2021 IL App (5th) 190111-U

NO. 5-19-0111

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Madison County. |
| | ) | |
| v. | ) | No. 08-CF-2058 |
| | ) | |
| FRANK D. PRICE, | ) | Honorable |
| | ) | Neil T. Schroeder, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE WHARTON delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

**ORDER**

¶ 1 *Held*: Where the circuit court's denial of the defendant's postconviction petition was not manifestly erroneous, and the presumption that postconviction counsel provided reasonable assistance was not rebutted, and any arguments to the contrary would be without merit, the defendant's appointed appellate counsel is granted leave to withdraw, and the judgment of the circuit court is affirmed.

¶ 2 A jury found the defendant, Frank D. Price, guilty of strong-probability first degree murder, and found that his victim was under the age of 12 years. The circuit court sentenced the defendant to imprisonment for 70 years. This court affirmed the judgment of conviction. The defendant then filed a petition under the Post-Conviction Hearing Act. See 725 ILCS 5/122-1 *et seq.* (West 2016)). The circuit court summarily dismissed the postconviction petition, but this court reversed. Eventually, the circuit court held an evidentiary hearing on the petition and denied it. The defendant now appeals from the denial of his postconviction petition. His court-appointed attorney

on appeal, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks merit, and has filed a motion to withdraw as counsel on that basis, along with a legal memorandum in support thereof. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Having received copies of OSAD's *Finley* motion and memorandum, the defendant has filed with this court a *pro se* objection to the motion. This court has thoroughly examined OSAD's motion and memorandum, the defendant's written objection, and the entire record on appeal, and has determined that this appeal does indeed lack merit. Accordingly, OSAD's motion to withdraw must be granted, and the judgment of the circuit court must be affirmed.

¶ 3 BACKGROUND

¶ 4 In 2008, the defendant was charged with first degree murder, under a strong-probability theory. 720 ILCS 5/9-1(a)(2) (West 2008). It was alleged that he, without lawful justification, repeatedly struck E.A. in the head and body, causing E.A. to suffer traumatic brain injury and blunt trauma to the pancreas and kidney, knowing that his acts created a strong probability of death or great bodily harm to E.A., thereby causing E.A.'s death.

¶ 5 In December 2008, the defendant filed a motion to suppress the statements that he had made to police during a recorded interrogation. The defendant alleged, *inter alia*, that the police continued to question him even after he had invoked his right to counsel. Following a hearing in March 2009, the court denied the motion to suppress. In its written order, the court noted that the defendant had read and signed a written waiver of his rights. Approximately halfway through the interrogation, the defendant stated, "If you keep badgering me, I want a lawyer." The court found this invocation of the right to counsel "ambiguous, equivocal, and conditional." The court wrote that Lieutenant Gary Burns, one of the interrogators, sought clarification and an unambiguous invocation of the right. The defendant "continue[d] to talk to the officers, and the interrogation

resume[d]." According to the court, the interrogation ended when the defendant unambiguously stated that he wanted a lawyer.

¶ 6 In August 2009, the cause proceeded to trial by jury. Tonya Whitehead, age 27, testified that she had been the girlfriend of the defendant. In September 2008, she and her son, five-year-old E.A., were living with the defendant at a house in Cottage Hills, Illinois. During the weekend of Saturday, September 6, and Sunday, September 7, Whitehead did not notice any recent injuries on E.A. and he did not complain of any; his appetite was normal. During the evening on Sunday, September 7, at the defendant's house, Whitehead assisted E.A. with his bath. The only marks on E.A. were bruises on his collarbone, the result of the defendant's "poking him in the chest" in "a so-called playful manner," which E.A. did not like. They slept at the defendant's house that night.

¶ 7 Whitehead needed to be up early the next morning—Monday, September 8—to be at work at 7 a.m. The plan was for the defendant to drive Whitehead to work and then take E.A. to the school-bus stop. According to Whitehead, E.A. was excited about school. For the most part, he dressed himself; Whitehead had to button his shirt. At trial, Whitehead identified the button shirt, blue jeans, and sneakers that E.A. wore that morning. At about 6:40 a.m., the defendant drove Whitehead from his house to Whitehead's workplace. E.A. was in the back seat of the car. During the drive, E.A. was awake, and he did not complain about not feeling well. At exactly 7 a.m., they arrived at Whitehead's workplace. She told E.A. that she loved him and would see him soon, and he said, "I love you too." At approximately 11:30 a.m., the Bethalto Police Department phoned Whitehead at work and told her that her son was in critical condition.

¶ 8 Whitehead retrieved her cell phone and saw that she had missed calls from the defendant's mother and sister and from the hospital, but not the defendant. She phoned the defendant's mother, who told her that the defendant's sister was on her way to pick up Whitehead. The sister arrived,

and she drove Whitehead toward Alton Memorial Hospital, but then the hospital phoned and told them to go straight to Children's Hospital, where E.A. was being flown.

¶ 9 At Children's Hospital, Whitehead met with Detective Doyle and with doctors, who told her what was wrong with her son, and that he was not going to make it. After E.A. came out of surgery, Whitehead was allowed to see him. E.A. looked like "[h]e was already gone." Along with E.A.'s father (who was not named in the trial transcript), Whitehead decided to remove E.A. from life support, because E.A.'s brain was not getting oxygen. Whitehead was present when life support was shut off, and as E.A. passed away.

¶ 10 On cross-examination, Whitehead acknowledged telling the police that when she bathed E.A. on September 7, she observed marks on his chest, on his chin, on his right arm, and a lump on his head from a previous fall. On redirect examination, she recalled that one or two weeks before that bath, she saw E.A. and the defendant come out of the bathroom, and E.A. had "a huge knot on his head." The defendant said he was trying to help E.A. to put on his pants when E.A. fell and hit his head.

¶ 11 Personnel from the Village of East Alton Fire Department testified that on September 8, 2008, at approximately 11 a.m., a Suburban pulled into the fire station. The driver, who was the defendant, asked a firefighter, Eric Rudden, to help his son. Rudden looked into the vehicle and saw a woman in the front passenger seat, cradling a young boy who was wearing only underwear and was wrapped in a blanket. In response to Rudden's queries, the defendant said that the boy had been involved in a bicycle accident 10 or 15 minutes earlier. It seemed strange that someone would wear only underwear while riding a bike, Rudden thought. The boy was unresponsive, not even moaning, and his eyes were closed. Rudden put a c-collar around the boy's neck, to immobilize it, and he and colleagues then put the boy on a backboard to immobilize his back, and

removed him from the Suburban through the rear. Rudden felt "bumps" on the right rear portion of the boy's head. Looking closely at the boy's face, Rudden saw bruising above the left brow and "a little bit of blood around his mouth." Opening the boy's mouth, Rudden saw a cut on the inside of his lower lip. By then, an ambulance had arrived. The boy was placed inside.

