2017 IL App (2d) 141208-U
No. 2-14-1208
Order filed July 31, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANGEL R. LUCIANO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 07-CF-1615 Honorable James C. Hallock, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's trial counsel was not ineffective where defendant could not demonstrate prejudice because the issue concerning the location of an important meeting was a collateral issue and trial counsel's cross-examination of a key witness was thorough and competent, if not as extensive and perfect as defendant demands on appeal. The State failed to turn over a police report on an issue affecting the credibility of a key witness, but the suppression of the police report was not material because the defense had virtually all of the information contained in the police report from other sources, so the State's suppression of the police report did not constitute a *Brady* violation.

¶ 2 Defendant, Angel R. Luciano, appeals the second-stage dismissal of his postconviction petition (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal, defendant argues that that he made a substantial showing that he received ineffective assistance of trial counsel (1) when trial

counsel did not investigate whether Alejandro Ramos's testimony about a meeting at Queen Mari/Maribel Rodriguez's home was possible given that she sold her home well before the meeting occurred, and this would have so diminished the credibility of Ramos's testimony as to undermine confidence in the verdict; and (2) when trial counsel did not adequately cross-examine Jose Hernandez about his participation in the Fernando Dieppa murder for which he was never charged which would have so diminished the credibility of Hernandez's testimony as to undermine confidence in the verdict. Defendant also argues that he made a substantial showing that the State withheld a police report that included further details about Hernandez's participation in the Dieppa murder that would have undermined the evidence offered against defendant, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). We affirm.

¶ 3 I. BACKGROUND

¶ 4 In *People v. Luciano*, No. 2-08-0238 (2010) (unpublished order under Supreme Court Rule 23) (*Luciano I*), we extensively summarized the facts of the underlying case adduced at defendant's jury trial. For our purposes in this appeal of the second-stage dismissal of defendant's postconviction petition, we provide a general overview of the facts of the offense and focus on those facts pertinent to defendant's contentions.

¶ 5 On June 29, 1989, Willie Arce was fatally shot while he was in the basement of his residence. The fatal shot was fired by Michael Luciano, defendant's son. At the time of the shooting, defendant was the leader (the Inca) of the Aurora chapter of the Latin Kings street gang. The murder remained unsolved until federal investigations caused other members of the Aurora Latin Kings to cooperate with federal and local authorities.

¶ 6 The evidence at trial showed that, in June 1989, defendant was elected as the Inca or

leader of the Aurora Latin Kings. As the Inca, defendant had the authority to order "violations" of any gang members who broke the rules of the Latin Kings. Violations were punishments for rule breaking, and included beatings with fists or baseball bats upon specified areas of the body and lasting for a set amount of time. The severity of the punishment depended on the importance of the rule being broken; several witnesses testified that the punishment for "tricking," or cooperating with the police, was death.

¶ 7 The victim, Arce, had apparently taken money from the gang while he was the treasurer; additionally, Arce had smoked cocaine, which was forbidden. Defendant ordered a "head-to-toe" violation for Arce, meaning that Arce was to receive a beating with fists and feet all over his body, for a period of time. Arce refused to submit to the violation, which was an indication of disrespect of the Inca, and this angered defendant. Defendant then issued a "smash-on-sight" violation, but no one testified about the meaning of "smash on sight." Arce continued to refuse to accept the violation, but how Arce resisted was not allowed into evidence.

¶ 8 Within a few days of June 29, 1989, there was another meeting during which defendant was informed of Arce's continued refusal to submit to the ordered violation. Defendant was angered and issued an order to "[s]hoot [Arce] but do not kill him." Defendant's son, Michael Luciano, volunteered to perform the shooting.

¶ 9 On the evening of June 29, 1989, a number of gang members were hanging out near the Brady School in Aurora, which was the center of the gang's territory. Several members followed ambulances that drove up Arce's street where they observed Myra Arce, the victim's sister, crying.

¶ 10 During 1989, Myra had been dating Ramos. Ramos testified that he had slept over at Myra's house, but Myra denied that he had ever slept over at the house; Myra also believed that

Ramos did not know where in the house Arce slept and denied that she told Ramos that Arce slept in the basement. According to Myra, Arce slept in the basement because he was worried that he would be attacked. Myra believed that Ramos and Arce got along with each other; she denied that, about two weeks before the murder, Ramos and Arce had engaged in a fistfight. Aurora police officer Marshall Gauer testified that he observed Ramos and Arce involved in a fistfight, but he did not intervene to break up the fight or write up a report about it. Myra also stated that Ramos and Arce occasionally sold drugs together.

¶ 11 Myra related that, during 1989, Arce had been trying to withdraw from the Latin Kings. About three weeks before the murder, Arce, Michael Luciano, and others engaged in a confrontation in front of Arce's house. During the confrontation, Michael Luciano yelled at Arce, saying he was "out of the box," meaning that the Latin Kings would no longer protect Arce or, perhaps, even consider him to be a Latin King.

¶ 12 At about 8 p.m. on the night of the murder, Ramos dropped Myra off at her home. An hour later, Arce returned home, and Myra spoke with Arce for about an hour. Myra prepared to take a bath after speaking with Arce. As she was getting ready to bathe, she heard three gunshots which she believed originated in the basement. She went downstairs to investigate, and she saw Arce crawling up the stairs from the basement holding his stomach. An ambulance was summoned and Arce was taken to the hospital, but he succumbed to his wounds.

¶ 13 Evidence at the scene showed that Arce had likely been shot through a basement window. The window was screened by a bamboo curtain, but it was possible to see into the basement through gaps in the bamboo curtain. Holes in the headboard of Arce's bed appeared to line up with the window.

¶ 14 Bullets were recovered from Arce's body, but they were damaged and lacked individual

characteristics to determine whether they were fired from the same gun. No shell casings were recovered near the bedroom window. Arce was wounded in the lung and in the abdomen near the hips; this led to severe internal bleeding which caused Arce's death.

¶ 15 A gang expert with the Aurora police testified about the organization of the Latin Kings in Aurora, where the main hang-out for the gang was in 1989 in Aurora, and the rules and regulations of the gang embodied in its constitution and its manifesto. The expert also touched on the powers of the Inca, including violations for disobedience. In 1989, the Latin Kings were the strongest gang in Aurora. They used violence to maintain the members' discipline, to protect their neighborhood, to get new people into the gang, and to conduct the gang's business. The expert testified that there was no inter-gang retaliation arising from the Arce murder, although, in 1989, there were a number of gang shootings, and he was unable to recall the number of gang-related shootings and homicides following the Arce murder.

¶ 16 Key to the State's case was the testimony of four former gang members: Juan Acevedo, Carlos Escalante, Ramos, and Hernandez. Acevedo was a member of the Latin Kings in 1989 and left the gang in 2002 or 2003. The particulars of Acevedo's agreement to cooperate included the fact that he received a four-year sentence where the possible penalties had been between 15 and 30 years and 30 years to life. He also received money for bills and for relocating his family. He testified about the gang's organization, noting that, in 1989, defendant was the Inca, Escalante was the enforcer, and Acevedo himself was "on security." The gang used its treasury to buy drugs and guns, to post bond, and to give people money.

¶ 17 Acevedo specifically described a church festival at which defendant informed him that Arce had a violation coming. Acevedo noted that Arce refused to submit to the violation, which he characterized as a bad thing. On June 29, 1989, he was hanging out near the Brady School

with other gang members when he saw an ambulance heading in the direction of Arce's house. He, along with a number of other gang members, went to Arce's home. Escalante told everyone at Arce's house to leave, and they returned to their hang-out near the Brady School.

¶ 18 Escalante testified that, in 2004, he left the Latin Kings. In 2005, he agreed to cooperate with the government. He had pleaded guilty to a drug charge for which he received a 90-month sentence; he faced a 150-month minimum sentence before he agreed to cooperate. Escalante also faced a fine of up to $4 million, but in agreeing to cooperate, he had not been fined. He denied that he directly received any money from the government, and maintained that he did not read his plea agreement before he signed it.

¶ 19 In 1989 and at the time of the Arce murder, Escalante was the gang's enforcer and "go to guy." He discussed the gang's hierarchy and how the gang actually worked when he was in the position of the enforcer (as opposed to how it was supposed to work according to the gang's constitution and manifesto). When Escalante became enforcer, actions were already being taken against Arce for his misconduct of taking money from the gang's treasury without permission and for smoking cocaine, so he did not order any violations of Arce himself. Escalante also believed that defendant did not order a "hit" on Arce because a murder "hit" would not have been the penalty for Arce's misconduct of taking money from the treasury without permission and smoking cocaine. Escalante maintained that he fulfilled his responsibilities as enforcer, which was to carry out the orders given him by the Inca and the second-in-charge, the cacique.

