2011 IL App (5th) 090109-U

NO. 5-09-0109

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 98-CF-135
	)	
ANTHONY L. MURRAY,	)	Honorable
	)	Dennis E. Middendorf,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant who filed a postconviction petition made a substantial showing of a deprivation of constitutional rights so as to entitle him to an evidentiary hearing on his claims of ineffective assistance of trial and appellate counsel.

¶ 2 The defendant, Anthony Murray, appeals the second-stage dismissal of his postconviction petition. He argues that he made a substantial showing of deprivations of constitutional rights with respect to the numerous claims of ineffective assistance of counsel raised in his petition. We reverse in part, affirm in part, and remand for further proceedings.

¶ 3 The defendant was charged with first-degree murder in the stabbing death of Seneca Jones. Jones was stabbed in the chest immediately following a dice game that was held behind a duplex apartment building in Centralia, Illinois. There were essentially two versions of the events leading up to Jones's death; however, there were

numerous variations on each version. In one version, Thyron Edwards stabbed Jones after a dispute over the dice game. In the other version, the defendant stabbed Jones after he, John Hays, and Elliott Stevens conspired to rob Jones. Jones did not die immediately. Instead, he ran to his car and drove away. He died of his wounds in his car. Police responding to reports of an accident discovered Jones's body.

¶ 4 Edwards, Hays, Stevens, and the defendant were all charged in Jones's death. Hays pled guilty to second-degree murder. Stevens was tried separately. Edwards initially pled guilty to second-degree murder in a plea deal that included his agreement to testify against Stevens, but the plea was subsequently withdrawn. He later pled guilty to involuntary manslaughter and attempted armed robbery. The defendant was found guilty by a jury; however, the court granted a motion for a new trial on the grounds that one of the jurors failed to disclose during *voir dire* that he knew Seneca Jones and may have attended his funeral. Because differences in the evidence presented at each trial are at the heart of many of the defendant's contentions, we will now set out the pertinent testimony in detail.

¶ 5 Georgetta Anderson testified for the State in the defendant's first trial. Anderson was babysitting in one of the apartments in the duplex while the dice game was going on behind the building. She testified that a group of men, including the defendant, John Hays, Elliott Stevens, and a man she did not know, began playing dice on a street corner but later moved their dice game to the back of the duplex. At some point, Thyron Edwards joined the game.

¶ 6 Anderson testified that later in the evening, Edwards and Stevens came into the apartment where she was babysitting. Edwards was a friend of Anderson's, and she stated that it was not unusual for him to visit her while she was babysitting. She testified that Stevens was carrying a baseball bat when they walked in, but he set it

down by the front door. Anderson testified that Edwards went into the kitchen, looked through the drawers, and took out a steak knife. He told her that he was going to use it to "cut up some drugs." While Edwards and Anderson were in the kitchen, Stevens stayed in the living room and talked to Felicia, the 13-year-old girl Anderson was babysitting. After Edwards got the steak knife, the two men left. Stevens picked up the baseball bat on the way out the door.

¶ 7 Anderson testified that the dice game was still going on after 2 a.m. She heard an argument, but she could not tell who was arguing or what they were saying from inside the apartment. She went to the back door to find out what was happening. She testified that she saw Seneca Jones and the defendant arguing, but she could not hear what they were arguing about. She testified that she saw one of the other men, whose name she did not know, hit Jones on the head with the baseball bat, but Jones did not fall. Anderson then saw the defendant "go for Seneca Jones' chest" with a silver object in his hand. Jones cried out, "He cut me!" and then went towards his car. According to Anderson, the defendant, Hays, and Stevens all ran to a silver car and drove off together, while Edwards ran across a lot behind the duplex.

¶ 8 Anderson admitted making various inconsistent statements to the police. When she talked to police the morning after the stabbing, she did not tell them what she had seen and told them only that Thyron Edwards was present. On August 4, 1998, approximately six weeks later, she gave her first written statement to police. In it, she stated that Thyron Edwards stabbed Seneca Jones during an argument over Edwards's desire to be allowed to join in the dice game. According to Anderson's statement, Jones would not allow Edwards to play because he was too young. She also stated that the defendant was present, although he was not involved in the fight. On October 8, 1998, Anderson again spoke with police. This time, she told them that

the defendant stabbed Jones. On October 25, she gave a second written statement. In it, she stated that Elliott Stevens hit Jones over the head with the baseball bat, causing Jones to fall to the ground, and the defendant stabbed Seneca Jones.

¶ 9 Anderson testified that the statement she gave on August 4 implicating Thyron Edwards was false. She explained that she gave the statement because she was afraid of the defendant, Stevens, and Hays. She testified that she knew that the defendant was a "high-ranking member" of a gang, and she knew that Stevens and Hays were his friends. Anderson stated that she had met the defendant six or seven times before the night Seneca Jones was stabbed because they had a mutual friend, Dolores Freeman. On one occasion, Freeman told Anderson that the defendant was a high-ranking member of a gang. Anderson testified that when she told Freeman that she did not believe this, the defendant told her it was true.

¶ 10 Anderson further testified that shortly after Jones's death, the defendant called her several times on the telephone. He told her that if she did not tell the police that Thyron Edwards stabbed Seneca Jones, she or members of her family would be killed. Anderson testified that he told her specifically to say that Edwards stabbed Jones after an argument over the dice game.

¶ 11 At the defendant's second trial, the State did not call Anderson to the stand. This time, however, the defense called her as a witness. Counsel's decision to call her is one of the central issues in this appeal. Anderson's testimony in the second trial was mainly consistent with her testimony in the first trial. Significantly, she again testified that the defendant stabbed Seneca Jones, and she again testified that the defendant was a high-ranking gang official and that she only implicated Thyron Edwards because she was afraid of the defendant and his friends, Hays and Stevens. There were, however, some differences. This time, Anderson testified that while

Edwards was in the kitchen looking for a knife, Stevens remained standing in the doorway rather than sitting down in the living room to talk to Felicia. This time, she testified that the man she did not know punched Jones in the face rather than hitting him over the head with the bat. She also testified that she *did* hear some of the argument between Jones and the defendant. Specifically, she heard the defendant say, "I am tired of this."

