FOURTH DIVISION
MAY 5, 2011

No. 1-09-1877



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 99 CR 1892 |
| | ) | |
| ADAM GIBBS, | ) | Honorable |
| | ) | Jorge Luis Alonso, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

**O R D E R**

*HELD*: Circuit court's denial of defendant's post-conviction petition following an evidentiary hearing upheld where defendant failed to show that he received ineffective assistance of both trial and appellate counsel.

Defendant, Adam Gibbs, appeals the circuit court's denial of his petition for post-conviction relief filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2006)). On appeal, he disputes the circuit court's denial of his petition after presiding over a third-stage evidentiary hearing, arguing that he showed that he was denied his constitutional right to

effective assistance of both trial and appellate counsel. For the reasons contained herein, we affirm the judgment of the trial court.

## BACKGROUND

On November 30, 1998, Gregory Irby was shot and killed, and defendant was subsequently charged with two counts of first degree murder in connection with that crime. Following a jury trial, defendant was convicted of first degree murder and was subsequently sentenced to 35 years' imprisonment. This court affirmed defendant's conviction on direct appeal. *People v. Gibbs*, No. 1-01-4117 (February 27, 2004) (unpublished order pursuant to Supreme Court Rule 23). Because the facts of the offense were fully set forth in our prior order, we will restate only those facts necessary to fully understand and consider defendant's current appeal.

### Trial

The State's evidence presented at trial included the testimony of Joe Irby and Michael Henderson, two eyewitnesses to the shooting. Irby was the victim's cousin and Henderson was the victim's friend. On November 30, 1998, Irby and Henderson, borrowed the victim's vehicle, a blue Lumina. At approximately 10:30 a.m., Irby was driving the vehicle eastbound on I-290. Michael was a passenger in the car as was Sherrie, Irby's cousin, and Sherrie's son. As Irby navigated the vehicle onto the Dan Ryan Expressway, the car began to stall, and Irby exited the expressway and pulled into a Shell gas station located on 18th Street. After approximately five minutes, Irby was able to restart the vehicle and began driving it eastbound on 18th Street. The car stopped approximately five blocks later at Canal Street, however, and Irby and Henderson pushed the stalled vehicle off the street into a nearby lot. Sherrie and her son caught a bus and

left the area while Irby phoned the victim. Irby and Henderson then left the vehicle in the lot and proceeded to Irby's mother's house. When he arrived at his mother's house, Irby spoke again to the victim on the phone and then asked several people to drive him and Henderson back to the lot, including his brother-in-law, Terry Cheatem, and his friend, Maurice "Reese" Mack. Irby saw a man named Bird walk by as he was asking Reese for a ride. Finally, Irby's friend Donald Dean agreed to drive Irby and Henderson back to the lot where they had left the victim's car.

Irby and Henderson met the victim at the lot and the three men tried to start the car. When their efforts were unsuccessful, the victim called a tow truck for assistance. The three men sat in the victim's car and waited for the tow truck to arrive. The victim was sitting in the driver's seat, Henderson was sitting in the passenger seat, and Irby was in the back seat behind Henderson. While the men were waiting in the car, a gold Bonneville pulled into the lot directly behind them, blocking them in. A man exited the vehicle, approached the driver's side of the victim's car and asked, "Where is my mother fucking money at?" He then ordered the victim to "[g]et [his]mother fucking ass out of the car." Irby and Henderson both identified defendant as the man who approached the victim's car. Irby had previously seen defendant around the neighborhood. The three men exited the vehicle. Defendant placed his left hand on the victim's arm and guided him toward the Bonneville. Defendant's right hand remained in his pocket. Although neither Irby nor Henderson observed defendant holding a weapon with his right hand, they both believed he was concealing a gun.

Three other men exited the Bonneville, one of whom was Bird, the man who was present when Irby asked his friend Reese Mack for a ride to 18th and Canal Street. As defendant and the

victim reached the Bonneville, the victim jerked his arm away from defendant and began running toward a nearby building. Defendant followed him. Irby and Henderson also began to run away. Irby ran toward a nearby trailer and Henderson ran toward a fence. Both men heard approximately 10 or 11 shots fired. When he reached the trailer, Irby looked for the victim and saw defendant standing over the victim's body. As defendant began to head back toward the Bonneville, Irby saw a gun in defendant's hand. Irby and Henderson both saw the Bonneville leave the scene.

