2013 IL App (1st) 113450-U

FIFTH DIVISION
June 14, 2013

No. 1-11-3450

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	96 CR 25928
	)	
BRIAN WILLIS,	)	
	)	Honorable
Defendant-Appellant.	)	Kenneth Wadas,
	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

O R D E R

¶ 1 HELD: The trial court properly dismissed defendant's amended postconviction petition at the first stage of postconviction proceedings.

¶ 2 Defendant Brian Willis appeals the first-stage dismissal of his postconviction petition, arguing that the trial court erred in finding the petition to be frivolous and patently without merit because he raised the gist of a meritorious claim of ineffective assistance of trial and appellate counsel. Specifically, defendant argues that his trial counsel was ineffective for (1) failing to file a motion *in limine* to bar defendant's confession, (2) failing to present evidence that one of the

State's eyewitnesses was the actual shooter, (3) failing to object to admissible hearsay testimony, (4) failing to call defendant's girlfriend as an alibi witness, (5) failing to object to numerous improper comments made by the prosecutor during closing arguments, and (6) entering into a stipulation regarding the results of the gunshot residue tests. Defendant further asserts that his appellate counsel was ineffective for failing to raise these claims in his direct appeal.

¶ 3 The instant postconviction petition arises following defendant's third trial on the murder charges in the deaths of Alexander Clair and Jewel Washington that occurred on October 30, 1996. Defendant was convicted following his first trial, a bench trial, but his motion for a new trial was granted. At his second trial, defendant opted for a jury trial and was convicted. On appeal, this court reversed and remanded for a new trial based on violation of the special witness doctrine. *People v. Willis*, 349 Ill. App. 3d 1 (2004). At his third trial, the jury convicted defendant of the first degree murders of Clair and Washington. Defendant was subsequently sentenced to two concurrent terms of natural life. Defendant was represented by Chester Slaughter for his first two trials and then Tom Peters for his appeal from the second trial, his third trial, and the direct appeal from his third trial. He has new counsel for postconviction proceedings.

¶ 4 The State's theory of the case was that on the night of October 30, 1996, defendant argued with Clair near the intersection of 69th and Calumet about a tan automobile that Clair had sold defendant. Clair's girlfriend, Washington, was also present and stood behind Clair. After several minutes of arguing, defendant raised a 12-gauge shotgun and shot Clair twice. After Washington ran across the street, defendant chased and shot her. Both victims died from their injuries.

¶ 5 The State's evidence presented through several witnesses was as follows.

¶ 6 Readonia Bryant testified that on the evening of the shooting, he stepped outside a restaurant near 69th and Calumet and approached Clair who was standing near a tan automobile. Clair entered the automobile and started "fumbling" with it. After a few moments, he exited it and walked away. Later that evening, Bryant saw defendant in an alley. Defendant appeared to be "pissed." He asked Bryant about Clair being in his automobile, and Bryant replied he did not know about it. Bryant heard defendant say he was "going to check on" Clair, which he took to mean that defendant was going to "put [Clair] in his place."

¶ 7 Bryant later saw Clair and defendant arguing about the automobile. Washington was also present and standing behind Clair. Bryant heard defendant say he would "burn," or shoot, Clair. At some point in the argument, Harry Tanner walked past the group. Moments later, defendant raised a 12-gauge shotgun at Clair and fired it twice. Washington ran across the street and defendant followed her. Bryant lost sight of the them, but heard three shots fired.

¶ 8 Bryant did not speak with police until approximately three weeks after the homicides. Bryant stated that did not talk to police because he did not want to be labeled a snitch. Bryant previously pleaded guilty to five counts of possession of a controlled substance and one count of delivery of a controlled substance; the most recent conviction was in June 1999.

¶ 9 On cross-examination, defense counsel asked a series of questions regarding the statement Bryant made to the police and an assistant State's Attorney (ASA). Bryant responded on several occasions that he would "tell [him] the real story," but did not answer counsel's question. The judge admonished the jury to disregard Bryant's "speechifying." After several

more exchanges, the court told Bryant: "If you get smart like that one more time when a lawyer is asking you a question, I'm holding you in direct contempt and locking you up. I told you 15, 20 times, just answer the question." Following another similar exchange, the court found Bryant in contempt and sentenced him to 30 days in jail.

¶ 10 Harry Tanner testified at defendant's prior trials and before a grand jury. He also had provided a statement to police and an ASA and identified defendant from a photograph. At trial, however, he testified that a car accident left him with "a touch of amnesia" and his "memory [was] jacked up." He recalled being in the courtroom previously, but did not remember his prior testimony or statements in the case, the actual events from October 30, 1996, or defendant and defendant's family.

¶ 11 The prosecutor read portions of transcripts from Tanner's previous testimony where he testified he had known defendant for about six months. On the night of the shooting, Tanner exited a club on 69th Street and saw defendant arguing with Clair and Washington standing behind Clair. Tanner walked away, but turned back when he heard shots fired. He saw defendant holding a shotgun, pointing it toward the ground, and aiming it at Clair's head. Defendant followed Washington across the street and Tanner heard four more shots. Tanner had known Readonia Bryant and had seen him about half an hour before the shooting.

¶ 12 Tanner stated that he did not remember any of his previous testimony, but admitted to having five prior felony convictions. He also denied that he previously testified in exchange for assistance from the police on his pending charges because the prosecutor was "always throwing [him] in jail."

