2015 IL App (1st) 131790-U

THIRD DIVISION
February 10, 2015

No. 1-13-1790

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 2058
	)	
JAVIER ASCENCIO,	)	
	)	The Honorable
Defendant-Appellant.	)	Thomas J. Hennelly,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Defendant failed to establish the gist of a constitutional claim to warrant further proceedings under the Post-Conviction Hearing Act.

¶ 2 This appeal arises from the first-stage dismissal of defendant Javier Ascencio's petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). Defendant contends he established the gist of a constitutional claim of ineffective assistance of counsel to warrant further proceedings under the Act. We affirm.

¶ 3 BACKGROUND

¶ 4 Following a jury trial, defendant was found guilty of two counts of first degree murder and two counts of aggravated battery with a firearm, then sentenced to a mandatory term of natural life imprisonment with his 20-year sentence on each aggravated battery count to run concurrently. Trial evidence established that in the early morning hours on May 5, 2007, there was a warehouse party with some 60 to 100 people including rival gang members. Tensions escalated between the gangs culminating in shootings. The combined testimony of the witnesses established that defendant, then age 18, displayed a gang sign, shouted "King Love," then fired his gun 5 to 10 times into the crowd, harming Denisse Del Real and killing Guillermo Ortega. Seconds later, an unknown gunmen issued more gunshots, also fatally injuring Rigoberto Castaneda. Edgar Irenio was shot in the arm. The State introduced into evidence a video of this scene, and some of the State's witnesses identified themselves, defendant, and the victims in the video. The State also introduced ballistics evidence as to the location of cartridge casings and fired bullets. Evidence showed the bullets that killed Castaneda and Ortega came from different guns. As stated on direct appeal:

> "The jury viewed a portion of the video that depicted defendant and a second man standing together shortly before defendant fired into the crowd. After defendant fired those shots, both men walked toward the front door. As they neared the door, a fight broke out in the middle of the room. The video depicts defendant tapping the second man on the shoulder, after which the second man then turned to the crowd and fired several shots, striking Castaneda. Defendant and the second gunman then left together." *People v. Ascencio*, 2012 IL App (1st) 100378, ¶ 10 (unpublished order under Supreme Court Rule 23).

A witness testified defendant emerged from the warehouse with gun in hand, then yelled "King Love" and ran away. The defense did not present any evidence, and defendant was convicted on the State's evidence. Defendant was sentenced to a mandatory term of natural life imprisonment due to the double murders, although he had no criminal history.

¶ 5 Defendant subsequently filed a direct appeal. He argued the State failed to prove beyond a reasonable doubt that he was accountable for the murder of Castaneda. Although defendant conceded the existence of the second gunman and the contact between himself and the second gunman before the second round of shots, defendant argued the second gunman's identity was unknown and denied they acted in concert. He argued, "there was no evidence that the unknown second gunman was a Latin King, and therefore no evidence that Ascencio and the second gunman shared a common design." This court held defendant and the second gunman engaged in a common plan and design. Pointing to the video evidence recited above,[1] defendant was thus culpable for Cataneda's death under accountability theory. This court also rejected defendant's argument that the evidence was insufficient to show how Irenio was injured or who inflicted that injury. Even if defendant did not shoot Irenio, and the second man did, defendant was accountable for the resulting injury. The trial court's judgment was affirmed. *Ascencio*, 2012 IL App (1st) 100378 (unpublished order under Supreme Court Rule 23).