Police arrived at the location approximately 10 minutes later. Irby spoke to one of the detectives about the shooting but denied that he recognized anybody. He lied about being unable to identify defendant or Bird because he was scared. A few days later, Irby called Detective Biaocchi, who had given Irby his card after speaking with him on the day of the shooting, and informed the detective that he had additional information about the shooting. Irby met with Detective Biaocchi at the police station and identified defendant as the shooter and Bird as one of the passengers in the Bonneville. Henderson also spoke to police officers at the scene. Like Irby, Henderson also failed to identify anyone involved in the victim's death. Henderson told the police he did not see who shot the victim, which was a lie. Later that day, Henderson provided a description of the offender to the investigating officers. He indicated that the shooter was six feet tall, 160 pounds, had a medium brown complexion and a straggly beard. Henderson also acknowledged that he and Irby had ingested heroin earlier that day and indicated that heroin improved his perception ability.

On December 9, 1998, Irby was a passenger in his friend's van when he saw defendant in

a light blue Suburban near the area of 38th Street and Rhodes Street. Irby called Detective Biaocchi and provided him with a description of defendant and the vehicle in which he saw defendant. The following day, Irby viewed a lineup and identified defendant as the person who shot his cousin. He subsequently identified Bird and a man named Kyree, who had been the driver of the Bonneville. Henderson also viewed a lineup the same day and, he too, identified defendant as the shooter.

Detective Biaocchi confirmed that he spoke to Irby and Henderson on the day of the shooting and neither man identified anybody involved in the victim's death. He provided both men with his business card and instructed them to contact him should they remember or learn any additional details about the shooting. Irby called him on December 3, 1998 and told him that he had additional information about the murder. Detective Biaocchi subsequently met with Irby who provided him with the names of people he recognized that were involved in the shooting: Adam, Bird, and someone named either Correll or Terrell. Detective Biaocchi spoke to Irby again on December 10, 1998. During that conversation Irby told Detective Biaocchi that he had seen defendant with a gun in his hand and described defendant as a black male, who was approximately 20 to 28 years of age, approximately 5 feet 8 inches tall, and weighed approximately 150 pounds. Detective Michael Qualls received that description and subsequently arrested defendant.

The State presented forensic testimony that established that the cartridge cases, fired bullets and jacket fragments that were recovered at the scene were all fired from the same firearm, a .9 millimeter semi-automatic weapon. The gun used in the shooting was not

recovered, however, and no fingerprints were found on any of the weapons evidence.

Dr. Mitra Kelekar, a medical examiner, testified that the victim suffered from nine gunshot wounds, most of which were located on his back. These wounds were consistent with someone who was running away from the shooter at the time he was shot.

After the State rested its case, the defense called one witness, Officer Kenneth Walker, who testified that he reported to the scene of the shooting, but he did not speak with either Irby or Henderson. He did, however, hear the responses that they provided to other police officers and subsequently wrote in his report that one unknown black male had fled from the scene.

The jury returned with a verdict convicting defendant of first degree murder.

Direct Appeal

Defendant appealed his conviction and sentence, arguing: (1) the State failed to present sufficient evidence to prove him guilty of first degree murder; (2) he was denied his right to a fair trial due to prosecutorial misconduct; and (3) the jury was tainted when the trial court questioned the jury members about an alleged statement made by one specific juror indicating that she would not convict defendant if he had mental health problems. We affirmed defendant's conviction, finding that: the identification testimony of the two eyewitnesses was sufficient to establish defendant's guilt beyond a reasonable doubt; there was no prosecutorial misconduct that warranted reversal of defendant's conviction; and the trial court did not err in questioning the jurors to determine whether they could apply the law to the evidence and be impartial. *People v. Gibbs*, No. 1-01-4117 (February 27, 2004) (unpublished order pursuant to Supreme Court Rule 23).

