

No. 1-09-0480

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION
January 28, 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.)	05 CR 8802
)	
QUINN WALKER,)	The Honorable
)	Mary M. Brosnahan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.

JUSTICES Cahill and McBride concurred in the judgment.

O R D E R

HELD: The circuit court did not erroneously engage in a partial summary dismissal of defendant's post-conviction petition when it disposed of the entire petition while not expressly addressing every claim. Defendant did not state the gist of a meritorious claim that counsel rendered ineffective assistance by failing to challenge, or preserve challenges to, improper closing arguments by the State.

Following a jury trial, defendant Quinn Walker was convicted of two counts of aggravated criminal sexual assault (ACSA) and one count each of aggravated kidnaping and aggravated vehicular hijacking and was sentenced to 15-year prison terms on the ACSA counts, to be served consecutively to each other and to concurrent 10-year terms on the other convictions for a total of 40 years' imprisonment. We affirmed the judgment on direct appeal. People v. Walker, No. 1-06-2498 (2008) (unpublished order under Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his *pro se* post-conviction petition. He contends that the trial court erred by failing to rule on all of his claims. He also contends that he stated the gist of a meritorious claim of ineffective assistance of counsel regarding the failure to challenge, or preserve challenges to, improper prosecutorial comments during closing arguments.

Defendant was charged with multiple offenses for sexually assaulting A.G. on November 2, 2003. He was tried on two counts of ACSA during a robbery, two counts of ACSA while armed with a firearm, and one count each of aggravated kidnaping during robbery, aggravated vehicular hijacking while armed with a firearm, and robbery. The State made a motion *in limine* to admit evidence of defendant's prior sexual assault of T.S. and subsequent sexual assault of J.B., which the court granted as to T.S. but denied as to J.B.

At trial, A.G. testified that she was delivering newspapers near 77th Street and Wabash Avenue in Chicago in the early morning when defendant rushed at her and she screamed and ran. Defendant grabbed her, forced her into her car, robbed her of \$5, and drove for several minutes to an alley in a neighborhood unfamiliar to her. As defendant drove, A.G. saw a gun in his right hand. In the alley, defendant sexually assaulted A.G. twice. While he assaulted her in the front passenger seat, the gun was on the left side of the driver's seat. Defendant then drove briefly before leaving her in the car. Throughout the incident, defendant did not point the gun at A.G. She drove back to where she had been delivering newspapers, found her husband, and told him what had happened. She went to the police station and then the hospital. A.G. described her attacker to police after the incident and then identified defendant as her attacker in a March 2005 lineup based on his skin tone, eyes, and nose. She denied having seen defendant before the attack and specifically denied having sex with him before the night in question.

Three women testified that they lived near 77th and Wabash in November 2003 and that, upon hearing a woman screaming outside their homes on the early morning in question, they each looked outside. Two saw a man pushing a woman into a car and one saw a double-parked car speed away.

A.G.'s husband testified that, as he was delivering newspapers, A.G. drove up to him at high speed, crying and shaking. She told him what had just happened and described her attacker, and he advised her to go to the police station. Later, after A.G. left the hospital, she seemed to be "depressed." A police officer testified that A.G. seemed disheveled and distraught when he interviewed her, during which she described her attacker in detail. The officer brought A.G. to the hospital, the emergency room physician testified that he took swabs from her, and the parties stipulated that A.G. described the incident and her attacker to a hospital nurse. DNA testing of the swabs found two DNA profiles, including A.G.'s, and defendant could not be excluded as the source of the semen on the swabs. A police detective interviewed A.G. in the hospital, during which A.G. gave a detailed description of her attacker, was crying, and seemed very upset. The detective also testified that, upon defendant's March 2005 arrest, A.G. identified him in a lineup as her attacker while defendant denied knowing or assaulting her.

T.S. testified to an earlier sexual assault by defendant in October 1997, when she was 14 years old. She became severely intoxicated with two boys, was accosted by a group of boys in a park, and then sexually assaulted in a car by a person who DNA

evidence showed to be defendant. T.S. had a consensual sexual relationship with defendant several months after the incident.

Defendant testified that he and A.G. had a consensual sexual relationship beginning in September 2003. After each of three sexual encounters, he paid her \$300, \$300, and \$200 respectively. However, he refused to pay her a requested \$700 after an October 2003 encounter, and she expressed her displeasure in a telephone conversation two or three weeks later. He denied seeing A.G. on the night in question. He acknowledged that he recognized A.G. when shown her photograph after his arrest but denied telling officers that he did not know her, stating instead that he told them to contact his attorney if they had any questions for him.