¶ 12 Defense counsel cross-examined Anderson about her August 4 statement to police implicating Thyron Edwards. In addition, counsel asked Anderson how she knew Elliott Stevens, whose actions she had described in her testimony. She replied that she had met him only once before the dice game, earlier in the day. She further testified that she had not seen him since. Counsel asked if Anderson saw Stevens in the courtroom. She looked around and replied, "No." Counsel then asked a man in the court to stand up and identify himself. The man stood up and said that he was Elliott Stevens. The court sustained the State's objection, noting that the man was not under oath. In addition, the court told defense counsel that Stevens would now be excluded as a witness due to his presence in the courtroom while another witness was testifying. Any reasonably effective attorney would know that Stevens would be barred as a witness due to his presence in the courtroom while another witness was testifying. Counsel stated that he did not intend to call Stevens. Later, the defendant identified Stevens. Counsel's decision not to call Stevens as a witness is also at issue in this appeal.

¶ 13 Elliott Stevens testified for the defendant in his first trial. He testified that he and the defendant traveled together by train from Chicago to Centralia. They went to Centralia for the weekend to visit two female friends, Philese Killion and GG Rice. Killion was in the early stages of a romance with the defendant. She was also Seneca

Jones's cousin. Rice was Killion's roommate.

¶ 14 Stevens testified that on June 20, the day before Jones was killed, he spent time with the defendant, Philese Killion, and another friend whose nickname was "Bones." (We note that "Bones" was known to the witnesses in this case only by his nickname. Police were never able to determine his identity. Thus, he did not testify in either trial.) They were at the apartment of another friend, Tenisha Johnson. (We note that Johnson was not home that weekend. Both the defendant and Killion testified at the second trial that she allowed them to stay at her apartment.) Stevens testified that they stayed at Johnson's apartment until approximately 2 or 3 in the afternoon and then went to Killion's house, where they played video games and watched a movie.

¶ 15 Stevens then testified that he, "Bones," Killion, Rice, and the defendant went to Mt. Vernon for dinner and returned to Centralia at approximately 8 or 9 in the evening. Stevens got out of the car on the street near the duplex where the events at issue occurred. He wanted to go to a party at a bar called Scotty's Tavern, which was nearby, but he was not allowed in because he had no I.D. with him. He testified that he did not know where "Bones," Killion, and the defendant went after they dropped him off, but he assumed they went "home." He was never asked to clarify whose home he meant.

¶ 16 Stevens testified that he met up with John Hays after being dropped off near Scotty's Tavern. They bought some liquor and then joined the men who were already playing in the dice game. The game began on the street corner near Scotty's Tavern but later moved to a patio behind the duplex. Stevens testified that Thyron Edwards, John Hays, Seneca Jones, and "Bones" were all present, but the defendant was not. Stevens testified that Edwards got out of the game after Stevens had been watching

them play for about 10 or 15 minutes, but half an hour later, he tried to get back into the game. According to Stevens, Edwards asked someone to cover his $5 bet, but he was told that now the players were only "shooting tens and twenties." Seneca Jones told Edwards to leave, and Edwards responded by telling the other players that if he could not play, they would have to leave his house. Jones told Edwards that he knew it was not really his house.

¶ 17 Stevens testified that the game continued after this dispute, and Edwards continued to watch. It soon began raining, and Stevens went inside the apartment where Georgetta Anderson was babysitting Felicia. He testified that the others continued to play dice under the metal canopy covering the patio. When Stevens went back outside, he saw Jones punching Edwards somewhere on his upper body. Then he saw Edwards start running down the street towards Scotty's Tavern, with Jones chasing after him. Stevens said that Jones had cash in his hand as he ran. He testified that Jones turned around, ran back towards Stevens, and said, "He just stabbed me!" Jones then said, "I will be back," and ran across the street, got in his car, and drove away quickly. Edwards continued running down the street.

¶ 18 Stevens testified that "Bones" and John Hays came around from the back of the duplex at this point. He asked them what happened, and they told him that Edwards stabbed Jones. Stevens testified that he next saw the defendant at the home of Philese Killion at 7 or 7:30 in the morning. The defendant was asleep and Killion was not home.

¶ 19 The State called Thyron Edwards as a witness in both trials. Although there were some minor differences, his testimony in both trials was mostly consistent. We need only discuss his testimony at the second trial. Edwards testified that he was watching the dice game behind the duplex but did not participate. He testified that the

defendant, John Hays, and Elliott Stevens were all playing in the dice game, along with a few other men whose names he did not know. He believed that Hays, Stevens, and the defendant were members of a street gang called the Black P-Stones. He explained that he had cousins who were members of the same gang, so he was familiar with the handshake and greeting that gang members used. He observed the defendant and his friends use this handshake and greeting; he therefore concluded that they were members of the same gang.

¶ 20 Edwards testified that he saw Hays and Stevens step away from the game. The two men appeared to be discussing something, but he could not hear what they were saying. Then Stevens walked away and Hays returned to the game. Edwards walked around to the front of the duplex and saw Stevens carrying a wooden baseball bat. Edwards testified that he talked Stevens into giving him the bat. Edwards's testimony regarding the sequence of events that followed was somewhat confusing. He first testified that after Stevens gave him the bat, he placed it against the side of the house. Then he went inside the apartment and Stevens went back to the dice game. He later testified, however, that after setting the bat against the side of the house, he went back to watch the dice game for five minutes and then went into the apartment. He testified that he asked Felicia if he could get a glass of water, and she said yes. As he went into the kitchen to get the water, he saw Stevens coming out of the kitchen carrying a knife.

¶ 21 Edwards testified that he returned to watching the dice game, and Hays asked him to participate in a robbery of Seneca Jones. Edwards stated that Hays tried to give him a knife and told him that he wanted Edwards to stab Jones in the neck. The defendant, who was standing nearby, said, "If you all are going to do that, all I want is his chain and his watch." Edwards told them that he did not want any part of the

robbery plan.

¶ 22 Edwards testified that he saw the defendant make a "swinging motion" with his arm towards Jones's chest. He heard Jones make a noise and saw him start to fall but then catch his balance and run off towards his car, clutching his chest. Edwards said that he did not actually see the knife because it was too dark. He admitted on cross-examination, however, that he testified in the defendant's first trial that he could see a shiny object in the defendant's hand. Asked if this was true, he said yes. Edwards testified that as Jones ran off, one of the other men in the dice game yelled after him, "Seneca, give me my money!" Edwards did not remember who yelled this. (We note that at the defendant's first trial, he testified that Hays said this.) Edwards testified that the defendant, Hays, Stevens, and "Bones" got into a gray Mitsubishi and drove off together, and Edwards walked home to his aunt's house.

