

NOTICE
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2012 IL App (4th) 110079-U
NO. 4-11-0079
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
October 22, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
MARCUS E. HARVELL,)	No. 01CF775
Defendant-Appellant.)	
)	Honorable
)	Leslie J. Graves,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Turner concurred in the judgment.
Justice Appleton dissented in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in finding, after an evidentiary hearing on defendant's postconviction petition, defendant had not proved his claim his counsel refused to present the lesser-mitigated-offense jury instruction and defense defendant wanted.

¶ 2 In January 2011, the trial court held an evidentiary hearing on defendant's petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2006)). In his petition, defendant, who had been convicted of first-degree murder, alleged he was denied the effective assistance of counsel when his trial counsel, Jon Noll, (1) failed to tell him he had the right to choose whether to submit a jury instruction for second-degree murder, and (2) failed to seek such an instruction. After the hearing on the petition, the court found defendant had not proved the claims in his petition and denied it. Defendant appeals, arguing the trial court's

decision is manifestly erroneous. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Defendant's Trial

¶ 5 On August 14, 2001, the State charged defendant with the first-degree murder of Antonio McGrone (720 ILCS 5/9-1(a)(1), (2) (West 2000)). In February 2002, defendant's jury trial commenced.

¶ 6 At defendant's trial, the State's evidence established defendant went with two others to Brandon Court during the evening of August 9, 2001. They were riding in a vehicle defendant did not own but had been driving. Defendant kept a gun in that vehicle. When defendant arrived at Brandon Court, a number of people had gathered. At some point, a man, who was wearing a wig, glasses, and white gloves, approached the group. At trial, the parties referred to this individual as "wig man." Individuals in the group began laughing at "wig man", and "wig man" pulled out a gun and began shooting at defendant's feet. The group ran. The State's witnesses testified they heard additional shots anywhere between "seconds" and "[m]aybe two minutes" after "wig man" fired the initial shots at defendant. A bullet struck McGrone, 13 years old, as he was trying to flee.

¶ 7 At the jury-instruction conference, neither party tendered a second-degree-murder instruction. When the trial court asked defendant if he understood the significance of that fact, he responded he did. The court then asked counsel if either prosecution or defense wanted the court to admonish defendant of his right to request the instruction. The State responded the admonishments were not necessary. Defense counsel did not respond directly, but asked the court if it would give the instruction if he tendered one. The court did not directly reply, but

instead asked if the attorneys were finished for the day.

¶ 8 The jury found defendant guilty of first-degree murder. The trial court later sentenced defendant to a prison term of 50 years. Defendant appealed.

¶ 9 B. Remand for Post-Sentencing Admonishments

¶ 10 In December 2003, this court entered a summary order, remanding to the trial court for the purpose of admonishing defendant pursuant to Illinois Supreme Court Rule 605(a)(3)(B) (eff. Oct. 1, 2001). *People v. Harvell*, No. 4-02-0585 (Dec. 12, 2003) (unpublished order under Illinois Supreme Court Rule 23). We found the trial court failed to admonish defendant he must file a motion to reconsider sentence within 30 days of sentencing to challenge his sentence on appeal. *People v. Harvell*, No. 4-02-0585 (Dec. 12, 2003) (unpublished order under Supreme Court Rule 23).

¶ 11 At the hearing on remand, defendant, for the first time, contended Noll, his trial counsel, refused defendant's request to seek a second-degree murder jury instruction. After the trial court admonished defendant pursuant to Illinois Supreme Court Rule 605(a)(3)(B), the following discussion occurred:

"[NOLL]: Judge, I believe the [a]ppellate [c]ounsel for the [d]efendant wishes the [c]ourt to consider in terms of sentencing that the [d]efendant acted under strong provocation. Specifically, he was shot at, and that if he did commit this murder it was under that strong provocation. I believe that's the statement you want to have placed in the record?"

[DEFENDANT]: Yes.

[THE COURT]: Remind me, counsel, was that a lesser included?

