2011 IL App (4th) 100189-U Filed 8/30/11

NO. 4–10–0189

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
JOHN L. WARD,	)	No. 05CF1424
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Coryell,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

¶ *1* *Held*: A postconviction petition unaccompanied by the supporting materials required by section 122–2 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122–2 (West 2008)) is subject to summary dismissal pursuant to section 122–2.1(a)(2) of the Act (725 ILCS 5/122–2.1(a)(2) (West 2008)).

¶ 2 A statement verified pursuant to section 1–109 of the Code of Civil Procedure (Code) (735 ILCS 5/1–109 (West 2008)) and lacking a notarization is not an "affidavit" within the meaning of section 122–2 of the Act.

¶ 3 An unsworn police report is not an acceptable substitute for the supporting affidavit required by section 122–2 of the Act.

¶ 4 Defense counsel's failure to perform an investigation cannot serve as the basis of a claim of ineffective assistance of counsel if all defendant can do is speculate as to what such an investigation would reveal.

¶ 5 Defendant, John L. Ward, is serving consecutive 15-year terms of imprisonment for attempt (first-degree murder) (720 ILCS 5/8–4(a), 9–1(a)(1) (West 2004)) and armed robbery (720

ILCS 5/18–2(a)(4) (West 2004)). He appeals from the summary dismissal of his postconviction petition. In our *de novo* review, we conclude that his petition fails to state the gist of a constitutional claim because his petition is unaccompanied by any supporting affidavits. See *People v. Collins*, 202 Ill. 2d 59, 66 (2002). Therefore, we affirm the trial court's judgment.

¶ 6 I. BACKGROUND

¶ 7 A. The Charges

¶ 8 On November 1, 2005, the State filed four counts against defendant, counts IV through VII, and each count was labeled "Additional Information." These counts accused him of committing offenses in Macon County on October 11, 2005.

¶ 9 Count IV charged defendant with attempt (first-degree murder) (720 ILCS 5/8–4(a), 9–1(a)(1) (West 2004)) in that he shot Dean Richardson in the arm and the abdomen, intending to kill him.

¶ 10 Count V charged defendant with armed robbery (720 ILCS 5/18–2(a)(4) (West 2004)) in that he took from Richardson, at gunpoint, a wallet containing cash and also discharged the firearm, causing great bodily harm to Richardson.

¶ 11 Count VI charged defendant with aggravated battery with a firearm (720 ILCS 5/12–4.2 (West 2004)) in that he shot Richardson.

¶ 12 Count VII charged defendant with unlawful possession of a weapon by a felon (720 ILCS 5/24–1.1(a) (West 2004)) in that having been convicted of a felony in Macon County case No. 00-CF-1276, *i.e.*, criminal damage to property worth more than $300, he knowingly possessed a pistol. This weapons charge was severed before the trial.

¶ 13 B. The Jury Trial

¶ 14 1. *The Road Trip, Which Culminated in Richardson's Getting Shot*

¶ 15 The jury trial occurred on February 5 and 6, 2007, and the evidence tended to show the following. On October 11, 2005, Torrey "T-Money" Simpson borrowed his girlfriend's car, and he and Dean Richardson traveled from Decatur to Springfield. According to Richardson's testimony, the original purpose of this trip was to do some Christmas shopping at White Oaks Mall in Springfield, but they went to the Deja Vu strip club instead. Richardson had on his person $760 to $780 in cash, the proceeds of his disability check, which he had received by reason of his schizoaffective disorder and heart problems. He lent Simpson $10 or $20 at Deja Vu.

¶ 16 After visiting Deja Vu, Simpson and Richardson left Springfield at about 9:30 p.m. and arrived in Decatur around 10:20 p.m. At some point, they reached an agreement that once they returned to Decatur, Richardson would sell some cannabis to a friend of Simpson's. Richardson had this cannabis in his residence in Decatur. So, after negotiating with the prospective buyer, Richardson would have to fetch the cannabis from his residence.

¶ 17 Before meeting with the prospective buyer, Simpson and Richardson bought groceries at the Kroger store in Decatur. They came out of the store, Simpson first and then Richardson, and they climbed back into the car. Simpson told Richardson they had to wait there because the prospective buyer was going to meet them in the Kroger parking lot.