¶ 6 With an attorney acting on his behalf, defendant filed the present postconviction petition on February 28, 2013. This same attorney is now representing him on appeal. In the petition, defendant raises a number of claims alleging his trial counsel was constitutionally ineffective in failing to secure a "firm" plea offer from the State while failing to "strongly encourage" defendant to take the deal even though defendant faced a life sentence if convicted. Trial counsel is also faulted for failing to contradict the State's evidence that defendant was a Latin King, which prejudiced defendant as to the accountability finding and in failing to argue in closing that defendant was not accountable for the actions of the second shooter. Defendant claims trial counsel was ineffective in failing to ensure during *voir dire* that the jurors harbored no bias against gang members. Defendant also alleged counsel was ineffective for failing to impeach one of the State's witnesses and to object to allegedly improper comments during the

[1] The appellate court's description of the facts in the video is largely consistent with that in the State Appellate Defender's brief on direct appeal. Although the video is somewhat unclear, the State Appellate Defender conceded the video appeared to show defendant and the second gunman shooting.

State's closing argument. Defendant claims appellate counsel was ineffective with respect to the latter issue. Finally, defendant claimed cumulative error.

¶ 7 In support, defendant attached typewritten affidavits from his cousin and high school friend. Defendant also attached unsigned, unnotarized, and typewritten statements from his father and former girlfriend. The contents of these affidavits and statements will be addressed as we discuss each issue in turn. While the postconviction petition and appellate brief also reference defendant's own affidavit, that affidavit does not appear in the record on appeal.[2] In addition, in the postconviction petition, counsel also erroneously asserted the petition had reached second-stage proceedings when in fact it had not.

¶ 8 After reviewing the petition under first-stage standards, the trial court summarily dismissed it, as defendant failed to state the gist of a constitutional claim. This appeal followed.

¶ 9 ANALYSIS

¶ 10 Defendant now contends that the trial court erred when it summarily dismissed his postconviction petition. Our review is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). Although the trial court's reasons for dismissing a petition may provide assistance to this court, we review the judgment, and not the reasons given for the judgment. *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010).

¶ 11 The Act provides a method by which persons 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, the Illinois Constitution, or both. 725 ILCS 5/122-1 *et seq*. (West 2012); *Hodges*, 234 Ill. 2d at 9. The threshold inquiry at the first-stage of proceedings is whether the allegations contained in the petition are frivolous or patently without merit. 725 ILCS 5/122-2.1

[2] Postconviction appellate counsel states in her appellate brief that "[m]uch of the 'Evidence Adduced at Trial' is taken from petitioner's 'Statement of Facts' from his opening brief in his direct appeal." Supreme Court Rule 341(h)(6) (eff. Jan. 1, 2016) requires an appellant to cite facts with appropriate reference to the pages of the record relied on. The postconviction appellate brief almost entirely cites verbatim the Appellate Defender's fact section from direct appeal regarding what occurred at trial. While counsel on direct appeal appears to have relied on the record, it is less clear whether postconviction appellate counsel did so, given that she merely copied the Appellate Defender's brief. Accordingly, we question whether postconviction counsel fully considered claims of ineffective assistance of appellate counsel before filing defendant's postconviction petition.

(West 2012); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A petition is frivolous or patently without merit if the allegations contained therein, taken as true and liberally construed in favor of the petitioner (*Edwards*, 197 Ill. 2d at 244), have no arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 11-13, 16. A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16; see also *People v. Allen*, 2015 IL 113135, ¶ 26. (S) An indisputably meritless legal theory, for example, is one which is completely contradicted by the record, while fanciful factual allegations include those which are fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17. These first-stage standards apply even where, as here, the defendant has retained private counsel to draft his postconviction petition. *People v. Tate*, 2012 IL 112214, ¶ 12.

¶ 12 The low threshold to survive summary dismissal, however, does not excuse the petitioner from providing factual support for his claims; he must supply sufficient factual basis to show the allegations in the petition are capable of objective or independent corroboration. *Allen*, 2015 IL 113135, ¶ 24. To do this, section 122-2 requires a petition to have affidavits, records, or other evidence supporting its allegations or state why they are not attached. 725 ILCS 5/122-2 (West 2012); *Hodges*, 234 Ill. 2d at 10.

