2016 IL App (1st) 140504-U

SECOND DIVISION
June 28, 2016

No. 1-14-0504

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. 03 CR 17306
	)	
OCTAVIA ANIMA,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

O R D E R

¶ *Held*: Summary dismissal of defendant's postconviction petition was proper where he failed to make an arguable claim of actual innocence or ineffective assistance of trial and appellate counsel.

¶ 2 Octavia Anima, the defendant, appeals from the summary dismissal of his petition for relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq*. (West 2012). On appeal, defendant contends that the trial court erred in dismissing his petition, as it stated a gist of a claim of actual innocence based on an affidavit of his codefendant, which he asserts was "completely exculpatory." Defendant further contends that his petition stated the gist of a claim

of ineffective assistance of both trial and appellate counsel for the combined failure to object to, or raise on direct appeal, improper arguments made by the prosecutor during rebuttal closing arguments.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the 2003 beating death of Pablo Valdez, which occurred in a Chicago alley. Defendant and his codefendant, Miguel Nunez, were charged with felony murder predicated on aggravated battery. Defendant was tried before a jury and Nunez was simultaneously tried at a bench trial before a judge. Defendant was convicted and sentenced to 24 years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Anima*, No. 1-07-2227 (2009) (unpublished order under Supreme Court Rule 23). In our order, we set forth the underlying facts of the case in detail. Due to the nature of defendant's current claims, those facts will be repeated here to some extent.

¶ 5 At trial, Manuel Perez testified that in the early morning hours of July 14, 2003, he, the victim, Alfredo Soto, Christian Ortiz, and three women went to a restaurant. The women went inside. As the men stood outside the restaurant, a Bronco, a Suburban, and a third car passed by. Men inside the Bronco made hand signals indicating that they were from the Two-Six street gang. Perez, a member of the Gangster Disciples, responded by calling out, "Two-Six killer." The Suburban made a U-turn and about 10 men got out of the vehicle. The men in Perez's group began running in different directions. Eventually, everyone in Perez's group except the victim returned to the restaurant. Perez testified that he and his friends tried calling the victim's cell phone several times, but he never answered. The next day, Perez viewed a lineup and identified defendant and codefendant as two of the men who had chased him and his friends.

¶ 6 Alfredo Soto's testimony was similar to Perez's. Soto testified that more than 10 men exited the Bronco and Suburban and chased the men in Soto and Perez's group. Christian Ortiz also offered similar testimony. Ortiz stated that when the men exited from the Bronco and Suburban and began running toward his group, he ran inside the restaurant. He did not see what happened to his friends and never identified any of the men who chased him.

¶ 7 Graciela Gonzalez testified that she and the other women in their group sat near a window in the restaurant. A few minutes after they sat down, Ortiz ran into the restaurant. Gonzalez looked out the window and saw more than five men she did not recognize running down the street. When the women went outside, she saw more than five men walking fast from a nearby alley.

¶ 8 Chicago police officer Brian Treacy testified that about 1:45 a.m. on the date in question, he and his partner were stopped at a red light when he observed a Suburban pull into a gas station parking lot. A white vehicle that had passed the gas station made a U-turn and returned to the gas station at a high rate of speed. Believing the gas station was about to be robbed, Officer Treacy drove into its parking lot. He observed several men, including defendant, emerging from an opening in the fence behind the gas station and running toward the vehicles. Officer Treacy and his partner ordered the men to halt, kneel, and place their hands on the suspects' vehicles. As the officers conducted searches of the detained men, Officer Treacy heard a call over the radio of an assault in progress in the alley behind the gas station. Officer Treacy went to the alley, where he observed the victim's body lying on the ground. The detained men were taken to the police station. Officer Treacy inventoried some of their clothing, as he had observed suspect blood

specs on some of their pants and shoes. From defendant, he inventoried a pair of pants, a t-shirt, and gym shoes.

¶ 9 A forensic scientist with the Illinois State Police testified that she obtained DNA from a buccal swab performed on defendant. Defendant's pants contained both defendant's and the victim's DNA. No blood was discovered on defendant's shirt or shoes.

