THIRD DIVISION
November 28, 2018

No. 1-17-0760

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. 11 CR 3945
	)	
TIMOTHY SINICO,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of post-conviction petition affirmed. Affidavits stating witness admitted lying about defendant's participation in offenses did not negate evidence of accountability and was not arguably conclusive evidence of actual innocence. Trial counsel was not arguably ineffective for failing to introduce or make use of various pieces of allegedly favorable evidence. Because evidence did not support giving IPI 3.17, neither trial nor appellate counsel was arguably ineffective for failing to request instruction or assert error on direct appeal.

¶ 2 A jury convicted defendant Timothy Sinico of the first-degree murder and attempted armed robbery of Adrian Thompson. After his convictions and sentences were affirmed on direct appeal, defendant filed a post-conviction petition, alleging his actual innocence and various claims of ineffective assistance of trial and appellate counsel. The circuit court dismissed the petition at the first stage. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 We discussed the trial evidence in full detail in our order on direct appeal. See *People v. Sinico*, 2015 IL App (1st) 132164-U (June 30, 2015), ¶¶ 3-24. Here, we summarize that evidence as it is relevant to the claims raised in the post-conviction petition.

¶ 5 On April 23, 2009, codefendant Montrell Banks shot Adrian Thompson, an acquaintance and cannabis dealer, during an attempted armed robbery. The State's theory was that defendant agreed to help Banks rob Thompson and was therefore accountable not only for the robbery but also for the murder, which Banks committed in furtherance of the robbery.

¶ 6 The shooting took place around 10:00 p.m., in the garage behind Darnell Benson's house. Benson, also a cannabis dealer, was a friend of Banks and defendant. Benson had spent much of the afternoon smoking cannabis and listening to music in the garage with his girlfriend, Tiarra Smith, and their friend, Asaundra Washington. Defendant and Banks joined them sometime later in the day.

¶ 7 Benson testified that defendant asked to buy some cannabis from him, but he did not have any available for sale. Defendant then called Thompson to arrange a purchase but could not reach him. Benson also called Thompson and eventually reached him. Thompson came over later that evening.

¶ 8 Benson heard defendant say, "I'm going to rob [Thompson], foe." (That was sometime after Benson had called Thompson, but before Thompson arrived.) Before trial, Benson told the police and prosecutors that *Banks* talked about robbing Thompson that day, but he did not tell them that *defendant* did, too. Benson explained at trial, however, that the questions posed to him during that interview were focused more on Banks than on defendant.

¶ 9 Smith testified that Banks said "he was going to rob [Thompson]." Defendant agreed to help him, but Smith could not recall the exact words defendant used to express that agreement. Benson was sitting in his car, listening to music, when that conversation took place. In her videotaped statement, Smith did not say that defendant agreed to help Banks rob Thompson. She testified, however, that she told this to investigators before they began recording her statement.

¶ 10 Washington testified that either Banks or defendant told her not to go inside because they were "about to hit a lick." She understood this to mean that defendant and Banks were going to rob someone, but they did not say whom they were planning to rob.

¶ 11 Despite these apparent threats, and despite the fact that Banks was playing with a gun in the garage, Smith and Benson both testified that they did not think Thompson was in any danger. They thought the talk of robbing him was just bluster. Benson, in particular, testified that Banks was known to say such things without following through on them. So when Thompson arrived, nobody thought it was necessary to warn him of any impending danger.

¶ 12 Benson and Washington testified to the circumstances of the shooting. (Smith went to the store and was not at the garage when Thompson was shot.) When Thompson drove up, Banks said, "I'm fitting to get this n***, foe." Banks got into the back seat of Thompson's car. Defendant got into the front passenger's seat. Thompson, Banks, and defendant passed some cannabis around. Banks got out of the car, pulled out his gun, and pointed it at Thompson. Banks repeatedly said, "I'm a Four Corner Hustler," and demanded that Thompson empty his pockets. According to Benson, defendant put his hands up like "he was being robbed as well."