¶ 13 To determine whether defendant's allegations as to ineffective assistance of counsel lacked an arguable basis in law or fact, we turn to the standard set forth set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), requiring that a defendant show that counsel's performance "fell below an objective standard of reasonableness" and the deficient performance prejudiced the defense. *Hodges*, 234 Ill. 2d at 17. If this court, however, concludes defendant did not suffer prejudice, we need not decide whether counsel's performance was constitutionally deficient. *People v. Harris*, 206 Ill. 2d 293, 304 (2002). If it is arguable that counsel was ineffective under *Strickland*, then the petition cannot be summarily dismissed. *Tate*, 2012 IL 112214, ¶¶ 19-20.

¶ 14 Defendant first challenges his trial attorney's effectiveness during pretrial plea negotiations. The right to effective assistance of counsel extends to the decision to reject a plea

offer, even if the defendant subsequently receives a fair trial. *People v. Hale*, 2013 IL 113140, ¶ 16. To show prejudice, the defendant must establish there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* ¶ 18. That is, defendant must show there is a reasonable probability that absent his attorney's deficient advice, he would have accepted the State's plea offer; the plea would have been entered without the prosecution canceling it; and the trial court refusing to accept it. *Id.* ¶¶ 18-19; see also *Lafler v. Cooper*, – U.S. –, 132 S. Ct. 1376, 1385 (2012). This showing of prejudice must encompass more than a defendant's own self-serving testimony. *Hale*, 2013 IL 113140, ¶ 18. There must be independent, objective confirmation that defendant's rejection of the proffered plea was based upon counsel's erroneous advice and not on other considerations. *Id.*

¶ 15 Here, defendant does not claim he was unaware of the possibility of life imprisonment or that his counsel failed to discuss the sentencing possibilities in his case before trial. Rather, he asserts trial counsel was ineffective for erroneously advising him that he could pursue plea negotiations after his trial and for failing to negotiate a better plea deal than offered by the State. Defendant admits the State actually offered a plea, which he rejected. We note, however, defendant's explanation on appeal as to the number of years offered by the State lacks clarity. Defendant alternatively represents in his brief that the plea offer was "more than 50 years" and simply "50 years." The State has noted this discrepancy and urges this court to view the plea deal as 50 years, but defendant has not filed a response brief. Regardless, our conclusion remains the same that defendant has not established an arguable claim regarding ineffective assistance during pretrial negotiations for the following three reasons.

¶ 16 First, defendant's plea claim lacks supporting evidence. Defendant has attached the purported affidavits of his father and former girlfriend, Saira Rodriguez, in support. Although these documents are styled as affidavits and contain the headline, "Affidavit," neither is signed, dated, or notarized. The supreme court recently held in *Allen*, 2015 IL 113135, ¶¶ 24, 34, that lack of notarization cannot be a basis for dismissing a petition at the first stage of proceedings,

where courts must consider the petition's substantive virtue over its procedural compliance. In *Allen*, however, the statement attached to the defendant's postconviction petition was signed and contained a thumbprint for verification, although no notarization. The supreme court held that statement qualified as "other evidence" under the Act and was sufficient under the forgiving standards of first-stage review. *Id*. ¶¶ 43, 48; see also 725 ILCS 5/122-6 (West 2012). This case is distinguishable in that the "affidavits" of defendant's father and his former girlfriend lack any type of verification and moreover are typewritten, as opposed to handwritten. This presents the possibility that they could have been produced by anyone. Defendant, through his postconviction counsel, incredibly has not explained in the petition or on appeal why these so-called affidavits fall short. We conclude that even under *Allen*, the unsigned affidavits are insufficient to satisfy "other evidence." And, again, while the petition references defendant's affidavit and also a supplemental postconviction common law record, neither appears in the record on appeal. Counsel offers no explanation for their absence even in the face of the State noting it. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (it's the appellant's burden to maintain a sufficiently complete record to support a claim of error and any incompleteness in the record is resolved against the appellant). For these reasons, we conclude the supporting evidence as to defendant's plea negotiations is lacking. See *People v. Collins*, 202 Ill. 2d 59, 66 (2002) (failure to attach affidavits, records, or other evidence or explain their absence is fatal to a postconviction petition at first stage).

