

2018 IL App (1st) 160102-U

No. 1-16-0102

Order filed August 24, 2018

Fifth Division

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the
) Circuit Court of
Respondent-Appellee,) Cook County.
)
v.) No. 03 CR 26651
)
TONY SPENCER,) Honorable
) Joseph M. Claps,
Petitioner-Appellant.) Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly dismissed petitioner's postconviction petition at the second stage of postconviction proceedings because petitioner failed to make a substantial showing of ineffective assistance of appellate counsel based on counsel's failure to challenge on direct appeal the trial court's failure to properly admonish potential jurors about fundamental principles concerning the presumption of innocence and the defendant's decision not to offer evidence or testify. Despite the trial court's erroneous admonishment, petitioner failed to make a substantial showing that appellate counsel's forfeiture of this issue prejudiced the defense because the evidence of defendant's guilt was not closely balanced.

¶ 2 In this proceeding under the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 *et seq.* (West 2012)), defendant Tony Spencer appeals the circuit court's order that granted the State's motion to dismiss his petition. Defendant argues that he made a substantial showing of ineffective assistance of appellate counsel based on counsel's failure to challenge on direct appeal the trial court's failure to properly question potential jurors about their understanding and acceptance of fundamental principles regarding the presumption of innocence and defendant's decision not to offer evidence or testify. Defendant argues that he is entitled to an evidentiary hearing on this claim because he made a substantial showing that counsel's forfeiture of this erroneous admonishment issue prejudiced defendant because the evidence identifying him as the offender was closely balanced.

¶ 3 For the reasons that follow, we affirm the circuit court's second stage dismissal of defendant's postconviction petition.¹

¶ 4 I. BACKGROUND

¶ 5 Defendant was arrested for and convicted of the robbery of Chicago police sergeant Ralph Craig, at gunpoint, at an automated teller machine (ATM) located near Washington Boulevard and Loomis Street at about 3 a.m. on November 22, 2003.

¶ 6 At the jury trial in 2008, the State presented evidence showing that at the time of the offense Sergeant Craig was not in uniform and drove an unmarked squad car from his office to the ATM. The ATM was outdoors and in an illuminated alcove just outside a building's revolving door. As Craig withdrew \$10 from the ATM, defendant approached Craig from behind. Defendant told Craig to give him the money or he would kill Craig. Craig turned and

¹ In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

faced defendant, who was approaching quickly and pointing a gun directly at Craig. Defendant wore a black jacket and a gray hooded sweatshirt. Defendant took Craig's \$10 and ordered him to empty his pockets and turn over all his money. Craig emptied his pockets and his police badge, police identification, wallet, and \$7 fell to the ground. Defendant picked up Craig's money. When defendant realized that Craig was a police officer, defendant threatened to kill Craig, demanded his gun, and patted him down searching for his gun. When defendant's gun "dipped down a little bit," Craig pushed defendant to the side and moved away from the alcove. Craig fell and injured his leg as he pulled out his gun. Defendant came out of the alcove, facing Craig. Craig tried to regain his balance and fired two gunshots at defendant, missing him both times. Then defendant fled and Craig called for assistance from his squad car.

¶ 7 The ATM's surveillance video camera recorded the crime, and the State introduced into evidence several still photographs taken from the camera and the video recording. Craig identified defendant in the camera stills and described what occurred in each photo. Craig testified that during the offense defendant faced him and came as close as one foot away from Craig's face. The area was lit from a nearby streetlamp, and Craig could see defendant's face despite the hood of defendant's sweatshirt. Although Craig could not describe defendant's hairstyle due to the hood defendant wore, Craig said that defendant had a "slight, thin mustache" and "some facial hair."

¶ 8 According to the record, the first radio report described the offender as a black male between six feet one inch and six feet two inches tall, weighing about 200 pounds, and wearing "blue gray sweats" and a black jacket. A second radio report described the offender as a black male, 30 years old, weighing 200 pounds, having a short Afro haircut, and wearing a black jacket and gray sweatpants. Detective Patrick Deenihan interviewed Craig at the scene and testified that

Craig had described the offender as a black male, about 25 to 30 years old, clean shaven, wearing a gray hooded sweatshirt under a dark overcoat, and armed with a blue steel semiautomatic handgun.

¶ 9 On the date of the offense, Officer Adrienne Seiber and her partner were in a marked squad car, heard the description of the offender, and began touring the area near Washington Boulevard and Loomis Street at about 3:15 a.m. They saw defendant, who was walking and wearing a puffy black coat over a gray hooded sweatshirt. The officers drove alongside defendant and followed him for about 30 seconds. Officer Seiber rolled down her window and said, "Hey, come here." Defendant turned, looked at her, and then fled down the street and into a gangway. Seiber pursued defendant on foot while her partner followed in the squad car. Defendant fled into an unlit construction site, and Seiber lost sight of him due to the darkness. Seiber and her partner continued touring the area in their squad car, looking for defendant.

