2012 IL App (2d) 100554-U
No. 2-10-0554
Order filed May 29, 2012



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>VINCENT TREVIZO,<br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Kendall County.<br><br><br><br>No. 01-CF-0118<br><br>Honorable Grant S. Wegner, Judge, Presiding. |

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

**ORDER**

*Held*: The trial court's ruling were not against the manifest weight of the evidence regarding defendants' claims that he was denied his right to testify, his right to a jury trial, his right to file a motion to substitute the trial judge, and his right to effective assistance of counsel. Defendant waived, pursuant to Supreme Court Rule 341(h)(7), the claim that dismissal of certain allegations in his petition for postconviction relief at the second stage of the proceedings was erroneous. Therefore, the dismissal of defendant's postconviction petition is affirmed.

¶ 1 Following a bench trial, defendant, Vincent Trevizo, was found guilty of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2000)), aggravated arson (720 ILCS 5/20-1.1(a)(1) (West 2000)), and concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 2000)). The trial court sentenced

defendant to 35 years' imprisonment for first-degree murder, a concurrent 10-year term for aggravated arson, and a consecutive 5-year term for concealment of a homicidal death. We affirmed defendant's conviction on direct appeal. *People v. Trevizo*, No. 2-03-0754 (2006)(unpublished order under Supreme Court Rule 23). Thereafter, defendant filed a petition for postconviction relief pursuant to section 122-1 of the Post-Conviction Act (the Act)(725 ILCS 5/122-1 (West 2008)), alleging various constitutional errors occurred at trial. At the second stage of the proceedings, the trial court granted the State's motion to dismiss defendant's petition in part and denied it in part. After a third-stage evidentiary hearing on defendant's remaining allegations, the trial court denied the petition. Defendant now appeals, contending that (1) the trial court's finding that he was not denied the right to testify was against the manifest weight of the evidence; (2) the trial court's finding that he was not denied his right to a jury trial was against the manifest weight of the evidence; (3) the trial court's finding that he was denied his right to file a motion to substitute the trial court judge was against the manifest weight of the evidence; (4) he was denied the effective assistance of trial and appellate counsel was against the manifest weight of the evidence; and (5) the trial court erred by granting the State's motion to dismiss in part at the second stage of the proceedings. We affirm.

¶ 2 I. Background

¶ 3 The facts underlying defendant's convictions are detailed in this court's prior order, and only the facts necessary to resolve this appeal will be recited. On May 7, 2001, defendant was charged by indictment with two counts of first-degree murder, one count of concealment of a homicidal death, one count of aggravated arson, and one count of residential arson. The indictment alleged that, on September 3, 2000, defendant strangled the victim, Melissa Plut, thereby causing her death. The indictment further alleged that defendant set fire to the victim's residence while the victim's

body remained inside. Before he was indicted, defendant retained attorneys Tom Breen and Todd Pugh to represent him.

¶ 4 On May 16, 2001, the trial court arraigned defendant. During the hearing, the trial court admonished defendant as follows:

> "You have the right to choose whether your trial is held in front of a judge or in front of a jury. You have the right in this matter to persist in a not guilty plea throughout the proceedings without testifying in this matter. No one can force you to testify. *** You can testify if you choose, but you cannot be forced to testify because of your privilege against self-incrimination *** .

After the trial court asked defendant if he understood his rights, defendant responded "Yes, your Honor." Defendant pleaded not guilty.

¶ 5 Prior to trial, defendant exercised his right to substitute the trial court judge twice. On August 8, 2001, defendant appeared before Judge Wojtecki, who presided over the remainder of the proceedings. At the beginning of that hearing, the trial court stated:

> "I'm going to make a disclosure to you. I don't think it matters, but first of all, I know [Breen]. We were prosecutors together in the Cook County State's Attorneys Office and I consider [Breen] a friend. I don't think that's cause for recusal. Secondly, I want to tell you, [Breen], when I was in the public defender's office here doing some felony cases, this murder came up and I thought our office was going to be on it, I wasn't sure, so I went down and I talked to the State's Attorneys about the case. It was before anybody was ever arrested. Only thing I wanted to know was whether or not we might get it and I can tell you all that I recall—what I recall is that there was a homicide in Joliet, there was a fire, someone

was burned to death, a woman, and the State I think thought the boyfriend did it and that's all I remember. That's all I discussed."

