2014 IL App (1st) 121328-U

FIFTH DIVISION
June 13, 2014

No. 1-12-1328

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. 03 CR 2749
	)	
JOHN MESKAUSKAS,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

ORDER

¶1 *Held*: Affirming the judgment of the circuit court of Cook County where defendant failed to make a substantial showing of a constitutional violation regarding his claims of ineffective assistance and failure by the State to disclose material evidence.

¶2 Defendant, John Meskauskas, appeals from the second-stage dismissal of his petition for relief pursuant to the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq*. (West 2000). On appeal, defendant argues that he made a substantial showing that he was deprived of the right to the effective assistance of counsel where his trial counsel failed to investigate and call certain witnesses, and that his due process rights were violated where the State failed to

disclose before trial a statement by one witness which was favorable to the defense.

¶3 I. BACKGROUND

¶4 Following a bench trial, defendant was convicted of first degree murder, home invasion, and aggravated discharge of a firearm. On direct appeal, this court affirmed defendant's convictions, disagreeing with his sole claim that the trial court erred in finding that he did not prove by a preponderance of the evidence that he acted in a sudden, intense passion resulting from a serious provocation which would have reduced his culpability to second degree murder. *People v Meskauskas*, No. 1-05-1682, (November 17, 2006) (unpublished order under Supreme Court Rule 23), *leave denied*, 224 Ill. 2d 587 (2007). This court's prior Rule 23 order provided a detailed statement of the trial evidence, and we set forth this evidence here to the extent necessary to resolve defendant's current appeal.

¶5 The trial evidence showed that in the early morning hours of January 5, 2003, defendant shot and killed the victim, Ronald Radovick, after a party at an apartment where the victim lived with David Howe (the victim's half-brother), Roy Radzus, and Jack Senodenos. Radzus and defendant were friends and former members of the Ambrose gang, while the victim was a former member of the Latin Kings gang. Defendant attended a party at their apartment on the evening of January 4, 2003, with his girlfriend and mother of his child, Dawn Booth.

¶6 According to the testimony of Radzus, Senodenos, Howe, and Booth, while playing cards with the victim and Senodenos, defendant began singing gang-related songs, made Ambrose gang gestures, and made comments regarding the two gangs. Booth testified that she asked Radzus to tell defendant to leave the party so no fights would occur. Radzus testified that he spoke with defendant twice in the bathroom and told him that there was no "gangbanging" allowed, but defendant responded that he hated the Latin Kings, that members had killed friends

of his, and that, "I killed a King before, I'll do it again." Radzus told defendant to leave.

¶7 Defendant continued to display gang signs and changed the words in a gang-related song that was playing on the radio to show disrespect to the Latin Kings gang, which upset the victim. Radzus again told defendant that he had to leave. Booth testified that Howe told defendant that he would "have ten mother f'ers at [their] door with a nine." Howe denied making this statement. Booth testified that she was crying and she felt outnumbered. Bryon Bauer (Radzus's cousin) tried to help Booth and defendant leave, and as he escorted them out of the apartment through the front door, defendant and the victim yelled at each other.

¶8 Once defendant got outside, the victim exited through the back door of the apartment and assaulted defendant, putting him in a headlock and punching him. Several people pulled the two away from each other, the police arrived, and defendant left in a car with Booth. Booth drove defendant to their apartment while Bauer followed them.

¶9 Booth testified that when they got to their apartment, defendant swore at her and broke a glass table with his head when she refused to give him the keys to the car. Defendant obtained the keys and left. According to Booth, after waiting between 20 minutes to one hour, she and Bauer drove to James Kall's residence, where she dropped off her daughter and picked up Kall, who was defendant's friend. Kall, Bauer, and Booth then drove to Radzus and the victim's apartment. She brought Kall because she "figured [defendant] would listen to him." Radzus testified that the three arrived at about 2 a.m., an hour after defendant and Booth had left, but Howe testified that it was only 30 minutes after they initially left. Booth apologized to the victim, who told her that everything was okay.

¶10 Approximately 15 to 45 minutes after Kall, Bauer, and Booth arrived, defendant began pounding and banging on the front door to the apartment. Radzus testified that Booth, Kall,

Bauer, Senodenos, and the victim went to the front door as defendant continued kicking or pounding on the door from the other side. Radzus indicated that Bauer and Booth told Kall to go out and calm defendant down and Kall tried to slip outside to talk to defendant. Radzus testified that the door was then kicked in; although Radzus did not actually observe defendant enter through the door, no one invited defendant inside. Radzus testified that Senodenos and the victim ran past him toward the east exit door of the apartment, which led to a stairway, and defendant was "right behind them." Radzus did not see anything in the victim's hand. Radzus tried to grab defendant's shirt, but "with [defendant's] left hand he raised the gun in front of my face and proceeded to pull the trigger." The victim was running toward the east door, and Radzus saw the victim get shot in the back and the victim then ran out the door. Radzus testified that defendant "[s]hoved me off and *** chase[d] them out through the family room out the east door." Radzus went upstairs for about five minutes. By the time he returned downstairs, the victim was lying on the floor in the family room, looking for bullet holes in his body.