¶ 12 Meanwhile, as firefighters worked to safely move the boy from the Suburban to the ambulance, Randy Mortland, the fire chief for the Village of East Alton, talked to the defendant, with whom he was familiar. The defendant was "emotionally distraught," and Mortland asked him what had happened. "I just really wanted to know how he was injured," Mortland said, "but he started a story that he had taken his girlfriend to work about 7:00 I think it was, and on the way home they had passed their school bus, the little boy's school bus and went—they went home, returned home." Mortland continued relating the defendant's account, testifying that the defendant said that he gave the boy time to play before going to school. The defendant went to use the bathroom. He heard the boy cry. Walking out of the bathroom, he saw the boy vomit. The defendant asked what was wrong, and the boy said that he had crashed his bicycle. The defendant had him lie down. When the boy started "a strange snoring" kind of breathing, the defendant decided to take him to see the defendant's mother, a nurse, at her home in Wood River. At the mother's house, they decided to take the boy to the hospital. During the drive, Mortland related, the defendant decided to stop at the fire station, instead.

¶ 13 Patricia New, a paramedic for 10 years, testified that during the six-minute drive from the Village of East Alton fire station to Alton Memorial Hospital, the boy's breathing was shallow; he seemed unconscious and was completely unresponsive. She checked the boy's body for injuries. On his head, he had a small hematoma on the left side of his forehead and a larger hematoma on the right side, with "a very large lump" on the back of the head. "[F]ingerprint bruises" were

scattered across his torso. However, he did not have "road rash" or any dirt or grass stains on him, which would be typical for people injured in bicycle accidents. New remained with the boy until he was put on a helicopter to fly from Alton Memorial to Children's Hospital in Saint Louis.

¶ 14 Eric Staten, a sergeant with the East Alton Police Department, testified that on September 8, 2008, he was directed to the East Alton Fire Department, where he saw a small, unconscious boy being attended to by ambulance personnel. Staten spoke with the defendant, who told him that he had the boy, E.A., in his car when he dropped off E.A.'s mother at work, then returned home and found that they had missed E.A.'s school bus. He had E.A. go out and play, but a short time later, E.A. came back inside, started vomiting, and then became unresponsive. He said that he was unsure of how E.A. was injured, but he figured it was from riding his bike, since the bike had been moved from the previous night. Thinking that this story sounded "suspicious," Staten asked the defendant to come to the police department for an interview, and the defendant agreed.

¶ 15 At the police station, Staten spoke with the defendant in a small room equipped for audio and video recording. However, the audio portion of the recording was not functioning as Staten informed the defendant of his rights, and as the defendant indicated his understanding thereof, and as Staten asked the defendant to provide a written account of what had happened to cause E.A.'s injuries. The audio problem was soon remedied. The clock on the wall read 11:35 at the start of the video; it read 3:55 at the end of the video. The jury was shown an edited version of the interrogation.

¶ 16 At 11:35, the defendant is seen sitting, alone, in the small interrogation room, writing an account of what had happened to cause E.A.'s injuries. At 11:47, Staten walked into the room and said that the hospital needs to know when the defendant first noticed that E.A. was injured, and the defendant answered "maybe 8:30, 9 o'clock this morning." Staten then asked when E.A. had

become unresponsive, and the defendant answered, "a little bit after that." The defendant's written account, which was approximately 87 words, was admitted into evidence.

¶ 17 The defendant wrote that he drove his girlfriend to work and then drove home to put E.A. on the bus. The bus was two blocks past the defendant's street. The defendant went home to use the bathroom. E.A. then came in the house and "got sick." The defendant started to change E.A.'s clothes, but E.A. "got sick again." The defendant phoned the school to say that E.A. would not be there that day. E.A. lay down. When the defendant checked on him, he was "unresponsive." The defendant telephoned his (*i.e.*, the defendant's) mother, and together they went to the "EAPD," the defendant wrote.

¶ 18 The video shows that at 11:56, Staten read the defendant's written account and asked for clarification on a few points. According to the defendant, E.A. did not say anything about how he felt or what had happened to him. After E.A. got sick the second time, at approximately 8 a.m., the defendant asked E.A. what had happened to his head, and E.A. just looked "dazey." The defendant let him lie down. The defendant phoned his mother for advice, because she had worked in nursing her whole life. As the defendant spoke with Staten, he appeared to be crying. However, Staten noticed an absence of tears.

¶ 19 At approximately 11:59, according to the clock in the video, Staten informed the defendant that detectives with the Madison County Sheriff's Office wanted to speak with him. Staten's involvement in the interrogation ended at that point.

¶ 20 At approximately 12:09, two Madison County detectives, Gary Burns and Bill Marconi, entered the small interrogation room. Marconi informed the defendant of his rights, which the defendant indicated he understood, and Marconi and Burns asked background questions about living arrangements, etc.

¶ 21 Starting at 12:19, the defendant gave the detectives the following account of events. He, Tonya, and E.A. were up early Monday in order to drive Tonya to work at 7 a.m. The defendant observed that E.A. was noticeably tired during the drive to Tonya's workplace. After dropping off Tonya, the defendant and E.A. drove back to their own neighborhood, and the defendant saw that they had missed E.A.'s school bus. Back at home, the defendant told E.A. that he could play for a short while before the two of them left for school. The defendant had to use the bathroom. After finishing in the bathroom, he opened the bathroom door and saw E.A. He asked E.A. if he wanted something to eat, and E.A. answered, "No." E.A. vomited. The defendant started to wipe off his mouth and noticed bruises above E.A.'s eye and on his chin. He asked E.A. whether he was all right, and E.A. answered, "No, I don't feel good." The defendant removed E.A.'s clothes, in order to wash off the vomit. E.A. seemed tired. The defendant had E.A. lie on the couch, while he phoned the school to inform them that E.A. would not be there that day. He moved E.A. to the floor, where he cooled him with a fan. When E.A. started moaning slightly, the defendant took it as a sign that something was wrong, and he phoned his mother, who had worked in nursing. E.A. was nonresponsive. The defendant placed E.A. in a blanket and carried him to the Suburban; it was after carrying E.A. that the defendant noticed drops of blood on his shoulder. The defendant's mother was waiting for them on her porch. She looked at E.A. and told the defendant to proceed to the hospital. The defendant had "no clue" about what had happened to E.A., but he thought that E.A. had ridden his bicycle outside, since the bike had been moved since the previous night. The defendant stated that he never hit E.A. and never physically disciplined him.

¶ 22 At approximately 2:52, the detectives informed the defendant that doctors who had examined E.A. had concluded that his injuries were due to a blow to the back of his head, and that E.A. was in surgery to drain the blood from his brain. Shortly afterward, the defendant said that

he and E.A. had "played around a little bit" during the drive home from Tonya's workplace; at one point, E.A. put the defendant in a headlock, and the defendant made him get back into his seat. "Now, whether he hit his fuckin' head on somethin' else, I don't know." Several minutes later, the defendant said that in his hurry to get to the bathroom after returning home, he pushed E.A. toward a sofa, which was upholstered. The defendant did not see what had happened to E.A. after the push, but he speculated that E.A. may have hit his head on the concrete floor of the living room. To the end of the interrogation, the defendant denied purposely inflicting injury on E.A. "I did not fucking hit that kid," the defendant insisted.