¶ 17 Second, even assuming these statements suffice as "other evidence," and assuming the existence of defendant's affidavit, our conclusion would not change. Defendant has not cited any law establishing that defense counsel maintains an actual duty to secure a plea deal that is less than that offered by the State. Criminal defendants have no right to be offered a plea. *Lafler*, – U.S. –, 132 S.Ct. at 1387. A defendant's constitutional right to counsel during plea bargaining is triggered only if and when the State chooses to initiate plea negotiations. See *Id*. at 1384; *People v. Boyt*, 129 Ill. App. 3d 1, 17 (1984). Thus, the protections of the right to counsel during such

negotiations demand that counsel provide effective assistance in relation only to plea agreements actually offered by the State. See *Lafler*, – U.S. –, 132 S.Ct. at 1384, 1387. In addition, defendant has not alleged the State was willing to offer anything less than either 50 years or "more than 50 years" for the murder of two people and shootings of two others. See *People v. Petrenko*, 237 Ill. 2d 490, 502 (2010) (we look at whether the allegations raised *in the petition*, liberally construed and taken as true, are sufficient). Such an outcome seems unlikely given defendant's admission that he knew the name of the unknown shooter and other accomplices, which further implicated him in the shootings. In addition, he does not even explain whether he was present during plea discussions.

¶ 18 Third, assuming counsel's deficiency, defendant still cannot arguably show a reasonable probability that he would have accepted the State's plea offer absent the deficient advice. See *Hale*, 2013 IL 113140, ¶ 18. In his petition, in reference to his nonexistent affidavit, defendant said he "wanted to accept the State's offer if it was anything close to the minimum sentence for first degree murder." This statement suggests a lack of willingness to accept a plea above the minimum of about 20 years' imprisonment. In addition, Rodriguez's statement says defendant would not take a plea of 50 or 60 years because it was tantamount to a life sentence. Again, defendant has not alleged the State was willing to offer anything less than 50 years, and we think it's fantastic to imagine the State would present a plea of only 20 some years given the crimes charged and the evidence in this case, which was overwhelming. Four witnesses saw defendant shoot into the crowd. Several knew defendant and two identified him in a police lineup. While at trial Luis Avilez denied seeing defendant shooting towards rival gang members, the State nonetheless introduced his handwritten statement to an Assistant State's Attorney, stating the opposite. According to his statement, a day after the shooting, Avilez encountered defendant, who told him "the shit he did last night was crazy," but he accidentally shot his friend, Denisse Del Real (who was among the State's witnesses) while he was trying to scare some "GD's" (Gangster Disciples). The video evidence corroborated witness testimony. It also showed

defendant working in tandem with the second shooter. Defendant was heard to yell gang slogans before the shooting and as he was leaving the warehouse with a gun in hand. Two people died as a result of the shootings and two people were harmed. Thus, defendant's claims are unsupported, contradicted by his very own petition, and merely speculative. This is insufficient even for first-stage postconviction review. For the foregoing reasons, defendant also has not established an arguable claim of prejudice as to the plea negotiations. He therefore has not set forth an arguably meritorious claim of ineffective assistance of counsel.

¶ 19 Defendant next contends his trial counsel was ineffective for failing to contest his gang membership. Defendant claims the State "used [his] alleged gang affiliation to support its argument that [he] should be found accountable for the actions of the second shooter, who shot Castaneda." In support, defendant points to affidavits attached to his petition, including the signed and notarized affidavits of defendant's friend and cousin denying his gang membership. Defendant contends counsel's failure to investigate and present such evidence caused him prejudice. He also contends counsel was ineffective for failing to argue in closing that he was not accountable for the second shooter's actions because there was "no affiliation" between the two. In his brief before this court, defendant concedes there was "overwhelming evidence of guilt for the death of Guillermo Ortega."