¶ 10 Chicago police officer Richard Johnson testified that when he arrived at the scene, other officers had already detained several men. In the alley, Officer Johnson observed a body lying in front of a garage. He called for an ambulance, a detective, and an evidence technician. Near the body were broken boards, broken bottles, a broken stick, and pool of blood. The victim's face was covered in blood and disfigured.

¶ 11 Dr. Adrienne Segovia performed an autopsy on the victim. She testified that during the autopsy, she noted 46 external injuries and numerous internal injuries. Dr. Segovia opined that the victim died of multiple injuries due to an assault and that the manner of his death was homicide. She further opined that the injuries she observed on the victim's body were consistent with blunt force trauma, and that the injuries to the victim's head and neck were fatal.

¶ 12 Chicago police detective Michael Hughes testified that he was assigned to investigate the victim's murder. He and his partner spoke with officers at the scene. He then observed a body that appeared to have suffered extensive head wounds caused by blunt trauma. There were pieces of wood, a bloody beer bottle, and blood splatter near the body. Several hours later, he interviewed several individuals at the police station, including defendant. Defendant told Detective Hughes that he was a member of the Latin Saints, that he was in a van that got bricked,

that the van pulled over, and that he chased a man down an alley. Defendant reported that one of the men in his group grabbed a board and kicked the man on the ground.

¶ 13 Jose Flores, a member of the Latin Saints street gang, testified that in the early morning hours on the day in question he and several other men were riding around in a Suburban. When someone threw bottles at the vehicle, he and several other men got out and chased a man down an alley. Flores stated that he was unable to catch the man in the alley. He returned to the Suburban and was subsequently arrested.

¶ 14 Flores testified that while he was at the police station, he spoke with Assistant State's Attorney (ASA) Molly Riordan. Flores could not identify the statement he gave ASA Riordan. He identified his signature on the document, but said that the police had threatened him. He denied telling ASA Riordan that he went into the alley and saw defendant, codefendant, and four other men beating a man lying on the ground. He also denied telling ASA Riordan that he saw someone take a stick and hit the man on the ground. He recalled being brought to a courthouse and speaking with ASA Lisette Mojica. Flores testified that ASA Mojica told him she was going to charge him with murder if he did not testify before the grand jury, so he testified before the grand jury and answered "yes" to the questions asked. He did not recall testifying before the grand jury that he observed a group of men kicking and hitting a man on the ground. On cross-examination, Flores stated that he gave the handwritten statement and testified before the grand jury because he was afraid that the police were going to charge him with a crime with which he had nothing to do. He further testified on cross-examination that he did not see defendant beat anyone up on the night in question.

¶ 15 ASA Lisette Mojica testified that when she interviewed Flores, he told her what he had observed before, during, and after the victim's murder. She identified a transcript of Flores' testimony to the grand jury. Flores testified before the grand jury that on the date in question, four or five gang members threw bottles at the Suburban in which Flores was riding. The men in the Suburban got out and began chasing the men who threw the bottles. When he was unable to catch them, Flores ran in the direction that other men from his group had run. Flores then observed a crowd of six men kicking a man on the ground and beating him with a board. Flores ran to a gas station. Before the grand jury, Flores identified a picture of defendant and testified that he was one of the men inside the Suburban.

¶ 16 Chicago police detective Michael O'Donnell testified that he assisted in the investigation of the victim's murder. He was present for the conversation between Jose Flores and ASA Riordan. According to Detective O'Donnell, Flores chose to make a handwritten statement.

¶ 17 Detective O'Donnell testified that he and his partner interviewed defendant. Defendant informed the officers that he had been driving around in a Suburban, that a group of men threw bottles at them, that the Suburban pulled over, and that the people in the Suburban began chasing the men who threw the bottles. Defendant said they caught one of the men in the alley, that three or four people kicked the victim, that one person had a stick, and that he himself kicked the victim one time. A short time later, Detective O'Donnell interviewed defendant a second time. Defendant named four men who had been in the Suburban, including codefendant, and identified two of them as having struck the victim with boards. Detective O'Donnell testified that he was also present for defendant's discussion with ASA Riordan, which was consistent with defendant's

earlier conversations with the detective. About an hour after defendant spoke with ASA Riordan, he made a videotaped statement.

