2013 IL App (1st) 113593-U

FIFTH DIVISION
October 25, 2013

No. 1-11-3593

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.	)	06 CR 18038
	)	
CARL WHITEHEAD,	)	
	)	Honorable
Defendant-Appellant.	)	Charles P. Burns,
	)	Judge Presiding.

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

O R D E R

¶ 1 HELD: The trial court properly dismissed defendant's postconviction petition at the first stage of postconviction proceedings because defendant has failed to set forth the gist of a meritorious claim of ineffective assistance of trial and appellate counsel.

¶ 2 Defendant Carl Whitehead 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

object to inadmissible hearsay statements presented as substantive evidence under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2006)), (2) participating in the editing and failing to bar codefendant's videotaped statements, (3) failing to object to admission of improper impeachment evidence, and (4) failing to object to improper gang evidence. Defendant also asserts that his appellate counsel was ineffective for failing to raise these issues properly on direct appeal and for failing to challenge the sufficiency of the evidence on direct appeal.

¶ 3 Following a jury trial, defendant was found guilty of first degree murder, home invasion, residential burglary, and attempted armed robbery in the November 2005 homicide of Ramiro Aguirre. He was subsequently sentenced to a term of natural life for the murder conviction, a term of 30 years for home invasion, and concurrent terms of 15 years for residential burglary and attempted armed robbery. Defendant's conviction and sentence were affirmed on direct appeal. We will discuss the facts as necessary for the issues raised on appeal. For a more detailed discussion of these facts, see *People v. Whitehead*, No. 1-08-3589 (June 30, 2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 Norma Calderon testified that she was married to Ramiro Aguirre and in November 2005, she was eight months pregnant. They lived at 5852 West North Avenue in Chicago. On the night of November 21, 2005, she went to sleep early in the nursery. She awoke during the night when she heard the sound of breaking glass and a beeping sound. She went to the door to the nursery and saw a man. He put a gun to her forehead and a hand over her mouth. He walked her toward the bathroom. As they walked, Aguirre opened the door and he began to struggle with the

man. The man pointed a gun at Aguirre's chest and fired. Aguirre fell to the ground. The man put the gun to Calderon's head and asked, "Where is the money?" Calderon answered that they did not have money in the house. The man continued to demand money, but eventually left, telling Calderon not to call the police. After he left, she called the police. Aguirre was pronounced dead at the scene.

¶ 5 In July 2006, Calderon viewed a lineup and recognized defendant, but was not certain he was the offender. She stated that she recognized him by his eyes and voice. She testified at trial that she was 90% sure that defendant was the perpetrator. Calderon also testified that there had been a fire in her garage several days prior to the murder. She denied telling anyone that there was money in the garage and said they did not keep money there.

¶ 6 Tenisha Gibbs testified that she lived at 1606 North Mayfield and her apartment was across the street from 5852 West North. She stated that she met defendant in July 2005 and had a sexual relationship with him. Although Tenisha Gibbs gave a statement about her knowledge of defendant to an assistant state's attorney, she denied the substance of that statement at trial. She admitted to giving some basic details, such as, her name, age, address, and employment. She also acknowledged that she signed the statement, but denied giving the statement.

¶ 7 At trial, Gibbs denied knowing who lived at 5852 West North. She denied that she became pregnant with defendant's baby. When the prosecutor asked if defendant gave her money for an abortion, defense counsel made an objection, which the trial court sustained. She denied telling the police that defendant would look out her window toward the parking lot across the street. She denied that defendant asked her to hold onto a gun. She stated that she was forced to

sign the statement because the police told her they were going to keep her child and come to her place of employment until she cooperated.