Post Conviction

Thereafter, defendant subsequently filed a *pro se* petition for post-conviction relief, citing ineffective assistance of both trial and appellate counsel. In pertinent part, he asserted that he was denied effective assistance of appellate counsel because counsel failed to "raise each and every meritorious" issue on appeal. Defendant's allegation of ineffective assistance of trial counsel was premised on trial counsel's failure to file a motion to suppress identification testimony based on the inconsistent descriptions of the offender that Irby and Henderson provided to detectives. Finally, defendant argued he was entitled to post-conviction relief because the State committed a discovery violation when it failed to disclose evidence that Irby and Henderson were under the influence of heroin when the shooting occurred. The circuit court docketed defendant's *pro se* petition and advanced it to the second stage of post-conviction review. Defendant was appointed counsel and his public defender filed a supplemental petition on defendant's behalf.

In the supplemental petition, defendant included additional claims of ineffective assistance of trial and appellate counsel. Specifically, defendant argued that trial counsel was ineffective for: (1) failing to object when the jury received an improper eyewitness identification instruction; (2) failing to request a cautionary jury instruction regarding the testimony of narcotics users; (3) failing to object to Henderson's testimony that heroin use improved his perception ability and failing to call a narcotics expert to refute that testimony; (4) failing to call Christopher Mitchell as an alibi witness; (5) failing to introduce evidence that defendant did not possess a beard at the time of the shooting because this was evidence of actual innocence; (6)

failing to impeach Irby and Henderson about the inconsistencies in their prior descriptions of the offender; and (7) eliciting evidence that bolstered the State's case and failing to object to prejudicial arguments made by the State during closing argument. With respect to appellate counsel, defendant cited the following instances of ineffective assistance: (1) counsel's failure to argue that the jury received an improper instruction regarding eyewitness identification testimony; (2) counsel's failure to call an expert witness to refute Henderson's testimony that heroin use improved his perception ability; (3) counsel's failure to challenge prejudicial remarks made by the State during closing argument; and (4) appellate counsel's failure to argue that trial counsel was ineffective for eliciting evidence that Bird overheard Irby ask Reece Mack for a ride, thereby explaining how defendant knew where to find the victim.

Four affidavits were attached to defendant's supplemental post-conviction petition. Doctor Seymour Ehrenpreis completed an affidavit in which he opined that "the snorting of heroin if anything would depress [Henderson's] ability to observe" and indicated that he would have testified as such if he had been called as a witness at defendant's trial. Christopher Mitchell completed an affidavit in which he averred that on November 30, 1998, he and two of his friends went to court with defendant at approximately 8:00 a.m. They left court at approximately 12:00 p.m., returned to defendant's house where they played video games and talked until approximately 4:00 p.m. Margaret Rather, defendant's mother, completed an affidavit stating that she saw defendant on November 29, 1998, and that he did not have a beard that evening. Finally, defendant completed an affidavit in which he stated that he was playing a video game with Mitchell and several other friends at his house at the time the victim was shot. He also

denied that he had a beard on November 30, 1998.

The State filed a motion to dismiss defendant's post-conviction claims. In its motion, the State maintained that the majority of his claims were barred by *res judicata* or *waiver*. Notwithstanding these procedural defaults, the State argued that defendant could not satisfy the two-prong *Strickland* test to establish that he was denied effective assistance of both trial and appellate counsel.

The circuit court granted the State's motion to dismiss defendant's *pro se* post-conviction petition in its entirety. With respect to the claims advanced in defendant's supplemental petition, the circuit court dismissed all but one of the claims contained therein, and ordered an evidentiary hearing to determine whether trial counsel was ineffective for failing to call Christopher Mitchell as an alibi witness.

At the hearing, defendant called Christopher Mitchell, who testified that on November 30, 1998, he accompanied defendant to court located at 26th Street and California Avenue because defendant had a status hearing on another pending criminal matter. They left the courthouse around noon, got takeout from Popeye's Chicken, and drove back to defendant's apartment located 37th Street and Vincennes. He played video games with defendant and some other friends at defendant's apartment until approximately 4 p.m., at which point he left because defendant had to pick his girlfriend up from work. Mitchell indicated that he met with Jerry Bischoff, defendant's trial counsel, prior to trial and informed Bischoff that he and defendant were together at the time of the murder. Mitchell testified that Bischoff was planning to call him as an alibi witness and instructed him to come to court during defendant's trial. Mitchell came to

court but Bischoff never called him to testify.

