2015 IL App (2d) 121189-U
No. 2-12-1189
Order entered January 26, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 99-CF-64
TERRY R. WAGNER,	)	Honorable Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant alleged that the State failed to disclose information regarding the victim's history of violence and mental illness in violation of *Brady*, he failed to state a claim under the Post-Conviction Hearing Act because defendant could not establish that failure to disclose was material; defendant's claims of ineffective assistance of counsel failed because the claims were barred by *res judicata*, and defendant failed to establish that he was prejudiced; defendant's argument that he was denied effective assistance of appellate counsel regarding counsel's failure to raise a sufficiency of the evidence argument failed because defendant could not establish prejudice; trial court is affirmed.

¶ 2 Defendant, Terry Wagner, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 1998)) and unlawful concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 1998))

after a bench trial. Defendant was sentenced to 30 years' imprisonment for the first degree murder conviction and 6 years' imprisonment for the concealment of a homicidal death conviction to be served consecutively. We affirmed his conviction on direct appeal. *People v. Wagner*, No. 2-01-1289 (Oct. 21, 2003) (unpublished order under Supreme Court Rule 23). Defendant filed an amended postconviction petition that the trial court dismissed at the second stage. Defendant argues on appeal that the trial court erred by dismissing his amended petition because he made a substantial showing of violations of his constitutional rights in that: (1) the State withheld exculpatory and impeaching evidence from defendant prior to defendant waiving his right to a jury trial; and (2) defendant was denied effective assistance of counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 This court has previously set forth the evidence adduced at defendant's trial. We will restate only those portions of the evidence that are pertinent to the issues raised in this appeal. After this court affirmed defendant's conviction and sentence on direct appeal (*People v. Wagner*, No. 2-01-1289 (Oct. 21, 2003) (unpublished order under Supreme Court Rule 23), defendant filed a petition for postconviction relief.

¶ 5 At trial, defendant's brother-in-law, Wilbur Lash, testified as follows. On December 30, 1998, at about 8 p.m., he arrived at a party at defendant's sister's apartment. Defendant; Carlos Marquez; defendant's niece, Sharena Wagner; and Gladys Martinez were there. The victim, John Banks, arrived about half an hour later. Lash brought a gun to the party and left it on the living room coffee table. The victim, who was Caucasian and had been drinking vodka from a bottle, was saying "[n]i**er, sh*t, telling jokes, just saying all types of crazy stuff." Defendant told the victim to stop talking like that and walked in the other room. Everyone who was a minority at the party was mad at the victim. Lash told the victim that he should leave but the

victim refused. Defendant and Marquez tried to throw the victim out of the apartment, but the victim pushed his way back in.

¶ 6 Lash also testified as follows. He heard Sharena call for defendant from the kitchen. Lash picked up the gun from the coffee table and he and defendant went into the kitchen. Defendant took the gun from Lash. As Lash was leaving the kitchen he heard a "pop," and Lash turned back and saw defendant holding the gun and the victim was holding his chest. Lash asked defendant, "What did you do, Man?" Defendant replied, "I told that mother f***er." Lash then walked into the living room and about five seconds later, he heard another shot. Lash saw the victim kneeling on the kitchen floor and defendant holding the gun. Lash left the apartment 15 minutes later. About 20 minutes later defendant asked Lash to help him move the victim's body. Lash had known defendant for 12 to 13 years and defendant was very high on drugs the night of the shooting. The victim was more aggressive than usual the night of the shooting. Earlier that evening, the victim said that he was going to "kill some ni****s with a stick."

¶ 7 Carlos Marquez testified as follows. Marquez was at the party when the shooting occurred. Marquez, defendant, Lash, and the victim had been doing drugs all day. When they ran out of cocaine, the victim went to his parents' house to get money, bought more cocaine and brought the drugs back to the party. When the drugs were gone, the victim drank. Defendant became paranoid when he was "high." Later, Sharena, who was in the kitchen with the victim and Gladys Martinez, called for defendant. Defendant and Marquez ran into the kitchen where the victim was standing in front of Sharena. Marquez pushed the victim out of the apartment "so that he don't get hurt." The victim pushed the door back open and walked back into the apartment. Everybody in the kitchen was yelling. Defendant said, "That's it," and Marquez heard two gunshots. Defendant gave the gun to Marquez and asked him to get rid of it.