¶ 18 Eventually, a man walked up to the car and said, " 'What's up T?' " He was African-American, and Richardson testified he had never seen him before that night. In the courtroom, Richardson identified defendant as the man.

¶ 19 Simpson opened a door of the car, allowing the man to climb into the backseat. The man asked Richardson what he would be buying and how much it would cost. Richardson answered,

" [']I don't know, an eight for 25 or something like that.['] " The man acted as if he were "reaching in to get money," but instead he pulled out a pistol and aimed it at Richardson. The man told Richardson, " ['G]ive me all your money.['] " Richardson handed the man his wallet. (And at trial, Richardson specifically denied giving his wallet to Simpson; he insisted he relinquished his wallet to the armed robber.) According to Richardson, Simpson was just sitting there in the car without the least appearance of being surprised; nor did the man order him to part with any money. After Richardson handed his wallet to the man in the backseat, the pistol just "went off," he testified, and the bullet went through his left arm and into the left side of his chest.

¶ 20 The man then got out of the car and walked away at a fast pace. Richardson could not find his own cell phone, so he asked Simpson if he could borrow his cell phone. (The phone actually belonged to Simpson's girlfriend, Karen Kearns; she was letting Simpson use it, as she was letting him use her car.) Simpson allowed Richardson to use his phone. At 11:39 p.m., Richardson called 9-1-1 and then his parent's house.

¶ 21 Simpson drove out of the Kroger parking lot, and Richardson assumed he was taking him to the hospital, but instead–it is unclear why–Simpson took him to Walgreen's. Eventually, an ambulance arrived at Walgreen's, and Richardson was taken to the hospital, where he remained seven and a half weeks.

¶ 22 The police searched Simpson's girlfriend's car. On the backseat, on the driver's side, where the robber had been sitting, they found a cell phone, People's exhibit No. 1. No identifiable prints were on the phone.

¶ 23 2. *The Police Interview Simpson*

¶ 24 In the early morning of October 12, 2005, the police interviewed Simpson. He had

his girlfriend's cell phone with him, and the police seized it as evidence. This phone was labeled People's exhibit No. 4 at trial. The last incoming call on this phone was at 11:28 p.m. on October 11, 2005, and it was from someone named "Vell," whose phone number was 217-201-0799. The last outgoing call was to Vell at 11:29 p.m. Vell was in the list of "contacts" in this phone that Simpson had been carrying on his person.

¶ 25 During the interview, it also emerged that Simpson had Richardson's wallet on his person, along with $701 in cash.

¶ 26 3. *The Testimony of Marlon Williams*

¶ 27 The State called Marlon Williams, who testified he was facing prosecution for domestic battery. He also admitted he had prior convictions of theft and domestic battery as well as a delinquency adjudication for theft.

¶ 28 Williams testified he was well acquainted with defendant, whom he called "Lavelle." In fact, he and defendant had gone together to the U.S. Cellular store on Water Street in Decatur, to procure a phone for defendant. Williams had agreed to activate the phone for defendant in return for payment.

¶ 29 Williams testified that defendant was carrying this phone with him the evening of October 11, 2005, when defendant came to the house of Williams's grandmother and picked him up. They went to defendant's cousin's house, where they smoked some cannabis in a car in the backyard. While they were at the cousin's house, defendant received a call on the cell phone. After receiving this call, defendant told Williams he was going to pick up his girlfriend and then "get up with this guy."

¶ 30 The prosecutor asked Williams:

"Q. Did he say what he and this guy were going to do?

A. No. He just said he had something planned to do.

Q. I'm sorry.

A. He had something planned to do.

Q. And do you recall any particular words that he used about what he was planning to do?

A. To hit a lick.

Q. Hit a lick?

A. Yeah.

Q. And are you familiar–is that a slang term for something or a street term for something?

A. Yes.

Q. What does 'hit a lick' refer to?

A. Taking something from somebody."

(Likewise, Charles Hendricks, a detective with the Decatur police department, testified, on the basis of his 9 1/2 years' experience, that "hitting a lick" was street slang for robbery or theft.)

¶ 31 Williams testified that defendant then returned him to his grandmother's house and that he did not see defendant again until the next day, when defendant again picked him up from his grandmother's house. On this occasion, defendant told Williams he needed another phone because he lost his phone the previous night.