¶11 According to Howe, he heard what sounded like a foot kicking the front door. Howe testified that Bauer went to the door first and then stated, "He has a gun."[1] Howe testified that everyone ran to the door to try to hold it shut, but the door "flew open," and Howe saw defendant "standing there with a black gun" in his right hand. Howe testified that no one opened the door for defendant or invited him inside. Howe testified that everyone "scattered" and ran. He did not see anything in the victim's hands. He saw everyone running toward the back of the apartment, away from defendant. Howe went upstairs; he heard two gunshots at first, then two more, and he heard about six gunshots in total. He called 911 and then returned downstairs, where he found the victim lying in the family room, bleeding.

¶12 According to Booth's testimony, she heard a "big noise," "like kicking" at the front door.

[1] Howe testified that the door had a peephole.

She stated, "[defendant], if it's you, I'm in here, you know, everything's okay." She testified that Kall went to the front door and she stayed in the living room. She observed the victim run into the kitchen and grab a knife from the sink as defendant was kicking the door. She testified that defendant then entered through the front door, but she did not see Kall touch the door handle and she did not know how defendant got in the apartment. She explained that as defendant was kicking the door, the victim walked towards the door with the knife, but she did not think the victim walked past her or ever came face to face with defendant. She did not hear the victim yell anything gang-related. Booth testified that defendant walked "[r]eal fast" past the television, and she saw a gun in his hand. She then heard gunshots. Defendant had already walked past her at the time she heard the gunshots. The victim was just between the living room and the dining room when defendant came through the door, but then the victim ran away from defendant toward the back of the apartment. Booth got down on the floor when she heard the gunshots.

¶13 Booth next remembered being outside and seeing defendant chase Senodenos and the victim around the apartment building; Senodenos was first, then the victim, and then defendant. She testified that the victim came around the corner and stated that he had been shot twice. She told him to go inside and she followed him in, where he fell down. She admitted that she did not want defendant to be in their daughter's life and she did not want him to get out of jail.

¶14 According to Senodenos's testimony, he also thought someone was kicking the front door when he heard the loud banging. He heard Booth say something. Senodenos told Kall that if he was "any kind of father figure to [defendant] you'd better go over there and talk to him," and Bauer and Kall went to the front door. Senodenos stayed in the living room and the victim was near him. Senodenos noticed that the victim held a kitchen knife in his hand. Senodenos testified that the only time he saw the knife in the victim's hand was before defendant entered the

apartment. He never saw the victim wield the knife in defendant's direction. Senodenos testified that Bauer was talking to defendant through the door, and he saw Bauer touch the doorknob. Senodenos looked at the victim, looked back to the door, and then saw that the door had been opened. He saw defendant on the other side of the partially open door, and defendant then pushed the door open. Senodenos testified that Bauer was holding the door and Kall was near it, although he acknowledged that he previously testified that Kall and Bauer both held the door.

¶15 Senodenos testified that he and the victim started running toward the east exit door by the family room. Senodenos explained that they ran from the living room, through the dining room and kitchen area, and to the family room, where the door was. The victim was behind Senodenos as they ran. Senodenos heard the victim state that defendant was "gaining on us." As Senodenos went to open the door, he turned and "saw a flash over my shoulder and a loud bang, *** [I] opened the door at that time [the victim] said, 'He hit me, I'm hit, I'm hit.' " They ran outside. Senodenos heard a second shot and saw the victim get hit and lean up against a car. He ran back to the victim and tried to help him run. As they continued to run, defendant fired a third shot. The victim again stated that he had been hit. Senodenos testified that he and the victim ran around the apartment complex 1 ½ times, with Senodenos's assistance, the closest defendant got was within 10 to 15 feet, and defendant held the gun while chasing them. Senodenos heard two more gunshots as they ran. The victim then reentered the apartment through the front door; he could barely breathe and was staggering, and Senodenos pushed him into the apartment.

¶16 Senodenos returned outside to get in his car and leave, but he saw defendant coming around the front of the apartment building. Senodenos put his hands up in the air and told defendant, "You don't want to do this, you don't want to do this." Defendant approached him with the gun and pointed it in his face, within a foot of him. Senodenos grabbed the barrel, and

defendant looked at him and said, "You're cool, you're cool, you didn't see a thing, you're cool." They pushed off of each other and defendant went across the street, still pointing the gun, and said, "You tell the cops you didn't fuckin' see a thing." Defendant ran off. Senodenos found the victim in the family room, bleeding, with two bullet holes in his back.

