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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
Respondent-Appellee,)	Cook County.
)	
v.)	No. 08 CR 17442
)	
EMANUEL WILEY,)	Honorable
)	Timothy J. Chambers,
Petitioner-Appellant.)	Judge Presiding.

ORDER

JUSTICE ROCHFORD delivered the judgment of the court.

Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

¶ 1 *Held:* We affirmed the first stage dismissal of defendant's postconviction claim of ineffective assistance of appellate counsel, where defendant failed to show any arguable prejudice by his appellate counsel's allegedly unreasonable conduct. Defendant's remaining claims on appeal were forfeited where they were not raised in his postconviction petitions.

¶ 2 A jury convicted defendant, Emanuel Wiley, of attempted murder and aggravated battery with a firearm. The trial court sentenced him to 40 year term of imprisonment for the attempted murder conviction, and a concurrent 25 year term of imprisonment for the aggravated battery

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with a firearm conviction. On direct appeal, the appellate court affirmed. See *People v. Wiley*, 2012 IL App (1st) 113117-U. Defendant subsequently filed a postconviction petition and supplemental postconviction petition, which the postconviction court dismissed at the first stage. Defendant now appeals the first-stage dismissal of his postconviction petitions. We affirm.

¶ 3 At trial, Steven Williams testified that his friend, Johnny Parker, picked him up at approximately 11 or 11:15 p.m. on August 16, 2008, on the northwest side of Chicago and drove them to the corner of Lavergne Avenue and Crystal Street, where he saw a woman named Keisha. Keisha was standing on the sidewalk on the driver side of the car, and she began talking with Mr. Parker. While they were talking, Mr. Williams was playing with his phone. Mr. Williams noticed a man walking down the sidewalk on the passenger side of the car: "and he looked kind of suspect," meaning "he was just walking with his hands down, with his hands to his side." Mr. Williams did not take his eyes off the man and did not look back at his phone. Instead, Mr. Williams continued to watch the man, as he walked steadily closer. When the man was under the streetlight, Mr. Williams saw his face, and also saw he was wearing shorts and colorful shoes, but no shirt. Mr. Williams testified he had a "low haircut," was maybe six feet tall or six feet, one inches tall, and skinny. He was holding a revolver in his hands. When asked to describe his degree of attention while looking at the man with the gun, Mr. Williams stated: "I just kept my eyes on him." Nothing blocked Mr. Williams' view of the man. Mr. Williams made an in-court identification of defendant as the man he saw holding the gun and walking toward them.

¶ 4 As defendant got to within two or three feet of the car, Keisha said to him: "Why don't

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you go in the house and put the gun up?" Defendant replied: "Shut up talking to me before I *** shoot at you or shoot at the other guys in the car." While defendant was talking to Keisha, Mr. Williams was looking primarily at defendant's right hand because that was the hand holding the gun; Mr. Williams was not looking closely at defendant's torso.

¶ 5 Mr. Williams saw defendant shoot the gun with his right hand. Mr. Williams ducked down toward the gearshift and heard defendant fire four shots. One of the shots shattered the rear window of the car, while another shot struck Mr. Williams on the lower-right side of his back. Mr. Parker drove Mr. Williams to West Suburban Hospital.

¶ 6 When Mr. Williams arrived at West Suburban Hospital, he spoke with a detective and described the man who had shot him as a black male, in his late twenties, with a low haircut, and a skinny build. Mr. Williams did not tell the detective that the man had a tattoo on the hand holding the gun.

¶ 7 On August 29, 2008, Mr. Williams went to police headquarters, where he picked defendant out of a lineup as the person who had shot him.

¶ 8 Johnny Parker testified that in the evening of August 16, 2008, he was driving his girlfriend's car and picked up Mr. Williams at about 11:15 or 11:20 p.m. Mr. Williams sat on the front passenger seat. Mr. Parker drove westbound on Crystal Street and parked on the corner of Crystal Street and Lavergne Avenue, close to the crosswalk, near a girl named Keisha. Mr. Parker had known Keisha for about six months, and they began talking.