During closing arguments, the prosecutor summarized A.G.'s account of the offense, referred once to defendant as one of the "faces of danger." While describing the events after the crime, the prosecutor stated in reference to the emergency room physician who took the swabs that "[y]ou can only imagine how warm and friendly he must have been after this traumatic incident." The prosecutor also opined that A.G.'s testimony was "consistent *** clear *** [and] credible" and that her actions after the incident were "the actions of somebody who had just been raped." In reference to A.G.'s lineup identification of defendant, the State opined that she would not forget defendant's face because she had "looked at the face of death, the person

that held her fate in his hands with a gun" during the offense. With regards to T.S.'s testimony, the State argued that "you can only imagine what she felt when she later learned that the person she had later met was the person who had sex with her that night." The defense objection that the latter assertion was not supported by evidence was overruled.

The prosecutor characterized defendant's account of an ongoing consensual relationship with A.G. as "ridiculous, unsubstantiated, uncorroborated, incredible [and] insulting," and argued that defendant devised it after being confronted with "the wall of evidence against him" including the DNA evidence. The prosecutor argued that the idea that the DNA evidence arose from an earlier relationship with A.G. did not make sense but "[w]hat makes sense is that [defendant] is a rapist because that's what happened." The prosecutor ended by describing the charges against defendant and arguing that his actions fit the charges.

Defense counsel's central argument was that A.G. had consensual sex with defendant before November 2, 2003, and that this explained the DNA evidence. He argued that none of the three women who heard a scream in the night identified either A.G. or defendant. He argued that A.G.'s account of the incident was not consistent, noting various discrepancies in her testimony and between her testimony and that of other witnesses. He argued that A.G.'s testimony to the particulars of the sexual assault

was incredible based on male biology -- "[t]hree ejaculations in a five-minute period? Even a ten-minute period? I would like to meet that man" -- and the size of A.G., defendant, and A.G.'s car. He argued that defendant was the only person in the lineup who met A.G.'s description and noted that her identification of defendant was based on his skin, eyes, and nose.

In rebuttal, the prosecutor argued that the jury had to either believe A.G.'s corroborated testimony that defendant kidnaped and sexually assaulted her or defendant's testimony that he did not assault A.G. but had a prior sexual relationship with her. The prosecutor offered explanations for various alleged discrepancies in A.G.'s testimony. In reference to alleged discrepancies in the timing of the event, the prosecutor argued that A.G. could not easily check the time during the incident: "Oh, excuse me, Mr. Rapist, I'm going to look at my watch [while] you're chasing me." In response to the defense argument that her account of the sexual assaults was incredible, the prosecutor opined that "most men aren't sex freaks." This comment drew a defense objection, which was sustained. The prosecutor also argued that defendant's DNA was "his calling card *** better than a driver's license." Defense counsel objected, but the court overruled on the basis that "this is argument." The prosecutor argued that the other line-up participants were "the best [the police] could" assemble.

As to A.G.'s motive to identify defendant as her attacker, the prosecutor argued that she could have embellished her account with allegations that he pointed the gun at her and expressly threatened her life if she had wanted to implicate him out of spite or revenge, but instead "she came up here and told you the truth. She was credible. She told you exactly what happened." The prosecutor argued that there was no evidence that A.G. and her husband had a "rocky marriage" that would cause her to have a sexual relationship with defendant and asked rhetorically "[c]an you imagine how hard" it was for A.G.'s husband to testify regarding "the day his wife got raped." The prosecutor noted the police testimony that defendant denied after his arrest that he knew A.G. and argued that he fabricated the prior consensual relationship in response to the irrefutable DNA evidence, characterizing defendant's testimony as "whoppers," "ridiculous," and "lies." It was "preposterous" that defendant paid A.G. the sums of money that he testified to paying her for sex. The prosecutor argued that there was no conspiracy to convict defendant, that the witnesses came to court to tell the truth in support of justice, and described sexual assault as "a crime of opportunity, whether it's stranger danger, rape, or acquaintance rape" before describing the instant case as "a stranger danger rape." Lastly, the prosecutor argued that T.S.'s testimony corroborated A.G.'s testimony and "showed what type of man

[defendant] is." When the prosecutor argued that T.S.'s attacker was "[t]his man," defense counsel objected that T.S. did not so testify, but the court overruled on the basis that DNA evidence was presented on the point.

Following instructions and deliberation, the jury convicted defendant of two acts of ACSA and of aggravated kidnaping, aggravated vehicular hijacking, and robbery. The jury found that he was not armed with a firearm during the sexual assaults.

At sentencing, J.B. testified that defendant sexually assaulted her in March 2004. Defense counsel objected to her testimony based on the ruling *in limine*, but the court overruled, noting that evidence excluded at trial may be admissible at sentencing. A.G.'s victim impact statement was read to the court. Following arguments in aggravation and mitigation, the court sentenced defendant to 15-year prison terms on two ACSA counts, to be served consecutively to each other and to concurrent 10-year prison terms on the three other convictions.