The State called attorney Bischoff, who testified that he reviewed reports and discussed the evidence with defendant prior to trial. Defendant identified several potential witnesses and Bischoff interviewed those witnesses, including Mitchell. After the interviews, Bischoff initially decided to proceed at trial with an alibi defense and listed Mitchell as one of the potential witnesses in his discovery answers. Bischoff indicated, however, that he made a strategic decision at trial not to call Mitchell as an alibi witness. He explained that during the direct and cross-examinations of Irby and Henderson, he learned that they were both heroin addicts who had ingested the narcotic before the shooting. Based on their testimony, Bischoff believed that the State's case was "very weak" because there was no physical evidence linking defendant to the crime; rather, the entirety of the State's case "all boiled down to the two witnesses, Mr. Henderson and Mr. Irby who were high on heroin at the time" of the shooting. Accordingly, Bischoff spoke to defendant about changing their trial strategy. Following their discussion, Bischoff decided to forego an alibi defense, and argue instead that the State failed to present sufficient evidence to prove its case. Defendant agreed to the change in trial strategy.

After hearing the testimony and reviewing the transcripts, the trial court denied the remaining count in defendant's petition for post-conviction relief, finding that defendant failed to meet his burden of establishing ineffective assistance of counsel. The trial court found Bischoff to be a credible witness and believed that his decision not to call Michell as an alibi witness was a matter of trial strategy. Based on Bischoff's testimony, the court found:

> "[Bischoff] did everything correctly. He met with the witnesses,

> including [Mitchell]. He filed answers, multiple answers, he updated his Answer and, in fact, its uncontradicted that those witnesses were ready, willing, and able to testify. Once trial started, he changed his strategy based on the weakness, in his view, of the State's case. I cannot say that his strategy was unreasonable or that his actions in the manner in which he proceeded was unreasonable. There is a temptation to think that the case can only get better if you put on alibi witnesses and there is no harm if there is a weak case presented by the State. There is no harm in presenting alibi witnesses, and that is not true. There are pitfalls in putting on alibi witnesses and very strong reasons to believe that if you put on alibi witnesses, they'd better to a very good job. If they don't, the focus of the jury–the focus of the fact finder shifts from did the State prove its case to who is telling the truth.
>
> I believe that his strategy was sound. Obviously if he could do it again or if he knew what the outcome would be, no doubt he would proceed differently. But that is not the issue. The issue is whether he was ineffective, and he was not."

This appeal followed.

ANALYSIS

I. Ineffective Assistance of Trial Counsel

Defendant first argues that the circuit court erred in finding that trial counsel's failure to

call Mitchell as an alibi witness constituted sound trial strategy. He contends that counsel's decision to forgo an alibi defense and solely attack the sufficiency of the State's evidence due to his belief that the State's case was "very weak" was unreasonable and poor trial strategy.

The State initially responds that defendant forfeited review of his claim because he failed to raise this issue on direct appeal. The State contends that this issue could have been raised on direct appeal because Mitchell's name was listed as a potential alibi witness in the discovery materials that trial counsel tendered to the State. Accordingly, because the record contained all the materials necessary to raise this issue on direct appeal and defendant failed to do so, the State argues that he waived his claim of ineffective assistance of trial counsel. Notwithstanding waiver, the State argues that the trial court's finding that trial counsel did not provide ineffective assistance was not against the manifest weight of the evidence. The State observes that an attorney's decisions concerning what evidence to present and which witnesses to call are matters of trial strategy, which are generally immune from ineffective assistance of counsel claims. Moreover, the State argues that attorney Bischoff explained that his decision not to call Mitchell to testify as an alibi witness was made based on his perception of the weakness and flaws in the State's case.

