No. 1-09-0109

FIRST DIVISION
DATE: January 18, 2011

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 7948
	)	
ANGEL ORTEGA,	)	Honorable
	)	Marjorie C. Laws,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Hall and Justice Lampkin concurred in the judgment.

O R D E R

HELD: Counsel on direct appeal was not ineffective for failing to raise the issue of provocation based on mutual combat where defendant responded to being hit on the back of a head with a kitchen tool by fatally stabbing the victim, an act that was greatly disproportionate to the provocation; the trial court's dismissal of defendant's postconviction petition was affirmed.

Defendant Angel Ortega appeals from the second stage

dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2002)). On appeal, he contends that his petition made a substantial showing of ineffective assistance of appellate counsel for failing to argue that defendant's first degree murder conviction should be reduced to second degree murder based on the provocation of mutual combat. We affirm.

At trial, defendant acknowledged that he fatally stabbed the victim, Luis Rivera, while visiting the apartment of Carmen Rivera, the mother of three of defendant's children and the victim's sister. Defendant and Carmen had separated years earlier. Carmen testified that when she asked defendant to leave her house on the evening of March 9, 2001, he asked her to go to his apartment. When she refused, defendant began yelling, ultimately calling her a "bad name" in Spanish, translated in English as "b*tch." This upset Carmen, so she slapped defendant, who then swung at her, but missed. He swung again and hit Carmen's teenaged daughter Antonia. Antonia and Carmen's oldest son tried to stop the fight.

Carmen then walked toward the bathroom. Defendant initially followed, but as she entered the bathroom, he walked back toward the children with his right hand in his pocket. As Carmen exited the bathroom, she heard her son, Julio, yell that defendant had stabbed the victim. She saw the victim trying to get up while defendant continued to stab him. Carmen jumped in front of the

victim and tried to push defendant away. Julio then jumped in front of her. Defendant stabbed Julio, however, Julio was not injured as the knife struck a pencil sharpener in his pocket. After she saw defendant stab the victim three times, she hit defendant with a cheese grater. Defendant kept swinging the knife until Carmen's mother hit him over the head with a bowl.

Defendant's daughter, Carmen Ortega (C.O.), and stepdaughter Antonia, testified that the fight between defendant and Carmen ended after the victim hit defendant on the head with a cheese grater. (The victim's striking the defendant came before Carmen's later also striking the defendant with the cheese grater.) Defendant initially followed Carmen toward the bathroom and put his coat on. He then turned around, went toward the victim, and stabbed the victim in the abdomen. When defendant saw Carmen run out of the bathroom, he jumped on top of the victim and stabbed the victim again.

Julio Ortega, defendant's son, testified that once Carmen entered the bathroom, defendant turned around, returned to the living room, pulled a knife from his pocket, and stabbed the victim. Julio yelled that defendant had stabbed the victim and Carmen exited the bathroom 10 seconds later. Defendant turned around, looked at Carmen, smiled, jumped on top of the victim, and stabbed the victim.

Defendant testified that Carmen had agreed to go to his apartment, but after he told his stepdaughter Antonia that Carmen

had previously contracted herpes, Carmen became upset and refused to go. He called her "two faced" and she responded by saying that he wanted some bullets. This "pissed [defendant] off", as he had been shot before. He then called her, in Spanish, a name he knew would upset her. The English translation of the word is "b*tch." Carmen responded by slapping him. Defendant drew his hand back to slap her, but Antonia came between them. He planned to leave, but then someone hit him on the back of the head. He turned around, saw the victim, and then stabbed the victim with the knife he carried for protection.

Defendant testified that he felt like he deserved to be hit. However, during cross-examination, defendant testified that when someone hits you, you react by doing to that person what he did to you. When the victim hit defendant with the cheese grater, defendant's response was to hurt the victim back.

The victim had been stabbed four times, *i.e.*, once in the abdomen, once in the left hand, and twice in the left arm and shoulder with significant bruising around the wounds. The trial court found defendant guilty of first degree murder and sentenced him to 25 years in prison.

