

No. 1-11-2794

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 01 CR 2607
)	
EDWIN MARTINEZ,)	Honorable
)	Colleen Ann Hyland,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held:* Dismissal of defendant's postconviction petitions at the second stage reversed where there was a substantial showing of ineffective assistance of trial counsel based on the cumulative effects of counsel's failures to interview and call witnesses to impeach the credibility of a key witness, and to seek the admission of the contents of a restaurant receipt into evidence and testimony of witness, which would show a timeline making it improbable defendant committed the murder.

¶ 2 Defendant, Edwin Martinez, was convicted of murder for the December 27, 2000, fatal shooting of Robert Sanchez. Defendant appeals from the second-stage dismissal of his petitions for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2006). On appeal, defendant argues his postconviction petitions made a substantial showing that he was

denied effective assistance of trial counsel based on counsel's failure to investigate and present testimony from two witnesses which would have undermined the credibility of the State's key witness, and from presenting the contents of a restaurant receipt and the testimony of his mother to support the theory that the State's time line made it highly unlikely he murdered Mr. Sanchez. We reverse the dismissal of defendant's postconviction petitions and remand the matter for an evidentiary hearing.

¶ 3 Adam Reyes, a member of the Satan Disciples and a convicted felon, testified at defendant's bench trial. Mr. Reyes stated defendant was a leader of the Satan Disciples and nicknamed "Chico." Both Mr. Reyes and Mr. Sanchez sold drugs supplied by defendant. In November 2000, defendant asked Mr. Reyes to deal with Mr. Sanchez because he was an informant and "tellin' the cops on [defendant]." Mr. Reyes dismissed defendant's request as "just talk" and did not take defendant seriously. The following month, Mr. Reyes declined defendant's request to "take care" of Mr. Sanchez and defendant indicated he would deal with the problem himself. However, several days later, on December 24, defendant was with Mr. Reyes and Rachel Narbaiz, a/k/a, Rachel Martinez, the mother of defendant's nephew, in an automobile behind Ms. Narbaiz's home. Defendant asked them to shoot Mr. Sanchez. When Mr. Reyes and Ms. Narbaiz both refused, defendant became angry. Ms. Narbaiz told defendant to leave. Despite disobeying defendant's orders to kill Mr. Sanchez, Mr. Reyes was never punished by the gang.

¶ 4 At about 7:30 p.m. on December 27, 2000, defendant called Mr. Reyes and asked to borrow a .380-caliber pistol which Mr. Reyes had obtained from Mark Alonzo, who was known as "Shortie." Shortly thereafter, defendant arrived at Mr. Reyes' residence located at 1406 W. 59th Court in Cicero, Illinois. Defendant told Mr. Reyes that he planned to lure Mr. Sanchez

into the woods by explaining that he had to dispose of the gun. After receiving the gun, defendant drove away with Mr. Sanchez in the car. At about 9:40 p.m., defendant called Mr. Reyes and stated that everything was "mashed potatoes and gravy." Mr. Reyes understood this statement to mean that defendant had killed Mr. Sanchez. Mr. Reyes and defendant met at the home of their friend Samantha Mercado at about 1:30 a.m. and then went for a drive. Defendant told Mr. Reyes that he "smoked Bobby, shot him in the head, and that he cried like a bitch." Defendant said he disposed of the gun he used to murder Mr. Sanchez. On New Year's Day, defendant called Mr. Reyes and warned him not to speak to anyone about the incident.

¶ 5 On cross-examination, Mr. Reyes testified that he had an agreement with the State where he would not be charged in the murder of Mr. Sanchez if he told the State everything he knew about the shooting. Mr. Reyes also testified that after he received the gun from Shortie, he kept it at his house for a time. He later wrapped the gun in a towel and stored it at Samantha Mercado's house for a few days. On redirect examination, Mr. Reyes clarified that his agreement with the State was to tell only the truth and that the State made no promise that he would not be charged in the murder of Mr. Sanchez.

