FIRST DIVISION
Rule 23 filed September 30, 2014
Modified upon denial of rehearing November 3, 2014

No. 1-12-2313
2014 IL App (1st) 122313-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 01 CR 5087
	)	
RICHARD HODGES,	)	
	)	Honorable Neera Lall Walsh,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant made a substantial showing that his counsel was ineffective for failing to interview a witness and for failing to investigate and present certain ballistics evidence; other claims did not merit an evidentiary hearing; reversed and remanded in part and affirmed in part.

¶ 2 Defendant Richard Hodges appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Defendant contends that he made a substantial showing that his trial counsel was ineffective for failing to interview three witnesses

and for failing to investigate and present certain ballistics evidence. After this court allowed defendant to file a *pro se* supplemental brief, defendant made additional claims that we also address: (1) his appellate counsel was ineffective for failing to challenge whether the evidence was sufficient to support his murder conviction; (2) his trial counsel was ineffective for not filing a motion to suppress defendant's post-arrest statement, which was involuntary and the product of illegal police conduct, (3) his trial counsel and appellate counsel were ineffective for failing to challenge his post-arrest statement on the grounds that it was illegally obtained after a warrantless arrest for which there was no probable cause; and (4) his trial counsel was ineffective for failing to challenge his defective indictment, which was filed beyond the 30-day limit. For the following reasons, we reverse and remand in part and affirm in part.

¶ 3 I. BACKGROUND

¶ 4 The record reveals that around 1 a.m. on January 20, 2001, defendant participated in a shooting incident in the vicinity of a gas station near Augusta Boulevard and Cicero Avenue in Chicago. The victim, Christopher Pitts, died as a result. Defendant was tried by jury while his two codefendants and nephews, Toniac Jackson and David Jackson, were tried simultaneously in severed bench trials. Among other charges, including aggravated discharge of a firearm and unlawful use of a weapon by a felon, the State contended that defendant was guilty of first degree murder under an accountability theory. In contrast, defendant's theory was that Pitts and his friends shot at him and therefore his actions amounted to second degree murder or self-defense. At trial, the evidence showed that defendant fired shots in Pitts's direction with a 9 millimeter gun and Toniac fired a 10 millimeter gun at Pitts. A third gun, which was .25 caliber, was recovered by police and apparently belonged to David.

¶ 5 Because defendant's postconviction claims include allegations about his counsel's investigation of specific witnesses, we note that before trial, the State indicated that it may call as witnesses Marquis Brown, James Wilson, Edward Cunningham, and Detective Andras,[1] among others. For his part, defendant indicated he would call anyone listed in the State's answer to discovery, along with Yousaf Mohammad, Forensic Investigator Chester Garrelli, Timothy Dolgach, and Detective Andras.

¶ 6 The record of pretrial proceedings includes further discussion about potential witnesses. At one point, defense counsel stated that when he looked through the discovery materials, he learned that several of the State's witnesses were incarcerated. Defense counsel also noted that one witness was not only incarcerated, but also convicted, and reported that he was in the process of taking "certain statements." At a later date, defense counsel stated that he knew that some of the State's witnesses were in custody, but their locations were unknown. Defense counsel went on to request "follow-up discovery on where they might be located and whether the State intends to use them[,] or who the State intends to use" and further stated that the addresses he had were not valid. When the case was set for trial, the State raised an issue about Marquis Brown, a potential State witness:

> "Judge, one other matter, [Marquis][2] *** Brown also known as [Marquis] Scales is a witness in this case. He was subpoenaed to be here personally. He failed to appear. We're asking leave to file a petition for rule to show cause why he should not be held in contempt ***."

[1] Detective Andras's name is also spelled "Andres" in the record. Here, we use the spelling on the State's amended answer to discovery.

[2] Marquis Brown is also referred to as Marques Brown in the report of proceedings. Here, we use the spelling in the State's amended answer to discovery.

¶ 7 The record of pretrial proceedings also includes discussion about ballistics evidence. At one point, counsel stated that he had received "certain ballistics reports" that indicated that further ballistic testing was being done. Counsel further noted that "[t]he issue is whether or not there was further discovery based on those ballistics" and reported that he needed a test run on one particular bullet found at the scene. At a later proceeding, counsel stated that certain ballistics reports were still outstanding, which the State acknowledged. Eventually, the State tendered "final discovery" to defense counsel, which included a final firearms report.

¶ 8 At trial, just before jury selection, the subjects of bullet casings and witnesses came up during a discussion about exhibit lists. Defense counsel stated that he had asked to see "certain bullet shell casings which we haven't seen" and added that "we have a certain officer who is under subpoena to testify***." Later, the court inquired about the bullet that counsel had said he did not have a chance to see. Counsel responded "[a]fter the jury selection" and the State noted that "[t]hey're all here."

¶ 9 Also before jury selection, the State noted that it intended to proceed on an accountability theory and that it would not be able to definitively show whose bullet actually hit Pitts.

¶ 10 Additionally, defense counsel addressed his decision not to file a motion to suppress an inculpatory statement that defendant made shortly after the incident:

> "Judge, we did not file one motion in particular and I want to address it. Whenever there's a statement I always ask the Court I'm not challenging the statement 'A,' that I fully investigated whether or not I thought a challenge to the statement would be something that would meet with favor with the Court.
>
> In my view it would be breaking faith with this court to attempt to argue a motion to quash a videotaped statement or suppress a videotaped statement in this

case either on the basis of voluntariness or warnings that were given. The tape speaks for itself. We did not do that.

[Co-counsel] and myself and [defendant] went over this at length. I'm just putting it on the record."

The court and defendant then had the following colloquy:

"THE COURT: Is that correct, Mr. Hodges?

DEFENDANT: Yes.

THE COURT: And you understand that your lawyer is not challenging the statement?

DEFENDANT: Yes."

¶ 11 Following opening statements, James Wilson testified that around 12:30 or 1 a.m. on January 20, 2001 he was in a van at a gas station located at Augusta and Cicero. Also in the van were Anthony Brown, Marquis Brown, "Muffin," "Little Mike," and Deonte Harris, as well as Pitts, the eventual victim. At one point, while Wilson, Pitts, and Muffin were buying water, a man who was not with Wilson's group threw a bottle at Pitts, who then ran north. Although Wilson initially testified that the man who threw the bottle only took a few steps, he admitted that he had told an assistant State's Attorney that this man shot at Pitts. Wilson further testified that the van drove off and he and Muffin ran down a side street.

¶ 12 Wilson further testified that he also saw a second man at the gas station, who he told the assistant State's Attorney was defendant. Wilson testified that this second man also chased and shot at Pitts. Wilson stated that when he returned to Augusta and Cicero, he saw that Pitts was dead. According to Wilson, no one in the van had a gun and he denied that any shooting came from the van. However, Wilson also testified that he could not tell who was firing guns during

the incident. On cross-examination, Wilson stated that although he had identified defendant in a lineup, he did not identify defendant as someone who was shooting.