¶ 20 To the extent defendant is merely repackaging his direct appeal challenge of accountability for the second murder, we agree with the State that the claim is procedurally barred. See *People v. Simms*, 192 Ill. 2d 348, 360 (2000); see also *People v. Blair*, 215 Ill. 2d 427, 442-43 (2005) (*res judicata* and forfeiture may be invoked to dismiss a postconviction petition at first-stage proceedings). Pointing to the video, this court already held the evidence was sufficient to sustain defendant's conviction via accountability for Castaneda's murder. *Id.*

¶ 21 *Res judicata* aside, proof that defendant was not in a gang would not have disproved defendant's accountability for the second murder. Moreover, declining to present it was a matter of strategy. See *People v. Enis*, 194 Ill. 2d 361, 378 (2000) (decision to call certain witnesses on

a defendant's behalf enjoys a strong presumption of sound trial strategy, rather than incompetence). First, defendant has provided only two legitimate signed and notarized affidavits, one from his cousin, Claribel Salas, and another from his friend, Alejandro Solis, stating he was not in a gang. His cousin attests she did not attend the party and thus her affidavit is of minimal value. Solis, in his affidavit, says "[t]here weren't really gang bangers" at the party, that he never heard anyone yell "King Love," and never observed defendant with a gun, and that he was "around" defendant "a lot that night." Solis says he ran when the shooting occurred. Solis' statements, however, do not necessarily contradict the ample testimony from witnesses who did see defendant with a gun and/or shooting and hear him shouting gang slogans. Nor do they contradict defendant's videotaped actions with the second shooter. In addition, were Solis to testify, he would have been heavily impeached by contrary testimony.

¶ 22 The unsigned, unnotarized affidavits by defendant's father and former girlfriend, Rodriguez, also do not help. Both relayed they told defense counsel that defendant was not in a gang. Defendant's father said he knew others who would essentially state the same and "I think [defense counsel] talked to a couple of people." Even assuming the affidavits' validity and given the above-described affidavits, we can presume defense counsel was aware of this defense and made a strategic choice not to present testimony about defendant's gang status by family and close friends who had a clear interest in defendant's well-being and hence questionable credibility. See *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003). This evidence of motive would have conflicted with trial evidence by other friends, partygoers, and rival gang members as to defendant's gang status, and it could possibly have only highlighted the gang issue at defendant's expense. The record also shows defendant was listed in the Chicago police system as a Latin King before his arrest. Moreover, it would not have necessarily contravened evidence showing defendant was at least affiliated with the gang that evening. Statements by counsel support our conclusion, and contradict defendant's claim that counsel failed to investigate witnesses, where counsel stated in a pretrial hearing, "there are going to be witnesses that will

testify to the exact opposite of what the State is going to present, in terms of their gang evidence," and also listed three witnesses in discovery. Counsel also filed a motion to bar defendant's gang evidence. After the State rested, defense counsel conferred with his client momentarily, then said defendant did not wish to testify and they did not plan to call "other witnesses." It would be a stretch to say counsel was arguably deficient for failing to present the evidence defendant now cites. Indeed, gang affiliation with the second shooter was merely inferential, as there was no direct evidence that the second shooter was a gang member.

¶ 23 Furthermore, it wasn't defendant's gang affiliation that sealed his fate on the Castaneda charge, but rather the video evidence showing defendant had a common plan with the unknown gunman, who killed Castaneda, and defendant exited the warehouse along with the gunman after also having previously shot into the crowd. See *In re W.C.*, 167 Ill. 2d 307, 338-40 (1995) (proof of a common purpose or design need not be supported by words of agreement, but may be drawn from the circumstances surrounding the commission of an act by a group); *People v. Cooks*, 253 Ill. App. 3d 184, 189-90 (1993) (where a defendant facilitates and sets in motion criminal acts and fails to oppose them, accountability can be found). In other words, any evidence denying defendant's gang membership would not have refuted the identification testimony and video evidence at trial establishing defendant was the first shooter and the video evidence establishing his accountability. Thus, even assuming any deficiency on counsel's part, defendant cannot show the outcome of the proceeding would have been arguably different. Thus, there is no arguable prejudice.

