony conviction, but later advised him not to testify, stating that his testimony concerning the circumstances of his written confession would hurt his case. Defendant argues that counsel's change of mind cannot be attributed to defendant and undermined the reliability of the verdict.

¶ 22 Claims of ineffective assistance of counsel are judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. In order to establish this prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

¶ 23 The State maintains that the record reveals defense counsel's planned trial strategy was to suppress defendant's statement, and when that failed, present defendant's testimony that the statement was coerced in an attempt to negate the impact of the admission. The State argues that the record shows defendant "flipped" on his attorney by deciding not to testify at trial, and that counsel cannot be found incompetent for his client's decision. We agree with the State.

¶ 24 Prior to trial, counsel filed a motion to suppress defendant's statement on the theory that police officers threatened him and "tricked" him into an admission by telling him he was to be a witness rather than a defendant in the case. At the hearing on the motion to suppress, defendant

testified consistent with this theory, stating that the police told him he was going to be a witness, instructed him as to what to write, indicated he would be released and sent home if he followed their directions, and told him what to say to the Assistant State's Attorney. At the conclusion of the hearing, the trial court stated the motion presented a "question of credibility" and denied the motion to suppress.

¶ 25 On a subsequent pretrial date, in apparent anticipation of his client taking the stand, counsel presented a motion *in limine* to preclude the State from impeaching defendant with his prior conviction for possession of a controlled substance. Counsel stated, "We intend to have him testify, and I don't feel that is a crime probative issue here, first degree murder." The trial court denied the motion.

¶ 26 At trial, counsel gave an opening statement reflecting his strategy of having defendant testify regarding how he came to make an incriminating statement to the police. Counsel told the jurors that they would hear from defendant. He stated, "[Defendant] made a statement that he wrote out and you will hear more about why he wrote it out and the circumstances under which he wrote it out and his mental state of mind as well as his emotional state of mind." Counsel further stated:

> "The evidence in this case is going to show that that police officer did not take the usual standard written statement from [defendant].
>
> What happened was the police from Maywood had it already written out what they believe had happened and the State's Attorney sat down, his name is Baker, with [defendant] and said okay, this is what happened. You were there and you had on masks and you were shooting and so forth. Now, sign your name.

> The evidence is going to show that [defendant] refused to sign that statement, that he in fact told Mr. Baker that's not what I'm saying, I did not do this. I was not present when this occurred and I am not going to sign that statement saying anything different."

¶ 27 Also in opening statement, counsel told the jury that defendant had a prior conviction for possession of a controlled substance, and having "been in the company of the police once," he was fearful of the police. We agree with the State that this statement reflects counsel's strategy of "fronting" the evidence of a prior conviction in order to lessen the impact of having the State impeach his client when he took the stand.

¶ 28 After the State rested, the trial court and the attorneys held a jury instruction conference, at which defendant was present. The trial court addressed defendant as follows:

> "THE COURT: *** I want to address -- as long as [defendant] is present in open court, I want to address him anyway.
>
> [Defendant], you understand, sir, you have an absolute right to testify in this case? You also have an absolute right to remain silent. You understand that, don't you, sir.
>
> DEFENDANT: Yes.
>
> THE COURT: Now the decision as to whether you testify or not testify is your decision and yours alone. Obviously you're going to talk with your lawyers, and you know, they may advise you one way or the other. The final decision has to be yours. Do you understand?
>
> DEFENDANT: Yes."

¶ 29 At the conclusion of the conference, the trial court again broached the subject of defendant's right to testify:

"THE COURT: [Defendant], you and I had a little conversation regarding your alternatives regarding testifying or not testifying. Have you made a decision as to whether you're going to testify or not testify?

[DEFENDANT]: Yes.

THE COURT: And what is it?

[DEFENDANT]: No.

THE COURT: You're not going to testify?

[DEFENDANT]: No.