¶ 32 Defendant also asked Williams if he had heard what happened the previous night. Defendant wanted to go get a newspaper. Williams asked him why he needed a newspaper. He

replied that "he wasn't going to talk about it right now."

¶ 33 The prosecutor asked Williams:

"Q. Did he at some point after that talk about it?

A. Yes.

Q. Where were you at when this occurred?

A. In the back yard of his cousin house.

Q. And were you smoking weed back there then?

A. Yes.

Q. What did the defendant tell you had happened?

A. He said that the dude had set him up.

Q. He said what?

A. This dude had set him up.

Q. Okay. Dude?

A. Yes.

Q. All right. Go ahead?

A. And he said he had set him up and he got dropped off at Krogers and he had got in the car and he pulled a gun out on the dude and he tried to rob him, but dude grabbed the gun so he had to shoot him.

Q. Did he tell you anything more about the cell phone during this conversation?

A. Yeah. He said he didn't know if he had lost it when he was

running or if he lost it in the car."

On redirect examination, the prosecutor asked Williams:

"Q. You said the defendant said to you that the dude set him up. Did he ever refer to the 'dude' by any name?

A. T-money.

Q. T-money?

A. Yes."

4. *Testimony of Employees of U.S. Cellular*

¶ 34 Danielle McDannell, a sales manager for U.S. Cellular, testified that according to the customer records relating to People's exhibit No. 1 (the phone the police had found on the backseat of the car in which the shooting had occurred), this phone was in the name of Marlon Williams; it was activated under his name on October 3, 2005; and the number assigned to this phone was 217-201-0799. (Again, this is the number corresponding to "Vell" in the contacts database of exhibit No. 4, the phone the police seized from Simpson.)

¶ 35 Jamaal Smith testified he currently was the sales manager at U.S. Cellular in Bloomington but that he previously was employed at the U.S. Cellular store on Water Street in Decatur. He had worked for U.S. Cellular since July 2005. Business records revealed he was the employee who had handled the transaction regarding People's exhibit No. 1. He "vaguely" recalled the transaction. Williams had told him the phone "was to be used by his friend." The "friend," a black male, was present with Williams during the transaction, but Smith could not remember anything distinctive about him so as to be able to describe or identify him.

¶ 36 5. *Stipulation as to Calls Made and Received*

¶ 37 The parties stipulated that People's exhibit No. 1A was an accurate list of calls made on October 11, 2005, from People's exhibit No. 1 (the phone found on the backseat of the car) to People's exhibit No. 4 (the phone Simpson had been carrying). The parties further stipulated that People's exhibit No. 4A was an accurate list of calls made from People's exhibit No. 4 to People's exhibit No. 1 on that date. People's exhibit 1A lists 22 such calls from 10:15 p.m. to 11:29 p.m., and each call is only a few seconds in duration. People's exhibit No. 4A lists 12 such calls from 10:13 p.m. to 11:20 p.m., and each of these calls, except for one, is a minute in duration.

¶ 38 6. *The Photographic Arrays*

¶ 39 During their investigation, the police showed Richardson three photographic arrays: the first two on October 12, 2005 (the day after the shooting), and the third on November 1, 2005. The first array contained a photograph of Marlon Williams in the fifth position but no photograph of defendant. Richardson told the police that the person in the sixth position looked similar to the robber.

¶ 40 In the second photographic array, a photograph of defendant was in the fifth position on the first page. Richardson did not identify anyone but remarked that the person in the third position on the second page resembled the robber.

¶ 41 On November 1, 2005, the police showed Richardson a third photographic array. The photograph in the fourth position was of defendant. Richardson told the police he was "pretty sure" the photograph in the fourth position was of the man who had robbed him and shot him but that he "was not 100 percent" certain.

¶ 42 Defendant was the only person who appeared in more than one of the three photographic arrays (he appeared in the second and third arrays). His hairdo was different, though,

from one array to the other.

¶ 43 7. *Defendant's Testimony*

¶ 44 Defendant testified in his own behalf. He began by admitting that on October 11, 2000, in case No. 00–CF–1276, he was convicted of criminal damage to property worth more than $300.