¶ 8 Assistant State's Attorney Donna Norton testified that she took Gibbs' statement in the presence of Detective James Gilger. Norton stated that she spoke with Gibbs privately and asked Gibbs if she had been threatened or if any promises had been made in exchange for her statement, Gibbs responded in the negative. In the statement, Gibbs stated that in the summer of 2005, defendant asked her to hold a gun for him, which she placed in her mattress. She described the gun as a black, semiautomatic handgun that was "small enough to fit in a pocket." Defendant took the gun back from her later the same day. She held the gun for defendant a couple more times that summer. Defendant also asked her to hold money for him, usually amounts of cash around $1,000 and $2,000. Gibbs stated that she became pregnant in November 2005 and decided to abort the pregnancy when she learned defendant had another girlfriend. In January 2006, defendant took her to get an abortion and paid for the procedure. They stopped seeing each other after the abortion.

¶ 9 The State presented the testimony of several witnesses, including Demario Lowe, Monique Causey, Sedale Miller, and Emmanuel Malone. These witnesses recanted much of their prior grand jury testimony at trial. When they were each impeached with their prior testimony, they testified that they said what the police told them to say and the prior testimony was not the truth. Another witness, Donald Williams, testified that he did not remember his prior grand jury testimony or the events described therein. The State also published the grand jury testimony previously given by these witnesses through the assistant state's attorney who questioned them

before the grand jury. The State also presented the witnesses' prior inconsistent statements through the testimony of Detectives John Valkner and James Gilger, who investigated Aguirre's murder.

¶ 10 Lowe identified defendant at trial as the person he knew as "Spunky." He admitted that he previously appeared before the grand jury, but stated that the police told him what to say. He admitted that he previously said defendant was dating a woman who lived across the street from Aguirre, who Lowe referred to as "the Mexican." Lowe was aware of a garage fire at the Aguirre property before the murder. Lowe previously testified before the grand jury that he was present at a meeting at Carlos James's mother's house. At that meeting, Miller told him that when "the Mexican's" garage caught fire, Calderon was heard saying that she had $17,000 in the garage. Defendant responded by saying that they were going to "run up in there" which Lowe understood to mean that they were going to rob them.

¶ 11 Causey also testified that her prior grand jury testimony was not the truth and that the police told her that if she repeated their version, then her boyfriend, Lowe, would be able to come home. Before the grand jury, Causey stated that she was present during the garage fire and heard Calderon tell the firefighters to hurry to put out the fire because she had "like 17 or $18,000 in the garage."

¶ 12 Miller testified that he was present at the garage fire at Mayfield and North and stood in a crowd. He stated that he saw a lady come out of the building, screaming that her money was in the building. He could not tell what she said exactly, but he heard her say "17 something" and she was referring to money. Later, Miller was present in the basement of 1706 North Mayfield,

with Williams, Malone, Carlos James, Lowe, and defendant. Miller admitted that they talked about the garage fire, but he denied that defendant asked him to do something regarding the garage.

¶ 13 Miller also admitted to speaking with the detectives. He said he was pressured to speak with them because he saw his name on a police report as an accessory to the murder. Miller said the detectives pressured him to say that defendant asked him to "take part in a lick," which meant a robbery. He did not remember telling the detectives that defendant told him that Aguirre was "holding," meaning that he had drugs or money. Miller also did not remember telling the detectives that defendant said he was going to rob Aguirre.

¶ 14 Miller acknowledged that he testified before the grand jury about defendant's statements indicating a plan to rob Aguirre. In his grand jury testimony, Miller stated that he was present for the garage fire and heard Calderon say there was $17,000 in the garage. Later, Miller was in the basement with several people, including defendant. He testified that defendant said defendant was going to rob Aguirre. Miller heard defendant talk about robbing Aguirre more than once and asked Miller "to like have a surveillance on [Aguirre]." Defendant also asked Miller to assist him in the robbery, but he declined to help defendant with the robbery. Later, Miller discussed the murder with defendant, but defendant never directly admitted to committing it, he "smirked" once and another time said he did "some dumb s***." Miller denied that his grand jury testimony was truthful.

