2016 IL App (4th) 140763-U

NO. 4-14-0763

FILED
November 7, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
CLARANCE A. THOMPKINS,	)	No. 10CF1138
Defendant-Appellant.	)	
	)	Honorable
	)	Scott Daniel Drazewski,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in its first-stage dismissal of defendant's postconviction petition.

¶ 2 Following a September 2011 consolidated bench trial with codefendant James Ray Manuel, the trial court found defendant, Clarance A. Thompkins, guilty of home invasion while armed with a firearm (720 ILCS 5/12-11(a)(3) (West 2010)) and armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)). In November 2011, the trial court sentenced defendant to concurrent terms of 45 years' imprisonment. Defendant's sentence included a 15-year enhancement for the use of a firearm on both charges.

¶ 3 In July 2013, this court affirmed defendant's conviction and sentence. See *People v. Thompkins*, No. 4-12-0018 (July 29, 2013) (unpublished order under Supreme Court Rule 23).

¶ 4 In June 2014, defendant filed a *pro se* postconviction petition alleging, *inter alia*, ineffective assistance of appellate counsel.

¶ 5 In August 2014, the trial court summarily dismissed defendant's postconviction petition as frivolous and patently without merit.

¶ 6 Defendant appeals, arguing the trial court erred in summarily dismissing his postconviction petition where he made an arguable claim his appellate counsel was ineffective for failing to argue on direct appeal the court improperly consolidated his case with his codefendant's case. We affirm.

¶ 7 I. BACKGROUND

¶ 8 In December 2010, defendant was charged by indictment with home invasion while armed with a firearm (720 ILCS 5/12-11(a)(3) (West 2010)) and armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)). Codefendant James Manuel was indicted for the same offenses.

¶ 9 On August 4, 2011, the State filed a motion to consolidate defendant's and Manuel's trials. (We note the parties were represented by different attorneys throughout the proceedings.) The State's motion alleged (1) defendant and Manuel "participated in the same acts or in the same comprehensive transaction out of which the offenses arose;" (2) "the State's proof in both cases will show the offenses are connected by commonality of place, time[,] and events;" (3) the witnesses for the State will be the same for both cases; (4) "there will be substantial hardship to witnesses if the two cases were tried separately;" and (5) there would be a waste of resources if separate trials were held.

¶ 10 During the hearing on the motion to consolidate, the State reiterated its argument from its motion: "[the] offense occurred at the same time, same date, same location, the same

witnesses are going to be involved, including the victims[,] are the same victims. All witnesses are identical for the State and presumably for the defense." The State also argued it was unaware of any inconsistent defenses by either defendant. It also noted, because both defendants exercised their right to remain silent, there were no inconsistent statements from them. The State also maintained the evidence would implicate defendant and Manuel and not involve any third party.

¶ 11 Defendant's trial counsel argued defendant could not get a fair trial if the State's motion was granted because of the potential for inconsistent defenses. Defendant's counsel incorporated the argument made by Manuel's attorney against the State's motion that an uncharged individual named Cordarro Dunn could have committed the robbery with either codefendant. Dunn had previously been tried and convicted with defendant and Manuel in a separate 2008 "home invasion/armed robbery" case, committed shortly after the home invasion/armed robbery at issue here. According to Manuel's counsel, discovery showed one of the robbers was larger than the other and "it's certainly possible that one or both defendants in this case would know a defense and add a theory of defense that suggests Mr. Dunn, being larger than either one of these two defendants, was the other person involved in the home invasion." Defendant's counsel maintained it was possible defendant and Manuel "could point the finger at each other as well as this third individual [Manuel's counsel] has referenced," which would prevent them from receiving a fair trial.

¶ 12 At the conclusion of the hearing, the trial court granted the State's motion to consolidate. In granting the State's motion, however, the court indicated it was willing to

reconsider its ruling if defendant could provide additional facts or arguments regarding potential inconsistent defenses.

¶ 13 Thereafter, both defendant and Manuel waived their respective rights to a jury trial.

