2011 IL App (4th) 100217-U

Filed 8/29/11

NO. 4–10–0217

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
JUSTIN A. BELL,	)	No. 05CF209
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Steigmann and McCullough concurred in the judgment.

ORDER

¶ 1 *Held*: Even though (taking the postconviction petition as true) defense counsel breached professional standards by calling defendant to testify, in disregard of defendant's expressed preference not to testify, the overwhelming evidence against defendant negates any possibility of prejudice from the substandard performance, and hence the trial court was correct in summarily dismissing the postconviction petition.

¶ 2 Defendant, Justin A. Bell, who is serving a 35-year prison sentence for first-degree murder (720 ILCS 5/9–1(a) (West 2004)), appeals from the summary dismissal of his petition for postconviction relief. In his brief, he defends only one of the claims in his petition: the claim that defense counsel rendered ineffective assistance by calling him to testify at trial, in contravention of his expressed preference not to testify. According to defendant, the only damaging item that emerged from his testimony was his prior conviction of possession of a controlled substance; otherwise, his testimony tracked the statement he previously made to the police–a statement the State

already had presented in its case in chief. Nevertheless, defendant contends that this prior conviction undermined his credibility and that there is a reasonable probability that, but for the revelation of this prior conviction, the jury would have believed his statement to the police that he killed Wyneva Johnson under the influence of sudden and intense passion or in a mistaken belief that he was defending himself, for purposes of the less serious offense of second-degree murder.

¶ 3 In our *de novo* review, we uphold the summary dismissal because given the overwhelming evidence of first-degree murder, including the number and severity of Johnson's stab wounds, it strikes us as extremely unlikely that the jury would have attached much importance to defendant's prior conviction of possession of a controlled substance. Therefore, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. The Trial

¶ 6 The information alleged that on April 5, 2005, defendant murdered Wyneva Johnson. Specifically, the four counts alleged an intent to kill (720 ILCS 5/9–1(a)(1) (West 2004)), an intent to do great bodily harm (720 ILCS 5/9–1(a)(1) (West 2004)), a knowledge that his acts would cause death (720 ILCS 5/9–1(a)(1) (West 2004)), and a knowledge that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9–1(a)(2) (West 2004)).

¶ 7 The trial occurred in September 2005, and the State called Ercelyn Thomas as its first witness. She testified that she lived on the first floor of Vermilion Garden Apartments, at 1234 Garden Drive, Danville, with her children and brother. Around 2:45 a.m. on April 5, 2005, she was awakened by a loud crash; something had struck her bedroom window. She peered through the blinds: a young black man was standing outside her window. The hair on his head was closely

cropped. He wore light blue jeans and a light-colored jersey over a white T-shirt. A woman was kneeling beside him–or Thomas inferred she was kneeling because she could see only the woman's head and neck. The man "was holding [the woman] up" and delivering uppercuts to her body. Thomas could not see where, exactly, his punches were landing, but "he was hitting her like a man." She did not see anything in his hand. She assumed the woman did not hit back, because to hit him, she would have had to swing upward, and Thomas never saw her hands. Thomas rapped on the windowpane. The man turned slightly toward the window and then turned back to the woman and gave her a parting punch before running away. The woman "let out a high[-]pitch[ed] screeching sound, like 'Somebody help me.' And when she got the last part out, the 'me' part, she just fell [on her side]; and *** that was it. Her legs w[ere] shaking, and that was pretty much it." Thomas raised the sash and asked her if she was all right. There was no reply. Although it was "slightly dark" out, Thomas could see that the "side of [the woman's] shirt was real bloody." While on the telephone with the police, Thomas asked her brother to go outside and see if he recognized the woman. He went out and said, "'It's Nee-Nee from upstairs.'" (They called Johnson "Nee-Nee.") The police arrived and then the paramedics. Johnson was dead.

