2018 IL App (1st) 161872-U

No. 1-16-1872

Order filed December 20, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 17924
	)	
FREDERICK SMITH,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the summary dismissal of defendant's postconviction petition where defendant failed to raise the gist of a claim of ineffective assistance of trial counsel for failing to investigate the crime scene.

¶ 2 Defendant Frederick Smith appeals the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that the trial court erroneously dismissed his petition where he stated the gist of a claim of ineffective

assistance of trial counsel for failure to investigate the crime scene. For the following reasons, we affirm.

¶ 3 Defendant was charged with first degree murder for the fatal shooting of Carlton Hamilton. His first trial in 2010 resulted in a hung jury. In a later jury trial, he was found guilty of first degree murder and sentenced to 75 years' imprisonment. We set forth the facts of the case in defendant's direct appeal (*People v. Smith*, 2014 IL App (1st) 120639-U (unpublished order under Illinois Supreme Court Rule 23)), and we recite them here to the extent necessary to our disposition.

¶ 4 Defendant and codefendant Georgio Gaines were charged with the murder of Carlton Hamilton in joint but severed jury trials. Gaines was also tried for the murder of George Fletcher, who was killed several hours after Hamilton.[1] At defendant's first trial, Spencer Williams and Maurice Barbee had both identified defendant as one of the men who shot and killed Hamilton. However, at defendant's second trial, Williams testified that he could not recall most of the events surrounding Hamilton's murder on August 9, 2006, or any of his testimony to the grand jury or defendant's previous trial. He acknowledged that he was incarcerated at the time of trial on an armed habitual criminal conviction and had a prior burglary conviction. Williams recalled multiple letters he wrote to the Cook County State's Attorney's office in 2009 and 2010 while defendant's case and Williams' own case were pending. In the letters, he threatened he would not testify at "the murder trials," or would testify untruthfully, unless he received a "deal" on his own sentence. Williams admitted his sentence was never reduced.

[1] Gaines was convicted of Fletcher's murder, but acquitted of Hamilton's murder. Gaines is not a party to this appeal.

¶ 5 On cross-examination, Williams testified he did not recognize defendant or Gaines and did not recall witnessing them commit a shooting in August 2006 near the 8100 block of South Cornell Avenue. He did not recall telling anyone that defendant shot a gun at someone.

¶ 6 Chicago police detective Kathleen Chigaros testified that she spoke with Williams during the course of a homicide investigation on August 9, 2006 at around 6:30 p.m. Williams told her he was walking northbound on Cornell Avenue from 82nd Street when he saw a green minivan approach from the direction of 81st Street. As the minivan slowed, he observed defendant and Gaines start shooting from the van. Defendant and Gaines then exited the van and approached Hamilton. Someone yelled, "finish him, finish him," and defendant pointed his gun and fired additional shots. Following the shooting, Williams observed defendant and Gaines return to the van and drive away. Williams stated that an individual named "Winston" was also in the van, and he knew the men were from the area of 82nd Street and Ingleside Avenue. Finally, Williams told Chigaros that he would go to the police station as soon as possible to assist the investigation.

¶ 7 Assistant State's Attorney (ASA) Donna Norton testified that, on September 5, 2006, she took a handwritten statement from Williams in connection with Hamilton's homicide. Williams was not promised anything in exchange for his statement. Williams' handwritten statement was introduced into evidence and then published to the jury. Williams stated that, at approximately 6:30 p.m. on August 9, 2006, he was walking on Cornell Avenue and saw Hamilton and Maurice Barbee, both of whom he had known for about 15 years, standing at 8130 South Cornell. A green Mercury minivan with gray trim at the bottom approached the men. Williams observed Gaines fire several shots at Hamilton from the front passenger window with a semi-automatic handgun, either a nine-millimeter or a .40-caliber, and Hamilton fell to the ground. Williams backed up

and stood behind a white picket fence at 8152 South Cornell when the shots were being fired, and Barbee ran into a gangway.