¶ 6 Samantha Mercado testified she was a friend of Mr. Reyes and had known defendant for two years. At that time, she lived at 5401 W. 54th Street in Cicero, Illinois. Mr. Reyes, Mr. Sanchez and defendant would come to her house "and party." On the evening of December 27, 2000, she was at Mr. Reyes' house. Defendant came to the house that night, talked to Mr. Reyes, and then left. On cross-examination, she testified that she did not see Mr. Reyes hand a gun, or anything else, to defendant when he was at Mr. Reyes' house on the night of December 27.

¶ 7 Mario Abarca, Mr. Sanchez's stepfather, testified his stepson and defendant were friends. Defendant had been living at Mr. Abarca's home located at 5343 W. 24th Street in Cicero,

Illinois. On December 27, 2000, Mr. Sanchez left the house with defendant between 7 and 8 p.m. Mario Arbaca never saw Mr. Sanchez again.

¶ 8 Benjamin Abarca, Mario Abarca's brother, who was involved in drug transactions with Mr. Sanchez, was living in his brother's house with Mr. Sanchez. He last saw Mr. Sanchez on December 27, 2000, when Mr. Sanchez left the house between 6:30 and 7:30 p.m. Benjamin Abarca later called Mr. Sanchez several times on the evening of December 27; Mr. Sanchez never returned his calls. When Benjamin Abarca called Mr. Sanchez again between 9:30 and 10 p.m., defendant answered the phone. Defendant explained that Mr. Sanchez had lent defendant his cell phone.

¶ 9 Iliana Herrera, Mr. Sanchez's girlfriend, testified that she called Mr. Sanchez's cell phone at 7:33 p.m. and his pager at 11:15 p.m. on December 27, 2000, but Mr. Sanchez did not respond. When she called Mr. Sanchez's cell phone shortly after midnight on December 28, 2000, defendant answered. Defendant told her that he had driven Mr. Sanchez to the home of Oscar Solis and that Mr. Sanchez had left his cell phone in defendant's car. Mr. Solis testified, however, that he did not see Mr. Sanchez on the night of December 27.

¶ 10 Elba Luna testified her sister June was dating defendant in December 2000. On December 24, Ms. Luna and her mother and sister moved to "the south side." On the afternoon of December 28, Elba Luna gave Mr. Sanchez's cell phone to Mr. Sanchez's sister at Mr. Sanchez's home after defendant had given the phone to her and driven her there.

¶ 11 Cook County Sheriff's investigator John G. Sheridan testified that Mr. Sanchez's body was discovered by police at Sundown Meadows Forest Preserve near the Village of Hodgkins on December 28, 2000, at about 6 p.m. The body was found in an area of the forest preserve which was about four to five blocks' distance from the entrance to the Hodgkins forest preserve. Mr.

Sanchez had suffered gunshot wounds to the head. Shell casings were found around the body. On cross-examination, investigator Sheridan was asked if he found a restaurant receipt on the body and he answered that "[t]here was a receipt found," which was turned over as evidence.

¶ 12 Elwin Trammell, who was a Cook County Forest Preserve police sergeant, testified that he interviewed defendant on January 4, 2001. Special agent Todd Mayberry of the Federal Bureau of Investigation (FBI) was present during the interview. At the time of the interview, defendant was not in custody, but was taken into custody by the FBI on January 6, 2001. Defendant was arrested and charged with the murder of Mr. Sanchez on January 10, 2001.

¶ 13 In the interview, defendant admitted to being a member of the Satan Disciples and a drug dealer. Both Mr. Reyes and Mr. Sanchez helped him sell drugs. Defendant said he had lived at Mr. Sanchez's home for about three months, but was now living at his grandmother's house at 1518 N. Monticello Avenue in Chicago. Defendant first told the sergeant that he last saw Mr. Sanchez on December 26, 2000, at defendant's mother's home at 5232 W. 24th Street in Cicero, Illinois. Mr. Sanchez had been in defendant's car on that night. On the night of December 27, after discovering Mr. Sanchez's cell phone in the back seat of his car, he went to Mr. Sanchez's house to return it, but no one was home. Defendant later told Sergeant Trammell that on December 27, after helping his girlfriend move, he visited Mr. Sanchez at his home between 8 and 9 p.m., and that Mr. Sanchez's stepfather (Mario Abarca) answered the door. He also said he spent the night at his girlfriend's new home on December 27. Defendant also said that on December 28, 2000, he went to the Sanchez home and gave Mr. Sanchez's phone to his sister. When Sergeant Trammell pointed out the discrepancies in his statements, defendant responded he was confused about the dates.

