

No. 1-13-3803

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 99 CR 20102
)	
RUFFO SALGADO,)	Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justice Hall concurred in the judgment.
Presiding Justice Gordon specially concurred.

O R D E R

¶ 1 *Held:* We affirm the circuit court’s second-stage dismissal of petitioner’s post-conviction petition after our review of his claims that he was denied due process by the State’s failure to disclose an eyewitness’s pending misdemeanor charge, trial counsel rendered ineffective assistance by failing to impeach an eyewitness regarding an inconsistent statement, and the

statutory provisions concerning a juvenile's automatic transfer from juvenile to adult court proceedings violated due process and the prohibition against cruel and unusual punishment.

¶ 2 Defendant Ruffo Salgado, who was convicted of first degree murder, appeals from the circuit court's dismissal of his petition at the second stage of post-conviction proceedings. On appeal, defendant alleges he made a substantial showing that (1) the State violated due process by failing to disclose that one of its eyewitnesses had a pending misdemeanor charge at the time he testified at trial; and (2) defendant was denied effective assistance of counsel when trial counsel failed to impeach an eyewitness regarding alleged inconsistent statements about which hand the shooter used to hold his gun. Defendant also argues the failure to consider his youth before automatically transferring him from juvenile court to face adult proceedings violated his rights to due process and to be free from cruel and unusual punishment.

¶ 3 For the following reasons, we affirm the circuit court's summary dismissal of defendant's post-conviction petition.

¶ 4 I. BACKGROUND

¶ 5 On February 22, 1992, defendant, who was 17 years old, fatally shot the victim, Erling Cox. Defendant fled the country for several years after the shooting. In 1999, he was charged by indictment with two counts of first degree murder. At his July 2003 jury trial, eyewitnesses Carlos Brito, Gina Harjung and Saul Salgado identified defendant as the shooter, but defendant's four siblings testified that he was at a family party at the time of the shooting. The jury found defendant guilty of first degree murder, and the circuit court sentenced him to 54 years in prison. This court affirmed defendant's conviction on direct appeal. *People v. Salgado*, 366 Ill. App. 3d 596 (2006).

¶ 6 According to the record, the State's evidence at the jury trial established that on the date of the offense, defendant and his cousin, Saul Salgado, were drinking at a bar on the north side of Chicago. Carlos Brito, the owner of the bar, knew Saul through his parents. Brito approached defendant and Saul and asked to see their identification. The two refused, and Brito told them to leave. Defendant argued with Brito, threatened to return, and warned that he "was going to be sorry." Brito noticed something on defendant's nose, which later was corroborated by Saul to be a bandage. Later that evening, Brito was standing outside the bar when defendant and Saul drove back to the bar and parked in an alley.

¶ 7 According to Brito, defendant walked up to Brito, put a gun to the back of his head, and said Brito now would sell defendant some beer. Defendant fired the gun once away from Brito's direction and then returned the gun to Brito's head. Defendant ordered Brito into the bar. Saul meanwhile trailed about ten feet behind defendant. Brito opened the door, walked inside and told the bartender to call the police. The bartender handed the telephone to the victim, Erling Cox. Defendant shoved Brito against the pool table, drew his gun and fired several gunshots towards the bar. Three gunshots struck the victim, who fell to the ground. Brito turned around, saw defendant's face, and threw a pool cue ball at him. Defendant then fled the bar. When Brito viewed photo arrays shortly after the shooting, he did not identify anyone as the shooter from a photo array that contained Saul's photograph but not defendant's. Then, when the police showed Brito a photo array that included defendant's photograph, Brito positively identified defendant as the shooter. Furthermore, in an August 1999 lineup, Brito positively identified defendant as the shooter.