¶ 8 As Gaines shot at Hamilton from the passenger window, additional shots were fired from the side door of the van. Defendant then stood over Hamilton, holding what appeared to be a Tech 9 handgun. Someone in the van yelled, "finish him," and defendant fired three more shots at Hamilton. Defendant returned to the van through the sliding door and the vehicle drove away. Williams got an "even better look" at both defendant and Gaines as the van drove slowly past him because the sliding door was not closed.

¶ 9 The State introduced into evidence a transcript of Williams' grand jury testimony, which ASA Francisco Lamas published to the jury. Williams' grand jury testimony was substantially similar to the version of events given in his handwritten statement. During the grand jury proceeding, Williams testified that, at the time the van approached Hamilton and Barbee, he was "two houses. Two and a half houses" away from the men. A court reporter also published portions of Williams' prior trial testimony. That testimony was also consistent with his grand jury testimony and handwritten statement. At the prior proceeding, Williams testified he was "like 12, 13 feet" away from Hamilton and Barbee when the van drove up and Gaines pointed a gun at Hamilton. Williams acknowledged writing letters to the State's Attorney's office requesting a sentence reduction.

¶ 10 ASA Patrick Keane testified that he met with Williams regarding testifying before the grand jury in an unrelated murder case. While he acknowledged that Williams had pending cases, Keane did not make any promises to Williams in exchange for his testimony.

¶ 11 Maurice Barbee testified that, at 6:30 p.m. on August 9, 2006, he was speaking to Hamilton outside 8130 South Cornell. Barbee observed a green van approaching them and saw defendant in the front passenger seat, aiming a machine gun with a long clip at them. Barbee ran to the side of a house about 50 feet away and heard four or five shots fired. However, he did not see what occurred. After the shots stopped, he emerged from the side of the house and saw Hamilton, who appeared to still be breathing, on the ground. Barbee heard someone inside the van say "finish him" two or three times and saw two people exit the van. One of the individuals was defendant, who was holding a gun and wearing a "fisherman hat." Barbee could not see the second individual. Defendant stood over Hamilton, and Barbee ran toward the backyard of a nearby house. He heard two or three more gunshots. He eventually went out to the street and saw Hamilton on the ground. Police subsequently arrived, but Barbee did not speak with them because he "[j]ust didn't want to." He spoke with detectives the following morning and identified defendant in a photographic lineup as the shooter. Barbee acknowledged that he had prior convictions for possession of a stolen motor vehicle and driving under the influence of alcohol, and three prior convictions for driving on a suspended license.

¶ 12 Chicago police department forensic investigator William Moore testified that he photographed the crime scene and conducted a general canvass of the area on August 9, 2006, at around 7:30 p.m. Moore and his partner recovered five .45-caliber cartridge cases and one nine-millimeter cartridge case, which indicated that two guns were involved. Moore also recovered a fired bullet.

¶ 13 Chicago police detective Kevin Scott testified that he was assigned to investigate the murders of Hamilton and Fletcher. On August 10, 2006, at approximately 9:43 a.m., Scott went

to an alley near the 900 block of East 86th Street and observed an "almost completely burned out" green Mercury Villager minivan. Scott testified that an evidence technician was unable to recover any fingerprints from the van.

¶ 14 Pierre Macon testified he knew defendant and Gaines, but denied most of the State's questions concerning the events of August 9 and 10, 2006. He acknowledged giving a handwritten statement, but denied much of its contents, claiming that the police forced his statement and told him what to say. Macon further acknowledged testifying before the grand jury, but on cross-examination claimed that his grand jury testimony was likewise not true and forced by police. He acknowledged that he was incarcerated at the time of trial and had previously been convicted of residential burglary and criminal drug conspiracy.

¶ 15 ASA Geraldine D'Souza testified that, on January 8, 2007, she took a handwritten statement from Macon, who indicated he was not threatened and did not appear to be repeating a memorized statement. The court admitted into evidence a redacted version of Macon's handwritten statement and ASA D'Souza published it to the jury.