¶ 8 She lay against the west side of the apartment building, in a fetal position. The grass around her was wet with blood. (The police illustrated their testimony with an abundance of photographs taken contemporaneously at the scene, all of which were admitted in evidence.) The white vinyl siding above Johnson's body was smeared with blood. The blade of a kitchen knife–single-edged, 4 1/2 inches long, and broken off at the handle–lay 2 feet away from her in the grass; its pointed tip was bloody. The black plastic handle of the knife was underneath her body. The police went upstairs to Johnson's second-story apartment, apartment H. The door stood open, and

a ring of keys was on the floor. In the southwest room of the apartment, the black plastic handle of another knife lay on the carpeting, next to a bed. Its blade likewise was broken off. The mattress of the bed was slightly askew, and the bloody blade lay on the box springs. (This was the same design of knife as the one the police had found outside. They also found the same type of black-handled knife inserted into a wooden block in Johnson's kitchen.) The blanket on the bed was bloodstained. A window by the bed faced west, and it was open. Below the window, the interior wall was smeared with blood; so were the blinds. Blood had dripped onto the windowsill. Two television cables hung out of the window, leading down to a satellite dish on the ground. Blood was smeared down the siding of the building, alongside the cables. The screen to the window was on the ground, 15 feet below, behind two air-conditioners. The top of one of the air-conditioners was smeared with blood. Drops of blood had fallen onto the concrete platform of the air-conditioners, beside a gold necklace. The siding behind the air-conditioners was bloody. Thomas's window was below and to the left of Johnson's second-story window. Two bloody palm prints, side by side, were on the upper windowpane of Thomas's window.

¶ 9 The police radioed headquarters and inquired whether anyone had ever made a 9-1-1 call from apartment H. They learned that in December 2004, Johnson reported damage to her car and that she named defendant as possibly being the perpetrator. (Defense counsel objected to this testimony. "Course of conduct," the prosecutor argued. The trial court overruled the objection.) The police began looking for defendant as a suspect in Johnson's murder.

¶ 10 Defendant had fled Vermilion Garden Apartments and gone to the nearby residence of his aunt, Gayle Watson. It was 4 a.m., and he awakened his cousin, Sherika Watson, by tapping

on her bedroom window. Sherika let him into the house. He appeared to be "a little nervous." She asked him why he had stopped by at such an early hour. She testified:

> "A. *** [H]e said that he was coming to see my mom and my son [be]cause he was[,] like[,] that'll be the last time we see him.
>
> Q. What did he say?
>
> A. I was like, 'Why?' He was just like, 'I messed up.' He was like, '[Be]cause this [is] going to be the last time you see me.' So I walked back to my room and l[ay] back in the bed, and he was sitting on the edge of my bed. But he just kept repeating the same thing over and over. He just kept saying, 'I messed up.'
>
> Q. Did you ask any more questions?
>
> A. I kept asking him what did he do, and he wouldn't []ever say. He was just like he didn't mean to do it, but he never would go into detail what he did."

¶ 11 With Sherika's permission, defendant used the telephone. Then he knocked on his aunt's bedroom door, asking to speak with her "because he had [done] something." Gayle testified that "[h]e was very upset. He was crying uncontrollably. He was pacing[] [and] kept shaking his head," saying over and over again that "he had messed up." Gayle kept asking him how he had messed up. Finally, he divulged that he might have hurt "her." Gayle asked him whom he meant: Ebony Sims or Johnson. He answered, "Nee-Nee." He hastened to add that he never meant to hurt Johnson; he claimed his memory was blank before the point in time when he saw the broken knife in his hand. He did not even know how he had got hold of the knife, but when he realized what had

happened, "he jumped out the window" (or so Gayle understood him to say). Noticing now, for the first time, the blood on his clothing, defendant requested Gayle to telephone the hospital to see if Johnson was all right. At Gayle's bidding, Sherika agreed to give defendant a ride to his mother's house and from there, to the police station. On the way, defendant asked Sherika to turn up the radio because he expected this was the last time he would get to listen to music. He changed his mind about going to his mother's house and asked Sherika to drop him off instead at the residence of a friend, Isabelle Ramos, on Cannon Street.

