

No. 1-14-1474

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

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 06 CR 8139
	)	
LUCRECIOUS TOWERS,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge, Presiding.

---

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Rochford and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in dismissing the defendant's amended postconviction petition at the second stage where he failed to make a substantial showing that: (1) his alleged newly discovered evidence of actual innocence was of such a conclusive character that it would probably change the result on retrial, and (2) his trial attorney was ineffective for failing to investigate and call three witnesses at trial.

¶ 2 The defendant, Lucrecius Towers, appeals from the dismissal of his amended petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)).

On appeal, he contends that the trial court erred in dismissing his amended petition at the second

stage of the proceedings because he made a substantial showing that (1) he is actually innocent based upon newly discovered evidence, and (2) his trial counsel was ineffective for failing to investigate and call three witnesses at trial. For the reasons that follow, we affirm.

¶ 3 The record reveals that the defendant was charged with six counts of first-degree murder (720 ILCS 5/9-1(a)(1), 9-1(a)(2) (West 2006)) and two counts of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)) in connection with the fatal shooting of John Falls.

¶ 4 The evidence adduced at trial established that, in the afternoon of January 14, 2006, the defendant shot and killed the victim, John Falls, in retaliation for a traffic altercation that occurred earlier that same day. According to the testimony of Christopher Doss, James Harper, and April McFulson, Falls was driving a rented Jeep Trailblazer on the southwest side of Chicago during the early morning hours of January 14, 2006. Doss, Harper and McFulson were also in the vehicle. Falls was driving north on Emerald Street near 56th Street when he pulled up behind a gray Ford Focus that was stopped in the middle of the street and blocking the northbound lane. The Focus was parked next to a white Pontiac Bonneville. Falls honked his horn, drove around the Focus, and then proceeded north on Emerald. Harper stated that Falls turned into the entrance of an alley, but stopped with the rear of the Trailblazer still protruding onto Emerald Street because the driver of the Focus had been following closely behind them. Falls got out of the Trailblazer, approached the driver of the Focus, and began to argue with him. The argument eventually escalated into a physical altercation.

¶ 5 During the altercation, the driver of the white Bonneville, whom Doss and Harper both identified in court as the defendant, pulled up to the alley and got out of his car. At that point, Doss and Harper exited the Trailblazer to assist Falls. Harper joined the fight between Falls and the driver of the Focus, while Doss fought with the defendant. Harper testified that he used an

empty vodka bottle to hit the driver of the Focus, who fell to the ground, and the defendant fled on foot out of the alley. Harper then got into the driver's seat of the Focus and crashed it into a tree. Falls pulled him out of the Focus and they, along with Doss, got back into the Trailblazer and drove away. Falls continued driving east through the alley and then turned south onto Union Avenue.

¶ 6 Meanwhile, the defendant had returned to his Bonneville and pursued Falls' Trailblazer. During the chase, the defendant rear-ended Falls' car, forcing it to spin into a parked vehicle. The defendant, whose vehicle also sustained damage and began to smoke, put it in reverse and sped away from the Trailblazer. Because the Trailblazer had a flat tire and other damage, Fall drove to 69th and Wentworth and parked it in front of Harper's house. The group got in Harper's truck, drove to a police station to file a police report, and then went to a private party where they stayed until 6 or 6:30 a.m.

¶ 7 On cross-examination, Harper testified that Falls was driving down 56th and Emerald because he was looking for Ebony Ester, Falls' ex-girlfriend, who was staying at a friend's house. He explained that Falls stopped in front of Ester's friend's house but decided to turn around because he did not see Ester's vehicle. Harper denied that Falls was looking to catch Esters with her current boyfriend and he denied making any such statement to the police.

¶ 8 McFulson testified that, after the private party, she and Falls went to Falls' sister's house where they slept until noon. Thereafter, Falls borrowed his sister's white Volkswagen Touareg, and he and McFulson drove to Popeye's Louisiana Kitchen (Popeye's), a fast-food restaurant located at 75th Street and Lafayette Avenue. McFulson testified that, as they were waiting in the restaurant's drive-through lane, she observed a man walk in front of their car. Less than two seconds later, she heard a pop and felt specks of glass hit her face. McFulson immediately put

her head down and kept it there. She eventually ran from the car to the restaurant, asking someone to call the police. McFulson identified the defendant in court as the man she observed walk in front of Falls' car at Popeye's. She explained that, even though she had been talking on her cell phone, she could see the defendant's face clearly as he walked near the car.