¶ 16 In his statement, Macon stated that, on August 9, 2006, he was at Ralph Jones' apartment on Drexel Avenue, where he would "sometimes" "hang out" and "smoke weed," along with defendant, Gaines, Winston Gibbons, Fletcher, and Anthony Williams (Anthony).[2] Anthony lived in the apartment. On that day, Macon observed Anthony driving Fletcher's minivan. Defendant was in the passenger seat and Gaines was in the back seat. Macon left and returned to the apartment around 8 or 9 p.m. Gibbons, Gaines, Anthony, and defendant were in the alley.

[2] Because Anthony Williams and Spencer Williams have the same last name, we refer to Anthony Williams by his first name.

Defendant told Macon that he would give him money in exchange for burning Fletcher's van. Macon agreed to burn the van because he needed money and was afraid of defendant.

¶ 17 Anthony and Macon drove Fletcher's van to 85th Street and Ingleside. There was gasoline in the van, which Macon "threw" around the inside of the car. He then lit the inside of the van on fire, and burned his face and right hand. Macon and Anthony then returned to Jones' apartment. Fletcher was upset because his van had been gone for a long time. Macon then went to lie down because he was in pain from his burns.

¶ 18 Macon slept for three hours, and when he awoke, defendant, Gaines, Fletcher, Jones, Gibbons, and Anthony were in the apartment. He heard Fletcher ask defendant about his van, and defendant responded that the van was "stopped on Western." Fletcher thereafter left the apartment. Gaines and Gibbons had guns in their hands when they returned to the apartment.[3] They went into a room and shut the door. Prior to leaving the apartment, Macon asked defendant for the money he was promised for burning the van, but defendant told him, "No, you ain't getting nothing. Get out of 82nd or I'll do something to your bitch ass and your bitch ass family." Macon subsequently left the apartment.

¶ 19 ASA Sanju Oommen testified that, on January 10, 2007, she spoke with Macon in her office about a homicide from August 2006. Oommen asked Macon to go into the grand jury. During the grand jury hearing, Macon was asked, "What could you hear [defendant] and [Fletcher] talking about?" He answered, "[Fletcher] was asking [defendant]—[defendant] was telling him the car stopped on 78th and Western."

[3] The portion of Macon's statement read into the record does not reflect when Gibbons and Gaines left the apartment.

¶ 20 Ralph Jones testified that, in August 2006, he lived at an apartment on South Drexel Avenue with Anthony Williams. Jones returned to his apartment on August 9, 2006, at around 7:30 p.m. and found Fletcher in his living room. He did not know why Fletcher was there, and asked him repeatedly to sit down because he was looking through the blinds. Anthony and Macon were also present in the apartment, but they left around 8 p.m. Anthony returned to the apartment about 15 minutes later, and Macon returned after another 15 minutes with "red and blistery" hands. Macon was breathing as if he was in pain and had just been burned. Jones gave Macon ice for his hands. He then went to the front of the apartment to "keep [his] eye" on Fletcher, who "was bouncing up and down like a Jack-in-the-Box." When Jones returned to the kitchen, Macon was asleep at the table.

¶ 21 At approximately 1 a.m. the following morning, defendant, Gaines, and Gibbons entered Jones' apartment. In the front room, defendant and Fletcher had "a little argument." Defendant told Fletcher, "You worried about that raggedy ass van? I just got jacked for my dope and my money." Defendant also said, "We gonna take care of you, man. We got you, man. Don't worry. We got you, man. We're gonna take care of you." While that transpired, Gibbons was sitting on a table nearby with his hand "up under a hoody and there was a big bulge up under the hoody." Gaines was sitting on a couch holding a nine-millimeter Glock. Defendant told Gaines and Gibbons, "Take care of this guy, man," and the two men left the apartment with Fletcher. Gaines and Gibbons returned after a period of time. Jones overheard a conversation between defendant and Gaines, who subsequently left the apartment.

¶ 22 On cross-examination, Jones acknowledged that he witnessed Fletcher smoke crack-cocaine on the day in question, and that he may have smoked some also. He further

acknowledged using drugs in the past and that he was a convicted felon with a prior conviction for retail theft.

