2014 IL App (2d) 130368-U
Nos. 2-13-0368, 2-13-0369, 2-13-0370, 2-13-0550 & 2-13-0551
Order filed November 7, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. LUMONT D. JOHNSON, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Winnebago County. Nos. 02-CF-1840 02-CF-1841 02-CF-1861 Honorable Joseph G. McGraw, Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. ANTHONY S. ROSS, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 02-CF-1840 Honorable Joseph G. McGraw, Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v.	))))))	Appeal from the Circuit Court of Winnebago County. No. 02-CF-1861

TYJUAN T. ANDERSON,	)	Honorable
	)	Joseph G. McGraw,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in allowing defendants to add a claim to their postconviction petitions during the third stage of the proceedings, and the trial court's decision to grant defendants' postconviction relief was not manifestly erroneous. Therefore, we affirmed.

¶ 2 Following jury trials, defendants, Lumont D. Johnson, Anthony S. Ross, and Tyjuan T. Anderson, were convicted of the first-degree murder (720 ILCS 5/9-1(a)(2) (West 2002)) of eight-year-old Demarcus Hanson and sentenced to 50 years' imprisonment. Defendants filed individual postconviction petitions that progressed to a joint third-stage evidentiary hearing. During the third stage, the trial court allowed defendants to amend their postconviction petitions with due process and ineffective-assistance-of-counsel claims based on trial counsels' late access and/or failure to use recorded conversations to impeach a key witness in defendants' trials, Alex Dowthard. The trial court granted defendants postconviction relief based on the added due process claim. The State appeals, arguing that the court erred by allowing defendants to amend their postconviction petitions at the third stage and by granting them postconviction relief. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Underlying Proceedings

¶ 5 After defendants were charged with the 2002 murder of Demarcus, Ross's trial was severed, and Anderson and Johnson were tried together. Both were jury trials. Anderson and

Johnson's joint trial began first, in October 2002, followed by Ross's trial in February 2004. The following evidence was adduced.

¶ 6 On April 14, 2002, Demarcus was sleeping at the house of his grandmother, Estella Dowthard, when he was killed by gunshots that were fired through the bedroom window. Estella heard the shots, realized that Demarcus had been hit, and called 911 around 2:53 a.m. to report the shooting. The State's theory was that Estella's son (and Demarcus's uncle), Alex Dowthard, and not Demarcus, was the intended victim.

¶ 7 Dowthard was a key witness at both trials and offered the following testimony. He was a member of the Gangster Disciples, and defendants were part of a rival gang called the "Stones." On the night that Demarcus was shot, Dowthard was with his friend Lataurean Brown. They sat on the hood of Dowthard's car in front of a liquor store when defendants drove up in a blue and white Suburban. Dowthard and defendants exchanged gang slurs, and then defendants drove away. After that, Dowthard and Brown were driving down Tay Street, with Brown driving, when they saw defendants' Suburban driving towards them. Dowthard shot at defendants' Suburban four to five times with his gun. Dowthard and Brown kept driving, turned the corner, and saw defendants again. Dowthard then fired two to three more shots at defendants. After shooting at defendants, Dowthard told Brown they needed to find another car to drive around in, but they could not find one. Dowthard then told Brown to drive to his mother's (Estella's) house so that Dowthard could hide his gun, which he did underneath a car in her driveway.

¶ 8 As Dowthard walked back towards his car, a red car pulled up next to his car, and defendants exited the vehicle. Johnson and Ross were holding automatic chrome handguns and ran towards Dowthard. Dowthard ran to the back of Estella's house and knelt behind the garage. After about 20 seconds, Dowthard heard four or five gunshots "up front somewhere." Dowthard

then ran through Estella's yard and found Brown, who had driven off before the shots were fired, nearby. The two drove to a housing project.

¶ 9 The next morning, Dowthard learned that Demarcus had been shot and killed. He did not immediately contact the police, however, because he was on parole and was not supposed to have a gun. Dowthard learned that the police wanted to question him about the shooting, and he went with his uncle to the police station. Initially, Dowthard did not tell the truth and told the police that he knew nothing about how Demarcus was killed. Dowthard said he had spent the night with a friend, and he had asked that friend to give him a false alibi. Dowthard also lied about being on parole. Eventually, when the police threatened to test him for gun powder residue, Dowthard admitted possessing a gun and was taken to Big Muddy River Correctional Center (Big Muddy) for a suspected parole violation.

¶ 10 Trial evidence also showed that Detectives Joseph Stevens and Doug Palmer interviewed Dowthard at Big Muddy on May 2, 2002. During that interview, Dowthard denied hearing the gunshots that killed Demarcus and said "I'll do my time and get out. I'll see the [parole] board next month." On May 13, 2002, while incarcerated at Big Muddy, Dowthard was charged with committing an unrelated forgery from a few months prior. Dowthard told the police that he would give information about Demarcus's death only if they promised to inform the parole board and the State's attorney that he had cooperated.

¶ 11 On May 31, 2002, in a written statement, Dowthard identified defendants as the ones responsible for Demarcus's death. In his written statement, Dowthard said that he did not cooperate with the police at first because he thought he could handle the situation himself. Dowthard's written statement did not include his admission of shooting at defendants' Suburban on the night of the incident. Although Dowthard testified that the State had not offered him

anything in exchange for his testimony, the State dismissed the forgery charge and wrote a letter to the parole board to that effect. In addition, the State never charged Dowthard with any offense related to his shooting at defendants' Suburban.

¶ 12 Brown testified that he initially lied to police when questioned 10 days after the shooting. Although Brown told police about Dowthard shooting at defendants' Suburban, he did not say who had shot at Estella's house. It was not until May 2002 that Brown told police that defendants were responsible for Demarcus's death. However, when Brown spoke to police in May 2002, he never said that he was present when shots were fired at Estella's house. According to Brown, he saw defendants drive up in a red car and run after Dowthard, although he did not see defendants carrying any guns. Brown heard the shots after driving away from Estella's house.

¶ 13 The State did not identify or produce the weapon that killed Demarcus, and all three defendants presented alibi defenses.

¶ 14 Defendants were found guilty of first-degree murder and sentenced to 50 years' imprisonment.

¶ 15 B. Posttrial Proceedings

¶ 16 Anderson and Johnson filed individual motions for a new trial raising several issues, including late access to several recorded conversations. During Dowthard's incarceration at Big Muddy in May 2002, he had several telephone conversations with family and friends. These conversations, which totaled about 40 hours, were recorded in 20 tapes (Dowthard tapes). The Dowthard tapes predated Dowthard's May 31, 2002, written statement to police implicating defendants. However, the State did not make the Dowthard tapes available to defendants' trial counsel until the Friday afternoon before Anderson and Johnson's joint trial was to begin.

