FIRST DIVISION
November 5, 2018

No. 1-15-3205

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 20074
	)	
JEANINE ELAM,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Justices Pierce and Griffin concurred in the judgment.

ORDER

¶ 1 Held: Defendant made a substantial showing, sufficient to survive a motion to dismiss, that her privately retained trial counsel was ineffective for failing to call the only witness who would have corroborated her defense at trial, so we remand for a third-stage evidentiary hearing on that issue. But defendant failed to show that any of the remaining claims in her *pro se* postconviction petition had merit, so we affirm the circuit court's dismissal of those claims.

¶ 2 Defendant Jeanine Elam appeals from the circuit court's dismissal of her petition for relief pursuant to the Post-Conviction Hearing Act (735 ILCS 5/122-1 *et seq.* (West 2014)) at the second stage of proceedings. On appeal, Ms. Elam contends that (1) the circuit court's dismissal

of her petition should be reversed because she made a substantial showing that she received ineffective assistance of trial counsel, based on counsel's failure to call the only witness who could have supported Ms. Elam's claim of self-defense, and (2) her petition should be remanded for new second-stage proceedings on her other claims of trial court error because she received unreasonable assistance when postconviction counsel failed to amend the petition to include a claim of ineffective assistance of appellate counsel and thereby avoid forfeiture of the remaining issues in her petition. For the following reasons, we affirm in part and reverse in part. We agree with Ms. Elam that she is entitled to an evidentiary hearing on her claim that she received ineffective assistance of trial counsel in the failure to call a witness that could have corroborated significant aspects of her defense. We agree with the State that the trial court properly dismissed Ms. Elam's other claims of trial court error.

¶ 3 I. BACKGROUND

¶ 4 Ms. Elam was convicted of first degree murder and unlawful use of a weapon by a felon. She was found to have personally discharged a firearm that proximately caused the death of James Taylor on July 25, 2005. We summarized the evidence in detail in our order affirming her conviction on direct appeal (*People v. Elam*, No. 1-07-0980 (2009) (unpublished order under Supreme Court Rule 23)) and summarized it again in our reversal of the trial court's dismissal of Ms. Elam's postconviction petition at the first stage of proceedings (*People v. Elam*, 2012 IL App (1st) 101486-U). We briefly restate those facts relevant to this appeal.

¶ 5 A. Ms. Elam's Trial

¶ 6 On July 25, 2005, a fight began in the alley near Ms. Elam's house between Ms. Elam's neighbor, Ifeamyi Odum, and several members of the Four Corner Hustlers street gang, including the victim, James Taylor. Ms. Elam, Ifeamyi's brother Charles, the Odums' mother, Ms. Elam's mother Vertenna Elam (who we will refer to as Vertenna), and Ms. Elam's aunt

Mary Baker, were all present for part or all of the fight. During the fight, Ms. Elam drew a gun, and shot Mr. Taylor twice. At that point, everyone dispersed and Ms. Elam disguised herself and hid. Within hours, however, she called the police and turned herself in. Later that day, Mr. Taylor died from his injuries.

¶ 7 The dispute at trial centered on what happened before the shooting and whether Mr. Taylor was one of the aggressors. The State's theory of the case was that Mr. Taylor was trying to break up the fight when Ms. Elam approached him with a gun and shot him. The defense theory was that Ms. Elam shot Mr. Taylor in self-defense, to protect herself and her mother from the retaliation that Mr. Taylor threatened her with during the fight and that the gang had threatened her with when, several days earlier, she stood up to the gang leader.

¶ 8 1. The State's Witnesses

¶ 9 The State's witnesses included Reverend Robin Hood who was driving by at the time of the fight. The reverend testified that he stopped his car about 15 to 20 feet away from the fight and saw Mr. Taylor and a woman trying to break up the fight. Reverend Hood said that he then saw Ms. Elam approach the fight holding a gun, extended out, and pointing the gun between Mr. Taylor and the other two young men. He heard her say "get your hands off of my mother," then saw her fire the gun. Reverend Hood stated that at least three shots were fired, and that by the time the second shot was fired, he could tell Mr. Taylor had been hit somewhere in the "head area."