¶ 18 ASA Molly Riordan testified that she spoke with Jose Flores at the police station. At the end of the conversation, Flores agreed to make a handwritten statement, which was published to the jury. Flores stated that on the date in question, he, defendant, codefendant, and five other men were riding in a vehicle when a group of men threw bottles at them. Flores and his group got out of the vehicle. He and one of his cohorts chased a man down an alley, but did not catch him. Flores then went down the alley in the opposite direction. He saw defendant, codefendant, and four other men beating a man who was lying on the ground. One of the men in the group then hit the victim with a stick. Flores returned to the gas station and was arrested.

¶ 19 ASA Riordan further testified that she spoke with defendant, and that after about 20 minutes of conversation, defendant agreed to make a videotaped statement. The video was published to the jury. In the video, defendant stated that he and three other men were riding in the Suburban. Two other vehicles were driving with them. When a rival gang began throwing bottles at the Suburban, defendant, codefendant, and six other men chased the people who threw the bottles. The men in defendant's group caught one of the men and kicked and hit him. Defendant kicked him once in the stomach. As defendant began to turn around, he saw two of his cohorts hit the victim with a board. Defendant ran back to the gas station and was subsequently arrested.

¶ 20 Defendant called his ex-girlfriend, Madonna Mullins, as a witness. Mullins testified that on the date in question, she was a passenger in a car that was driving with the Suburban. When

people began throwing bottles at both vehicles, several men got out and started to run toward a gas station. Mullins did not see defendant among the group who ran.

¶ 21 Carlos Padilla also testified for defendant. He testified that he was driving the Suburban in which defendant, codefendant, and two other men were passengers. When four or five men he did not know started throwing bottles at a car that was accompanying them, Padilla stopped and let his passengers out. Padilla did not know where his passengers went. He drove a short distance and pulled into a gas station. Codefendant and one of the other passengers returned to the Suburban. Shortly thereafter, the police arrived and ordered everyone out of the vehicle. The police arrested Padilla and placed him in a squadrol with defendant and two other men. Padilla had not seen defendant since he and the other passengers had gotten out of the Suburban.

¶ 22 Dr. Karl Reich, an expert in forensic DNA analysis, testified for defendant that the only evidence linking defendant to the victim was the analysis of a "supposed" blood stain on a pair of pants. He opined that it was "extremely unusual" that the two DNA profiles observed on the stain – defendant's and the victim's – were of equal amount. Dr. Reich also testified that the State's forensic scientist had received requests to test the recovered pieces of wood, but that she had not performed the requested tests. Finally, Dr. Reich testified that he requested, but did not receive, the logs regarding cross-contamination.

¶ 23 Defendant testified on his own behalf that he was not a member of the Latin Saints. On the date in question, he was riding in a Suburban with four other men. When some men started throwing bottles at the Suburban, he and his cohorts got out of the Suburban and began to chase the men who threw the bottles. The men in defendant's group caught the man they were chasing

and began to beat him. One of the men grabbed a board. Defendant denied beating or kicking the victim or picking up a weapon. Defendant ran back to the gas station and was arrested.

¶ 24 Defendant further testified that he was brought to the police station and questioned. During the first conversation, he informed the police that he did not know anything. The police told him that other people said he killed the victim. Eventually, defendant made an oral statement and a videotaped statement. The police told him to say that he kicked the victim one time because there was blood on his clothes. Defendant testified that he rehearsed his testimony prior to having his statement videotaped. The reason he falsely stated on the videotape that he kicked the victim one time in the stomach was because the detective said that "it was better" because he had blood on his clothes.

¶ 25 Following deliberations, the jury found defendant guilty of felony murder. The trial court subsequently sentenced defendant to 24 years' imprisonment.