¶ 17 Anderson's trial counsel, Karen Sorenson, stated that the Dowthard tapes were difficult to understand due to the static and background noise of a penitentiary, and that there was no time to filter out the extraneous noise. As a result, Sorenson and Johnson's attorney, Randy Wilt, did not personally listen to the Dowthard tapes but gave them to other attorneys to review. Sorenson stated that "it was very difficult to even explain to them what it was that we were looking for with regard to those tapes because the issues were so complex. There were so many people [Dowthard] could potentially have been talking to and so many things he might have been talking to them about that would have been fodder for cross-examination, but we simply didn't have the opportunity to do that." Both Sorenson and Wilt argued that the Dowthard tapes could have been of key importance because it was not until after these recorded conversations that Dowthard suddenly changed his story and implicated defendants in the shooting. However, the Dowthard tapes were not used at the joint trial of Anderson and Johnson.

¶ 18 Likewise, the Dowthard tapes were not used at Ross's subsequent trial. In addition, Ross's attorney, Jeffrey Kline, made no reference to the Dowthard tapes in his motion for a new trial.

¶ 19 Each defendant filed a direct appeal and raised issues unrelated to the Dowthard tapes, and this court affirmed their convictions. See *People v. Anderson*, 367 Ill. App. 3d 653 (2006); *People v. Ross*, No. 2-04-0391 (2006) (unpublished order under Supreme Court Rule 23); *People v. Johnson*, No. 2-03-0395 (2005) (unpublished order under Supreme Court Rule 23).

¶ 20 C. Postconviction Proceedings

¶ 21 Defendants filed individual postconviction petitions, with Johnson filing his petition in 2005, and Ross and Anderson filing their petitions in 2007. The trial court advanced the petitions to the second stage on October 18, 2007. Defendants then filed individual amended

postconviction petitions, and the State moved to dismiss defendants' petitions in December 2009. The trial court denied the State's motion in April 2010.

¶ 22 In the meantime, in September 2008, postconviction counsel for Anderson and Ross advised the court that they did not have a complete set of police reports regarding the case, and they requested "leave to issue a subpoena just to get the police reports in this case in the interim." The court granted this motion. After the first subpoena "returned only 300-odd" pages of police reports, Ross's postconviction counsel again filed a motion for discovery of the complete police file in June 2010. In his motion, Ross noted that his trial attorney, Kline, had fled the country and was unreachable.[1] A second subpoena was issued in September 2010.

¶ 23 An evidentiary hearing commenced on July 18, 2011. On that day, Ross's postconviction counsel filed a motion seeking, among other things, permission to compel the State or the Rockford Police Department to produce the Dowthard tapes. Ross's motion noted that the complete police file had already been requested on "two separate occasions." The trial court agreed that the Dowthard tapes needed to be produced, although the State advised the court that it could not locate them.

¶ 24 As the evidentiary hearing continued, the parties appeared in court on November 2, 2011, at which time Johnson's postconviction counsel, Richard McLeese, advised the court that he had recently discovered the Dowthard tapes in his office. McLeese explained that when he began representing Johnson in the postconviction proceedings, he obtained many materials from Johnson's trial counsel Wilt from the underlying trial, including the Dowthard tapes. McLeese then moved offices and did not realize that the Dowthard tapes had been separated from "the rest of the paper files" in Johnson's case. McLeese "lost track of the whole issue" but remembered

[1] The parties later learned that Kline was killed in Costa Rica in 2006.

that some of the materials from Wilt included tapes. McLeese looked for the tapes and had found them 10 days ago. The court agreed with McLeese that the Dowthard tapes needed to be transcribed to determine their significance, if any. Based on the content of the Dowthard tapes, the court noted that defendants may want to file "amended" postconviction petitions.

¶ 25 Defendants subsequently moved to admit the Dowthard tapes into evidence at the evidentiary hearing. Defendants argued that in the tapes, Dowthard admitted to getting a deal from the State and not being present at the time of Demarcus's shooting. In addition, defendants argued that the Dowthard tapes revealed that Dowthard was coached by other individuals on what to tell the police. Defendants advised the court that, if the Dowthard tapes were deemed admissible, they planned to seek leave to amend their postconviction petitions with due process and ineffective assistance of counsel claims in relation to the tapes. Over the State's objection, the court determined on June 1, 2012, that the Dowthard tapes were admissible and potentially relevant at the evidentiary hearing.

¶ 26 1. Amendment of Postconviction Petitions

¶ 27 On July 13, 2012, Anderson moved to amend his postconviction petition based on the Dowthard tapes. Anderson alleged that the Dowthard tapes could have been of key importance because it was after the last of the tapes were recorded that Dowthard suddenly changed his story and first advised the police that he had knowledge that defendants were involved in the shooting death of Demarcus. Anderson also alleged that his trial counsel Sorenson "either did not listen to all the tapes, or did not use them." Because Sorenson should have impeached the credibility and testimony of Dowthard, Anderson alleged that he was denied the effective assistance of trial counsel and, in the alternative, due process of law.

¶ 28 On August 31, 2012, Johnson and Ross filed similar motions to amend their postconvictions based on the Dowthard tapes. Johnson alleged ineffective assistance of trial and appellate counsel and a denial of due process. Ross alleged only ineffective assistance of trial counsel based on Kline's failure to use the Dowthard tapes to impeach Dowthard.

¶ 29 The parties appeared in court on August 31, 2012, regarding defendants' motions to amend their postconviction petitions. At that hearing, the State first objected on the basis of prejudice. According to the State, defendants should not be permitted to amend their petitions years after the commencement of the postconviction proceedings and one year after the commencement of the third-stage evidentiary hearing (the evidentiary hearing had commenced in July 2011). Second, the State objected on the basis that the issue of the Dowthard tapes was forfeited because it was not raised in defendants' direct appeals. The court granted defendants leave to amend their postconviction petitions based on the Dowthard tapes. It also granted the State time to file a responsive pleading. On October 5, 2012, the State moved to dismiss the amended claims, and this motion was denied.

¶ 30 2. Evidentiary Hearing

¶ 31 The evidentiary hearing continued, spanning 18 months total. The testimony and evidence related to the four main claims in defendants' postconviction petitions: (1) police misconduct; (2) third-party admissions and testimony that two other individuals, Kefentse Taylor and Casel Montgomery, were responsible for Demarcus's death; (3) misconduct by the State in the form of *Brady* violations, including not timely disclosing the Dowthard tapes, and the related claim that late access to the tapes prevented trial counsel from impeaching Dowthard; and (4) ineffective assistance of trial counsel. Approximately 35 witnesses testified, and we summarize only the testimony relevant to the issues on appeal.

