2020 IL App (2d) 170933-U
No. 2-17-0933
Order filed June 17, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSEPH MURRAY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 10-CF-88 Honorable George D. Strickland, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Birkett and Justice Brennan concurred in the judgment.

ORDER

¶ 1 *Held*: Following a stage-three evidentiary hearing, the trial court did not err in denying defendant's postconviction petition, where defendant alleged that he was denied effective assistance of counsel in that trial counsel's deficient performance—his failure to impeach a witness's in-court identification of defendant, where the witness had previously failed to identify defendant in a line-up—prejudiced him. Affirmed.

¶ 2 Defendant, Joseph Murray, appeals from the third-stage denial of his post-conviction petition, arguing that he made a substantial showing that he received ineffective assistance of counsel, where trial counsel failed to impeach the in-court identification of defendant by the State's only eyewitness who had previously failed to select defendant from a line-up. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Trial

¶ 5 Defendant was charged with shooting and killing Curtis Pride, Jr., on January 1, 2010. A jury trial commenced on February 28, 2011.

¶ 6 Kedre Pride, the victim's son and 14 years old at the time of trial, testified that, on January 1, 2010, he was at his father's apartment at 2717 Galilee in Zion. Kedre and his brothers were staying with Pride during winter break. Pride lived in a basement apartment, which was accessed upon walking down some stairs, entering a common area, and then arriving at the apartment door on the right. At around lunchtime, Kedre heard a knock on his ground-level bedroom window. Kedre saw an African-American man gesture for him to come to the door. The man wore a red coat with white writing across the chest, blue jeans, white shoes, and a hat. The hat was black and white (or cream) with a design. It came over the ears "like springs that was [*sic*] connected to it. It had a little ball at the top." The jacket was a jacket, not a hooded sweatshirt, possibly with white sleeves and buttons, and it had a zipper. The jacket was buttoned, and there was no writing on the sleeves. The man had a mustache connected to a goatee. He was medium-sized and "[p]retty skinny." Kedre viewed People's exhibit No. 6 (a photograph of defendant with his face blackened out, wearing a black and white and gray patterned hat that comes down over the ears and has a black ball on top and a red hoodie with white and gold writing cross the chest; the sleeves are red with possibly gold or white writing on them and the sweatshirt has a zipper, not buttons) and testified that it depicted a person wearing the clothes that he saw through the window.

¶ 7 Kedre nodded to the person at the window and went to get Pride. He saw Pride peeking through the blinds. Kedre saw only the man's lower body and feet (although, on cross-examination, he stated that he could not see the man's feet). Pride walked out of the apartment

door to the common area. Kedre returned to his bedroom, assuming that Pride was going to sell the man marijuana. After the apartment door closed, Kedre heard one gunshot. Pride yelled, and Kedre heard another gunshot. He ran to lock the apartment door and looked through the peephole. He saw the man from the window running out the common-area front door. Kedre testified that, when he ran out the door, the man was still wearing the hat. After calling his mother, Kedre called 911.

¶ 8 On cross-examination, Kedre testified that his father received no phone calls on the day of the shooting. Kedre woke up around 6:30 or 7 a.m. Pride was already awake.

¶ 9 Next, defense counsel asked defendant to stand and asked Kedre if defendant was the man he saw in the window. Kedre replied that he was. When asked if defendant looked skinny, Kedre replied that he did not. When asked again if the man in the window was skinny, Kedre replied, "He was medium size, not like thin, like really skinny, but he was like normal basically." He agreed that, earlier, he had used the word "skinny."

¶ 10 The man who came to the window was not wearing gloves. When Pride went to the common area to meet the man, he did not have anything in his hands.

¶ 11 In the common area, police found a black and white patterned winter knit hat, with a black ball on top and side tassels. Kelly Lawrence a forensic scientist with the Northeastern Illinois Regional Crime Lab, obtained a DNA profile from the hat originating from more than one individual. The minor profile was unsuitable for comparative testing, but appeared to come from a female. The major profile ("essentially the person who is there more than another person"), which consisted of a full, 13-loci DNA profile, matched, at all 13 loci, defendant's DNA profile. Lawrence testified that this match would occur by chance in approximately one in 25.9 quadrillion unrelated African-Americans. She excluded Pride's profile from the hat.

