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2018 IL App (4th) 150272-U

NO. 4-15-0272

FILED
May 14, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CLYDE H. WALLACE, a/k/a Clyde Wallace Bey, Defendant-Appellant.	)	Appeal from the Circuit Court of Sangamon County No. 10CF725 Honorable Patrick W. Kelley, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices DeArmond and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* We grant the office of the State Appellate Defender's motion to withdraw and affirm the trial court's summary dismissal of defendant's postconviction petition where defendant's petition fails to state a claim he was denied effective assistance of counsel.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised in this case. We grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In August 2010, the State filed informations alleging five counts of aggravated robbery (720 ILCS 5/18-5(a) (West 2010)) and five counts of armed robbery (720 ILCS 5/18-2(a) (West 2010)) against defendant, Clyde H. Wallace, a/k/a Clyde Wallace Bey. In October 2010, a preliminary hearing was held and defendant requested a continuance.

¶ 5 Later in October 2010, the State charged defendant by informations with six counts of aggravated robbery (720 ILCS 5/18-5(a) (West 2010)) (counts I to VI) and six counts of armed robbery (720 ILCS 5/18-2(a) (West 2010)) (counts VII to XII). Counts I through XII alleged defendant committed six robberies from August 13, 2010, through September 16, 2010.

¶ 6 In August 2012, this case proceeded to trial with defendant representing himself. Before trial, the State dismissed counts I to X for lack of evidence. The case proceeded on counts XI and XII.

¶ 7 A brief background of the facts of the crime follows. On September 6, 2010, before 10 p.m. at the Walgreens at 1155 North 9th Street in Springfield, Walgreens employees Lucinda White, Kervin Jones, and Tara Burkhart were on duty. White, Jones, and Burkhart testified they observed defendant enter Walgreens wearing a wig of curly hair with brown streaks, glasses, and a cap. Jones testified he approached defendant and asked defendant if defendant needed assistance. Defendant stated no.

¶ 8 Burkhart testified she asked defendant if he needed assistance. Defendant replied he was looking for hair clippers. Burkhart told defendant where the hair clippers were. Burkhart observed defendant pick up hair clippers.

¶ 9 Defendant approached the front cash register. White testified she walked behind the register to assist defendant. Defendant asked White for two cartons of cigarettes. When White was about ring up the purchase, defendant stated "put 'em on the counter, bitch. I got a gun. Give me the money." Defendant had a silver gun tucked under his left arm with two holes pointed at White. White put the money in the cash register on the counter. Defendant took the money, cigarettes, and hair clippers, and left Walgreens.

¶ 10 In September 2010, Detective Sara Jett and Detective Steve Dahlkamp showed

photo arrays to White, Jones, and Burkhart. White circled defendant's photograph and stated she was 100% sure defendant was the offender due to his facial features. Jones identified defendant as the offender. Burkhart identified defendant as the offender, but was only 80% certain.

¶ 11 Prior to testifying at trial, White and Jones viewed the security-surveillance system footage showing defendant at Walgreens. White and Jones stated the footage truly and accurately depicted some, but not all, of defendant's movements within Walgreens.

¶ 12 Britney Lunsford, defendant's ex-girlfriend, testified she and defendant occasionally stayed at her aunt Lashay Lovved's home. In August 2010, Lovved ordered defendant and Lunsford to leave Lovved's home because Lovved found a silver revolver in defendant and Lunsford's room. Lunsford testified Lovved had "a lot of wigs." Lovved testified she owned approximately 25 wigs and some of her wigs were missing, including a black wig with brown highlights, when defendant and Lovved moved out. Around the time of the robbery, Lunsford observed defendant with hair clippers she had not seen before.

¶ 13 The jury acquitted defendant of armed robbery but found him guilty of aggravated robbery and robbery. The trial judge ruled the robbery conviction merged with the aggravated robbery conviction.

¶ 14 OSAD represented defendant on direct appeal. OSAD raised two issues on appeal. The first issue was whether the trial judge erred in allowing evidence of a photo array showing defendant was arrested prior to the robbery. Issue two was whether defendant's statutory right to a speedy trial was violated by the State's subterfuge. For issue one, this court found error but determined no plain error occurred because the evidence was overwhelming. For issue two, this court found no error. In July 2014, this court affirmed defendant's conviction. *People v. Wallace*, 2014 IL App (4th) 121140-U.

