2020 IL App (5th) 170279-U

NO. 5-17-0279

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 11-CF-596
	)	
DAVID N. MARSH,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Moore and Boie concurred in the judgment.

ORDER

¶ 1 *Held*: Order dismissing postconviction petition affirmed where defendant did not establish ineffective assistance of trial counsel as he failed to show that counsel's performance arguably fell below an objective standard of reasonableness and that he was arguably prejudiced by counsel's performance and where defendant did not establish ineffective assistance of appellate counsel for failure to raise on direct appeal the ineffective assistance of trial counsel claims, because those claims were found to be without merit. Collateral estoppel does not apply, as issues asserted in instant appeal are not the same as those asserted on direct appeal.

¶ 2 The defendant, David N. Marsh, appeals the June 30, 2017, order of the circuit court of Jackson County that summarily dismissed his postconviction petition. In this

appeal, the defendant raises claims of ineffective assistance of trial counsel and appellate counsel. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On or about November 4, 2011, the defendant was arrested for burglary. On November 4, 2011, a felony information was filed, charging the defendant with burglary. On November 15, 2011, a first-amended information was filed, charging the defendant with two counts of burglary. Count I alleged that, on October 31, 2011, the defendant and Terrell W. White entered Robertson Vending, located at 1764 North Illinois Avenue in Carbondale, knowingly and without authority, with the intent to commit a theft therein. Count II alleged that, on November 2, 2011, the defendant and Terrell W. White entered Arnold's Market, located at 2141 South Illinois Avenue in Carbondale, knowingly and without authority, with the intent to commit a theft therein.

¶ 5 On December 2 and 3, 2013, the defendant was tried before a jury on both counts. During *voir dire*, the circuit court questioned each potential juror individually. The circuit court asked questions regarding the four principles of criminal law referenced in Illinois Supreme Court Rule 431(b): (1) the defendant's presumption of innocence, (2) the State's burden to prove the defendant guilty beyond a reasonable doubt, (3) the fact that a defendant need not testify or produce any evidence at all, and (4) that the defendant's refusal to testify could not be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012).[1] When the circuit court questioned Marsha Conley as a potential juror, she denied

[1]The defendant and the State agreed on direct appeal that the circuit court failed to ask whether the potential jurors understood and accepted each principle.

knowing the defendant and denied knowing anything that would prevent her from being fair and impartial. Conley was ultimately selected as a juror.

¶ 6 At the trial, Officer Brody Jeters of the Carbondale Police Department testified that, in the early morning of October 31, 2011, he was dispatched to Robertson Vending regarding an alarm. He noted that he saw that the front door had been busted open, and he found only other officers at the scene. Jeters helped to secure the building, and he found large garden shears and a screwdriver that appeared to have been used in the burglary as well as a partial footprint. Jeters testified that a crime scene investigator collected the tools and analyzed the footprint.

¶ 7 Support Services Sergeant Corey Kemp of the Carbondale Police Department testified that, on October 31, 2011, he was dispatched to the Robertson Vending alarm call. Kemp testified that he assisted the owner in obtaining the video surveillance of the burglary. He explained that the store had a DVR system, which recorded all video to a hard drive, and he was able to choose the date and time of the video to be copied. Kemp testified that he chose the events that were to be copied and that the video captured the actual burglary in progress. He copied the relevant recordings to a USB drive that did not alter the video. Kemp testified that he then converted the copy to a DVD, which he identified in court.

¶ 8 Rickey Robertson, the owner of Robertson Vending, testified that Robertson Vending stocks and services coin-operated vending machines. He testified that the business stored its money in a "safe room," which was reinforced, had a security system and cameras, and had a large safe as well as some filing cabinets where bags of quarters

were stored. He stated that, on October 31, 2011, he received a call that the business's alarm system had been triggered. He went to the business, where he found that the front door was busted open. Robertson testified that the door was not damaged when he closed the business the previous day, and he had not given anyone permission to enter after hours. He testified that he walked through the business and found that someone also broke into the safe room by busting the deadbolts out of its door, and he noticed that some of the change bags were missing from the filing cabinet. Robertson testified that the change bags were off-white cotton bags similar to money bags at the bank, and that "Robertson Vending" was printed on the bags. However, the bags were turned inside out, and therefore the printing was on the inside of the bags. Robertson reported that the stolen bags contained approximately $350 in quarters.

