

defendant's brother (Mark), and Donald Frymire, who had also been dating Jennings at the time. Jennings was present before, during, and after the incident, and she and Brown had been drinking and arguing that night.

¶ 5 Shortly before unlawfully entering Brown's home and attacking him, the defendant, Mark, and Frymire repeatedly called him on his cell phone and his home phone, antagonizing him and leaving him threatening messages that were played at the defendant's trial. On their way out of the apartment, they destroyed various items of property, and as a result, there was "glass everywhere." Although when arrested hours later the defendant claimed that he was at home having sex while Brown was being beaten, glass fragments and Brown's DNA were discovered in the defendant's bloodstained clothes.

¶ 6 In September 2006, a Madison County jury found the defendant guilty of home invasion. At trial, Brown and Jennings both testified that the defendant had actively participated in the attack by kicking and stomping Brown. Notably, Jennings's testimony was impeached with a prior inconsistent statement that she gave when interviewed by the police following the defendant's arrest. Additionally, Jennings acknowledged that the defendant was her cousin and that she did not want to testify against him. The defendant presented no evidence in his defense.

¶ 7 Following the defendant's conviction, trial counsel filed a motion for a new trial on the defendant's behalf, alleging two specific points of error. At the hearing on the motion, the defendant personally addressed the trial court and offered several additional reasons why the motion should be granted. Among the defendant's stated claims was an allegation that his trial attorney was ineffective for failing to call Mark and Frymire as witnesses for the defense. The trial court subsequently denied the defendant's motion for a new trial and entered judgment on his conviction.

¶ 8 On direct appeal, the defendant argued, *inter alia*, that the trial court should have

further inquired into his assertion that his trial attorney should have called Mark and Frymire as witnesses for the defense. When affirming the trial court's judgment, we soundly rejected that argument and determined that the defendant was unable to satisfy either part of the two-prong test used to evaluate ineffective-assistance-of-counsel claims with respect to his underlying allegation. *People v. Bull*, No. 5-07-0187 (2009) (unpublished order under Supreme Court Rule 23) (eff. May 30, 2008). We further determined that there was "overwhelming evidence that [the] defendant personally participated in the beating of Brown and that he also was accountable for the actions of his codefendants." *Id.* at 4-5.

¶ 9 In December 2009, alleging prosecutorial misconduct and advancing 18 ineffective-assistance-of-counsel claims, the defendant filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)). Among other things, the defendant's postconviction petition alleged that the State had knowingly used Jennings's perjured testimony to convict him. The defendant's petition further alleged that trial counsel should have tendered jury instructions on the lesser-included offenses of residential burglary and criminal trespass to a residence. The petition realleged that trial counsel was ineffective for failing to call Mark and Frymire as defense witnesses.

¶ 10 The various documents that the defendant attached in support of his postconviction assertions included affidavits from Mark, Frymire, and Jennings. In their affidavits, Mark and Frymire both suggested that the defendant was in no way responsible for what had occurred at Brown's house on the morning in question and that the defendant had only gone along to "watch the fight." In her affidavit, Jennings intimated that although she had signed a written statement describing the incident, the statement was false and did not accurately reflect what she had told the police officers who had asked her to sign it. Stating that she was later reminded that she had implicated the defendant "from the start," Jennings further averred that the State had threatened to jail her if she refused to testify at the defendant's trial

and that she "was to say that [she had] seen [the defendant] hit [Brown,] but in fact it was [Mark and Frymire]."

¶ 11 In March 2010, the trial court entered a written order summarily dismissing the defendant's petition as "frivolous and patently without merit." After reciting the law applicable to the defendant's postconviction claims, the trial court specifically held that "all claims in the instant matter" were barred by *res judicata* or waiver. In April 2010, the defendant filed a timely notice of appeal.

¶ 12 DISCUSSION

¶ 13 The defendant maintains that the trial court erred in summarily dismissing his postconviction petition because with respect to his allegations that (1) his trial attorney was ineffective for failing to call Mark and Frymire as defense witnesses, (2) his trial attorney was ineffective for failing to tender jury instructions on the lesser-included offenses of residential burglary and criminal trespass to a residence, and (3) the State knowingly used Jennings's perjured testimony to convict him, his petition set forth the gist of those constitutional claims. We disagree.

¶ 14 The Post-Conviction Hearing Act

¶ 15 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2008). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002).