¶ 23 Carol Doyle, an investigator with the Madison County Sheriff's Office, went to Children's Hospital on September 8, 2008, arriving in the early afternoon, to investigate what had happened to E.A. Upon her arrival, E.A. was in surgery; his left skull was being worked on. When he came out of surgery, Doyle photographed him. She identified photographs showing bruising around his left eye, "multiple round bruises" across his chest, bruises on his hands and legs, and bruises or abrasions along his arms and shoulders. Doyle also photographed "[m]ultiple bruises" on the left side of E.A.'s back, though she could not photograph the right side due to E.A.'s surgery on the left side of his skull.

¶ 24 Dr. Ian Dorward was the chief resident in neurosurgery at St. Louis Children's Hospital. On September 8, 2008, E.A. was brought to the intensive care unit. E.A. was "clearly significantly brain injured" and "essentially comatose at the time." He was "not waking up or *** consciously responding to stimuli." CT scans showed (1) that E.A. had a subdural hematoma on the left side of his brain, which led to an accumulation of blood and resulting pressure on the brain, and (2) "a profound swelling of the brain," which increased pressure inside the skull to the point that "the brain tissue starts to squeeze out the base of the skull." Those two features "meant this was a life-

threatening injury." According to Dr. Dorward, such brain injuries in children "happen almost exclusively from high impact acceleration type of injuries," such as "high speed motor vehicle accidents," assaults, or "very severe blunt trauma to the head." "[W]ith an injury that severe," Dr. Dorward testified, the only option was "a very large craniotomy," *i.e.*, removing a chunk of skull, and then addressing the hematoma by using suction to evacuate the hemorrhage. E.A. was taken to the operating room within 30 minutes of seeing Dr. Dorward. In the operating room, Dr. Dorward assisted Dr. Limbrick, who was the attending neurosurgeon on call. In the case of E.A., as soon as his skull was opened, his brain started "herniating out through that space indicating just a tremendous amount of pressure." Shortly afterward, E.A.'s blood pressure dropped precipitously. At that point, they "closed things up as rapidly as [possible]" and returned him to the intensive care unit, where he was continued on life support. With the procedure aborted, Dr. Dorward testified, they could not insert, through the skull, a "pressure monitor" on the other side of E.A.'s brain.

¶ 25 Dr. Matthew Goldsmith was an attending physician in the pediatric intensive care unit (PICU) at Children's Hospital. He had been an attending physician for seven years and had been associated with the hospital since 1995. Dr. Goldsmith testified that on September 8, 2008, E.A. was transferred from the hospital's emergency room to the PICU. E.A. was never conscious. CT scans of E.A.'s head showed "bleeding in *** the subdural space" and "swelling or edema" in the brain, which "pose[d] an immediate risk of serious brain injury and of death, particularly the swelling." According to Dr. Goldsmith, a brain injury as severe as E.A.'s would occur in bicycle accidents only where the cyclist was struck by a car, and it would be "exceedingly uncommon" for a person to be walking or talking after the injury. While E.A.'s head injury was the chief concern, Dr. Goldsmith noted that a CT scan of E.A.'s abdomen showed swelling of the pancreas,

an organ "very deep" in the body, behind the stomach. Such an injury would be "very unusual" in a bicycle accident not involving a motor vehicle; Dr. Goldsmith personally had never encountered it. "An injury like that would usually be caused by blunt force trauma." E.A. remained in the PICU for only a short time, until neurosurgeons decided to have him taken to an operating room. After the surgery, in the evening, Dr. Goldsmith thought that E.A. was unlikely to survive. By the morning of September 10, 2008, E.A. had lost "any evidence of brain function." E.A. was "brain dead" and was on "organ support," *i.e.*, a ventilator. "Organ support" is the phrase that is used when the patient is "legally dead," Dr. Goldsmith explained. Within "minutes or hours" after being taken off "organ support," the patient's blood pressure falls and his heart stops beating. Later that day, September 10, E.A. was removed from organ support.

¶ 26 Dr. Maria Spivey, a medical doctor, testified that she worked at Children's Hospital in September 2008, and for six years she had been a consulting physician with the hospital's child protection team. Whenever a doctor thought that a child in the hospital might have been injured due to abuse or maltreatment, the doctor contacted the child protection team to make a diagnosis. With E.A., CT scans of his head showed bleeding around the brain and "significant swelling of the brain." CT scans of his abdomen revealed "three major abdominal injuries"—"two pancreatic fractures and a contusion to the kidney." A fracture was a significant injury to the organ, and a contusion was a bruise. Dr. Spivey examined E.A. after surgery. She found that E.A.'s left eye was swollen and red. He showed significant bruising all over his arms, on his upper and lower legs and inner thighs, and on his left hip. The surgery precluded Dr. Spivey from examining E.A.'s back, but she did see pictures of it.

¶ 27 Dr. Spivey, in an attempt to obtain information on how E.A. could possibly have been injured, spoke with Tonya Whitehead, but Whitehead did not suggest any explanation for or

mechanism of injury. Whitehead told Dr. Spivey that E.A. seemed normal the morning of September 8, 2008, when she was dropped off at work. Having determined that the defendant was in charge of E.A. at the time of his injuries, Dr. Spivey spoke with Detective Doyle about the defendant's statements to police. Doyle told her that the defendant had said that E.A. must have fallen off his bike, since the bike had been moved. Doyle also related that the defendant had said he pushed E.A. into his car seat, and at another point had pushed E.A. into a couch.

¶ 28 "[W]hen you put everything together," Dr. Spivey opined, "it was clear that this was a case of inflicted injury, both inflicted physical abuse and traumatic brain injury." No accidental mechanism, except for a major automobile collision, could possibly account for the number or severity of E.A.'s injuries. Dr. Spivey characterized her opinion as "preliminary" because the medical examiner would have the final say.

¶ 29 In the midst of Dr. Spivey's testimony, the parties conferred with the judge outside the jury's hearing. Defense counsel stated that he did not want Dr. Spivey to relate any hearsay testimony from a William and Kim Huntsman. The State promised not to ask for such testimony. During her testimony, Dr. Spivey never mentioned the Huntsmans nor any of their alleged statements to her.

¶ 30 Dr. Phillip Burch, a physician and a medical examiner for the City of St. Louis since 1986, testified that he performed an autopsy on E.A. on September 11, 2008. He had been told that E.A. was five years old, which appeared to be correct. E.A. had been declared dead on September 10 at 3:45 p.m.