¶ 13 Banks shot Thompson as he tried to drive away. Banks got into his own car. Defendant jumped out of Thompson's moving car as it headed in reverse down the alley and soon crashed.

Defendant ran to Banks's car, yelling, "He dead, foe. He dead. And damn, you almost shot me." Banks and defendant drove away together.

¶ 14 Defendant called Benson later that night. Defendant said that he and Banks only got two bags of cannabis from Thompson, and that they were "gathering alibis" on the way home.

¶ 15 Banks's girlfriend, Avrian Mims, testified that on the day after the shooting, Banks told her that his revolver was at Benson's house. A few days later, Banks said that he had retrieved the gun from Benson's house and moved it to his grandmother's house. A few weeks after that, Banks told both Mims and Benson that he sold the gun to Melvin "Rambo" Welch. The evidence showed that Welch, in turn, sold it to Shawn Smith. A forensic scientist from the Illinois State Police testified that the bullet recovered from Thompson was fired from a gun recovered from Smith's bedroom.

¶ 16 FBI Special Agent Joseph Raschke testified for the State as an expert in historical cell-site analysis. Based on his analysis of call records and cell-tower activity, Special Agent Raschke testified to the times and approximate locations of various calls placed to and from cell phones registered to defendant, Banks, Thompson, and Mims. The relevant aspects of his testimony are described in more detail below.

¶ 17 The jury found defendant guilty of first-degree murder and attempted armed robbery. In a separate but simultaneous trial, another jury convicted Banks of the same crimes. The trial court sentenced defendant to an aggregate prison term of 50 years.

¶ 18 We affirmed defendant's convictions and sentences on direct appeal. *Sinico*, 2015 IL App (1st) 132164-U (June 30, 2015) (PLA denied, No. 119801, 42 N.E.3d 374 (Nov. 25, 2015)); cert denied, *Sinico v. Illinois*, 136 S. Ct. 2393 (2016)).

¶ 19 Defendant, who was represented by counsel, then filed a timely post-conviction petition in the circuit court. While it was pending, the circuit court granted defendant leave to file a supplemental petition. The circuit court considered, and summarily dismissed, both petitions in a single order. We summarize only those claims that defendant raises on appeal.

¶ 20 In his first filing, defendant alleged his actual innocence, based on newly discovered evidence in the affidavits of Antoine Brantley and Arthur Walton. Brantley and Walton state, in sum, that Benson admitted that he lied about defendant's involvement in Thompson's murder. Benson also admitted, among other things, that he agreed to hold Banks's gun after the shooting, and that he later defaced it with a screwdriver so it would not be traceable. The circuit court found that the affidavits were newly discovered, non-cumulative, and material; but since they were hearsay, they were not so conclusive that they would likely change the result on retrial.

¶ 21 Defendant also alleged that trial counsel was ineffective for failing to introduce or make appropriate use of various pieces of favorable evidence at trial. That evidence included (1) an excerpt from Benson's pretrial statement, in which he said that defendant was aware of Banks's habit of making idle threats; (2) cell-phone call records that purportedly contradicted Benson's testimony that defendant called him after the shooting and admitted that he was gathering alibis with Banks; and (3) potential testimony from witnesses who told detectives that they saw another car—neither Thompson's nor Banks's—in the alley, behind Benson's garage, at the time of the shooting. The circuit court found that these claims were waived (or more properly, forfeited) on direct appeal, and that counsel's alleged omissions were all matters of reasonable trial strategy.

¶ 22 In his supplemental petition, defendant alleged that trial counsel was ineffective for failing to tender Illinois Pattern Jury Instruction, Criminal, No. 3.17, the so-called accomplice-witness instruction, with respect to Benson, Washington, or Smith; and that direct-appeal counsel

was ineffective for failing to raise this issue. The circuit court found that the evidence did not warrant giving IPI 3.17 with respect to any of the witnesses.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 A. Actual Innocence

¶ 26 Defendant's first argument on appeal is that the affidavits of Antoine Brantley and Arthur Walton contain newly discovered evidence of his actual innocence.