¶ 20 Turning to the Arce murder, on June 29, 1989, Escalante saw the ambulance heading toward Arce's house. Escalante went to Arce's house and dispersed the other gang members gathered there. As he was returning to the gang's hang-out near the Brady School, he encountered Michael Luciano, who was standing at a corner not far from Arce's house or the

school. Escalante described that Michael Luciano was wearing a black hoodie and black pants or sweat pants (one of the gang's colors), and he was holding a medium-caliber revolver, perhaps of .32 or .38 caliber. Escalante ordered Michael Luciano to leave.

¶ 21 In his issues on appeal, defendant focuses on Ramos and Hernandez. In 1989, Ramos was a member of the Aurora Latin Kings and was dating Myra. Ramos asserted that he was testifying because he had something to "get off [his] chest." Ramos testified that he did not receive any promises or deals from the federal authorities. Ramos admitted that he did receive money from the federal authorities for travel expenses. At the time of the trial, Ramos had no charges pending against him.

¶ 22 During his career with the gang, Ramos had held every position in the gang's hierarchy. In 1999, Ramos moved away from Aurora and left the Latin Kings. While he was active, most of the members sold drugs to raise money; usually, the gang posted a security detail during these activities to guard against rival gangs and the police interfering in the drug sales. Ramos also explained the gang hierarchy, its leadership structure, the members' duties, the manifesto, and the punishments available for breaking the rules. Turning specifically to 1989, until about June, Junior Sosa was the Inca; in June, defendant was elected to the position.

¶ 23 Ramos recounted that he had a good relationship with Arce and had slept over at Arce's home. Arce, however, was not in good standing with the Latin King's because he had wasted money from the gang's treasury and owed that money to the gang. Ramos testified that, a "couple [of] weeks" before Arce's murder, he was present at Queen Mari's house when defendant ordered a head-to-toe violation of Arce, but Arce refused to receive that violation and, in fact, disrespected the gang by walking through its territory. Ramos explained that Arce carried a pistol.

¶ 24 Ramos mentioned that he "was at Willie's house, visiting Myra, and a bunch of the Kings came by." The following colloquy ensued:

"[The State] Q. Without indicating what was said or what happened, was there a meeting after this incident at Willie Arce's house?

[Ramos] A. Yes.

Q. Who was at the meeting?

A. Me, [defendant], his son Michael Luciano, Carlos Escalante, and a couple [of] other members.

Q. Was it a planned meeting?

A. No.

Q. And was [defendant] given some information?

A. Yes.

Q. What was his reaction?

A. He wasn't happy.

Q. And what happened the night of June 29, 1989?

A. Willie Arce was killed."

¶ 25 Turning to the night of the murder, Ramos recalled that he was "hanging out" with other gang members in the neighborhood, including Hernandez and Cesar Montalvo, along with a few other members he was unable to identify by name. Neither Michael Luciano nor defendant was present. When he saw the emergency vehicles speeding in the direction of Arce's house, he ran over to the house and watched Arce being placed in the ambulance. Ramos asserted that he had already been at the Arce house earlier in the evening while Arce was present.

¶ 26 The next day, Ramos met with defendant. According to Ramos, this meeting occurred at

"Bambi's house," and just he and defendant were present. Ramos said that defendant "was worried about if we got taken to the police station to be questioned for Willie Arce's case or for his murder that we should just say that Kings don't kill Kings." Ramos also said that defendant instructed him, if asked, to say that Michael Luciano and Jose Delgado were out of town.

¶ 27 On cross-examination, defense counsel asked Ramos whether, two weeks before the Arce murder, he had engaged in a fistfight with Arce. Ramos denied that a fight took place. In defendant's case, Marshall Gauer, an officer with the Aurora police department, testified that he observed a fistfight between Ramos and Arce. He did not, however, intervene to stop the fight or contemporaneously submit a report about the fight. Ramos admitted on cross-examination that he had lied under oath when he testified before a jury in Kane County, but claimed that he was following the orders of the then-Inca, Rudolfo Pena. He also admitted testifying, falsely, that he had been offered $1,000 by an assistant State's attorney to lie under oath.

¶ 28 Defense counsel then began to cross-examine Ramos about the meetings with defendant. This portion of the cross-examination was confused and confusing, so we reproduce it in full:

> "[Defense counsel]: Q. Let's talk about this impromptu gathering that you talked about, okay? [Counsel is apparently referring to Ramos's direct testimony that he was involved in a meeting at which information was relayed to defendant and defendant became angry.] This is after—this is before the homicide; is that correct?
>
> [Ramos]: A. Yes.
>
> Q. Okay. Can you tell the folks, sir, how much longer? Was it a day, a week, a year?
>
> A. As in—I don't understand the question. Repeat it.
>
> Q. Okay. Here's the question: The Willie Arce homicide, okay, it's right here,

was this meeting before the Willie Arce homicide or after the Willie Arce homicide?

A. Before.

Q. Great. Now here's my next question: How much before? A day, a week, two weeks, a month? Can you tell us?

[State]: I'm going to object to which meeting.

THE COURT: Do you know which meeting he's talking about?

[Ramos]: No.

THE COURT: Sustained.

[Defense counsel]: Q. You testified to one meeting before the homicide and one meeting after. Do you remember that?

[State]: Objection. Misstates the testimony, Judge.

THE COURT: Overruled

[Ramos]: Is he asking about the one that—

THE COURT: Let him ask another question. Obviously you don't know what he's asking.

[Defense counsel]: Q. Remember, you talked about two meetings; is that correct?

A. Yes.

Q. A meeting was before and another meeting was after. Now I'm talking about the meeting before, if you don't mind. Can you tell the ladies and gentlemen of the jury how long before the homicide? Was it a day, a week, two weeks?

A. You know, I can't answer that because actually there's three meetings.

THE COURT: All right. Do you want to rephrase it?

[Defense counsel]: I guess.

Q. Remember you talked about a place, I believe it was at Bambi's?

A. Yes.

Q. Okay. That was before the homicide; is that correct?

A. Yes, for the incident that happened at Willie's house.

Q. Fair enough. Now, can you tell us, please, how many weeks or days before the homicide was this impromptu meeting?

A. Couple days.

Q. Couple days. Would that be two or three or would it be longer?

A. After the incident it was right away, the same day.

Q. After the incident?

A. After the incident it was the same day.

Q. Fine, okay, but I'm talking about the one before sir. Stay with me on this. Before the homicide.

A. That would be the one that happened the same day after the incident at Willie Arce's house.

Q. Okay. Fine. That's fine. After Willie Arce's house. How many days was that before the homicide?

[State]: Objection; asked and answered.

THE COURT: I think there's some confusion. We need to go back over and talk about what meetings we're talking about.

[Defense counsel]: Fair enough, fair enough.

Q. This Willie Arce incident at the house, we'll say that's number one, right there, that's it. And the next day or the same day there was this impromptu meeting, correct?

A. Yes.

Q. Okay. Great. Now, after this impromptu meeting, how many days or weeks or months occurred till Willie Arce got shot and killed?

A. Maybe three or four days. Two to three, two—yeah, three to four days. Now I know exactly what you're saying.

Q. Fair enough. Thank you sir.

And at that meeting, okay, the first one we're talking about, three or four days ahead when this conversation went on, it's your testimony that [defendant] didn't say anything, everyone was just silent; isn't that correct?

A. Yeah.

Q. Thank you.

This meeting before the incident, you know, before, three or four before, where did it take place?

A. At Bambi's house.

Q. Okay. Great. And we're at Bambi's house. Are we inside the house, are we out in front of the house?

A. On the side.

Q. I'm sorry?

A. On the side of the house.

Q. Inside the house. Thank you.

A. On the side of the house.

Q. I apologize. On the side of the house. Okay.

A. Yes.

Q. Are there like chairs there, or is there a picnic table?

A. No. There's a back door that leads to a basement and her yard that's fenced in.

Q. Fair enough. So at this particular, I'll call it impromptu meeting, okay, there's you there and there's [defendant]. Who else is there?