¶17 The defense presented the testimony of Faith Neswick, who testified that she attended the party at the apartment, she saw Booth and defendant try to leave, and Howe and the victim followed them. Neswick testified that Howe stated that he would send a large number of people to defendant's house to kill defendant, Booth, and their daughter. She was not at the party when defendant returned.

¶18 Defendant testified that during the card game, the victim insulted the Ambrose gang, promoted the Latin King gang, and made Latin King gang signs. Defendant denied making any Ambrose gang signs. Defendant testified that he (defendant) changed the lyrics of a song to insult the Latin King gang, and Howe stated that he would "have 50 motherf*** Kings at your door with a nine to kill you and your lady." Defendant testified that everyone playing cards ran at him and Booth, so they left the apartment. The victim came running from the back of the building and tackled and punched him several times. Senodenos and Howe also punched him.

¶19 Defendant testified that, back at his and Booth's apartment, they got into an argument and he left so she could cool off. When he returned 20 to 30 minutes later, no one was there. Booth and Bauer had discussed returning to the party to apologize to the victim; defendant was worried because Howe had just threatened her life and he knew that the victim had killed a girl before, so he got his loaded gun and went back to the victim's apartment to get Booth and his daughter. Defendant explained that he "need[ed] some protection" and if someone came at him, he "could pull [his] shirt up, show them the gun, and they'd just leave [him] alone."

¶20 Defendant testified that he knocked on the door of the apartment, and Booth screamed, "[defendant], I'm here. If that's [defendant], I'm here." Defendant responded, "Yeah, it's me. Open the door." He denied kicking the door or pushing his way into the apartment. The gun was in his waist at the time and not visible. Defendant testified that Bauer and Kall opened the door and he asked them about Booth and his daughter. He walked in and saw Booth near the fish tank in the living room, and Senodenos and the victim off to the side. Defendant walked toward Booth, but the victim screamed, "King love, motherf***." Defendant testified that he interpreted this as a "battle cry," and the victim was holding a 10-inch knife and pointing it at defendant. Defendant pulled out his gun when he saw the knife. The victim was three or four feet away and started to "kind of like walk towards [defendant]." Defendant testified that thought he was going to be stabbed or killed. Defendant testified:

> "[The victim] turned around. I shot. [The victim] ran up a couple of feet. *** [the victim] and [Senodenos] ran up a couple of feet. I walked towards him to chase him away from me. [Senodenos] turned around like he was coming back for [the victim,] and I shot again."

¶21 Defendant testified that he followed the victim and Senodenos, but they stopped after a couple of feet, and Senodenos turned around "like they were going to come back at me," so defendant fired the gun. He explained that the victim turned away when he saw the gun and defendant fired, but then the victim stopped again near the dining room. Defendant denied that he was trying to kill the victim. He testified that he "was trying to get [the victim] away from me." Defendant explained that "[e]verytime [the victim] would stop and [Senodenos] would turn around and I thought they were going to come back at me, I would fire." Defendant testified that he shot the gun because the victim "didn't get far enough away from me for me to feel safe

enough to feel like I wasn't threatened no more [*sic*]. Like I said, he stopped, he kept stopping like he was going to come back." Defendant testified that he thought if he turned his back on them, they "were going to turn around and get me, [*sic*] that he was going to stab me." After they went outside, the victim again stopped, and Senodenos "turned around like they were going to come back again, and I shot. And every time—as we were going around the building, every time [the victim] would stop and [Senodenos] would turn around, I would shoot at him again to get him away from me."

¶22 Defendant decided that they were not going to come after him once the victim went back inside. He did not realize that he shot the victim three times. Defendant testified that he went to his car and drove to a friend's house, and he was arrested later that same morning. He admitted that his testimony was different from what he told police because the police threatened to charge Booth and take his daughter away, so he made up a lie.

¶23 The parties stipulated that the victim was pronounced dead at the hospital on January 5, 2003, and that the bullets recovered from the victim's body were fired from the gun recovered from the same residence were defendant was subsequently found and arrested. The victim died of multiple gunshot wounds. The autopsy revealed three gunshot wounds: one to the posterior left shoulder, one to the posterior left arm, and one to the posterior right leg. There was no evidence of close-range firing.

¶24 Defense counsel argued in closing that the evidence showed that defendant was guilty of only second degree murder because he believed that he was justified in using deadly force, even if his belief was unreasonable, and/or there was a serious provocation by the victim. Counsel asserted that defendant was not guilty of home invasion because he was invited to the apartment, Kall and Bauer opened the door, and defendant did not use threats or force to enter.