¶ 27 At the first stage, defendant must show that this evidence is "arguably 'new, material, noncumulative *** [and] so conclusive it would probably change the result on retrial.' " *People v. White*, 2014 IL App (1st) 130007, ¶ 18 (quoting *People v. Coleman*, 2013 IL 113307, ¶ 96). All well-pleaded factual allegations must be taken as true, as long as they are not affirmatively rebutted by the record; and credibility or reliability determinations are not permitted. *People v. Sanders*, 2016 IL 118123, ¶¶ 37, 42. We review a summary dismissal *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 28 Brantley states in his affidavit that he spoke to Benson in May 2009. Benson said he was "scared" because he was "the main suspect" in Thompson's murder. Benson admitted that "he was the one who called [Thompson]" and asked him to come over to his garage; and that "he had the murder weapon for [Banks] until [Banks] picked it up saying he found someone to buy it." Benson said that he would avoid prison "by all means necessary, he didn't care if [defendant] had anything to do with what [Banks] did or not he would lie if he had to."

¶ 29 Walton states in his affidavit that Benson contacted him through social media in July 2016. Benson admitted in his message that he "testified against [defendant] only because [he] feared going to jail himself." Benson claimed to know that defendant "did not have nothing to do

with it or didn't plan to rob [Thompson]." But Benson was "scared" because the police said "they was gone put the murder on him," so he "lied to the police" and said that "[Banks] killed [Thompson] while [Banks] and [defendant] were trying to rob [Thompson]."

¶ 30 Benson told Walton that he was the one who called Thompson, and that "he took the gun from [Banks] and later shoved a screwdriver in it" to "mess [it] up" and make it untraceable. Immediately before Banks got into Thompson's car, Banks said to Benson that "he was about to rob those ni***s"—the plural referring to Thompson *and defendant*, who was already in the car. And after the shooting, Banks "forced [defendant] in [his] car" at gunpoint, before driving away from the scene with defendant in tow.

¶ 31 The State does not dispute defendant's contentions that these affidavits are new, material, and noncumulative. The only question in dispute is whether they are arguably conclusive. The State argues that they cannot be, no matter what they purport to say about Thompson's murder, because they are "pure hearsay," offering nothing but reports of Benson's alleged out-of-court statements to Brantley and Walton.

¶ 32 In his reply brief, defendant says that he does not offer Benson's out-of-court statements to prove the truth of the matters they assert. Rather, he offers them to show that Benson has "twice since the trial of this case related accounts of the murder which contradicted his trial testimony." (Actually, once: Benson's reported statements to Brantley were made in May 2009, shortly after the murder on April 23 of that year, and long before defendant was tried in February 2013.) In other words, defendant seeks to impeach Benson's trial testimony with the statements he made to Brantley and Walton.

¶ 33 Defendant argues that this impeachment evidence is conclusive enough to support a claim of actual innocence, because Benson was the State's key witness. Only Benson, he claims, "put

clear and specific words of criminal intent in [defendant's] mouth," both when he testified that defendant said, "I'm going to rob [Thompson]," and when he testified that defendant admitted that he was fabricating alibis with Banks. Benson could now be impeached with his inconsistent statements. And if the jury rejected Benson's testimony, it would also likely reject Washington's and Smith's "vague and unclear" testimony that defendant agreed to help Banks rob Thompson. That would leave the State with no evidence that defendant agreed or intended to rob Thompson.

