

No. 1-08-3511

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).

FIFTH DIVISION
May 27, 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. 96 CR 1896
)	
KMUEL KING,)	The Honorable
)	Bertina E. Lampkin,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Joseph Gordon and Howse concurred in the judgment.

O R D E R

HELD: Despite erroneous jury instruction, defendant did not raise meritorious claim of ineffectiveness of his appellate counsel because he was not prejudiced by counsel's failure to raise issue on direct appeal; the dismissal of defendant's post-conviction petition without an evidentiary hearing was affirmed.

Defendant Kmuel King appeals the circuit court's grant of the State's motion to dismiss his post-conviction petition,

contending he has presented a meritorious claim of the ineffectiveness of his appellate counsel. Defendant asserts that his counsel on direct appeal should have raised the issue of his trial attorney's failure to object to an incorrect jury instruction under which the jury could have found he committed both first degree murder and involuntary manslaughter, which involve inconsistent and mutually exclusive mental states. We affirm.

Following a jury trial, defendant was convicted of first degree murder and concealment of a homicidal death in the 1995 killing of his mother, Bobbie King. The day after King's body was found, defendant admitted to police that he and Monica Cosby, his girlfriend and co-defendant, strangled King after an argument, hid her body in a shopping cart and concealed the cart in a neighbor's apartment. At trial, defendant testified he attempted to stop Cosby while she choked the victim for 15 minutes. King died of strangulation, and her head also showed signs of blunt force trauma.

During the jury instruction conference, defense counsel asked that the jury be instructed on involuntary manslaughter. The jury was instructed on the elements and culpable mental states of first degree murder and involuntary manslaughter.

The jury was further instructed as follows:

"The defendant is charged with the

offense of first degree murder. Under the law, a person charged with first degree murder may be found: (1) not guilty of first degree murder and not guilty of involuntary manslaughter; or (2) guilty of first degree murder; or (3) guilty of involuntary manslaughter.

Accordingly, you will be provided with three verdict forms pertaining to the charge of first degree murder, not guilty of first degree murder and not guilty of involuntary manslaughter, guilty of first degree murder, and guilty of involuntary manslaughter.

From these three verdict forms, you should select the one verdict form that reflects your verdict and sign it as I have stated."

The jury also received the following concluding instruction relating to verdict forms pursuant to paragraph 6 of Illinois Pattern Jury Instructions, Criminal, No. 26.01R (3d ed. 1992) (hereinafter, IPI Criminal 3d No. 26.01R):

"If you find the State has proved the defendant guilty of both first degree murder and involuntary manslaughter, you should

select the verdict form finding the defendant guilty of first degree murder and sign it as I have stated.

Under these circumstances, do not sign the verdict form finding the defendant guilty of involuntary manslaughter."

The jury found defendant guilty of first degree murder and concealment of a homicidal death. The trial court sentenced defendant to an extended term of 80 years in prison based the court's finding of the brutal and heinous nature of the murder. Defendant also received a consecutive 5-year sentence for concealment. On direct appeal, this court remanded and defendant was resentenced to 60 years pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In accordance with a subsequent supervisory order of the Illinois Supreme Court, this court affirmed defendant's original 80-year sentence, concluding that the supervisory order nullified the 60-year sentence imposed on remand. *People v. King*, Nos. 1-98-4534 and 1-02-1845 (consolidated) (2003) (unpublished order under Supreme Court Rule 23).

In 2004, defendant filed a *pro se* post-conviction petition that was docketed for second-stage proceedings when the circuit court did not rule on it within 90 days of its filing. Post-conviction counsel was appointed for defendant. On March 24,

2008, counsel filed a supplemental petition contending defendant's trial and appellate counsel were ineffective. The petition asserted defendant's trial attorney was ineffective not only in failing to object to the instruction but also because trial counsel, in fact, had requested that a version of IPI Criminal 3d No. 26.01R be given that included the incorrect paragraph. The petition further asserted that appellate counsel should have raised a claim of trial counsel's ineffectiveness.

In moving to dismiss the petition, the State conceded IPI Criminal 3d No. 26.01R was given in error. The State maintained, however, that the verdict did not necessarily mean the jury erroneously concluded defendant had committed both first degree murder and involuntary manslaughter and then followed the incorrect instruction to arrive at a first degree murder verdict. The circuit court granted the State's motion to dismiss defendant's post-conviction petition, concluding the erroneous instruction did not result in prejudice to defendant, given the evidence of his participation in the crime.

On appeal, defendant argues he made a substantial showing of the ineffective assistance of his appellate counsel for failing to raise the meritorious issue of trial counsel's ineffectiveness as to the incorrect jury instruction. He argues this court should reverse his convictions and remand his case for a new trial or, in the alternative, an evidentiary hearing on his post-

conviction petition.

The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2004)) provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. An evidentiary hearing on a defendant's post-conviction claim is warranted only where the allegations of the petition make a substantial showing that a defendant's constitutional rights have been violated. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010). This court reviews *de novo* the dismissal of a post-conviction petition without an evidentiary hearing. *People v. Pack*, 224 Ill. 2d 144, 147 (2007).

