

2014 IL App (1st) 122184-U

No. 1-12-2184

Fifth Division
December 31, 2014

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 07 CR 8871
)	
DEON ROSS,)	The Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's *pro se* postconviction petition at the first stage where defendant's claims of ineffective assistance of counsel lacked merit.

¶ 2 Following a bench trial, defendant Deon Ross was convicted of attempted first-degree murder, armed robbery, aggravated battery with a firearm, and two counts of aggravated battery. After hearing factors in aggravation and mitigation, the trial court merged the

aggravated battery with a firearm and the two aggravated battery convictions into the attempted first-degree murder conviction and sentenced defendant to consecutive terms of 6 and 14 years in the Illinois Department of Corrections (IDOC) for the attempted first-degree murder and armed robbery, respectively. On direct appeal, defendant argued that the testimony of the victim, Jason Smith, was unreliable and that the State did not prove that defendant actually took property from the victim beyond a reasonable doubt. We found that the State's evidence was sufficient and affirmed defendant's conviction and sentence. *People v. Ross*, 2011 IL App (1st) 091531-U, ¶ 22.

¶ 3 Defendant later filed a *pro se* postconviction petition, arguing: (1) that his trial counsel was ineffective for failing to investigate and call James Manuel (also known as Mickey Miller) to testify at trial; and (2) that his appellate counsel provided ineffective assistance since appellate counsel did not argue on direct appeal that defendant's trial counsel was ineffective for failing to object to hearsay testimony. Defendant supported his postconviction petition with an affidavit from Manuel, in which Manuel averred that he met with defendant, an unidentified female, and a man named Bryant Neal on the day of the crime, but that they never planned to rob Smith and instead Neal sold Smith a pound of marijuana at Smith's apartment. The trial court dismissed defendant's postconviction petition at the first stage, and defendant appeals. For the following reasons, we affirm the dismissal of defendant's postconviction petition.

¶ 4

BACKGROUND

¶ 5

I. Pretrial Proceedings

¶ 6

Prior to trial, on August 28, 2008, the trial court granted defense counsel a continuance so that she could locate and interview witnesses. At the next proceeding, on September 24, 2008, the trial court continued the case again so that defense counsel could complete her investigation. On October 22, 2008, defense counsel advised the trial court that she was still attempting to locate several occurrence witnesses, and the case was again continued.

¶ 7

On November 13, 2008, defendant's counsel advised the trial court that she was "actively looking for a witness"¹ but she had not been able to "sit down and talk with him yet" because he never showed up at an agreed time and place to meet with her. Defense counsel also stated that it was difficult to contact the witness because he was calling her from another person's cellular telephone. The trial court continued the case so that defense counsel could locate the witness.

¶ 8

At the next proceeding on December 19, 2008, defense counsel advised the trial court that she had been "out on the street three times" and that her investigator was still trying to locate two witnesses:

"DEFENSE COUNSEL: We have been to the house many times and we just can't reach the person. One person I cannot – they have moved. I mean, that person I've talked to the phone one time [*sic*]. I've made an appointment. They didn't show up, and I haven't been able to find them.

¹ Defense counsel never identified the witness by name.

And I mean, I'm trying not to delay things, but I really am trying very hard to—

THE COURT: Well, we're having the same conversation over and over. These people are avoiding you. They don't want to be interviewed. I don't know, I don't know how you are—

DEFENSE COUNSEL: Well, I have made progress, and we're down to two people left. Two people.

THE COURT: Occurrence witnesses?

DEFENSE COUNSEL: One is an occurrence witness.

THE COURT: What's the other?

DEFENSE COUNSEL: One is tangentially an occurrence witness.

* * *

THE COURT: I'm not continuing this indefinitely. You are having the same conversation with me for about half a year.

DEFENSE COUNSEL: I have made progress in half a year.

THE COURT: *** I can't give you this infinite amount of time. It starts to prejudice the other side. They're going to lose witnesses that they have because you're searching for people that are less than cooperative. Doesn't give you much confidence they're going to show up or help you anyway."

¶ 9 On January 14, 2009, the last status hearing held before trial, defense counsel advised the court that she was still unable to locate witnesses:

"DEFENSE COUNSEL: *** I would ask for one last status date, though.

THE COURT: To do what, ***?

DEFENSE COUNSEL: I have found more people since I was here last. I told you I would and I did. But I still have two people that I would like to talk to prior to trial. If I have a status date—

THE COURT: Well, we've had this conversation and you were having trouble finding these people.

* * *

THE COURT: Tell me where you're at with locating these people. We have had this conversation. We have been talking about this for about half a year."

Defense counsel then explained that one witness was currently in the hospital, but she could not locate the other. The trial court stated that it would not grant the defense any more continuances to locate the witness and it set the case to begin trial on March 13, 2009.