¶ 23 The parties stipulated that, if called, medical examiner Tera Jones would testify that she performed a postmortem examination on Hamilton's body on August 9, 2006. She recovered two bullets from Hamilton's body and concluded he died from multiple gunshot wounds. The manner of death was homicide.

¶ 24 Illinois State Police sergeant Wayne Ladd testified that, on September 22, 2006, he recovered a Masterpiece Arms Mach 10 .45-caliber firearm, with a loaded extended clip, from Eric President on the 7500 block of South Evans Avenue, about a mile and a half away from where Hamilton was shot. He inventoried the gun, and it was submitted for testing.

¶ 25 Illinois State Police forensic scientist Kurt Zielinski, an expert in firearms identification and operations, testified that he analyzed the bullets recovered from the crime scene and Hamilton's body. Zielinski concluded that the three fired bullets sent to him for analysis were .45-caliber and fired from the same firearm. He additionally analyzed the six cartridge cases recovered from the scene and determined one was a nine-millimeter Luger and that the other five were .45 auto caliber casings fired from the same firearm.

¶ 26 Illinois State Police forensic scientist William Demuth, an expert in the field of firearms and toolmark identification and firearms operation, opined that the five .45-caliber cartridge casings recovered from the scene of Hamilton's homicide and all three bullets were fired from the gun recovered by Sergeant Ladd.

¶ 27 Chicago police officers Emmett McClendon and Mark Hein testified that, on September 4, 2006, they were part of a team tasked with finding Winston Gibbons and Gaines. Gibbons was

arrested near East 81st Street. Gaines was subsequently arrested at a residence on South Escanaba Avenue. During his arrest, Gaines directed police to a garbage can containing a nine-millimeter semi-automatic handgun with 11 live rounds.

¶ 28 Chicago police detective James Braun testified that, on August 9, 2006, Williams identified defendant and Gaines in separate photographic arrays as Hamilton's shooters. Braun met with Barbee on August 10, 2006, and Barbee identified defendant as Hamilton's shooter in a photo array. Barbee did not identify anyone in the second photo array containing Gaines' photo. On September 5, 2006, Williams identified Gaines in a physical lineup as one of the individuals he had observed shooting. Later, on July 30, 2007, police learned that defendant had been located in Indiana and arranged for him to be arrested and transported for a lineup. The following day, Williams identified defendant in a lineup as one of the individuals he had observed shooting.

¶ 29 Defendant elected not to testify, and the defense rested without presenting any evidence. Following arguments, the jury found defendant guilty of first degree murder and that, during the commission of the offense, he personally discharged a firearm that proximately caused the death of another person. The court thereafter sentenced defendant to 50 years' imprisonment for first degree murder, with a 25-year enhancement for personally discharging a firearm that proximately caused Hamilton's death.

¶ 30 We affirmed defendant's conviction on direct appeal over his various contentions of ineffective assistance of counsel. *Smith*, 2014 IL App (1st) 120639-U (unpublished order under Illinois Supreme Court Rule 23).

¶ 31 On October 19, 2015, defendant filed a *pro se* postconviction petition. In his petition, defendant claimed, as relevant here, that trial counsel was ineffective for failing to "investigate uncover 'readily available evidence that would have assisted the defense.[']" Defendant claimed that codefendant Gaines' attorney "sent a investigator to the crime scene and found out it was 210 feet no 10 to 12 away the white fence that was witness Spencer Williams vantage point," whereas his own attorney did not send an investigator to the scene.

¶ 32 In support of this claim, defendant attached to his petition an excerpt from the trial transcript, in which codefendant Gaines' attorney argued in closing that Williams' ability to observe the crime was undermined by the investigator's finding that Williams' vantage point of the murder was much farther away than Williams claimed: 210 feet, not 10 to 12 feet.

¶ 33 On December 18, 2015, the trial court entered an order summarily dismissing defendant's postconviction petition, finding, in relevant part, that defendant's ineffective assistance of counsel claim was waived because it "involve[d] matters of record which [defendant] failed to bring on direct appeal." Further, the court found that defendant's claim was "merely a bald, conclusory allegation" because defendant failed to explain how he was prejudiced by counsel's failure to send an investigator to the crime scene.