¶ 31 Dr. Burch began the autopsy by noting extensive surgical intervention on the left side of E.A.'s head, but Dr. Burch also found evidence of blunt force trauma to the head. This evidence included an abrasion above the left eye and to the left of the left eye, bruising on the left eye lid, a

bruise on the left ear, an abrasion at the left side of the nose, an abrasion on the chin, bruising on the "upper facial lip" and on "the inner surface of the lower facial lip," and a "laceration in the soft tissue below the level of the teeth of the buccal mucosa." There was evidence of blunt force trauma on E.A.'s body, as well. This evidence included nine bruises on the anterior chest wall, which appeared to be healing; bruising on both arms, front and back; bruising on both legs, "in the thigh areas *** and around the knees and towards the ankle"; and six bruises on "both sides of the upper back and at the mid-back and lower back," all of which were at least one inch in diameter and one of which was "like five inches in diameter." There was evidence of blunt force trauma to E.A.'s internal organs. This evidence included hemorrhage in the upper portion of the small intestine, which would require "considerable force because it's in a relatively protected area," and bleeding on "the inside of the left kidney." Dr. Burch did not see any abnormality with the pancreas, despite earlier reports, either because "the C.T. scan picked up something falsely or the condition of the body changed between when the C.T. scan was done and when [he] looked at the body."

¶ 32 The key testimony of Dr. Burch concerned E.A.'s brain. According to Dr. Burch, the brain showed a hemorrhage on its surface, which was probably received "within a couple of days" before E.A.'s death." It was "markedly swollen" to the point where it was "too large to fit in the skull cap" and it "flattened against the undersurface of the skull." When the brain flattens in that fashion, it starts to die, according to Dr. Burch. E.A.'s brain weighed 1450 grams, "which is the weight of a normal adult brain," according to Dr. Burch. On each eye, the retina was torn. "Whatever caused the blunt trauma to the head," Dr. Burch testified, "that energy was transmitted to the eyes and caused the hemorrhage and tearing of the eyes." This "devastation to the entire brain," concluded Dr. Burch, was caused by an acceleration-deceleration movement that, within seconds, would leave a child unconscious and unable to be aroused, or would result in a seizure or death. The

cause of death was closed head injury, and the manner of death was homicide. The "devastating head injury" could not have been caused by the boy himself; an older and larger individual "would have to have done this injury to the child."

¶ 33 Police searched the defendant's yard and house on September 8. The search revealed that only one bicycle was found at the house; dust and dirt on its seat suggested that the bike had not been ridden recently. Inside the house, the clothes that E.A. had worn that morning—his button shirt, blue jeans, and shoes—were found inside the clothes dryer.

¶ 34 Larry Williams testified that he was a neighbor of the defendant, and they had been "buddies" for most of their lives. On a couple of occasions, they discussed E.A. On the first occasion, the defendant stated that E.A. had "pissed himself" so the defendant "shook the shit out of him," and "then he pissed himself again." On the second occasion, the defendant stated that he "beat [E.A.'s] ass and put him to bed." However, in a discussion outside the presence of the jury, the court was reminded that this second statement by Williams had been the subject of a motion *in limine* that the court had granted, and therefore the court subsequently instructed the jury to disregard the second statement.

¶ 35 Peggy Ontis, the defendant's mother, testified that on Friday, September 5, 2008, E.A. spent the night at her house. Ontis looked at E.A.'s head and did not notice anything unusual. The next morning—Saturday, September 6—E.A. was "fine" and "energetic." Ontis and E.A., and another of Ontis's grandchildren, went to the soapbox derby; Tonya Whitehead and the defendant were there, too. That afternoon, they went to a birthday barbecue for Ontis's daughter at the defendant's house. Many children were there, riding bicycles, and some of the older children formed mounds of dirt to ride over. Ontis saw E.A. riding a bike, and at some point, E.A. informed Ontis that he hurt his "belly" while on the bike; he did not provide details. He ran off and continued

playing. Around dusk on Saturday, E.A. returned to Ontis's house to spend the night. E.A. seemed "tired" but fine, and no bruises were visible on his face. On Sunday morning, September 7, Ontis and E.A. went to church. Early Sunday afternoon, they retuned to Ontis's house. E.A. asked to watch a particular movie, and he immediately went to sleep until approximately 6:30 p.m. When Tonya Whitehead and the defendant came to pick up E.A. at approximately 6:45 p.m., Ontis told Tonya that "something was wrong with [E.A.]" and he needed to go to Children's Hospital. He had gotten up to use the bathroom, and he was "weaving" from one side of the hallway to the other. Ontis returned E.A. to Whitehead. She did not follow up on her suggestion about Children's Hospital, and she did not see E.A. again until Monday, September 8.

¶ 36 Penny Price, the defendant's sister, testified that on Friday, September 5, E.A. had "a bump on the left side of his head" from "a previous fall." On Saturday, September 6, Price arrived for her birthday party at the defendant's house. E.A. came running toward Price, but he caught his toe in a small hole in the ground, "fell to the left and come [*sic*] down and smacked his head off the bumper of the car." He had "little cuts and scrapes all over him." Mary Marin gave him a Band-Aid. He sat for a short time, then played ball. Sometime later, Price saw a little boy swinging a Nerf bat, and he "clocked [E.A.] pretty good." It "stunned" E.A., and he complained that his head hurt. Sometime later, Price saw E.A. ride his bike over a mound of dirt "a foot and a half, maybe two foot high" and "hit it wrong," causing E.A. to land "head first with the handlebars hitting his stomach." E.A. was "all entangled in the bike." He sat down, obviously hurt. He continued playing, though "not as hard" as earlier. Mary Marin, a friend of the Price family, testified and corroborated much of Penny Price's testimony.

¶ 37 The defendant chose not to testify. The jury returned a verdict of guilty of first degree murder. Also, the jury returned a special interrogatory finding that E.A. was under the age of 12 years.

¶ 38 Defense counsel filed, on behalf of the defendant, a posttrial motion and an amended posttrial motion. In December 2009, the court denied the amended posttrial motion and sentenced the defendant to 70 years of imprisonment and 3 years of mandatory supervised release.

¶ 39 On direct appeal, the defendant did not contest his conviction or his sentence. Instead, he argued that the circuit court had erred in its handling of an alleged conflict of interest that had arisen between the defendant and his attorney subsequent to the trial but prior to the defendant's hearing on his amended posttrial motion and sentencing. This court rejected the defendant's argument and affirmed the judgment of conviction. See *People v. Price*, 2011 IL App (5th) 100047-U.

¶ 40 On December 3, 2012, the defendant filed a verified *pro se* postconviction petition. He raised seven issues, *viz.*: (1) E.A.'s mother engaged in extraneous and improper communications with jurors, and the trial judge "act[ed] in an inappropriate manner regarding defense counsel," thus depriving the defendant of a fair trial; (2) direct-appeal counsel provided ineffective assistance when he failed to argue to this court that the defendant was not proved guilty beyond a reasonable doubt; (3) the testimony of a State's witness, Dr. Maria Spivey, permitted the State to introduce testimony from two unreliable sources, and deprived the defendant of a fair trial; (4) the circuit court refused to instruct the jury on the lesser offense of involuntary manslaughter; (5) direct-appeal counsel provided ineffective assistance when he failed to argue to this court that he was interrogated by police after he had invoked his right to counsel; (6) direct-appeal counsel provided ineffective assistance when he failed to argue that the State, in its final arguments to the jury, had

relied on improper remarks that were not based on the trial evidence or reasonable inferences therefrom; and (7) the circuit court failed to adequately question the jurors on the *Zehr* principles (*People v. Zehr*, 103 Ill. 2d 472 (1984)). Attached to the petition were an unsworn affidavit from the defendant and sworn affidavits from 11 other people, all of whom stated that they had been in the courthouse for the defendant's trial and had observed improper behavior such as E.A.'s mother, and others, telling various jurors to "just get this over [with] and *** find him guilty," and the trial judge's tapping her pencil and rolling her eyes as defense counsel addressed closing arguments to the jury. On December 10, 2012, the circuit court summarily dismissed the petition as frivolous and patently without merit. The defendant appealed.