Marquez took the gun, rode downtown on his bike, threw the gun in the river and rode his bike home. About half an hour to an hour after the shooting had occurred, defendant came over to Marquez's home and asked him to put the victim's body in the trunk of the victim's car. Marquez and defendant drove the victim's car back to the apartment and went into the kitchen. The victim was lying there but Marquez could not tell whether the victim was breathing. Defendant and Marquez carried the victim downstairs and put the victim in the trunk of the victim's car. Defendant had the keys to the victim's car and he opened the trunk. Defendant drove Marquez home. About two hours later, Marquez went back to the apartment looking for drugs. Defendant and Marquez drove the victim's car with the victim still in the trunk, looking for drugs and then drove back to the apartment. They did this about four times and then, at about 5 or 6 a.m. they abandoned the car on the west side of Aurora. It was defendant's idea to abandon the car.

¶ 8 Leopold Butler, defendant's cousin, testified as follows. Butler was at the party at the time of the shooting but he did not remember the night very well because he was high. Everyone at the party was under the influence of alcohol or drugs. Butler heard Sharena, who was in the kitchen with the victim and Gladys, yell for defendant. Defendant then yelled at the victim to leave Sharena alone. The victim yelled back and defendant said, "I'm tired of [the victim's] s**t." Sharena yelled and defendant and Lash went into the kitchen. Butler heard a gunshot. Butler went into the kitchen and saw defendant pointing the gun at the victim and saw defendant shoot the victim.

¶ 9 Sharena Wagner, defendant's niece, testified as follows. Sharena was present at the time of the shooting. While in the kitchen with Gladys, the victim told Sharena that "he was against black people" and then he "drew a K.K.K. sign and asked [Sharena] if [she] knew what it was." Sharena became angry and scared and called for defendant. Everyone came into the

kitchen. Defendant told the victim to leave but he refused. Defendant and Marquez told Sharena and Gladys to go into the living room. As they were leaving, Sharena saw Lash pull out a gun. While Sharena was in the living room, she heard two gun shots and ran into the kitchen. The victim was sitting in a chair and then he fell. Sharena and Gladys left the apartment about 15 minutes later.

¶ 10 Gladys Martinez testified as follows. Gladys was present at the apartment on the night of the shooting and essentially repeated Sharena's recollection of events adding that the victim showed them a swastika. A videotaped interview of Gladys was introduced into evidence and played for the court. The videotape contained Gladys's statement that she heard defendant say, "I'm going to kill this mother****r."

¶ 11 Defendant testified as follows. Defendant had been addicted to crack cocaine and alcohol for 13 years, had been in rehab twice, and had tried to commit suicide because of his addiction. He typically smoked $200 to $300 worth of crack cocaine a day. Defendant was present in the apartment the time of the shooting. He was extremely high that night and he and the victim had been using drugs all day. The apartment was his sister's and it was a crack house. The victim was acting differently than before. The night of the shooting the victim was acting "crazy" and told "n****r jokes and was making threats towards us." Defendant asked the victim to leave. Defendant did not bring the gun to the apartment and did not intend to hurt the victim. At the end of questioning defendant asked to make a statement; defendant said, "I want to say that I am sorry to the [victim's] family for the incident happening."

¶ 12 Mary Fultz, defendant's girlfriend and mother of his five children, testified as follows. Defendant had been using crack cocaine since 1990 and when he is high on drugs defendant is paranoid. At Thanksgiving 1998, Mary did not allow defendant to see their children because of his heavy drug use around them.

¶ 13 Aurora police detective Martin Sigsworth testified as follows. Defendant voluntarily came to the police department for an interview and Sigsworth advised defendant of his Miranda rights. Defendant said that he understood his rights and wished to waive them. Defendant told Sigsworth that the last time he saw the victim was at 7 p.m. on December 30, 1998. During a second interview, Sigsworth told defendant that he knew defendant was not being truthful. Sigsworth also told defendant that he was being accused of killing the victim. In response, defendant denied shooting the victim, said that he would not admit to doing something he did not do, and said that he would not answer any other questions.

