2019 IL App (1st) 170390-U

No. 1-17-0390

Order filed May 31, 2019

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 4113
	)	
RONNIE WARD,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition is affirmed where (1) counsel on direct appeal was not ineffective for failing to raise an ineffective assistance claim against trial counsel for not objecting to the State's closing argument, since the trial court's jury instructions corrected any prejudice caused by the allegedly improper remarks, and (2) trial counsel was not arguably ineffective by allegedly refusing to allow defendant to testify, where the record shows that defendant told the trial court it was his desire not to testify. Defendant has forfeited his claim that counsel on direct appeal was ineffective for not raising an ineffective assistance claim against trial counsel for submitting an allegedly flawed jury instruction.

¶ 2 Defendant Ronnie Ward appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). On appeal, defendant contends that his petition stated arguable claims that (1) counsel on direct appeal was ineffective for failing to state a claim of ineffectiveness of trial counsel for submitting a flawed jury instruction and for failing to challenge prosecutorial misconduct during closing arguments, and (2) trial counsel was ineffective for forbidding him to testify at trial. We affirm.

¶ 3 Defendant was charged in an 18-count indictment arising from an incident in Chicago on January 24, 2012. The State nol-prossed 14 counts and proceeded on 3 counts of first degree murder (720 ILCS 5/9-1(a)(1), (2), (3) (West 2012)) and 1 count of armed robbery (720 ILCS 5/18-2(a)(4) (West 2012)). The victim was Robin Davis, defendant's girlfriend. We set forth only the evidence from defendant's jury trial that is relevant to the issues on appeal.

¶ 4 Alice Pittman testified that on January 24, 2012, at about 12:30 a.m., she visited Ms. Davis at a house on the 5000 block of South Perry Avenue. In a bedroom at the back of the house, Ms. Pittman joined defendant, Ms. Davis, and Jack Sullivan. Defendant and Ms. Davis argued, and defendant waved and "clicked" a gun at Mr. Sullivan and Ms. Pittman. Defendant grabbed Ms. Davis by the collar as she left the bedroom, and did not appear to be "playing" with her. Defendant then entered the living room with Ms. Davis and shot her. Ms. Pittman fled the house, and when she later returned to the living room, Ms. Davis's coats and shirt had been removed from her body.

¶ 5 Mr. Sullivan testified that he was in the bedroom with defendant and Ms. Davis, who were arguing with each other. Defendant repeatedly told Ms. Davis, "I got something for you,"

and asked her for money. Defendant also pointed a gun at Mr. Sullivan and said there were no bullets in it, but Mr. Sullivan responded that there is "always one in the chamber." Ms. Pittman later entered the bedroom. When they all tried to leave the house, defendant pointed the gun at everyone and shot Ms. Davis in the head. Defendant left and reentered the house, pulled Ms. Davis's shirt and bra up, took money that was in her bra, and ran back outside, yelling that he "kill[ed] his baby" and was going to go to jail.

¶ 6 Chicago police detective John Murray testified that when he arrived at the scene, he found a woman lying on the floor "bare chested," with "a brassiere *** draped across her" and a pool of blood surrounding her head. Chicago police officer Cedric Campbell testified that later that morning, he arrested defendant and conducted a pat-down but found no gun.

¶ 7 Following this testimony, the trial court held a jury instruction conference. The court allowed defense counsel's request for an involuntary manslaughter instruction, but disallowed any second degree murder instructions.

¶ 8 The defense called Dr. Christofer Cooper, a psychologist, who testified that he evaluated defendant and determined defendant had an IQ score of 63, which was within the lowest categorized range of scores. Then, outside the presence of the jury, the following colloquy occurred between the trial court and defendant:

> "THE COURT: Mr. Ward, it's my understanding that your attorneys have explained to you that you have a constitutional right to testify in your own behalf; is that correct?
>
> THE DEFENDANT: Yes.

THE COURT: You also have a constitutional right not to testify; do you understand that?

THE DEFENDANT: Yes.

THE COURT: After discussing this with your attorneys, what is your wish? Do you want to testify in this case?

THE DEFENDANT: No."

