

NOTICE

This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2026 IL App (4th) 251205-U

NO. 4-25-1205

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 16, 2026

Carla Bender

4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Winnebago County
TROY MICHAEL ROSSATO,	)	No. 18CF2108
Defendant-Appellant.	)	
	)	Honorable
	)	Debra D. Schafer,
	)	Judge Presiding.

JUSTICE VANCIL delivered the judgment of the court.
Presiding Justice Steigmann and Justice Lannerd concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, finding the trial court correctly dismissed defendant's postconviction petition where defendant failed to show that trial counsel rendered deficient performance.

¶ 2 On September 7, 2021, following a bench trial, defendant, Troy Michael Rossato, was convicted of two counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(2) (West 2018)). His convictions were later affirmed by the Appellate Court, Second District. See *People v. Rossato*, 2022 IL App (2d) 210698-U, ¶ 56. He filed a postconviction petition, in which he raised numerous allegations of ineffective assistance of trial counsel. The trial court dismissed all but one of his claims at a second-stage hearing on the petition. Following a third-stage evidentiary hearing, the court found that defendant had not received ineffective assistance of counsel and dismissed his remaining claim.

¶ 3 Defendant now appeals, arguing the trial court erred in dismissing his

postconviction petition. We affirm.

¶ 4

I. BACKGROUND

¶ 5

On October 3, 2018, defendant was indicted on two counts of criminal sexual assault, a Class 1 felony (720 ILCS 5/11-1.20(a)(2)) (West 2018)). The charges alleged that, between July 13 and 14, 2018, he committed an act of sexual penetration with L.R., knowing that L.R. was unable to give knowing consent, in that he inserted his finger and penis into L.R.'s vagina while L.R. was unconscious.

¶ 6

During discovery, the State provided defendant with a bystander's report relating to statements made by an individual named Hannah Timmer (first bystander's report). At a subsequent status hearing, the State referenced the first bystander's report and moved to continue, telling the trial court, "Based on that report, I don't feel comfortable proceeding to trial in this matter until I do some further investigation regarding the information contained therein. I don't want to speak for defense counsel, but I believe he may want to do the same." Defense counsel agreed with the continuance, noting that the first bystander's report contained information that could "reasonably be *Brady* material." See *Brady v. Maryland*, 373 U.S. 83 (1963). The court granted the continuance.

¶ 7

On November 5, 2020, the State provided defendant with a second bystander's report containing L.R.'s response to the first bystander's report (second bystander's report).

¶ 8

At a December 4, 2020, hearing, defense counsel informed the trial court that negotiations between defendant and the State based on the bystander's reports had "irretrievably broken down." The court subsequently set the case for trial.

¶ 9

Defendant's trial began on August 19, 2021. L.R. testified that on July 13, 2018, she and Timmer were working together. After work, they decided to go out drinking. At one of the

bars they went to, they met defendant and Dylan Badker, the boyfriend of one of their coworkers. L.R. testified that she had never met defendant before that night.

¶ 10 After having a few drinks at the bar, Timmer invited L.R. and a few of her friends back to her house to swim in her indoor pool and continue drinking. L.R. stated that Badker and defendant showed up at the house after calling and texting numerous times “trying to get an invite.” She testified that the group swam, played games, and drank. L.R. recalled that, at some point, “things started to get foggy. I was definitely feeling real drunk.” She stated that she remembered playing Jenga and defendant telling her that she would be unable to make a move she was attempting in the game. She replied, “ ‘Watch me.’ ” She stated that this was the only interaction she recalled having with defendant at that point.

¶ 11 L.R. testified that, after playing Jenga, she “[did not] really remember much.” Her next recollection was of herself over a toilet, vomiting. She stated that Timmer was present in the bathroom, and she believed Badker was as well, instructing others how to hold her head. When asked about the gaps in her memory, L.R. responded, “Everything was foggy. I was extremely intoxicated. I really don’t know.”

¶ 12 L.R. remembered Timmer and another person carrying her upstairs and into a bedroom. She reiterated that she remembered only “bits and pieces.” Timmer helped her undress and put a robe on. After putting on the robe, L.R. stayed in bed, as she “couldn’t really move.” She testified that she later awoke to someone penetrating her vagina with his finger. At first, she was unable to see who the person was. She stated, “I just remember him being on my neck and, like, kissing my neck and then telling—asking me if it felt good.” She stated that she tried to keep her legs closed because she was unable to speak. She fell in and out of consciousness multiple times. She testified:

“Each time I woke up, it was like it was happening again and I didn’t remember the time before. So I just remember being, like, shocked and I was like, ‘No,’ and I remember trying to say no but I couldn’t really say no. And I just remember, like, trying to keep rolling away. And I was, like—and I just took a lot of strength to do that and so I would fall unconscious again. It happened several times.”

She stated that she was only able to identify defendant after he got on top of her and penetrated her with his penis, at which point she looked up into his face. She recalled that she tried to scream and hit him but was unable to do either. She passed out again, and when she awoke, he was penetrating her with his fingers, stating that he knew it felt good to her. She was finally able to roll away from defendant and “put [herself] up against the wall” on the side of the bed, where she remained, crying, until she passed out again. She testified that this was the last time she saw defendant.

¶ 13 Later in the morning, Timmer woke L.R. L.R. stated she was “still really out of it” at this time, but she was able to drive back to her house and go to sleep. When she awoke at approximately 2 p.m., she started to remember the events of the previous night and early morning. She stated that she immediately texted Timmer to ask if anyone had come into the bedroom she was in at the party. Based on her conversation with Timmer, she went to the hospital and underwent a sexual assault examination.

¶ 14 L.R. testified that she never told defendant she wanted to have sex with him or do anything sexual with him.