¶ 23 Edwards admitted giving various inconsistent statements to the police. Initially, he denied knowing anything at all about a dice game. He claimed that he did so because he believed that the stabbing was gang-related and did not want to be involved. After he was at the police station for an hour, he was told that Jones had died of his wounds. At this point, Edwards decided to give police information. He further admitted to giving police two different written statements. Although he told police in both statements that the defendant stabbed Jones, during the first statement he avoided telling them that he held the bat in his hands. It was only after he was confronted with the fact that a neighbor had seen him with the bat that he admitted he had possession of the bat.

¶ 24 The State called John Hays in the defendant's second trial. Hays did not testify in the defendant's first trial. Like Georgetta Anderson, Hays had given inconsistent statements to the police, the first implicating Thyron Edwards and the second

implicating the defendant. He later gave similar conflicting statements to prosecutors. Prior to the defendant's first trial, Hays told the State's Attorneys that Thyron Edwards stabbed Seneca Jones. Prior to the second trial, he told prosecutors that the defendant stabbed Jones. When he took the stand, Hays surprised the State's Attorneys by testifying that it was Edwards who stabbed Jones. He testified that neither the defendant nor Elliott Stevens was at the dice game when Jones was stabbed. Hays testified that after being stabbed, Jones picked up his money and ran after Edwards, calling him a "nigger." Jones then went to his car.

¶ 25 The State asked the court declare Hays a hostile witness, and the court granted this request. The State's Attorney then cross-examined Hays regarding the second statement he made to police, the one in which he implicated the defendant. In that statement, Hays told police that he, Edwards, Stevens, and the defendant were all at the dice game. He told them that the defendant was standing next to Jones "and he just stuck a knife in Seneca." Hays told police that he and the defendant got into the front of a car and "Bones" and Stevens got in the back. Hays acknowledged making the statement to police, but he testified that it was not true.

¶ 26 Hays testified that he initially thought Jones was stabbed in the arm, rather than the chest. This was because he saw Jones grab at his shoulder as he ran from the scene. Hays testified that when he saw Philese Killion later, he told her that Jones (her cousin) had been stabbed in the arm.

¶ 27 Then the prosecutor attempted to cross-examine Hays with two statements that he made to the prosecutor a few days before trial. At this point, defense counsel asked for a sidebar and moved for a mistrial. He argued that the State was cross-examining Hays with statements that had not been disclosed to the defense. The court found that the substance of the two statements was identical to that of another

statement, which *had* been disclosed to the defense. Specifically, the statements that Hays made to prosecutors a few days before trial were identical in substance to his second statement to police, which implicated the defendant. The court determined that the substance of the statements was therefore disclosed to the defense. See Ill. S. Ct. R. 412(a)(ii) (eff. Mar. 1, 2001). The court further found that the statements to prosecutors were not in writing and were not reduced to a memorandum. See Ill. S. Ct. R. 412(a)(I) (eff. Mar. 1, 2001). The court denied the motion for a mistrial and ruled that the statements were admissible.

¶ 28 The prosecutor then asked Hays several times if it was true that Hays told him shortly before trial that he had agreed with Stevens, "Bones," and the defendant to blame the stabbing on Edwards if they were questioned by police because they were friends and members of the same gang. Hays denied making the statements. The State later called Officer Steve Prather, who was present when prosecutors interviewed Hays two times just days before the defendant's second trial. Officer Prather confirmed that the interviews took place and that Hays told prosecutors that the defendant was the one who stabbed Jones.

¶ 29 Next, defense counsel questioned Hays. He first asked if Hays conspired with anyone to rob or harm Seneca Jones. Hays said no. Counsel then asked why he pled guilty. Hays replied: "It was for two reasons: the first reason, I didn't have any money for a lawyer. The second reason, they found him guilty, and he wasn't even there, so I knew they was going to find me guilty." This reference to the defendant's conviction in his first trial forms the basis of one of the defendant's contentions in this appeal.

¶ 30 Hays then testified in greater detail about the events leading up to Jones's death. He testified that Thyron Edwards was out of money and asked the other

participants in the dice game to lend him $5 to cover a bet. Jones told Edwards that they were now "shooting tens and twenties, not fives." Edwards told the others that if he could not play, they would have to leave his house, but Jones replied, "I ain't going nowhere because this ain't your house." Hays testified that Jones then grabbed his money and the dice. He testified that Edwards ran and Jones followed him. Jones "caught [Thyron] around the front" and had ahold of his shirt. Then, according to Hays, Jones hit Edwards twice before Edwards broke away from him, tearing Edwards's shirt. Hays heard Jones call out, "He stabbed me!" Jones then went to his car and sped away.

¶ 31 Hays testified again that he found Philese Killion and told her that her cousin, Seneca Jones, had been stabbed in the arm. During questioning by the State, Hays had testified that he ran into Killion while looking for Jones and that he and "Bones" went to the home of another friend and fell asleep in the car in front of her house. On cross-examination, he testified that when they woke up in the morning, they went to Killion's house to pick up some belongings they had left there, but the defendant and Killion were not there. He stated that he and "Bones" then went to Tenisha Johnson's apartment, where they found the defendant and Killion still asleep in bed together.

¶ 32 Defense counsel next asked Hays about prior statements that he made both to police and prosecutors. Hays stated that before the defendant's first trial, he told prosecutors that Edwards stabbed Jones, and he was not called as a witness. He acknowledged making a statement to police when he was arrested three days after the incident. Although he told police that Edwards was the assailant, other aspects of the statement were inconsistent with his testimony. For example, he told them that Edwards and Jones were arguing "about cheating." He also told police that he saw Edwards stab Jones in the chest before Jones grabbed Edwards by the shirt and hit

him. In addition, he told police that the defendant and Stevens were at the dice game but that they left before Jones was stabbed.

¶ 33 Asked about the reason he gave two different statements to police, Hays explained that he gave the first statement to Chicago police immediately after his arrest. He was then transported back to Centralia, where he was questioned by officers investigating Jones's murder. Hays testified that the Centralia officer who questioned him told him that police did not believe it was possible for Edwards to have stabbed Jones because Edwards was too small. He further testified that the Centralia officer suggested to him that the defendant was likely the one who stabbed Jones. After two hours, Hays changed his statement.