¶ 15 Williams testified that in November 2005, he lived at 1706 North Mayfield with his grandmother and his cousin, Malone. He said that people were in the basement frequently, but

he did not recall a time when defendant and "Mario" were there. He admitted that he testified before the grand jury. In that testimony, Williams said he was going into the basement to get a pair of pants and as he came into the basement, a conversation between defendant and "Mario" stopped. Defendant asked Williams if he was being nosy. The men went outside and Williams overheard defendant say, "we can take this lick." Williams stated that defendant said that "the Mexican" "might be holding," which meant he might have money or drugs. At trial, Williams did not remember giving these responses.

¶ 16 Malone testified that he lived at 1706 North Mayfield with his grandmother and aunt in November 2005. He remembered being in the basement on multiple occasions. He stated that he knew about the garage fire in November 2005, but he was not present during the fire. Malone did not recall his grand jury testimony and said he was forced to testify because the police threatened to charge him as an accessory. In his grand jury testimony, Malone testified that he was present with defendant, Miller, Lowe, and others for a conversation that occurred after the garage fire. Defendant and Miller discussed the possibility that Aguirre had money or drugs in the house. Defendant said it would be "a good lick to hit," which meant a "robbery job, to see what he got in his house."

¶ 17 The State also called codefendant Marcus Griffin. Griffin testified that he had entered into a plea agreement prior to his testimony, admitting his role as a lookout for defendant. In exchange, Griffin was to receive a 10-year sentence for armed robbery. Despite the agreement, Griffin denied any knowledge or involvement in the crime. He stated that the inculpatory statements were fed to him by the detectives. Griffin denied being in the vicinity of North and

Mayfield on November 22, 2005, meeting defendant there, or seeing defendant with a gun. He denied that defendant told him that he was going to rob "the Mexican" and that defendant asked Griffin to be the lookout. He denied that he heard gunshots or that he saw defendant come down the stairs of the house. He denied that he was supposed to "chirp" defendant if he saw the police. The State later presented portions of Griffin's videotaped statement during the testimony of Detective John Valkner.

¶ 18 A transcript of the videotaped statement was presented with defendant's motion for a new trial, but was not part of the trial transcript. In the transcript of the videotaped statement, Griffin said he was present with Miller and other people at the garage fire. Miller told him that Aguirre "had like 36 hundred or thousand" and "that is what [Aguirre's] wife said." Miller told Griffin that he and defendant planned to rob them.

¶ 19 Griffin stated that he worked for defendant and would "open the dope spot" for defendant for two to three days at a time. Defendant never told Griffin that Aguirre was "holding." On the day of the homicide, defendant "chirped" him during the night and told him to come outside. Griffin stated that defendant told him "to go open the block" and to watch for the police and chirp him because defendant was " 'fixin' to poke dude,' " which Griffin said meant to rob him. Griffin agreed. He waited outside for about 20 minutes, then he started to walk to the alley and he heard a gunshot. He looked up and saw defendant coming down the stairs. Griffin stated that defendant said that if Griffin told anyone, defendant would kill Griffin. Griffin saw a gun in defendant's hand. He described it as black and gray and defendant had it at his side. They each ran away. He did not see defendant again for a couple of months.

¶ 20 Griffin said defendant did not point the gun at him, but he had seen defendant act violent when he "beat up people." He also had heard about defendant shooting someone in the hand on Parkside, but he did not see it.

¶ 21 The State also presented evidence that the police recovered a .45 caliber cartridge casing from where Aguirre was killed. An expert testified that this cartridge casing matched another cartridge casing recovered from the scene of a May 2004 shooting of an individual named Eric Bowman on the 1600 block of North Parkside. The trial court allowed the State to present other crimes evidence of the Parkside shooting, but the trial court instructed the jury that the evidence was being offered solely on the issue of defendant's identification.

¶ 22 Edwin Marrero testified about the Parkside shooting. On May 15, 2004, he was driving and saw defendant in another vehicle. He was angry with defendant for a prior accident and decided to "ram" defendant's car. Defendant drove away, but returned a few minutes later with a gun. He started firing toward Marrero and his friends, striking Marrero's car and Bowman's hand. Marrero did not give a statement to the police about the incident until May 2006.