¶ 14 During the September 2011 consolidated bench trial, Barbara Hopper testified she and her husband, Lester Hopper (he and his family use Richard), hired a moving company when they moved into their Bloomington home. Richard, who is disabled and uses a wheelchair, collects firearms as a hobby. Barbara asked the moving company whether they moved firearms. After finding out the moving company would not move Richard's guns, Barbara moved them herself. The weapons were moved prior to the furniture being delivered by the moving company.

¶ 15 On July 29, 2008, approximately five months after the couple moved, Barbara answered a ring at their front door at approximately 8:50 p.m. At first she did not see anyone, and then two men came from around the side of the garage. Barbara testified she tried to close the door when she "saw that they had masks on and guns," but "one of them pulled [her] through the door." The men then pulled her inside the house and said, " 'this is a robbery.' " Barbara described the individuals as "black," "mid-twenties," and "it seemed like one of them was a little taller than the other." She described the attackers as wearing "black clothing," a hooded sweatshirt, and "surgical masks." One of the men wore gold wire-rim glasses and had drawn a mustache on his surgical mask. He grabbed hold of her wrist and held her. He had a gun, but Barbara could not identify the type of weapon other than it was a gun. She testified it "seemed awful big" because "when it's held at you, it was awful big." Barbara testified, "I would say it was a shotgun."

¶ 16 Barbara testified one of the men said "that they needed money" and she told them "we didn't have any." The second man asked, " 'where's the guns,' " but before Barbara could answer, he was "already going to where the guns were." The gun collection was located in the room immediately to the left of the front door. This man went into the gun room with a duffel bag and began filling it with guns. Barbara testified he had the same stature as one of the movers. She said no one else had been in the house with the same stature. Once the robbers filled the duffel bag with guns, they left out the front door.

¶ 17 On cross-examination, Barbara testified the robbers were in the house for approximately 10 to 15 minutes. One of the robbers was "a little thinner than the other." On redirect examination, Barbara testified, other than the movers, only family and the cable installer had been in the house. The trial court asked whether the man in the front room was armed. Barbara testified he was armed with what "must have been a handgun" because "it was not a long gun like a rifle."

¶ 18 Richard, then 67 years old, testified he had fallen off a roof 19 years ago and suffered a traumatic head injury, which affected his memory. Some memories would come to him at a later time rather than right away. Richard collected coins and a variety of long guns and handguns. Richard testified he was in the kitchen on July 29, 2008, at around 8:45 p.m., when his wife answered the door. A man accosted her and "came into the kitchen area holding a gun to my wife's head" and holding her by the wrist. Richard testified the gun was a "cheap-looking gun" and a .22-caliber handgun. The man holding his wife had a tattoo on his right forearm that "looked like two worms crisscrossing." Defendant's and Manuel's arms were published to Richard, but he did not recognize anything on either one of them. Richard observed the other

man go directly to his gun room. During the robbery, Richard was in the gun room with the robbers and observed the "tall man" remove a Colt .45-caliber handgun with "pearlized grips" from a filing cabinet, which had been moved by the moving company.

¶ 19 On cross-examination, Richard testified, in addition to the cable installer, a carpet installer and chair lift installer had been in the house.

¶ 20 The State introduced into evidence an inventory created by Richard and his son listing 21 guns stolen on July 29, 2008, including (1) an "Intratec Tec-9 9mm Semi-Auto Pistol," (2) an "Intratec DC-9 9mm Semi-Auto Pistol," (3) a "Taurus Hunter 66 .357 Revolver," (4) a "Taurus Hunter .44 Revolver," (5) a "Yugoslavian M48 8mm Rifle," and (6) a "Colt Government .45 Semi-Auto Pistol." According to the inventory, the collection was valued in excess of $10,000.

¶ 21 Amy Keil, an officer with the Bloomington police department, testified she responded to a report of armed robbery on September 9, 2008, in the area of Todd Drive in Bloomington. (This is the home invasion/robbery referred to in paragraph 11, *supra*.) When she arrived, another officer had located a suspect, who was identified as defendant. Officer Keil recovered a handgun from the front right pocket of defendant's pants. Richard identified the handgun as the Colt .45-caliber handgun stolen from his collection.