¶ 15 On cross-examination, L.R. estimated that she and Timmer left the bar to go to Timmer’s house at around 1 or 2 a.m. She guessed that, after being taken up to the bedroom by Timmer, she fell asleep at approximately 4 a.m. She stated that the bedroom was dark at this time.

Later, when she observed defendant leaving the bedroom after penetrating her with his penis and fingers, it was “starting to get light out.” She estimated that this was around 5 or 6 a.m. She guessed that Timmer then woke her up at around 9 a.m. so she could drive herself home.

¶ 16 Timmer testified that she had never met defendant before that night. She stated that, at the house, L.R. was acting like “a little social butterfly.” She stated that she and another individual at the party, Blair Beeman, noticed L.R. getting sick and helped her upstairs into the bedroom. She described L.R. as “[t]otally out of it. Throwing up. Just, like, very lethargic and heavy.” She stated that while she was undressing L.R. and helping her into the robe, Badker and defendant were also in the bedroom. She testified that Badker helped her put L.R. on the bed and position her so that she would not choke on her vomit. Defendant did not help but watched them put her onto the bed.

¶ 17 After putting L.R. onto the bed and placing a trash can beside her, the group went back downstairs to the party. Timmer testified that she and Badker picked up cigarette butts outside for around 15 minutes. When they came back inside, she observed defendant coming down the stairs from the bedroom. She stated she “freaked out” and demanded to know why he was in the bedroom when L.R. was, “[e]ssentially, unconscious.” Defendant stated that he “ ‘didn’t do anything she didn’t want.’ ” Timmer then went upstairs and found L.R. against the wall, “kind of moaning, saying, ‘No.’ ” She told Badker and defendant that they needed to leave, or she would call the cops.

¶ 18 On cross-examination, Timmer stated that the group arrived at her house at around 11 p.m. She estimated that she saw defendant coming down the stairs from the bedroom at approximately 12:30 a.m. but noted, “I’m not 100 percent sure.” She stated that defendant and Badker left the residence at around 1 a.m. On redirect, she stated that she was guessing on the

specific timeline and “literally [had] no idea” what time the events took place.

¶ 19 Beeman testified that she was at Timmer’s house on the night of July 13, 2018, and into the morning of July 14, 2018. She did not know either Timmer or L.R. before that night. She stated that she “blacked out” that night due to her drinking. She remembered seeing L.R. in a bathroom throwing up and attempting to help her. She confirmed that she and Timmer helped L.R. up the stairs to the bedroom. She recalled seeing other people upstairs but did not remember who they were.

¶ 20 Emily Bunton, an emergency room nurse, testified that L.R. came into the hospital on the evening of July 14, 2018, and stated she wanted to have a sexual assault examination performed. Bunton stated she performed the examination. The parties stipulated to the admission of a lab report showing that defendant’s semen was found in L.R.’s vagina.

¶ 21 The State rested, and the defense moved for a directed verdict, arguing that the State had failed to prove that L.R. was incapable of consent or that defendant was aware of her incapacity. The trial court denied the motion.

¶ 22 Defendant testified that on July 13, 2018, his fiancée dropped him off at a bar so he could have a few drinks and play the slot machines. He later called Badker and asked if he wanted to join him. After Badker arrived at the bar, he introduced defendant to L.R. and Timmer. Eventually, the two women left, and defendant left with Badker a short while later. They stopped at a gas station to buy alcohol before driving to Timmer’s home.

¶ 23 At Timmer’s house, the group sat at a table near the pool to play Jenga and cards. During that time, he engaged in “small talk, flirtatious back and forth” with L.R. He stated that after playing Jenga, L.R. got into a hot tub. From the hot tub, she looked over at him and “did a gesture with her finger, like she was doing oral” sex.

¶ 24 At around 1:30 a.m., he went outside to smoke a cigarette. When he returned inside, L.R. was no longer downstairs. He stated that he was downstairs for another 15 or 20 minutes before needing to use the bathroom. Timmer told him to use the bathroom upstairs, which required him to enter the room where L.R. was in bed. He testified that when he walked past L.R. to use the bathroom, she was awake. When he came out of the bathroom, he asked her, “ ‘You good over there?’ ” and she replied, “ ‘Yeah. Come here.’ ” He stated that the two “chitchatted, and one thing led to the other.” The two kissed and eventually had sex. He stated that at no point while he was having sex with L.R. did she ever pass out or fall asleep, and he did not notice anything unusual about her. He testified that they had sex in different positions and that, during sex, she stated, “ ‘Yes, daddy. More, daddy.’ ” He stated that they communicated during sex, and L.R. had no trouble speaking.

¶ 25 According to defendant, after they finished, L.R. asked if he had a girlfriend. He told her that he did, and she stated that she felt “dirty.” Defendant testified that the two fell asleep. He later woke up around 6:30 a.m. and got out of bed because he had a job later that morning. When he went back downstairs, Timmer stated she was going up to talk to L.R. He stated that when Timmer came back down, he thanked her for having them over, and he and Badker left.

¶ 26 On questioning by the trial court, defendant clarified that he was the one being “more flirty,” as opposed to L.R.

¶ 27 The defense then rested. Following closing arguments, the trial court took the matter under advisement.

¶ 28 At a hearing on December 7, 2021, the trial court gave its ruling. It stated that there was no dispute that sex had occurred between defendant and L.R., and the only question was whether the sex was consensual. This ultimately came down to a question of credibility and

whether the court believed the testimonies of L.R., Timmer, and Beeman or the testimony of defendant as to L.R.'s intoxicated state. Although noting that Timmer's timeline was contradicted by both L.R. and defendant, the court nevertheless found Timmer, L.R., and Beeman to be credible witnesses. It found defendant guilty of both charges of criminal sexual assault.