¶25 The trial court made extensive findings of fact and, as stated, found defendant guilty of first degree murder, home invasion, and aggravated discharge of a firearm.

¶26 After the conclusion of defendant's direct appeal, defendant filed a *pro se* petition seeking relief under the Act on February 19, 2008. He filed a supplemental *pro se* petition on February 26, 2008, and a second supplemental petition was filed by counsel on May 28, 2010. Among the several issues raised in his postconviction petitions, and as is relevant to the instant appeal, defendant argued that he was deprived of the effective assistance of trial counsel because counsel failed to investigate or call as witnesses at trial Kall or Bauer, and that his due process rights were violated by the State's failure to disclose a statement made by Bauer on the day of trial that was favorable to the defense. Defendant asserted that this evidence would have shown that he returned to the apartment out of concern for his family, that the door was opened for defendant and he did not kick it in, and that defendant did not have the gun drawn when he entered the apartment, but removed it only after the victim ran toward him with a knife screaming, "King love motherf***." Defendant argued that this evidence would have affected the outcome of the trial because it contradicted the State's trial witnesses and it would have bolstered defendant's uncorroborated testimony.

¶27 Postconviction counsel attached affidavits from Bauer and Kall to the second supplemental petition. Kall averred that he went to Radzus's apartment with Booth and Bauer, where he spoke with the victim. When Kall asked the victim what happened earlier that evening between him and defendant, the victim told him that he "kicked [defendant's] a*** real good" because defendant was an "Ambro." Kall averred that he told the victim that he was there to calm things down in case defendant returned to the apartment, and the victim stated, "[i]f that bitch comes back, he'll regret it," and "[t]he [p]olice won't be here to save him this time." Kall

averred that a few minutes later, he heard pounding on the front door, and he and Bauer went to the door while the victim ran to the kitchen:

> "[Booth] screamed through the door that she was inside and everything was okay. I opened the door and [defendant] asked me where were his daughter and [Booth]. I said his daughter was at my house, then I opened the door further and said that [Booth] was right here. [Defendant] then entered the apartment, walked past me and toward [Booth]. At that time, I did not see a gun in [defendant's] hand. I then heard [the victim] scream: 'King love motherf***!' [Defendant] then pulled a gun from his waistline. [Bauer], who had been standing next to me, fell to the floor. I reached out to grab [defendant's] shoulder, but when I heard the first gunshot, I fell to the floor and covered myself."

¶28 Kall also averred that he was taken to the police station in handcuffs and he was not allowed to leave until he signed a statement that the police read to him, and he signed it in order to be allowed to go home. He averred that he told the police what happened that night consistent with his affidavit, but the police were not interested and wanted him to sign the statement they prepared. He averred that his police statement was not true.[2]

¶29 In Bauer's affidavit, Bauer averred that, at the party at Radzus's apartment, an argument broke out between defendant, the victim, Howe, and several others. Bauer left the apartment with defendant, but when they got outside, the victim and several other people "jumped on" defendant. Bauer helped free defendant and then accompanied him to defendant's apartment. Bauer averred that defendant and Booth argued and defendant left the apartment. Booth expressed fear that defendant would return to the party and suggested that they return to the victim's apartment. Booth and Bauer stopped at Kall's house along the way to drop off Booth's

[2] We note that defendant initially submitted a statement from Kall with his first *pro se* petition, which was dated November 8, 2007, but was not in proper affidavit form. In that statement, Kall indicated that Bauer opened the apartment door for defendant and Bauer told defendant where Booth and his daughter were.

daughter and pick up Kall. Sometime after they arrived at the victim's apartment, defendant "repeatedly banged on the apartment door." Bauer averred that he and Kall went to the door. Booth yelled that she was there and everything was okay, and defendant stated, "Then open the door." According to Bauer, the following transpired:

> "[Kall] opened the door and [defendant] asked: 'Where is [his daughter] and [Booth]?' [Kall] told him that [his daughter] was at his house and that [Booth] was right here. [Kall] then opened the door for [defendant] to enter the apartment. As [defendant] walked towards [Booth], I heard [the victim] scream: 'King love motherf***!' [The victim] held a knife and walked towards [defendant]. [Defendant] then reached under his coat and pulled a gun from his waistline. That was the first time I saw a gun. I immediately fell to the floor and covered my head." [3]

¶30 Bauer averred that his statements in the affidavit were the truth, and although they differed from the statement he made to the police, the police had threatened to charge him as an accomplice unless he went along with what they wanted him to say. Bauer averred that defendant did not "bust in" through the apartment door or have the gun in his hand when he entered. Bauer also averred that he was subpoenaed to testify at trial by the State, but on the day of trial:

> "prior to my taking the stand, I told a female assistant State's attorney what happened at the party. It is the same thing that I have stated in this affidavit. She then told me I probably would not have to testify. I was never called to testify at [defendant's] trial."