¶ 9 Robertson testified that the surveillance system had cameras in several areas, including the safe room and front entrance, and was continuously recording and working properly on October 31, 2011. At that time, Robertson viewed the DVD recording of the burglaries identified by Kemp. Robertson stated the footage was dated October 31, 2011, and began at "1 minute, 19 seconds after midnight." The footage was admitted and published to the jury. The footage showed two individuals, who Robertson was unable to identify, in the front entrance. One of the individuals wore a hoodie with the hood up and the other had a large Afro. The two individuals were then seen attempting to break into the safe room. The individuals left the building at "2 minutes and 29 seconds after midnight" and returned at "15 minutes and 41 seconds after midnight." The individuals

were seen breaking into the safe room, taking change bags from the filing cabinets, and leaving at "16 minutes and 40 seconds after midnight."

¶ 10 Jeff Buritsch, a crime scene investigator for the Carbondale Police Department, testified that he was dispatched to Robertson Vending on October 31, 2011, to process a crime scene. Buritsch conducted a cursory review of the business and examined the video surveillance. He determined that two individuals entered the business by forcing open the doors. Supporting his theory, he identified four photographs showing the damage to the doors. One photograph was published to the jury, and Buritsch used it to show that the damage to the door proved that it was forced open by an outside blow, rendering the door inoperable. Buritsch stated that he found the striker plate and bolts of the door inside the business, and he identified photographs showing where these parts had landed. Buritsch testified that he examined the door to the safe room. He identified photographs showing the location of a pair of hedge clippers and a claw hammer. He testified that he collected these items at the scene, and he identified the items in court. He testified that damage to the items was consistent with them having been used as pry tools. Buritsch added that he found a screwdriver which he also identified in court. Buritsch testified that the damage to the door of the safe room led him to conclude that the door had been forced open by being pried at the striker plate. He testified that he entered the safe room, where he noticed filing cabinets that were open.

¶ 11 Officer William Bethel of the Carbondale Police Department testified that, on November 2, 2011, at about 6 a.m., he was dispatched to Arnold's Market in Carbondale on a burglary call. Upon arrival, he noticed that the front window of the store was broken,

and an ATM inside the store had been knocked over. He testified that he worked with other officers to search the building to see if anyone remained, but he found no one still inside. Bethel testified that he saw a cellphone located outside the front of the store on the pavement, but he did not collect the cellphone, nor did he conduct a crime scene investigation.

¶ 12 Rodney Kroenlein, the owner of Arnold's Market, testified that he was called in the early morning of November 2, 2011, regarding a break-in at the store. He arrived at the store to find the front window broken and an ATM leaning over. He walked through the store to determine if anything had been stolen, but it appeared that only the ATM had been moved. Kroenlein testified that the store had a 16-camera video surveillance system, which activated when it detected motion and recorded footage to a DVR located in the store. He testified that, on November 2, 2011, he reviewed the footage, found the surveillance system was functioning normally, and saw that it captured the breaking of the window and the moving of the ATM. Kroenlein copied the footage to a DVD, which he identified in court. The DVD was admitted into evidence and published to the jury. Kroenlein testified that the footage was dated November 2, 2011, at 3:10 a.m. The video depicted two individuals pull up to the store in a white van, break the front window with a tool, enter the store, and attempt to put the ATM through the window. The individuals then abandoned the ATM, returned to the van, and left at 3:12 a.m. Kroenlein testified that he did not recognize the individuals, nor could he see an identifiable face in the footage.

¶ 13 Officer Jesse Ital of the Carbondale Police Department testified that, on November 2, 2011, he was dispatched to Arnold's Market to investigate the broken window and collect evidence. Ital testified that he noticed a cellphone lying on the ground underneath the window and an ATM leaning against the window. He identified a photograph showing the cellphone in front of the doors of the store. Ital testified that he collected the cellphone as evidence, and he identified it in court. Based on his review of the crime scene, Ital believed the individuals had entered the foyer through the broken window but went no further into the store. Ital testified that he found a rubber mallet—which appeared to be the tool used to break the window—lying on the floor behind the ATM. He identified a photograph showing where the mallet was located. Ital testified that he collected the mallet, and he identified it in court.

¶ 14 Lieutenant Matthew Dunning of the Carbondale Police Department testified that he became involved in the Arnold's Market investigation at around 8 a.m. on November 2, 2011. Dunning identified the cellphone previously identified by Ital as having been at the scene. He testified that he reviewed the contact list and found a contact named "Mom." Dunning later determined that "Mom" was Phyllis Marsh and she had a relationship with the defendant.

¶ 15 Detective Aaron Baril of the Carbondale Police Department testified that he was involved in the investigation at Arnold's Market on November 2, 2011. He testified that he reviewed the video surveillance and determined that the individuals responsible arrived in a white Dodge Caravan. Baril located the vehicle on November 2, 2011, and determined that it belonged to Sylvia Steinmetz. Baril identified photographs of the van

from the date in question which showed that all the back seats had been removed and depicted shards of glass throughout the van.