¶ 16 At the first stage, the trial court independently assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2008); *People v. Edwards*, 197

Ill. 2d 239, 244 (2001). To survive the first stage, "a petition need only present the gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). A *pro se* petition for postconviction relief is considered frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* "A claim completely contradicted by the record is an example of an indisputably meritless legal theory." *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 17 If a petition is not dismissed at the first stage, it advances to the second stage, where an indigent petitioner can obtain appointed counsel and the State can move to dismiss the petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2008). At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *People v. Edwards*, 197 Ill. 2d 239, 245 (2001).

¶ 18 "A postconviction proceeding permits review of constitutional issues that were not and could not have been adjudicated on direct appeal." *People v. Sanders*, 238 Ill. 2d 391, 413 (2010). "Therefore, any issues considered by the court on direct appeal are barred by the doctrine of *res judicata*, and issues which could have been considered on direct appeal are deemed procedurally defaulted." *People v. Ligon*, 239 Ill. 2d 94, 103 (2010); see also *People v. Blair*, 215 Ill. 2d 427, 442 (2005) (holding that "the legislature intended that trial courts may summarily dismiss postconviction petitions based on both *res judicata* and waiver"). "The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*." *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 19

Ineffective Assistance of Counsel

¶ 20 A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). To succeed on a claim of ineffective assistance of trial counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, a defendant must show "(1) that his attorney's performance fell below an objective standard of reasonableness and (2) that the attorney's deficient performance resulted in prejudice." *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). Because a defendant must satisfy both prongs of the *Strickland* test, "if the ineffective assistance claim can be disposed of on the ground that the defendant did not suffer prejudice, a court need not determine whether counsel's performance was constitutionally deficient." *People v. Haynes*, 192 Ill. 2d 437, 473 (2000). To establish prejudice, a defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Richardson*, 189 Ill. 2d 401, 411 (2000).

¶ 21 Here, the defendant first maintains that he presented the gist of a constitutional claim that his trial attorney was ineffective for failing to call his codefendants as witnesses for the defense. As the State notes, however, the trial court properly dismissed this claim as *res judicata* because its relative merits were addressed and decided on direct appeal.

¶ 22 On direct appeal, when rejecting the defendant's assertion that the trial court should have further inquired into his posttrial claim that his trial attorney should have called Mark and Frymire as witnesses for the defense, we noted that "it was well within the range of competent representation for defense counsel to have declined to call them as defense witnesses," because both codefendants had "pled guilty to home invasion, and unless they were to perjure themselves, they would have had to confirm important elements of the State's case against [the] defendant." *People v. Bull*, No. 5-07-0187, order at 5 (2009) (unpublished

order under Supreme Court Rule 23). We further held that given the overwhelming evidence of the defendant's guilt, whatever testimony his codefendants might have provided "could not have affected the weight of that evidence." *Id.* We thus concluded that the defendant was unable to support his claim that his trial attorney was ineffective for failing to call Mark and Frymire as defense witnesses. *Id.* We note that in the present appeal, the defendant urges that we revisit this issue because it was previously decided without the benefit of his codefendants' affidavits. As the State observes, however, on direct appeal, when considering whether the defendant could establish prejudice under *Strickland*, we assumed *arguendo* that had Frymire and Mark been called as defense witnesses, their testimony would have supported the defense theory that they were responsible for what had occurred at Brown's apartment and that the defendant was not legally accountable for their conduct. Accordingly, his codefendants' affidavits notwithstanding, the trial court properly dismissed as *res judicata* the defendant's postconviction claim that his trial attorney was ineffective for failing to call them as witnesses for the defense.

¶ 23 The defendant next suggests that the trial court should not have summarily rejected his allegation that his trial attorney was ineffective for failing to tender jury instructions on the lesser-included offenses of residential burglary and criminal trespass to a residence. At the outset, we note that because this issue could have been raised on direct appeal, the trial court did not err in finding that the defendant forfeited consideration of the claim. *Ligon*, 239 Ill. 2d at 103; *Blair*, 215 Ill. 2d at 442. Forfeiture aside, however, the defendant's argument still fails.

¶ 24 To warrant an instruction on a lesser-included offense, the evidence presented at trial must be such that "a jury could rationally find the defendant guilty of the lesser offense, but acquit on the greater offense." *People v. Landwer*, 166 Ill. 2d 475, 486 (1995). Here, the State's home invasion charge alleged that the defendant and his codefendants entered

Brown's home without authority and intentionally injured Brown by kicking and punching him. 720 ILCS 5/12-11(a)(2) (West 2006). To convict the defendant of the lesser-included offense of criminal trespass to a residence, the jury would have had to have found that he or one of his codefendants entered Brown's home without authority. 720 ILCS 5/19-4(a)(1) (West 2006). To convict the defendant of the lesser-included offense of residential burglary, the jury would have had to have found that he or one of his codefendants entered Brown's home without authority and with the intent to commit an aggravated battery. 720 ILCS 5/12-4(a), 19-3(a) (West 2006).

