2013 IL App (5th) 110496-U

NO. 5-11-0496

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 99-CF-1492
	)	
DIWONE WALLACE,	)	Honorable
	)	Michael N. Cook,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Spomer and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's postconviction petition alleging that trial counsel was ineffective for failure to call an additional alibi witness was properly denied where the defendant failed to demonstrate a reasonable probability that the outcome of his trial would have been different had the witness been called.

¶ 2 The defendant, Diwone Wallace, was convicted of two counts of first-degree murder in the shooting deaths of Tina Jackson and Montez Wilson. He filed a postconviction petition alleging that trial counsel was ineffective for failing to call several witnesses and present other evidence. The postconviction court denied the petition after an evidentiary hearing. On appeal, the defendant argues only that counsel's failure to call one of those witnesses–his uncle, Calvery Brown–constituted ineffective assistance. He argues that the court erred in denying his petition because there was a reasonable probability that he would have been acquitted had Brown's testimony been offered to corroborate his alibi defense. We affirm.

¶ 3 In the early morning hours of December 5, 1999, five men entered the home of Tina Jackson and Dwayne Wilson. Wilson's brother, Montez, was in the house, as were several children–Tina Jackson's younger brother and three children, and Dwayne Wilson's nephew. Tina Jackson and Montez Wilson were shot to death at close range with a shotgun. The defendant and four codefendants were charged with first-degree murder and tried separately. A sixth defendant, Terrance Luster, pled guilty to home invasion in a plea agreement that included his testimony against the other defendants. Luster acted as a lookout for the others.

¶ 4 The defendant's trial on these charges took place over five days in May 2001. Luster testified that at approximately 2:30 on the morning of the murders, five men came to his house. Those men were the defendant, Alexander Matlock, David Taylor, Antwone Bradley, and Marcus Bradley. Matlock asked Luster if he could use Luster's walkie-talkies. Luster explained that he usually used the walkie-talkies in making drug transactions. He understood that the group intended to use them for some sort of criminal activity. Luster testified that Matlock asked him to go along with the group, and Luster agreed to do so.

¶ 5 Luster testified that the group went to the home of Dwayne Wilson and his girlfriend, Tina Jackson. He testified that Marcus Bradley kicked in the door, and all five of the other men went into the house. Ten minutes later, Luster began to get nervous, so he called David Taylor on the walkie-talkie and asked them to hurry up. Taylor told Luster to come to the door and bring a bag that had been left on the porch. As Luster approached the residence, he heard a female scream followed by a shotgun blast. He continued walking toward the house. When he got to the door, he saw the defendant pointing a sawed-off, pump-action shotgun at Montez Wilson. Luster testified that Wilson turned "as [if] to run," and the defendant then shot him.

¶ 6 Luster admitted that he lied to police when he was interviewed shortly after the murders. At that time, he denied involvement. Luster testified that he lied because he was

afraid. He also acknowledged that his testimony was part of a negotiated plea agreement. Pursuant to that agreement, the State dropped the murder charges against Luster and agreed to request a sentence of seven years on the home invasion charge in exchange for his guilty plea and his testimony against his five codefendants. Luster further acknowledged that he would not be sentenced until after he testified in their trials.

¶ 7 Damian Jefferson, Tina Jackson's young brother, was sleeping at the Wilson-Jackson home on the night of the murders. Damian was 12 years old when the murders took place and 14 years old when he testified at trial. He testified that he was sleeping in a bedroom with Tina's children and Dwayne Wilson's nephew when he awoke to the sound of male voices in the house. He recognized the voice of David Taylor, but did not recognize the other voices. Damian testified that he then heard a scream followed by two gunshots. He then heard Montez Wilson calling out Tina's name. Damian ran home and told his mother, Trina Jackson Prater, about the shootings.

¶ 8 Mario Stanley and Akhenaton Wallace each testified that they saw a car park in a driveway on Carrol Court. Carrol Court runs parallel to Laura Lee, the street on which Jackson and Wilson lived; it is the next block over. Both Stanley and Wallace testified that they saw four men get out of the car and walk toward Laura Lee. Both identified the defendant as one of those four men. Both testified that they heard gunshots and then saw the same four men run back to the car and speed away.