¶ 13 Joan Curry, who lived near 69th and Calumet the night of the shooting, corroborated Bryant's testimony and Tanner's previous testimony with regard to the time and the firing of the shots. She testified that she heard loud noises from behind her house. She then heard running near her house and someone say in a high-pitched voice, "Please don't. Please don't." She could not determine if the voice was male or female. She then heard additional shots closer to her home. Curry told her son not to open the door, go outside, or look out the window. She testified that he "didn't obey" her and he looked out the window. He told her that there was a body lying on the ground. Curry stated that she never went outside until the police came to her house.

¶ 14 Darlene Clair, Alexander Clair's mother, testified that sometime around August 1996, Clair sold a tan automobile to defendant, whom she had known from the neighborhood. She stated that her son had problems about money with the buyer of the car.

¶ 15 Two former ASAs testified to corroborate Tanner's prior testimony and statements. ASA Joe Alesia had interviewed Tanner and presented him as a witness at defendant's previous trial and ASA Brian Clauss had presented Tanner's testimony to the grand jury. Both recalled Tanner's previous testimony as consistent with the transcripts read by the prosecutor. ASA Alesia recalled that prior to defendant's first trial, Tanner was "a little leery of testifying" because he was afraid of defendant. Although the State's Attorney's office offered Tanner relocation and security measures, he was not relocated.

¶ 16 The police recovered one shotgun shell on 69th Street and four additional shells near Curry's house. Paul Bernatek testified that he was a retired Chicago police detective that had investigated the case. He took Tanner's statement the night of the shooting and corroborated the

details of the statement as read by the prosecutor. In addition, Tanner had identified defendant from a photograph that the police had removed from defendant's home.

¶ 17 Additionally, John Butler, a retired Chicago police detective, testified that he recovered evidence from the scene. He also stated that he administered gunshot residue (GSR) tests to Harry Tanner, Thomas Clair and Jimmy West. Butler described the process of the tests, including the use of vials, swabbing the hands and fingers of an individual, and the use of a control. The tests were administered approximately three hours after the shooting. The parties stipulated that the GSR kits were tested and found that to a reasonable degree of scientific certainty, Tanner's and Clair's hands contained the elements found after a gun is discharged, but not at the necessary elevated levels to identify GSR. West's hands did not contain the elements.

¶ 18 Sergeant Vincent James testified that defendant's previous defense attorney, Chester Slaughter, contacted him to arrange for defendant to surrender to police. Although Sergeant James was not involved in the investigation, he was contacted because he knew Slaughter's law partner. Prior to entering an interview room, Slaughter handed James a piece of paper stating that defendant had been in fear for his life and he shot the victims to protect himself. Sergeant James gave the paper back to Slaughter and told him that his client could make any statement that he wished. After an officer read defendant his *Miranda* rights, defendant stated that Clair had threatened him with a gun, so he shot both of the victims to protect himself. Slaughter then terminated the statement.

¶ 19 Attorney Chester Slaughter testified for defendant. He had coordinated with Sergeant James to turn defendant in, but stated that he did not give Sergeant James a note stating that

defendant was claiming self-defense. At the station, none of the officers spoke directly to defendant. Slaughter provided the officers with biographical information for defendant.

¶ 20 On cross-examination, Slaughter stated he had not given Sergeant James a note or card, but may have given him a business card. Although he had a business card with defendant's biographical information written on the back of it, that card was not given to Sergeant James.

¶ 21 Defendant testified he had been sleeping at home the day of the shooting and later went to the home of his girlfriend, Shavonn Ingram. He drove a blue automobile that his mother and grandmother had purchased for him. He stated that he did not know Jewel Washington or Alexander Clair.

¶ 22 On cross-examination, defendant stated that he never "hung out" near 69th and Calumet. Prior to the court proceedings, he did not know Tanner, but knew Bryant. Defendant did not recall what he was doing at 10 o'clock that night. He never gave a statement to police and did not remember whether Slaughter was carrying a piece of paper with him at the police station.

¶ 23 Debra Willis, defendant's mother, testified she did not know if defendant was in the house the day of the shooting, but he was not home when police officers arrived looking for him. The officers removed a photograph of defendant from her home. She looked for defendant and found him at Ingram's house, where she told him to stay until she could arrange for an attorney. Debra was present when defendant met with Sergeant James and did not hear defendant or Slaughter tell police that he acted in self-defense. She corroborated defendant's testimony that she and her mother bought him a blue automobile.

¶ 24 On cross-examination, Debra stated that she heard defendant give police biographical

information and saw Slaughter hand a card the size of a business card to one of the police officers, who read it and retained it. She did not know where defendant was at the time of the shooting.

¶ 25 Maria Willis, defendant's grandmother, corroborated Debra's testimony as to the events the night of the shooting. Maria testified that defendant was at home at some point the evening of October 30, 1996, but she could not recall at what time he left. She was also present when defendant met with the police and never heard him say that he acted in self-defense.

¶ 26 The jury found defendant guilty of the first degree murders of Clair and Washington. The trial court denied defendant's motion for a new trial and sentenced him to two concurrent terms of natural life imprisonment.

¶ 27 On direct appeal, defendant asserted that the State had failed to prove him guilty of the first-degree murders of Clair and Washington beyond a reasonable doubt. This court affirmed defendant's conviction. *People v. Willis*, No. 1-07-0056 (March 19, 2010) (unpublished order under Supreme Court Rule 23). While the direct appeal was pending, defendant filed a *pro se* section 2-1401 petition under the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)), asserting that the statutory 30-day period to obtain the indictment violated his constitutional rights and the indictment was void because it cited the improper statute and was not obtained within 48 hours of his arrest. The trial court granted the State's motion to dismiss. On appeal, the State Appellate Defender filed a motion for leave to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), which this court granted and affirmed the trial court. See *People v. Willis*, No. 1-08-3542 (November 13, 2009) (unpublished order under

Supreme Court Rule 23).