¶ 26 On direct appeal, defendant contended that his felony murder conviction should have been reversed where the predicate offense, aggravated battery, was inherent in and arose from the murder. This court rejected defendant's arguments and affirmed his conviction and sentence. *People v. Anima*, No. 1-07-2227 (2009) (unpublished order under Supreme Court Rule 23).

¶ 27 Defendant filed an attorney-drafted postconviction petition in 2013. The petition included a claim of actual innocence based on an affidavit executed by codefendant Miguel Nunez. In the affidavit, Nunez stated that he witnessed the beating of the victim; that he, defendant, and four other men chased the victim into the alley; that the four other men beat the victim; and that "I did not see Octavia Anima approach, hit, strike or touch [the victim] in any manner in that alley." The petition also included a claim of ineffective assistance of both trial and appellate counsel for

the combined failure to object to, or raise on direct review, improper arguments of the prosecution during rebuttal closing argument.

¶ 28 The trial court summarily dismissed the petition. Defendant appeals from that dismissal.

¶ 29 ANALYSIS

¶ 30 In cases not involving the death penalty, the Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). The instant case involves the first stage of the process, during which the trial court independently assesses the petition, taking the allegations as true. *Hodges*, 234 Ill. 2d at 10. Based on this review, the trial court must determine whether the petition "is frivolous or is patently without merit," and, if it so finds, dismiss the petition. *Hodges*, 234 Ill. 2d at 10; 725 ILCS 5/122-2.1(a)(2) (West 2012).

¶ 31 A petition may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16; see *People v. Tate*, 2012 IL 112214, ¶¶ 9-12 (holding that the first-stage standards for *pro se* petitions set out in *Hodges* also apply to petitions prepared by counsel). A petition has no arguable basis in law when it is founded in "an indisputably meritless legal theory," for example, a legal theory that is completely belied by the record. *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 32 CLAIM OF ACTUAL INNOCENCE

¶ 33 On appeal, defendant first contends that dismissal of his petition was improper because it made a freestanding claim of actual innocence based on an affidavit executed by Miguel Nunez. Defendant argues that if believed, Nunez's affidavit is completely exculpatory.

¶ 34 A postconviction petitioner may assert a claim of actual innocence where the claim is based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Such evidence must be newly discovered, material and not cumulative, and, most importantly, of such conclusive character that it would probably change the result on retrial. *Id.*; *People v. Coleman*, 2013 IL 113307, ¶ 84. Evidence is considered new where it was discovered after trial and could not have been discovered earlier through the exercise of due diligence; material where it is relevant and probative of the petitioner's innocence; noncumulative where it adds to what the jury heard; and conclusive where, when considered along with the trial evidence, it would probably lead to a different result. *Coleman*, 2013 IL 113307, ¶ 96.

¶ 35 In the instant case, defendant correctly observes in his brief that a postconviction petition may raise a freestanding claim of actual innocence based on newly discovered evidence. However, he has made no argument, either in his petition or his brief, that the information contained in Nunez's affidavit is newly discovered. On this basis alone defendant's claim fails. Moreover, had defendant made the argument, we would reject it. Miguel Nunez was tried simultaneously with defendant and took the stand to testify in his own defense. In these circumstances, it would be impossible for us to find that Nunez was unknown to defendant at the time of trial or unavailable to defendant as a witness.

¶ 36 Defendant also fails to meet the requirement that the supporting evidence must be so conclusive that it would probably change the result on retrial. *Coleman*, 2013 IL 113307, ¶¶ 84, 96. Evidence of actual innocence must support total vindication or exoneration, not merely present a reasonable doubt. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40; *People v. Green*, 2012 IL App (4th) 101034, ¶ 36. Here, Nunez stated in his affidavit that he, defendant, and four other men chased the victim into the alley, that the four other men beat the victim, and that he "did not see Octavia Anima approach, hit, strike or touch Valdez in any manner in that alley." Critically, while Nunez identified the four other men as the principal offenders in his affidavit, he also placed defendant squarely at the scene of the beating. Because defendant was convicted under a theory of accountability, Nunez's affidavit does not exonerate him. See *People v. Edwards*, 2012 IL 111711, ¶¶ 39-40 (finding that a co-offender's affidavit stating that the defendant "had nothing to do with this shooting" was not exonerating because it did not indicate the defendant was not present during the crime).