¶ 12 Unique Williams testified that she dated Pride and was in his apartment on January 1, 2010. Williams left the apartment around 11:45 a.m., and there was no clothing on the floor in the common area.

¶ 13 Robin Wade started dating defendant in January 2009, but defendant left town in April 2009. In June 2009, Wade dated and had a sexual relationship with Pride, which lasted a couple of months. Defendant returned to town in November 2009, and Wade and defendant resumed their relationship. Around Thanksgiving, Wade told defendant about her relationship with Pride. Defendant was upset, but, initially, appeared understanding. In December 2009, their relationship began to deteriorate, and defendant became more focused on Pride. He learned that Pride lived around the corner from Wade, and he became "very upset."

¶ 14 Wade further testified that, on the Monday before New Year's Day 2010, she had a conversation with defendant concerning an incident at the library between defendant and Pride. Defendant told Wade that he saw Pride, jumped out of his car, walked up to him, and asked Pride if he and Wade were still seeing each other. Pride responded that he had not seen Wade since October. Defendant stated that Wade and Pride "must have gotten her [*sic*] story straight." Wade broke up with defendant on December 30, 2009.

¶ 15 Wade identified a photograph of defendant taken at the emergency room entrance of the hospital where she worked. She recognized defendant in the photograph from the hat and clothes he wore, because Wade purchased the outfit for him, but not the hat. The photograph is the same one from which Kedre identified the clothes that the shooter wore.

¶ 16 Jovon Bettis[1] testified that, on January 1, 2010, she was at home with defendant, her brother, her cousin, and some other friends. Defendant woke her up at noon or 1 p.m. and asked her to take him to get his baby from his aunt. They drove to an area around 27th and Galilee in Zion. Defendant exited the vehicle, stating that he was going in and coming right back. She did not see where defendant went. Bettis pulled into the middle of the alley. Bettis denied hearing any noises or gunshots. Defendant returned to the car. He wore a black hoodie, jeans, and a hat. Initially, she testified that she did not recognize the hat depicted in People's exhibit No. 8, which depicted the hat found in the common area after Pride was shot. When confronted with her signature on the exhibit, she acknowledged that the signature was hers, but said she did not recall signing it or speaking with police on January 7, 2010, because she was drunk and high. However, Bettis next acknowledged that it *was* the hat defendant wore on January 1, 2010, when he left the vehicle. She testified that defendant still had on the hat when he returned to the car, but later testified that she did not remember. They drove back to Bettis's house. Bettis identified another photograph (the same one of defendant at the hospital that Kedre and Wade identified) as depicting the clothes that defendant wore on January 1, 2010, when she drove him to 27th and Galilee.

¶ 17 Bettis recalled being interviewed by detective Giamberduca on January 7, 2010, and that the interview was videotaped.[2] She did not recall telling Giamberduca that, while she was in the

[1] Bettis had not appeared in court when instructed to do so, and the trial court issued a body attachment with a $100,000 bond to secure her presence. She ultimately arrived in court, and the State noted that there was a warrant for her arrest in a pending (apparently unrelated) case. She was taken into custody on the body attachment and called to the stand.

[2] The State introduced two versions of the interview, a full version (exhibit No. 55), and a

alley and after defendant left the vehicle, she heard gunshots. She denied that, when defendant returned to the vehicle, he said, "Get me the fuck out of Zion. Get me out of Zion right now." Bettis did not remember whether defendant said, "Dude robbed me. He stole from me. He had to go." She also did not remember telling Giamberduca that: when defendant retuned to the car, he had everything he left with except his hat; defendant said, "Fuck, left my fucking hat in the house;" and, when defendant returned to the vehicle, Bettis saw the "print" of a gun in his pants.