A. Mike, Carlos Escalante, Mike Luciano that is, Carlos Escalante, Jessie Ranjel, a few others that were involved in the incident—

Q. Okay.

A. —at Willie's house.

Q. I'm just trying to see if you know their names.

A. Yes, I know their names.

Q. Can you give me—you've given us three or four. Can you tell us anybody else?

A. No.

Q. And can you please tell us, sir, how many other individuals that you cannot remember were there numerically? Five, seven, two?

A. There was people around in the front of the house and there was just a couple us, me, [defendant], the people I mentioned in the yard talking about the incident.

Q. Fair enough. You're in the yard. That's fine. So there were some folks out in front, too; is that correct?

A. Yes.

Q. Some Latin Kings; is that correct?

A. Yes.

Q. You didn't happen to see with your own eyes who shot Willie Arce, did you?

A. No.

Q. When you were talking to [the assistant State's attorney] before the grand jury, do you recall saying that it was a week later that Willie Arce was shot, rather than three days?

A. It could have been.

Q. Could have been. So okay. You're just trying to do right?

A. Just a couple days.

Q. Three days, it could have been a week?

A. Yes, in between there.

Q. Fair enough.

Judge, could I have a moment, please?

THE COURT: Sure.

[Defense counsel]: Judge, I don't have any other questions for this witness. Thank you."

¶ 29 During the State's redirect examination, Ramos was further questioned about the "impromptu meeting" at which defendant purportedly received the information that Arce had resisted or avoided his punishment. The State began questioning Ramos about the "conversation that occurred right after the incident at Willie Arce's house," and Ramos corrected himself, stating that the conversation had not been at Bambi's house, but at "Queen Mari's house." Ramos clarified that the conversation at Bambi's house covered the topic of "if [the police] asked questions about what had happened to Willie." From the context, we believe Ramos was referring to his earlier testimony that defendant instructed him to tell any police investigators that "Kings don't kill Kings." During this clarification testimony, Ramos stated that, at Queen

Mari's house, when defendant was given the information about Arce, he was "very pissed." The remainder of Ramos's redirect examinations and recross-examinations concerned his self-admittedly false testimony in other proceedings.

¶ 30 Turning to Hernandez's testimony, we note that defendant focuses on the testimony affecting his credibility. In 1989, Hernandez became a member of the Latin Kings. He testified that he sold cocaine and marijuana on behalf of the Latin Kings. In 2002, he was arrested after he had been caught on tape trying to sell cocaine. Hernandez entered into a plea agreement in which he received a 94-month sentence[1] and agreed to cooperate with federal and state authorities. Hernandez agreed that he had received other benefits, such as food, the opportunity to wear civilian clothing when he testified, and the opportunity to receive contact visits. Hernandez elaborated that he was required to "[b]e truthful," otherwise the government could rescind his plea and reinstate the prosecution for "cocaine conspiracy," which could result in a much greater sentence. Hernandez also discussed the fact that, due to his cooperation, he was a marked man in the federal prisons resulting in transfers to the special housing units of the facilities into which he was placed. Hernandez explained that, in the special housing units, he was locked in his cell for 23 hours each day with no contact with any other inmates, other than a cellmate, if he had one.

¶ 31 On cross-examination, Hernandez testified about how he came to accept a plea agreement. Hernandez admitted that he pleaded guilty to two counts out of nine with which he had been charged. He received a 94-month sentence in exchange for pleading guilty; he faced a

[1] During direct examination, Hernandez testified that his sentence had been cut in half in exchange for his cooperation.

sentencing range of 5 to 40 years. From 2002 to 2005, he spoke with various law enforcement organizations, including the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, and Firearms, and the Aurora police department. He discussed drug sales by various Latin Kings and approximately 40 shootings and murders.

¶ 32 Of particular relevance to defendant's issues concerning Hernandez in this appeal is the following colloquy between defense counsel and Hernandez:

> "[Defense counsel] Q. Thank you, sir. And on 28 April 2004, you mentioned in a meeting with the FBI, you talked about four murders, plus the murder that you had participated in, correct?
>
> [State]: Objection, your Honor.
>
> THE COURT: Overruled.
>
> [Defense counsel] Q. Plus the murder you had participated in; is that correct?
>
> [Hernandez] A. I talked to them, but I can't remember the exact dates.
>
> Q. But you didn't talk about [defendant] or the Willie Arce homicide, did you?
>
> A. I talked to them, but I don't remember the exact dates."

¶ 33 Hernandez also recounted testimony before a federal grand jury in which he read a statement that had been prepared for him. In that federal grand jury statement, Hernandez discussed three shootings and 11 murders, including the murder of Fernando Dieppa, in which he had been involved.[2] Defense counsel emphasized that the Arce murder was not discussed at this

[2] A portion of Hernandez's grand jury testimony was attached as an exhibit to defendant's postconviction petition. In that testimony, Hernandez described in detail his participation in the Dieppa murder.

time. Other than the above-quoted colloquy and the reference to the grand jury testimony, defense counsel did not seek to elaborate on the details of the murder "[Hernandez] had participated in."

¶ 34 Defense counsel highlighted the fact that the "truth" Hernandez had promised to tell was simply his own word; none of the various law enforcement investigators had been with Hernandez when he committed or observed the various crimes about which he was testifying. In addition, the law enforcement investigators compiled reports and Hernandez's testimony in every trial remained consistent with those reports. Defense counsel further highlighted that, if the federal authorities believed he was not being truthful in his testimony, his plea could be revoked and all the counts with which he was charged could be reinstated, even those for which the limitations periods had expired.

¶ 35 Hernandez also testified that, before defendant's trial, he had been visited by defense counsel's investigator. When he received the visit from the investigator, he was being held in a cell along with Acevedo and Escalante. Hernandez refused to speak with the investigator. Hernandez also acknowledged that he, Acevedo, and Escalante had all been transported to the trial together in the same van.

¶ 36 Regarding the specifics of the Arce murder, defense counsel engaged Hernandez in the following colloquy:

> "[Defense counsel] Q. Do you remember on 9/20/02, 9:00 in the morning, talking to ATF Agent Anton and Aurora Police Department Investigator Johnston and Detective Sigsworth about the Willie Arce homicide?
>
> [Hernandez] A. Yes.
>
> Q. Okay. Because you didn't talk to any of the federal agents about it except for

on this day. This is the day I'm talking about, okay? Do you remember telling them about the Willie Arce homicide?

A. Not specifics.

Q. Okay. Do you remember telling them that earlier in the day this conversation—earlier in the day that Willie Arce was killed, this conversation [in which Hernandez heard defendant order that Arce be shot but not killed] occurred?

A. Yeah, I could have."

¶ 37 Hernandez then described, inconsistently with Ramos's account, the conversation had occurred in the street near the Brady School. Hernandez maintained that defendant issued the order, " 'Shoot him but don't kill him,' " with regards to Arce. Hernandez believed he had recounted the order to the federal grand jury in his written statement.

¶ 38 The jury was instructed on a theory of accountability. The jury found defendant guilty of first degree murder.

¶ 39 Following the verdict, defendant filed a motion for judgment notwithstanding the verdict or for a new trial. The trial court denied the motion. Defendant was then sentenced to a 38-year term of imprisonment (during which defendant was entitled to day-for-day credit, allowing him to serve 50% of the sentence). Defendant did not move to reconsider the sentence.

¶ 40 On direct appeal, defendant raised four issues: (1) a challenge to the sufficiency of the evidence; (2) his felony murder conviction violated the one act-one crime principle; (3) gang-expert testimony was cumulative and unduly prejudicial; and (4) prosecutorial misconduct during closing argument. We rejected defendant's contentions regarding the sufficiency of the evidence, the gang-expert testimony, and prosecutorial misconduct. We agreed with defendant that his felony murder conviction violated the one act-one crime principle and vacated that

conviction. Defendant filed a petition for leave to appeal to our supreme court which was denied.

¶ 41 On October 12, 2010, defendant filed a *pro se* postconviction petition alleging, among other things, that his trial counsel was ineffective for not investigating whether Queen Mari/Maribel Rodriguez owned the location of the meeting at which defendant purportedly issued the shoot-but-do-not-kill order against Arce at the purported time of that meeting and his appellate counsel failed to raise the issue of a *Brady* violation on appeal. Apparently, the trial court did not consider defendant's *pro se* postconviction petition within the 90-day window for first-stage consideration. As a result, on February 4, 2011, defendant's postconviction petition was advanced to the second stage. On March 23, 2011, postconviction counsel was appointed.