¶ 41 In an unpublished order filed in May 2014, this court focused on the first claim in the petition—the claim that the defendant was deprived of a fair trial by extraneous and improper communication with jurors—and this court found that that claim, supported by affidavits, presented the gist of a constitutional claim. This court noted that the entire petition would need to be remanded for further proceedings if even a single claim in the petition presented the gist of a constitutional claim. Accordingly, this court reversed the summary dismissal and remanded the cause for further proceedings. See *People v. Price*, 2014 IL App (5th) 130010-U.

¶ 42 On remand, the public defender was appointed as the defendant's postconviction counsel. He announced that he would not be filing an amended postconviction petition. The State filed a motion to dismiss the postconviction petition, asserting that the defendant had failed to make a substantial showing of a constitutional violation. In December 2016, the circuit court held a hearing on the State's motion to dismiss, and in June 2017, the circuit court denied the motion.

¶ 43 On December 11, 2017, the court held an evidentiary hearing on the defendant's postconviction petition. The defendant was the sole witness, and his testimony takes up just four

and one-third pages in the record of proceedings. He testified that he asked his court-appointed direct-appeal counsel to raise various issues, including an issue relating to his statements to police, but counsel declined to do so. Also, the defendant referred to his affidavits concerning *ex parte* communication with jurors. The court took the matter under advisement.

¶ 44 Postconviction counsel filed a certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) immediately before the evidentiary hearing. A second certificate of compliance was filed on August 30, 2018.

¶ 45 On March 4, 2019, the circuit court found that the defendant had failed to make a substantial showing of a constitutional violation and denied the postconviction petition. The defendant filed a timely notice of appeal, and the circuit court appointed OSAD to represent the defendant.

¶ 46 ANALYSIS

¶ 47 This appeal is from the denial of a petition for postconviction relief after a third-stage evidentiary hearing. As previously mentioned, the defendant's appointed attorney on appeal, OSAD, has filed with this court a *Finley* motion to withdraw as counsel and a supporting memorandum, and the defendant has filed a *pro se* written objection. OSAD suggests two potential issues for review: (1) that the denial of the postconviction petition was manifestly erroneous and (2) that postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c). Neither issue has arguable merit.

¶ 48 Potential Issue 1—Whether the Circuit Court's Denial of the Defendant's Postconviction Petition After an Evidentiary Hearing Was Manifestly Erroneous

¶ 49 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) provides that a criminal defendant may challenge his conviction or sentence for substantial violations of federal or state constitutional rights. *Id.* § 122-1(a)(1); *People v. Edwards*, 2012 IL 111711, ¶ 21.

A postconviction proceeding begins when the defendant files a verified petition in the circuit court. 725 ILCS 5/122-1(b) (West 2016). The Act provides for three stages of review by the court. *People v. Domagala*, 2013 IL 113688, ¶ 32. At the first stage, the court may summarily dismiss the petition only if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2016); *Domagala*, 2013 IL 113688, ¶ 32. At the second stage, the court must determine "whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). All well-pleaded facts, except for those positively rebutted by the trial record, are to be taken as true. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). If the defendant makes a substantial showing at the second stage, the petition advances to the third stage, where an evidentiary hearing is held. 725 ILCS 5/122-6 (West 2016); *Domagala*, 2013 IL 113688, ¶ 34. At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). The court "may receive proof by affidavits, depositions, oral testimony, or other evidence," and "may order the [defendant] brought before the court." 725 ILCS 5/122-6 (West 2016). The court typically acts as fact-finder, determining the credibility of witnesses and the weight to be given particular testimony and evidence, and resolving any conflicts in the evidence. *Domagala*, 2013 IL 113688, ¶ 34.

¶ 50 The denial of a postconviction petition after a third-stage evidentiary hearing is generally reviewed for manifest error. *People v. Coleman*, 2013 IL 113307, ¶ 98. Manifest error is that which is plain, clearly evident, and indisputable.

¶ 51 When considering the denial of the defendant's postconviction petition, OSAD considers each of the seven postconviction claims presented therein. The question is whether the circuit court erred manifestly in denying each of the seven claims.

¶ 52 The First Postconviction Claim: Improper Messages to Jurors

¶ 53 The first postconviction claim presented by the defendant was that E.A.'s mother, and others, subjected several jurors to improper *ex parte* communications. The defendant's affidavits state that these communications were along the lines of, "come on let's just get this over and just find him guilty." Such communication during trial, about a matter pending before the jury, is presumed prejudicial to the defendant's right to a fair trial. *People v. Harris*, 123 Ill. 2d 113, 132-33 (1988). However, "[a] verdict will not be set aside where it is obvious that no prejudice resulted from a communication to the jury, either by the court or by third persons outside the presence of the defendant." *Id.* at 132. Here, there was no evidence that prejudice resulted from a communication to the jury. The affidavits did not even allege prejudice. For example, the affidavit quoted above stated that the three jurors who had been addressed "looked at each other and then at the woman that spoke this." Such a reaction does not establish prejudice. Furthermore, the defendant at the third-stage evidentiary hearing did not present any witness—such as a juror from his trial—to testify about prejudice caused by such communications.

¶ 54 In that same postconviction claim, the defendant alleged that the trial judge "act[ed] in an inappropriate manner regarding defense counsel," *i.e.*, she smirked, rolled her eyes, etc., as defense counsel presented his case to the jury, as one affiant wrote. A judge's hostile attitude toward defense counsel may be prejudicial. *Id.* at 137. However, the judge at the third-stage evidentiary hearing was free to disbelieve the affiants' factual allegations regarding the judge's behavior. Furthermore, the defendant did not present, at the evidentiary hearing, any evidence of the judge's behavior or how it may have affected the jurors. The circuit court did not err manifestly in denying relief on this first postconviction claim.

¶ 55 The Second Postconviction Claim: Ineffective Assistance by Direct-Appeal Counsel for Not Arguing Reasonable Doubt

¶ 56 The second postconviction claim was that the defendant's direct-appeal counsel provided ineffective assistance when he failed to argue that the evidence was insufficient to prove beyond a reasonable doubt that the defendant was guilty of first degree murder. At the third-stage evidentiary hearing, the defendant did not offer evidence in support of this claim, but such evidence could potentially be found in the record. Therefore, this court will address this claim.