¶ 10 The State also called Ralph Sewell, who was a member of the Four Corner Hustlers street gang. Mr. Sewell testified that the fight involved "four guys on the sidewalk," including Ifeamyi and Charles Odum. He did not recognize the other two individuals. As Mr. Sewell moved closer to the fight, he saw Ms. Elam's mother, the Odums' mother, and Mr. Taylor trying to break it up. Mr. Sewell testified that he then heard Ms. Elam say "don't put your hands on my mother. I'll

f*** you all up." Mr. Sewell was five to ten feet away from Ms. Elam, and saw her pull a handgun from her purse. She fired once at Mr. Taylor while Mr. Taylor was facing her, then "just continued to shoot" as Mr. Taylor tried to turn and run. The second time Ms. Elam fired the gun, she shot Mr. Taylor in the side of the head.

¶ 11 2. The Defense Witnesses

¶ 12 At the time of the shooting, Ms. Elam had difficultly moving as the result of a prior severe car accident and, on a separate occasion, being pushed down the stairs—by her ex-boyfriend, a fact which was revealed by the pre-sentence investigation report. As Ms. Elam explained at trial, she had eight screws and a plate in her right ankle, six screws and a plate in her left ankle, a rod from her knee to her hip, and "three plates, twelve screws and wires in [her] face." She was not able to run or sprint, but, according to her testimony, could "limp pretty fast."

¶ 13 The defense witnesses included Ms. Elam's mother Vertenna, Ifeamyi Odum, and Ms. Elam herself. The defense account begins four days before the shooting. Ms. Elam testified that on, July 21, 2005, she and her cousin, "Deloco," approached Ralph Sewell in an attempt to diffuse a situation between Deloco and the Four Corner Hustlers street gang. Before she started talking to Mr. Sewell, however, Chavez—who Ms. Elam testified was the head of the Four Corner Hustlers—interrupted and "muff[ed]" Ms. Elam on her face, meaning he grabbed her head with his hand and pushed her. In response, Ms. Elam sprayed him in the face with pepper spray. Ms. Elam testified that as she started walking to her car that day, Chavez said "I'm fixing to shoot you, B****." Mr. Sewell pulled a gun from underneath his shirt and tried to hand it to Chavez, but another individual, "KC," grabbed the gun and said not to shoot Ms. Elam. Ms. Elam got into her car, but was blocked in by a truck and a van. A bunch of men got out of the van, Chavez said, "get that b****, pull her out." Then, as Ms. Elam maneuvered her car to escape, Chavez punched in the driver-side window as Mr. Taylor and "Church Boy" threw glass

bottles at her car. Ms. Elam's mother Vertenna testified that she saw Chavez punch out the driver-side window of the car with his fist while Ms. Elam was "trying to get away." Ifeamyi did not see the incident but saw that Ms. Elam's car window was damaged. Ms. Elam testified that after the incident on July 21, she bought a gun to protect herself and hid at her cousin's house. She returned to her mother's house on July 23 to see if "everything had died down," but saw Mr. Taylor, Church Boy, and Fame, "[g]iving [her] real dirty looks" and pointing. She then returned to her cousin's house where she stayed that night and the following night. She returned to her home just before the incident on July 25 and she was standing in the alley behind her house when the fight began.

¶ 14 Vertenna, Ms. Elam's mother, testified that she was inside her house with Ms. Elam's aunt, Mary Baker, when the fight began. They saw three men, including Mr. Taylor, attacking Ifeamyi. They stepped out onto their front porch and the fighting stopped. Ifeamyi then walked toward his own home, which was a few houses south on the same side of the street. Vertenna stated that two of the three men immediately followed Ifeamyi, but Mr. Taylor stayed behind for a minute and said something that Vertenna did not hear to Ms. Elam, who was standing outside. Mr. Taylor then followed the other two men who were going after Ifeamyi. Vertenna testified that she told Ms. Elam to stay on the porch as she and Ms. Baker followed the men to the Odum house.

¶ 15 Ifeamyi testified that when they were in front of his house, his brother Charles was attacked by Fame, Church Boy, and Mr. Taylor, but that Ifeamyi was no longer a part of the fight. Vertenna's recollection was that Ifeamyi was attacked again in front of his house, and she testified that Charles and the Odums' mother were also attacked.