¶ 13 Assistant State's Attorney Lisa Hennelly testified about the circumstances surrounding Wilson's statement, which was then published to the jury. According to the statement, Toniac threw the bottle at Pitts, and then took a gun out of his waistband and shot at Pitts while chasing him. Subsequently, Wilson observed Toniac and defendant chase Pitts, with defendant also shooting at him. Toniac turned a corner and ran to a Geo Tracker that was parked at the gas station, but defendant continued to chase Pitts. Pitts eventually slipped and defendant caught up to him. Wilson ran down a side street with Muffin and saw Pitts lying in the street at Augusta and Cicero.

¶ 14 Officer John Haritos testified that shortly after 1 a.m. on January 20, he was on routine patrol with his partner in the area of Augusta and Cicero when he heard shots fired. Officer Haritos observed a man with a gun in his hand enter a Geo Tracker. Officer Haritos followed the Tracker and testified that eventually a man—identified as Toniac—got out of the Tracker and dropped a gun to the curb. Officer Haritos recovered the gun, which was determined to be a .25 caliber Beretta.

¶ 15 In the midst of the State's case, the parties discussed other witnesses who might testify. Defense counsel stated that Detective Andras was under subpoena and "may be critical" to defendant's case. Defense counsel further stated that defendant's witnesses would consist of defendant's former employer, Detective Andras, and "possibly one other witness." Additionally, the court advised the parties that it had located a letter from Kris Rastrelli from the Illinois State Police regarding a discrepancy with respect to evidence submitted by the police department. Subsequently, referencing different documents, defense counsel stated that "[o]ne of the

problems is that the author of this report or one of the letters is Detective Cunningham," whom the State was trying to help defendant locate. Defense counsel added that the parties may work out a stipulation, "but if Cunningham then becomes important on this case if he weren't before he might be important now. Hopefully we'll find him still but that remains an issue."

¶ 16 Returning to presenting testimony, the State called forensic investigator Robert Tovar to describe his investigation of the scene, which occurred during the early morning hours of January 20. Tovar testified that the area was cordoned off with tape when he arrived, and that he investigated the space inside the tape as well as other areas. From near Pitts's body, Tovar recovered approximately seven 9 millimeter cartridge casings, one fired bullet, and four metal fragments. From the area around the gas station, Tovar recovered approximately eight .25 caliber cartridge casings, four 9 millimeter cartridge casings, and five 10 millimeter cartridge casings. Tovar observed a van with bullet holes that was parked near Pitts's body and had a fired bullet in the front passenger seat. Additionally, Tovar recovered a bullet from the wall of a nearby apartment and a bullet from Pitts's clothing.

¶ 17 On cross-examination, Tovar acknowledged that Detective Andras and Detective Cunningham had been with Tovar and his partner for part of the investigation, "directing what they want done," but stated that Tovar and his partner collected evidence. In response to defense counsel's question about whether Tovar had instruments to help him, Tovar replied that he did not and explained his technique for finding evidence. When defense counsel asked whether Tovar would have needed his flashlights, Tovar responded, "[s]ometimes yes, sometimes no."

¶ 18 Kris Rastrelli, a forensic scientist for the Illinois State Police, stated that the 10 millimeter cartridge casings that were recovered were fired from the same firearm, as were the 9 millimeter cartridge casings that were recovered. Additionally, the recovered .25 caliber cartridge casings

were fired from the recovered .25 caliber handgun. Rastrelli also testified that other bullets and fragments that were recovered were 9 millimeter/.38 caliber.

¶ 19 On cross-examination, Rastrelli acknowledged that the 9 millimeter shell casings she examined had two different head stamps and were therefore from different manufacturers. Rastrelli also admitted that there was one fired bullet jacket fragment for which she could not identify the caliber. Additionally, she acknowledged that a metal fragment and two parent bullet cores were unsuitable for further microscopic comparisons. Rastrelli also acknowledged that as of approximately a year and a month from the date of the shooting, she had not received the bullets to examine, though she eventually completed her examination.

¶ 20 Dr. Tae An, a deputy medical examiner who performed Pitts's autopsy, testified that Pitts had six entry wounds and six exit wounds. Dr. An additionally testified that the wounds did not indicate that the bullets were fired from close range. Dr. An concluded that Pitts died of multiple gunshot wounds and the manner of death was homicide.

¶ 21 Assistant State's Attorney Scott Herbert testified about the statement defendant had made at the police station. After defendant told Herbert that he wanted to make the statement, Herbert asked a detective that had been present to leave the room, whereupon Herbert asked defendant how he had been treated, if he needed anything, if he wanted anything to eat or drink, and if he needed to use the bathroom. In response, defendant said that he had been "treated fair."

¶ 22 In his statement, defendant recalled that on January 20, he was in a Tracker with Toniac and David. Defendant had a 9 millimeter handgun, but he did not know if Toniac and David also had weapons. After defendant, Toniac, and David arrived at the gas station, Toniac went to a cashier window to buy some juice. As Toniac waited in line, Pitts and other men arrived in a van. Pitts and Toniac began arguing and Toniac tried to hit Pitts with a bottle. After the door to

the van opened and another man began to get out, defendant fired two shots over the men's heads, and Toniac and the other men began to run. Toniac and defendant then both fired shots and chased Pitts. When defendant got to the middle of the street, he ran out of bullets, but kept chasing Pitts. At one point, Pitts fell over, which defendant assumed was because Pitts had been shot. Eventually, defendant ran back to the Tracker, but changed course when he noticed it was being followed by a squad car. As defendant ran, he dismantled his gun and threw various pieces into alleys to prevent anyone else from getting a hold of it.

¶ 23 At the end of his statement, defendant stated that he had been treated "fair" in police custody, had been given something to eat and drink, and that no threats or promises had been made to make defendant give his statement.

¶ 24 On cross-examination, Herbert stated that he did not remember whether defendant had said anything during various conversations that was not mentioned in the videotaped statement.

¶ 25 Defendant testified in his defense, stating that he had fired the shots at the gas station because the group from the van was "fixing to do something" and he wanted to protect himself and Toniac. Defendant further explained that he was afraid of the group in the van because they were "known in the neighborhood for doing a lot of different stuff," such as carrying guns and conducting carjackings. Defendant denied that he fired in anyone's direction and thought that after he fired the shots, the group would disappear and leave Toniac alone.

¶ 26 Defendant further testified that after he fired the shots, the group ran around the gas station. Defendant also heard a few shots, including one that went past his head, but he did not see any guns. Defendant, Toniac, and Pitts ran off. When defendant turned a corner, he saw that the door to the van was open and "it was like a burst***of fire came out of the van." Defendant then fired toward Pitts, who was in front of him, because defendant thought Pitts was shooting at

him. According to defendant, a lot of shots were being fired at this point. Eventually, defendant ran out of bullets and went to the middle of the street, where he saw a squad car and heard three or four more shots. Defendant ran away from the squad car and threw away pieces of his gun before he ultimately returned to his home.