¶ 18 Bettis further testified that, on the evening of February 28, 2011, the day that trial commenced in this case, she had a conversation with defendant, who asked her where she was. Bettis replied that she was at her sister's house. Defendant told her to disappear, and "I told you they were not going to do—not going to do shit. All you had to do was disappear. Period. Man." He also stated, "They can't do shit but put a warrant out for your arrest," and "I am trying to figure out why the fuck you came when I told you not to." Defendant also told Bettis, "I told you man. It will be over Thursday or Friday," and "I told you from the jump to disappear." Bettis testified that she told defendant that she was not coming to court.

¶ 19 On New Year's Eve, Bettis stayed in her apartment and drank alcohol and smoked marijuana. Between noon on December 31, 2009, and noon on January 1, 2010, Bettis drank about 12 drinks containing Henessey and gin and smoked approximately 25 blunts (about four or five inches long) of marijuana. At noon on January 1, 2010, she was still tipsy, but not drunk, and she was high.

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short version (exhibit No. 54). Both were admitted into evidence, but only the short version, about two minutes in length, was played for the jury. *People v. Murray*, 2013 IL App (2d) 120714-U, ¶ 15 n.2.

¶ 20 Lake County Sheriff's detective Gianni Giamberduca interviewed Bettis on January 6, and 7, 2010. He testified that Bettis left out details during the first interview, at the sheriff's office, on January 6, 2010. Further, he did not believe that she was under the influence of alcohol or marijuana during the January 7, 2010, interview, at the Zion police department, because, between the first and second interviews, Bettis was in custody. Bettis identified the photograph of defendant at the hospital as depicting the clothes defendant wore on January 1, 2010, and she signed the photograph (on January 7, 2010). She also identified a photograph of the hat found in the common area (People's exhibit No. 8), stating that it was the hat defendant wore that day.

¶ 21 A portion of the videotaped interview from January 7, 2010, was played for the jury. Bettis states in the interview that she heard gunshots, defendant returned to the vehicle and told her to get him "the fuck out of Zion," and she asked defendant what happened and he replied the "dude robbed me" and "had to go, "and that she could see the outline of the gun in his pants. He also stated, "dude stole my money and my drugs, he had to go." Bettis also stated that, when he returned, defendant was missing his hat, and he said "Fuck, I left my fucking hat in the house." Bettis saw the imprint of a gun in defendant's pocket when he returned to the car.

¶ 22 Giamberduca testified that, initially, on January 6, 2010, Bettis stated that she awoke at 2 p.m. on January 1, 2010, which would have been after the homicide. She claimed she went shopping for two or three hours and purchased the outfit that defendant wore the night he was arrested. Between the first and second interviews, Giamberduca confronted Bettis about inconsistencies in her stories. He did not threaten her with criminal prosecution. At the end of the second interview (on January 7, 2010), Giamberduca asked Bettis if she had been truthful, and she replied, "100 percent." He did not ask her that question at the end of the first interview.

¶ 23 During defendant's case-in-chief, Zachariah Pitts, age 18, testified that he, his ex-girlfriend Ruby Gary, her two children, Bettis (his sister), defendant, and Jessie Jenkins were in an apartment at Lake Shore Towers on New Year's Eve 2009. Pitts testified that the group had a party, played cards, drank alcohol, and smoked marijuana. At 2 a.m., Pitts left the apartment, but defendant and Bettis remained. Pitts returned to the apartment at 4 a.m. on New Year's Day. Defendant and Bettis were still there. Pitts awoke around 9 a.m. and saw that defendant was still there, but Bettis was not. Pitts testified that Bettis and Ruby had gone food shopping and returned around 11 a.m. Bettis also brought defendant an outfit. Pitts never saw defendant leave the apartment on January 1, 2010, and Bettis did not leave again after she returned from shopping.

¶ 24 Pitts is serving a sentence for attempt armed robbery. He was taken into custody on June 24, 2010. He is defendant's seven-year-old daughter's uncle. Pitts was present on January 7, 2010, when investigators came to Ruby Gary's apartment. However, he did not find out defendant was charged with murder until August 9, 2010, when he was in jail. Prior to that, investigators did not question him about the murder.

¶ 25 Faya Shiu, a private investigator, testified that she had a conversation with Bettis on January 12, 2010, in her office. Bettis came to her, saying she was looking to hire an attorney and a private investigator. Bettis retained Shiu. The two women drove to Zion. On the way there, Bettis told Shiu about her statements to police, stating that she had been intoxicated and high on marijuana at the time of her interviews and that she told the police several times of her condition. Bettis also told Shiu that she could not remember the statements she made that night.