¶ 29 Defendant filed a motion for judgment notwithstanding the verdict or, alternatively, for a new trial, which the trial court denied. He was sentenced to consecutive terms of seven years and six months in the Illinois Department of Corrections for each offense. He filed a motion to reconsider his sentence, which was also denied.

¶ 30 Defendant appealed his convictions, arguing that the State had failed to prove beyond a reasonable doubt that L.R. was unable to give consent and that he knew L.R. was unable to give consent. *Rossato*, 2022 IL App (2d) 210698-U, ¶ 2. The Second District affirmed. *Id.*

¶ 31 On December 22, 2023, defendant filed a certified petition for postconviction relief. In his petition, he argued that trial counsel was ineffective for (1) failing to utilize the first bystander's report to show that L.R. was unsure if she had been assaulted and that Timmer was reluctant to testify against him, (2) failing to use text messages between L.R. and Timmer from July 14, 2018, to impeach them at trial, (3) failing to present expert testimony on how alcoholic blackouts affect memory formation, and (4) failing to obtain defendant's phone records to establish that he was still at the party at 6 a.m. on July 14, 2018, and had not fled the scene. The petition further alleged that defendant was actually innocent based on newly discovered evidence, namely, the first bystander's report and L.R.'s and Timmer's text messages.

¶ 32 Defendant attached the first bystander's report to the petition. The report, authored by Teresa Lazzerini, a victim service provider with the state's attorney's office, stated that Timmer, after receiving a subpoena to testify in defendant's case, had contacted her to report that she did

not feel comfortable testifying based on statements L.R. had made. Timmer stated that L.R. had told her that she did not know “if the crime really happened because she was ‘hammered.’ ” According to Timmer, L.R. told her that it did not matter if the crime occurred because defendant “had a record already” and was “not a good person.” Timmer told Lazzerini that she was willing to testify but did not want to do so if defendant was innocent.

¶ 33 Defendant also attached records of text messages between L.R. and Timmer on July 14, 2018. At 1:59 a.m. on that day, L.R. sent a text to an individual named Jake, stating, “We are all swimming at [Timmer’s] if you wanna come.” At 2:47 a.m., she sent more texts to Jake, reading, “Jake!!! Omg lol,” and, “Come to [Timmer’s].” Later, at 2:15 p.m., L.R. sent a text to Timmer that read “[Timmer], did one of the guys come to the room when I went to bed?” Timmer responded, “What was the one dude[’]s name? You were sitting on his lap.” Timmer then identified defendant by name and asked, “Why?” and “Creepy?” She texted L.R., “Are you okay?” The record then shows that Timmer and L.R. had a phone conversation for approximately four and a half minutes. Following the call, Timmer texted, “I want you to get like swabbed [L.R.] Like no fucking joke.” She further texted, “That shit[’]s not fine, when I went up there I didn’t know what you were saying and now it all makes sense,” and, “I freaked on that dude this morning.” L.R. responded, “I just don’t know what to do tho.. [sic] I wish I remembered more. I feel so gross.”

¶ 34 Defendant also attached excerpts from two online articles concerning alcohol-induced blackouts, both from the National Institute on Alcohol Abuse and Alcoholism.

¶ 35 Finally, defendant attached documents from his cell phone carrier indicating its policy of deleting call detail records and cell tower information after one calendar year. He also attached an affidavit from his brother stating that he had spoken to defendant on the phone at 6 a.m. on July 14, 2018.

¶ 36 At a first-stage hearing, the trial court found that the petition stated the gist of a constitutional claim and advanced it to the second stage of postconviction proceedings.

¶ 37 The State then moved to dismiss the petition, arguing that trial counsel did not provide ineffective assistance because his choices at trial were reasonable trial strategy and that the “newly discovered” evidence for defendant’s actual innocence claim was not newly discovered, as it was tendered to the defense prior to trial. Specifically, with respect to defendant’s first argument, the State noted that defendant’s petition had failed to mention that the second bystander’s report existed, which lessened the significance of the first bystander’s report. The State attached the second bystander’s report to its petition. This report, written by Victim Service Provider Brianna Smith and dated October 29, 2020, stated that Smith and an attorney with the State had spoken with L.R. about the statements Timmer claimed L.R. had made. L.R. told them, “ ‘When I first talked to [Timmer] that morning, I was out of it. I believe I was drugged. I did drink but a girl knows! I knew I had sex and I didn’t want it!’ ” When asked about her statement regarding defendant’s past and whether it mattered that he committed the crime, L.R. stated, “ ‘I never said that. From what I recall from the conversation with [Timmer] was I said “it doesn’t matter what he’s done” meaning in his past. I don’t care if he’s done this before, it happened.’ ”

¶ 38 A second-stage hearing was held on March 24, 2025. Following the arguments of the parties, the trial court found that defendant’s claim of actual innocence was not cognizable because the supporting evidence was not newly discovered. It also dismissed defendant’s second, third, and fourth claims of ineffective assistance. It found that (1) Timmer’s and L.R.’s texts would not necessarily have impeached either woman and may have harmed defendant’s theory of the case, (2) defendant’s claim regarding scientific literature of alcoholic blackouts was not supported by the affidavit of an expert and was speculative, and (3) evidence of cell phone records placing

defendant at the party at 6 a.m. on July 14, 2018, would not have assisted defendant's case where Timmer acknowledged at trial that she was guessing as to her timeline of the night and L.R. herself testified that defendant was still at the house at around 6 a.m.

¶ 39 The trial court found defendant's first claim of ineffective assistance—that trial counsel was ineffective for failing to present the first bystander's report at trial—should advance to a third-stage evidentiary hearing to determine if this decision by counsel was an “informed, strategic decision or neglect.”