The trial court further stated:

"I don't know anything about this case. I don't even know who the defendant is. *** I wanted to tell you that. I probably would have learned more from the newspaper, I guess."

Thereafter, the following colloquy occurred:

"MS. FLETCHER [Assistant State's Attorney]: You're not going to tell him I have your cat?

THE COURT: She has my cat.

MR. BREEN [Defendant's Attorney]: I don't want to know the story behind that, judge.

MS. FLETCHER: He got it from me originally.

THE COURT: She has my cat and I paid cat support for a while but I'm not anymore. Does that matter?

MR. BREEN: No."

¶ 6 On September 19, 2002, defendant executed a written waiver of a jury trial. Before executing the waiver, the trial court admonished defendant by asking him whether anyone forced him to sign the waiver, promised him anything in return for signing the waiver, whether he was under the influence of any medications, or whether he was under the influence of drugs or alcohol. Defendant answered "no" to each question. The trial court further asked defendant whether he understood that once he executed the jury waiver, the waiver could be undone in only limited situations, and as a

general matter, he could not change his mind. Defendant responded "I understand, your Honor." The trial court found that defendant freely and voluntarily executed the jury waiver.

¶ 7 After a bench trial, the trial court found defendant guilty of one count each of first-degree murder, concealment of a homicidal death, and aggravated arson. Following a sentencing hearing, the trial court sentenced defendant to a total of 45 years' imprisonment. On direct appeal, defendant challenged the sufficiency of the evidence and also contended that the trial court violated his constitutional right to confrontation by precluding him from introducing as evidence the results of a polygraph examination administered upon another suspect. We affirmed defendant's conviction in an order dated May 18, 2006. *People v. Trevizo*, No. 2-03-0754 (2006)(unpublished order under Supreme Court Rule 23).

¶ 8 On July 26, 2007, defendant filed his petition for postconviction relief. Defendant's petition alleged that he was precluded from testifying at trial; he did not knowingly waive his right to a jury trial; Judge Wojtecki was biased and should have recused himself; he was unaware that he could move to substitute the trial court judge for cause; prosecutorial misconduct resulting from the State allegedly failing to disclose materials in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and presenting false testimony; he was denied the effective assistance of trial counsel; and that the State failed to prove defendant guilty beyond a reasonable doubt.

¶ 9 On October 30, 2007, the trial court ruled that defendant's petition was not subject to summary dismissal pursuant to section 122-2.1 of the Act, and appointed counsel to represent defendant. On January 16, 2009, the State moved to dismiss defendant's petition at the second stage of the proceedings. The State argued, in part, that defendant's petition should be dismissed in its entirety because all of the allegations could have been raised on direct appeal, but were not. On June

26, 2009, the trial court denied the State's motion with respect to whether defendant's allegations that he was denied his right to testify at trial, denied his right to trial by jury, was not advised that he could move to substitute the trial court judge for cause, and denied his right to the effective assistance of counsel. The trial court granted the State's motion with respect to the other allegations in the petition, and the matter proceeded to the third stage.

¶ 10 On November 2, 2009, the trial court conducted an evidentiary hearing. Defendant's mother, Carolyn Trevizo, testified that she met with Breen before defendant was indicted and discussed whether defendant would testify. Carolyn testified that Breen said that defendant would not testify unless the trial was "going south." Carolyn testified that she met with Breen and Pugh after defendant was arrested and his attorneys reiterated that defendant was not going to testify. On cross-examination, Carolyn acknowledged that defendant's attorneys never told defendant that he could not testify. Defendant's father, David Trevizo, testified in a substantively similar manner as Carolyn with respect Breen's and Pugh's statements to defendant about testifying only if the trial was "going south." David further testified that he was prepared to testify at trial regarding a suspicious vehicle he noticed in the vicinity of the victim's home the week of the murder, but defendant's attorneys did not call him as a witness.

