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FIRST DIVISION
September 12, 2016

No. 1-14-1112
2016 IL App (1st) 141112-U

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.)	
)	01 CR 18019
JEFFREY BOWERS,)	
)	
Defendant-Appellant.)	Honorable Thaddeus L. Wilson,
)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* Postconviction counsel's motion to withdraw was sufficient; defendant failed to make a substantial showing of ineffective assistance of counsel; affirmed.

¶ 2 Defendant, Jeffrey Bowers, appeals from an order of the circuit court granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, defendant contends that: (1) his postconviction counsel's motion to withdraw was legally insufficient; and (2) he made a substantial showing of a

constitutional claim that his trial and appellate attorneys provided ineffective assistance related to a coerced verdict issue. We affirm.

¶ 3 The detailed facts of the underlying case are contained in *People v. Bowers*, No. 1-08-1964 (2011) (unpublished order under Supreme Court Rule 23). Defendant was charged with multiple counts of first-degree murder, attempted murder, aggravated battery with a firearm, and aggravated discharge of a firearm for his involvement in the shootings of four people on June 23, 2001. According to the State, defendant and two accomplices fired into a crowd, fatally wounding two people and seriously injuring two others.

¶ 4 Defendant's trial began on May 6, 2008. Following closing arguments, the court instructed the jury, and deliberations began at approximately 1 p.m. At around 4:15 p.m., the jury sent a note asking if it could have a witness's testimony, which was subsequently provided. At around 4:35 p.m., the jury sent a note asking what it meant that the identification marks were stricken from evidence that the jury received. The parties agreed on a response and the court also asked the jury if it wanted to see the firearms evidence, which the jury declined. At around 7 p.m., the court called the parties into the courtroom and the following exchange occurred:

"THE COURT: Bring the defendant out. Let the record reflect it's approximately 7 [p.m.]. Jurors have been deliberating about 6 and a half hours, and I don't think they have had dinner; so I have instructed the sheriff to order them to a hotel and we're going to sequester them over the evening, and we will have everybody back here at 10 [a.m.]. ***

DEFENSE COUNSEL: May I be heard. It's my position at this point in time – I have no issue with the jury breaking now. They have been at this for I think your Honor stated the amount of time accurately.

Judge, I'm objecting to sequestration at this point in time. I'm asking that the case be held over until Monday. I'm asking they be brought out and ordered by the Court – from my observations they have been almost all on time. They have been following the Court's instructions. I believe they would be able to follow a court order.

Given that it is Mother's Day weekend and I'm afraid sequestration given the timing of a holiday will influence their wish to wrap up deliberations quicker. I ask it be held over until Monday and you order them not to watch the news or look at internet news and not to discuss this case with anybody and not to think about the case in terms of internal deliberations, and keep the case out of their mind and come back Monday morning.

It's my objection for the record.

THE COURT: Your objection will be noted for the record. We will sequester them until tomorrow morning. Be back here at 10 [a.m]."

At approximately 7:10 p.m., the court convened the parties and announced that "apparently the jurors have reached a verdict." The following colloquy then occurred:

"THE COURT: When they rang the buzzer, I was informed that one of the sheriffs were in there and the jurors told them that all of the forms, they did sign one wrong verdict form.

Mr. Wolf [defense counsel].

DEFENSE COUNSEL: Judge, first of all, it was our understanding that the jurors – that the deputies were informed we have a verdict within 30 seconds and that didn't happen, and the buzzer went off at least when I saw it at about

7:08. Apparently in their haste to come up with a verdict to avoid sequestration, that's what I'm hearing, they apparently signed at least one wrong verdict form.

THE COURT: There's absolutely no evidence of that Mr. Wolf, absolutely none in their haste they signed the wrong verdict form. That [may be] your opinion, sir, but there is absolutely no evidence of that."

The parties agreed on a process for the jury to submit the correct verdict forms. At approximately 7:25 p.m., the verdicts were read. Defendant was found guilty of two counts of first degree murder, two counts of first degree murder during which defendant personally discharged a firearm, two counts of attempted first degree murder, and two counts of aggravated battery with a firearm. The jury was polled and each juror affirmed the verdicts. Subsequently, defendant filed a posttrial motion that asserted 57 claims of error, which was denied. Defendant was sentenced to natural life.