[NOLL]: Judge, that got into a bit of conflict between me and my client. I had requested it, but my client did not want to proceed forward with it. That is my recollection. This has been a couple years, but I believe that is my recollection. I wanted a [s]econd [d]egree, but basically—

[DEFENDANT]: Judge, that's wrong.

[DEFENSE COUNSEL]: Go ahead and correct me.

[DEFENDANT]: I had asked for a [s]econd [- d]egree [- m]urder instruction. My mom even asked. Now I don't see how he can sit up here and say—."

¶ 12 C. Direct Appeal

¶ 13 After the hearing on remand, defendant appealed his conviction. Defendant contended the circumstances of his case were such that the trial court should have (1) admonished him of his right to request a jury instruction and (2) determined whether he knowingly waived that right. We found no error and affirmed the court's judgment. See *People v. Harvell*, No. 4-04-0871 (July 13, 2005) (unpublished order under Illinois Supreme Court Rule 23).

¶ 14 D. Postconviction Proceedings

¶ 15 1. *Petitions*

¶ 16 In June 2006, defendant filed a *pro se* postconviction petition under the Act. Defendant alleged Noll failed to provide the effective assistance of counsel in that he, among

other things, failed to request second-degree-murder jury instruction.

¶ 17 Defendant attached two affidavits to the petition—one signed by himself and one by his mother, Elizabeth. Defendant averred he told Noll he wanted the second-degree-murder instructions, but Noll told him he was not requesting the instruction as part of trial strategy. Defendant further averred he did not know the choice whether to tender the instruction was his and not counsel's. He also stated he did not know he had the right to testify in his own defense regardless of Noll's trial strategy. In her affidavit, Elizabeth averred she received a collect call from defendant in January 2002. During this call, defendant informed her he was concerned about the progress of the case and Noll's representation. Elizabeth stated she and defendant, after first speaking with Noll, "were under the impr[e]ssion *** [defendant] would be taking the stand [on] his own behalf and also that he would be seeking to have the charges reduced to second[-]degree murder." She further contended she called Noll to discuss defendant's concerns. Noll responded he had spoken with defendant and was aware of defendant's concerns. According to Elizabeth, Noll further informed her he prepared the case and the trial date was too close to change the strategy.

¶ 18 In August 2006, the trial court summarily dismissed defendant's postconviction petition. The court found the allegations conclusory and the issues frivolous and without merit.

¶ 19 In July 2008, this court reversed the summary dismissal of defendant's *pro se* postconviction petition. Citing defendant's assertions at the hearing on remand and defendant's supporting affidavits, we held defendant stated the gist of a constitutional claim Noll was ineffective for refusing defendant's requests to tender a second-degree-murder instruction.

People v. Harvell, No. 4-06-0741 (July 14, 2008) (unpublished order under Illinois Supreme

Court Rule 23).

¶ 20 In April 2010, defendant, represented by counsel, filed an amended petition for postconviction relief. In his petition, defendant incorporated all of his prior pleadings, including the affidavits he filed with his *pro se* petition.

¶ 21 *2. Evidentiary Hearing*

¶ 22 In January 2011, the trial court held a hearing on defendant's amended petition. Three witnesses testified: defendant, defendant's mother Elizabeth Harvell, and trial counsel Jon Noll.

¶ 23 Defendant testified, upon learning from the newspapers he was a suspect in the first-degree murder of McGrone, he decided to find an attorney and turn himself in. Defendant's mother helped find Noll. Defendant met with Noll at his office in mid-August. After defendant told Noll the facts of the case, Noll responded he believed the case was a second-degree-murder case and he said defendant would testify. At the time, defendant did not know what Noll meant by "second degree."

¶ 24 According to defendant, while in custody at the county jail, he went to the law library and became better versed in second-degree theory. He discussed his case with another inmate, who was also jailed for first-degree murder. That inmate told defendant he believed the facts in defendant's case indicated second-degree murder because defendant was not the aggressor in the case.

¶ 25 Defendant testified he met with Noll about once a week to discuss the case. Defendant told Noll about his thoughts on second-degree murder. When asked how Noll responded, defendant testified to the following: "[b]asically that he has his strategy how he

wanted to argue the case. He had it already prepared, and I guess he didn't believe that what I was talking about was legitimate or not."

