2013 IL App (2d) 120232-U
No. 2-12-0232
Order filed March 8, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EMERIO TALAVERA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 98-CF-1182 Honorable David R. Akemann, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's second amended postconviction petition at the second stage, because the petition made no substantial showing that trial or appellate counsels were ineffective; to the extent that defendant's postconviction claims rely on facts that appear on the face of the original trial record, the claims are procedurally defaulted.

¶ 2 Defendant, Emerio Talavera, appeals from the second-stage dismissal of his second amended postconviction petition. Defendant was convicted of first-degree murder following a jury trial in the circuit court of Kane County for the killing of Hector Munoz on May 28, 1998. He was sentenced

to 40 years' imprisonment. On appeal, he contends that he has made a substantial showing that he received ineffective assistance of trial and appellate counsel. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The evidence at trial was that defendant, who was 16 years old at the time of the offense, was a member of the Latin Kings gang in Elgin, Illinois. Hector Munoz, also a member of the Latin Kings gang, previously had held the position of "Inca," which was the highest ranking position in the gang. However, Hector had stepped down from his leadership position months prior to his death. At the time of the shooting, defendant held the position of "enforcer." In this position, defendant was responsible for "holding security" at gang gatherings, which meant being armed with a gun and protecting the group, and for overseeing internal discipline within the gang. When a member violated gang rules, the member would "get served" or "get violated," which meant being beaten. According to defendant, an aspect of his role as "enforcer" was to ensure that the beatings occurred. Defendant would "take the time" by counting the seconds while a person was "get[ing] violated."

¶ 5 On the day of the shooting, defendant, Hector, and fellow gang member Julian Gomez attended a Latin Kings gathering at the home of Geronimo Covarrubias, also a member of the gang. The group was planning to get tattoos, but the person performing the tattoo work never arrived. The group hung around, drinking beer and smoking marijuana. Latin Kings gang member Eric Galarza had been holding security when defendant arrived. When Galarza left the gathering, he handed defendant a chrome .380 caliber handgun, so that defendant could hold security. According to defendant, the gun was a "nation gun," which meant it was property of the gang. Defendant, Hector, and Julian left the gathering after Geronimo's mother told everyone to leave the house. Defendant brought the handgun with him.

¶ 6 Defendant, Hector, and Julian then drove in Hector's car to another gang member's house, where they engaged in what defendant believed to be a cocaine transaction. The three then stopped by a liquor store before driving to their friend Rosie Salas's house, where they drank more beer and played with Rosie's children. According to defendant, he removed the handgun from his waistband and placed it in the couch cushions as he watched cartoons with the children. He retrieved the gun and placed it back in his waistband prior to departing.

¶ 7 Defendant, Hector, and Julian left Rosie's house around the time it was getting dark. Defendant estimated that he had consumed six beers by that point. Hector drove, Julian sat in the passenger seat, and defendant sat in the rear passenger-side seat, since the rear driver-side seat was occupied by a child's car seat. Music was playing loudly in the car, and the group did not have a specific destination in mind as they drove. Defendant removed the gun from his waistband and placed it on the seat to his left, since it had a tendency to slip down into his pants while he was seated. Defendant was slouched in his seat, feeling "bubbly" and "buzzed" from the beer and marijuana he had consumed. According to defendant, Hector was driving in his customary position, which was with his seat tilted all the way back.

¶ 8 While the three men were traveling on Erie Street on the west side of Elgin, Hector said something like " 'Rambo's behind us.' " Rambo was the nickname for Christian Garza, a fellow Latin Kings gang member who also had been present at Geronimo's house earlier in the evening. Julian made a Latin Kings hand gesture out of the passenger-side window. Defendant testified that he wanted to show off the gun to the car behind them, since "it was a chrome gun and it looked nice." Defendant reached over with his right hand to pick up the gun from the seat, pushed himself up from his slouched position, then raised up the gun to show it off. According to defendant, as he

"yanked it up, that's when it went off." The bullet struck Hector in the back of the head. With its driver deceased, the car accelerated and veered to the left, crashing into a parked car. Defendant testified that he had no intention of harming Hector, whom defendant considered to be his friend, and that he was just "being stupid" with the gun.

¶ 9 Christian had turned off of Erie and was waiting in his vehicle nearby on Roberts Drive. After Hector's car crashed, Julian, followed by defendant, ran to Christian's car and jumped through a window into the vehicle. Christian's car, which had sparkly blue paint and gold rims, had no door handles. Raul Gomez, who was Julian's brother and was in the car with Christian, testified that defendant said, " 'We shot the trick,' " soon after entering the car. Raul testified that defendant later said, " 'Ding dong, Hector's dead.' " Likewise, Julian testified that defendant said, " 'I shot the trick.' " "Trick" was a slang term used to refer to someone who had testified against another Latin Kings gang member or who had talked to the police, in violation of gang rules. According to defendant, he never said anything about shooting the "trick" but, instead, said, " 'Hector got hit, man, and he's dead. Get out of here, man.' "

¶ 10 Christian, Raul, Julian, and defendant then drove to Aurora. Defendant threw the bullets one by one out of the car window as they traveled down the highway. Once the group arrived at a fellow gang member's house in Aurora, defendant stashed the gun under a bush near the house. No one was present at the house, however, so the group then drove to an apartment complex in Geneva, where Julian discarded his bloody clothes in a dumpster. The clothes had become bloody because the airbag in Hector's car had broken Julian's nose during the crash. The group then returned to Elgin and checked into a Super 8 motel, where defendant showered. Defendant and Christian were

arrested the next day at a car wash after an Elgin police officer spotted Christian's car being detailed. The officer stopped the detailing process just as the car's interior was being shampooed.

