FIRST DIVISION
February 14, 2017

No. 1-15-0333

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 25708
	)	
RICHARD COLE,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* Circuit court's order granting the State's motion to dismiss defendant's postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) is affirmed over defendant's contentions that he made a substantial showing that his: (1) trial counsel was ineffective for failing to inform him that he had the right to decide whether to tender to the jury an instruction for the lesser included offense of involuntary manslaughter; and (2) appellate counsel was ineffective for failing to challenge his aggregate 130-year prison sentence as excessive on direct appeal.

¶ 2 Defendant, Richard Cole, appeals from an order of the circuit court granting the State's motion to dismiss his postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). He contends that the circuit court erred in dismissing his petition because he made a substantial showing that: his trial counsel was ineffective for failing to inform him that he had the right to decide whether to request a jury instruction for the lesser included offense of involuntary manslaughter; and his appellate counsel was ineffective for failing to challenge his aggregate 130-year prison sentence as excessive on direct appeal. We affirm.

¶ 3 Following a 2006 jury trial, defendant was found guilty of first degree murder, attempted first degree murder and attempted robbery. Defendant was sentenced to 100 years' imprisonment for first degree murder, which included a 50-year firearm enhancement provision, and a consecutive term of 30 years' imprisonment for attempted first degree murder to be served concurrently with a 15-year term for attempted armed robbery.

¶ 4 We recount the evidence presented at defendant's jury trial to the extent necessary to resolve the issues raised on appeal. The record shows that on September 28, 2001, about 12 p.m., defendant attempted to rob Roberto Gonzalez, a food truck owner, and his coworker, Pedro Rodriguez, while they were selling food near a mattress factory on the west side of Chicago. Gonzalez testified that at the time he was holding about $1,000 in his hand. Defendant walked up to Gonzalez, pointed a gun at his head and said, "This is a stick up. Give me the money, I'll kill you." When Gonzalez refused, defendant fired the gun into the ground near Gonzalez and attempted to grab the money. Gonzalez placed the money in the pocket of his sweatshirt. When

Gonzalez did so, defendant shot him in the legs three times and attempted to run away. Rodriguez then grabbed defendant's arm and tried to take the gun away from defendant. The two men wrestled over the gun and defendant shot Rodriguez, who fell to the ground. Defendant again tried to run away, but was restrained by factory workers until the police arrived and arrested him.

¶ 5 Several factory workers also testified and corroborated this version of events. Luis Martinez stated that he saw defendant fire the gun and shoot Rodriguez, who was holding onto defendant's arm. Another factory worker then struck defendant's gun which caused the cylinder to fall out of the gun. Martinez and other workers then tried to restrain defendant, who pulled the trigger of the gun, but the gun did not discharge. Defendant attempted to reload the gun with more bullets, but was ultimately restrained by the workers. Augustine Herrera testified that as he and his coworkers struggled with defendant, defendant aimed the gun at them and pulled the trigger. The gun did not discharge because the cylinder was missing from the gun.

¶ 6 Assistant State's Attorney Daniel Faermark testified that defendant confessed to the crime during his custodial interrogation. Defendant's statement was memorialized in writing and published to the jury. In his statement, defendant admitted that he walked up to Gonzalez, poked him in the stomach with a gun, and demanded the money he was holding. Defendant shot Gonzalez in the leg twice and attempted to run away. As he did so, Rodriguez started to wrestle with defendant to take his gun. Defendant stated that, during the fight, the gun was in his hand. He also stated that he shot Rodriguez and that he pulled the trigger, but that he did not do so on purpose. Defendant acknowledged that Rodriguez did not have a weapon. After he shot

Rodriguez, several individuals jumped on defendant and held him down to prevent him from running away.