¶ 22 Daniel Diciaula testified in the instant case as part of a proffer agreement with federal authorities. According to Diciaula, he purchased an Intratec TEC-9 handgun from "friends." On the day he purchased the gun, he met with Mario Dunning, who took him to a house where they met with the seller, later identified as Manuel. Diciaula went downstairs, where a table was set up with guns on it. He identified a Taurus handgun, the TEC-9, and the

Colt .45-caliber handgun as guns that were present. He attempted to purchase the Taurus and the Colt but Manuel wanted to keep them "because I guess they're special." Diciaula purchased a 9-millimeter handgun, two 8-millimeter handguns, a .40-caliber handgun, and was unsure if he purchased a .45-caliber handgun.

¶ 23 Officer Evan Easter of the Normal police department testified he located the Intratec TEC-9 handgun in Diciaula's residence in March 2010.

¶ 24 Angelina Comas-Thompkins, defendant's mother, testified defendant lived with her during the August to September 2008 time period. She testified her dog located a stash of guns near the garage behind her house around the time period defendant was arrested in September 2008. She called Greg Patton, a teacher at Bloomington High School, who was acquainted with defendant through a mentoring program, and told him, "I found something, and I really think you need to come and get them." Comas-Thompkins denied telling Megan Bachman (Manuel's girlfriend) or Dunning she found guns in her residence.

¶ 25 Patton testified defendant's mother called on September 9, 2008, and requested he come to her residence. Once Patton arrived, defendant's mother showed him some weapons wrapped up in towels. Patton testified they talked together and "[s]he was trying to protect her son, and I was trying to protect him, also." Patton removed the weapons from defendant's mother's house and took them to the Bloomington police department. Patton did not inform the police he retrieved the weapons from the Thompkins residence.

¶ 26 Officer Scott Sikora, of the Bloomington police department, testified he met with Patton on September 9, 2008, and secured the weapons. The weapons included a "Tec 9," a

"large revolver," and an "AK-47." Patton told Sikora "he had been contacted by a concerned citizen about some kids [playing] around a [D]umpster" where he found the weapons.

¶ 27 Megan Bachman testified Manuel is her boyfriend and the father of her daughter. Bachman saw defendant bring a hunter green duffel bag to her residence. Defendant brought the bag into the house with Manuel and went downstairs into the basement. Bachman did not recall telling investigators this was approximately a month or two before defendant's and Manuel's arrests in September 2008. Bachman testified, over objection, she had a conversation with defendant's mother shortly after defendant was arrested for the September 9, 2008, robbery. According to Bachman's testimony, defendant's mother stated "[t]hat she had found [weapons] and she turned them in to the police" and "I should look to see if I have any guns; and if I did, to let her know and she would have the police come get them."

¶ 28 John Atteberry, a detective with the Bloomington police department, testified he participated in a proffer session with federal investigators and Diciaula. Diciaula told investigators Mario Dunning approached him about guns someone wanted to sell. Diciaula identified Manuel as the person who sold the guns. Atteberry testified he also interviewed Bachman as a part of the investigation. Bachman stated in the summer of 2008, she saw defendant with a duffel bag at her residence. Bachman stated she was at defendant's mother's residence when defendant removed "something wrapped up" from a closet and a firearm fell out. Atteberry testified Bachman told him about a conversation that occurred at the courthouse between Bachman and defendant's mother:

> "Q. Okay. And what was the purpose for this conversation, if you recall?

A. Yes. The conversation was that she located—Angelina Comas-Thompkins located some firearms at her house, and if Megan had any firearms there, at her house, she needed to get rid of them.

Q. And did she indicate how they could be gotten rid of?

A. To give her a call, to give Angelina a phone call. They would be taken care of.

Q. And did she indicate how they were going to get taken care of?

A. I believe it was with someone that she knew."

The trial court permitted Bachman's statements about what defendant's mother said to her about the effort to retrieve other guns as an admissible statement under the coconspirator exception to the hearsay rule.

¶ 29 Jaclyn Hinrichsen, a representative of the moving company, testified a review of company records showed defendant worked on the Hoppers' March 1, 2008, move.