¶ 16 Baril testified that he spoke with the defendant on November 3, 2011, and learned that the defendant came to Carbondale on November 2, 2011, to smoke crack cocaine. The defendant told Baril that he borrowed his girlfriend Sylvia's van and went to visit his friends, Tommy and Kim. Baril identified these individuals as Sylvia Steinmetz, Thomas O'Grady, and Kim Smith. The defendant told Baril that he fell asleep at Kim's residence around 11 p.m. on November 1, 2011, and two white males he did not know took the van to get cigarettes before returning it. The defendant told Baril that his cellphone was in the van, and he believed the two white males took it because he had since lost it. The defendant claimed that the van was returned around midnight on November 2, 2011, and he returned it to Sylvia Steinmetz in Vienna. Baril testified that he located the van at Sylvia Steinmetz's residence. He indicated that, at the time he questioned the defendant, the defendant had a bandaged cut on his left ring finger. Baril testified that, on November 14, 2011, he arrested Terrell White for both the November 2, 2011, Arnold's Market burglary and the October 31, 2011, Robertson Vending burglary.

¶ 17 Sylvia Steinmetz testified that she owned a 2000 Dodge Caravan, which she allowed the defendant to borrow around the time of November 2, 2011, and the defendant returned it to her before 6 a.m. on November 2, 2011.

¶ 18 Kim Smith testified that, around October 31, 2011, she was working at Sidetracks in Carbondale when the police picked her up from her job and transported her to the Carbondale police station regarding a warrant for failure to pay fines on a forgery charge.

Smith testified that her employer hosted a Halloween party on October 31, 2011, and she took costume supplies home, including a black Afro wig. She testified that the defendant and Terrell White visited her around that time. She stated that she had known the defendant and White for over 15 years. She testified that the defendant and White stayed at her residence off and on for three or four days. Smith testified that they arrived at her residence in a white van, which she identified via photograph as Steinmetz's van. Smith testified that, during that time, the three of them smoked crack cocaine. She testified that the defendant and White left and returned several times during this period. On one occasion, the defendant asked her for the black Afro wig, which she gave to him. On that occasion or another, the defendant asked if she had any tools, and she gave him a rubber mallet. She identified the rubber mallet recovered from Arnold's Market as the rubber mallet she gave to the defendant. Smith testified that, on one occasion, the defendant called her about 30 minutes after leaving and asked if her drug dealer "would take a hundred dollars in quarters." She added that the defendant arrived shortly thereafter with an off-white canvas bag containing about $94 in quarters. She did not recall any writing on the bag.

¶ 19 Smith was shown portions of the Robertson Vending surveillance tape. She identified the Afro on one of the individuals on the tape as being the same Afro wig she gave to the defendant. She identified the defendant as the individual who reached into the filing cabinet and removed bags of quarters. She claimed that she had "known [the defendant] 20 years" and could identify his face "from the nose down." She noted that

"the little goatee, the little mustache that he has been wearing for years [could be seen] from the middle of his nose down."

¶ 20 Smith testified on cross-examination that she cried when the police picked her up because "[she] was scared because [she] knew they were taking [her] freedom." She admitted that she wanted to cooperate so that the police would not arrest her. However, she stated that she would have cooperated either way. She admitted she is an addict, but she was not using drugs at the time of the trial. Smith testified on redirect that there were no men other than the defendant and White at her residence during the relevant time. She denied telling the defendant that two men took the van, nor did she see anyone other than the defendant or White take the van. She testified that Detective Baril, who questioned her, never threatened her, and she cooperated with him because "[t]here was no reason for [her] not to cooperate."

¶ 21 Terrell White testified that, while he was originally a defendant in this case, he made an open plea. He testified that he did not take a deal, and the prosecutor recommended that the court sentence him for four years. However, the court sentenced him to probation instead. White testified that, around October 31, 2011, he met with the defendant and ended up at Smith's residence "[d]rinking [and] smoking [crack cocaine]." He testified that only he, the defendant, and Smith were present. He testified that he was at Smith's residence "[o]ff and on" for three or four days and, during that time, he and the defendant went to Robertson Vending in a "White Chrysler" van. He then identified via photograph Steinmetz's van as the van they drove to the business. White testified that they went to the business to break in with a pry bar. He stated that he and the defendant

both participated in the break-in. White testified that they looked around the office for money so they could buy "[g]as, cigarettes, [and] beer." White testified that he wore the Afro wig acquired from Smith. He testified that he and the defendant left Robertson Vending and returned 10 or 15 minutes later "because [they] didn't get nothing the first time." He testified that they kicked in the door to the room "where they kept all the *** coins and stuff." He noted the room contained filing cabinets and a safe. He testified that he kicked in the door, and the defendant took canvas bags of coins from the filing cabinets. He testified that they used the money to buy gas, cigarettes, and drinks, then took what was left to Smith's residence and used it to buy crack cocaine. White reviewed the surveillance tape from Robertson Vending and identified himself and the defendant. He noted the tape depicted that the defendant also attempted to kick in the door to the safe room.