¶ 11 The State's theory at trial was that defendant killed Hector in his capacity as "enforcer" because Hector had "tricked" on two prior occasions by testifying at unrelated criminal trials. The State called three witnesses in connection with Hector's earlier testimony.[1] First, the State called attorney Thomas McCulloch, who testified that he had represented Latin Kings gang member Luis Acevedo at a trial in 1996 in connection with a shooting that took place in Elgin. McCulloch testified that he had called Hector as an alibi witness at Acevedo's trial. Hector had testified that Acevedo had been with him at a Latin Kings gathering at the time of the shooting. According to McCulloch, Hector had identified six to eight other gang members by name who had been present at the gathering, and also had named the then-leader of the Latin Kings gang.

¶ 12 Next, the State called Assistant State's Attorney David Johnston, who testified that he had prosecuted Hector in early May 1998 on charges of attempted murder, armed violence, aggravated battery, and mob action. According to Johnston, Hector had been one of four codefendants tried separately in connection with the same incident. Hector's trial had taken place on May 7 and 8, 1998, and, during his testimony, Hector had identified codefendant Jesus Napoles as one of the gang members involved in the crime. Additionally, according to Johnston, Hector had testified that Jesus had been the first to approach and begin arguing with the victim.

¶ 13 Finally in connection with Hector's prior testimony, the State called Assistant State's Attorney Robert Steffen, who testified that he had participated in the prosecution of Jesus Napoles

---

[1]Prior to trial, Hector's prior acts of testifying had been the subject of a defense motion *in limine* that the trial court had denied.

in May 1998. Steffen testified that, on May 8, 1998, the same day that Hector had testified in his own trial, a trial judge had issued a no bond warrant for Jesus's arrest, because Jesus had failed to appear for a hearing in his case. Steffen further testified that Jesus had appealed the issuance of the no bond warrant, and that the appellate court had affirmed the trial court's issuance of the no bond warrant on May 27, 1998, one day prior to Hector's killing.

¶ 14 Defense counsel's strategy at trial was accident. During his closing argument, defense counsel argued that defendant and Hector had been friends and that the shooting had been an "accident" and a "colossal blunder." Counsel argued that the shooting had not been a planned, intentional act, but had been the accidental act of a "16-year-old boy" who "goofed badly." Defense counsel offered no argument that the jury could have found defendant guilty of the lesser-included offense of involuntary manslaughter, even though the trial court would instruct the jury on the lesser-included offense (IPI Criminal No. 7.07 (3d ed. 1992)), and instead argued solely for an acquittal based on the contention that the homicide was an accident.

¶ 15 As stated above, the jury returned a verdict of guilty of first-degree murder, and the trial court sentenced defendant to 40 years' imprisonment.

¶ 16 We affirmed defendant's conviction and sentence on direct appeal. *People v. Talavera*, No. 2-00-0560 (2002) (unpublished order under Supreme Court Rule 23). We held that (1) the evidence was sufficient to support a conviction of first-degree murder, and (2) the trial court did not err in allowing the State to introduce evidence of Hector's testimony at the two prior trials, since the evidence was relevant and competent to establish motive. *Talavera*, No. 2-00-0560. Four years later, we reversed the trial court's second-stage dismissal of defendant's first amended postconviction petition, because defendant's court-appointed postconviction counsel had not filed

a certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). *People v. Talavera*, No. 2-05-0138 (2006) (unpublished order under Supreme Court Rule 23). We remanded to the trial court for further postconviction proceedings. *Talavera*, No. 2-05-0138.

¶ 17 On remand, defendant retained private counsel and filed a second amended postconviction petition, which contained three constitutional claims. First, defendant contended that he received ineffective assistance of trial counsel, because, during closing argument, counsel had "abandoned" the argument that the jury could have found defendant guilty of the lesser-included offense of involuntary manslaughter and, instead, argued solely for acquittal based on the purportedly legally invalid theory of accident. Second, defendant contended that trial counsel had been ineffective because he elicited testimony from three witnesses—Julian Gomez, Detective Bill Wolf, and Dr. Joseph Cogan—that tended to prove the State's case.[2] Third, defendant contended that trial counsel was ineffective for failing to request a limiting instruction regarding the purported hearsay evidence of Hector's prior testimony, which the trial court had admitted solely to establish motive. Defendant further contended that the absence of a limiting instruction resulted in a violation of his constitutional right to confront the witnesses against him, as provided in *Crawford v. Washington*, 541 U.S. 36 (2004). Defendant also argued that appellate counsel was ineffective for failing to raise each of these claims on direct appeal.

¶ 18 The State filed a motion to dismiss defendant's second amended postconviction petition. After hearing argument, the trial court granted the State's motion to dismiss. The court subsequently denied defendant's motion to reconsider. Defendant timely appealed.

---

[2]We will discuss the these three witnesses' testimony when we address defendant's arguments on appeal.

¶ 19 ANALYSIS

¶ 20 On appeal, defendant argues that the trial court improperly dismissed his second amended postconviction petition at the second-stage. Although defendant's second amended postconviction petition incorporated by reference his original and first amended petitions, defendant offers no argument on appeal in support of his first two petitions. We will limit our discussion to the claims actually argued on appeal.