On appeal, this court affirmed the judgment of the trial court and granted counsel's motion to withdraw filed pursuant to *Anders v. California*, 386 U.S. 738 (1967). See *People v. Ortega*, No. 1-02-2604 (2003) (unpublished order under Supreme Court Rule 23).

While his direct appeal was pending, defendant filed a *pro se* postconviction petition alleging, among other claims, that the trial court erred by finding defendant guilty of first degree murder, rather than second degree murder, when defendant acted under a sudden and intense provocation. He also alleged that appellate counsel was ineffective when he filed an *Anders* brief because there were issues of merit, including provocation, that could have been raised on appeal.

The trial court docketed the petition and defendant was appointed counsel. In July 2008, postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), indicating that he had consulted with defendant and would not be amending the petition. The State then filed a motion to dismiss. After hearing argument, the court granted the State's motion.

We review the trial court's dismissal *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). At the second stage, it is the defendant's burden to make a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473; see also *People v. Spreitzer*, 143 Ill. 2d 210, 218 (1991) (a defendant is not entitled to an evidentiary hearing unless the allegations in his postconviction petition are supported by the trial record and the accompanying affidavits, and make a substantial showing that his rights were violated). All well-pled facts in the petition that are not positively rebutted by

the trial record are taken to be true. *Pendleton*, 223 Ill. 2d at 473.

A claim of ineffective assistance of appellate counsel is governed by the same rules that apply to claims of ineffective assistance of trial counsel. *People v. Golden*, 229 Ill. 2d 277, 283 (2008); see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Accordingly, "[a] defendant who contends that appellate counsel rendered ineffective assistance, *e.g.*, by failing to argue an issue, must show that the failure to raise that issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have been reversed." *People v. Griffin*, 178 Ill. 2d 65, 74 (1997).

Appellate counsel is not obligated to raise every possible issue on appeal, and it is not incompetence for counsel to choose not to raise an issue which counsel determines is nonmeritorious, unless, of course, counsel's judgment regarding the merits of that issue is patently wrong. *People v. Smith*, 195 Ill. 2d 179, 190 (2000); *People v. Rogers*, 197 Ill. 2d 216, 223 (2001) (if the underlying issue is nonmeritorious, a defendant suffers no prejudice). Appellate counsel's decisions as to which issues to raise on direct appeal are generally entitled to substantial deference. *Rogers*, 197 Ill. 2d at 223.

Here, defendant contends that he received ineffective assistance on direct appeal when counsel failed to argue that the evidence supported a conviction for second degree murder, rather

than first degree murder. Specifically, defendant argues that the evidence at trial established that the victim was killed during mutual combat.

A person commits second degree murder when he intentionally causes the death of another and he is acting under a sudden and intense passion resulting from serious provocation by the victim. See 720 ILCS 5/9-2(a)(1) (West 2000). Serious provocation is "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2000). In order to be found guilty of second degree murder instead of first degree murder, a defendant proven guilty of first degree murder must prove a mitigating factor by the preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2000).

The only categories of serious provocation recognized in Illinois are mutual quarrel or combat, substantial physical injury or assault, illegal arrest, and adultery with the defendant's spouse. *People v. Chevalier*, 131 Ill. 2d 66, 71 (1989). "Mutual combat is a fight or struggle which both parties enter willingly or in which two persons, upon a sudden quarrel, and in hot blood, mutually fight upon equal terms and death results from the combat." *People v. Neal*, 112 Ill. App. 3d 964, 967 (1983). It is not mutual combat when the defendant's response is disproportionate to the provocation, especially when a deadly weapon is used. *People v. Austin*, 133 Ill. 2d 118, 127 (1989).

