

No. 1-10-0465

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
)	the Circuit Court
Plaintiff-Appellee,)	of Cook County
)	
v.)	No. 97 CR 26737
)	
DAVID BIBBS,)	Honorable
)	Arthur F. Hill, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Presiding Justice Garcia and Justice McBride concurred in the judgment.

ORDER

¶ 1 **Held:** The trial court dismissal of defendant’s second-stage postconviction petition was affirmed.

¶ 2 Defendant David Bibbs appeals the trial court’s dismissal of his postconviction petition at the second stage. Defendant contends that the circuit court erred in granting the State’s motion to dismiss where the petition made a substantial showing of a violation of defendant’s right to a fair trial due to pervasive prosecutorial misconduct and ineffective assistance of trial and appellate

counsel. We affirm.

¶ 3 The following facts were adduced at trial:

¶ 4 “Defendant was charged on October 16, 1997, with two counts of aggravated discharge of a firearm. Officers Louis Gayton and Bill Heneghan testified at defendant’s trial that they saw a white Chevy car driven by defendant run through a stop sign at the intersection of Morse and Glenwood Avenues, in Chicago. The Chevy came to a stop and two men ran from the car. Officer Heneghan apprehended one of the men, Daniel Matias, but the second man got away. According to Heneghan, Matias was shouting that the ‘dude had a gun.’ Defendant got out of the car and, according to Officer Gayton, fired a gun toward Heneghan and Matias. Gayton returned fire and hit a window of the Chevy. Defendant got back inside the car and drove away. The car was later found abandoned. Defendant was apprehended shortly afterwards and taken to the hospital for treatment of cuts on the back of his head and above his left eye. Defendant told the nurse who treated him that he was brought to the hospital because he ‘shot at a police officer.’

¶ 5 Matias identified defendant in a lineup as the man who shot at Officer Heneghan. Matias gave a statement to the police that he and a friend saw defendant in a white Chevy at the corner of Morse and Glenwood. Matias said he saw defendant reach into the passenger side of the car for what Matias believed was a gun. Matias ran and was stopped by Heneghan. Matias told police at the

scene that he heard a shot, heard someone yell ‘gun’ and then heard a second shot.

At trial, Matias recanted his earlier statement to police. Matias testified he ran from defendant’s car because he saw the police and had drugs on him. Matias explained he told Heneghan that defendant had a gun to divert Heneghan’s attention from Matias to defendant.” *People v. Bibbs*, No. 1-06-1655, order at 1-2 (2007) (unpublished order under Supreme Court Rule 23).

¶ 6 Defendant was convicted of both counts of aggravated discharge of a firearm and sentenced to 25 years in prison. We affirmed defendant’s convictions on direct appeal but remanded for resentencing. *People v. Bibbs*, No. 1-98-4195 (2001) (unpublished order under Supreme Court Rule 23). On remand, defendant was sentenced to 23 years in prison. We affirmed defendant’s conviction and sentence. *People v. Bibbs*, No. 1-01-3217 (2003) (unpublished order under Supreme Court Rule 23).

¶ 7 Defendant filed a *pro se* postconviction petition on October 3, 2001, which was summarily dismissed as untimely. On appeal, we reversed and remanded to the trial court to determine whether defendant’s petition stated the gist of a meritorious constitutional claim. *People v. Bibbs*, No. 1-02-0473 (2003) (unpublished order under Supreme Court Rule 23). On remand, the trial court summarily dismissed defendant’s postconviction petition for failure to state the gist of a meritorious constitutional claim. Defendant appealed. We reversed and remanded for the claim to be advanced to the second stage. *Bibbs*, No. 1-06-1655. On remand, the trial court summarily dismissed defendant’s postconviction petition, finding that the claims of prosecutorial misconduct were waived, without merit and failed to make a substantial showing of

a constitutional violation.