¶ 40 A third-stage hearing was held on August 28, 2025. Defendant's trial counsel, Glenn Jazwiec, testified that his strategy at trial was to argue that the State was unable to prove (1) that L.R. was too intoxicated to consent to sex and (2) that defendant knew she was unable to consent to sex. He stated that he reviewed both the first and second bystander's reports prior to trial and decided not to use them. He explained:

“It was part of my trial strategy regarding what use I could get out of it, whether or not it was exculpatory and whether or not I would open the door to the fact that, in there, there was a statement which I was trying to get not into was that L.R. stated that she was hammered and didn't remember a lot of what happened. So that was something that my entire theme of the trial was to show that she wasn't intoxicated to a level that she would not have been able to consent.”

Jazwiec also noted that, in the second bystander's report, L.R. disputed Timmer's recollection of their conversation and stated that, on the morning she spoke with Timmer, she was still “out of it,” presumably from her intoxication the previous night, which would have harmed his defense. He stated this was also why he decided not to use the portion of the first bystander's report that stated L.R. said she could not remember if a crime occurred, as it was undisputed that she and defendant

had had sex and this statement would have indicated she was heavily intoxicated when the sex occurred. When asked why he decided not to question Timmer on the stand about her reluctance to testify against defendant, he answered that Timmer's reluctance would have bolstered her credibility and showed she was not "just somebody who's coming in on behalf of her friend and will spill out anything that her friend wanted to say." Finally, Jazwiec noted that the statements in the bystander's reports were "double hearsay" and disputed, lessening their reliability and benefit to the defense.

¶ 41 On cross-examination, he acknowledged that he had referred to the first bystander's report as "reasonably to be *Brady* material" when discussing it at a pretrial hearing. He stated that the prosecutor at that time wanted to look further into the statements and determine if the charges should be dropped. Although he considered the report to be "[p]ossibly" helpful, he stated he did not consider the report to be as significant as the prosecutor did, considering the full context of both reports. He testified that he did not recall if he had tried to speak to Timmer after receiving the first bystander's report. He stated that he informed defendant of the first bystander's report after he had received it, and they discussed it.

¶ 42 After questioning Jazwiec, defendant's postconviction counsel asked that Jazwiec be excused. Counsel then presented the trial court with a federal case, "*Griffin*," in which a federal court had previously found Jazwiec to be untruthful in his testimony regarding an allegation of ineffective assistance. See *United States v. Griffin*, 3:21-CV-50291 (N.D. Ill. Dec. 8, 2022). He sought to have the court take judicial notice of the case or, alternatively, to allow him to question Jazwiec on the findings contained therein. The court responded:

"Well, the problem is you're just laying it on both of us, and I don't know how in the world [the State] could possibly ask questions on rebuttal relating to

this, if that was your intention. I mean, I don't have any idea what it says. What you handed me was a 13-page document. And I guess what you want me to find is that a judge found [Jazwiec] misled them [*sic*]; and, therefore, he's misleading me?"

Postconviction counsel argued, "I believe it's relevant. I think a finding by a federal judge that [Jazwiec] basically lied to the court in July of 2022 is relevant to your determination today—or on this case." The State objected, arguing the case was not relevant and that it had not received any prior notice of the defense's intention to use it in questioning Jazwiec. The court agreed, telling defense counsel, "[T]his is just being tendered today. I don't think that's appropriate. I'm not going to allow you to inquire."

¶ 43 Ultimately, the trial court found Jazwiec did not provide ineffective assistance in failing to use the bystander's reports at trial. It stated:

“While it is quite clear that [postconviction counsel], with the benefit of hindsight, would make different strategic decisions, the Court cannot find that Mr. Jazwiec's decisions were unsound given his theory of the case that his client, [defendant], was telling the truth when he testified in great detail that [L.R.] was not incapable of consenting to sex with him and that [L.R.] was not so intoxicated at the time.

The fact that his defense was unsuccessful at trial does not render his decision as unsound nor does it rise to the level of ineffective assistance of counsel at trial.”

Having already dismissed defendant's other claims, the court denied defendant's postconviction petition.

¶ 44 This appeal followed.

¶ 45

II. ANALYSIS

¶ 46 On appeal, defendant argues that (1) the trial court erred in its third-stage dismissal of his claim that Jazwiec was ineffective for failing to utilize the bystander's reports at trial, (2) the court erred in not allowing him to impeach Jazwiec at the evidentiary hearing using the findings of the "*Griffin*" court, and (3) the court erred in its second-stage dismissal of his claims that Jazwiec was ineffective for failing to present text message evidence and expert testimony at trial and for failing to obtain cell phone and cell tower records for defendant's cell phone. He further argues that, even if these alleged deficiencies of trial counsel do not establish prejudice individually, their cumulative effect undermines the reliability of the result at trial.

¶ 47 We will address each issue in turn.

¶ 48 A. Third-Stage Dismissal of Ineffectiveness Claim

¶ 49 Defendant first argues that the trial court committed manifest error in its third-stage dismissal of the claim that Jazwiec was ineffective for failing to utilize the bystander's reports at trial.

¶ 50 1. *Forfeiture*

¶ 51 Initially, the State argues that defendant has forfeited this argument by failing to raise the issue on direct appeal. It argues that the bystander's reports were produced during discovery and, therefore, "were a part of the trial court record." We disagree.

¶ 52 "The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal." *People v. Carroll*, 2024 IL App (4th) 231207, ¶ 51. Accordingly, issues which could have been raised on direct appeal, but were not, are considered forfeited. *Id.* However, the doctrine of forfeiture will be relaxed where fundamental fairness

requires, where the forfeiture stems from the ineffective assistance of appellate counsel, or where the facts relating to the claim do not appear on the face of the original appellate record. *Id.*

¶ 53 Here, the State is correct that the bystander’s reports were disclosed to the defense prior to trial and that defendant therefore knew of the reports at the time of the direct appeal. However, although the reports had been disclosed to the defense, they were not used in any proceedings before the trial court. Accordingly, they were not part of the record on appeal. Defendant therefore could not have raised this claim on direct appeal and has not forfeited the claim for failing to do so. See *People v. Carroll*, 2026 IL 131360, ¶ 64 (holding that the correct standard for forfeiture is not whether a defendant knew of the facts supporting an issue at the time of the direct appeal but rather whether those facts appeared in the original record).