¶ 15 In January 2015, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2014)). In the 20-page petition with attachments, defendant alleged various errors arising from his arrest through closing arguments at trial.

¶ 16 On Thursday, March 12, 2015, the State filed a motion to dismiss the postconviction petition. On Tuesday, March 17, 2015, the trial court issued its one-page order summarily dismissing defendant's postconviction petition as frivolous and patently without merit.

¶ 17 This appeal followed. OSAD was appointed to represent defendant. In February 2017, OSAD filed a motion for leave to withdraw as defendant's counsel on appeal and attached a memorandum of law. OSAD provided notice and proof of service to defendant consistent with Illinois Supreme Court Rule 13 (eff. July 1, 2013).

¶ 18 On its own motion, this court granted defendant leave to file additional points and authorities by March 24, 2017. This court granted defendant's motion for extension of time to file brief by August 28, 2017. He filed none.

¶ 19 II. ANALYSIS

¶ 20 OSAD asserted it had thoroughly reviewed the record and considered raising 11 issues but concluded the issues would be without arguable merit.

¶ 21 A. Whether the Postconviction Proceedings Were Sound

¶ 22 OSAD contends no colorable argument can be made defendant's postconviction proceedings were not sound because the State filed a motion to dismiss at the first stage. OSAD argues although the State improperly filed a motion to dismiss at the first stage, reversal is not required.

¶ 23 The Illinois Supreme Court holds "a post-conviction proceeding that does not involve the death penalty has three distinct stages." *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). In stage one,

> "[T]he defendant files a petition and the circuit court determines whether it is frivolous or patently without merit. At this stage, the Act does not permit any further pleadings from the defendant or any motions or responsive pleadings from the State. Instead, the circuit court considers the petition independently, without any input from either side. To survive dismissal at this stage, a petition need only present the gist of a constitutional claim." *Gaultney*, 174 Ill. 2d at 418.

¶ 24 In stage two,

> "[T]he circuit court appoints counsel to represent an indigent defendant. 725 ILCS 5/122-4 (West 1992). Counsel may file an amended post-conviction petition. Also, at this second stage, the Act expressly provides that the State may file a motion to dismiss or answer to the petition. 725 ILCS 5/122-5 (West 1992). Section 122-5 specifically contemplates that the State will file a motion to dismiss or answer *after* the circuit court has evaluated the petition to determine if it is frivolous." (Emphasis in original.) *Id.*

¶ 25 In stage three, "the circuit court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 1992). If the circuit court dismisses the petition or denies post-conviction relief at any stage, the defendant may appeal." *Id.* at 418-19. The Illinois Supreme Court held the early filing of a motion by the State does not *per se* contaminate the circuit court's determination and does not prevent the circuit court from independently evaluating whether a postconviction petition is frivolous or patently without merit. *Id.* at 419. "[R]eversal is required where the record shows

that the circuit court sought or relied on input from the State when determining whether the petition is frivolous." *Id.* at 419.

¶ 26 The record shows the circuit court did not seek or rely on input from the State when determining whether defendant's petition was frivolous. No hearing was held on the petition or State's motion. The State's motion did not discuss facts or legal issues, cite cases, or state the standard for dismissal.

¶ 27 The circuit court's order did not reference the State's motion. The State's early filing of the motion did not contaminate the circuit court's determination and did not prevent the circuit court from independently evaluating whether defendant's postconviction petition was frivolous or patently without merit. We agree with OSAD defendant's postconviction proceedings were sound and reversal is not required.

¶ 28 B. Whether Defendant's Trial Counsel and Appellate Counsel Were Ineffective

¶ 29 OSAD contends no colorable argument can be made as to ineffective assistance of trial counsel and appellate counsel.

¶ 30 The United States Supreme Court held for ineffective assistance of counsel allegations a reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91.

¶ 31 The United States Supreme Court held, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 691-92.