¶ 22 White testified that he and the defendant also went to Arnold's Market during this timeframe and they both intended to take the ATM from Arnold's Market "[t]o get the money." He testified that they went to the store, broke a window, attempted to move the ATM, and left when they discovered the ATM was too heavy. He testified that they arrived in Steinmetz's van and used the rubber mallet from Smith's residence to break the window. White reviewed the surveillance tape from Arnold's Market and identified both himself and the defendant. He noted that the tape depicted the defendant breaking the window with the rubber mallet. White testified that the defendant had his cellphone prior to them breaking in at Arnold's Market, but the defendant could not find his cellphone after they left. He testified that he slept at Smith's residence that night.

¶ 23 White conceded on cross-examination that he made statements to Detective Baril that may contradict his testimony. He testified that he told Baril that the defendant pried the door open to Robertson Vending and he got the bag of quarters from a vending machine. However, White clarified that they broke into "[o]ne vending machine. We broke into Robertson." He did not recall telling Baril that it was the defendant who wore the Afro wig at Robertson Vending.

¶ 24 The defendant recalled Detective Baril to the stand. Baril testified regarding White's statements when questioned on November 14, 2011. He indicated that White told him that the defendant—not both of them—pried open the door at Robertson Vending, that they obtained the money from Robertson Vending from a "[v]ending machine," and that they broke into only one machine. Baril did not recall that White said the money came from a filing cabinet. Baril testified that White could not recall where he slept after leaving Arnold's Market and that White told him the defendant was wearing "[a] wig or something" during the break-in at Robertson Vending. Baril testified that White did not know at that time if the defendant had a cellphone and did not remember the defendant leaving anything behind at Arnold's Market. However, Baril reported that the defendant's DNA was found on the cellphone. He was unsure if anyone else's DNA was found on the cellphone. On cross-examination, Baril testified that he asked White, "What about a cellphone?" White responded, "I don't have a cellphone."

¶ 25 At the end of the trial, the jury found the defendant guilty on both counts. On March 14, 2014, the circuit court sentenced the defendant to 20 years' imprisonment on each count, to be served concurrently, and 3 years of mandatory supervised release. The

circuit court also awarded the defendant 94 days in presentence custody credit. The defendant filed a timely notice of appeal.

¶ 26 On direct appeal, the defendant argued that the circuit court's admonitions to the venire violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), but the error was not properly preserved. The State conceded that the circuit court violated Rule 431(b) because it did not specifically question all potential jurors whether they understood and accepted these four principles as required by the rule and by *People v. Zehr*, 103 Ill. 2d 472, 477-78 (1984). The defendant argued that this admitted error was reversible under the plain-error doctrine because the evidence was closely balanced.

¶ 27 On November 21, 2016, this court entered an order affirming the circuit court's judgment in part and modifying it in part. *People v. Marsh*, 2016 IL App (5th) 140155-U, ¶¶ 36-37. We determined that the circuit court's violation of Rule 431(b) was not reversible under the plain-error doctrine because the evidence was not so closely balanced that the violation threatened to tip the scales of justice against the defendant. *Id*. ¶¶ 31-33. Accordingly, we affirmed the circuit court's judgment to that regard and modified the mittimus by granting the defendant an additional 127 days of presentencing credit based the parties' joint motion requesting the same. *Id*. ¶¶ 33-34.

¶ 28 On May 22, 2017, the defendant filed a *pro se* postconviction petition in which he raised, *inter alia*, four claims that he raises in the instant appeal. First, the defendant argued that his trial counsel was ineffective for not exercising a peremptory challenge on an allegedly biased juror—Marsha Conley—because the defendant claimed he and Conley attended Alcoholics Anonymous [AA] meetings together. Second, the defendant

argued that his trial counsel was ineffective because he solicited damaging evidence which proved the defendant's DNA was present on the cellphone that was found outside Arnold's Market. The defendant's third and fourth arguments alleged ineffective assistance of appellate counsel for failing to raise on direct appeal the two arguments of ineffective assistance of trial counsel.

¶ 29 On June 30, 2017, the circuit court entered an order by docket entry finding, *inter alia*, that the defendant's trial counsel's failure to strike juror Conley was not objectively unreasonable and, in light of the evidence presented, the defendant could not show that the failure to strike Conley prejudiced the defense or affected the outcome of the trial. The circuit court further found that the defendant's complaints regarding the DNA evidence did not support the ineffective assistance of counsel claims, as they were matters of trial strategy. The circuit court rejected the defendant's arguments regarding ineffective assistance of appellate counsel, given its findings that trial counsel was not ineffective. The circuit court concluded that the defendant's *pro se* postconviction petition was patently without merit and summarily dismissed it. See 725 ILCS 5/122-2.1(a)(2) (West 2016). After the circuit court denied his motion to reconsider, the defendant filed, *pro se*, a timely notice of appeal on July 26, 2017. Subsequently on August 11, 2017, the Office of the State Appellate Defender filed an amended notice of appeal.