¶ 54 *2. Bystander’s Reports*

¶ 55 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2022)) is a statutory vehicle that allows defendants to obtain relief from substantial violations of their federal or state constitutional rights that occurred at trial or sentencing. *People v. Jackson*, 205 Ill. 2d 247, 257 (2001). “The Act sets forth three stages of review.” *People v. Domagala*, 2013 IL 113688, ¶ 32. At the first stage, a petition may be dismissed if it is frivolous or patently without merit, or where it has no arguable basis in law or fact. *Id.* If the trial court does not dismiss the petition at the first stage, it advances to the second stage of proceedings, where counsel may be appointed to represent the defendant, and the State may file an answer or a motion to dismiss the petition. *Id.* ¶ 33. At this stage, the trial court must determine if the petition makes a “ ‘substantial showing of a constitutional violation.’ ” *Id.* (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)).

¶ 56 If the defendant makes this constitutional showing, the petition advances to a third-stage evidentiary hearing. *Id.* ¶ 34. It is at the third stage that the trial court must determine if the

defendant is entitled to relief. *Id.* During the evidentiary hearing, the trial court acts as the fact finder, determines witness credibility, decides the weight to be given to testimony and evidence, and resolves any evidentiary conflicts. *Id.* Accordingly, we review the trial court's decision at the third stage for manifest error. *People v. Brooks*, 2021 IL App (4th) 200573, ¶ 47. A decision is manifestly erroneous when the opposite conclusion is clearly evident. *Id.*

¶ 57 Here, defendant's postconviction claim concerns the effectiveness of his trial counsel, Jazwiec. We address claims of ineffective assistance of counsel under the familiar standard provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Carroll*, 2026 IL 131360, ¶ 67. Under the *Strickland* standard, a defendant alleging ineffective assistance of counsel must show that (1) counsel's performance was objectively unreasonable under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* The failure to satisfy either prong of this standard is fatal to an ineffective-assistance claim. *Id.* ¶ 68.

¶ 58 "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. To show ineffectiveness, a defendant must overcome the strong presumption that the challenged action or inaction of counsel might have been the product of sound trial strategy. *Jackson*, 205 Ill. 2d at 259. A strategic decision by counsel made after a thorough investigation of the relevant law and facts is "virtually unchallengeable." *People v. Childress*, 191 Ill. 2d 168, 177 (2000).

¶ 59 Defendant argues that the trial court erred in concluding that Jazwiec was not ineffective for failing to utilize the bystander's reports at trial. Specifically, defendant argues that the reports (1) could have been used to impeach L.R.'s testimony, in which she described the assault in "great detail," because in the first bystander's report, Timmer stated that L.R. told her

she did not remember if a crime occurred and (2) would not have introduced any new evidence of L.R.'s intoxication, meaning it would not have harmed defendant. Defendant argues there was no strategic reason for Jazwiec to decline to use the reports. He additionally argues that Jazwiec was ineffective for failing to investigate after receiving the first bystander's report and that his decision not to use the reports at trial was not well-informed due to his lack of investigation.

¶ 60 We disagree. At the third-stage evidentiary hearing, Jazwiec clearly explained his rationale for not introducing either bystander's report at trial, and we find it to be reasonable. Although the first bystander's report contained information that may have been helpful to defendant, it also contained information that ran counter to Jazwiec's theory of the case, as well as defendant's own testimony. For example, according to the first bystander's report, L.R. told Timmer that she did not remember if a crime had occurred. While this might arguably have suggested that she could have consented to sex without remembering it afterwards, it also was further evidence of her level of intoxication on the night in question and supported her claim that she was too "hammered" to meaningfully consent. This contradicted defendant's testimony, in which he alleged that L.R. was an enthusiastic participant in their sexual encounter and was lucid and communicating throughout its entirety. Additionally, it supports the testimonies of L.R., Timmer, and Beeman that L.R. was significantly intoxicated. Indeed, L.R.'s alleged statement to Timmer was not that a crime had not occurred, only that she did not remember. Where neither party disputed that sex occurred and only disputed whether L.R. was sober enough to consent, this information would have been harmful to defendant's case. The mere fact of L.R.'s incomplete memory provided support for the State's case that she was too intoxicated to consent. While defendant argues that evidence of L.R.'s drunkenness had already been introduced, and therefore additional evidence would not have been harmful to his case, we disagree. As the trial court noted,

this case was a credibility contest, and additional information corroborating certain parties' accounts would have reinforced the credibility of those parties' version of events.

¶ 61 Further to that point, as Jazwiec explained, the first bystander's report strengthened Timmer's credibility as a witness. Her stated discomfort with testifying against defendant if he were innocent suggested that, despite being L.R.'s friend, she was not vindictive or merely saying whatever was necessary to convict defendant. In a case that turned on credibility, information that bolstered Timmer's status as an unbiased, credible witness was pivotal.

¶ 62 Moreover, we disagree with defendant's argument that L.R.'s alleged statements that she did not remember if a crime occurred would have impeached her at trial, where she testified in "great detail" to the encounter with defendant. Contrary to defendant's characterization of the evidence, L.R. was very clear at trial that she did not remember large portions of the evening and early morning. Although she offered some detail, her testimony was mainly comprised of disconnected pieces of recollection. Her statement that she did not know if a crime occurred was consistent with her testimony that she experienced periods of unconsciousness and would not know what she and defendant spoke about during that time, if they spoke at all.