¶ 23 Eric Bowman testified that he was in the area of 1647 North Parkside on May 15, 2004. He saw Marrero ram his car into another vehicle. Defendant was in the car that was struck by Marrero. A few minutes later, a man came running down the street and began shooting. Bowman ran to a friend's house and realized he had been shot in the hand. Bowman said he could not identify the shooter, but he admitted that he previously identified defendant as the shooter in a handwritten statement given to an assistant state's attorney.

¶ 24 After the State rested, defendant moved for a directed verdict, which the trial court

denied. For his defense, defendant called three witnesses to support his alibi defense. Defendant's girlfriend Ebony Williams and her best friend Kiamaya Pittman both testified that in November 2005, Williams was dating defendant. Pittman and Williams spent the night of November 21, 2005, at Williams' apartment in DeKalb working on a paper for school. Defendant arrived around 9 or 10 p.m. and stayed all night. Everyone left the apartment around 7 a.m. the next day. Defendant's mother also testified that defendant came to her house in Lombard around 9 a.m. on November 22, and they picked up her father to take him to a doctor's appointment. The witnesses admitted that they did not notify the police or the prosecution about defendant's alibi.

¶ 25 Following closing arguments, the jury found defendant guilty of first degree murder, home invasion, residential burglary and attempted armed robbery. Defendant retained a new attorney after the trial. The new attorney filed defendant's motion for a new trial, which was denied.

¶ 26 On direct appeal, defendant, still represented by his new posttrial counsel, argued: (1) Griffin's videotaped statement was erroneously admitted; (2) testimony about Gibbs' pregnancy and abortion was improperly admitted; (3) the trial court erred in admitting the other crimes evidence of the Parkside shooting; (4) the *voir dire* did not comply with Supreme Court Rule 431(b); (5) the trial court erred in failing to remove a sleeping juror; (6) the prosecutor's closing argument was improper; and (7) multiple allegations of ineffective assistance of trial counsel. This court affirmed defendant's conviction and sentence. See *Whitehead*, No. 1-08-3589.

¶ 27 In August 2011, defendant, represented by new postconviction counsel, filed his

postconviction petition. Defendant alleged multiple claims of ineffective assistance of trial and appellate counsel. Specifically, defendant argued that his trial counsel was ineffective for (1) failing to object to inadmissible hearsay statements presented as substantive evidence under section 115-10.1 (725 ILCS 5/115-10.1 (West 2006)), (2) participating in the editing and failing to bar Griffin's videotaped statements, (3) failing to object to admission of improper impeachment evidence, and (4) failing to object to improper gang evidence. Defendant also asserted that his appellate counsel was ineffective for failing to raise these issues properly on direct appeal and for failing to challenge the sufficiency of the evidence on direct appeal. In November 2011, the trial court dismissed the petition at the first stage of review in a written order.

¶ 28 This appeal follows.

¶ 29 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.

¶ 30 Initially, we observe that the statement of facts contained in defendant's opening brief does not comply with Supreme Court Rules. Rule 341(h)(6) requires a statement of facts "which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013). Defendant's statement of facts contains numerous argumentative comments in violation of Rule 341(h)(6) and we will not consider any improper comments made in the statement of facts.

¶ 31 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.

¶ 32 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.

¶ 33 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.

¶ 34 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.

¶ 35 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.

¶ 36 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.

¶ 37 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.

¶ 38 We first address whether some of defendant's claims are barred by *res judicata*. As previously stated, "the doctrine of *res judicata* bars consideration of issues that were previously

raised and decided on direct appeal." *Blair*, 215 Ill. 2d at 443. Further, defendant "may not avoid the bar of *res judicata* simply by rephrasing issues previously addressed on direct appeal." *Simms*, 192 Ill. 2d at 360.