¶ 10 II. Trial

¶ 11 The State charged defendant with first-degree murder of Bryant Neal, attempted first-degree murder of Jason Smith, armed robbery, aggravated battery with a firearm, and two

counts of aggravated battery. The State's evidence consisted of five main witnesses: (1) Jason Smith, the victim; (2) Alexis Joy, Smith's girlfriend who lived with him; (3) Yvette Jarvis, defendant's girlfriend who drove him away from the crime scene; (4) Susan Wolverton, a forensic examiner with the Chicago police department; and (5) Dr. Ponni Arunkumar, a medical examiner who performed an autopsy on Neal. Defendant exercised his right not to testify or call witnesses at trial.

¶ 12

A. Jason Smith's Testimony

¶ 13

At trial, Jason Smith testified that he was a carpenter and that he also sold marijuana to supplement his income. Smith acknowledged that he had a prior conviction for delivery of cannabis and that he also kept some marijuana at home for his own "personal use." Smith lived near 82nd Street and Eberhart Avenue with his girlfriend, Alexis Joy, and their two children. On February 15, 2007, Smith was at home with his 15-month-old son, and at 3:40 p.m., he walked outside to warm up his vehicle before picking up his older son at school. After running the engine for a few minutes, Smith walked back to his apartment. As he returned to the doorway, two men whom Smith did not know approached him and hit him in the head with a gun,² and he fell into a chair near the door. The two men were not wearing any disguises and Smith could see their faces "as clear as day." Smith identified defendant in court as one of the assailants, and he identified the other through a photograph as Bryant Neal, who is now deceased.

² Smith did not indicate whether it was defendant or Neal who hit him with the gun.

¶ 14 Smith testified that defendant and Neal struck Smith a couple more times and then walked Smith through his apartment, "like a dog." As they walked through the apartment, Smith pleaded for his son's life and gave defendant and Neal "everything [he] owned," including \$6,000 or \$7,000 in cash. Smith explained that he had this amount of cash at home because he had just received his tax refund and that he kept the money in several locations throughout the apartment, including in his pockets, in the bedroom dresser, and on top of the refrigerator. At one point, Neal forced Smith to kneel and Neal demanded that Smith remove his earrings. Smith handed Neal his earrings but Smith did not observe where Neal placed the earrings after he received them. Smith also observed Neal take a one-pound bag of marijuana, which Smith had purchased the day before, out of Smith's bedroom.

¶ 15 Smith testified that defendant stayed in the kitchen while Neal forced him into the bedroom at gunpoint. Neal searched the room, knocking items off shelves, including a box that contained Smith's loaded handgun. Smith then heard defendant yell from the kitchen, "He think we playing. Grab the baby." Neal grabbed Smith's infant son, cocked his gun back, and pointed it at the child's head. Smith testified that at the time, he was on his knees, near the box containing his gun. As Smith jumped toward the box and grabbed his gun, Neal shot him in the mouth. As Neal continued shooting, Smith fired three shots back at Neal, killing him.

¶ 16 Smith testified that, after shooting Neal, he observed defendant in the hallway and he chased after defendant with his gun. Smith caught up to defendant and they "tussled" in the doorway and down the stairs outside the apartment. At one point, Smith dropped his gun and

defendant picked it up and hit him with it. Smith later ran back into his apartment and found his son lying under Neal's body.

¶ 17 Smith testified that he then attempted to call the police but he was unable to place a call because the telephone line in the apartment had been pulled out, so he instead went to a neighbor's residence to call for help. The police arrived shortly afterwards, and Smith was transported to the hospital, where he realized he had been shot not only in the mouth, but also in his hand, buttocks, and both legs. While at the hospital, Chicago Police detectives Dan Stover and Tim Murphy interviewed Smith, who told them that money and earrings were taken from him; that defendant had yelled, "point the gun at the baby"; that he struggled with defendant in the outside stairwell; and that defendant grabbed Smith's gun and hit him in the head with it.

¶ 18 On cross-examination, Smith testified that he kept between \$6,000 and \$7,000 in cash in the apartment because both he and Alexis Joy, his live-in girlfriend, recently received their tax refunds. He explained that Joy had deposited her tax refund at the bank but later withdrew the money to buy furniture for the apartment. At the time of the incident, Smith kept money in his pocket, on top of the refrigerator, and in his top dresser drawer, while Joy's money was in a drawer in her dresser. During the crime, Smith observed Neal "stick" money in his pockets while Smith was on his knees in the bedroom, and when Smith removed his earrings at Neal's demand, Neal snatched them from him; however, Smith did not know what Neal did with the earrings and they were never recovered. Smith also testified that his gun was a gift from a family friend known as "J-Mow," and he explained that he kept a loaded

gun in the apartment for protection since his vehicle had been broken into a couple of days before the incident.