¶ 57 The two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), applies to claims of ineffective assistance of appellate counsel. *People v. Enis*, 194 Ill. 2d 361, 380 (2000). Under that test, a defendant must show both (1) that his attorney's performance fell below an objective standard of reasonableness, as measured by reference to prevailing professional norms, and (2) that the substandard representation so prejudiced the defendant that there is a reasonable probability that, absent the errors, the outcome would have been different. *Strickland*, 466 U.S. 687-88. When determining whether the evidence against the defendant was sufficient, this court must look at the evidence in the light most favorable to the State and must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Hagberg*, 192 Ill. 2d 29, 33-34 (2000). A defendant commits the offense of strong-probability first degree murder when (1) he performs acts which cause the death of an individual, and (2) at the time he does so, the defendant knows that his acts created a strong probability of death or great bodily harm to the individual or another. 720 ILCS 5/9-1(a)(2) (West 2008); see also Illinois Pattern Jury Instructions, Criminal, No. 7.01 (4th ed. 2000). An individual acts with knowledge when he is consciously aware that his conduct is practically certain to cause a particular result. 720 ILCS 5/4-5 (West 2008). Knowledge is ordinarily proved by circumstantial evidence rather than by direct evidence. *People v. Nash*, 282 Ill. App. 3d 982, 985 (1996).

¶ 58 Here, the evidence showed that five-year-old E.A. was in fine shape on Monday morning, September 8, 2008. He was excited about going to kindergarten and, for the most part, he dressed himself. As the defendant drove E.A. and E.A.'s mother to the latter's workplace, E.A. was awake, and he did not complain about not feeling well. At 7 a.m., E.A.'s mother was dropped off at work. By 11 a.m., E.A. was essentially comatose and in a life-threatened condition, and during the entire time between 7 a.m. and 11 a.m., the defendant had sole care of E.A.

¶ 59 The defendant told Madison County detectives that he had "no clue" about what had happened to E.A. to put him in that unresponsive condition, though he said that E.A. may have had a bicycling accident or may have hit his head on the concrete floor at home. At trial, two close relatives of the defendant and a family friend testified on the defendant's behalf; they portrayed E.A. as either accident prone or simply unlucky in the days prior to September 8. Medical personnel offered testimony on E.A.'s condition and its likely causes. Dr. Dorward, the chief resident in neurosurgery at Children's Hospital, testified that E.A. was "clearly significantly brain injured" and "essentially comatose at the time" he was brought to the hospital. E.A. had a subdural hematoma on the left side of his brain and "a profound swelling of the brain." According to Dr. Dorward, such brain injuries in children "happen almost exclusively from high impact acceleration type of injuries," such as "very severe blunt trauma to the head." Dr. Goldsmith, an attending physician in the PICU at Children's Hospital, testified that the condition of E.A.'s brain "pose[d] an immediate risk of serious brain injury and of death." According to Dr. Goldsmith, a brain injury as severe as E.A.'s would occur in bicycle accidents only where the cyclist was struck by a car, and it would be "exceedingly uncommon" for a person to be walking or talking after the injury. Dr. Burch, the medical examiner who performed E.A.'s autopsy, testified that the hemorrhage on the brain's surface was probably received "within a couple of days" before E.A.'s death. The

"devastation to the entire brain," he testified, was caused by an acceleration-deceleration movement that, within seconds, would leave a child unconscious and unable to be aroused, or would result in a seizure or death. Dr. Burch found the cause of death was closed head injury and the manner of death was homicide. The "devastating head injury" could not have been caused by the boy himself, said Dr. Burch; an older and larger individual "would have to have done this injury to the child."

¶ 60 To say the least, any rational trier of fact could have found that the defendant, who had sole care of E.A. from 7 a.m. to 11 a.m., was the older and larger individual who inflicted this devastating head injury (and the other injuries) upon E.A. Any rational trier of fact could have found the essential elements of strong-probability first degree murder beyond a reasonable doubt.

¶ 61 The defendant suggested in his postconviction petition that an "improper jury instruction" may have misled jurors into convicting him of first degree murder. The "improper" instruction read as follows: "In order for you to find that the acts of the defendant caused the death of [E.A.], the State must prove beyond a reasonable doubt that defendant's acts were a contributing cause of the death and that the death did not result from a cause unconnected with the defendant. However, it is not necessary that you find the acts of the defendant were the sole and immediate cause of death." Illinois Pattern Jury Instructions, Criminal, No. 7.15. There was nothing improper about this instruction. The defendant sought to persuade the jury that the death of E.A. was caused by factors other than his own actions (*e.g.*, hitting his head on a car bumper, getting hit in the head by another child with a Nerf bat, falling from a bicycle, etc.). The defendant's acts need not be the sole or immediate cause of death; it is enough that the defendant's acts contributed to the cause of death. *People v. Brown*, 169 Ill. 2d 132, 153 (1996). The committee note to pattern instruction

7.15 states that this instruction is to be given whenever causation is an issue. The cause of E.A.'s death was an issue in this case.

¶ 62 In sum, any argument that the evidence was insufficient to prove beyond a reasonable doubt that the defendant was guilty of first degree murder would have failed. Direct-appeal counsel was not ineffective for not presenting one. Also, the circuit court did not err manifestly in denying relief on this second postconviction claim.

¶ 63 The Third Postconviction Claim: The Testimony of Dr. Spivey Permitted the Introduction of Hearsay Testimony From Two Unreliable Sources

¶ 64 The third postconviction claim was that the trial testimony of Dr. Maria Spivey, a member of the child protection team at Children's Hospital, permitted the State to introduce unreliable testimony from two convicted felons, William and Kim Huntsman, thus depriving the defendant of a fair trial. This assertion is rebutted by the record. In the midst of Dr. Spivey's testimony, the parties conferred with the judge outside the jury's hearing, and defense counsel stated that he did not want Dr. Spivey to relate any hearsay statements that she had heard from Mr. and Mrs. Huntsman. The State promised not to ask for such testimony. During her testimony, Dr. Spivey never mentioned the Huntsmans nor any of their alleged statements to her. The circuit court did not err in denying postconviction relief on this third claim.

¶ 65 The Fourth Postconviction Claim: The Circuit Court's Refusal to Instruct Jury on Involuntary Manslaughter

¶ 66 The fourth postconviction claim was that the circuit court erred in declining to instruct the jury on involuntary manslaughter, thus depriving the defendant of a fair trial. The defendant requested such an instruction at the instruction conference and included the issue in his posttrial motion. Accordingly, this claim could have been raised on direct appeal, but was not. The

defendant could have argued that direct-appeal counsel was ineffective for not raising it, but did not. Even though the issue has been forfeited, this court will consider the claim.