¶ 30 Neither defendant nor Manuel put on any evidence.

¶ 31 During closing argument, defendant's trial counsel argued, although Richard testified he clearly saw the forearm of one of the robbers, he was unable to recognize the tattoos on either defendant. At that point, the trial court interrupted counsel to ask to be reminded what Richard had said about the tattoo and whether he had given a description of it. Defendant's trial counsel responded, "It was a snake or squiggly figure of some sort." During Manuel's closing argument, his trial counsel stated his notes indicated Richard testified the tattoo depicted "two worms criss-crossing."

¶ 32 At the conclusion of closing arguments, the trial court stated it "want[ed] to take another look at the tattoos on both [defendant's and Manuel's] arms" and asked both of them to step up to the bench. The record reflects the two men "stood before the bench and held out their arms."

¶ 33 After recessing to review its notes and consider the arguments, the trial court concluded the State proved both defendant and Manuel guilty beyond a reasonable doubt. In announcing its finding of guilt, the court observed the following:

> "The one point of evidence that I will comment on which I believe is important to the Court, but which I certainly see much differently than [Manuel's trial counsel] relates to the *** identification or lack thereof of either Defendant or of the tattoo, but in my analysis of this evidence, the amazing coincidence here is so amazing as to boggle the mind, which is that with all the other evidence intertwining Mr. Manuel with [defendant] and with the sale of these guns and the possession of these guns and the short period before they are both arrested in early September, both Mr. and Mrs. Hopper gave a description which was pretty consistent between the two of them of the two robbers.
>
> The shorter one holding the gun to Mrs. Hopper's head and the taller one being more directing matters and the one who grabbed the .45 and was pointing that at Mr. Hopper, and it is clear to me, while there's no identification here, that the description of these two

Defendants is very consistent with the description that the Hoppers gave, and [defendant] is the taller one, and Mr. Manuel is the shorter one, young black males in their twenties, and they fit the description.

And much was made of the tattoo evidence, but Mr. Hopper was not asked to elaborate by anybody when he said, well, he didn't recognize the tattoo.

The Court took another look at the tattoos, and Mr. Manuel actually had two tattoos on his arm, one is a cross that's further up on his forearm, and the other on, I forget which side, more on the side of his arm is lettering that is more calligraphy-like with a lot of curlicues and so forth, and it's just an amazing coincidence that he happens to have tattoos in his arm area where Mr. Hopper saw tattoos on this person, and I think part of those, certainly the ones down on the lower arm, could well fit the description.

I might add, putting a lot of stock in *** being able to recognize [the tattoos] three years later, we're talking about a gentleman who has made a miraculous recovery basically from a traumatic head injury and [is] doing very well, I think, under the circumstances [he] at least remembered that he saw a tattoo, which may well be more than most of us could have done with a .45 pointed at our head and a Saturday Night Special pointed at your wife's head, and I think both of them certainly commendably kept their heads and

noticed enough to at least give a decent description of both of the robbers.

***

And to put a lot of stock *** in the fact that Mr. Hopper didn't say, [']well, yes, those are the tattoos. I remember them explicitly['] somehow would exonerate Mr. Manuel, I think not. Rather, I think the fact that he fits the description and has tattoos on his lower arm is instead evidence which implicates him when you tie it together with the totality of the case.

You can't take any one particular piece of evidence in this matter. There's a number of things to tie together, and I think that for this trier of fact, the pieces of the puzzle were sufficient to complete the picture as to both Defendants, and I find both guilty [on both counts]."

¶ 34 On October 24, 2011, defendant filed a motion for a new trial, arguing (1) the State failed to prove defendant guilty beyond a reasonable doubt and (2) the trial court erred in granting the State's motion to consolidate the trials.

¶ 35 On November 23, 2011, the trial court denied defendant's posttrial motion. The court then sentenced defendant to concurrent terms of 45 years' imprisonment. Defendant's sentence included a 15-year enhancement for the use of a firearm on both charges.

¶ 36 On December 8, 2011, defendant filed a motion to reconsider his sentence, which the trial court denied.