¶ 21 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)) provides a method by which a criminal defendant can assert that a conviction was the result of "a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Proceedings are divided into three stages. *Hodges*, 234 Ill. 2d at 9; *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, if the trial court determines that a petition "is frivolous or is patently without merit," it can summarily dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 10. At this stage, the allegations in the petition, taken as true and liberally construed, need only present the "gist" of a constitutional claim, which means that the claim must have an arguable basis in law and fact. *People v. Brown*, 236 Ill. 2d 175, 184 (2010); *Hodges*, 234 Ill. 2d at 9.

¶ 22 If a petition survives to the second stage, counsel may be appointed to an indigent defendant, and the State will be allowed to file responsive pleadings. 725 ILCS 5/122-4, 122-5 (West 2010); *Hodges*, 234 Ill. 2d at 10-11. To advance beyond the second stage, the petition and any accompanying documentation must make a "substantial showing" of a constitutional violation. *Edwards*, 197 Ill. 2d at 246. In deciding whether the petition makes such a showing, the court

liberally construes the petition in light of the trial record and accepts as true all well-pleaded factual allegations unless "positively rebutted" by the record. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). If the court determines that no substantial showing has been made, then the court dismisses the petition. *Edwards*, 197 Ill. 2d at 246. Otherwise, the petition proceeds to the third stage, during which the court conducts an evidentiary hearing. 725 ILCS 122-6 (West 2010); *Edwards*, 197 Ill. 2d at 246. Our review of the dismissal of a postconviction petition at the second stage is *de novo*. *Brown*, 236 Ill. 2d at 184.

¶ 23 In reviewing the sufficiency of a defendant's postconviction claims of ineffective assistance of counsel, we are guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on an ineffective assistance of counsel claim, a defendant must show both (1) that counsel's performance fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 694. Regarding the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *People v. Coleman*, 2011 IL App (1st) 091005, ¶ 13. A defendant must overcome the presumption that counsel's conduct " 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Regarding the second prong, "[a] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome of the proceeding." *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *Strickland*, 466 U.S. at 694).

¶ 24 We must first address the issue of procedural default. A postconviction proceeding " 'is not a substitute for, or an addendum to, direct appeal,' " and, accordingly, the scope ordinarily "is limited to constitutional matters that have not been, nor could have been, previously adjudicated." *People v. Rissley*, 206 Ill. 2d 403, 412 (2003) (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994)). Any issues that could have been raised on direct appeal but were not are considered procedurally defaulted, and any issues that were adjudicated on direct appeal are barred by the doctrine of *res judicata*. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). The procedural default rule may be relaxed, however, where either (1) the facts relating to counsel's alleged ineffectiveness do not appear on the face of the original trial record, or (2) a defendant can establish that appellate counsel was ineffective for failing to raise an issue on direct appeal, or (3) fundamental fairness so requires. *People v. Williams*, 209 Ill. 2d 227, 233 (2004). Defendant's only argument relevant to the issue of procedural default is that appellate counsel was ineffective for failing to raise his three postconviction claims on direct appeal. Thus, to the extent that defendant's postconviction claims rely on facts that appear on the face of the original trial record, we will relax the procedural default rule only if defendant has made a substantial showing that appellate counsel was ineffective.

¶ 25 Courts also use the two-prong *Strickland* test to address claims of ineffective assistance of appellate counsel. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). A defendant "must show that appellate counsel's failure to raise the issue was objectively unreasonable and prejudiced the defendant." *Simms*, 192 Ill. 2d at 362. However, "[a]ppellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently

wrong." *Simms*, 192 Ill. 2d at 362. "[A] defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal." *Simms*, 192 Ill. 2d at 362.

¶ 26 At oral argument, as well as in his brief, defense counsel contended that defendant's postconviction petition need only set forth an "arguable" or a "plausible" claim of ineffective assistance of counsel to advance past the second stage. This is the standard at the first stage of postconviction proceedings, not the second stage. See *Hodges*, 234 Ill. 2d at 16 (holding that a postconviction petition may be summarily dismissed at the first stage "only if the petition has no arguable basis either in law or in fact"). At the second stage, "it is appropriate to require the petitioner to 'demonstrate' or 'prove' ineffective assistance by 'showing' that counsel's performance was deficient and that it prejudiced the defense." *People v. Tate*, 2012 IL 112214, ¶ 19. While defense counsel also suggested at oral argument that this standard renders the second and third stages indistinguishable, counsel ignores that, at the second stage, the court must accept all factual allegations as true, unless positively rebutted by the record. *Hall*, 217 Ill. 2d at 334. At the third stage, which involves an evidentiary hearing, the defendant must prove his or her factual allegations. In this case, however, the facts largely are not in dispute, because defendant's postconviction petition derived essentially all of its facts from the face of the original trial record. The only "new fact" is defendant's statement in the affidavit attached to his postconviction petition that he "never instructed [trial counsel] to abandon all argument in favor of the possible alternative verdict of guilty of the offense of involuntary manslaughter or to focus exclusively on a request for a verdict of not guilty of all offenses." We accept this fact as true for purposes of our analysis.

¶ 27 Abandonment of Involuntary Manslaughter Instruction in Favor of Legally Invalid Defense Theory of Accident

¶ 28 Defendant contends that his second amended postconviction petition made a substantial showing that trial counsel rendered ineffective assistance when, during closing argument, he abandoned any argument that the jury could have found defendant guilty of involuntary manslaughter and, instead, argued solely for acquittal based on the purportedly legally invalid theory of accident. Defendant further contends that appellate counsel was ineffective for failing to raise this issue on direct appeal.