¶ 12 Ramos testified she was asleep on her couch when she was awakened between 4:30 and 5 a.m. by a knocking on her door. She let defendant in, and he asked her, "'Can you call Ebony [Sims] for me? I gotta check on something. I'll be right back.'" He left, and Ramos lay back down on the couch. Defendant returned to the car and told Sherika to take him to his mother's house. Halfway there, he changed his mind again and told Sherika to take him back to Ramos's house. Sherika dropped him off there and headed home.

¶ 13 Defendant knocked on Ramos's door again. Reluctantly, she rose and let him into her house. He now appeared to be "shaken up," "[j]ust pacing the floor ***, asking [Ramos] to use the phone, asking [her] to call Ebony, and [saying] that he needed to see his daughter Jalaya [be]cause he thought he had [done] something bad." Jalaya, Ramos explained, was defendant's daughter by Sims (not to be confused with Jakayla, his daughter by Johnson).

¶ 14 Ramos now got a closer look at defendant's clothing. He wore light blue jeans and a blue and white jersey over a white T-shirt. The right leg of his pants was bloodstained. He told Ramos he had gone to Johnson's apartment to pick up something. She was not home at the time, but he had a key. When Johnson returned, " '[a]ll she wanted to do was fight and argue.' " Johnson tried

to hit him, and "he choked her for about two or three minutes or something" while she swung her arms and scratched him on the neck, trying to get free. Eventually, he released her, and when she caught her breath, they began arguing again. Johnson demanded that he leave. They fought further. " 'And then,' " defendant said, " 'her stupid ass jumped out the window.' " As defendant told Ramos this story, the police pulled up in front of Ramos's house. Defendant ran out the back door.

¶ 15 Acting on information from Sims and the Watsons, the police looked for defendant near his mother's house. They spotted him walking on Grace Street. When the squad car pulled up, defendant simply knelt down and put his hands behind his head. A police officer asked him if he was tired of running; defendant answered yes. In view of the fact that he had been so compliant once the police caught up with him, "[h]e asked if he could go see his mother[,] since he wasn't going to see her for a long time." The police denied this request. The police noticed drops of blood on his shoes, and they saw scratches, resembling "fingernail impressions," on his forearms and face–all of which they photographed. The photographs are in the record.

¶ 16 At 8:52 a.m. on April 5, 2005, the police commenced their interview of defendant. The interview was videotaped, and the prosecutor played the videotape to the jury. The interview also was transcribed, and the transcription, People's exhibit No. 32, is in the record.

¶ 17 Two detectives, Troy L. Hogren and Gene Woodard, began the interview by going over a written waiver of rights with defendant, which he signed. After the execution of this waiver, Woodard asked defendant what was the nature of his relationship with Johnson. Defendant answered that he had a one-year-old daughter by her, Jakayla Bell. He lived with his mother, but sometimes he overnighted at Johnson's apartment.

¶ 18 Defendant had told Johnson he would arrive at her apartment at 11 p.m. on May 4, but when he arrived at 11:30 p.m., the door was unlocked and nobody was home. He left and returned again at 1 a.m. Still no one was home. Johnson returned home at about 1:30 or 2 a.m. Johnson told him that Jakayla was at Johnsons's sister's house.

¶ 19 When Johnson returned home (without Jakayla), she and defendant got into an argument. Defendant would not tell Hogren and Woodard what the argument was about; he insisted it was about "nothing." During the argument, Johnson threw a set of keys at defendant, and the keys landed on the living room floor. The argument moved to Johnson's bedroom. She said she was going to leave. He replied that it was unnecessary for her to leave, considering that it was her apartment. She told him to leave, then. He said he would have to pack up his things.