¶ 34 Defendant filed his untimely notice of appeal in the trial court on January 25, 2016. On July 12, 2016, defendant requested leave to file a late notice of appeal with this court. We granted leave to file a late notice of appeal.

¶ 35 On appeal, defendant contends that the trial court erroneously dismissed his petition because he stated the gist of a constitutional claim that trial counsel was ineffective for failing to

investigate the crime scene. Defendant asserts that had counsel investigated the scene, he would have found evidence that impeached "key State witnesses."

¶ 36 The Act provides a three-stage process as a means for criminal defendants to challenge their convictions or sentences on grounds of constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Defendant's petition for postconviction relief was summarily dismissed at the first stage. At the first stage of postconviction proceedings, the trial court independently reviews the petition, taking the allegations as true, and determines whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition may be summarily dismissed as "frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009); *People v. Tate*, 2012 IL 112214, ¶ 9. A claim has no arguable basis when it is based on an indisputably meritless legal theory, such as one completely contradicted by the record, or a fanciful factual allegation, such as those that are fantastic or delusional. *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 37 To survive the first stage, a petition need only present the gist of a constitutional claim. *People v. Allen*, 2015 IL 113135, ¶ 24. Presenting a "gist" of a constitutional claim is a low threshold, and only limited detail is necessary for the petition to proceed beyond the first stage of postconviction review, as opposed to setting forth a claim in its entirety. *Hodges*, 234 Ill. 2d at 9; *People v. Williams*, 364 Ill. App. 3d 1017, 1022 (2006). We apply *de novo* review to a summary dismissal (*Hodges*, 234 Ill. 2d at 9), and therefore "may affirm, on any proper ground, a procedurally proper summary dismissal that was based on an improper ground" (*People v. Dominguez*, 366 Ill. App. 3d 468, 473 (2006)). On *de novo* review, we apply the same analysis

that a trial court would perform and our review is "completely independent" of the trial court's decision. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 151.

¶ 38 Initially, the parties disagree about whether defendant's claim is forfeited. At the first stage of postconviction proceedings, the common law doctrines of *res judicata* and forfeiture operate to bar the raising of claims that were or could have been adjudicated on direct appeal. *People v. Blair*, 215 Ill. 2d 427, 443-45 (2005). The State argues that defendant's claim is based on an investigator's testimony that was presented in Gaines' trial. Therefore, according to the State, the claim was known to defendant during trial and his direct appeal because he and Gaines had joint, albeit severed, trials, and consequently shared the same trial record, which contained the investigator's testimony. Defendant responds that the factual allegation that trial counsel failed to investigate the crime scene was not part of the record on appeal, and thus is not forfeited because it could not have been raised on direct appeal. We agree with defendant that this particular ineffectiveness claim is better suited to a postconviction petition. There was nothing in the record regarding whether counsel did or did not investigate the crime scene, regardless of the investigator's testimony presented during Gaines' trial. We therefore will consider the merits of defendant's claim.

¶ 39 The right to effective assistance of counsel a constitutional right, and violations of this right are cognizable under the Act. *People v. Jackson*, 205 Ill. 2d 247, 258-59 (2001). At first stage postconviction proceedings, "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced." *Hodges,* 234 Ill. 2d at 17 (citing *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984)). The failure to satisfy

either prong will defeat an ineffective assistance claim. *People v. Enis*, 194 Ill. 2d 361, 377 (2000).

¶ 40 Counsel must conduct " 'reasonable investigations or *** make a reasonable decision that makes particular investigations unnecessary.' " *People v. Domagala*, 2013 IL 113688, ¶ 38 (quoting *Strickland*, 466 U.S. at 691). " '[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.' " *People v. Guest*, 166 Ill. 2d 381, 389, 400 (1995) (quoting *Strickland*, 466 U.S. at 691). "Whether the failure to investigate constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial." *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26.