¶ 42 During the next three years, postconviction counsel attempted to determine exactly which documents and discovery trial counsel had held. Trial counsel was oddly uncooperative with postconviction counsel. Trial counsel's lack of cooperation was so extreme that postconviction counsel filed a petition for rule to show cause why trial counsel had refused to convey defendant's trial file to him. Eventually, trial counsel happened to be in the same courtroom as postconviction counsel and trial counsel represented that he had delivered the entirety of defendant's file to defendant's appellate counsel for purposes of defendant's direct appeal. At that hearing, the trial court and postconviction counsel acquiesced to this explanation and the petition for rule was dropped. Postconviction counsel, however, obtained an affidavit from defendant's appellate counsel indicating that trial counsel had never delivered defendant's trial file to her or to the appellate defendant's offices. Eventually, by receiving the trial court's permission to examine the trial files from other, related cases, along with the State's reproduction of the discovery originally turned over to trial counsel, postconviction counsel was satisfied that

he had obtained all of the necessary documents and discovery in order to produce an amended postconviction petition on defendant's behalf.

¶ 43 On February 13, 2014, postconviction counsel filed defendant's amended postconviction petition. Additionally, postconviction counsel filed his Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate. About two weeks later, postconviction counsel filed defendant's second amended postconviction petition. In the second amended postconviction petition, defendant raised a number of contentions of ineffective assistance of both trial and appellate counsel along with various due process violations. Pertinently, defendant alleged that trial counsel was ineffective for failing to investigate the location of a meeting which, according to Ramos's testimony, took place at Queen Mari's house; trial counsel was ineffective for failing to adequately examine and impeach Hernandez over his participation in the Dieppa murder, and a *Brady* violation occurred because the State did not provide trial counsel with an Aurora police report which differed from the FBI report of Hernandez's statements about his involvement in the Dieppa murder, and this report would have allowed trial counsel the opportunity to effectively impeach Hernandez's testimony. The State filed a motion to dismiss the second amended postconviction petition.

¶ 44 Following argument, on November 26, 2014, the trial court issued a written order granting the State's motion to dismiss. With regard to Ramos's testimony about the location of the meeting, the trial court held:

> "Petitioner's first claim of failure to do pre-trial investigation revolves around the location of a meeting where [defendant] was to have ordered the 'violation' of [Arce]. [Defendant's] claim is to the effect that with more trial preparation [trial counsel] would have discovered that the meeting could not have taken place at the location [Ramos]

testified to. This information, argues [defendant], would have or could have been used by trial counsel to cross-examine [Ramos] and possibly have the jury draw the conclusion that the meeting in fact did not occur.

The court here must apply the *Strickland* standard. Assuming that it is true that [defendant] told [trial counsel] of a conflict in that the meeting could not have taken places as described by [Ramos], and [trial counsel] did not investigate; can the court here find that there is prejudice to the defense in that the proposed cross-examination that would have been possible would have so swayed the jury as there would have been a different outcome? As noted above, the standard to be applied is: '… the result of the proceeding would have been different.' The court Finds: as to this allegation the standard has not been met."

¶ 45 Regarding the issue of Hernandez's involvement in the Dieppa murder and its potential effect on Hernandez's credibility, the trial court held:

"Next [defendant] alleges that trial counsel failed to attack the credibility of the witness Jose Hernandez. [Postconviction counsel] in this proceeding gives his professional estimation that trial counsel should have spent at least a half a day cross-examining Hernandez's credibility on the topic of the 'deal' he got from prosecutors to testify in this case. The record shows that the information about 'the deal' was out there, was before the jury, was available to the jury to weigh and consider. Nothing in the *Strickland* standard sets any quantity of cross-examination required. In fact, the standard is 'to eliminate the distorting effects of hindsight.' The record shows the details of the 'deal' was [*sic*] before the jury and [defendant] would now have the court find ineffectiveness because trial counsel did not review, repeat and repeat again ('at

> least for half a day') the terms he got from prosecutors to testify. Not only has [defendant] failed to convince this court that this allegation meets the *Strickland* standard[,] he wants to speculate that a jury needs evidence repeated over and over. [Defendant] accuses trial counsel of failing to destroy the credibility of witness Jose Hernandez; this when the jury heard he was facing 40 years on another case and his 'deal' was to cut 40 years down to under 8 years; and was cross-examined on Hernandez's role in another murder. Even with that information the jury found [Hernandez] believable. [Defendant] has failed to show the [result of the] proceeding would have been different."

¶ 46 Finally, as is pertinent here, the trial court addressed defendant's claim of a *Brady* violation:

> "[Defendant] alleges his due process rights were violated by the State, claiming that the State withheld an interview(s) of Jose Hernandez regarding the Dieppa murder. Although his claim is that some interview(s) were withheld, in this petition he does not advise what was withheld. Beyond not advising what was withheld there is no explanation of how this material was either favorable to [defendant], [*sic*] or exculpatory or would have been suitable to impeach state witnesses. The State had tendered FBI reports, and the grand jury information. Further the trial counsel cross-examined the witness Hernandez. The [State] here goes so far as to attach an affidavit from a court reporter which discloses that trial counsel in this matter had transcripts from the Dieppa murder case. The [State]

> details a long list of other reports and documents concerning the Dieppa trial that [defendant] was given. It is insufficient for [defendant] here to speculate that he might not have gotten some information. The court Finds: [defendant] has not demonstrated a *Brady* violation; the cross-examination conducted by trial counsel shows he had all the information about the Dieppa murder."

¶ 47 The trial court resolved the other issues raised by the State's motion to dismiss and dismissed defendant's second amended postconviction petition in its entirety. Defendant timely appeals.

¶ 48 II. ANALYSIS

¶ 49 On appeal, defendant argues that the second amended postconviction petition made substantial showings that he was deprived of the effective assistance of trial counsel regarding counsel's failure to determine that Ramos's testimony that the shoot-but-do-not-kill order was issued at Queen Mari's house was impossible and for failing to adequately cross-examine Hernandez regarding his participation in the Dieppa murder for which Hernandez was never charged. Defendant also contends that the second amended postconviction petition made a substantial showing that the State committed a *Brady* violation when it failed to tender an Aurora police department report concerning Hernandez's statements to Aurora police concerning the Dieppa murder. We first review the procedures and standards applicable to postconviction petitions. After this brief review, we consider each of defendant's contentions in turn.

¶ 50 A. Proceedings under the Post-Conviction Hearing Act Generally

¶ 51 As a starting point, we describe the familiar procedures of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). The Act provides a method to allow a

defendant to challenge his or her conviction on the grounds that the conviction resulted from a substantial denial of federal or state constitutional rights, or both. *People v. Cotto*, 2016 IL 119006, ¶ 26. The Act outlines a three-stage process to adjudicate these claims. *Id.* In the first stage, the trial court determines whether the petition is frivolous or patently without merit. *Id.* (citing 725 ILCS 5/122-2.1(a)(2) (West 2014)). If the petition survives the first-stage consideration of the trial court, it is advanced to the second stage. *Id.*

¶ 52 In the second stage, the trial court may appoint counsel for an indigent defendant; appointed postconviction counsel may amend the petition as necessary, and the State may file a motion to dismiss the petition or it may file an answer to the petition. *Id.* ¶ 27 (citing 725 ILCS 5/122-4, 122-5 (West 2014)). In the second stage, the trial court must determine whether the petition, plus any accompanying documentation, makes a substantial showing of a constitutional violation. *Id.* ¶ 28. If the petition does not make the necessary substantial showing of a constitutional violation, it may be dismissed. *Id.* If, however, the necessary showing is made, the petition is advanced to the third stage, and the trial court holds an evidentiary hearing on the claims. *Id.*

¶ 53 At the second stage, it is the defendant's burden to demonstrate a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 35. In assessing the defendant's showing, the trial court is not to make evidentiary determinations; instead, the well-pleaded facts that are not positively rebutted by the original trial record are taken as true. *Id.* In short, the second-stage petition is considered in the light of whether it is legally sufficient to demonstrate a constitutional violation, meaning that, if the petition's well-pleaded allegations of a constitutional violation were proved at an evidentiary hearing, the defendant would be entitled to relief. *Id.* We review *de novo* the second-stage dismissal of a postconviction petition. *People*

v. Pendleton, 223 Ill. 2d 458, 473 (2006). With these principles in mind, we turn to defendant's contentions on appeal.

