2015 IL App (1st) 142822-U

FIFTH DIVISION
November 6, 2015

No. 1-14-2822

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12 CR 10348
	)	
JAMARQUES ROBINSON,	)	
	)	Honorable
Defendant-Appellant.	)	Noreen V. Love,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Palmer concurred in the judgment.

ORDER

¶ 1 *Held*: Where no evidence was presented demonstrating defendant acted either in self-defense or recklessly, defense counsel did not render ineffective assistance by failing to request self-defense, second degree murder, or involuntary manslaughter jury instructions. The record was inadequate to evaluate defendant's claim that defense counsel was ineffective for failing to investigate or present evidence regarding the victim's time of death.

¶ 2 Following a jury trial, defendant Jamarques Robinson (defendant) was convicted of first degree murder and sentenced to 30 years' imprisonment. On appeal, defendant contends that he

received ineffective assistance of counsel where defense counsel (1) failed to investigate and present evidence regarding the timing of the victim's death; and (2) failed to request jury instructions on self-defense, second degree murder, and involuntary manslaughter. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested and charged by indictment with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2012)) for beating the victim, Jeremy Wallace, to death. Defendant retained private counsel who represented him during the pretrial and trial proceedings.[1] We recount only those testimonies and facts relevant to this appeal.

¶ 5 Krystal Helms

¶ 6 Krystal Helms (Helms), defendant's paramour, testified that at 6 p.m. on March 23, 2012, she left defendant's apartment located on West Roosevelt Road in Broadview to go to the liquor store.[2] As she returned to defendant's apartment, Helms, while on the phone with defendant, noticed the victim walking behind her. According to Helms:

> "[The victim] began shouting. Saying like hey, hey, A [*sic*] and I never responded. And he asked a question as who did you get that 40 for? And I said why? And he said because if it's for your man, he could have got his lazy a*** up and got it."

As Helms entered the apartment, defendant exited. Some time passed and two women knocked on the door asking if "Marques" was home. Helms told them he was not. She later learned these two women were the victim's mother and sister. Later that evening, defendant returned to his

[1] We note that the report of proceedings does not include pretrial matters, jury selection, or opening statements.

[2] For purposes of clarity, we note that defendant's apartment building was adjacent to the victim's mother's apartment building. The record discloses that these two buildings shared a laundry room, located at a different address, where the victim was found deceased. We will refer to this laundry room herein as "the apartment complex laundry room."

apartment with a man named "Lamar" and played video games. Defendant did not communicate to Helms what had occurred that evening.

¶ 7 Jamilah Wallace

¶ 8 Jamilah Wallace (Jamilah), the victim's sister, testified that on March 23, 2012, she resided with her mother, Zelma Wallace (Zelma), on South 13th Avenue in Broadview. That evening, defendant came to their apartment looking for the victim. The victim left the apartment with defendant, bringing a bottle of beer with him. Jamilah watched out the window as defendant, the victim, and an unidentified African-American man conversed near the alley. A short time later, Jamilah heard "scuffling noises" and observed defendant grabbing the victim from behind in a "bear hug." Defendant flung the victim against Jamilah's Dodge Durango and "body[-]slammed him to the ground." Jamilah observed defendant "stomp" and kick the victim "numerous times" in the head and chest as he laid motionless on his left side.

¶ 9 Jamilah yelled out the window, "stop, stop, that's my brother, stop" then ran out of her apartment towards the victim who was still lying on the ground. Jamilah asked defendant why he was kicking the victim, but he did not answer and walked away with the other individual. Jamilah testified this other man did not physically touch the victim. Jamilah noticed the victim was unconscious and had "a little blood on his lips." She then flagged down a police officer who was in a squad car. The victim regained consciousness 30 seconds later. According to Jamilah, he was "real disoriented" and refused medical treatment.

¶ 10 Jamilah returned to her apartment and 30 minutes later left with her mother to find defendant. As she was leaving, she observed the victim talking to two women in a red Ford Taurus. Jamilah and her mother went to defendant's apartment where they were told by a young African-American woman that defendant was not at home. Jamilah and her mother then went

back to their apartment, but the victim was not there. At 10:30 p.m., Jamilah observed the victim standing outside of her apartment building alone.

¶ 11 On cross-examination, Jamilah testified her brother was an alcoholic and when he consumed alcohol he would at times become belligerent and argumentative. Her brother occasionally slept in the apartment complex laundry room. Jamilah admitted she did not inform the investigating officers her brother was disoriented after the incident.

¶ 12 On redirect, Jamilah testified that her brother did not swing at defendant nor did he try to defend himself.

¶ 13 Zelma Wallace

¶ 14 Zelma, the mother of the victim, testified that on March 23, 2012, she was residing on South 13th Avenue in Broadview. At 7 p.m., her son left her apartment when an African-American male came to the door. Later, at 7:30 p.m., Zelma observed her son outside of the apartment building. He appeared to be disoriented.

¶ 15 On cross-examination, Zelma testified she did not observe what had happened between her son and defendant. Zelma further testified that her son would occasionally sleep in the apartment complex laundry room and that he "drank a lot." Zelma also testified her son did not complain of any injuries after the incident.

¶ 16 Lamar Ratliff

¶ 17 Lamar Ratliff (Ratliff), defendant's friend, testified to the following. On March 23, 2012, he and defendant walked to an apartment on 13th Avenue in Broadview. Ratliff waited on the sidewalk while defendant went to the door of an apartment. Shortly thereafter, defendant and the victim appeared. The victim was carrying "a beer and a bag wrapped around his wrist." Defendant and the victim stood in front of the apartment building talking while Ratliff tied his

shoes. Ratliff did not pay attention to them, and testified the conversation between defendant and the victim was "muffled." When Ratliff looked up, he observed defendant "grabbing" the victim from behind and "throwing him to the ground." Ratliff left the scene and later met defendant at a restaurant. Defendant did not discuss what had occurred. The two men went to defendant's apartment and played video games. The next morning defendant called Ratliff and informed him the victim had died.

¶ 18 On cross-examination, Ratliff testified that defendant had "a casual conversation" with the victim and no voices were raised. He further testified he did not observe defendant "stomp" on the victim.