¶ 32 The Illinois Supreme Court held under the *Strickland* test for ineffective assistance of counsel the defendant must show counsel's performance was deficient and the deficient performance prejudiced the defense. *People v. Tate*, 2012 IL 112214, ¶ 18, 980 N.E.2d 1100. The Illinois Supreme Court added, "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009). Further, the *Strickland* test applies to the second stage of postconviction proceedings. *Tate*, 2012 IL 112214, ¶ 19. At the second stage of postconviction proceedings, "it is appropriate to require the petitioner to 'demonstrate' or 'prove' ineffective assistance by 'showing' that counsel's performance was deficient and that it prejudiced the defense." *Id.* ¶ 19.

¶ 33 At trial, defendant proceeded *pro se*. The Illinois Supreme Court holds a defendant proceeding *pro se* cannot make an ineffective assistance of counsel claim. *People v.*

Gibson, 136 Ill. 2d 362, 382, 556 N.E.2d 226, 234 (1990). The United States Supreme Court holds "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.' " *Faretta v. California,* 422 U.S. 806, 834 n. 46 (1975). Defendant cannot claim ineffective assistance of trial counsel.

¶ 34 Defendant alleges appellate counsel was ineffective for not clearly or effectively arguing the two issues raised on direct appeal and failing to raise any issues he now raises in the postconviction petition. Defendant asserts he would have argued the issues on direct appeal differently.

¶ 35 The United States Supreme Court holds no decision "of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The Illinois Supreme Court holds "A defendant who contends that appellate counsel rendered ineffective assistance, *e.g.,* by failing to argue an issue, must show that the failure to raise that issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have been reversed." *People v. Griffin*, 178 Ill. 2d 65, 74, 687 N.E.2d 820, 827 (1997). The Illinois Supreme Court holds, "if the ineffective-assistance claim can be disposed of on the ground that the defendant did not suffer prejudice, a court need not decide whether counsel's performance was constitutionally deficient." *People v. Mahaffey*, 165 Ill. 2d 445, 458, 651 N.E.2d 174, 182 (1995).

¶ 36 The errors defendant alleges here rely on facts appearing in the record on direct appeal. In light of the surveillance video, eyewitness testimony from White, Jones, and Burkhart, and corroborating testimony from Lunsford and Lovved, this court found

overwhelming evidence of defendant's guilt under a plain-error analysis. *Wallace*, 2014 IL App (4th) 121140-U, ¶ 34.

¶ 37 OSAD could only be found ineffective if plain error occurred and prejudiced defendant. The Illinois Supreme Court holds plain error exists,

> "[W]hen (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007).

¶ 38 First, a clear or obvious error did not occur and the evidence was not so closely balanced that the error alone threatened to tip the scales of justice against defendant. Second, a clear or obvious error did not occur and OSAD's strategy in arguing the issues was not so serious it affected the fairness of defendant's trial and challenged the integrity of the judicial process.

¶ 39 Because defendant's other arguments are without merit, defendant has not shown OSAD committed plain error and has not shown he suffered prejudice since OSAD argued the issues on direct appeal differently than he would have. OSAD's strategic choices in how to argue the issues, which were made after thorough investigation of law and facts relevant to plausible options, are unchallengeable. *Strickland*, 466 U.S. at 690. We agree with OSAD no colorable argument can be made defendant had ineffective assistance of trial counsel or appellate counsel.

¶ 40 C. Whether the State Lacked Probable Cause to Arrest Defendant Without a Warrant

¶ 41 OSAD considered arguing the State lacked probable cause for defendant's warrantless arrest. OSAD contends defendant's claim is frivolous.

¶ 42 The Illinois Supreme Court holds "The standards applicable to a police officer's probable cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied to a magistrate's assessment; less stringent standards would encourage police to avoid obtaining a warrant." *People v. Johnson*, 94 Ill. 2d 148, 153, 445 N.E.2d 777, 779-80 (1983). The Illinois Supreme Court adds, "The Code of Criminal Procedure of 1963 allows a warrantless arrest only when a peace officer 'has reasonable grounds to believe that the person is committing or has committed an offense.' " *People v. Tisler*, 103 Ill. 2d 226, 236, 469 N.E.2d 147, 153 (1984).