¶ 16 Ms. Elam testified that Mr. Taylor threatened her by saying "You next bitch," before following the other two gang members to the front of the Odum house. After her mother and aunt

went to the Odums', Ms. Elam left her porch and followed the others. At that point, she saw Mr. Sewell coming toward her "with a few other guys." Ms. Elam explained: "I feared. I was scared. I thought he was going to get me or do something to me. I pulled the gun out." She testified that she did not intend to shoot Mr. Taylor but that she was shaking so bad that the gun accidentally went off. Ms. Elam said that after the first shot was fired, Mr. Taylor turned around and "ran right toward [her]. At a kind of low run." She fired the gun as he ran toward her, and he fell to the ground. Neither Ifeamyi nor Vertenna saw Ms. Elam shoot Mr. Taylor, nor did either of them hear his threat to Ms. Elam.

¶ 17 3. Other Trial Evidence

¶ 18 The parties stipulated to testimony from the assistant medical examiner who performed Mr. Taylor's autopsy. The autopsy revealed that Mr. Taylor had a gunshot entrance wound on the right side of his head that "coursed from right to left and backwards." Mr. Taylor had another gunshot wound on the right side of his lower back that "coursed from left to right and slightly downwards"; that bullet exited the body on the "right flank." A forensic investigator for the State testified as to the recovered bullets.

¶ 19 The State also put into evidence a letter that Ms. Elam wrote from jail to her former boyfriend. The State relied on that letter as evidence that Ms. Elam was operating more out of anger than she was out of fear on the day of the fight, since she claimed in that letter, "you were the last man/n**** to put they hands on me" and "I haven't been scared or spooked of no n**** since you."

¶ 20 4. Trial Court Findings and Sentence

¶ 21 The court found Ms. Elam guilty of first-degree murder, stating:

> "Mr. Hood was very clear. There was a boy trying to break up the fight. There were two boys fighting. The victim, the guy that got shot, was assisting the

> women. This Defendant was not acting in self defense. There is no second degree murder here. The defendant is guilty of first degree murder. And unlawful use of weapons by felon beyond a reasonable doubt. That's my finding."

¶ 22 The trial court sentenced Ms. Elam to 20 years in prison, plus an additional mandatory enhancement of 25 years based on its finding that Ms. Elam proximately caused Mr. Taylor's death by discharging a firearm, for a total of 45 years in prison for the murder, and three years in prison for the unlawful use of a weapon by a felon charge, with the sentences to run concurrently.

¶ 23 B. Direct Appeal

¶ 24 On direct appeal, Ms. Elam argued (1) her conviction should be reduced to second degree murder because the evidence was sufficient to show she had an unreasonable belief that she was acting in self-defense as a result of previous threats; and (2) she was denied the right to present a defense when the court prevented witnesses from testifying about the threats she received before the shooting. See *Elam*, No. 1-07-0980, slip op. at *1. This court affirmed Ms. Elam's convictions. *Id.*

¶ 25 C. First-Stage Postconviction Proceedings and Appeal

¶ 26 Ms. Elam filed a *pro se* postconviction petition on February 10, 2010, asserting a number of claims, including that she was denied due process and also that she received ineffective assistance from the privately retained lawyer who represented her at trial. Attached to Ms. Elam's petition were multiple affidavits, including one from Mary Baker, Ms. Elam's aunt. In the affidavit, Ms. Baker said that she heard "James Taylor [tell] Jeanine Elam you are next b****." Ms. Baker also said in her affidavit that she saw Mr. Taylor go toward Ms. Elam "aggressively" at the time Ms. Elam fired the gun.

¶ 27 The circuit court summarily dismissed Ms. Elam's petition but this court reversed that

dismissal. We found that based on Ms. Baker's affidavit, it was "entirely possible that the trial court might have interpreted the physical evidence differently if it was presented with a credible witness account that the victim was charging at defendant." *Elam*, 2012 IL App (1st) 101486-U, ¶¶ 10-11. We remanded Ms. Elam's case for second-stage proceedings. *Id.* ¶ 13.

