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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the
ILLINOIS,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	No. 08 CR 12327 (01)
v.)	
)	Honorable
ASHUR HIDOU,)	Marguerite A. Quinn,
)	Judge, presiding.
Defendant-Appellant.)	

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's postconviction petition failed to establish a substantial claim of ineffective assistance of trial counsel necessary to warrant a third-stage evidentiary hearing. Court did not err in finding that due process was not violated.

¶ 2 This appeal arises from the second-stage dismissal of defendant Ashur Hidou's petition filed under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2012). Defendant contends that trial counsel provided ineffective assistance and the circuit court erred in dismissing his petition because he made a substantial showing of a constitutional

violation based upon his trial counsel's failure to: confront witnesses, investigate, challenge expert witness' qualifications, lay a proper foundation for the victim's propensity for violence, object to evidence of gang involvement, investigate all legal defenses, and communicate with defendant. Defendant additionally contends trial counsel was ineffective because he refused to present exculpatory evidence, stipulated to treating doctor's testimony, coerced defendant into choosing a bench trial, and charged excessive fees. Defendant further alleges that due process was violated because vital witnesses were intimidated. We affirm.

¶ 3

BACKGROUND

¶ 4

Following a bench trial, defendant was convicted of first degree murder and sentenced to 35 years' imprisonment for the 2008 killing of Israel Moreno (also known as Kiki). Kiki was killed in the early morning of July 14, 2008, as a result of stab wounds inflicted by defendant. Defendant and Kiki knew each other from living in the same neighborhood; however, they were not friends in 2008. Kiki was a member of the Latin Counts street gang and defendant was a member of the Latin Kings street gang.

¶ 5

Vanessa Claudio testified for the State at trial. In June 2008, Vanessa was 18 years old and lived in a second floor apartment on Laurel Avenue in Des Plaines with her mother (Ida), father (Angelo), younger brother (Anthony) and younger sister (Veronica). Vanessa had a prior dating relationship with both defendant and Kiki. She had dated defendant for several weeks during her freshman year in high school. When the relationship ended they became close friends. Defendant also became close friends with the entire Claudio family. Vanessa testified that defendant called her parents "Moms" and "Pops" and would come to their home to "hang out" twice a week.

¶ 6 Vanessa met Kiki through her brother Angelo, Jr. Kiki lived about two blocks from the Claudio family. Vanessa stated that she had dated Kiki for 14 months and had broken up with him in February 2008. After the break-up she saw Kiki every day but did not always talk to him. She sometimes exchanged text messages with him. Vanessa stated that defendant told her that Kiki was not the right guy for her. Defendant also told her that he was a member of the Latin Kings.

¶ 7 The night of July 13, 2008, defendant had been at the Claudio family home. At approximately 5 p.m., defendant showed Vanessa and her parents a large knife that he had purchased for \$10. Afterwards more friends arrived. At approximately 1:30 a.m., she was in her bedroom with defendant and other friends when she heard Kiki yelling "Nessa" from outside her window about three times. She testified that defendant "looked a little mad, but not really." Vanessa ignored Kiki but eventually looked out her window and saw him walking away in the direction of Washington Street with his friend, Gregory Latson (Greg).

¶ 8 Vanessa testified that defendant left between 15 and 20 minutes later. Defendant said that he was leaving because his sister was there to pick him up. She also testified that her younger brother came home and that, as defendant was walking out of the house, defendant said that he was going to go to talk to the guys that were "messing with" her brother and that "he's going to get them." She returned to her bedroom and heard multiple people yelling and screaming. She yelled "they're fighting" and her father ran downstairs. Vanessa ran past her mother who was initially not allowing them to leave. When she got outside, she saw Kiki lying in the street at the intersection of Laurel Avenue and Washington Street and she ran towards him. She heard Greg say "he has a knife," but she did not see a knife. Vanessa saw

defendant and her father but she was focussed on Kiki. Kiki was pale and bleeding and "his guts and stuff were coming out." He called her name three times and started gasping for air.

¶ 9 At some point, Vanessa left Kiki's side and saw defendant by the laundry room in the back of her apartment building. She stated that he was "really bloody" and his eyes were swollen shut. She later went to the police station and gave a handwritten statement.

¶ 10 Vanessa also testified that a week before the incident, she was on her porch talking to her parents. At around 7 or 8 p.m., Kiki came over and stood across the street. He was calling to her as she tried to ignore him. He said "Don't think I'm afraid to cross the street 'cause I'm not afraid of the police." He then came over and tried to talk to her. He became angry when she would not look at him and grabbed her face and turned it towards him. Vanessa testified that her father became angry and told Kiki "[s]he's not no one's bitch." Kiki went up to her father and said, "Well, I'll make you my bitch." At that point, her brother and a friend came downstairs from the second floor. Kiki kept trying to get in the building and was "hitting everybody." Vanessa stated she was holding him and trying to hold him back. Kiki then hit Vanessa's mother, who fainted. The police arrived and Kiki tried running, but the police arrested him.