¶ 5 Defendant pursued a direct appeal, in which he raised the following issues: (1) the circuit court erred in excluding evidence that would have rebutted the State's theory of the case; (2) the circuit court erred in failing to make a timely ruling on his motion *in limine* to preclude admission of his prior convictions; (3) the court failed to conduct a proper *voir dire* of the jury in violation of Illinois Supreme Court Rule 431(b) (eff. May 1, 2007); and (4) the court improperly coerced the jury's verdict by ordering that the jury be sequestered.

¶ 6 This court found that defendant had forfeited the issue of whether the verdict was coerced. We stated that even though defense counsel objected to the sequestration order at trial, he did not also raise the issue in his posttrial motion. We also noted that defendant did not argue that the issue should be reviewed for plain error. Ultimately, this court affirmed defendant's convictions for the intentional murders of two victims during which he personally discharged a

firearm and vacated any other murder convictions. We also found that the court incorrectly imposed only one natural life sentence. We further held that the court erred in not sentencing defendant on the attempted murder and aggravated battery convictions. We vacated defendant's sentence and remanded for resentencing. On remand, defendant was sentenced on each murder count to natural life in prison, plus a consecutive prison term of 20 years for personally discharging a firearm in committing each murder, with the enhanced murder sentences to be served concurrently. Having merged the aggravated battery and attempted murder convictions, the court also sentenced defendant to 20 years in prison for each of the two attempted murder counts, to be served consecutively to the murder counts and to each other.

¶ 7 Defendant filed a petition for rehearing on February 15, 2011, and it was denied on February 23, 2011. On March 30, 2011, defendant filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on May 25, 2011.

¶ 8 On March 2, 2012,¹ defendant filed a petition for postconviction relief that asserted the following claims: (1) appellate counsel was ineffective for failing to brief and argue trial counsel's ineffectiveness for not raising in his posttrial motion that the verdict was hastened by sequester; (2) appellate counsel was ineffective for failing to brief and argue trial counsel's ineffectiveness for not making an adequate offer of proof of certain witnesses' proposed testimony; (3) appellate counsel was ineffective for failing to brief and argue trial counsel's ineffectiveness for not objecting and raising in a posttrial motion the prosecution's misconduct and improper statements; (4) appellate counsel was ineffective for failing to brief and argue the prosecutor's misconduct and improper statements; (5) appellate counsel was ineffective for failing to brief and argue that a line-up identification should have been suppressed; and (6) appellate counsel was ineffective for failing to brief and argue trial counsel's ineffectiveness for

¹ The notice of filing indicates that the petition was mailed on September 1, 2011.

not filing a motion to dismiss charges based on a failure to hold a prompt probable cause hearing after defendant's warrantless arrest.

¶ 9 As for the verdict issue, defendant asserted that notably brief deliberations raise the inference that the information about sequestration was the primary factor in procuring the verdict, citing *People v. Ross*, 303 Ill. App. 3d 966, 977 (1999). Defendant stated that "the fact that the jury deliberated only a few minutes after being informed that it would be sequestered strongly suggests that the [court's] decision to sequester the jury impermissibly hastened the verdict."

¶ 10 The postconviction petition was docketed on May 4, 2012, and counsel was appointed. On May 7, 2012, the court received defendant's *pro se* motion to amend his postconviction petition. Among other issues, defendant alleged that appellate counsel was ineffective for failing to brief and argue trial counsel's ineffectiveness for not raising in a posttrial motion the hastening of the verdict by sequester. Defendant stated that under Illinois Supreme Court Rule 436 (eff. July 1, 1997), a trial court could permit jurors to separate overnight, on weekends, on holidays, or in emergencies. Defendant also re-asserted that the fact that the jury deliberated for only a few minutes after being informed that it would be sequestered strongly suggested that the court's decision to sequester the jury impermissibly hastened the verdict.

¶ 11 On January 17, 2013, postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012), stating that he examined the petition and the record, consulted with defendant by mail, and determined that the petition adequately presented defendant's issues.