¶ 28 D. Second-Stage Postconviction Proceedings

¶ 29 On remand, Ms. Elam was appointed a public defender to represent her, who filed a supplemental postconviction petition on July 18, 2013. The only claim addressed in that supplemental petition was that Ms. Elam received ineffective assistance of trial counsel based on counsel's failure to present Ms. Baker as a witness in support of Ms. Elam's self-defense testimony. Counsel also attached another affidavit from Ms. Baker, in which she reiterated the version of events described in her initial affidavit, including having heard Mr. Taylor tell Ms. Elam, "You next b****," and further attested:

> "2. *** In 2007, I provided attorney Kevin Kelly with my former address *** and my date of birth ***. Attorney Kelly told me he needed this information in order for me to testify at trial. He told me that he would call me to testify after he interviewed me about what I saw and heard on July 25, 2005 regarding the shooting of James Taylor.
>
> * * *
>
> 5. I saw the two young men start attacking Ifeamyi Odum when he got to his house. James Taylor joined them in punching Ifeamyi Odum. I then saw Ifeamyi's mother and brother Charles Odum come out of their house, and try to stop the fight. I saw these three men attack Mrs. Odum and Charles Odum when they tried to stop them from hurting Ifeamyi Odum.
>
> ***

7. Immediately before the shooting, I saw James Taylor walk fast toward Jeanine Elam like he was ready to fight her. He left the fight to walk aggressively towards Jeanine Elam. As he got nearer, I saw Jeanine Elam firing the *** gun in his direction. I saw Jeanine Elam holding the gun as James Taylor started to fall. I do not remember seeing James shot in the back or the head. *** I was not standing next to my sister when I saw James Taylor leave the fight with the young men and walk aggressively towards Jeanine Elam.

8. [Reverend] Hood was still in his car when James Taylor was shot. I was standing closer than [Reverend] Hood to James Taylor and Jeanine Elam when she fired the gun.

* * *

12. I was never contacted by attorney Mr. Kelly to come to trial."

¶ 30 Counsel also filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), in which she attested that she had consulted with Ms. Elam "on numerous occasions by mail to ascertain her contentions of deprivations of constitutional rights," she had "obtained and examined the official appellate records" pertaining to Ms. Elam's case, and she had examined Ms. Elam's *pro se* petition and found that it adequately presented her claims of constitutional violations, but that she supplemented the petition "by alleging that trial counsel rendered ineffective assistance of counsel by failing to call Mary Baker as an eyewitness."

¶ 31 The State filed a motion to dismiss in which it argued, in part, that Ms. Elam's claims, other than her claim of ineffective assistance of trial counsel, were barred by forfeiture, as they could have been and were not raised by her on direct appeal. In a response to the motion, postconviction counsel argued orally that this procedural hurdle was no barrier to Ms. Elam's assertion of the claims because her appellate counsel had provided ineffective assistance by

failing to raise them in her appeal.

¶ 32 The circuit court granted the State's motion to dismiss on September 28, 2015. In a written order, the court dismissed the claim on which we had remanded the case for a second-stage hearing on the basis that paragraph 2 of Ms. Baker's new affidavit "now indicates that trial counsel interviewed Mary Baker, was aware of her statements and observations, listed her as a potential witness, and made a decision not to call her during trial." The court dismissed the claims of trial court error in Ms. Elam's *pro se* petition on the basis that they were all based on the trial record and were therefore forfeited because they could have been and were not raised on direct appeal. It also concluded that the claims lacked merit. The court noted that Ms. Elam's postconviction counsel "improperly" attempted to argue, at the hearing on the State's motion to dismiss, that appellate counsel was ineffective for failing to raise claims of trial court error on appeal, and that because no claim of ineffective appellate counsel was made in either the original or supplemental petition, it was forfeited. This appeal followed.

¶ 33 II. JURISDICTION

¶ 34 Ms. Elam timely filed her notice of appeal on October 5, 2015. This court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Supreme Court Rules 606 and 651, governing criminal appeals and appeals from final judgments in postconviction proceedings (Ill. S. Ct. R. 606 (eff. Mar. 20, 2009); R. 651(a) (eff. Dec. 1, 1984)).

¶ 35 III. ANALYSIS

¶ 36 Ms. Elam argues that her cause should be remanded for a third-stage evidentiary hearing so that she can attempt to make an evidentiary showing that her trial counsel was ineffective for failing to call Ms. Baker to testify at trial in support of Ms. Elam's self-defense claim. Ms. Elam also contends that she is entitled to new second-stage proceedings with new postconviction

counsel because her prior postconviction counsel unreasonably failed to include claims of ineffective assistance of appellate counsel in the supplemental postconviction petition in order to avoid forfeiture of her other postconviction claims. We consider these two arguments in turn.