¶ 37 On direct appeal, defendant argued (1) the State did not present sufficient evidence of his guilt, (2) the trial court erred in admitting testimony about statements his mother made, and (3) the 15-year firearm enhancement for armed robbery (720 ILCS 5/18-2(b) (West 2010)) is void.

¶ 38 On July 29, 2013, this court affirmed defendant's conviction and sentence. See *Thompkins*, No. 4-12-0018 (unpublished order under Supreme Court Rule 23). In affirming, we found, although the trial court erred in improperly admitting defendant's mother's statements under the coconspirator hearsay exception, that error was harmless. See *Thompkins*, No. 4-12-0018, ¶¶ 58, 62.

¶ 39 On June 1, 2014, defendant filed a *pro se* postconviction petition alleging, *inter alia*, the trial court abused its discretion by granting the State's motion to consolidate his case and Manuel's case. According to defendant's argument, his right to a fair trial was compromised because the testimony presented at the joint trial established the shorter offender had a tattoo on his arm resembling worms crisscrossing each other, and the other offender was taller. Defendant maintains he was prejudiced because the evidence about the tattoo was the only evidence used to link him to the offenses and the tattoo evidence implicated both defendant and Manuel. Defendant also alleged his trial counsel was ineffective for failing to file a motion for severance and his appellate counsel was ineffective for failing to raise the issue on direct appeal.

¶ 40 On August 4, 2014, the trial court summarily dismissed defendant's petition, finding, *inter alia*, defendant's claims of ineffective assistance of appellate counsel lacked support where the issues underlying those claims were without merit.

¶ 41 This appeal followed.

¶ 42 II. ANALYSIS

¶ 43 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition where he made an arguable claim his appellate counsel was ineffective for failing to argue on direct appeal the court erred in granting the State's motion to consolidate.

¶ 44 The State asserts defendant has procedurally defaulted this argument as it could have been raised on direct appeal. However, contrary to the State's position, appellate counsel could not have argued his own ineffective assistance on direct appeal. Indeed, the "Illinois Supreme Court has repeatedly recognized that waiver or procedural default may not preclude an ineffective assistance claim for what trial or appellate counsel allegedly ought to have done in representing a criminal defendant." *People v. Plummer*, 344 Ill. App. 3d, 1016, 1020, 801 N.E.2d 1045, 1049 (2003) (citing *People v. Erickson*, 161 Ill. 2d 82, 88, 641 N.E.2d 455, 458-59 (1994)); see also *People v. Blair*, 215 Ill. 2d 427, 450-51, 831 N.E.2d 604, 619 (2005) (a forfeited claim may nevertheless be considered in a postconviction petition "where the alleged forfeiture stems from the incompetence of appellate counsel.") As a result, the State's argument in this regard is not well taken.

¶ 45 The Post-Conviction Hearing Act (Postconviction Act) "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Postconviction Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial

deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 46 The Postconviction Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). To survive dismissal at this initial stage, the postconviction petition "need only present the gist of a constitutional claim," which is "a low threshold," requiring the petition to contain only a limited amount of detail. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996).

¶ 47 Our supreme court has held "a *pro se* petition seeking postconviction relief under the [Postconviction] Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 48 Claims of ineffective assistance of trial and appellate counsel are evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Enis*, 194 Ill. 2d 361, 377, 743 N.E.2d 1, 11 (2000). A defendant raising a claim of ineffective appellate counsel "must show both that appellate counsel's performance was deficient and that,

but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *People v. Petrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198, 1203 (2010).

¶ 49 At the first stage of postconviction proceedings, "a petition alleging ineffective assistance of counsel 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." *Petrenko*, 237 Ill. 2d at 497, 931 N.E.2d at 1203 (citing *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212). "Appellate counsel is not required to raise every conceivable issue on appeal," and counsel is not incompetent for refraining from raising meritless issues. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 77, 962 N.E.2d 528. Accordingly, we turn our attention to the merits of defendant's underlying claim.