¶ 45 Defendant admitted he knew Marlon Williams, having met him though a "cousin's cousin." Defendant denied, however, that Williams had obtained a cell phone for him.

¶ 46 Defense counsel, David A. Ellison, asked defendant:

> "Q. How did you find out about this incident with Mr. Richardson getting shot?
>
> A. Like a week after it had happened, he had called me, Marlon Williams, and told me, did you hear about it and I said what and he told me–
>
> MR. SCOTT [(prosecutor)]: Your Honor, I'm going to object to statements made by Mr. Williams.
>
> THE COURT: I will sustain it as hearsay as to what Williams said."

¶ 47 Defendant denied shooting Richardson. He testified that in the evening of October 11, 2005, instead of being in the Kroger parking lot, he was watching over three children, his nieces and nephew, at his sister's apartment on Mound Road in Decatur. His sister's name was Christina Hess.

¶ 48 Defendant admitted, though, that his middle name was Lavelle and that he had

refused to participate in a live lineup.

¶ 49 The defense presented no evidence other than defendant's testimony.

¶ 50 8. *The Verdicts and the Answers to Special Interrogatories*

¶ 51 On February 6, 2007, the jury found defendant guilty of all three charges: count IV, attempt (first-degree murder); count V, armed robbery; and count VI, aggravated battery with a firearm.

¶ 52 In addition to the verdict forms, the jury was given two special interrogatories, one for attempt (first-degree murder) and the other for armed robbery. On the one hand, the jury answered the special interrogatory on attempt (first-degree murder) as follows:

> "We, the jury, find that the State has *not* proved beyond a reasonable doubt that, during the commission of the offense of Attempt First Degree Murder, the defendant personally discharged a firearm that proximately caused great bodily harm to Dean Richardson." (Emphasis in original.)

¶ 53 On the other hand, the jury answered the special interrogatory on armed robbery as follows:

> "We, the jury, find that the State *has* proved beyond a reasonable doubt that, during the commission of the offense of Armed Robbery, the defendant personally discharged a firearm that proximately caused great bodily harm to Dean Richardson." (Emphasis in original.)

¶ 54 9. *Post-Trial Proceedings*

¶ 55 On March 7, 2007, Ellison filed a motion for a new trial. The motion requested a new trial for three reasons: (1) the evidence was insufficient to support the convictions, (2) the trial court erred by refusing to allow defendant to testify to his version of the conversation he had with Marlon Williams the day after the shooting, and (3) the jury's answers to the special interrogatories were inconsistent with each other.

¶ 56 On March 15, 2007, before Ellison's motion was heard, new counsel, Patrick Fagan, entered his appearance for defendant. The trial court relieved the public defender of any further responsibility in the case.

¶ 57 On June 28, 2007, Fagan filed an amended motion for a new trial. The amended motion requested a new trial on four grounds: (1) the evidence was insufficient to support the convictions, (2) the special interrogatories were confusing to the jury, (3) Ellison rendered ineffective assistance by failing to investigate an alibi defense and by failing to call defendant's sister Angel [*sic*] Hess to testify in support of that alibi, and (4) the trial court erred by refusing to allow defendant to testify to his version of his conversation with Williams.

¶ 58 The trial court held a hearing on the amended posttrial motion on the same day it was filed. In the hearing, Fagan called defendant's sister Christine Hess. She testified she lived on West Mound Street in Decatur and that on October 11, 2005, around 8 or 8:30 p.m., she went to her sister's house on Monroe Street, looking for a babysitter because she wanted to go out that night. Defendant was at her sister's house, and she took him back to her house on Mound Road to babysit. (Now and then, defendant babysat for her when she could not find anyone else.) She left defendant with her three children, who ranged from one year to five years in age, and she went out to a bar with Charr Gude and Chavan Evans. She did not return home until 2 a.m. Upon returning, she found defendant

and the children asleep.

¶ 59 Hess insisted that when defendant was arrested in October 2005, nobody approached her and spoke with her about the matter. She was unacquainted with Ellison. Nor did she ever approach anyone and discuss the matter with them. "At some point in time," though, she and defendant had a conversation about what had happened.