¶ 32 a. Witnesses

¶ 33 Sorenson testified that at Anderson and Johnson's joint trial, she represented Anderson as a public defender and Wilt represented Johnson while working at a private firm. A week before trial, Sorenson learned of the Dowthard tapes. She and Wilt went to the State's Attorney's office to listen to them, but they were voluminous and it was difficult to hear anything. She and Wilt ended up taking the Dowthard tapes out of the State's Attorney's office, dividing them up, and having different people from their staffs listen to them.

¶ 34 Wilt, currently an associate judge, testified as follows. The Dowthard tapes were first made available for review on Friday, October 18, 2002, before trial was to begin. On that day, he and Sorenson went to the State's Attorney's office to review the tapes. Wilt reviewed 1½ tapes for about two hours. Wilt then filed a motion to delay the start of trial due to discovery violations, because there were 18½ Dowthard tapes yet to be reviewed. The court denied the motion for a continuance but ordered on Monday, October 21, that the Dowthard tapes be released from the State's Attorney's office for defense counsel to review. Wilt thought the State was ordered to release the originals of the Dowthard tapes. There was not enough time to review the Dowthard tapes because the jury trial started later that week.

¶ 35 After the tapes were released, Wilt could not recall if he himself reviewed any of them. He thought Sorenson took possession of the Dowthard tapes because they agreed that the attorneys in her office would divide the tapes and review them. Wilt did not remember giving instructions as to what the attorneys in Sorenson's office should listen for on the tapes. Also, he did not recall receiving any summary of the Dowthard tapes. Wilt trusted Sorenson and the attorneys in her office because he had previously worked in the public defender's office. At some point, Wilt did recall an attorney from Sorenson's office saying that there was nothing of

value on the tapes, and the Dowthard tapes were not used at trial. Wilt's posttrial motion argued that there may have been something of value on the Dowthard tapes. When asked why he made this argument if an attorney from the public defender's office indicated that there was nothing of value on the Dowthard tapes, Wilt explained that he did not recall when he learned that the Dowthard tapes had no value; it could have been during or after trial or even after he filed his posttrial motion.

¶ 36 Wilt further testified that public defender Bob Fuenty was representing Ross at the time the Dowthard tapes were made available. On Friday (October 18) before Anderson and Johnson's joint trial, Fuenty was present with Wilt and Sorenson at the State's Attorney's office reviewing the tapes. Anderson and Johnson were tried together because they both had similar alibi defenses. Ross's defense was not the same, so his trial was severed. Wilt did not know whether Fuenty ever listened to the tapes or relied on other attorneys in the public defender's office to review them, like Wilt. Kline ended up representing Ross, and Wilt never spoke to Kline about the Dowthard tapes. Eventually, Wilt ended up with the Dowthard tapes and passed them onto Johnson's postconviction counsel, McLeese.

¶ 37 At the underlying trial, Wilt cross-examined Dowthard regarding his motive to lie and presented closing arguments to that effect. However, had Wilt known that the Dowthard tapes indicated that Dowthard was not around on the night of the shooting; that Dowthard was threatened with additional federal charges; that he was threatened by police; and, that Dowthard's cousin, Antowan Lambert, coached Dowthard on what to say to police, he would have used that information to cross-examine Dowthard at trial.

¶ 38 Sergeant Greg Lindmark testified as follows. At the end of May 2002, Lambert contacted Lindmark to say that Dowthard was ready to speak with police, and then Dowthard

provided the May 31, 2002, statement implicating defendants. Although Dowthard's written statement indicated that he had not been offered anything for his cooperation, Lindmark testified that Dowthard wanted the State notified of his cooperation. In July 2002, the State sent the parole board a letter advising it of its intention to dismiss Dowthard's forgery charge. The joint trial of Anderson and Johnson then began in October 2002.

¶ 39 Dowthard was called as a witness at the evidentiary hearing. When asked about Demarcus's shooting, Dowthard invoked his fifth amendment right against self-incrimination.

¶ 40 b. Substance and Significance of Dowthard Tapes

¶ 41 The Dowthard tapes, all of which predated Dowthard's May 31, 2002, written statement implicating defendants for the first time, were of conversations between Dowthard and friends and family while incarcerated at Big Muddy. The Dowthard tapes were transcribed by a court reporter. We summarize the content and alleged significance of the Dowthard tapes, as presented by defendants at the evidentiary hearing.

¶ 42 The following conversations, according to defendants, supported the conclusion that Dowthard was not present when Demarcus was shot. First, in a tape from May 2, 2002, Dowthard told his mother Estella that "he told them the truth," referring to the police. Defendants pointed out that at that time, Dowthard had told police that he did not know who shot Demarcus. Second, in a May 11, 2002, tape, Dowthard told his cousin Lambert that he "wasn't no mother f***ing where around, you know what I'm saying." Defendants argued that this comment was in reference to Demarcus's shooting. Third, in a May 18, 2002, tape, Dowthard had a conversation with his sister, Matilda Moore, and another unidentified female. During that conversation, Moore said that the police "want [Dowthard] to lie. He wasn't at granny's house, so why would he say he was there."

¶ 43 Next, defendants argued that the following conversations revealed that Lambert fed Dowthard information about what to tell the police about the shooting, and also about what Brown had told the police, so that the two versions would "coincide." First, in Dowthard's May 11, 2002, conversation with a male speaker, whom defendants argued was Lambert, the male speaker told Dowthard, "dude tell them, sh*t - he told them, sh*t, he was over by the, by the house, right?" The male speaker continued, "I guess – you and him was in the car by – Shaky house." The following conversation occurred:

"Male Speaker: Now a mother f**ker take the back way to the joint.

Inmate Alex Dowthard: Yeah.

Male Speaker: Right, mother f**ker took the back way to the joint, mother f***er come back to the car, *** back to the car and mother f***ker see the n*ggers – pullin up.

Inmate Alex Dowthard: Yeah.

Male Speaker: And mother f**ker try to get up out of there, and them n*ggers let, you know what I'm saying?

Inmate Alex Dowthard: Right.

Male Speaker: Got down, you know what I'm saying, but n*gger wait until the n*ggers left and then pulled up after them n*ggers pulled up out.

Inmate Alex Dowthard: Right.

Male Speaker: That's what a mother f**ker, you know what I'm saying, that was – the truth he gave them."

Defendants argued that this conversation was exactly what Brown told the police.

¶ 44 Second, in a May 16, 2002, tape, Lambert told Dowthard, "[k]now what I'm saying, so it will coincide."

¶ 45 Defendants also argued that the Dowthard tapes showed that Dowthard was coerced into giving police a statement to falsely implicate defendants. First, in a tape from early May, Dowthard told Estella that "they talkin' about bringin' me up on some federal charges or whatever, you know what I'm sayin'?" Second, in a May 20, 2002, tape, Dowthard told someone named Maria that the police were "playin' with me, hurtin' me until I'm damn near at the point man, you just don't know." Dowthard told Maria that detective "Palmer man got – hittin' me all upside my head and everything, man tellin' my sister what to – put his hands on me."

