

SECOND DIVISION
July 15 , 2014

No. 1-12-1735

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 01 CR 22050
)	
DERRICK STEVENS,)	Honorable
)	Thomas Hennelly,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

ORDER

¶ 1 *HELD:* Second-stage dismissal of postconviction petition affirmed where defendant failed to establish that his trial counsel was ineffective for failing to submit a jury instruction on a lesser included offense.

¶ 2 Defendant Derrick Stevens appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2012). He contends that the circuit court erred in dismissing his petition where he made a substantial

showing that his trial counsel was ineffective for failing to request a jury instruction on a lesser-included offense. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 In 2003, defendant was convicted of first degree murder for his participation in the shooting death of Leon Mayes. We set forth the evidence adduced at trial in our Rule 23 order affirming defendant's conviction on direct appeal. *People v. Stevens*, No. 1-04-0015 (2006) (unpublished order under Supreme Court Rule 23). We now recite only those facts necessary to our disposition.

¶ 5 Brenda Green testified that shortly after midnight on October 10, 2000, she and her boyfriend, Leon Mayes, drove to a store at 51st Street and Laflin Avenue and parked on the street outside. As they were sitting in the car, a silver Sunbird containing four individuals drove past, reversed, and stopped beside them. Green recognized the driver as Andre Brown (aka "Striker" or "Dre"), and the front passenger as defendant (aka "Poo"), both of whom she knew from the neighborhood. Green heard someone inside the vehicle say, "There go that mother fucker," and Leon then instructed her to drive off.

¶ 6 Green sped away down 51st Street with Brown and defendant in pursuit. As she was turning onto Ashland Avenue, she heard a gunshot, and Leon stated that "Striker was shooting at the car." Green looked in her rearview mirror and saw Brown holding a gun outside the driver's side window. She then heard additional shots fired, and Leon told her that she should slow down and "bail out." Green did as instructed and jumped to the curb; meanwhile, her car continued rolling down the street with Leon still in the front passenger seat. Brown eventually pulled over his vehicle, and defendant got out with a gun. Defendant shot into the front passenger's seat of Green's car until his gun was empty, then Green heard him say, "We got that mother fucker. Bar

none, running it." As defendant and Brown were driving off, Green was able to recognize an individual named "Banks" in the backseat of their car. Green testified that when she approached her own vehicle, she saw Leon "shot up in a lot of blood."

¶ 7 Defendant was arrested a few days later and gave a videotaped statement regarding his involvement in the shooting. Defendant acknowledged in his statement that he was a soldier in the Bar None faction of the Black P Stone gang. He stated that Brown was a general and explained that if someone refused to do what Brown told him to do, "He'll kill you." Defendant stated that the Bar None faction does not get along with the regular Black P Stone gang, and he explained that if you are a Black P Stone and come into Bar None territory, "[t]hey gonna do something to you. They gonna try to hurt you."

¶ 8 Defendant stated that, on the date in question, he and Brown were driving around and "getting drunk" to celebrate Brown's birthday. He was in the front passenger seat, Brown was driving, and "Banks" was in the back seat behind Brown. Defendant stated that someone else was sitting behind him, but that he did not know his name.

¶ 9 At 51st Street and Laflin Avenue, Brown pulled up next to a car occupied by Leon and his girlfriend. Brown was mad at Leon, a Black P Stone, for selling drugs in Bar None territory. He stated, "there go that motherfucker," then Leon's girlfriend looked over and drove off. Brown followed them and said, "I'm fitting to get this motherfucker." As they turned onto Ashland Avenue, Brown pulled a gun from his waistband and began shooting out the window towards their car. Leon's car slowed, the girlfriend got out and ran, and Brown fired some more shots. Brown eventually stopped the car and gave defendant a gun, saying, "Take care of that shit, finish that shit." Defendant stated that he was "scared" and that he walked over to the car and saw Leon "crunched down in his seat *** real low." Defendant "shot at the car in the air" and

also stuck his hand through the broken window and shot around inside of the car. He stated that he was "just trying to make it *** look good cause if you come back and you ain't did *** what [Brown] told you to do, he'll try to do something to you." He stated that he eventually stopped shooting when the gun was empty and said, "Bar None, motherfucker." He then returned to the car, handed the gun to Brown, and they drove off.