¶ 29 Addressing the involuntary manslaughter portion of defendant's argument first, defendant correctly points out that, during the jury instruction conference, defense counsel tendered an instruction on the lesser-included offense of involuntary manslaughter. In response to counsel's tendering of the instruction, the trial court admonished defendant that he had a choice of whether to submit the instruction to the jury. Defendant maintains that, because he chose to submit the instruction to the jury, defense counsel was then prohibited from making a strategic decision to abandon the instruction, which defense counsel himself had tendered.

¶ 30 The State responds that defendant has forfeited this argument by failing to cite authority. The State also argues that, overlooking defendant's failure to cite authority, his argument mischaracterizes Illinois law, which holds that a defense counsel's decision to argue a particular defense theory during closing argument is a matter of trial strategy.

¶ 31 While the State is correct that Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) requires an appellant to support his or her argument with citation of the authorities relied on, the rule is not violated simply because the authorities upon which the appellant relies are inapposite. *Vancura v. Katris*, 238 Ill. 2d 352, 372 (2010). Here, defendant cites *People v. Brocksmith*, 162 Ill. 2d 224 (1994), for the rule that the defendant, rather than defense counsel, ultimately should make

the decision whether to submit an instruction on a lesser-included offense to the jury. Defendant then argues that, given the rule from *Brocksmith*, defense counsel should not be permitted to abandon a lesser-included-offense instruction requested by a defendant. Defendant analogizes this situation to the situation, as in *People v. Buckley*, 282 Ill. App. 3d 81 (1996), where a jury is properly instructed on a lesser-included offense, but where a prosecutor misstates the law during closing argument. Defendant also cites *Herring v. New York*, 422 U.S. 853 (1975), in which the United States Supreme Court extolled the importance of closing arguments in criminal trials.

¶ 32 We agree with the State that the weight of Illinois law does not support defendant's position. It is well-settled that "[t]he evaluation of counsel's conduct cannot properly extend into areas involving the exercise of professional judgment, discretion[,] or trial tactics." *People v. Franklin*, 135 Ill. 2d 78, 118 (1990). Counsel's strategic decisions cannot form the basis for an ineffective assistance of counsel claim unless unsound. *People v. Barrow*, 133 Ill. 2d 226, 247 (1989). Within the realm of these strategic decisions, which are "virtually unchallengeable" (*Strickland*, 466 U.S. at 690), lies the decision of which defense theory to adopt during closing argument (*Franklin*, 135 Ill. 2d at 119; *People v. Milton*, 354 Ill. App. 3d 283, 290 (2004)). Furthermore, "[c]ounsel's decision to advance an 'all-or-nothing defense' has been recognized as a valid trial strategy [citations] and is generally not unreasonable unless that strategy is based upon counsel's misapprehension of the law." *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007).

¶ 33 *People v. Armstrong*, 244 Ill. App. 3d 545 (1993), which neither party cites, is instructive. The issue in *Armstrong* was whether the defendant's trial counsel was ineffective, where counsel tendered an instruction on the offense of second-degree murder but told the jury that it should disregard it. *Armstrong*, 244 Ill. App. 3d at 553-54. Defense counsel proceeded on the theory that

the defendant was not guilty because he had acted in self-defense. *Armstrong*, 244 Ill. App. 3d at 553-54. The court held that trial counsel had not been ineffective, because counsel's argument did not deny the jury the opportunity to find the defendant guilty of second-degree murder. *Armstrong*, 244 Ill. App. 3d at 554. Likewise, here, while defense counsel did not offer any argument to the jury in support of the instruction on the lesser-included offense of involuntary manslaughter, nothing in counsel's closing argument precluded the jury from finding defendant guilty of that offense. See *Walton*, 378 Ill. App. 3d at 588 (noting that the tendering of an instruction on a lesser-included offense gives the jury the option to convict the defendant of the uncharged lesser-included offense).

¶ 34 Neither *Brocksmith*, *Buckley*, nor *Herring* compels us to depart from this well-settled law. The court in *Brocksmith* held that a defendant is entitled to choose whether to submit a lesser-included-offense instruction to the jury, because the decision is "analogous to the decision of what plea to enter." *Brocksmith*, 162 Ill. 2d at 229. This reasoning does not extend to the decision of which defense theory to adopt, which is a matter of professional judgment. The issue in *Buckley* was whether the State's misstatement of the law during closing argument resulted in "substantial prejudice" to the defendant. *Buckley*, 282 Ill. App. 3d at 90. This clearly is distinguishable from defense counsel's decision to adopt one legally valid defense theory over another. Finally, the issue in *Herring* was whether a New York law that permitted judges in criminal bench trials to deny counsel the opportunity to make a closing argument was unconstitutional. *Herring*, 422 U.S. at 853-54. We fail to see how *Herring* applies where, as here, defense counsel was not denied the opportunity to make a closing argument.

¶ 35 Defendant also argues that the theory defense counsel did adopt during closing argument, which was that defendant was not guilty based on the theory of accident, was not legally viable.

Defendant relies on *People v. Lemke*, 349 Ill. App. 3d 391 (2004), in support of his contention that, under the facts of this case, the jury could not have acquitted defendant on a theory of accident.

¶ 36 The State rejects defendant's reading of *Lemke* and argues that accident was a legally viable defense theory under the facts of this case. According to the State, had the jury believed defendant's testimony that the gun accidentally had discharged as he "yanked" it up from the seat, then the jury could have acquitted him of first-degree murder and involuntary manslaughter.