¶ 20 Johnson then went to the kitchen and fetched a knife, which she laid on the bed in her bedroom, apparently to "intimidate" defendant, or so he inferred. She scratched him in the face, telling him, "I hate you," and he choked her with both hands. After being choked, she picked up the knife from the bed and pointed it at him. He responded by turning the knife toward her, and he did not know for sure, but he might have accidentally stabbed her with it at that time. In any event, he remembered that the blade of the knife broke.

¶ 21 Johnson headed for the window for some reason; defendant offered no explanation why. Anyway, he assumed there had been, all along, a second knife on or near the windowsill and that she grabbed this knife before jumping out the window. He assumed that, initially, she was unaware of this knife or else she would not have gone to the kitchen to fetch the knife that she thereafter laid on the bed.

¶ 22 When Johnson jumped out the window, defendant went outside and found her sitting against the apartment building, below and to the right of her second-story bedroom window. When he approached, she brandished the second knife. Again he responded by wrenching the knife around so that it pointed at her instead of at him, and in so doing, he bent the blade. Because the blade bent, rendering the knife useless, he assumed she suffered no additional stab wound outside the apartment building.

¶ 23 He then walked away, heading north, in the direction of a Laundromat. He went to his cousin's house. He threw his Peyton Manning jersey into the garbage because it was covered with blood and he did not want his mother to see him that way and he did not want to attract attention. After the interview, he directed the police to the garbage can into which he had thrown the jersey, and it was still in the garbage can.

¶ 24 Defendant told Hogren and Woodard that he would never kill anybody and that "[a]ll this [was] honestly [a] blur." Although he realized that Johnson was dead, he said that he and she would "always be like best friends." The interview ended at 9:25 a.m. on April 5, 2005.

¶ 25 Ebony Sims testified that around 11 a.m. on April 5, 2005, defendant telephoned her as she was leaving McDonald's. The police allowed defendant to use the phone. Sims testified: "[The] only thing he said is he didn't remember what happened and he just remembered it was blood on him."

¶ 26 A forensic pathologist, Bryan Mitchell, testified that he found a total of eight knife wounds on Johnson's body: (1) a stab wound above the left breast; (2) a stab wound below the left breast; (3) a stab wound in the left biceps; (4) a puncture wound adjacent to it; (5) a scratch on the left mid-forearm; (6) a puncture wound on the left mid-forearm, followed by another scratch; (7) an

incised wound laying open the right elbow; and (8) a stab wound in the right triceps. The wound above the left breast was fatal, penetrating the heart. The wound below the left breast went through the liver. The knife probably had a single-edged blade. Also, Mitchell found bruises on Johnson's neck as well as bruises on her inner right elbow and inner right wrist. He inferred, from the purple coloration of these bruises, that they were inflicted within 24 hours before death.

¶ 27 Defendant called his stepfather, Calvin Foreman, who testified he had seen Johnson and defendant get into fierce arguments. About two years before the trial, he broke up a fight between them when Johnson began hitting defendant with a stick. Foreman testified: "Mostly every time [Johnson came] to my house[,] [it was] about my [step]son, about his other affairs and jealousy *** and things like that."

¶ 28 Defendant's mother, Nancy Bell, testified that approximately two years before trial, not long after Jakayla's birth, she witnessed Johnson slap defendant in the face.

¶ 29 Jerome Harris testified that on November 30, 2004 (a date he was able to recall because a friend of his was released from prison that day), he and defendant borrowed Johnson's car and went to a liquor store. Upon their return to Vermilion Garden Apartments, Johnson got into the car with them, and they set out for another destination. According to Harris, Johnson and defendant got into an argument because she wanted defendant to drive rather than Harris. When defendant told her " '[i]t [didn't] matter,' " she pulled out a pocketknife and brandished it at Harris. Harris told defendant to calm Johnson down. He testified: "Mr. Bell reached back to grab the knife from her; and while he reached back to grab the knife from her, it was somewhat like of a tussle, whatever, between 'em while I'm still driving; and he end[ed] up cutting his left hand. I guess the knife f[e]ll

to the floor. He turned back around, and she s[a]t back in the seat." Harris admitted he was convicted of armed robbery in 2000.