¶ 25 Given the overwhelming evidence that the defendant personally participated in the beating of Brown and was also accountable for the actions of his codefendants, we agree with the State's contention that a rational jury could not have acquitted the defendant of home invasion while convicting him of the lesser-included offenses of residential burglary and criminal trespass to a residence. As a result, strategic considerations aside, the defendant is unable to prevail on his claim that his trial attorney was ineffective for failing to tender instructions on those offenses. See *People v. Bauer*, 393 Ill. App. 3d 414, 425 (2009); *People v. Phillips*, 383 Ill. App. 3d 521, 542-44 (2008).

¶ 26 On appeal, referencing his assertion that trial counsel should have called Mark and Frymire as witnesses for the defense, the defendant suggests that had his codefendants testified, he would have undoubtedly been entitled to have the jury instructed on the lesser-included offenses of residential burglary and criminal trespass to a residence. "The giving of a jury instruction on a lesser-included offense lies within the sound discretion of the trial court" (*People v. Grimes*, 386 Ill. App. 3d 448, 451 (2008)), however, and "conjecture and speculation *** cannot support an ineffective-assistance-of-counsel claim" (*People v. Gosier*, 165 Ill. 2d 16, 24 (1995)). Moreover, even where applicable, a trial court's failure to give a lesser-included-offense instruction "does not warrant a reversal where the evidence is so

clear and convincing that the jury could not have reasonably found the defendant not guilty." *People v. Taylor*, 233 Ill. App. 3d 461, 465 (1992).

¶ 27 Prosecutorial Misconduct

¶ 28 Referencing Jennings's affidavit, the defendant lastly argues that the trial court erred in dismissing his postconviction petition because he presented the gist of a claim that the State knowingly used her perjured testimony to convict him. The State counters that the defendant's prosecutorial-misconduct allegation is "false and contrary to the record."

¶ 29 We first note that because this allegation could have been raised on direct appeal, the trial court did not err in summarily dismissing the issue as forfeited. *Ligon*, 239 Ill. 2d at 103; *Blair*, 215 Ill. 2d at 442. We will nevertheless address the issue on its merits, as the State has opted to do.

¶ 30 "The rule is well-established that the State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process of law." *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). "A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *Id.*

¶ 31 Here, the parties disagree as to what Jennings's affidavit actually reveals. The State reads the affidavit as failing to affirmatively demonstrate that, assuming Jennings's trial testimony was perjured, the State knowingly used it. The State further observes that assuming Jennings was advised that "she had to testify or go to jail," that admonishment was not improper given that Jennings could have been jailed for contempt of court had she refused to appear when summoned. See *People v. Evans*, 349 Ill. App. 3d 311, 311-16 (2004). The defendant, on the other hand, maintains that although "not skillfully written," Jennings's affidavit "[a]t the least *** creates a question of fact regarding whether [the State] knew Jennings would be committing perjury." We need not resolve this dispute, however,

because in any event, the defendant is unable to show a reasonable likelihood that the alleged false testimony could have affected the jury's verdict. As we have repeatedly stated, at the defendant's trial, the State produced "overwhelming evidence that [the] defendant personally participated in the beating of Brown and that he also was accountable for the actions of his codefendants" (*People v. Bull*, No. 5-07-0187, order at 4-5 (2009) (unpublished order under Supreme Court Rule 23)), and the absence of Jennings's testimony would not have changed the outcome. Accordingly, forfeiture aside, the trial court properly dismissed the defendant's claim of prosecutorial misconduct (see *People v. Barrow*, 195 Ill. 2d 506, 529-33 (2001)), and we reject the defendant's contention that an evidentiary hearing is necessary to resolve the issue.

¶ 32

CONCLUSION

¶ 33 "Summary dismissal is a process that exists to cull petitions that are frivolous in nature or patently without merit." *People v. Johnson*, 312 Ill. App. 3d 532, 534 (2000). Here, for the foregoing reasons, we affirm the trial court's summary dismissal of the defendant's petition for postconviction relief.

¶ 34 Affirmed.