¶ 43 Additionally, the Illinois Supreme Court holds probable cause has the same meaning as reasonable grounds. *People v. Wright*, 56 Ill. 2d 523, 528, 309 N.E.2d 537, 540 (1974). Probable cause exists where the facts and circumstances within the officers' knowledge and of which officers have reasonably trustworthy information are sufficient to warrant belief an offense has been or is being committed. *Wright*, 56 Ill. 2d at 529.

¶ 44 Here a trial judge signed the arresting officer's "Field Booking and Probable Cause Statement" two days after defendant was arrested, which indicates probable cause existed to arrest defendant. Probable cause existed because the facts and circumstances within the arresting officer's knowledge and of which the officer had reasonably trustworthy information were sufficient to warrant belief defendant had been or was committing an offense. The State did not lack probable cause to arrest defendant without a warrant.

¶ 45 D. Whether the State Violated Defendant's Right to a Preliminary Hearing

¶ 46 OSAD contends no colorable argument can be made the State violated

defendant's right to a judicial determination probable cause existed to arrest him and the State violated his right to a prompt preliminary hearing.

¶ 47 The trial court found probable cause on September 26, 2010, which was less than 48 hours after defendant's warrantless arrest on September 24, 2010, and timely. Probable cause determinations must be prompt, not immediate. *People v. Willis*, 215 Ill. 2d 517, 527, 831 N.E.2d 531, 537 (2005) (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), which held "judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement.").

¶ 48 Defendant attended a preliminary hearing on October 14, 2010. The Illinois Constitution provides, "No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause." Ill. Const. 1970, art. I, § 7.

¶ 49 Section 109-3.1(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/109-3.1(b) (West 2010) sets a time limit of 30 or 60 days for the right to a prompt preliminary hearing. See also *People v. Roby*, 200 Ill. App. 3d 1063, 1066, 558 N.E.2d 729, 731 (5th Dist. 1990). Since defendant had his preliminary hearing 20 days after his arrest, defendant received a prompt preliminary hearing. "What is a prompt preliminary hearing must, of course, depend upon an appraisal of all of the relevant circumstances, and in this case it does not appear that there was any violation of the defendant's constitutional right to a prompt preliminary hearing." *People v. Hendrix*, 54 Ill. 2d 165, 169, 295 N.E.2d 724, 727 (1973). We agree with OSAD no colorable argument can be made the State violated defendant's right to a preliminary hearing.

¶ 50 E. Whether Defendant Received a Speedy Trial

¶ 51 OSAD contends no colorable argument can be made the State violated defendant's statutory and constitutional rights to a speedy trial. OSAD argues these issues are frivolous and barred by *res judicata*.

¶ 52 In *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 21, 53 N.E.3d 1, the Illinois Supreme Court held "*res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars a subsequent action between the same parties or their privies involving the same cause of action. The bar extends not only to what was actually decided in the prior action, but also to those matters that could have been decided." For *res judicata* to apply, three requirements must be met, "(1) a final judgment on the merits rendered by a court of competent jurisdiction, (2) an identity of cause of action, and (3) an identity of parties or their privies." *Id.*

¶ 53 This court already rejected defendant's argument and held "the State did not violate defendant's speedy-trial rights." *Wallace*, 2014 IL App (4th) 121140-U, ¶ 44. This court provided a final judgment on the merits and is a court of competent jurisdiction. *Wallace*, 2014 IL App (4th) 121140-U, ¶ 44. The identity of the cause of action is the same, which is whether defendant received a speedy trial. *Id.* ¶ 36. The identity of the parties is the same, which is the State and defendant, who OSAD represented. Accordingly, *res judicata* applies and defendant's claim he did not receive a speedy trial is barred.

¶ 54 F. Whether the State Committed *Brady* Violations

¶ 55 OSAD considered arguing the State committed *Brady* violations by (1) failing to disclose an additional interview of Lovved, whose house defendant stayed at, and (2) failing to disclose eyewitness Jones is the brother of a man whom defendant had previously shot with a firearm. See *Brady v. Maryland*, 373 U.S. 83 (1963). OSAD contends both of these contentions

are frivolous.

¶ 56 For OSAD's first contention, in *Brady*, the United States Supreme Court held "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." *Id.* at 87-88.