¶ 8 Gina Harjung testified that she does not drink alcohol and did not have any alcohol at the time of the offense. She was standing next to the victim at the time of the shooting and her

testimony was generally consistent with Brito's concerning the initial argument in the bar, the disturbance when defendant and Saul returned, and defendant's shooting of the victim. She testified that the shooter pulled the gun from his left side with his right hand and fired four times. She was seated close to where the shooter stood and "could see where he was looking in [her] face." She added that both the shooter and Saul were inside the bar at the time of the shooting and fled the scene together. In an August 1999 lineup, she identified defendant as the shooter and identified him again in court in July 2003 even though he looked "different." The defense perfected its impeachment of Harjung by admitting into evidence the fact that detective Steven Schorsch's written report indicated that Harjung had said the shooter pulled out his gun during the first argument and the bartender rose up and told him to put it away, and Harjung heard six gunshots fired when the shooter returned to the bar.

¶ 9 Saul's testimony was generally consistent with Brito's and Harjung's, except Saul indicated that he did not enter the bar when he and defendant returned to the scene. According to Saul, when defendant initially fired his gun outside the bar either into the air or at the ground, Brito ran inside the bar. Then defendant grabbed the door of the bar and stayed near the entrance while he fired into the bar four times. Saul could not see into the bar from his position. A pool ball struck the door, and defendant ran past Saul, who followed defendant back to the car. For the next three or four days, defendant and Saul slept in defendant's car on the south side of Chicago. Further, Saul later told the assistant State's Attorney (ASA) that defendant said he shot the victim because defendant thought the victim was going to call the police. Saul added that on the date of the offense defendant had carried his gun in the waist of his pants. Saul also explained that he did not have a close relationship with defendant.

¶ 10 The police were not able to locate defendant until an August 1999 anonymous tip informed them defendant may have returned to Chicago and gave them an address. At the address, the police received permission to enter the apartment and discovered defendant in a back room. Defendant produced identification indicating his name was “Francisco Roman”; the police, however, identified and arrested defendant.

¶ 11 Detective Schorsch interviewed defendant, who was advised of his *Miranda* rights in Spanish by Detective Thezan. Detective Thezan translated for defendant during the interview until Officer Jose Centano replaced Thezan. Officer Centano had served as a translator in nearly 1,000 cases during his law enforcement career. He and defendant spoke different dialects of Spanish. Consequently, Officer Centano paused after certain words and ensured that defendant understood what he was being told. After Officer Centano would attempt to clarify something, defendant would reiterate it so that both Officer Centano and defendant understood each other. Officer Centano had experienced this situation involving different Spanish dialects before and stated that there never was a time when he and defendant were unable to understand each other.

¶ 12 Following the lineups in which Brito and Harjung identified defendant as the shooter, defendant was interviewed again by Detective Schorsch, Officer Centano, and ASA Frank Andreou. ASA Andreou advised defendant of his *Miranda* rights, which Officer Centano translated from a form. Defendant confirmed that he understood the rights he was waiving and agreed to give a handwritten statement. Upon completion, Officer Centano read the statement back to defendant line-by-line, and defendant agreed that each line was accurate. Defendant then signed the statement.

¶ 13 According to his signed statement, defendant explained that he and Saul went to the bar to speak to people who had assaulted defendant a few weeks earlier. Saul gave defendant a gun

as a precaution. At the bar, defendant spoke to and danced with a woman. Eventually two of the men who previously had assaulted defendant approached him. When one of the men grabbed defendant, defendant took the gun out of his right jacket pocket to scare the men away. However, one of the men grabbed the gun and caused it to discharge. Defendant kept firing after the initial discharge because the men kept coming towards him. Defendant did not know that his gunshots struck anyone until Saul told him the next day that a person had been hit. Following the incident, defendant fled to Mexico and stayed there for approximately six years. Afterwards, he went to Arizona and assumed a different identity in order to find employment. After he returned to the Chicago area in 1999, he was discovered and arrested.