¶ 27 In addition to giving his version of the incident, defendant also testified about the circumstances of his videotaped statement. According to defendant, he made the statement because he wanted to "tell them the truth." Defendant maintained that he had told Herbert that he heard bullets and saw gunfire, but did not say that on the videotape because Herbert "didn't ask me that question" and had told defendant to "just answer yes or no." Defendant stated that he had no complaints about his treatment at the police station.

¶ 28 Defendant's former employer, Tim Dolgach, testified that other people at his company spoke of defendant as easy and enjoyable to work with.

¶ 29 Before the defense rested, and during a discussion in chambers, defense counsel stated that Officer Cunningham and Officer Andras had been subpoenaed, but defense counsel would not call them as witnesses. Defense counsel stated that "[t]here has been continuing attempts at contact with Officer Cunningham who is in rehab," and "[w]e have spoken to the [d]efendant and advised him of the circumstances and which route he would like us to take."

¶ 30 As to jury instructions, defense counsel requested instructions for second degree murder and self-defense because defendant claimed he was being shot at and that he had been in a crossfire. Defense counsel noted defendant's testimony that he did not know if Pitts had a gun and that he ran because "they were shooting" and it was his only way out. The State objected, asserting that neither self-defense nor second degree murder applied and defendant could never

have thought force was necessary. Ultimately, the court concluded that defense counsel's requested instructions would be given because "there has been some evidence."

¶ 31 The jury instructions included the following:

> "A mitigating factor exists so as to reduce the offense of first degree murder to the lesser offense of second degree murder if at the time of the killing the defendant believes that circumstances exist which would justify the deadly force he uses, but his belief that such circumstances exist is unreasonable."

The jury was also instructed that:

> "The defendant has the burden of proving by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder *** [Y]ou must be persuaded considering all the evidence in the case that it is more probably true than not true that the following mitigating factor is present: that the defendant at the time he performed the acts which caused the death of Christopher Pitts believed the circumstances to be such that they justified the deadly force he used, but his belief that such circumstances existed was unreasonable."

Additionally, the jury was instructed that:

> "A person is justified in the use of force when and to the extent that *** he reasonably believed that such conduct is necessary to defend himself or another against the imminent use of an unlawful force.
>
> However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such

force is necessary to prevent imminent death or great bodily harm to himself or another."

¶ 32 In closing argument, the State emphasized that Pitts was unarmed and noted that no weapon was recovered from him. According to the State, defendant admitted that he committed murder where he admitted that he chased and fired a gun at Pitts and did not see Pitts with a gun or see him fire any shots.

¶ 33 In contrast, defense counsel contended that other guns were involved in the incident, pointing to the different head stamps on the recovered 9 millimeter bullets. Additionally, defense counsel pointed to purported weaknesses in the investigation. Defense counsel questioned whether Tovar went to areas other than those that were previously cordoned off, such as the snow and places where people would be hiding, and noted that Tovar did not return to the scene in the morning when it was light out.

¶ 34 In rebuttal, the State challenged the suggestion that other guns were involved and asserted that the only shells found at the scene were from the guns belonging to David, Toniac, and defendant. The State reiterated its previous contention that Pitts was unarmed, stating, "I will say probably fifty times, it's important, [Pitts] is shot six times in the back, didn't have a gun."

¶ 35 Following deliberations, the jury found defendant guilty of first degree murder, aggravated discharge of a firearm, and unlawful use of a weapon by a felon. Defendant was sentenced to 60 years in prison for murder, which included a 20-year enhancement because defendant personally discharged a firearm. Consecutive to the murder sentence, defendant was sentenced to concurrent 10 and 5-year prison terms for aggravated discharge of a firearm and unlawful use of a weapon by a felon.

¶ 36 On direct appeal, defendant contended: (1) the State failed to prove beyond a reasonable doubt that he was guilty of aggravated discharge of a firearm; (2) the trial court erred when it allowed the State to publish Wilson's statement as substantive evidence; and (3) the statute mandating the addition of 20 years to his murder sentence was unconstitutional. On April 22, 2005, this court affirmed defendant's convictions and sentence. *People v. Jackson*, Nos. 1-03-2233, 1-03-3099 & 1-03-3216 (cons.) (2005) (unpublished order under Supreme Court Rule 23), *appeal denied*, No. 100659 (Dec. 1, 2005).

¶ 37 On January 12, 2006, defendant filed a *pro se* postconviction petition that alleged in part that he had received ineffective assistance of counsel at trial. In particular, defendant contended that his counsel failed to recite and introduce evidence of additional shooters. According to defendant, counsel had boasted to defendant about "particular crime scene reports" that defendant saw and that showed members of Pitts's group were firing handguns. Defendant alleged that the reports were signed by Detective Cunningham and indicated that he retrieved 9 millimeter, 10 millimeter, .22 caliber, .25 caliber, and .45 caliber casings, many of which were not submitted as evidence at defendant's trial. Defendant contended that the reports would have shown that Pitts and his group were shooting handguns and would have supported defendant's claim of self-defense. Defendant further alleged that his counsel went on with the trial even though he had not received the evidence on another set of spent shell casings that were 9 millimeter, .22 caliber, and .45 caliber. Additionally, defendant stated that more than 45 to 50 spent shell casings were recovered from the scene, but only 22 were presented at trial.

¶ 38 Defendant also alleged that his counsel should have called Detective Cunningham to testify. According to defendant, Detective Cunningham would have testified about the other set of shell casings that Pitts and his group were firing, which defendant alleged were 9 millimeter,

.22 caliber, and .45 caliber. Defendant averred that counsel "knew how extremely critical this officer was" to his trial, but did not ask for a continuance or mistrial when counsel had trouble locating him. Defendant also alleged that his counsel lied when he told the court that defendant was consulted about whether to call as witnesses Detective Andras and Detective Cunningham.

¶ 39 In an affidavit, defendant recalled a conversation he had with his counsel in 2004 about Detective Cunningham and Detective Andras. There, counsel had stated that because neither detective had testified, defendant had a mistrial. However, counsel had not asked for a mistrial "because he felt lucky." Defendant further averred that, because the detectives were key to his defense, he never would have agreed to not call the detectives to testify.

¶ 40 Defendant additionally alleged in his *pro se* petition that his counsel failed to "interview and/or investigate" several witnesses, including Michael Glasper, Marquis Scales, and Dontay Sanders. As to Glasper, defendant averred that in 2002, Glasper told him that he had been at the gas station and saw Pitts with a weapon. Defendant further stated that before trial, he told counsel about Glasper. Defendant also averred that he told counsel where to locate Glasper and that Glasper was willing to talk to counsel and testify. However, counsel did not interview Glasper or investigate what he had shared.