¶ 7 The State also presented the testimony of Tonia Brubaker, an expert in forensic science and firearms identification. Brubaker identified the murder weapon as a .32 caliber New England firearm, which worked in a single-action and double-action mode. In the single-action mode, a person firing the gun would have to cock the hammer and then pull the trigger to fire the gun. In the double-action mode, as a person pulls the trigger, the hammer is cocked, released, and then re-set. Brubaker determined that it would take seven to seven-and-a-half pounds of pressure to pull the trigger for it to sear from the hammer in the single action mode, and 13.5 to 14 pounds of pressure to pull the trigger in the double-action mode.

¶ 8 Defendant testified on his own behalf. He acknowledged that he knew the handgun he was carrying was loaded and ready to be fired. Defendant stated that he carried additional rounds of ammunition to protect himself. He also acknowledged that he knew that the gun was a deadly weapon and that it could kill or cause great bodily harm.

¶ 9 Defendant testified that he approached Gonzalez's catering truck to purchase a pastry but changed his mind. As defendant was walking away from the truck, Gonzalez grabbed his arm and accused him of stealing from the truck. Defendant pulled his arm away from Gonzalez, who continued to grab him. Defendant stated that he became frightened and shot at the ground to scare Gonzalez. When Gonzalez continued to approach defendant, defendant shot him in the legs. As defendant attempted to run away, Rodriguez grabbed him and they began to struggle for the gun. During the struggle, Rodriguez grabbed the muzzle of the gun and the gun discharged.

Defendant acknowledged that at the time his finger was on the trigger of the gun, but stated that he did not pull the trigger. He also acknowledged that he was scared and trying to protect himself. Defendant testified that he did not shoot Rodriguez on purpose. Rodriguez died of a single gunshot wound and Gonzalez was severely injured, requiring 10 surgeries, and was no longer able to work.

¶ 10 On direct appeal, we affirmed defendant's convictions and sentence, over his challenge to the sufficiency of the evidence to sustain his first degree murder and attempted first degree murder convictions, and his contention that he was denied the effective assistance of trial counsel because counsel failed to request that the jury be instructed on involuntary manslaughter. *People v. Cole*, No. 1-06-0896 (2008) (unpublished order under Supreme Court Rule 23). In doing so, we declined to address defendant's ineffective assistance of counsel claim because the record on appeal did not indicate that defendant was given the opportunity to decide whether trial counsel should tender to the jury an involuntary manslaughter instruction. *Cole*, No. 1-06-0896 at 21.

¶ 11 On June 11, 2009, defendant filed a *pro se* postconviction petition under the Act, raising numerous constitutional violations, including that: his trial counsel was ineffective for not consulting with him about exercising his right to decide whether to instruct the jury on the lesser included offense of involuntary manslaughter; and the trial court abused its discretion and violated the Illinois Constitution by imposing an excessive sentence.

¶ 12 On July 31, 2009, the trial court entered a written order dismissing defendant's petition after finding that the issues raised were the same issues he raised on direct appeal and therefore barred by the doctrine of *res judicata*. Defendant filed a notice of appeal from that order.

¶ 13 On September 10, 2009, prior to our ruling on that appeal, defendant's postconviction petition again appeared on the trial court's call and the trial court entered another order dismissing the petition. In this order, the trial court found the claims raised by defendant in his petition to be frivolous and patently without merit. Defendant filed a notice of appeal from that order.

¶ 14 After consolidating the appeals, we reversed and remanded for further proceedings under the Act because the record showed that when the trial court entered its initial order dismissing defendant's petition is had not examined it as required by the Act and the court's second dismissal order was not entered within 90 days of the date defendant filed his petition. See *People v. Cole*, 2011 IL App (1st) 092408-U.

¶ 15 On remand, defendant's appointed counsel filed an amended postconviction petition, arguing that defendant was denied his due process right to a fair trial because trial counsel failed to request a jury instruction on the lesser included offense of involuntary manslaughter. Defendant also argued that he was denied the effective assistance of appellate counsel based on counsel's failure to challenge his aggregate 130-year sentence as excessive.