¶ 19 B. Alexis Joy's Testimony

¶ 20 Alexis Joy testified that on February 15, 2007, she lived with her boyfriend, Jason Smith, who was nicknamed "J-Mow."³ At 4 p.m., the police called Joy at work to inform her that Smith had been shot and that she needed to pick up her son. When Joy arrived at the apartment at 5 p.m., she did not observe that anything was missing.

¶ 21 On cross-examination, Joy testified that she received a \$4,000 income tax refund that year, which was directly deposited into her bank account, and that she used the money to purchase a vehicle. Joy also testified that she did not keep large amounts of cash in the apartment, but she did not know if Smith did so, or if he had even received his tax refund before the incident, and that she never observed Smith with a gun in the apartment.

¶ 22 C. Yvette Jarvis's Testimony

¶ 23 Yvette Jarvis testified that she was defendant's girlfriend at the time of the incident. Jarvis pled guilty to armed robbery and home invasion prior to trial, and she was expecting the State to recommend a sentence of 10 years in the IDOC.⁴ Jarvis believed she would receive a reduced sentence if she testified truthfully in the case at bar.

³ As stated, Smith testified that his gun was a gift from a family friend named "J-Mow." Smith did not testify whether he goes by the same nickname.

⁴ Jarvis did not testify whether her armed robbery and home invasion convictions are related to the case at bar.

¶ 24 Jarvis testified that, on the morning of February 15, 2007, Jarvis, defendant, and Neal were driving near the 7700 block of Colfax Avenue when they encountered Mickey Miller, an acquaintance and former classmate of Jarvis'. As defendant, Neal, and Miller talked, Jarvis overheard them plan to rob Smith, and Miller told them that Smith kept drugs and \$10,000 or \$11,000 in cash at his apartment. Jarvis specifically heard Miller say, "[Smith] was sweet and had a lot of money." Defendant then drove Neal, Jarvis, and Miller to the 8200 block of Eberhart Avenue so that Miller could point out where Smith lived, and afterwards, defendant drove them back to 77th Street and dropped off Miller.

¶ 25 Jarvis testified that, between 3:30 and 4 p.m., defendant drove Neal back to the 8200 block of Eberhart Avenue and parked the vehicle a block away from Smith's apartment. Jarvis observed Neal place a gun in his pocket as he exited the vehicle. Jarvis remained in the vehicle and moved to the driver's seat and waited while defendant and Neal walked to Smith's apartment.

¶ 26 Jarvis testified that defendant later returned to the vehicle and she observed blood on defendant's clothes. Defendant was gagging and vomiting, and he had difficulty speaking. Defendant entered the vehicle and Jarvis drove around the block looking for Neal, but defendant did not tell her what had just occurred inside Smith's apartment.

¶ 27 Jarvis testified that she then drove defendant to his mother's house, where he told his mother, Jeannyne Galloway, that Neal had been shot and defendant asked her to go out and find him. Jarvis and Galloway agreed to search for Neal, so they returned to 8200 block of Eberhart Avenue, where they observed multiple police vehicles. Near the crime scene, a

neighborhood boy who Jarvis did not know told her that someone in the house did not survive. Jarvis and Galloway then drove to the hospital, where they learned that Neal had died from his injuries. Detectives Stover and Murphy encountered Jarvis at the hospital, but she left when the detectives asked to interview her. Jarvis and Galloway returned to the Galloway's house, where defendant had since changed clothes and cleaned up. Defendant and Jarvis then left Galloway's house to stay with a friend in Indiana.

¶ 28 On cross-examination, Jarvis testified that defendant and Neal never used the word "robbery," and that they never discussed weapons before they drove to Smith's apartment. She also testified that defendant did not bring back money or drugs when he returned to the vehicle after the incident.

¶ 29 D. Forensic Investigator Susan Wolverton's Testimony

¶ 30 Susan Wolverton testified that she is a forensic investigator for the Chicago police department. On the evening of February 15, 2007, Wolverton processed the crime scene at Smith's apartment. There, she observed a revolver outside of the building's walkway and a bag of marijuana underneath the apartment stairs on the ground floor. Inside the apartment, Wolverton observed blood on the front door, the walls, and the floor. Wolverton recovered bullets and shell casings in Smith's bedroom and in the hallway.

¶ 31 E. Dr. Ponni Arunkumar's Testimony

¶ 32 Dr. Ponni Arunkumar testified that she is a medical examiner and that she performed Neal's autopsy, which revealed that Neal had gunshot wounds in the abdomen and in the leg. Dr. Arunkumar opined that the cause of Neal's death was a result of a gunshot wound that

damaged major arteries that led to massive blood loss, and that the manner of Neal's death was a homicide. Dr. Arunkumar never recovered earrings or money from Neal's body.

¶ 33 After these witnesses testified, the State rested. Defendant exercised his right not to testify or call any witnesses at trial.