¶ 41 In an affidavit attached to the petition, Glasper stated that he and defendant were cellmates in the county jail in July 2002. During a conversation, Glasper realized he was familiar with the circumstances of defendant's case and disclosed that on January 20, 2001, at around 1:10 a.m., he was driving on the 4800 block of Augusta when he heard 15 to 20 gunshots. Glasper made several maneuvers and ultimately drove down Cicero, where he observed two or three people standing around someone lying on the ground. After Glasper parked his car near a gas station and returned to the small crowd, he saw a bystander pick up a black handgun and rush

off. Within minutes, a van pulled up and two men got out. Glasper stated that although he would have testified, defendant's counsel never contacted him about doing so.

¶ 42 As to Scales, defendant averred that he was one of the men in the van and knew that Pitts had a gun. Defendant further stated that in 2004, Scales went to defendant's parents' house and told defendant's family that the State did not want to use him as a witness because of what he knew about the case.

¶ 43 In his affidavit, Scales stated that he was in the van with "Lil Mike," James, "Muffin," "Ant," Pitts, and Dionta. Scales further stated that when the group arrived at the gas station, Muffin, James, and Pitts left the van to buy something to drink. Within five to seven minutes, Scales heard two gunshots and ducked. Later, he saw Pitts lying on the ground and a bystander pick up a black handgun from Pitts.

¶ 44 Defendant averred that a third witness, Sanders, was also in the van with Pitts. In 2005, defendant spoke to Sanders, who stated that Pitts had a gun when he left the van because "of the area and time." Sanders also asked defendant why his counsel did not contact him.

¶ 45 In his affidavit, Sanders stated he was in the van with "Lil Mike," James, Muffin, "Ant," Pitts, Deontae, and Marquis. Sanders further stated that when Pitts got out of the van to buy a drink, he took his gun "because it was very late and it's always something around in this area." After hearing gunshots, the van drove off, but came back to the gas station. There, Sanders saw a few people standing around Pitts, who was lying on the ground. Sanders averred that "some guy" picked up a handgun off the ground from where Pitts was lying and then quickly walked away.

¶ 46 At the end of his petition, defendant discussed his attempts to attach more support for his claim about the additional shell casings. In an attached request for a court order, defendant

stated that a document from the medical examiner's office indicated that more shell casings were recovered from the scene than were presented at trial, and these additional shell casings were 9 millimeter, .45 caliber, and .22 caliber. Eventually, defendant spoke to an employee at the medical examiner's office who stated that the document in question was a crime scene progress report that was signed by Detective Cunningham.

¶ 47 On February 21, 2006, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit. The appellate court affirmed the summary dismissal (*People v. Hodges*, No. 1-06-0902 (2008) (unpublished order under Supreme Court Rule 23)) and defendant was subsequently granted leave to appeal to the supreme court.

¶ 48 Ultimately, the supreme court reversed and remanded the petition for second-stage proceedings. *People v. Hodges*, 234 Ill. 2d 1 (2009). As to the legal basis for defendant's claims, the court found that although the testimony of Glasper, Scales, and Sanders would not have supported defendant's theory of self-defense, it was at least arguable that testimony indicating that Pitts was armed would have supported "unreasonable belief" second degree murder. *Id*. at 20-21. The court further found that under a liberal construction, defendant's petition included this claim. *Id*. at 21. A dissenting opinion contended that the petition was properly dismissed because defendant could not meet the statutory requirements for second degree murder. *Id.* at 25-30 (Garman, J., dissenting, joined by Thomas, J. and Karmeier, J.). The majority concluded that this argument was more appropriate to the second stage of proceedings. *Id.* at 22.

¶ 49 On remand, postconviction counsel was appointed. On August 16, 2011, postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) stating that he had consulted with defendant either by mail, phone, or in person to ascertain his

contentions of deprivation of constitutional rights, examined the transcript of the record of proceedings at trial, and prepared an amended pleading that was necessary to adequately present, preserve, and supplement defendant's claims.

¶ 50 In addition to incorporating his *pro se* petition, defendant's amended petition contained eight other claims: (1) defendant was actually innocent based on Scales's and Sanders's affidavits, which indicated Pitts was armed; (2) his trial counsel was ineffective for not presenting Glasper's exculpatory testimony that Pitts was armed; (3) defendant was denied due process at a grand jury when prosecutors compelled Wilson to falsely implicate defendant; (4) defendant's trial counsel was ineffective for not challenging his post-arrest statement, which was involuntary and the product of illegal police conduct; (5) defendant's trial counsel and appellate counsel were ineffective for failing to challenge his post-arrest statement on the grounds that it was illegally obtained after he was arrested without a warrant or probable cause; (6) defendant's trial counsel was ineffective for failing to sufficiently demand explanations for inconsistencies and discrepancies, or document the sloppy manner in which the recovered ballistic evidence was handled; (7) defendant's appellate counsel was ineffective for failing to challenge whether the evidence was sufficient to support his murder conviction based on accountability principles and based on a finding that he fired the fatal shots; and (8) defendant's trial counsel was ineffective for failing to challenge the indictment, which was filed beyond the 30-day limit.

¶ 51 Defendant attached a number of supporting documents to his amended petition, including the same affidavits from Scales, Sanders, and Glasper that were attached to his *pro se* petition. Additionally, defendant attached two of his own affidavits. In the first, he averred that Scales and Sanders were newly-discovered witnesses that he was not aware of before trial. He further stated that he learned of Scales in July 2005 and that Scales would have testified at defendant's

trial if someone had contacted him. Defendant also averred that he learned of Sanders in August 2005, and because defendant did not know of Sanders before trial, he could not have given his counsel Sanders's contact information. Defendant's second affidavit described his treatment at the police station. Defendant averred that after he was locked in a room for 45 to 55 hours, Detective Kato hit defendant twice in the chest. Defendant also stated that Detective Kato threatened to "make this case stick" to defendant's son and to destroy defendant's parents' home looking for a gun. Defendant stated that he gave in and told the detective he would say whatever the detective wanted him to say. Detective Kato then instructed defendant to make a videotaped statement and told defendant he would be in the room every time someone else spoke to defendant. Defendant further averred that in March or April 2001, he told his counsel about what happened at the police station. However, counsel replied that he would not challenge defendant's statement because defendant did not look beat up and "even stated that whenever there is a statement, I always ask the Court I'm not challenging the statement."

¶ 52 Also attached to the amended petition were a number of reports, including defendant's arrest report that stated that defendant "had been identified as being one of the offenders who had shot at the victim with a handgun causing his death."

¶ 53 An attached report from the Cook County medical examiner's office stated:

> "In summary, the subject an eighteen year old male was standing outside a vehicle parked in a gas station talking to another male, when reportedly three offenders walked up with hand weapons, and fired shots at the subject. The subject ran southbound on Cicero Avenue, and was being pursued by the offenders, who were shooting at the subject as he was running.