The Act provides a means by which a person may challenge his criminal conviction and assert that the conviction resulted from the substantial denial of his constitutional rights. 725 ILCS 5/122-1 et seq. (West 2006); *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010). Accordingly, " '[t]he function of a post-conviction proceeding is not to relitigate the defendant's guilt or innocence but to determine whether he was denied constitutional rights.' " *People v.*

*Thompkins*, 161 Ill. 2d 148, 151 (1994), quoting *People v. Shaw*, 49 Ill. 2d 309, 311 (1971). Because a post-conviction proceeding is a collateral attack on a defendant's conviction and sentence, the rules of waiver and *res judicata* apply. *People v. West*, 187 Ill. 2d 418, 425 (1999). Due to "considerations of *res judicata* and waiver, the scope of post-conviction review is limited 'to constitutional matters which have not been, and could not have been, previously adjudicated.' " *Thompkins*, 161 Ill. 2d at 151, quoting *People v. Winsett*, 153 Ill. 2d 335, 346 (1992).

The Act contemplates a three-stage process for cases that do not involve the death penalty. *People v. Jones*, 213 Ill. 2d 498, 503 (2004). Proceedings under the Act are commenced by the filing of a petition in the trial court that contains the allegations pertaining to the substantial denial of the defendant's constitutional rights. *Id*. At the first stage, the trial court must, within 90 days, review the petition and determine whether the allegations, if taken as true, demonstrate a constitutional violation or whether they are "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The defendant must attach affidavits, records or other allegations to support the claims contained within the petition or explain the reason for the absence of such evidence. 725 ILCS 5/122-2 (West 2008). At the first stage, the focus is on whether the petition sets forth a "gist" of a constitutional claim. *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002). If the court determines that the defendant satisfied the minimum pleading threshold, then the petition will be placed on the docket for second-stage proceedings. 725 ILCS 5/122-2.1(b) (West 2008). At the second stage, a defendant, if indigent, is entitled to counsel, and the State is permitted to file an answer or a motion to dismiss the defendant's petition for post conviction relief. 725 ILCS 5/122-2.1(b)

(West 2008); *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001). During this stage, the trial court reviews the petition and any accompanying documentation supporting the allegations contained therein to determine whether the defendant made a "substantial showing" that a constitutional violation occurred. *Edwards*, 197 Ill. 2d at 246. Credibility determinations are not made at the second-stage of post-conviction review. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). If the defendant fails to make a substantial showing of a constitutional violation the petition will be dismissed. *Edwards*, 197 Ill. 2d at 246. If, however, the defendant satisfies the substantial showing requirement, the petition will be advanced to the third stage of post-conviction review where the trial court will preside over an evidentiary hearing on the petition and may make fact-finding and credibility determinations. 725 ILCS 5/122-6 (West 2008); *Childress*, 191 Ill. 2d at 174. In order to make these findings, the Act provides that the circuit court "may receive proof by affidavits, depositions, oral testimony or other evidence" and "may order the defendant brought before the court." 725 ILCS 5/122-6 (West 2008). Where, as here, the trial court presides over an evidentiary hearing involving fact-finding and credibility determinations, the trial court's ruling will not be disturbed unless its decision is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); *People v. English*, 403 Ill. App. 3d 121, 129 (2010). Manifest error is error that is " 'clearly evident, plain, and indisputable.' " *People v. Johnson*, 206 Ill. 2d 348, 360, (2002), quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997).

As a threshold matter, we first address the State's argument that defendant forfeited review of his claim of ineffective assistance of trial counsel because defendant could have raised