¶ 11 Defendant's wife, Kelly Trevizo, testified that she met with Breen and Pugh before defendant was arrested and that defendant told his attorneys he wanted to testify at trial. Kelly testified that she could not recall what defendant's attorneys told him about him testifying. Raul Ramirez, defendant's uncle, testified that Breen and Pugh advised defendant to have a bench trial. Ramirez testified that he was "shocked" because he, along with defendant's other family members, thought defendant should have a jury trial. Ramirez testified that neither he, nor defendant's other family members,

expressed displeasure that defendant waived his right to a jury trial because they thought Breen and Pugh "knew what [they were] doing." On cross-examination, Ramirez acknowledged that Breen and Pugh met with defendant's family to explain why they believed a bench trial was better trial strategy.

¶ 12 Defendant testified that he first met with his attorneys before being arrested. Defendant testified that, at that meeting, he was "adamant" that he wanted to testify if there was a trial. Defendant testified that his attorneys told him that he would testify only if the case "went south." Defendant testified that, after being indicted, he spoke with Breen and Pugh "fairly often" about his desire to testify, but they told him that they would make the decision regarding who testified at trial. Defendant testified that he told his attorneys at trial that he wanted to testify, including right after the State rested because he believed a witness for the State changed his testimony. Defendant further testified that, after the trial court judge who presided over the arraignment was no longer presiding over the case, he told Breen and Pugh that he wanted that judge to preside over the trial. Defendant testified that his attorneys told him that he could not substitute the trial court judge because they already moved to substitute the trial court judge twice. Defendant testified that his attorneys never explained to him the difference between substituting a judge as a matter of right compared to substituting a judge for cause. Defendant testified that he told Breen and Pugh that he was "adamant" about removing Judge Wojtecki.

¶ 13 Defendant further testified that his attorneys did not explain to him the difference between a jury trial and a bench trial. Defendant testified that he did not understand the jury waiver before signing it, and that he signed the waiver only because he trusted his attorneys. Defendant testified that he did not know that he had a constitutional right to testify, and that his attorneys did not advise him that he had a constitutional right to testify at trial or to have a jury trial.

¶ 14 On cross-examination, defendant admitted that he never told the trial court that he wanted to testify. Defendant acknowledged that, at the hearing where he executed the jury waiver, the trial court asked him whether he understood that he was waiving his right to a jury trial, and that he acknowledged that he did. Defendant testified that he did not try to reassert his right to a jury trial because he believed that he was not permitted to do so. Defendant acknowledged that the transcripts of his arraignment hearing reflected that the trial court told him he could choose whether to have a jury trial and whether to testify, and that he told the trial court that he understood those rights. Defendant acknowledged that, although he wanted Judge Wojtecki removed, the trial court did not make any pretrial rulings that adversely affected him. Defendant admitted that he wanted Judge Wojtecki removed because he did not understand why "we needed to have Judge Wojtecki when we already had a judge. See, I guess I just didn't understand that *** ." Defendant admitted that his attorneys never used the word "can't" with respect to him testifying, but maintained that they told him that he was not testifying at trial.

¶ 15 Defendant rested after his testimony. The State called Breen. Breen testified that he represented defendant before defendant was indicted, and during defendant's trial and appeal. Breen testified that he discussed the "pros and cons" of a jury trial and a bench trial with defendant and defendant's family. Breen testified that he never told defendant that he would make the decision regarding a jury trial or a bench trial for defedant, and that the decision to have a jury or bench trial "would never be made" by Breen. Breen testified that he had conversations with defendant regarding whether defendant should testify. Breen testified that defendant agreed with his assessment that defendant should not testify. Breen testified that he did not tell defendant that his attorneys would decide whether defendant testified at trial.

¶ 16 Breen further testified that he did not call defendant's father, David, as a witness because David's testimony would not be relevant. Breen testified that before trial, defendant exercised his right to substitute the trial court judge twice, and any further substitution of the trial court judge could only be for cause. Breen testified that he did not recall discussing with defendant whether Judge Wojtecki should be substituted, but that if he felt there was cause to substitute that judge, he would have discussed the matter with defendant. On cross-examination, defendant's postconviction counsel asked Breen if he told defendant that "he would only testify if the case was going south," and Breen acknowledged that was a phrase he would use, but that phrase was being taken out of context.