To establish the ineffective assistance of counsel, a defendant must establish that his attorney's representation fell below an objective standard of reasonableness and that the performance caused prejudice to his case. *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984), adopting *Strickland v. Washington*, 466 U.S. 668 (1984). This standard applies to claims of ineffective trial and appellate counsel. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). In the context of a claim of the ineffectiveness of appellate counsel, the defendant must show that counsel's failure to raise an issue was objectively unreasonable and that the decision not to raise the issue prejudiced the defendant. *People v. Hanks*, 335 Ill. App. 3d 894,

900 (2002). Appellate counsel is not obligated to raise every conceivable issue on appeal (*People v. Easley*, 192 Ill. 2d 307, 329 (2000)), and a defendant has not suffered prejudice from appellate counsel's failure to raise an issue in a direct appeal where the underlying issue is not meritorious. *People v. Childress*, 191 Ill. 2d 168, 175 (2000).

The State again concedes in this appeal that paragraph 6 was incorrectly given but contends defendant's counsel on direct appeal did not violate either prong of *Strickland*. The Committee Note to the instruction provides that paragraph 6 "should *not* be given when the lesser offense has the less culpable mental state of recklessness." (Italics in original.) Committee Note, IPI Criminal 3d No. 26.01R. The note describes, as an example, the charged offenses of first degree murder, which requires an intentional or knowing mental state, and involuntary manslaughter, which requires proof of a reckless mental state. Therefore, that instruction incorrectly advised the jury that, in the single death of King, it could find defendant guilty of two offenses with mental states that were logically and legally inconsistent, and moreover, that such a finding should result in a guilty verdict on the offense of first degree murder. Accordingly, the giving of IPI Criminal 3d No. 26.01R in this case constituted error.

The giving of an admittedly incorrect jury instruction does

not always constitute reversible error. See *People v. Tucker*, 245 Ill. App. 3d 722, 730-31 (1993); *People v. Summers*, 202 Ill. App. 3d 1, 12 (1990) (issuance of similar instructions as in instant case was not plain error). Jury instructions should not be viewed in isolation but instead should be construed as a whole to determine whether they fairly, fully and comprehensively informed the jury of the relevant law. *People v. Gonzalez*, 388 Ill. App. 3d 566, 582 (2008). Here, although the jury erroneously received IPI Criminal 3d No. 26.01R, the jury was given accurate descriptions of the elements of first degree murder and involuntary manslaughter. The jury received separate verdict forms indicating that it could find defendant guilty of first degree murder or guilty of involuntary manslaughter. The jury was not given a form with which it could find defendant guilty of both offenses. The jury was also instructed it could find defendant was not guilty of either offense.

The jury returned a verdict that defendant was guilty of first degree murder. There is nothing to suggest the jury used the analysis set out in the erroneous instruction, *i.e.*, finding defendant guilty of first degree murder after first finding he committed both that offense and involuntary manslaughter. "The only manner in which the conclusion of a jury on a verdict may be recognized is by a formal return of its verdict to the court." *People v. Fisher*, 259 Ill. App. 3d 445, 453 (1994).

Defendant cites *People v. Pegram*, 124 Ill. 2d 166 (1988), to support his contention that the instruction constituted fundamental error resulting in prejudice to his case. We do not find the facts here comparable to those in *Pegram*, where defense counsel failed to submit jury instructions on the proffered defense of compulsion and the State's burden of proof on that defense and was deemed ineffective for those omissions. *Pegram*, 124 Ill. 2d at 173-74. Likewise, we do not find analogous *People v. Salazar*, 162 Ill. 2d 513 (1994), in which the jury was erroneously instructed that it was the State's burden to prove (rather than disprove) a mitigating mental state of the defendant, creating the precise instructional issue that the Illinois Supreme Court previously had deemed prejudicial in *People v. Reddick*, 123 Ill. 2d 184 (1988). An error of the dimension found in *Pegram*, *Salazar* and *Reddick* did not occur in the present case.

Here, the jury's guilty verdict on the count of first degree murder was amply supported by the evidence, including defendant's statement that he and Cosby placed a bag over his mother's head, tied the bag shut, and covered her body with clothing. Appellate counsel's failure to raise the issue of the incorrect jury instruction on direct appeal did not prejudice defendant.

As a final note, we address defendant's request for relief in the form of a new trial in the context of a post-conviction

proceeding. In making that request, defendant asserts a new trial is warranted because it is impossible to tell from the instructions given in this case whether the jury returned a verdict "free from the influence of the erroneous instruction."

Defendant cites *People v. Carter*, 389 Ill. App. 3d 175 (2009), which is distinguishable on several bases. Most significantly, *Carter* involved a direct appeal from a conviction, not a post-conviction proceeding, which is the case here. Moreover, the jury in *Carter* returned conflicting verdicts, which did not occur here, and the jury in that case posed a question to the judge immediately after being sent to deliberate that reflected its confusion as to the given instructions. *Carter*, 389 Ill. App. 3d at 179. In the instant case, the jury did not return legally inconsistent verdicts and the record also does not establish that the jury expressed uncertainty as to the instructions or the law.

In conclusion, while IPI Criminal 3d No. 26.01R was erroneously given at defendant's trial, the error did not contribute to defendant's conviction in light of the evidence of his intent to kill his mother and conceal her death. Defendant's appellate counsel therefore did not provide ineffective assistance in failing to raise on direct appeal the issue of trial counsel's failure to object to the giving of that instruction.

1-08-3511

Accordingly, the circuit court's order granting the State's motion to dismiss defendant's post-conviction petition is affirmed.

Affirmed.