this issue on direct appeal. See *People v. Sanders*, 238 Ill. 2d 391, 398 (2010) (issues that could have been raised on appeal but were not are considered waived for purposes of post-conviction review). Here, in response to the State's discovery request, trial counsel filed an answer and two amendments thereto, which contained the names of witnesses and their expected trial testimony. In pertinent part, trial counsel identified Christopher Mitchell as a potential alibi witnesses and summarized his expected trial testimony as follows: "He will state that he drove with [defendant] from 26th and California along with several other persons. They went to his home and played video games. They were playing video games at the time of the incident at [defendant's] house. [Defendant] left at about 3:00 p.m. to pick up his girlfriend." Although defendant acknowledges the discovery response, he argues that his claim of ineffectiveness is based in part, on Mitchell's affidavit, which is not part of the trial record. See generally *People v. Jones*, 364 Ill. App. 3d 1, 4-5 (2005) (When the evidentiary basis for a defendant's post-conviction claim lies outside of the original appellate record then the issue could not have been raised before a reviewing court and the forfeiture rule will be relaxed). Here, although Mitchell's affidavit was not part of the record on appeal, it merely reiterates the information that defense counsel provided in his discovery responses. Accordingly, we find that defendant waived this issue. Notwithstanding waiver, we find that his ineffective assistance of trial counsel claim lacks merit.

Every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-prong test set forth in

*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001). Counsel's performance is assessed by using an objective standard of competent performance under the prevailing professional norms. *People v. Ramsey*, 239 Ill. 2d 342 (2010). To satisfy the second prong, the defendant must establish that, but for, counsel's unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). A reasonable probability that the trial result would have differed is "a probability sufficient to undermine confidence in the outcome-or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *Evans,* 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008). Claims alleging ineffective assistance of appellate counsel are determined under the same standards applicable to ineffective assistance of trial counsel claims. *People v. Pitsonbarger*, 205 Ill. 2d 444, 465 (2002); *Edwards*, 195 Ill. 2d at 163.

As a general rule, decisions counsel makes pertaining to trial strategy following a thorough investigation of the relevant law and facts are " 'virtually unchallengeable.' "

*Thompkins*, 161 Ill. 2d at 160, quoting *Strickland*, 466 U.S. at 690-91. More specifically, counsel's decision whether or not to present a particular witness falls within the realm of trial strategy, and accordingly, that decision will generally not support an ineffective assistance of counsel claim. *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989); *People v. Arroyo*, 339 Ill. App. 3d 137, 155 (2003).

Here, at the evidentiary hearing, attorney Bischoff testified that he met with defendant prior to trial and interviewed potential witnesses, including Mitchell. Based on their conversation, Bischoff named Mitchell as one of the potential witnesses he might call at trial in the discovery materials that he tendered to the State. Before trial commenced, Bischoff intended to present an alibi defense; however, he explained that he altered his strategy when he learned, for the first time at trial, that the State's two eyewitnesses to the shooting were high on heroin when it occurred. Based on the testimony, Bischoff believed the State's case was "very weak" and spoke to defendant about changing their trial strategy. Following their conversation, Bischoff decided to forgo the alibi defense and instead, attack the sufficiency of the State's case. The record thus shows that Bischoff conducted a thorough investigation of potential defense witnesses and made a reasoned decision about the defense with which he chose to proceed at trial. Bischoff's failure to present an alibi defense did not result from his failure to adequately prepare for trial and defend defendant. He provided a through explanation for his tactical decision and testified that defendant did not object to the change in trial strategy. Although the strategy ultimately proved unsuccessful, we note that a defendant is entitled to competent, not perfect, representation (*People v. Stewart*, 104 Ill. 2d 463, 491-91 (1984)) and that counsel's

performance must be judged based on the circumstances known at the time of trial and not viewed in hindsight (*People v. Clarke*, 391 Ill. App. 3d 596, 614 (2009)). Based on the record, we find that Bischoff's trial strategy was not unreasonable and did not amount to ineffective assistance of counsel. See, *e.g.*, *Thompkins*, 161 Ill. 2d at 154 (finding that defense counsel was not ineffective for failing to call the defendant's wife as an alibi witness because "*Strickland* instructs we should defer to counsel's decision not to present her testimony"); *People v. Arroyo*, 339 Ill. App. 3d 137, 155-57 (2003) (finding that counsel was not ineffective for failing to present the testimony of an exculpatory witness when the attorney explained that his decision was a matter of trial strategy because the witness would be subject to impeachment).