¶ 28 In June 2011, defendant, represented by a new attorney, filed his initial postconviction petition. The petition asserted that his attorney for his third trial and its appeal was ineffective for: (1) failing to file a motion *in limine* to bar defendant's alleged oral confession; (2) failing to present exculpatory evidence pointing to Tanner as the actual shooter; (3) failing to object to the inadmissible hearsay testimony of ASA Alesia; (4) failing to submit a jury instruction on eyewitness testimony; (5) failing to call defendant's girlfriend Shavonn Ingram as an alibi witness; (6) failing to object to numerous improper comment during the State's closing arguments; and (7) failing to raise any of these errors on appeal. Defendant also raised a claim of actual innocence and requested certain scientific discovery to help prove this claim.

¶ 29 In July 2011, defendant filed an amended postconviction petition. He raised the same claims as in the initial petition with the addition of a new claim of ineffective assistance of counsel that his attorney should not have entered into a stipulation regarding the results of the GSR testing, misstated those results and then allowed the State to misstate the results in closing arguments.

¶ 30 In October 2011, the trial court dismissed defendant's amended postconviction petition in a written order as frivolous and patently without merit at the first stage of review.

¶ 31 This appeal followed.

¶ 32 On appeal, defendant argues that the trial court erred in dismissing his postconviction petition because he stated the gist of a claim of ineffective assistance of trial and appellate counsel. Defendant has not raised his claim of actual innocence on appeal.

¶ 33 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2008)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues which could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005); *Barrow*, 195 Ill. 2d at 519. The standard of review for dismissal of a postconviction petition is *de novo*. *Coleman*, 183 Ill. 2d at 389.

¶ 34 At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2002). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks an arguable basis in law or fact if it is "based on an indisputably meritless legal theory," such as one that is "completely contradicted by the record," or "a fanciful factual

allegation," including "those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17.

¶ 35 If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2002). At the dismissal stage of a postconviction proceeding, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *Coleman*, 183 Ill. 2d at 380. At this stage, the circuit court is not permitted to engage in any fact-finding or credibility determinations, as all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true. *Coleman*, 183 Ill. 2d at 385.

¶ 36 Defendant contends that the trial court erred in dismissing his postconviction petition because he presented arguable claims of ineffective assistance of trial and appellate counsel.

¶ 37 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶ 38 A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced defendant. *Rogers*, 197 Ill. 2d at 223. Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). Thus, the inquiry as to prejudice requires that the reviewing court examine the merits of the underlying issue, for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal. *Simms*, 192 Ill. 2d at 362. Appellate counsel's choices concerning which issues to pursue are entitled to substantial deference. *Rogers*, 197 Ill. 2d at 223.

¶ 39 At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be dismissed if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result. *Hodges*, 234 Ill. 2d at 17.

¶ 40 Defendant first contends that his previous attorney should have filed a motion *in limine* to

bar defendant's alleged confession that he acted in self-defense. Specifically, defendant asserts that his attorney should have moved to suppress Sergeant James' testimony that Slaughter gave him a note stating that defendant acted in self-defense and defendant gave an oral statement after receiving his *Miranda* rights also stating he acted in self-defense. Defendant argues that this testimony should have been suppressed because it was irrelevant, unreliable and prejudicial.

¶ 41 In order to prove ineffective assistance of counsel, defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *People v. Giles*, 209 Ill. App. 3d 265, 269 (1991). A decision that involves a matter of trial strategy will typically not support a claim of ineffective representation. *People v. Simmons*, 342 Ill. App. 3d 185, 191 (2003). The question of whether to file a motion to suppress evidence is traditionally considered a matter of trial strategy. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000). In order to establish prejudice resulting from the failure to file a motion to suppress, a defendant must show that the motion would have been granted and that the trial outcome would have been different if the evidence had been suppressed. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). The failure to file a motion to suppress does not establish incompetent representation when the motion would have been futile. *Patterson*, 217 Ill. 2d at 438.

¶ 42 Here, the record demonstrates that such a motion would have been futile. Prior to defendant's second trial, Slaughter, his attorney at the time, filed a motion *in limine* asking to prohibit the State from introducing evidence that defendant acted in self-defense. While no order indicating a denial is in the record, the copy of the motion in the common law record bears a

notation, "Denied." The same trial judge presided over defendant's second and third trials. Since the same trial judge had previously denied this motion *in limine*, defendant's attorney at his third trial was not ineffective for failing to raise the same motion again. Defendant has failed to show any prejudice because he cannot make an arguable claim that the motion would have been granted. Accordingly, this claim of ineffective assistance was properly denied.

¶ 43 Next, defendant asserts that his attorney was ineffective for failing to present evidence showing that Tanner was the actual shooter. Specifically, defendant contends that his attorney "missed key opportunities to severely impeach" Tanner and point to him as the actual shooter, including cross-examination regarding his prior testimony that he ran from the police and was handcuffed and that the police initially accused Tanner of the murder and told him he fit the description of the offender. Defense counsel also failed to question Tanner's credibility by confronting him with prior testimony that he had consumed liquor and smoked marijuana prior to the shooting. Finally, defense counsel did not rebut the State's contention that Tanner was afraid of defendant because in his prior testimony, Tanner denied being afraid.

¶ 44 Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court. Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable. *Pecoraro*, 175 Ill. 2d at 326-27.

¶ 45 However, defense counsel did cross-examine Tanner thoroughly and questioned whether he was lying when he said he had amnesia and did not remember the events of October 30, 1996. The following colloquies occurred during defense counsel's cross-examination of Tanner.