¶ 37 As a initial matter, when evaluating a postconviction claim of ineffective assistance of trial or appellate counsel, courts must look to the state of the law at the time of the direct appeal. *People v. English*, 2013 IL 112890, ¶ 34 (citing *Strickland*, 466 U.S. at 689; *People v. Weninger*, 292 Ill. App. 3d 340, 345 (1997)). This rule is implicated here, because *Lemke* was decided in 2004, four years after defendant's jury trial, and two years after his direct appeal was concluded. Furthermore, there is an issue of whether *Lemke* was consistent with the law as it existed at the time of defendant's trial and direct appeal, or whether the case was a deviation from prior cases that had treated the question of whether the discharge of a firearm was accidental or reckless as an issue for the trier of fact to decide. See *People v. Schwartz*, 64 Ill. App. 3d 989, 993-94 (1978) (citing cases). We need not resolve this issue, however, because *Lemke* is readily distinguishable.

¶ 38 In *Lemke*, the defendant, who had been drinking heavily, got into an argument and a physical altercation with his stepson outside of the defendant's home. *Lemke*, 349 Ill. App. 3d at 393. The defendant went inside, retrieved a pistol, then went back outside. *Lemke*, 349 Ill. App. 3d at 393. The defendant testified that he then felt a sharp pain at his hip and heard a blasting noise, before seeing his stepson fall to the ground. *Lemke*, 349 Ill. App. 3d at 393. At a bench trial on charges of first-degree murder, defense counsel adopted an "all-or-nothing" theory that the shooting had been

an accident. *Lemke*, 349 Ill. App. 3d at 399. The judge found the defendant guilty of first-degree murder. *Lemke*, 349 Ill. App. 3d at 395.

¶ 39 On appeal, the court in *Lemke* held that the defendant had been denied the effective assistance of counsel, because, "[g]iven the defendant's testimony, counsel's adoption of an all-or-nothing approach could only have been based on a misapprehension of the law." *Lemke*, 349 Ill. App. 3d at 399. The court cited the well-established rule that "whether the discharge of the weapon creates the requisite intent has been seen as a question of fact for the trier of fact." *Lemke*, 349 Ill. App. 3d at 399 (citing *People v. Hoover*, 250 Ill. App. 3d 338, 351 (1993); *People v. Franklin*, 189 Ill. App. 3d 425, 430 (1989)). However, the court limited this rule to "situations where the handling of a firearm is not otherwise reckless." *Lemke*, 349 Ill. App. 3d at 399. The court then concluded that this was not the situation in the case before it, because the defendant's recklessness stemmed from his possession and directing of the gun at his stepson during an ongoing dispute. *Lemke*, 349 Ill. App. 3d at 400. The court stated that, under these facts, "[t]he defendant's pointing of a handgun in the direction of [his stepson] cannot be seen as an accident." *Lemke*, 349 Ill. App. 3d at 400.

¶ 40 We cannot say, as the court did in *Lemke*, that defendant's actions as a matter of law could not have been accidental. In *Lemke*, the gun discharged after the defendant had retrieved it during a heated argument, had returned outside, and had pointed the gun at his stepson. *Lemke*, 349 Ill. App. 3d at 393. The court in *Lemke* concluded that the defendant's actions, at a minimum, constituted recklessness. *Lemke*, 349 Ill. App. 3d at 399-400. Here, by contrast, defendant had the gun with him in Hector's car, not because he had retrieved it in the heat of an argument, but because he had been carrying it around all afternoon and evening in his role as "enforcer." There was no testimony that defendant had been arguing with Hector, or that he had raised the gun in anger only

to have it "accidentally" discharge. Rather, defendant testified that everything in the car was calm, that the occupants were driving around listening to music and feeling "bubbly" and "buzzed," and that he had placed the gun on the seat to his left so that he could feel more comfortable as he slouched in his seat. According to defendant, the gun discharged as he "yanked" it up from the seat so that he could show it off to Rambo's car, which was behind them. Defendant's testimony did not describe a shooting that, as a matter of law, could not have been accidental. As the State argues, had the jury found defendant to be the most credible witness, and had it found the two Gomez brothers not credible, it could have acquitted defendant of first-degree murder based on a theory of accident.

¶ 41 *Lemke* also is distinguishable because, while *Lemke* was a bench trial, defendant's trial was before a jury, and the jury was instructed on the lesser-included offense of involuntary manslaughter, as well as on the definitions of "recklessness" and "intent" (see IPI Criminal Nos. 5.01, 5.01A (3d ed. 1992)). Thus, it would be a strain to characterize defense counsel's strategy in this case as "all-or-nothing," as the court characterized the defense counsel's theory in *Lemke*.[3] Furthermore, as we stated above, while defense counsel in the present case did argue for acquittal based on a theory of accident, nothing in counsel's closing argument precluded the jury from finding defendant guilty of involuntary manslaughter. See *Walton*, 378 Ill. App. 3d at 588; *Armstrong*, 244 Ill. App. 3d at 553-54.

¶ 42 Harmful Testimony from Three Witnesses

[3]In characterizing defense counsel's strategy as "all-or-nothing," the court in *Lemke* seemed to ignore that a judge in a bench trial may convict a defendant of an uncharged lesser-included offense *sua sponte*. *Walton*, 378 Ill. App. 3d at 588.