¶ 34 Philese Killion testified for the defendant in his second trial. She did not testify at his first trial. She testified that the defendant and Elliott Stevens arrived at her house together on June 19, the day before the events at issue occurred. She testified that they spent the remainder of that day together, mostly at her house, but then went to Tenisha Johnson's apartment. She said that they stayed at Johnson's apartment all day the following day until they left to go out for dinner in Mt. Vernon. Although they did not leave the apartment all day, other friends were "in and out of the house" visiting them throughout the day. According to Killion, she and the defendant left at around 7 or 8 in the evening to go to dinner with GG Rice, Elliott Stevens, and a man she knew only as Maurice. (We presume that Maurice and the man nicknamed "Bones" are the same person.) On the way home, they stopped at Killion's house so that she could give instructions to her brother about taking care of her daughter. Then Stevens and Maurice dropped her and the defendant off at Tenisha Johnson's apartment and went on their way.

¶ 35 Killion testified that during the night, she went out to look for the man she was

dating before she began her tryst with the defendant. She had been told that he was with another woman. (We note that although she did not testify to this directly, Killion told police that someone called her in the middle of the night to tell her this.) She estimated that she left at approximately 1 a.m. While she was out, she ran into John Hays. Hays told her that Thyron Edwards had just stabbed her cousin Seneca in the arm. Hays then drove Killion back to Tenisha Johnson's apartment and told her that Jones and Edwards were arguing over a dice game when Edwards stabbed Jones. He also told her that Jones said he would kill Edwards.

¶ 36 Killion testified that she told the defendant what happened and told him that she wanted to go out again to look for Jones because she wanted to see if he was okay and she was not sure if he would try to kill Edwards. It is not entirely clear from her testimony whether she actually did go back out to look for Jones, however. She testified that at some point she went back to bed with the defendant. She further testified that they woke up in the morning when GG Rice came to tell Killion that Seneca Jones was dead. She testified that Elliott Stevens was asleep on the sofa (although it is not clear when or how he arrived) and she thought that John Hays was also there, but she was not certain of this. She stated that she went to the hospital immediately after learning that Jones was dead.

¶ 37 Killion admitted that she previously told police that she and the defendant spent the night together at her own house, not Tenisha Johnson's apartment. She also admitted that in her statement, she told police that after Hays told her that Jones had been stabbed, she went to her mother's house and stayed there with her family until she talked to police the following morning. She also told police that her brother informed her that the defendant, "Bones," and Stevens came to her house at around 7 in the morning to pick up the defendant's PlayStation before heading to Chicago.

Killion testified that she told police she and the defendant stayed at her house rather than Tenisha Johnson's apartment because she did not want to cause any problems for Johnson with her landlord.

¶ 38 The defendant also testified only at his second trial. He testified that he and Stevens traveled together from Chicago by train, arriving at Philese Killion's house early on the morning of June 19. He stated that they planned to ride back to Chicago with John Hays in his car. The defendant testified that he and Killion went to Tenisha Johnson's apartment the following morning. Unlike Killion, he testified that they returned to Killion's house a few times during the day so that Killion could check on her daughter. Like Killion, he testified that they went out for dinner in Mt. Vernon with Rice, Stevens, and "Bones." He testified that they returned to Centralia at around 10 p.m. They first stopped at Killion's house so she could check on her daughter, then they drove around for a short while, then they asked to be let off at Johnson's apartment. He estimated that they got in at around 11.

¶ 39 The defendant testified that someone called Killion on the phone at around 1 or 2 in the morning. She told him she needed to go out to "check on something," but did not tell him what it was. He testified that she returned about 40 minutes later with both "Bones" and John Hays. The defendant stayed in the bedroom, but he heard "bits and pieces" of a conversation in the living room. He heard Killion ask, "Is he okay?" In the morning, GG Rice came to the apartment and told Killion that Seneca Jones was dead. Killion left. According to the defendant, "Bones" was still at the apartment in the morning, but Hays and Stevens came back after Killion left. An hour later, they all went back to Killion's house to pick up something the defendant had left there, then they drove back to Chicago.

¶ 40 During deliberations, the jury foreman sent two notes to the court. The first

note asked if jurors could convict the defendant of a lesser charge. The court instructed jurors to choose from the verdict forms they had been given. The second note indicated that the jury was deadlocked, with nine jurors voting to convict and three voting to acquit. The court instructed the jury to continue deliberating. See *People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972). After further deliberation, the jury found the defendant guilty. The court subsequently sentenced him to 45 years in prison.

¶ 41 The defendant filed a direct appeal. The only issues he raised were (1) the admission of evidence related to his gang membership and (2) the court's decision not to grant a mistrial when the jury indicated that it was deadlocked nine to three in favor of conviction. This court affirmed the defendant's conviction. *People v. Murray*, No. 5-99-0729 (Oct. 23, 2001) (unpublished order pursuant to Supreme Court Rule 23 (eff. July 1, 1994)).

¶ 42 The defendant subsequently filed a postconviction petition. In it, he alleged that he received ineffective assistance at trial. He raised numerous claims that trial counsel was inefficient. He alleged that counsel was ineffective for (1) calling Georgetta Anderson as a witness, (2) failing to call Elliott Stevens, (3) not following up on the State's failure to disclose Hays's two statements to prosecutors days before trial, (4) failing to impeach Thyron Edwards with the factual basis for his guilty plea, and (5) allowing jurors to hear that the defendant was convicted in his previous trial. The defendant further alleged that he was denied a fair trial because (1) the State made improper remarks during closing arguments and (2) the State knowingly used the perjured testimony of Edwards. The defendant alleged that trial counsel was ineffective for failing to object to some of the prosecutor's arguments. He alleged that appellate counsel was ineffective for failing to raise all of these claims in the

defendant's direct appeal. Although the defendant raised a few additional claims, he does not continue to argue that the court erred in dismissing those claims.

¶ 43 The procedural history of the defendant's petition is complex. The court dismissed nearly all of the defendant's claims at the second stage. The court granted the defendant leave to amend his petition with respect to two of his claims and ultimately denied both claims after an evidentiary hearing, a ruling he does not appeal. The defendant appealed the court's second-stage ruling on the remaining claims; however, the postconviction court's order did not address one count of the defendant's petition. Thus, this court dismissed that appeal and remanded the cause to allow the postconviction court to consider the remaining count. The court entered a second order dismissing the lone remaining count. The defendant then filed the instant appeal.