¶ 34 To be conclusive evidence of innocence, the newly discovered evidence—when taken as true—must exonerate the defendant, by directly negating the evidence of guilt presented at trial. *E.g.*, *People v. Anderson*, 401 Ill. App. 3d 134, 140 (2010). For this reason, mere *impeachment* evidence is not conclusive evidence of *innocence*. *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008). A statement cannot be taken as directly negating (or proving) anything at all unless it is taken as true (and thus offered to prove the truth of the matter asserted). The mere fact that a witness has made conflicting statements about the crime proves nothing, one way or the other, about a defendant's innocence or guilt; it simply shows that this particular witness's credibility is open to question.

¶ 35 Here, defendant is not even asking us to take anything Benson reportedly said to Walton or Brantley as true. But then the most the affidavits could prove is that Benson has contradicted himself. They do not prove, or even arguably prove, that defendant never agreed or intended to rob Thompson.

¶ 36 In any event, the jury was well aware that Benson, by the time of trial, had already made conflicting statements about defendant's involvement in the attempted robbery and murder. On cross examination, Benson frankly acknowledged that he had told the police "a completely different story" than he told on direct examination. In particular, he never told the police that he

heard defendant say he was going to rob Thompson. And he acknowledged that he did not tell the police *anything* until he learned that *he* was the prime suspect in the murder. In short, Benson was impeached at trial, and quite vigorously, with many of the same inconsistencies and motives to lie that the affidavits impute to him.

¶ 37 The affidavits cannot be used to prove defendant's innocence unless Benson's statements to Brantley and Walton are taken as true. (In his opening brief, defendant does, at times, appear to offer Benson's statements for this purpose, rather than for impeachment.) But even if they are, they still do not arguably prove defendant's innocence. In reaching that conclusion, we need not, and do not, accept the State's blanket assertion that hearsay can never support a claim of innocence, even at the first stage of a post-conviction proceeding. We hold only that these particular statements fall far short of proving what defendant needs to prove.

¶ 38 Defendant paints the affidavits as reporting clear admissions by Benson that his trial testimony was perjured. But neither affiant swears that Benson recanted either of the key claims he made about defendant at trial: that defendant said "I'm going to rob [Thompson]," and that he admitting fabricating alibis with Banks.

¶ 39 According to Brantley, Benson merely said, shortly after the shooting, that "he would lie if he had to." That was nearly four years before defendant's trial, and even before Benson was formally questioned by the police. Brantley's affidavit does not mention either inculpatory claim that Benson would later make about defendant at trial. Even on a charitable reading, Brantley's affidavit, when taken as true, does not show that either of those claims was in fact false.

¶ 40 According to Walton, who did speak to Benson after defendant's trial, Benson claimed that he "testified against [defendant] only because [he] feared going to jail himself," and that he

"lied to the police" about defendant's participation in the robbery. In fact, Benson asserted, defendant "did not have nothing to do with it or didn't plan to rob [Thompson]."

¶ 41 This bare conclusion is not enough. Benson never made any specific factual statements showing *how* he knew that defendant did not intend to participate in the robbery. If a declarant could simply allege that he knows the defendant had or lacked a certain mental state—or could otherwise simply allege knowledge of the defendant's innocence, without providing a specific factual basis for that claim—then the first stage would not even set a low threshold; it would cease to function as any meaningful screen at all.

¶ 42 Benson admitted (both to Walton and to Brantley) that he took the gun from Banks after the shooting; held it until Banks found a buyer; and defaced it, hoping to make it untraceable. Whatever these allegations may show about Benson, they do not negate defendant's own role in the robbery—and thus the murder—of Thompson. Indeed, they provide no information at all about defendant's conduct; they are irrelevant, in particular, to the question whether he agreed or intended to rob Thompson.

¶ 43 Benson admitted (again, both to Walton and to Brantley) that *he* was the one who called Thompson. Benson testified, on direct examination, that defendant called Thompson. But he also testified, on direct and cross-examination, that *he* called Thompson after defendant was unable to get in touch with him. Defense counsel asked Benson the following series of questions: "You try to call [Thompson]?"; "You get in touch with [Thompson]"; and "And at some point, [Thompson] comes over?" Each time, Benson answered, "Yes, sir." This allegation is not even new, much less conclusive; it conveys nothing that defendant's jury did not already know.