¶ 12 On March 18, 2013, defendant filed a *pro se* motion to supplement his postconviction petition. In part, defendant asserted that appellate counsel was ineffective for failing to argue for

plain error review of an unpreserved issue. Defendant stated that on direct appeal, appellate counsel argued that defendant was deprived of his right to a fair and impartial jury trial where, after the jury had deliberated for six and a half hours, the trial court improperly hastened the jury's verdict by ordering the jury to be sequestered over the Mother's Day holiday weekend, and the jury returned its verdict only a few minutes after being informed of the sequestration.

Defendant stated that the jurors rushed to a verdict and convicted defendant on all counts to avoid sequestration. Defendant further stated that this issue was not preserved and appellate counsel should have been aware that it was not preserved. Additionally, defendant contended that if appellate counsel had argued for plain error review, the argument would have passed the initial threshold because "the clear and obvious error happened when the trial court ordered the jury's sequester on a holiday weekend, in clear opposition to [Rule 436]." Defendant also asserted that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for not raising in a posttrial motion the issue of the court hastening the jury's verdict.

¶ 13 Attached to defendant's *pro se* motion was an affidavit from Brian Carroll, defendant's appellate counsel. Carroll averred that in his direct appeal brief, he "inadvertently did not include an argument that the [verdict] issue should be reviewed under the plain-error doctrine, mistakenly believing the issue was properly preserved, when it was not in fact included in [defendant's] post-trial motion." Carroll additionally averred that after the appellate court did not address the merits of the verdict issue, he filed a petition for rehearing. The petition was denied, and Carroll stated that he filed a petition for leave to appeal to the Illinois Supreme Court, which was also denied. The petition had argued that the appellate court's refusal to address the merits of the verdict issue was inconsistent with established case law. Also attached to defendant's motion

was the portion of his direct appeal brief that discussed the verdict issue. The excerpt did not address forfeiture or plain error.

¶ 14 On May 10, 2013, postconviction counsel filed a motion to withdraw pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004). Postconviction counsel stated that he consulted with defendant by mail and over the phone to ascertain his contentions of deprivation of his constitutional rights, examined the petition and the relevant portions of the record, and "found no claims which did not upon investigation turn out to be without merit." According to postconviction counsel, defendant was sent a copy of the motion and a letter explaining the *Greer* procedure—that an attorney who finds no reasonably arguable postconviction issues must submit a motion asking to withdraw and analyzing why none of the potential issues had legal merit.

¶ 15 Postconviction counsel further stated that defendant had asserted that the verdicts were hastened by the trial court's order that the jury be sequestered. Postconviction counsel stated that at trial, defense counsel objected to the sequester order, but failed to include the point in his posttrial motion. According to postconviction counsel, defendant argued that trial counsel's failure constituted ineffective assistance of counsel, and that appellate counsel's failure to argue trial counsel's ineffectiveness was itself ineffective. Postconviction counsel contended that "[s]etting aside the issue of whether the jury sequestration issue is *res judicata*," defendant's argument was not reasonably arguable. Postconviction counsel noted that Rule 436 allows the trial court, in its discretion, to keep the jury together in the charge of an officer of the court overnight, on weekends, on holidays, or in emergencies. Postconviction counsel asserted that "[i]t is not reasonably arguable that the trial court abused its discretion by ordering a jury sequestration in a case where the defendant was charged with shooting an AK-47 into a crowd of people, killing two individuals and seriously injuring two others." Postconviction counsel further

stated that defendant had misread cases such as *Ross*, 303 Ill. App. 3d 966. According to postconviction counsel, "[i]t is error to inform jurors that if they do not reach a verdict by a certain time, they will be sequestered. In [defendant's] case, the trial court set no such deadline; it simply ordered the jurors sequestered, an act clearly within its discretion." The motion to withdraw also included other claims that defendant had raised but are not germane to this appeal.

¶ 16 Defendant filed a *pro se* motion to respond to the motion to withdraw, and appended written correspondence with postconviction counsel. In one letter from postconviction counsel dated October 12, 2012, postconviction counsel stated in part that the verdict issue "was dealt with on direct appeal and is *res judicata*." Defendant responded with an undated letter.