¶ 26 The jury found defendant guilty on all three counts of first-degree murder and further found that he personally discharged the firearm. The trial court sentenced defendant to 52 years' imprisonment.

¶ 27 On direct appeal, this court affirmed defendant's convictions. *People v. Murray*, 2013 IL App (2d) 120714-U. Defendant challenged trial counsel's performance, arguing that counsel was ineffective for failing to object to the trial court's ruling that Bettis could not exercise her right against self-incrimination.[3] In addressing the prejudice prong of the ineffective-assistance claim, this court determined that there was no reasonable probability that, if defense counsel had successfully objected and Bettis did not testify, the outcome would have been different. *Id.* ¶ 26. First, we concluded that Bettis's videotaped interview, which was shown to the jury and admitted, was "more damaging to defendant's case than her trial testimony," where the jury heard Bettis state that: she drove defendant to the crime scene, heard gunshots, saw an outline of a gun on defendant's pants, and that, when defendant returned to her vehicle, he stated that he had left his hat inside and that the victim "had to go." *Id.* ¶ 27. Second, we concluded that, even if both Bettis's trial testimony and the videotape had been excluded, the evidence was overwhelming, where: defendant was upset that Pride had a relationship with Wade and knew Pride lived nearby; he had previously confronted Pride about the relationship; Wade ended her relationship with defendant two days before the murder; Wade identified a photograph (from the hospital where she worked) of defendant wearing clothing that she bought for him and a black and white patterned hat with earflaps and a black ball on top; Kedre identified (in the photograph of defendant from the hospital) the clothing the shooter wore; the discrepancies in Kedre's description of the jacket at trial and seen in the photograph were for the jury to weigh, but his description of the hat was

[3] Soon after Bettis took the stand at trial, she invoked the Fifth Amendment, after which the trial court noted that, if she did not answer questions, she might be held in contempt of court. Thereafter, Bettis continued with her testimony.

consistent with the hat in the photograph and the hat found at the scene; and the DNA on the hat matched defendant's DNA. *Id.* ¶ 28.

¶ 28 B. Post-Conviction Proceedings

¶ 29 On April 9, 2014, defendant filed a *pro se* post-conviction petition. The matter was set for second-stage post-conviction proceedings, and counsel was appointed on July 23, 2014. On September 29, 2014, counsel filed an amended post-conviction petition, alleging that trial counsel was ineffective for failing to impeach Kedre's in-court identification of defendant with his prior improper identifications from several photo line-ups. Kedre also did not identify defendant in a line-up conducted the day after Pride died.

¶ 30 On November 9, 2016, the State moved to dismiss, alleging that trial counsel made a strategic decision in eliciting the in-court identification and that counsel was not required to draw further attention to Kedre's in-court identification by impeaching him with his prior photo line-up selections. A second-stage hearing was held on January 11, 2017. The trial court denied the State's motion to dismiss, and the petition moved to the third stage.

¶ 31 The third-stage evidentiary hearing was held on April 13, 2017. At the hearing, post-conviction counsel submitted stipulations to the court and then rested. In one stipulation, the parties agreed that Kedre was certain he could identify the individual he saw knocking on his window the day after Pride was shot. Kedre then looked at the first line-up and could not identify the suspect. During the second line-up, Kedre selected a photo of Adarius Walton and stated, "This guy looks like the guy, but it's not." Then, examining the third line-up, Kedre selected a photo of Vincent Cansler and stated that the person looked like the person he saw in his window, but he was not certain. During the fourth line-up, Kedre did not identify any photographs. Finally,

in another stipulation, Kedre viewed a fifth line-up that included defendant's photo, but he did not select defendant as the person he saw knocking on his window.