¶31 The State filed a motion to dismiss defendant's petitions on September 2, 2011, arguing that most of the claims were procedurally defaulted and that Kall's affidavit would not have

[3] Defendant initially submitted a statement from Bauer with his *pro se* supplemental petition, which was dated January 28, 2008, but it was not in proper affidavit form. In that statement, Bauer indicated that he was the one who opened the door for defendant.

changed the outcome given the overwhelming evidence at trial. Defendant filed a response to the State's motion.

¶32 Following oral arguments, the circuit court issued an order on May 4, 2012, granting the State's motion to dismiss. The court found that most of the claims were procedurally waived, but all of them were also without merit, and that defendant failed to make a substantial showing that his constitutional rights were violated.

¶33 On appeal from the circuit court's dismissal of his postconviction petitions, defendant raises two claims or error and asserts that the case should be remanded for a third-stage evidentiary hearing.

¶34 II. ANALYSIS

¶35 Pursuant to the Act, a criminal defendant may pursue a three-stage process to collaterally attack his convictions based on substantial violations of his constitutional rights. *People v. Boclair*, 202 Ill. 2d 89, 99–100 (2002). If a defendant's initial *pro se* petition withstands the first stage by making out the gist of a constitutional claim, the petition advances to the second stage of review, where the defendant receives the benefit of representation by counsel, who has the opportunity to amend the petition, and the State may respond to the petition or file a motion to dismiss. *Id.* at 100. "[A] motion to dismiss raises the sole issue of whether the petition being attacked is proper as a matter of law." *People v. Domagala*, 2013 IL 113688, ¶ 35 (quoting *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). "[T]he dismissal of a post-conviction petition is warranted only when the petition's allegations of fact—liberally construed in favor of the petitioner and in light of the original trial record—fail to make a substantial showing of imprisonment in violation of the state or federal constitution." *Coleman*, 183 Ill. 2d at 382. A defendant must support the allegations in the petition with either the record or accompanying

affidavits. *Id.* at 381. The court takes as true all well-pled factual allegations which are not positively rebutted by the record. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). However, the court does not resolve evidentiary questions, engage in fact-finding, or make credibility determinations at this stage. *Domagala*, 2013 IL 113688, ¶ 35 (quoting *Coleman*, 183 Ill. 2d at 385). Where the petition and any accompanying exhibits make out a substantial showing of a constitutional violation, the defendant is entitled to a third-stage evidentiary hearing. *Coleman*, 183 Ill. 2d at 381-82.

¶36 We review the circuit court's second-stage dismissal of a postconviction petition *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶37 A. Ineffective Assistance of Counsel

¶38 Defendant contends that he made a substantial showing that his counsel provided constitutionally defective representation in failing to investigate or call as witnesses Kall and Bauer, whom he argues would have supported his claim that he was allowed to enter the apartment and was therefore not guilty of home invasion, and that he was guilty of second degree murder because he drew his gun after the victim raised a knife at him and shouted a Latin Kings battle cry.

¶39 The State asserts defendant's trial counsel did not provide objectively unreasonable assistance and that Kall and Bauer's testimony would not have made a difference in the outcome of the trial. The State contends that evidence that defendant committed first degree murder was overwhelmingly established by the testimony of other witnesses, the proposed testimony would not have proven that he committed only second degree murder based on an unreasonable belief in the need for self-defense, and both proposed witnesses' testimony would be of questionable value given their inconsistencies.

¶40 To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011), citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome ***." *People v. Enis*, 194 Ill. 2d 361, 376-77 (2000). "There is a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance." *Id.* at 377. Defendant's failure to establish either defective representation or prejudice precludes a finding of ineffective assistance of counsel. *Id.*

¶41 Generally, whether to call a particular witness at trial is a strategic decision which, as a matter reserved to trial counsel's discretion, cannot support a claim of ineffective assistance of counsel. *People v. Richardson*, 189 Ill. 2d 401, 414 (2000). However, "counsel may be deemed ineffective for failure to present exculpatory evidence of which he or she is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense." *People v. Redmond*, 341 Ill. App. 3d 498, 516 (2003). Counsel must also conduct " 'reasonable investigations or *** make a reasonable decision that makes particular investigations unnecessary,' " which includes "the obligation to independently investigate any possible defenses." *People v. Domagala*, 2013 IL 113688, ¶ 38 (quoting *Strickland*, 466 U.S. at 691). " '[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' " *People v. Guest*, 166 Ill. 2d 381, 389, 400 (1995) (quoting *Strickland*, 466 U.S. at 691). "Whether the failure to investigate constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial."