¶ 11 Greg also testified for the State. He and Kiki were best friends. On June 13, 2008, Greg had driven from Aurora, where he lived, to spend the night at Kiki's. Kiki lived with his brother (Hector) and his mother (America). When Greg arrived, Kiki was there, along with Hector, his cousin (Diamonte), and three women that Hector knew from college. Greg had brought a 12-pack of beer and each man drank about three beers between 10:30 p.m. and 2 a.m. in the morning. At about 2 a.m. on June 14, 2008, Kiki and Greg went for a walk. They

walked until they were across the street from Vanessa's apartment. Kiki shouted out "Nessa" two or three times, but she did not respond.

¶ 12 Greg testified that he told Kiki "let's go." Greg started walking with Kiki behind him. Kiki stopped and said, "Well, who is this walking in the middle of the street?" Greg stopped, turned around and looked. He saw a man dressed in black whom he had never seen before. Kiki then said, "Oh, it's just Ashur." After Kiki acknowledged who it was and disregarded it, Greg did not think anything of it. Kiki and Greg proceeded walking north towards Kiki's house. Greg testified that he then heard Kiki say "What's up, bitch?" When Greg turned he saw that defendant had closed the distance between himself and Kiki. Greg testified that defendant had to have closed the distance quickly.

¶ 13 Greg testified that "I saw Ashur pull out a knife, a large knife, and at the same time Kiki swung with his left arm, and I saw Ashur stab Kiki right here (indicating) like under his left side." Greg further testified that Kiki swung at defendant and defendant had the knife in his hand and he stabbed Kiki. Then they collapsed on the ground and fell backwards. Defendant was on the bottom and Kiki was on top of him. Greg testified that, as they were going down, defendant was stabbing Kiki. As Kiki was falling forward, he was flailing his arms and defendant was stabbing Kiki. Greg testified that defendant stabbed Kiki "[a] lot" and estimated it to be "five, six times."

¶ 14 Greg then tried to get the knife out of defendant's hand by grabbing his wrist. The knife was double-edged and six to eight inches long. Greg testified that he grabbed defendant by the arm, and folded his arm across his chest. Kiki got up and started walking north towards his house. Greg testified that he started kneeing defendant in the face and as he tried to take the knife away, defendant shouted "King Love." Defendant then grabbed the blade of the

knife as Greg tried to get the knife away. Greg testified that defendant was "holding the blade and the blade was slashing him." Defendant's hand was cut because Greg was pulling him.

¶ 15 Greg stated that people arrived on the scene. Vanessa's father grabbed defendant, told Greg to let go, and said "I got him." Greg heard Vanessa scream, "Oh my God, Kiki's dying." She was standing over Kiki where he had collapsed after walking. Greg ran over and saw Kiki laying on the ground and trying to breathe. Kiki was bleeding profusely.

¶ 16 Ray Maldonado testified that Anthony Claudio was his best friend. On July 13, 2008, he had been at a party where he drank three beers and a cup of vodka. After the party, Maldonado went to the Claudio home. He was in Vanessa's bedroom when Kiki called for Vanessa. Maldonado looked through the window and saw Kiki walking down the street. He also saw defendant walking in the street in the other direction, but then he saw defendant switch the direction he was walking in. He lost sight of defendant and Kiki because of the trees. He heard Kiki say, "that's what we're on." He did not see the beginning of the fight but heard a scuffle. He ran outside and witnessed Greg and defendant struggling for the knife. He also saw Kiki walking towards his house and then saw him collapse. Maldonado testified that he ran over to Kiki and saw "his insides hanging out" in "the stomach area." He saw defendant and Anthony running west and he lost sight of them. Maldonado called his sisters to come pick him up.

¶ 17 Four or five minutes later, Maldonado walked back to the Claudio's house and saw defendant and Anthony in the basement. Meanwhile, his sisters had arrived but the police told them to leave the area. One of his sisters called Maldonado from the park and he met them there. He and defendant got in the car. They were going to take defendant to the hospital but defendant said he could not go to the hospital and wanted to go home and see his

mother. They dropped defendant off on Devon Avenue in Chicago. Maldonado gave a statement to the police later that day.

¶ 18 Vanessa's mother, Ida Claudio, testified for the defense. She stated that, after Kiki had been arrested for the incident in which he had hit her and others, they all had signed complaints. Ida obtained an order of protection against Kiki and he was not allowed on their property. She also testified that, for three to four months before the incident, her family was scared of Kiki because he was always threatening that he was going "to get" her family. She stated "we were, like, in prison" and "[c]ouldn't go outside."

¶ 19 Anthony Claudio, defendant's witness, testified consistently with the State's witnesses regarding the incident. He also testified that defendant had told him that he was a member of the Latin Kings street gang, and that he heard defendant say "King Love" after the stabbing.