¶ 17 Defendant filed *pro se* motions to amend his postconviction petition on May 14, 2013, and June 10, 2013. Among the issues raised was that his appellate counsel was ineffective for failing to argue for plain error review of the issue that the trial court improperly hastened the jury's verdict by ordering the jury sequestered over Mother's Day weekend. Defendant noted that the jury returned its verdict only a few minutes after being informed of the sequestration. Defendant contended that a clear and obvious error occurred when the trial court ordered sequestration overnight on a holiday weekend, "in clear opposition to the committee comments of Illinois Supreme Court Rule 436."

¶ 18 At a proceeding on June 10, 2013, the court acknowledged postconviction counsel's motion to withdraw and stated that defendant "put too much stock into the fact that I appointed counsel or *** [moved] to the second stage." The court stated that there were "so many reasons that that happens." The court granted postconviction counsel leave to withdraw. Defendant agreed that the *pro se* amended petition he filed on June 10, 2013, superseded his other filings.

¶ 19 On August 23, 2013, the State filed a motion to dismiss defendant's postconviction petition. In part, the State contended that defendant's appellate counsel was not ineffective for failing to argue for plain error review of the verdict issue. The State asserted that defendant had not shown that the judge's statement in any way changed or coerced the verdicts. The State further stated that the length of the deliberations did not indicate that the jury was deadlocked or otherwise unable to unanimously agree.

¶ 20 On October 30, 2013, defendant filed a *pro se* motion for leave to file a supplemental amended petition, which constituted a response to the State's motion to dismiss. In part, defendant re-asserted his claim that his appellate counsel was ineffective for failing to argue for plain error review of the verdict issue. Defendant quoted the committee comments for Rule 436, stating that " 'the *intention* of this *rule* is to *allow jurors* to go home for an *evening, weekend, holiday* or emergency and *dispense* with the need to accommodate jurors in a hotel overnight, *even* if the cause has been submitted to them for final deliberations. This proposed rule provides that in *appropriate cases*, jurors *may separate* temporarily after being admonished with regard to their duties. *It does away* with the blanket requirement that they be *sequestered and guarded*. ' " (Emphasis in defendant's motion.) Defendant argued that his was an "appropriate case." Defendant further contended that based on the record, there was a clear inference that the sequestration order coerced the jury to reach a verdict. According to defendant, the fact that after 6 1/2 hours of deliberating, the jury reached a verdict within 10 minutes of the sequestration order raised the inference that the jury reached its verdict based on the sequestration, which showed that the jury was no longer fair, impartial, or indifferent. Defendant also asserted that the error was so serious that it affected the fairness of his trial and undermined the integrity of the judicial process.

¶ 21 A hearing on the motion to dismiss was held on February 28, 2014. Appearing *pro se*, defendant contended in part that the trial court's order to sequester the jury was in clear opposition to the committee comments for Rule 436. On April 4, 2014, the court dismissed the petition, stating that defendant had not made a substantial showing of a violation of his constitutional rights. In a written order, the court stated that the statement about sequestration, even if the jury was present for it, informed the jury that it did not need to reach a decision that night. The court further stated that there was no evidence in the record or from defendant that the court's sequestration announcement actually interfered with the jury's deliberations or that the jury was deadlocked at the time of the announcement. The court asserted that the sequestration issue could not have survived plain error review where there was no clear and obvious error. Subsequently, defendant timely appealed.

¶ 22 On appeal, defendant first contends that the order allowing postconviction counsel to withdraw and the subsequent dismissal of defendant's petition should be reversed because the motion to withdraw was legally insufficient. Defendant argues that the motion to withdraw did not meet the requirements of *People v. Kuehner*, 2015 IL 117695, and *Greer*, 212 Ill. 2d 192. According to defendant, postconviction counsel's explanation for why the coerced verdict issue was frivolous and patently without merit did not include any new information to rebut defendant's *pro se* claims. Defendant further asserts that the motion did not inform the court of postconviction counsel's investigation of the coerced verdict claim. Defendant additionally contends that postconviction counsel was incorrect that *res judicata* barred the claim and moreover, never analyzed the substance of defendant's actual claim. Defendant asserts that postconviction counsel instead addressed the issue of whether the court had the right to sequester the jury, which was not the issue raised on direct appeal or in the postconviction petition.