¶ 16 In support of his petition, defendant attached numerous portions of the record on appeal. He also attached his own affidavit, averring that his privately retained trial counsel did not inform him of any lesser included offenses to first-degree murder and that either second-degree murder or involuntary manslaughter were possible verdicts. Counsel also did not discuss with defendant the jury instructions or explain to him that counsel would not request an instruction on involuntary manslaughter. Defendant did not know that counsel intended to request a self-

defense instruction until counsel requested the instruction at trial. After counsel did so, defendant asked him why he requested the instruction, but counsel did not answer. Defendant averred that counsel did not inform him that he had the right to decide whether to request a jury instruction on the lesser included offense of involuntary manslaughter. Defendant also averred that, had counsel informed him that an involuntary manslaughter instruction was an option, he would have asked counsel to request the instruction.

¶ 17 The State filed a motion to dismiss the petition, arguing that defendant's claim of ineffective assistance of trial and appellate counsel failed under both prongs of the *Strickland* analysis. Specifically, the State argued that defendant's theory of the case at trial was self-defense and therefore it would not have been sound trial strategy for counsel to undercut this theory by also requesting an instruction for the offense of involuntary manslaughter. With respect to defendant's claim of ineffective assistance of appellate counsel, the State argued that counsel was not ineffective for failing to challenge defendant's sentence on appeal where the record showed the trial court's careful consideration of all the relevant factors in aggravation and mitigation during sentencing.

¶ 18 In his response to the State's motion, defendant argued that trial counsel was ineffective for failing to request a jury instruction for involuntary manslaughter where counsel argued at trial that defendant acted recklessly and defendant's testimony supported the giving of the instruction. Defendant maintained that counsel's failure to discuss the involuntary manslaughter instruction with defendant and to request the instruction denied him the right to a fair trial. Defendant also

maintained that appellate counsel was ineffective for failing to challenge his sentence on direct appeal given defendant's age and lack of significant criminal history.

¶ 19 After hearing arguments from the parties, the court granted the State's motion to dismiss. In its oral pronouncements, the court noted that this was "a self-defense case all the way," and found that trial counsel was "absolutely effective" in making arguments consistent with self-defense. The court also noted that counsel requested and received a self-defense instruction and that his decision not to present an alternate and relatively inconsistent theory of the case to the jury was essentially a matter of trial strategy. The court also found that appellate counsel was not ineffective for failing to challenge defendant's sentence where the aggregate 130-year term was, not only within the sentencing range, but "totally appropriate considering the facts and circumstances [of] this case."

¶ 20 On appeal, defendant first contends that his postconviction petition made a substantial showing that his trial counsel was ineffective for depriving defendant of his right to decide whether to tender to the jury an involuntary manslaughter instruction.

¶ 21 The Act, generally, provides for a three-stage process by which a defendant may assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). At the first-stage, the court may summarily dismiss the petition without any responsive pleading by the State. *Id.* at 379. If a petition is not summarily dismissed, it proceeds to the second-stage where it is docketed by the court and the State must either answer or move to dismiss the petition. *Id.*

¶ 22 The case at bar involves the second-stage of postconviction proceedings. The dismissal of a petition at this stage is warranted only when the allegations in the petition, liberally construed in favor of defendant and in light of the original trial record, fail to make a substantial showing of a constitutional violation. *Id.* at 382. We review *de novo* the circuit court's dismissal of defendant's postconviction petition without an evidentiary hearing. *Id.* at 389.

¶ 23 We initially address the State's argument that defendant's claim of ineffective assistance of trial counsel is barred by the doctrine of *res judicata*. The State maintains that, although defendant frames his claim as one of ineffective assistance of trial counsel, the dispositive underlying issue of whether defendant acted recklessly when shooting Rodriguez has already been decided by this court on direct appeal and we are therefore barred from considering his claim. See *People v. Blair*, 215 Ill. 2d 427, 443 (2005) ("the doctrine of *res judicata* bars consideration of issues that were previously raised and decided on direct appeal"). In support of this argument, the State points to our ruling on direct appeal rejecting defendant's contention that he acted recklessly when he shot Rodriguez. *Cole*, No. 1-06-0896 at 16.