¶ 37 Even if Nunez's affidavit could somehow be considered newly discovered evidence, it is not of such conclusive character that it would probably change the result if a new trial were granted. Therefore, defendant's claim of actual innocence is founded on a legal theory that is completely belied by the record and has no arguable basis in law. See *Hodges*, 234 Ill. 2d at 16. Accordingly, the trial court did not err in summarily dismissing the petition.

¶ 38 CLAIM OF INEFFECTIVE ASSISTANCE

¶ 39 Defendant's second contention on appeal is that his petition stated an arguable claim of ineffective assistance of both trial and appellate counsel for the combined failure to object to, or

raise on direct appeal, improper arguments made by the prosecutor during rebuttal closing argument. Defendant takes issue with the five following remarks:

> "Why then was Mr. Innocent, why would he get out of the Suburban at all? What is the point?
>
> ***
>
> "And the very notion that he comes up in this courtroom and says that Mike Hughes is a liar, that Molly Riordan is a liar, you can't believe Lisette Mojica, you can't believe the D.N.A. people, that is repugnant. At some point in time it's got to stop.
>
> ***
>
> "She [defense counsel] wants to come here and point at everybody else, kind of like her client.
>
> ***
>
> "What is going on here is something called jury nullification. What they want you to do is to see shadows, they want you to get back there and say oh, boy, she put a D.N.A. expert on and he had some problems and maybe this didn't really happen.
>
> ***
>
> "And ask yourselves ladies and gentlemen what Mr. Innocent here must have been thinking, because he leaves Pablo Valdez looking like that in the alley ***."

¶ 40 Defendant argues that the prosecutor's sarcastic reference to defendant as "Mr. Innocent" on two separate occasions diminished the presumption of innocence and degraded his defense; that the prosecutor's use of the term "repugnant" to characterize the defense went beyond the bounds of proper argument and was intended to antagonize the jury; that arguing defense counsel

was "'pointing fingers' like the defendant" denigrated defense counsel; and that arguing defendant was presenting a defense of jury nullification was improper and denigrated counsel and the defense. Defendant maintains that in light of the "myriad improprieties" in the prosecutor's argument, there can be no explanation for trial counsel's failure to object. He argues that the cumulative effect of all these improper arguments should have warranted a new trial had counsel objected, and that appellate counsel was ineffective for not raising the issue on appeal as a matter of plain error.

¶ 41 Traditionally, to establish ineffective assistance of counsel, a defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, our supreme court has indicated that in the context of first-stage postconviction proceedings, a defendant need not conclusively establish these factors; in *Hodges*, our supreme court held that "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. The failure to satisfy either prong of this test precludes a finding of ineffectiveness. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 76. Claims of ineffective assistance of appellate counsel are determined under the same standard as claims of ineffective assistance of trial counsel. *Id* at 77. There is no requirement that appellate counsel must raise every conceivable issue on appeal, and counsel will not be found ineffective for refraining from raising meritless issues. *Id* at 77.

¶ 42 Prosecutors are given wide latitude when making closing arguments. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Reversal based on closing argument is warranted only if a prosecutor made improper remarks that engendered "substantial prejudice," that is, if the remarks constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. In closing, the State may comment on the evidence presented and draw reasonable inferences therefrom. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). The prosecution may attack a defendant's theory of defense (*People v. Doyle*, 328 Ill. App. 3d 1, 12 (2002)) and, during rebuttal, the State may respond to comments made by the defendant which invite a response. *People v. Kliner*, 185 Ill. 2d 81, 154 (1998). On review, we consider challenged remarks in the context of the entire record as a whole, in particular the closing arguments of both sides. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000).