¶ 26 Defendant said he told Noll his concerns about Noll's strategy. Defendant said three witnesses had stated they saw defendant with a gun. Thus, defendant believed it did not make sense to go "all or nothing" in trying to blame the wig man. Defendant thought he would be found guilty. When defendant told Noll his concerns over the first-degree strategy, Noll responded he had a strategy and did not want to be distracted "with too many different things." Noll stated defendant's theory was not "legit."

¶ 27 Defendant testified the attorneys and judge discussed a second-degree-murder jury instruction at his trial. Defendant said he did not know he could ask for a second-degree instruction. That matter was not explained to him.

¶ 28 Defendant said in May 2004, he returned to the trial court for remand. The trial court asked whose decision it was not to seek a second-degree instruction. According to defendant, Noll gave the impression he wanted the second-degree instruction while defendant did not. Defendant testified Noll did not speak the truth. Defendant stated the truth was that "I always—I asked him before my—until a few times before my trial I said I wanted a second-degree instruction." Noll's theory was the "wig man" shot McGrone. Defendant's theory was that, if he was the perpetrator, it was in response to provocation.

¶ 29 On cross-examination, defendant stated Noll told him, when they first met, his case was a second-degree murder case. Noll then changed his mind after reviewing the case and proposed going "all or nothing." Defendant did not believe he had a good chance of winning on this theory.

¶ 30 On redirect examination, defendant testified he realized the problem with his defense—that three witnesses had identified defendant as the shooter—before trial. Defendant testified Noll did not explain how he planned to overcome the witness testimony identifying defendant as the shooter. Defendant said he did not do anything in response, because he did not believe the decision was his. Likewise, defendant did not raise the issue in the jury-instruction conference because he believed the decision belonged to his attorney.

¶ 31 Elizabeth testified, when she learned defendant was a suspect, she told him to turn himself in. The two discussed finding a lawyer and agreed upon Noll. Elizabeth testified the issue of second-degree murder was first raised by Noll. Before trial, Noll said he would see if he could get the charges against defendant reduced to second-degree murder.

¶ 32 Elizabeth stated before trial, she discussed her son's concerns "about his case and *** charges." Elizabeth did not specify those concerns, but said she discussed them with Noll, who told her not to worry.

¶ 33 On cross-examination, Elizabeth testified she met with Noll "probably a couple times, probably two."

¶ 34 Noll testified he had been practicing law for over 35 years and had been involved in approximately 300 jury trials. He explained he had changed trial strategies after a trial had started in other cases because witnesses can change stories or equivocate. In general, when he looks at cases that may have involve lesser-included offenses, Noll discusses the issues with clients. When asked whose decision it is to seek lesser-included instructions, Noll testified he generally discusses strategy with clients, "offer[ing] times, lesser-included offenses, admit[ting] certain elements that would not be admitted on the case in chief, so that before you start arguing

or presenting lesser included you want to get the approval of your client."

¶ 35 Noll testified the ultimate decision on whether to pursue "lesser-included charges" belongs to his clients. Noll stated defendant "was a very good person" and "was always straightforward with" him. Noll remembered talking with defendant in August 2001. Noll recited some of the facts of the case and said before trial, he and defendant discussed the possibility of proceeding on a lesser-included offense. Noll believed if they wanted to pursue a second-degree murder instruction, defendant would probably have had to testify and defendant was reluctant to do that. Defendant "felt throughout this that it was more along the lines of accident than it was an intentional act on his part."

¶ 36 Noll testified he discussed with defendant the significance of a second-degree-murder instruction. Noll explained to defendant to pursue such an instruction, defendant would "essentially" have to admit every element of the offense. Defendant did not believe the State had a strong case against him.