¶ 19 Leland Kinnamon

¶ 20 Leland Kinnamon (Kinnamon) testified to the following. On March 23, 2012, he was residing on South 13th Avenue in Broadview. At 7 p.m., he was on the street loading a lawn mower onto a trailer when he heard people "arguing, yelling." He turned around to face Roosevelt Road and observed three African-American men standing in the yard of an apartment building. He observed one of the men approach the victim from behind, grab a hold of him, and slam him up against the side of a Dodge Durango. Kinnamon observed that the man's action was "like [a] bear hug from behind." Kinnamon then observed the man "slam[] [the victim] up against the side of the vehicle." The victim fell to the ground and lay on his side facing the vehicle. Kinnamon observed the man "stomp" or "pull[] his leg all the way up to him. Bent knee and flat footed[]" twice on the right side of the victim's head. Kinnamon instructed his wife to call 911. When he turned his attention back to the men, Kinnamon observed a young woman come out of an apartment yelling for the man to stop. The man who had been stomping the victim then walked towards the other individual who was near the alley. The two men quickly

walked away. When the police vehicle approached, the two men ran.

¶ 21 Kinnamon went over to the scene and observed the victim lying motionless on the ground. The victim "started to move a little bit and rolled over, and sat up leaning against the side of the [vehicle]." The victim appeared disoriented, but informed the police officer that he was fine.

¶ 22 On cross-examination, Kinnamon testified he initially observed the incident from 200 feet away and that the sound of glass breaking drew his attention to the three men. He further testified that upon approaching the victim, he did not observe any abrasions, bruises, or swelling on the right side of the victim's face. On redirect, however, Kinnamon clarified that the closest he came to the victim was 30 feet away.

¶ 23 Daniel McGlathery

¶ 24 Daniel McGlathery (McGlathery) testified that on March 23, 2012, he went to Kinnamon's home to purchase a lawn mower. At 7 p.m. he and Kinnamon were in the process of loading a lawn mower onto McGlathery's trailer when he heard the sound of glass breaking behind him. McGlathery turned and observed "a black male falling from the side of the SUV towards the ground and there was another male black behind him." He then observed "the man that was standing behind [the victim] [come] up behind [the victim] and [start] stomping on the back of his head or the side of his head actually into the ground." McGlathery described "stomping" as "taking his foot, raising it up very high [and] with full force coming down on his head." The man stomped on the victim's head three times. The victim lay on the ground "limp, lifeless" as he was being stomped. McGlathery then heard a woman scream and observed her come outside. The man who was stomping the victim then "took off running down the alley." McGlathery finished loading the lawn mower onto his trailer and left. He did not walk over to

the scene.

¶ 25 On cross-examination, McGlathery explained he did not see the victim being slammed into the ground.

¶ 26 Sergeant Robert Bartlotte

¶ 27 Sergeant Robert Bartlotte (Sergeant Bartlotte) testified that on March 23, 2012, he was on patrol in the 2100 block of 13th Avenue when, just before 7 p.m., he heard someone yelling across Roosevelt Road. Sergeant Bartlotte immediately drove to the scene. When he arrived, he observed the victim lying against a vehicle. Sergeant Bartlotte testified he knew the victim from his work in Broadview. The victim said to him, "Officer Rob, can you help me up?" He helped the victim to his feet and noticed a broken bottle inside a brown paper bag nearby. Jamilah told him that "somebody jumped on her brother and stomped his head." She identified the person as "Marques." The victim declined Sergeant Bartlotte's offer to call an ambulance and did not want to press charges against defendant. Nevertheless, Sergeant Bartlotte prepared a police report regarding the incident.

¶ 28 On cross-examination, Sergeant Bartlotte testified he did not observe abrasions on either side of the victim's face.

¶ 29 Alicia Holmes

¶ 30 Alicia Holmes (Holmes), a friend of the victim's, testified as follows. At 7 p.m. on March 23, 2012, she and two friends drove to 13th Avenue and Roosevelt Road in a red Ford Taurus to bring the victim his keys. The victim approached the vehicle and told them that "he had gotten into it. He didn't tell us exactly what happened." While he was talking to them, Holmes noticed the victim "kept like messing with his ear. He had a piece of tissue in his hand. And I asked him what was wrong, and he just kept dabbing at his ear." Holmes noticed blood on

the tissue and that it was coming from his right ear.

¶ 31 On cross-examination, Holmes testified she did not notice whether there were any cuts or bruises on the victim's face. She was not sure whether the blood was coming from inside or outside of the victim's right ear.

¶ 32 Kalisha Stubbs

¶ 33 Kalisha Stubbs (Stubbs) testified that on the evening of March 23, 2012, at 8 p.m. the victim came to her apartment uninvited looking for a mutual friend. The victim asked Stubbs if he could "take a rest" in her apartment. She reluctantly agreed and the victim came in and watched television with her, her brother, and her uncle.

¶ 34 While watching television, the victim informed Stubbs he had been in a fight and asked her to look at his face. Stubbs noticed that the right side of his face was "slightly swollen with scratches." The victim then "started complaining of a headache" and asked Stubbs for a "pain pill." Stubbs's brother gave him a "Bayer." The victim told them he "never had a headache like that before." Thereafter, the victim went to the bathroom. When he emerged, he was "sweating real bad *** [t]here was sweat all over his face like somebody threw a bucket of water on him."

¶ 35 At 9:10 p.m., Stubbs called the victim a cab because he was complaining that "he didn't feel good, and he was sleepy." The cab arrived at 9:30 p.m. As the victim stood up to leave, he was "stumbling." Stubbs's brother and uncle escorted him downstairs. Stubbs watched as he entered the cab.

¶ 36 On cross-examination, Stubbs testified that the victim never mentioned defendant's name to her when telling her about the fight he was in. She further testified she did not ask him for details about the fight. Stubbs testified:

"To be honest, Jeremy is a character. So, when he was telling me the story, he

> was making it seem like, you know, he had the upper hand in the fight. Getting good blows in. He made a comment that he showed me good though right here. Do you want to feel right here? He hit me good right here."

The victim told her that he got five "good blows in," and at the time she found his recollection of the fight to be "funny" because she knew "he probably didn't get a swing off."