¶ 44 The defendant argues that he made a substantial showing of a violation of constitutional rights with respect to each of the allegations. The State argues that we need not reach the merits of these claims for two reasons. First, the State argues that all of the claims could have been raised in the defendant's direct appeal and are, therefore, waived. See *People v. Towns*, 182 Ill. 2d 491, 502-03, 696 N.E.2d 1128, 1133-34 (1998); *People v. Makiel*, 358 Ill. App. 3d 102, 105, 830 N.E.2d 731, 737 (2005). The defendant has argued that appellate counsel was ineffective for failing to raise these claims on direct appeal. When a defendant alleges that waiver of his claims resulted from ineffective assistance of appellate counsel, we relax the waiver rule. *Makiel*, 358 Ill. App. 3d at 105, 830 N.E.2d at 737.

¶ 45 Second, the State argues that all of the defendant's claims could be resolved without looking beyond the trial record. We find that two of the defendant's claims required the court to look beyond the record.

¶ 46 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) provides a three-step process for resolving claims that a defendant's conviction resulted from violations of rights protected by the state or federal constitutions. *Makiel*, 358 Ill. App. 3d at 104, 830 N.E.2d at 736. To survive summary dismissal at the first stage, a defendant need only allege the gist of a constitutional claim. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1073 (2010). If the court does not dismiss the petition at the first stage, the court must then appoint counsel and docket the matter for further proceedings. *Makiel*, 358 Ill. App. 3d at 104, 830 N.E.2d at 736; 725 ILCS 5/122-4 (West 2008).

¶ 47 At the second stage, the State may file an answer to the petition or a motion to dismiss. *Makiel*, 358 Ill. App. 3d at 104, 830 N.E.2d at 736; 725 ILCS 5/122-5 (West 2008). To survive a second-stage motion to dismiss, a defendant must allege a substantial violation of constitutional rights. *Makiel*, 358 Ill. App. 3d at 104, 830 N.E.2d at 736. At this stage, all of the allegations of the petition are taken as true. *Makiel*, 358 Ill. App. 3d at 105, 830 N.E.2d at 736. However, not all claims warrant an evidentiary hearing. If a claim can be resolved on the record, the court may deny that claim without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 381-82, 701 N.E.2d 1063, 1072 (1998). If the court does not dismiss or deny the petition at the second stage, it then moves to the third stage, which is an evidentiary hearing. *Makiel*, 358 Ill. App. 3d at 104, 830 N.E.2d at 736; 725 ILCS 5/122-6 (West 2008). Our review of a second-stage dismissal is *de novo*. *Makiel*, 358 Ill. App. 3d at 105, 830 N.E.2d at 736-37.

¶ 48 Here, the defendant has alleged ineffective assistance of both trial and appellate counsel. Both types of claims are evaluated under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail, a defendant must

demonstrate that counsel's performance was deficient because it fell below an objective standard of reasonableness. *Makiel*, 358 Ill. App. 3d at 105, 830 N.E.2d at 737. The defendant must also demonstrate that he was prejudiced by counsel's deficient performance–that is, he must show that but for counsel's mistakes, there is a reasonable probability that he would have been acquitted. *Makiel*, 358 Ill. App. 3d at 105-06, 830 N.E.2d at 737 (citing *Strickland*, 466 U.S. at 694).

¶ 49 The two contentions that merit the most discussion are the defendant's claims that trial counsel was ineffective for calling Georgetta Anderson to the stand and declining to call Elliott Stevens. The defendant has also argued that appellate counsel was ineffective for failing to raise these issues in the defendant's direct appeal. Because this appeal comes to us after proceedings at the second stage, we need not determine whether the defendant will ultimately prevail on these claims; we determine only whether he has made allegations sufficient to entitle him to an evidentiary hearing on the claims. See *Makiel*, 358 Ill. App. 3d at 112, 830 N.E.2d at 742. We find that he has met this standard.

¶ 50 We recognize that a defendant alleging ineffective assistance must overcome a strong presumption that counsel's decisions constituted sound trial strategy. See *Strickland*, 466 U.S. at 689. Even in the face of this strong presumption, on the record before us we find it very difficult to see any sound strategy behind the decision to call Georgetta Anderson. As discussed, Anderson's testimony at both trials placed the defendant at the scene of the crime and named him as the person who actually stabbed Seneca Jones. In addition, she testified that the defendant repeatedly threatened her. This testimony was undoubtedly harmful to the defendant.

¶ 51 We note that the defendant was also able to elicit some testimony from Anderson that was at least potentially beneficial. However, the potential benefit was

very slight. For example, Anderson testified at the second trial that she had an altercation with Edwards in which Edwards shoved and hit her. Although this was not directly relevant, it showed that Edwards resorted to violence in the heat of an argument, which might have lent at least some credibility to the theory that Edwards stabbed Jones as a result of an argument. In addition, Anderson was cross-examined about her own prior statement in which she told police that Edwards stabbed Jones. However, without looking beyond the record, any benefit from this testimony appears to be greatly outweighed by the harm done by the bulk of her testimony.

¶ 52 It is important to emphasize that Anderson, like many of the witnesses in this case, gave numerous inconsistent statements. She initially told police she knew nothing at all about the events leading up to Seneca Jones's death and even denied seeing a dice game played behind the duplex at all. She then gave signed statements to police giving contradictory stories as to who stabbed Jones. Although her second statement to police and her testimony at both trials were all generally consistent, there were numerous minor discrepancies even between these three versions of events. We also believe it is worth reiterating that prosecutors chose not to call Anderson as a witness in the second trial. It is impossible to know what, if anything, she told prosecutors or defense counsel prior to the second trial. Although there is no indication on the record that defense counsel was surprised by Anderson's testimony, it is quite possible that there was additional helpful testimony he hoped to elicit which simply never came out. However, we cannot presume that to be the case on the record as it exists.

¶ 53 The State, however, argues that the postconviction court properly dismissed the counts of the petition alleging ineffective assistance of trial and appellate counsel based on the testimony of Georgetta Anderson. The State contends that calling

Anderson to the stand to lay the foundation for the statement to police in which she implicated Thyron Edwards was the only way for the jury to hear this version of events. The State points out that her prior inconsistent statement would be admissible as substantive evidence. See 725 ILCS 5/115-10.1(c)(2)(A) (West 1998) (providing that a prior inconsistent statement is admissible if the witness signed the statement and is subject to cross-examination).

¶ 54 The State further argues that the decision to call Anderson was sound trial strategy because it was reasonable for counsel to conclude that the jury would believe her first statement to police implicating Edwards rather than her testimony or subsequent statement implicating the defendant. In support of this contention, the State points out that (1) Anderson was convicted of forgery at some point between the two trials, (2) the statement to police implicating Thyron Edwards was made shortly after the events at issue, and (3) Anderson had a history of treatment for depression, which, according to the State, lent some support to the defense theory that she changed her statement under pressure from police.