In so finding, we are unpersuaded by defendant's reliance on our prior decision in *People v. King*, 316 Ill. App. 3d 901 (2000). There, we found that the defense attorney's failure to call an available alibi witness that would have supported an otherwise uncorroborated alibi defense amounted to ineffective assistance of counsel. *King*, 316 Ill. App. 3d at 916. In finding that counsel was ineffective, we found it notable that counsel could not provide any explanation at the evidentiary hearing on the defendant's post-conviction petition as to why he failed to call the witness. *Id*. Instead, counsel testified that he spoke to the witness, subpoenaed her, but could not recall why he did not call her as a witness at trial. *Id*. at 906. Based on this evidence, we found merit to the defendant's post-conviction petition, stating: "Because [defense counsel] failed to provide any explanation at the evidentiary hearing and because we cannot conceive of any sound trial strategy that would justify counsel's failure to call an available alibi witness who would have bolstered an otherwise uncorroborated defense, we find that [counsel's] failure to call [the

exculpatory witness] was the result of incompetence." *Id.* at 916. Here, in contrast, Bischoff provided a thorough explanation of his preparation and performance prior to and during trial and indicated that his decision not to call Mitchell stemmed from a decision to alter his trial strategy, a decision to which defendant raised no objection. See, *e.g.*, *Arroyo*, 339 Ill. App. 3d at 155 (distinguishing *King*, in part, because the defense attorney in that case provided a specific explanation for his decision not to call an exculpatory witness).

Accordingly, we conclude that the circuit court's finding that trial counsel did not provide ineffective assistance based on his failure to call Mitchell as an alibi witness was not against the manifest weight of the evidence. We similarly reject defendant's argument that the cumulative errors made by trial counsel resulted in ineffective assistance. The examples defendant cites include counsel's failure to call an expert to refute Henderson's testimony concerning heroin use and perception ability and the failure to call his mother to testify about his physical appearance on the night before the shooting. These additional claims of ineffective assistance raised in his post-conviction petition also concern trial strategy and we are not convinced that counsel's failure to call these additional witnesses was unreasonable or that the trial outcome would have differed had counsel done so. Ultimately, we find that the claims of ineffective assistance of trial counsel raised in defendant's post-conviction petition lack merit.

II. Ineffective Assistance of Appellate Counsel

Defendant next argues that he was denied effective assistance of appellate counsel because counsel failed to challenge the trial court's misstatement of Illinois Pattern Jury Instruction (IPI) Criminal No. 3.15, which sets forth the factors a jury may consider in assessing

the reliability of the State's witnesses. Instead of using the word "and" when listing the relevant factors, the trial court used the disjunctive "or" in between each of the factors listed in IPI Criminal No. 3.15. Defendant argues that the instruction was defective as a matter of law and prejudiced him. Accordingly, appellate counsel's failure to raise this issue on direct appeal constituted ineffective assistance of counsel.

The State responds that it was not error to include "or" in the version of IPI Criminal No. 3.15 in effect at the time of defendant's trial. The State contends that given the state of the law as it existed at the time of defendant's trial and appeal, appellate counsel could not have raised this issue on appeal. On the merits, the State maintains that defendant was not prejudiced by the instruction and, accordingly, did not receive ineffective assistance of appellate counsel.

At the time of defendant's trial, IPI Criminal No. 3.15, entitled "Circumstances of Identification," provided:

"When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including but not limited to the following:

[1] The opportunity the witness had to view the offender at the time of the offense.

[or]

[2] The witness's degree of attention at the time of the offense.

[or]

[3] The witness's earlier description of the offender.

[or]

[4] The level of certainty shown by the witness when confronting the defendant.

[or]

[5] The length of time between the offense and the identification confrontation." Illinois Pattern Jury Instructions, Criminal, No. 3.15 (3d ed).[1]

In *People v. Herron*, 215 Ill. 2d 167, 191 (2005), our supreme court found that "giving IPI Criminal No. 3.15 with the 'ors' is indeed plain error." *People v. Herron*, 215 Ill. 2d 167, 191 (2005). The court reasoned: "The committee note explains that this instruction simply lists factors, well established by case law which offer guidance 'in an area that contains complexities and pitfalls not readily apparent to some jurors' [Citation.] The committee note directs judges to [g]ive numbered paragraphs that are supported by the evidence' and advises, 'The bracketed numbers are present solely for the guidance of the court and counsel and should not be included in the instruction submitted to the jury.' " *Id.* at 188, quoting IPI Criminal 4th No. 3.15, Committee Note, at 107. The court explained that plain error, however, does not mandate automatic reversal of a defendant's conviction; rather, whether a trial court's error in reading IPI Criminal No. 3.15 warrants reversal "depends upon the quantum of evidence presented by the State against the defendant." *Id*. at 193. An improper jury instruction only rises to the level of plain error where it can be determined that it " 'create[d] a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.' " *Id*. quoting *People v. Hopp*, 209 Ill. 2d 1, 8 (2004).