¶ 30 ANALYSIS

¶ 31 The issues the defendant raises on appeal mimic the following claims in his postconviction petition: (1) whether the defendant's trial counsel provided ineffective

assistance by allowing a potentially biased juror to sit on the jury; (2) whether the defendant's trial counsel provided ineffective assistance by eliciting damaging evidence against the defendant at the trial; and (3) whether the defendant's appellate counsel was ineffective for failing to raise on direct appeal the said claims of ineffective assistance of trial counsel.

¶ 32 I. Collateral Estoppel

¶ 33 As a threshold matter, we review the applicability of a case cited by the State, which is determinative of whether we will address the merits of the appeal. The State does not respond to the issues posed by the defendant, but contends, rather, that this court's previous decision in the direct appeal collaterally estops the defendant from asserting his ineffective assistance of counsel claims in the instant appeal. The State cites *People v. Wright*, 2013 IL App (4th) 110822, ¶ 11, in which the defendant was convicted and sentenced to 55 years in prison for first degree murder. The defendant in *Wright* argued on direct appeal, *inter alia*, that the circuit court erred in sentencing him by considering two circumstances as aggravating factors. *Id*. ¶ 12. Although the defendant conceded that the issue would normally be forfeited because his trial counsel failed to raise it in a motion to reduce sentence, he requested review under the plain-error doctrine. *Id*. ¶ 13. The reviewing court in the direct appeal found no plain error because the evidence at the sentencing hearing was not closely balanced. *Id*.

¶ 34 The defendant in *Wright* subsequently filed a postconviction petition, alleging that his trial counsel provided ineffective assistance by failing to preserve the circuit court's consideration of the aggravating factors at the sentencing hearing and alleging that his

appellate counsel provided ineffective assistance on direct appeal by failing to raise the ineffective assistance of trial counsel claims. *Id.* ¶ 15. The circuit court in *Wright* summarily dismissed the defendant's postconviction petition as frivolous and patently without merit. *Id*. ¶ 16. The reviewing court held on appeal that the doctrine of collateral estoppel applied to preclude the defendant from raising the same issue that was previously litigated in an action involving the same parties. *Id*. ¶ 30. The court reasoned that because it held on direct appeal that there was no plain error—as the sentencing hearing was fair in spite of the mention of an invalid aggravating factor—the defendant was collaterally estopped from claiming that he was prejudiced by his trial counsel's failure to preserve the same issue for review or by his appellate counsel's failure to address a theory that was without merit. *Id*. ¶ 31.

¶ 35 We disagree with the State that *Wright* is applicable here because there, the defendant attempted to raise the *same* issue via his ineffective assistance of counsel claims as he had raised on direct appeal via his plain error argument. *Id*. Conversely, here, the issue the defendant raised on direct appeal is different from the issues in the instant appeal. The issue on direct appeal focused on the four principles of criminal law referenced in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), and this court found no plain error because the evidence was not closely balanced. *People v. Marsh*, 2016 IL App (5th) 140155-U, ¶¶ 31-33. As noted, the issues in the instant appeal are whether the defendant's trial counsel provided ineffective assistance by allowing a potentially biased juror to sit on the jury; whether his trial counsel provided ineffective assistance by eliciting damaging evidence against the defendant at the trial; and whether his appellate

counsel was ineffective for failing to raise on direct appeal the said claims of ineffective assistance of trial counsel. The issues in the instant appeal are different from those on direct appeal. Accordingly, collateral estoppel—or issue preclusion—does not apply here because there has been no attempt to relitigate issues that were previously litigated in an action involving the same parties. See *Wright*, 2013 IL App (4th) 110822, ¶ 30. For these reasons, we find *Wright* does not apply to this case, and we proceed in reviewing the appeal on its merits.

¶ 36 II. Dismissal of Postconviction Petition

¶ 37 Postconviction petitions are governed by the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). The Act "provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial." *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). "Under the Act, a post-conviction proceeding not involving the death penalty contains three stages." *Id*. at 244. "At the first stage, the trial court independently assesses a defendant's petition, and if the court determines that the petition is frivolous or patently without merit, the court can summarily dismiss it." (Internal quotation marks omitted.) *People v. Little*, 2012 IL App (5th) 100547, ¶ 12. "A post-conviction petition is considered frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the 'gist of a constitutional claim.' " *Edwards*, 197 Ill. 2d at 244 (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). "A trial court should not summarily dismiss a postconviction petition unless its lack of legal and factual merit is certain and indisputable." *Wright*, 2013 IL App (4th) 110822, ¶ 22.