¶ 43 Defendant's first objection to rebuttal closing argument involves the prosecutor's sarcastic use of the words "Mr. Innocent," which he argues diminished the presumption of innocence. Although we do not condone the prosecutor's use of unnecessary sarcasm (see *People v. Burton*, 338 Ill. App. 3d 406, 418 (2003)), "[t]he wide latitude extended to prosecutors during their closing remarks has been held to include some degree of both sarcasm and invective to express their points." *People v. Banks*, 237 Ill. 2d 154, 183 (2010). Here, it appears that the prosecutor's use of "Mr. Innocent" was a comment on defendant's credibility, which defendant himself placed before the jury by choosing to testify. Moreover, the prosecutor used the term only twice, both times in passing while challenging defendant's version of events. After reviewing the entire record, including both sides' closing arguments, we cannot find the prosecutor's words, including the words "Mr. Innocent", improper.

¶ 44 Second, defendant argues that the prosecutor's use of the term "repugnant" to characterize the defense went beyond the bounds of proper argument and was intended to antagonize the jury. We disagree. Although a prosecutor may not allege in closing argument that defense counsel has deliberately lied or fabricated a defense, he may use words such as "ridiculous," "sad," and "pathetic" to describe a theory of defense. *People v. Ligon*, 365 Ill. App. 3d 109, 124-25 (2006). Here, the prosecutor described the defense theory that three of the State's witnesses were liars as repugnant. We cannot find that this comment was improper. See *People v. Ulmer*, 158 Ill. App. 3d 148, 151 (1987) (finding that the trial court's description of the defendant's offense as "most repugnant to society" did not constitute grounds for reversal).

¶ 45 Third, defendant argues that the prosecutor's comment that defense counsel was "'pointing fingers' like the defendant" denigrated defense counsel. This misquoted comment must be examined in context. In her closing argument, defense counsel questioned the State's failure to conduct forensic testing on the wood planks and wooden spindle that were found on top of the victim's body. Specifically, defense counsel noted that the State had not tested the wood for fingerprints or other biological evidence. Subsequently, the prosecutor argued in rebuttal as follows:

> "The wood. Why didn't anybody test the wood? What happened? The spindle, the pieces of wood. Tell you something, the closer you get that wood to the body the more likely it is that it really doesn't mean too much. You saw those pictures, those 4 pieces of wood were laying there right on top of Pablo Valdez and got red marks on them, looks like it might be blood. Take it in the back and look. What good is it going to do Cynara

Anderson to test the piece of wood and what is it going to tell you? Oh, yeah those are the boards they used to beat him to death.

Now if [defense counsel] really wanted that, she could have called and asked them to test it.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[THE STATE]: She wants to come here and point at everybody else, kind of like her client."

When viewed in context, it is clear that the prosecutor's comment was made in response to defense counsel's argument that the State, though bearing the burden of proof, had failed to test the planks and spindle for fingerprints or other biological evidence. Because the State may use rebuttal arguments to respond to comments made by the defendant which invite a response (*Kliner*, 185 Ill. 2d at 154), we find no impropriety in the prosecutor's remark.

¶ 46 Next, defendant asserts that the prosecutor's argument that defendant was presenting a defense of jury nullification was improper and denigrated counsel and the defense. The prosecutor's statement occurred in the following context:

"Ladies and gentlemen, when you get back into that jury room, one of the things you might be saying to yourself is this is really not a complicated matter, what is going on here. What is going on here is something called jury nullification. What they want you to do is to see shadows, they want you to get back there and say oh, boy, she put a D.N.A. expert on and he had some problems and maybe this didn't really happen. You know what, ladies and gentlemen, if you're thinking to yourself when you go back in there there

> isn't much to this and it's pretty darn simple and there is a veritable mound of evidence against this guy and what he did and what he's responsible for, you would be exactly right."