¶ 63 Finally, L.R.'s alleged statements in the first bystander's report that it did not matter if defendant had actually assaulted her because he was a bad person, standing alone, might have been beneficial to defendant's case. However, in the second bystander's report, L.R. expressly denied making these statements and provided an alternative account of her conversation with Timmer. Considering that the arguably beneficial statements in the first bystander's report were disputed and the report presented a great potential for harm to defendant's case if it was presented at trial, we cannot say that Jazwiec's decision not to use this report at trial was unreasonable.

¶ 64 We also do not find that Jazwiec's failure to investigate after receiving the first

bystander's report rendered his decision uninformed. Defendant specifically takes issue with Jazwiec's actions in a short window of time, from when he received the first bystander's report to when he received the second. Jazwiec testified at the evidentiary hearing that he did not recall speaking to Timmer during this time frame. However, this limited window cannot be viewed in isolation when assessing Jazwiec's ultimate performance at trial. At the time Jazwiec had the first bystander's report, he was aware both that the report contained information that was potentially useful and information that was potentially harmful. Once he received the second bystander's report, the usefulness of the beneficial information in the first report was undermined by L.R.'s denial of the statements Timmer claimed she made. At this point in time, he had enough information about the documents to determine if it would benefit defendant's case to use either report at trial. That he did not speak to Timmer in the narrow window from his receipt of the first bystander's report to his receipt of the second is ultimately immaterial.

¶ 65 In sum, we conclude that the trial court did not commit manifest error in determining that Jazwiec's decision not to use the bystander's reports at trial was sound trial strategy. Because we find defendant failed to prove the deficient performance prong of the *Strickland* standard, he has failed to prove that trial counsel was ineffective.

¶ 66 B. "*Griffin*" Case

¶ 67 Defendant next argues that the trial court erred in refusing to allow defense counsel to impeach Jazwiec at the evidentiary hearing using the federal "*Griffin*" case. Defendant argues that the case was admissible under Illinois Rule of Evidence 608 (eff. Jan. 6, 2015), which allows the credibility of a witness to be attacked by evidence referring to the witness's character for untruthfulness. He also argues that the trial court could have taken judicial notice of the case under Illinois Rule of Evidence 201 (eff. Jan. 1, 2011).

¶ 68 To begin, we note that the Illinois Rules of Evidence do not apply to postconviction proceedings. See Ill. R. Evid. 1101(b)(3) (eff. Sept. 17, 2019). Rather, at third-stage postconviction proceedings, trial courts have discretion to accept evidence that does not comply with the codified rules of evidence. *Brooks*, 2021 IL App (4th) 200573, ¶ 58. We have compared such hearings to sentencing hearings, noting that evidence may be admitted if it is both relevant and reliable. *Id.* ¶ 52. We have specifically found that evidentiary rulings at third-stage proceedings involve the court’s “ ‘oversight of the courtroom and maintenance of a case’s progress.’ ” *Id.* ¶ 50 (quoting *People v. Wilson*, 2019 IL App (1st) 181486, ¶ 58). The trial court thus has wide discretion to limit the type of evidence it will admit in a postconviction hearing. *People v. Coleman*, 206 Ill. 2d 261, 278 (2002).

¶ 69 Our supreme court addressed a similar issue in *Coleman*. There, the defendant was convicted of first degree murder, armed robbery, and home invasion. *Id.* at 265. He filed a postconviction petition alleging, among other issues, that his trial counsel was ineffective. *Id.* at 268. At a third-stage evidentiary hearing, the trial court prevented postconviction counsel from questioning trial counsel about “whether any court had previously found that [he] had provided ineffective assistance of counsel.” *Id.* at 274.

¶ 70 The defendant appealed, arguing, in part, that his cross-examination of trial counsel was improperly limited by the trial court at the evidentiary hearing. *Id.* at 283. The supreme court disagreed, finding that any prior findings of ineffectiveness constituted a “collateral matter having no relevance to the issues at the evidentiary hearing.” *Id.* at 284. It concluded, “We fail to see how such evidence would give rise to an inference that [trial counsel] was ineffective in this case.” *Id.*

¶ 71 Defendant argues that the instant case is distinguishable from *Coleman* because, here, postconviction counsel attempted to question Jazwiec on whether he had lied at a prior

ineffective assistance hearing, whereas postconviction counsel in *Coleman* attempted to question trial counsel on whether he had ever previously been found ineffective. This is an immaterial distinction. The trial court here found that postconviction counsel was attempting to use the fact that Jazwiec was found to be untruthful before a federal court in the “*Griffin*” case to show that he was likewise being untruthful before the court in the instant case. This is identical to the *Coleman* court’s finding that postconviction counsel was attempting to admit evidence of prior findings of ineffectiveness to prove ineffectiveness in the case before it. Like the court in *Coleman*, the trial court here could reasonably have concluded that the prior case was irrelevant, as a prior court’s finding of untruthfulness did not mean that Jazwiec was being untruthful in the instant case and had no bearing on whether his performance at trial was deficient or prejudicial to defendant. Therefore, the trial court did not abuse its discretion in determining that this evidence was irrelevant and excluding it.

¶ 72 We also note that the trial court based its decision to exclude questioning on the “*Griffin*” case in part on postconviction counsel’s failure to give advance notice to either the court or the State that he intended to use this case. Because the trial court has discretion to oversee its courtroom and maintain a case’s progress, we further find that the decision to exclude evidence on this ground was not an abuse of discretion. See *Brooks*, 2021 IL App (4th) 200573, ¶ 50.