¶ 14 The parties stipulated to the admission of phone records, which indicated a number of

incoming and outgoing calls from Mr. Sanchez's cell phone on the evening in question, including incoming calls from Benjamin Abarca and Ms. Herrera. Mr. Sanchez's cell phone records also showed that calls were made from Mr. Sanchez's cell phone to Mr. Reyes' cell phone on December 27, 2000, between 7:32 p.m. and 9:42 p.m. Other telephone records admitted into evidence by stipulation showed calls made to Mr. Sanchez's cell phone from Benjamin Abarca's phone at 8:21 p.m., 8:22 p.m., 8:23 p.m., 8:27 p.m., 8:28 p.m., 8:29 p.m., 8:32 p.m., 8:35 p.m., 8:44 p.m., 8:58 p.m., 9:30 p.m., 9:31 p.m., and 10:06 p.m. on the evening of December 27, 2000. It was further stipulated that the shell casings found near the body of Mr. Sanchez were from a gun described as a "Winchester 380 Auto caliber."

¶ 15 After the State rested, and defendant's motion for directed finding was denied, trial counsel told the trial court there was a stipulation that the police evidence inventory listed "two receipts." The trial court stated that the information on the receipts was hearsay and could not "be used." The State and trial counsel agreed with this conclusion.

¶ 16 Following closing arguments, the trial court found defendant guilty of first-degree murder after concluding that the evidence, although circumstantial, was sufficient to prove defendant guilty of murder beyond a reasonable doubt. In making its determination, the trial court credited Mr. Reyes' testimony, *i.e.*, that defendant solicited him to kill Mr. Sanchez, that defendant explained to Mr. Reyes why he had to borrow his gun and, later, that defendant called Mr. Reyes to tell him that he killed Mr. Sanchez. The trial court also noted the inconsistencies in defendant's statements to Sergeant Trammel. The trial court sentenced defendant to 50 years' imprisonment. In *People v. Martinez*, No. 1-04-0126 (2006) (unpublished order under Supreme Court Rule 23), this court affirmed the judgment on direct appeal.

¶ 17 On July 24, 2007, defendant filed a *pro se* postconviction petition alleging, in pertinent

part, that his trial counsel was ineffective for failing to interview and subpoena Rachel Narbaiz. Defendant attached the affidavit of Ms. Narbaiz attesting that defendant never asked her to kill Mr. Sanchez, nor did he ask Mr. Reyes to kill Mr. Sanchez in her presence. She denied being in a car behind her house with Mr. Reyes and defendant on December 24, 2000. Ms. Narbaiz further attested that she was interviewed by investigators from the office of the Cook County State's Attorney in October 2002, but was never contacted by defendant's attorney. Defendant's *pro se* petition also attached the report describing the interview of Ms. Narbaiz conducted at her home by investigators from the office of the Cook County State's Attorney. The summary of the interview states Ms. Narbaiz denied that defendant had asked her and Mr. Reyes to kill Mr. Sanchez. Ms. Narbaiz told the investigators she was in jail at the time of the murder having been arrested on December 26, 2000, when her actual arrest date was December 27, 2000. The report reveals that defendant's brother, Giovanni Martinez, was in the kitchen and listening to the interview.

¶ 18 Defendant's affidavit stated that he informed trial counsel about Rachel Martinez (Narbaiz). Defendant also averred that he told trial counsel there was no truth to Mr. Reyes' claims that he solicited Mr. Reyes and Rachel Martinez (Narbaiz) "to kill anyone."