> Reportedly the subject was struck multiple times, and fell on the street at the above location of occurrence. Police advise that two of the offenders are in custody, and numerous shell casings were found at the scene, consisting of .22 calibre, 9 mm, and .45 calibre type ammunition. This case was ordered into the Forensic Institute."

This report indicated that Detective Cunningham was the person interviewed for the report and the reporting investigator was Chester Garelli.

¶ 54 Also attached to the amended petition was a report that described evidence received by the Illinois State Police Forensic Science Center, which consisted of various bullets, fragments, and .25 caliber, 10 millimeter, and 9 millimeter cartridge casings. Additionally, defendant attached a discrepancy notification from Kris Rastrelli from the Illinois State Police, indicating that although the inventory stated that five 10 millimeter cartridge casings were submitted, "only 4 [unreadable] of 10 mm caliber were inside the envelope."

¶ 55 The State filed a motion to dismiss the petition on December 15, 2011. In part, the State asserted that Glasper's affidavit did not support defendant's claim that Glasper saw Pitts with a gun, and moreover, the affidavit indicated that Glasper did not see the shooting. Further, the State noted the dissent's argument in *Hodges*, 234 Ill. 2d 1, that defendant's theory of second degree murder was completely contradicted by the record, and asserted that nothing defendant presented had changed that conclusion.

¶ 56 The State also addressed defendant's claim that his confession was coerced, contending that this claim was refuted by the videotaped statement itself and the trial record. To counter defendant's claim that the police lacked probable cause to arrest him, the State attached a copy of a police report which purported to show that David Jackson identified defendant as a shooter. As

to defendant's claims about counsel's handling of the ballistics evidence, the State contended that defendant failed to show he was prejudiced where defendant admitted he had a 9 millimeter gun and that he shot at Pitts.

¶ 57 At the hearing on the motion to dismiss, the court asked postconviction counsel why he had not attached affidavits from the two detectives mentioned in the petition instead of just the reports that were attached. Postconviction counsel replied that in addition to being valuable, the reports were "all we have." Postconviction counsel further stated that having affidavits "would be great," but he had not tried to get the affidavits because "let's just say our office didn't do that." Postconviction counsel went on to posit that asking a detective for an affidavit "saying that he acted improperly and illegally arrested someone would be fruitless to try."

¶ 58 On July 18, 2012, the court granted the State's motion to dismiss the petition. In part, the court found that as to defendant's claim that his trial counsel was ineffective for not presenting Glasper's testimony, defendant could not show prejudice because Glasper's affidavit was "vague and of little evidentiary value." The court further found that defendant's remaining claims of ineffective assistance of counsel relating to a motion to suppress, failure to investigate, and the allegedly defective indictment were waived because they are matters of record that defendant failed to raise on direct appeal.

¶ 59 II. ANALYSIS

¶ 60 As noted, defendant has raised issues on appeal through his attorney, the Office of the State Appellate Defender, and by filing a *pro se* brief. We first consider the issues raised in the State Appellate Defender's brief.

¶ 61 A. Issues in the State Appellate Defender's Brief

¶ 62 Defendant first contends that he is entitled to an evidentiary hearing to resolve whether Pitts was armed, as Glasper, Scales, and Sanders now attest. Defendant argues that his petition and supporting affidavits made a substantial showing that his trial counsel was ineffective for failing to interview Glasper, Scales, and Sanders. Defendant asserts that each of the witnesses would have provided crucial corroboration for defendant's claim that he believed Pitts was armed. According to defendant, the jury would have been far more likely to find that defendant believed, albeit unreasonably, that deadly force was necessary if the evidence showed that Pitts had been armed at the time.

¶ 63 The Act provides a three-stage process by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). During the second stage of proceedings, a defendant must make a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 35. At this stage, the circuit court may not engage in any fact-finding and all well-pleaded facts are taken as true. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). A petition should be dismissed only when the petition's factual allegations—liberally construed in favor of the defendant and in light of the original trial record—fail to make a substantial showing of imprisonment in violation of the state or federal constitution. *Id*. at 382. We review the second-stage dismissal of a postconviction petition *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 64 Generally, to prevail on a claim of ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. *Id*. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Bull*, 185 Ill. 2d 179, 203 (1998).

¶ 65 We first consider whether counsel was ineffective for failing to interview Glasper. Counsel has a duty to make factual and legal investigations on behalf of a client (*People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001)) and must explore all readily available sources of evidence that might benefit the client (*People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005)). Whether counsel was ineffective for failing to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. *Id*. A particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. (Internal quotation marks omitted.) *People v. Guest*, 166 Ill. 2d 381, 400 (1995).

¶ 66 Taking the facts in defendant's petition and Glasper's affidavit as true (*Coleman*, 183 Ill. 2d at 381), defendant told counsel about Glasper before trial, but counsel did not interview him. Glasper averred that around the time of the incident and after hearing gunshots in the vicinity, he observed someone lying on the ground and a bystander pick up a black handgun and rush off. Glasper also observed two men exit a van that arrived a few minutes later.

¶ 67 The failure to interview witnesses may indicate incompetence, particularly when the witnesses are known to trial counsel and their testimony may be exonerating. *People v. Steidl*, 177 Ill. 2d 239, 256 (1997). Here, Glasper's testimony would have supported defendant's otherwise uncorroborated testimony that he believed he was being shot at, thus supporting a second degree murder verdict. Whether Pitts was armed and other shooters were involved were key issues in the case. Defendant testified at trial that although he did not see any guns, a shot went past his head and he fired at Pitts because he thought Pitts was shooting at him. Trial

counsel repeatedly tried to suggest that other people were shooting, including when he raised questions about the extent of Tovar's investigation and asserted that the different head stamps were evidence of another 9 millimeter gun. In its closing argument, the State emphasized that Pitts was unarmed. Glasper's testimony that a gun was picked up at the scene would have directly supported the defense's theory at trial. If the jury had heard that another gun was retrieved, it would have lent support to defendant's otherwise unsupported theory that he genuinely, though unreasonably, thought he had to shoot because Pitts and others were shooting at him.