¶ 30 Defendant took the stand in his own behalf. He testified he spent the night at Johnson's apartment from April 3 to 4, 2005. The evening of April 4, 2005, he came and went several times. At 1 a.m. on April 5, 2005, he returned to the apartment. The door was unlocked, and no one was home. (He denied having keys to the apartment or telling Sherika that he had keys.)

¶ 31 Johnson returned to the apartment at about 1:45 a.m., and, according to defendant's testimony, she accused him of giving her genital herpes. Defendant told her that was impossible (since he himself did not have the disease). She demanded that he leave. He tried to use the telephone, but she unplugged the line from the wall. He tried to walk out of the apartment, but she blocked the doorway, preventing him from leaving. He then returned to the master bedroom, sat in a chair, and resumed watching television, but she followed him and continued to argue. Defendant told her that if she wanted to argue, he would leave. She went to the kitchen and returned with a steak knife, which she laid on the bed. Defendant asked her "what was the point of going to get the knife; it[] [was] not that serious." She replied, " 'I'm not gonna use this knife on you.' " He asked her, " 'What is the reason for you[r] getting the knife[,] then[,] if you're not going to use it on me?' " " 'Just in case,' " she replied. Then she struck him in the face with her open hand, inflicting a scratch on his cheek. He grabbed her by the throat with both hands, to prevent her from hitting him again. She scratched his arm. When he let her go, she bent down, picked up the knife, and swung it at him. (According to defendant, Johnson cut him with a knife on a previous occasion, in April or May 2003; he showed the jury the scar on the outside of his right hand.) Defendant hit Johnson in the face with his fist. He then grabbed her wrist and "[t]urn[ed] the knife toward[] her to get her to drop the

knife." After struggling a while longer, she told him she was sorry for trying to stab him, whereupon she dropped the knife: "[n]ot immediately, but she drops it. In the midst of everything, she drops it."

¶ 32 Defense counsel asked defendant:

"A. How would you describe the confrontation. Was it a fight?

A. Yes, I'd describe it as a fight.

Q. Okay. Did she continue to come at you while the knife was turned toward[] her?

A. Yes, sir.

Q. Was she stabbed by the knife?

A. At that point in time[,] I was not aware that she was.

Q. Did you ever stab her with it?

A. As in my hand stabbing?

Q. With your hand on her wrist, take it toward[] her?

A. As to push it?

Q. Yeah.

A. No."

¶ 33 According to defendant's testimony, when Johnson dropped the knife, he bent down to pick it up so she would not assault him with it again. It was then that he noticed the knife was broken. He looked up, and she was climbing out the window. He ran downstairs to make sure she was all right. He found her sitting on the ground, her back against the wall of the apartment building.

When he approached her, he noticed she had another knife. She pointed it at him as if to stab him. He did the same thing he had done upstairs: he grabbed her wrist and turned the knife toward her. Then he swung at her with his other hand. She dropped that knife, and he fled because he "[d]idn't want to fight anymore."

¶ 34 Later, in his aunt Gayle's house, defendant discovered blood on his clothing and inferred that Johnson must be injured. He never told his aunt that he had jumped out of Johnson's window; she must have misunderstood him. He told her he had "messed up" because he "felt it was the wrong decision to *** try to fight back."

¶ 35 The prosecutor asked defendant:

> "Q. So how did Wyneva get four stab wounds? When did they happen?
>
> A. In the process. I wouldn't call them stab wounds. Stabbing mean[s] someone take[s], reaches back. I didn't reach back. I didn't have the weapon in my hand.
>
> * * *
>
> Q. So are you saying that you don't ever actually remember her getting stabbed?
>
> A. In the process of this? No, sir. She never acted as if she was hurt at all.
>
> * * *
>
> Q. Now, you're saying that when you left the final time from Wyneva's place, you didn't even know that she was bleeding?