People v. Harmon, 2013 IL App (2d) 120439, ¶ 26.

¶42 We note that, under the second prong of the second degree murder statute, and as it relates to defendant's contention on appeal, "[a] person commits second degree murder when he commits the offense of first degree murder and at the time of the killing he believes the circumstances to be such that, if they exist, would justify the use of deadly force under the principles of self-defense, but his belief is unreasonable." *People v. Luckett*, 339 Ill. App. 3d 93, 99 (2003) (citing 720 ILCS 5/9-2(a)(2) (West 2003)).[4]

¶43 Additionally, a person is guilty of home invasion " 'when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present' and he or she '[i]ntentionally causes any injury to any person or persons within such dwelling place.' " *People v. Taylor*, 318 Ill. App. 3d 464, 472 (2000) (quoting 720 ILCS 5/12-11-(a)(2) (West 1998)). However, where a defendant is invited by an occupant of a residence, he is authorized to enter, but this authorization is "limited and *** criminal actions exceed this limited authority." *People v. Bush*, 157 Ill. 2d 248, 253 (1993) (citing *People v. Peeples*, 155 Ill. 2d 422, 487 (1993). Where a defendant gains access by "trickery and deceit and with the intent to commit criminal acts, his entry is unauthorized ***." *Id.* at 254.

¶44 In a case involving circumstances similar to those here, *People v Guest*, the defendant asserted that his counsel failed to investigate and call as a witness someone who initially provided a statement to the police identifying the defendant as the gunman. *Guest*, 166 Ill. 2d at 389. During postconviction proceedings, the witness averred that he never made such a

[4] The other prong, which defendant raised at trial and on his direct appeal, provides that a person is guilty of second degree murder where he was acting "under a sudden and intense passion resulting from serious provocation." (720 ILCS 5/9-2(a)(1) (West 2003).

statement to the police, that someone else was the gunman, and that the defendant's counsel never contacted him. *Id.* at 399-400. Our supreme court held that trial counsel reasonably concluded that the proposed testimony was of questionable value, or possibly harmful to the defendant, given his acquaintance with the defendant and the fact that the witness's initial statement and identification of defendant in the police reports contradicted his postconviction affidavit, rendering the witness subject to "very damaging impeachment." *Id*. at 400. On that basis, the supreme court found that counsel reasonably declined to interview or call the witness at trial as a matter of sound trial strategy. *Id.* The court held that, even assuming deficient performance, the defendant had not established prejudice, given the witness's vulnerability to impeachment and the other substantial evidence against the defendant. *Id*. at 401. See also *People v. Marshall*, 375 Ill. App. 3d 670, 676-78 (2007) (finding no ineffective assistance where counsel did not interview a potential witness or present his testimony at the defendant's trial, but knew of its substance based on the witness's prior testimony at the witness's own trial, which contradicted the witness's later statement; thus, the value of the witness's testimony would have been undermined by the State through impeachment); *People v. Kubat*, 114 Ill. 2d 424, 433-34 (1986) (holding that counsel was not ineffective for failing to present the testimony of alibi witnesses where their credibility would have been subject to severe damage on cross-examination, and one witness was in a relationship with the defendant).

¶45 In the present case, considering the contradictory statements Kall and Bauer gave to the police after the shooting, it was reasonable for trial counsel to conclude that they would not have provided favorable testimony for defendant at the time of his trial, and to forgo further investigation and presentation of their testimony at trial. As in *Guest*, Bauer and Kall's testimony would have been subject to substantial impeachment in light of their earlier statements

to police which offered a different version of events than they averred to in postconviction proceedings, in addition to the fact that the evidence also indicated that they were defendant's friends. As noted in *Guest*, "based on the police reports, counsel could reasonably conclude that [their] testimony would probably be harmful to defendant." *Guest*, 166 Ill. 2d at 400. It was reasonable for trial counsel to forgo presenting testimony of these witnesses where they would have been vulnerable to damaging impeachment. *Id*. Considering that the value of their testimony would have been reduced by such impeachment, we cannot say that trial counsel's actions were objectively unreasonable.

¶46 Further, in addition to the impeachment based on their prior police statements, there were also contradictions between Kall and Bauer's affidavits and their statements attached to defendant's *pro se* petitions. Kall provided conflicting statements on the subject of who spoke to defendant and who opened the door for defendant. In his statement attached to defendant's initial *pro se* petition, Kall stated that Bauer spoke to defendant and opened the door. However, Kall averred in his affidavit attached to counsel's supplemental petition that he (Kall) was the one who spoke to defendant and opened the door. Similarly, Bauer initially stated in his statement attached to the *pro se* supplemental petition that he spoke to and opened the door for defendant, but then averred in his affidavit attached to the supplemental petition that Kall spoke to defendant and opened the door.