¶ 9 As Mr. Parker was talking to Keisha, he saw a man wearing shorts, but no shirt, walking on the sidewalk to his right. Mr. Parker watched as the man walked off the sidewalk, into the

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middle of the street, and then stepped in front of the car. Mr. Parker saw something shiny in his hand, but he did not know what it was at that time; he thought it might be "a radio or something." Mr. Parker saw his face and noticed he had a low haircut. Mr. Parker made an in-court identification of the man as defendant.

¶ 10 Mr. Parker asked Keisha whether defendant was holding a gun in his hand. Keisha told defendant to "put it up." Defendant told Keisha to shut up or else he would shoot her and the occupants of the car. Defendant then raised his right hand and began shooting. He was about two feet in front of the car when he fired the gun. At that point, Mr. Parker could tell that the shiny object in defendant's hand was a revolver.

¶ 11 After defendant fired his first shot, Mr. Parker attempted to run over defendant with the car. Defendant jumped to the side, avoided getting hit by the car, and fired a second shot that hit Mr. Williams in the back. Mr. Parker drove down Crystal Street, and defendant fired a third shot that struck the rear window.

¶ 12 Mr. Parker drove Mr. Williams to West Suburban Hospital. While a security guard came and took Mr. Williams inside the hospital, Mr. Parker remained outside and called Keisha. After talking with Keisha, Mr. Parker believed he knew the identity of the shooter. Mr. Parker talked with a female police officer and handed her the phone so she could talk with Keisha. Mr. Parker then talked with some detectives and gave them a description of the shooter as a skinny, black male, in his early twenties, between five feet eight inches tall and six feet tall, wearing shorts but no shirt, and having a low haircut. On August 29, 2008, Mr. Parker picked defendant out of a lineup and identified him as the shooter.

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¶ 13 Lieutenant Mary Platt testified that, shortly after midnight, on August 17, 2008, she was notified of the shooting and went to West Suburban Hospital, where she spoke with Mr. Parker, who told her what had happened and stated that Keisha knew who the shooter was. Mr. Parker called Keisha and handed the phone to Lieutenant Platt. After speaking with Keisha, Lieutenant Platt began looking for someone named "Real" or, "Neal." Lieutenant Platt asked Keisha to come to the hospital or to the police station, but she did not do so.

¶ 14 On cross examination, Lieutenant Platt testified she did not recall whether Mr. Parker told her the shooter had any tattoos.

¶ 15 Detective Arthur Young testified that, at approximately 1:55 a.m., on August 17, 2008, he received an assignment to investigate a shooting. He went to West Suburban Hospital and spoke with Lieutenant Platt, who told him she had spoken on the phone with a woman named Keisha. After speaking with Lieutenant Platt, Detective Young knew to begin looking for a person by the nickname "Real" or, "Neal."

¶ 16 Detective Young then went to the emergency room and spoke with Mr. Williams for about five minutes, who described the shooter as a black male, in his late twenties, with a skinny build, a low haircut, wearing blue jean shorts, colorful gym shoes, and no shirt. He did not specifically say that the shooter had any tattoos. He described the gun used in the shooting as a revolver, and said he would recognize the shooter.

¶ 17 After speaking with Mr. Williams, Detective Young spoke with Mr. Parker outside the emergency room entrance. Mr. Parker described the shooter as a black male, between the ages of 20 and 27, approximately five feet ten inches tall, weighing 170 pounds with a skinny build,

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wearing blue jean shorts, and no shirt. Mr. Parker did not make any mention of tattoos.

¶ 18 Mr. Parker told Detective Young about Keisha and stated that the gun used in the shooting was a revolver. After speaking with Mr. Parker, Detective Young was looking for a particular person nicknamed "Real."

¶ 19 Detective Young went back to the police station, called Keisha, and asked her to come down for an interview. She did not do so. Detective Young never asked Mr. Williams or Mr. Parker any specific, direct questions about tattoos.