¶ 23 The Act provides a method for a defendant to assert that his conviction was the result of a substantial denial of his rights under the United States Constitution, Illinois Constitution, or both. See 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction proceeding consists of three stages. *Hodges*, 234 Ill. 2d at 10. At the first stage, the circuit court has 90 days to review a petition and may summarily dismiss it if the court finds it to be frivolous and patently without merit. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). If the court does not summarily dismiss the petition, it advances to the second stage, where counsel may be appointed. *People v. Hodges*, 234 Ill. 2d at 10. To reach a third-stage evidentiary hearing, a defendant must make a substantial showing of a violation of his constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). A petition's allegations must be supported by the record or accompanying affidavits. *Id.* Additionally, "[t]he doctrine of *res judicata* bars the consideration of issues that were previously raised and decided on direct appeal." *People v. Blair*, 215 Ill. 2d 427, 443 (2005).

¶ 24 The right to counsel in postconviction proceedings is statutory and a defendant is entitled only to the level of assistance provided by the Act—a "reasonable level of assistance." See 725 ILCS 5/122-4 (West 2012); *People v. Turner*, 187 Ill. 2d 406, 410 (1999). This is not the same level of assistance that the Constitution guarantees to defendants at trial. *Greer*, 212 Ill. 2d at 204 (quoting *People v. Owens*, 139 Ill. 2d 351, 364 (1990)). As to what postconviction counsel must do, Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012) requires a showing that postconviction counsel consulted with the defendant to ascertain his contentions of deprivation of constitutional rights, examined the record of the proceedings at the trial, and made any amendments to the *pro se* petitions that are necessary for an adequate presentation of the defendant's contentions.

¶ 25 Fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on a defendant's behalf. *Greer*, 212 Ill. 2d at 205. Further, postconviction counsel is not required to continue representing a defendant if counsel determines that the petition is frivolous and patently without merit. *Id.* at 209. Initially, our supreme court stated that an attorney moving to withdraw "should make some effort to explain *why* defendant's claims are frivolous and patently without merit." (Emphasis in original.) *Id.* at 212. In *Kuehner*, 2015 IL 117695, the supreme court further addressed the requirements for postconviction counsel who seeks to withdraw. The supreme court stated that when postconviction counsel seeks to withdraw after the trial court determined that the *pro se* petition was not frivolous and patently without merit, the motion to withdraw "is tantamount to a motion to reconsider." *Kuehner*, 2015 IL 117695, ¶ 21. In that instance, the motion to withdraw seeks to bring to the trial court's attention information that was not apparent on the face of the *pro se* petition during first-stage review. *Id.* The supreme court further stated that a request for leave to withdraw after a first-stage judicial determination that the *pro se* petition was not frivolous or patently without merit "is an extraordinary request." *Id.* ¶ 22. Ultimately, the supreme court held that where a *pro se* postconviction petition advances to the second stage based on an affirmative judicial determination that the petition is neither frivolous nor patently without merit, "appointed counsel's motion to withdraw must contain at least some explanation as to why all of the claims set forth in that petition are so lacking in legal and factual support as to compel his or her withdrawal from the case." *Id.* ¶ 27. It is appointed counsel's burden to establish that the *pro se* petition is in fact frivolous and patently without merit. *Id.* ¶ 22.

¶ 26 As a preliminary matter, *Kuehner* applies to this case because the supreme court's decisions apply retroactively to cases pending at the time the decision was announced, including

those cases on direct review in the appellate court. See *Miller v. Gupta*, 174 Ill. 2d 120, 128 (1996). Moving to the substance of defendant's contentions, we find that postconviction counsel's motion to withdraw met the requirements of *Kuehner* as to the coerced verdict claim. We note that defendant has challenged the motion to withdraw only as to that claim, and so we do not address the sufficiency of the motion as to defendant's other *pro se* claims. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"). Postconviction counsel addressed two aspects of the coerced verdict claim—whether the court's decision to sequester the jury was itself improper and whether the way the sequestration was presented was improper. In the motion to withdraw, postconviction counsel quoted Rule 436 (eff. July 1, 1997)—including the statement that the jury can be sequestered on weekends and holidays— and stated that it was not reasonably arguable that the trial court abused its discretion in ordering sequestration given defendant's alleged conduct. Postconviction counsel also addressed how sequestration was presented to the jury, stating that the trial court did not set a deadline and simply ordered the jurors sequestered.