¶ 24 We would add that to the extent defendant now argues trial counsel was ineffective for failing to address accountability in closing arguments, defendant has clearly forfeited the argument (see *Blair*, 215 Ill. 2d at 443-44) and, moreover, is incorrect. After having objected to the accountability instruction before the court, defense counsel argued to the jury that the video was too unclear to convict defendant. Defense counsel noted no witnesses testified as to defendant working in concert with a second gunman. On appeal, and without any citation to the

record, defendant argues counsel should have pointed out that the second shooter acted in concert with another man and the second shooter left in a separate car from defendant. See Ill. S. Ct. . 341(h)(7) (eff. Jan. 1, 2016) (requiring appellant to cite record). This evidence would have been inconsistent with counsel's trial strategy and does not really contradict defendant's accountability. There is no arguable prejudice and hence no arguable ineffectiveness.

¶ 25 Defendant next contends his trial counsel was ineffective for failing to question the jury during *voir dire* about potential gang bias. The State argues, and we agree, that defendant has forfeited this claim because he could have raised it on direct appeal but did not. See *Blair*, 215 Ill. 2d at 443-44. He has not argued appellate counsel was ineffective for failing to raise the issue. Fofeiture aside, defendant fails to point to anywhere in the record showing the jury harbored any bias. The judge also appropriately instructed the jury that sympathy, bias, and prejudice should have no part in the verdict, which should be based on the evidence. The jurors acquiesced to judging the case fairly based on the evidence. See *People v. Powell*, 355 Ill. App. 3d 124, 142 (2004). We also note defense counsel could have made a reasonable strategic choice not to highlight gang evidence during *voir dire*, especially since some of the prosecution witnesses were also involved in gangs. See *People v. Macias*, 371 Ill. App. 3d 632, 641 (2007); *People v. Furdge*, 332 Ill. App. 3d 1019, 1026 (2002). Likewise, while the State used gang evidence to its advantage, so too did the defense, for example, arguing in closing that the number of gangs at the party meant there could have been more than two guns.

¶ 26 Regardless, defendant cannot show prejudice. *People v. Strain*, 194 Ill. 2d 467 (2000), a direct appeal case on which defendant relies, is distinguishable. The supreme court in *Strain* held the trial court erred in denying defense counsel's questions probing juror bias during *voir dire*, such as whether the jurors would find defendant less believable for being in a gang. *Strain* did not address ineffective assistance of counsel. In *Strain*, moreover, the outcome of trial turned on the defendant's credibility, that of some police officers, and gang members. Gang testimony was pervasive. By contrast, here, the outcome of trial turned on witness identification testimony

and video evidence showing defendant and the second gunman as shooters. That, together with the testimony, is what the verdict rested upon. While evidence of defendant's gang affiliation suggested his motive for shooting, it was not so pervasive as in *Strain*. See *Furdge*, 332 Ill. App. 3d at 1027. We cannot say that on this record counsel's alleged deficiency in failing to raise a question of juror bias about gangs arguably undermined confidence in the verdict or affected the outcome of trial. For the reasons stated, trial counsel was not arguably ineffective.

¶ 27 Defendant next contends that his trial attorney was ineffective for failing to present impeachment evidence against the State's witness Del Real, whom defendant shot in the in the lower back. Del Real testified that defendant was throwing up gang signs and just before the shooting he said "King Love." She told police that defendant shot her. On cross-examination, defense counsel elicited that before the shootings Del Real and defendant had some type of romantic involvement and while they were not exactly dating, they were "talking." Counsel also highlighted that Del Real visited defendant in jail after the shooting. Presumably, this was so counsel could argue, as he did in closing, that it would be senseless to go visit someone in jail who just shot you and thus defendant could not have done the shooting. The State on redirect elicited that Del Real did not want to go to jail but did so because defendant "kept telling people to tell me to go."

