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2017 IL App (3d) 140967-U

Order filed March 8, 2017

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0967
	)	Circuit No. 09-CF-1192
PEDRO SANCHEZ,	)	
Defendant-Appellant.	)	Honorable Amy Bertani-Tomczak, Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Carter and McDade concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Defendant's postconviction petition did not present the gist of a claim that he received ineffective assistance of appellate and trial counsel.
- ¶ 2 Defendant, Pedro Sanchez, appeals from the summary dismissal of his *pro se* postconviction petition. Defendant argues the court's dismissal was erroneous as his petition presented the gist of a claim of ineffective assistance of counsel where: (1) appellate counsel failed to challenge the State's closing argument on direct appeal; (2) trial counsel failed to cross-examine one of the State's witnesses about a gun charge that was dismissed before trial; and (3)

appellate counsel failed to challenge the State's adversarial participation in defendant's *Krankel* hearing. We affirm.

¶ 3

### FACTS

¶ 4

Defendant's postconviction allegations of error are directed at trial counsel's cross-examination of the State's witness, Michael Ortiz, the State's comments during its closing arguments, and the posttrial proceedings on defendant's claim of ineffective assistance of counsel. Accordingly, we have summarized the facts relevant to these issues. The remaining facts are succinctly summarized in defendant's direct appeal. See *People v. Sanchez*, 2013 IL App (3d) 120046-U.

¶ 5

Prior to trial, the court appointed the public defender to represent defendant. Thereafter, public defenders April Simmons and Shenonda Tisdale appeared on defendant's behalf.

¶ 6

At defendant's jury trial, Ellissa Hinton testified that she and defendant had sexual relations on two separate occasions, but Hinton did not have a dating relationship with defendant. Defendant indicated to Hinton that he was willing to take their relationship further. However, Hinton stopped defendant's advances because she was in a relationship with the victim.

¶ 7

On the night of the murder, the victim answered the door to the apartment that he shared with Hinton. Hinton heard some mumbling about a girl followed by a gunshot. Hinton recognized that one of the voices belonged to defendant. Hinton discovered the victim had been shot in the head.

¶ 8

Christian Lopez testified that he, Jesus Zambrano, and Michael Ortiz, rode with defendant to the apartment complex where the murder occurred. Surveillance video from the apartment complex showed Zambrano exit the car and retrieve a handgun from under the hood. Inside the apartment building, Lopez waited on the second floor while defendant and Zambrano

proceeded to the third floor. Lopez heard a gunshot and the three men ran to the car. After the incident, defendant repeatedly told Zambrano “I love you, Jesus. I love you.”

¶ 9 Prior to Ortiz’s testimony, the court read an order that granted use immunity to Ortiz pursuant to section 106-2.5 of the Code of Criminal Procedure of 1963 in exchange for his testimony. 725 ILCS 5/106-2.5(b) (West 2008). Ortiz testified that, in the afternoon on the day of the murder, defendant, Zambrano and he were at Claudia Sanchez’s house drinking alcoholic beverages and smoking marijuana. While at the house, Ortiz overheard defendant talking on the telephone “[l]ike there was an argument and [I] heard him and I guess his ex-girlfriend arguing.” Trial counsel objected to Ortiz’s statement, and the court sustained the objection. The State then asked Ortiz:

“Q. Did you observe [defendant] on the phone?

A. Not really but to me it seemed like he was talking to a female.

Q. Why did it seem like that?

A. Because he sounded like he was upset about somebody leaving him.

Q. Did you hear him say anything about a girl?

[TRIAL COUNSEL]: Objection, leading.

THE COURT: I will sustain it as to the leading.

BY [THE STATE]:

Q. Did you hear him say anything specifically while he was on the phone?

A. No, sir, just like arguments and like I said, sir, I was walking away minding my own business. I mean, I asked him at one point what was going on, you know, but just minding my own business.

Q. So you don't remember any specifics about the conversation?

A. Just like why did she leave or something like that. That's basically what I heard and like I said, minding my own business because I am thinking it's between him and her so leave it alone."

Following this exchange, the State tendered the witness to trial counsel for cross-examination. Trial counsel's cross-examination highlighted the fact that Ortiz had been drinking alcoholic beverages and smoking marijuana in the afternoon prior to the murder. Trial counsel also asked Ortiz if he knew the individual defendant was speaking to on the telephone. Ortiz did not know the individual, but he assumed defendant was speaking to a female.

¶ 10 The defense recalled Hinton to testify. Hinton said that she did not speak with defendant on the telephone or receive any messages from defendant on the day of the murder.

¶ 11 In its closing argument, the State argued the jury has "the evidence that [defendant] had a disagreement with [the victim] specifically or \*\*\* Hinton." Trial counsel objected to the statement as facts not in evidence. The court overruled the objection, and the State responded that it was not suggesting that there was evidence that defendant and the victim argued about Hinton, but Hinton dated the victim while also having "something on the side with" defendant. Hinton declined defendant's attempts to further their relationship, which caused defendant to hold a "grudge" against the victim. The State argued that the evidence established that either defendant or Zambrano had shot the victim, and based on an accountability theory, either could be convicted of murder.