¶ 14 Aurora police detective Christina Deuchler-Lueders testified as follows. On January 10, 1999, at about 6 p.m. she was told that defendant wanted to speak to her. Defendant ultimately told Deuchler-Lueders that he shot the victim because the victim was trying to harm a female relative. Defendant repeated this confession during a videotaped statement that was admitted into evidence and played for the court. Deuchler-Lueders stated that she did not know whether defendant was under the influence of alcohol or drugs when he spoke with her and provided the videotaped statement.

¶ 15 Joseph Cogan, an expert in forensic pathology, testified as follows. Cogan performed the autopsy on the victim, who tested positive for cannabis and cocaine and had a blood alcohol level of .217. However, the blood level may not have been accurate because the victim's body had been frozen. Cogan opined that the victim died from multiple gunshot wounds. The victim was shot twice; the first shot entered the left chest and the second shot entered the head at a slightly downward angle and fractured the victim's skull. After the victim was shot, he could have survived "a maximum, about an hour." Cogan testified that he "would be surprised if [the victim] was alive an hour after" he was shot.

¶ 16 John Banks, the victim's father testified as follows. On December 30, 1998, the victim left home in his Buick Regal. The victim returned an hour later and John gave him $20. That was the last time John saw his son alive. A couple of days later, John reported his son missing to the Aurora police. Subsequently, John and his wife were notified that the Buick Regal was found and a body was found in the trunk. John identified that body as his son's, the victim. John testified that victim had a history of drug use which prevented him from working, and that he was taking Prozac and Depakote for depression.

¶ 17 The trial court found defendant guilty of first degree murder and unlawful concealment of a homicidal death and sentenced defendant to terms of 30 years' and 6 years' imprisonment, respectively, to be served consecutively. The trial court denied defendant's posttrial motion. Defendant filed a direct appeal and this court affirmed defendant's conviction and sentence. *Wagner*, No. 2-01-1289.

¶ 18 On March 30, 2004, defendant filed *pro se* a postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2004). On June 2, 2004, defendant filed a motion for discovery. On July 23, 2004, the trial court appointed counsel to represent defendant on his postconviction petition. On June 23, 2005, appointed counsel adopted defendant's motion for discovery. On November 2, 2006, the trial court granted defendant's request to proceed *pro se*. On March 16, 2007, defendant received materials pursuant to his discovery motion.

¶ 19 On February 18, 2010 defendant filed an amended *pro se* postconviction petition asserting: (1) his right to due process was violated because the State failed to disclose exculpatory and impeaching evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963), prior to defendant's jury trial; (2) he was denied effective assistance of trial counsel; (3) he was denied effective assistance of posttrial counsel: and (4) he was denied effective assistance of appellate counsel.

Defendant supported his amended petition with police reports, mental health records, medical records, affidavits and other documents. On June 7, 2012, defendant filed *pro se* a supplemental postconviction petition asserting additional claims of ineffective appellate counsel.

¶ 20 On July 28, 2010, the State filed an answer to defendant's amended and supplemental petitions. On August 5, 2010, the State filed a motion to dismiss. Defendant filed a response to the State's motion to dismiss on February 17, 2011. On February 22, 2012, after hearing argument, the trial court granted the State's motion to dismiss at the second stage. Defendant filed a motion to reconsider on March 21, 2012, which the trial court denied on October 17, 2012. Defendant filed his notice of appeal on October 29, 2012.

¶ 21 After the parties filed their briefs regarding this appeal, defendant filed a "Motion To Clarify the Record On Appeal." Defendant's motion seeks to inform this court that defendant's method of citing to the record differs from the State's. We grant defendant's motion.

¶ 22 II. ANALYSIS

¶ 23 Defendant contends that the trial court erred by dismissing his amended postconviction petition without granting an evidentiary hearing because the allegations contained in his petition, supporting affidavits, and exhibits made a substantial showing of violations of his constitutional rights. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). In cases not involving the death penalty, the Act establishes a three-stage process for adjudicating a postconviction petition. *Id*. at 471-72.

¶ 24 When a petition proceeds to the second stage, the Act provides that counsel may be appointed for defendant if defendant is indigent. See 725 ILCS 5/122-4 (West 2012); *Pendleton*, 223 Ill. 2d at 472. After defense counsel has made any necessary amendments to the petition, the

State may file a motion to dismiss the petition or file an answer to the petition. *Id*. at 472. If the State files a motion to dismiss, the trial court may hold a second-stage dismissal hearing. *People v. Harper*, 2013 IL App (1st) 102181, ¶ 33.