¶ 57 Lovved's statement in the additional interview was she was missing a wig. Lovved's statement was unfavorable to defendant and would not tend to exculpate him or reduce his penalty. Lovved's statement provided additional proof defendant stayed at Lovved's house and robbed a Walgreen's while wearing a wig, which bolstered the State's case. The State failing to disclose the additional interview of Lovved did not violate *Brady*.

¶ 58 For OSAD's second contention, the United States Supreme Court held, "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *U.S. v. Bagley*, 473 U.S. 667, 682 (1985). "[I]mplicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *U.S. v. Agurs*, 427 U.S. 97, 104 (1976).

¶ 59 The United States Supreme Court holds materiality "is not a sufficiency of evidence test." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Whitley*, 514 U.S. at 435.

¶ 60 Defendant alleges *Brady* evidence would have impacted Jones' testimony and credibility. For three reasons, there was not a reasonable probability had the evidence been disclosed to the defense the result of the proceeding would have been different. First, Jones' testimony was cumulative of the testimony of White and Burkhart, who were the other eyewitnesses.

¶ 61 Second, even if the State disclosed Jones is the brother of a man whom defendant had previously shot with a firearm, defendant may have sought to impeach Jones, but this would not have created a reasonable probability the outcome of the trial would have been different. The purpose of impeaching evidence is to destroy the credibility of the witness. *People v. Bradford*, 106 Ill. 2d 492, 499, 478 N.E.2d 1341, 1343 (1985). Impeachment "simply challenges the credibility of the witness." *People v. Douglas*, 2011 IL App (1st) 093188, ¶ 47, 961 N.E.2d 875 (2011). The alleged *Brady* evidence would only have impacted Jones' credibility but would not have provided substantive evidence of defendant's theory of the case, which was the witnesses conspired to convict defendant. The alleged *Brady* evidence would not have created a reasonable probability the outcome of the trial would have been different.

¶ 62 Third, the evidence of defendant's guilt, such as video surveillance of the robbery, eyewitness testimony from White, Burkhart, and Jones, and testimony from Lunsford and Lovved, was overwhelming. We agree with OSAD no colorable argument can be made the State committed *Brady* violations.

¶ 63 G. Whether Allegations of False Testimony Are Cognizable Under the Post-Conviction Hearing Act

¶ 64 OSAD considered arguing Jones, White, and Lovved perjured themselves. Under the Post-Conviction Hearing Act, if the State has not knowingly used false testimony or lacked diligence, the action of a witness falsely testifying is an action of a private individual for which

there is no remedy under the due-process clause. *People v. Brown*, 169 Ill. 2d 94, 106, 660 N.E.2d 964, 970 (1995). Nothing in the record before us suggests the State knowingly used false testimony or lacked diligence in obtaining testimony from Jones, White, and Lovved. Thus, Jones, White, and Lovved allegedly falsely testifying is the action of private individuals for which there is no remedy under the due-process clause and Post-Conviction Hearing Act.

¶ 65 The Illinois Supreme Court holds, for example, if the State made the mistake of producing an expert witness who was an imposter, charging the State with responsibility for the imposter's false testimony is fair. *People v. Cornille*, 95 Ill. 2d 497, 513, 448 N.E.2d 857, 865 (1983). Since Jones, White, and Lovved were not imposters posing as expert witnesses, the State cannot be charged with responsibility for their allegedly false testimony. Any argument Jones, White, and Lovved provided false testimony is not cognizable under the Post-Conviction Hearing Act.

¶ 66 H. Whether the State Knowingly Used Perjured Testimony

¶ 67 OSAD considered arguing the State knowingly used perjured testimony from Jones, White, and Lovved. Defendant did not identify what testimony from Lovved was perjured and did not identify the allegedly perjured testimony the State knowingly used. In his petition, defendant needed to present the "gist of a constitutional claim" regarding the perjured testimony. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). The gist of a constitutional claim standard "is a low threshold and a defendant need only present a limited amount of detail in the petition. At this stage, a defendant need not make legal arguments or cite to legal authority." *Gaultney*, 174 Ill. 2d at 418. Because defendant raised no details, defendant failed to present the gist of a constitutional claim for Lovved's alleged perjury and the allegedly perjured testimony the State used.