¶ 46 Finally, defendants argued that Dowthard benefitted from implicating defendants, and that a May 23, 2002, tape showed that Lambert told Dowthard that his forgery charge would be dismissed if he cooperated with police. Lambert said:

> "I tell'em man, look man, you know what I'm sayin' what the f**k do ya'll wanna hear? They say we got the case d*mn near closed. We just need dude to come on with it, man, you know what I'm saying'? I said, look, tell me this here, man, if he come with it, take all these pussy-a*s charges up off of 'em. They man, the head mother f**ker, Lombardi, man tell me we'll get these charges up off of 'em, man, and he won't have no hold. I said the dude ain't got no hold now, but they presented these papers every month. If you don't go to the board, they gonna present the same warrant papers, that gonna, it gonna automatically carry you over every month. The man said he could hold this here, man, for the rest of his mother f**kin' life every month, man. And ain't nothin' you can do about it, man, as long as a charge is coming up on you, man."

¶ 47 Later, Lambert said, "don't take no mother f**kin' rocket scientist to figure out what these people, man you know what I'm sayin' wanna hear, man, to get this shit up off a mother f**ker and leave mother f**kers alone." Still later, Lambert said, in reference to the forgery charge, "That's not nothin'. They gonna throw that out." He said:

> "You know what I'm sayin' that all they wanna hear, man, you know what I'm sayin'. And then the mother f**ker, they told me, man, this – gave me a mother f**kin' guarantee that, God d*mn it, they get this mother f**ker charge and everything else. The [*sic*] say man, me and you, God d*mn it, can be in La-La-Land doing what the f**k we wanna do. They just want them n*ggers behind mother f**kin bars, man."

¶ 48 In the same May 23, 2002, tape, Dowthard's sister Moore said, "If they talkin' about they goin' drop his case or tell him to say somethin', put that sh*t in writin'. And make sure his attorney right by his side when they say that sh*t. Otherwise they gonna f**k you." Near the end of the call, Lambert asked Dowthard, "How you wanna deal with the – deal, man?"

¶ 49 c. Kline's Ineffective Assistance of Counsel

¶ 50 At the evidentiary hearing, Ross's postconviction counsel also argued that Ross's trial counsel Kline was ineffective for failing to impeach Dowthard with the information on the Dowthard tapes. Defendants submitted transcripts of Kline's cross-examination of Dowthard at trial. As defendants pointed out, Kline was not present to explain "why he did what he did." However, defendants argued that Kline did not impeach Dowthard in any meaningful way. For example, Kline did not impeach Dowthard regarding coercion by the police to implicate defendants; Lambert's feeding of information to Dowthard; and the consideration that Dowthard received in exchange for his written statement. Defendants argued that Kline's failure to

impeach Dowthard was prejudicial in light of the State's closing argument that Dowthard had "no incentive" to cooperate with the State and was telling the truth.

¶ 51 3. Trial Court's Decision

¶ 52 On March 19, 2013, the trial court rendered a written decision on defendants' postconviction petitions. The trial court rejected defendants' arguments regarding: (1) police misconduct; (2) third-party admissions that two other individuals committed the crime; (3) misconduct by the State regarding the failure to disclose material evidence; and, (4) ineffective assistance of counsel. Regarding Kline, the court found that his performance "could be deemed adequate" and did not fall below the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). On the subject of the Dowthard tapes, however, the trial court found that defendants had met their burden of showing a due process violation, and it granted them a new trial.

¶ 53 The court reasoned as follows. When the case was stripped down to its bare essentials, it was a one-witness case: Dowthard. Dowthard told many versions of what happened on the night of the shooting, denying or omitting his involvement on more than one occasion. To say that Dowthard's "cooperation and willingness 'evolved' would be charitable." Dowthard had legal reasons, including potential criminal exposure, to not cooperate, initially. He also had legal reasons, including accommodations received or benefits conferred, to explain his cooperation at various points. Dowthard's biases and motives for testifying truthfully or untruthfully, as the case may have been, were many and various. While trial counsel Wilt attempted to illustrate for the jury why Dowthard might have made certain statements at one time and omissions or denials at another, Wilt lacked "the one thing" to put Dowthard's statements in the proper context: the Dowthard tapes.

¶ 54 According to the court, trial counsel (Sorenson, Wilt, and Kline) did not have timely access to the Dowthard tapes to use them to shed light upon the truthfulness, or lack of truthfulness, of Dowthard's various evolving statements. While the court was unclear why the Dowthard tapes were turned over on the eve of trial, the court did not conclude, nor did it need to do so, that the tapes were deliberately withheld from the defense. The reality was that several hours of tapes did not become available until shortly before trial, at an interval that was too brief to meaningfully listen to them and determine their significance, if any, regarding the truthfulness of Dowthard's eyewitness testimony.

¶ 55 The court noted that attorneys other than the trial attorneys were assigned the duty of listening to the Dowthard tapes "to see if there was anything on them," and Wilt testified that they reported that there was nothing of significance. This was "understandable" based on the fact that the conversations in the Dowthard tapes were "long, rambling, disjointed and full of street-slang." Only an attorney intimately familiar with the facts of the case would be able to determine the significance of the Dowthard tapes regarding Dowthard's denials, lies, admissions, refusals, omissions, etc. The trial attorneys themselves needed to listen to every minute of the Dowthard tapes to "extract or glean from the chaff the few kernels of impeachment that existed," because the assistant public defenders who listened to the tapes "could not have known what they needed to be listening for." Due to the last minute access to the Dowthard tapes by attorneys not familiar with the facts of the case, any impeachment or "context" that might have been gleaned from them was lost. And, the court found that "[w]hile the kernels of impeachment may have been few, they were not insignificant." They included outright denials of knowledge about the facts of the case; potential coaching to testify a certain way; as well as potential incentive to testify in a certain way.

¶ 56 As a result, the jury was "denied an essential element in evaluating" Dowthard's credibility in terms of whether he "was telling the truth of why he said what he said and when he said it." Because it was a closely balanced case consisting of one essential witness, the court could not be "sufficiently reassured that the outcome might not have been different had Alex Dowthard been cross-examined about [the tapes] made when he was in custody." The court could not be sufficiently reassured that the jury would not have concluded that Dowthard was "unworthy of belief or untrustworthy when [the Dowthard tapes] were considered along with all of his many other inconsistent actions and statements." The jury should have been able to evaluate whether the Dowthard tapes were evidence of Dowthard's intent to lie and benefit himself by testifying against defendants. In sum, defendants met their burden of persuading the court that due process required that they receive a new trial.

¶ 57 The State timely appealed.