¶ 37 Ronnie Edwards

¶ 38 Ronnie Edwards (Edwards), a part-time cab driver, testified as follows. At 9:30 p.m., he picked up a male customer who requested to go to 23rd Avenue and Roosevelt Road. Edwards observed his customer was intoxicated. After the customer exited the cab, Edwards observed him throw up in the middle of the street and then walk to an apartment. Edwards reiterated he dropped off the customer at 23rd Avenue and Roosevelt Road when asked if he misstated the address.

¶ 39 Leroy Tate

¶ 40 Leroy Tate (Tate), a resident of the apartment complex, testified he found the victim's body on the floor of the apartment complex laundry room at 8:30 a.m. on March 24, 2012.

¶ 41 Tracy Kenny

¶ 42 Tracy Kenny (Kenny) is a firefighter paramedic with the Broadview Fire Department and testified as follows. At 8:54 a.m. on March 24, 2012, she was dispatched to the location of Roosevelt Road in Broadview. She entered the apartment complex laundry room and observed the victim lying face down on his stomach. She proceeded to roll him towards her to determine if he was breathing or had a pulse. As she was attempting to roll him, Kenny observed that the victim's torso stayed in the same position, which indicated rigor mortis had set in his entire body. Kenny noticed blood on the victim's face and bright red blood on the basement floor. The victim

had no vital signs and Kenny determined he was deceased.

¶ 43 Detective David Yurkovich

¶ 44 Detective David Yurkovich (Detective Yurkovich) testified that on March 24, 2012, he received an assignment to investigate the victim's death. The next day, the medical examiner, Dr. Daniel Perez (Dr. Perez), informed him the victim died from a subdural hematoma in his brain caused by blunt force trauma. The victim's death was ruled a homicide. Detective Yurkovich then interviewed the witnesses, and based on those interviews, attempted to locate defendant. Detective Yurkovich, however, could not locate defendant. Detective Yurkovich's investigation later revealed that on March 27, 2012, a one-way Amtrak ticket to St. Paul, Minnesota was purchased in defendant's name by his father. Defendant was subsequently arrested in Minnesota and transported to Cook County.

¶ 45 On cross-examination, Detective Yurkovich testified that his investigation did not reveal where the victim went upon arriving at 23rd Avenue and Roosevelt Road nor how long the victim stayed in that area.

¶ 46 Dr. Ariel Goldschmidt

¶ 47 Dr. Ariel Goldschmidt (Dr. Goldschmidt), a Cook County Medical Examiner, testified regarding the victim's autopsy results because Dr. Perez no longer worked at the Cook County Medical Examiner's office at the time of the trial.

¶ 48 After reviewing Dr. Perez's report and the photographs accompanying it, Dr. Goldschmidt opined that the victim's cause of death was from a "[s]ubdural hematoma due to blunt force trauma to the head due to assault and contributing cirrhosis of the liver due to chronic alcoholism."[3] Dr. Goldschmidt explained that a "blunt force injury" means "a forceful impact to

[3] During his testimony, Dr. Goldschmidt used the terms "hematoma" and "hemorrhage"

the head" from any kind of object. Dr. Goldschmidt testified he included cirrhosis of the liver and alcoholism as secondary factors because alcoholism causes cirrhosis of the liver which leads to "significantly increased risk for developing a subdural hemorrhage." Dr. Goldschmidt clarified the victim's subdural hemorrhage was not caused by his cirrhosis, but by a blunt force trauma to his head. Dr. Goldschmidt agreed with Dr. Perez's assessment that the victim's death was a homicide.

¶ 49 Regarding the autopsy report of March 25, 2012, Dr. Goldschmidt testified it indicated the victim's scalp, lips, and mouth were free of injuries, but that rigor mortis was present in all joints. Dr. Goldschmidt explained that for complete rigor mortis to set in, at least six hours must pass from the time the person died. An internal examination revealed the victim suffered from three types of hemorrhages on the right side of his brain: (1) a subdural hemorrhage (a bleed between the brain and its protective covering); (2) a subarachnoid hemorrhage (a smaller bleed on the surface of the brain); and (3) a pontine hemorrhage (a bleed occurring in the brain stem). The subarachnoid and pontine hemorrhages were secondary to the larger subdural hemorrhage. Dr. Goldschmidt testified that the victim's subdural hemorrhage was eight ounces, which is "a very large amount of blood." No fractures were noted in the victim's skull. Despite the lack of fractures in the skull, Dr. Goldschmidt testified a very large hemorrhage is possible because "the scalp can act as enough of a buffer *** [and] if the head were struck by an object, the object could also be not necessarily hard enough to fracture the skull."

¶ 50 The report further indicated that the victim's liver was large, scarred or cirrhotic, and had a nodular appearance, which indicated chronic liver damage. The victim also had ethanol in his system and his blood alcohol level was 182 milligrams per deciliter, between two and three times

---

interchangeably.

the legal limit.

¶ 51 Regarding the victim's cause of death, Dr. Goldschmidt testified that the blunt force trauma was related to "one acute event" which occurred "within the past hours prior to death." Dr. Goldschmidt opined that the victim could have sustained these injuries from being thrown against a vehicle, thrown to the ground, or being stomped on the head. In addition, Dr. Goldschmidt opined that it was possible to sustain this type of injury without a fracture to the skull if the person was struck in the head with a softer object such as a shoe.

¶ 52 Dr. Goldschmidt further testified that with such a subdural hemorrhage, an individual's condition could initially appear normal and become progressively worse. According to Dr. Goldschmidt, it takes time for such a large subdural hemorrhage to build up, so it was possible the victim initially believed he did not need medical care. As the subdural hemorrhage worsened, one could develop "neurologic symptoms like [a] headache, dizziness, blurry vision" and "slurred speech." A person developing a subdural hemorrhage would also "at some point begin sweating profusely" and vomit. It would also be normal for a person suffering from a subdural hemorrhage to have blood come out of one's mouth as he or she is dying, which is more common in a slow death. Dr. Goldschmidt testified he opined the victim here died slowly because his body had time to create a second hemorrhage.