¶ 32 The State called Louis Pissios, defendant's trial counsel, who testified that he had a flexible trial strategy that depended on the availability of certain witnesses. There was at least one witness who could potentially provide an alibi defense in the case. There was also a witness—Bettis—who could place defendant at the scene of the crime (and, ultimately, was "hysterical" while on the stand and recanted her earlier statement, saying she was high on drugs and alcohol). There was also an audiotape of a jail call that defendant made to Bettis. There was a level of uncertainty at the commencement of the case as to what the evidence would ultimately look like. Pissios also mentioned Wade and defendant's jealousy over Wade being with Pride. Addressing the DNA on the hat, Pissios stated it matched defendant's DNA. In addition, there were photographs admitted at trial of defendant wearing a similar hat at a hospital.

¶ 33 Pissios testified that he recalled Kedre's testimony on direct examination about the clothing worn by the man who came to his window, but did not identify a specific person. During cross-examination, Pissios asked Kedre, "This the man you saw at the window that day?" However, he did not think that Kedre would positively identify defendant, based on the angle of view from defendant's apartment and the fact that the photo line-up results were "inconclusive." Kedre, however, did identify defendant as the man he saw at his window immediately prior to his father's death. Afterwards, Pissios did not impeach Kedre with his two prior line-up selections and his failure to select defendant from an additional line-up. "It was a judgment call on my part. We have a young teenager who had just lived through a horrible scenario basically." Pissios believed that the jury would have a lot of sympathy for Kedre, "and I felt that the reasonable doubt surrounding the overall proof against [defendant] was not significant enough for the jury to find

him guilty. So I chose not to explore that." It was a strategic decision, Pissios testified. Pissios's overall cross-examination strategy was to be respectful of Kedre, "but to still try to find problems with his testimony about what he saw and heard on the day that his father died."

¶ 34 Addressing Kedre's identification of defendant in court, Pissios stated that he did not believe "it was that bad because I think I thought the testimony was kind of incredible. That statement by Kedre was kind of incredible compared to all the other statements that he made with respect to identifying [defendant]. I think that his statement—him making that statement, in a way, attacked his own credibility." Kedre, Pissios testified, "did not see the guy who shot and killed his dad." He stated at trial that defendant was the person who did it, but "I thought the jury would find that incredible." Pissios also testified that there was no testimony that the person who knocked on the window was the person who shot Pride. "There was nothing to say that there weren't two people there, so that negates the hoodie identification." Pissios also questioned Kedre about the hat, and Kedre testified that the man who was at the door was still wearing a hat when he ran away, which would suggest that the hat found at the crime scene had no relation to the case.

¶ 35 On November 9, 2017, the trial court denied defendant's petition. The court found that Kedre was an innocent and truthful witness and "so his testimony was, of course, something that would be very possibly believed by the jury." The in-court identification, the court found, was damaging to defendant's case, and it was *not* a reasonable strategy for defense counsel to fail to impeach Kedre with his failure to identify defendant in the line-up. However, the court further found that defendant was not prejudiced by counsel's deficient performance. The evidence of defendant's guilt, the court determined, was overwhelming. The court noted that: (1) Kedre testified that the shooter had on the hat when he left the door; (2) there was no evidence that Wade's other boyfriends would have wanted to kill Pride or that a disgruntled drug buyer would have

wanted to kill him; (3) defendant had confronted Pride soon before the murder about his relationship with Wade and, two days before the murder, Wade broke up with defendant and this was the only motive evidence the jury heard; (4) defendant's DNA was on the hat found at the scene; (5) both Kedre and Bettis identified the "somewhat unusual" hat, which "was of extreme significance"; and (6) Bettis's videotaped statements, which were given shortly after the incident, were significant. The court further noted that the fact that Kedre believed that the shooter wore the hat *outside* the door was not "overly significant. It could have been a mistake. *** The most important thing is whether or not the person still had the hat on when he actually *left* the door. And I think that that's what a juror would think." (Emphasis added.)