¶ 55 There were numerous reasons for jurors to find that Georgetta Anderson was not a particularly credible witness. We do not agree, however, that it was sound trial strategy to assume that jurors would conclude that her statement to police implicating Thyron Edwards was the most credible of the many inconsistent statements she gave. Although the statement implicating Thyron Edwards was made closer in time to the night of the murder than the statement she made implicating the defendant, it was made more than a month after Jones's death. The only statement Anderson made immediately after the events at issue was one we know to be false–that is, she told police that she did not see anything happen, not even a dice game. We are also not persuaded that there is any reason to find a link between Anderson's struggles with

depression and her susceptibility to alleged pressure from police to change her statement.

¶ 56 Moreover, jurors in the second trial heard that Anderson had made two previous statements that were generally consistent with her trial testimony implicating the defendant–four months after the murder she told police that the defendant stabbed Jones, and at his first trial she testified that the defendant stabbed Jones. For all of these reasons, we do not believe we can conclude on the record before us that it was sound trial strategy to assume that jurors would discount Anderson's testimony implicating the defendant and believe her prior statement implicating Edwards.

¶ 57 We also do not agree with the State that introducing Anderson's statement to police was the only way for jurors to hear the version of events in which Edwards stabbed Jones. Had defense counsel called Elliott Stevens, he could have testified that Edwards stabbed Jones. In addition, John Hays actually testified that Edwards stabbed Jones. Although Hays was expected to testify that the defendant stabbed Jones, defense counsel was aware all along that Hays, like Anderson, had given a statement to the police implicating Edwards. Had Hays testified as expected, his prior inconsistent statement implicating Edwards would have been admissible as substantive evidence. See 725 ILCS 5/115-10.1(b) (West 1998). Moreover, by the time defense counsel actually called Anderson to the stand, Hays had already testified directly that Edwards was the one who stabbed Jones. Thus, jurors had already heard this version of events once, and counsel had an option to put it before the jury through a second witness without having to resort to calling Anderson, a witness whose testimony would likely hurt the defendant.

¶ 58 The only evidence elicited from Georgetta Anderson that was even arguably helpful to the defense that could not be obtained elsewhere was her testimony that

Edwards had pushed and hit her during an unrelated argument earlier in the evening. The relationship between this testimony and the events at issue is so slight that it is difficult to see how it can be sound trial strategy to call her to the stand. If there was any good reason for counsel to call Georgetta Anderson as a witness, it does not appear in the record as it exists. We therefore conclude that an evidentiary hearing is necessary to resolve the defendant's claim that counsel was ineffective for calling Georgetta Anderson.

¶ 59 We must also consider whether the defendant alleges prejudice as a result of counsel's decision to call Anderson as a witness. As previously noted, a defendant must demonstrate a reasonable probability that but for counsel's deficient performance, a different result was reasonably probable. A reasonable probability of a different result is a probability sufficient to undermine confidence in the outcome; a defendant need not establish that the result would certainly have been different. *People v. Manning*, 241 Ill. 2d 319, 327-28, 948 N.E.2d 542, 547 (2011). Here, Georgetta Anderson was the only eyewitness to the crime who was not a codefendant. We have just discussed at length how damaging her testimony was to the defendant. In the defendant's direct appeal, we rejected a claim of plain error, finding that the evidence–including Anderson's testimony–was not closely balanced. *Murray*, No. 5-99-0729, order at 5-6. However, the evidence was not overwhelming, either. Even with Anderson's testimony, jurors deliberated for a long time and sent two notes to the court indicating that they were conflicted. Under these circumstances, a different result was reasonably probable without Anderson's damaging testimony.

¶ 60 Similarly, we find that the defendant's challenge to counsel's decision not to call Elliott Stevens merits further consideration and an evidentiary hearing. As the defendant argues, if Stevens had testified at the second trial consistently with his

testimony in the first trial, he could have corroborated the testimony of Hays, Killion, and the defendant that the defendant was not at the dice game when Jones was stabbed. He also could have corroborated Hays's testimony that there was an altercation between Edwards and Jones shortly before the stabbing.

¶ 61 The State argues, however, that it was sound trial strategy to eliminate Stevens as a potential witness because his testimony would have contradicted that of the defendant and Killion. This is because both the defendant and Killion testified that the defendant was with Killion at Tenisha Johnson's apartment at the time the stabbing occurred, while Stevens's testimony put the defendant at Killion's house. We disagree.

¶ 62 First and foremost, we note that Stevens did not testify regarding the defendant's whereabouts at the time Jones was stabbed. He testified that he did not know where the defendant and Killion went after they dropped him off near the duplex but that he assumed that they went "home." He further testified that when he saw the defendant the next morning, he was at Killion's house asleep. This does conflict with the testimony of the defendant and Killion, both of whom testified that they woke up at Tenisha Johnson's apartment when GG Rice came to inform them that Seneca Jones was dead. However, the defendant did testify to returning to Killion's house without Killion after Rice informed her that Seneca Jones was dead. Moreover, there were inconsistencies between the testimony of the defendant and Killion on this issue. If jurors chose to believe the defendant and Killion, they were going to have to overlook some inconsistencies and assume that at least one witness did not remember all the details accurately. This was true whether Stevens testified or not. Indeed, no matter which version of events jurors chose to believe, they would need to resolve inconsistencies not only between witnesses telling similar stories but among

the various statements made by each individual witness.

¶ 63 We also note in passing that the State's argument is disingenuous given its argument that it was sound trial strategy to call Anderson to lay the foundation for the admission of her prior inconsistent statement implicating Edwards. In that statement, Anderson told police that the defendant was at the dice game. This contradicts the testimony of Killion and the defendant far more directly than Stevens's testimony from the first trial.

¶ 64 Again, we cannot draw any conclusions on the record before us as to whether the decision not to call Stevens was, in fact, objectively reasonable. We do not know whether he said anything to indicate that his testimony at the second trial would have been different from his testimony in the first trial. Without looking beyond the record, it appears that Stevens's testimony could have helped the defendant. We believe that, while the decision not to call him was likely not as detrimental as the decision to call Anderson, the postconviction court should consider whether the cumulative effect of the two decisions is sufficient to meet the prejudice prong of *Strickland*. Thus, we conclude that the defendant made allegations that were sufficient to entitle him to an evidentiary hearing on this claim.