¶ 58 II. ANALYSIS

¶ 59 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*.) (West 2012)) provides a mechanism for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). A postconviction proceeding is not an appeal from the judgment of conviction; rather, it is a collateral attack on the trial court proceedings. *People v. English*, 2013 IL 112890, ¶ 21. To be entitled to relief under the Act, a defendant must make a substantial showing of a constitutional violation. *Beaman*, 229 Ill. 2d at 71. The Act provides a three-stage process for adjudicating postconviction petitions (*English*, 2013 112890, ¶23), and the petitions in this case advanced to a third-stage evidentiary hearing (see 725 ILCS 5/122-6 (West 2012)).

¶ 60 A. Added Claims Based on Dowthard Tapes

¶ 61 The State's first argument on appeal is that the trial court abused its discretion by allowing defendants to add claims based on the Dowthard tapes to their postconviction petitions.

¶ 62 Trial courts have discretion to allow defendants to amend their postconviction petitions. *People v. Smith*, 2013 IL App (4th) 110220, ¶ 23. Section 122-5 of the Act states:

> "*The court may in its discretion make such order as to amendment of the petition* or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, *as shall be appropriate, just and reasonable and as is generally provided in civil cases*." (Emphases added.) 725 ILCS 5/122-5 (West 2012).

Under section 2-616(a) of the Code of Civil Procedure, "[a]t any time before final judgment amendments may be allowed on just and reasonable terms." *Smith*, 2013 IL App (4th) 110220, ¶ 23; 735 ILCS 5/2-616(a) (West 2012). Because the burden increases substantially before permission may be granted to file a second postconviction petition, the Act provides for liberal amendments to an original petition. *Id*. The standard we apply in determining whether a trial court properly exercised its discretion in allowing an amendment to conform to the proof is whether the amendment furthered the ends of justice. *People v. Washington*, 256 Ill. App. 3d 445, 449 (1993).

¶ 63 The State's first argument regarding the added claims is that it suffered prejudice. The State argues that it was prejudiced by the additional claims based on the piecemeal nature and sheer length of the postconviction proceedings. The State points out that defendants were allowed to add a claim to their postconviction petitions several years after the original postconviction petitions were filed and one year after the third-stage evidentiary hearing had commenced. Based on the premise that it was entitled to know what would be covered well in

advance of the evidentiary hearing, the State characterizes the "late-filed claims" as inherently prejudicial. Also, the State argues that it is "hard to see how the late filing of the claims regarding" the Dowthard tapes met the standard of "appropriate, just and reasonable" when Johnson's postconviction attorney McLeese had the tapes the entire time. As we explain, based on the sequence of events regarding the Dowthard tapes, the State did not suffer prejudice by the court's allowance of the added claims.

¶ 64 This case is unique in that none of the parties were aware of the location of the Dowthard tapes until October 2011. However, the State was aware of defendants' discovery requests and the Dowthard tapes, in particular, early on. As early as 2008 and then again in 2010, defendants requested the complete police file. Then, on July 18, 2011, the first day of the evidentiary hearing, defendants specifically requested the Dowthard tapes. The trial court agreed that the tapes needed to be produced, but the State could not locate them.

¶ 65 The evidentiary hearing continued, and when the parties appeared in court on November 2, 2011, McLeese reported that he had just discovered the Dowthard tapes in his office 10 days before (October 2011). It is unclear whether McLeese had the only set of Dowthard tapes in existence, but based on Wilt's testimony, McLeese had the originals. (Wilt testified that he thought the State released the *originals* for trial counsel to review, which he eventually obtained and then passed on to McLeese). Regardless, it is clear that no claims based on the Dowthard tapes could be made until the tapes were located and transcribed. The court stated that the Dowthard tapes needed to be transcribed to determine their significance, if any. The court even stated that depending on the content of the Dowthard tapes, defendants may want to file "amended" postconviction petitions. From the date that the Dowthard tapes were found and transcribed, the evidentiary hearing was put on hold.

¶ 66 Based on the content of the Dowthard tapes, defendants moved in June 2012 to admit them into evidence and advised the court that they planned to seek leave to amend their postconviction petitions. After the court deemed the tapes admissible, defendants moved to amend their postconviction petitions. Over the State's objection, the court granted defendants' request in August 2012. However, the court did not automatically advance the added claims to the third-stage evidentiary hearing; instead, it gave the State an opportunity to respond. Again, the State suffered no prejudice because it was allowed to file a motion to dismiss the added claims.

¶ 67 After the court denied the State's motion to dismiss, the evidentiary hearing resumed. Defendants continued to present witnesses regarding their existing and added claims, and the State thoroughly cross-examined Wilt on the issue of the Dowthard tapes. See *Washington*, 256 Ill. App. 3d at 450 (the trial court did not abuse its discretion by allowing amendment of postconviction petition where the State had the opportunity to cross-examine the witness with regard to the new theory). Once again, the State suffered no prejudice because it did not present its case until after the court allowed defendants to amend their petitions, meaning it was not hampered in its ability to call witnesses or defend against the added claims. Therefore, the State has failed to explain how it was prejudiced by the added claims at any stage of the postconviction proceedings.

¶ 68 The State's next challenge to the added claims is based on the Act itself. According to the State, section 122-5 of the Act should not be interpreted to allow amendments once a third-stage evidentiary hearing has commenced. This argument is easily rejected.

¶ 69 Section 122-5 provides that the trial court has discretion to allow amendments "as shall be appropriate, just and reasonable and as is generally provided in civil cases." 725 ILCS 5/122-

5 (West 2012). Nothing in the plain language of this section limits the trial court's discretion regarding amendments to the second stage of postconviction proceedings or to the beginning of a third-stage evidentiary hearing, as the State urges. See *People v. Youngblood*, 365 Ill. App. 3d 210, 211 (2006) (the best indicator of the legislature's intent is the plain language of the statute itself; we must not read into the plain language exceptions, limitations, or conditions that the legislature did not express). On the contrary, the general rule in civil cases, which the Act endorses, is that when a party asks to amend a complaint, leave to do so is freely given. See *People v. Cleveland*, 2012 IL App (1st) 101631, ¶ 57. Therefore, nothing in the plain language of the statute lends itself to the State's restrictive interpretation, and the court did not abuse its discretion by allowing defendants to amend their petitions with the added claims.

¶ 70 Finally, while not entirely clear, it appears that the State is also arguing that the court should have granted its motion to dismiss the added claims. As stated, the trial court did not immediately advance the added claims regarding the Dowthard tapes to the third stage. Rather, it allowed the State to file a responsive pleading, which the State did by filing a motion to dismiss. The State argued below, as it seems to argue on appeal, that the added claims are forfeited. Any claims based on the Dowthard tapes are forfeited, according to the State, because the Dowthard tapes have always existed, not only during the trials, but also in the appeal and postconviction proceedings. The State's argument is unpersuasive.