¶ 60 The prosecutor asked Hess:

> "Q. Did you speak with an attorney by the name of Karen Root?
>
> A. I can't remember, honestly.
>
> Q. What do you mean you can't remember?
>
> A. Because it has been so long and I have had so much stuff take place since then. I just really can't remember.
>
> Q. Do you remember a female attorney that was involved in this case that you spoke with about it?
>
> A. I can't remember if I did, I might have. But I can't remember. I am not going to say I did and I am not going to say I didn't. I just can't remember."

¶ 61 The defense next called defendant, who testified that around 6 p.m. on October 11, 2005, he was "house-sitting" for one of his sisters, Ashley Hess, and that around 8 or 8:30 p.m., his other sister, Christine Hess, picked him up to babysit her three children at her house. Upon arriving at Christine's house, defendant watched television, and Christine left. Nobody else was there with the children that night, and defendant could not recall how long Christine was gone, because he was

asleep when she returned home. He did not leave her house until the next morning.

¶ 62 According to defendant, he told Ellison at least 10 times that he was at his sister's house when the shooting took place, and he gave Ellison his sister's cellular telephone number and her house address. To defendant's knowledge, Ellison never contacted, or attempted to contact, either his sister or her children.

¶ 63 The defense rested, and the State called the assistant public defender, Ellison. He testified he initially was appointed to represent defendant but that at some point in time, maybe December 2005 or January 2006, defendant retained private counsel, Karen Root, whereupon Ellison turned his file over to her. Root and defendant had a falling out, and in January 2006, Root withdrew from representing him. Consequently, the file returned to Ellison, and he resumed his representation of defendant.

¶ 64 Ellison acknowledged that defendant had told him he was babysitting at his sister's house at the time of the shooting. Nevertheless, Ellison had decided not to call either the sister or her children at trial. The prosecutor asked Ellison:

> "Q. And was there any reason why you didn't do that or call the sister I guess?
>
> A. One, the sister could only testify that he was with the children when she left. Mrs. Root interviewed her and I got Mrs. Root's notes from that interview. She, basically, the sister said she went to the Night Owl, that nobody else knew that John was baby-sitting for her; her sister would not divulge who she was at the Night Owl with. There were other women she was with, wouldn't say who

that was and her statement was that it is her brother. These other people don't want to get involved, that she would not tell–the sister would not say who these other people were and they didn't want to get involved and the last line was Mr. Ward will just have to deal with it.

Q. As far as the children themselves, were there any concerns you had about calling them as witness?

A. Yeah. I don't think they would qualify as witnesses that young.

Q. Did you determine then, as a matter of trial strategy, not to pursue calling the sister as a witness?

A. Yes.

Q. And basic reasons were what?

A. Well, she would say–she couldn't (1) give him an alibi. She wasn't there when this incident supposedly occurred. She couldn't say that she was with John when this incident supposedly occurred. If I would call her and she would say she wasn't going to say who the other people were, you know, nobody–our investigator couldn't verify it. If she would have said that on the stand, it would look terrible on the defense form and I decided, as a matter of strategy, not to call her."

In response to questioning by the trial court, Ellison admitted he did not personally contact the sister; instead, he merely relied on Root's notes.

¶ 65 After hearing the foregoing testimony and the arguments by counsel, the trial court agreed with defendant that Ellison's representation fell below an objective standard of reasonableness. Nevertheless, the court found no prejudice. The court explained:

> "I am going to make a finding that Mr. Ellison's representation fell below an objective standard. He didn't do anything to follow up talking to the witness. He didn't do anything on direct examination of this of Mr. Ward to, at least, flush out Mr. Ward's version of the conversation with the other individual, Marlon Williams. However, my recollection of the evidence in this case is such that I don't think it would have mattered. The testimony that I have before me is that he would have produced a witness who would have said that she saw him 10:30 that night, saw him again two o'clock in the morning and left him with some children and the children were there and he was there when they left–when she left–and he was there when she came back. But she can't say where he was at midnight or whenever the shooting took place. And the fleshing out of the testimony of Marlon Williams, he did deny shooting. We have got that much accomplished. I think the standard of the lawyer fell below a reasonable standard; however, I don't think it was such it would have affected the outcome of the trial."

Therefore, the court denied the amended motion for a new trial.