"Q. For the last hour and fifteen minutes you've been lying to us, haven't you?

A. No.

Q. You haven't said one word of truth this afternoon, have you?

A. Yeah.

***

Q. You want everybody to believe that you can't remember running away on October 30th from the scene of this double homicide? You running away?

A. (No audible response.)

Q. That wasn't you running away?

A. No, I don't remember that.

Q. You don't remember the police stopping you two blocks from the scene of a double homicide, where you were running to get away from the police?

A. No.

Q. You don't remember them putting you in a police car, in

the back seat, handcuffed, and taken to a police station?

A. (No audible response.)

Q. You don't remember that?

A. No.

Q. You don't remember them going down to the police station and testing your hands for gunshot?

A. I had my hands tested before, yeah.

Q. That night you had them tested?

A. I don't remember when.

***

Q. How about the police, do you remember accusing the police of trying to frame you unless you cooperated with them?

A. I don't remember that.

Q. You don't?

A. No."

¶ 46 Defense counsel continued to question Tanner about his prior accusations that police officers and ASAs "saying they're going to put this case on you." Counsel presented Tanner with his prior written statements. Tanner identified his signature, but testified that to his "knowledge" a statement that the prosecutor offered to help Tanner with his pending cases if he came to court was not true because "[h]e's always throwing me in jail." Counsel also asked Tanner if the statement that the police told him that he would be implicated in the double homicide if he did

not testify was true, but Tanner said he did not remember, even though his signature was on the statement.

¶ 47 Contrary to defendant's argument, his attorney did question Tanner about his prior testimony in which he ran from the scene of the homicides and was handcuffed by police as well as defendant's statements that the police told him he would be implicated in the homicide if he did not cooperate with their investigation. While defendant contends that his attorney did not focus on these subjects enough, his attorney's cross-examination of Tanner questioned his credibility and created the inference that Tanner might have been the shooter. It was his attorney's trial strategy to decide how extensively to cross-examine Tanner. Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent. *People v. Young*, 341 Ill. App. 3d 379, 383 (2003). Because defense counsel did present evidence to support the theory that Tanner was the shooter and did impeach Tanner with his prior testimony, his trial strategy was not arguably unreasonable and does not support a claim of ineffective assistance of trial counsel.

¶ 48 Defendant next argues that his trial counsel was ineffective for failing to object to the admission of hearsay testimony by ASA Alesia. Specifically, defendant asserts that ASA Alesia was allowed to testify about what Tanner told him prior to the first trial, including that Tanner said he was afraid of defendant. According to defendant, this statement was an out-of-court statement offered for the truth of the matter asserted, *i.e.*, that Tanner was afraid of defendant.

¶ 49 The hearsay rule generally prohibits the introduction of an out-of-court statement used to prove the truth of the matter asserted. *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007).

However, "[d]efense counsel's failure to object to testimony may be a matter of sound trial strategy, and does not necessarily establish deficient performance." *People v. Evans*, 209 Ill. 2d 194, 221 (2004).

¶ 50 The State maintains that trial counsel's decision not to object to the hearsay statement was part of his trial strategy because counsel cross-examined ASA Alesia regarding other specifics of that pretrial conversation that were beneficial to the defense. During cross-examination, defense counsel asked ASA Alesia if Tanner had mentioned Bryant's presence at the scene of the homicides, which Tanner had not. Counsel elicited testimony that Tanner did not state that he told defendant in front of Bryant that Clair had "been messing with his car." Tanner also did not mention that he and Bryant both walked eastbound on 69th after the shooting. Instead, Tanner told ASA Alesia that Bryant was only present 30 to 45 minutes prior to the shooting.

¶ 51 Defense counsel also questioned ASA Alesia about complaints made by Tanner that accused ASA Alesia of wrongdoing. Tanner asserted that ASA Alesia "fixed" Tanner's pending warrants by having them removed and not to tell anyone what he did. ASA Alesia testified that Tanner falsely accused him of a crime.

¶ 52 The cross-examination of ASA Alesia helped defendant's case by discrediting Tanner by showing his inconsistent statements about the homicides and also questioned Bryant's credibility and his presence at the scene of the homicides. Further, defense counsel referred to ASA Alesia's testimony during closing arguments to argue that Tanner was a known liar and he falsely accused defendant. If defense counsel had raised an objection to the alleged hearsay statements from the out-of-court conversation, he would not have been able to present evidence that challenged the

credibility of the two eyewitnesses to the homicides. It was a reasonable trial strategy not to object to the testimony that Tanner was afraid of defendant because testimony from the same conversation was beneficial to defendant's theory of the case. Since the decision to make the objection was a reasonable trial strategy, defendant cannot support this claim of ineffective assistance.

¶ 53 Next, defendant argues that his attorney Peters was ineffective for failing to call his girlfriend Shavonn Ingram as an alibi witness. In support of his claim, defendant refers to an affidavit from Ingram attached to his motion for a new trial, filed by Peters after the third trial, which details her proposed testimony. The motion for a new trial asserted that prior attorney Slaughter was ineffective for failing to conduct an adequate investigation and as a result, Peters was not able to present a complete alibi defense at the third trial. At the hearing on the motion for a new trial, Peters stated that if he had called Ingram at trial, then the State would have been able to prove that Ingram had not spoken to prior counsel Slaughter and was not on the original answer, implying that "the alibi was made up at the last minute."

¶ 54 In the affidavit, Ingram stated that she "recalled" that defendant came to see her during the evening of October 30, 1996, and he stayed at her house for several days. He stayed there with his mother's permission until an attorney came to the house and defendant left with the attorney. Ingram also said that she spoke with defendant's attorney before the third trial, but had not talked to an attorney about defendant prior to that conversation. She would have been willing to testify at defendant's previous trials, but she had never been contacted.