¶ 14 At trial, defendant presented the testimony of his four siblings, who all testified that defendant was at a family birthday party at the time of the shooting. These witnesses acknowledged they did not mention this alibi to the police or ASA during the investigation of the case.

¶ 15 The jury found defendant guilty of first degree murder. Defendant moved for a new trial, arguing descriptions of the shooter from two witnesses, Abraham Perez-Merlos and Ricardo Rivera, probably would have changed the result of the trial. Specifically, when the police interviewed these two witnesses, they described the shooter as having a ponytail and blonde dyed hair. Defendant claimed their descriptions of the shooter were consistent with Saul's appearance at the time of the shooting. Defendant conceded that these witnesses' descriptions of the shooter were included in the disclosed general progress report sheets for the case; nevertheless, defendant argues this information was not listed in the typed police reports. The circuit court denied defendant's motion for a new trial, holding that the evidence was not new, the defense had access to the information, and the evidence would not have changed the jury's verdict.

¶ 16 Thereafter, defendant moved the court to reconsider the denial of the motion for a new trial based on his discovery of two additional new witnesses, Carmello and David Mendoza, who would identify Saul as the shooter. The circuit court denied the motion to reconsider, holding defendant failed to show either due diligence concerning the discovery of these witnesses or that their testimony would have changed the jury's verdict.

¶ 17 On direct appeal, defendant argued the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by allegedly failing to tender the police report containing two witnesses' descriptions of the shooter; the circuit court failed to conduct an evidentiary hearing on defendant's claim of newly discovered witnesses; ineffective trial counsel failed to argue that defendant's handwritten statement should have been suppressed based on defendant's unknowing waiver of his *Miranda* rights and the translator's alleged incompetence; and defendant's handwritten statement was procured in violation of the Vienna Convention. This court rejected defendant's arguments and affirmed his conviction. *Salgado*, 366 Ill. App. 3d 596.

¶ 18 In August 2007, defendant filed a post-conviction petition drafted by private counsel. He alleged, *inter alia*, that the State violated *Brady* by failing to disclose Saul's arrest and pending misdemeanor cannabis possession charge, and trial counsel was ineffective for not impeaching Harjung concerning which hand the shooter used to hold his gun.

¶ 19 The defense supplemented the petition in April 2013. The State moved to dismiss the petition, and the circuit court granted the motion. Defendant timely appealed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues he made a substantial showing that (1) the State violated *Brady* by failing to disclose Saul had been charged with misdemeanor possession of cannabis eight days prior to defendant's trial, and (2) trial counsel was ineffective for failing to impeach

Harjung's trial testimony that the shooter held the gun in his right hand with her prior statement to the police that the shooter had the gun on his left side. He also argues the statutory provision regarding a juvenile's automatic transfer from the jurisdiction of juvenile court to face adult court proceedings violated defendant's constitutional rights to due process and to be free from cruel and unusual punishment.

¶ 22 The Post-Conviction Hearing Act (725 ILCS 5/122-1, *et seq.* (West 2006)) enables a defendant to challenge a conviction for violations of federal or state constitutional rights by showing that he suffered a substantial deprivation of those rights during the proceedings which resulted in the conviction. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). Post-conviction proceedings may go through three stages; in the first stage, the circuit court may dismiss the petition if the court finds it is frivolous and without merit. *Id.* at 472 (citing 725 ILCS 5/122-2.1(a)(2) (West 2006)). If the petition is not dismissed, it moves on to the second stage, during which the State may move to dismiss the petition following any amendments made to the petition by defendant's counsel. *Id.* (citing 725 ILCS 5/122-5 (West 2006)). If the State does not file a motion to dismiss or the motion is denied, then the proceedings move to the third stage, in which the defendant may present evidence to support his petition. *Id.* at 472-73 (citing 725 ILCS 5/122-6 (West 2006)).