¶ 68 We are not persuaded by the State's contention that counsel had a strategic reason for not interviewing Glasper. Generally, a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. (Internal quotation marks omitted.) *Strickland*, 466 U.S. at 689. The State alleges that Glasper was the defendant in *People v. Glasper*, 234 Ill. 2d 173 (2009), who was convicted of first degree murder and attempted first degree murder. Defendant contends, and we agree, that the State has failed to substantiate this assertion. See Ill. S. Ct. R. 341(h) (eff. Feb. 6, 2013) (argument "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"). As the record does not suggest a strategic reason for why counsel did not interview Glasper and his testimony would have supported defendant's second degree murder theory, we find defendant has made a substantial showing that his counsel was ineffective in this respect. See *People v. Makiel*, 358 Ill. App. 3d at 107-109 (petition advanced to evidentiary hearing where the record did not reflect a strategic reason for failing to contact, interview, subpoena, and call a witness and that witness's testimony would have contradicted certain trial testimony); *People v. Bates*, 324 Ill. App. 3d 812, 815-16 (2001) (petition advanced

to evidentiary hearing where a witness told police that he saw a gun lying on the ground next to the victim's hand and that an unknown male took the gun before the police arrived, the record did not provide a definitive answer as to why the witness was not called to testify, and the witness "could have been an important witness for defendant," who claimed self-defense at trial).

¶ 69 The State also relies on the dissenting opinion in *Hodges*, 234 Ill. 2d 1 (2009), which stated that defendant's second degree murder claim was meritless because defendant could not satisfy the requirements for such a verdict. *Hodges*, 234 Ill. 2d at 29-30 (Garman, J., dissenting, joined by Thomas, J. and Karmeier, J.). The State asserts that because defendant was the aggressor, he is eligible for second degree murder only if: (1) the force he was threatened with was so great that he reasonably believed that he was in imminent danger of death or great bodily harm, and he exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant; or (2) the defendant withdrew from physical contact with the assailant and indicated clearly to the assailant that he desired to withdraw and terminate the use of force, but the assailant continued or resumed the use of force. 720 ILCS 5/7-4(c) (West 2000). The State argues that according to defendant's own statement, his actions did not fit either scenario. The State also seems to take issue with the trial court's decision to give the second degree murder instruction in the first place, citing *People v. Morgan*, 187 Ill. 2d 500, 534 (1999), for the proposition that an instruction on voluntary manslaughter based on unreasonable belief in justification is permissible only if a defendant presents some evidence that unlawful force was used against the defendant, and the defendant was not the aggressor.

¶ 70 Unfortunately for the State, the jury instructions are already settled. Had the State requested instructions about when an aggressor can use deadly force, perhaps they would have

been granted and the jury would have rejected defendant's second degree murder claim on that basis. However, the State never requested such an instruction. Moreover, the trial court determined there was sufficient evidence for a second degree murder instruction. Both the State and the defendant are entitled to have the jury instructed on their theories of the case, and an instruction is warranted if there is any evidence, no matter how slight, to support it. *People v. Barnard*, 208 Ill. App. 3d 342, 349-50 (1991). It would be improper now to erase the second degree murder instruction as it was given or impose a new instruction, as the State seems to request. See *People v. Milsap*, 189 Ill. 2d 155, 163-64 (2000) (noting that jury instructions must be settled before attorneys give their closing arguments). Accordingly, we are not persuaded by the State's argument.

¶ 71 We next address whether counsel was ineffective for failing to interview Scales and Sanders. Defendant asserts that counsel was obligated to interview them because they were both in the van.

¶ 72 Both defendant and the State agree that Scales is Marquis Brown. During pretrial proceedings, an assistant State's Attorney stated that Marquis Brown was also known as Marquis Scales, and that he was a witness for the State who failed to appear in response to a subpoena. Counsel was likely aware of Marquis Brown before this point because he was listed as a potential witness on the State's amended answer to discovery. In his affidavit, Scales does not state that counsel did not interview him, and defendant only stated in his affidavit that Scales would have testified if someone had contacted him. There are no affirmative indications in the petition or record that Scales was not actually interviewed. Indeed, counsel's comments during pretrial proceedings suggest that he investigated the people on the State's list of potential witnesses, fulfilling his duty to conduct reasonable investigations or make a reasonable decision

that makes particular investigations unnecessary. (Internal quotation marks omitted.) *People v. Domagala*, 2013 IL 113688, ¶ 38. At various points, counsel stated that he learned that several of the witnesses were incarcerated and that he was in the process of taking statements, and asked for follow-up discovery on where some witnesses were located and who the State intended to use as witnesses. Defendant contends that once it was clear that Scales was not willing to testify for the State, the need for counsel to interview him became even stronger. As noted, the record indicates that counsel fulfilled his duty with respect to Scales. Even if Scales was not interviewed, defendant's assertion that Scales suddenly became helpful for the defense is speculative, and insufficient to overcome the presumption that any failure to interview Scales was valid trial strategy (*People v. Calhoun*, 404 Ill. App. 3d 362, 383 (2010)), given that he was a witness for the State until the eve of trial. Based on the affidavits and petition, Scales only became helpful after trial, either when he spoke to defendant's parents in 2004 or when defendant learned of him in 2005. Defendant has failed to show that his counsel performed deficiently, and therefore he has not made a substantial showing that his counsel was ineffective for not interviewing Scales.

¶ 73 Defendant has also failed to show that his counsel was ineffective for not interviewing Sanders. Unlike Scales, Sanders's name does not appear anywhere in the record and appears to be a new occupant of the van. In his affidavit, defendant stated that he only learned of Sanders in 2005 and could not have provided his counsel with Sanders's contact information because defendant did not know of Sanders before trial. We fail to see how counsel could be deficient for failing to interview a witness he would have no reason to know existed. See *People v. Blankley*, 319 Ill. App. 3d 996, 1005 (2001) (counsel not deficient for failing to call unnamed and unknown witnesses on defendant's behalf).

¶ 74 Arguing in the alternative, defendant next contends that Sanders's and Scales's affidavits made a substantial showing of an actual innocence claim. In order to succeed on a claim of actual innocence, a defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. Evidence is new if it was discovered after trial and could not have been discovered earlier through the exercise of due diligence. *Id.* Putting aside for the moment the question of whether Scales is actually a newly-discovered witness, defendant's actual innocence claim suffers from a different problem. A free-standing claim of innocence means that the newly-discovered evidence being relied on is not being used to supplement an assertion of a constitutional violation with respect to the trial. (Internal quotation marks omitted.) *People v. Hobley*, 182 Ill. 2d 404, 443-44 (1998); *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008). Here, because defendant used the same allegations in Scales's and Sanders's affidavits to support his ineffective assistance of counsel claim, the affidavits cannot also be used to support a free-standing claim of actual innocence. See *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007) (affidavit used to assert ineffective assistance of counsel claims could not also be used to support a free-standing claim of actual innocence). As a result, defendant's actual innocence claim fails.

¶ 75 In reaching this conclusion, we disagree with defendant's contention, raised in his petition for rehearing, that we are prohibiting a defendant from pleading an ineffectiveness claim and an actual innocence claim based on the same witness. Consistent with precedent, we are only stating that the same evidence cannot be used to support both claims. See *Hobley*, 182 Ill. 2d at 444 (State's actions regarding a fingerprint report and second gasoline can found at scene may have established due process claim under *Brady*; consequently, evidence did not support claim of actual innocence); *People v. Washington*, 171 Ill. 2d 475, 479 (1996) (same testimony that

supported an ineffective assistance claim could support a claim of actual innocence where ineffective assistance claims were stricken under the fugitive dismissal doctrine).