¶ 9 The defense rested and the trial court described the purpose of closing arguments to the jury, stating that they are "really a discussion [of] the facts that have been proven and reasonable inferences to be drawn from the facts." The court noted that the arguments were "not to be considered as evidence." Then, the court stated, "Following the closing arguments, I will read the instructions of law that you are to follow and you will get these in writing ***."

¶ 10 During closing arguments, the State contended that defendant threatened Ms. Davis throughout the day, shot her, and took money from inside her bra. The State asserted:

"Now, the Judge is going to instruct you as to the law. As he told you, he will verbally instruct you and he'll give you a packet of instructions. Don't bother trying to read that. There's a whole lot of words in a little print, but essentially there are two propositions that we must prove in order for you to find the Defendant guilty of first degree murder."

As to the "first proposition," the State explained it is uncontested that defendant caused Ms. Davis's death. The State asserted that the "second proposition" contained four prongs: that defendant "knew that his acts would cause" Ms. Davis's death, that "he knew that his acts created a strong probability of [Ms. Davis's] death," that he knew his acts created a strong

probability of "great bodily harm" to Ms. Davis, or that "he was committing the offense of armed robbery." The State then outlined the multiple ways in which the evidence established defendant's intent as to first degree murder. Finally, the State outlined the elements of armed robbery.

¶ 11 Defense counsel argued that "[w]hat happened was a reckless tragedy." According to defense counsel, defendant pulled the trigger of the gun multiple times and did not think it was loaded. Defense counsel also claimed that the State had not presented any evidence that defendant took anything from Ms. Davis after shooting her. Defense counsel concluded that if defendant "is guilty of anything, it's involuntary manslaughter," since defendant "did not intend to kill" Ms. Davis.

¶ 12 At the close of arguments, the court addressed the jury, stating "I now will instruct you as to the law. The law that applies to this case is stated in these instructions and it will be your duty to follow [all] of *** them. You must not single out certain instructions and disregard others." The court then instructed the jury on the elements of the charged offenses and involuntary manslaughter, including the mental states required for each offense. The jury found defendant guilty of first degree murder, but not armed robbery, and the trial court sentenced him to 52 years' imprisonment.

¶ 13 On appeal, defendant argued that the evidence at trial showed he unintentionally shot Davis, and that the prosecutor misstated the trial testimony during closing arguments. *People v. Ward*, 2015 IL App (1st) 131798-U, ¶¶ 32, 39. We affirmed. *Id.* ¶ 45.

¶ 14 On August 15, 2016, defendant filed a *pro se* postconviction petition (the "petition") alleging, in relevant part, that trial counsel was ineffective for denying him the "right to testify

over [trial] counsel's objection." According to defendant, "Counsel's and Court's failure to adequately and properly inform him of the extent of that right" prevented him "from knowingly, intelligently, and willingly waiving" the right. Defendant claimed that the trial court and trial counsel failed to tell him he had a right to testify despite trial "counsel's objection, prohibition, or recommendations." "To the contrary," trial counsel allegedly advised defendant that counsel was "in charge of" the witnesses who would be called. In support of this argument, defendant attached his affidavit, which stated:

> "I fully desired to testify at trial. However, Court-appointed Counsel informed me that he would not let me testify. He further told me that he was the one who selected the witnesses to be called because he was the one who had to present the defense. I understood all that to mean that included me. At no time did trial counsel inform me that I had the authority to over-rule [*sic*] him and testify in spite [*sic*] of his advice or demands. Had I, I would have testified. Further, the explanation given by the Court at trial did not inform me that my decision to testify would over-rule [*sic*] my attorneys [*sic*] prohibitions. Had I understood that, I would have testified. And, I believe that my testimony would have positively influenced the jury and Court."

¶ 15 Additionally, defendant asserted that counsel on direct appeal was ineffective for failing to raise an ineffective assistance claim, based on trial counsel's failure to object to the prosecutor's statement in closing arguments that the jury should ignore the jury instructions. In a section of the petition titled "Reasonable Doubt—Elements / Evidence Insufficient," defendant also claimed that "he was prejudiced by the State's failure to prove every element of the offense

beyond a reasonable doubt with evidence sufficient to persuade a properly instructed jury of his guilt beyond a reasonable doubt."