¶ 20 Detective Ruben Weber testified that on August 29, 2008, Mr. Williams and Mr. Parker separately picked defendant out of a lineup at the police station and identified him as the shooter.

¶ 21 Detective Weber identified People's exhibit number 18 as a photograph of defendant on the day of the lineup that depicts his torso with accompanying tattoos. Detective Weber identified a tattoo of the word "Real" on his left arm.

¶ 22 On cross examination, Detective Weber testified further regarding the photograph of defendant's tattoos:

"Q. And in addition to the 'Real' on his forearm, there's also a number of other tattoos; is that right, sir?

A. That's correct.

Q. Specifically a 'B' and an 'M' by the shoulders?

A. Yes.

Q. Also a--what appears to be a flying dragon; is that right, sir?

A. Or something. I don't know. From here, I can't tell what that would be."

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¶ 23 After the photograph was brought closer to Detective Weber, he resumed testifying as follows:

"Q. And there appears to be a winged animal on that same arm; is that right, sir?

A. Yes.

Q. And also a 'B' and an 'M'?

A. Yes.

Q. Also another tattoo up towards the right shoulder; is that right, sir?

A. Yes.

Q. Also another tattoo on the left shoulder *** right above the elbow, it appears; is that right, sir?

A. Yes.

Q. And also a tattoo on the same hand that says 'Real'—where the forearm says 'Real'; is that right, sir?

A. Yes.

Q. Also another tattoo that says 'Cherish Life' over the left breast; is that right?

A. Yes.

Q. And these are tattoos that are pretty readily seen; is that right, sir?

* * *

A. Yeah, I could see them."

¶ 24 Detective Weber was shown defense exhibit number three, which he identified as a photograph of defendant taken after the lineup. Detective Weber stated that a neck tattoo is

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visible in that photograph. Detective Weber was shown defense exhibit number four, which he identified as another photograph of defendant after the lineup. Detective Weber agreed that a "couple more tattoos" are visible in that photograph, including a sickle with something written above it, another tattoo on the hand and another name on the forearm.

¶ 25 On redirect examination, Detective Weber was shown People's exhibit number 19, which he identified as another photograph of defendant from the lineup. Detective Weber circled defendant's left forearm in People's exhibit number 19 showing a tattoo of the word: "Real." Detective Weber clarified that defendant's right forearm shows a tattoo of the word: "Hell."

¶ 26 Defendant failed to include any of the photographs in the record on direct appeal.

¶ 27 After the State rested, defendant called Pierra Arrington, who testified that defendant was her neighbor and she had known him for 24 years. At about 9 or 9:30 p.m. on August 16, 2008, she was at Lafollette Park with Keith Hodges, defendant, and Latrice Longstreet. Lafollette Park is located at Lavergne and Potomac Avenues. After about an hour of drinking at the park, they all went to a store at Division Street and Lavergne Avenue to buy cigarettes. The store was closed, so they went to a gas station one block away at LeClaire Avenue and Division Street. They bought the cigarettes, saw a couple of friends, and talked with them for 30 to 45 minutes. Then they returned to Lafollette Park and began drinking again.

¶ 28 Ms. Arrington testified that, about one hour later, they heard gunshots. The four of them began running away. Ms. Arrington and Mr. Hodges ran to Ms. Arrington's house, which was a five-minute walk from the park. Defendant and Ms. Longstreet ran to Ms. Longstreet's house, which was around the corner from Ms. Arrington's house.

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¶ 29 Ms. Arrington testified she did not see defendant with a gun that evening, she did not see him shooting anybody, and he did not leave her presence until after the gunshots were fired.

¶ 30 Latrice Longstreet testified consistently with Ms. Arrington.

¶ 31 Both Ms. Arrington and Ms. Longstreet testified that, even after becoming aware that defendant had been accused of the shooting, they never contacted the police or the office of the Cook County State's Attorney to inform them that defendant was not the shooter.