¶ 34 F. Stipulated Evidence

¶ 35 The trial proceeded by way of stipulation. The parties stipulated that, if called, Chicago Police officers P. Ortiz and T. Pope⁵ would have testified that they interviewed Smith, who told them that he and Neal tussled after Neal pointed his gun at Smith's son; that the tussling caused the gun to fire; that he fired several shots at Neal; that he tossed his gun out of the apartment; and that defendant fled the scene on foot. The parties also stipulated that, if called, Detectives Stover and Murphy would testify that Smith never told them that defendant hit him on the head with a gun while on the stairs, or that defendant yelled from the kitchen, "point the gun at the baby."

¶ 36 G. Closing, Conviction, and Sentence

¶ 37 At closing argument, the defense argued that Smith was an unreliable witness because his testimony was inconsistent and impeached, and that he was a felon in possession of a firearm. The defense also argued that, since the police never recovered any of Smith's money or property in defendant's possession, the State did not prove robbery because there was no evidence that defendant had taken anything. The State responded that it proved that all the

⁵ The officers' first names do not appear in the appellate record.

elements of armed robbery beyond a reasonable doubt, and that defendant's actions resulted in Smith's injuries.

¶ 38 The trial court stated in its decision that Smith, who admitted to selling marijuana and possessing a gun as a felon, "carried baggage in this case," and that Smith's testimony raised many questions, such as how much money Smith kept in his apartment and how he obtained his gun. However, despite the inconsistencies in Smith's testimony, the trial court found that the State presented sufficient evidence that a robbery actually occurred. As a result, the trial court found defendant guilty of armed robbery, aggravated battery, aggravated battery with a firearm, and attempted first-degree murder, but acquitted defendant of the first-degree murder charge. The trial court then denied defendant's posttrial motion for a new trial.

¶ 39 At sentencing, after considering factors in aggravation and mitigation, the trial court merged the aggravated battery with a firearm and two aggravated battery convictions into the attempted first-degree murder conviction and sentenced defendant on May 11, 2009, to 6 years in the IDOC for attempted first-degree murder and 14 years for armed robbery, to be served consecutively. The trial court denied defendant's motion to reconsider, and defendant appealed.

¶ 40 III. Direct Appeal

¶ 41 On direct appeal, defendant argued that the victim's testimony was insufficient to prove him guilty of armed robbery beyond a reasonable doubt, and that he should have been charged with attempted armed robbery instead because the State failed to prove that he actually took Smith's property. *Ross*, 2011 IL App (1st) 091531-U, ¶ 17. Defendant did not

challenge his conviction of attempted first-degree murder on direct appeal. We affirmed defendant's conviction and sentence, finding that the evidence was not "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to defendant's guilt. *Ross*, 2011 IL App (1st) 091531-U, ¶ 22. We noted that the trial court is the factfinder in this case, and is responsible for determining the credibility of the witnesses in this case, and that the trial court addressed the flaws and imperfections of Smith's testimony. *Ross*, 2011 IL App (1st) 091531-U, ¶ 21. Despite defendant's claim that the evidence did not prove that he took property from Smith, we found that the trial court reasonably accepted Smith's testimony that defendant took his money and earrings, and as a result, the State's evidence was sufficient to convict defendant of armed robbery beyond a reasonable doubt. *Ross*, 2011 IL App (1st) 091531-U, ¶ 22.

¶ 42

IV. Postconviction Petition

¶ 43

On May 31, 2012, defendant filed a *pro se* postconviction petition in which he argued that he was denied effective assistance of counsel because his attorney failed to conduct a pretrial investigation to locate and interview a potential witness named James Manuel. Defendant supported his petition with an affidavit from Manuel, in which Manuel stated that goes by the alias "Mickey Miller" and that he rarely tells anyone his real name or address. Manuel also stated in his affidavit that he never talked about potentially robbing Smith when he met with defendant, Neal, and Jarvis on the morning of February 15, 2007, and that the reason that defendant later drove him, Neal, and Jarvis to Smith's apartment was so that Neal could sell Smith a pound of marijuana. Defendant argued that Manuel's testimony would

have undermined the State's case that defendant intended to rob or attempt to murder Smith, and that there is a reasonable likelihood that defendant would have been acquitted had Manuel testified.

¶ 44 Additionally, defendant argued that he was denied effective assistance of counsel because his appellate counsel did not raise his trial counsel's ineffectiveness for failing to object to inadmissible hearsay testimony, and that there is a reasonable probability that defendant would have been acquitted if his trial counsel had objected to the testimony.

¶ 45 The trial court dismissed defendant's postconviction petition on June 7, 2012, and defendant appealed.