¶ 50 The trial court has substantial discretion in determining whether joinder of prosecutions is proper, and its decision will not be reversed on review absent an abuse of that discretion. *People v. Marts*, 266 Ill. App. 3d 531, 542, 639 N.E.2d 1360, 1368 (1994). An abuse of discretion will only be found where the trial court's decision is arbitrary, unreasonable, or fanciful, or where no reasonable person would agree with the trial court's view. *People v. Fleming*, 2014 IL App (1st) 113004, ¶ 38, 14 N.E.3d 509.

¶ 51 A defendant does not have a right to be tried separately from a codefendant when they are charged with offenses arising out of a common occurrence. See *People v. Ruiz*, 94 Ill. 2d 245, 257, 447 N.E.2d 148, 152 (1982). Section 114-7 of the Code of Criminal Procedure (Code) addresses when it is proper for the trial court to join related prosecutions. 725 ILCS 5/114-7 (West 2010). Under section 114-7, the court may order two or more charges to be tried together if the defendants could have been charged together. See 725 ILCS 5/114-7 (West

2010). Section 111-4(b) of the Code provides "[t]wo or more defendants may be charged in the same indictment *** if they are alleged to have participated in the same act or in the same comprehensive transaction out of which the *** offenses arose." 725 ILCS 5/111-4(b) (West 2010).

¶ 52 When determining whether multiple acts were part of the same comprehensive transaction, the factors generally considered by the court include (1) the proximity in time and location of the offenses; (2) the identity of evidence needed to establish a link between the offenses; (3) whether the offenses shared a common method; and (4) whether the same or similar evidence would prove the elements of the offenses. *Fleming*, 2014 IL App (1st) 113004, ¶ 36, 14 N.E.3d 509; *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 69, 992 N.E.2d 539. "The 'most important factors' in determining whether offenses are part of a comprehensive transaction are their proximity in time and location and whether there is common evidence with respect to the offenses." *Fleming*, 2014 IL App (1st) 113004, ¶ 41, 14 N.E.3d 509 (quoting *People v. Harmon*, 194 Ill. App. 3d 135, 139-40, 550 N.E.2d 1140, 1143 (1990)).

¶ 53 Here, the time and location are indisputably identical as both defendant and Manuel were charged with offenses alleged to have occurred on July 29, 2008, at the Hoppers' home. There was also ample evidence linking defendant's and Manuel's cases. Finally, the State used the same evidence to establish the same elements of the same offenses against both defendant and Manuel. Thus, the comprehensive-transaction factors weigh heavily in favor of consolidation. Having found the cases were sufficiently related for purposes of consolidation, we turn our attention to the issue of whether defendant would have been prejudiced by a joint trial.

¶ 54 "If it appears that a defendant *** is prejudiced by a joinder of *** defendants for trial[,] the court may order separate trials." 725 ILCS 5/114-8(a) (West 2010). A defendant " 'must demonstrate how [he] is going to be prejudiced by proceeding with a joint trial.' " *People v. Daugherty*, 102 Ill. 2d 533, 541, 468 N.E.2d 969, 972 (1984) (quoting *People v. Lee*, 87 Ill. 2d 182, 186, 429 N.E.2d 461, 463 (1981)). However, " '[m]ere apprehensions of prejudice are not enough' " to justify separate trials. *People v. Ngo*, 388 Ill. App. 3d 1048, 1058, 904 N.E.2d 98, 107 (2008) (quoting *People v. Bean*, 109 Ill. 2d 80, 92, 485 N.E.2d 349, 355 (1985)). Instead, it is incumbent on the defendant to actively and specifically show how he would be prejudiced by a joint trial. *Lee*, 87 Ill. 2d at 189, 429 N.E.2d at 464.

¶ 55 There are two forms of potential prejudice which warrant severance. *Ngo*, 388 Ill. App. 3d at 1058, 904 N.E.2d at 107; *Daugherty*, 102 Ill. 2d at 541, 468 N.E.2d at 973. "The first type [of prejudice] occurs when a codefendant has made hearsay admissions that implicate the defendant. The defendant may be denied his constitutional right of confrontation if the codefendant's hearsay admission is admitted against him and the defendant is unable to cross-examine the codefendant because the latter does not testify." *Daugherty*, 102 Ill. 2d at 541, 468 N.E.2d at 973.