On direct appeal, we vacated the robbery conviction and two merged counts of ACSA based upon the unproven firearm allegation but otherwise affirmed defendant's convictions and sentences. In addition to seeking the vacatur, defendant challenged the admission of T.S.'s evidence. We found that the evidence was admissible and that any error in its admission was harmless because the evidence of defendant's guilt was overwhelming.

Defendant filed the instant petition in November 2008, accompanied by motions for the appointment of counsel and to proceed *in forma pauperis*. He argued that the multiple charges of ACSA violated the prohibition on double jeopardy. He alleged that he was not tried by an impartial jury because four named jurors were crime victims, related to crime victims, or worked in law enforcement. He also alleged that the court failed to ask the venire the questions regarding burden of proof and the presumption of innocence required by Supreme Court Rule 431(b). 177 Ill. 2d R. 431(b). Defendant argued that A.G.'s testimony was incredible based upon various alleged inconsistencies in her testimony and between her testimony and that of the other witnesses. He alleged that the vision of one of the three eyewitnesses to the kidnaping was poor. He argued that the prosecutor asked leading questions of A.G., improperly vouched for "or spoke on the credibility of" witnesses, insulted defendant and demeaned his testimony, mischaracterized the evidence, and inflamed the passions of the jury. He argued that A.G.'s "skin color-eyes-nose" identification should not have been admitted. He argued that an improper non-pattern jury instruction was given regarding the allegation that he used a firearm during the crime. Defendant challenged J.B.'s testimony at sentencing when she was barred from testifying at trial.

Defendant alleged that trial counsel was ineffective for, among other issues, not obtaining security video of his purported September 2003 meeting with A.G. or telephone records to corroborate a prior consensual relationship, not challenging the aforementioned four jurors, stipulating rather than objecting to the nurse's hearsay evidence regarding A.G.'s description of the incident and attacker, failing to object to all the improper arguments in the State's closing argument, and failing to seek a mistrial on that basis. In particular, he alleged that trial counsel objected seven times during closing arguments when 19 improper comments were made by the State in closing. Defendant also alleged that direct appeal counsel was ineffective for not raising the preceding claims.

On January 12, 2009, the court dismissed defendant's petition as frivolous and patently without merit and denied his accompanying counsel and *in forma pauperis* motions. In its order, the court listed defendant's claims as: "(1) he was convicted by a biased jury; (2) his indictment is improper as it triggers double jeopardy; (3) the State committed prosecutorial misconduct; (4) a State's witness gave inconsistent testimony; (5) the trial court committed numerous errors; and (6) he was denied the effective assistance of trial counsel" and direct appeal counsel. The court found that "many" of defendant's claims were forfeited because they could have been raised on

direct appeal but were not, including the claims of a biased jury, invalid indictment, improper closing argument, inconsistent testimony, and trial error by (1) not ensuring that the jury understood the law, (2) allowing improper identification testimony, (3) allowing J.B.'s sentencing testimony, (4) giving a non-pattern jury instruction, and (5) not instructing the jury that T.S. was "promiscuous." The court also examined defendant's ineffective assistance claims, expressly including stipulating to A.G.'s conversation with the nurse and failing to object to the allegedly biased jurors, failing to object more frequently during closing arguments to allegedly inflammatory arguments by the State, failing to seek a mistrial for those arguments, and failing to obtain video showing defendant and A.G. together at a gas station and hotel to corroborate his account. Lastly, the court concluded that appellate counsel was not ineffective because trial counsel had not been ineffective. This appeal timely followed.

On appeal, defendant first contends that the trial court erred by failing to rule on all of his claims. He cites People v. Rivera, 198 Ill. 2d 364 (2001), for the rule that a partial summary dismissal of a post-conviction petition is improper. However, a partial summary dismissal occurs when a petition contains multiple claims or allegations and the circuit court summarily dismisses some of the claims as frivolous or patently

without merit while advancing the remaining claims for further proceedings. Rivera, 198 Ill. 2d at 370-74. The court here did not engage in an improper partial summary dismissal because it dismissed the entire petition rather than advancing some claims for further proceedings.

While defendant is correct that the circuit court did not expressly address each of his claims in its dismissal order, that does not constitute reversible error.

"We note defendant's argument that the trial judge ignored some of the post-conviction witnesses and affiants. In his memorandum order, the trial judge specifically referred to approximately half of defendant's post-conviction witnesses and affiants; the judge did not recite the testimony of each *seriatim*. However, all of the evidence was presented to the trial judge. Absent an indication to the contrary, we presume that the trial judge considered all of the evidence in denying the petition. The fact that the trial judge chose to address only certain evidentiary items does not mean that the judge failed to consider all of the

evidence presented." People v. Hall, 157

Ill. 2d 324, 338 (1993).