¶ 76 Defendant next contends that he made a substantial showing that his trial counsel was ineffective for failing to investigate and present evidence that more bullet casings were recovered from the scene than were introduced at trial. Defendant points to the report from the Cook County medical examiner's office attached to his amended petition that indicated that .22 caliber, 9 millimeter, and .45 caliber casings were found at the scene. Defendant argues that the presence of .22 and .45 caliber casings necessarily indicates the presence of other shooters, and this evidence would have corroborated defendant's testimony that Pitts and his friends were armed and fired guns, thus making defendant's testimony that he believed his actions were justified more credible. Defendant further asserts that evidence of other shooters would have destroyed the State's theory of the case, which was that defendant could not have believed he was in danger where no other shells were at the scene other than those tied to defendant and his codefendants.

¶ 77 As a preliminary matter, the State characterizes defendant's claim as contending that counsel was ineffective for not introducing the medical examiner's report, which was not referred to in his *pro se* petition, and then asserts that this claim is raised for the first time on appeal. We disagree with the State's narrow conception of defendant's claim. In his *pro se* petition, defendant contended that his counsel failed to present evidence of additional shooters and referred to reports that would have shown that Pitts and his group were shooting. In his amended petition, defendant contended that his counsel should have demanded explanations for inconsistencies and discrepancies, or documented the sloppy manner in which the ballistics evidence was handled, and attached the medical examiner's report. Rather than contend that his counsel was ineffective for failing to introduce the medical examiner's report, defendant made a

broad claim about counsel's approach to the ballistics evidence, which is supported by the medical examiner's report.

¶ 78 Turning to the merits, defendant's petition and the medical examiner's report raise questions about the extent of counsel's investigation and why counsel declined to introduce this evidence, whether through testimony from Detective Cunningham or through a different avenue. Defendant claims that counsel had a report that showed the existence of additional and different shell casings, but did not introduce it or call Detective Cunningham, who allegedly signed various reports and was the person interviewed for the medical examiner's report. Based on the report of proceedings, defense counsel initially planned to call Detective Cunningham, but then decided against it—a decision defendant maintains in his petition that he would not have agreed to and was made without defendant's input. While counsel stated at the beginning of trial that he had not seen certain shell casings, the report of proceedings also suggests that counsel saw them at some later point. We note that a factual dispute raised by the pleadings, such as whether additional bullet casings were recovered, cannot be resolved at the second stage of proceedings. See *People v. Morris*, 335 Ill. App. 3d 70, 85 (2002). Overall, questions remain about defense counsel's investigation and failure to present the evidence of additional casings. An evidentiary hearing will resolve the unanswered questions about the extent of counsel's investigation and why he did not introduce evidence of any additional calibers of bullet casings recovered. See *id.* at 86 (evidentiary hearing would provide opportunity to answer questions about counsel's actions and the extent of his investigation).

¶ 79 Moreover, this evidence would have been particularly helpful to defendant in light of his uncorroborated testimony that he saw a burst of gunfire from the van, many shots were fired, and he was shot at. As noted, defense counsel tried to suggest that other guns had been involved and

pointed to weaknesses in the investigation. Significantly, the bullets in the medical examiner's report are of a different caliber than the bullets attributed to his codefendants. The additional casings would have provided important evidence to support defendant's testimony that Pitts and others were shooting at him. With this evidence, there is a reasonable probability that defendant would have been found guilty of second degree murder based on his unreasonable but sincere belief that his actions were justified because Pitts and others were shooting during the incident.

¶ 80 As an alternative argument that we need not resolve, defendant lastly contends that we should remand for further second-stage proceedings before a different court because the trial court failed to perform its designated function under the act. Defendant argues that the dismissal order shows that the court failed to understand and evaluate defendant's second degree murder claim and incorrectly found that certain claims were waived. We are remanding two of defendant's claims for a third-stage evidentiary hearing—his counsel was ineffective for failing to interview Glasper and for failing to investigate and present the evidence of additional casings. However, we note that because our review is *de novo* (*Pendleton*, 223 Ill. 2d at 473), we are not bound by the circuit court's reasoning. The question is the correctness of the result reached, and not the correctness of the reasoning upon which that result was reached. *People v. Johnson*, 208 Ill. 2d 118, 128 (2003).

¶ 81 B. Issues in Defendant's *Pro se* Brief

¶ 82 We next address the issues that defendant raised in his *pro se* brief. Defendant first contends that his appellate counsel was ineffective for failing to challenge whether the evidence was sufficient to support his murder conviction. Defendant argues that the jury instructions were unclear and so the verdict does not indicate whether defendant was found to be the fatal shooter

or whether he was guilty based on an accountability theory. Defendant challenges the sufficiency of the evidence based on both possibilities.

¶ 83 The *Strickland* standard applies equally to claims of ineffective assistance of appellate counsel. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). To succeed, a defendant must show that the failure to raise an issue on appeal was objectively unreasonable and this decision prejudiced the defendant. *People v. Johnson*, 205 Ill. 2d 381, 405-06 (2002). Appellate counsel need not brief every conceivable issue (*Id*. at 406), and if the underlying issue is without merit, the defendant was not prejudiced (*People v. Rogers*, 197 Ill. 2d 216, 223 (2001)).

¶ 84 A person is accountable for the conduct of another when either before or during the commission of the offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees, or attempts to aid the other person in the planning or commission of the offense. 720 ILCS 5/5-2(c) (West 2000). To prove that a defendant possessed the intent to promote or facilitate the crime, the State may present evidence that either (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design. *People v. Fernandez*, 2014 IL 115527, ¶ 13.

¶ 85 The jury instructions were entirely consistent with the State's theory at trial that defendant was guilty of first degree murder through accountability and it was not known who fired the fatal shots. In support of his argument that the instructions made the verdict unclear, defendant points to the proposition that, to prove a defendant committed murder, the State had to prove that "defendant personally charged a firearm." We disagree that including this proposition blended different theories of defendant's guilt. The instructions did not ask the jury to find that defendant personally discharged a firearm that caused Pitts's death, which would make defendant the person who killed Pitts. Instead, the instructions only required the jury to find that defendant

fired a gun, which was consistent with a theory that defendant was legally responsible for Pitts's death even if it could not be proven who fired the shots that killed Pitts. See *People v. Flynn*, 2012 IL App (1st) 103687, ¶ 35 (20-year sentencing enhancement for personally discharging a firearm applied to an accountable defendant who personally discharged a firearm during the murder offense but may not have fired the actual gunshot that hit the murder victim). Defendant was found guilty of first degree murder via accountability.