¶ 24 Although on direct appeal we considered, and rejected, defendant's argument that the evidence supported a conviction for involuntary manslaughter rather than first degree murder, we did so in the context of defendant's challenge to the sufficiency of the evidence to sustain his murder conviction. As such, we did not consider whether the evidence presented was sufficient to justify an involuntary manslaughter instruction. Rather, we found that, based on the evidence presented, the jury could have concluded that defendant intentionally fired the gun to end the struggle with Rodriguez. *Cole*, No. 1-06-0896 at 17-18. More importantly, defendant raised the

jury-instruction issue on direct appeal and we specifically declined to consider it because the record on appeal did not indicate that defendant was given the opportunity to decide whether trial counsel should tender to the jury an involuntary manslaughter instruction. *Cole*, No. 1-06-0896 at 21. Under these circumstances, we choose to address the merits of defendant's claim of ineffective assistance of trial counsel.

¶ 25 A claim of ineffective assistance of counsel is examined under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). *People v. Harris*, 206 Ill. 2d 293, 303 (2002). To prevail on a claim of ineffective assistance, a defendant must show both that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's deficient performance so prejudiced the defendant as to deny him a fair trial. *Strickland*, 466 U.S. at 687-88. To establish deficient performance, a defendant must overcome the strong presumption that counsel's actions were the product of sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). To establish prejudice as a result of counsel's deficient performance, a defendant must prove there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Perry*, 224 Ill. 2d at 342. If either prong of the *Strickland* test is not satisfied, the defendant's claim must fail. *Id.* As such, a reviewing court need consider whether counsel's performance was deficient if the defendant did not suffer prejudice. *Id.*

¶ 26 Before addressing defendant's argument, it is important to specify the basis of defendant's ineffectiveness claim. Defendant does not argue that trial counsel was ineffective for merely failing to request an involuntary manslaughter instruction. See *People v. Moore*, 358 Ill. App. 3d

683, 688 (2005), citing *People v. Dominguez*, 331 Ill. App. 3d 1006, 1014-15 (2002) ("where a defendant has made the decision whether to give a lesser included offense instruction, that decision is considered to be one of trial strategy, which has no bearing on the competency of counsel" and cannot form the basis of an ineffective assistance claim). Rather, defendant alleges that counsel was ineffective for failing to inform him that he had the right to decide whether to tender such an instruction. Defendant supports his claim with an affidavit in which he avers that counsel did not inform him of this right and that, had counsel done so, he would have asked counsel to request the instruction.

¶ 27 Our supreme court has held that the decision of whether to submit an instruction on a lesser charge to the jury is similar to the decision of what plea to enter, and ultimately belongs to the defendant. *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994). In *Brocksmith*, the court also recognized that the failure to permit a defendant to make that decision would constitute reversible error. *Brocksmith*, 162 Ill. 2d at 229-30; see also *Moore*, 358 Ill. App. 3d at 688.

¶ 28 However, although it is the defendant's right to decide whether to tender a lesser included offense instruction, this right is an "entirely different matter than a right to actually have the jury instructed on a lesser included offense." *People v. Medina*, 221 Ill. 2d 394, 402 (2006). Whether a jury will actually receive a lesser included offense instruction depends on the evidence adduced at trial. *Medina*, 221 Ill. 2d at 402.

¶ 29 Therefore, in order to establish prejudice in this case, defendant must show, not only that the evidence presented was sufficient to warrant an involuntary manslaughter instruction, but also that, had the instruction been given to the jury, there is a reasonable probability that the

result of the proceeding would have been different. Here, because defendant cannot show either, he was not prejudiced by counsel's failure to inform him that he had the right to decide whether to request an involuntary manslaughter instruction.

¶ 30 A defendant is entitled to a lesser included offense instruction only if there is "some evidence" in the record that, if believed by the jury, will reduce the crime charged to a lesser offense. *People v. McDonald*, 2016 IL 118882, ¶ 25. This evidentiary prerequisite must be met before a right to have the jury instructed arises. For the reasons that follow, we find that this prerequisite has not been met.