¶ 20 Anthony testified regarding Kiki's violent tendencies which included the incident that occurred a week before the incident when Kiki hit Ida in the face. Anthony also testified that, on one occasion, Anthony was in a store when Kiki arrived. Anthony stated that "[Kiki] told me to take off my hat, I'm gangbangin'. And he hit it off."

¶ 21 Angelo Claudio also testified for the defense. Consistent with his wife's testimony, he said that Kiki had been tormenting the family. Angelo stated that, during the struggle between defendant and Kiki, he heard defendant yelling, "Kiki. I hope you die."

¶ 22 Defendant testified on his own behalf. He admitted he had a knife that he had shown to the Claudio family. He stated that he had begun to carry a knife approximately a month and a half before the incident because he had been "jumped" near his housing complex "by a few guys" who had their faces covered. He stated he believed they were Kiki and the Latin Counts. Defendant denied that he was a member of the Latin Kings street gang and denied

that he had told Vanessa and Anthony that he was a Latin King. He admitted, however, that he associated with Latin King gang members and some were "good friends." He denied knowing that "King Love" meant someone cared about and loved that gang.

¶ 23 Defendant stated that, on the night of the incident, he left the Claudio's house because his sister was picking him up. He said his good-byes, shook Anthony's hand and left. When he got outside and did not see his sister's car, he started walking north on Laurel Avenue towards Washington Street to go to a convenience store so that his sister could pick him up there.

¶ 24 According to defendant, as he was walking, he saw Kiki and another guy (whom he later learned was Greg) speed-walking towards him. Defendant testified that he "got scared" and "felt that it was just my time," meaning that they were going to kill him. He stated that, as he was looking back and forth at Greg and Kiki, "it all happened fast." He "heard someone fall, boom back." He "turned around looking to see what it was." Kiki was behind him and defendant could not run, so he turned around. Kiki had hit him. Defendant was then "grabbed from behind" and "slammed" to the ground. He remembered getting hit in the face, dragged, kicked and punched. Defendant blacked out for a second and could not see. He pulled out his knife because he "just wanted them to get off" and he "just started swinging wildly." He stated he blacked out again and the next thing he knew "the blade is coming toward the top of my chest, bottom of my chest, the top of my stomach area." He was on his side and managed to grab the blade. There was a struggle for the blade and the next thing he remembered was Angelo's voice telling him it was okay and to let go of the blade.

¶ 25 Defendant admitted that he did not see Kiki with any weapons in his hands. He also admitted that his friends helped him leave the area and he did not stay to tell the police that

he was defending himself. He confirmed that after the stabbing he did not ask Anthony to call the police.

¶ 26 Defendant's injuries were treated by Dr. Ron at Swedish Covenant Hospital. The parties stipulated that, if called to testify, Dr. Ron would state that defendant gave the name "Ashy Hidy," the birth date of July 3, 1989, and told Dr. Ron that he had been "jumped." Dr. Ron's stipulated testimony also detailed defendant's injuries as they were diagnosed at the hospital.

¶ 27 Dr. Tera Jones performed the autopsy on Kiki. The parties stipulated that she was an expert in forensic pathology. The parties also stipulated to her testimony that Kiki had three stab wounds on the left front chest and abdomen and five stab wounds to the back. Dr. Jones further opined that the cause of death was multiple stab wounds.

¶ 28 The court found defendant guilty of first degree murder. In so finding, the court determined that defendant's testimony was not credible and found the State's witnesses credible. In addition, the court stated that "it would be too simplistic to say this is a gang matter. This is something that there is a rivalry here, an antagonism that goes beyond that. It's very personal. It was between the defendant and the decedent, Mr. Moreno. And yes, they were in rival gangs. But this was much more personal than that." The court further noted that it was cognizant of the fact that it could find defendant guilty of second degree murder, but concluded that, based upon the facts, defendant was guilty of first degree murder.

¶ 29 Prior to filing his posttrial motion, defendant hired new counsel. Defendant's new counsel filed a posttrial motion, in which he asserted, *inter alia*, that he was denied effective assistance of counsel at trial. The court denied the motion and defendant appealed.