This court's decision in *People v. Jones*, 371 Ill. App. 3d 303 (2007), is instructive. In that case, we rejected the defendant's contention that there was evidence of mutual combat such that his first degree murder conviction should be reduced to second degree murder when the record indicated that the defendant responded to the victim's hitting, poking, and spitting at him by hitting her with a hammer numerous times, fracturing her jaw and skull and lacerating her neck. *Jones*, 371 Ill. App. 3d at 309. We reiterated that when a defendant's actions were "grossly" disproportionate to any provocation by the victim, the mutual combat aspect of provocation was inapplicable as a matter of law. *Jones*, 371 Ill. App. 3d at 309.

Here, according to defendant, he Carmen were engaged in a physical altercation that led to defendant's being hit in the head with a cheese grater and his stabbing the victim in response. Even if we were to accept defendant's testimony that his stabbing the victim was an immediate response to his being hit in the head with a cheese grater, defendant's response of stabbing the victim multiple times causing his death was not a proportionate response to the victim's action (*Austin*, 133 Ill. 2d at 126-27). Thus, the mutual combat aspect of provocation was inapplicable to this case as a matter of law (*Jones*, 371 Ill. App. 3d at 309).

We are unpersuaded by defendant's reliance on *People v. Collins*, 213 Ill. App. 3d 818 (1991), and *People v. Goolsby*, 45

Ill. App. 3d 441 (1977). In *Collins*, the defendant's first degree murder conviction was reduced to second degree murder when the evidence revealed that the defendant and the victim were intoxicated and the victim was shot while the men struggled over a loaded gun. *Collins*, 213 Ill. App. 3d at 821-22. On appeal, this court determined that "under the specific circumstances" of the case it was proper to reduce the defendant's conviction to second degree murder where the evidence was too vague and inconclusive to sustain a conviction for first degree murder. *Collins*, 213 Ill. App. 3d at 826-27. In *Goolsby*, the defendant testified that he grabbed a knife to defend himself after he had exchanged several punches with the victim, and the victim had hit him several times with a five to six pound lead paper weight. *Goolsby*, 45 Ill. App. 3d at 444. Although the defendant thought that the knife would scare the victim, the victim instead grabbed the defendant, the men wrestled, and the victim was fatally wounded during the struggle. *Goolsby*, 45 Ill. App. 3d at 444. On appeal, this court determined that while the evidence established that the victim died as a result of a violent fight with the defendant over money, the evidence was insufficient to prove the defendant guilty of murder beyond a reasonable doubt. *Goolsby*, 45 Ill. App. 3d at 449. Rather, the evidence proved defendant guilty of voluntary manslaughter, and we reduced the defendant's conviction accordingly. *Goolsby*, 45 Ill. App. 3d at 449-50. The defendant in *Collins* killed his victim during a

struggle over a dangerous weapon, and the defendant in *Goolsby* stabbed his victim in the context of a mutual combat comprised of roughly proportionate provocations and responses. Here, there is evidence neither of defendant's losing control of his weapon or of the killing stemming from the confusion of an ongoing struggle. Further, as we have said, defendant's stabbing his victim was grossly disproportionate to any provocation he suffered. Accordingly, *Collins* and *Goolsby* do not change our result.

Contrary to defendant's position in the instant case, appellate counsel's failure to raise the issue of provocation based on mutual combat on direct appeal was not objectively unreasonable (*Griffin*, 178 Ill. 2d at 74), when the evidence at trial showed defendant's response to the victim's "provocation" with a kitchen tool was to stab the victim multiple times. Based on this record, defendant cannot show how he was prejudiced by appellate counsel's failure to raise this issue. As defendant is unable to show how he was prejudiced by appellate counsel's failure to raise this issue, his claim of ineffective assistance of appellate counsel must fail. See *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (as failure to satisfy either prong of the *Strickland* test defeats a claim of ineffective assistance, a court does not have to determine whether counsel's performance was deficient before examining the prejudice a defendant suffered because of counsel's alleged errors).

Accordingly, the judgment of the trial court is affirmed.

Affirmed.