¶ 53 On cross-examination, Dr. Goldschmidt testified that he did not examine the victim's body, and that his testimony was predicated on Dr. Perez's report. He acknowledged the cause of the blunt force trauma which led to the victim's death could have been from a number of different sources. He also did not know at what time the victim sustained the blunt force trauma. Dr. Goldschmidt acknowledged that one can also sweat, vomit, and have a headache for reasons other than a subdural hemorrhage, including drinking a large quantity of alcohol. He also did not

know how long it took for the rigor mortis to set in to the victim's body, as the report only indicated that it was "present in all joints."

¶ 54 Dr. Goldschmidt further testified that while the victim's cirrhosis of the liver was a contributing factor in his death, Dr. Perez did not report the cirrhosis to be a contributing factor. Dr. Goldschmidt opined that Dr. Perez may have failed to include it because "[s]ome doctors don't tend to list some of the peripheral factors as much. [Dr. Perez] listed cirrhosis of the liver in his findings, but not in his opinion of the cause of death."

¶ 55 Dr. Goldschmidt also testified that if the victim sustained trauma to the right side of his head with the left side of his head on the concrete, abrasions would likely be present on the left side of the victim's face. It would also be likely that the right side of his face would show physical signs from the forceful stomps.

¶ 56 On redirect, Dr. Goldschmidt clarified that the victim's death was not caused by his cirrhosis. The cirrhosis contributed to the subdural hemorrhage by making the victim's blood unable to clot properly, but did not cause his death. Dr. Goldschmidt further testified that people can suffer this type of injury and not have facial abrasions. Dr. Goldschmidt opined that one reason why there were no visible injuries on the right side of the victim's face was because the subdural hemorrhage occurred underneath his hair.

¶ 57 The State rested and, outside the presence of the jury, the court advised defendant of his right to testify. Defendant indicated he would not testify. The court then asked defendant if he had an opportunity to speak with his attorney about testifying, to which defendant replied, "Yes, your honor."

¶ 58 Defendant then moved for a directed verdict, arguing the State failed to prove beyond a reasonable doubt that he engaged in the conduct that gave rise to the victim's death. Defense

counsel stressed (1) the inconsistent testimony regarding the number of times defendant stomped on the victim's head and (2) the lack of any evidence regarding what the victim did between the time the cab dropped him off and the time of his death. The trial court denied defendant's motion and the defense rested.

¶ 59 Jury Instructions

¶ 60 Outside the presence of the jury, the State offered instructions for the offense of first degree murder. Defense counsel did not object. The State also requested an instruction which provided that the it must prove beyond a reasonable doubt that defendant's acts were a contributing cause of the victim's death and that the death did not result from a cause unconnected with defendant. Defense counsel objected, arguing "we still do not know what caused the blunt force trauma that gave rise to [the victim's] death." The court overruled the objection. Defense counsel did not request instructions on self-defense, second degree murder, or involuntary manslaughter.

¶ 61 Closing Arguments

¶ 62 In closing argument, defense counsel argued that the State failed to meet its burden to prove that the actions of defendant caused the victim's death. Defense counsel pointed to the lapse in the State's timeline between when the victim was dropped off by Edwards and when he was found in the apartment complex laundry room:

> "What happened between 23rd and Roosevelt and him getting back to the laundry room over at 12th and Roosevelt? How did he get there? Who was he with? What happened between 23rd and 12th? You may be asking yourself the same questions. But the fact is you shouldn't have to ask yourself those questions because it was their burden to tell you, to answer all of those questions. Now, I told you they wouldn't be able to do that. So

> they want you to connect the dots. They want you to fill in the blanks. They want you to do whatever you have to do to find Mr. Robinson guilty. But that's not enough. That's not sufficient under the law, Ladies and Gentlemen."

¶ 63 In retelling the series of events, defense counsel argued defendant and the victim had become involved in a "physical altercation." Defense counsel did not argue or allude to a self-defense theory. The State's attorney, however, made an objection stating, "there was no evidence of a physical altercation, at least it being mutual," which the trial court sustained.

¶ 64 Following closing arguments, the jury deliberated and found defendant guilty on both counts of first degree murder.

¶ 65 Posttrial Proceedings

¶ 66 On June 28, 2014, defendant fired his trial counsel and retained new counsel. He also filed a motion for a new trial asserting that the victim's death "very well could have been caused by his chronic and extreme intoxication, especially given that no one could testify to what occurred between the time that Mr. Wallace was dropped off by Mr. Edwards and when he was found deceased in the laundry room." Defendant further asserted there is "a reasonable inference from all of the evidence that Defendant was involved in a physical altercation with Mr. Wallace because Mr. Wallace was the initial aggressor." Defendant pointed to the victim's alcoholism and that he had "already verbally provoked the Defendant."

¶ 67 Defendant further argued his defense counsel was ineffective for failing to request self-defense, second degree murder, and involuntary manslaughter jury instructions. Defendant contended he was entitled to these instructions because the evidence, namely that the victim had told Stubbs that he had gotten five "good blows in," demonstrated Defendant was justified in his use of force. Lastly, he argued that defense counsel was ineffective for failing to properly

investigate legal and factual issues related to the victim's cause of death.

¶ 68 Attached to the motion for a new trial was an affidavit from defendant in which he averred that his defense counsel did not consult with him regarding the jury instructions nor did he advise him of the benefits of testifying. Had he been so advised defendant stated that he would have testified that "the victim was the aggressor in the physical altercation, that he grabbed the beer bottle he went outside with by the neck to use as a weapon, and was physically combative, aggressive, and threatening towards me."

¶ 69 On July 17, 2014, the court denied defendant's motion for a new trial finding there was no evidence that the victim swung five times at defendant or that defendant swung at the victim. According to the trial court, "there's nothing in the entire record that says anything about self defense" and it would not have given jury instructions regarding self-defense, second degree murder, or involuntary manslaughter based on the facts presented at trial. In addition, the trial court stated it advised defendant regarding testifying and asked whether he had discussed with his lawyers his decision not to testify. The trial court stated, "he had that opportunity to say I want them [the jury] to hear my side of the story, because there's no testimony that he [defendant] was ever attacked. And there was no–absolutely no witnesses that say he was ever attacked."