¶ 30 On direct appeal defendant contended, *inter alia*, that he was denied effective assistance of counsel because his counsel failed to (1) appreciate the distinctions between first degree

murder, second degree murder, and self defense; (2) understand and argue the admissibility of evidence pertaining to Kiki's propensity for violence; (3) effectively cross examine Greg; (4) object to improper witness evaluation and irrelevant evidence, including the testimony from Dr. Tera Jones. See *People v. Hidou*, 2013 IL App (1st) 103511-U. This court affirmed defendant's conviction. *Id.* In doing so, we noted that the decision to pursue one theory of defense is reasonable trial strategy. We further concluded that nothing in the record shows that his counsel was unaware of the distinctions between first degree murder, second degree murder, and self defense. Significantly, this court observed that even if trial counsel's failure to argue second degree murder was the result of incompetence and not trial strategy, the trial court specifically stated that it "was cognizant of the fact that [it] could find defendant guilty of second degree murder," but did not find that offense appropriate after considering the evidence. The court observed that, contrary to defendant's contention that his counsel failed to argue for the admissibility of evidence showing Kiki's propensity for violence, substantial evidence was admitted at trial demonstrating Kiki's violent nature. This court also found that the cross-examination of Greg was reasonable trial strategy. In addition, the court stated that stipulating that Dr. Tera Jones was an expert in forensic pathology was not deficient representation because Dr. Jones was qualified to give the opinions she provided and any objection would have been overruled.

¶ 31 Defendant subsequently filed a postconviction petition, which is the subject of this appeal, alleging ineffective assistance of trial counsel and due process violations. In support, defendant attached 33 exhibits, including 12 affidavits, an expert report, phone records, and Cook County jail records. The circuit court found that each of defendant's claims failed due

either to *res judicata* or were reasonable trial strategy. The court further found that the remaining claims were not supported by the accompanying affidavits. Defendant appealed.

¶ 32

ANALYSIS

¶ 33

There are three stages of the postconviction process. *People v. Pendleton*, 223 Ill. 2d 458, 472-73 (2006). Relevant here is the second stage. The purpose of the second stage is to determine whether defendant is entitled to an evidentiary hearing based upon the plain language in his petition. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the State responds by filing a motion to dismiss at this stage, the trial court may only rule on the legal sufficiency of defendant's claim as stated in the petition. *People v. Ward*, 187 Ill. 2d 249, 255 (1999). Dismissal is warranted if defendant fails to make a substantial showing that his constitutional rights were violated which would necessitate relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2012)) if proven true at an evidentiary hearing. *Coleman*, 183 Ill. 2d 248, 259 (1989); *Domagala*, 2013 IL 113688, ¶ 35. The trial court's dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *Coleman*, 183 Ill. 2d at 389.

¶ 34

To prove ineffective assistance, a defendant must show that "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to 'deprive the defendant of a fair trial, whose result is reliable.'" *People v. Albanese*, 104 Ill. 2d at 524 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The court indulges in a strong presumption that an attorney's conduct falls within a wide range of reasonable professional conduct. *Albanese*, 104 Ill. 2d at 526. A defendant is entitled to competent, but not perfect, representation and thus matters that involve trial strategy are virtually unchallengeable. *People v. Hatchett*, 2015 IL App (1st) 130127, ¶ 28. A strategy

does not amount to ineffective assistance because it is unsuccessful (*People v. Johnson*, 2015 IL App (3d) 130610, ¶ 31) or when, with the benefit of hindsight, another attorney would have taken another course of action. *People v. Smith*, 2012 IL App (1st) 102354, ¶ 86. An allegation in a postconviction petition must be supported by corroborating exhibits and affidavits. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). Any allegation that is not supported by an accompanying exhibit or affidavit is properly dismissed. *Id.*

¶ 35 Defendant contends that the trial court erred by dismissing his postconviction petition without an evidentiary hearing and alleges 12 reasons why he was denied effective assistance of counsel. He also alleges a separate due process violation. The State argues that several of these allegations were addressed in this court's prior order on direct appeal, and are therefore barred by *res judicata*. The State further asserts that the contentions that are not barred are waived because they could have been brought on direct appeal. Alternatively, the State asserts that even if the claims are not waived, they fail because trial counsel's assistance was reasonable and defendant cannot establish that he was prejudiced.

¶ 36

A. *Res Judicata*

¶ 37

Initially, we begin our discussion with defendant's postconviction claims that were addressed on direct appeal. "Under the doctrine of *res judicata*, any issues the court considered on direct appeal are barred from additional review in a postconviction proceeding." *People v. Snow*, 2012 IL App (4th) 110415, ¶ 30. Where the defendant raises ineffective assistance of counsel claims on direct appeal and then asserts only "somewhat different allegations of incompetence" in the postconviction petition, those claims are barred by *res judicata* even if slight variations in the argument exist. *Id.* (citing *People v. Albanese*,

125 Ill. 2d 100, 105 (1988)). In addition, claims that defendant failed to raise on direct appeal but could have been considered by the court are waived. *Id.*

¶ 38 On direct appeal defendant argued, *inter alia*, that his trial counsel was ineffective because he failed to effectively confront Greg, failed to investigate and effectively challenge the qualifications of Dr. Tera Jones, failed to lay a proper foundation for the introduction of evidence regarding Kiki's propensity for violence, and failed to understand and argue second degree murder. This court affirmed the trial court's ruling and resolved each of these arguments in its unpublished order. See *People v. Hidou*, 2013 IL App (1st) 103511-U. Thus, these claims are barred from our consideration by *res judicata*. *Snow*, 2012 IL App (4th) 110415, ¶ 30. **To the extent that these claims are supported by new evidence, they are discussed below.**