¶ 55 Ingram also testified at the hearing on defendant's motion for a new trial. She

remembered that defendant came over the day before Halloween and stayed for about a week. She did not recall what time he arrived, but said it was still light outside. Ingram testified that she was first contacted by Peters a few months earlier and had never been contacted by any other attorney. On cross-examination, Ingram testified that she was not contacted by defendant or his family about testifying and said she never discussed the case with them. She stated that she did not know why the police were looking for defendant on the night of October 30, 1996.

¶ 56 However, prior to trial, defense counsel Peters discussed with the prosecutor and the trial judge the discovery of Ingram as a possible alibi witness. The prosecutor stated that he was informed about Ingram that day and asked for time to talk to her before she testified. The judge asked if Ingram appeared in the police reports and the prosecutor answered that she did not, nor was she mentioned in the transcripts of defendant's prior trials. Defense counsel responded that defendant's previous attorney Slaughter had filed an answer indicating a possible alibi defense with a location and defendant's grandmother Maria as a witness. When he took the case, he asked to adopt the prior answer and did not know about Ingram until recently. In describing Ingram's potential testimony, defense counsel Peters stated

> "to clarify further, she's not an alibi in the sense of saying I know that Brian was at my house at this time. All she can say is he was at my house when Mr. Slaughter came to pick him — pick up Brian Willis, and there is testimony about that in the record, and that he had been at my house for several days though she does not know how many days. So she's not like saying, oh, for sure I was

looking at the clock and there was Brian, he couldn't have done it.

It's not that kind of alibi."

¶ 57 Additionally, in the hearing on the motion for a new trial, defense counsel Peters stated that he felt "it was a strategic decision not to call Miss Ingram. And the reason, and I pretty sure this is in the written document saying I felt I had to make that decision because her name was not on the first answer to discovery. It was not on any answer for the first or the second trial." Defense counsel was concerned that the State would cross-examine Ingram about her testimony being recently discovered, even though she stated that defendant was at her house that night and for several days thereafter. Defense counsel did not want the State to argue that Ingram's testimony was a recent fabrication based on the absence of her name in any court filings or prior proceedings and that defendant's alibi at the prior trials was that he was at home with his grandmother. Defendant's mother and grandmother also testified at the hearing and both stated that they informed Slaughter about Ingram as an alibi witness. However, Slaughter contradicted their testimony and testified at the hearing that neither defendant nor his family mentioned Ingram as a possible alibi witness. He said defendant and his family informed him that defendant was at home at the time of the homicides.

¶ 58 In denying the motion for a new trial, the trial court noted that "there [was] no way that I could grant a motion for new trial based on a lawyer making a tactical decision not to call Shavonn Ingram, the true alibi, because she would now be impeached by not coming forward earlier when she really did come forward earlier or her information was supplied to a lawyer earlier."

¶ 59 The record establishes that defense counsel opted not to call Ingram as a strategic decision because the cross-examination by the State could have damaged defendant's case by implying that Ingram's alibi testimony was a last minute fabrication. Defense counsel presented testimony from defendant's mother and grandmother that he spent part of the day at home, which was consistent with the defense presented at defendant's prior two trials. Ingram's testimony would have been impeached by testimony from the prior trials. Given the possibility of impeachment and implication of the fabricated alibi defense, it was a reasonable trial strategy not to call Ingram to testify at trial. Defense counsel recognized these problems and explained the reasoning behind his strategic decision. Accordingly, defendant cannot show that his attorney's performance was arguably deficient.

¶ 60 Defendant also contends that his attorney Peters was ineffective for failing to object and preserve objections to several improper comments made by the State during closing arguments. Specifically, defendant asserts that the prosecutor (1) made improper accusations that Tanner feared defendant; (2) made prejudicial comments about the neighborhood where the homicides occurred; (3) made impermissible comments about defendant's alleged flight and retention of an attorney; (4) improperly vouched for Tanner's credibility; and (5) impermissible comments regarding prior consistent statements by its witnesses.

¶ 61 "Defendant faces a substantial burden in attempting to achieve reversal of his conviction based upon improper remarks made during closing argument." *People v. Moore*, 358 Ill. App. 3d 683, 693 (2005). Generally, prosecutors are given wide latitude in closing arguments, although their comments must be based on the facts in evidence or upon reasonable inferences drawn

therefrom, even if such inferences reflect negatively on the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Further, "[a] closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context." *Nicholas*, 218 Ill. 2d at 122. The State may challenge a defendant's credibility and the credibility of his theory of defense in closing argument when there is evidence to support such a challenge. *People v. Kirchner*, 194 Ill. 2d 502, 549 (2000).

¶ 62 While a prosecutor's remarks may sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different. *People v. Byron*, 164 Ill. 2d 279, 295 (1995). Thus, "comments constitute reversible error only when they engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments." *People v. Nieves*, 193 Ill. 2d 513, 533 (2000).

¶ 63 Defendant first asserts that the prosecutor improperly argued that Tanner changed his testimony from prior trials because he feared defendant. After referring to Tanner's testimony that he had amnesia, the prosecutor stated, "Why did he do it then years later? You know why. He's been hanging out with the family and talking [to] his [defendant's] family." Defense counsel objected to this statement, but the trial court overruled the objection. Defendant complains that his attorney should have preserved this objection by raising it on direct appeal. Following the objection, the prosecutor continued, stating that Tanner "walks back to the same neighborhood this defendant's friends live in. Surely you can see why here he has a touch of amnesia, but this

is important." Defense counsel did not object to this statement. Later, the prosecutor commented that Tanner "still [has] to live out there. You know what, sometimes survival is a greater instinct than coming in here and trying to do the right thing. First you got to live." The prosecutor also stated that Tanner has to live in the area and he has "to think of his own safety" and the law allows them to consider his prior testimony "as the truth. Not the amnesia nonsense." Defendant contends that these comments lacked any evidence in support and defendant suffered severe prejudice.