¶ 25 At the second-stage dismissal hearing, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473. Further, the trial court must accept as true "all well-pleaded facts that are not positively rebutted by the trial record." *Id*. Where, as here, the defendant's claims are based on matters outside the record, the trial court is prohibited from engaging in fact finding. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). Thus, factual disputes raised by the pleadings that require a determination of the truth or falsity of supporting affidavits or exhibits cannot properly be made at a hearing on a motion to dismiss, but rather can only be resolved during a third-stage evidentiary hearing. *Id*. at 381. If a substantial showing of a constitutional violation is set forth, the petition advances to the third stage for an evidentiary hearing. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). We review *de novo* the trial court's dismissal of a postconviction petition at the second stage of the proceedings. *Coleman*, 183 Ill. 2d at 378.

¶ 26 A. *Brady* Claims

¶ 27 1. The Victim's Prior Violent Conduct and Mental Health Records

¶ 28 Defendant argues that his right to due process was violated because the State failed to disclose, prior to defendant's bench trial, exculpatory and impeaching evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). In particular, defendant contends that the State improperly failed to disclose: (1) an Aurora police department report and signed statement indicating that approximately 18 months before defendant shot the victim, the victim's mother went to the police department and told officers that the victim had threatened and physically harmed her; she was afraid of the victim because he had threatened many times to kill her, her

husband, himself, and others; and the victim had said that he hated himself and other people; (2) an order of protection issued by the trial court about six months before defendant shot the victim ordering him to, *inter alia*, stay away from his mother; (3) a record of the victim's involuntary admission to a mental health facility approximately six months before the victim was shot; and (4) the victim's mental health records indicating that he was diagnosed with, *inter alia*, bipolar disorder, intermittent explosive disorder, and that he had threatened others. The State argues that the trial court properly determined that *res judicata* barred defendant's *Brady* claims and that defendant's claims are insufficient to state *Brady* violations. We may affirm on any basis supported by the record. *People v. Jones*, 399 Ill. App. 3d 341, 359. (2010).

¶ 29 A postconviction proceeding is not a substitute for a direct appeal, but instead, is a collateral attack upon the conviction that allows only limited review of constitutional claims that could not be raised on direct appeal. *People v. Harris*, 224 Ill. 2d 115, 124 (2007). Therefore, claims that could have been raised on direct appeal, but were not, are forfeited, and claims that were addressed on direct appeal are barred by *res judicata*. *Harris*, 224 Ill. 2d at 124–25; 725 ILCS 5/122-3 (West 2010); see also *People v. Makiel*, 358 Ill. App. 3d 102, 105 (2005) (any issues that were decided on direct appeal are barred by *res judicata*; any issues that could have been raised on direct appeal are defaulted). This rule is relaxed where, *inter alia*, "the facts relating to the claim do not appear on the face of the original appellate record." *Id.* at 105. Where defendant's postconviction claim relies on evidence outside the original appellate record, forfeiture is not implicated. *People v. Enis*, 194 Ill. 2d 361, 375-76 (2000).

¶ 30 The State argues that defendant raised these issues in his amended posttrial motion, which were rejected by the trial court. Thus, the State argues that issues regarding its alleged failure to disclose evidence regarding the victim's violent character are barred by *res judicata*. The record supports this argument. Defendant's amended posttrial motion asserted that defense counsel was

ineffective because he failed to: (1) file a pretrial motion asking the court to issue subpoenas for the victim's mental health and substance abuse records; (2) obtain a copy of the order protection at issue; (3) investigate evidence of prior acts of violence that would have been admissible under *People v. Lynch*, 104 Ill. 2d 194 (1984); and (4) interview witnesses regarding the victim's history of violence even though defendant had provided defense counsel with this information. The trial court rejected these arguments and denied defendant's amended posttrial motion. Thus, defendant could have raised these issues on direct appeal. To the extent that defendant failed to raise these issues on direct appeal, such issues are forfeited here. See *Harris*, 224 Ill. 2d at 124-25.