¶ 38 At the second stage of the postconviction proceeding, " '[t]o prevail on a claim of ineffective assistance under *Strickland*, a defendant must show both that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance prejudiced the defense.' " (Emphasis omitted.) *People v. Tate*, 2012 IL 112214, ¶ 19 (quoting *People v. Hodges*, 234 Ill. 2d 1, 17 (2009), quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

¶ 39 However, at the first stage, we apply a more lenient standard than we do at the second stage. *Wright*, 2013 IL App (4th) 110822, ¶ 22. At the first stage, " 'a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced.' " (Emphases in original.) *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17). "This 'arguable' *Strickland* test demonstrates that first-stage postconviction petitions alleging ineffective assistance of counsel are judged by a lower pleading standard than are such petitions at the second stage of the proceeding." *Id*. ¶ 20. " '[A] petition which is sufficient to avoid summary dismissal is simply one which is *not* frivolous or patently without merit.' " (Emphasis in original.) *Wright*, 2013 IL App (4th) 110822, ¶ 23 (quoting *Hodges*, 234 Ill. 2d at 11). "We decide *de novo* whether the petition deserves to be summarily dismissed as legally and factually inarguable." *Id*.

¶ 40 A. *Ineffective Assistance of Trial Counsel Allegations*

¶ 41 1. Biased Juror Allegation

¶ 42 The first issue on appeal is whether the defendant's trial counsel provided ineffective assistance by allowing a potentially biased juror to sit on the jury. Both the Illinois and the United States Constitutions guarantee a defendant a fair and impartial jury. *People v. Bennett*, 282 Ill. App. 3d 975, 980 (1996). "The right to a trial by an impartial tribunal is so basic that the violation of the right requires a reversal." *People v. Cole*, 54 Ill. 2d 401, 411 (1973).

¶ 43 Here, the defendant argues that his trial counsel was ineffective for failing to strike Marsha Conley from the jury. He alleged in his postconviction petition that he informed his trial counsel that Conley lied when she indicated that she did not know the defendant and that she "in fact knew of him quite well and his history, due to the fact that they *** had attended AA meetings together." The defendant alleged that Conley could not be fair and impartial because of her knowledge of the defendant's history of drug and alcohol abuse. Notwithstanding the defendant's report to trial counsel, Conley was not stricken, but was allowed to serve on the jury. Accordingly, the defendant contends that his trial counsel was arguably deficient for failing to strike Conley and that he was arguably prejudiced by the deficient performance. We disagree.

¶ 44 In *People v. Manning*, 241 Ill. 2d 319, 333 (2011), the defendant alleged that his trial counsel was ineffective for failing to strike a potential juror. The challenged juror in *Manning* indicated that he could not be fair, although he had stated earlier that he *could* be fair and set aside any prejudice. *Id*. at 336. The Illinois Supreme Court observed that,

while some people may consider the trial counsel's failure to challenge the juror to be questionable, that alone was insufficient to find counsel's conduct to be deficient under *Strickland*. *Id*. The court noted that "[r]eviewing courts should hesitate to second-guess counsel's strategic decisions, even where those decisions seem questionable." *Id*. at 335. The court added that "counsel's actions during jury selection are generally considered a matter of trial strategy" and "counsel's strategic choices are virtually unchallengeable." *Id*. at 333.

¶ 45 There is a strong presumption that counsel's assistance is reasonable, and a defendant must overcome the presumption that the action challenged may be considered sound trial strategy. *Id*. at 334. Moreover, "[a]ttorneys consider many factors in making their decisions about which jurors to challenge and which to accept" and "this is part of trial strategy, which is generally not subject to challenge under *Strickland*." *Id*. at 335. The *Manning* court concluded that, when considering the entire *voir dire* of the challenged juror in context, it was "possible that defendant's trial counsel decided that [the juror] was not unequivocally biased." *Id*.

¶ 46 Applying these principles to the case at bar, while some may question defense counsel's decision to keep Conley on the jury in light of the defendant's claim that Conley lied when asked if she knew the defendant, we nonetheless find it possible that counsel decided that Conley "was not unequivocally biased." *Id*. Notably, the defendant himself asserts in his brief on appeal that "[a]nonymity is a central tenant of attending an [AA] meeting." Taking as true the defendant's allegation that Conley lied when she denied knowing the defendant (see *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)), the

pledge of anonymity associated with AA would reasonably explain Conley's denial of knowing him. Moreover, AA has been identified as "a well-recognized *support* program" that "achieves a measure of success." (Emphasis added.) *Youle v. Edgar*, 172 Ill. App. 3d 498, 505 (1988). Because AA is a program which provides *support* to alcoholics, it would have been sound trial strategy for the defendant's trial counsel to conclude that Conley would be sympathetic with and supportive of the defendant rather than asserting bias against him as the defendant alleges.