¶ 43 Defendant next argues that his second amended postconviction petition made a substantial showing that trial counsel rendered ineffective assistance by eliciting allegedly harmful testimony from three witnesses—Julian Gomez, Detective Bill Wolf, and Dr. Joseph Cogan—and that appellate counsel was ineffective for failing to raise this issue on direct appeal. According to defendant, when the trial court addressed this claim, it misinterpreted the case law as requiring defendant to show that defense counsel elicited testimony that proved a critical element of the State's case. Furthermore, defendant argues, any determination of whether harmful evidence was key or critical to the State's case should be reserved for the third stage of postconviction proceedings. The State responds that the trial court properly applied the law and that, regardless, the testimony elicited by defense counsel was not harmful.

¶ 44 We disagree with defendant that the trial court misapplied the law in this area. As the trial court did, defendant relies on *People v. Bailey*, 374 Ill. App. 3d 608 (2007), *People v. Orta*, 361 Ill. App. 3d 342 (2005), and *People v. Jackson*, 318 Ill. App. 3d 321 (2000).[4] All three cases involved defendants convicted of possession of a controlled substance with intent to deliver, and, in all three cases, defense counsel elicited testimony from witnesses that was critical in proving the element of intent to deliver. In *Bailey*, defense counsel elicited testimony that was the only evidence linking the defendant to a man who had been standing on a nearby street corner yelling " 'rocks' " at passing cars. *Bailey*, 374 Ill. App. 3d at 614-15. In *Orta*, defense counsel elicited testimony that police

[4]While both *Bailey* and *Orta* were decided after defendant's direct appeal was concluded, both cases relied on *Jackson*, which was decided three months before defendant filed his opening brief on direct appeal. Thus, we consider all three cases to be representative of the state of the law at the time of defendant's direct appeal.

officers had found prerecorded currency during a search of the defendant's home—currency which had been used in a prior undercover drug transaction orchestrated by the police. *Orta*, 361 Ill. App. 3d at 345, 347. In *Jackson*, defense counsel elicited testimony that, shortly after an unknown person had given the defendant money, a man standing near the defendant had reached into a bag and handed something to the unknown person. *Jackson*, 318 Ill. App. 3d at 328. In all three cases, the courts held that defense counsel had rendered ineffective assistance of counsel because counsel had elicited evidence that was "key," "critical," or "essential" to the State's case. *Bailey*, 374 Ill. App. 3d at 615 ("The testimony was a key piece of evidence."); *Orta*, 361 Ill. App. 3d at 343 ("In this case, the defendant's lawyer elicited testimony from police officers that enabled the State to prove an essential element of its charge."); *Jackson*, 318 Ill. App. 3d at 328 ("For defense counsel to elicit testimony which proves a critical element of the State's case where the State has not done so upsets the balance between defense and prosecution so that defendant's trial is rendered unfair."). The trial court did not misread these cases.

¶ 45 The allegedly harmful testimony was as follows. Julian Gomez testified at length during the State's case-in-chief regarding the events of May 28, 1998. His testimony on direct examination included his statement that defendant had declared, " 'I shot the trick,' " soon after entering Christian Garza's car. During cross-examination, defense counsel asked Julian whether he had told police that the shooting had been an accident. When Julian denied this, defense counsel attempted to impeach him with a prior inconsistent statement to the police. At the police station on May 30, 1998, Detective Bill Wolf had asked Julian, " '[W]hy do you think that [defendant] shot Hector?' " Julian had answered, " 'Through his accident, or if it was on purpose, if he did it on purpose, it was because of some papers.' " When defense counsel asked Julian if he remembered being asked this question

and giving this answer, Julian said, "I don't remember." During redirect, the State asked Julian what he had meant when he had said "papers," and Julian responded, "Papers on Hector testifying."

¶ 46 During defendant's case-in-chief, defense counsel called Detective Wolf to the stand. Counsel asked Detective Wolf about taking a recorded statement from Julian Gomez at the police station on May 30, 1998. He asked Detective Wolf if he remembered asking Julian why the shooting occurred, and if he remembered Julian answering, " 'Through his accident, or if it were on purpose, if he did it on purposes, it was because of some papers.' " Detective Wolf answered affirmatively.

¶ 47 The final piece of challenged testimony came from Dr. Joseph Cogan, whom the State called as an expert witness. Dr. Cogan was a forensic pathologist for the Cook County medical examiner's office who conducted autopsies for Kane County on a part-time basis and who had performed Hector's autopsy. On direct examination, Dr. Cogan testified that he had observed a five-inch-diameter circle of "stippling" around Hector's gunshot wound. According to Dr. Cogan, "stippling" resulted from gunpowder and other metal fragments being discharged from the gun's barrel along with the bullet. He testified that he would have had to fire the gun that was used in the shooting to determine the distance from which the gun was fired. Since no gun was ever recovered in this case, Dr. Cogan was able only to estimate that the gun that killed Hector had been discharged at "close range." Dr. Cogan testified that, by "close range," he meant within three feet. However, because the stippling on Hector's head was visible to the naked eye, he could further estimate that the gun was discharged "within 18 inches or so." Dr. Cogan further testified that visible stippling could indicate a shooting from a distance of "a quarter of an inch up to 18 inches, depending on how tight that stippling is."

¶ 48 During defense counsel's cross-examination of Dr. Cogan, counsel asked the witness, "And so from your examination of this case of the stippling that you found, you can only say as an expert that *** it was close range, and not further than 3 feet; is that correct?" Dr. Cogan answered, "No. As far as my opinion specifically, it's not a contact from the size of the pattern. I would say it's more than one inch, less than 18 inches. Somewhere between 1 and 18 inches is the range."