¶ 8 On appeal from that order, defendant contends that the circuit court erred in granting the State's motion to dismiss defendant's postconviction petition where the petition made a substantial showing of a violation of defendant's right to a fair trial due to pervasive prosecutorial misconduct and ineffective assistance of trial and appellate counsel.

¶ 9 We first note that defendant has not waived his prosecutorial misconduct claim though he failed to raise the issue on direct appeal. Raising a claim of ineffective assistance of appellate counsel for failure to raise an issue on direct appeal is an exception to waiver in postconviction proceedings. *People v. Fair*, 193 Ill. 2d 256, 268, 738 N.E.2d 500 (2000). We review the trial court's dismissal of a second-stage postconviction petition *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999 (2006).

¶ 10 To withstand a dismissal at the second stage, the petition and supporting documentation must make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246, 757 N.E.2d 442 (2001).

¶ 11 Defendant contends that he was denied a fair trial due to three errors during the State's closing argument. First, defendant alleges that the State engaged in misconduct because it suggested to the jury that Matias changed his story out of fear of retaliation by defendant when there was no evidence to support that claim. The State responds that these comments were based on reasonable inferences from the evidence.

¶ 12 The State is granted wide latitude in closing argument. *People v. Cloutier*, 156 Ill. 2d 483, 507, 622 N.E.2d 774 (1993). The State may comment on the evidence, draw reasonable

inferences from the evidence and “also respond to comments by defense counsel which clearly invite a response.” *People v. Hudson*, 157 Ill. 2d 401, 441, 626 N.E.2d 161 (1993). The comments are considered as a whole, in the context of the parties’ arguments. *People v. Buss*, 187 Ill. 2d 144, 244, 718 N.E.2d 1 (1999).

¶ 13 During trial, Matias testified that he lived in the neighborhood where the shooting occurred and that he had seen defendant around the neighborhood before. During closing argument, the prosecutor said the following:

“Daniel Matias’ story changed. Why? I cannot say. ***

[B]ut I do know that it would be difficult to come into here in Court and implicate a man that he knew from the neighborhood, a man with the incredible nerve to fire a shot in his direction in the presence of Chicago police officers and come in here and implicate that man and then go back to the same neighborhood.”

¶ 14 During rebuttal, the State said:

“There is a reason for why [Matias] changed his story up here. I don’t know what it is. Could it be that he’s got to go back to that area? It might be but I don’t know, but he told that same story over and over again and signed his name to a handwritten statement.”

¶ 15 We believe this comment was a proper response to defendant’s theory that Matias changed his story because he went along with the officer’s version to avoid a narcotics charge. The State did not directly implicate defendant but suggested generally that “it would be difficult” for one to testify against defendant and then return to the same neighborhood where the shooting

occurred. *People v. Knott*, 224 Ill. App. 3d 236, 260, 586 N.E.2d 479 (1991) (the “possibility of prejudicial impact was minimized by the fact that the prosecutor did not attribute the absent witness’s fright to this specific defendant”), *appeal granted*, 145 Ill. 2d 640, 596 N.E.2d 634 (1992), *vacated as moot*, ___ Ill. 2d ___, 621 N.E.2d 611 (1993). The statement was a reasonable inference based on the evidence that Matias still lived in the neighborhood.

¶ 16 Defendant also argues that the State mistakenly stated Matias “knew” defendant from the neighborhood while Matias only testified that he had “seen” defendant “around the neighborhood.” We believe this is a matter of semantics and find that argument unpersuasive.

¶ 17 Defendant next contends that the State unfairly bolstered the credibility of its witnesses during closing arguments when the State told the jury that the police officers were “honest” and “unimpeached.” Defendant claims that those remarks were improper because the prosecutor offered his personal opinion, placed the integrity of the office of the State’s Attorney behind the credibility of the statement and unfairly characterized the State’s witnesses as “unimpeached.”

The State responds that the comments were invited by defendant’s opening statement, were based on the evidence and did not express the prosecutor’s personal view.