¶ 19 The *pro se* petition advanced to the second stage. Defendant's appointed postconviction counsel, on October 1, 2010, filed a supplemental petition which reiterated defendant's ineffectiveness of trial counsel claim for the failure to interview or subpoena Ms. Narbaiz, and presented additional ineffectiveness claims. The supplemental petition claimed counsel was ineffective for failing to interview or present Diana Mercado as a witness at trial. In her attached notarized and signed statement, Diana Mercado stated that approximately one week prior to the murder, Mr. Reyes came to her house with a gun which he wanted to leave there. When Diana

Mercado told Mr. Reyes that he could not leave the gun, he called a cab and waited outside the house to be picked up. Mr. Reyes told her that he was going to use the gun to kill Mr. Sanchez. Her daughter, Samantha Mercado, never told her that Mr. Reyes had asked to hide a gun in their house. Diana Mercado did not see a gun in the house at any time in December 2000. Diana Mercado was not interviewed by the police, nor by defense counsel. Diana Mercado, however, was interviewed by the FBI regarding the shooting.

¶ 20 The supplemental petition attached a supplementary report of Sergeant Trammell. This report provided that Mr. Reyes, during an interview, stated that Shortie gave him a .380-caliber automatic pistol in mid-December 2000. Mr. Reyes wanted the gun for protection from a rival gang. He brought the gun to Samantha Mercado's house and asked Samantha's mother, Diana Mercado, if he could leave the gun there. Mr. Reyes wrapped the gun in a towel, and "stashed the weapon underneath Sam's bed, unbeknownst to her." The supplementary report also stated that after defendant had asked Mr. Reyes and Ms. Narbaiz to shoot Mr. Sanchez on December 24, 2000, Mr. Reyes was upset and went to the Mercado house. Mr. Reyes said Diana Mercado noticed something was wrong.

¶ 21 The supplemental petition also added a claim that trial counsel was ineffective for failing to present the testimony of defendant's mother, Maritza Amaya, and for failing to present the contents of a restaurant receipt which was recovered from Mr. Sanchez's body. In support, the supplemental petition included a police inventory report which showed that a receipt from the Aguascalientes restaurant, located at 2110 South Cicero Avenue, in Cicero, Illinois, which was dated December 27, 2000, and time stamped "20:24 p.m." (presumed to be 8:24 p.m.), was recovered from Mr. Sanchez's body. In an attached affidavit, Ms. Amaya averred that on December 27, 2000, at approximately 6:30 p.m., defendant and Mr. Sanchez left her house at

5232 W. 24th Street to go to Aguascalientes restaurant and that defendant returned "sometime before 9 p.m.," and stayed for about an hour. Ms. Amaya said she attended most court dates in the case, and trial counsel did not interview her nor ask her about the whereabouts of defendant on December 27. Based on the affidavit and receipt, defendant argues that it is "highly unlikely" that he killed Mr. Sanchez because the restaurant receipt showed that Mr. Sanchez was still alive at 8:24 p.m., while defendant had returned to his mother's house sometime before 9 p.m.

¶ 22 During the postconviction proceedings, postconviction counsel sought leave to issue a subpoena seeking records relating to a federal investigation of defendant, which postconviction counsel believed was ongoing at the time of defendant's arrest for this matter. In seeking the subpoena, counsel informed the court that defendant was taken into federal custody "just days" after the murder of Mr. Sanchez. Postconviction counsel informed the court that a federal case was filed against defendant which was terminated shortly after its filing, and defendant was represented in the federal matter by the same trial counsel as in this case. The subpoena was denied.

¶ 23 On December 10, 2010, the State moved to dismiss defendant's postconviction petitions and defendant filed a response. Following a hearing, the postconviction court, in a lengthy written order reviewing all claims, granted the State's motion to dismiss.