A. No, sir.

* * *

Q. Okay. She's got four stab wounds and the incised wound on the elbow, and you haven't noticed any blood at this point, right?

A. No, sir."

¶ 36 The defense rested, and there was an instruction conference. The trial court granted defendant's request to instruct the jury on the lesser offense of second-degree murder ((720 ILCS 5/9–2 (West 2004)) in addition to first-degree murder. Defense counsel also tendered an instruction on the included offense of involuntary manslaughter (720 ILCS 5/9–3(a) (West 2004)), arguing that "the mere act of turning the knife back toward[] Wyneva Johnson[] [and] continuing to fight with her was a reckless act." The court refused the instruction on involuntary manslaughter on the basis of the following sentence from *People v. DiVincenzo*, 183 Ill. 2d 239, 250 (1998): "In general, a defendant acts recklessly when he is aware that his conduct might result in death or great bodily harm, although that result is not substantially certain to occur." The court saw no evidence that defendant had such an awareness.

¶ 37 After the jury reassembled, the trial court asked defense counsel if the defense rested, and defense counsel answered that he would like to recall defendant to the stand. Over the State's objection, the trial court granted the request. Defense counsel asked defendant:

"Q. Mr. Bell, I forgot to ask you about one thing when we had you testify. In case of 02 CF 328, you were convicted of the crime of possession of a controlled substance?

A. Yes, sir."

The defense then rested.

¶ 38 In its case in rebuttal, the State called, among other witnesses, the forensic pathologist, Bryan Mitchell. He testified that during the autopsy, he examined Johnson's vaginal area and that he did not find any genital herpes. Nor did he find any evidence of vaginal infection.

¶ 39 The jury found defendant guilty of first-degree murder. Defense counsel filed a posttrial motion, which contended only that the evidence failed to prove defendant guilty beyond a reasonable doubt. In a subsequent hearing, the trial court denied the posttrial motion and sentenced defendant to 35 years' imprisonment.

¶ 40 B. The Direct Appeal

¶ 41 In his direct appeal, defendant argued for reversal and a new trial on three grounds: (1) the trial court refused to instruct the jury on the lesser included offense of involuntary manslaughter (720 ILCS 5/9–3(a) (West 2004)); (2) the court denied defendant's motion for a change of venue; and (3) the court allowed the State to present evidence of another crime, *i.e.*, criminal damage to property, without properly instructing the jury on the limited use of such evidence. *People v. Bell*, No. 4–05–1025, slip order at 1 (May 11, 2007) (unpublished order under Supreme Court Rule 23). To the extent that defendant had procedurally forfeited those contentions because of his attorney's failure to include them in the posttrial motion (which merely challenged the sufficiency of the evidence), defendant invoked the doctrine of plain error and claimed ineffective assistance of counsel. *Id.*

¶ 42 We found no foundation in the evidence for an instruction on involuntary manslaughter. *Id.* We held that the mere fact of pretrial publicity did not disqualify Vermilion County as a venue for trial. *Id.* Finally, we concluded that the evidence of the uncharged crime did

not rise to the level of plain error, and we found no reasonable probability that but for the mention of this uncharged crime at trial, the verdict would have been different. *Bell*, slip order at 2. Therefore, we affirmed the trial court's judgment. *Id.*

¶ 43 Defendant did not petition the supreme court for leave to appeal.

¶ 44 C. The Postconviction Proceeding

¶ 45 On January 15, 2010, defendant filed a petition for postconviction relief, in which he made the following claims: (1) pretrial publicity and the inadequacy of *voir dire* deprived him of a fair trial; (2) trial counsel rendered ineffective assistance by failing to adequately address the issues of pretrial publicity and the trial court's defective *voir dire* of prospective jurors; and (3) trial counsel rendered ineffective assistance by calling defendant to testify, contrary to defendant's expressed wish not to testify.