¶ 18 During opening statements, defense counsel stated:

“Officer Gayton is lying to you, Ladies and Gentlemen. He’s lying to all of us.

***. *** The specific orders about when [the police] can fire and you can’t fire at someone unless they are threatening you; so he had to make up [defendant] shooting that gun that evening.

You have one man who started this chain of events, and the rest of them based on the lie he told, based on the story he told had to pick up the pieces and put together his case.

* * *

*** Don't believe one lying cop, find my client not guilty.”

¶ 19 During closing arguments, the prosecutor said:

“You heard the testimony of Officer Gayton and Officer Heneghan. You couldn't find two more honest, forthright and credible police officers on the force. They got up on that stand and the defense attorney tried as hard as he could to impeach but he could not. These officers testified credibly, and why weren't they impeached? Because what they were telling was the truth.

* * *

*** [Y]ou saw Officer Heneghan testify. This man is the picture of honesty. His face would probably turn purplish red if he told a fib. He didn't come in here and try and embellish, he didn't come in here and try and say he saw what he didn't see, he was honest about that.”

¶ 20 The State contends that defendant forfeited review of the State's characterization of the officers as “unimpeached” because defendant did not allege in his petition that these particular comments were improper. But, defendant alleged in his amended petition that the State improperly vouched for the credibility of the police officers when it told the jury the officers were “honest” and “unimpeached.” See *People v. Barrow*, 195 Ill. 2d 506, 538, 749 N.E.2d 892

(2001) (a defendant waives a postconviction issue if the issue is not raised in the original or amended postconviction petition). The issue is not waived.

¶ 21 It is up to the trier of fact to determine the credibility of witnesses, weigh the evidence and draw reasonable inferences. *People v. Moss*, 205 Ill. 2d 139, 164, 792 N.E.2d 1217 (2001). Generally, it is improper for the prosecutor to vouch for the credibility of a witness, express a personal opinion on a case or place the integrity of the State's Attorney's office behind a witness's testimony. *People v. Emerson*, 122 Ill. 2d 411, 434, 522 N.E.2d 1109 (1987); *People v. Lee*, 229 Ill. App. 3d 254, 260, 593 N.E.2d 800 (1992). But, the State may discuss witness credibility and is entitled to assume the truth of the State's evidence. *People v. Pryor*, 170 Ill. App. 3d 262, 273, 524 N.E.2d 700 (1988).

¶ 22 Improper comments made during closing argument do not warrant reversal unless the remark caused substantial prejudice to the defendant, “taking into account the content and context of the comment, its relationship to the evidence and its effect on the defendant's right to a fair and impartial trial.” *People v. Johnson*, 208 Ill. 2d 53, 115, 803 N.E.2d 405 (2003) (quoting *People v. Williams*, 192 Ill. 2d 548, 573, 736 N.E.2d 1001 (2000)). A verdict will not be disturbed unless it can be said that absent the remarks, the verdict would have been different. *People v. Byron*, 164 Ill. 2d 279, 295, 647 N.E.2d 946 (1995).

¶ 23 Because Officers Heneghan and Gayton were questioned about inconsistencies between their case reports and testimony during trial, the prosecutor should not have used the word “unimpeached” in his closing argument. But, given the strength of the evidence against defendant in this case, we believe the mistake did not materially interfere with the jury's duty to

assess credibility or cause the jury to reach a different result. See *Byron*, 164 Ill. 2d at 296.

¶ 24 The prosecutor's statements about the honesty of the testifying officers were also not improper because they were invited by defense counsel's opening remarks. Among other things, defense counsel told the jury during her opening statement that the witness was a "lying cop." The prosecutor properly responded in his closing argument that the witnesses were "honest officers," telling the truth. We note that Officers Heneghan's and Gayton's testimony was consistent with Matias's statement to the police.

¶ 25 The prosecutor's comments here are similar to those made in *Pryor*. In that case, the court found the prosecutor did not improperly vouch for the credibility of its witness, Downs, in stating, "'Downs is right. Downs has told you what he saw. Downs is believable. *** Downs is correct.'" *Pryor*, 170 Ill. App. 3d at 273.