¶ 39 B. Failure to Conduct Any Investigation and to Present Witnesses

¶ 40 Defendant asserts numerous allegations of ineffective assistance that involve trial counsel's alleged failure to conduct an investigation to discover additional witnesses and present these witnesses at trial. For multiple reasons, and in various sections of his brief, defendant argues that Sal Chavez, Jessica Cisneros, Philip Rangel, Maureen Aguilar, Marlene Khoshaba, and George Nissan should have been called as witnesses. Generally, the decision whether to call a witness is a matter of trial strategy. *People v. Munson*, 206 Ill. 2d 104, 139 (2002). In addition, this court has previously explained that decisions regarding cross-examination and impeachment are also trial strategy and do not support claims of ineffective assistance. *Johnson*, 2015 IL App (3d) 130610, ¶ 31. We note that the State contends that these claims could have been brought on direct appeal and are waived. Defendant disagrees and asserts that he became aware of trial counsel's ineffective assistance

in this regard following a subsequent investigation. Regardless of whether the claims are waived, none establish a constitutional violation.

¶ 41

1. Sal Chavez

¶ 42

As noted above, defendant argues that his trial counsel was ineffective because he did not call Sal Chavez to testify about Greg's "gangbanging" and love of fighting. This argument has no merit for two reasons. First, this court has already stated on direct appeal that trial counsel's strategy for cross-examining Greg was reasonable. *Hidou*, 2013 IL App (1st) 103511-U, ¶ 56. Second, Chavez's proposed testimony could not properly show, as defendant asserts, that defendant had a reasonable belief that he needed to defend himself from Greg because defendant testified that he did not know of Greg or his reputation at the time of the fight. In addition, although Chavez witnessed part of the fight between Kiki and defendant, his proposed testimony does not establish that defendant was not the initial aggressor.

¶ 43

Defendant further argues that Chavez's proposed testimony would have attacked the credibility of Maldonado. Specifically, defendant argues that Chavez would have testified that Maldonado was drunk, did not actually look out Vanessa's bedroom window to see Greg and Kiki, and was a gang member. The record reveals that trial counsel cross-examined Maldonado according to the defense theory of the case that Kiki had attacked defendant. Further, even without Chavez's testimony, the court was aware that Maldonado had been drinking alcohol. Maldonado testified that he drank three beers and cup of vodka at a party that night. In addition, although defendant maintains that he was not a gang member and testified as such at trial, both Vanessa and Anthony Claudio testified that defendant was, in fact, a gang member. Thus, as the gang evidence applied to both parties, it was a valid

defense strategy to allow minimal gang references. Therefore, trial counsel's decision not to call Chavez as a witness was reasonable trial strategy.

¶ 44

2. Jessica Cisneros

¶ 45

Similarly, defendant contends that trial counsel was ineffective for failing to call Jessica Cisneros to confront Maldonado. Cisneros stated in her affidavit that she would have testified that Maldonado was a gang member and that he had hearing and vision problems. As noted above, it was reasonable trial strategy not to question Maldonado regarding his gang affiliations. In addition, Maldonado's alleged hearing and vision problems mentioned in Cisneros's affidavit are based on a statement made by a third-party who dated Maldonado over a year after the fight occurred, not her personal knowledge.

¶ 46

Defendant also asserts that Cisneros should have been called as a witness because she would have corroborated defendant's version of events that he left the Claudio home to meet his sister. Cisneros' affidavit states that she was on the phone with defendant when he left the Claudio home and discovered that his sister was not there to pick him up. Phone records support that defendant was on the phone with Cisneros at that time. However, there are several other witnesses who testified that defendant told them he was going to meet his sister. Cisneros' testimony in this regard is at best cumulative. Further, according to her affidavit, she would have testified that during that phone conversation he told her that his sister was, in fact, not there and that he was going to walk toward the convenience store. She also stated that defendant then saw Kiki on the street. Thus, her testimony actually helps establish that defendant's sister did not come pick him up and that defendant started walking toward Kiki. It does nothing to clarify whether defendant was the initial aggressor. Thus, trial counsel's

decision not to call Cisneros was reasonable trial strategy. *Munson*, 206 Ill. 2d 104, 139 (2002).

¶ 47 3. Maureen Aguilar

¶ 48 Defendant contends that trial counsel was ineffective for failing to call his sister Maureen Aguilar at trial because she would have testified that it was customary for either her or her sister to pick up defendant from the Claudio's home. He argues that this testimony would have established that he left the house to find his sister, not to attack Kiki. Aguilar's testimony was cumulative, however, because other witnesses testified to the fact that defendant's sisters usually picked him up.