¶ 10 At about 4 a.m., Officer Anthony Gibbons and his partner were driving their marked squad car and saw defendant walking and carrying a puffy black jacket and wearing a gray hooded sweatshirt. Because defendant fit the description of the offender, the officers turned their car around and approached defendant from behind. Defendant turned, looked in the officers' direction, and immediately began to run. The officers followed him in their squad car. Defendant fled into a parking lot and then jumped over the wrought-iron fence surrounding the parking lot. Officer Gibbons pursued defendant on foot and noticed another marked squad car, which was occupied by Officer Timothy Parker and his partner, also approach defendant.

¶ 11 Officer Parker stopped and exited his squad car and assisted Gibbons. They saw defendant drop the jacket he was carrying and run into a backyard. Gibbons saw what looked

like the handle of a gun protruding from a pocket of the jacket. Gibbons remained with the jacket while Parker followed defendant into the backyard and took him into custody. Parker described defendant as having a mustache and a “scruffy” beard. Officer Seiber arrived at the scene and identified defendant as the man who fled when she asked him to “come here.”

¶ 12 The police recovered the black jacket and the gun, which was not loaded and did not contain a magazine for bullets. The gun lacked a magazine safety feature and thus could be fired without a magazine. The police also recovered from the ground at the scene of the ATM Sergeant Craig’s \$10 ATM receipt.

¶ 13 At about 6:30 a.m., a lineup was held at the police station. Defendant chose the third position in the lineup. He wore the same blue sweatpants and gray hooded sweatshirt he was wearing at the time of his arrest. The four other participants in the lineup wore dark-colored jackets or sweatshirts, which were the clothes they were wearing when they were arrested. Craig identified defendant as the offender and recognized his face and the gray hooded sweatshirt. Craig also identified the gun used in the robbery. A photograph of the lineup was introduced into evidence.

¶ 14 The gun was tested for DNA evidence. The results revealed that a mixture of two incomplete human DNA profiles was present on the gun. The major and minor profiles were incomplete because not enough DNA was present at 13 locations on the DNA strands to obtain the full information necessary to constitute a complete profile. Defendant was excluded as a contributor to the minor profile but could not be excluded from having contributed to the major profile. The calculation of the expected occurrence of the major profile in the general population

was 1 in 330,000 black people, 1 in 4.2 million white people, and 1 in 1.1 million Hispanic people.

¶ 15 The jury convicted defendant of armed robbery, and the trial court sentenced him to natural life in prison as a habitual criminal based on his two prior convictions for armed robbery.

¶ 16 On direct appeal, defendant argued that the State failed to prove his guilt because (1) he did not resemble Craig's description of the offender or the person shown on the surveillance video, (2) Sergeant Craig's limited view of the offender rendered his identification testimony unreliable, (3) Officer Seiber's identification of defendant was an unreliable showup identification, and (4) the lineup was impermissibly suggestive. This court affirmed defendant's conviction. *People v. Spencer*, 2011 IL App (1st) 091813-U.

¶ 17 In July 2012, defendant filed the *pro se* postconviction petition in the instant case, and appointed counsel amended the petition to allege ineffective assistance of appellate counsel for failing to challenge the trial court's improper admonitions to the venire members. Specifically, the amended petition alleged that appellate counsel failed to raise this issue under the plain error doctrine and the evidence identifying defendant as the offender was closely balanced.

¶ 18 The State moved to dismiss the petition, and the circuit court granted the State's motion. Defendant timely appealed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues that he is entitled to an evidentiary hearing on his claim that he suffered prejudice when appellate counsel rendered ineffective assistance by forfeiting review of the trial court's failure to properly admonish the potential jurors about fundamental principles

concerning the presumption of innocence and defendant's decision not to offer evidence or testify because the evidence identifying defendant as the offender was closely balanced.

¶ 21 A proceeding under the Act is a collateral attack on the defendant's prior conviction and allows only constitutional claims to be heard that were not presented during trial and could not have been raised in the appeal from the conviction. *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007). Therefore, *res judicata* bars any issues previously decided at trial or on direct appeal and issues that could have been presented in the appeal from the conviction but were not. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005). However, the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires, where the forfeiture stems from the ineffective assistance of appellate counsel, or where the facts relating to the issue do not appear on the face of the original appellate record. *People v. Williams*, 209 Ill. 2d 227, 233 (2004).