¶ 17 The State called Todd Pugh, Breen's partner. Pugh testified that he, along with Breen, represented defendant at trial and direct appeal. Pugh testified that he thought defendant should not testify at trial. Pugh testified that he never told defendant that he could not testify. Pugh testified that defendant waived his right to a jury trial after consulting with him and Breen. Pugh testified that he did not tell defendant that the decision of whether defendant would have a jury trial or a bench trial would be made by his attorneys. Pugh testified that after, defendant waived his jury trial, defendant did not express to him that he wanted to reassert his right to a jury trial. Pugh testified that he was unaware of any legal basis to remove Judge Wojtecki for cause. On cross-examination, Pugh denied that, after Carolyn told him defendant looked forward to testifying, he responded "I thought we went over this, he will not be testifying." Pugh testified that he never told defendant that testifying was not an option. Pugh testified that he explained to defendant that his right to a jury trial was ultimately defendant's decision to make.

¶ 18 The trial court denied defendant' petition in a written order dated January 29, 2010. The trial court concluded that, after considering the credibility of the witnesses and the trial record, defendant failed to establish a substantial deprivation of his constitutional right to testify at trial. Specifically, the trial court found "Breen and Pugh to be credible when testifying that they discussed the right to testify with [defendant] *** ." The trial court found that defendant failed to establish a substantial deprivation of a constitutional right with respect to his right to a jury trial. The trial court emphasized the admonitions the trial court gave defendant when he exercised the jury waiver. The trial court further found that defendant did not establish a substantial deprivation of a constitutional right regarding his attorneys' failure to advise him about substituting Judge Wojtecki, and that defendant failed to establish a substantial deprivation of his constitutional rights resulting from the alleged ineffective assistance of trial counsel. Defendant timely appealed after the trial court denied his motion to reconsider.

¶ 19 II. Discussion

¶ 20 Because each of defendant's contentions are brought under the Act, we will begin our analysis with a statutory overview of postconviction proceedings. We will then address each of defendant's contentions in turn.

¶ 21 The Act provides criminal defendants with a statutory remedy who claim that substantial violations of their constitutional rights occurred at trial. *People v. Edwards*, 2012 IL 111711, ¶ 21. The Act, however, is not a substitute to an appeal, "but rather, is a collateral attack on a final judgment." *Id.* With the exception of cases where the death penalty has been imposed, proceedings under the Act are divided into three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). At the first stage, the trial court has 90 days to examine the petition and can summarily dismiss the petition

if it is frivolous or patently with merit; however, the petition must only state the gist of a constitutional claim to survive summary dismissal. *Id.* If the petition survives the first stage, an indigent defendant is appointed counsel, the petition may be amended, and the State can move to dismiss the petition. *Id.* Dismissal at the second stage is proper if the petition, liberally construed in light of the trial record, fails to make a substantial showing of a constitutional violation. *Id.* At the third stage, a defendant may present evidence at a hearing. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2007).

¶ 22 "Throughout the second and third stages of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation." *Id.* When a petition advances to the third stage, and fact-finding and credibility determinations are involved, a reviewing court will not reverse unless the trial court's findings were manifestly erroneous. *People v. Taylor*, 237 Ill. 2d 356, 373 (2010). If no such determinations are necessary—*i.e.*, no new evidence is presented and the issues presented are purely legal—we apply *de novo* review. *Pendleton*, 223 Ill. 2d at 473. Manifest error is error which is clearly evident, plain, and indisputable. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

¶ 23 In addition, in an initial postconviction proceeding, the doctrine of *res judicata* bars the defendant from raising claims that were raised or could have been raised on direct appeal. *People v. Barkes*, 399 Ill. App. 3d 980, 986 (2010) (citing *People v. Blair*, 215 Ill. 2d 427, 433 (2005)). "Procedural default, however, will be excused where (1) fundamental fairness so requires; (2) the alleged waiver stems from the incompetence of appellate counsel; or (3) the facts relating to the claim do not appear on the face of the original appellate record." *People v. Munson*, 206 Ill. 2d 104, 118 (2002). To invoke the fundamental fairness exception, a defendant must satisfy the cause-and-

prejudice test by objectively showing that defense counsel's efforts to raise the claim on direct review were impeded and that the error so infected the entire trial that the defendant's conviction violated due process. *People v. Simpson*, 204 Ill. 2d 536, 552 (2001) (citing *People v. Franklin*, 167 Ill. 2d 1, 20 (1995)).