¶ 67 "The difference between first degree murder and involuntary manslaughter lies in the defendant's mental state." *People v. McDonald*, 2016 IL 118882, ¶ 51. A defendant commits strong-probability first degree murder when his acts cause death to another and he knows his acts create a strong probability of death or great bodily harm. 720 ILCS 5/9-1(a)(2) (West 2008). A person acts with knowledge when he is consciously aware that his conduct is practically certain to cause a particular result. *Id.* § 4-5. In contrast, a person commits involuntary manslaughter when he "unintentionally kills an individual without lawful justification *** if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly." *Id.* § 9-3(a). A person acts recklessly "when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." *Id.* § 4-6. Reckless conduct generally involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. See *People v. Davis*, 35 Ill. 2d 55, 60 (1966). A defendant is entitled to a jury instruction on a lesser-included offense if there is "*some evidence* in the record that, if believed by the jury, will reduce the crime charged to a lesser offense." (Emphasis in original.) *McDonald*, 2016 IL 118882, ¶ 25.

¶ 68 In this case, the defendant did not present any evidence that, if believed by the jury, would reduce first degree murder to involuntary manslaughter. That is, he did not present any evidence that he acted recklessly in performing the acts that killed E.A. At one point, during the recorded interrogation by detectives, the defendant said that he pushed E.A. to the couch on his way to the

bathroom, but this was not the type of act that would be likely to cause death or great bodily injury. First degree murder was the only charge appropriate for the defendant—an apparently healthy 35-year-old man—who inflicted a devastating brain injury, the type commonly associated with high-impact motor vehicle collisions, plus various other injuries, on a defenseless 5-year-old boy. See *People v. DiVincenzo*, 183 Ill. 2d 239, 250-51 (1998) (nonexhaustive list of factors to consider when determining "whether a defendant acted recklessly and whether an involuntary manslaughter instruction is appropriate"); see also *People v. Handley*, 51 Ill. 2d 229, 235 (1972) (a manslaughter instruction "should not be given if the evidence clearly demonstrates that the crime was murder and there is no evidence to support a conviction of manslaughter"). The circuit court did not abuse its discretion in declining to instruct the jury on involuntary manslaughter. See *McDonald*, 2016 IL 118882, ¶ 42 (standard of review). Therefore, the court did not err in denying the defendant postconviction relief on this claim.

¶ 69 The Fifth Postconviction Claim: Ineffective Assistance of Direct-Appeal Counsel for Not Arguing a Violation of Right to Counsel

¶ 70 The fifth postconviction claim was that direct-appeal counsel provided ineffective assistance when he failed to argue that the circuit court had violated his right to counsel when it allowed evidence of the defendant's statements to police detectives after he had invoked his right to an attorney. Counsel did not provide ineffective assistance for failing to so argue.

¶ 71 Prior to the custodial interrogation, the police properly informed the defendant of his right to remain silent, his right to the presence of a lawyer, his right to a free lawyer if he could not afford one, etc. See *Miranda v. Arizona*, 384 U.S. 436 (1966). The defendant indicated that he understood these rights, and that he could stop answering questions, and demand a lawyer, at any time. The interrogation by the two detectives, Burns and Marconi, began, and the defendant answered, in a fashion, the questions posed to him by the detectives. At 3:15, according to the

clock on the interrogation room wall, the defendant said, "You know what? I want a lawyer if you're just going to sit here and keep badgering me, I want a lawyer." Burns said, "You said a word here and I'm supposed to stop. Do you want a lawyer?" The defendant answered, "If you're going to keep badgering me, yes." Burns asked, "What do you consider badgering?" He promptly assured the defendant, "If you want a lawyer, we're going to back out of here. OK?" The defendant continued to speak, without answering the question about a lawyer. "You've invoked your right to counsel," Burns said, "Do you want a lawyer?" The defendant did not answer. At that point, Detective Marconi left the room. At 3:17, Burns asked, "Do you want a lawyer or not?" The defendant answered, "I don't know what to do, dude." For the next three minutes, Burns asked the defendant, in various ways, whether he wanted to consult with a lawyer or to continue speaking with him; the defendant either did not answer or said that he did not know what to do. Burns asked, "Can I stay in here or do you want a lawyer?" and the defendant answered, "You can stay." Finally, Burns asked, "Do you want to talk to a lawyer or not?" and the defendant responded, "I don't know what I want, dude, I'm freaked out." The defendant soon returned to answering questions posed by Burns.

¶ 72 When a defendant is properly advised of his rights and submits to custodial interrogation, but he subsequently invokes his right to counsel, the interrogation must cease until an attorney is present. *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981). However, not every mention of an attorney is sufficient to invoke the right to counsel. Only an unambiguous request for an attorney is sufficient to invoke the right. *Davis v. United States*, 512 U.S. 452, 459 (1994). If "a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, [United States Supreme Court] precedents do not require the cessation of questioning."

(Emphasis in original.) *Id.* The determination of whether an accused actually invoked his right to counsel under *Miranda* and *Edwards* "is an objective inquiry." *Id.* at 458-59.

¶ 73 Here, the defendant did not unambiguously or unequivocally invoke his right to counsel. When the defendant said, "I want a lawyer," it was immediately followed by, "if you're just going to sit here and keep badgering me." That statement is conditional. Detective Burns spent the next five minutes trying to get a straight answer to the question of whether the defendant wanted a lawyer. During that time, the defendant never answered, "Yes, I want a lawyer." Instead, the defendant was silent or stated that he did not know. This is not the kind of clear statement demanded by *Davis.* See also *People v. Sommerville*, 193 Ill. App. 3d 161, 169 (1990) ("simply referring to an attorney *** does not automatically constitute an invocation of the right to counsel"). There was no basis for suppressing the defendant's statements to police. Accordingly, the defendant's direct-appeal counsel cannot be faulted for not arguing that suppression was required, and the circuit court did not err in denying postconviction relief on this claim.

¶ 74 The Sixth Postconviction Claim: Ineffective Assistance by Direct-Appeal Counsel for Not Arguing That Trial Prosecutor Made Improper Closing Remarks

¶ 75 The sixth postconviction claim is that direct-appeal counsel provided ineffective assistance when he failed to argue that the trial prosecutor made improper closing remarks to the jury when he stated that the defendant "kicked and punched" E.A. "Closing arguments must be based on facts in evidence or upon reasonable inferences which can be drawn from these facts." *People v. Hamilton*, 100 Ill. App. 3d 942, 953-54 (1981) (closing arguments relating to "the State's theory of a gun switch by the two defendants" were not improper). Nobody testified that he or she had seen the defendant kick or punch E.A. However, the evidence was such that kicking and punching could be reasonably inferred. The injuries to E.A.'s head, not to mention the rest of his body, could be explained by high-velocity kicks or punches by the defendant, who had sole care of E.A.

at the time he was injured. Direct-appeal counsel was not ineffective for failing to argue that the trial prosecutor had made improper closing arguments. The circuit court did not err in denying postconviction relief on this claim.

¶ 76 The Seventh Postconviction Claim: Deprivation of the Right to an Impartial Jury by the Circuit Court's Failure to Comply With Rule 431(b)

¶ 77 The defendant's seventh, and last, postconviction claim was that he was deprived of his right to an impartial jury by the circuit court's failure to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). At the third-stage evidentiary hearing, the defendant did not testify about this purported error, but the error is evident from the trial transcript.