¶ 37 When asked if defendant opposed tendering the second-degree instruction, Noll testified to the following: "We didn't have a discussion, like I am talking now, where I sat down and said you have First Degree or Second Degree. It was do you want us to go forward with what we're doing? Do you want that strategy, and basically he didn't object to it." When asked the same question in a different way, Noll responded as follows:

"He didn't say no. He just didn't object. He didn't come out and say, 'I want the second degree.' I said, 'are you satisfied with this, is there anything else you want to present, any other issues?' And basically he said [']no, let's see what[] the jury says.['] But it wasn't

a situation where we—we were argumentative in any degree.

[Defendant] wasn't that way. He wasn't pounding on the table saying, 'I want second degree.' If he had, I guarantee you I would have tendered that to the judge."

¶ 38 Noll testified the first time he learned defendant wanted a second-degree-murder instruction was at the hearing on remand.

¶ 39 On cross-examination, when asked if there had been discussions regarding second-degree murder, Noll responded, "I am pretty sure there were." Noll testified the murder was a result of "such a strange series of events." Defendant went to Brandon Court when "this knucklehead [came] out and start[ed] shooting at their feet like a Gene Autry movie." Noll testified, "I felt that there could be some Jury nullification, some Jury consideration that he didn't go there to murder this young McGrone kid." Noll clarified he meant "jury consideration that there are mitigating factors that could have allowed for second-degree consideration."

¶ 40 On cross-examination, counsel asked if, given the testimony of an individual standing near McGrone when McGrone was shot that seconds, not minutes, passed between the shots, defendant would have been entitled to a second-degree instruction without defendant's testimony. Noll answered by stating it was "difficult to say" due to the other testimony. Noll explained another witness had testified to minutes passing. Noll said he agreed even slight or inconsistent evidence permitted a defense that could be inferred from the evidence, which was why he "was pushing for the second-degree instruction with" his client.

¶ 41 On cross-examination, when asked whether he was certain, (at the 2004 hearing on remand) of his testimony, Noll answered as follows: "Okay, no, I am not certain today. I am

not certain then, but all I can tell you is general sense impressions. I can't give you exact quotes. I just know the way I practice, and my practice is always, always, always look for lesser included."

¶ 42 Noll further explained on cross-examination his level of certainty regarding whether the two discussed second-degree-murder instructions as follows: "I can't be specific with you, but I can be more certain than a generalization, and the position we had was my client did not want a second degree. He felt he could be acquitted on the first-degree murder because of *** all the circumstances involved." Noll testified he did not tell defendant the decision was defendant's, but he testified to the following: "I did tell him if he wanted to go with second degree, I was more than willing to put that out on the table, and I explained to him the problems with going with the second degree and the benefits—benefits being potential lesser sentence, problems being essentially you admit everything except for provocation."

¶ 43 Noll testified, in forming trial strategy, he expected his clients to participate with him. Noll called defendant "well spoken and intelligent." Noll testified he tried to "lay out [the] options" for defendant. Noll stated he would not go into a courtroom and gamble with a client's life—his client had to agree with what he did or they would sit down and restructure the defense. Noll testified the two jointly decided on a course of action, but it did not turn out the way they hoped. Noll called the strategy decision "a continuing issue." Noll would proceed on any defense a client thought viable.

¶ 44 Noll testified he could not recall the reason he asked the trial court, at the jury-instruction conference, if it would present the second-degree-murder instruction if he asked for it. Noll conjectured it was his way of showing defendant he could still seek the instruction. If the

trial court had answered the question in the affirmative, Noll testified he "probably" would have "gone back to the jail and said, 'listen, she is willing to give second degree, let's go with it.' " If the court had answered the question in the negative, Noll would have argued the facts at trial supported such an instruction.

¶ 45 On redirect examination, Noll testified at some point during his representation he did explain to defendant he could ask for a second-degree-murder instruction. Noll believed defendant understood the discussion, but defendant did not ask for such an instruction.

¶ 46 On recross examination, Noll testified defendant did not want to pursue a second-degree defense. Defendant "wanted to go the guilt or innocence;" he wanted "to be acquitted of the murder of" McGrone.