¶ 24 Guided by these principles, we now turn to the merits of defendant's contentions.

¶ 25 A. Right to Testify At Trial

¶ 26 Defendant's first contention is that the trial court's ruling that he was not denied his right to testify at trial was against the manifest weight of the evidence. Defendant argues that the evidence established at the evidentiary hearing demonstrated that his trial counsel prevented him from testifying at trial. The State counters that the trial court's ruling was consistent with the manifest weight of the evidence because Breen and Pugh testified that, although they believed defendant should not testify, the ultimate decision was left to him.

¶ 27 In the current matter, the trial court's determination that defendant failed to establish a deprivation of a his constitutional right to testify at trial was not manifestly erroneous. Initially, we note that the transcript of defendant's arraignment reflects that the trial court admonished defendant by informing him "[n]o one can force you to testify. *** You can testify if you choose, but you cannot be forced to testify because your of your privilege against self-incrimination." Therefore, the trial court informed defendant at the outset that he had a choice to testify, and the choice whether to testify was his to make.

¶ 28 Moreover, the transcript of the evidentiary hearing reflects that the trial court was presented with conflicting evidence as to whether defendant wanted to testify at trial, informed his trial attorneys of that desire, and that his attorneys failed to advise him that he could ultimately make the

decision. Specifically, defendant testified that, when he first met with his attorneys, he was adamant that he wanted to testify at trial. Defendant further testified that he spoke fairly often with Breen and Pugh about his desire to testify, but that his attorneys told him that they would make the decisions regarding who testified. However, Breen testified that defendant agreed with his advice that he should not testify, and that he never advice defendant the decision would be made by his attorneys. Pugh's testimony was similar Breen's.

¶ 29 Based on the record, which reflects that the trial court considered conflicting testimony, we find no basis for upsetting the trial court's evaluation of the witnesses' credibility. See *People v. Taylor*, 237 Ill. 2d 356, 379 (2010) (affirming the denial of a postconviction petition and deferring to trial court's credibility determinations); see also *People v. Griffin*, 109 Ill. 2d 293, 307 (1985) (reversing appellate court for substituting its credibility determination for that of the trial court in a postconviction petition proceeding). Accordingly, the trial court's determination that defendant failed to demonstrate a substantial deprivation of a constitutional right based on his failure to testify was not manifestly erroneous.

¶ 30 B. Jury Waiver

¶ 31 Defendant's next contention is that the trial court erred in ruling that he failed to demonstrate a substantial deprivation of a constitutional right resulting from his execution of the jury waiver. Defendant emphasizes that his testimony at the evidentiary hearing demonstrated that he did not understand the consequences of executing the jury waiver. According to defendant, the "undisputed fact" is that neither Breen, Pugh, or the trial court's admonitions informed him that he had a constitutional right to a jury trial, and that it was "his decision alone to waive said right."