¶ 16 On November 3, 2016, the circuit court entered a written order that summarily dismissed the petition. As to the contention that trial counsel was ineffective for barring defendant from testifying, the circuit court found that "petitioner's own admission that he interpreted his counsel's explanation of trial strategy to indicate that he was prohibited from testifying demonstrates that his counsel did not bar him from testifying." The circuit court also observed that the trial court "was not required to explain petitioner's right to testify, beyond informing him that he has the right to take the witness stand in his defense." As to the State's comment telling the jury to ignore the instructions, the circuit court found that "[n]one of petitioner's cited instances demonstrate that the State's conduct engendered substantial prejudice." Defendant has appealed from the dismissal of the petition.

¶ 17 On appeal, defendant first argues that his petition stated an arguable claim that counsel on direct appeal was ineffective for not raising an ineffective assistance claim, on the basis that trial counsel failed to object to the State's remark in closing argument to not "bother trying to read" the jury instructions. According to defendant, this remark directed the jury to ignore instructions regarding defendant's mental state, which was the main issue at trial. The State responds that the prosecutor may have been referring to a screen in the courtroom displaying the instructions, but in any case, defendant cannot show this remark prejudiced him, since the remainder of the State's closing argument and the jury instructions correctly stated the law. Accordingly, the State posits that defendant's underlying ineffective assistance of trial counsel claim lacks merit, and so

defendant cannot establish prejudice for purposes of his ineffectiveness of appellate counsel claim.

¶ 18 The Act (725 ILCS 5/122-1 *et seq.* (West 2016)) provides a procedure for persons under criminal sentence to "assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage of postconviction proceedings, "[t]he allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim." *People v. Brown*, 236 Ill. 2d 175, 184 (2010). This standard presents a low threshold, and "[a] petitioner need present only a limited amount of detail and is not required to include legal argument or citation to legal authority." *Id.* A *pro se* defendant need only "allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *Hodges*, 234 Ill. 2d at 9.

¶ 19 The Act authorizes the circuit court to summarily dismiss the petition through a written order where "the court determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). A *pro se* petition for postconviction relief is "frivolous or *** patently without merit" only where it "has no arguable basis either in law or in fact." (Internal quotation marks omitted.) *Hodges*, 234 Ill. 2d at 16. A petition lacks an arguable basis in law or fact where it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* "An example of an indisputably meritless legal theory is one that is completely contradicted by the record," and "[f]anciful factual allegations include those that are fantastic or delusional." (Internal quotation marks omitted.) *People v. White*, 2014 IL App (1st) 130007, ¶ 18. "The

summary dismissal of a postconviction petition is reviewed *de novo*." *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 20 Defendants have a constitutional right to the effective assistance of counsel at trial and on direct appeal under the United States Constitution and the Illinois Constitution. *People v. Jackson*, 205 Ill. 2d 247, 258-59 (2001); U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. 1, § 8. To prevail on an ineffective assistance claim, a defendant must establish that (1) "counsel's performance was objectively unreasonable under prevailing professional norms," and (2) "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Cathey*, 2012 IL 111746, ¶ 23 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). As to the first prong, a defendant must show counsel's assistance was deficient in that " 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' " *People v. Coleman*, 183 Ill. 2d 366, 397 (1998) (quoting *Strickland*, 466 U.S. at 687). As to the second prong, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Enis*, 194 Ill. 2d 361, 376 (2000).

¶ 21 At the first stage of postconviction proceedings, "a petition alleging ineffective assistance of counsel 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." *Cathey*, 2012 IL 111746, ¶ 23. The prejudice inquiry requires us to review the merits of the underlying issue. *People v. Viramontes*, 2016 IL App (1st) 160984, ¶ 72. Appellate counsel is not required to brief "every conceivable issue on appeal," and counsel may refrain

from raising issues that, in counsel's judgment, "are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Simms*, 192 Ill. 2d 348, 362 (2000). "Appellate counsel's choices about which issues to pursue are entitled to substantial deference." *Viramontes*, 2016 IL App (1st) 160984, ¶ 72.