¶ 47 We further note the defendant indicates in his brief that "because *** Conley lied to the court when she said she did not know him, it is *possible* that the knowledge of [the defendant's] addiction prejudiced her against him." (Emphasis added.) Again, even if a trial counsel's failure to challenge a jury is questionable, this alone is insufficient to find the conduct was deficient under *Strickland* (*Manning*, 241 Ill. 2d at 336), and we hesitate to second-guess counsel's strategic decisions, even if those decisions seem questionable. *Id*. at 335. For these reasons, we find that defense counsel's decision not to strike Marsha Conley from the jury was a matter of trial strategy. Accordingly, we reject the defendant's argument that his trial counsel's performance arguably fell below an objective standard of reasonableness for failure to strike Conley and his ineffective assistance of trial counsel on this basis fails. See *Tate*, 2012 IL 112214, ¶ 19.

¶ 48 2. Elicitation of Damaging Evidence Allegation

¶ 49 The second issue on appeal is whether the defendant's trial counsel provided ineffective assistance by eliciting damaging evidence against the defendant at the trial. "This court has held a defense attorney who elicits damaging testimony that proves an

element of the State's case may be found to have provided ineffective assistance." *People v. Bailey*, 374 Ill. App. 3d 608, 614 (2007). However, "[t]he defendant must overcome the strong presumption that counsel provided adequate assistance and exercised reasonable professional judgment in making all significant decisions." *People v. Brooks*, 334 Ill. App. 3d 722, 726 (2002). "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." (Emphasis omitted.) *People v. King*, 316 Ill. App. 3d 901, 916 (2000).

¶ 50 Here, the defendant contends that his trial counsel elicited direct evidence from Detective Baril to prove that the defendant was at the scene of the Arnold's Market burglary. The defendant cites defense counsel's direct examination of Baril, during which Baril testified that the defendant's DNA was found on the cellphone which was found outside Arnold's Market. The defendant argues that "[n]ot only did defense counsel elicit direct evidence that [the defendant] was at the scene of the burglary, the State relied on that evidence when it argued [in closing] that [the defendant] was guilty of the burglary." The defendant claims that, "[b]ecause defense counsel elicited evidence that [the defendant's] DNA was on the cellphone, defense counsel proved an element of the State's case: that it was [the defendant] who committed this offense." We disagree.

¶ 51 The defendant points out in his brief on appeal that the defendant "explained in his statement to Baril that when the two men came to Kim's house they borrowed his van and took his cellphone." We find the testimony elicited from Baril by defense counsel

comports with an attempt to further the theory that these two men—not the defendant—were responsible for the burglaries. Defense counsel questioned Baril as follows:

"Q. Okay. Do you know if anybody did any kind of swabbing for DNA?

A. I would assume she did.

Q. Okay. But you don't—

A. I don't know for certain.

Q. Okay. Well, as you sit there, do you recall having any results to pass on to the state's attorney about anything that was done?

A. Regarding DNA?

Q. Or anything or fingerprints.

A. I know about some DNA, I believe, yes, that was—I believe there was DNA that was located on the cellphone.

Q. Okay. Was any of it damaging to the defendant?

A. Yes.

Q. Okay. Which part?

A. From my knowledge, there was DNA found on the cellphone that belonged to [the defendant].

Q. So you're aware of what happened with the cellphone about the DNA, the results?

A. Yes. Yes.

Q. Okay. So isn't it true that there was also another person's DNA found on the cellphone that wasn't [the defendant]?

A. That, I'm not sure."

¶ 52 We find this line of questioning was elicited by the defendant's counsel as a matter of trial strategy to incite doubt regarding the defendant's participation in the burglary rather than to implicate the defendant as he suggests. Baril testified that the defendant previously informed him that he had left his cellphone in the van, that two unknown men took the van, and that he had since lost his cellphone. If these facts were true, the presence of the defendant's DNA on his stolen cellphone would be of no consequence. Counsel was attempting to exonerate the defendant by providing an explanation for the defendant's cellphone being found outside Arnold's Market. This is exemplified by counsel's question to Baril: "So isn't it true that there was also another person's DNA found on the cellphone that wasn't [the defendant]?" In light of the defendant's statement to Baril, counsel's question regarding another person's DNA could be seen as an attempt to implicate the two unknown men who took the van. When reviewed in context, we disagree with the defendant that Baril's testimony that the defendant's DNA was found on the cellphone proved an element of the State's case by linking him to the scene at Arnold's Market, and we find the testimony was elicited as a matter of trial strategy.