¶ 49 Defendant also maintains that Aguilar would have provided evidence that she purchased the knife for defendant as a gift. Given that the defense theory was that defendant purchased the knife to protect himself because he felt threatened by gang members in the area, it is difficult to see how testimony that the knife was a gift would have helped advance defendant's case. It was reasonable for trial counsel to not call Aguilar to present this evidence. *Munson*, 206 Ill. 2d at 139.

¶ 50 4. Marlene Khoshaba

¶ 51 Defendant additionally argues that his sister Marlene Khoshaba should have been called as a witness. Khoshaba would have also testified that it was customary for her or her sister to pick up defendant from the Claudio home. Again, this evidence was cumulative as it was presented by other witnesses and was not in dispute. Khoshaba further stated in her affidavit that she would have testified that she communicated with defendant the night of the fight to pick him up. However, she would have also testified that she fell asleep and missed defendant's call later that night. When she awoke at 2:11 a.m. she saw that she had missed his

call, she attempted to return his call but he didn't answer. Thus, her testimony establishes that she did not pick him up that night. It does not exculpate defendant. Therefore, it was reasonable for trial counsel not to call Khoshaba as a witness.

¶ 52

5. George Nissan

¶ 53

Defendant further contends that trial counsel was ineffective for failing to call George Nissan to testify. Nissan would have testified that he provided the hospital with incorrect identifying information, not defendant. Defendant maintains that Nissan's testimony would have clarified that he did not purposefully provide the hospital with the wrong name. Although Nissan's testimony would have clarified who provided the false information, it does nothing to negate the evidence of how the fight occurred. Therefore, defendant cannot establish prejudice because he cannot show that the outcome of trial would have been different. Moreover, Nissan was a problematic witness because he initially did not cooperate with police when they came to his home to arrest defendant, thus it was reasonable to not call him at trial.

¶ 54

6. Philip Rangel

¶ 55

Defendant next contends that trial counsel should have called Philip Rangel as a witness. This claim must fail because it is not supported by an affidavit demonstrating Rangel's proposed testimony. A postconviction petition alleging failure to present a witness must attach a supporting affidavit from that witness. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 71. "[T]he failure to either attach the necessary 'affidavits, records, or other evidence' or explain their absence is 'fatal' to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal." *People v. Delton*, 227 Ill. 2d 247, 255 (2008) (citing *People v. Collins*, 202 Ill.2d 59, 66 (2002)).

¶ 56

C. Prejudice

¶ 57

In addition to defendant's inability to show that his trial counsel was unreasonable for not calling the above witnesses, defendant is also unable to show that failing to call them resulted in prejudice, as required. *Hodges*, 234 Ill. 2d at 17. On direct appeal this court noted that there was overwhelming evidence to convict defendant of first degree murder. The court stated: "The evidence at trial showed, among other things, that defendant: (1) had animosity toward Kiki; (2) armed himself with a deadly weapon, (3) stated he was going 'to get' Kiki, (4) sought out Kiki; (5) approached Kiki from behind as he was walking away; (6) confronted Kiki with a deadly weapon; (7) yelled out hateful comments during the attack and declared allegiance to his gang; (8) stabbed Kiki three times in the chest and five times in the back, penetrating the heart; (9) fled from the scene; and (10) failed to make a police report." *People v. Hidou*, 2013 IL App (1st) 103511-U. We agree with this court's assessment of the evidence at trial. Significantly, none of the proposed witnesses provide new evidence establishing what occurred immediately before the confrontation. The proposed evidence in defendant's petition, taken as true, would not negate the court's findings or change the outcome of trial. Therefore, defendant was not prejudiced by counsel's alleged errors, and his counsel was not ineffective. *Hodges*, 234 Ill. 2d at 17.

¶ 58

D. Alleged Ineffective Assistance at Trial

¶ 59

1. Stipulation to Dr. Ron's Testimony

¶ 60

Defendant next contends that trial counsel was deficient when he agreed to stipulate to Dr. Ron's testimony. Specifically, defendant argues that his new expert, Dr. Baden, reviewed the case and it is Dr. Baden's opinion that certain information in the medical records stipulation does not accurately reflect the true nature of defendant's injuries. Notably, defendant does not

argue that trial counsel should have called an expert witness, such as Dr. Baden, at trial. Rather, he uses Dr. Baden's report to introduce an alternate medical opinion regarding defendant's injuries. Trial counsel merely stipulated that, if called, Dr. Ron would testify to the information in the medical report from the hospital the night defendant's injuries were diagnosed. Dr. Baden's opinion disagreeing with Dr. Ron would not have changed the outcome of trial. Defendant cannot demonstrate prejudice or ineffective assistance. *Hodges*, 234 Ill. 2d at 17.