¶ 22 The Act provides a three-stage process for hearing a petitioner's constitutional claims. *Harris*, 224 Ill. 2d at 125. A petition that states the gist of a constitutional claim advances from the first stage to the second stage if the trial court examines it independently and determines it is not frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2012). A petition is frivolous and patently without merit when it has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill. 2d 1, 13 (2009). At the second stage of the process, the trial court may appoint counsel for the defendant, the petition may be amended, and the State may either answer the petition or move to dismiss it. 725 ILCS 5/122-4, 122-5 (West 2012); *Harris*, 224 Ill. 2d at 126.

¶ 23 The petition may be dismissed at the second stage "when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At this stage, the court shall focus only on the legal sufficiency of the claims, and all well-pleaded facts in the petition and

any accompanying affidavits, which are not positively rebutted by the record, are taken as true. *People v. Domagala*, 2013 IL 113688, ¶ 35. Any fact-finding or witness credibility determinations must await an evidentiary hearing at the third stage of the postconviction proceedings. *Id.* The defendant, however, is not entitled to an evidentiary hearing as a matter of right; the allegations of the petition must be supported by the record or by accompanying affidavits, and nonspecific and nonfactual assertions that merely amount to conclusions are not sufficient to warrant a hearing under the Act. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). When, as here, a petition is dismissed at the second stage of the postconviction process, we review the matter *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 182 (2005).

¶ 24 A defendant alleging a claim of ineffective assistance of counsel must satisfy both prongs of the test discussed in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing that “counsel’s performance was deficient” and the deficient performance “prejudiced the defense.” To satisfy the test’s performance prong, the defendant must show “that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. To satisfy the prejudice prong, the 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. If an ineffectiveness claim can be disposed of on the ground of insufficient prejudice, then that course should be taken and the court does not need to consider the quality of the attorney’s performance. *Id.* at 697.

¶ 25 Appellate counsel is not obligated to raise “every conceivable issue on appeal,” but, rather, is expected to “exercise professional judgment to select from the many potential claims of error that might be asserted on appeal.” *Williams*, 209 Ill. 2d at 243. Appellate counsel’s

assessment of the merits of an issue, furthermore, depends on the state of the law at the time of the direct appeal. See *People v. Weninger*, 292 Ill. App. 3d 340, 345 (1997). Appellate counsel is not required to raise issues that counsel reasonably determines are not meritorious. *People v. Collins*, 153 Ill. 2d 130 (1992); see also *Strickland*, 466 U.S. at 689 (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”).

¶ 26 Defendant contends that he should receive a third-stage evidentiary hearing under the Act because the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), which requires the court to ask the venire members if they understand and accept four principles about the presumption of innocence, the burden of proof, and the defendant’s decision not to offer evidence or testify. Defendant argues that he was prejudiced by appellate counsel’s unreasonable forfeiture of this issue because the evidence identifying defendant as the offender was so closely balanced that the trial court’s error threatened to tip the scales of justice against him.

¶ 27 Forfeited claims of error are reviewable under the plain error rule, which is a narrow and limited exception to forfeiture. *People v. Hiller*, 237 Ill. 2d 539, 545 (2010). To obtain relief under this rule, a defendant must show that a clear or obvious error occurred. *Id.* The defendant bears the burden of persuading the court that either (1) the evidence at the hearing was so closely balanced (regardless of the seriousness of the error) as to severely threaten to tip the scales of justice against the defendant, or (2) the error was so serious (regardless of the closeness of the evidence) as to deny the defendant a fair trial and challenge the integrity of the judicial process.

People v. Herron, 215 Ill. 2d 167, 187 (2005). If the defendant cannot meet this burden of persuasion, the “procedural default must be honored.” *People v. Walker*, 232 Ill. 2d 113, 124 (2009). In order to determine whether the plain error doctrine should be applied, the reviewing court must first determine whether any error occurred. *Herron*, 215 Ill. 2d at 187.

¶ 28 Rule 431(b) requires the trial court to ask prospective jurors if they understand and accept that (1) a defendant is presumed innocent of the charges against him; (2) the State must prove the defendant guilty beyond a reasonable doubt before he can be convicted; (3) the defendant is not required to offer any evidence on his own behalf; and (4) if a defendant does not testify, it cannot be held against him. “The court’s method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in [Rule 431(b)].” *Id.* The trial court’s questioning of the venire concerning these four principles, which are commonly referred to as the *Zehr* principles, is intended to ensure compliance with *People v. Zehr*, 103 Ill. 2d 472, 477 (1984), which sought to end the practice where the judge made a broad statement of the applicable law followed by a general question concerning the juror’s willingness to follow the law. Ill. S. Ct. R. 431, Committee Comments.