¶ 12 The court instructed the jury that:

"[c]losing arguments are made by the attorneys to discuss the facts and circumstances in the case and should be confined to the evidence and to any

reasonable inferences to be drawn from the evidence. Neither opening statements nor closing arguments are evidence and any statement or argument made by the attorneys which is not based on the evidence should be disregarded.”

¶ 13 The jury found defendant guilty of first degree murder.

¶ 14 Defendant filed a *pro se* motion alleging that trial counsel, April Simmons, had provided ineffective assistance. Defendant argued that Simmons had failed to: (1) discredit an unnamed witness; (2) utilize contradicting statements to impeach one of the State’s witnesses; (3) request an accomplice witness jury instruction; and (4) make necessary objections related to several witnesses false or fabricated statements. At the hearing on the motion, defendant presented his allegations of ineffective assistance of counsel at length. The court allowed Simmons and co-counsel Tisdale to respond to defendant’s allegations. The court also asked the State for its comment on defendant’s allegations. Ultimately, the court found no need to appoint counsel to investigate defendant’s claims and denied the motion.

¶ 15 On direct appeal, we held that trial counsel’s decision not to request an accomplice-witness jury instruction was based on sound trial strategy and otherwise affirmed the case. *Sanchez*, 2013 IL App (3d) 120046-U, ¶ 14.

¶ 16 On October 22, 2014, defendant filed a *pro se* postconviction petition. The petition alleged that: (1) trial counsel was ineffective for failing to impeach Lopez with his video recorded statement; (2) the court erred in denying defendant’s request for the appointment of independent counsel to investigate his ineffective assistance claims; (3) trial counsel was ineffective for failing to question Ortiz about a deal to drop a gun charge in exchange for his testimony; (4) the State made improper remarks during its closing argument; and (5) appellate counsel was ineffective for failing to raise each of these claims.

¶ 17 On November 21, 2014, the court summarily dismissed defendant’s postconviction petition. Defendant appeals.

¶ 18 ANALYSIS

¶ 19 Defendant argues the court erred in dismissing his postconviction petition at the first stage of proceedings because it presented the gist of a claim that he received ineffective assistance of counsel. Defendant contends that his petition sufficiently alleged that: (1) appellate counsel did not object to the State’s comments during its closing argument that defendant’s telephone conversation proved that he was upset that Hinton had pursued a relationship with the victim; (2) trial counsel failed to cross-examine Ortiz about a gun charge that was dismissed prior to trial; and (3) appellate counsel did not raise an issue regarding the State’s participation in the preliminary *Krankel* hearing. We find that each of defendant’s arguments lacks merit.

¶ 20 At the first stage of postconviction proceedings, a defendant need only allege a “gist” of a claim, *i.e.*, enough facts to assert an arguable violation of his constitutional rights. (Internal quotation marks omitted.) *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Issues that were raised on direct appeal are barred by the doctrine of *res judicata* and issues that could have been raised, but were not, are forfeited. *People v. English*, 2013 IL 112890, ¶ 22.

¶ 21 Defendant did not raise his three claims of ineffective assistance of trial counsel on direct appeal. However, defendant seeks to avoid forfeiture by arguing that appellate counsel rendered ineffective assistance by not raising these issues on direct appeal. See *id.* ¶ 22 (forfeiture doctrine relaxed where forfeiture stems from the ineffective assistance of appellate counsel).

¶ 22 A petition that alleges ineffective assistance of appellate counsel may not be summarily dismissed if it is arguable that: (1) counsel’s performance fell below an objective standard of reasonableness, and (2) defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. To warrant second-

stage proceedings, defendant “must show that the failure to raise the issues was objectively unreasonable and that, but for this failure, defendant’s conviction or sentence would have been reversed.” *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 37. If the underlying issue is meritless, defendant cannot show prejudice for appellate counsel’s failure to raise it on appeal. *Id.*

¶ 23 I. State’s Closing Argument

¶ 24 Defendant argues that appellate counsel was ineffective for failing to raise an issue concerning trial counsel’s decision not to object to the State’s closing argument. Specifically, the State argued that defendant’s telephone conversation established that he was upset that Hinton had pursued a relationship with the victim instead of defendant. We find that the State’s comment regarding the telephone call that Ortiz overheard was permissible based on Ortiz’s testimony and inferences from that testimony. Therefore, appellate counsel was not deficient in failing to raise the issue on appeal.

¶ 25 The State has wide latitude in making its closing argument. *People v. Blue*, 189 Ill. 2d 99, 127 (2000). The State “may comment on the evidence and any fair, reasonable inferences it yields.” *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). “A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context.” *Id.* at 122.