¶ 28 In his petition, defendant claims Del Real visited defendant multiple times in prison and argues his counsel was ineffective for failing to further impeach Del Real with this information. He argues the jury could have inferred that he "bullied her into visiting." The only supporting evidence is his father's faulty affidavit, which is insufficient. Even so, we view this proposed impeachment as having a limited effect since the jury could also have inferred that Del Real visited defendant multiple times because she might have a penchant for dating criminals or abusers. It was tangential information and not dispositive to defendant's guilt and thus failure to disclose it was not prejudicial. The video and the witnesses' testimony about the video provided overwhelming evidence of defendant's criminal acts. We cannot say given this overwhelming

evidence there exists an arguable basis for concluding that additional impeachment of Del Real would have affected the jury's verdict.

¶ 29 We reach a similar conclusion about defendant's claim as to closing arguments. Defendant contends his trial counsel was ineffective for failing to object to the State's comments in closing and appellate counsel was ineffective for failing to raise the issue. It is well settled that a prosecutor is allowed a great deal of latitude in closing argument and has the right to comment on the evidence presented and on reasonable inferences arising therefrom, even if such inferences are unfavorable to the defendant. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). The prosecutor may also respond to comments by defense counsel which clearly invite a response. *People v. Willis*, 2013 IL App (1st) 110233, ¶ 102. Even if a prosecutor's closing remarks are improper, they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different. *Id*.

¶ 30 Defendant complains of the State's comments on Del Real. The State argued in rebuttal that Del Real walked into the court "with genuine fear" and "[w]ho wants to come into a courtroom *** and look at him, a Latin King, and say that's the guy that I [s]aw do the shooting, that's the guy that shot me?" The State continued, "She finally mustered up enough courage up there to say what happened." Defendant argues the evidence did not support these statements.

¶ 31 We disagree. Not only were the State's comments a legitimate response to defense counsel's closing argument, but they were indeed inferences arising from the trial evidence on which the State had a right to comment. The evidence showed that Del Real, who was around age 19 at the time of the crime, was so soft-spoken at trial that the court and State had to tell her repeatedly to speak up so they could hear her. When the court told her to speak louder initially, she responded, "I'm nervous." When the State asked her what happened around 2:30 a.m. at the party (the time of the shooting), Del Real began to cry and stated, "I can't even talk" and that she was shot. The State then asked her who "was shooting the gun?" She responded that she did not remember and again that she was nervous. The court told Del Real to "take a minute to

compose" herself. In response to the State's question, Del Real then said that she saw defendant shooting the gun. The defense in closing characterized Del Real's testimony as rife with uncertainty, arguing the State "had to prod her with more and more questions until she finally" identified defendant and remembered he stated "King love." The State, by contrast, permissibly responded by characterizing her testimony as rife with fear. Defense counsel thus had no legitimate basis to object to the State's rebuttal comments and even assuming defense counsel did have a basis, there is no arguable prejudice. For reasons already explained, we do not believe the State's rebuttal argument on Del Real's testimony arguably resulted in substantial prejudice to defendant. Absent those remarks, the jury verdict would not have been arguably different. Accordingly, appellate counsel was also not ineffective for failing to raise the issue. See *Petrenko*, 237 Ill. 2d at 497.

¶ 33 Defendant lastly contends that all of the aforementioned alleged errors cumulatively require arguable reversal in his case. As we have found no merit to any of the alleged errors, this contention is necessarily rejected.

¶ 34 CONCLUSION

¶ 35 We affirm the decision of the trial court dismissing defendant's postconviction petition at the first stage of proceedings.

Affirmed.