¶ 32 Here, our careful review of the record reflects that the trial court did not make an indisputable error in ruling that defendant knowingly and voluntarily executed the jury waiver. During defendant's arraignment, the trial court admonished defendant that "[y]ou have the right to choose whether your trial is held in front of a judge or in front of a jury." During the September 19, 2002, hearing, the trial court asked defendant a series of questions and considered defendant's responses before it accepted the executed jury waiver. Defendant represented to the trial court that no one had forced him to sign the waiver or promised him anything in return for signing the waiver and that he was not under the influence of medications, drugs, or alcohol at that hearing. Defendant further represented to the trial court that he understood that, once he executed the waiver, it could only be undone in limited circumstances. Finally, the trial court was presented with conflicting testimony regarding whether Breen and Pugh fully informed defendant about his right to a jury trial. Defendant testified that his attorneys never explained to him the difference between a jury trial or a bench trial, and that he did not reassert his right to a jury trial because he did not believe he was permitted to do so. Conversely, Breen testified that he discussed the "pros and cons" of a bench trial with defendant and defendant's family, and Pugh testified that defendant did not express a desire for a jury trial after executing the jury waiver. Ramirez, defendant's uncle, testified that, although he was "shocked" that Breen and Pugh recommended a bench trial, he did not express displeasure that defendant waived his right to a jury trial because he and defendant's other family members trusted Breen and Pugh.

¶ 33 As with the previous issue, the trial court apparently found Breen's and Pugh's testimony more credible than defendant's testimony. See *Taylor*, 237 Ill. 2d at 378. We find no basis in the record to upset that credibility determination. Therefore, the trial court's determination that

defendant failed to demonstrate a substantial deprivation of a constitutional right resulting from his execution of the jury waiver did not constitute manifest error.

¶ 34 C. Substitution of Trial Judge for Cause

¶ 35 Defendant's third contention is that the trial court's determination that he failed to demonstrate a substantial deprivation of his constitutional right to a fair trial as a result of Breen and Pugh failing to file a motion to substitute Judge Wojtecki for cause was manifestly erroneous. In support of this contention, defendant argues that his attorneys never explained to him the difference between substituting a judge as a right compared to substituting a judge for cause. Defendant further asserts that Judge Wojtecki should have recused himself *sua sponte* based on the appearance of impropriety.

¶ 36 In the current matter, the trial court's determination that defendant did not establish a substantial deprivation of a constitutional right based on his attorneys' failure to recommend a motion to substitute the trial court judge for cause did not constitute manifest error. Section 114-4(d) of the Code of Criminal Procedure of 1963 (the Criminal Procedure Code) (725 ILCS 5/114-5(d) (West 2008)) provides that a defendant "may move at any time for substitution of judge for cause, supported by affidavit." *Id.* During the evidentiary hearing, defendant acknowledged that Judge Wojtecki made disclosures on the record when he was initially assigned to the case. Defendant testified that he spoke with Breen and Pugh about having Judge Wojtecki removed because he believed Judge Wojtecki had a friendship with the assistant State's attorney. Defendant testified that his attorneys told him that he could not seek to have Judge Wojtecki removed because he previously had two judges substituted. Defendant testified that he "just took their word for it." On cross-examination, however, defendant admitted that his reason for wanting Judge Wojtecki

removed, in addition to the judge's disclosures, was because he did not understand why "we needed to have [Judge Wojtecki] when we already had a judge. See, I guess I just didn't understand that *** ." Defendant further acknowledged that, after he spoke with Pugh regarding his concerns about Judge Wojtecki, he did not seek a new lawyer.

¶ 37 In addition, Breen testified that he did not recall speaking with defendant regarding whether Judge Wojtecki should be substituted, but that he would have discussed the matter with defendant if he thought there was cause to substitute the judge. Breen testified on cross-examination that defendant and his family were "very comfortable" with Judge Wojtecki. Pugh testified that defendant never indicated that he wanted Judge Wojtecki removed. On cross-examination, Pugh denied that defendant "expressed his hesitation with Judge Wojtecki hearing the case" after Judge Wojtecki made his disclosures.

¶ 38 Pursuant to the above, we find no reason to substitute our determination of credibility for that of the trial court's. The trial court observed and heard the witnesses testify, and was in a better position to engage in credibility determinations than this court. See *Taylor*, 237 Ill. 2d at 376. The trial court's determinations do not amount to indisputable error, and therefore, its decision that defendant failed to demonstrate a substantial deprivation of a constitutional right resulting from Breen and Pugh failing to file a motion to substitute Judge Wojtecki for cause was not manifestly erroneous.