¶ 44 Other allegations in Walton's affidavit pertain to Banks, rather than defendant. Before the shooting, Banks allegedly said that he was going to rob Thompson *and* defendant ("*those* ni***,"

in the plural); after the shooting, Banks allegedly told defendant to get into his car at gunpoint. These allegations do not refute the testimony that defendant had announced his intention to rob or help rob Thompson earlier in the day. At best, they might help to show that Banks double-crossed defendant.

¶ 45 In sum, the affidavits, when taken as true, do not arguably show that defendant never agreed to rob (or help rob) Thompson. Thus, they do not directly negate the State's evidence that defendant was accountable for the attempted armed robbery and first-degree murder of Thompson. Defendant has not offered any arguably conclusive evidence of his innocence.

¶ 46 B. Ineffective Assistance of Trial Counsel

¶ 47 Defendant next contends that trial counsel was ineffective for failing either to introduce or to make appropriate use of various pieces of favorable evidence at trial.

¶ 48 At the first stage, defendant must show that counsel's representation was arguably deficient, and that he was arguably prejudiced by counsel's failures. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). To be deficient, counsel's representation must be objectively unreasonable under prevailing professional norms. *People v. Easley*, 192 Ill. 2d 307, 317 (2000). Deficient representation is prejudicial if there is a "reasonable probability" that the outcome of the trial would have been different if not for counsel's error(s)." *People v. Houston*, 226 Ill. 2d 135, 144 (2007). A reasonable probability is one that undermines confidence in the verdict. *Id.*

¶ 49 First, defendant contends that counsel was ineffective for failing to make use of "critical exculpatory evidence" in Benson's recorded pretrial statement. A pivotal claim of the defense theory was that Banks was known to make idle threats, and that defendant—like everybody else in Banks's circle—never took those threats seriously. So even if "words were spoken" between defendant and Banks "that might have been taken as an agreement to rob Thompson," defendant

had "no reason" to believe that Banks meant them seriously. On cross-examination, counsel developed the point that *Benson* never took Banks's threats seriously. But Benson's pretrial statement, defendant contends, included evidence that *defendant* did not either. Counsel should have used that evidence to support defendant's claim that he never agreed to rob Thompson.

¶ 50 As an initial matter, the State argues that defendant forfeited this claim by failing to raise it on direct appeal. Ineffective-assistance claims must be raised on direct appeal when they are based entirely on the trial record; but when they "depend[ ] upon facts not found in the [trial] record," they may—indeed, must—be raised on collateral review. *People v. Veach*, 2017 IL 120649, ¶¶ 46-47. Benson's recorded pretrial statement was never admitted into evidence at trial. Because it was not part of the trial record, defendant did not forfeit this claim on direct appeal.

¶ 51 Benson's pretrial statement does not provide any support for the defense theory that was not already elicited at trial. In his statement, Benson told the detective that he, defendant, Thompson, and several others were all part of the same circle. When they would hang out, Banks would frequently make threats—"I'll beat Will's ass, I'll beat Bill's ass, I'll rob Will, I'll rob Bill"—without following through on them. The detective asked Benson, "Nobody took [Banks] seriously?" Benson initially answered:

> Never took him seriously because, I never took him seriously especially because he'd be with me, he'd say what he'd do the next time he'd see these people, and then they'd come right over on the same day or the next day and we're all hanging and it's like he never said anything, it's like he was friends with them, too. So I never took him serious like, okay I never even took it serious enough to go tell the other guys like, "you wouldn't believe some of the stuff this guy said about you" but, because I didn't take him seriously.

Benson then qualified his statement that he never took Banks's threats seriously:

> But there was one that had worried me because I had heard him say, he was saying that, the first day he finds out that [defendant] has more than two hundred dollars in his pocket he's going to rob him. And then, even when he first got the pistol, he was just talking about how he was going to shoot [defendant] just for having the audacity to try to be a white Four Corner Hustler.