¶ 22 A prosecutor has wide latitude in closing argument. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). In considering challenges to improper remarks in a closing argument, we must view the closing argument in its entirety and read the challenged remarks in context. *Id.* at 122. "Reversal is warranted only if the prosecutor's remarks created substantial prejudice," which occurs where the remarks "constituted a material factor in a defendant's conviction." (Internal quotation marks omitted.) *People v. Johnson*, 385 Ill. App. 3d 585, 604 (2008). Counsel's arguments " 'generally carry less weight with a jury' " than do the trial court's instructions, since " '[t]he former are usually billed in advance to the jury as matters of argument *** and are likely viewed as the statements of advocates.' " *People v. Lawler*, 142 Ill. 2d 548, 564 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 384 (1990)). Absent contrary evidence, we must presume the jury followed the trial court's instructions. *People v. James*, 2017 IL App (1st) 143036, ¶ 52; see also *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). Our supreme court has held that where the jury is otherwise properly instructed on the law, any misstatements made in closing arguments are "of little consequence" and thus "not reversible error." *Lawler*, 142 Ill. 2d at 565.

¶ 23 Defendant's argument is that counsel on direct appeal was ineffective for failing to raise an ineffective assistance claim against trial counsel, who in turn failed to object to the State's remark that the jury should not "bother trying to read" the jury instructions. At the outset, we observe that the State identifies nothing in the record to prove its theory that the State was

referring to a screen displaying the instructions. Nevertheless, defendant cannot establish prejudice for purposes of his ineffective assistance claim against counsel on direct appeal, since his underlying ineffective assistance of trial counsel claim lacks merit. *Viramontes*, 2016 IL App (1st) 160984, ¶ 72.

¶ 24 The record as a whole shows defendant was not prejudiced by trial counsel's alleged ineffectiveness, since the trial court's directions before and after closing arguments would have corrected any juror's belief that the written instructions did not need to be followed. The trial court prefaced the parties' closing arguments with an explanation of the purpose of closing arguments. The court then explained that, after arguments, it would "read the instructions of law *that you are to follow*." (Emphasis added.) Following closing arguments, the court told the jury, "I now will instruct you as to the law. The law that applies to this case is stated in these instructions and it will be your duty to follow [all] of *** them. You must not single out certain instructions and disregard others." The trial court then read the jury instructions, including the elements of the charged offenses and involuntary manslaughter. Thus, despite the State's remark to not "bother trying to read" the jury instructions, the trial court repeatedly told the jury it must follow the instructions and specifically ordered the jury not to "single out" or "disregard" any instructions. See *Lawler*, 142 Ill. 2d at 565 (finding that while the prosecutor misstated the law, "the prosecutor's misstatement was of little consequence and, thus, not reversible error," since the trial judge "on numerous occasions" correctly stated the law to the jury, and "the jury was properly instructed"); see also *People v. Aleman*, 313 Ill. App. 3d 51, 67-68 (2000) (stating the State's remarks "must be juxtaposed with the numerous instances in which both the court and the attorneys advised and instructed the jury" properly).

¶ 25 Moreover, viewing the State's closing argument as a whole, its remark was insignificant and not a material factor in defendant's conviction. Despite telling the jury to not "bother trying to read" the jury instructions, the State proceeded to describe in detail how the evidence at trial established defendant's mental state, which was the disputed element of defendant's first degree murder charges. The State also outlined how the evidence established the elements of armed robbery. Considering the State's closing argument as a whole, as well as the trial court's curative instructions, defendant was not prejudiced by trial counsel's failure to object to the State's comments, and therefore, defendant was not arguably prejudiced by the alleged failure of counsel on direct appeal to raise the ineffective assistance of trial counsel claim. *Cathey*, 2012 IL 111746, ¶ 23.

¶ 26 Defendant next argues that the petition stated an arguable claim that his trial counsel provided ineffective assistance by barring him from testifying. Defendant claims that he did not know that he had a right to testify "over his attorney's advice and wishes." The State responds that this claim lacks merit, since defendant failed to alert the trial court to his desire to testify, and the record shows that he knowingly and voluntarily waived that right.