¶ 23 During the second stage, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Id.* at 473. In the second stage, "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Id.* This court reviews a circuit court's stage-two dismissal of a defendant's post-conviction petition using a *de novo* standard. *Id.*

¶ 24

A. *Brady* Violation

¶ 25 First, defendant contends he made a substantial showing that the State violated his due process rights by failing to disclose the fact that eyewitness Saul had been charged with misdemeanor possession of cannabis prior to trial and the charges were still pending when he testified against defendant. Furthermore, defendant asserts that if Saul's misdemeanor charge had been disclosed then a reasonable probability exists that the result of the trial would have been different.

¶ 26 In *Brady*, the Court held that “the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. 83, 87 (1963). If the defendant cannot establish that the improperly withheld evidence was both favorable to the defense and material, then the defendant cannot prevail under *Brady*. *People v. Simpson*, 204 Ill. 2d 536, 555 (2001). Evidence is material if “ ‘there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’ ” *Simpson*, 204 Ill. 2d at 555-56 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Furthermore, a reasonable probability that the result of a proceeding would have been different is a “ ‘probability sufficient to undermine confidence in the outcome’ ” of the proceeding. *Simpson*, 204 Ill. 2d at 556 (quoting *Bagley*, 473 U.S. at 682).

¶ 27 The issue of whether the ASAs were aware that Saul had been charged with misdemeanor possession of cannabis at the time he testified is irrelevant to our analysis; under *Brady*, the State has an affirmative duty to disclose any evidence favorable to defendant that is material to either his guilt or punishment. The undisclosed information concerning Saul's pending misdemeanor charge was favorable to the defense because, in addition to generally attacking Saul's credibility

with his 1994 aggravated battery felony conviction, the defense also could have particularly attacked Saul's bias or motive to testify favorably for the State. See *People v. Sharrod*, 271 Ill. App. 3d 684, 689 (1995) (citing *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). Nevertheless, defendant fails to make a substantial showing regarding his *Brady* claim because the overwhelming evidence supporting his conviction refutes his assertion of a reasonable probability of a different result in this proceeding if Saul's misdemeanor charge had been disclosed.

¶ 28 Even assuming, *arguendo*, that Saul's credibility would have been significantly undermined by the disclosure of his pending misdemeanor charge, the overwhelming evidence supports the jury's determination that defendant was guilty of the fatal shooting of the victim. The evidence established that defendant voluntarily and knowingly admitted to the police and the ASA that he alone fired his gun in the bar even though defendant attempted to minimize his offense by claiming he acted in self-defense. Defendant also admitted he fled the country after the offense and then assumed a false identity when he returned. Defendant argues that his handwritten statement to the police was unreliable because Officer Centano sometimes had to clarify information due to the different Spanish dialects they spoke. To support this argument, defendant asserts the handwritten statement was "unusually disjointed, repetitive, and at times mystifying," particularly concerning how many times the two men in the bar approached defendant as he spoke and danced with a woman. We disagree. Any vagueness in defendant's description of his alleged acts at the bar simply raises questions concerning the credibility of his self-defense claim; defendant's "mystifying" version of the incident does not indicate that the translation abilities of Officer Centano, who participated as a translator in over 1,000 cases, were deficient.

¶ 29 In addition to defendant's handwritten admission that he fired the gunshots that killed the victim, the testimony of Brito, Harjung and Saul consistently identified defendant as the shooter, even though Saul attempted to minimize his role by placing himself outside the bar at the time of the shooting. Harjung, who observed the initial argument between defendant and Brito and later was standing next to the victim when he was shot, identified defendant as the shooter from a lineup and positively identified him again at trial. Brito observed defendant in the bar earlier that evening to determine whether he was underage and then argued with defendant after telling him to leave. Brito even noticed that defendant had an adhesive bandage on his nose. When defendant returned to the bar, put a gun to Brito's head, and pushed him against the pool table, Brito turned around after the shooting began, saw defendant's face, and threw a cue ball at him. Later, Brito identified defendant from a photo array and a lineup as the shooter. Notably, Brito did not identify anyone as the shooter from a photo array that included Saul's picture but not defendant's. Based on the overwhelming nature of the evidence, defendant has failed to meet his burden concerning the materiality of that evidence, *i.e.*, that the pending charge against Saul created a reasonable probability that the outcome of the trial would have been different.