¶ 46 ANALYSIS

¶ 47 On appeal, defendant argues that the trial court erred when it dismissed his *pro se* postconviction petition and that his petition should be remanded for second-stage proceedings because he presented the gist of a constitutional claim. In his postconviction petition, defendant argues: (1) that his trial counsel provided ineffective assistance of counsel because she did not investigate or call James Manuel, a key witness, to testify at trial; and (2) that his appellate counsel was ineffective for failing to argue on direct appeal that defendant's trial counsel was ineffective for failing to object to hearsay testimony at trial. For the following reasons, we affirm the trial court's dismissal of defendant's postconviction petition.

¶ 48 I. Standard of Review

¶ 49 When we review a trial court's dismissal of a postconviction petition without an evidentiary hearing, we apply a *de novo* standard of review. *People v. Suarez*, 224 Ill. 2d 37,

42 (2007); *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 50

II. The Post-Conviction Hearing Act

¶ 51

The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides that a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). In a postconviction proceeding, a petitioner is not entitled to an evidentiary hearing as a matter of right. *People v. Simms*, 192 Ill. 2d 348, 359 (2000). To be entitled to postconviction relief, a defendant bears the burden of showing that he or she suffered a substantial deprivation of his or her federal or state constitutional rights in the proceedings. 725 ILCS 5/122-1(a) (West 2012); *Pendleton*, 223 Ill. 2d at 471 (citing *Whitfield*, 217 Ill. 2d at 183); *People v. Evans*, 186 Ill. 2d 83, 89 (1999); *People v. Lacy*, 407 Ill. App. 3d 442, 455 (2010).

¶ 52

In noncapital cases, the Act provides a three-stage process for adjudicating a petition for postconviction relief. 725 ILCS 5/122-1 *et seq.* (West 2012); *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the trial court examines the petition independently and without any further pleadings from the defendant or any motions or responsive pleadings from the State. *People v. Brown*, 236 Ill. 2d 175, 184 (2010) (citing *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). The allegations in the petition, taken as true and liberally construed, need to present the " 'gist of a constitutional claim.' " *People v. Delton*, 227 Ill. 2d 247, 254 (2008) (quoting

Gaultney, 174 Ill. 2d at 418); *People v. Porter*, 122 Ill. 2d 64, 74 (1988) (in order to avoid dismissal, defendant need only present the "gist" of a constitutional claim that would provide relief under the Act). This "gist" standard is a low threshold, which requires the defendant to present only a limited amount of detail, not the claim in its entirety or legal argument or citation to legal authority. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009) "Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low." *Hodges*, 234 Ill. 2d at 9.

¶ 53 In considering the petition at the first stage, the trial court may examine "the trial record, the court file of the proceeding in which the defendant was convicted, any action taken by an appellate court in such a proceeding, any transcripts of such proceedings, and affidavits or records attached to the petition." *People v. Diehl*, 335 Ill. App. 3d 693, 700 (2002) (citing 725 ILCS 5/122-2.1(c) (West 2012)). The trial court may summarily dismiss the petition if the allegations in the petition are positively rebutted by the record. See *Coleman*, 183 Ill. 2d at 381-82 ("this court has consistently upheld the dismissal of a post-conviction petition when the allegations are contradicted by the record from the original trial proceedings" (citing *People v. Gaines*, 105 Ill. 2d 79, 91-92 (1984), and *People v. Arbuckle*, 42 Ill. 2d 177, 182 (1969))); see, e.g., *People v. Williams*, 364 Ill. App. 3d 1017, 1025 (2006) (concluding that defendant failed to state the gist of a constitutional claim that he was unfit to plead guilty when the record "clearly show[ed] that defendant understood the nature and purpose of the proceedings," informed the trial court that he understood the charges against him, did not

exhibit "irrational" behavior in court, and actively participated in the proceedings and conferred with trial counsel).

¶ 54 III. Ineffective Assistance of Counsel

¶ 55 Defendant claims that the trial court erred when it dismissed his *pro se* postconviction petition as frivolous and patently without merit. Specifically, defendant argues that he presented the gist of a constitutional claim that: (1) his trial counsel was ineffective for failing to investigate and present the testimony of James Manuel at trial; and (2) his appellate counsel was ineffective since counsel did not argue on appeal that defendant's trial counsel was ineffective for failing to object to hearsay testimony at trial.

¶ 56 A defendant has a sixth amendment right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. To determine whether a defendant was denied his or her right to effective assistance of counsel, a reviewing court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *People v. Albanese*, 104 Ill. 2d 504, 525-526 (1984).