¶ 31 In addition, on direct appeal defendant argued that defense counsel was ineffective by failing to present an effective claim of self-defense by failing to investigate and present evidence of the order of protection and that the victim was a violent person. *Wagner*, No. 2-01-1289, at 10. We rejected defendant's argument, reasoning that the evidence at issue would not have established that defendant was in danger of imminent harm when he shot the victim (*id.*), one of the elements of self-defense (see *People v. Lee*, 213 Ill. 2d 218, 224 (2004)). Therefore, the trial court properly determined that defendant's *Brady* violation claims regarding the State's failure to disclose information about the victim's violent character are barred by *res judicata*. See *Harris*, 224 Ill. 2d at 124-25.

¶ 32 Further, even if the alleged failure to disclose was not barred by *res judicata*, defendant cannot establish a *Brady* violation. To establish a *Brady* violation, a defendant must show that: (1) the State failed to disclose exculpatory or impeaching evidence to the defendant; and (2) the defendant was prejudiced because the evidence was material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 74 (2008). Evidence is material " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different.' " *People v. Barrow*, 195 Ill. 2d 506, 534 (2001) (quoting *People v. Coleman*, 183 Ill. 2d 366, 393 (1998), quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). A reasonable probability is "a 'probability sufficient to undermine confidence in the outcome.' " *People v. Hobley*, 182 Ill. 2d 404, 433 (1998) (quoting *Bagley*, 473 U.S. at 682 (1985)).

¶ 33 Evidence is admissible if it is relevant to a material issue and its probative value is not outweighed by its prejudicial affect. *People v. Morris*, 2013 IL App. (1st) 111251, ¶ 101. Evidence is relevant if it tends to make the existence of any fact in consequence more or less probable than it would be without the evidence. *People v. Beaman*, 229 Ill. 2d 56, 74 (2008). When self-defense is properly raised, the defendant may offer evidence of the victim's violent and aggressive character for two reasons: (1) to show that the defendant's knowledge of the victim's violent tendencies affected his perceptions of and reactions to the victim's behavior; and (2) to support the defendant's version of the facts where there are conflicting accounts of what occurred. *People v. Lynch*, 104 Ill. 2d 194, 199-200 (1984). Under the first approach, the victim's violent and aggressive character is relevant only when the defendant knew of such. See *Lynch*, 104 Ill. 2d at 200. Under the second approach, the defendant's knowledge of the victim's violent and aggressive character is irrelevant but there must be conflicting accounts of what occurred in order for the evidence to be admissible. *Lynch*, 104 Ill. 2d at 200–01.

¶ 34 In this case, defendant argues that the undisclosed evidence indicating the victim's history of violent behavior and his mental health records supported defendant's claim of self-defense because it corroborated defendant's trial testimony. However, defendant's trial testimony fails to support admission of the undisclosed evidence under *Lynch*.

¶ 35 Defendant testified that the victim was acting differently the night of the shooting; that, on the night of the shooting, unlike on previous occasions, the victim was acting crazy and threatening people. Defendant did not testify that the victim had been violent in the past or had violent

tendencies. Thus, the victim's history of violent behavior and mental health records would not have been admissible under the first *Lynch* approach. See *Lynch*, 104 Ill. 2d at 200. In addition, defendant does not argue, and the record does not indicate, that there are conflicting accounts of what occurred. Therefore, the evidence at issue would not have been admissible under the second *Lynch* purpose. *Lynch*, 104 Ill. 2d at 200-01. Accordingly, defendant cannot show that the State's failure to disclose the victim's history of violent behavior or his mental health records prejudiced defendant because he cannot show that the evidence was material to guilt or punishment. See *Beaman*, 229 Ill. 2d at 74.

¶ 36 Further, accepting all of defendant's allegations and contentions contained in the attached affidavits as true, nothing establishes that the undisclosed evidence would be admitted by the trial court for the purpose of establishing self-defense. A person is justified in the use of force in self-defense against another when he reasonably believes that such conduct is necessary to defend himself against the other's imminent use of unlawful force. See 720 ILCS 5/7-1(a) (West 1998); *People v. Robinson*, 375 Ill App. 3d 320, 334 (2007). In this case, the record positively rebuts that defendant was in imminent danger when he shot the victim. While witnesses testified that the victim was acting in an insulting manner and was making general threats, no one, not even defendant, testified that they reasonably believed that the victim was about to cause death or great bodily harm. Further, although defendant's affidavit states that he saw a "shiny object" in the victim's hand, defendant does not state that he believed that the object was a weapon; rather, he identifies that object as a spoon. Thus, defendant fails to establish that he was in imminent harm for self defense purposes. Therefore, defendant's *Brady* violation claims regarding the victim's prior violent conduct and mental health records, fail.