¶ 39 The State asserts that defendant's claim that his trial counsel was ineffective for failing to object to the admission of Griffin's videotaped statement and participating in the editing of the inadmissible statement is barred by *res judicata* because appellate counsel raised this claim on direct appeal. Specifically, defendant on direct appeal argued that the trial court erred in admitting the videotaped statement without proper foundation, the statement contained inadmissible hearsay under section 115-10.1 and improper gang evidence, and trial counsel was ineffective for failing to move to redact. Defendant now contends that *res judicata* does not apply because the reviewing court concluded the admission of the videotaped statement was invited error and "failed to conduct any meaningful analysis of the underlying, inadmissible portions of the video. Thus, there was no ruling on the actual issue and *res judicata* does not apply." We agree with the State.

¶ 40 While the reviewing court found that the admission of the videotaped statement was barred as invited error, the court further concluded that "[r]egardless of forfeiture, the record does not reveal any obvious error in the admission of the videotaped statement or by including in the evidence provided to the jury during deliberations." *Whitehead*, slip op. at 12. Additionally, the court noted that the claim of ineffective assistance on this issue was "of dubious merit" and that the decision not to file a motion *in limine* to redact the videotaped statement was trial strategy and that the court could not conclude that "had counsel filed such a motion, there was a

reasonable probability the outcome of defendant's trial would have been different." *Whitehead*, slip op. at 29-30.

¶ 41 It is clear that defendant's claim of ineffective assistance of trial counsel relating to the admission of Griffin's videotaped statement was previously considered on direct appeal. On direct appeal, the reviewing court found that the admission of the videotaped statement was invited error, but also found that no error existed in the admission of the statement and trial counsel was not ineffective. Thus, the court did consider the merits of the claim and defendant cannot raise this issue again in these proceedings. Further, any attempt by defendant to rephrase the issue does not avoid the procedural bar. "Because this court previously addressed defendant's claim of ineffective assistance of counsel on direct review of his case, the subsequent addition of different allegations of incompetence does not allow the relitigation of this issue on defendant's petition for post-conviction relief." *People v. Emerson*, 153 Ill. 2d 100, 107 (1992). Accordingly, we find that the doctrine of *res judicata* bars consideration of any claim of ineffective assistance of trial and appellate counsel relating to the admission of Griffin's videotaped statement.

¶ 42 Next, defendant contends that trial counsel was ineffective for failing to object to inadmissible statements included in the grand jury testimony of multiple witnesses. Specifically, defendant asserts that (1) the admission of the grand jury testimony from Lowe, Miller and Causey included inadmissible hearsay pertaining to Calderon's alleged statement that there was $17,000 in the garage at the time of the fire and (2) the grand jury testimony included improper character and opinion evidence.

¶ 43 The prior grand jury testimony was admitted at trial pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963. Section 115-10.1 allows for the admission of prior statements of a witness that are: (1) inconsistent with trial testimony; (2) the witness is subject to cross-examination concerning the statement; and (3) the prior statement was made under oath at a prior hearing or trial or describes an event that the witness had personal knowledge of and the statement is signed or sworn by the witness or recorded on audio or video tape. 725 ILCS 5/115-10.1 (West 2006).

¶ 44 Defendant argues that the grand jury testimony of Lowe, Miller and Causey contained inadmissible hearsay evidence of Calderon's statement about money in the garage. 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, "an out-of-court statement offered to prove its effect on a listener's mind or to show why the listener subsequently acted as he did is not hearsay and is admissible." *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008).

¶ 45 Here, the witnesses' prior testimony about Calderon's statement at the time of the fire that there was money in the garage was not being used to prove the truth of the matter asserted, *i.e.*, that there was, in fact, money in the garage, but was admitted to show the effect on the listener. It is irrelevant whether there was money in the garage or whether Calderon ever made such a statement. Rather, the effect the statement had on defendant and his friends was relevant because it provided a motive for defendant to break into Aguirre and Calderon's residence. Since this out-of-court statement was not used to prove the truth of the matter asserted, it was not

inadmissible hearsay. The comments were admissible under section 115-10.1 and trial counsel was not ineffective for failing to make a fruitless objection.