¶ 27 "A criminal defendant's right to testify on his own behalf, or not to testify at all, is rooted in the fifth, sixth, and fourteenth amendments of the United States Constitution." *People v. Patrick*, 233 Ill. 2d 62, 69 (2009) (citing *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987)); U.S. Const., amends. V, VI, XIV. The ultimate decision of whether to testify "belongs to the defendant but is generally made after consultation with counsel." *Patrick*, 223 Ill. 2d at 69. Where a defendant asserts in a postconviction petition that trial counsel denied his or her right to testify, the claim is properly rejected where the defendant did not also raise a contemporaneous

objection at trial. *People v. Thompkins*, 161 Ill. 2d 148, 177-78 (1994); see also *Enis*, 194 Ill. 2d at 399-400; *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009) (applying this rule to appeals from summary dismissals). This rule recognizes that counsel's advice will always " 'in retrospect appear to the defendant to have been bad advice, and he will stand to gain if he can succeed in establishing that he did not testify because his lawyer refused to permit him to do so.' " *Thompkins*, 161 Ill. 2d at 178 (quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973)).

¶ 28 While the petition and attached affidavit stated that defendant "fully desired" to testify, there is no allegation that he at any time communicated this desire to either counsel or the trial court. To the contrary, the trial court asked defendant whether he wished to testify, and defendant affirmatively declined to do so. Defendant also confirmed on record that his attorneys explained to him that he has a right to testify, and that, after discussing the matters with his attorneys, it was his wish not to testify. Therefore, the petition's claim that trial counsel denied him the right to testify is "completely contradicted by the record" and was properly summarily dismissed. (Internal quotation marks omitted.) *White*, 2014 IL App (1st) 130007, ¶ 18.

¶ 29 Notwithstanding, defendant contends that the trial court never asked him whether trial counsel explained he could testify against counsel's contrary advice. Defendant also claims the trial court failed to inquire into whether trial counsel coerced or pressured him into not testifying. Defendant therefore asserts that the record is consistent with his claim that he was misinformed as to whether he could make the ultimate decision to testify. However, this claim is founded on the assertion that defendant in fact wanted to testify, while trial counsel did not want him to. As we have noted, the record shows that defendant expressly confirmed at trial that it was his own "wish" not to testify. Defendant did not assert at trial that he wished to testify (*Thompkins*, 161

Ill. 2d at 177-78), and his contention is completely contradicted by the record (*White*, 2014 IL App (1st) 130007, ¶ 18). Accordingly, his postconviction claim of ineffective assistance of trial counsel is patently without merit.

¶ 30 Lastly, defendant argues that his postconviction petition stated an arguable claim that trial counsel was ineffective for submitting a flawed jury instruction that implied he could be guilty of both first degree murder and involuntary manslaughter, and that counsel on direct appeal was ineffective for failing to raise an ineffective assistance claim against trial counsel on this issue.

¶ 31 Although the parties address this issue on the merits, we observe that defendant failed to raise the allegedly improper jury instruction in his postconviction petition. In the petition, the sole reference to the propriety of the written jury instructions occurred in the context of defendant's challenge to the sufficiency of the evidence, wherein he alleged that he "was prejudiced by the State's failure to prove every element of the offense beyond a reasonable doubt with evidence sufficient to persuade a *properly instructed jury* of his guilt beyond a reasonable doubt." (Emphasis added.) This statement does not actually allege that the jury was improperly instructed or provide any detail as to the nature of the instruction ostensibly being challenged. The remainder of the section concerns the sufficiency of the evidence at trial, without referencing the issue of jury instructions. Notably, in summarily dismissing the postconviction petition, the circuit court did not rule on any jury instruction issue.

¶ 32 Even liberally construing defendant's postconviction allegations, we cannot find that defendant's petition challenged the jury instructions regarding the elements of first degree murder and involuntary manslaughter. Because defendant's postconviction petition does not state a claim concerning the jury instruction issue, we cannot review the issue for the first time in this

postconviction appeal. 725 ILCS 5/122-3 (West 2016) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."); *People v. Pendleton*, 223 Ill. 2d 458, 474-75 (2006) (finding the defendant waived an admonishment claim raised for the first time on postconviction appeal where the petition did not allege his admonishments were inadequate). Accordingly, we do not consider whether counsel on direct appeal was ineffective for failing to raise an ineffective assistance of trial counsel claim, based on the assertion that trial counsel submitted an erroneous jury instruction.

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 34 Affirmed.