¶ 54 B. Inadequate Investigation of Ramos's Testimony

¶ 55 Defendant first contends that he received ineffective assistance of counsel due to his trial counsel's failure to adequately investigate Ramos's testimony that the shoot-but-do-not-kill order was given by defendant at Queen Mari's house. In order to prevail on a claim of ineffective assistance of counsel, a defendant must fulfill the familiar *Strickland* standard (*Strickland v. Washington*, 466 U.S. 668, 687 (1984)): the defendant must show both that counsel's performance was deficient and that, as a result of the deficient performance, defendant was prejudiced. *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Under the *Strickland* standard, "prejudice" means that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *Id.* at 520. Likewise, a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.* For a defendant to succeed on a claim of ineffective assistance of counsel, he or she must satisfy both of the *Strickland* elements. *People v. Tucker*, 2017 IL App (5th) 130576, ¶ 27. For example, the failure to prove prejudice will stop the inquiry, because in the absence of prejudice, counsel's deficient performance becomes irrelevant. *Id.*

¶ 56 Defendant argues that his trial counsel did not investigate whether it was possible for defendant to have issued the shoot-but-do-not-kill order at Queen Mari's house. Defendant emphasizes that it was counsel's failure to investigate that resulted in the ineffective assistance claim in this respect. It is well established that counsel's strategic choices, such as what evidence to present, are virtually immune from review under a claim of ineffective assistance. *People v. Manning*, 241 Ill. 2d 319, 327 (2011). However, where the claim of ineffective

assistance is based on a failure to investigate, the decision is no longer immunized from review. *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005). Therefore, for purposes of our analysis, we will deem that defendant has established trial counsel's deficient representation, because his claim is based on counsel's alleged failure to investigate the evidence. We thus consider whether defendant was prejudiced as a result.

¶ 57 Defendant alleges that, before trial, he informed trial counsel that Ramos's intended testimony about the meetings at Queen Mari's house at which, according to other evidence, defendant ordered first the head-to-toe violation of Arce followed by the shoot-but-do-not-kill order, would have been false and defendant urged trial counsel to interview Maribel Rodriguez (Queen Mari). Defendant argues that, had trial counsel investigated the ownership of Queen Mari's house at the time of the purported meetings, trial counsel would have discovered that she had sold the house, so Ramos's testimony was, flatly, a lie, and none of his remaining testimony could be deemed credible. Defendant notes that he provided documentation demonstrating that, in April 1989, Rodriguez sold her house and, according to affidavits from the buyers, Melicio and Rita Zamora, no meetings of the Latin Kings occurred on their property after their purchase of the house. Defendant concludes that trial counsel's failure to investigate these circumstances resulted in prejudice because, through the impeachment of demonstrating that Ramos was lying, the credibility of the remainder of his testimony would have been so undermined that there is a reasonable probability the jury would have delivered a different verdict. We disagree.

¶ 58 The short of the matter is that the location of the shoot-but-do-not-kill meeting is collateral to the issue of whether defendant issued such an order and whether another gang member acted upon the order. It has long been held that a matter is collateral if it is not relevant to a material issue in the case. *People v. Santos*, 211 Ill. 2d 395, 405 (2004); *People v. Chew*,

160 Ill. App. 3d 1082, 1086 (1987). The test for determining if a matter is collateral is whether the matter could be introduced for any purpose other than to contradict. *Santos*, 211 Ill. 2d at 405. Both *Santos* and *Chew* are illustrative of these principles.

¶ 59 In *Santos*, there was evidence that the victim had engaged in sexual relations with someone other than the defendant. *Id.* Our supreme court deemed this evidence to be wholly irrelevant to the material issue in the case, namely, whether the defendant could have reasonably believed the victim to have been of age when the act of sexual penetration took place between them. *Id.* The court further reasoned that the only reason the defendant tried to raise the issue was to contradict her statements to medical personnel with her later statements to law enforcement personnel. *Id.* Our supreme court concluded that, because the evidence was offered only to contradict, it was a collateral matter. *Id.*

¶ 60 Likewise, in *Chew*, the victim stated that he was going to visit a friend when the defendant and two others robbed him. *Chew*, 160 Ill. App. 3d at 1084. According to the victim, the defendant drew a gun and pointed it at him while the two other offenders rifled his pockets and removed his money. *Id.* The defendant argued that newly discovered evidence, that the place the victim was visiting was in fact drug house, was sufficient to warrant a new trial. *Id.* at 1085. The appellate court disagreed, holding that the evidence was collateral even if it tended to impeach the victim's testimony, because it was not in any way material to the issue of whether the victim was robbed at gunpoint by the defendant and the other two offenders. *Id.* at 1086.

¶ 61 In this case, the issue of where the meeting took place was not a material issue. Rather, the material issues were whether defendant ordered that Arce be shot and whether one of the gang members carried out the order. The location of the meeting has little bearing whether the fatal order was issued or carried out by another gang member. As in both *Santos* and Chew,

then, the meeting's location is a collateral matter. *Santos*, 211 Ill. 2d at 405; *Chew*, 160 Ill. App. 3d at 1086. Because the evidence of the ownership of Queen Mari's house was collateral, impeachment with this evidence would not have been permitted, because a witness's impeachment is limited to relevant matters. *People v. Harris*, 182 Ill. 2d 114, 138 (1998).

¶ 62 Defendant maintains that Ramos was lying. This is not the only conclusion that could be drawn, as Ramos could simply have misremembered where the meeting took place. Thus, the jury could have concluded that Ramos was lying, and if so, disbelieved his remaining testimony. Or, the jury could have concluded that Ramos was unable to remember the location and also disbelieved his remaining testimony. However, because the issue of where the meeting occurred is collateral, there is little to no likelihood of it impacting the credibility of Ramos's material testimony.

¶ 63 In the first place, Ramos's testimony about the location meeting contradicted itself, with Ramos variously testifying that the impromptu meeting (which other evidence showed was the meeting at which the shoot-but-do-not-kill order was issued) occurred at Bambi's house or at Queen Mari's house. Hernandez, by contrast, testified that the shoot-but-do-not-kill meeting occurred near the Brady School. Thus, Ramos's memory for the collateral details had been impeached both by another witness as well as in the course of his own confused and confusing testimony. Therefore, the jury was well aware that Ramos was, at best, shaky in his recollection of the location of the meeting. Trial counsel attempted to draw the inference that Ramos was lying because of the leniency of the plea deal he received, and, because of his confused and confusing testimony about the location of the meeting, the jury was well aware of the infirmities of Ramos's testimony.

¶ 64 What was not shaky, however, was Ramos's recollection of the substance of the meeting. Ramos testified that, after being given information regarding Arce, defendant became mad and shortly thereafter, Arce was shot dead. Likewise, Hernandez also testified that, after being given information regarding Arce, defendant grew angry and issued the shoot-but-do-not-kill order. Additionally, the Ramos's and Hernandez's accounts of the meeting's attendees were consistent. Thus, despite Ramos's inability to remember the collateral issue of where the meeting was held, his account was corroborated in substantive detail by Hernandez's account. The substantive corroboration also serves to minimize the inference that Ramos was lying. Because the ownership of Queen Mari's house was a collateral issue, and because Ramos's testimony about the location of the meeting was compromised by his own obvious struggles remembering and Hernandez's inconsistent testimony, there is no reasonable probability that the jury would have returned a different verdict if it had been apprised of the ownership of Queen Mari's house in June 1989. In other words, defendant was not prejudiced by his trial counsel's failure to investigate the matter and to present it at trial. Because there is no prejudice accruing from the alleged failure of trial counsel to investigate, defendant cannot sustain his claim of ineffective assistance on this point.

¶ 65 Defendant relies on *People v. Truly*, 230 Ill. App. 3d 948 (1992), to support his claim of prejudice. According to defendant, as in *Truly*, trial counsel was aware of witnesses (Rodriguez and the Zamoras) who could impeach Ramos, but he never interviewed them, which prejudiced defendant. See *id.* at 955. Our analysis above demonstrates that no prejudice accrued to defendant resulting from trial counsel's failure to pursue the issue of the ownership of Queen Mari's house. Additionally, *Truly* is significantly factually distinguishable. There, the defendant's counsel did not investigate four witnesses whose names and addresses were provided

by the defendant and who would have corroborated the defendant's alibi to the offense. *Id.* Here, by contrast, the failure to investigate the potential testimony of Rodriguez and the Zamoras related not to a material issue, such as an alibi, but to a collateral issue that had already been placed before the jury, albeit not as completely as defendant contends it could have been. The fact that, in *Truly*, the failure to investigate the testimony of witnesses who could have corroborated the defendant's alibi serves to distinguish *Truly* from this case in which the failure to investigate impacted the testimony about a collateral issue.