¶ 37 A. Ineffective Assistance of Trial Counsel

¶ 38 Postconviction proceedings have three possible stages in noncapital cases. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage, a petition may only be dismissed if the claims are found to be frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If, as here, a petition is advanced to the second stage of proceedings, counsel is appointed for an indigent defendant (725 ILCS 5/122-4 (West 2014)), and the State may move to dismiss the petition (*People v. Gerow*, 388 Ill. App. 3d 524, 526 (2009)). At this stage, a petition should be dismissed "when the petition's allegations of fact—liberally construed in favor of the petitioner and in light of the original trial record—fail to make a substantial showing" of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). If the petition makes the required substantial showing, it is then advanced to the third stage of proceedings, in which the circuit court holds an evidentiary hearing. *Tate*, 2012 IL 112214, ¶ 10. We review the second-stage dismissal of a postconviction petition *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 39 At the second stage of proceedings, "[u]nless the petitioner's allegations are affirmatively refuted by the record, they are taken is true, and the question is whether those allegations establish or 'show' a constitutional violation." *People v. Domagala*, 2013 IL 113688, ¶ 35. "In other words, the 'substantial showing' of a constitutional violation *** is a measure of the legal sufficiency of the petitioner's well-pled allegations of a constitutional violation *which if proven* at an evidentiary hearing, would entitle petitioner to relief." (Emphasis in original.) *Id.*

¶ 40 In her petition, Ms. Elam alleged that she received ineffective assistance of trial counsel based on counsel's failure to call Mary Baker as a witness because Ms. Baker was a necessary

witness to corroborate the defense theory that Ms. Elam shot Mr. Taylor in self-defense. "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." *Id.* ¶ 36 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A defendant must satisfy both the performance and prejudice prong of this standard in order to prevail. *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 41 1. Deficient Performance

¶ 42 We find that Ms. Elam has made a substantial showing that her counsel was deficient for failing to call Mary Baker as a witness at trial. To show that counsel's performance was deficient, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms." *Domagala*, 2013 IL 113688, ¶ 36.

¶ 43 The State is right, of course, that "trial counsel's decision whether to present a particular witness is within the realm of strategic choices that are generally not subject to attack on the grounds of ineffectiveness of counsel." *People v. King*, 316 Ill. App. 3d 901, 913 (2000). But there are limits to this principle. First, "counsel's tactical decisions may be deemed ineffective when they result in counsel's failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense." *Id.* Also, a tactical decision can be the basis for an ineffective assistance claim when it is made without reasonable investigation. *People v. Steidl*, 177 Ill. 2d 239, 256-57 (1997); *People v. Makiel*, 358 Ill. App. 3d 102, 107-08 (2005). Both of these limitations could apply here.

¶ 44 As Ms. Elam points out, Ms. Baker's testimony "would have directly supported the defense strategy of self-defense and corroborated [Ms. Elam's] own testimony." It also would have completely undermined the trial court's premise, when it found Ms. Elam guilty, that Mr.

Taylor was "a boy trying to break up the fight." Ms. Baker was quite clear that it was Charles Odum who was trying to break up the fight and that Mr. Taylor's entire role was being an aggressor. At trial, there was no dispute that Ms. Elam shot Mr. Taylor; the sole question was whether she believed—reasonably or unreasonably—that he was a threat and that she was acting in self-defense when she did so. A person "is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another ***." 720 ILCS 5/7-1(a) (West 2014). In addition, if a person has an unreasonable belief he is acting in self-defense, first-degree murder is mitigated to second-degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 113 (1995).

¶ 45 The question of what Mr. Taylor did just before Ms. Elam shot him was the crucial issue on either self-defense or mitigation to second-degree murder. The trial court concluded from the evidence that "There was a boy trying to break up the fight. There were two boys fighting. The victim, the guy that got shot, was assisting the women." The only witness who directly contradicted that at trial was Ms. Elam herself. While her mother and Ifeamyi corroborated part of what Ms. Elam said happened, they did not see Mr. Taylor just before the shots were fired and could not testify as to whether he was an aggressor or trying to break up the fight at that time, nor did either of them hear Mr. Taylor's threat to Ms. Elam, which she testified he made shortly before she shot him. The defense presented only Ms. Elam's own testimony to show that Mr. Taylor threatened her and aggressively ran at her.