The detective interjected, "But you say you never took him seriously." And Benson continued:

> Right. So I took that to mention because, I did mention that to [defendant] because one day [defendant] was trying to come hang out on Austin with us. [Banks] was there. That was the first time I had ever heard him say anything like that to that extent about [defendant]. So, [defendant's] telling me he's trying to come over and I'm telling him, you don't need to come over here. After I get off the phone, away from [Banks], the next day, I see [defendant] and tell him like, I didn't want you to come over here because this guy is saying like the next time you come around he's going either to shoot you for trying to be a white gang banger or rob you.

¶ 52 Defendant's description of Benson's statement is not accurate. Benson said, no less than four times, that *he* never took Banks's threats seriously, but he never once said the same about defendant. Everything that Benson told the detective in his initial answer—that he considered Banks's threats idle bluster, and that defendant and Banks were part of the same circle of friends—was brought out in Benson's trial testimony. To that extent, his pretrial statement was, as the State points out, a prior consistent statement. Because the evidence in question was inadmissible (*People v. Johnson*, 2012 IL App (1st) 091730, ¶ 60)—not to mention redundant—

defense counsel was not incompetent for failing to offer it at trial. And for those same reasons, defendant was not prejudiced by counsel's omission.

¶ 53 The only evidence in Benson's pretrial statement that was not brought out at trial did not support—and arguably undermined—defendant's theory that he had "no reason" to believe that Banks was serious about robbing Thompson. Benson said there *was* at least one instance when he *did* take a threat of violence by Banks seriously. Banks once threatened to "rob" and "shoot" defendant; and Benson was concerned enough to warn defendant, keep him away from Banks for the time being, and later explain to defendant why he did that. The decision not to present this evidence to the jury was not incompetent, and it certainly did not prejudice the defense. Counsel was not arguably ineffective.

¶ 54 Second, defendant contends that counsel should have used available cell-phone records to impeach Benson's testimony that defendant called him after the shooting and admitted that he was "gathering alibis" with Banks. According to defendant, records of his cell-phone activity on the night of the shooting show that he did not place any calls to Benson after 10:00 p.m., roughly when the shooting took place. Rather, as Benson's cell-phone records show, it was Benson who called defendant several times after the shooting.

¶ 55 The State again alleges that defendant forfeited his claim. The State asserts that all of the cell-phone records in question were part of the trial record, and thus defendant could have raised this claim on direct appeal. At a minimum, though, Benson's cell-phone records were not moved into evidence at trial. Because defendant is relying on evidence outside the trial record, he did not forfeit his claim on direct appeal. See *Veach*, 2017 IL 120649, ¶¶ 46-47.

¶ 56 The parties stipulated at trial that defendant's cell phone had two numbers assigned to it: a Sprint cellular number, and a Nextel direct-connect number. FBI Special Agent Joseph

Raschke, who testified for the State as an expert in historical cell-site analysis, explained that direct connect and cellular are separate services. Direct connect functions like a "walkie-talkie," allowing only one party to a call to speak at a time. Communicating through direct connect is commonly known as "chirping."

¶ 57 As defendant argues, his Sprint records show that he did not place any calls to Benson—using his cellular number—after 10:00 p.m. on the night of the shooting.

¶ 58 But Benson's direct-connect records show eleven chirps between defendant and Benson shortly before 11:00 p.m. For each chirp, those records list defendant's direct-connect number as the "destination." According to defendant, this show that Benson called (or rather chirped) him, and not the other way around, as Benson testified.

¶ 59 Special Agent Raschke testified that (notwithstanding the form of the records), it is not possible to determine whether a chirp is incoming or outgoing. In other words, it is not possible to determine, from the records, whether Benson chirped defendant or defendant chirped Benson. Defendant does not offer any evidence to rebut Special Agent Raschke's testimony on this point. The call records do not impeach Benson's testimony that defendant called him (using one method or another) after the shooting.