¶ 9 Edwina Ross testified at trial that she and her parents were directly in front of the white Volkswagen Touareg in the restaurant drive-through lane. Ross, who was sitting in the back seat, turned around to see how many cars were in line behind them and saw a man with a gun walk around the corner of the restaurant. The man stood between 5'7" and 5'8" and was dressed in a black leather coat and a black-hooded sweater with the hood down. Nothing was blocking Ross's view, and she could see Falls in the driver's seat of the Touareg and observed McFulson talking on her cell phone. According to Ross, the shooter stood on the curb by the driver's side-view mirror and, with the gun in his right hand, extended his arm at a slight downward angle and fired six or seven shots. The shooter then pulled his hood up with his left hand as he ran around the corner of the restaurant. Ross testified that she saw the shooter's face as he approached the Touareg and as he was shooting, and she identified the defendant in court as the man who fired multiple shots at Falls.

¶ 10 Detective Paul Spagnola testified that he and his partner, Detective Rick Harrison, were assigned to investigate the shooting. They interviewed witnesses who described the shooter as a black male, between 26 and 27 years old, approximately 5'8" tall, weighing 160 pounds, and wearing a dark leather jacket, dark clothes, and a hooded sweater, with the hood down. Within a couple of days after the shooting, Detectives Spagnola and Harrison went to 5639 South Emerald to look at a dark-blue 1992 Chevrolet Lumina because it matched the description of a car that

might have been used as a "get-away" car in the murder. The vehicle was registered to a person named Marco McNeal.

¶ 11 On January 16, 2006, Detective Spagnola composed a black-and-white photo array that included pictures of Arian Bonds and Marco McNeal. Spagnola showed the array to Doss, Harper, and McFulson. Doss identified the photograph of Marco McNeal as someone who looked like the individual that had been driving the Focus on January 14, 2006. He also selected the photo of Arian Bonds, saying that he resembled the driver of the white Bonneville that night. Though Spagnola's report indicated that Doss had identified Arian Bonds, it did not specify that Doss indicated he thought that Arian Bonds "resembled" the man he had fought. Harper also identified Marco McNeal as the person he thought was the driver of the Focus, and with whom he and Falls fought on January 14, 2006. McFulson was not able to make any identifications from the photo array.

¶ 12 Detective Spagnola testified that he continued his investigation by attempting to locate Arian Bonds and Marco McNeal. Although he could not locate Marco McNeal, he interviewed Arian and his brother, Carlos Bonds. After interviewing Arian and Carlos Bonds, Detective Spagnola shifted the focus of the investigation to the defendant.

¶ 13 Detective Spagnola testified that he created a second photo array that was comprised of color photographs, including a picture of the defendant and a man named Terrence Cobb. After viewing this photo array, Doss and Harper identified the defendant as the driver of the white Bonneville and Terrence Cobb as the driver of the gray Focus who were involved in the traffic altercation during the early morning hours of January 14, 2006. McFulson identified the defendant as the man she saw walk in front of Falls' car while they were waiting in the drive-through lane of Popeye's the following afternoon, and Ross identified the defendant as the

shooter. Doss, Harper, McFulson, and Ross also identified the defendant in a subsequent lineup following his arrest on March 13, 2006, and their lineup identifications were consistent with those made from the second, color photo array.

¶ 14 The evidence indicated that Falls suffered five gunshot wounds, all of which entered his body on the left side. In addition, the prosecution presented evidence that the police recovered four fired bullets from the inside of the white Volkswagen Touareg, one bullet from a sleeve of a leather jacket found on the sidewalk, and eight ejected cartridge casings. The bullets found at the scene and those recovered from Falls' body were fired from the same weapon, as were the recovered cartridge casings.

¶ 15 After the State rested, the defense called Carlos Bonds, who testified that in January 2006, he lived at 5638 South Emerald Street with his brother, Arian. He stated that, at that time, Arian and the defendant both drove a white Pontiac Bonneville and both men wore their hair in braids. He also testified that Arian was dating Ebony Esters. Carlos acknowledged that he was arrested on January 29, 2006, for delivery of a controlled substance and that, on the day of his arrest, he spoke to the police about Falls' murder. He stated that he knew the defendant from the neighborhood, but they were not friends because he and the defendant had a fight over a woman earlier that same month. On cross-examination, Carlos denied telling the police that, on January 14, 2006, he saw the defendant driving a dark-colored Chevrolet Lumina. He also denied making a similar statement to an assistant state's attorney on March 14, 2006.