¶ 46 In her affidavit, Ms. Baker was able to corroborate this testimony. She attested that she heard Mr. Taylor say to Ms. Elam "that she was next bitch." She also says that she saw Mr. Taylor leave the fight "to walk aggressively toward Jeanine Elam." This testimony directly corroborates Ms. Elam's otherwise uncorroborated testimony and bolsters defense counsel's

theory of self-defense or, at the least, unreasonable self-defense, which would have reduced Ms. Elam's conviction to second-degree murder.

¶ 47 Taking the facts of Ms. Baker's affidavit as true, we cannot contemplate a reasonable strategy for counsel not to call the only witness who would have corroborated crucial parts of Ms. Elam's testimony on the central issue at trial. Under these circumstances, we find that Ms. Elam's petition and supporting documents make a substantial showing that her trial counsel was deficient for failing to call Ms. Baker as a witness. As we noted in *People v. Butcher*, 240 Ill. App. 3d 507, 510 (1992), where the evidence was closely balanced and the State's case hinged on identity, trial counsel's failure to call two additional witnesses who would have corroborated that the defendant was not one of the offenders could not "be attributed to a professionally reasonable tactical decision" and, further, we could not "conceive of any sound reason for failing to have these witnesses at trial."

¶ 48 At the evidentiary hearing, Ms. Elam may also be able to show a failure by her counsel to properly investigate Ms. Baker as a witness. While Ms. Baker's affidavit makes clear there was some contact between defense counsel and herself prior to trial, there is nothing in the record that clarifies the extent of that contact. Ms. Baker attested that counsel told her "that he would call [her] to testify after he interviewed [her] about what [she] saw and heard on July 25, 2005." It is unclear from this statement whether counsel actually interviewed Ms. Baker or told her he was going to interview her at some later time. Moreover, even if counsel did interview Ms. Baker, it does not necessarily follow that he made a strategic decision, based on a reasonable investigation, not to call her as a witness.

¶ 49 The State relies on *People v. Lacy*, 407 Ill. App. 3d 442, 465 (2011), where we rejected an ineffective assistance claim based on counsel's failure to call the defendant's aunt as an alibi witness. However, in contrast to this case, the aunt's proposed testimony in *Lacy* directly

contradicted the physical evidence. The aunt claimed in support of her alibi testimony that the defendant was not even permitted to go to Chicago Heights, where the crimes occurred, but the defendant had been arrested in Chicago Heights. Thus, there were reasons not to call the aunt as a witness that were apparent from the trial record. No such reasons appear here.

¶ 50 The State also argues that it was reasonable for defense counsel not to call Ms. Baker "when trial counsel had already presented a friend of [Ms. Elam] and [Ms. Elam's] mother." But, as noted above, neither Ifeamyi nor Vertenna could corroborate important aspects of Ms. Elam's testimony. In addition, the State emphasizes what it views as inconsistencies between Ms. Elam's account and the forensic evidence presented at trial, on the one hand, and Ms. Baker's affidavit, on the other. The State points to Ms. Baker's silence in her affidavit as to how many times she saw Ms. Elam fire the gun, whether Ms. Elam fired the gun before Mr. Taylor turned around, and her affirmative statement that she did not see Ms. Elam shoot Mr. Taylor in the back or the head. These statements are not inconsistent with Ms. Elam's account or with the forensic evidence. They are, at most, omissions. Ms. Baker's affidavit may not be overly detailed, but taking the allegations of the affidavit as true and construing it liberally in favor of Ms. Elam (see *Coleman*, 183 Ill. 2d at 380 (quoting *People v. Jennings*, 411 Ill. 21, 26 (1952)), Ms. Elam has shown that, if called, Ms. Baker would have corroborated crucial points in her testimony and supported the defense theory at trial. And, as such, she has made a substantial showing that trial counsel was deficient for failing to call Ms. Baker.