¶ 66 In his reply, defendant does not directly address whether the location of the meeting was a collateral issue, although the State had labeled it so. Instead, defendant queries if trial counsel had proved false, either through lying or misremembering, Ramos's testimony about the location, then "what other facts was he also mis-remembering or lying about?" Defendant asserts that the remainder of Ramos's testimony would have unraveled. We disagree. This argument, while possessing some amount of surface appeal, ignores the fact that Ramos's testimony about who was present when the order was issued (and, inferentially, who issued the order) dovetailed with Hernandez's testimony about the same matters. Thus, Ramos's testimony was corroborated. More importantly, the issue of the location of the meeting is collateral, so trial counsel would have been precluded from raising it. Additionally, Ramos's testimony was self-contradictory regarding the location of the meeting and was contradicted by Hernandez's testimony on that issue. Thus, the jury was aware that Ramos was already impeached on the issue of the location of the meeting.

¶ 67 Defendant argues that Ramos's redirect examination established that one meeting occurred at Bambi's house and another occurred at Queen Mari's house. This argument, however, is unresponsive to the determinative question of whether the issue is collateral or

material. In addition, rhetorically, defendant is in the awkward position of claiming that Ramos now must be believed so his testimony can be refuted. In our view, Ramos's testimony about the collateral issue of the location of the meeting is sufficiently discredited by his own bumbling and confused testimony. He remained clear regarding the material issues, and this was corroborated through other testimony. Thus, we reject defendant's argument and conception of Ramos's testimony.

¶ 68 Defendant finally argues that, although discrediting Ramos about the issue of the location of the meeting would not have been outcome determinative, it would have caused the remaining evidence to be viewed in a different light so as to undermine confidence in the verdict. Stated another way, defendant maintains that he was prejudiced by counsel's failure to investigate the ownership of Queen Mari's house. We have addressed that above, and defendant's final argument on this point provides no detail or other grounds sufficient to persuade us that he was prejudiced.

¶ 69 Relatedly, defendant also argues that conclusively discrediting Ramos would have served to give the jury reason to disbelieve Ramos (because he was lying) and would have extended to discrediting the other former gang member witnesses, whose credibility was already dubious by virtue of the significant benefits they received in exchange for their testimony. The argument remains flawed because it remains nonresponsive to the issue of whether the potential testimony of Rodriguez and the Zamoras concerned a collateral issue. At root, the potential testimony of Rodriguez and the Zamoras would have been improper impeachment because it would not have been relevant to any material issue in the case. *Harris*, 182 Ill. 2d at 138. Because it was improper, it would have been properly precluded, and because it would not have been allowed, it cannot have been prejudicial. We reject defendant's argument.

¶ 70 C. Inadequate Cross-Examination of Hernandez

¶ 71 Defendant next contends that trial counsel was ineffective regarding his cross-examination of Hernandez regarding his participation in and accountability for the 1997 Dieppa murder. It will be recalled that, in order to demonstrate that a defendant received ineffective assistance from trial counsel, the defendant must show both that counsel's performance was deficient and that, as a result of the deficient performance, defendant was prejudiced. *Barrow*, 195 Ill. 2d at 519. Specifically, defendant contends that trial counsel was ineffective for failing to cross-examine Hernandez about the fact that he was not charged in the Dieppa murder even though his statements to police and grand jury testimony indicated that he was legally accountable for that murder, for which he could have faced up to a 60-year prison sentence.

¶ 72 In his second amended postconviction petition, defendant attached excerpts of Hernandez's testimony to a grand jury in which he explained his role in the Dieppa murder. Defendant also attached excerpts of Hernandez's testimony in the trial of Jorge Torres for the murder of Dieppa. According to the grand jury testimony, Hernandez was notified by his sister that a rival gang member was near her home. As it turns out, Hernandez's sister was roommates with a woman who was dating Dieppa, and Dieppa was a member of a rival gang. Hernandez gathered two friends, and the three men left to "search for someone with a gun that we could use to shoot Dieppa." In their search, they picked up Torres; then they were able to obtain a gun. With the gun in their possession, Hernandez drove the other three men to Dieppa's location. Torres got out of the car to shoot Dieppa, but he retreated and explained that there was a woman in the car with Dieppa. One of the men explained to Torres how to shoot Dieppa without shooting the woman and accompanied Torres as he returned to Dieppa's car and shot Dieppa.

Hernandez and the other man waited in the car while Torres shot Dieppa. Hernandez then drove them away.

¶ 73 In the Torres trial, defendant's trial counsel represented Torres. Defendant's trial counsel cross-examined Hernandez in the course of the Torres trial. When asked on cross-examination if he had "any problems making up a plan to go over and kill" Dieppa, Hernandez replied, "No." Hernandez also testified that he went to Dieppa's location with the intention to "[a]t least shoot him."

¶ 74 Based on the testimony given in the two proceedings, defendant argues that Hernandez was legally accountable for Dieppa's murder. The various testimonies showed that Hernandez secured a gun, came up with a plan to shoot Dieppa, drove the assailants to Dieppa's location, and facilitated the escape of the assailants by driving them away from the scene of the murder. Hernandez admitted that his intent was at least to shoot Dieppa, and he agreed that he had no problem with planning the offense that could (and did) result in Dieppa's murder. We believe defendant is correct in his assertion that, based on those facts given by Hernandez, he could have been charged with the murder of Dieppa.

¶ 75 Defendant argues that, in keeping with the longstanding rule that a witness may be impeached with a showing of bias, interest, or motive to falsely testify (*People v. Cookson*, 215 Ill. 2d 194, 214 (2005)), the impeachment of Hernandez with the details of his involvement and participation in the Dieppa murder would have revealed Hernandez to the jury as a murderer, and one who skated away from the consequences of his actions by testifying against defendant. Had this been done, according to defendant, Hernandez's credibility would have been "profoundly questionable when his favorable testimony allowed him to walk away from a murder."

¶ 76 In support of this position, defendant cites *People v. Salgado*, 263 Ill. App. 3d 238 (1994), and *People v. Baines*, 399 Ill. App. 3d 881 (2010), apparently for their factual similarity to this case. In *Salgado,* Robert Saltijeral (who was the object of a failed assassination attempt in another and unrelated case) testified that he observed the defendant there, along with two codefendants, shooting on the night in question. *Salgado,* 263 Ill. App. 3d at 241. Saltijeral was the only witness in the defendant's trial to give direct testimony that he observed defendant as a shooter in the offense. *Id.* at 246. However, at the earlier trial of the two codefendants, Saltijeral had testified he did not see the defendant shooting on the night in question. *Id.* "[T]he defendant's attorney did not attempt to impeach Saltijeral with this crucial contradictory testimony." *Id.* The appellate court determined that the failure to impeach was deficient performance on the attorney's part and that the defendant had been prejudiced because "the impeachment value of directly contradictory testimony made under oath at a prior trial by the State's premier eyewitness [could] hardly be overestimated." *Id.* at 247.

¶ 77 In our view, *Salgado* is distinguishable. The impeachment defendant seeks was not a direct contradiction from previous sworn testimony. Instead, it would have been delving into a specific crime that defendant discussed during the course of his debriefing pursuant to his plea agreement to cooperate with federal and State authorities. While it may be significant (and we will discuss its ramifications below), it is simply not in the same league as the impeachment available in *Salgado,* the direct contradiction of trial testimony by previously given, sworn, testimony. We note that Hernandez was the only witness to expressly testify that he heard defendant utter the words, "[s]hoot him but don't kill him," which might place Hernandez on a similar footing as Saltijeral in *Salgado*. However, the impeachment is only a deeper exploration of Hernandez's criminal history, not previous testimony contradicting his claim that defendant

issued the shoot-but-do-not-kill order. Thus, the impeachment is likely to be much less of a game changer than in *Salgado*. For these reasons, then, *Salgado* is distinguishable.