¶ 36 Returning to Bettis's statements, the trial court found that her statements, "in and of themselves, probably even without the DNA, were they to be believed—and these are the videotaped statements—would have been more than enough to convict the defendant because she indicated she took him—was asked by him to take her to where the murder took place, that she dropped him off, that she heard a pow, and that the defendant came running back, that she saw an outline in his pants which appeared to be a gun." Defendant, the court further noted, stated that he left his hat there, they had to get out of Zion, and that the man robbed him. Noting Bettis's recantation and the call from defendant prior to this, telling her "not to show up" at trial, the court determined "[t]hat is devastating testimony, devastating testimony for the jury to hear, of a defendant attempting to encourage [a] witness[ ] to not testify." The court also noted that Bettis's explanation at trial that she was drunk when she gave her initial statement was not "an explanation." The call from defendant, the court determined, made Bettis's recantation "much less effective." Given the overwhelming evidence, the court found, the second part of the *Strickland* analysis was not met. Defendant appeals.

¶ 37 II. ANALYSIS

¶ 38 Defendant argues that the trial court erred in denying his petition, where he made a substantial showing of ineffective assistance of trial counsel when counsel failed to impeach Kedre's in-court identification of defendant. For the following reasons, we disagree.

¶ 39 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)) provides a method by which a criminal defendant can assert that his or her conviction was the result of a substantial denial of the petitioner's rights under the United States Constitution or Illinois Constitution or both. *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010). A postconviction proceeding is not an appeal from the judgment of conviction, but rather is a collateral attack on the trial court proceedings. *Id.* at 499.

¶ 40 The Act sets forth three stages of review. First, the circuit court may dismiss postconviction petitions that are frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2018). A petition may be summarily dismissed as frivolous or patently without merit only if it has no arguable basis either in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009).

¶ 41 If the circuit court does not dismiss the petition, it advances to the second stage. At the second stage, counsel may be appointed to an indigent defendant and the State may file a motion to dismiss or an answer to the petition. 725 ILCS 5/122-4, 122-5 (West 2018). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a "substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001).

¶ 42 If the petitioner makes the requisite substantial showing that his or her constitutional rights were violated, the petitioner is entitled to a third-stage evidentiary hearing. *Id.* At such a hearing, the circuit court serves as the fact finder, and, therefore, it is the court's function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any

evidentiary conflicts. See *People v. English*, 2013 IL 112890, ¶ 23. At this stage, the circuit court must determine whether the evidence introduced demonstrates that the petitioner is, in fact, entitled to relief. *People v. Domagala*, 2013 IL 113688, ¶ 34. Throughout the second and third stages of a post-conviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 43 When a postconviction petition advances to the third stage, when fact-finding and credibility determinations are involved, we will not reverse the decision of the trial court unless it is manifestly erroneous. *Id.* If no new evidence is presented and the issues presented are pure questions of law, we apply *de novo* review, "unless the judge presiding over postconviction proceedings has some 'special expertise or familiarity' with the trial or sentencing of the defendant and that 'familiarity' has some bearing upon disposition of the postconviction petition." *Id.* The evidentiary hearing allows the parties to develop matters not contained in the trial record and, thus, not before the appellate court. *People v. Lester*, 261 Ill. App. 3d 1075, 1078 (1994).

¶ 44 Every Illinois defendant has a constitutional right to the effective assistance of counsel under the sixth amendment to the United States Constitution and article I, section 8, of the Illinois Constitution. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Domagala*, 2013 IL 113688, ¶ 36; see also *People v. Brown*, 2017 IL 121681, ¶ 25 ("The sixth amendment [(U.S. Const., amend. VI)] guarantees a criminal defendant the right to effective assistance of trial counsel at all critical stages of the criminal proceedings"). Claims of ineffective assistance of counsel are governed by the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984) (adopting *Strickland*). To succeed on a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance fell below

an objective standard of reasonableness; and (2) the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687; *Brown*, 2017 IL 121681, ¶ 25.

¶ 45 To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel's performance was so "inadequate 'that counsel was not functioning as the "counsel" guaranteed by the sixth amendment.' " *People v. Dupree*, 2018 IL 122307, ¶ 44 (quoting *People v. Evans*, 186 Ill. 2d 83, 93 (1999)). To satisfy the prejudice prong of *Strickland*, the defendant must demonstrate "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland*, 466 U.S. at 694). "A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness." *People v. Simpson*, 2015 IL 116512, ¶ 35. Whether a defendant sufficiently alleges ineffective assistance of counsel is a legal question subject to *de novo* review. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010).