Accordingly, the trial court erred when it included the "ors" in its instruction to the jury.

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[1] The instruction was changed in 2003 and the "ors" were removed. *See* Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed); *Herron*, 215 Ill. 2d at 191

However, we observe that defendant's trial was conducted in March 2001, his appellate brief was filed on October 4, 2002, and that the supreme court did not issue its *Herron* decision until 2005, after his appeal had already been decided. Nonetheless, appellate counsel could have raised this issue on appeal since the first district filed an opinion in 2001 finding that it was error for the trial court to include the "ors" in administering IPI Criminal No. 3.15. See *People v. Gonzalez*, 326 Ill. App. 3d 629, 640 (2001) (finding that the use of 'or' between each of the factors was improper because it erroneously "implie[d], as a matter of law, that the identification testimony of an eyewitness may be deemed reliable if just one of the five factors listed weighs in favor of reliability"). Accordingly, while there was no supreme court decision addressing this issue, there was relevant authority in this district that appellate counsel could have relied upon to raise this issue on appeal.

Nonetheless, we do not find that defendant can show that appellate counsel's failure to raise this issue on appeal caused him prejudice under the second prong of the *Strickland* test. Courts reversing a defendant's conviction based on a trial court's erroneous reading of IPI Criminal No. 3.15 have done so only when the evidence against the defendant was so closely balanced that the error could have tipped the scales of justice against the defendant. See, *e.g.*, *Herron*, 215 Ill. 2d at 190-91; *Gonzalez*, 326 Ill. App. 3d at 640; *People v. Iniguez*, 361 Ill. App. 3d 807, 814 (2005). Where, however, the evidence against a defendant was not closely balanced and the erroneous instruction was not unduly emphasized to the jury, then the error is ultimately harmless. See, *e.g*, *People v. Battle*, 393 Ill. App. 3d 302, 309-12 (2009); *People v. Sims*, 358 Ill. App. 3d 627, 638 (2005)*; People v. Smith*, 314 Ill. App. 3d 530, 546 (2003). Defendant contends

that the evidence was closely balanced because the State's case rested on the testimony of two drug users who were not credible. We disagree. On direct appeal, we previously observed that there was physical evidence to corroborate the testimony provided by Joe Irby and Michael Henderson. Specifically, we stated:

> "Joe testified he heard ten to eleven gun shots fired and there were nine bullet wounds on the victim's body. Both witnesses testified that the victim was running away from defendant when defendant started firing. The victim's wounds were consistent with someone running away. There were also cartridge cases surrounding the victim's body. Clearly, the cartridge casings ejected from the murder weapon near the victim's body show that the shooter stood near the victim as he shot him. Joe testified that he saw defendant standing over the victim." *People v. Gibbs*, No. 1-01-4117, order at 13 (February 27, 2004) (unpublished order pursuant to Supreme Court Rule 23).

Given that the evidence against defendant was not closely balanced, we conclude that the erroneous instruction was ultimately harmless and defendant was not prejudiced by appellate counsel's failure to raise this issue on appeal. Therefore, defendant did not receive ineffective assistance of appellate counsel and his post-conviction petition was properly denied. See *Smith*, 341 Ill. App. 3d at 547 (rejecting the defendant's claim that counsel was ineffective for failing to object to the trial court's improper IPI Criminal No. 3.15 instruction because the evidence against him was not closely balanced and counsel's failure to raise this issue did not prejudice him).

## CONCLUSION

Accordingly, for the reasons contained herein, we affirm the judgment of the circuit court.

Affirmed.