¶ 16 Testifying on his own behalf, the defendant acknowledged that, in January 2006, he drove a white Pontiac Bonneville and wore his hair in braids. He also stated that he lived at 5630 South Emerald for about a month and he frequented the neighborhood. He denied, however, any involvement in the traffic altercation or the shooting incident. According to the defendant, the

first time he learned of Falls' murder was when he was arrested in March 2006. The defendant acknowledged that he knew Arian Bonds from the neighborhood and that Arian also drove a white Pontiac Bonneville. He also stated that he and Carlos Bonds were not friends and that they had a fight over a woman in early January 2006.

¶ 17 The parties stipulated that a private investigator located a dark-colored Chevrolet Lumina in the vicinity of 50th and Halsted Streets, and the defendant introduced a certified vehicle registration record indicating that Marco McNeal was the owner of a dark-blue 1992 Chevrolet Lumina.

¶ 18 In rebuttal, the prosecution called Assistant State's Attorney Mary Anna Planey, who testified that she interviewed Carlos Bonds in March 2006 and that Carlos told her that he had seen the defendant driving a dark-colored Chevrolet Lumina on the morning of January 14, 2006.

¶ 19 During closing argument, the defense argued that the State failed to prove the defendant guilty beyond a reasonable doubt. More specifically, defense counsel asserted that Arian Bonds committed the crime and that this was a case of mistaken identity. He noted that Arian Bonds lived near 56th and Emerald, drove a white Bonneville, and wore his hair in braids, just like the defendant. The defense also pointed out that Arian was dating Falls' ex-girlfriend and that, during the early morning hours of January 14, 2006, Falls was looking to catch his ex-girlfriend with her new boyfriend. According to the defense, Arian Bonds was involved in the physical altercation during the early morning hours of January 14, 2006, and he was the person who shot and killed Falls hours later. Defense counsel attacked the credibility of the State's witnesses, highlighted the discrepancies in their testimony, and argued that the identification testimony of McFulson and Ross was unreliable for a number of reasons.

¶ 20 Following closing arguments, the jury found the defendant guilty of first-degree murder. The trial court sentenced him to a term of 55 years' imprisonment for first-degree murder and a consecutive term of 45 years based upon the jury's finding that the defendant personally discharged the firearm that caused Falls' death. This court affirmed the defendant's conviction and sentence on direct appeal. *People v. Towers*, No. 1-08-1875 (March 9, 2010) (unpublished order under Supreme Court Rule 23).

¶ 21 In March 2011, the defendant filed a *pro se* postconviction petition pursuant to section 122-1 of the Act (725 ILCS 5/122-1 (West 2010)), alleging, *inter alia*, that his trial counsel was ineffective for failing to investigate and present the testimony of several witnesses whose testimony would have bolstered the defense's theory that Arian Bonds committed the crime.

¶ 22 In June 2011, the trial court advanced the petition to the second stage of postconviction proceedings. Thereafter, the defendant retained private counsel who filed an amended postconviction petition. As amended, the petition alleged, *inter alia*, that (1) the defendant was actually innocent based upon "newly discovered evidence" that Ralph Lewis witnessed Arian Bonds shoot Falls, and (2) ineffective assistance of counsel based upon his trial attorney's failure to investigate and call Eric Carson, Marco McNeal, Gregory Brooks, and Terrence Cobb as witnesses at trial. In support, the defendant attached his own affidavit, as well as affidavits from Carson, McNeal, Lewis, and Brooks. He also included a handwritten statement from Cobb.

¶ 23 Ralph Lewis stated in his affidavit that, in May 2012, he met the defendant in Menard Correctional Center and learned that he was incarcerated in connection with the shooting death of John Falls. Upon learning of the reason for the defendant's incarceration, Lewis informed the defendant that he knew Arian Bonds from his neighborhood and that, "in the early morning hours" of January 14, 2006, Arian was giving him a ride home when he "unexpectedly stopped at



the Popeye's on 75th Street," exited the vehicle without saying anything, and walked toward the front door of the restaurant. Lewis attested that he observed Arian approach a white truck "that was sitting at the drive thru window," pull out a gun, and shoot at the vehicle. At that time, Lewis exited the car and ran home. Lewis further averred that he did not come forward with this information sooner because he was in violation of his parole, but that he decided to come forward when he learned that the defendant had been convicted of Arian Bonds' crime.