¶ 30 Defendant cites several cases to support his contention that Saul's pending misdemeanor charge was material, including *People v. Galloway*, 59 Ill. 2d 158, 163 (1974) (the police informant's narcotics addiction was material); *People v. Sharrod*, 271 Ill. App. 3d 684, 689 (1995) (the armed robbery victim's juvenile supervision was material); and *People v. Preatty*, 256 Ill. App. 3d 579, 589-90 (1994) (witness's participation in a pretrial diversion program was material). The present case, however, is distinguishable from the cases cited by defendant.

¶ 31 In *Galloway*, where a police informant sold the defendant drugs as part of a sting operation, the informant's undisclosed narcotics addiction would have undermined his credibility

and the two officers conducting surveillance of the sale were unable to see the handoff in detail. 59 Ill. 2d at 160-61, 163. Here, in contrast, all three eyewitnesses were immediately present at the bar during the shooting and observed defendant fire the gunshots that killed the victim.

¶ 32 In *Sharrod*, the juvenile victim was robbed outside his home at gunpoint by a group of males who then engaged in a confrontation with the victim's parents and brother on the porch of the victim's home. 271 Ill. App. 3d at 685-88. The victim was on juvenile supervision at the time he identified the defendant as a participant in the crimes. *Id.* at 688. The court reversed the defendant's convictions based on the State's failure to disclose the juvenile supervision, which prevented the defense from cross-examining the victim regarding any hope or expectation for leniency in connection with the supervision disposition. *Id.* at 690. The instant case, however, is distinguishable from *Sharrod*. Here, any hope for leniency Saul may have had for his misdemeanor charge was not material considering the overwhelming evidence, as discussed above, of defendant's handwritten statement admitting to firing the gun in the bar and the consistent testimony of unbiased eyewitnesses Brito and Harjung.

¶ 33 In *Pretty*, the testimony of the security guard who apprehended the defendant was the only direct evidence that the defendant and not someone else dropped the glove stuffed with drugs on the ground. 256 Ill. App. 3d at 581-86. The State failed to disclose that the security guard was in a pretrial diversion program and faced a felony charge for acting as a private investigator without a license. *Id.* at 586-87. The court found this impeachment evidence was material because the case hinged on a credibility contest between the security guard and the defendant, who consistently denied that the glove was his and that he had ever seen it before. 256 Ill. App. 3d at 590. Here, in contrast, defendant admitted that he fired the gun in the bar and the consistent testimony of multiple witnesses identified defendant as the shooter.

¶ 34 Defendant's handwritten admission and the testimony of Brito and Harjung establish that, even without Saul's testimony, the evidence of defendant's guilt was overwhelming. Thus, we conclude that Saul's pending misdemeanor charge was not material and defendant has failed to make a substantial showing that the State's alleged failure to disclose Saul's pending misdemeanor charge violated defendant's due process rights under *Brady*.

¶ 35 B. Effectiveness of Counsel

¶ 36 Defendant next argues his trial counsel was ineffective for failing to impeach Harjung regarding her inconsistent statements concerning whether the shooter held the gun in his left or right hand. Defendant claims there is a reasonable probability he would have been acquitted if Harjung had been impeached on this issue.

¶ 37 A defendant alleging a claim of ineffective assistance of counsel must satisfy both prongs of the test discussed in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing that "counsel's performance was deficient" and the deficient performance "prejudiced the defense." To satisfy the first prong, the defendant must show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The second prong requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. If an ineffectiveness claim can be disposed of on the ground of insufficient prejudice, then that course should be taken and the court does not need to consider the quality of the attorney's performance. *Id.* at 697.