¶ 70 Defendant was sentenced to 30 years' imprisonment. This appeal timely followed.

¶ 71 ANALYSIS

¶ 72 On appeal, defendant asserts his defense counsel was ineffective for two reasons: (1) failing to investigate and present evidence regarding the timing of the victim's death; and (2) failing to request jury instructions on self-defense, second degree murder, and involuntary manslaughter. We address each argument in turn.

¶ 73 Ineffective Assistance of Counsel

¶ 74 A defendant has a sixth amendment right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. An accused is entitled to capable legal representation at trial. *People v. Wiley*, 165 Ill. 2d 259, 284 (1995). To establish a claim of ineffective assistance of counsel, a defendant must prove both (1) deficient performance by counsel and (2) prejudice to defendant. *People v. Smith*, 195 Ill. 2d 179, 187-88 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To satisfy the first prong of the *Strickland* test, a defendant must demonstrate his counsel's performance fell below an objective standard of reasonableness, as measured by prevailing norms. *Smith*, 195 Ill. 2d at 188. "To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy." *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). To satisfy the second prong, prejudice is demonstrated if there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Echols*, 382 Ill. App. 3d 309, 312 (2008). A probability rises to the level of a "reasonable probability" when it is "sufficient to undermine confidence in the outcome" of the proceeding. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002) (citing *Strickland*, 466 U.S. at 694).

¶ 75 The failure to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *People v. Patterson*, 192 Ill. 2d 93, 107 (2000). Thus, "[m]anifestly, ineffectiveness claims can be solely on the prejudice component, without establishing whether counsel's performance was deficient." *People v. Stanley*, 397 Ill. App. 3d 598, 613 (2009) (citing *Strickland*, 466 U.S. at

697).

¶ 76 1. Failing to Adequately Conduct a Factual and Legal Investigation

¶ 77 We first address defendant's argument that defense counsel failed to adequately conduct a factual and legal investigation. Specifically, defendant contends that defense counsel was ineffective when he failed to (1) cross-examine Dr. Goldschmidt regarding the timing of the victim's death and (2) present any evidence to rebut the testimony of Dr. Goldschmidt. According to defendant, with adequate investigation, defense counsel could have established that the trauma was caused by another individual because the victim died "13 hours" after the incident. Defendant contends that had evidence regarding the time of the victim's death been presented to the jury, the outcome of the trial would have been different.

¶ 78 In response, the State asserts that this claim of ineffective assistance of counsel is not appropriate on direct review because it involves matters that are not part of the record. In particular, the State asserts there is no evidence in the record regarding defense counsel's investigation nor is there any evidence demonstrating that defense counsel interviewed other medical experts but chose not to present them as witnesses.

¶ 79 Initially, we address whether this issue is appropriate for a direct appeal. When, on direct appeal, a defendant challenges his attorney's failure to take some action, "the record will frequently be incomplete or inadequate to evaluate that claim because the record was not created for that purpose." *People v. Henderson*, 2013 IL 114040, ¶ 22 (citing *Massaro v. United States*, 538 U.S. 500, 504-05 (2003)). "Where the disposition of a defendant's ineffective assistance of counsel claim requires consideration of matters beyond the record on direct appeal, it is more appropriate that the defendant's contentions be addressed in a proceeding for postconviction relief [citation], and the appellate court may properly decline to adjudicate the defendant's claim

in his direct appeal from his criminal conviction." *People v. Morris*, 229 Ill. App. 3d 144, 166 (1992). It is during a collateral proceeding that "the defendant has a full opportunity to prove facts establishing ineffectiveness of counsel, [and] the government has a full opportunity to present evidence to the contrary." (Internal quotation marks omitted.) *Henderson*, 2013 IL 114040, ¶ 21.

¶ 80 In this case, the record is inadequate to evaluate defendant's assertion that defense counsel was ineffective for failing to investigate or present evidence about the victim's time of death. There is no evidence in the record to demonstrate the extent of the investigation undertaken by defendant's counsel prior to trial, nor does the record disclose the full extent of defense counsel's pretrial communications with defendant. Pertinent portions of the report of proceedings below were missing from the record on appeal. Namely, we do not have before us any of the pretrial matters, jury selection and *voir dire*, or the opening statements. These proceedings may be pertinent to defendant's claim; therefore, any doubts arising from the incompleteness of the record must be construed against him. See *People v. Ranstrom*, 304 Ill. App. 3d 664, 672 (1999). In addition, defendant's argument that an expert could have rebutted Dr. Goldschmidt's testimony is speculative as the record does not indicate whether defense counsel knew of such an individual. See *Morris*, 229 Ill. App. 3d at 165 ("An attorney is ineffective when he fails to investigate exculpatory witnesses who are *known* to the attorney." (Emphasis added.)). Accordingly, we decline to address the merits of defendant's argument. We note, however, that defendant is not precluded from pursuing such a claim under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)).[4]

[4] We similarly discharge defendant's two-sentence argument that trial counsel was ineffective for failing to meet with him and discuss his options regarding the jury instructions. Not only does defendant present this argument in violation of Illinois Supreme Court Rule

¶ 81 2. Failing to Request Self-Defense and Second Degree Murder Jury Instructions

¶ 82 Defendant next asserts that defense counsel was ineffective for failing to request self-defense and second degree murder jury instructions where (1) the evidence presented at trial supported these instructions and (2) counsel attempted to argue a "mutual combat situation" to the jury."

¶ 83 The State responds that defense counsel's decision not to request these instructions was sound trial strategy where he was pursuing the defense of reasonable doubt based on causation. Additionally, the State asserts that defense counsel had no legal basis to request self-defense and second degree murder instructions where the record did not support the affirmative defense.

¶ 84 The second prong of the *Strickland* test requires defendant to be prejudiced by defense counsel's deficient performance. *Albanese*, 104 Ill. 2d at 525. When the evidence presented at trial does not support a certain jury instruction, it necessarily follows that a defendant cannot be prejudiced by counsel's failure to request such an instruction. *People v. Martin*, 271 Ill. App. 3d 346, 357 (1995) (citing *Albanese*, 104 Ill. 2d at 527); *People v. Salas*, 2011 IL App (1st) 091880, ¶ 93 (the defendant was not prejudiced by counsel's failure to tender an instruction to the jury where the evidence did not support such an instruction). Therefore, to determine whether defense counsel here provided ineffective assistance, we first consider whether the evidence presented entitled defendant to the jury instructions.