¶ 46 Defendant argues that he was deprived of his right to effective assistance of counsel when trial counsel failed to impeach Kedre's in-court identification of defendant, the State's only eyewitness, who previously selected two different individuals from two different line-ups, yet failed to select defendant from an additional line-up. Defendant contends, and the State agrees, that the only issue here is whether he was *prejudiced* by trial counsel's deficient performance. Defendant asserts that he showed, by a preponderance of the evidence, that there was a reasonable probability that the result of the proceeding would have been different, that is, that his chance at a different outcome was "better than negligible." *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003) (defining "reasonable probability" as "better than negligible").

¶ 47 Defendant asserts that trial counsel's failure to remediate Kedre's in-court identification prejudiced him, because the jury was left believing that Kedre, a truthful and innocent witness,

saw defendant knock on his window and run from the apartment after his father was shot. The evidence, according to defendant, actually showed that the shooter was skinny or medium build, in his mid-20s, and about 5 feet 8 inches tall. Kedre's in-court identification suggested that defendant, a 32-year-old, 5 feet 11 inches tall, 220-pound man somehow matched the description Kedre gave hours after his father's death. Trial counsel, defendant argues, let this gross mischaracterization go unchallenged and failed to impeach Kedre's in-court identification with the line-up that included defendant's photograph, which Kedre failed to select. If counsel had done so, defendant asserts, the jury's view of contradictory evidence—the relevance of the hat at the scene, the present of defendant's DNA on it, and the credibility of Bettis's testimony and interrogation—would have been further impacted, because there would not have been any credible evidence directly placing defendant at the scene. Defendant maintains that the jury likely would have given considerable weight to Kedre's recollection of the suspect and his line-up selections made when his recollection was fresh. Thus, trial counsel's failure to highlight the glaring weakness in the State's case irreparably harmed defendant's case. The totality of the evidence, defendant argues, shows that the chance of a different outcome was better than negligible.

¶ 48 The State responds that the trial court did not err in determining that the outcome of the trial court not have been different, where it considered defendant's motive, the fact that his DNA was found on the hat that was found at the scene, and Bettis's testimony (the person who drove defendant to Pride's apartment).

¶ 49 We conclude that the trial court did not err in denying defendant's petition. Again, to satisfy the prejudice prong of *Strickland*, the defendant must demonstrate that "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland*, 466 U.S. at

694).[4] Defendant failed to meet this standard. Wade testified to defendant's anger about her recent relationship with Pride and the fact that Pride lived around the corner from her. She also related that, a few days before New Year's Day, defendant told her about an encounter he had with Pride at the library. Wade broke up with defendant on December 30, 2009. Thus, her testimony established defendant's motive for killing Pride, and was, as the trial court found, the only motive evidence the jury heard. Critically, she also identified defendant in the photograph from the hospital as wearing clothes (but not the hat) she purchased for him. This is the same photograph from which Kedre identified defendant's clothes (his face was blackened out in the version of the photograph he identified) and from which Bettis identified defendant wearing on January 1, 2010, when she drove him to 27th and Galilee, the crime scene. Also depicted in this photograph was the hat similar to the one found at the scene that contained defendant's DNA.

¶ 50 Bettis's videotaped testimony was very strong evidence of defendant's guilt. As the trial court found, she testified that defendant asked her to take him to the scene, where she dropped him off, drove into the alley, and heard a gunshot. Defendant returned to her vehicle, and Bettis saw an outline of a gun on his pants. Defendant told her to get him out of Zion and that the "Dude robbed me. He stole from me. He had to go." In the video, she also stated that defendant did not return to the car with his hat, and he stated that he left his hat in the house. In both of her versions of the events, Bettis stated that defendant wore the clothes depicted in the hospital photograph, which, again, Kedre also identified as clothing the shooter wore on the day of the incident and Wade identified as defendant's clothes and hat.

[4] We reject defendant's request that we adopt the federal standard that defines "reasonable probability" to mean "better than negligible." See *Leibach*, 347 F.3d at 246.