¶ 24 Eric Carson stated in his affidavit that he does not know anything about the shooting death of John Falls and "was completely unaware until contacted by [the defendant's] lawyer, Mr. Johnson." Carson also stated that he never told Carlos Bonds that the defendant said he "killed a man" and that any statement by Carlos to the contrary "is absolutely untrue." Carson attested that he told the defendant's trial attorney that he was willing to testify and "clear [him]self of this mishap," but was never called to testify.

¶ 25 Marco McNeal's affidavit stated in its entirety as follows:

"This is in response to an incident that involved my vehicle back in 2006 and [Arian] Bonds. Back in 2006[,] I got a call from [Arian] from an anonymous number asking to borrow my car because his had been in an accident. He told me that his brother had an altercation with his girlfriend's ex-boyfriend and he tore his car up. [Arian] then asked me if he could keep my car because he had a room at the motel and no transportation and I said yes. He then brought my car the next evening and told me that he found the guy who his brother was fighting and who tore up his car and that he "made the n\*\*\* pay for it." He explained that the guy had thought Carlos was him and tried to get him back because he was dating his girl. I don't know [the defendant] but I do know that he would never borrow,

drive, or even be in my car, and I know that he didn't have anything to do with the crime he's locked up for because [Arian] and his brother Carlos were involved! Had I known an innocent person was locked up, I would've been [*sic*] told my statement. From what [Arian] told me I know he committed that crime that [the defendant is] in jail for. No one ever contacted me to come to his trial but I will if my statement can help an innocent man."

¶ 26 Brooks attested that, while he was incarcerated "back in September," someone informed him that he was being subpoenaed to testify at the defendant's trial. He states that "they" asked him questions about the defendant and Carlos Bonds and whether he witnessed a fight at 55th and Emerald. Brooks claims that he told "him" that he witnessed the fight at 55th and Emerald, which involved "Carlos, [Cobb] and some dudes," not the defendant. Brooks also stated that Carlos is a "liar" and that he never told Carlos that he saw the defendant in a "fight with some guys" on 55th and Emerald. Brooks also averred that he was at the courthouse during the defendant's trial but was never called as a witness.

¶ 27 According to Cobb's written statement, sometime in "December or January 2006," he was standing outside of Arian's house on Emerald Street when the driver of a gray Jeep stopped and asked him if he knew who lived at Arian's house. Cobb told the driver that if he wanted to know who lived there, to knock on the door of the house. The driver also asked Cobb if he knew who drove the white Bonneville that was parked by Arian's house. Although Cobb knew the Bonneville was Arian's vehicle, Cobb said "f\*\*\* you to the driver." In response, the driver swung at Cobb because he did not give him the information he sought, and the other passengers in the vehicle joined in the fight. Cobb stated that three or four men beat him and broke a glass bottle across his head and face, requiring a trip to the hospital and stitches on his face and hand.

Cobb also averred that he "heard from the neighborhood that Arian Bonds was seeing a girl who had a jealous boyfriend," and the men who attacked him were looking for Arian. He added that the defendant and Arian resembled each other in that both men were light skinned, wore their hair in dreads, and had a "wiry frame." Finally, Cobb claimed that he never owned or drove a Ford Focus, nor was he or the defendant in an altercation on January 14, 2006.

¶ 28 The State filed a motion to dismiss the amended petition, asserting that the defendant had not met his burden to establish his claims of actual innocence and ineffective assistance of counsel. On May 1, 2014, the trial court granted the State's motion and dismissed the defendant's petition. In doing so, the court noted that the defendant's actual innocence claim failed because the allegations in Lewis's affidavit are "completely contrary to the facts of the case," arise "out of thin air," and have "no traction." As to the ineffective-assistance-of-counsel claim, the trial court observed that trial counsel did, in fact, interview several of the witnesses whose statements contradicted with one another and that decisions regarding which witnesses to call was a matter of trial strategy. This appeal followed.

¶ 29 On appeal, the defendant argues that the trial court erred in dismissing his amended petition without an evidentiary hearing because: (1) he presented newly discovered evidence that would change the result on retrial, and (2) his trial attorney was ineffective for failing to investigate and call three witnesses at trial.