¶ 39 Finally, with respect to defendant's assertion that Judge Wojtecki should have *sua sponte* recused himself, we find that argument waived. Unlike defendant's assertion that his trial counsel failed to properly advise him about removing a judge for cause, which involved matters outside of the original appellate record, this argument was apparent from record of the trial court proceedings.

Defendant testified at the evidentiary hearing that Judge Wojtecki disclosed that he was Breen's former colleague at the Cook County State's Attorney's office, made previous out-of-court remarks regarding this case, and that the assistant State's attorney had his animal. These disclosures were clearly in the record on direct appeal. As a result, defendant's failure to raise that argument on direct appeal is subject to the doctrine of *res judicata*. See *Barkes*, 399 Ill. App. 3d at 986. Moreover, even if we were to reach the merits, defendant would not prevail because, in order to prevail on a motion for substitution for cause, defendant's allegations must demonstrate animosity, prejudice, hostility, ill will, distrust, predilection, or arbitrariness. *People v. Harvey*, 279 Ill. App. 3d 518, 523 (2008). Defendant's allegations demonstrated none of the above.

¶ 40 D. Ineffective Assistance of Trial and Appellate Counsel

¶ 41 Defendant's fourth contention is that the trial court's determination to deny him postconviction relief on the basis that he was not denied the effective assistance of trial counsel was against the manifest weight of the evidence. Defendant's claim is premised on his attorneys' decision not to call defendant's father, David, as a witness. According to defendant, David would have testified that he saw the victim's former boyfriend, Michael Hir, twice during the week prior to the victim's murder "in the wee hours of the morning." Defendant maintains that "Hir was overwhelmingly more likely to have murdered [the victim], and for counsel not to have called David to "make a viable defense therefrom[] is incompetency at the highest level." Defendant also maintains that his trial attorneys were ineffective because they failed to advise him of his right to testify, his right to a jury trial, and his right to bring a motion to substitute Judge Wojtecki for cause. The State counters that his attorneys' decision not to call David as a witness was a matter of trial

strategy, and further, defendant failed to show that he was prejudiced by not testifying, waiving his right to a jury trial, and not filing a motion to substitute Judge Wojtecki for cause.

¶ 42 To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance was deficient and (2) the deficient performance prejudiced defendant such that he or she was deprived a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting *Strickland*). To establish the first prong, a defendant must show that his counsel's performance was so inadequate that counsel failed to function as the "counsel" guaranteed by the sixth amendment. *People v. Nunez*, 325 Ill. App. 3d 35, 42 (2001). "[T]he defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *** Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *People v. Smith*, 195 Ill. 2d 179, 188 (2000). A defendant is entitled to reasonable, not perfect representation, and in recognition of the variety of factors that go into determinations of trial strategy, claims of ineffective assistance of counsel must be judged on a circumstance-specific basis viewed at the time of counsel's conduct, not in hindsight. *People v. Wilborn*, 2012 IL App (1st) 092802, ¶ 79. Thus, decisions concerning which witnesses to call at trial and what evidence to present on a defendant's behalf ultimately rest with trial counsel and are afforded great deference on review. *Id.*

¶ 43 To establish the prejudice prong, a defendant must prove that there was a "reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Smith*, 195 Ill. 2d at 188. A reasonable probability that the outcome would have been different is a probability sufficient to undermine confidence in the outcome, or in other words, counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair.

*People v. Evans*, 209 Ill. 2d 194, 220 (2004). Nonetheless, a "reasonable probability of a different result" is not merely a "possibility of a different result." *Id.* Failure to satisfy either *Strickland* prong precludes an ineffective-assistance-of-counsel finding. *Nunez*, 325 Ill. App. 3d at 42.