¶ 49 On appeal, defendant contends that the testimony from Julian Gomez and Detective Wolf concerning "some papers" tended to prove the State's theory that defendant had killed Hector in retaliation for "tricking." Defendant points out that the State had attempted to elicit testimony from various witnesses regarding their observations of certain "papers," but had failed to do so. Defendant also points out that, during the State's rebuttal closing argument, it referenced Julian's comment regarding "some papers" in support of its motive theory.

¶ 50 Defendant's argument regarding the "some papers" testimony from Julian and Detective Wolf misses the mark. Defendant ignores that a prior inconsistent statement used for impeachment purposes is not admissible as substantive evidence. See *People v. Cruz*, 162 Ill. 2d 314, 359 (1994) ("[T]he purpose of such impeachment evidence is to destroy the credibility of the witness and *not* to establish the truth of the impeaching material. Prior inconsistent statements *** are not to be treated as having any substantive or independent testimonial value." (Emphasis in original.)). The only exception to this rule is when a prior inconsistent statement meets the requirements of section 115-10.1 of the Code of Criminal Procedure (725 ILCS 5/115-10.1 (West 2000)), which Julian's "some papers" statement to police would not have met. We also note that the jury received Illinois Pattern Jury Instruction, Criminal, No. 3.11 (3d ed. 1992), which, as read to the jury, provided in relevant part as follows:

> "The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind ordinarily may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom."

Thus, the jury was properly instructed on the evidentiary value of prior inconsistent statements used for impeachment purposes.

¶ 51 Contrary to defendant's characterization, defense counsel did not *elicit* any testimony concerning "some papers" from Julian or from Detective Wolf. Rather, defense counsel used Julian's prior inconsistent statement—that defendant had killed Hector "through his accident"—to impeach Julian, who denied at trial that he had told the police that the shooting might have been an accident. Defense counsel arguably made the strategic decision to impeach Julian using his entire prior statement—including the "some papers" portion of the statement—because, otherwise, the State would have been able to admit the rest of Julian's statement to qualify or explain the portion used. See *People v. Harris*, 123 Ill. 2d 113, 142 (1988) ("It is well established that where a witness has been impeached by proof that he has made prior inconsistent statements, he may bring out all of the prior statements to qualify or explain the inconsistency and rehabilitate the witness."). Furthermore, defense counsel called Detective Wolf merely to complete the impeachment of Julian, since Julian had denied making the "through his accident" statement. See *People v. Allan*, 231 Ill. App. 3d 447, 457 (1992) ("A witness' denial of a prior inconsistent statement makes it incumbent upon the cross-examiner to offer evidence of the prior inconsistent statement.").

¶ 52 While defendant points out that, during the State's rebuttal closing argument, it referenced Julian's "some papers" statement in support of its motive theory, this does not alter our analysis.

Arguably, defense counsel should have objected to this portion of the State's closing argument, since it referenced facts not in evidence. However, defendant has not raised this argument on appeal.

¶ 53 Furthermore, even if we were to conclude that defendant had made a substantial showing that defense counsel's decision to impeach Julian with the "some papers" statement fell below an objective standard of reasonableness, we nevertheless would conclude that defendant's petition has failed to make a substantial showing that he was prejudiced by counsel's decision. Again, prejudice requires a showing of a reasonable probability that the result of the proceeding would have been different, which is a probability sufficient to undermine confidence in the outcome of the proceeding. *Colon*, 225 Ill. 2d at 135. Here, the State presented a significant amount of evidence in support of its motive theory, including testimony regarding defendant's role as "enforcer," testimony from the two Gomez brothers about defendant declaring that he had " 'shot the trick,' " and testimony from the three attorneys regarding Hector's prior testimony in violation of gang rules. Defendant has not made a substantial showing that, in light of this evidence, disclosing Julian's statement concerning "some papers" was a key or critical piece of evidence.

¶ 54 Similarly, regarding Dr. Cogan's testimony that defense counsel elicited on cross-examination—that the gun had discharged "[s]omewhere between 1 and 18 inches" from Hector's head—we agree with the State that defendant has not made a substantial showing that this testimony was harmful to him. The statement from Dr. Cogan came during a portion of the cross-examination focused on imputing uncertainty and conjecture into the expert's conclusions. Arguably, defense counsel succeeded in this endeavor, since he elicited testimony from Dr. Cogan that he could not narrow down his opinion from a 17-inch range. Regardless, Dr. Cogan already had testified on direct

that visible stippling could indicate a shooting from a distance of "a quarter of an inch up to 18 inches, depending on how tight that stippling is."

¶ 55 Moreover, Dr. Cogan's opinion elicited on cross-examination was not inconsistent with defendant's testimony concerning the circumstances of the shooting. Defendant himself testified that the gun had discharged as he "yanked" it up from the seat to his left, which was the side closest to Hector, and that Hector had been driving with his seat tilted into the backseat. Thus, it likely came as no surprise to the jury when it heard Dr. Cogan's opinion that the shooting had been "close range" or within 1 to 18 inches.