¶ 46 Additionally, defendant asserts that his trial counsel was ineffective for failing to object to improper character and opinion evidence in the grand jury testimony. Defendant contends that "Lowe's conjecture that Whitehead committed the murder was speculative, prejudicial, and invaded the province of the jury. Likewise, Miller's grand jury statement informed the jury that Whitehead was a 'bad guy,' that Miller feared Whitehead, and that Miller inquired about witness relocation as a result of this testimony." However, defendant fails to cite any authority for his contention that these statements were inadmissible character and opinion evidence. We find that defendant has forfeited this claim by failing to comply with Supreme Court Rule 341(h)(7). Supreme Court Rule 341(h)(7) requires appellants' brief to include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). " 'A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research.' " *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1995) (quoting *Thrall Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986)). Contentions supported by some argument, but no authority do not meet the requirements of Supreme Court Rule 341(h)(7) (*People v. Pickens*, 354 Ill. App. 3d 904, 917 (2004)), and, therefore, defendant has forfeited this argument of ineffective assistance of counsel.

¶ 47 Defendant next argues that his trial counsel was ineffective for failing to object to

improper impeachment evidence. Defendant lists multiple instances of improper impeachment evidence in his brief from testimony of police detectives. Three of the included complaints involve testimony concerning Calderon's alleged statement about money in the garage. Since we have already concluded that these statements were not hearsay and properly admitted, we need not address these statements further.

¶ 48 The remaining instances of allegedly improper impeachment were statements to Detectives Gilger and Valkner, which included Gibbs' statement regarding defendant asking her to hold a gun, defendant watching Aguirre's house through the window, and her pregnancy and abortion; Williams' and Malone's statements about overhearing defendant discussing whether Aguirre was "holding" and a "good lick to hit"; and Bowman's statement identifying defendant as the individual who shot him. According to defendant, this impeachment evidence was improper because the State called the witnesses with the purpose of impeaching them because the State knew the witnesses were not going to testify consistently with their prior statement and the impeachment did not affirmatively damage the State's case.

¶ 49 While prior inconsistent statements may be used to impeach a witness and admitted as substantive evidence under section 115-10.1, "a party may only impeach its own witness through use of a prior inconsistent statement when the testimony of that witness does 'affirmative damage' to the party's case." *People v. Donegan*, 2012 IL App. (1st) 102325, ¶ 36 (quoting *People v. Cruz*, 162 Ill.2d 314, 361 (1994)). "The prior testimony need not directly contradict testimony given at trial to be considered ‘inconsistent’ [citation] and is not limited to direct contradictions but also includes evasive answers, silence, or changes in position." *People v. Martinez*, 348 Ill.

App. 3d 521, 532 (2004). "For witness testimony to be affirmatively damaging, it must do more than fail to support the State's position; it must give 'positive aid' to the defendant's case, for instance, by being inconsistent with the defendant's guilt under the State's theory of the case." *People v. McCarter*, 385 Ill. App. 3d 919, 933 (2008) (quoting *Cruz*, 162 Ill. 2d at 362). "It is insufficient that a witness merely disappoints the State by failing to incriminate the defendant." *McCarter*, 385 Ill. App. 3d at 933.

¶ 50 In *Donegan*, the State's theory of the case was that the defendant and codefendant shot and killed the victim as part of an ongoing gang war. At trial, two of the State's witnesses denied that the defendant was a gang member or that they had spoken with the defendant and the codefendant prior to the homicide. A third witness denied previously identifying the defendant in another shooting. The reviewing court concluded that this testimony at trial caused affirmative damage to the State's case, noting that "the harm was exacerbated by the fact that each of those [witnesses] testified at trial that their prior statements were dictated to them by the State or were coerced by the threat of prosecution." *Donegan*, 2012 IL App. (1st) 102325, at ¶ 58.