Similarly, all of defendant's claims were presented to the circuit court by his petition, and we will not presume from the fact that the court chose to expressly address only certain claims that it failed to consider all of the claims.

Defendant also contends that he stated the gist of a meritorious claim of ineffective assistance of trial and appellate counsel regarding the failure to challenge, or preserve challenges to, improper prosecutorial comments during closing arguments at trial.

The circuit court may examine the trial record and any action by this court in evaluating a post-conviction petition within 90 days of its filing, and must summarily dismiss the petition if it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2008). A *pro se* petition is frivolous or patently without merit only if it has no arguable basis in law or fact; that is, if it is based on an indisputably meritless legal theory, such as one completely contradicted by the record, or a fanciful factual allegation, such as one that is fantastic or delusional. People v. Brown, 236 Ill. 2d 175, 184-85 (2010). The summary dismissal of a post-conviction petition is reviewed *de novo*. Brown, 236 Ill. 2d at 184.

A claim of ineffective assistance of counsel is evaluated under the familiar Strickland test, requiring a defendant to show that counsel's performance was deficient and that prejudice resulted from the deficient performance. Brown, 236 Ill. 2d at 185, citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Therefore, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) counsel's performance arguably fell below an objective standard of reasonableness, and (2) the defendant was arguably prejudiced as a result. Brown, 236 Ill. 2d at 185.

A prosecutor has wide latitude during closing argument and may comment on the evidence and any fair and reasonable inferences therefrom even if those inferences reflect negatively upon the defendant. People v. Glasper, 234 Ill. 2d 173, 204 (2009); People v. Maldonado, 402 Ill. App. 3d 411, 422 (2010); People v. Willis, 402 Ill. App. 3d 47, 57 (2010) (not erroneous to refer to a defendant on trial on a narcotics charge as a "drug dealer"). The State may address witness credibility in its closing argument. People v. Lavelle, 396 Ill. App. 3d 372, 380 (2009). Thus, while a prosecutor may not vouch for a witness or invoke the credibility of his office in his argument, comments on the strength of the evidence are proper, including assertions that a witness was telling the truth or was credible or believable. People v. Jackson, 399 Ill. App. 3d 314, 318 (2010).

Similarly, while the State may not suggest that defense counsel fabricated a defense theory, used deception, or suborned perjury, the State may challenge the credibility of a defendant or his defense theory when there is evidence supporting the challenge. Glasper, 234 Ill. 2d at 207. On review, this court considers the entire closing arguments of both parties in order to place the remarks in context. Glasper, 234 Ill. 2d at 204; Maldonado, 402 Ill. App. 3d at 422. Improper remarks in the State's closing argument constitute reversible error only where they created substantial prejudice by constituting a material factor in the conviction. Maldonado, 402 Ill. App. 3d at 422.

Here, defendant carefully picks out from the State's lengthy and sweeping closing arguments various unflattering references to himself and his theory of the case and complimentary references to A.G. as victim and witness. After reviewing the closing arguments as a whole, we find no reversible error, and thus no ineffective assistance by trial or appellate counsel, for three reasons.

Firstly, many of the comments in question were brief and isolated, which is a significant factor in assessing their impact. People v. Runge, 234 Ill. 2d 68, 142 (2009). Similarly, reasonable counsel could conclude as a matter of strategy that objecting to each such comment would cause the jury to focus undue attention on them even if the objections were sustained.

Secondly, many if not most of the comments were not erroneous. It is clearly a reasonable inference from the evidence that defendant committed ACSA, and we will not find error in the minimal difference between the State arguing that defendant committed ACSA as charged and that he is a rapist. Similarly, in light of the fundamentally-conflicting accounts by A.G. and defendant, their respective credibility was at issue and it is reasonable to infer from the evidence that defendant lied. We cannot find the prosecutor's remarks concerning whether defendant is a rapist or lied in his testimony to be a material factor in his conviction because both issues were squarely and unavoidably before the jury whether or not the prosecutor made particular comment upon them. Stated another way, the jury would know what the State's position was on both issues with or without the comments in question.

Lastly, none of the comments individually or collectively prejudiced defendant in light of our finding on direct appeal that the evidence against defendant was overwhelming, a finding which we now reiterate. Defendant contends that the evidence was not overwhelming because "the trial boiled down to a credibility contest between these two witnesses," himself and A.G. However, that characterization ignores the evidence of multiple witnesses from before and after the sexual assaults of A.G. amply corroborating her account of a sudden and traumatic attack on the

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day in question. We conclude that defendant's claim of ineffective assistance is refuted by the record and thus not of arguable merit.

Accordingly, the judgment of the circuit court is affirmed,
Affirmed.