¶ 10 Marlin Gosa (aka Antonio Banks), who was arrested in November 2000, gave a handwritten statement regarding the events on the night of the shooting as well. Gosa acknowledged that he, too, was a member of the Black P Stone gang, and he admitted to being a passenger in the back seat of Brown's car on the night of the shooting. He stated that when Brown was chasing Leon and Green, Brown and defendant were "yelling and saying things like 'we gonna get them.' " He also stated that after Brown stopped his car, defendant got out with Brown's gun, walked over to Green's car, and "shot a lot of shots at the guy sitting in the passenger seat." Gosa testified consistent with his handwritten statement before a grand jury. At defendant's trial, however, he denied being with Brown and defendant on the night of the shooting.

¶ 11 Chicago police ultimately recovered multiple bullets, bullet fragments, and nine-millimeter Luger cartridge casings from inside Green's vehicle and several more nine-millimeter Luger cartridge casings from outside on the street. A forensic scientist for the Illinois State Police testified that all of the jacket fragments and bullets suitable for comparison were fired from the same firearm. He testified that all of the recovered cartridge cases were fired from the same firearm as well.

¶ 12 Dr. Nancy Jones, an assistant Cook County medical examiner, testified that she performed an autopsy on Leon Mayes. She recounted that Leon suffered 13 gunshot wounds,

but that she did not notice any evidence of close range firing on the skin around the wounds. Dr. Jones opined that Leon died as a result of multiple gunshot wounds and that the manner of death was homicide.

¶ 13 At the close of evidence, the trial court instructed the jury on accountability along with the elements of first degree murder. The jury ultimately returned a verdict finding defendant guilty of first degree murder, and the trial court sentenced defendant to a term of 50 years' imprisonment, which included a 20-year enhancement for personally discharging a firearm during the commission of the offense.

¶ 14 This court subsequently affirmed defendant's conviction and sentence on direct appeal. *People v. Stevens*, No. 1-04-0015 (2006) (unpublished order under Supreme Court Rule 23). Defendant claimed, *inter alia*, that his trial counsel was ineffective because he: (1) conceded to defendant's participation in Leon's murder in order to argue the unavailable defense of compulsion; and (2) failed to request a jury instruction on the lesser-included offense of aggravated discharge of a firearm. We found that trial counsel was not ineffective for arguing the defense of compulsion, as it was "the only 'defense' that was available in light of the overwhelming evidence of [defendant's] guilt." However, we declined to address whether counsel was ineffective for failing to request an instruction on aggravated discharge of a firearm because "whether the defendant consented to [counsel's] strategy [wa]s based on evidence not in the record."

¶ 15 In March 2007, defendant filed a *pro se* petition for post-conviction relief. He alleged multiple claims of ineffective assistance of trial counsel, none of which are raised on appeal. On July 3, 2007, the circuit court docketed defendant's petition and appointed counsel to represent him.

¶ 16 On April 30, 2010, post-conviction counsel filed a supplemental petition, asserting that defendant's trial counsel was ineffective for failing to request a jury instruction on the "lesser-included offense" of aggravated discharge of a firearm. Counsel argued that there had been some evidence at defendant's trial to warrant an instruction on aggravated discharge of a firearm. Further, she argued that defendant could have properly raised the defense of compulsion had such an instruction been given. In an affidavit attached to the petition, defendant averred that "[a]t no time did my trial attorney discuss with me the possibility of raising a lesser included offense of aggravated discharge of a firearm." Defendant averred that "[h]ad [his attorney] discussed the possibility of presenting a lesser included offense, [he] would have requested him to present the court with a jury instruction so that the jury could instead convict [him] of aggravated discharge of a firearm."

¶ 17 On May 20, 2011, the State filed a motion to dismiss defendant's *pro se* and supplemental postconviction petitions. The State disputed that aggravated discharge was a lesser-included offense of first degree murder and argued that, even if it was, defendant was not entitled to such an instruction because the evidence at trial was not such that a jury could have rationally found him guilty of the lesser offense yet acquitted him of murder. Additionally, the State asserted that defendant never had a viable compulsion defense, arguing that there was "no specific demand or threat issued as required by case law" and that the circumstances did not allow for a reasonable belief of "imminent" harm to defendant.