¶ 53 We cannot say that no reasonably effective defense attorney facing similar circumstances would have pursued the strategy that the defendant's trial counsel did in eliciting the testimony from Detective Baril. See *King*, 316 Ill. App. 3d at 916. Accordingly, we find that the defendant failed to rebut the presumption that his trial counsel provided adequate assistance and exercised reasonable professional judgment in all the significant decisions he made. See *Brooks*, 334 Ill. App. 3d at 726. For these

reasons, we reject the defendant's argument that his trial counsel's performance arguably fell below an objective standard of reasonableness for eliciting the said testimony from Baril and his ineffective assistance of trial counsel on this basis fails. See *Tate*, 2012 IL 112214, ¶ 19.

¶ 54 Even if we were to assume, *arguendo*, that the defendant's trial counsel's performance arguably fell below an objective standard of reasonableness for eliciting the testimony from Baril, the defendant's ineffective assistance of counsel argument still fails because the defendant cannot show that he was arguably prejudiced by the testimony. See *id*. As we held on direct appeal, the defendant could not establish plain error because the evidence was not closely balanced. *Marsh*, 2016 IL App (5th) 140155-U, ¶¶ 31-33.

> "Plain-error review under the closely-balanced-evidence prong of plain error is similar to an analysis for ineffective assistance of counsel based on evidentiary error insofar as a defendant in either case must show he was prejudiced: that the evidence is so closely balanced that the alleged error alone would tip the scales of justice against him, *i.e.*, that the verdict 'may have resulted from the error and not the evidence' properly adduced at trial (see *People v. Herron*, 215 Ill. 2d 167, 178 (2005) (plain error)); or that there was a 'reasonable probability' of a different result had the evidence in question been excluded (see *Strickland*, 466 U.S. at 694)." *People v. White*, 2011 IL 109689, ¶ 133.

"Both analyses are evidence-dependent and result-oriented." *Id*. ¶ 134.

¶ 55 As we observed on direct appeal, the defendant did not contest any testimony by any of the police officers. He did not contest the testimony of the two business owners.

He did not contest Sylvia Steinmetz's identification of the van used in both burglaries. He did not contest the rubber mallet or various tools found by the police. *Marsh*, 2016 IL App (5th) 140155-U, ¶ 29. Regarding the surveillance tapes, we noted that Kim Smith and Terrell White both pointed to the specific features that allowed them to identify the defendant on the tape. Smith described how she had "known [the defendant] for 20 years" and could identify his face "from the nose down," including "the little goatee, the little mustache that he has been wearing for years [could be seen] from the middle of his nose down." White identified both himself and the defendant in both surveillance tapes. *Id*. ¶ 30. Although the defendant contended on direct appeal that the surveillance tapes were insufficient for identification and he challenged Smith and White's credibility as witnesses, we concluded that neither the tapes nor the testimonies of Smith and White's testimony were problematic enough to consider the evidence closely balanced. *Id*. ¶ 32.

¶ 56 For the same reasons we found on direct appeal that the evidence was not closely balanced, we find in the instant appeal that the evidence against the defendant was such that he cannot show that he was arguably prejudiced by the testimony his counsel elicited from Baril. See *Tate*, 2012 IL 11214, ¶ 19; *White*, 2011 IL 109689, ¶ 133. Accordingly, the defendant's ineffective assistance of trial counsel on this basis fails.

¶ 57 B. *Ineffective Assistance of Appellate Counsel Claims*

¶ 58 The final issue on appeal is whether the defendant's appellate counsel was ineffective for failing to raise on direct appeal the above-said claims of ineffective assistance of trial counsel. "Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial

counsel." *People v. Childress*, 191 Ill. 2d 168, 175 (2000). A defendant who alleges that his appellate counsel rendered ineffective assistance of counsel must show that the failure to raise an issue on direct appeal was arguably unreasonable and that the decision arguably prejudiced the petitioner. *Id*.; *Tate*, 2012 IL 11214, ¶ 19. "Unless the underlying issue is meritorious, [the] petitioner suffered no prejudice from counsel's failure to raise it on direct appeal." *Childress*, 191 Ill. 2d at 175; see also *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 109 (appellate counsel is not incompetent to refrain from raising issues he believes are without merit).

¶ 59 In this case, having found that the defendant's ineffective assistance of trial claims are without merit, we conclude that the defendant suffered no prejudice from his appellate counsel's failure to raise those ineffective assistance of trial claims on direct appeal. See *id*. Accordingly, the defendant's ineffective assistance of appellate counsel arguments fail.

¶ 60 CONCLUSION

¶ 61 For the foregoing reasons, we affirm the circuit court's June 30, 2017, order that summarily dismissed the defendant's postconviction petition.

¶ 62 Affirmed.