¶ 30 Pursuant to the Act, a criminal defendant may pursue a three-stage process to collaterally attack his convictions based on substantial violations of his constitutional rights. *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002). If a defendant's initial *pro se* petition withstands the first stage by making out the gist of a constitutional claim, the petition advances to the second stage of review, where the defendant receives the benefit of representation by counsel, who has the

opportunity to amend the petition, and the State may respond to the petition or file a motion to dismiss. *Id.* at 100. "[A] motion to dismiss raises the sole issue of whether the petition being attacked is proper as a matter of law." *People v. Domagala*, 2013 IL 113688, ¶ 35. "[T]he dismissal of a post-conviction petition is warranted only when the petition's allegations of fact—liberally construed in favor of the [defendant] and in light of the original trial record—fail to make a substantial showing of imprisonment in violation of the state or federal constitution." *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). A defendant must support the allegations in the petition with either the record or accompanying affidavits. *Id.* at 381. The court takes as true all well-pled factual allegations which are not positively rebutted by the record. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). However, the court does not resolve evidentiary questions, engage in fact-finding, or make credibility determinations at this stage. *Domagala*, 2013 IL 113688, ¶ 35. Where the petition and any accompanying exhibits make out a substantial showing of a constitutional violation, the defendant is entitled to a third-stage evidentiary hearing. *Coleman*, 183 Ill. 2d at 381-82. We review the trial court's second-stage dismissal of a postconviction petition *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 31 Before reaching the merits, we address the defendant's contention that the trial court applied the wrong standard in reviewing his amended postconviction petition where it found Lewis's affidavit lacked credibility. In support of his assertion, the defendant cites to the trial court's remarks that the allegations in Lewis's affidavit are "completely contrary to the facts of the case," arise "out of thin air," and have "no traction." The defendant asks this court to reverse the dismissal of his amended petition and remand for a third-stage hearing. The State responds by arguing that the trial court did not make any credibility determinations but was merely noting that Lewis's allegations, taken as true, are rebutted by the record.

¶ 32 In our view, even if the trial court erred by engaging in fact-finding or making credibility determinations, our supreme court recently held that a trial court's utilization of the wrong standard is not a basis for reversing a dismissal of a postconviction petition. See *People v. Sanders*, 2016 IL 118123, ¶¶ 42, 47-54 (although the trial court erred by making credibility determinations, the supreme court nevertheless affirmed the second-stage dismissal of the defendant's postconviction petition). As a reviewing court, we may affirm a trial court's dismissal on any ground substantiated by the record, regardless of the trial court's reasoning. *People v. Demitro*, 406 Ill. App. 3d 954, 956 (2010). Thus, we conclude that the use of an improper standard in analyzing a postconviction petition at the second stage does not itself serve as a basis for reversal, and we need not address whether the trial court applied the wrong standard.

¶ 33 Turning to the merits, the defendant argues that his amended petition made a substantial showing of actual innocence, relying on the affidavit of Ralph Lewis.

¶ 34 A claim of actual innocence is cognizable in a postconviction petition because the imprisonment of an innocent person violates the due process clause of the Illinois Constitution. *People v. Ortiz*, 235 Ill. 2d 319, 331 (2009). Actual innocence is not the same as sufficiency of the evidence or reasonable doubt, nor mere impeachment of trial witnesses, but a claim of total vindication or exoneration. *People v. Coleman*, 2013 IL 113307, ¶ 97. To advance to the third stage of postconviction proceedings based upon a claim of actual innocence, the defendant must present evidence that is "newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial." *Sanders*, 2016 IL 118123, ¶ 46.