¶ 27 Perhaps postconviction counsel could have elaborated on his explanation, but all *Kuehner* requires is "at least some explanation" as to why all of the claims are frivolous and patently without merit. See *Kuehner*, 2015 IL 117695, ¶ 27. Postconviction counsel's explanation met that minimum threshold as to the coerced verdict claim. If the underlying issue is not meritorious, then a defendant cannot establish a claim of ineffective assistance of appellate counsel. See *People v. Enis*, 194 Ill. 2d 361, 377 (2000). *Kuehner* also does not state that postconviction counsel is required to detail the efforts of any investigation in the motion to withdraw. Additionally, contrary to defendant's contention, postconviction counsel did not state in his

motion to withdraw that the issue was barred by *res judicata*. Instead, postconviction counsel explicitly set aside issues of *res judicata* and addressed the merits of defendant's claim. The motion to withdraw was legally sufficient.

¶ 28 Next, defendant contends that he made a substantial showing of a constitutional claim that his trial and appellate attorneys provided ineffective assistance by failing to preserve the coerced verdict issue. According to defendant, his direct appeal counsel's performance was deficient because he did not argue the coerced verdict issue through plain error or through trial counsel's ineffectiveness for failing to properly preserve the issue. Defendant further contends that there is a reasonable likelihood that this court would have reversed defendant's convictions and remanded the case for a new trial. Defendant argues that the fact that the jury deliberated for over six hours only to immediately return a guilty verdict with a mis-signed verdict form upon learning of the sequestration demonstrates that the court's sequestration order coerced the verdict and deprived defendant of his right to an impartial jury. Defendant notes that extremely brief deliberations after a sequestration announcement raise the inference that the announcement was a primary factor in procuring the verdict, and contends that the inference is even stronger here because it was the Friday before a holiday weekend and the jurors had a greater incentive to avoid being sequestered.

¶ 29 As noted above, to receive an evidentiary hearing, a defendant must make a substantial showing of a violation of constitutional rights. *Coleman*, 183 Ill. 2d at 381. A "substantial showing" of a constitutional violation is a measure of the legal sufficiency of the allegations, which if proven at an evidentiary hearing, would entitle a defendant to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. At the motion to dismiss stage, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *People v. Childress*, 191 Ill. 2d 168,

174 (2000). We review *de novo* the trial court's decision to dismiss postconviction claims without an evidentiary hearing. *Id.*

¶ 30 To establish that appellate counsel was ineffective, a defendant must satisfy the standard articulated in *Strickland v. Washington*, 466 U.S. 668, 685-87 (1984). *People v. English*, 2013 IL 112890, ¶ 33. Accordingly, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense, meaning that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 694. We need not determine whether counsel's performance was deficient before examining whether there was prejudice, and we may dispose of an ineffective assistance claim based on a lack of prejudice alone. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984). Unless the underlying issue is meritorious, a defendant will not be said to have suffered prejudice from appellate counsel's failure to raise an issue on appeal. *People v. West*, 187 Ill. 2d 418, 435 (1999).

¶ 31 Because defendant's argument involves plain error, we briefly summarize the plain error doctrine. Under this doctrine, a reviewing court may reach a forfeited error affecting substantial rights in two circumstances: (1) where the evidence is so closely balanced that the jury's guilty verdict may have resulted from the error, or (2) where the error is so serious that the defendant was denied a substantial right. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The first step, however, is to determine whether error occurred at all. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 32 We first determine whether any error occurred when the trial court ordered the jury sequestered, such that defendant was prejudiced by appellate counsel's failure to argue for plain error review or that trial counsel should have preserved his objection. We conclude that the trial

court's comments about sequestration were entirely proper. To determine whether a reference to sequestration is coercive, a court must consider the totality of the circumstances to decide whether the language used actually interfered with the jury's deliberations or coerced a verdict to the prejudice of the defendant. *People v. Hanks*, 210 Ill. App. 3d 817, 822 (1991). Because coercion "is a highly subjective concept that does not lend itself to precise definition or testing, a reviewing court's decision often turns on the difficult task of ascertaining whether the challenged comments imposed such pressure on the minority jurors that it caused them to defer to the conclusions of the majority for the purpose of expediting a verdict." *People v. Fields*, 285 Ill. App. 3d 1020, 1029 (1996).