¶ 61 2. Dr. Tera Jones' Opinion as to Cause of Death

¶ 62 **Defendant contends that trial counsel was ineffective for failing to challenge Dr. Jones' opinion as to cause of death. Specifically, defendant asserts that according to Dr. Baden's report, the paramedics improperly intubated Kiki causing asphyxiation. Generally, where a person inflicts a dangerous wound upon another that is calculated to endanger or destroy life, that person cannot exonerate himself by showing that his victim's death resulted from unskilled or improper medical treatment. *People v. Mars*, 2012 IL App (2d) 110695, ¶ 16; *People v. Stamps*, 8 Ill. App. 3d 896, 901 (1972). When such a wound is inflicted, "a presumption arises that the death resulted from the culpable act of the defendant. The presumption then must be rebutted by the defendant's presentation of contrary evidence that the *sole* cause of death was the intervening gross negligence of physicians." *Id.* ¶ 17 (Emphasis in original.) *People v. Mars*, 2012 IL App (2d) 110695, ¶ 16; (citing *People v. Gulliford*, 86 Ill.App.3d 237, 242 (1980)).**

¶ 63 **Defendant cites *People v. Domagala*, 2013 IL App (1st) 113688, for the proposition that gross negligence is a defense to murder. We agree. *Id.* ¶ 39. However, such a**

defense is not applicable here. In this case, defendant inflicted three stab wounds on Kiki's left front chest and abdomen and five stab wounds to the back. These were dangerous wounds that were calculated to endanger or destroy life. In fact, Dr. Jones, who performed Kiki's autopsy and was qualified as an expert in forensic pathology, testified that these wounds caused Kiki's death.¹ Defendant did not present sufficient evidence in his postconviction petition to contradict Dr. Jones' opinion or to rebut the presumption that his actions caused Kiki's death. Dr. Baden's report does not state that the sole cause of death was asphyxiation and that the stab wounds were not a contributing cause. The report does not detail the physical characteristics of a death caused by stab wounds compared to a death caused by asphyxiation and state whether Kiki's body had these characteristics. Significantly, it also does not state that Kiki would have survived the eight stab wounds if the alleged improper intubation had not occurred. See *Domagala*, 2013 IL App (1st) 113688, ¶39. ("gross negligence is an intervening cause and constitutes a defense in those cases where, but for gross negligence, death would not have occurred.") (citing 40 C.J.S. *Homicide* § 11 (2006)). Contrary to defendant's assertion, the evidence supports a finding that defendant's actions were likely to cause death and did cause Kiki's death. Dr. Baden's report, taken as true, does not establish that the legal cause of death was the paramedics' gross negligence. Accordingly, defendant cannot show that if trial counsel had consulted with his own expert that the result of trial would have been different.

¶ 64

3. Failure to Object to Evidence of Gang Involvement

¹Defendant argues that Dr. Jones should not have been qualified as an expert. This argument was rejected by this court on direct appeal (*People v. Hidou*, 2013 IL App (1st) 103511-U) and is barred by *res judicata*. *Snow*, 2012 IL App (4th) 110415, ¶ 30.

¶ 65 Defendant maintains that trial counsel was ineffective in failing to object to evidence that defendant was in a gang. Although gang evidence is prejudicial, it is admissible where it is relevant to motive. *People v. Weston*, 2011 IL App 91st) 092432, ¶22. At trial, Vanessa and Anthony testified that defendant was in a gang and Greg and Anthony testified that he yelled "King Love" when he stabbed Kiki. Evidence was also presented that Kiki was in a rival gang. As discussed above, it was reasonable trial strategy for defense counsel to attempt to minimize the evidence of gang affiliation by not highlighting it with an objection. Moreover, defendant cannot prove prejudice because any failure to object to gang evidence did not impact the outcome of trial. The trial court specifically noted that although both parties were in gangs, the fight was personal and not based on gang affiliation.

¶ 66 4. Failure to Investigate All Legal Defenses

¶ 67 Defendant asserts that trial counsel failed to investigate all legal defenses. Specifically, defendant argues that he was intoxicated when the fight occurred and that trial counsel should have pursued a theory of second degree murder. In addition, he again asserts that trial counsel should have argued that the paramedics' gross negligence was primarily responsible for Kiki's death. Although trial counsel had a duty to investigate any possible defense, that duty is limited to defenses that were reasonable. *Domagala*, 2013 IL 113688, ¶ 38. For intoxication to be a defense, it must be so extreme that it suspends entirely the power of reason or renders the defendant incapable of forming the requisite intent to commit the crime in question. *People v. Anderson*, 325 Ill. App. 3d 624, 633 (2001). There is nothing in the record that demonstrates defendant's intoxication was at such an extreme level. Moreover, this court previously explained on direct appeal that trial counsel's decision to pursue an "all-or-nothing" defense is recognized as a sound trial strategy." *Hidou*, 2013 Ill App (1st)

103511-U (quoting *People v. Barnard*, 104 Ill. 2d 218, 231-32 (1984)). Thus, it was reasonable for trial counsel to pursue the sole theory that Kiki attacked defendant. Additionally, as we have previously explained – regardless of whether it was argued – the trial court considered and rejected second degree murder. Accordingly, defendant is unable to show ineffective assistance on this ground.