¶ 9 Trina Jackson Prater, and her sister, Tiffany Jackson, went to the Wilson-Jackson house after Damian came home and told them about the shootings. Both testified at trial that Montez Wilson told them that "Diwone Smith" shot him. Similarly, Wilson's sister, Shirley Collins, testified that when she arrived, Wilson told her that "Diwone" shot him. In a statement to police 10 days after the shootings, Collins indicated that she initially thought Wilson said that "Dwayne" shot him, but she realized that he was saying "Diwone" after he

repeated it a few times. The State presented testimony of several witnesses that the defendant was sometimes called Diwone Smith, while the defendant presented testimony from several witnesses who knew him for many years and had never heard him called Diwone Smith.

¶ 10 Lieutenant Richard Scott testified that when he arrived at the scene, Wilson told him that "Dwayne" shot him. However, it was difficult for Lieutenant Scott to hear what the dying Wilson was trying to say. Lieutenant Scott asked Wilson if he was saying "Dwayne," and Wilson said no. Wilson then told him that he did not know who shot him. Deputy Timothy Owens likewise testified that Montez Wilson told him he did not know who shot him. According to Deputy Owens, Wilson was having difficulty breathing and appeared to not want to talk to police. Asked how he knew Wilson did not want to talk to them, Deputy Owens explained that Wilson turned away from him.

¶ 11 Danny Cleggett, the defendant's cellmate while he was awaiting trial on these charges, also testified for the State. Cleggett testified that the defendant admitted to him that he committed the murders. He testified that the defendant also told him that he had asked his aunt and grandmother to give him an alibi defense.

¶ 12 The defendant testified in his own defense. He denied involvement in the murders and testified that he was at home at his grandmother's house when the shootings occurred. He testified that he was home nearly all night, but left twice. At approximately 4 or 5 in the afternoon of December 4, he went to his mother's house. Later, at approximately 7 or 8 in the evening, he went to the store to buy cigarettes and a snack for his son. He then brought the snack to his son, who was at the defendant's mother's house. The defendant stayed at his mother's house for 40 minutes, then returned to his grandmother's house, where he remained for the rest of the night.

¶ 13 The defendant was asked on direct examination who was present when he returned

home the second time. He replied, "My auntie and grandmother and them, my uncle." On cross-examination, he was asked if his grandmother, Victoria Wallace, and his aunt, Brenda Brown, were home. The defendant replied: "Yes. There were several other people too." He testified that two of his uncles and the girlfriend of one of his uncles were there. Asked for their names, he replied, "Melinda and Charles and Calvin." We note that on appeal, both parties presume that the uncle named "Calvin" is actually Calvery Brown.

¶ 14 Brenda Brown and Victoria Wallace testified in support of the defendant's alibi defense. Both testified that they lived in the house and were home all night. Brown testified that the defendant arrived home sometime between 9 and 10 in the evening. She further testified that the defendant remained in the house, asleep on the living room sofa, until she left for work at 6:30 the following morning. Wallace testified that the defendant never left the house at all.

¶ 15 The jury found the defendant guilty. On August 29, 2002, the court sentenced him to natural life in prison. The defendant filed a direct appeal, arguing that the court erred in admitting the hearsay statements of Montez Wilson and that he received ineffective assistance of trial counsel. This court affirmed his conviction on May 28, 2004. *People v. Wallace*, No. 5-02-0610 (May 28, 2004) (unpublished order pursuant to Supreme Court Rule 23).

¶ 16 The defendant filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2004)) on September 13, 2004. Counsel was appointed to represent the defendant. Through counsel, the defendant filed three amended postconviction petitions and a supplement to the third amended petition. The defendant alleged that he received ineffective assistance of counsel due to counsel's failure to call several potentially helpful witnesses, including Calvery Brown. He raised additional claims; however, those claims are not involved in this appeal.