¶ 37 2. Witness's Convictions, Probation and MRS Status

¶ 38 Next, defendant argues that, in violation of *Brady*, the State failed to properly disclose

certain witness's convictions, conditions of probation, and MSR status, which could have been used as impeachment. In particular, defendant argues that the State failed to disclose: (1) Lash's May 2000 conviction for obstruction of justice; (2) Martinez's March 1999 conviction for possession of a stolen vehicle in which she was sentenced to 30 month probation and the fact that she was serving her probation when she testified in defendant's case; 3) Butler's July 1999 convictions for DUI, and unlawful possession of a controlled substance to which he pleaded guilty in July 1999 and was sentenced to two years' imprisonment, and that Butler was on MSR when he testified on the State's behalf at defendant's trial (4) Marquez's August 2000 three-count charge of felony trespass to residence, his indictment for residential arson, and his conviction for attempted obstruction of justice for which he was sentenced to six months extended probation and that this evidence could have been used to impeach Lash's trial testimony. Defendant states in his affidavit that, if he had known about these witnesses' criminal histories, he would have chosen a jury trial and he would not have testified.

¶ 39 In this case, we determine that defendant has failed to establish a *Brady* violation regarding the State's alleged failure to disclose witness's criminal histories. The record indicates that Lash testified regarding his obstruction of justice conviction. During cross-examination by defense counsel, Lash testified that he pleaded guilty to obstruction of justice and agreed to testify in exchange for a guilty plea and a sentence of two years' probation. The record also indicates that Martinez testified regarding her criminal activity. Martinez testified at defendant's trial that she was convicted of possession of a stolen vehicle. Regarding Butler, the record indicates only that Butler pleaded guilty to DUI and was sentenced to supervision. There is no indication whether Butler was sentenced to imprisonment for more than one year. Thus, defendant cannot establish that this conviction would have been proper impeachment evidence. See *People v. Montgomery,* 47 Ill. 2d 510, 516 (1971). In addition, Butler testified at defendant's trial that he

had been convicted of at least four felonies in the past ten years. Thus, defendant cannot establish that the State's failure to disclose Butler's conviction for unlawful possession of a controlled substance and that he was on MSR when he testified was material. See *Barrow*, 195 Ill. 2d at 534. Marquez testified at defendant's trial that he had been charged with residential arson and trespass to residence. In addition, there is no evidence in the record that Marquez was sentenced to six months' extended probation for his conviction for obstruction of justice. Thus, defendant cannot show prejudice (see *Beaman*, 229 Ill. 2d at 74) or that the alleged evidence is material (see *Barrow*, 195 Ill. 2d at 534). Accordingly, defendant has failed to establish a *Brady* violation regarding the State's failure to disclose these witnesses' criminal conduct. Although the trial court dismissed this claim as barred by *res judicata*, we may affirm on any basis support by the record. *People v. Johnson*, 237 Ill. 2d 81, 88-89 (2010). Thus, the trial court properly dismissed these claims.

¶ 40 Defendant cites *People v. Blackman*, 387 Ill. App. 3d 1013 (2005) and *People v. Aguilar*, 218 Ill. App. 3d 1 (1991), to support his argument. *Blackman* and *Aguilar* are distinguishable from this case. In *Blackman*, the undisclosed evidence was material. *Blackman*, 387 Ill. App. 3d at 1019. Similarly, in *Aguilar* the undisclosed evidence caused the defendant extreme prejudice. *Aguilar*, 218 Ill. App. 3d at 10. Significantly, that evidence consisted of facts that established the existence of bias. In other words, the informant in *Blackman* had a bias in favor of the State because it paid her relocation expenses. *Blackman*, 387 Ill. App. 3d at 1018. Similarly, in *Aguilar*, the witness arguably had a bias in favor of the State because he was a paid police informant, and this evidence also supported the defendant's entrapment defense. *Aguilar*, 218 Ill. App. 3d at 8-11. In contrast, the only undisclosed evidence here does not establish bias in favor of the State. At best, it would have been cumulative of the witness's admitted prior felony convictions, to weaken credibility. In light of the testimony and the witness's impeachment we

cannot say that one undisclosed conviction was material. We do not condone the State's failure to disclose, however, defendant suffered no prejudice. See *People v. Rincon*, 387 Ill. App. 3d 708, 730 (2008).