¶ 32 Following all the evidence, the jury convicted defendant of attempted murder and aggravated battery with a firearm. The trial court sentenced him to a 40-year term of imprisonment for attempted murder, and a concurrent 25-year term of imprisonment for aggravated battery with a firearm.

¶ 33 On direct appeal, defendant argued that the State failed to prove him guilty beyond a reasonable doubt and that his trial counsel provided ineffective assistance. We affirmed. *Id.*

¶ 34 Defendant filed a *pro se*, postconviction petition, alleging that his appellate counsel committed ineffective assistance on direct appeal by failing to include, in the record on appeal, the photographs of his tattooed body testified to by Detective Weber. Defendant contended that the photographs would have supported his argument on direct appeal that he was not proved guilty beyond a reasonable doubt where the eyewitnesses failed to mention his tattoos when questioned by the police. Defendant further alleged in his postconviction petition that his trial counsel committed ineffective assistance by failing to produce supporting evidence at trial that he had the tattoos before the crime occurred, and by failing to investigate and call Keisha Chambers as a witness.

¶ 35 Defendant also filed a supplemental *pro se* postconviction petition, alleging his appellate counsel committed ineffective assistance on direct appeal by failing to discover and argue that defendant was six feet three and one-half inches tall, which was several inches taller than the description of the shooter given by the eyewitnesses.

¶ 36 The postconviction court dismissed defendant's postconviction and supplemental postconviction petitions at the first stage of proceedings. Defendant appeals.

¶ 37 The Postconviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), provides a method whereby a person under a criminal sentence can assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction proceeding not involving the death penalty involves three stages. *Id.* at 10. At the first stage, the postconviction court must independently review the petition within 90 days of its filing, take the allegations as true, and determine whether the petition is frivolous or patently without merit. *Id.* A *pro se* postconviction petition must be given a liberal construction (*id.* at 21), and may be summarily dismissed at the first stage only if the petition has no arguable basis either in law or in fact. *Id.* at 11-12. Review is *de novo*. *People v. Robinson*, 217 Ill. 2d 43, 60 (2005).

¶ 38 First, defendant argues that the postconviction court erred in summarily dismissing his *pro se* postconviction petition at the first stage, where he adequately alleged his appellate counsel provided ineffective assistance on direct appeal by failing to include, in the record on appeal, the photographs of his tattooed body testified to by Detective Weber. Defendant contends such photographs would have supported his argument on direct appeal that he was not proved guilty

beyond a reasonable doubt where the eyewitnesses failed to mention his tattoos when questioned by police.

¶ 39 Ineffective assistance of counsel claims are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and that he was prejudiced thereby such that there is a reasonable probability that, but for his counsel's unreasonable performance, the result of the proceeding would have been different. *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010). In the context of an ineffectiveness claim against appellate counsel, prejudice is shown when there is a reasonable probability that, but for counsel's errors, the appeal would have been successful. *Id.* at 497. "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." (Emphasis added.) *Hodges*, 234 Ill. 2d at 17.

¶ 40 The postconviction court did not err in summarily dismissing, at the first stage, defendant's postconviction claim of ineffective assistance of appellate counsel because there is not an arguable, reasonable probability that defendant's direct appeal would have been successful even if his appellate counsel had included in the record the photographs of his tattooed body. Initially, we note that even though the appellate record on direct appeal did not contain photographs of defendant's tattooed body, the record did contain Detective Weber's testimony at

trial giving a detailed description of the tattoos on his torso and arms as depicted in the photographs. Photographs of defendant's tattooed body (People's exhibit numbers 18 and 19), which were testified to and described by Detective Weber at trial, are contained in the postconviction appellate record now before us in the present case. Detective Weber accurately described defendant's tattoos as depicted in those photographs.