¶ 17 The court held an evidentiary hearing on the defendant's petition in October 2011. Calvery Brown testified that on the night Tina Jackson and Montez Wilson were killed, he lived with his mother, Victoria Wallace, and three of his siblings, Brenda, Donna, and Sonny. He testified that he spent that day "out ripping and running." In particular, he stated that he did some work for someone and then spent time visiting with a friend. Brown testified that he and his friend bought a bag of marijuana and then went to Victoria Wallace's house. He estimated that they got there at approximately 7 or 8 in the evening.

¶ 18 Brown testified that Victoria Wallace, Brenda Brown, and the defendant were at the house when he arrived. He further testified that he and his friend sat out on the driveway all night in the friend's car. He noted, however, that he was "in and out of the house" during the evening and saw the defendant lying on the living room sofa. Brown testified that he stayed there all night, and if he left at any point, "it was just to go not even a mile up the road to the little Country Line to get a beer and come back." He further testified that he remained awake all night, and the defendant could not have left the house without his noticing.

¶ 19 Defense counsel asked Brown if he would have testified on the defendant's behalf had he been asked to do so. Brown replied, "Yeah, but I had circumstances of my own, you know, I was kind of working then and I had a traffic warrant, you know, and I couldn't take 14 days because I would have lost my job." He stated, however, that if he had been subpoenaed to testify, he would have testified at the defendant's trial the same way he testified at the evidentiary hearing.

¶ 20 The defendant's trial counsel, William Stiehl, Jr., testified that he filed an alibi defense on behalf of the defendant. He did not recall whether any family members in addition to Brenda Brown and Victoria Wallace wanted to testify that the defendant was home with them at the time of the murders. He testified that the name Calvery Brown did not sound familiar to him. As far as Stiehl remembered, he was not aware that Brown was home with the

defendant until the defendant mentioned Brown in an amended postconviction petition. Asked whether there would be a tactical reason not to call more than two witnesses to testify that the defendant was home that night, Stiehl replied, "If you call more than two or three witnesses to say the same thing, then in my experience, the jury tends not to pay attention."

¶ 21 The defendant also testified at the hearing. In response to questioning by the State's attorney, he acknowledged that defense counsel called multiple alibi witnesses. Asked if he ever discussed Calvery Brown with counsel, the defendant replied, "Mr. Stiehl said I had already had people saying that I was at home so he didn't want to call him."

¶ 22 At the end of the evidentiary hearing, the court ruled from the bench. In rejecting the defendant's claim of ineffective assistance of counsel, the court found that defense counsel had good reasons for the decisions he made regarding which witnesses to call. The court further found that the outcome of the defendant's trial would not have been different if Calvery Brown had testified. The court denied the defendant's petition. This appeal followed.

¶ 23 The Post-Conviction Hearing Act provides a procedure that allows a defendant to challenge his conviction on the grounds that it resulted from a violation of rights protected under the federal or state constitutions. To be entitled to relief, a defendant must demonstrate that the conviction resulted from a substantial deprivation of constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006).

¶ 24 Proceedings under the Post-Conviction Hearing Act have three distinct stages. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007. This appeal comes to us after the third stage of postconviction proceedings, an evidentiary hearing. At the third stage, a defendant "bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. When a ruling after an evidentiary hearing requires the postconviction court to make credibility determinations and findings of fact, we will not

reverse unless the court's decision is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 25 Here, the defendant has alleged ineffective assistance of counsel. We evaluate his claim under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In order to support a claim of ineffective assistance, a defendant must show that trial counsel's performance fell below an objective standard of reasonableness. *People v. Makiel*, 358 Ill. App. 3d 102, 105, 830 N.E.2d 731, 737 (2005). The defendant must also show that he suffered prejudice as a result of counsel's deficient performance. This requires the defendant to demonstrate that but for counsel's mistakes, there is a reasonable probability that he would not have been convicted. *Makiel*, 358 Ill. App. 3d at 105-06, 830 N.E.2d at 737 (citing *Strickland*, 466 U.S. at 694).

¶ 26 To prevail, a defendant must make *both* of these showings. *Strickland*, 466 U.S. at 687. If it is easier to dispose of an ineffective assistance claim on the basis of the defendant's failure to demonstrate prejudice, we may do so without considering whether counsel's performance was inadequate. *People v. Albanese*, 104 Ill. 2d 504, 527, 473 N.E.2d 1246, 1256 (1984) (quoting *Strickland*, 466 U.S. at 697).