¶ 47 On this evidence, the trial court denied defendant's petition. The court concluded the case presented a "he said-he said situation with a couple of quirks." The court observed defendant testified when he first met Noll, Noll stated the case looked like a second-degree-murder case, but defendant also testified he did not know about second-degree murder until he was in jail. Defendant said he then changed his mind that second-degree murder should be part of the case, but then Noll also changed his mind and decided they should not proceed on a second-degree murder theory. The court further observed it had heard "Noll speak for about 20 years." The court stated Noll "is a very proper speaker" and it did not "believe that in the statements where he says, 'Your Honor, I believe this,' he's indicating any self doubt or doubt of the situation." The court concluded "[t]hat is just his manner of speaking."

¶ 48 The trial court further expressed concern about defendant's testimony regarding what his mother knew. The court noted defendant testified "he had many, many conversations

with Noll" and defendant talked with his mother about his concern Noll did not want to ask for the second-degree instruction. Yet, the court observed, defendant's mother indicated she first learned of the possibility of a second-degree approach from Noll, who said he would see about having the court give the instruction. Defendant's mother also indicated she spoke with Noll "maybe twice." The court found her testimony actually supported a finding Noll was the one who wanted the second-degree defense. The court stated "the record indicates the [second-degree murder instruction] question was asked [by Noll] but was never fully flushed out and was not answered."

¶ 49 This appeal followed.

¶ 50 II. ANALYSIS

¶ 51 On appeal, defendant contends the trial court's decision is manifestly erroneous. We disagree.

¶ 52 A. Proceedings under the Act

¶ 53 The Act affords "a remedy whereby defendants may challenge their convictions or sentences for violations of federal or state constitutional law." *People v. Coleman*, 206 Ill. 2d 261, 277, 794 N.E.2d 275, 286 (2002). It creates a three-stage process through which a defendant may acquire postconviction review of a claim his conviction led to a substantial denial of his constitutional rights. *People v. Dopson*, 2011 IL App (4th) 100014, ¶ 17, 958 N.E.2d 367. In the first stage of proceedings, a trial court will consider whether the postconviction petition is frivolous or patently without merit. *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010). If the court finds the petition frivolous and patently without merit, it must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2006). If, however, the postconviction

petition survives the first-stage review, it advances to the second stage where counsel is appointed and appointed counsel may amend the *pro se* petition. *Andrews*, 403 Ill. App. 3d at 659, 936 N.E.2d at 653. Also at this stage, the State may answer the petition or move to dismiss it. 725 ILCS 5/122-5 (West 2006). If the State answers the petition or the court denies the State's motion to dismiss, the proceeding advances to the third stage, during which defendant may submit evidence to support his or her claim. *Andrews*, 403 Ill. App. 3d at 658-59, 936 N.E.2d at 653; 725 ILCS 5/122-5, 122-6 (West 2006). At the third-stage evidentiary hearing, the defendant bears the burden of making "a substantial showing of a deprivation of constitutional rights." *Coleman*, 206 Ill. 2d at 277, 794 N.E.2d at 286.

¶ 54 Defendant's appeal follows the dismissal of his petition after a third-stage evidentiary hearing. This court will not disturb a trial court's decision following an evidentiary hearing unless the decision is manifestly erroneous. *Coleman*, 206 Ill. 2d at 277, 794 N.E.2d at 286. Manifest error is "error that is 'clearly evident, plain, and indisputable.'" *Coleman*, 206 Ill. 2d at 277, 794 N.E.2d at 286 (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85, 686 N.E.2d 574, 582 (1997)).

¶ 55 B. Effectiveness of Counsel

¶ 56 Defendant's constitutional claim on postconviction review is he was denied the effective assistance of counsel because his trial counsel denied him his right to choose whether to seek the second-degree-murder jury instruction. A defendant, under *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984), can prove he was denied the effective assistance of counsel by establishing two factors: (1) his counsel's "representation fell below an objective standard of reasonableness," and (2) absent the error, there is a reasonable probability the trial's outcome

would have been different. *People v. Young*, 341 Ill. App. 3d 379, 383, 792 N.E.2d 468, 472 (2003). A defendant must prove both prongs to prevail on an ineffectiveness claim, meaning a court may resolve such a claim if it determines the defendant cannot prove just one ground. *People v. Little*, 335 Ill. App. 3d 1046, 1052, 782 N.E.2d 957, 963 (2003).