¶ 66 10. *The Sentences*

¶ 67 The matter proceeded to sentencing. The trial court sentenced defendant to 15 years' imprisonment on count IV, attempt (first-degree murder), and another 15 years' imprisonment on count V, armed robbery, ordering that these terms run consecutively (see 730 ILCS 5/5–8–4(a)(I) (West 2004) (the court shall impose consecutive sentences if one of the offenses was a Class X or Class 1 felony and the defendant inflicted severe bodily injury)). The court found that count VI, aggravated battery with a firearm, merged into count IV.

¶ 68 On July 27, 2007, defendant filed a motion to reconsider the sentence. On September 24, 2007, the trial court declined to reduce the sentence.

¶ 69 C. The Direct Appeal

¶ 70 On September 24, 2007, defendant appealed on four grounds: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) defense counsel rendered ineffective assistance by failing to interview and call defendant's sister as a witness to corroborate his alibi; (3) the trial court erred by giving Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 3.15), an instruction on the factors a jury should consider when weighing the identification testimony of a witness; and (4) even if the court did not err by giving IPI Criminal 4th No. 3.15, defense counsel rendered ineffective assistance by tendering this instruction. *People v. Ward*, No. 4–07–0809, slip order at 1-2 (February 25, 2009) (unpublished order pursuant to Supreme Court Rule 23). We concluded that a rational trier of fact could have found defendant guilty of the charged offenses (*Ward*, slip order at 16); that Ellison's reliance on Root's notes probably did not fall below professional standards and that, in any event, Ellison's decision not to call Hess caused no prejudice to the defense, considering that she would have been incapable of corroborating that defendant was in her apartment at the time of the shooting (*Ward*, slip order at 19); and that

defendant had forfeited his objection to IPI Criminal 4th No. 3.15 by failing to object to the instruction at trial and to reiterate the objection in his posttrial motion (*Ward*, slip order at 19-20). Consequently, we affirmed the trial court's judgment. *Ward*, slip order at 20.

¶ 71 On May 28, 2009, the supreme court denied leave to appeal. *People v. Ward*, 232 Ill. 2d 594 (2009) (No. 108132).

¶ 72 D. The Postconviction Proceeding

¶ 73 On November 23, 2009, defendant filed a postconviction petition, in which he raised five claims. First, the jury was erroneously allowed to convict him as both the principal and the accomplice in the armed robbery. Second, the State shifted the burden of proof during closing argument by stating that (a) it did not matter if defendant was the principal or the accomplice and (b) defendant's alibi was uncorroborated by his sister Christina Hess. Third, trial counsel rendered ineffective assistance by failing to impeach Richardson with his prior inconsistent statements. Fourth, trial counsel rendered ineffective assistance by failing to investigate evidence that would have weakened Richardson's credibility. Fifth, appellate counsel rendered ineffective assistance by failing to raise ineffective assistance of counsel in that trial counsel neglected to file a motion to dismiss the information on the ground that the State's Attorney never signed it.

¶ 74 Of these five claims, we will explore only the claim that defendant pursues in this appeal: in his words, a "claim of ineffective assistance of counsel based on counsel's failure to investigate evidence which would have detracted from the complaining witness's credibility, specifically evidence that the complaining witness was intoxicated at the time of the offense, suffered from a schizoaffective disorder, and may have been taking medications which would have interfered with his ability to observe and recall the events of the night in question and the identity

of the offender." Initially, we note that defendant has provided no affidavit in support of this claim (and, incidentally, his petition itself is unsworn). A verification pursuant to section 1–109 of the Code (735 ILCS 5/1–109 (West 2008)), lacking a notarization, is not an affidavit. See *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493 (2002); *People v. Carr*, 407 Ill. App. 3d 513, 516 (2011); *People v. Niezgoda*, 337 Ill. App. 3d 593, 596 (2003). Instead of an affidavit, defendant submitted an unsworn police report, in which the investigating police officer repeated a statement by a Kroger employee, Nathan H. Risem: "Risem stated while the w/m waited, he was mumbling something to himself, appearing to be somewhat intoxicated as his speech sounded somewhat slurred."