¶ 64 " 'To be proper, closing argument comments on evidence must either be proved by direct evidence or be a fair and reasonable inference from the facts and circumstances proven.' " *People v. Cox*, 377 Ill. App. 3d 690, 707 (2007) (quoting *People v. Hood*, 229 Ill. App. 3d 202, 218 (1992)). However, it is improper for "the State to suggest that a witness was afraid to testify because the defendant threatened or intimidated him when that argument is not based on evidence produced at trial." *Cox*, 377 Ill. App. 3d at 707.

¶ 65 The State responds that the prosecutor's argument was proper as an explanation for Tanner's change in testimony from the first trial to the third trial based on Tanner's stated fear of defendant, his interaction with defendant's family and his continued residence in the same neighborhood as defendant's family. As the State points out, ASA Alesia testified that Tanner indicated that he was afraid of defendant and afraid to testify prior to the first trial. ASA Alesia also stated that his office offered relocation services to Tanner, but Tanner did not relocate. From this testimony, the evidence supported an inference that Tanner changed his testimony out of fear. We point out that defense counsel did initially object to this line of questioning and the

trial court overruled the objection.

¶ 66 However, even if trial counsel erred in failing to object and fully preserve this issue, defendant cannot establish prejudice. Defendant argues that it was "blatantly obvious that the Defendant suffered severe prejudice as a result of these comments." But defendant makes no further argument under the prejudice prong of *Strickland* that there was a reasonable probability that the result of the trial would have been different. The jury was able to view the evidence presented, including Tanner's testimony in which he did not express any fear, but that he had amnesia and did not remember the events, in reaching the verdict. We cannot say that these comments influenced the jury's verdict such that it is arguable that the result would have been different if defense counsel had objected to each comment. Since defendant has not shown the requisite prejudice, his claim for ineffective assistance was properly denied.

¶ 67 Defendant also contends that the prosecutor impermissibly pursued a prejudicial theme in closing arguments about the way of life at 69th and Calumet and his attorney should have objected to these comments. According to defendant, these comments were inflammatory and designed to inflame the jury's passion. Defendant specifically highlights this excerpt from the rebuttal closing argument.

> "You know, counsel asked you, well, the thing about this is it doesn't make any sense why would you shoot someone over a car? Well, guess what, welcome to Chicago. Welcome to 69th and Calumet, where unfortunately, in some of the neighborhoods we live, or maybe don't live, you know, life is cheap sometimes.

> That's just the way it goes. People get killed for all kinds of reasons. Who's got the last chicken leg or something. People get killed for all kinds of stupid reasons. I guess that's the beauty of humanity especially down at 69th and Calumet."

¶ 68 The prosecutor continued to make references to the neighborhood around 69th and Calumet during the argument, including references about the failure to go to the police because at 69th and Calumet, "it's a matter of survival" and "Life at 69th and Calumet, it's not like Barrington or a rich suburb or something, it's not like that." Defendant also complains of the prosecutor's references to the dispute over the tan car and the lack of a car title.

> "And this is again, folks this is 69th and Calumet. It's not like they're signing titles over and make sure you check with the Secretary of State, you file that right away for my car for my junk tan two door, whatever it is. It's not how it works over there, okay."

¶ 69 Defendant asserts that these comments were baseless and caused him severe prejudice. However, defendant has failed to cite any cases in which a prosecutor's comments on a neighborhood prejudiced a defendant. The State maintains that the comments were proper, inferred by the evidence and in response to defense counsel's argument. "During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses." *People v. Cosmano*, 2011

IL App (1st) 101196, at ¶ 57.

¶ 70 Defense counsel during closing argument made frequent comments that the shooting did not make sense and specifically pointed out that there was no official record regarding the sale of the tan car. In response, the State admitted that there was no documentation, but noted that in the neighborhood, cars could be sold without a title. This comment was based on the evidence presented at trial. Bryant testified about a dispute between Clair and defendant about the car. Additionally, Clair's mother corroborated the sale of the vehicle to defendant and that her son was having problems over money with the car buyer. During rebuttal, the prosecutor properly responded to defense counsel's argument about the lack of record for the car sale.

¶ 71 Further, the homicides occurred at 69th and Calumet and the comments regarding the neighborhood were inferences based on the evidence. Curry testified about hearing the fired shots and a person saying, "Please don't. Please don't," but neither she nor her son went outside. Bryant waited almost three weeks to come forward to the police and defense counsel questioned why he waited so long. The prosecutor responded by arguing about the circumstances of the neighborhood. These comments were either based on or inferred from the evidence presented at trial. The prosecutor was seeking to highlight the fact that a life was not necessarily valued the same way everywhere. Moreover, "a prosecutor may comment unfavorably on the evil effects of the crime and urge the jury to administer the law without fear, when such argument is based upon competent and pertinent evidence." *People v. Nicholas*, 218 Ill. 2d 104, 121-22 (2005).

¶ 72 While defendant contends that he has been severely prejudiced, he simply states this conclusion, but fails to argue any support for how these comments caused him prejudice such

that there was a reasonable likelihood that the result of the proceeding would be different. Even if the comments were not inferred by the evidence or invited by defense counsel, defendant has not shown how these remarks undermined the confidence in the outcome. Defendant cannot establish sufficient prejudice to support his claim of ineffective assistance.