¶ 57 It is well-established the ultimate decision to tender an instruction on a *lesser-included* offense belongs to the defendant rather than to defense counsel. *People v. Brocksmith*, 162 Ill. 2d 224, 229-30, 642 N.E.2d 1230, 1233 (1994). In *Brocksmith*, our supreme court found a defense counsel's assistance ineffective when the defense counsel, rather than the defendant, made such a decision. *Brocksmith*, 162 Ill. 2d at 229-30, 642 N.E.2d at 1233. The court concluded the decision whether to tender a lesser-included offense was analogous to the decision of what plea to enter and should be treated the same. *Brocksmith*, 162 Ill. 2d at 229, 642 N.E.2d at 1232.

¶ 58 Second-degree murder is not a *lesser-included* offense, but a *lesser-mitigated* offense of first-degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 122, 646 N.E.2d 587, 595 (1995). It is a lesser offense because the penalties are not as harsh; it is mitigated because it requires proof of the first-degree murder in addition to defendant's proof, by a preponderance of the evidence, of the existence of a mitigating factor. *Jeffries*, 164 Ill. 2d at 122, 646 N.E.2d at 595 (citing *People v. Newbern*, 219 Ill. App. 3d 333, 353, 579 N.E.2d 583, 596 (1991)).

¶ 59 The parties agree the holding of *Brocksmith*, which involves *lesser-included* offenses, extends to cases involving *lesser-mitigated* offenses. Like the decision whether to tender a lesser-included offense, the decision whether to tender a lesser-mitigated offense is analogous to the decision of what plea to enter. Following *Brocksmith's* analysis, we find the

defendant, not defense counsel, should make the ultimate decision to tender an instruction on a lesser-mitigated offense.

¶ 60 We turn to the trial court's decision defendant failed to prove defense counsel Noll took that decision from him. Defendant argues the record shows inconsistencies in Noll's testimony. Defendant emphasizes Noll, at one point, testified he routinely discusses second-degree murder as a defense with his clients, but then testified he did not explicitly explain first- and second-degree murder with defendant and only asked defendant if he agreed with the strategy Noll planned. Defendant further emphasizes Noll testified he pushed for a second-degree defense with defendant.

¶ 61 We find no manifest error in the court's decision. The trial court, upon observing the case presented the situation of "he said, he said," deemed the testimony of defendant and his mother was crucial in finding defendant had not established his claim. The court found convincing the testimony, from both defendant and his mother, that established Noll believed, in the beginning, the case was a second-degree-murder case. Noll testified he knew the decision belonged to defendant, the two worked on the strategy together, and defendant did not want to admit the elements of the offense or to testify. Noll also testified he discussed second-degree murder as a defense and defendant did not want to pursue it. The court believed Noll and, by dismissing the case, found defendant had not met his burden of making "a substantial showing of a deprivation of constitutional rights." *Coleman*, 206 Ill. 2d at 277, 794 N.E.2d at 286.

¶ 62 We note defendant's concerns about the apparent inconsistencies in Noll's testimony. The trial court was not convinced such inconsistencies showed defendant suffered a deprivation of constitutional rights. The record does not show this decision was "error that is

'clearly evident, plain, and indisputable.' " *Coleman*, 206 Ill. 2d at 277, 794 N.E.2d at 286 (quoting *Ruiz*, 177 Ill. 2d at 384-85, 686 N.E.2d at 582).

¶ 63

III. CONCLUSION

¶ 64 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.

¶ 65 Affirmed.

¶ 66 JUSTICE APPLETON, dissenting.

¶ 67 I respectfully dissent. Even the majority acknowledges "apparent inconsistencies" in attorney Noll's testimony. While there is some dispute concerning the timing of defendant's interest in requesting an instruction on second degree murder, it is uncontroverted that he did so. Where even the trial court recognized at the jury instruction conference that a second degree instruction was in play from the adduced evidence, the failure to make a record of defendant's decision augers in favor of reversing his conviction for a new trial.