¶ 73 Finally, defendant argues that the trial court could have taken judicial notice of the “*Griffin*” case. He relies exclusively on Illinois Rule of Evidence 201 in support of this proposition. See Ill. R. Evid. 201 (eff. Jan. 1, 2011) (discussing when a court is permitted and mandated to take judicial notice of a fact). As stated, the Illinois Rules of Evidence do not apply to postconviction proceedings. Defendant has offered us no other support for this argument. Indeed, we note that defendant does not argue that the trial court was *obligated* to take judicial notice of the “*Griffin*”

case, only that it was *allowed* to do so. Presumably then, the court was also allowed *not* to take judicial notice of the case, as in fact it chose to do. We find no error.

¶ 74 C. Second-Stage Dismissal of Ineffectiveness Claims

¶ 75 At the second stage of postconviction proceedings, the trial court tests the legal sufficiency of a petition. *Domagala*, 2013 IL 113688, ¶ 35. At this stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *Id.* All well-pleaded facts that are not positively rebutted by the record are to be taken as true, and the trial court does not engage in any fact-finding or credibility determinations. *Id.* The question is whether the allegations, if proven at an evidentiary hearing, would entitle the defendant to relief. *Id.* Because the trial court does not engage in any fact-finding at this stage, we review its decision to dismiss a claim *de novo*. *Childress*, 191 Ill. 2d at 174.

¶ 76 Defendant argues that the trial court erred in dismissing three of his ineffective assistance claims at the second stage of proceedings. These claims are (1) that Jazwiec was ineffective for failing to present evidence of text messages exchanged between L.R. and Timmer on July 14, 2018; (2) that Jazwiec was ineffective for failing to present expert testimony on alcohol-induced memory impairment; and (3) that Jazwiec was ineffective for failing to obtain cell phone and cell tower records for defendant's phone. We will address each claim in turn.

¶ 77 1. *Text Message Evidence*

¶ 78 The State again argues that defendant has forfeited this issue because the text messages were produced to trial counsel in discovery and were thus known at the time of the direct appeal. However, like the bystander's reports, because these texts were not used at trial, they were not included in the record on appeal. Accordingly, defendant has not forfeited the issue for failing to include it on direct appeal.

¶ 79 Defendant argues that the text messages L.R. sent to Jake between 1:21 a.m. and 3 a.m. demonstrated that she was conscious and coherent during this time, contradicting Timmer's, L.R.'s, and Beeman's testimony that she was incapacitated. Defendant also argues that the text L.R. sent to Timmer later that day, when she asked if one of the men at the party had come into her room, establishes that "at the time most proximate to the alleged assault, L.R. did not have an independent recollection of anyone entering the bedroom." He maintains that this would have given the fact finder a basis on which to view her later "detailed and elaborate" testimony at trial skeptically. Finally, defendant argues that the text message from Timmer implying that L.R. sat on defendant's lap during the party contradicted L.R.'s later statements at trial that she did not speak to defendant beyond a brief exchange while playing Jenga.

¶ 80 Taking defendant's allegations as true, we find Jazwiec's decision not to present these text messages could not form the basis for a claim of ineffective assistance of counsel. Like the bystander's reports, the text messages had the potential to harm defendant's case as much, if not more, than the potential to benefit it. To begin, defendant argues that L.R.'s texts to Jake in the early morning on July 14, 2018, suggest that L.R. was awake and coherent at the time she, Timmer, and Beeman claimed she was incapacitated. However, this is an inaccurate statement of the testimony presented at trial. L.R. testified that she was put to bed by Timmer and Beeman around 4 a.m., well after the time she sent the text messages to Jake. Indeed, L.R. testified that she left the bar to go to Timmer's home between 1 and 2 a.m. Text messages sent around this time to Jake, informing him of the group's plans and asking him to come to the residence, line up perfectly with her timeline. Further, contrary to defendant's claims, Beeman did not provide a time as to when L.R. became unconscious and, while Timmer stated that she saw defendant coming down from L.R.'s bedroom at around 12:30 a.m., she also testified that she was guessing as to the time of

events and “literally [had] no idea” when each event occurred. Introducing the text messages L.R. sent to Jake would have done nothing more than corroborate L.R.’s testimony. They would not have impeached her.

¶ 81 Defendant argues that L.R.’s text message to Timmer asking if anyone had come into her bedroom at the party suggested that she had no memory of the event and would have cast doubt on her later trial testimony. We disagree. From the text messages, it appears that L.R. sent this text without any prompting from Timmer. Rather than “asking Timmer to tell her what had happened,” as defendant claims, it instead demonstrates that L.R. had some independent memory of someone interacting with her after she had been put to bed and was in and out of consciousness. Although L.R. did not provide defendant’s name in the texts, this was not inconsistent with her later testimony at trial, in which she identified defendant as the man who assaulted her. L.R. specifically stated at trial that she texted Timmer on July 14, 2018, right when she “started to remember things coming back” from the previous night and early morning. It is possible that, while she was murky on certain details at the time she texted Timmer, she later remembered enough to identify defendant at trial as the man who assaulted her. To that end, L.R.’s text does not suggest that she did not remember that defendant specifically assaulted her, only that she was looking for confirmation where her own recollection was murky.

¶ 82 Defendant argues that the text from Timmer indicating that L.R. sat on defendant’s lap on the night in question would have cast doubt on L.R.’s testimony and strengthened defendant’s testimony because L.R. testified that the two had little interaction, while defendant testified that the two flirted back and forth. This is true, but it also could demonstrate, again, that L.R. was too intoxicated to remember the events from the previous night the morning after, which ran counter to Jazwiec’s trial strategy. We further note that although defendant testified that he

and L.R. flirted, he never claimed that L.R. sat in his lap at any point in the evening and, in fact, testified at trial that he was acting more flirtatious than her.