¶ 44 Turning first to defendant's arguments that he was denied the effective assistance of counsel as a result of his attorneys not advising him of his right to testify, right to a jury trial, and right to file a motion to substitute Judge Wojtecki for cause, defendant has failed to establish either the first or second *Strickland* prong with respect to each assertion. Initially, defendant failed to demonstrate prejudice as a result of his attorneys not filing a motion to substitute Judge Wojtecki for cause. Defendant was required to show actual prejudice on the part of Judge Wojtecki, *i.e.*, bias or prejudice from an extrajudicial source that produced an opinion on the merits by the judge that was based on something other than what the judge learned from his participation in the case. See *People v. Hayden*, 338 Ill. App. 3d 298, 309 (2003) (citing725 ILCS 5/114-5(d) (West 2000)). Defendant points to no particular ruling by Judge Wojtecki demonstrating an actual bias or prejudice toward him. Instead, defendant admitted on cross-examination that he could not identify a ruling by Judge Wojtecki before trial that prejudiced him. Because the record is devoid of any indication that Breen or Pugh had proof of actual prejudice on the part of Judge Wojtecki, either before, during, or after trial, defendant's attorneys were not ineffective for failing to move to substitute judge. See *Hayden*, 338 Ill. App. 3d at 310 (rejecting an ineffective-assistance-of-counsel claim premised on failing to file a motion to substitute the trial court judge for cause).

¶ 45 In addition, defendant failed to establish the second *Strickland* prong with respect to his argument that waiving his right to a jury trial constituted the ineffective assistance of counsel. Defendant has not argued, much less demonstrated, that a jury would have made any different

findings or conclusions than the trial court did. See *People v. Elliot*, 299 Ill App. 3d 766, 776 (1998). Finally, defendant's attorneys were not ineffective for advising him not to testify. "As a general rule, advice to testify is a matter of trial strategy that does not amount to ineffective assistance of counsel unless counsel refused to allow the defendant to testify." See *People v. Coleman*, 2011 IL App (1st) 091005, ¶ 29. As noted above, the trial court's determination that Breen and Pugh did not prevent defendant from testifying was consistent with the manifest weigh of the evidence. Further, the record reflects that Breen and Pugh gave defendant their professional opinions, based on the evidence in the case, that defendant should not testify unless the case was going "south." That statement cannot be the basis of a claim that the advice was not objectively reasonable, as those statements amount to nothing more than their professional opinions based on the circumstances of the case. See *id.* ¶ 31.

¶ 46 Next, defendant failed to establish the first *Strickland* prong with respect to Breen or Pugh not calling David Trevizo as a witness. A defendant can overcome the strong presumption that defense counsel's choice of strategy was sound if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy. *People v. King*, 316 Ill. App. 901, 916 (2000).

¶ 47 Here, Breen's decision not to call David Trevizo on the basis that his testimony was irrelevant was not beyond the realm of reasonable defense strategy. David's testimony was limited to seeing Hir in the area during the week of the murder, but not on the night of the murder. Therefore, there is no indication in the record that, had Breen called David to testify, David's testimony would be supported by other evidence linking Hir to the offenses. See *People v. Arroyo*, 339 Ill. App. 3d 137, 157-58 (2003); *cf. King*, 316 Ill. App. 3d at 916 (finding trial counsel

ineffective for failing to call a potential witness because there was no evidence at the postconviction evidentiary hearing providing a reasonable explanation for not calling a potential witness).

¶ 48 E. Allegations Dismissed at Second-Stage Proceeding

¶ 49 Defendant's final contention is that the trial court erred in dismissing without an evidentiary hearing, the other allegations in his postconviction petition.

¶ 50 We find this contention waived pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). "A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented." *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1994). Bare contentions without argument or citation to authority do merit consideration on appeal, and as a result, are deemed waived. *People v. Perea*, 347 Ill. App. 3d 26, 37 (2004).

¶ 51 Defendant's argument supporting his final contention is limited to two paragraphs with scant citation to authority. In lieu of developed argument, he argues that he "cited to legal authorities, which will allow this [c]ourt to make a ruling on the merit[s], and order a new trial, or alternatively remand for an evidentiary hearing, based on the [r]ecord, attached [p]etition as cited above, which this court must take judicial notice thereof." Because defendant failed to develop this argument in any meaningful manner, we deem that his contention that the trial court erred in dismissing part of his petition without an evidentiary hearing forfeited. See *id.* at 37-38.

¶ 52 III. Conclusion

¶ 53 For the foregoing reasons, we affirm the judgment of the circuit court of Kendall County.

¶ 54 Affirmed.