¶ 38 In reviewing a claim of ineffective assistance of counsel, this court reviews counsel's actions under the totality of the circumstances of the individual case. *People v. Shatner*, 174 Ill. 2d 133, 147 (1996). Judicial scrutiny of counsel's performance is highly deferential, and

counsel's trial strategy is given a strong presumption of reasonable professional assistance. *Strickland*, 466 U.S. at 689. To establish deficient performance, defendant must identify counsel's acts or omissions that allegedly are not the result of reasonable professional judgment and overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007); *Strickland*, 466 U.S. at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Defendant must show that counsel's errors were so serious and his performance was so deficient that he did not function as the counsel guaranteed by the sixth amendment. *Perry*, 224 Ill. 2d at 342.

¶ 39 Defendant contends his trial counsel's decision not to use the police report of Harjung's statement to impeach her regarding which hand the shooter used to hold his gun was unreasonable because counsel's strategy seemed to be to attempt to impeach Harjung whenever possible. Defendant argues there is a reasonable probability this information would have changed the result of the trial because he was right-handed whereas Saul was left-handed, and although Harjung testified at trial that the shooter fired the gun using his right hand, the police report indicates she told the detective shortly after the incident that the shooter "had the gun in his left hand."

¶ 40 Defendant cannot meet his burden to make a substantial showing under *Strickland* of ineffective assistance of counsel. First, defendant fails to show that counsel's performance was deficient. According to the police report, Harjung told the detective the shooter initially was sitting at the end of the bar drinking and started to pull out a gun, which was on his left side. The

bartender told the shooter to put the gun away, Brito told the shooter to leave, and the shooter left. About 45 minutes later, the shooter came back and “had the gun in his left hand and opened the front door with his right. He just started shooting, he sho[t] 6 times.”

¶ 41 Contrary to defendant’s arguments on appeal, the police report does not actually indicate Harjung said defendant fired the gun using his left hand. Rather, the report states the gun was in defendant’s left hand when he opened the door using his right hand. He could have transferred the gun to his right hand when he “just started shooting.” However, Harjung’s trial testimony that defendant drew the gun from his left side using his right hand is inconsistent with the police report indicating Harjung said the gun was in defendant’s left hand as he used his right hand to open the door. Thus, the actual inconsistency in Harjung’s testimony that trial counsel did not impeach is not quite as dramatic as defendant asserts, and counsel could have chosen as a matter of trial strategy not to impeach Harjung on this inconsistency because defendant’s use of his right hand to open the door would have been consistent with his being right-handed. *Strickland*, 466 U.S. at 691 (trial counsel’s strategic decisions are not second-guessed by this court). Furthermore, counsel did perfect impeachment concerning Harjung’s inconsistent statements about whether four or six gunshots were fired and whether defendant pulled out his gun when he initially was drinking at the bar and was told to put the gun away and leave. In determining if under all of the circumstances counsel’s assistance was ineffective, the court considers the entire record rather than isolated incidents of conduct. *People v. Kluppelberg*, 257 Ill. App. 3d 516, 526 (1993). Our review of the record in this case establishes counsel aggressively and ably represented defendant.

¶ 42 Defendant cites *People v. Garza*, 180 Ill. App. 3d 263 (1989), to support his claim of unreasonable assistance of trial counsel, but defendant’s reliance on that case is misplaced. In