¶ 26 Ortiz testified that defendant sounded upset while speaking to someone on the telephone and he observed that defendant seemed to be engaged in an argument. Ortiz further testified he assumed that the person defendant was talking to was a female. When combined with Hinton’s testimony that she refused defendant’s relationship advances, this evidence supported the State’s comment that defendant was upset with Hinton. Even if we considered this as a fact not in evidence, the court instructed the jury that closing arguments are not evidence, and absent

evidence to the contrary, we presume the jury followed the court's instruction. *People v. Mahaffey*, 165 Ill. 2d 445, 470 (1995). Defendant has cited to nothing in the record that would rebut this presumption.

¶ 27

## II. Cross-Examination of Ortiz

¶ 28

Defendant contends that appellate counsel was ineffective for failing to argue that trial counsel did not cross-examine Ortiz about a gun charge that was dismissed prior to defendant's trial. Even assuming appellate counsel was deficient in failing to raise this issue on appeal, defendant cannot prevail due to lack of prejudice.

¶ 29

The record establishes that the court notified the jury, prior to Ortiz's testimony that Ortiz was testifying pursuant to an order that granted use immunity. Given this disclosure, cross-examination of Ortiz regarding the particulars of the grant of immunity or the dismissal of a gun charge would do little to further impeach Ortiz's credibility. Additionally, the effect of further impeachment was marginalized by the fact that Ortiz's testimony was largely consistent with the version of events described by Lopez. In defendant's direct appeal, we observed that the evidence was not close. *Sanchez*, 2013 IL App (3d) 120046-U, ¶ 18. For purpose of this issue we set aside Ortiz's testimony and note that Lopez testified that he rode with defendant and Zambrano to the apartment complex where the murder occurred. Lopez saw Zambrano retrieve a gun from under the hood of the car. Lopez accompanied defendant and Zambrano into the apartment building where Lopez heard a gunshot. The group fled the scene, and in the car, Lopez heard defendant tell Zambrano that he loved him. A surveillance video recording from the apartment complex corroborated Lopez's testimony regarding the retrieval of the gun and entry into the apartment building. Hinton's testimony that, before the gunshot, she heard defendant's voice, confirmed defendant's presence at the scene of the shooting. Finally, Zambrano's



possession of the gun prior to the shooting does not eliminate defendant's culpability for the murder. The State argued that defendant was accountable for the murder and the evidence supports a verdict based on accountability. Specifically, the evidence showed the defendant was present at the scene at the time of the shooting, and defendant's statement to Zambrano after the shooting indicated defendant's intent. See 720 ILCS 5/5-2(a) (West 2008)); see also *People v. Flynn*, 2012 IL App (1st) 103687, ¶ 23 (defendant may be legally accountable for acts of another if he shared the criminal intent of the principal). In light of this evidence, defendant's petition did not allege an arguable claim that he was prejudiced by trial counsel's failure to cross-examine Ortiz regarding a dismissed gun charge.

¶ 30

### III. *Krankel* Hearing

¶ 31

Defendant argues that appellate counsel was ineffective for failing to argue that the State impermissibly participated in the posttrial *Krankel* hearing. In its appellee brief, the State argued that defendant forfeited this claim because it does not appear in defendant's *pro se* petition. We find this issue to be forfeited.

¶ 32

The fourth claim of defendant's postconviction petition alleged "[t]he trial court erred by not granting [defendant's] post-trial motion for appointment of new counsel to help with ineffective assistance of counsel motion." Notably, this claim does not include an allegation that appellate counsel was ineffective for failing to raise an issue concerning the State's adversarial participation in the preliminary *Krankel* hearing or an allegation of prejudice. See *People v. Jolly*, 2014 IL 117142, ¶ 38 (State is allowed minimal participation in the preliminary *Krankel* inquiry and is not permitted to assume an adversarial role). The question of whether the circuit court erred in refusing to appoint new counsel is entirely different than the claim presented on appeal that appellate counsel was ineffective for failing to challenge the State's participation in

the preliminary *Krankel* hearing. Because this issue was not contained within defendant's *pro se* petition, he cannot raise it for the first time on appeal.

¶ 33 In *People v. Jones*, 211 Ill. 2d 140, 148 (2004), the supreme court explained that “ ‘[t]he question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations *in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the [Post-Conviction Hearing] Act.’ ” (Emphasis in original.) *Id.* (quoting *People v. Coleman*, 183 Ill. 2d 366, 388 (1998)). Thus, any issues to be reviewed must be presented *in the petition* filed in the circuit court, and a defendant may not raise an issue for the first time while the matter is on review. *Id.* The issue of appellate counsel's effectiveness for not seeking review of the *Krankel* proceedings is not properly before this court.

¶ 34

#### CONCLUSION

¶ 35 The judgment of the circuit court of Will County is affirmed.

¶ 36 Affirmed.