¶ 41 To show prejudice, defendant must demonstrate that " 'but for' counsel's deficient performance, there is a reasonable probability that result of the proceeding would have been different." *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011). " '[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair.' " *Id.* (quoting *People v. Evans*, 209 Ill. 2d 194, 220 (2004)). If we can dispose of defendant's ineffective assistance claim because he suffered no prejudice, we need not address whether his counsel's performance was objectively reasonable. *Lacy*, 407 Ill. App. 3d at 457.

¶ 42 Here, we find defendant did not state the gist of a claim of ineffective assistance of counsel because he did not show that he was arguably prejudiced by counsel's alleged failure to

investigate the crime scene.[4] The investigator in Gaines' case testified that Williams was 210 feet away from the shooting, not 12 feet, as Williams had indicated. While defendant claims that this undermined Williams' ability to have seen the shooting, we do not find that it arguably would have changed the outcome of the trial in light of the substantial evidence against him.

¶ 43 As we previously determined on defendant's direct appeal, the evidence against defendant was "overwhelming." *Smith*, 2014 IL App (1st) 120639-U, ¶ 65. Both Williams and Barbee, who were eyewitnesses to the shooting, identified defendant shortly thereafter as standing over Hamilton with a gun immediately before hearing someone yell "finish him, finish him," followed by two or three gunshots. The evidence showed Williams not only saw defendant fire at Hamilton, but that he also got "an even better look" at defendant as he drove away from the scene in the green minivan. Additionally, the evidence showed defendant subsequently instructed Macon to destroy the van after the shooting. Importantly, Williams had identified defendant by name as the shooter shortly after the murder when he spoke with Detective Chigaros in the area. The evidence of defendant's guilt was, therefore, overwhelming.

¶ 44 Defendant nevertheless argues that we should disregard our prior conclusion that the evidence against him was overwhelming because Williams' prior statements are undermined by the investigator's testimony that Williams was actually farther away from the shooting than he had previously indicated. While that information may somewhat undermine Williams' reliability concerning his view of the shooting, we reiterate that Williams prior statements showed he

[4] The State points out that defendant did not assert he was prejudiced in his postconviction petition, and improperly argues he was prejudiced for the first time on appeal. Nevertheless, it is well established that, at first stage proceedings, a *pro se* petitioner need only present "a limited amount of detail" and is not required to "set forth a constitutional claim in its entirety" or "allege facts supporting all elements of a constitutional claim to survive summary dismissal." *Brown*, 236 Ill. 2d at 188 (citing *People v. Edwards*, 197 Ill. 2d 239, 244-45 (2001)).

viewed defendant multiple times on the day in question, and not only during the shooting itself. As previously indicated, Williams, after the shooting, also "got an even better look" at defendant as the van drove slowly away from the scene. Moreover, to the extent that the investigator's testimony could impeach Williams' account of the shooting, we note that Williams' credibility was already "severely undermined" at trial. See *Smith*, 2014 IL App (1st) 120639-U, ¶ 64 (unpublished under Illinois Supreme Court Rule 23) (noting the State's direct examination of Williams was "devastating" to his credibility where he could not recall his previous statements regarding the shooting and attempted to threaten the State's Attorney's office with false testimony prior to trial in exchange for a lesser sentence).

¶ 45 Further, in reaching this conclusion, we reject defendant's contention that the prejudice to him was demonstrated by codefendant Gaines' acquittal of Hamilton's murder. Critically, Williams and Barbee observed defendant standing over Hamilton with a gun immediately before they heard several additional gunshots, thereby supporting the jury's finding that defendant personally fired the fatal shots. This is in stark contrast to Gaines, who was not observed in as compromising a position standing over Hamilton with a gun. Further, unlike defendant, Gaines was not identified by multiple witnesses as one of the shooters, as Barbee could not identify the second shooter.[5] Accordingly, we are not persuaded by this contention, and we do not find that defendant made an arguable claim of ineffective assistance of trial counsel in his postconviction petition.

¶ 46 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 47 Affirmed.

[5] The evidence was presented simultaneously to both juries.