¶ 51 Here, the witnesses testified inconsistently with prior statements and caused affirmative damage to the State's theory of the case. Each denied having made their previous statements and some of the witnesses testified that their prior statements were not true and they had been threatened or coerced by the police. Gibbs testified that the police threatened to take her child away or they would come to her job. Malone testified that the police threatened to charge him as an accessory. Bowman denied that defendant was the person that shot him in the earlier Parkside shooting, which was a significant connection for the identification of defendant in the State's

case. Williams admitted that he lived at 1706 N. Mayfield with Malone and people were frequently in the basement, but he not recall a time when defendant was there or a time when he overheard defendant talking about a robbery and that Aguire "might be holding." Williams testified that he did not remember the substance of his conversation with the detectives or his grand jury testimony. These witnesses gave inconsistent testimony at trial that affirmatively damaged the State's theory of the case and, therefore, the State properly admitted their prior statements to the police. Since the admission of this evidence was not error, trial counsel was not ineffective for failing to make a fruitless objection.

¶ 52 Defendant also asserts that his trial counsel was ineffective for failing to request that a limiting instruction be given to the jury at the time the impeachment was introduced. However, this allegation differs from the claim in defendant's petition. In his petition, defendant asserted that his trial counsel was ineffective for failing to request a limiting instruction. Defendant did not qualify the timing of the limiting instruction in his petition, and as the trial court found, a limiting instruction was given to the jury at the end of the trial. Defendant cannot rephrase his allegation to present a new contention on appeal. The supreme court has consistently held that a claim not raise in the postconviction petition cannot be raised for the first time on appeal. See *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006); *People v. Jones*, 213 Ill. 2d 498, 505 (2004); *People v. Davis*, 156 Ill. 2d 149, 158-60 (1993). Accordingly, defendant cannot raise for the first time on appeal that his trial counsel was ineffective for failing to request a limiting instruction at the time the impeachment evidence was presented.

¶ 53 Next, defendant argues that his trial counsel was ineffective for failing to object to gang

evidence during Bowman's testimony. At trial, Bowman did not identify defendant as the shooter in the Parkside shooting, but he was confronted with a prior statement in which he identified defendant. This statement was given almost two years after the shooting and was the first time Bowman identified defendant as the perpetrator. When asked by the prosecutor at trial why he did not identify the shooter in 2004, Bowman responded, "I told them I didn't want to get involved in that gang stuff or nothing. I just didn't want to get involved." Defendant asserts that his attorney was ineffective for failing to object, move for a mistrial, or move to strike the answer.

¶ 54 However, the record belies this claim. During Bowman's direct examination, the prosecutor requested a sidebar and asked to go into gang evidence because Bowman had "clearly flipped on us." In response, defense counsel voiced an objection "to any of that going in." The prosecutor asserted that he wanted to ask Bowman why he changed his testimony. The trial court allowed the prosecutor to ask the question. The prosecutor asked the question shortly thereafter on redirect. Following the question and response noted above, the prosecutor asked if Bowman knew if defendant was involved in a gang, defense counsel objected and the trial court sustained the objection. The record does not support defendant's claim that his attorney failed to object to gang evidence.

¶ 55 Defendant also points to other brief references to gangs during the trial to support his assertion of ineffective assistance. These references did not imply that defendant was involved in a gang, but implicated Miller and Griffin as potential gang members. However, in his petition, defendant only referred to the mention in Bowman's testimony. As previously stated, defendant

cannot present new arguments on appeal. Based on this, we decline to consider any additional references to gang evidence. Since the record established that trial counsel did raise an objection to the introduction of gang evidence in Bowman's testimony, defendant's claim of ineffective assistance is without merit.

¶ 56 Since we have found that trial counsel was not ineffective for any of the claims raised in the postconviction petition, we likewise conclude that any claim of ineffective assistance of appellate counsel for failing to assert trial counsel's ineffective assistance lack merit.