¶ 41 B. Ineffective Assistance of Counsel

¶ 42 Defendant argues that defense counsel was ineffective for failing to investigate and elicit testimony from defendant, Marquez, Martinez and Sharena Wagner to support a claim of defense of dwelling. The State argues that the trial court properly dismissed this claim as barred by *res judicata* because defendant raised this issue in his posttrial motion and on direct appeal. Defendant contends that the trial court erred by ruling that his claim was barred by *res judicata* because his claim is supported by evidence outside the record; affidavits establishing that before defendant shot the victim, he was forced to leave the apartment and then broke back into the apartment.

¶ 43 The issue of defense counsel's ineffectiveness for failing to elicit testimony from witnesses was addressed in defendant's posttrial motion and on direct appeal. See *Wagner*, No. 2-01-1289, slip op. at 9. On direct appeal, we rejected this argument, reasoning that defense counsel elicited such evidence from witnesses and argued defense of others during closing argument. *Id*. at 10. Thus, the trial court properly dismissed this claim as barred by *res judicata*.

¶ 44 Further, even if the issue had not been barred by *res judicata*, defendant cannot establish that he was prejudiced by defense counsel alleged deficient conduct. Under the familiar, two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984), to succeed on a claim of ineffective assistance of counsel, "a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *People v.*

Houston, 226 Ill. 2d 135, 144 (2007). The failure to establish either of these prongs is fatal to a defendant's claim of ineffective assistance. *People v. Hayden*, 338 Ill. App. 3d 298, 305 (2003). Therefore, a court need not decide whether counsel's performance was deficient before analyzing whether the defendant was prejudiced. *People v. Cortes*, 181 Ill. 2d 249, 295-96 (1998). In addition, when evaluating an ineffective assistance claim based on counsel's failure to investigate, the value of the evidence not presented must be considered, as well as the closeness of the evidence presented. *People v. English*, 403 Ill. App. 3d 121, 137 (2010). Counsel's performance is not ineffective if he fails to present evidence that is cumulative to other evidence presented. *People v. Phyfiher*, 361 Ill. App. 3d 881, 886-87 (2005).

¶ 45 In this case, the evidence contained in the affidavits supporting defendant's claim of defense of dwelling would not have changed the outcome of the trial. Defendant relies on his own affidavit, and those of Marquez, Martinez, and Sharena Wagner, as evidence of that the victim was shot after he forced his way back into the apartment. At trial, Lash and Marquez testified that before defendant shot the victim, the victim was forced to leave the apartment and then the victim broke back into the apartment. *Wagner*, No. 2-01-1289, slip op. at 2. Therefore, the evidence contained in the affidavits was cumulative and defendant cannot establish a claim for ineffective assistance of counsel. See *People v. Jarnagan*, 154 Ill. App. 3d 187, 194 (1987) ("Failure to call or investigate a witness whose testimony is cumulative does not demonstrate ineffective assistance of counsel").

¶ 46 Defendant also argues that defense counsel was ineffective because he failed to file a formal discovery motion. Defendant contends that he could not make a knowing waiver of a jury trial because he did not know of the exculpatory and impeaching evidence; *i.e.*, the victim's history of violent behavior and mental health records and the State's witness' criminal histories. Defendant also alleges that trial counsel was ineffective because he failed to impeach the State's

witnesses with their criminal histories. Because we have already determined that this evidence was not material, defendant cannot establish that he was prejudiced. Therefore, he cannot establish ineffective assistance of counsel.

¶ 47 Next, defendant argues that defense counsel was ineffective for failing to investigate and interview witnesses who could have testified about defendant's knowledge about the victim's violent background in support of defendant's claim of self defense. Defendant attached six affidavits to support this allegation: (1) Sharena Wagner stated that the victim tried to rape her on the day of the shooting and that she told defendant; (2) Beulah Fultz stated that the victim had a bad temper, especially when he was on drugs, and that defendant knew that he was violent; (3) Karen Wagner stated that the victim fought with Karen's sister and with defendant and that the victim "beat up" defendant; (4) Gloria Fultz stated that in 1997 she told defendant that the victim became violent with Gloria when after she "pushed [the victim] out of" her apartment; the victim grabbed her by the neck and Gloria thought he was going to kill her; (5) Blenda Howard stated that in 1997 the victim hit defendant in the face so that defendant's "nose and lip was busted and [defendant] was bleeding a lot"; and (6) defendant stated that he was 5'6" and weighed 180 pounds and the victim was 6'4" and over 200 pounds and the victim was "really violent when he was on drugs and alcohol," the victim asked defendant to help him kill his father, the victim threatened to kill defendant, and they fought "in the past."