¶ 78 In *Baines*, the appellate court determined that the defendant's counsel was ineffective when he did not know the facts of the case or basic courtroom procedure. *Baines*, 399 Ill. App. 3d at 897. The defendant's counsel mangled to such an extent his examination of the victim, who was also the only witness able to identify the defendant, that the defendant's counsel did not bring out the victim's false identification of an innocent person as an attacker, an identification in which the victim continued to persist despite video evidence establishing that the falsely accused person was actually working at a Home Depot at the time of the offense. *Id.* at 895-96. The appellate court found that this failure, along with a number of other egregious errors, like incriminating the defendant during the defendant's direct examination, resulted in ineffective assistance. *Id.* at 899. Here, by contrast, trial counsel failed to inquire more deeply into Hernandez's participation in the Dieppa murder. Again, while Hernandez was the only witness to directly testify that defendant issued the shoot-but-do-not-kill order, the impeachment for which defendant argues does not actually relate to Hernandez's ability to recall whether defendant issued the order, but goes toward, perhaps, a motive to testify falsely. While significant, it is simply not the pervasive failure seen in *Baines*, and it does not undermine Hernandez's testimony about the occurrence as the impeachment would have done in *Baines*. Therefore, *Baines*, too, is distinguishable.

¶ 79 What is pertinent in *Baines*, is the notation that, in order to demonstrate prejudice, the overall evidence must be weak, and the ineffectiveness exhibited by the defendant's attorney must have failed to challenge the evidence. *Id.* at 898. *Baines* identifies an instance of prejudice

where the credibility of the victim, the State's crucial witness, was not challenged. *Id.* (citing *People v. Anthony Roy W.*, 324 Ill. App. 3d 181, 186-87 (2001)).

¶ 80 Defendant appears to be attempting to make this argument, that Hernandez's credibility was not adequately challenged. We disagree. Hernandez explained that he was arrested on a drug charge and pleaded guilty to "cocaine conspiracy" and unlawful possession of a weapon. He faced a prison term of up to 40 years, but received a seven-year-ten-month term of imprisonment for cooperating with the authorities. He was questioned about his criminal past, and defendant's trial counsel discussed, albeit briefly, that Hernandez had participated in a murder, but even then, had not mentioned defendant's involvement in the Arce murder. Defendant's trial counsel also set up the reasonable inference that Hernandez was incriminating 30 or 40 other gang members (including defendant) in order to obtain a favorable deal from the authorities. Trial counsel indeed emphasized that, on only a single day later during Hernandez's debriefing did he mention the Arce murder. Trial counsel also noted that, had Hernandez simply informed the authorities that defendant, for example, liked to shoplift, the authorities would not have been very impressed; Hernandez needed to deliver a big gang member committing a big crime. Based on this cross-examination, we cannot say that Hernandez's credibility was not impeached. The Dieppa murder was acknowledged, and the details of the plea agreement and motives for testifying falsely were explored. Thus, we cannot say that trial counsel's performance in this case resembles the situation noted in *Baines*, namely, the failure to impeach the critical witness resulting in a finding of prejudice. *Id.*

¶ 81 Neither of the cases cited by defendant to particularly support his contention that Hernandez was inadequately impeached applies to the circumstances here. In this case, we conclude that Hernandez *was* adequately impeached. Hernandez indicated that he was arrested

on various charges, including "cocaine conspiracy" and a weapons charge, both of which he pleaded guilty to. Hernandez faced up to a 40-year prison term on his charges. He decided to cooperate with the federal authorities, and his cooperation was extended to State proceedings as well. In exchange, Hernandez indicated that his sentence was halved to a 94-month term. (We recognize that doubling the 94-month term leads to a sentence of considerably less than the 40-year term he originally faced, and this does not appear to be explained in the record. We surmise that the 15-year-and-8-month maximum term derived from doubling his actual reflects sentencing on the charges Hernandez pleaded guilty to.) Hernandez also indicated that, should he not cooperate, he would face the rescission of the plea deal and the reinstatement of all of the charges he faced.

¶ 82 The record also shows that Hernandez received use immunity for any statements he gave as part of his cooperation with and debriefing by the federal and State authorities. It was during his debriefing that he revealed the details of the Dieppa murder, including his participation and accountability for the murder. His statements before the grand jury and at the Torres trial were therefore immunized under the cooperation aspect of his plea deal. While the jury was not informed that Hernandez received this benefit, they learned, summarily, that Hernandez was personally involved in a murder, as well as involved to unknown degrees in some 40 other offenses about which he gave information. The jury also learned that, up until the day he revealed his participation in a murder to the authorities, he had not yet discussed defendant's involvement in the Arce murder. Defendant's trial counsel got Hernandez to admit that, while he did not know what the federal and State authorities considered "cooperation" to mean, it likely meant testifying consistently with his statements to those authorities. Hernandez also admitted that the authorities expected testimony about significant offenses, not minor offenses. From that

the inference arises that Hernandez was plugging the names of the more desirable big fish into the crimes about which he was providing information in order to appease the federal and State authorities and retain the benefits of his plea agreement. Thus, the jury learned that Hernandez had a significant motive to testify falsely in order to avoid the lengthy sentence to which he was subject, that Hernandez was a hardened criminal whose criminal career spanned at least 15 years, that Hernandez participated in at least one murder, that Hernandez knew about or participated in some unknown degree in up to 40 other crimes, and that Hernandez was arrested for a significant "cocaine conspiracy" and eight other charges subjecting him to a possible 40-year prison sentence. In addition, the jury learned that Hernandez had betrayed his erstwhile gang brothers and that he freely lied in prison in order to save his own skin. From this, the jury could infer that Hernandez had few qualms about lying when it might benefit him, even for so small a gain as making his incarceration slightly less unpleasant. Based on these facts established in defendant's trial counsel's cross-examination of Hernandez, the jury had adequate information on Hernandez's veracity, bias, and motive to testify falsely.

¶ 83 Finally, we note that a defendant is entitled to competent, not perfect, representation. *People v. West*, 187 Ill. 2d 418, 432 (1999). Defendant received a competent level of assistance and especially when compared to *Baines* or *Salgado*. Defendant argues that, by not highlighting the fact that defendant was a self-confessed murderer, he was deprived of crucial impeachment that would have likely tipped the balance, given the other obvious infirmities in the testimony of the former gang members. Defendant contends that, by not going into detail about Hernandez's participation in the Dieppa murder, the jury was not told about all the significant aspects of Hernandez's plea deal, because defendant could have faced up to a 60-year term of imprisonment for his participation in the Dieppa murder. We disagree.

¶ 84 There is no evidence in the record that demonstrates any sort of contractual exchange regarding the Dieppa murder. The details of Hernandez's participation were developed only after he had agreed to plead guilty on the drug and weapon charges. The jury learned the significant fact that Hernandez participated in a murder, and it also learned that Hernandez's criminal career was replete with violence and drug crimes. The jury also learned that Hernandez had few qualms about the betraying those close to him or lying when he perceived it to be in his interest to do so. The Dieppa murder was one incident in a long and sordid criminal history, but it was not a crime that was potentially solved until Hernandez discussed it during his debriefing after his agreement to the plea deal. Thus, it is not properly a part of the plea deal, other than the fact that Hernandez was required to tell the truth when he was called to testify at a trial. Defendant's trial counsel was able to suggest that "truth" was whatever Hernandez had told police in order to cravenly save his own skin by betraying those who had been close to him. Thus, Hernandez was thoroughly, even if not perfectly, impeached.

¶ 85 Defendant argues that, because the details of Hernandez's participation in the Dieppa murder were not discussed, the jury could only see Hernandez as a drug dealer and former gang member, and not as the driving force in organizing, planning, and carrying out the Dieppa murder. This, to an extent is true. However, the jury was informed that Hernandez participated in a murder, so it was aware that, in addition to Hernandez's roles as former gang member and drug dealer, Hernandez had participated in at least one murder. Moreover, the jury was well aware of Hernandez's motives to testify falsely, his bias, and his all too easy relationship with untruth, if he perceived untruth to be in his interest. Thus, Hernandez was thoroughly impeached, even as a participant in a murder. We cannot say, based on this record, that more

questioning about Hernandez's participation in the Dieppa murder would have created a reasonable probability that the jury would have reached a different result.