¶ 18 On May 25, 2012, the circuit court granted the State's motion and dismissed defendant's postconviction petitions. The court found that the decision of defendant and trial counsel to not request an instruction on aggravated discharge of a firearm was a matter of "trial strategy." The court stated, "I think [defendant] to come in now and sort of Monday morning quarter back that

he didn't have the lesser included instruction is disingenuous and I don't find—I am not persuaded by that whatsoever." Defendant now appeals pursuant to Illinois Supreme Court Rule 651 (eff. Apr. 26, 2012).

¶ 19

ANALYSIS

¶ 20 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the second stage of proceedings, defendant has the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only when the allegations, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). All well-pleaded facts that are not positively rebutted by the record are taken as true. *Pendleton*, 223 Ill. 2d at 473. We review *de novo* the dismissal of a postconviction petition without an evidentiary hearing (*Hall*, 217 Ill. 2d at 334), and may affirm the circuit court's judgment on any basis supported by the record (*People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010)).

¶ 21 In the case at bar, defendant contends that he made a substantial showing that his trial counsel was ineffective for failing to request a jury instruction on the "lesser-included offense" of aggravated discharge of a firearm. To establish ineffective assistance of counsel, defendant must show that his trial counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). He must also show that counsel's deficient performance resulted in prejudice, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been

different. *Id.* at 687, 694. The failure to satisfy either prong of *Strickland* is fatal to a defendant's ineffective assistance claim. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 22 Defendant maintains that there was sufficient evidence at trial for the jury to be instructed on the lesser offense of aggravated discharge of a firearm. He therefore claims that trial counsel was ineffective for failing to request the instruction, especially where it was trial counsel's "only option if he was to successfully assert the theory of compulsion."

¶ 23 The State responds that defendant has not established that aggravated discharge of a firearm is a lesser-included offense of first degree murder. Specifically, the State argues that the evidence of defendant's guilt was "overwhelming" and the jury therefore could not have rationally found him guilty of aggravated discharge of a firearm, yet acquitted him of first degree murder.

¶ 24 In Illinois, courts apply the charging instrument approach when determining whether an offense qualifies as a lesser-included offense. *People v. Kennebrew*, 2013 IL 113998, ¶ 41. Under this approach, "the lesser offense need not be a 'necessary' part of the greater offense, but the facts alleged in the charging instrument must contain a 'broad foundation' or 'main outline' of the lesser offense." *Id.* ¶ 30. The charging instrument approach requires a two-step analysis. *Id.* First, we determine whether an offense is a lesser-included offense. *Id.* Then, we examine the evidence at trial "to determine whether the evidence was sufficient to uphold a conviction on the lesser offense." *Id.* "[T]he second step—examining the evidence adduced at trial—should not be undertaken unless and until it is first decided that the uncharged offense is a lesser-included offense of a charged crime." *People v. Kolton*, 219 Ill. 2d 353, 361 (2006).

¶ 25 We initially find that aggravated discharge of a firearm was a lesser-included offense of defendant's first degree murder convictions. Here, defendant and his co-defendant, Brown, were

charged with nine counts of first degree murder, one count of attempted first degree murder, and two counts of aggravated discharge of a firearm. The State proceeded to trial on only two counts of first degree murder (Counts 1 and 2), which alleged that defendants:

"WITHOUT LAWFUL JUSTIFICATION, INTENTIONALLY OR KNOWINGLY SHOT AND KILLED LEON MAYES WITH A FIREARM, AND DURING THE COMMISSION OF THE OFFENSE THEY PERSONALLY DISCHARGED A FIREARM.

* * *

"[and] THEY, WITHOUT LAWFUL JUSTIFICATION INTENTIONALLY OR KNOWINGLY SHOT AND KILLED LEON MAYES WITH A FIREARM, KNOWING THAT SUCH ACT CREATED A STRONG PROBABILITY OF DEATH OR GREAT BODILY HARM TO LEON MAYES, AND DURING THE COMMISSION OF THE OFFENSE THEY PERSONALLY DISCHARGED A FIREARM."