¶ 27 The evidentiary hearing in this matter took place 10 years after the defendant's trial. Defense counsel testified that he did not recognize the name Calvery Brown and could not remember whether he had discussed the possibility of calling additional family members to support the defendant's alibi defense. On this record, it is impossible to determine whether counsel affirmatively decided not to call Brown as an additional alibi witness. In addition, assuming he did decide not to call Brown, it is nearly impossible to assess whether that decision constituted sound trial strategy. We find, however, that the defendant's claim of ineffective assistance of counsel must fail because he cannot demonstrate that a different outcome was reasonably probable had Calvery Brown been called as an additional alibi

witness.

¶ 28 Generally, failure to present cumulative evidence does not constitute ineffective assistance of counsel. *People v. Henderson*, 171 Ill. 2d 124, 155, 662 N.E.2d 1287, 1303 (1996); see also *People v. Giles*, 209 Ill. App. 3d 265, 271, 568 N.E.2d 116, 121 (1991) (rejecting a defendant's claim that counsel was ineffective for electing to call only two of three potential alibi witnesses and noting that the third witness's testimony "would have only been cumulative"). However, the defendant correctly notes that there are exceptions to this general rule. He points to several cases where counsel was found to be ineffective for failing to present evidence to corroborate a defense. See *People v. King*, 316 Ill. App. 3d 901, 738 N.E.2d 556 (2000); *People v. Butcher*, 240 Ill. App. 3d 507, 608 N.E.2d 496 (1992); *People v. Skinner*, 220 Ill. App. 3d 479, 581 N.E.2d 252 (1991); *Montgomery v. Peterson*, 846 F.2d 407 (7th Cir. 1988). We find each of these cases distinguishable.

¶ 29 We note that, although the *King* opinion contained language indicating that counsel may be found ineffective for failure "to call witnesses whose testimony would support an otherwise uncorroborated defense" (*King*, 316 Ill. App. 3d at 913, 738 N.E.2d at 566), the case actually did not involve cumulative testimony. There, the defendant was a school bus driver who was convicted of aggravated criminal sexual assault and kidnaping after a 17-year-old passenger on his bus accused him of rape. *King*, 316 Ill. App. 3d at 903-04, 738 N.E.2d at 559. The evidence against him at trial consisted mainly of the testimony of the victim and two other students on the bus, all of whom attended a high school for students with psychological disorders. *King*, 316 Ill. App. 3d at 907, 738 N.E.2d at 561. According to their testimony, the defendant was alone on the bus with the complainant after he altered his route to drop off another student before her and allowed the bus attendant to leave early. *King*, 316 Ill. App. 3d at 907, 738 N.E.2d at 562.

¶ 30 In his postconviction petition, the defendant alleged that trial counsel was ineffective

for failing to inform the defendant that he had a right to testify in his own defense and failing to call "an essential alibi witness." *King*, 316 Ill. App. 3d at 904, 738 N.E.2d at 559. The alibi witness was the bus attendant. Both she and the defendant could have testified at trial that the bus attendant did not leave early and the defendant was never alone with the complainant. *King*, 316 Ill. App. 3d at 904, 738 N.E.2d at 560. However, neither testified. Thus, although defense counsel presented evidence at trial to undermine the complainant's credibility as a witness due to her mental health problems, he presented no evidence to directly rebut her testimony that she was left alone on the bus with the defendant. *King*, 316 Ill. App. 3d at 916, 738 N.E.2d at 568. It is hardly surprising that the appellate court agreed with the defendant's assertion that he had received ineffective assistance of counsel. Here, by contrast, the defendant testified that he was home when Tina Jackson and Montez Wilson were shot to death, and that testimony was corroborated by two other witnesses.