¶ 65 The defendant next argues that counsel was ineffective for failing to follow up on a discovery violation by the State–specifically, the State's failure to disclose the two statements John Hays made to prosecutors days before the defendant's second trial. As previously discussed, counsel *did* object to the State's use of these statements at trial on the grounds that they were not disclosed to the defense. The court ruled that the statements were admissible because it found that the State's disclosure of the substance of other, nearly identical statements satisfied the requirements of Rule 412. However, the court told defense counsel that it would revisit this ruling if counsel

provided the court with relevant authority to support his position. Counsel did not raise the issue again. It is this failure to revisit the issue that the defendant now contends amounted to ineffective assistance of counsel.

¶ 66 Rule 412 governs the State's duty to make disclosures to the accused in a criminal trial. The rule provides that upon request, the State must provide the defense with any written or recorded statements of a codefendant, as well as "the substance of any oral statements made by *** a codefendant, and a list of witnesses to the making and acknowledgement of such statements." Ill. S. Ct. R. 412(a)(ii) (eff. Mar. 1, 2001). The duty to make these disclosures continues "up to and during trial." *People v. Hendricks*, 325 Ill. App. 3d 1097, 1103, 759 N.E.2d 52, 56 (2001). Contrary to the defendant's contentions in this appeal, defense counsel cited to Rule 412 in arguing that disclosure of other substantially similar statements does not satisfy this requirement. The court disagreed.

¶ 67 We find that the trial record demonstrates that counsel's failure to revisit the issue after this ruling does not amount to ineffective assistance. Counsel cannot be ineffective for failing to make an argument that would be futile. *People v. Holmes*, 397 Ill. App. 3d 737, 745, 922 N.E.2d 1179, 1187 (2010). Once the court admitted Hays's statements to prosecutors, it is unlikely that a mistrial would have been granted. Failure to make Rule 412 disclosures requires a new trial only where the defendant is prejudiced by the State's failure to make the disclosure and the trial court fails to eliminate the prejudice. *Hendricks*, 325 Ill. App. 3d at 1103, 759 N.E.2d at 56-57. Here, there was little if any prejudice from the statements. As previously discussed, Hays had made a prior statement to police, the substance of which was nearly identical to the statements he made to prosecutors just before trial. Although we agree with the defendant that this does not relieve the State of its obligation to

disclose the *fact* that the statements were made, we do not believe that the statements could have come as a surprise to defense counsel. See *People v. Bailey*, 91 Ill. App. 3d 910, 916, 415 N.E.2d 466, 470 (1980) (emphasizing that the defense was not prejudiced where counsel was not surprised by the substance of undisclosed statements). Counsel was aware that the State chose not to call Hays as a witness in the defendant's first trial after he told prosecutors that Thyron Edwards stabbed Seneca Jones. Thus, we do not believe that either the substance or the fact of the statements came as a surprise.

¶ 68 Moreover, defense counsel elicited testimony from Hays that before the defendant's first trial, Hays told prosecutors that Thyron Edwards stabbed Seneca Jones and was not called as a witness in that trial. This was an effective strategy to downplay the significance of Hays's statements to prosecutors days before the defendant's second trial. Thus, it is unlikely that disclosure would have enabled counsel to more effectively discredit the testimony about the two statements. See *Hendricks*, 325 Ill. App. 3d at 1103, 759 N.E.2d at 57 (noting that the likelihood of disclosure helping the defense discredit evidence is a factor to consider in determining whether reversal or a new trial is warranted). Because the postconviction court could determine on the record that this claim lacked merit, we find that the court properly dismissed the claim at the second stage.

¶ 69 The defendant next argues that counsel was ineffective for failing to impeach Edwards with the factual basis of his guilty plea. In a factually related argument, the defendant contends that he was denied a fair trial by the State's knowing use of perjured testimony. He further contends that appellate counsel was ineffective for failing to raise either of these issues on appeal.

¶ 70 In support of these claims, the defendant points to both the allegations in the

charge against Edwards and the factual basis read into the record at his guilty plea hearing. The charge alleged that Edwards performed an act likely to cause the death of Seneca Jones or great bodily harm to Seneca Jones. The factual basis presented to the court at Edwards's guilty plea hearing included a statements that Edwards "obtained a knife that was ultimately handed to Anthony Murray" and he was legally accountable for the actions of an accomplice, namely the defendant. The defendant points out that the allegations in the charge itself are completely inconsistent with Edwards's trial testimony. He also points out that Edwards denied ever having possession of the knife or agreeing to participate in a robbery, which is also inconsistent with the factual basis presented for his guilty plea.

¶ 71 We first note that Edwards testified that he pled guilty to involuntary manslaughter and attempted robbery. Defense counsel asked him why he pled guilty if he had nothing to do with the crime, and Edwards replied that he thought he could be found guilty as an accomplice just because he was present. Thus, counsel presented testimony that could certainly lead the jury to question Edwards's credibility when he denied any involvement in Jones's death. We next note that when given the opportunity to speak at his guilty plea hearing, Edwards denied any involvement in or responsibility for Jones's death. He also read a letter he wrote apologizing to the family of Seneca Jones, but he explained that he was apologizing because he could have warned Jones but did not do so. Ordinarily, a guilty plea constitutes an admission to the essential elements of the offense charged. *People v. Gray*, 406 Ill. App. 3d 466, 473, 941 N.E.2d 338, 344 (2010). However, a defendant has the right to plead guilty if he believes it is in his best interest to do so even though he maintains his innocence. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). Because Edwards's guilty plea was accompanied by a statement maintaining his innocence, it cannot be

viewed as a prior inconsistent statement.

¶ 72 We are also not persuaded by the defendant's argument that the State's use of Edwards's testimony that was inconsistent with the factual basis for his guilty plea amounts to the knowing use of perjured testimony. The State's knowing use of perjured testimony is a violation of a defendant's right to a fair trial. If there is a reasonable likelihood that the false testimony influenced the verdict, the defendant's conviction must be set aside. These rules apply whether the State knowingly elicits testimony it knows to be false or allows such testimony to go uncorrected. *People v. Nowicki*, 385 Ill. App. 3d 53, 96, 894 N.E.2d 896, 935 (2008). However, in order for these rules to apply, the State's use of perjured testimony must be knowing. *Nowicki*, 385 Ill. App. 3d at 98, 894 N.E.2d at 937 (quoting *People v. Cornille*, 95 Ill. 2d 497, 509-10, 448 N.E.2d 857, 863 (1983)). In most cases, this means prosecutors must actually know the testimony is false; however, under certain circumstances not present here, the State has an obligation to use due diligence to determine whether its witnesses are testifying truthfully. *Nowicki*, 385 Ill. App. 3d at 98-99, 894 N.E.2d at 937-38.