¶ 24 On appeal, defendant argues that his postconviction petitions made a substantial showing that his trial counsel was ineffective for failing to investigate and present available testimony from Rachel Narbaiz, Diana Mercado, and Maritza Amaya, and to introduce the contents of the restaurant receipt. Defendant maintains the testimony and evidence would have undermined the credibility of Mr. Reyes and would have established a timeline showing it was improbable that defendant committed the murder.

¶ 25 The Act, generally, provides a three-stage process by which a defendant may assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). The instant case involves the second stage of the postconviction process. Dismissal of a postconviction petition, at this stage, is warranted only where the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Id.* at 382. The court does not resolve evidentiary questions at the second stage. *People v. Pomagala*, 2013 IL 113688, ¶ 35. If the petition is not dismissed at the second stage, it proceeds to stage three, where the circuit court conducts an evidentiary hearing. 735 ILCS 5/122-6 (West 2010).

¶ 26 Our review of the circuit court's dismissal of a postconviction petition without an evidentiary hearing is *de novo*. *Coleman*, 183 Ill. 2d at 389.

¶ 27 A defendant who argues ineffective assistance of counsel must first demonstrate that his counsel's representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. at 687; *People v. Lacy*, 407 Ill. App. 3d 442, 456-57 (2011). Second, a defendant must establish prejudice by showing "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000) (citing *Strickland*, 466 U.S. 668, 697 (1984)).

¶ 28 As to the insufficient performance prong of the *Strickland* test, there is a strong presumption that trial counsel's challenged action or inaction may have been the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Decisions regarding the calling of witnesses, or the presentation of evidence, are matters of trial strategy, and are, generally, immune from ineffective assistance of counsel claims. *People v. West*, 187 Ill. 2d

418, 432 (1999).

¶ 29 Trial counsel, however, does have a duty to conduct "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. A strategic decision as to whether to call a witness "may be made only after there has been a 'thorough investigation of law and facts relevant to plausible options.'" *People v. Gibson*, 244 Ill. App. 3d 700, 703-04 (1993) (quoting *Strickland*, 466 U.S. at 690). As to counsel's duty to investigate, we have held:

"An attorney who fails to conduct reasonable investigation, fails to interview witnesses, and fails to subpoena witnesses cannot be found to have made decisions based on valid trial strategy. [Citations.] Whether defense counsel was ineffective for failure to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. [Citations.] Attorneys have an obligation to explore all readily available sources of evidence that might benefit their clients. [Citations]. Defense counsel has a professional obligation, both legal and ethical, to explore and investigate a client's case. [Citations.] Failure to conduct investigation and develop a defense has been found to be ineffective assistance. [Citations.] Failure to present available witnesses to corroborate a defense has been found to be ineffective assistance. [Citations.]" (Citations omitted.) *People v. Makiel*, 358 Ill. App. 3d 102, 107-08 (2005).

¶ 30 We will first consider defendant's claim of ineffectiveness as to the failure to interview and call Ms. Narbaiz and Diane Mercado as witnesses.

¶ 31 The record shows trial counsel was aware of both Ms. Narbaiz and Diana Mercado prior to trial. Ms. Narbaiz was listed as a potential witness for the State. Additionally, the record

supports a conclusion that trial counsel was aware that Ms. Narbaiz contradicted Mr. Reyes' claim—that defendant had asked him and Ms. Narbaiz to shoot defendant. The report of the interview with Ms. Narbaiz, which was conducted by a Cook County State's Attorney investigator, reveals she denied she had been solicited by defendant. In his affidavit, defendant states he informed counsel that Ms. Narbaiz would deny the claim that he had solicited Mr. Reyes and Ms. Narbaiz to kill Mr. Sanchez. In fact, although counsel did not call Ms. Narbaiz at trial, he did argue during opening statements that Ms. Narbaiz disputed Mr. Reyes' claim that she was recruited to commit the murder and cross-examined Mr. Reyes about her. Additionally, trial counsel, in presenting the motion for a directed finding, argued Mr. Reyes was incredible, in part, for claiming that defendant, an alleged leader of a gang, would "go around and recruit some girl to do a shooting." There is nothing to explain why trial counsel would not have interviewed Ms. Narbaiz as a potential witness to support this theory and to contradict Mr. Reyes' testimony. The report on Ms. Narbaiz 's interview does reveal that defendant's brother was listening in another room and that Ms. Narbaiz told the investigators she was in jail on December 26, 2000, when the exact date may have been December 27. We, however, cannot conclude at this stage that trial counsel chose not to interview or call Ms. Narbaiz as a witness because her credibility could be attacked on these or other grounds.