THE COURT: Now I should mention, [defendant], your attorney has already pointed out to the ladies and gentlemen of the jury you would be testifying. I believe that was done in opening statement.

[ASSISTANT STATE'S ATTORNEY]: That's correct. We do have a motion.

THE COURT: And I also assume you understand that he's also advised them of your prior convictions.

[ASSISTANT STATE'S ATTORNEY]: He did mention it, judge.

THE COURT: Do you understand that, [defendant]?

[DEFENDANT]: Yes.

THE COURT: And at this time you're choosing not to testify, is that correct?

[DEFENDANT]: Yes.

THE COURT: And you're making that decision freely and voluntarily, is that correct?

[DEFENDANT]: Yes.

THE COURT: I don't know what I can say, state.

[ASSISTANT STATE'S ATTORNEY]: Judge, all I would do –

THE COURT: The bell has been rung.

[ASSISTANT STATE'S ATTORNEY]: Obviously there is nothing I can do to remedy the situation where counsel has committed himself. We didn't object. We truly believed counsel absolutely was going to put the defendant on.

There was a myriad yesterday of facts that could only go to the jury through the defendant's mouth. All I can do is ask counsel's motion *in limine* be precluded from repeating one word that he uttered in opening statement like the defendant had a job, like the defendant was told he –

THE COURT: We will listen to the testimony the defense presented, and if you think there is a proper objection, you make that objection. I'll make sure I rule."

¶ 30 We agree with the State that the above exchange reflects defendant "flipped" on his attorney and made his own decision not to testify. The trial court did not take defendant's announcement lightly, but rather, confirmed several times that he understood his decision and specifically asked whether he was making his decision freely and voluntarily. Moreover, when defendant told the trial court he would not be testifying, the State objected, noting that defense counsel had made several points in opening statements which could only be proved if defendant took the stand. The record in this case positively rebuts defendant's claim that it was his attorney, and not himself, who made the decision that he would not testify. As such, defendant has not

made a substantial showing of ineffective assistance of counsel. The claim was properly dismissed.

¶ 31 Defendant's second contention on appeal is that he was denied his right to due process where the prosecution failed to correct testimony it knew to be false. Specifically, defendant asserts that "shortly after Mariscio Holt testified eight times that Roy Archie's truck was parked in Kelly's store lot, Holt notified the prosecutors that he was wrong *** that it was a car and not a truck." Defendant argues that no one corrected this "erroneous truck testimony" in a timely manner at his trial.

¶ 32 It is true that the State's knowing use of perjured testimony to obtain a conviction constitutes a violation of due process and that a resulting conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict. *People v. Williams*, 332 Ill. App. 3d 254, 261-62 (2002). These principles also apply when the State permits unsolicited false testimony to go uncorrected when it occurs. *Williams*, 332 Ill. App. 3d at 262.

¶ 33 Here, Mariscio Holt testified at defendant's trial that he, Malikah James, and a woman named Beverly drove to a convenience store run by a man named Roy. Holt stated that he noticed Roy's truck at the store and that they parked a space away from it. Holt then continued to testify about the events of the evening. About three weeks after testifying at defendant's trial, Holt testified at the bench trial of defendant's two codefendants, Semeyone Booker and Melvin Williams. At that time, Holt testified that Roy's truck was actually a car. He acknowledged that he had identified the vehicle as a truck at defendant's trial, stated that he had meant car, and explained that Roy had a car on the date of the shooting but had since acquired a truck.

¶ 34 We cannot agree with defendant that Holt's testimony regarding Roy's vehicle affected his due process rights. Nothing in the record supports defendant's bald assertion that during

defendant's trial, the State knew Roy had a car, not a truck, and failed to correct Holt's misidentification. Moreover, the issue of whether Roy's vehicle was a truck or a car is not important. The import of Holt's testimony was his description of what defendant did during the shooting. Whether Holt saw Roy's truck or Roy's car prior to the shooting is immaterial and there is no reasonable likelihood that it affected the jury's verdict. Defendant's has failed to make a substantial showing of a constitutional violation. Accordingly, dismissal of the claim was proper.