¶ 86 Further, a defendant may be found guilty under an accountability theory even though the identity of the principal is unknown. *People v. Cooper*, 194 Ill. 2d 419, 435 (2000). The law on accountability incorporates the common design rule, which provides that where two or more persons engage in a common criminal design, any acts in furtherance of the common design committed by one party are considered to be the acts of all parties to the common design and all are equally responsible for the consequences of such further acts. *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 58. Words of agreement are not necessary to establish a common purpose to commit a crime, and the common design can be inferred from the circumstances surrounding the perpetration of the unlawful conduct. *People v. Taylor*, 164 Ill. 2d 131, 141 (1995). Importantly, a conviction under accountability does not require proof of a preconceived plan if the evidence indicates involvement by the accused in the spontaneous acts of the group. *Cooper*, 194 Ill. 2d at 435.

¶ 87 Here, the evidence was sufficient to find that defendant was accountable for Pitts's death. At trial, defendant testified that after he fired shots at the gas station, he fired more shots at Pitts. In defendant's videotaped statement, he admitted that he and Toniac chased and fired shots at Pitts. Wilson also recalled in his statement that defendant and Toniac chased and shot at Pitts. The shell casings discussed at trial matched the caliber of guns carried by defendant and his

nephews. Defendant also admitted that he ran from the scene and discarded pieces of his gun along the way. We note that a defendant's flight from the scene may be considered in determining whether defendant is accountable. *Taylor*, 164 Ill. 2d at 141. Overall, the evidence at trial showed that defendant was part of a common, though spontaneous, scheme to attack Pitts. Because the evidence at trial was sufficient to find that defendant was accountable for Pitts's death, appellate counsel was not ineffective for failing to challenge it.

¶ 88 Defendant next contends that his trial counsel was ineffective because he did not challenge defendant's post-arrest statement, which defendant asserts was involuntary and the product of illegal police conduct. Defendant argues that his affidavit, which alleges that before defendant made his videotaped statement, Detective Kato hit him and threatened to destroy his parents' house and implicate his son in the incident, indicates that his statement was involuntary. Defendant further contends that because his post-arrest statement was the main evidence of his guilt, the outcome of the trial likely would have been different if a motion to suppress had been presented.

¶ 89 The decision whether to file a motion to suppress is generally a matter of trial strategy, which is entitled to great deference. (Internal quotation marks omitted.) *People v. Bew*, 228 Ill. 2d 122, 128 (2008). Moreover, strategic choices made after a thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. *People v. Towns*, 182 Ill. 2d 491, 514 (1998). Here, counsel's comments about a potential motion to suppress indicate that counsel made a strategic decision not to file one after a thorough consideration of the matter. Before trial, counsel stated he had fully investigated the possibility of challenging defendant's statement and that it would be "breaking faith" to argue a motion to suppress. Further, the record indicates that defendant was complicit in his counsel's decision not to pursue the motion.

Counsel stated that he went over the matter at length with defendant and the court confirmed this with defendant.

¶ 90 Further, defendant's claim that his confession was involuntary is contradicted by the record, which also justifies its dismissal. See *People v. Jefferson*, 345 Ill. App. 3d 60, 72-73 (2003) ("[i]t is well-settled that the dismissal of a postconviction petition may be upheld when the record from the original trial proceedings contradicts the allegations in the defendant's petition"). At trial, defendant stated that he did not have any complaints about his treatment at the police station. Because counsel was not ineffective for failing to file a motion to suppress and defendant's statement at trial contradicts his claim that his confession was involuntary, his claim was properly dismissed.

¶ 91 Next, defendant contends his trial and appellate counsel were ineffective for failing to challenge his post-arrest statement on the grounds that it was illegally obtained after a warrantless arrest for which there was no probable cause. In his petition and in his *pro se* brief, defendant mentions reports and statements from various people, including Deontae Harris, Anthony Brown, PaulaTorie Free, Yousuf Mohamad, Marcus Brown, and James Wilson, as well as Toniac Jackson and David Jackson. Defendant contends that these statements do not indicate that defendant had a gun, shot a gun, or was at the scene of the incident.

¶ 92 Because defendant has not provided supporting documents, he has failed to make a substantial showing that his trial and appellate counsel were ineffective for not challenging his statement on this basis. Section 122-2 of the Act requires that the petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or state why the same are not attached." 725 ILCS 5/122-2 (West 2010). Defendant did not attach the reports or statements he referenced in his petition or explain why they were missing. An excerpt from a

police report that was attached to his *pro se* petition contained summaries of statements from only two of the people he names. In its motion to dismiss, the State attached a copy of a complete police report that contains summaries of statements given by many of the people defendant referred to in his petition. However, motions to dismiss are generally limited to consideration of the defendant's allegations and the original trial record. *People v. Moore*, 189 Ill. 2d 521, 533 (2000). The prosecution may not provide evidentiary materials and the circuit court is not to consider evidence introduced by the State. *Makiel*, 358 Ill. App. 3d at 111. We therefore do not consider the police report attached to the State's motion to dismiss. Without supporting documents of his own, either attached to the petition or in the record, defendant has made nonfactual and nonspecific assertions that merely amount to conclusions, which are insufficient to require an evidentiary hearing. *Coleman*, 183 Ill. 2d at 381.

¶ 93 Lastly, defendant contends that his trial counsel was ineffective for failing to challenge his indictment, which was filed beyond the 30-day time limit. Defendant notes that he was arrested on January 21, 2001 and indicted on February 26, 2001, a total of 36 days after his arrest. Defendant contends the indictment was filed beyond the 30-day limit, citing sections 109-3.1 and 114-1 of the Code of Criminal Procedure (725 ILCS 5/109-3.1, 114-1 (West 2000)). According to defendant, his extended pretrial detention "compounded the harm from illegal police coercion and improper interrogation."

¶ 94 Even if the indictment was filed late, defendant has failed to make a substantial showing that his counsel was ineffective for not challenging it because defendant has not sufficiently alleged that the any delay in the indictment prejudiced him. See *People v. Youngblood*, 389 Ill. App. 3d 209, 215 (2009). Defendant states that the extra six days added to the harm he experienced related to his involuntary statement. Putting aside the problem that defendant's

allegations regarding police misconduct are contradicted by the record, we find that defendant's broad assertion of how he was prejudiced amounts to a conclusion and is not sufficient to merit an evidentiary hearing. See *Coleman*, 183 Ill. 2d at 381. Defendant has therefore failed to make a substantial showing that his counsel was ineffective for not challenging the indictment.

¶ 95 III. CONCLUSION

¶ 96 For the foregoing reasons, we remand for an evidentiary hearing on two of defendant's claims: his counsel was ineffective for failing to interview Michael Glasper and his counsel was ineffective for failing to investigate and present evidence of additional bullet casings. We affirm the dismissal of defendant's other claims.

¶ 97 Reversed and remanded in part and affirmed in part.