¶ 31 In *Butcher*, the defendant was convicted of armed robbery. Two men robbed a jewelry store and attacked the two owners. Neither victim was able to identify the assailants. *Butcher*, 240 Ill. App. 3d at 508, 608 N.E.2d at 497. The State presented the testimony of three other witnesses who described the physical characteristics of the robbers. However, their descriptions were inconsistent. In addition, one witness thought that the assailant had a mustache, and the defendant did not have a mustache. *Butcher*, 240 Ill. App. 3d at 509-10, 608 N.E.2d at 498. A defense witness testified that the defendant was not one of the robbers. She also described the robbers as Hispanic men with olive skin, a description the light-skinned defendant did not match. *Butcher*, 240 Ill. App. 3d at 510, 608 N.E.2d at 498. The appellate court found that defense counsel's failure to call two additional witnesses who could have corroborated this testimony constituted ineffective assistance. In reaching this conclusion, the court emphasized the weakness of the State's case. *Butcher*, 240 Ill. App. 3d at 510, 608 N.E.2d at 498.

¶ 32 The instant case is distinguishable from *Butcher* in several ways. First, as we will discuss in more detail later, the State's case against the defendant here is far stronger than its case in *Butcher*. Second, as we have already discussed, defense counsel called two witnesses to corroborate the defendant's testimony that he was home at the time of the murders. Third, although the *Butcher* court did not discuss this, the testimony of all of the witnesses in that case was subject to the same weakness–that is, the reliability of their testimony depended on their ability to perceive and accurately describe an individual they did not know and may have seen only briefly. This was as true of the defense witness as it was of the State's witnesses. As such, corroboration of her testimony might have led jurors to infer that her description of the assailant was more accurate than those of the State's witnesses. Here, by contrast, all of the occurrence witnesses knew the defendant.

¶ 33 In *Skinner*, the defendant was convicted of residential burglary in the theft of a television set. A police detective testified that he and his partner went to a basement apartment, knocked on the door, and identified themselves as police officers. *Skinner*, 220 Ill. App. 3d at 481, 581 N.E.2d at 254. He testified that the defendant allowed them into the apartment. The defendant told them that he lived there and that the two television sets in the apartment belonged to him. The victim's daughter, however, identified one of the televisions as her mother's. *Skinner*, 220 Ill. App. 3d at 481, 581 N.E.2d at 254. The detective's partner testified to the same facts. *Skinner*, 220 Ill. App. 3d at 482, 581 N.E.2d at 254. The defendant, however, testified that he did not live in the apartment. He testified that he worked in the building repair business and was in the basement apartment to fix a broken pipe. The defendant denied telling the police that he lived in the apartment. *Skinner*, 220 Ill. App. 3d at 482, 581 N.E.2d at 254.

¶ 34 On appeal, the defendant claimed ineffective assistance of counsel based on counsel's failure to call his mother and stepfather to testify that he lived with them at the time of the

burglary. *Skinner*, 220 Ill. App. 3d at 483, 581 N.E.2d at 255. He argued that their testimony could have corroborated his testimony and would have contradicted the testimony of the two detectives. *Skinner*, 220 Ill. App. 3d at 485, 581 N.E.2d at 256. In accepting this argument, the appellate court noted that "the jury had *no* corroboration of defendant's testimony." (Emphasis added.) *Skinner*, 220 Ill. App. 3d at 485, 581 N.E.2d at 256. Here, as discussed at length, the defendant's testimony that he was at home when the murders occurred was corroborated by two witnesses.

¶ 35 In *Montgomery*, the defendant was charged with two residential burglaries that were committed on the same day in different counties. He was first tried in Moultrie County. *Montgomery*, 846 F.2d at 408. At that trial, the defendant's wife testified that she went with the defendant to a Sears store to purchase a bicycle for their son and that the defendant was home with her most of the rest of the day. A total of 12 witnesses testified that they saw the defendant in Springfield during the day that the burglaries occurred. *Montgomery*, 846 F.2d at 409. All of these alibi witnesses were either family members or close friends of the defendant and his family. The defendant was convicted. *Montgomery*, 846 F.2d at 409. The following month, the defendant was tried in Macon County for the burglary that occurred there. At that trial, the defense presented the testimony of one additional alibi witness, the Sears employee who sold the defendant and his wife the bicycle. *Montgomery*, 846 F.2d at 409. This time, the defendant was acquitted. *Montgomery*, 846 F.2d at 415-16.