¶ 31 The record shows that defendant's counsel asked for and received both a self-defense instruction and a second-degree murder instruction based on an unreasonable belief for self-defense. Defendant nevertheless argues that counsel was ineffective for failing to also request an instruction on involuntary manslaughter.

¶ 32 In this case, the trial court may give an involuntary manslaughter instruction only if the instruction is supported by some evidence in the record that would reduce the crime of first degree murder to involuntary manslaughter. However, a manslaughter instruction should not be given if the evidence shows that the homicide was murder, not manslaughter. *People v. Minnifield*, 2014 Ill. App. (1st) 130535, ¶ 80. A defendant is not entitled to reduce first degree murder to involuntary manslaughter by a hidden mental state known only to him and unsupported by the facts. *Id.*, citing *Sipp*, 378 Ill. App. 3d at 164 (quoting *People v. Jackson*, 372 Ill. App. 3d 605, 614 (2007)).

¶ 33 The difference between involuntary manslaughter and first degree murder lies in the mental state that accompanies the conduct resulting in the victim's death. *People v. Robinson*, 232 Ill. 2d 98, 105 (2008). Involuntary manslaughter requires a less culpable mental state than first degree murder and is therefore a lesser included offense of the latter. *Robinson*, 232 Ill. 2d at 105. A person commits first degree murder when he kills an individual without lawful justification and he knows that his acts create a strong probability of death or great bodily harm. 720 ILCS 5/9-1(a)(1), (a)(2) (West 2000). However, a person commits involuntary manslaughter when he performs acts that are likely to cause death or great bodily harm to another and he performs those acts recklessly. 720 ILCS 5/9-3(a) (West 2000).

¶ 34 Specifically, the Criminal Code of 1961 (Code) defines involuntary manslaughter, in pertinent part, as: "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly ***." 720 ILCS 5/9-3(a) (West 2000). The Code defines "recklessness" as:

> "A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. An act performed recklessly is performed wantonly, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning." 720 ILCS 5/4-6 (West 2000).

¶ 35 In determining whether an involuntary manslaughter jury instruction is warranted, certain factors, while not dispositive, may be considered: (1) the disparity of size and strength between the defendant and the victim; (2) the duration of the altercation and the severity of the victim's injuries; (3) whether the defendant used a weapon; (4) whether the defendant inflicted multiple wounds; and (5) whether the victim was defenseless. *McDonald*, 2016 IL 118882, ¶ 52.

¶ 36 In the present case, these factors weigh against defendant's argument that he was entitled to an involuntary manslaughter instruction. The record shows that defendant approached Gonzalez with a loaded gun, demanded Gonzalez's money and threatened to kill Gonzalez. Defendant acknowledged that he knew the handgun he was carrying was loaded and ready to be fired. He also acknowledged that he knew that the gun was a deadly weapon and that it could kill or cause great bodily harm. When Gonzalez refused to tender the money, defendant shot Gonzalez and attempted to flee the scene. Rodriguez then grabbed defendant's arm, and the men wrestled over the gun. Defendant acknowledged that Rodriguez did not have a weapon and there is no indication in the record of a size disparity between Rodriguez and defendant. Defendant admitted that, during this short struggle, he had his hand on the gun and pulled the trigger, shooting Rodriguez in the chest and killing him. Defendant's statement was corroborated by the testimony of Luis Martinez, who testified that he saw defendant fire the gun and shoot Rodriguez.

¶ 37 Although at trial defendant testified that he did not shoot Rodriguez on purpose and that he did not pull the trigger, we do not find this testimony, standing alone and in light of the factors considered above, to be a sufficient basis for an involuntary manslaughter instruction.

Accordingly, we concluded that the record does not contain any evidence that, if believed by the jury, would have reduced defendant's first degree murder charge to involuntary manslaughter, and, thus, defendant was not entitled to an involuntary manslaughter instruction.