¶ 41 On direct appeal, appellate counsel cited to Detective Weber's testimony when arguing that defendant was not proved guilty beyond a reasonable doubt where neither eyewitness told police about his tattoos. In considering appellate counsel's argument, we cited the relevant standard of review as being whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Wiley*, 2012 IL App (1st) 113117-U, ¶ 43 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We then noted that *People v. Slim*, 127 Ill. 2d 302, 307 (1989), and *Neil v. Biggers*, 409 U.S. 188 (1972), set forth the following relevant factors to consider in evaluating an identification: (1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Wiley*, 2012 IL App (1st) 113117-U, ¶ 44 (citing *Slim*, 127 Ill. 2d at 307-08). With respect to the *Slim/Biggers* factors, we further noted that both eyewitnesses had a good opportunity to view defendant at the time of the crime, they both testified to their high degree of attention, they both gave prior accurate descriptions of defendant, they both identified defendant in a lineup less than two weeks

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after the shooting, and they showed no uncertainty in their identifications. *Id.* ¶¶ 45-49. We concluded that, weighing all the *Slim/Biggers* factors, and viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the eyewitnesses had viewed defendant under circumstances permitting a positive identification. *Id.* ¶ 50.

¶ 42 We next considered appellate counsel's specific argument that the eyewitnesses' identifications of defendant as the shooter were suspect because when questioned by police they did not mention the tattoos on his torso and arms that were testified to by Detective Weber as being readily visible. *Id.* ¶ 51. We held that the eyewitnesses' failures to mention the presence of defendant's tattoos affected the weight of their testimony but were not so important as to raise a reasonable doubt of his guilt, where each witness made a separate and positive identification of defendant based on an adequate opportunity to observe him at the time of the crime. *Id.* In so holding, we noted that each witness' failure to mention the presence of defendant's tattoos was explained by their testimony that when they viewed defendant their focus was on his face and the hand holding the gun, and not on his torso and arms. *Id.* ¶ 52. When asked to provide a description to police, they naturally provided a description of those features upon which they had focused their attention. *Id.* We further held that a rational trier of fact could have found that the eyewitnesses failed to mention the tattoos because the police officer failed to ask either of them any specific, direct questions about tattoos. *Id.* We affirmed defendant's convictions. *Id.* ¶ 78.

¶ 43 There is not an arguable, reasonable probability that the result would have been different had the photographs of defendant's tattooed body been included in the appellate record on direct appeal. As discussed earlier in this order, the tattoos depicted in defendant's photographs were

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accurately described by Detective Weber at trial. Detective Weber's testimony was included in the appellate record on direct appeal. Had the photographs of defendant's tattooed body also been included in the appellate record on direct appeal, they would have been cumulative to Detective Weber's testimony and would have added nothing new to make us reexamine our holding and to cause us to rule in favor of defendant. Accordingly, defendant's postconviction claim of ineffective assistance of appellate counsel was properly dismissed at the first stage.

¶ 44 Next, defendant contends the postconviction court erred in summarily dismissing his postconviction petitions at the first stage because he was denied a fair trial through: the State's elicitation of Keisha's inadmissible hearsay implicating defendant; the trial court's improper admission of said evidence and failure to give a limiting instruction; trial counsel's ineffectiveness by failing to adequately object to the admission of the hearsay evidence or to the State's rebuttal closing argument referencing said evidence, by eliciting additional hearsay, and by failing to request a limiting instruction; and appellate counsel's ineffectiveness on direct appeal by not adequately arguing that the trial court erred in admitting this hearsay evidence and in not giving a limiting instruction, and by not adequately arguing trial counsel's ineffectiveness regarding the admission of the hearsay evidence. Defendant forfeited review by failing to raise any of these issues either in his initial postconviction petition or in his supplemental postconviction petition, even where the petitions are given a liberal reading. *People v. Jones*, 213 Ill. 2d 498, 505 (2004); 725 ILCS 5/122-3 (West 2012).

¶ 45 For the foregoing reasons, we affirm the circuit court.

¶ 46 Affirmed.