¶ 36 The defendant filed a petition for a writ of *habeas corpus*, alleging that he had received ineffective assistance of counsel at his Moultrie County trial. *Montgomery*, 846 F.2d at 408. In accepting this argument, the Seventh Circuit Court of Appeals pointed to two key factors. First, the court emphasized that the store clerk was "the *only* disinterested witness" in the case. (Emphasis in original.) *Montgomery*, 846 F.2d at 413. Thus, the court explained, he could "hardly be characterized as a cumulative alibi witness." *Montgomery*,

846 F.2d at 413. In addition, the court noted that the defendant's acquittal in the second trial–where the store employee testified–showed that the testimony may well have made a difference in the outcome. *Montgomery*, 846 F.2d at 415-16. Here, by contrast, there was no reason for jurors to find Calvery Brown any more credible than Victoria Wallace or Brenda Brown–all three were members of the defendant's family.

¶ 37 The defendant further contends that counsel's failure to present an additional alibi witness was prejudicial for two reasons. First, he argues that the evidence in this case was closely balanced. Second, he points out that the defendant testified at trial that Calvery Brown was home. He argues that in light of this testimony, jurors "would naturally be drawn to Mr. Brown's failure to testify, and [would] draw the conclusion that Mr. Brown would not corroborate his defense." We reject both of these contentions.

¶ 38 First, we do not believe the evidence was closely balanced. It is true, as the defendant points out, that many of the witnesses who testified in this case had multiple prior felony convictions. In addition, the only eyewitness to the shootings was Terrance Luster, a codefendant who received a very favorable plea agreement in exchange for his testimony. Additional credibility problems for Luster include the fact that he had two prior felony convictions and the fact that one of the murder victims was his daughter's first cousin. As the State points out, however, much of Luster's testimony was corroborated by other evidence. Montez Wilson was found in the living room, where Luster said that he was shot. Wilson was shot in the back, which is consistent with Luster's testimony that he turned as if to run away just before the defendant shot him. Luster's testimony that Marcus Bradley kicked in the door was corroborated by police testimony that there was a muddy footprint on the door. Although Damian Jefferson did not see either of the shootings, his testimony was consistent with Luster's as to the sequence of events.

¶ 39 We are also not persuaded that the defendant's testimony that his uncle was present

was likely to lead the jury to infer that Brown did not testify because his testimony would not have corroborated the alibi defense. This case is markedly different from a case in which a defendant claims to have been with another person at the time of the offense but does not call any alibi witness. If a defendant claims that he was in the presence of other individuals at the relevant times but does not call *any* of them to testify, it is only natural for jurors to wonder why none of the potential alibi witnesses testified. However, while jurors might naturally expect at least *some* witnesses to testify that the defendant was, in fact, with them, they probably do not expect all five potential witnesses to testify.

¶ 40 It is also worth noting that, although the jury was aware that both Brenda Brown and Victoria Wallace were home all night, they did not know whether Calvery Brown or Charles and Melinda were home all night. Under these circumstances, we do not find that the mere mention of Calvery Brown's name would inevitably arouse jurors' suspicions about the reasons he was not called to testify.

¶ 41 Moreover, the State did nothing to emphasize the defendant's reference to the three additional uncalled alibi witnesses. The State's attorney did ask the defendant the names of his two uncles and his uncle's girlfriend, but he did not ask anything more about them. In the State's closing arguments, the prosecutor reminded jurors that the defendant's cellmate testified that the defendant told him that he was going to have a "bogus alibi" at trial. He asked jurors to consider this testimony when they considered the testimony of Brenda Brown and Victoria Wallace. This was the only reference to the defendant's alibi defense in the State's closing arguments. Under these circumstances, we do not find it likely that the jury's attention was drawn to the fact that Calvery Brown did not testify at trial.

¶ 42 In conclusion, when we consider Calvery Brown's possible testimony in the context of the defendant's trial as a whole, we do not believe that it is reasonably probable that adding a third alibi witness would have tipped the balance in the defendant's favor. Thus, we find

that he has failed to establish the prejudice needed to support a claim of ineffective assistance of counsel.

¶ 43 For the reasons stated, we affirm the judgment denying the defendant's postconviction petition.

¶ 44 Affirmed.