¶ 60 And they certainly do not impeach Benson's testimony that defendant admitted he was fabricating alibis with Banks after the shooting. That admission is why Benson's testimony was inculpatory in the first place. It makes no difference whether defendant or Benson originated the call (or chirp) during which that admission was made. Thus, even if the records were impeaching at all, their potential impeachment value was minimal at best. Defendant cannot show that he was arguably prejudiced by counsel's alleged failure to impeach Benson with these records.

¶ 61 Third, defendant contends that counsel was ineffective for failing to call two occurrence witnesses. According to a detective's supplemental report, these witnesses said that they heard multiple gunshots, whereas the State's witnesses testified that Banks shot Thompson once; and that they saw a third car—neither Thompson's nor Banks's—driving in the alley behind Benson's garage at the time of the shooting.

¶ 62 Assuming the witnesses identified in the police report would have been available to testify, their testimony would not have been material to the question of defendant's guilt. Pointing to a discrepancy in the number of gunshots heard by different witnesses, or the presence of an unidentified car driving through a public alley, would not have advanced defendant's theory that he did not intend or agree to rob Thompson. Trial counsel was not arguably ineffective for failing to call these witnesses.

¶ 63 C. IPI 3.17

¶ 64 Finally, defendant contends that trial counsel was ineffective for failing to tender IPI 3.17, the so-called accomplice-witness instruction, with respect to Benson; and that appellate counsel was ineffective for failing to raise this issue on direct appeal.

¶ 65 The *Strickland* standard for ineffective-assistance claims applies to appellate counsel. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). Appellate counsel is not required to raise "every conceivable issue on appeal;" rather, counsel is expected to exercise reasonable professional judgment in "select[ing] from the many potential claims of error that might be asserted on appeal." *People v. English*, 2013 IL 112890, ¶ 33. Prejudice, in the context of the claim raised here, means a reasonable probability that *trial* counsel would have been found ineffective, based on the underlying issue, if *appellate* counsel had competently raised it on direct appeal. See *Petrenko*, 237 Ill. 2d at 497.

¶ 66 IPI 3.17 provides: "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000).

¶ 67 A witness is an "accomplice" for purposes of this "accomplice-witness instruction" if there is probable cause to believe that the witness was guilty of the offense, either as a principal or on a theory of accountability. *People v. Caffey*, 205 Ill. 2d 52, 116 (2001). A person is accountable for another's criminal conduct when, "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c). Thus, IPI 3.17 should be given if the evidence, and the reasonable inferences drawn from it, establish probable cause to believe that the witness either committed or facilitated the offense. *Caffey*, 205 Ill. 2d at 116.

¶ 68 Defendant argues that there was probable cause to believe that Benson was accountable for the attempted armed robbery and murder. The evidence did not bear out this claim.

¶ 69 There is no dispute that Benson was present when these crimes were committed, but his presence alone does not make him accountable for them. See, *e.g.*, *People v. Taylor*, 186 Ill. 2d 439, 446 (1999).

¶ 70 Benson called Thompson, and that call brought Thompson to Benson's garage, where he was murdered. But there was no evidence that Benson intended to lure Thompson to his garage to be robbed or murdered. Rather, Benson was trying to help defendant buy some more cannabis: Defendant asked to buy some from Benson, but he did not have any available for sale; defendant then called Thompson, who also sold cannabis, but could not get in touch with him; so Benson

called Thompson on defendant's behalf, and eventually reached him. That call was not evidence that Benson was accountable for the crimes that were later committed against Thompson.