¶ 57 Under *Strickland*, a defendant must prove both that: (1) his or her attorney's actions or inactions constituted error(s) so serious as to fall below an objective standard of reasonableness "under prevailing professional norms" (*People v. Colon*, 225 Ill. 2d 125, 135 (2007); *Evans*, 209 Ill. 2d at 220); and (2) defense counsel's deficient performance prejudiced the defendant. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland*, 466 U.S. at 687-88). "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an

objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. The failure to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 58 IV. Claim of Ineffective Assistance for Failing to Call James Manuel to Testify

¶ 59 In his *pro se* postconviction petition, defendant first claims that his trial counsel provided ineffective assistance because she did not interview James Manuel, a known alibi witness, to testify at trial. Defendant argues that his trial counsel's performance fell below an objective standard of reasonableness because she did not "investigate the alternative defense that could have been supported by [Manuel's] testimony." In support, defendant argues that he provided Manuel's phone number to defense counsel and she later "informed the trial court that she was attempting to interview an occurrence witness *** and admitted to the trial court that she never interviewed [that] witness." Defendant concludes that defense counsel "could not have made a strategic decision to reject [Manuel's] testimony, which would have dissolved [defendant] of criminal responsibility, if counsel never bothered to hear it in the first place." Defendant attached to his petition an affidavit from James Manuel, in which he averred that he uses the alias "Mickey Miller" and rarely tells anyone his real name or address because he "trust[s] very few people in general," and that no one contacted him concerning this case until May 17, 2012. Manuel also stated in his affidavit that he met with defendant, Neal, and an unidentified female from 2:30 p.m. to 3:40 p.m. on February 15, 2007, and that they drove to 82nd Street and Eberhart so that Neal could sell a pound of marijuana to a man named "J-

Mow," who told Neal that he would pay Neal if he returned in 20 minutes. Manuel averred that neither he, defendant, Neal, nor the female discussed plans to commit a robbery that day.

¶ 60 In response, the State argues that defense counsel's performance did not fall below an objective standard of reasonableness because she attempted over several months to meet with several witnesses with no success. The State also argues that, even if defense counsel's performance fell below an objective standard of reasonableness, her performance did not prejudice defendant because Manuel's testimony would have not changed the outcome at trial.

¶ 61 Defense counsel did not provide ineffective assistance since the appellate record shows that she diligently attempted to locate and interview witnesses over the course of several months but was ultimately unsuccessful. Defense counsel obtained at least five continuances while searching for occurrence witnesses over the course of several months, beginning on August 28, 2008. At the next proceeding, on September 24, 2008, defense counsel obtained an additional continuance to complete her investigation, and on October 22, 2008, she advised the trial court that she was still attempting to locate several occurrence witnesses. On November 13, 2008, defendant's counsel advised the trial court that she was "actively looking for a witness," whom she did not name, but that she was unable to "sit down and talk with him yet" because he never showed up at an arranged meeting. Defense counsel also stated that it was difficult to contact the witness since he was calling her from another person's cellular telephone. At the next proceeding on December 19, 2008, defense counsel advised the trial court that she had been "out on the street three times" and that her investigator was

still trying to locate two witnesses. When defense counsel explained her difficulty locating the witnesses after one witness did not show up for an appointment and then moved, the trial court responded, "These people are avoiding you. They don't want to be interviewed," and advised counsel that it would not continue the case "indefinitely" since she had been searching for "less than cooperative" witnesses for the past six months. On January 14, 2009, the last status hearing before trial, defense counsel explained that she was still attempting to interview two witnesses – one witness was currently in the hospital, but she could not locate the other. The trial court then stated that it would not grant the defense any further continuances to locate the witnesses since she had been trying for "half a year," and the trial court set the case for trial.

¶ 62 Although defense counsel never stated the names of the witnesses she was trying to locate, defendant claims that the appellate record supports his argument that his counsel acted unreasonably since she admitted to the trial court that she never interviewed a witness. However, the record shows that counsel tried repeatedly for several months to search for witnesses who were either uncooperative or difficult to locate. Defense counsel advised the trial court that at least one witness missed an appointment and that, although she had been to homes looking for witnesses, making phone calls, and working with an investigator, she was still unable to locate at least one witness. A defendant is entitled to reasonable, not perfect, representation. *People v. Fuller*, 205 Ill. 2d 308, 330 (2002). Even if defense counsel never actually interviewed Manuel, her representation did not fall below an objective standard of

reasonableness since the appellate record shows that she diligently attempted to locate witnesses.

¶ 63 Furthermore, regardless of whether defense counsel actually interviewed Manuel, her decision not to call Manuel to testify is a matter of trial strategy. "Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel," and "[a]s matters of trial strategy, such decisions are generally immune from claims of ineffective assistance of counsel." *People v. Reid*, 179 Ill. 2d 297, 310 (1997). "The only exception to this rule is when counsel's chosen trial strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing." *Reid*, 179 Ill. 2d at 310. "In recognition of the variety of factors that go into any determination of trial strategy, *** claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review." *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002) (citing *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), and *Strickland*, 466 U.S. at 689). Thus, "mistakes in trial strategy or tactics or in judgment do not of themselves render the representation incompetent." (Internal quotation marks omitted.) *People v. Hillenbrand*, 121 Ill. 2d 537, 548 (1988).