¶ 29 According to the record, the trial court told the venire members that it was “absolutely essential as we select this jury that each of you understand and embrace these fundamental principles” that all persons charged with a crime were presumed innocent, that the State had the burden of proving the defendant guilty beyond a reasonable doubt, and that the defendant had no obligation to testify on his own behalf or call any witnesses in his defense. The court explained that the defendant “may simply sit here and rely upon what he and his attorneys perceive to be the inability of the State to present such evidence to meet their burden. Should that happen, you

will have to decide the case on the basis of the evidence presented by the prosecution. The fact that the defendant does not testify must not be considered by you in any way in arriving at your verdict.” The court explained that if defendant elected to testify or his attorneys presented witnesses on his behalf, then the jurors should consider that evidence in the same manner and by the same standard as the evidence presented by the State. The court repeated that there was no burden on defendant to prove his innocence. Rather, it was the State’s burden to prove him guilty beyond a reasonable doubt.

¶ 30 Later, the court again fully explained the first and third *Zehr* principles regarding the presumption of defendant’s innocence and no requirement that he offer any evidence on his own behalf. Concerning the fourth *Zehr* principle, the court explained that the defendant “need not testify; and if he chooses not to testify, you must not consider that in any way in arriving at your verdicts.” However, if defendant “does testify, then you should judge his testimony in the same manner and by the same standards that you use in judging the testimony of any other witness.” Then the court asked, “Does anybody here not accept those principles of law and are unwilling to follow them? Anybody? No response.”

¶ 31 Finally, the court asked, “Do each of you also understand and accept the provision that the State has the burden of proving the defendant’s guilt beyond a reasonable doubt? This is their burden. Anybody not accept that? No response.”

¶ 32 The record establishes that the trial court properly admonished the venire regarding the second *Zehr* principle concerning the State’s burden of proof. However, the trial court failed to ask the venire members whether they *understood* the first, third, and fourth *Zehr* principles. Furthermore, the trial court did not completely and accurately state the fourth *Zehr* principle;

when the trial court admonished the venire against considering “in any way” defendant’s choice not to testify, the trial court omitted the admonishment that a defendant’s decision not to testify *cannot be held against him*.

¶ 33 A trial court’s questions about the *Zehr* principles “constitute preliminary instructions to potential jurors on how they must evaluate the evidence” (*People v. Sebby*, 2017 IL 119445, ¶ 67), and “an instruction given at the end of the trial will have little curative effect” (*Zehr*, 103 Ill. 2d at 477). The *Zehr* principles were directly implicated in this case where defendant did not testify or present evidence. The trial court’s failure to properly admonish the venire regarding these principles was clear error. *Sebby*, 2017 IL 119445, ¶ 49.

¶ 34 Once clear error has been established, the relevant question in a first-prong plain error case is whether the evidence was closely balanced. *Id.* ¶ 69. Defendant must show that the quantum of evidence presented by the State against him rendered the evidence closely balanced. *Id.* ¶ 51. “Whether the evidence is closely balanced is, of course, a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable doubt challenge.” *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). In order to determine whether the evidence was closely balanced, “a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment within the context of the case.” *Sebby*, 2017 IL 119445, ¶ 53. This “inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses’ credibility.” *Id.*

¶ 35 Defendant argues that the evidence identifying him as the offender was closely balanced because (1) he did not resemble either Craig’s description of the offender or the surveillance camera stills of the offender, (2) Craig did not have a good opportunity to see the offender’s face

during the crime, (3) the lineup at the police station was impermissibly suggestive, and (4) the robbery proceeds were not found on defendant, who never gave an inculpatory statement.

¶ 36 First, defendant argues that Craig described the offender as clean shaven and about 25 to 30 years old whereas defendant was 42 years old and had a graying beard (a mustache and connected goatee) when he was arrested one hour after the offense. Defendant also contends that the offender in the camera stills was a distinctly clean shaven young man with thin lips and a small angular nose whereas defendant has pronounced lips and a wide nose and had unmistakable facial hair.

¶ 37 Second, defendant argues that Craig had a limited opportunity to see the offender's face because Craig's attention was drawn to the offender's gun and the robbery occurred in less than 30 seconds. During that time, according to defendant, Craig and the offender faced away from each other for about 22 seconds. Moreover, defendant claims that during the approximately 8 seconds when they faced each other, Craig's view of the offender was obscured by the hood of his sweatshirt and the lack of light outside the alcove of the ATM. Third, defendant contends that the suggestive nature of the lineup would have completely overwhelmed Craig's memory of the offender because defendant's light gray sweatshirt caused him to stand out drastically from the four other lineup participants, who wore dark coats.