¶ 68 5. Failure to Review Discovery with Defendant

¶ 69 Defendant contends that trial counsel was ineffective because he failed to review discovery with defendant. Consequently, he argues that he was not prepared for trial because he was not aware of the evidence the State had against him. In addition, he argues that had he reviewed the discovery, he would have insisted that trial counsel pursue a second degree murder theory. "Trial counsel's decision whether to provide his client with discovery materials constitutes a matter of trial strategy and judgment that ultimately lies within counsel's discretion." *People v. James*, 362 Ill. App. 3d 250, 257 (2005) (citing *People v. Davison*, 292 Ill.App.3d 981, 988–89, (1997)). Thus, a postconviction petition is properly dismissed when a defendant's ineffective assistance claim is based upon counsel's failure to provide the defendant with discovery materials. *Id.*

¶ 70 6. Failure to Communicate with Defendant and Prepare him for Trial

¶ 71 Defendant additionally claims he was denied his constitutional right to effective assistance because trial counsel failed to communicate with him. Defendant further argues that the court must accept his assertion that trial counsel failed to communicate with him because the court must take all well-pleaded facts as true at the second stage postconviction proceeding. Contrary to defendant's assertion, the court is not required to accept facts that are positively rebutted by the record. *Pendleton*, 223 Ill. 2d at 473. Defendant's contention is

belied by the record which reveals that trial counsel met with defendant on several occasions. Defendant's own affidavit refers to several conversations he had with trial counsel. Accordingly, defendant's claim is without merit.

¶ 72 7. Alleged Coercion to Choose a Bench Trial

¶ 73 Defendant next asserts that his trial counsel coerced him into choosing a bench trial by promising him that counsel knew, based upon the judge's demeanor, that he would receive a positive outcome. He also argues that counsel intimidated him by telling him that a jury would convict him because of the evidence that he was in a gang. The record is clear that the trial court thoroughly questioned defendant regarding his signed jury waiver. Defendant confirmed that he had the opportunity to discuss the difference between a bench and jury trial with his attorneys. When asked if anyone forced or threatened him to take a bench trial and whether he had been promised anything, defendant replied "No." Thus, defendant's contention that he was coerced is rebutted by the record, which indicates that his jury waiver was voluntary. *Pendleton*, 223 Ill. 2d at 473. Moreover, an attorney's recommendation that a defendant choose a bench trial over a jury trial is generally a matter of trial strategy. *People v. Hobson*, 386 Ill. App. 3d 221 (2008). Trial counsel was not ineffective in this regard.

¶ 74 8. Fees

¶ 75 Defendant additionally argues that trial counsel was ineffective because trial counsel's deficient level of representation was not proportionate to the significant amount of money he charged. Defendant offers no legal support for his contention that this amounts to a constitutional violation. Constitutional violations alleged in a postconviction petition must pertain to the effect counsel's assistance had on defendant's ability to have a fair trial.

Strickland, 466 U.S. at 687. The legal fees do not impact defendant's right to a fair trial. Therefore this claim must fail.

¶ 76 i. Advising Defendant to Testify Falsely

¶ 77 Defendant contends that his trial counsel's assistance was unreasonable because he advised defendant that "his only way to win was to testify to their made up story about why had had the knife on the date in question and that he was swinging the knife 'wildly' during the incident." The fact that defendant was young and scared does not absolve him from his obligation to testify truthfully.

"All defendants must be presumed to know that if they choose to testify they must testify truthfully. Defendants are not entitled to rely on a lawyer's advice to testify falsely, and if they do so, there is no sound reason to treat them any differently from defendants who testify falsely entirely on their own initiative. If the allegations of defendant's postconviction are true, his complicity with his attorney in presenting false testimony forecloses a claim of ineffective assistance of counsel." *People v. Cleveland*, 342 Ill. App. 3d 912, 916 (2003).

Moreover, other than defendant's bare contention, there is nothing in the record to support this claim. Accordingly, this claim was properly dismissed.

¶ 78 E. Alleged Due Process Violation

¶ 79 1. Intimidation of Witnesses

¶ 80 Finally, defendant contends that he was denied a fair trial because vital witnesses were intimidated by gang members who were watching the trial. To prevail on a postconviction petition alleging a due process violation, the alleged constitutional violation must stem from " 'state action that is inconsistent with fundamental principles of liberty . ' " *People v. Brown*,

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169 Ill. 2d 94, 103 (1995) (quoting *People v. Cihlar*, 111 Ill. 2d 212, 216 (1986)). There is nothing in the record that suggests the trial court was inappropriately influenced by gang members in the courtroom. Accordingly this claim was properly dismissed.

¶ 81

CONCLUSION

¶ 82

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

¶ 83

Affirmed.