¶ 86 Defendant argues that the prejudice accruing from Hernandez's incomplete impeachment coupled with that from Ramos's testimony about the location of the shoot-but-do-not-kill meeting not having been shown to be impossible demonstrated the existence of prejudice sufficient to undermine confidence in the result of the trial. We disagree. Ramos's testimony about location was a collateral issue, and there was no prejudice resulting from trial counsel's failure to pursue that avenue of cross-examination. Likewise, there was no prejudice resulting from Hernandez's purportedly incomplete cross-examination: Hernandez was thoroughly impeached and the jury had all the information it needed to assess his credibility. The fact that trial counsel could have done more does not diminish what he was able to accomplish, and his cross-examination of Hernandez was certainly competent, if not as perfect as defendant could have wished. Accordingly, we reject defendant's argument on this point, and we hold that trial counsel was not ineffective in his cross-examinations of either Ramos or Hernandez.

¶ 87 D. *Brady* Violation

¶ 88 Defendant last contends that the State committed a *Brady* violation when it failed to turn over a police report dated September 12, 2002, which summarized an interview between Hernandez and Detective Johnson of the Aurora police department during which Hernandez revealed further details about his participation in the Dieppa murder. A *Brady* violation occurs when the prosecution withholds evidence favorable to the accused and material to guilt or punishment, thereby violating the accused's constitutional right to due process of law. *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). Even if the prosecutor is not personally aware of the evidence, the rule imputes the knowledge of all of the other investigators to the prosecutor, so if

such evidence is withheld, it is still a violation. *Id.* In this way, the *Brady* rule accommodates the prosecutor's special role in our criminal system, namely, the search for the truth and not simply to win criminal trials, but to make sure that justice is done. *Id.*

¶ 89 In order to make out a claim for a *Brady* violation, the defendant must show: (1) the undisclosed evidence is favorable to the defendant because it is 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. *Id.* at 73-74. The materiality of the evidence is judged by a standard similar to that used in reviewing a *Strickland* claim of ineffective assistance of counsel: evidence is material if there is a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed, meaning that, had the evidence been introduced, it would have undermined confidence in the verdict. *Id.* at 74. As this question is presented in the context of a second-stage dismissal of defendant's postconviction petition, our review remains *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 90 Defendant argues that the withheld September 12, 2002, police report met each of the elements necessary to establish a *Brady* violation. First, it was favorable to defendant because it provided additional details with which to impeach Hernandez. Second, the State did not turn over the police report along with the rest of the discovery. Last, it was material because it would have allowed trial counsel more thoroughly impeach Hernandez especially regarding his motives to plan and participate in the Dieppa murder. Defendant contends that this information would have allowed him to better undermine Hernandez's credibility. In turn, with Hernandez's credibility fatally undermined, there is a reasonable probability that the result would have been different because Hernandez was the only witness to provide direct testimony that defendant issued the shoot-but-do-not-kill order. With the jury discrediting Hernandez and his testimony

that defendant ordered the shooting of Arce, the State's case would collapse, and the trial result would have been different.

¶ 91 Defendant cites *People v. Carballido*, 2015 IL App (2d) 140760, ¶ 79, to support the proposition that the police report here was material due to "the high relevance of the suppressed evidence" and the "significant dispute over the reliability of other key evidence against defendant." In *Carballido*, the State did not turn over an officer's field notes which would have allowed the defendant to impeach that officer when he vouched for the accuracy of his written report as a very nearly verbatim report of the defendant's inculpatory statement to his sister about his intent and knowledge that a confederate had a gun and planned to shoot a rival gang member; the field notes from which the officer claimed to have written the report did not contain an account of the defendant's statement to his sister. *Id.* ¶ 80. This court analyzed the evidence in that case and noted that the defendant's inculpatory statement to the police had been significantly challenged; the State examined the defendant's sister to corroborate the defendant's inculpatory statement to the police, but the sister gave unexpected testimony supporting the defendant's challenge to the evidence. *Id.* The State then examined the officer who interviewed the sister, and he testified that, from his field notes, he had composed a report stating that the sister had given him a statement that strongly confirmed that the defendant knew about the gun and the intent to use it to shoot a rival gang member. *Id.* This court concluded that, had the field notes been turned over to the defendant, the defendant could have impeached the officer with his inaccurate statements about the sister's version, which would have prevented the officer's testimony from bolstering the reliability of the State's key evidence. *Id.* We concluded that the field notes had a great potential to impact the outcome of the trial. *Id.*

¶ 92 *Carballido* is distinguishable from this case. Here, defendant's trial counsel had Hernandez's grand jury testimony and testimony from Torres's trial. Further, trial counsel had thoroughly impeached Hernandez regarding his biases and motives to testify falsely, along with his criminal history, and his willingness to betray others when he perceived such a course to be in his personal interest. Trial counsel also conveyed to the jury that Hernandez had participated in a murder, even though counsel did not go into details. Thus, Hernandez was impeached. In *Carballido*, the *Brady* violation impeded impeachment of a witness who was then able to improperly and unduly bolster the State's theory of the case. Here, there is no similar situation. Hernandez was impeached on all bases so the jury had an accurate and adequate framework to judge his credibility. *Carballido*, therefore, is distinguishable and offers little in the way of guidance.

¶ 93 Due to the significant differences between *Carballido* and this case, we determine that a different outcome is also required. In *Carballido*, the defendant had significantly undermined the State's theory of the case through his testimony and the unexpectedly corroborating testimony of his sister. *Id.* In order to attack the sister's version, the State called the officer who took the sister's statement, and officer assured the jury, apparently falsely, that his report included a nearly verbatim recitation of the sister's own words. *Id.* In turn, the report was represented to be based on field notes, but, as it turned out, the field notes did not actually support the officer's testimony: they did not include the sister's words or even a good summary of those words. This rendered the field notes material in the *Brady* sense. However, there were also issues of a number of additional errors, such as hearsay being erroneously used as substantive evidence, erroneous exclusion of important testimony, improper closing argument, and reliability issues with other evidence. *Id.* ¶ 79. The additional concerns present in

Carballido are either not present here, or present to a much, much lower degree. Obviously, the reliability of the testimony of the former gang members is significant, but that reliability was tested through thorough cross-examinations and fully presenting the former gang members' biases, criminal histories, benefits of cooperating, and their motives to testify falsely. This served to mitigate concerns over their reliability as the various cross-examinations squarely impinged on the former gang members' credibility. However, there was little dispute over other evidence in the case, there does not appear to be the same sorts of improper hearsay being used substantively, or any of the other voluminous and wide-ranging errors identified in *Carballido*.

¶ 94 In particular, the materiality of the police report is significantly undercut by the fact that the defense had both Hernandez's grand jury testimony and his testimony from the Torres trial, both of which described his participation in the Dieppa murder. Unlike in *Carballido*, the defense had the impeachment information available. It appears that the information on the police report varied slightly from that contained in Hernandez's testimonies before the grand jury and the Torres jury. Thus, the September 12, 2002, police report was far less significant than the field notes in *Carballido*: here, the defense knew most of the important details of Hernandez's participation in the Dieppa murder, while in *Carballido*, the defense's cross-examination was hampered by the absence of the field notes. We therefore conclude that the police report was not material because, had it been tendered, there is no reasonable probability that the outcome of the trial would have been different. Because the report was not material, we reject defendant's contention.

¶ 95 Defendant argues that the lack of the September 12, 2002, police report coupled with Ramos's mistaken or false testimony about the location of the meeting and the fact that all of the former gang members were receiving significant benefits for their cooperation means that, like in

Carballido, the key State's evidence was shaky. We disagree. The jury was fully apprised of the deals the former gang members (including Hernandez) received for their cooperation. Ramos's testimony about the location of the meeting was collateral. The details of Hernandez's participation in the Dieppa murder were known to trial counsel, and the jury was also aware that Hernandez had participated in a murder. For these reasons, we reject defendant's contention.

¶ 96 Defendant also contends that, had the September 12, 2002, police report been tendered, its details would somehow have turned the tide by allowing Hernandez to be more effectively impeached. As we noted above, Hernandez could, in the abstract, have been more impeached on the Dieppa murder. However, Hernandez was already thoroughly and extensively impeached regarding the details of the plea deal that led to his cooperation and testimony in this trial. He was also shown to have few qualms about abandoning and betraying others as well as lying to others if he believed it was in his self interest to do so. Hernandez's criminal history and the violence of his life and career in the Latin Kings were adequately displayed to the jury. Finally, the jury was aware that he participated in a murder even if the details were not presented. Hernandez was thoroughly impeached on all of these grounds, and the September 12, 2002, police report would have provided little more than had already been accomplished. We reject defendant's contention. We hold that the trial court's judgment on the *Brady* issue was correct.

¶ 97 III. CONCLUSION

¶ 98 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 99 Affirmed.