¶ 51 2. Prejudice

¶ 52 Ms. Elam has also made a substantial showing that she was prejudiced by counsel's failure to call Ms. Baker as a witness. To show prejudice, a defendant must show "that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland*, 466 U.S. at

694). Our supreme court has defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220.

¶ 53 If Ms. Baker had been called to testify, based on the statements in her affidavit, she would have directly supported Ms. Elam's testimony that Mr. Taylor threatened her and then aggressively ran at Ms. Elam just before Ms. Elam shot him. She would have also undermined the State's theory that Mr. Taylor was trying to break up the fight, rather than aggressively beating up Ifeamyi Odum and threatening Ms. Elam. In combination with evidence of Ms. Elam's injuries that prevented her from running and the threats from the Four Corner Hustlers gang just four days before, we find that there is a probability the trial court could have found that Ms. Elam shot Mr. Taylor out of a reasonable or unreasonable belief that she was acting in self-defense or defense of others.

¶ 54 We also note that in her direct appeal, Ms. Elam convinced this court that the trial court erred in excluding some of the evidence that Ms. Elam tried to present as to the threats that the gang had made against her. We found, however, that these rulings did not amount to plain error and that Ms. Elam's trial counsel had failed to preserve them by including them in her posttrial motion. *Elam*, No. 1-07-0980, slip op. at *13-18. Our supreme court has made clear that we can review an allegation of potential prejudice from ineffective trial counsel in light of other errors in the trial. In *People v. Sutherland*, 194 Ill. 2d 289, 299-300 (2000), the supreme court granted postconviction relief based on ineffective assistance of trial counsel where the "combination" of "improper prosecutorial argument and trial counsel's ineffective assistance now lead us to conclude that the original trial was sufficiently compromised by error as to vitiate our confidence in its fairness."

¶ 55 The State argues that we found it refuted Ms. Elam's self-defense claims when we

affirmed her conviction on direct appeal. But there the question was whether " 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present.' " *Elam*, No. 1-07-0980, slip op. at *10 (quoting *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996)). As this court has noted previously, "sufficiency of the evidence is not the touchstone for decision under [the ineffective assistance of counsel] test of prejudice." *People v. Moore*, 279 Ill. App. 3d 152, 160 (1996). On direct appeal, we found only that a rational trier of fact could have found the mitigating factors were not present based on the evidence that was presented. Here, we must consider whether trial counsel's failure to call the only witness who would have corroborated Ms. Elam's testimony and bolstered her claim of self-defense was sufficient to undermine the outcome of the trial. We find that it was.

¶ 56 The State also points the to the trial court's finding that "the forensic evidence suggested that the victim was running away from Petitioner when she shot him in the back, and he was shot in the head when he turned and looked back." But as we noted when we reversed the trial court's summary dismissal of Ms. Elam's *pro se* petition:

> "Although the trial court interpreted the physical evidence to support its conclusion that the victim was running away from defendant at the time she shot him, there was no expert testimony to support this conclusion. It is entirely possible that the trial court might have interpreted the physical evidence differently if it was presented with a credible witness account that the victim was charging at defendant." *Elam*, 2012 IL App (1st) 101486-U, ¶ 10.

We still find this to be the case.

¶ 57 For all the reasons above, we find that Ms. Elam has made a substantial showing that she received ineffective assistance of trial counsel based on counsel's failure to call Ms. Baker as a

witness. The circuit court should proceed to a third-stage evidentiary hearing on this issue at which the burden will be on Ms. Elam to demonstrate both prongs of the *Strickland* standard.

¶ 58 B. Unreasonable Assistance of Postconviction Counsel

¶ 59 Ms. Elam also contends that her postconviction counsel provided unreasonable assistance by failing to amend her *pro se* postconviction petition to include a claim of ineffective assistance of appellate counsel, which, as Ms. Elam recognizes, was necessary to avoid forfeiture of her other claims regarding errors in her trial. Ms. Elam argues that, as a result, we should reverse the dismissal of her petition on the claims of trial court error and remand it for new second-stage proceedings with new postconviction counsel. In response, the State argues that postconviction counsel sufficiently fulfilled her duties. Our review is *de novo*. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 60 Ms. Elam had several claims in her *pro se* postconviction petition that appointed postconviction counsel did not amend after we remanded the case. Ms. Elam makes no argument in support of the merits of any of those claims, but contends that regardless of their merit, postconviction counsel violated Illinois Supreme Court Rule 651(c) in failing to amend her petition to include a claim of ineffective assistance of appellate counsel in order to overcome forfeiture of those claims for not raising them on direct appeal. We disagree.