¶ 46 Defendant attached to his petition an affidavit alleging as follows. Trial counsel never explained to him that he, personally, had a right to decide whether to testify. Instead, trial counsel told him he would be calling him as a witness and that he therefore should "be prepared"–even though defendant had told trial counsel he did not want to testify. Defendant never expressed an objection directly to the trial court, because he did not think he had the right to speak up if he were represented by counsel. If defendant had known that only he could make the ultimate decision whether to testify, he would have declined to testify.

¶ 47 On March 12, 2010, the trial court summarily dismissed the postconviction petition for four reasons. First, the court found the petition to be untimely, considering that it was filed more than six months after the date when defendant could have filed a petition for leave to appeal and considering that defendant had filed no affidavit giving a reasonable explanation for the delay.

Second, in the direct appeal, the appellate court had already addressed the issues of pretrial publicity and the adequacy of *voir dire*, and the appellate court's decision was *res judicata* as to those issues. Third, on the authority of *People v. Brooks*, 371 Ill. App. 3d 482 (2007), the court held that since defendant had "raised ineffective assistance of counsel claims before the appellate court, any additional claims [were] waived for purposes of this proceeding." Fourth, if trial counsel had rendered ineffective assistance by forcing defendant to testify on his own behalf, it was "not credible to believe this was a matter of which [defendant] only learned 3 years later." Therefore, pursuant to section 122–1 of the Post-Conviction Hearing Act (725 ILCS 5/122–1 (West 2008)), the court summarily dismissed the petition as untimely. Alternatively, if, *arguendo*, the petition was timely, the court dismissed it pursuant to section 122–2.1(a)(2) (725 ILCS 5/122–2.1(a)(2) (West 2008)) as frivolous and patently without merit.

¶ 48 This appeal followed.

¶ 49 II. ANALYSIS

¶ 50 A. Standard of Review

¶ 51 In the first stage of a postconviction proceeding, the allegations of the postconviction petition, liberally construed and taken to be true, need only state "the gist of a constitutional claim." (Internal quotation marks omitted.) *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The "gist" means the essence, the main point or part (Merriam-Webster's Collegiate Dictionary 492 (10th ed. 2000)), as opposed to a factually complete statement of the claim (*Edwards*, 197 Ill. 2d at 244). By requiring, in the first stage, only "the gist of a constitutional claim," the supreme court intends to set "a low threshold." (Internal quotation marks omitted.) *Id.* Only "a limited amount of detail" is required in the petition, and the petition need not make any legal arguments or cite any legal

authority. (Internal quotation marks omitted.) *Id.*

¶ 52 Thus, a trial court should not summarily dismiss a petition as "frivolous" or "patently without merit" (725 ILCS 5/122–2.1(a)(2) (West 2008)) merely because some factual details are missing or because the petition omits some of the facts necessary to support a constitutional claim. Instead, a petition is frivolous or patently without merit only if it lacks an arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). A petition lacks an arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. "An example of an indisputably meritless legal theory is one which is completely contradicted by the record. [Citation.] Fanciful factual allegations include those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17.

¶ 53 B. The Lack of Prejudice

¶ 54 The parties agree on three points, and rightly so. First, in stage one of the postconviction proceeding, a trial court may not summarily dismiss a postconviction petition on the ground of its untimeliness. *People v. Boclair*, 202 Ill. 2d 89, 100 (2002). Second, *res judicata* does not bar defendant's claim of ineffective assistance premised on his attorney's forcing him to testify, because the record did not enable defendant to litigate that claim on direct appeal. See *People v. Harris*, 206 Ill. 2d 1, 13 (2002). Third, because a defendant is entitled to decide, personally, whether to take the stand and testify (see *People v. Madej*, 177 Ill. 2d 116, 146 (1997), overruled on other grounds in People v. Coleman, 177 Ill. 2d 116, 148-49 (1998)), it would be substandard performance on the part of defense counsel to compel the defendant to take the stand against the defendant's will.