¶ 32 As to Diana Mercado, Sergeant Trammel's police report indicates she had knowledge of Mr. Reyes' possession of the gun used in the shooting and was listed by the State as a potential witness during discovery. Trial counsel also had knowledge that Mr. Reyes, Mr. Sanchez, defendant, and other witnesses "[hung] around at Samantha's house." Further, Diana Mercado stated in her affidavit that she was interviewed by the FBI about the shooting. The record at this stage is not clear whether this interview was known to trial counsel, whether he obtained any

existing reports as to that interview, either in his role as trial counsel in this case, or as defendant's counsel in the federal investigation, or what the interview may or may not have revealed about this case. We, therefore, have no basis at this stage to conclude that trial counsel's decision not to interview and then call Diana Mercado was sound trial strategy.

¶ 33 As to the second prong of the *Strickland* test, to establish prejudice, a defendant must show a reasonable probability which is sufficient to undermine confidence in the outcome of the proceeding, that but for counsel's errors the proceeding would have resulted in a different outcome. *Strickland*, 466 U.S. at 694. The prejudice prong may be satisfied based on the cumulative effect of the alleged failures of trial counsel. *People v. Vera*, 277 Ill. App. 3d 130, 141 (citing *People v. Garza*, 180 Ill. App. 3d 263, 270 (1995)).

¶ 34 The case against defendant was largely circumstantial and turned almost entirely on the testimony of Mr. Reyes. Trial counsel's theory at trial was that Mr. Reyes was not to be believed, and his testimony was incredible.

¶ 35 The trial court, in finding defendant guilty, specifically relied in part on the testimony of Mr. Reyes that defendant had solicited him to kill Mr. Sanchez on three occasions. In her affidavit, Ms. Narbaiz contradicts Mr. Reyes' claim that on December 24, 2000, defendant asked her and Mr. Reyes to kill Mr. Sanchez. Her affidavit also contradicts Mr. Reyes' testimony that the three were together in a car behind her home on December 24. It is true that Ms. Narbaiz does not contradict Mr. Reyes' testimony that defendant had, on two prior occasions, asked Mr. Reyes alone to kill Mr. Sanchez. But, as to the first request, Mr. Reyes himself did not believe at the time that defendant was serious. Moreover, Ms. Narbaiz contradicts Mr. Reyes' testimony about defendant's third and final request to kill Mr. Sanchez which was made just a few days before the murder. Mr. Reyes claimed that defendant became angry when he and Ms. Narbaiz

refused his request to kill Mr. Sanchez. Their refusal, according to Mr. Reyes' testimony, apparently set in motion defendant's plan to kill Mr. Sanchez. If questions were successfully raised as to the veracity of Mr. Reyes' testimony about defendant's solicitation of both Mr. Reyes and Ms. Narbaiz, there is a reasonable probability that the trial court may have doubted defendant had asked Mr. Reyes to kill Mr. Sanchez on the other occasions.

¶ 36 Diana Mercado's affidavit also presents statements which would have the reasonable probability of undermining confidence in Mr. Reyes' testimony. Mr. Reyes testified that, prior to the shooting, he hid the gun used in the murder at Samantha Mercado's house. Diana Mercado's affidavit statement—that she told Mr. Reyes he could not keep the gun at her house and that she did not see a gun in her house during the month of December 2000—is not consistent with Mr. Reyes' testimony.

¶ 37 Furthermore, Diana Mercado also stated that Mr. Reyes told her he was going to use the gun to "kill Bobby." This statement, taken as true at this stage, would have the tendency to place greater culpability for the murder on Mr. Reyes and may be seen as contradictory to Mr. Reyes' claim that he had refused to comply with defendant's requests to kill Mr. Sanchez.