¶ 85 A. Self-Defense Jury Instruction

¶ 86 Self-defense is an affirmative defense (720 ILCS 5/7-14 (West 2012)), wherein a defendant asserts he "is justified in the use of force against another when and to the extent that he

---

341(h)(7) (eff. Feb. 6, 2013) as it is unsupported by any citation to authority, but we also note that defendant concedes in his reply brief that "the record in the instant case does not contain any indication that trial counsel consulted with Mr. Robinson about whether to forego self-defense, second degree murder, or involuntary manslaughter instructions."

reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force." 720 ILCS 5/7-1(a) (West 2012). On the other hand, second degree murder is a lesser mitigated offense of first degree murder. *People v. Rodriguez*, 336 Ill. App. 3d 1, 17 (2002). Second degree murder is distinguished from self-defense only in terms of the nature of the defendant's belief at the time of the killing. *Id.;* see 720 ILCS 5/9-2(a)(2) (West 2012) (a person commits the offense of second degree murder when he commits the offense of first degree murder and "if at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing *** but his or her belief is unreasonable"). Therefore, if the defendant's belief as to the use of force was reasonable, self-defense may apply; conversely, if the defendant's belief was unreasonable, a second degree murder conviction may be appropriate. *Rodriguez*, 336 Ill. App. 3d at 17.

¶ 87 When self-defense is raised, it must be disproved by the State beyond a reasonable doubt. *People v. Jaffe*, 145 Ill. App. 3d 840, 852 (1986). To instruct the jury on self-defense, the defendant must establish some evidence of each of the following elements: "(1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable." *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995); *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 64. If the State negates any one of the self-defense elements, the defendant's claim of self-defense must fail. *Jeffries*, 164 Ill. 2d at 128. Even a slight amount of evidence is sufficient to raise the issue of self-defense and will justify giving an instruction on self-defense to the jury. *Jaffe*, 145 Ill. App. 3d at 852.

¶ 88 In this case, the evidence presented at trial did not support giving a self-defense

instruction. There was no evidence that suggested the victim threatened defendant, the victim was the aggressor, or defendant was in danger of imminent harm. Additionally, neither the State nor defendant raised any evidence regarding defendant's subjective belief that a danger existed that justified his use of force against the victim. See *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 55 (" 'unless the State's evidence raises the issue involving the alleged defense, the defendant bears the burden of presenting evidence sufficient to raise the issue.' " (Emphasis omitted.) (quoting *People v. Everette*, 141 Ill. 2d 147, 157 (1990)). Instead, the testimony established defendant went looking for the victim who then went willingly outside with defendant. Initially their conversation was unremarkable, but soon "scuffling" began. No evidence was presented regarding how the incident commenced. The one individual closest to the incident, defendant's friend Ratliff, testified he was tying his shoes at the time and did not see or hear what occurred between defendant and the victim prior to the incident. When Ratliff did look up, he observed defendant grab the victim from behind and throw him to the ground, as did Jamilah and Kinnamon. McGlathery, Jamilah, and Kinnamon testified they observed defendant stomp on the victim's head a number of times while he lay motionless on the ground.

¶ 89 Defendant, however, contends that the evidence demonstrated the victim was the initial aggressor. We disagree. First, the victim's words to Helms calling defendant "lazy" are not sufficient provocation. See *Lewis*, 2015 IL App (1st) 122411, ¶ 63 (" 'the use of foul or abusive language is no reason for taking another's life' " (quotin*g People v. Felella*, 131 Ill. 2d 525, 534 (1989)). The degree of force used in self-defense must be proportional to the threat perceived and, in turn, the threat perceived must be something that would place a reasonable person in fear of death or great bodily harm. See *People v. Everette*, 141 Ill. 2d 147, 162 (1990). Accordingly, words or insults do not suffice. Second, no witnesses testified they observed the victim hit or

attack defendant. Third, although the evidence indicated the victim was carrying a bottle when he exited his mother's apartment, no one testified they observed defendant brandish the bottle as a weapon. The evidence, however, suggests the victim was carrying the bottle in a bag when he was grabbed from behind and the bottle fell to the ground, shattering.

¶ 90 Defendant further argues that the fact there was no testimony regarding how the incident commenced "leave[s] open the possibility that [the victim] was the aggressor." The standard, however, is not whether there is a possibility that the defendant acted in self-defense, but that there was *some evidence* presented as to the elements of self-defense. *Lewis,* 2015 IL App (1st) 122411, ¶ 56. Because no evidence was presented regarding the elements of self-defense, we cannot say defense counsel acted unreasonably when he failed to request the jury be instructed on self-defense. See *Martin,* 271 Ill. App. 3d at 357 (where the defendant did not make a proper showing of the elements required to establish either self-defense or second degree murder, the defendant was not entitled to have the jury instructed on either and, thus, trial counsel's failure to request those instructions did not amount to ineffective assistance of counsel); see *cf. People v. Getter,* 2015 IL App (1st) 121307, ¶ 76 (concluding the defendant was prejudiced where trial counsel failed to submit a self-defense instruction and the record "strongly suggest[ed] that the jury would have acquitted defendant entirely if it had those instructions").

¶ 91 B. Second Degree Murder Jury Instruction

¶ 92 We now turn to consider defendant's argument that counsel was ineffective for failing to request a second degree murder instruction because (1) he argued a theory of "mutual combat" to the jury and (2) the evidence supported the instruction.

¶ 93 First degree and second degree murder share the same elements. *People v. Flemming,* 2015 IL App (1st) 111925, ¶ 53; see 720 ILCS 5/9-1 (West 2012) (a person commits first degree

murder when he or she either intends to kill or do great bodily harm to an individual knowing such acts will cause death to that individual, or that such acts create a strong probability of death or great bodily harm to another individual). The difference between the two is that second degree murder involves the presence of a mitigating factor, such as serious provocation or an unreasonable belief in justification. *Flemming*, 2015 IL App (1st) 111925, ¶ 53.