¶ 47 Jury nullification occurs when jurors choose to disregard the law and, based on considerations that have no legal justification, such as the race, character, or status of either the victim or the accused, acquit a defendant because they believe they are achieving "true justice." *People v. Smith*, 296 Ill. App. 3d 435, 441 (1998) (Steigmann, J., specially concurring). While juries have the power to return verdicts that defy both the facts and the law, jury nullification is not authorized. *People v. Rollins*, 108 Ill. App. 3d 480, 486 (1982). Rather, jury nullification "is simply a corollary of the constitutional rule that there is no appeal from a verdict of acquittal in a criminal case." *Id*. Because asking jurors to disregard the law is improper, a prosecutor may not accuse the defense of encouraging jury nullification unless that accusation has an evidentiary basis. See *People v. Abadia*, 328 Ill. App. 3d 669, 679 (2001) (unless based on some evidence, statements made in closing arguments by the prosecution which suggest that defense counsel fabricated a defense theory, attempted to free his client through trickery or deception, or suborned perjury are improper).

¶ 48 The State asserts that the prosecutor's mention of jury nullification was invited by defense counsel's closing argument because counsel suggested to the jurors that they disregard the law of accountability and acquit defendant. Defense counsel introduced her closing argument with the following statements:

> "One kick is not enough. Even if you believe the video confession, one kick is not enough. You're not going to be instructed like the State would like to you think that one

kick is enough and that's it. You're going to be instructed on legal responsibility and my client is the only person we're here for today ***."

¶ 49 Contrary to defense counsel's argument, "one kick" would be sufficient for the jury to find defendant accountable for the victim's murder. See 720 ILCS 5/5-2(c) (West 2004) (accountability exists when, either before or during the commission of an offense, and with the intent to promote or facilitate that commission, a person solicits, aids, abets, agrees, or attempts to aid another person in the planning or commission of the offense; when 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 common design or agreement and all are equally responsible for the consequences of those further acts). In light of defense counsel's inaccurate statement that "one kick is not enough," we agree that the prosecutor's comment was invited. Moreover, even if we were to find the prosecutor's remark improper, we could not find it prejudicial. The comment was made in passing and was indirect; although the prosecutor used the term "jury nullification," he did not explain what the phrase meant. The prosecutor did not explicitly state that defense counsel was asking the jury to disregard the law, and we direct prosecutors and defense attorneys to refrain from using words that suggest the other side is doing something improper.

¶ 50 Finally, even if we were to find that defendant made an arguable claim that trial and appellate counsel's performance fell below an objective standard of reasonableness when they failed to object to, or to raise on appeal, any of the above-quoted comments made by the prosecutor in rebuttal closing arguments, we would not find that defendant has made an arguable claim of prejudice. See *Wilborn*, 2011 IL App (1st) 092802, ¶ 76 (the failure to satisfy either the

deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffectiveness). At trial, the State introduced ample evidence for the trial court to find the defendant accountable for the victim's murder. By his own admission, defendant chased the victim into an alley and then kicked him during the group beating that led to the victim's death. Defendant's confession was corroborated by forensic evidence indicating that blood stains on defendant's pants contained the victim's DNA. In light of the overwhelming evidence in this case, even if we had found the prosecutor's rebuttal closing argument improper, we cannot say the prosecutor's argument engendered substantial prejudice or constituted a material factor in the defendant's conviction. Accordingly, defendant's claim of ineffectiveness fails. See *People v. Richardson*, 2015 IL App (1st) 113075, ¶ 21 (where evidence is overwhelming, it is not arguable that defendant was prejudiced by alleged deficient performance).

¶ 51 CONCLUSION

¶ 52 We cannot find that defense counsel was ineffective for failing to object to any of the identified comments made by the prosecutor during rebuttal closing arguments, or that appellate counsel was ineffective for failing to raise the comments on direct appeal as a matter of plain error. See *Wilborn*, 2011 IL App (1st) 092802, ¶ 77 (appellate counsel will not be found incompetent for refraining from raising meritless issues). Defendant has failed to state the gist of a claim of ineffective assistance of trial and appellate counsel where it is not arguable that either attorney's performance fell below an objective standard of reasonableness or that defendant was prejudiced. See *Hodges*, 234 Ill. 2d at 17. Defendant's legal theory is belied by the record and therefore, his petition has no arguable basis in law. *Hodges*, 234 Ill. 2d at 16. Therefore, summary dismissal was proper.

¶ 53 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 54 Affirmed.