¶ 71 The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal. *English*, 2013 IL 112890, ¶ 22. The State is correct that issues that could have been raised on direct appeal, but were not, are forfeited. *Id.* However, the doctrine of forfeiture is relaxed where fundamental fairness so requires, where the forfeiture

stems from the ineffective assistance of appellate counsel, or where the facts relating to the issue do not appear on the face of the original appellate record. *Id.* Because the third factor exists here, the forfeiture doctrine is relaxed in this case.

¶ 72 Despite the existence of the Dowthard tapes prior to Anderson and Johnson's joint trial and Ross's trial, the original appellate record did not contain the Dowthard tapes. Moreover, because the Dowthard tapes were not transcribed until the postconviction proceedings, defendants' appellate counsel were not aware of the substance and significance of the Dowthard tapes. Thus, we agree with defendants that the claims relating to the Dowthard tapes, claims of due process and ineffective assistance of trial counsel, do not appear on the face of the original appellate record. The result is that these claims are not forfeited in the postconviction proceedings. Accordingly, the trial court properly denied the State's motion to dismiss and advanced the added claims premised on the Dowthard tapes to the third stage to be included in the evidentiary hearing.

¶ 73 B. Postconviction Relief

¶ 74 Next, the State argues that the trial court's decision to grant defendants postconviction relief was manifestly erroneous. Following a third-stage evidentiary hearing where fact-finding and credibility determinations are involved, we will not reverse the trial court's decision unless it is manifestly erroneous. *English*, 2013 IL 112890, ¶ 23; see also *People v. Domagala*, 2013 IL 113688, ¶ 34 (at a third-stage evidentiary hearing, the trial court serves as the fact finder; thus, it is the court's function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts). The State concedes that the trial court in this case, the same court that presided over Ross's underlying trial, was required to make credibility determinations, meaning that the manifestly-erroneous-standard-of-review is

appropriate. *Cf. Beaman*, 229 Ill. 2d at 72 (if no fact-finding or credibility determinations are necessary at the third stage; *i.e.*, no new evidence is presented and the issues presented are pure questions of law, we will apply a *de novo* standard of review).

¶ 75 The trial court determined that defendants established a *Brady* violation based on the Dowthard tapes. To establish a *Brady* violation, a defendant must show that: (1) the undisclosed evidence is favorable because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the defendant was prejudiced because the evidence is material to guilt or punishment. *Beaman*, 229 Ill. 2d at 73-74.

¶ 76 1. *Brady* Claim as to Ross

¶ 77 The State begins by arguing that the Dowthard tapes were not suppressed. Regarding Ross, in particular, the State points out that Ross was not similarly situated to Anderson and Johnson, who were jointly tried in October and November 2002, because he was tried much later, in February 2004. The Dowthard tapes became available in October 2002, and defendants concede that Ross's later trial date negates the suppression requirement under *Brady*, meaning that Ross suffered no *Brady* violation. Nevertheless, defendants argue that Ross, too, is entitled to postconviction relief based on his claim of ineffective assistance of trial counsel. Before addressing this ineffective-assistance-of-counsel claim, we first address the *Brady* claim as to Anderson and Johnson.

¶ 78 2. *Brady* Claim as to Anderson and Johnson

¶ 79 Regarding Anderson and Johnson, the State argues that the Dowthard tapes were not suppressed because they were turned over *before* trial, and because trial counsel arranged for other attorneys to review them. To this end, the State challenges the court's findings that the attorneys assigned to listen to the Dowthard tapes could not have known what to listen for, and

that the trial attorneys themselves needed to listen to every minute of the tapes to extract or glean from the chaff the few kernels of impeachment that existed. According to the State, the court's "emphasis assumes a fact not in evidence," which is that Sorenson did not explain the nature of the case when she assigned other attorneys to listen to the tapes. The State points out that during the evidentiary hearing, no one asked Sorenson "what she told her people when she assigned them to review" the Dowthard tapes. Arguing that it is "likely that she advised these trusted attorneys about the issues at trial" and Dowthard being a key witness, the State concludes that defendants' failure to ask what information the other attorneys were given before reviewing the tapes means that defendants have failed to show a constitutional violation.

¶ 80 For the following reasons, the State's position lacks merit. First, the trial court found that 40 hours of tapes did not become available until shortly before trial, at an interval that was too brief to meaningfully listen to them and determine their significance regarding the truthfulness of Dowthard's testimony. This finding was supported by the evidence presented at the evidentiary hearing. See *People v. Carter*, 2013 IL App (2d) 110703, ¶ 76 (credibility and factual determinations will not be reversed unless they are manifestly erroneous). The evidence showed that Sorenson and Wilt did not have access to the Dowthard tapes until the Friday before Anderson and Johnson's joint trial was scheduled to begin; Wilt's motion for a continuance based on the late discovery was denied; though the court ordered that the tapes be released from the State's Attorney's office, they were too voluminous for Sorenson and Wilt to listen to prior to trial; and, Sorenson testified that it was difficult to hear anything on the tapes.

¶ 81 Second, the trial court's finding that only the trial attorneys (Sorenson and Wilt), as opposed to the assistant public defenders, would understand what to listen for on the Dowthard tapes was not manifestly erroneous. Given Dowthard's evolving motives to testify or not to

testify in a certain way, combined with his differing versions of events to police, the trial court correctly determined that only an attorney "intimately familiar with the facts of the case" would be able to assess the value of the Dowthard tapes. The court's finding is illustrated by Wilt's testimony that he was advised by one of the attorneys reviewing the Dowthard tapes that they contained nothing of value. This conclusion by the reviewing attorney was "understandable," according to the court, due to the content of the tapes: they were "long, rambling, disjointed and full of street-slang." Nonetheless, the Dowthard tapes did contain some information that could be used to impeach Dowthard. Wilt testified at the evidentiary hearing that had he known that the Dowthard tapes indicated that Dowthard was not around on the night of the shooting; that Dowthard was threatened with additional federal charges; that Dowthard was threatened by police; and that Dowthard's cousin Lambert coached him on what to say to the police, Wilt would have used that information to cross-examine Dowthard at trial.

¶ 82 Third, the record contradicts the State's assertion that Sorenson "likely advised" the attorneys in her office about the issues at trial and key witness Dowthard, specifically. Sorenson and Wilt both filed motions for new trials in the underlying proceeding. At the hearing on those motions, Sorenson explained that the case was too complex to advise the attorneys reviewing the tapes what information was relevant. According to Sorenson, "it was very difficult to even explain to [the reviewing attorneys] what it was that we were looking for with regard to those tapes because the issues were so complex. There were so many people [Dowthard] could potentially have been talking to and so many things he might have been talking to them about that would have been fodder for cross-examination, but we simply didn't have the opportunity to do that." Therefore, the trial court's finding that the Dowthard tapes were suppressed, albeit inadvertently by the State, was not manifestly erroneous.