Garza, the shooter allegedly approached the car occupied by the victim and the eyewitness, asked the victim about his gang affiliation, and fired multiple gunshots that hit and killed the victim. *Id.* at 264. The police officer who responded to the scene testified that the eyewitness was hysterical and gave a description of the shooter that included his weight, height, clothing, hair color, and that he had blue eyes and a scar over his left brow. *Id.* The eyewitness selected two men out of a “mug book” and said they looked similar to the shooter, but then did not identify them after viewing a more recent photo and a lineup. *Id.* at 266. About a week later, the eyewitness told the police two men on a motorcycle approached her and the man who looked very similar to the victim’s shooter fired a gun at her. *Id.* at 265. She tentatively identified the defendant as the shooter from photographs and later positively identified him in a lineup. *Id.* The defendant, who had brown eyes and no scars on his face, told the police that he had lit some firecrackers while on the motorcycle and waved a toy gun to make it seem like he was firing a gun. *Id.* A detective testified that when he spoke with the eyewitness concerning discrepancies in police reports about her descriptions of the shooter, the eyewitness explained that her description details about the blue eyes and scar referred to the victim. *Id.* at 266. At a posttrial motion, a police officer testified that his notes contained a description of the shooter as having a “possible scar on arm above a tattoo” because the eyewitness said the shooter claimed he had scars and tattoos to prove his gang affiliation but the eyewitness did not see them. *Id.*

¶ 43 The *Garza* court found the evidence was closely balanced and the discrepancies in the descriptions of the sole eyewitness linking the defendant to the murder were not insignificant. *Id.* at 269. Furthermore, the mug shots of the other men whom the eyewitness thought looked similar to the shooter were never presented to the jury. *Id.* In addition, trial counsel failed to call witnesses to corroborate the defendant’s alibi testimony for both shooting incidents. *Id.* The trial

court concluded that although any one error, by itself, may not have amounted to ineffective assistance of counsel, counsel's cumulative errors rendered the result of the proceedings unreliable. *Id.* at 270.

¶ 44 Here, in contrast, defendant cannot point to cumulative errors by trial counsel, who vigorously cross-examined the State's witnesses, perfected the impeachment of Harjung concerning evidence of two inconsistent statements to the police about particular events at the bar, and presented witnesses to support defendant's alibi. In addition, the evidence in this case was not closely balanced. Defendant's weak alibi evidence was not sufficient to challenge the overwhelming evidence of his guilt, as discussed in detail above, where defendant admitted to shooting the victim, three eyewitnesses testified that defendant was the shooter, and defendant was consistently identified as the shooter in photo arrays and lineups.

¶ 45 Lastly, defendant has not made a substantial showing that if his trial counsel had impeached Harjung's trial testimony about defendant pulling out his gun from his left side using his right hand, then there was a reasonable probability that the outcome of the trial would have been different. The evidence against defendant was overwhelming; even if Harjung had been impeached on this particular issue, the testimony of two other witnesses and defendant's own handwritten statement established his guilt.

¶ 46 We conclude defendant has not made substantial showing of ineffective assistance of trial counsel to proceed to an evidentiary hearing.

¶ 47 C. Unconstitutional Legislation Regarding Juveniles

¶ 48 Finally, defendant asserts that the jurisdiction provisions of the Juvenile Court Act of 1987 (705 ILCS 405/5-120, 5-130 (West 2000)), are unconstitutional because they violate due process and the right to be free from cruel and unusual punishment. Defendant, however,

concedes that this claim is foreclosed by *People v. Patterson*, 2014 IL 115102. He raises this issue solely to preserve it for federal court review. In light of his concession, we need not consider this issue further.

¶ 49

III. CONCLUSION

¶ 50 For the above reasons, we find defendant failed to make a substantial showing that he was denied either due process by the State's failure to disclose the pending misdemeanor charge of eyewitness Saul, or effective assistance of trial counsel. We also find that defendant's constitutional challenge to the jurisdiction provisions of the Juvenile Court Act of 1987 is foreclosed by the Illinois Supreme Court's decision in *Patterson*. We therefore affirm the judgment of the circuit court, which summarily dismissed defendant's post-conviction petition.

¶ 51 Affirmed.

¶ 52 PRESIDING JUSTICE GORDON, specially concurring.

¶ 53 I concur in the judgment only.