¶ 33 Simply informing a jury that it might be sequestered is not coercive. *People v. Steidl*, 142 Ill. 2d 204, 232 (1991). The length of deliberations after a trial court's comments is relevant, though length alone is inconclusive in determining whether the comments were the primary factor in procuring the verdict. *People v. Ferro*, 195 Ill. App. 3d 282, 292 (1990). Further, brief deliberations invite an inference of coercion. *Id.* Nonetheless, despite the verdict being returned approximately 10 minutes after the sequestration order, the court's comments were not coercive based on the totality of the circumstances. The court stated that it "instructed the sheriff to order them to a hotel and we're going to sequester them over the evening, and we will have everybody back here at [10 a.m.]." The comment that the jury would be ordered to a hotel and sequestered overnight was simple, neutral, and not coercive. See *Hanks*, 210 Ill. App. 3d at 819-20, 822 (comment that if the jury broke for the evening, the jury would be sequestered was "simple, neutral, and not coercive"). Indeed, after a long period of deliberation—here, over six hours—being advised of potential sequestration can remove pressure to reach an immediate decision. See *People v. Baggett*, 115 Ill. App. 3d 924, 930 (1983). Further, it is not error to allow jurors to

continue deliberating after being informed they were going to be sequestered overnight. See *People v. Defyn*, 222 Ill. App. 3d 504, 515-16 (1991). Additionally, to the extent that defendant suggests that the court acted improperly because the bailiff was still in the jury room when the verdict was reached, we note that there is no evidence that the bailiff was doing anything other than carrying out instructions. See *People v. Nemecek*, 277 Ill. App. 3d 243, 249 (1995) (where the court instructed the bailiff to tell the jury they would be sequestered, and the jury asked for another 5 or 10 minutes to deliberate, there was no evidence of an intent to improperly hasten the verdict). There is no evidence in the record that the court attempted to rush the deliberations, and no mention was made to the jurors that it was Mother's Day weekend. Additionally, defendant's assertion that the mis-signed verdict form is evidence of coercion amounts to speculation, particularly in light of the court's neutral statement about sequestration.

¶ 34 We are also not persuaded by defendant's reliance on *People v. Friedman*, 144 Ill. App. 3d 895 (1986). There, at one point during deliberations, the jury asked about the meaning of an instruction. *Friedman*, 144 Ill. App. 3d at 903. After clarifying that instruction, the court told the jury that in about 45 minutes, it would arrange for overnight accommodations. *Id.* The jury returned guilty verdicts approximately five minutes later. *Id.* Stating that the jury deliberated for more than four hours before the remark about sequestration and for only five minutes afterward, the court found that it was likely that the remark impermissibly hastened the verdict. *Id.* at 903-04. We find relevant this court's discussion of *Friedman* in *People v. McCoy*, 405 Ill. App. 3d 269, 278 (2010). We stated that in *Friedman*, "it was clear that the jury could not have given due consideration to the newly-defined legal concept in five minutes," and further, the only factor that was considered in *Friedman* "was how long the jury deliberated after receiving the sequestration announcement." *McCoy*, 405 Ill. App. 3d at 278. Those concerns about *Friedman*

are salient here. In this case, the jury had not recently received new information and the totality of the circumstances—not just the length of deliberations after the sequestration announcement—demonstrates that the court's comments were not coercive.

¶ 35 As the court's comments about sequestration were proper, the verdict was not coerced, and there was no error. As a result, defendant was not prejudiced by his appellate counsel's failure to raise plain error or his trial counsel's ineffectiveness, and defendant has not made a substantial showing of a constitutional violation.

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 37 Affirmed.