¶ 38 In reaching this conclusion, we have considered the numerous cases cited by defendant in support of his argument that the evidence presented was sufficient to justify an involuntary manslaughter instruction and find them distinguishable from the case at bar. See *People v. Consago*, 170 Ill. App. 3d 982 (1988) (the trial court erred in refusing to tender an involuntary manslaughter instruction where the defendant testified that he shot the victim accidentally in the course of a heated argument and the evidence showed that the defendant and the victim struggled over a gun, which had a "hair" trigger); *People v. Hoover*, 250 Ill. App. 3d 338 (1993) (affirming the defendant's involuntary manslaughter conviction over her contention that she was acting in self-defense after considering the evidence in light of the factors that generally justify the use of force in defense of a person); *People v. Sibley*, 101 Ill. App. 3d 953 (the trial court erred in refusing to instruct the jury on the lesser included offense of reckless conduct where the defendant testified that he believed the gun he was using to scare the victim's father was not loaded and had lowered the gun when the victim's father grabbed it and they struggled over it); *People v. Roberts*, 265 Ill. App. 3d 400 (1994) (trial court erred in refusing to tender an instruction on recklessness because the jury could have concluded that it was the defendant's intent to merely scare the victim by placing a gun to his head and that it was the victim's act of slapping the defendant's hand which caused the gun to discharge).

¶ 39 We are likewise not persuaded by defendant's argument challenging the court's reasoning for granting the State's motion to dismiss his petition. Specifically, defendant argues that the court erroneously recalled that this was a "self-defense case all the way." Defendant maintains that counsel did not argue that defendant shot Rodriguez in self defense, but rather that he did so unintentionally. In support of this argument, defendant relies on excerpts of trial's counsel's closing argument.

¶ 40 However, because the dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*, this court need not defer to the trial court's reasoning and is free to make its own independent assessment of the allegations in the petition and supporting documentation. *People v. Sanders*, 2016 IL 118123, ¶ 31, citing *Coleman*, 183 Ill. 2d at 388-89. To the extent that defendant argues that trial counsel's closing arguments support an involuntary manslaughter instruction, we note that closing arguments cannot be considered as evidence that defendant did not intentionally shoot Rodriguez. See *People v. Meeks*, 382 Ill. App. 3d 81, 83-4 (2008) (closing arguments are not evidence).

¶ 41 We briefly note that, even assuming, *arguendo*, the evidence was sufficient to warrant an involuntary manslaughter instruction, defendant has failed to prove that there is a reasonable probability that, had the instruction been given, the result of his trial would have been different. As recounted above, the evidence that defendant acted intentionally when he shot Rodriguez was overwhelming.

¶ 42 In sum, because there was no evidence in the record to support defendant's claim of merely reckless conduct, defendant was not entitled to a lesser included involuntary

manslaughter instruction. Moreover, even if the instruction had been given, defendant has failed to show a reasonable probability that, but for counsel's alleged error, the result of his trial would have been different. As such, defendant suffered no prejudice from trial counsel's alleged failure to inform him that he had the right to decide whether to request an involuntary manslaughter instruction. Therefore, defendant has failed to make a substantial showing of ineffective assistance of trial counsel.

¶ 43 Defendant next contends that his postconviction petition made a substantial showing that his appellate counsel was ineffective for failing to challenge his aggregate 130-year sentence as excessive on direct appeal.

¶ 44 Claims of ineffective assistance of appellate counsel are examined under the two-prong test set forth in *Strickland*. *People v. Johnson*, 205 Ill. 2d 381, 405 (2002). A defendant who contends that appellate counsel was ineffective must show that the failure to raise an issue on direct appeal was objectively unreasonable and that this failure prejudiced the defendant. *Johnson*, 205 Ill. 2d at 405-06. Appellate counsel need not brief every conceivable issue on appeal and may refrain from developing nonmeritorious issues without violating *Strickland*. *Id.* at 406. Therefore, unless the underlying issue is meritorious, the defendant suffers no prejudice from counsel's failure to raise it on appeal. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). In order to assess the merit of the underlying sentencing issue, we must determine whether it would have been successful if raised on direct appeal. *Childress*, 191 Ill. 2d at 175.