¶ 78 Rule 431(b), at the time of the defendant's trial, required the court to ask each potential juror, individually or in a group, whether he or she "understands and accepts" these four principles: "(1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her." Ill. S. Ct. R. 431(b) (eff. May 1, 2007); see also *Zehr*, 103 Ill. 2d at 477. Where the defendant objects, the court will not inquire into the fourth principle, the one regarding the defendant's failure to testify. Ill. S. Ct. R. 431(b) (eff. May 1, 2007). In this case, at the very start of *voir dire*, the court told the prospective jurors that the defendant was presumed innocent of the charge, that before he could be convicted the State must prove him guilty beyond a reasonable doubt, that the defendant is not required to offer any evidence on his own behalf, and that the defendant's failure to testify cannot be held against him by the jury. In short, the court informed the potential jurors of the Rule 431(b) principles. The court immediately added that "the prosecutors and also the defense attorney can go further into these questions," and in fact the trial prosecutors and (even more so) defense

counsel did ask the potential jurors about some of these principles. Nevertheless, the circuit court itself did not question any potential juror on whether he or she understood or accepted any of these four principles. The court's failure to comply with Rule 431(b) is obvious from the record.

¶ 79 The issue of the circuit court's noncompliance with Rule 431(b) was not raised in the defendant's direct appeal. Because the issue was not the subject of a contemporaneous objection by the defendant and was not included in the defendant's written posttrial motion, the issue was procedurally defaulted on direct appeal. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). This court could not have considered the issue on direct appeal, unless this court exercised its discretion and excused the defendant's procedural default. *People v. Clark*, 2016 IL 118845, ¶ 42. Traditionally, courts have identified two instances in which a procedural default is excused: (1) when a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) when a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). In short, a procedural default is excused in the event of plain error. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); see also *People v. Averett*, 237 Ill. 2d 1, 18 (2010) (the plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances).

¶ 80 Here, a clear or obvious error occurred as the circuit court failed to ask whether each potential juror understood and accepted the Rule 431(b) principles. Under either prong of the plain-error doctrine, that is the initial analytical step. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). However, the issue otherwise fails to pass muster under either prong of plain error.

¶ 81 Under the first prong, the defendant would need to show that the evidence was so closely balanced that this error alone threatened to tip the scales against the defendant. The evidence was not closely balanced. Instead, the evidence showed that five-year-old E.A. was in perfectly fine condition at 7 a.m. but in a life-threatened condition before 11 a.m., and E.A. was in the sole care of the defendant during that time. The medical testimony made clear the devastating injuries that E.A. received at that time, including a head injury so severe that, in children, it is seen "almost exclusively from high impact acceleration type of injuries," such as automobile accidents or very severe blunt trauma to the head. Meanwhile, the defendant's recorded account of events did not begin to explain E.A.'s condition.

¶ 82 Under the second prong of the plain-error doctrine, a Rule 431(b) violation is not cognizable, unless there is evidence that the violation produced a biased jury. *People v. Wilmington*, 2013 IL 112938, ¶ 33. Here, there is no evidence of a biased jury. The record does not show bias, and the defendant has not proffered any evidence of bias.

¶ 83 In sum, even if the procedural default were excused, and the Rule 431(b) issue were considered by this court, the defendant could not prevail on it. The evidence of guilt was simply overwhelming, and there is no evidence that jury bias, instead of an unbiased consideration of the evidence, led to the defendant's conviction. The circuit court did not err in denying relief on this claim.

¶ 84 Potential Issue 2—Whether Postconviction Counsel Failed to Comply With Rule 651(c)

¶ 85 OSAD's second potential issue is whether postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c), which is intended to assure a reasonable level of assistance.

¶ 86 In a postconviction proceeding, the right to counsel is wholly statutory, and therefore a postconviction petitioner is entitled only to the level of assistance required by the Act, which is a

"reasonable" level of assistance. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). In order to assure this reasonable level of assistance, Illinois Supreme Court Rule 651(c) imposes certain duties on postconviction counsel. *Id.* Rule 651(c) requires that the record shall contain a showing, which may be made by postconviction counsel's certificate, that counsel (1) has consulted with his client by phone, by mail, by electronic means, or in person, to ascertain his contentions of constitutional deprivations, (2) has examined the record of proceedings of the trial, and (3) has amended the *pro se* posttrial motion as necessary for an adequate presentation of his client's contentions. Ill. S. Ct. R. 651(c) (eff. July 1, 2017). Counsel's filing of a Rule 651(c) certificate raises "a rebuttable presumption that post-conviction counsel provided reasonable assistance." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. "It is defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with the duties mandated by Rule 651(c)." *Id.* Appellate review of whether counsel substantially complied with Rule 651(c) is *de novo*. *People v. Bass*, 2018 IL App (1st) 152650, ¶ 13.

¶ 87 Here, postconviction counsel filed a certificate of compliance with Rule 651(c) immediately before the third-stage evidentiary hearing held on December 11, 2017. Counsel filed a second Rule 651(c) certificate on August 30, 2018, approximately 8½ months after the evidentiary hearing, and six months before the circuit court entered its written order denying the postconviction petition. In the certificate filed on August 30, 2018, counsel certified that: "1. I have consulted with the Defendant in person, my [*sic*] mail, by phone or by electronic means to ascertain the defendant's contentions of deprivation of Constitutional Rights; 2. I have examined the trial court files, the record of proceeding at the trial or plea of guilty and the report of proceedings at the sentencing hearing; and 3. I have made any amendments to the petition filed pro se that are necessary for adequate presentation of petitioner's contentions." In short, counsel's

certificate closely tracks the wording of Rule 651(c), giving rise to the rebuttable presumption that counsel provided reasonable assistance.

¶ 88 In his *pro se* objection to OSAD's *Finley* motion, which he has filed with this court, the defendant asserts that he has rebutted the presumption. He states that postconviction counsel "failed to amend [his] pro-se petition," which included a failure to amend the petition so as to add allegations that the defendant was "prejudiced by [direct-appeal] counsel's ineffective assistance." He also states that postconviction counsel "failed to attach necessary affidavits and evidence to support the claims in the pro-se petition." There is a striking lack of specifics in this supposed "rebuttal" of the presumption. The defendant does not explain how exactly his petition should have been amended, except to add allegations of "prejudice" by direct-appeal counsel's supposed failures to meet professional norms, and he does not explain what "affidavits and evidence" should have been added to support his claims. The defendant's assertions do not rebut the presumption that postconviction counsel provided reasonable assistance. Furthermore, this court has addressed the defendant's postconviction claims of ineffective assistance of direct-appeal counsel in a manner that assumes a "prejudice" allegation was made.

¶ 89 CONCLUSION

¶ 90 For all the foregoing reasons, this court concludes that the denial of the defendant's postconviction petition was not manifestly erroneous, and that postconviction counsel fulfilled his duties under Rule 651(c). Any argument to the contrary would lack merit. Accordingly, OSAD's *Finley* motion to withdraw as counsel is granted, and the judgment of the circuit court is affirmed.

¶ 91 Motion granted; judgment affirmed.