¶ 35 Defendant's final contention is that his appellate counsel was ineffective for failing to raise the issue of faulty jury instructions regarding eyewitness identification. As with claims of ineffective assistance of trial counsel, the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984), applies to claims of ineffective assistance of appellate counsel. *People v. Golden*, 229 Ill. 2d 277, 283 (2008). In order to succeed on such a claim, a postconviction petitioner must show that appellate counsel's performance fell below an objective standard of reasonableness and that this performance caused prejudice. *Golden*, 229 Ill. 2d at 283. Prejudice exists if there is a reasonable probability that, but for appellate counsel's errors, the appeal would have been successful. *Golden*, 229 Ill. 2d at 283.

¶ 36 At trial, the jury was given Illinois Pattern Jury Instruction Criminal No. 3.15 (hereinafter IPI Criminal No. 3.15), which sets forth five factors a jury may consider in assessing the reliability of the State's witnesses. Illinois Pattern Jury Instructions, Criminal, No. 3.15 (3d ed. 1992). Instead of using the word "and" when listing the five factors, the trial court used the disjunctive "or" between each factor. Trial counsel did not object to the instruction and appellate counsel did not raise the issue on direct appeal.

¶ 37 On November 26, 2001, after the briefs were submitted in defendant's direct appeal but before this court decided the case, we held in *People v. Gonzalez*, 326 Ill. App. 3d 629 (2001),

that an identical instruction, with the inclusion of the word "or" between the enumerated factors, was plain error because a jury could have concluded that eyewitness testimony was reliable if only one of the five factors was present. Since the issuance of *Gonzalez*, our supreme court has agreed that giving the instruction using "or" is plain error. *People v. Herron*, 215 Ill. 2d 167, 191 (2005).

¶ 38 Here, appellate counsel could have raised the issue of the erroneous jury instruction in a supplemental brief as an issue of plain error. However, an attorney is not obligated to brief every conceivable issue on appeal, and it is not incompetence of appellate counsel to refrain from raising issues which are without merit. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). A defendant does not suffer prejudice where his appellate counsel fails to raise a nonmeritorious claim on appeal. *Simms*, 192 Ill. 2d at 362.

¶ 39 In the instant case, defendant has not shown prejudice, that is, a reasonable probability that had appellate counsel raised the issue of the erroneous instruction, it would have been successful. See *Golden*, 229 Ill. 2d at 283. Courts that have reversed based on a trial court's erroneous reading of IPI Criminal No. 3.15 have done so when the evidence against the defendant was so closely balanced that the error could have tipped the scales of justice against the defendant. See, *e.g.*, *Herron*, 215 Ill. 2d at 193-94; *Gonzalez*, 326 Ill. App. 3d at 641; *People v. Iniguez*, 361 Ill. App. 3d 807, 814 (2005). In contrast, in cases where the evidence was not closely balanced and the erroneous instruction was not unduly emphasized to the jury, courts have found the error harmless. See, *e.g*, *People v. Battle*, 393 Ill. App. 3d 302, 309 (2009); *People v. Sims*, 358 Ill. App. 3d 627, 638 (2005); *People v. Smith*, 341 Ill. App. 3d 530, 546 (2003).

¶ 40 Here, the evidence was not closely balanced. Holt made a reliable and positive identification of defendant as the driver of the car, and two witnesses testified that defendant

confessed to his role in the murders. On direct appeal, we found that the evidence against defendant was overwhelming. *People v. Barry*, No. 1-00-2412 (2002) (unpublished order under Supreme Court Rule 23), slip op. at 19. In addition, the instruction was not unduly emphasized to the jury. Given these circumstances, the erroneous instruction was ultimately harmless and defendant was not prejudiced by appellate counsel's failure to raise the issue on appeal. The postconviction petition was properly dismissed.

¶ 41 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 42 Affirmed.