¶ 38 Fourth, defendant argues that he did not have any proceeds of the robbery on his person when he was arrested about three blocks from the scene of the robbery. He asserts that it would have been illogical for the offender to have stayed near the scene of the robbery and maintained possession of the jacket, sweatshirt, and gun used during the robbery because those items would have been readily identifiable by the police officer robbery victim, who could quickly obtain assistance from other police officers in the search for the offender.

¶ 39 In determining whether a witness's identification is reliable, courts have considered the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). Courts also consider whether the witness was acquainted with the suspect before the crime, and whether there was any pressure on the witness to make a certain identification. *People v. Brooks*, 187 Ill. 2d 91, 130 (1999).

¶ 40 After reviewing the record in this case, we do not find the evidence to be closely balanced. Craig did not know defendant prior to the offense, a gun was displayed and pointed at Craig during the robbery, the robbery occurred quickly, and there was some variation in the descriptions of the offender's facial hair. Nevertheless, identifications based on a view of an offender for only a few seconds have been found reliable, and a witness's failure to mention a physical characteristic such as a mustache or facial hair does not render an otherwise positive identification unreliable. *Williams*, 118 Ill. 2d. 407, 413-14 (1987).

¶ 41 Craig positively and credibly identified defendant as the offender shortly after the offense. The testimony and pictorial evidence established that the ATM alcove had lighting and the area was illuminated by a nearby streetlamp. Moreover, Craig explained that the offender came as close as one foot to Craig's face while they faced each other, and the sweatshirt hood did not conceal the offender's face. Craig also testified that he described the offender to Detective Deenihan as having a "slight, thin mustache" and "some facial hair." Even if Deenihan accurately recorded Craig's description at the scene as including the term "clean shaven," this detail does not raise a significant discrepancy. Defendant did not have a heavy or full beard but

rather had groomed his facial hair to sport a goatee with a connected mustache while the sides of his face had been shaved.

¶ 42 Contrary to defendant's argument on appeal, the offender shown in the surveillance camera stills resembles defendant's appearance at the time of his arrest, and this pictorial evidence is not at odds with either Craig's description of the offender's facial hair or Officer Parker's description that defendant had a mustache and a "scruffy" beard. In addition, this court rejected on direct appeal defendant's assertion that the lineup was impermissibly suggestive because he was the only person wearing a gray hooded sweatshirt. Defendant was not required to wear distinctive clothing worn by the suspect in the crime (see *People v. Gabriel*, 398 Ill. App. 3d 332, 349 (2010)), and the four other lineup participants also wore clothing similar to that worn by the offender—*i.e.*, dark coats. Finally, although the police did not recover the \$17 robbery proceeds on defendant when he was arrested, he was found near the scene of the robbery shortly after the offense, he fled police officers who approached him, and he was still in possession of the gun, sweatshirt, and black jacket at the time of his arrest.

¶ 43 The present case is distinguishable from *Sebby*, 2017 IL 119445 at ¶ 63, where the court concluded that the evidence was closely balanced because the State and defense eyewitnesses presented two conflicting yet credible versions of the events without extrinsic evidence to corroborate or contradict either version. Specifically, the defendant was convicted of resisting a peace officer after three deputies went to a residence to serve a court order regarding the custody of a minor. *Id.* ¶¶ 3, 5. The three deputies testified that the defendant became agitated, yelled, poked one of the deputies and then struggled and fell when the deputies attempted to handcuff him. *Id.* ¶¶ 10-21. The defendant and two other occupants of the house testified that the defendant remained calm and did not make any contact with the deputies, who were belligerent,

cursed and threatened the defendant, and then grabbed and pulled him, which caused him to fall on his face onto the gravel covered ground. *Id.* ¶¶ 22-36.

¶ 44 Here, in contrast, Craig identified defendant as the offender, and no opposing witness testified otherwise. Furthermore, the camera stills of the offense and the recovery of the gun, sweatshirt, and jacket in defendant's possession near the scene of the robbery and shortly after the offense occurred corroborated the testimony of Craig and the police officers who responded to the call to locate the offender.

¶ 45 Given the totality of the evidence, the evidence finding defendant guilty of armed robbery was not closely balanced. Because the evidence was not closely balanced, defendant fails to make a substantial showing that appellate counsel rendered ineffective assistance to defendant by not invoking the plain error rule and challenging the trial court's erroneous admonishments concerning the *Zehr* principles.

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, we affirm the circuit court's second stage dismissal of defendant's postconviction petition.

¶ 48 Affirmed.