¶ 68 Defendant alleges Jones changed his account of defendant. On the one hand, in a police report, Jones was reported to have stated defendant walked by Jones while Jones was at the Walgreens photo lab. On the other hand, Jones testified at trial, he approached defendant, asked defendant if defendant needed help, and walked away when defendant indicated he did not need help.

¶ 69 This court has held inconsistencies in testimony cannot be equated with perjury, nor do inconsistencies in testimony establish or show the State knowingly used perjured testimony. *People v. Moore*, 2012 IL App (4th) 100939, ¶ 31, 975 N.E.2d 1083. The alleged inconsistencies defendant raises do not establish perjury because Jones encountered defendant in both accounts, which were supported by video surveillance. Further, the First District has held, "Mere inconsistencies in testimony do not establish perjury or that the State knowingly used perjured evidence." *People v. Trimble*, 220 Ill. App. 3d 338, 346, 580 N.E.2d 1209, 1213 (1991). The First District also held, "A witness's testimony constitutes perjury only if the witness knowingly makes a false statement." *People v. Pulgar*, 323 Ill. App. 3d 1001, 1010, 752 N.E.2d 585, 592 (2001). We hold (1) mere inconsistencies in Jones' accounts do not establish perjury or the State knowingly used perjured evidence and (2) Jones' testimony does not constitute perjury because defendant failed to show Jones knowingly made a false statement.

¶ 70 Defendant alleged White altered her account of the robbery. During trial, White testified she saw silver holes tucked under defendant's left armpit, which she believed was a gun. White testified defendant stated, "Bitch I got a gun. Give me the money." In one police report, White stated she saw a silver revolver tucked under defendant's left armpit. In a second police report, White described the gun as being silver and tucked under defendant's left armpit. Further, in both police reports, White indicated defendant stated, "Bitch I got a gun. Give me the

money." White's account of the robbery was consistent, not altered.

¶ 71 Defendant's argument is White's testimony is conflicting and improbable, which is insufficient to establish guilt beyond a reasonable doubt. *People v. Grayson*, 29 Ill. 2d 229, 238, 193 N.E.2d 801, 805 (1963). The Illinois Supreme Court has held "Such a contention falls short of a claim that the State knowingly used perjured testimony." *Grayson*, 29 Ill. 2d at 238. "Inconsistencies between the testimony of witnesses and an alleged improbability of testimony go only to the weight and credibility of the evidence and fall short of establishing a knowing use of perjury." *People v. Tyner*, 40 Ill. 2d 1, 3, 238 N.E.2d 377, 378 (1968). Thus, "The discrepancies relied upon by the defendant do not suggest perjury." *People v. Armstrong*, 39 Ill. 2d 567, 568, 237 N.E.2d 449, 450 (1968). We conclude the record fails to support any claim the State knowingly used perjured testimony.

¶ 72 I. Whether Appellate Counsel Was Ineffective for Failing to Argue the Prosecutor Committed Misconduct During Closing Arguments

¶ 73 OSAD considered arguing the State committed prosecutorial misconduct during closing argument by shifting the burden of proof and inflaming the passion of the jury and OSAD was ineffective for failing to raise this issue on direct appeal. Defendant's postconviction petition complained of the following arguments by the prosecutor: "defendant should have had an alibi," "defendant has to prove the burden of proof," and "prosecution intended to inflame the jury's emotion by improperly continuing to state Lucinda White has two kids to take care of and the jury should feel for her." OSAD concludes this argument is frivolous.

¶ 74 The Illinois Supreme Court holds in reviewing comments made at closing arguments the question is whether the comments engender substantial prejudice against a defendant such that it is impossible to say whether a verdict of guilt resulted from the comments. *People v. Nieves*, 193 Ill. 2d 513, 533, 739 N.E.2d 1277, 1286 (2000). Misconduct in closing

argument is substantial and warrants reversal and a new trial if the improper remarks were a material factor in defendant's conviction. On direct appeal, this court determined the evidence of defendant's guilt was overwhelming and not closely balanced. *Wallace*, 2014 IL App (4th) 121140-U, ¶ 34. The prosecutor's comments during closing argument did not engender substantial prejudice against defendant and were not substantial and a material factor in defendant's conviction.