¶ 48 As previously discussed, at trial defendant testified that on the night of the shooting the victim acted crazy and was threatening people but that the victim was acting differently than before. Further, at the end of questioning defendant asked to make a statement. At no time during his testimony did defendant say that the victim had been violent in the past. Therefore, trial counsel could have made a reasonable decision that the evidence at issue would not have been admissible under *Lynch*. *Lynch*, 104 Ill. 2d at 199-200. A counsel's duty to investigate extends

to making reasonable investigations or making a reasonable decision which makes a particular investigation unnecessary. *Strickland*, 466 U.S. at 689. Accordingly, defendant has failed to overcome the strong presumption that defense counsel's action or inaction "might have been the product of sound trial strategy." *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 49 Lastly, defendant argues that he was denied effective assistance of appellate counsel because appellate counsel failed to raise a viable reasonable doubt challenge to defendant's conviction for concealment of a homicidal death. Claims of ineffective assistance of appellate counsel are measured against the same standard as claims of ineffective assistance of trial counsel. *People v. Caballero*, 126 Ill. 2d 248, 269–70 (1989). A defendant must demonstrate both a deficiency in counsel's performance and prejudice resulting from the deficiency. *People v. Edwards*, 195 Ill. 2d 142, 162 (2001), citing *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance was below an objective standard of reasonableness. *Edwards*, 195 Ill. 2d at 163. Prejudice is demonstrated if there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced defendant. *People v. Enis*, 194 Ill. 2d 361, 377 (2000).

¶ 50 Defendant argues that the State failed to prove that the victim had died before defendant put the victim in the trunk. The State argues that it proved that defendant was guilty of concealment of a homicidal death because it proved that the victim was dead when defendant abandoned the vehicle many hours later at 5 or 6 a.m.

¶ 51 Section 9-3.1 of the Criminal Code of 1961 defines the offense of concealment of a homicidal death as such: "A person commits the offense of concealment of a homicidal death

when he conceals the death of any other person with knowledge that such other person has died by homicidal means." 720 ILCS 5/9-3.1 (West 2002). Thus, to obtain a conviction of the offense the State must prove (1) knowledge that a homicidal death has occurred, and (2) an affirmative act of concealment of the death. *People v. Salinas*, 365 Ill. App. 3d 204, 208 (2006). To establish the first element of the offense, the State must prove that the victim was dead when the act of concealment occurred. *Id.*

¶ 52 In this case, the forensic pathologist opined, "I would be surprised if [the victim] was alive an hour after the infliction of the gunshot wound." Marquez testified that he and defendant placed the victim's body in the trunk of the car after Marquez left the apartment and returned about a half hour to an hour later. Thus, a rational trier of fact could have found beyond a reasonable doubt that the victim was dead when defendant placed the victim inside the trunk. Accordingly, defendant cannot establish that he was prejudiced by appellate counsel's failure to raise this issue on direct appeal and, therefore, defendant cannot establish that he was denied effective assistance of appellate counsel.

¶ 53 Defendant cites *Salinas*, 365 Ill. App. 3d 204, to support his argument. In *Salinas*, the defendant set the victim's car on fire after the victim had been shot. However, the coroner testified that the victim had inhaled smoke from the fire and therefore, at the time the car was set on fire the victim was not yet dead. *Id.* at 207, 208. Accordingly, the defendant's conviction for concealment of a homicide was reversed. *Id.* at 208. In contrast, in this case, there was no conclusive evidence that the victim was alive when defendant concealed him in the trunk. Further, the concealment in this case continued until defendant abandoned the car hours later when there was no doubt that the victim was dead. Therefore, *Salinas* is distinguishable from this case.

¶ 54 III. CONCLUSION

¶ 55 The judgment of the circuit court of Kane County is affirmed.

¶ 56 Affirmed.