¶47 We also observe that neither Kall nor Bauer gave any indication in their affidavits whether defendant's trial counsel actually attempted to contact them and interview them. Defendant acknowledges in his brief on appeal that both men were listed as possible witnesses by both the State and defendant's trial counsel before trial. In fact, the record reveals that in addition to listing these two individuals, among others, as witnesses, defense counsel requested

discovery, received the police reports in this case, and deposed other witnesses as part of his investigation and preparation for trial. Therefore, the record supports that counsel at least knew of these two potential witnesses and otherwise actively investigated the case. Counsel's knowledge of the existence of these witnesses and his decision to list them as trial witnesses suggests, at least to some extent, that counsel had investigated such avenues of testimonial evidence, and ultimately decided against it.

¶48 Although defendant relies on *People v. Skinner*, 220 Ill. App. 3d 479 (1991), we find that case distinguishable from the present circumstances. In *Skinner*, the court found that trial counsel was ineffective for failing to call as witnesses the defendant's mother and stepfather, who would have corroborated the defendant's testimony that he did not live at the address where stolen property was found. *Id.* at 485. However, in contrast to the witnesses in this case, the potential witnesses in *Skinner* had not given contradictory statements that would have subjected them to impeachment by the State. Further, the court in *Skinner* reversed the defendant's convictions only upon finding that it was the combination of this error, in addition to trial counsel's failure to impeach the sole eyewitness against the defendant, that rose to the level of undermining the outcome of the proceedings. *Id.* at 485.

¶49 We also find that, regardless of whether counsel's performance was deficient, defendant has failed to establish a reasonable probability that he would have been convicted of second degree murder and acquitted of home invasion, had Bauer and Kall testified. As it relates to the murder charge, Kall's affidavit indicated that defendant pulled the gun out when the victim screamed, "King love motherf***," but the affidavit did not include anything about the victim possessing a knife, and therefore would not have supported defendant's testimony or theory of defense. Although Bauer's affidavit corroborated that the victim shouted a gang slur and walked

toward defendant with a knife, we do not believe Bauer's testimony would have changed the outcome of the trial viewed alongside the rest of the trial evidence. Although defendant expressed that he was afraid for the safety of Booth and his children, he did not call the police, but instead armed himself with a loaded gun and returned to the apartment, from where he was forcibly made to leave earlier. Additionally, more than one witness at trial testified that the victim obtained a knife as defendant was at the door, and Booth testified that the victim walked towards the door with the knife. Thus, the court was presented with this evidence. And by all accounts, the undisputed evidence indicated that defendant shot at the victim and Senodenos as they attempted to run away from him, defendant pursued them, and he shot the victim three times from behind. Defendant continued to pursue them and shoot at them, and chased them outside and around the apartment building. Defendant also threatened Senodenos after the victim went inside. Despite his claim of fearing for his life, defendant had sufficient criminal intent to demand, immediately after the shooting, that Senodenos tell the police that he saw nothing, while pointing the gun at his face.

¶50 With respect to the home invasion conviction, regardless of Kall and Bauer's proposed testimony that Kall or Bauer opened the door for defendant, the evidence nevertheless showed that defendant had bad intent when he entered. *Bush*, 157 Ill. 2d 253-54. It is undisputed that, at the party, defendant was affronted by insults to his gang, which he testified that he took personally. He was essentially forced to leave the apartment and beaten up by the victim. As stated, he then chose to arm himself with a loaded gun and return to the apartment. The proposed testimony of Kall and Bauer would not have contradicted the other testimony establishing that defendant repeatedly banged, pounded, or kicked the door, aggressively, which all trial witnesses testified to. In fact, their affidavits corroborated that he repeatedly pounded or

banged on the door. Neither Kall nor Bauer testified that anyone actually invited defendant inside. Further, according to testimony, defendant produced the gun and started shooting within moments of crossing the threshold into the apartment. Thus, even assuming the door was opened for him, defendant was not authorized to enter the apartment, as he did not have an innocent intent when he returned, and Kall and Bauer's affidavits fail to refute that evidence.

¶51 We conclude that defendant has not made a substantial showing that his constitutional right to the effective assistance of counsel was violated. *Coleman*, 183 Ill. 2d at 381-82.

¶52 2. Withheld Evidence

¶53 Defendant also contends on appeal that he made a substantial showing that the State committed a *Brady*[5] violation when it failed to disclose Bauer's statement made on the day of trial. Defendant argues that Bauer's statement constituted favorable, material evidence that supported his defense and did not contradict his own trial testimony. Defendant asserts that his allegations must be accepted as true for purposes of a motion to dismiss, his petition suggested that he was personally unaware of Bauer's statement, and the conflict between Bauer's affidavit and the State's case warrants a third-stage evidentiary hearing.