¶ 55 Nevertheless, the parties disagree on whether this substandard performance of forcing defendant to testify ultimately caused him any prejudice. A claim of ineffective assistance had to

be premised on more than substandard performance. Prejudice must result from the substandard performance. *People v. McLaurin*, 235 Ill. 2d 478, 502 (2009). "Prejudice" exists if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). A "reasonable probability" does not mean that the outcome probably would have been different but for the substandard performance. *People v. Jackson*, 205 Ill. 2d 247, 259 (2001) ("[T]he prejudice prong of *Strickland* is not simply an 'outcome-determinative' test ***."). The standard is less demanding than absolute probability. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004). The standard is not so lax, however, that it can be satisfied by a mere possibility of a different result. *Id.*

¶ 56 Defendant argues that if only defense counsel had not called him to the stand (against his wishes) and, consequently, evinced that he had a felony conviction of possession of a controlled substance, there is a reasonable probability that the jury might have found him guilty of second-degree murder instead of first-degree murder: there is a reasonable probability that the jury would have believed defendant's suggestion to the police that he acted under sudden and intense passion resulting from a serious provocation by Johnson (see 720 ILCS 5/9–2(a)(1) (West 2004)) and that he acted under a genuine (though unreasonable) belief that force was necessary to prevent Johnson from killing or seriously harming him (see 720 ILCS 5/9–2(a)(2), 7–1 (West 2004)).

¶ 57 This estimation of the impact of defendant's prior conviction of possession of a

controlled substance is, under the circumstances, fanciful and unrealistic. We find no reasonable probability that but for the disclosure of this prior conviction, the jury would have accepted defendant's theory of second-degree murder, as the trier of fact would have had to believe it was necessary to use such severe and prolonged force against Johnson in self-defense. Johnson sustained the following wounds: (1) a stab wound above her left breast, which pierced her heart; (2) a stab wound below her left breast, which pierced her liver; (3) a stab wound to her left bicep; (4) a puncture wound to her upper arm; (5) a puncture wound to her left forearm; (7) an incised wound on her right elbow; and (8) a stab wound to the back of her left arm. Compared to these grave wounds, defendant's prior conviction of possession of a controlled substance could not have led the trier of fact to a finding of guilty on the charge of first-degree murder.

¶ 58 Defendant's violent deeds and his incredible story sealed his fate, not his prior conviction of possessing an illegal drug. Assuming that Johnson did in fact brandish a knife at him, he responded with such excessive and sustained force that he became the aggressor. See *People v. Nunn*, 184 Ill. App. 3d 253, 269 (1989). And it is difficult to imagine how he could have been unaware that he had crossed the line from self-defense to aggression, especially considering that Johnson leaped out of a second-story window to try to get away from him. Defendant then went downstairs to finish her off.

¶ 59 Admittedly, to inflict such great violence, defendant evidently was consumed with great passion, but to reduce first-degree murder to second-degree murder pursuant to section 9–2(a)(2) (720 ILCS 5/9–2(a)(1) (West 2004)), his response to Johnson's provocation had to be in proportion to the provocation (see *People v. Shaw*, 278 Ill. App. 3d 939, 952 (1996)). We are convinced that it was the disproportionality of defendant's response, not his prior conviction of

possession of a controlled substance, that led the jury to reject his theory of second-degree murder. Also, under section 9–2(a)(1), defendant would have had to "negligently or accidentally" cause Johnson's death (while acting under a "sudden and intense passion"). No reasonable trier of fact could have regarded Johnson's numerous stab wounds as accidental.

¶ 60 III. CONCLUSION

¶ 61 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 62 Affirmed.