¶ 51 Addressing Kedre, who was only 14 years old at the time of the trial, the trial court noted his inconsistent physical description of the shooter. Kedre described the shooter as both medium-sized and skinny and "normal basically." We also note that Kedre also initially described the jacket of the man who came to his window as a red jacket, not a hoodie, with white buttons and a zipper. However, when he identified that State's photograph of defendant at the hospital (with defendant's face blackened out), which showed defendant in a red zippered hoodie with no buttons, Kedre stated that it depicted the person in the clothes he wore when he came to his window. The jury also heard Kedre testify that the shooter still had on his hat when he ran out the door. The trial court determined that the minor could have been mistaken about the hat and that the critical information was that the shooter had it on when he *left*. The foregoing reflects, as the court acknowledged, that the minor's testimony was less than precise or even mistaken on some points. However, on the critical points of the identification of the jacket that defendant wore on the day of the murder and the presence of the hat, which contained defendant's DNA, in the common area, his testimony was consistent with Bettis's identification of defendant's outfit that day. Kedre did not testify that he saw the shooter *after* he left the common area, but that he saw him while still there and wearing the hat (albeit, in the process of leaving the building). Thus, we disagree with defendant's argument that the DNA evidence has limited relevance, where Kedre testified that the person who ran from the apartment entryway had on his hat and Bettis stated that defendant wore a hat that day. Defendant contends that the hat left in the entryway could not be the suspect's hat and that defendant's DNA on this hat does not actually connect him to the shooting. We disagree, again, because Kedre did not state that he saw the shooter after the shooter exited the building. In any event, Kedre's description of the hat, as a black and white (or cream) had with a design that came over the ears and had a "little ball on the top" was consistent with the hat found at the scene

and consistent with Bettis's statement that defendant wore the hat that day and left it in the building.

¶ 52 Defendant takes issue with Bettis's videotaped interrogation and the body attachment order, arguing that they should not be given significant weight by this court. Defendant notes that Bettis ultimately appeared and explained that she evaded the court's subpoena because the prosecutor was rude to her, not because of what defendant said to her. Accordingly, her statements, defendant asserts, about her phone conversation with defendant should not be seen as evidence of guilt, because it was not defendant's conduct that induced Bettis to miss part of trial. We reject this argument. Without explanation, defendant would have us ignore the conversation he had with Bettis, but credit Bettis's explanation concerning the prosecutor, which came *after* her conversation with defendant (in which he tried to intimidate her to refrain from testifying).

¶ 53 We also conclude that the trial court did not err in discounting Bettis's explanation at trial that she was drunk and high when she gave her statements to police (and Shiu's testimony that Bettis told her this information). The jury heard detective Giamberduca's testimony that he did not believe that Bettis was under the influence of alcohol or marijuana during the January 7, 2010, videotaped interview, because, between January 6 and January 7, she was in custody. Also, again, the jury heard Bettis testify about the telephone call with defendant on the day trial commenced, wherein he tried to intimidate her by instructing her to disappear and that "[t]hey can't do shit but put a warrant out for your arrest." She told defendant that she would not go to court, but ultimately appeared and testified, recanting her videotaped statements. Given this evidence and sequence of events at trial, the videotaped statements were clearly, as the trial court determined, "devastating" evidence of defendant's guilt. In our view, had trial counsel impeached Kedre's in-court

identification of defendant, there was no reasonable probability of a different outcome. *Domaglia*, 2013 IL 113688, ¶ 36.

¶ 54 Addressing the alibi witnesses, defendant notes that Bettis's recorded statements directly conflicted with, and were undermined by, this evidence, including Pitts's testimony that defendant and others were at his apartment between New Year's Eve and New Year's Day. We disagree with defendant's argument. The jury resolved this issue against him. Further, trial counsel's failure to impeach Kedre's in-court identification of defendant did not bolster the defense witnesses' testimony. Pitts testified that he was present on January 7, 2010, when investigators came to Gary's apartment, but he did not provide police the alibi information until August 9, 2010, *after* he was taken into custody himself (on June 24, 2010).

¶ 55 In summary, the trial court did not err in denying defendant's postconviction petition.

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, the judgment of the circuit court of Lake County is affirmed.

¶ 58 Affirmed.