¶ 83 The State's next argument is that the Dowthard tapes are not material. The State argues that there is little likelihood that the tapes would have aided the jury in evaluating Dowthard's credibility given that the tapes are "long, rambling, disjointed and full of street slang," as the trial court acknowledged. In a similar vein, the State downplays the significance of the tapes' content, arguing that it "is not amazing that Dowthard" denied involvement to his mother Estella, and that because the tapes were never authenticated, Anderson and Ross merely speculate that Lambert is the individual on the tape coaching Dowthard on what to say. Finally, the State argues that the Dowthard tapes are cumulative of "the already significant impeachment" of Dowthard.

¶ 84 "Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *People v. Green*, 2012 IL App (4th) 101034, ¶ 39. To establish materiality, a defendant must show that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Beaman*, 229 Ill. 2d at 74. In making the materiality determination, courts are to consider the cumulative effect of all the suppressed evidence rather than considering each item of evidence individually. *Id*.

¶ 85 The State's arguments on the issue of materiality are unpersuasive. At the outset, the trial court's finding that the conversations in the Dowthard tapes were "long, rambling, disjointed and full of street-slang" does nothing to diminish its finding that "[w]hile the kernels of impeachment may have been few, they were not insignificant." On the contrary, it is precisely the rambling nature of the Dowthard tapes that supports the court's finding, discussed above, that the trial attorneys themselves needed to listen to the tapes to spot the few but significant "kernels" of impeachment.

¶ 86 Moreover, the State, by arguing that Dowthard's denial of involvement to Estella is of limited evidentiary value, makes the mistake of isolating an item of evidence and assessing its impact individually. The same is true with the State's argument that defendants merely speculate that it is Lambert's voice on one of the tapes coaching Dowthard. Rather than considering each item of evidence individually, courts are to consider the cumulative effect of all the suppressed evidence. See *Beaman*, 229 Ill. 2d at 74. Furthermore, the identity of the individual speaking to Dowthard is not nearly as significant as the content of the statements, in which the individual coaches Dowthard to give the police certain information. As the trial court determined, the case against defendants hinged on Dowthard, and the substance of the Dowthard tapes put the "timeline of Dowthard's denials, lies, admissions, refusals, omissions and the like" into "the proper context."

¶ 87 Finally, the substance of the Dowthard tapes was not cumulative. While the State is correct that Dowthard was impeached regarding his "spotty" cooperation with the police, as well as his denial of receiving leniency from the State, despite the dismissal of his forgery charge and the fact that he was never charged with firing a gun on the night of the incident, the trial court found that the "kernels of impeachment" on the Dowthard tapes were not insignificant. According to the trial court, although Wilt attempted to illustrate for the jury why Dowthard made certain statements at one time and omissions or denials at another, Wilt lacked "the one thing" to put Dowthard's statements in the proper context: the Dowthard tapes. As we explain, the Dowthard tapes included evidence that was not cumulative, such as "outright denials of knowledge about the facts of the case," as well as "potential coaching" and "potential incentive" to testify a certain way.

¶ 88 After learning that Demarcus had been killed (April 14, 2002), Dowthard did not contact the police immediately. At trial, Dowthard testified that his reason for not coming forward was because he was on parole and did not want it revoked based on his possession of a gun. Dowthard testified that this was why he lied to the police, claiming to know nothing about the shooting and creating a false alibi with the help of his friend. Dowthard did not admit to possessing a gun until the police threatened to test him for gun powder residue. He then admitted to hiding a gun under a car in Estella's driveway, and he was taken to Big Muddy for a suspected parole violation.

¶ 89 However, Dowthard's stated motivation for denying knowledge of the shooting, the fear of a parole violation, differed from the substance of the Dowthard tapes, in which Dowthard denied knowledge of the shooting for the simple reason that he was not there. When detectives interviewed defendant at Big Muddy on May 2, 2002, Dowthard denied hearing the gunshots that killed Demarcus and said "I'll do my time and get out. I'll see the [parole] board next month." In a tape from the same day (May 2), Dowthard told Estella that he told the police "the truth," and in a May 11, 2002, tape, Dowthard told Lambert that he "wasn't no motherf**king where around." In a May 18, 2002, tape, Dowthard's sister Moore said that the police wanted Dowthard "to lie" even though he "wasn't at granny's house, so why would he say he was there."

¶ 90 In another tape from early May, Dowthard told Estella that "they talkin' about bringin' me up on some federal charges or whatever." On May 13, 2002, defendant was charged with an unrelated forgery and learned that he would not be granted parole. In the meantime, in a May 11, 2002, tape, an unidentified male whom defendants argued was Lambert, coached Dowthard on what Brown had told the police about the incident. Defendants argued that Lambert's version

was exactly the version Brown had told the police, which was that Brown and Dowthard drove to Estella's house; Dowthard got out to hide the gun; as Dowthard was walking back to the car, a car pulled up with defendants in it; and Dowthard ran. In a May 16, 2002, tape, Lambert told Dowthard, "[k]now what I'm saying, so it will coincide."

¶ 91 In a May 23, 2002, tape, Lambert told Dowthard that his forgery charge would be dismissed if he cooperated with police. Lambert told Dowthard that he asked the police what "do ya'll wanna hear? [The police] say we got the case d*mn near closed. We just need dude to come on with it." Later, Lambert told Dowthard that it did not take a "rocket scientist to figure out what these people *** wanna hear." Lambert said that the police gave him a "guarantee" about "the charge and everything else." "They just want them n*ggers behind *** bars, man." In the same May 23, 2002, tape, Moore told Dowthard that if "they" were going to "drop his case," to get it in writing. Near the end of the call, Lambert asked Dowthard how he wanted to "deal with the deal – man?"

¶ 92 One week later, at the end of May 2002, Lambert contacted the police to say that Dowthard was ready to talk to them, and Dowthard provided the May 31, 2002, statement implicating defendants. In his statement, Dowthard claimed yet a different reason for not originally "cooperating" with police. Instead of saying that he feared a parole violation, as he testified at trial, or that he was not there, as he stated on one of the tapes, Dowthard's statement indicated that he did not cooperate with police at first because he wanted to handle Demarcus's shooting "on his own."

¶ 93 In sum, because it was a closely-balanced, one-witness case at its core, the court could not be "sufficiently reassured that the outcome might not have been different" had Dowthard been cross-examined on the Dowthard tapes. The court could not be sufficiently reassured that

the jury would not have concluded that Dowthard was "unworthy of belief or untrustworthy when [the Dowthard tapes] were considered along with all of his many other inconsistent actions and statements." We agree with the court that the jury should have been able to evaluate whether the Dowthard tapes were evidence of Dowthard's intent to lie to benefit himself by testifying against defendants. Therefore, the court's finding that the Dowthard tapes were material and that Anderson and Johnson established a *Brady* violation was not manifestly erroneous.