¶ 64 Here, defense counsel's strategy was sound since she did not "fail to conduct any meaningful adversarial testing." *Reid*, 179 Ill. 2d at 310. Although the defense did not call witnesses or present evidence, defense counsel advocated that the State did not meet its burden of proof to convict defendant beyond a reasonable doubt. Defense counsel cross-

examined the State's witnesses and impeached Smith and Jarvis, and counsel argued at closing argument that testimony from the State's witnesses was contradictory and unreliable and that the State did not prove its case beyond a reasonable doubt. If called to testify, Manuel would have corroborated some crucial aspects of Smith's and Jarvis' testimony by testifying that defendant did in fact meet with Neal, Jarvis, and Manuel on the day of the crime, and that defendant drove to Smith's apartment just before the crime occurred. Manuel's testimony placing defendant at scene of the crime, as well as at the meeting where the crime was planned, may have hurt defendant's case even if Manuel would have testified that defendant never planned a robbery. Even if defense counsel knew Manuel's testimony and had him available, defense counsel's strategy not to call Manuel to testify could have been a reasonable trial strategy and as a result, she did not provide ineffective assistance of counsel.

¶ 65 Also, even if trial counsel's performance was objectively unreasonable, she did not provide ineffective assistance of counsel because defendant was not prejudiced by the exclusion of Manuel's testimony. Defendant argues that, had Manuel testified that he did not discuss a robbery with defendant and Neal and that defendant merely accompanied him and Neal to Smith's apartment so that Neal could purchase marijuana, the trial court would have acquitted defendant, finding that he did not intend to rob Smith based on the evidence presented. See *People v. Taylor*, 164 Ill. 2d 131, 140 (1995) (mere presence at the commission of the crime is not sufficient to establish accountability).

¶ 66 There was ample evidence to convict defendant on a theory of accountability even if Manuel had testified that defendant did not plan a robbery in advance. The State may prove accountability "by showing *either* (1) that the defendant shared the criminal intent of the principal, *or* (2) that there was a common criminal design." (Emphasis in original.) *People v. Fernandez*, 2014 IL 115527, ¶ 21 (citing *In re W.C.*, 167 Ill. 2d 307, 337 (1995)). When one aids another in planning or committing a crime, he is criminally liable for the conduct of the person he aids. *Fernandez*, 2014 IL 115527, ¶ 21. "The State need not provide a verbal agreement between the parties, the trier of fact can infer a common design from the circumstantial evidence." *People v. Adams*, 394 Ill. App. 3d 217, 233 (2009) (citing *People v. Reeves*, 385 Ill. App. 3d 716, 727 (2008)). See *Taylor*, 164 Ill. 2d at 141 (the common design can be inferred from the circumstances surrounding the perpetration of the unlawful conduct). Factors in determining accountability include: (1) failure to report the crime; (2) proof that the defendant was present during the perpetration of the offense; (3) that the defendant fled from the scene; and (4) that the defendant maintained a close affiliation with other offenders after the commission of the crime. *People v. Perez*, 189 Ill. 2d 254, 257 (2000)

¶ 67 In the instant case, there is sufficient evidence to convict defendant on a theory of accountability even in the absence of evidence that defendant planned a robbery in advance. Smith testified that defendant and Neal approached Smith at his apartment door, that one of the men struck him in the head with a gun, and that they forced their way into his apartment. The men struck him a few more times and then led him around the apartment "like a dog."

As they walked Smith around the apartment, Smith handed defendant and Neal anything he thought they wanted. Smith then heard defendant yell, "He think we playing. Grab the baby," followed by Neal grabbing Smith's son and pointing his gun at the child's head. Later, defendant hit Smith on the head with a gun in the stairway and defendant fled back to the vehicle where Jarvis was waiting for him.

¶ 68 Smith's testimony shows that defendant and Neal acted through a common criminal design when they struck Smith and forced their way into his apartment at gunpoint, took his property, and threatened to harm his child. Moreover, the appellate record shows that defendant never reported the crime, was present during the crime, fled from the crime scene, and maintained a close affiliation with Jarvis after the commission of the crime. If called to testify, Manuel's testimony would not undermine the overwhelming evidence presented by the State that showed that defendant participated in the robbery. As a result, defendant would not have been not prejudiced by defense counsel's trial strategy since there was sufficient evidence to convict defendant even if Manuel had testified. Since defense counsel did not provide ineffective assistance of counsel, the trial court properly denied defendant's postconviction petition.