These charges essentially allege that defendant intentionally or knowingly shot Leon with a firearm. They thus contain a "broad foundation" or "main outline" of the lesser offense of aggravated discharge of a firearm, which occurs when a defendant intentionally or knowingly "[d]ischarges a firearm in the direction of another person or in the direction of a vehicle he or she knows or reasonably should know to be occupied by a person." 720 ILCS 5/24-1.2(a)(2) (West 2000).

¶ 26 The next inquiry in our analysis is whether the evidence was sufficient to uphold a conviction of aggravated discharge of a firearm. *Kennebrew*, 2013 IL 113998, ¶ 30. "A

defendant is entitled to a lesser-included offense instruction only if the evidence at trial is such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *People v. Medina*, 221 Ill. 2d 394, 405 (2006). This is an "evidentiary prerequisite [that] must be met before a right to have the jury instructed on a lesser-included offense arises." *Id.*

¶ 27 Here, we cannot say that a jury could have rationally convicted defendant of aggravated discharge of a firearm yet acquitted him of first degree murder. As we noted on direct appeal, the evidence establishing defendant's guilt of first degree murder in this case was overwhelming. Defendant was a passenger in Brown's vehicle on the night of the shooting. According to a fellow gang member, defendant offered encouragement to Brown as he was chasing Green and Leon by "yelling and saying things like 'we gonna get them.'" After Green jumped out of her moving vehicle to avoid being shot, Brown pulled his car over, handed defendant a gun, and told defendant to "finish that shit." Defendant accepted the gun and, according to Green, fired several shots into the front passenger seat of Green's car where Leon was sitting. Defendant's fellow gang member specifically stated that defendant "shot a lot of shots *at the guy* sitting in the passenger seat." (Emphasis added.) Defendant finally announced, after firing every bullet in his weapon, "We got that mother fucker. Bar none, running it." We cannot fathom a situation where a defendant facing similar evidence would not be found guilty of first degree murder.

¶ 28 Defendant nonetheless argues that there was a possibility that the jury could have convicted him of the lesser offense of aggravated discharge of a firearm because: (1) he gave a statement that he did not actually shoot Leon; (2) neither Green nor Gosa saw him hit Leon with a bullet; and (3) there was no evidence of close range firing. However, even if a jury were to accept the dubious proposition that defendant did not fire any shots at Leon, we find that

defendant could still not be rationally found guilty of aggravated discharge of a firearm yet not guilty of first degree murder.

¶ 29 The State tried defendant in this case under a theory of accountability. A person is legally accountable for the conduct of another if "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2000). Under the common design rule, "where two or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts." *People v. Perez*, 189 Ill. 2d 254, 267 (2000). "Words of agreement are not necessary to establish a common purpose to commit a crime." *Id.* And, most pertinent here, "[a]ccountability may be established through a person's knowledge of and participation in the criminal scheme, *even though there is no evidence that he directly participated in the criminal act itself.*" (Emphasis added.) *Id.*

¶ 30 Here, contrary to defendant's claim, it does not matter whether any of the shots fired by defendant struck Leon. The evidence overwhelmingly established that defendant participated in a common criminal design where he not only offered encouragement to Brown, his gang leader, during the initial car chase, but also used Brown's gun, himself, to fire multiple shots into and around Green's car before announcing his and Brown's gang slogan. A jury could not rationally find, under these circumstances, that defendant fired shots at Leon, but was nevertheless not guilty of first degree murder under a theory of accountability. We find that defendant was not entitled to a jury instruction on the lesser-included offense of aggravated discharge of a firearm;

and, consequently, his trial counsel did not act unreasonably in failing to request such an instruction.

¶ 31 Defendant has failed to meet his burden of making a substantial showing of ineffective assistance of counsel. *Flores*, 153 Ill. 2d 283. We therefore conclude that the circuit court properly dismissed his postconviction petition. *Hall*, 217 Ill. 2d at 334.

¶ 32 For the reasons stated, we affirm the second-stage dismissal of defendant's postconviction petition by the circuit court of Cook County.

¶ 33 Affirmed.