¶ 26 Here, the prosecutor similarly stated, "what [Henaghan and Gayton] were telling was the truth" and "[Heneghan] was honest about that." The prosecutor did not comment on their credibility as a matter of his own personal belief, and we believe that these remarks were within the bounds of permissible argument.

¶ 27 Next, defendant contends that during rebuttal the State unfairly attacked the integrity of defense counsel by calling the defense's theory "preposterous," "insulting" and "ridiculous":

"The bottom line with [defendant's] whole conspiracy story is that it is absolutely preposterous. ***

* * *

***. *** You think that [defendant] couldn't figure out how to pitch a

gun in an hour? Please, that is insulting.

* * *

You think there is no transfers of [gunshot residue] with that? That is ridiculous. ***

* * *

***. *** You know, isn't it pathetic when you are going to rip on a Chicago police officer or any other professional because he is doing a good job and getting promoted."

¶ 28 The State may challenge the credibility of a defendant and the defendant's theory of defense in closing argument when there is evidence to support such a challenge. *People v. Kirchner*, 194 Ill. 2d 502, 549, 743 N.E.2d 94 (2000). Unless based on evidence, the State shall not "accuse defense counsel of attempting to create a reasonable doubt by confusion, misrepresentation or deception." *Johnson*, 208 Ill. 2d at 82. There is no reversible error unless the remark caused substantial prejudice to the defendant. *Johnson*, 208 Ill. 2d at 115.

¶ 29 Here, the State challenged the credibility of defendant's theory of defense but did not allege that defense counsel had deliberately lied to the jury or had fabricated a defense. See *People v. Ligon*, 365 Ill. App. 3d 109, 124, 847 N.E.2d 763 (2006) (the prosecutor's use of the words "ridiculous," "sad" and "pathetic" to describe the defense during rebuttal closing argument did not deprive the defendant of a fair trial).

¶ 30 Defendant's reliance on *People v. Monroe*, 66 Ill. 2d 317, 323, 362 N.E.2d 295 (1977), is unpersuasive. In *Monroe*, our supreme court found reversible error based on the State's

argument that “ [defense counsel's] closing argument is fraudulent' ” and “ [defense counsel] doesn't believe it himself.' ” *Monroe* is distinguishable because the prosecutor's comments there directly referred to the defense counsel and accused him of attempting to deceive the jury. Here, the challenged remarks were directed only against defendant's defense theory and were based on the evidence adduced at trial. We believe that the prosecutor's comments during closing arguments did not substantially prejudice defendant or deprive him of a fair trial.

¶ 31 Defendant finally contends he was denied his right to the effective assistance of both trial and appellate counsel due to their failure to object to the prosecutorial misconduct.

¶ 32 A defendant is guaranteed the right to effective assistance of counsel under the United States and Illinois Constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, sec. 8; *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526, 473 N.E.2d 1246 (1984). To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's representation “fell below an objective standard of reasonableness,” and (2) there is “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 687, 694; *Albanese*, 104 Ill. 2d at 526. “[A] reviewing court may review either prong first, and the court need not consider both prongs of the standard if a defendant fails to show one prong.” *People v. Cunningham*, 376 Ill. App. 3d 298, 301, 875 N.E.2d 1136 (2007) (citing *Strickland*, 466 U.S. at 697). The same standard applies to both trial and appellate counsel. *People v. Tenner*, 175 Ill. 2d 372, 378, 677 N.E.2d 859 (1997).

¶ 33 Having found no reversible error in the State's closing argument, we find no reasonable

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probability that, but for trial or appellate counsels' failure to object to the alleged misconduct, the result would have been different. See *Strickland*, 466 U.S. at 694.

¶ 34 Defendant has failed to make a substantial showing of a violation of his constitutional right. The judgment of the circuit court is affirmed.

¶ 35 Affirmed.