¶ 35 In this case, we need not address whether the defendant's new evidence could have been discovered earlier in the exercise of due diligence and whether it is material and not merely cumulative because we conclude that, even assuming these conditions have been satisfied, the evidence is not of such a conclusive character that it would probably change the result on retrial. Evidence is conclusive when it places the trial evidence in a different light and undermines the court's confidence in the factual correctness of the guilty verdict. *Coleman*, 2013 IL 113307, ¶ 97. Stated differently, we must be able to find that the allegedly "new evidence is so conclusive that it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt." *Sanders*, 2016 IL 118123, ¶ 47. "[T]he conclusiveness of the new evidence is the most important element of an actual innocence claim." *Id.*

¶ 36 Well-pleaded factual allegations in a postconviction petition and its supporting evidence must be taken as true unless they are positively rebutted by the record of the original trial proceedings. *Coleman*, 183 Ill. 2d at 382. Here, there are many contradictions between Lewis's affidavit and the record. For example, Lewis attests that Arian Bonds was giving him a ride home during the *early morning* hours of January 14, 2006, when he "unexpectedly" drove to a Popeye's restaurant, exited the vehicle and started shooting at "a white truck that was sitting at the drive thru window." However, the undisputed evidence presented at trial established that Falls was shot in the *afternoon* of January 14, 2006. Lewis's statement that he was with Arian Bonds during the early morning hours of January 14, 2006, also conflicts with the defendant's theory at trial that Arian and Falls were involved in a physical altercation near 56th and Emerald Street during that time period. Moreover, Arian, who stands between 6'2" and 6'4", does not match the physical description of the shooter, who stood at 5'7" or 5'8," and thus, Lewis's statement that Arian committed the crime contradicts the trial identification of the defendant as

the shooter. At best, the allegations in Lewis's affidavit merely establish that Arian Bonds committed a similar crime, at a similar location, but at a different time; it does not exonerate the defendant as required for a claim of actual innocence. See *Coleman*, 2013 IL 113307, ¶ 97.

¶ 37 The remaining statements in Lewis's affidavit are vague and include no new information pointing to actual innocence. He fails to provide any facts regarding the number of vehicles waiting in the drive-through, the number of passengers in the "white truck," and the number of shots fired. He does not describe the vehicle that Arian was driving, nor does he provide any information regarding his relationship to Arian or the events that took place prior to Arian giving him a ride home. Instead, Lewis only raises a generic claim that Arian committed the crime. He does not provide an alibi for the time during which the other witnesses testified that the defendant was involved in a traffic altercation and subsequent shooting and he does nothing to dispel the identification testimony of Ross and McFulson that the defendant approached Falls' vehicle and shot Falls multiple times, causing his death.

¶ 38 In sum, the statements in Lewis's affidavit cannot overcome the evidence presented at trial to exonerate the defendant. We conclude, therefore, that the defendant failed to make a substantial showing of his actual innocence and the trial court properly dismissed his claim at the second stage of the proceedings.

¶ 39 Next, the defendant asserts that his amended petition made a substantial showing that he was deprived of his constitutional right to effective assistance of counsel where his trial attorney failed to interview or call as witnesses Marco McNeal, Gregory Brooks, and Terrence Cobb.<sup>1</sup>

---

<sup>1</sup> The defendant has apparently abandoned any reliance of the affidavit of Eric Carson. Moreover, because we consider the nonnotarized, handwritten statement of Cobb, we need not address the defendant's alternative argument that postconviction counsel offered unreasonable assistance for failing to obtain a notarized affidavit.

He maintains that their affidavits, which must be taken as true, show their testimony would have supported the defense theory at trial that Arian Bonds was involved in a physical altercation with Falls during the early morning hours of January 14, 2006, and that Arian, not the defendant, shot and killed Falls the following day. The defendant claims that, based on the allegations in the witnesses' affidavits, counsel's failure to present their testimony at trial constituted deficient representation.

¶ 40 Every defendant has a constitutional right to the effective assistance of counsel under the sixth amendment to the United States Constitution and the Illinois Constitution. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Claims of ineffective assistance of counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The failure to satisfy either the deficiency prong or the prejudice prong precludes a finding of ineffective assistance of counsel. *Id.* at 697.

¶ 41 Decisions concerning which witnesses to call at trial and what evidence to present on the defendant's behalf are matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *People v. Patterson*, 217 Ill. 2d 407, 442 (2005). The failure to interview witnesses, however, may be indicative of deficient representation when the witnesses are known to trial counsel and their testimony may be exonerating or support an



otherwise uncorroborated defense. *Coleman*, 183 Ill. 2d at 398. Despite that general rule, an attorney is not required to "read the defendant's mind" about the existence of a potentially exculpatory witness and the potential nature of the witness's testimony. *People v. Irvine*, 379 Ill. App. 3d 116, 130 (2008). Whether trial counsel was ineffective for failing to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005).