¶ 69 V. Claim of Ineffective Assistance for Failing to Raise Hearsay Issue on Appeal

¶ 70 Defendant next claims that his appellate counsel was ineffective for failing to argue on direct appeal that defendant's trial counsel was ineffective for failing to object to hearsay testimony at trial. Defendant argues that his appellate counsel's performance was objectively unreasonable where he "failed to raise trial counsel's ineffectiveness for allowing the State,

without objection, to elicit hearsay evidence from his co-defendant, Yvette Jarvis, that were not admissible under the hearsay exception for statements made against penal interest or the co-conspirator exception." Defendant argues that Jarvis' testimony that she overheard defendant, Neal, and Manuel plan a robbery was inadmissible hearsay and that defense counsel should have objected. The State responds that appellate counsel did not provide ineffective assistance of counsel since Jarvis' testimony was not hearsay and, even if it was, defendant was not prejudiced by it.

¶ 71 Generally, issues that could have been brought on direct appeal, but were not, cannot be raised for the first time in a postconviction petition (*People v. Miller*, 203 Ill. 2d 433, 437 (2002)); however, forfeiture of a claim does not apply when it stems from the incompetence of appellate counsel (*People v. Blair*, 215 Ill. 2d 427, 450-51 (2005)). Ineffective assistance of appellate counsel is determined under the same standard as a claim of ineffective assistance of trial counsel. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (citing *People v. West*, 187 Ill. 2d 418, 435 (1999)). When claiming that appellate counsel was ineffective for failing to raise an issue on appeal, defendant must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced defendant. *People v. Enis*, 194 Ill. 2d 361, 377 (2000). Appellate counsel is not required to raise every conceivable issue on appeal, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit. *Edwards*, 195 Ill. 2d at 163-64 (citing *People v. Johnson*, 154 Ill. 2d 227, 236 (1993)). Unless the underlying issue has merit, there is no prejudice from appellate counsel's failure to raise an issue on appeal. *Edwards*, 195 Ill. 2d at 164 (citing

People v. Childress, 191 Ill. 2d 168, 175 (2000)). Accordingly, we must determine whether defendant's claim of ineffective assistance of trial counsel for failing to object to Jarvis' testimony is meritorious.

¶ 72 "Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and it is generally inadmissible due to its lack of reliability unless it falls within an exception to the hearsay rule." *People v. Olinger*, 176 Ill. 2d 326, 357 (1997). Courts tend to exclude a hearsay statement since there is a lack of an opportunity to test the credibility of the statement through cross-examination. *People v. Crowe*, 327 Ill. App. 3d 930, 937 (2002). Testimony offered for its effect on the listener or to explain the subsequent course of conduct of another is not hearsay. *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008) (citing *People v. Thomas*, 296 Ill. App. 3d 489, 499 (1998)).

¶ 73 Here, Jarvis testified that, when she met with defendant, Neal, and Manuel on the afternoon before the crime, she was present and overheard them plan to rob Smith, and that Manuel told them that Smith kept drugs and \$10,000 or \$11,000 in cash at his apartment. Jarvis testified that she specifically heard Miller say, "[Smith] was sweet and had a lot of money." Jarvis' testimony may not have been hearsay if the statements were offered to show their effect on Jarvis because she was to be used as the driver, and the conversation explains her subsequent course of conduct. If it was not offered to prove the truth of the matter, it would not be hearsay. The statements explain why she later drove defendant and Neal to Smith's apartment and why she waited in the vehicle for them to return. Since Jarvis'

testimony was not hearsay, trial counsel's performance did not fall below an objective standard of reasonableness when she failed to object.

¶ 74 Even if Jarvis's testimony was inadmissible hearsay, and was used to prove the truth of the matter, a claim of ineffective assistance of counsel for failing to object is still without merit since defendant was not prejudiced by the testimony. Defendant argues that the admission of Jarvis' testimony was not harmless and prejudiced his case since the State referenced the testimony in closing arguments. *People v. Jura*, 352 Ill. App. 3d 1080, 1090 (2004). Defendant also argues that there is a presumption of unreliability that attaches to a codefendant's confession and that Jarvis' testimony should be discredited.

¶ 75 However, as previously discussed, there was sufficient evidence to convict defendant on a theory of accountability. Smith's testimony alone shows that defendant and Neal acted through a common criminal design when they struck Smith and forced their way into his apartment at gunpoint, took his property, and threatened to harm his child. Moreover, the appellate record shows that defendant never reported the crime, was present during the crime, and fled from the crime scene. Even if the trial court discredited Jarvis' testimony, or struck her testimony, there was sufficient evidence to convict defendant. As a result, defendant's claim that trial counsel provided ineffective assistance is meritless and appellate counsel was not ineffective for deciding not to raise the issue on appeal. Since appellate counsel did not provide ineffective assistance of counsel, the trial court properly denied defendant's postconviction petition.

¶ 76

CONCLUSION

¶ 77

For the foregoing reasons, we affirm the dismissal of defendant's postconviction petition.

¶ 78

Affirmed.