¶ 73 Here, there was no way for prosecutors to know whether Edwards–or any other witness–was telling the truth. At oral argument, the defendant pointed out that the State's Attorney who presented the factual basis for Edwards's guilty plea also prosecuted the defendant. He argued that a prosecutor cannot present a factual basis unless he believes it to be true. The defendant thus contends that the prosecutor's use of testimony that is at odds with the factual basis he presented at a codefendant's plea hearing raises questions as to whether the prosecutor believed the testimony to be true. We do not agree. We first note that although the defendant raised the issue in his brief, he did not make this specific argument. It is therefore waived. See Ill. S.

Ct. R. 341(h)(7) (eff. July 1, 2008). Moreover, the factual basis presented to the court is simply a recitation of the facts the State's Attorney believes he could prove if the matter were to go to trial. We find that the allegations in the defendant's petition fall short of what is needed to show that the State made knowing use of perjured testimony. Because this determination can be made without looking beyond the existing record, the court correctly dismissed this claim.

¶ 74 The defendant further contends that trial counsel was ineffective for allowing jurors to learn that he had been convicted in his first trial. As previously discussed, Hays testified to this fact when defense counsel asked him why he pled guilty. The defendant argues that counsel was ineffective both for eliciting this testimony and for failing to object when the prosecutor mentioned during rebuttal argument that the defendant had been granted a new trial. He contends that by mentioning the new trial during rebuttal, the prosecutor reminded jurors that the defendant had previously been convicted of Jones's murder.

¶ 75 We believe that the court could properly resolve this claim without a hearing for two reasons. First, taken in context, Hays's testimony was not harmful to the defendant. Hays testified that he was afraid he would be found guilty if his case went to trial because the defendant was found guilty even though he was not even at the dice game. In other words, Hays testified that the defendant was wrongly convicted.

¶ 76 Second, the defendant mischaracterizes the prosecutor's argument. The prosecutor made a passing reference to the fact that the defendant was granted a new trial, but he never specifically commented on the fact that the defendant was found guilty in his first trial. The comment was made in an effort to rebut defense counsel's argument that Edwards got a favorable deal for agreeing to testify against the

defendant. Defense counsel's argument was based on the fact that Edwards pled guilty to involuntary manslaughter and attempted robbery and was sentenced to only 7½ months in prison and four years on probation. The prosecutor argued in rebuttal, "Thyron Edwards pled guilty back in January. It was just a couple of months ago that the defendant was granted a new trial." He then argued that when Edwards pled guilty, he did not know that the defendant would be tried again. Edwards and Anderson were impeached with their inconsistent testimony from the defendant's first trial, so it is unlikely that jurors could remain unaware that the defendant had been tried twice. Under these circumstances, we do not find any prejudice to the defendant. Accordingly, the postconviction court properly dismissed this claim without a hearing.

¶ 77 The defendant next argues that he was denied a fair trial by improper closing remarks. He argues that trial counsel was ineffective for failing to object to some of these remarks and that appellate counsel was ineffective for failing to raise the issue of closing arguments in the defendant's direct appeal. In this appeal, the defendant offers very little argument in support of his contention that these allegations were sufficient to survive second-stage dismissal of his petition. He acknowledges that the issue could have been raised on direct appeal. He then argues only that principles of waiver should not prevent him from raising this issue because (1) fundamental fairness requires the waiver rule to be relaxed to allow him to present his claim that the cumulative affect of the improper remarks denied him a fair trial and (2) the waiver of this claim stemmed from appellate counsel's allegedly deficient performance. He concludes that he should be afforded a hearing at which he can present case law in support of his claim that improper arguments denied him a fair trial.

¶ 78 We do not believe this conclusory argument gives us any basis to reverse the postconviction court's dismissal of this claim. Moreover, we have read the closing arguments of both parties in their entirety. The allegations in the petition misstate one of the challenged remarks. The petition alleged that the prosecutor told jurors that they owed it to Seneca Jones and his family to find the defendant guilty. The prosecutor actually argued that jurors owed it to Jones and his family to sift through the confusing and inconsistent testimony to try to determine what really happened. Although the prosecutor did elicit sympathy for Jones and his father–telling jurors that Jones was only 20 years old when he died, that his "right to grow old was taken away," and that John Jones lost a son–we do not believe this comment was prejudicial enough to warrant reversal.

¶ 79 Most of the other challenged statements were isolated remarks. Only two merit further discussion. The State argued that Georgetta Anderson was credible because she was testifying "for her brother" who died unexpectedly when she was 17 years old. The State further argued that she was testifying because she was able to understand the pain Seneca Jones's father felt because she had lost both her brother and her mother. The prosecutor also told jurors twice that the State had chosen not to call Georgetta Anderson in the second trial "out of decency" because she had recently lost her mother and she had a history of clinical depression. While we do not condone these remarks, we do not think they are prejudicial enough to require reversal. See *People v. Rosenthal*, 394 Ill. App. 3d 499, 515, 914 N.E.2d 694, 709 (2009) (stating that improper closing arguments require reversal only if they resulted in substantial prejudice to the defendant).

¶ 80 Finally, we note that the defendant's petition alleged that counsel was ineffective for failing to take adequate steps to protect the defendant from evidence

of his gang affiliation. That evidence was admitted for limited purposes relating to witness credibility. In the defendant's direct appeal, we found that the evidence was used only for the limited purposes for which it was admitted and that "all proper procedures were followed to protect the defendant from being prejudiced from any gang evidence that would be admitted." *Murray*, No. 5-99-0729, order at 4. In his petition, the defendant argued that counsel was ineffective for failing to request a limiting instruction. The defendant does not address this claim on appeal beyond a general argument that he alleged a substantial violation of constitutional rights with regard to each of his claims of ineffective assistance of counsel. Thus, we find that he has waived consideration of this claim.

¶ 81 We conclude that the defendant has alleged a substantial violation of constitutional rights with respect to his claims that trial counsel was ineffective for calling Georgetta Anderson and declining to call Elliott Stevens. Thus, we reverse the portions of the court's order dismissing those claims, and we remand for further proceedings. We affirm the remainder of the order.

¶ 82 Reversed in part and affirmed in part; cause remanded.