¶ 42 At the outset, we note that none of the affidavits attached to the defendant's amended petition support his claim that his trial attorney failed to interview McNeal, Brooks, and Cobb. That is, none of the affiants swore that they were not contacted by an attorney or investigator regarding the defendant's trial. Because the affidavits do not foreclose the possibility that trial counsel or his private investigator contacted and interviewed the three witnesses, the defendant's assertion that his trial attorney failed to interview McNeal, Brooks, and Cobb is not supported by the affidavits or other evidence as required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2012)). See *People v. Delton*, 227 Ill. 2d 247, 254 (2008); *People v. Williams*, 2016 IL App (1st) 133459, ¶ 31.

¶ 43 In any case, our review of the record demonstrates that the defendant's trial attorney conducted a thorough investigation into the mistaken-identity defense and presented evidence at trial in support of the defense. Prior to trial, defense counsel interviewed at least four witnesses, including Carlos Bonds, Arian Bonds, Eric Carson, and Gregory Brooks. He also filed a discovery response naming numerous other individuals as potential witnesses, including Marco McNeal, and hired a private investigator who located McNeal's vehicle near 50th and Halsted Streets. At trial, the defense relied on a theory of mistaken identity and sought to discredit the identification testimony of Ross and McFulson by presenting evidence that Arian Bonds was the

actual offender. The record reflects that evidence supporting the mistaken-identity defense was presented through the testimony of Carlos Bonds, as well as by Doss's initial identification of Arian Bonds as the driver of the white Bonneville, and testimony that, within a couple of days after the shooting, the police located a dark-blue Chevrolet Lumina parked at 5639 South Emerald, across the street from Arian Bonds' house. To further bolster the defense theory, defense counsel vigorously cross-examined Harper and elicited testimony from him that Falls was looking for his ex-girlfriend, Ebony Esters, and presented the testimony of Carlos who testified that his brother Arian was dating Esters. Defense counsel relied upon this testimony to argue in closing that Arian and Falls were fighting over Esters and that Arian was the person who subsequently shot and killed Falls. Because defense counsel investigated the mistaken-identity defense by interviewing several witnesses, his decision to move forward with this evidence at trial is virtually unchallengeable. See *People v. Peeples*, 205 Ill. 2d 480, 542 (2002) ("Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable").

¶ 44 Furthermore, the defendant's trial counsel could reasonably have concluded, as a matter of trial strategy, that McNeal, Brooks and Cobb would not have been helpful at trial. Taken together, their proposed testimony establishes only that the defendant was not involved in a traffic altercation at 56th and Emerald during the early morning hours of January 14, 2006, and that McNeal loaned his vehicle to Arian Bonds. Because McNeal, Brooks, and Cobb were not at the scene of the shooting, which occurred in the afternoon of January 14, 2006 at a Popeye's restaurant, their proposed testimony does not establish that the defendant was not the shooter. Given the weaknesses present in these affidavits, the defendant's trial counsel could reasonably

have concluded, after a reasonable investigation, that McNeal, Brooks, and Cobb would not have testified favorably on the defendant's behalf.

¶ 45 We also find that, regardless of whether counsel's performance was deficient, defendant has failed to establish a reasonable probability that he would not have been convicted had McNeal, Brooks, and Cobb testified. None of the witnesses' statements offer the exculpatory evidence that the defendant tries to convince us they do. Although they generally state that Arian and Carlos were involved "in the crime," none of these witnesses actually observed the shooting incident that occurred in the afternoon of January 14, 2006. Accordingly, none of the statements from the potential witnesses the defendant offered are capable of producing a different outcome on retrial and, as such, cannot sustain the defendant's claims of ineffective assistance of counsel where no substantial showing of prejudice has been made.

¶ 46 In sum, the defendant has failed to make a substantial showing that he was deprived of his constitutional right to effective assistance of counsel. Indulging a strong presumption in favor of the defendant's trial counsel, we find that the defendant's trial counsel made a reasonable investigation into the mistaken-identity defense and could have had sound reasons for choosing not to present the testimony of McNeal, Brooks, or Cobb at trial. We conclude, therefore, that defendant has not made a substantial showing that his constitutional right to the effective assistance of counsel was violated. *Coleman*, 183 Ill. 2d at 381-82.

¶ 47 For the reasons stated, we affirm the judgment of the circuit court of Cook County which dismissed the defendant's amended postconviction petition at the second stage.

¶ 48 Affirmed.