¶ 61 The right to postconviction counsel is statutory, and a defendant is only entitled to a reasonable level of assistance. *People v. Owens*, 139 Ill. 2d 351, 359 (1990). Illinois Supreme Court Rule 651(c) governs appeals in postconviction proceedings, and "requires that the record on appeal disclose that appointed counsel in the trial court took the steps necessary to assure adequate representation of the petitioner's claims." *Id.* "[A] petitioner is entitled to less from post-conviction counsel than from direct appeal or trial counsel" and, therefore, "it should be even more difficult for a petitioner to prove that he or she received unreasonable assistance than

to prove that he or she received ineffective assistance under *Strickland*." *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 50.

¶ 62 Rule 651(c) states, in part, that the record of postconviction proceedings:

> "shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

The purpose of Rule 651(c) is "to ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court." *Profit*, 2012 IL App (1st) 101307, ¶ 18. Substantial compliance with the rule is sufficient. *Id.*

¶ 63 In a long line of cases, this court has held that when counsel files a Rule 651(c) certificate, as counsel did here, it gives rise to a rebuttable presumption that postconviction counsel followed the requirements of the rule and also provided reasonable assistance. See *e.g.*, *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 16; *Profit*, 2012 IL App (1st) 101307, ¶ 19; *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23; *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009); *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007). It is Ms. Elam's burden to overcome that presumption.

¶ 64 Ms. Elam argues that she has demonstrated a violation of Rule 651(c) based on her counsel's failure to amend her petition to allege ineffective assistance of appellate counsel, which was necessary for Ms. Elam to overcome the procedural bar of forfeiture with respect to her remaining claims that were not raised in her direct appeal. Citing *People v. Turner*, 187 Ill.

2d 406 (1999), and *People v. Suarez*, 224 Ill. 2d 37 (2007), Ms. Elam argues that—regardless of the merits of those other claims—the failure of postconviction counsel to amend her petition and allege ineffective assistance of appellate counsel in order to preserve those claims is a failure to comply with Rule 651(c), for which the proper remedy is for us to remand for new second-stage proceedings with new postconviction counsel.

¶ 65 But in both *Turner* and *Suarez*, the rebuttable presumption that is present here did not arise. In *Turner* the record did not indicate whether counsel had filed a Rule 651(c) certificate (*Turner*, 187 Ill. 2d at 409-417), and in *Suarez* the record demonstrated that counsel had not, in fact, filed the required certificate (*Suarez*, 224 Ill. 2d at 40, 44). We have held that when a certificate is filed, and therefore the presumption of reasonable assistance is present, "the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition." *Profit*, 2012 IL App (1st) 101307, ¶ 23. As we noted in *Profit*, our supreme court has stated that " '[f]ulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf.' " *Id.* ¶ 23 (quoting *People v. Greer*, 212 Ill. 2d 192, 205 (2004)). And, as in *Profit*, we hold that a presumption of reasonable assistance arising from the filing of a Rule 651(c) certificate is not overcome absent some showing that the procedurally-barred claims—for which postconviction counsel was allegedly unreasonable for not preserving through a claim of ineffective assistance of appellate counsel—had merit. *Id*. To the extent that the cases on which Ms. Elam relies (see *People v. Kirk*, 2012 IL App (1st) 101606; *People v. Schlosser*, 2012 IL App (1st) 092523) disagree with the holding in *Profit*, we find *Profit* was better reasoned. No showing of merit was made here and therefore we reject Ms. Elam's claim of unreasonable assistance of postconviction counsel.

¶ 66 IV. CONCLUSION

¶ 67 For the foregoing reasons, we reverse and remand Ms. Elam's petition for a third-stage hearing only with respect to her claim that trial counsel was ineffective for failing to call Ms. Baker as a witness. We affirm the judgment of the circuit court in reference to its dismissal of her claims of trial court error.

¶ 68 Affirmed in part; reversed in part; remanded.