¶ 94 "Serious provocation" is defined by statute as "conduct sufficient to excite intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2012). Only four categories of serious provocation are recognized by our supreme court: "(1) substantial physical injury or assault, (2) mutual quarrel or combat, (3) illegal arrest, and (4) adultery with the offender's spouse." *People v. Sipp*, 378 Ill. App. 3d 157, 166 (2007) (citing *People v. Chevalier*, 131 Ill. 2d 66, 73 (1989)). The "[d]efendant has the burden of proving there is at least 'some evidence' of serious provocation or the trial court may deny the instruction." *People v. Austin*, 133 Ill. 2d 118, 125 (1989). Moreover, "[t]he evidence upon which defendant relies must rise above the level of a mere factual reference or witness' comment." *Id.*

¶ 95 Defendant argues that because defense counsel "attempted" to argue a "mutual combat scenario" to the jury, he should have requested second degree murder instructions. This court has held that "[w]here defense counsel argues a theory of defense but then fails to offer an instruction on that theory of defense, the failure cannot be called trial strategy and is evidence of ineffective assistance of counsel." *People v. Serrano*, 286 Ill. App. 3d 485, 492 (1997). The initial question before us, then, is whether defense counsel argued a "mutual combat scenario" to the jury. We find no support in the record for defendant's claim.

¶ 96 Mutual combat is "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms where death

results from the combat." (Internal quotation marks omitted.) *People v. Viramontes*, 2014 IL App (1st) 130075, ¶ 49 (quoting *People v. Thompson*, 354 Ill. App. 3d 579, 588 (2004) and *Austin*, 133 Ill. 2d at 125). "Provocation by mutual combat will not be found if the manner in which the accused retaliates is out of proportion to the provocation." *Viramontes*, 2014 IL App (1st) 130075, ¶ 49.

¶ 97 Our review of the record reveals that defense counsel did not argue a "mutual combat" theory, but instead focused on the State's inability to prove beyond a reasonable doubt that defendant caused the victim's death. In closing argument, defense counsel employed a consistent refrain that the State failed to "connect the dots." Defense counsel highlighted the lapse in the State's timeline and relied heavily on Dr. Goldschmidt's testimony that he did not know exactly what trauma caused the victim's subdural hemorrhage. Although defense counsel referred to the incident as a "physical altercation" during closing arguments, it was the State that objected, arguing this language inappropriately suggested the incident was a mutual combat scenario. The trial court sustained the objection. After being presented with all the evidence and hearing the arguments of counsel, the jury found defendant guilty of first degree murder. Defense counsel made the strategic decision to argue that the State failed to prove its case. That defendant's counsel was ultimately unsuccessful in his arguments "does not mean counsel performed unreasonably and rendered ineffective assistance." *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007); see *People v. Martin*, 236 Ill. App. 3d 112, 125 (1992) (defense counsel not ineffective where the principal contested issue at trial was the defendant's guilt or innocence, not whether he reasonably or unreasonably acted in self-defense so as to warrant a second degree murder instruction).

¶ 98 Defendant also argues a second degree murder instruction was warranted "based on the

mitigating factors that [defendant] acted out of a belief in the need for justified self-defense, but that his belief was unreasonable, or that he acted under a sudden and intense passion resulting from serious provocation." Defendant points to Stubbs' testimony that the victim told her he got five "good blows in" during the fight, and the fact the victim was holding a bottle during the incident, as being enough evidence to support a second degree murder instruction.

¶ 99 Defendant was not entitled to a second degree murder instruction based on his unreasonable belief that self-defense was warranted. As discussed above, defendant did not present evidence at trial that he was entitled to a self-defense instruction. "In the absence of any evidence supporting the giving of a self-defense instruction, defendant was not entitled to an instruction on second-degree murder." *Salas*, 2011 IL App (1st) 091880, ¶ 87; see *Martin*, 271 Ill. App. 3d at 357 (where defendant did not make a proper showing of the elements required to establish self-defense, counsel was not ineffective for failing to request a second degree murder instruction). Accordingly, without evidence that defendant acted out of a belief in the need for justified self-defense, the jury cannot be instructed that his belief was unreasonable.

¶ 100 The evidence fails to support defendant's argument that he was provoked by mutual combat. Defendant relies on Stubbs's testimony and the fact that the victim had a bottle during the incident, to support his theory that he was justified in his use of force. To the contrary, although the victim told Stubbs he got five "good blows in," Stubbs testified she did not believe him. In addition, no testimony was elicited that the victim threatened to use the bottle as a weapon against defendant. In fact, Sergeant Bartlotte testified the bottle remained broken inside a bag after the incident.

¶ 101 Moreover, no evidence was presented as to how the incident commenced; thus, we do not know whether the parties entered the fight willingly. The evidence, however, does demonstrate

that the parties did not fight upon equal terms. Defendant was observed "bear-hugging" the victim from behind and slamming him into a vehicle and then into the ground. Once on the ground, the victim did not fight back and lay there defenseless while defendant repeatedly stomped on his head. See *People v. Lopez*, 371 Ill. App. 3d 920, 936 (2007) (fight not on equal terms where the victim was shot while she was unarmed and lying under the covers in bed, cradling a pillow). Although not externally visible, the extent and severity of the victim's injuries, a "very large" subdural hemorrhage and two secondary hemorrhages, further demonstrates the parties were not on equal terms. See *Viramontes*, 2014 IL App (1st) 130075, ¶ 51. Thus, we conclude defense counsel was not ineffective for failing to request a second degree murder instruction where the evidence did not support the giving of such instructions. See *Martin*, 271 Ill. App. 3d at 357.

¶ 102 3. Failure to Request an Involuntary Manslaughter Jury Instruction

¶ 103 Lastly, defendant argues that his defense counsel was ineffective for failing to request an involuntary manslaughter jury instruction. "The basic difference between involuntary manslaughter and first degree murder is the mental state that accompanies the conduct resulting in the victim's death." *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). Thus, involuntary manslaughter requires a less culpable state of mind than first degree murder. *People v. Jones*, 219 Ill. 2d 1, 31 (2006). An individual commits first degree murder when he kills another without lawful justification and he intends or knows that his acts "will cause death" or knows that his acts "create a strong probability of death or great bodily harm." 720 ILCS 5/9-1(a)(1), (2) (West 2012). A person commits involuntary manslaughter if he performs acts that are "likely to cause death or great bodily harm to some individual, and he performs them recklessly." 720 ILCS 5/9-3(a) (West 2012). A person acts recklessly "when that person consciously disregards a

substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2012).