¶54 On the other hand, the State urges that this claim was properly dismissed because defendant failed to show that Bauer's statement was actually withheld from the defense and because defendant did not establish that the statement was material. The State asserts that defendant presented no evidence in his petitions or attached affidavits to substantiate that the prosecutor withheld this information. The State contends that it is inconsistent for defendant to claim that his counsel was ineffective for failing to call Bauer to testify, while also asserting that the State withheld Bauer's statement from defense counsel.

¶55 "A *Brady* claim requires a showing that: (1) the undisclosed evidence is favorable to the

[5] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either wilfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008). Evidence is considered material "where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *People v. Harris*, 2013 IL App (1st) 111351, ¶ 50. When assessing materiality, the court "does not consider the sufficiency of the evidence, but rather whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Id.* (quoting (quoting *People v. Harris*, 206 Ill. 2d 293, 311-12 (2002)).

¶56 We conclude that, regardless of whether the information about Bauer's pretrial statement was withheld, the statement was not material, *i.e.*, it did not give rise to a reasonable probability that the outcome of the trial would have been different. *Harris*, 2013 IL App (1st) 111351, ¶ 50. Similar to our discussion regarding Bauer's statement in the context of defendant's claim of ineffective assistance of counsel, we find that the statement did not put the entire case in such a different light that it undermined confidence in the verdict.

¶57 The trial testimony overwhelmingly showed that defendant was forced to leave the party, he returned to the apartment with a loaded gun after having engaged in a verbal and physical altercation with the victim, and that he shot the victim three times from behind while the victim attempted to run away from him. Despite the fact that Booth advised defendant that "everything was okay" before the door was opened, defendant produced the gun and started shooting at the victim within moments of entering the apartment. Considering Bauer's statement in the context of the trial evidence, it leaves uncontradicted the fact that, having engaged in a gang-related dispute and been beaten by the victim, defendant armed himself at home and returned to the

apartment with a loaded weapon, and then shot the victim three times in the back of his body while the victim was attempting to run away from him. In fact, according to defendant's own testimony, even though the victim pointed the knife at him and shouted, "King love motherf***," and started to "kind of like walk towards [defendant]," the victim had already turned around away from defendant when defendant fired the first shot. All three gunshots pierced the victim from behind. By his own admission, defendant continued pursuing and shooting at the victim in order to "chase him away from me" and to "get [the victim] away from me."

¶58 Additionally, Bauer's statement also offered evidence that was not favorable to defendant. Like other witnesses, Bauer averred that defendant "repeatedly banged" on the door upon his return to the apartment, instead of merely knocking. Although Bauer averred that he opened the door after defendant demanded that it be opened, Bauer did not state that defendant was actually invited inside by anyone. In addition, Bauer's statement that he and Booth returned to the victim's apartment because she was worried that defendant would go back there would have contradicted defendant's testimony that they all talked about returning to the apartment together to apologize to the victim and that he was concerned for Booth's safety.

¶59 We also note that, other than defendant's argument in his *pro se* supplemental petition that the State failed to disclose Bauer's pretrial statement, defendant never otherwise presented any evidence or allegations in his petitions or in the attached statements and affidavits to substantiate that the State actually withheld this information from the defense. As stated, defense counsel listed Bauer as a potential trial witness. While recognizing that, as defendant asserts, all well-pleaded facts are to be taken as true and no fact-finding is permitted during second-stage postconviction proceedings, we are also mindful that "[n]onfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act."

Coleman, 183 Ill. 2d at 380-81. As previously set forth, a third-stage evidentiary hearing is warranted only if the defendant makes a substantial showing of a constitutional violation and "the petition is supported by 'affidavits, records, or other evidence' or explains 'why the same are not attached' (Ill. Rev. Stat. 1987, ch. 38, par. 122-2)." *People v. Johnson*, 154 Ill. 2d 227, 239-40 (1993). Where such evidentiary support is lacking, the petition is "generally dismissed without an evidentiary hearing unless the petitioner's allegations stand uncontradicted and are clearly supported by the record. ([Citation.]) In fact, our courts have specifically held that the absence of affidavits, records or other evidence in support of the post-conviction petition renders the petition insufficient to require an evidentiary hearing." *Id.* at 240.

¶60 We conclude that defendant has failed to make a substantial showing of a constitutional violation regarding his *Brady* claim. Accordingly, the circuit court properly granted the State's motion to dismiss defendant's postconviction petitions.

¶61 CONCLUSION

¶62 For the reasons stated above, we affirm the circuit court's dismissal of defendant's postconviction petitions.

¶63 Affirmed.