¶ 83 However, most relevantly, in discussing the text messages defendant believes Jazwiec should have presented, he ignores their damaging context. In the same conversation with Timmer in which L.R. asked if anyone came to her room and Timmer stated that L.R. sat on defendant's lap, Timmer told L.R. that she wanted her to get swabbed at the emergency room. After a short phone call with L.R., Timmer texted, "That shit[']s not fine, when I went up there I didn't know what you were saying and now it all makes sense." She also texted, "I freaked on that dude this morning." These statements corroborate L.R.'s and Timmer's testimony that, when Timmer went to check on L.R. after defendant left her room, she found L.R. pressed against the wall, moaning " 'no' " repeatedly to herself, a difficult fact to reconcile with a theory of consensual sex. They also corroborate Timmer's testimony that, after seeing L.R., she yelled at defendant to leave her home, in contrast to defendant's testimony that they parted peacefully after he thanked her for the party.

¶ 84 Finally, we address defendant's argument that the trial court made factual determinations when it interpreted the text messages, which is not permitted at the second stage of postconviction proceedings. First, our review is *de novo*; we do not review the trial court's decision or its reasoning. Second, the trial court did not make factual determinations. It was tasked at the second stage proceeding with determining whether defendant's allegations, taken as true, made a substantial showing of a constitutional violation. See *Domagala*, 2013 IL 113688, ¶ 35. In answering this question, it accepted as true that the text messages between L.R. and Timmer existed and said what defendant claimed they said and then determined if they made a substantial showing of a constitutional violation. It necessarily had to consider whether they could form the

basis for a claim of ineffective assistance to make this determination. Defendant's interpretation of the second-stage standard would seemingly require a trial court to take as true that a defendant's claims establish a constitutional violation, rather than making that determination itself. This is not what the Act requires. See *id.* ¶ 41 (analyzing whether trial counsel was ineffective to determine if the trial court properly dismissed the defendant's postconviction claim at the second stage of proceedings).

¶ 85 To summarize, considering the texts themselves, as well as the context surrounding them, it is clear that whatever potential they had to help defendant's case was outweighed by the potential to harm it. Accordingly, we find that it was not unreasonable for Jazwiec to choose not to present these texts at trial. Having found no deficient performance, we need not discuss prejudice to conclude that this claim was appropriately dismissed at the second stage.

¶ 86 *2. Expert Testimony*

¶ 87 Defendant next argues that Jazwiec provided ineffective assistance in failing to present expert testimony on alcohol-induced memory impairment at trial. In support of this claim, defendant attached to his petition two online articles from the National Institute on Alcohol Abuse and Alcoholism. He did not identify an expert who would testify to the information contained in them, nor did he include an affidavit from any expert stating how the information would have been beneficial to his case.

¶ 88 The Act requires allegations in a postconviction petition to be supported by affidavit, records, or other evidence. 725 ILCS 5/122-2 (West 2022); *People v. Hall*, 217 Ill. 2d 324, 332 (2005). If the documentation is not attached, the petition must explain why it is unavailable. *Hall*, 217 Ill. 2d at 332. The purpose of this requirement is to show that a postconviction petition's claims are capable of objective or independent corroboration. *Id.* at 333.

Where a petition makes a claim that trial counsel was ineffective for failing to investigate and call a witness, the claim must be supported by an affidavit from the proposed witness. *People v. Enis*, 194 Ill. 2d 361, 380 (2000). “In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary.” *Id.*

¶ 89 Here, although defendant argues that Jazwiec was ineffective for failing to present expert testimony on alcohol-induced memory impairment, he has failed to attach the necessary accompanying affidavit from an expert to his petition. Accordingly, we do not know what the testimony would have been at trial or whether it would have benefited defendant’s case. Accordingly, we cannot say that Jazwiec was ineffective for failing to present this testimony. This claim was correctly dismissed at the second stage of proceedings. See *id.*

¶ 90 *3. Cell Phone and Cell Tower Records*

¶ 91 Defendant next argues that the trial court erred in dismissing his claim that Jazwiec was ineffective for failing to “obtain cell phone and cell tower records.” He argues that these records would have corroborated multiple aspects of his defense, in that they would have established, through records of a call made to his brother, that he remained at Timmer’s residence on July 14, 2018, until approximately 6:30 a.m. He asserts that this information would contradict the State’s theory at trial, which was that he committed the assault and then fled.

¶ 92 Even taking defendant’s allegations as true—that his cell phone records would have placed him at Timmer’s house at approximately 6 a.m.—this would not have benefited his defense at trial. While Timmer’s timeline had defendant leaving her house earlier, as previously stated, she testified that her timeline was only a guess. However, L.R. herself testified that defendant left Timmer’s home at around 6 a.m. We fail to see, then, the significance at trial of additional evidence

that defendant left the home at the same time. Defendant and L.R. have never disagreed on this particular point. Further, the mere fact of his being in the general location of Timmer's home at 6 a.m. provides no information as to the nature of his departure. It does not suggest, for example, that Timmer did not yell at him for being alone in L.R.'s room while she was passed out and throw him out of the house. Therefore, even taking as true that Jazwiec did not obtain defendant's cell phone records, we cannot find Jazwiec's performance was deficient where those records would not have benefited defendant's case. Accordingly, we find this claim was properly dismissed at the second stage.

¶ 93

D. Cumulative Error

¶ 94

Finally, defendant argues that, even if we conclude that each of his allegations of deficient performance was not prejudicial on its own, when taken together, the allegations created sufficient prejudice to have undermined the result at trial and require reversal.

¶ 95

We concluded that defendant failed to show that Jazwiec provided deficient performance in each of his allegations. Accordingly, his final argument concerning possible prejudice stemming from deficient performance is irrelevant.

¶ 96

III. CONCLUSION

¶ 97

For the reasons stated, we affirm the trial court's judgment.

¶ 98

Affirmed.