¶ 45 In arguing that this issue would have been successful on appeal, defendant does not dispute that his aggregate sentence is within the statutory limits prescribed by law. Rather, he

alleges that in imposing his sentence—"equivalent to natural-life imprisonment"—the trial court ignored his rehabilitative potential. Specifically, defendant maintains that his rehabilitative potential was demonstrated by his age (22) at the time of the offense and his limited criminal history.

¶ 46 A trial court has broad discretion in imposing sentence and its sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A trial court is granted such deference because it is generally in a better position than a reviewing court to determine the appropriate sentence because the trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, habits, and age. *Stacey*, 193 Ill. 2d at 209. As such, a reviewing court will not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *Id.* Rather, our supreme court has established that absent an abuse of discretion by the trial court, this court may not alter a sentence on review. *Id.* at 209-10. Moreover, where, as here, the sentence is within the statutory limits for the offenses the defendant was convicted, it will be deemed excessive and the result of an abuse of discretion by the trial court, only if the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 47 Here, after examining the record, we cannot say that defendant's sentence is greatly at variance with the spirit of the law or manifestly disproportionate to the nature of defendant's offenses, such that the trial court abused its discretion in imposing the sentence. The record clearly shows that prior to imposing sentence, the court heard testimony from multiple mitigation

witnesses, including defendant's grandmother, who testified about defendant's employment history and that he was not a violent person. The court also heard trial counsel's argument in mitigation referencing defendant's limited criminal history and his youth. We presume the trial court considered all of this evidence, absent some contradictory indication other than the sentence itself. *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993). We see no such contradictory indication in the record before us.

¶ 48 Rather, the record shows, as noted by the trial court, that these mitigating factors were outweighed by the factors in aggravation. In announcing sentence, the court specifically considered and enumerated all the statutory factors in aggravation and mitigation that applied to this case, then stated "there are multiple factors in aggravation applicable, [and] virtually none in mitigation." The court recounted the nature of defendant's offense, including that he killed one person and took away Gonzalez's livelihood. See *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002) (the seriousness of the crime is the most important factor in determining an appropriate sentence). The court also noted that, if it was not for the factory workers who detained defendant that he likely would have shot another person and caused more "chaos." The court further noted that, given defendant's conduct, he was likely to commit another crime and found it necessary to impose a sentence which would serve as a deterrent to others from engaging in similar conduct. Given this record, we refuse to find an abuse of discretion by the trial court.

¶ 49 In reaching this conclusion, we have examined, and find unpersuasive, the cases and an article cited by defendant in support of his argument that, as a result of his youth, he exhibited great rehabilitative potential. Defendant's argument is essentially asking this court to substitute

its judgment for that of the trial court and re-weigh the relevant factors in his favor, which we cannot do. *Stacey*, 193 Ill. 2d at 209.

¶ 50 We observe that the sentencing range for defendant's first-degree murder conviction was 45 years to natural life, which includes a 25-year to natural life sentencing enhancement for personally discharging a firearm that proximately caused death to another person. 730 ILCS 5/5-8-1(a)(1), (d)(iii) (West 2000). Therefore, the trial court had the option of sentencing defendant to a term of natural life imprisonment and declined to do so, which suggests that the court considered mitigating evidence such as defendant's age. Because the record shows the trial court considered defendant's age and other mitigating evidence in imposing sentence, we find that, even if appellate counsel had challenged the sentence on appeal, that challenge would not have been successful. Accordingly, defendant was not prejudiced by appellate counsel's failure to raise an excessive sentence claim on direct appeal and, thus, his petition did not make a substantial showing that he received ineffective assistance of appellate counsel.

¶ 51 For the reasons stated, we affirm the second-stage dismissal of defendant's postconviction petition.

¶ 52 Affirmed.