¶ 94 3. Ross's Ineffective Assistance of Counsel Claim

¶ 95 Having conceded that Ross cannot establish a *Brady* violation, defendants make the alternative argument that Ross's trial counsel Kline provided ineffective assistance of counsel for failing to utilize the Dowthard tapes. Included in the State's reply brief is a motion to strike this argument, based on defendants' failure to file a cross-appeal after the trial court rejected their ineffective-assistance-of-counsel claims. Defendants filed a response to the State's motion to strike, arguing that no cross-appeal was necessary. The State then asked for leave to reply to defendants' response. These motions are taken with the case, and we grant the State's request for leave to reply to defendants' response.

¶ 96 One who has obtained by judgment all that has been asked for in the trial court cannot appeal from the judgment. *Mashni Corp. v. Board of Election Commissioners for City of Chicago*, 362 Ill. App. 3d 730, 743 (2005). A trial court's findings that are adverse to the appellee do not require the appellee's cross-appeal if the judgment of the trial court was not at least in part against the appellee. *Id*. at 744; see also *People ex rel. Village of Buffalo Grove v. Village of Long Grove*, 173 Ill. App. 3d 946, 952 (1988) ("specific findings adverse to the appellee do not require a cross-appeal so long as the judgment was entirely in favor of the appellee.").

¶ 97 We reject the State's argument that defendants were required to file a cross-appeal. Although the trial court's findings were adverse to defendants on their ineffective-assistance-of-counsel claims, the judgment was entirely in defendants' favor. In other words, defendants received all the relief that they requested: their postconvictions were granted, their convictions were overturned, their sentences were vacated, and they were each granted a new trial. Therefore, there was no basis for defendants to file a cross-appeal, and the ineffective-assistance-of-counsel claim as to Ross, despite being an adverse finding, is properly before this court. See *Ruddock v. First National Bank of Lake Forest*, 201 Ill. App. 3d 907, 910-11 (1990) (while the favorable judgment below provided no basis for a cross-appeal, certain findings of the trial court were properly before the reviewing court "as the judgment may be sustained upon any ground warranted regardless of whether it was relied on by the trial court and regardless of whether the reason given by the trial court was correct."). Accordingly, we deny the State's motion to strike defendants' arguments of ineffective assistance of trial counsel.

¶ 98 Likewise, we deny the State's motion to respond to defendants' arguments of ineffective assistance of counsel in a supplemental brief. Once defendants asserted this claim as an alternative basis for affirming the trial court, the State had the opportunity to address the argument in its reply brief, but did not do so. For this reason, defendants argue that the State has forfeited this issue. See *Franciscan Communities, Inc. v. Hamer*, 2012 IL App (2d) 110431, ¶ 19 (failure to argue a point results in forfeiture of the issue). We agree with defendants, as the State has given no reason for failing to address the issue other than to say its request for supplemental briefing was made in good faith.

¶ 99 Claims of ineffectiveness of counsel are analyzed under the familiar standard set forth in *Strickland*. *People v. Manning*, 241 Ill. 2d 319, 326 (2011). To meet this standard, a defendant

must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688; *Manning*, 241 Ill. 2d at 326.

¶ 100 Whether, and how, to cross-examine a witness is normally a matter of trial strategy, which will not support a claim of ineffective assistance of counsel under *Strickland*. *People v. Salgado*, 263 Ill. App. 3d 238, 246 (1994). "However, the complete failure to impeach the sole eyewitness when significant impeachment is available is not trial strategy, and, thus, may support an ineffective assistance claim." *Id*. at 246-47.

¶ 101 Kline's trial strategy, as demonstrated by his opening and closing statements, was to portray Dowthard as having a reason to lie, as well as "biased, unbelievable, incredible and inconsistent." Because Kline was not available to testify at the evidentiary hearing, it is unclear whether he listened to the Dowthard tapes. Regardless, the Dowthard tapes were not used to impeach Dowthard at trial. Therefore, Kline did not expose Dowthard's varied motives in refusing to cooperate with the police and then providing the May 31, 2002, written statement implicating defendants. In addition, Kline did not impeach Dowthard regarding whether he was actually present on the night of the shooting; whether he was coached to provide a similar account as Brown; and his potential incentive for testifying against defendants. Contrary to the trial court's finding, the failure to utilize the Dowthard tapes rendered Kline deficient. See *Salgado*, 263 Ill. App. 3d at 247 (if counsel knew of the key witness's contradictory statements from a prior trial, the failure to use it for impeachment was deficient performance; alternatively, the failure to investigate whether the transcript held some useful impeachment constituted deficient performance). Accordingly, that finding by the trial court was manifestly erroneous.

¶ 102 Turning to the prejudice prong, we note that that prong does not require a defendant to demonstrate that the result of his trial would have been different. See *Manning*, 241 Ill. 2d at 326. Rather, a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome; put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair. *Id*. Essentially, for the same reasons that the trial court found a *Brady* violation, defendants have satisfied the prejudice prong. See *Beaman*, 229 Ill. 2d at 74 (To establish materiality, a defendant must show that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict); see also *Green*, 2012 IL App (4th) 101034, ¶ 39 (evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed).

¶ 103 As stated, the trial court in this case determined that it was a closely-balanced case hinging on the testimony of one witness, Dowthard. We also note that the same trial court that presided over the postconviction proceedings presided over Ross's trial. At Ross's trial, the State argued that Dowthard had "no incentive" to cooperate with the State; Dowthard received no benefit, expected, implied, or otherwise, in exchange for his testimony; Dowthard had no incentive to falsely implicate defendants; and, Dowthard was telling the truth and "accurately gave information that only a person who witnessed the events that he said he witnessed could have relayed to you."

¶ 104 However, the trial court questioned whether the jury would have concluded that Dowthard was "unworthy of belief or untrustworthy when [the Dowthard tapes] were considered along with all of his many other inconsistent actions and statements." Because the jury did not have the opportunity to assess whether the Dowthard tapes were evidence of Dowthard's intent

to lie to benefit himself by testifying against defendants, the result of the trial was unreliable, and the trial court could not be "sufficiently reassured that the outcome might not have been different" had Dowthard been cross-examined on the Dowthard tapes. Thus, defendants established that Kline was ineffective, thereby entitling Ross to postconviction relief. See *People v. Dinelli*, 217 Ill. 2d 387, 403 (2005) (we may affirm the trial court on any basis supported by the record).

¶ 105 III. CONCLUSION

¶ 106 For the foregoing reasons, the judgment of the Winnebago County circuit court granting defendants postconviction relief is affirmed.

¶ 107 Affirmed.