¶ 56 Limiting Instruction and *Crawford* Violation

¶ 57 Defendant next argues that his second amended postconviction petition made a substantial showing that defense counsel was ineffective for failing to request a limiting instruction regarding the purported hearsay evidence of Hector's testimony at the two earlier unrelated criminal trials, and that appellate counsel was ineffective for failing to raise this issue on direct appeal. Defendant contends that the trial court admitted this evidence—in the form of testimony from attorneys McCulloch, Johnston, and Steffen—solely to establish motive, and that a limiting instruction was necessary to prevent the jury from considering the testimony "substantively to show that the [d]efendant associated with gang members who committed violent criminal acts unrelated to the offense on trial." Defendant further contends that, pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), the absence of a limiting instruction resulted in a violation of his constitutional right to confront the witnesses against him.

¶ 58 As an initial matter, we can easily reject defendant's *Crawford* argument. Even overlooking the fact that *Crawford* was decided in 2004 and announced a new rule that was unavailable at the

time of defendant's direct appeal,[5] the rule from *Crawford* has no application to non-hearsay statements, including statements that are not admitted for the truth of the matter asserted. *People v. Banks*, 237 Ill. 2d 154, 182 (2010) ("The confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' " (quoting *Crawford*, 541 U.S. at 59 n.9)). Here, the evidence of Hector's prior testimony was not admitted to prove the truth of what Hector said at the two unrelated criminal trials, it was admitted solely to prove that Hector had violated the Latin Kings' rule against testifying at trial concerning the gang or its members. Thus, the evidence of Hector's prior testimony did not implicate the rule from *Crawford*.

¶ 59 Regarding defendant's limiting-instruction argument, the only argument defendant offers is that, absent a limiting instruction, the jury somehow was able to consider the evidence of Hector's

---

[5]The rule announced was that a testimonial statement of an out-of-court declarant is not admissible under an exception to the hearsay rule unless (1) the witness is unavailable to testify at trial and (2) the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. While our supreme court has held that the rule from *Crawford* is to be applied retroactively to all cases that were pending on direct review or not yet final at the time *Crawford* was decided (*People v. Stechly*, 225 Ill. 2d 246, 268 (2007)), it has not decided whether *Crawford* announced a watershed rule of criminal procedure, such that it should be applied retroactively in postconviction proceedings (see *Teague v. Lane*, 489 U.S. 288, 307 (1989) (discussing when new constitutional rules of criminal procedure apply retroactively to cases on collateral review)). Notably, however, the United States Supreme Court has held that *Crawford* did not announce a watershed rule that should apply retroactively in federal *habeas* proceedings. *Whorton v. Bockting*, 549 U.S. 406, 421 (2007). Regardless, we need not resolve this issue in order to resolve defendant's appeal.

prior testimony as evidence "that the [d]efendant associated with gang members who committed violent criminal acts unrelated to the offense on trial." However, the testimony from the three attorneys regarding Hector's prior testimony did not implicate—or even so much as hint at—defendant in any way. In our decision affirming defendant's conviction and sentence on direct appeal, we stated:

> "It is worth noting also that the motive testimony scrutinized in this case was that of the decedent [Hector] only. The introduction of this testimony does not inform the jury of any prior criminal record of defendant nor prejudice the jury against defendant by involving him in prior criminal activity." *Talavera*, No. 2-00-0560.

We continue to abide by this statement. While the evidence regarding Hector's prior testimony tended to establish a motive for the shooting, and while it did implicate Hector in prior crimes and prior gang-related activity, it did not similarly implicate defendant.

¶ 60 Furthermore, even if the evidence of Hector's testimony did somehow indirectly implicate defendant in prior criminal gang activity, the record reflects that defense counsel made a strategic decision not to request a limiting instruction. The record reveals that defense counsel objected to the State's jury instruction No. 15, which contained a version of Illinois Pattern Jury Instruction, Criminal, No. 3.14 (3d ed 1992):

> "Evidence has been received that the defendant has been involved in conduct other than that charged in the indictment. This evidence has been received on the issues of defendant's identification, intent and knowledge, and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that

> conduct and, if so, what weight should be given to this evidence on the issues of identification, intent and knowledge."

At the jury instruction conference, the State indicated that it was offering this instruction as "kind of a prior bad acts instruction that specifically relate[d] to [defendant's] gang membership and his specific role as enforcer." Defense counsel objected to the instruction on the basis that the instruction would be "specifically pointing out something which isn't really backed up by the evidence." The court recognized the "dilemma," since the instruction "call[ed] specific attention to that evidence." The court stated that it "regard[ed] this as a matter of trial strategy" and therefore refused the instruction. This exchange supports our conclusion that defense counsel's decision not to request a limiting instruction regarding Hector's prior testimony did not fall below an objective standard of reasonableness. Had counsel requested a limiting instruction, the instruction likely would have drawn the jury's attention to the fact that the evidence of Hector's earlier testimony tended to prove motive. Defendant has not made a substantial showing that this strategic decision constituted ineffective assistance.

¶ 61 CONCLUSION

¶ 62 Based on the foregoing, we conclude that the trial court properly dismissed defendant's second amended postconviction petition at the second stage. Even liberally construing defendant's second amended postconviction petition and accepting as true all well-pleaded facts, we conclude that defendant has not made a substantial showing that trial or appellate counsels were ineffective. Moreover, because an appellate counsel is not ineffective for failing to raise nonmeritorious claims on appeal (*Simms*, 192 Ill. 2d at 362), to the extent that defendant's postconviction claims rely on facts that appear on the face of the original trial record, we decline to relax the procedural default

rule, and we conclude that the issues are procedurally defaulted. Consequently, we affirm the judgment of the circuit court of Kane County dismissing defendant's second amended postconviction petition.

¶ 63 Affirmed.