¶ 73 Defendant next argues that his attorney failed to object to the prosecutor's improper arguments regarding defendant's alleged flight and his retention of an attorney.

> "But think about this for a second, if this is evidence of guilt. Flight. Flight. They're looking for him on the 30th. He's gone. He's vanishes, some people know where he is but they're not saying. Why is he gone? Why do you need a lawyer if you're just over at your girlfriend's house. Hum."

¶ 74 Defendant asserts that this comment was not based on evidence because there was no evidence of flight. Defendant further argues that the reference to retaining a lawyer was improper because it directed the jury's attention away from the crime and he had the right to hire an attorney when surrendering to the police. The only case cited by defendant in this claim is simply to the general principle that "[i]t is improper for the prosecution to direct the jury's attention away from the elements of the crime by commenting on issues irrelevant to the question of guilt or innocence." *People v. Moore*, 356 Ill. App. 3d 117, 120 (2005).

¶ 75 The State maintains that the comments were properly based on evidence that defendant knew from his mother that the police were looking for him and he stayed at his girlfriend's house for several days. He waited until he had an attorney before he turned himself into the police.

The prosecutor's comments about hiring an attorney were to challenge defendant's assertion that he had no idea why the police were looking for him.

¶ 76 Again, defendant simply concludes that he was prejudiced without any argument explaining how his attorney's failure to object prejudiced him and that there was a reasonable likelihood that the result of the proceeding would have changed absent this argument. Moreover, we agree with the State that the complained-of comments were proper comments on the evidence. Despite his mother knowing that the police wanted defendant, defendant remained in hiding at his girlfriend's house for nearly a week and only turned himself into the police once he had an attorney, even though defendant testified that he did not know why the police were looking for him. The prosecutor's comments were used to argue that defendant's testimony was not credible. Even if these comments were erroneous, defendant has not shown any prejudice and his claim of ineffective assistance must fail.

¶ 77 Defendant also asserts that his attorney was ineffective for failing to preserve and raise on appeal the improper comments when the prosecutor vouched for Tanner's credibility. Specifically, defendant points to comments in which the prosecutor argued that Tanner could not have lied because the police officers were not gullible. The prosecutor contended that the attorneys and police officers, "we're all stooges too, we just go along with the program." At this point, defense counsel objected, but the trial court overruled the objection. The prosecutor continued, asserting that "we're just saps too."

¶ 78 The State responds that the comments were proper and directed at the credibility of the defense theory that accused Bryant and Tanner of framing defendant and the prosecution put on

witnesses that were liars. In closing argument, defense counsel argued that Bryant and Tanner did not have

> "any problem of accusing innocent people of criminal acts of wrongdoing. So what we know about them is that they have all of these many many convictions, they have told multiple different stories, and they are willing for sure to commit perjury and to falsely accuse other people who are innocent.
>
> That's who they want you to believe beyond a reasonable doubt."

¶ 79 > " '[A] prosecutor, as the representative of the State of Illinois, stands in a special relation to the jury. He must therefore choose his words carefully so that he does not place the authority of his office behind the credibility of his witnesses. [Citation.] He may express an opinion if it is based on the record. [Citation.] He may not, however, state his personal opinion regarding the veracity of a witness or vouch for a witness's credibility.' " *People v. Schaefer*, 217 Ill. App. 3d 666, 669 (1991) (quoting *People v. Roach*, 213 Ill. App. 3d 119, 124 (1991)).

¶ 80 However, contrary to defendant's contention, the prosecutor was not vouching for the credibility with the authority of his position as an ASA. Rather, he was arguing that Bryant and Tanner were not liars, as asserted by defense counsel. The comments were in direct response to

defense counsel's argument that the State's witnesses were unbelievable. Since the comments were made in response to defense counsel's argument, there was no error and defense counsel was not ineffective for failing to raise this issue on appeal.

¶ 81 Next, defendant argues that his attorney was ineffective for failing to object to the prosecutor's impermissible comments regarding prior consistent statements. Specifically, defendant points to the prosecutor's argument in rebuttal about Bryant's testimony and noting that Bryant was acting like a "jerk" because he was frustrated by having to tell the same story so many times and then stating that Bryant's testimony "hasn't changed for ten years. That hasn't changed from day one." Defendant contends that this comment was an improper use of prior consistent statements. The State maintains that the comment was proper in response to the defense counsel's argument that detailed the inconsistencies between Bryant's and Tanner's testimonies and the assertion that Bryant should not be believed because the trial court held him in contempt for being disrespectful.

¶ 82 While a prior consistent statement is not admissible to rebut a claim of mistake, inaccuracy or poor recollection (*People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010)), defendant fails to make any argument that he was prejudiced by his attorney's failure to object. Again, defendant concludes that the failure to object was "highly improper and prejudicial," but does not argue how the alleged error arguably prejudiced him such that there is a reasonable probability that the result would be different. Further, the comment was not improper and was made in response to defense counsel's argument. The prosecutor did not refer to any specific prior consistent statement or discuss the substance of Bryant's prior statements. It was a single

statement that Bryant's story was not inconsistent and has not changed, despite defense counsel's argument that he was not credible. We conclude that there was no error and defendant's claim of ineffective assistance is without merit.