¶ 75 On February 19, 2010, the trial court entered an order summarily dismissing the postconviction petition pursuant to section 122–2.1(a)(2) (725 ILCS 5/122–2.1(a)(2) (West 2008)). Paragraph 23 of the dismissal order reads as follows:

> "Failure to investigate is alleged. Defense counsel did not call on Mr. Risen who was a clerk at the Kroger store. There is not an affidavit from Risen as to what his testimony would be. The police report just says he recalls the white male being somewhat intoxicated. Further, counsel was ineffective for not going further into Defendant's disabilities and the medications he was taking for them. This is speculative as is Risen's statements in the absences [*sic*] of any affidavits and is without merit."

The court found the petition to be "patently without merit" and summarily dismissed it.

¶ 76 This appeal followed.

¶ 77 II. ANALYSIS

¶ 78 In his petition for postconviction relief, defendant faults his trial counsel for "fail[ing] to investigate the victim's level of intoxication and whether the victim had THC [(tetrahydrocannabinol)] in his system at the time of the incident, both of which would have affected his ability to observe and recount the events that evening." It was crucial, defendant argues, to marshal and present any obtainable evidence of Richardson's intoxication, because Richardson's testimony was essential to the State's case. Richardson was the only eyewitness to identify defendant as the armed robber. And he was a vulnerable eyewitness, in defendant's opinion, because he failed to identify defendant in the second photographic array. Defendant maintains that in such a "closely balanced case," effective assistance necessarily would entail exploiting this vulnerability not only by bringing out the fact of Richardson's intoxication but also by investigating and proving "the impact of Richardson's schizoaffective disorder and any medications he may have been taking for that condition."

¶ 79 Defendant acknowledges that strategic decisions by defense counsel should be exempt from second-guessing by the courts and that making an informed decision as to which witnesses to call and which witnesses not to call is a matter of trial strategy. See *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989). Defendant argues, however, that a simple failure to do the work of a reasonably diligent defense attorney–a failure to "do a reasonable investigation, interview witnesses, and subpoena witnesses"–cannot be fairly characterized as a "strategy." See *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005).

¶ 80 As the State points out, however, "[a] claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." *People v. Enis*, 194 Ill.

2d 361, 380 (2000). Section 122–2 (725 ILCS 5/122–2 (West 2008)) requires the petition to have supporting materials attached to it in the form of "affidavits, records, or other evidence"–or else the petition must explain why these materials are not attached. If affidavits are required, the logical implication is that unsworn statements will not suffice. See *People v. De Avila*, 333 Ill. App. 3d 321, 327 (2002) ("[T]he rationale for the statutory requirement of an affidavit would be the increased reliability and trustworthiness of a sworn statement ***.") "In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *Enis*, 194 Ill. 2d at 380. In *Enis*, 194 Ill. 2d at 379-80, the defendant attached to his postconviction petition an unsigned, unsworn investigative report, as defendant has done in this case, and the supreme court declined to accept the report as a substitute for an affidavit.

¶ 81 The State observes that defendant "also failed to attach any affidavits concerning testimony about the effects of schizo-affective disorder and medication or lack thereof on mental capabilities." In his reply brief, defendant responds that his claim about Richardson's drug use and schizoaffective disorder were already supported by the record and that affidavits therefore were unnecessary. See 725 ILCS 5/122-2 (West 2008); *People v. Johnson*, 377 Ill. App. 3d 854, 859 (2007). Defendant's claim, though, is that trial counsel rendered ineffective assistance by failing to investigate the extent to which Richardson's schizoaffective disorder, medication or lack of medication for this disorder, and use of cannabis (at some unspecified time before the shooting) might have impaired his ability to accurately perceive and remember the features of the man who robbed and shot him. If answering that question merely were a matter of referring to the record of the trial, defense counsel's failure to investigate that question would be superfluous. But, really, the

answer to that question is not in the record. To an extent, common sense suggests the answer. It is common knowledge that cannabis tends to dull the mental faculties, as does alcohol. It is unknown, however, whether Richardson's schizoaffective disorder–medicated or unmedicated–would have hindered him from accurately perceiving and remembering his attacker. Any answer to that question would be speculative without an affidavit by a qualified expert. And speculation cannot support a claim of ineffective assistance of counsel. *People v. Gosier*, 165 Ill. 2d 16, 24 (1995).

¶ 82 III. CONCLUSION

¶ 83 For the foregoing reasons, we affirm the trial court's judgment. We award the State $50 in costs against defendant.

¶ 84 Affirmed.