¶ 38 The State's case against defendant was largely circumstantial. There was no physical evidence nor eyewitness linking defendant to the crime and no confession. In light of the other grounds to question Mr. Reyes' credibility (*e.g.*, he was a convicted felon and an accomplice to the murder by providing defendant with the gun), we conclude defendant has satisfied the prejudice prong as to the failure to interview and call Ms. Narbaiz and Ms. Mercado, whose testimony would have contradicted Mr. Reyes' testimony.

¶ 39 Defendant also argues he has made a substantial showing that he was denied effectiveness of counsel by trial counsel's failure to investigate and introduce the restaurant

receipt as substantive evidence and to investigate and interview his mother about his whereabouts on December 27, 2000.

¶ 40 The evidence at trial as to events leading up to the shooting showed a relatively short timeline between the 7:30 p.m. phone call from defendant to Mr. Reyes asking for the gun, and the 9:40 p.m. phone call to Mr. Reyes where defendant indicated he had killed Mr. Sanchez. Mr. Reyes testified that on December 27, 2000, at about 7:30 p.m., defendant called Mr. Reyes and asked for the gun. Mario Abarca testified that between 7 and 8 p.m. on December 27, defendant and Mr. Sanchez left his home (5401 W. 54th Street in Cicero). Benjamin Abarca said defendant and Mr. Sanchez left the Abarca home between 6:30 and 7:30 p.m. According to Mr. Reyes' testimony, defendant drove to his house (1406 W. 59th Court in Cicero) and arrived there shortly after his 7:30 p.m. call; defendant then took the gun and told Mr. Reyes his plan to kill Mr. Sanchez. Benjamin Abarca testified he called Mr. Sanchez's phone between 9:30 p.m. and 10 p.m. and defendant answered. His earlier phone calls to Mr. Sanchez that evening, beginning at 8:21 p.m., were not answered. Mr. Reyes testified that at about 9:40 p.m. that same evening, defendant called him and stated that everything was "mashed potatoes and gravy." Mr. Reyes next saw defendant on December 28, at 1:30 a.m. at the Mercado home (5401 W. 54th Street in Cicero). Mr. Sanchez's body was discovered at 6 p.m. on December 28, 2000.

¶ 41 When arguing for a directed finding and in his closing argument, trial counsel asserted that the State had not proven a credible timeline that tended to prove defendant had time to commit the shooting in the Hodgkins forest preserve between the time he left Mr. Reyes' home at about 7:30 p.m., and the earliest time established at trial that Mr. Sanchez was not answering his phone on the evening of December 27, 2000 (8:21 p.m.).

¶ 42 Although the restaurant receipt itself is not contained in the record, the inventory sheet

shows that a receipt from Aguascalientes restaurant dated December 27, 2000, and time stamped at 8:24 p.m. was recovered from Mr. Sanchez's body (his pants pocket). We also note that nothing in the record shows whether the restaurant receipt itself would have identified or led to the identity of the purchaser in some way. However, the 8:24 p.m. time stamp was within the crucial time frame, between defendant's two phone calls to Mr. Reyes: 7:30 p.m. and 9:40 p.m. The record shows that trial counsel was aware of the existence and contents of the restaurant receipt as it was identified in a police report. In his opening statement, trial counsel argued that police did not adequately investigate the significance of the receipt, nor uncover who actually had been at the restaurant that night. It is unclear that the parties' stipulation as to the admission of unidentified receipts found at the scene which was made at the close of evidence, included the restaurant receipt. Trial counsel, however, did not attempt to lay a foundation for the admittance of the contents of the restaurant receipt which would have overcome hearsay objections. We do not know what, if any, legal or factual investigation was conducted by trial counsel as to the restaurant receipt. On this record, we cannot say it was a tactical decision not to seek substantive admission of the receipt because a foundation could not be made or that there was no legal basis for its admission.