¶ 104 "An instruction is justified on a lesser offense where there is some evidence to support the giving of the instruction." *People v. Castillo*, 188 Ill. 2d 536, 540 (1999). It follows that where there is "some credible evidence in the record that would reduce the crime of first degree murder to involuntary manslaughter, an instruction should be given." *DiVincenzo*, 183 Ill. 2d at 249 (citing *People v. Foster*, 119 Ill. 2d 69, 87 (1987) and *People v. Ward*, 101 Ill. 2d 443, 451 (1984)). "[A] manslaughter instruction should not be given where the evidence shows that the homicide was murder, not manslaughter." *Sipp*, 378 Ill. App. 3d at 163. " '[A] defendant is not entitled to reduce first degree murder to [involuntary manslaughter] by a hidden mental state known only to him and unsupported by the facts.' " *Id.* at 164 (quoting *People v. Jackson*, 372 Ill. App. 3d 605, 614 (2007)).

¶ 105 A defendant's state of mind can rarely be established by direct evidence; however, it can be demonstrated by surrounding circumstances. Such circumstances include the character of the defendant's acts and the nature and seriousness of the victim's injuries. *People v. Williams*, 165 Ill. 2d 51, 64 (1995). In this case, defendant did not testify as to his mental state, thus, there is no direct evidence on the issue. Instead, defendant relies on the surrounding circumstances as demonstrated by testimony of the other witnesses. Although not dispositive, our supreme court has set forth certain factors that may suggest whether a defendant acted recklessly and whether an involuntary manslaughter instruction is appropriate. These include: "(1) the disparity in size and strength between the defendant and the victim; (2) the brutality and duration of the beating,

and the severity of the victim's injuries; and (3) whether a defendant used his bare fists or a weapon, such as a gun or a knife." (Internal citations omitted.) *DiVincenzo*, 183 Ill. 2d at 251. The court cautioned that "an involuntary manslaughter instruction is generally not warranted where the nature of the killing, shown by either multiple wounds or the victim's defenselessness, shows that defendant did not act recklessly." *Id.* "Whether an involuntary manslaughter instruction is warranted depends on the facts and circumstances of each case." *Id.*

¶ 106 Defendant argues defense counsel was ineffective for failing to request an involuntary manslaughter instruction where the evidence demonstrated he did not intentionally kill the victim. Defendant contends he acted recklessly as the evidence established: (1) the incident was brief; (2) defendant "used his body"; (3) defendant stomped on the victim only two or three times; and (4) the victim was able to walk away, lacked external injuries, and was intoxicated at the time of the incident.

¶ 107 Under the facts presented, defense counsel was not ineffective for failing to request an involuntary manslaughter instruction. First, defendant admitted in his brief that there was no evidence presented regarding the size disparity between him and the victim. There was, however, evidence regarding the strength of defendant, as he was observed by multiple witnesses "bear-hugging" the victim and throwing him into the side of a vehicle and then onto the ground. The victim, on the other hand, was intoxicated and ,when thrown to the ground, remained there. All of the eye-witnesses testified that the victim did not fight back. Second, although the incident was brief, the victim was brutally and severely beaten. Defendant was observed violently stomping the right side of the victim's head into the concrete. These stomps were so forceful they caused a "very large" subdural hemorrhage in the victim's brain. Moreover, at the time of the incident the victim was an alcoholic and had cirrhosis of the liver, a condition which

affected the ability of his blood to coagulate. It is well settled that a defendant "takes his victim as he finds him." *People v. Brackett*, 117 Ill. 2d 170, 178 (1987). Accordingly, although as few as two stomps were observed, the evidence demonstrated the forceful nature of defendant's action, in conjunction with the victim's underlying medical condition, weighs against the giving of an involuntary manslaughter instruction. Third, this was not an incident where the defendant attacked the victim with "bare fists," but instead stomped on the victim's head while wearing shoes. Dr. Goldschmidt testified that the fact defendant was wearing shoes when he stomped on the victim's head likely contributed to the lack of the victim's external injuries. Thus, the evidence did not demonstrate defendant acted recklessly.

¶ 108 Here, the State presented evidence that defendant acted deliberately and intentionally when he brutally stomped on the victim's head as he lay defenseless on the ground. See *People v. Castillo*, 2012 IL App (1st) 110668, ¶¶ 58, 63 (the defendant did not act recklessly where the evidence, in part, demonstrated the victim never tried to hit the defendant and was lying motionless on the ground while being kicked by defendant). There was no evidence defendant recklessly killed the victim. In the absence of any evidence of recklessness, defendant was not entitled to an involuntary manslaughter instruction. See *Viramontes*, 2014 IL App (1st) 130075, ¶ 65 (upholding the trial court's determination not to tender an involuntary manslaughter instruction where the evidence did not support that the defendant acted recklessly). Thus, defendant was not prejudiced by defense counsel's failure to request an involuntary manslaughter instruction, and his claim of ineffective assistance fails. See *Salas*, 2011 IL App (1st) 091880, ¶ 93 (the defendant was not provided ineffective assistance of counsel where no evidence was presented that the defendant acted recklessly); *People v. Minniefield*, 2014 IL App (1st) 130535, ¶ 87 (on collateral review, defense counsel was not ineffective for failing to request an

involuntary manslaughter instruction where the record lacked evidence supporting the defendant's claim he acted recklessly).

¶ 109 Having determined that defendant failed to satisfy the prejudice prong of the *Strickland* test, it is not necessary to consider the deficiency prong. See *Albanese*, 104 Ill. 2d at 527.

¶ 110 CONCLUSION

¶ 111 For the foregoing reasons, defense counsel did not provide ineffective assistance of counsel, and the judgment of the circuit court of Cook County is affirmed.

¶ 112 Affirmed.