¶ 57 Finally, defendant argues that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence on direct appeal. Defendant contends that the evidence against him was circumstantial and without the inadmissible hearsay, improper impeachment, character, opinion, and gang evidence, the evidence would be insufficient to convict him. We point out that we have already rejected defendant's challenges regarding the hearsay, impeachment, character and gang evidence.

¶ 58 As we previously observed, appellate counsel is not obligated to brief every conceivable issue on appeal. *Simms*, 192 Ill. 2d at 362. The choice of which issues to pursue is entitled to substantial deference. *Rogers*, 197 Ill. 2d at 223. With this in mind, we consider whether appellate counsel's choice not to challenge the sufficiency of the evidence satisfies both prongs of the *Strickland* test.

¶ 59 When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, our inquiry is limited to "whether, after viewing the evidence in the light

most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Cox*, 195 Ill. 2d 378, 387 (2001). It is the responsibility of the trier of fact to "fairly *** resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

¶ 60 The reviewing court must carefully examine the record evidence while bearing in mind that it was the fact finder who saw and heard the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Cunningham*, 212 Ill. 2d at 280. However, the fact a judge or jury did accept testimony does not guarantee it was reasonable to do so. Reasonable people may on occasion act unreasonably. Therefore, the fact finder's decision to accept testimony is entitled to great deference but is not conclusive and does not bind the reviewing court. *Cunningham*, 212 Ill. 2d at 280. Only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330.

¶ 61 Here, the State presented evidence that defendant, believing that Aguirre possessed a significant amount of money, broke into his home at night, held a gun to Calderon's head, and shot and killed Aguirre. Calderon testified about the circumstances of the crime and was 90% certain of her identification of defendant. She stated that she recognized him by his eyes and voice at the lineup.

¶ 62 The State also presented evidence from codefendant Griffin and several friends and acquaintances of defendant. Though these witnesses denied the veracity of their prior statements or testimony, the State properly offered these prior statements under section 115-10.1 (725 ILCS 5/115-10.1 (West 2006)). In the prior statements, multiple witnesses claimed to have heard Calderon tell firefighters while extinguishing a fire in her garage that there was $17,000 in the garage. While the truth of this statement was not relevant, the State showed that the effect of the statement motivated defendant to commit the offenses. Miller, Lowe, Williams and Malone all heard defendant discuss the idea of robbing the "Mexican." Defendant asked Miller to help him commit the crime, but Miller declined. Codefendant Griffin, who entered into a plea agreement in his case, denied his involvement at trial, but in his videotaped statement, he admitted to acting as a lookout for defendant. Griffin waited outside the house and was told to "chirp" defendant if he saw the police. Griffin heard a gunshot and saw defendant exit the house.

¶ 63 The State also matched the cartridge casing from Aguirre's home to casings recovered from an earlier shooting in which defendant was identified as the shooter. The trial court instructed the jury that the evidence of the prior shooting was to be considered only as identification evidence. Marrero and Bowman both testified about the prior shooting. Bowman did not identify defendant as the person who shot him, but he was impeached with his prior statement in which he had identified defendant as the shooter.

¶ 64 For his defense, defendant presented the alibi testimony of his mother, his girlfriend and her best friend. Despite being aware of the charges against defendant, none of the witnesses contacted the police or the prosecution with information to exonerate defendant. Williams and

Pittman testified that defendant was at Williams' apartment the night of the shooting while they worked on a paper the entire night. Defendant's mother stated that defendant picked her up the next morning to take her father to an appointment.

¶ 65 The State's evidence presented a strong circumstantial case against defendant. A rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Any conflicts in evidence or credibility determinations were left to the province of the jury. Based on the evidence presented, a reasonable doubt claim would not have been successful. We need not consider whether appellate counsel's representation was deficient because defendant cannot show that he was arguably prejudiced by his appellate counsel's decision not to challenge the sufficiency of the evidence. Defendant did not suffer any prejudice by not raising this nonmeritorious claim on direct appeal. Accordingly, this claim of ineffective assistance of appellate counsel fails.

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

¶ 67 Affirmed.