¶ 71 Defendant has not pointed to any trial evidence that supports a different inference about Benson's intent in calling Thompson. Washington and Smith testified that Benson was not a party to any of the discussions about robbing Thompson—only defendant and Banks were. True, Benson was well aware that Banks had threatened to rob Thompson (and many other people) at various times. But as Benson testified, and as defendant himself emphasizes, those threats were generally seen as idle bluster, and *none* of the witnesses thought that Thompson was in any real danger when he came to Benson's garage. And, unlike Banks and defendant, Benson did not get into Thompson's car. When Thompson arrived, Benson kept doing what he had been doing all day: hanging out with his girlfriend, smoking cannabis and drinking, and listening to music.

¶ 72 Defendant asserts that Benson "took the murder weapon from Banks and held it for him for safekeeping until Banks could find a buyer for it." The only evidence of what Banks may have done with the murder weapon came from Mims, Banks's girlfriend.

¶ 73 Mims testified that a few days after the shooting, Banks told her that he picked up his gun from Benson's house. Taken as true, Mims's (hearsay) testimony implies that Banks did indeed leave the murder weapon at Benson's house. But nobody, including Mims, testified that Banks gave his gun to Benson, as opposed to merely stashing it somewhere in Benson's garage—with or without Benson realizing it at the time. And there was certainly no testimony that Benson ever agreed to take the gun for "safekeeping."

¶ 74 Even if that inference is drawn in defendant's favor, it still does not show that Benson was an accomplice, within the meaning of IPI 3.17. To be accountable for either offense, as the instruction requires, Benson had to intentionally aid Banks "in conduct that constitutes an

element of the offense," and he had to do so "either before or during the commission of the offense." *Id.* at 447; 720 ILCS 5/5-2(c) (West 2016).

¶ 75 There was no evidence that Benson intended—before or during the offenses—to help Banks rob or murder Thompson. At most, Benson may have intended—after the fact—to help Banks conceal the murder weapon. "[A]n instruction on accomplice testimony need not be given where the alleged accomplice was not involved in any way until after commission of the crime." *People v. Turner*, 92 Ill. App. 3d 165, 168 (1980).

¶ 76 That is because someone who does not participate "before or during the crime *** is, at best, an accessory after the fact"; that person might be charged with aiding a fugitive (720 ILCS 5/31-5) or obstruction of justice (720 ILCS 5/31-4), but could not be charged with the underlying crime on a theory of accountability. 1 John F. Decker, Illinois Criminal Law: A Survey of Crimes and Defenses 172 (4th ed. 2006). For example, someone who "forms the intent to facilitate an escape only after [the offense] has occurred" could be charged as an accessory after the fact, but is not accountable for the underlying crime. *People v. Dennis*, 181 Ill. 2d 87, 104 (1998); *Taylor*, 186 Ill. 2d at 448; *People v. Johnson*, 2014 IL App (1st) 122459-B, ¶ 148.

¶ 77 The situation here is analogous: Even if Benson agreed—after the shooting—to help conceal Banks's gun, that conduct alone does not make him accountable for Banks's crimes against Thompson.

¶ 78 Benson was, for a time, the "primary suspect" in Thompson's murder. And he testified that (eventually) he cooperated in the investigation because he knew that he was. These facts do not show, as defendant argues, that there was probable cause to believe Benson was accountable for Banks's crimes. Of course Benson initially fell under suspicion: Thompson was murdered in Benson's garage; and at first, Benson made no effort to cooperate with the police. But in the end,

Benson was not charged, and there was no evidence that the State agreed to drop any potential charges against him in exchange for his testimony against defendant (or Banks).

¶ 79 In sum, trial counsel was not arguably ineffective for failing to tender IPI 3.17, because the evidence did not warrant this instruction with respect to Benson. And when trial counsel was not ineffective, based on the underlying claim, a defendant cannot show that he was prejudiced by appellate counsel's failure to raise that claim on direct appeal. *People v. Enis*, 194 Ill. 2d 361, 382 (2000). Appellate counsel was not arguably ineffective.

¶ 80 III. CONCLUSION

¶ 81 For these reasons, we affirm the summary dismissal of defendant's post-conviction petition.

¶ 82 Affirmed.