¶ 75 If the jury could have reached a contrary verdict had the allegedly improper remarks not been made or the reviewing court cannot say the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted. *People v. Linscott*, 142 Ill. 2d 22, 28, 566 N.E.2d 1355, 1358 (1991). The prosecutor's remarks here did not contribute to defendant's conviction. The prosecutor's arguments were entirely appropriate. *People v. Trice*, 2017 IL App (4th) 150429, ¶ 65, 87 N.E.3d 1087.

¶ 76 This court has held "felony criminal trials are serious matters with high stakes, and we expect advocates in our adversarial system of justice—both prosecutors and defense attorneys—to 'use all of their forensic skills to persuade the jury of the wisdom or justice of their respective positions.' " *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 28, 963 N.E.2d 394 (quoting *People v. Montgomery*, 373 Ill. App. 3d 1104, 1118, 872 N.E.2d 403, 415 (2007)). This court continues "to be disinclined to become the 'speech police' by imposing unnecessary restrictions upon closing arguments in criminal cases, and we encourage counsel to vigorously advocate for their position. Indeed, trial courts and reviewing courts should step in only when it can truly be said that comments during closing arguments 'were so prejudicial that real justice was denied or that the verdict resulted from the error.' " *Dunlap*, 2011 IL App (4th) 100595, ¶ 28 (quoting *People v. Montgomery*, 373 Ill. App. 3d 1104, 1119, 872 N.E.2d 403, 416 (2007)).

We agree OSAD was not ineffective on direct appeal for failing to raise the issue of prosecutorial misconduct during closing argument.

¶ 77 J. Whether Appellate Counsel Was Ineffective for Failing to Argue the Photo Array Was Impermissibly Suggestive and Defendant Is Barred From Relitigating Other Issues Regarding the Photo Array's Admissibility

¶ 78 OSAD considered arguing the photo array was impermissibly suggestive and should not have been published to the jury. Defendant argues this court should have granted a new trial because the jury received evidence of a photo array indicating defendant had been arrested prior to the robbery. OSAD concludes these allegations are frivolous or barred by *res judicata*.

¶ 79 "[D]efendant, who represented himself at trial, did not object to the introduction of the photo array at trial, nor did he raise the issue in a posttrial motion." *Wallace*, 2014 IL App (4th) 121140-U, ¶ 28. On direct appeal, this court held, "we decline to presume defendant's booking photo, rather than the evidence presented at trial, provided the basis upon which the jury adjudicated defendant's guilt." *Id.* ¶ 34. This court found "the evidence supporting the jury's verdict overwhelming, and the photo array did not contaminate the jury or affect the outcome of defendant's trial. Retrial without the erroneous admission of the evidence would not produce a different result. Admission of the photo array was not plain error." *Id.* ¶ 34. Because retrial without the erroneous admission of the photo array would not produce a different result, we hold OSAD was not ineffective for failing to argue the photo array was impermissibly suggestive.

¶ 80 On direct appeal, this court rejected defendant's argument this court should have granted a new trial because the jury received evidence of a photo array indicating defendant had been arrested prior to the robbery. *Id.* ¶ 34. *Res judicata* bars defendant from relitigating this issue. We hold appellate counsel was not ineffective for failing to argue the photo array was

impermissibly suggestive and defendant is barred from relitigating other issues regarding the photo array's admissibility.

¶ 81 K. Whether Defendant Is Entitled to a New Trial

¶ 82 OSAD considered arguing the cumulative effect of defendant's allegations entitles him to a new trial. We agree defendant's postconviction petition was frivolous, the other 10 issues defendant could raise are without merit, and defendant's postconviction petition was properly dismissed by the circuit court. We conclude defendant is not entitled to a new trial.

¶ 83 III. CONCLUSION

¶ 84 We agree with OSAD the 11 issues it raised would be without arguable merit. We grant OSAD's motion to withdraw as counsel on appeal. We affirm the trial court's summary dismissal of defendant's postconviction petition with no costs to defendant.

¶ 85 Affirmed.