¶ 56 Here, the State did not seek to introduce any prior out-of-court statements made by either codefendant. At the hearing, the State noted it did not intend to introduce any such evidence as neither defendant nor Manuel made any pretrial statements. Accordingly, the first type of prejudice is not at issue in this case.

¶ 57 The second form of prejudice occurs "when codefendants' defenses are so antagonistic to each other that one of the codefendants cannot receive a fair trial." *Bean*, 109 Ill.

2d at 93, 485 N.E.2d at 355. However, "[a]ctual hostility between the two defenses is required." *Bean*, 109 Ill. 2d at 93, 485 N.E.2d at 355. "Defenses are antagonistic when each codefendant implicates the other in the offense and professes his own innocence." *People v. McCann*, 348 Ill. App. 3d 328, 335, 809 N.E.2d 211, 217 (2004); see also *Lee*, 87 Ill. 2d at 187, 429 N.E.2d at 463 (antagonistic defenses existed where one defendant pointed his finger at the other defendant as the real perpetrator of the offense); *Daugherty*, 102 Ill. 2d at 542, 468 N.E.2d at 973 (finding antagonistic defenses where each defendant professed his innocence by condemning the other).

¶ 58 In this case, defendant did not indicate to the trial court his intent to present an antagonistic defense. During the hearing on the State's motion, defendant's counsel objected to consolidation on the basis of potential inconsistent defenses related to Dunn. Instead of indicating a specific intent to implicate Dunn and Manuel as the robbers, however, defendant's counsel argued it was merely possible the codefendants "could point the finger at each other" as well as Dunn. Thus, defendant failed to show how consolidation would prejudice him. We note Manuel's counsel also did not represent his client's defense would involve implicating defendant and Dunn in an attempt to exonerate Manuel. Instead, Manuel's counsel argued it was just possible one or both codefendants could suggest Dunn was the other robber.

¶ 59 We acknowledge, '[o]n appeal, the reviewing court is not to decide whether the cases should have been severed 'based on [the] subsequent events during the trial.' " *Ngo*, 388 Ill. App. 3d at 1058, 904 N.E.2d at 107 (quoting *Bean*, 109 Ill. 2d at 100, 485 N.E.2d at 358). However, a review of what took place is helpful to illustrate the actual lack of any antagonism between the codefendants. See *Daugherty*, 102 Ill. 2d at 545, 468 N.E.2d at 969 (detailing later events during trial to illustrate prejudice).

¶ 60 Here, the record reveals the codefendants' individual trial strategies did not involve reciprocally blaming one another. While neither defendant nor Manuel presented any evidence in their respective defenses, their closing arguments provide an indication of their individual defense strategies. For example, defendant's closing argument focused mainly on the State's failure to prove the elements of the charged offenses. Notably, defendant did not contend Manuel committed the robbery with Dunn. Likewise, during his closing argument, Manuel did not suggest defendant and Dunn committed the robbery. Instead, Manuel largely argued against the credibility of the State's witnesses and emphasized the fact there was no physical evidence placing him at the scene of the robbery. Thus, neither codefendant was prejudiced by the other's trial strategy.

¶ 61 In sum, the charged offenses were alleged to have occurred on the same date and at the same time and location. They also involved the same evidence, witnesses, and victims. All of these factors support consolidation. For his part, defendant failed to demonstrate to the trial court how he would be prejudiced by a consolidated trial. As a result, the court did not abuse its discretion in granting the State's motion to consolidate. Thus, defendant's appellate counsel was not ineffective for failing to raise the issue on direct appeal. See *People v. Easley*, 192 Ill. 2d 307, 329, 736 N.E.2d 975, 991 (2000) (appellate counsel is not ineffective for refraining from raising meritless issues on appeal); *People v. Childress*, 191 Ill. 2d 168, 175, 730 N.E.2d 32, 36 (2000) (unless the underlying issue has merit, there is no prejudice from appellate counsel's failure to raise that issue on appeal). Accordingly, the court did not err in dismissing defendant's postconviction petition at the first stage.

¶ 62 III. CONCLUSION

¶ 63 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as cost of this appeal.

¶ 64 Affirmed.