¶ 83 Finally, defendant argues that his attorney was ineffective for stipulating to the results of the GSR testing and then he misstated the results, which allowed the State to repeat the misstatement in closing arguments. Specifically, defendant asserts that by entering into the stipulation, defense counsel was forced to explain why there may not have been sufficient GSR on Tanner's hand or hands instead of presenting an expert to testify about this evidence. Defendant attached to his amended postconviction petition a deposition by forensic expert Mary Wong, given in an unrelated case, and an excerpt from a book written by Vincent Di Maio. Defendant states in his brief that this expert authority was attached "so the court could better understand how the jury was misinformed about the nature of the GSR findings."

¶ 84 Prior to trial, defense counsel moved to bar GSR testimony. The motion contended that the tests were administered more than three hours after the alleged offense, but to be reliable tests must be performed within 2 to 3 hours of the alleged shooting. At the prior trial, the parties stipulated that the results of the GSR tests administered to Tanner, Thomas Clair and Johnny West were negative. Defendant was no longer willing to stipulate to the results of the GSR tests and the tests were not reliable to a reasonable degree of scientific certainty. The motion was denied.

¶ 85 At trial, the State presented Butler's testimony that he administered the GSR tests and he detailed the process of the test administration. At the conclusion of the State's case, the parties

presented a stipulation from Robert Berk, an expert in the field of trace and microscopy and an expert in GSR analysis. The stipulation stated:

> "That when a weapon is discharged, the firing pin strikes the primer of the shell and this causes a chemical reaction which ignites the gunpowder and allows certain gases to escape from the barrel and rear or side of the weapon. These cases consent [*sic*] certain elements which can settle on an individual's hands.
>
> That a person's hand may contain these elements. However the level of these elements must be elevated in order to conclude that the person discharged, handled or was within close proximity to a discharged firearm.
>
> That many circumstances can affect these results and include the environment, swat on the kin [*sic*], contact with objects or surfaces, time the number of shots fired and whether or not the person washed his or her hands.
>
> The gunshot residue [tests] can be conducted reliably up to six hours after the discharged of a weapon.
>
> That on May 23, 1997, in inventory 1722689 consisting of the gunshot residue kits for Harry Tanner, Thomas Clair and Jimmy West were received at the Illinois State Police Forensic Science Center in Chicago. That the proper chain of custody for

these three kits was maintained at all times.

That after conducting gunshot residue analysis on these three kits, it could be concluded to a reasonable degree of scientific certainty that Harry Tanner and Thomas Clair's hand contained the elements but lacked the necessary elevated levels to identify gunshot residue and Jimmy West's hands did not contain the elements."

¶ 86 Defendant asserts that this stipulation "amounted to a bland statement regarding the inconclusive nature of the testing" and forced defense counsel to explain why there may not have been sufficient GSR on Tanner's hands, rather than have an expert explain the evidence. Additionally, defendant notes that defense counsel incorrectly stated in closing arguments that the GSR tests were administered six hours after the crimes and later said that the tests were four or five hours after the fact. Defense counsel also argued that the stipulation said that GSR could come off if you rub your hands or if your hands were handcuffed behind your back, which the stipulation did not state. Further, defendant asserts the prosecutor in rebuttal responded that the tests were done three hours after the homicides and implied that the GSR tests excluded Tanner as the shooter.

¶ 87 Defendant refers to his attached exhibits to his petition for support. The deposition of Mary Wong, a forensic scientist and expert in GSR, was taken in an unrelated civil case. According to defendant, Wong's deposition demonstrated why defense counsel should not have entered into the stipulation because her testimony explained that GSR can be removed by any

type of hand movement and the amount of GSR deposited on one's hands depends on the type of firearm used. Defendant's other attachment from a book by Vincent Di Maio stated that residue is rarely detected on the firing hand when a shotgun is used.

¶ 88 However, as the State points out, defendant does not assert that these individuals would be called as expert witnesses in the instant case, nor was there an affidavit from an expert about potential testimony on this issue. "To support a claim of failure to investigate and call witnesses, a defendant must introduce affidavits from those individuals who would have testified. Without affidavits, this court cannot determine whether these witnesses could have provided any information or testimony favorable to defendant." *People v. Guest*, 166 Ill. 2d 381, 402 (1995). Defendant's assertion that his trial counsel was ineffective is premised on sources from outside this case and has failed to present an expert witness who would provide testimony in line with his unrelated sources.

¶ 89 Further, the decision to stipulate is a matter of trial strategy. *People v. Campbell*, 208 Ill. 2d 203, 217 (2003). Even if his attorney had declined to stipulate to the results of the GSR test, the State would have presented the results via Berk's live testimony about the testing and results, which could have adversely affected defendant and his defense. The GSR stipulation did not implicate defendant. Additionally, the stipulation entered at this trial contained more detail than at previous trials, including the statement that external factors could cause the GSR to fade prior to testing. This statement was in line with defense strategy that Tanner was the actual shooter and the lack of a positive GSR test did not exclude him. Defendant's argument that his attorney should have handled the GSR test differently does not negate the valid trial strategy employed by

his attorney. Accordingly, defendant cannot establish that his attorney's performance was arguably deficient and this claim of ineffective assistance was properly dismissed.

¶ 90 Defendant concludes his ineffective assistance of counsel claims by asserting that the cumulative effect of these alleged errors show that his counsel was ineffective. We disagree. As we have held, none of the complained of errors amounted to ineffective assistance of counsel because defendant was unable to establish that his trial counsel's performance was arguably deficient and as a result, he was arguably prejudiced. Similarly, since trial counsel was not ineffective, defendant's claims of ineffective assistance of appellate counsel for failure to raise these issues on direct appeal were properly dismissed. Accordingly, the trial court did not err in dismissing his amended postconviction petition at the first stage.

¶ 91 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 92 Affirmed.