¶ 43 Ms. Amaya's affidavit statement gives significance to the restaurant receipt and places defendant in her home at certain key points of time. Ms. Amaya attested that defendant and Mr. Sanchez left her house (5232 W. 24th Street in Cicero) at about 6:30 p.m. on December 27, 2000, and defendant's plan was to drop off Mr. Sanchez at the Aquascalientes restaurant (2110 S. Cicero Avenue in Cicero). She stated defendant returned to her house "sometime before 9 p.m." and stayed for about an hour. Ms. Amaya's testimony would have shown defendant was with Mr. Sanchez on December 27, 2000, but she contradicts Mr. Reyes' statement as to why

defendant was with Mr. Sanchez and what their plans were. She also places defendant in her home at a time when he allegedly made the 9:40 p.m. call to Mr. Reyes. There is no explanation for trial counsel's failure to, at least, interview Ms. Amaya.

¶ 44 The State argues that there is no showing that trial counsel had any reason to interview Ms. Amaya, defendant's mother, or reason to understand she would have had any relevant information about the restaurant or defendant's whereabouts on December 27. In his postconviction petitions, defendant has not asserted he suggested that trial counsel interview and call his mother. As to this point, Ms. Amaya states in her affidavit only that she regularly attended the trial court proceedings and trial counsel never spoke to her about the murder. However, during defendant's interview with Sergeant Trammel, defendant stated Mr. Sanchez and he were at his mother's house on December 26, 2000, and this was the last time he saw Mr. Sanchez. Defendant, however, was confused about the dates. Trial counsel would have been aware Sergeant Trammel interviewed defendant and we are without a record of what, if any, investigation relating to the interview was done by trial counsel. Taking the allegations of the postconviction petitions and Ms. Amaya's affidavit as true, and in light of the circumstantial nature of the evidence at trial, defendant has demonstrated a substantial constitutional deprivation which requires an evidentiary hearing as to trial counsel's failure to interview Ms. Amaya.

¶ 45 As discussed, the evidence in this case was closely balanced with the State's case relying heavily on the testimony and credibility of Mr. Reyes, the time line established by Mr. Reyes and other witnesses, and the phone records. The postconviction petitions' claims of ineffectiveness for trial counsel's failure to investigate and call Ms. Narbaiz, Ms. Mercado, and Ms. Amaya, and investigate and introduce the restaurant receipt, cumulatively satisfies both prongs of *Strickland*.

"Although any one error of counsel, by itself, may not have satisfied the two-prong test established in *Strickland*, 'cumulatively, counsel's failures render the result of the proceedings 'unreliable under the standard enunciated in *Strickland*.'" *People v. Vera*, 277 Ill. App. 3d 130, 141 (1995) (citing *People v. Garza*, 180 Ill. App. 3d 263, 270 (1989)).

¶ 46 The State argues though, that because these witnesses had close ties to defendant—Ms. Narbaiz was defendant's brother's girlfriend, Diana Mercado was the mother of defendant's friend Samantha, and Maritza Amaya was defendant's mother—their testimony would likely be deemed incredible by the fact finder. See *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003) (stating that the testimony of family members is given little weight). The State further argues that questions about the witnesses' credibility would explain trial counsel's decision not to investigate and call these witnesses. The State's credibility arguments are misplaced at this stage. Further, we have no record to determine that trial counsel's decisions not to interview and call these witnesses were based on credibility issues, particularly when we must accept as true that the witnesses were not interviewed by trial counsel.

¶ 47 In summary, based on the record before us and taking defendant's well-pleaded facts and accompanying affidavits as true, we hold that defendant has made a substantial showing of ineffective assistance of trial counsel based on the cumulative failure to investigate the testimony of witnesses Rachel Narbaiz, Diana Mercado, and Maritza Amaya and to introduce the receipt from Aguascalientes restaurant as substantive evidence.

¶ 48 For the foregoing reasons, we reverse the judgment of the circuit court which dismissed the postconviction petitions and remand for an evidentiary hearing.

¶ 49 Reversed and remanded.