

No. 1-14-0203

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 18209
	)	
DONALD SHAW,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Summary dismissal of defendant's *pro se* postconviction petition is affirmed. Defendant's ineffective-assistance-of-counsel argument based on counsel's failure to request an independent felonious purpose jury instruction or separate jury verdict forms, not raised in his *pro se* postconviction petition, is deemed forfeited and lacks merit.

¶ 2 Defendant Donald Shaw appeals from the summary dismissal of his *pro se* postconviction petition. On appeal, he contends the circuit court erred in dismissing the petition where it presented an arguable claim that his trial counsel was ineffective for failing to request a

jury instruction on the independent felonious purpose rule at his trial for felony murder, and his counsel on direct appeal was ineffective for failing to raise that issue on direct appeal. We affirm.

¶ 3 Defendant and codefendants Lance Edwards and Natari Gordon were charged by indictment with various felonies arising from a shooting incident in which Shakir Beckley was killed and Vernard Davis was wounded.

¶ 4 Defendant and Edwards were tried in simultaneous but severed jury trials, and both were found guilty of first-degree murder on a theory of felony murder. Defendant was sentenced to 22 years in prison. Defendant appealed. This court reversed defendant's conviction and remanded, finding defendant should have been granted a continuance to secure the attendance at trial of a defense witness. *People v. Shaw*, No. 1-05-3623 (2007) (unpublished order under Supreme Court rule 23).

¶ 5 Prior to retrial, the State file a motion *in limine* to admit gang evidence to explain the motive for the shooting. The motion was granted, and the gang evidence was admitted at defendant's second jury trial.

¶ 6 Upon retrial, the State proceeded on counts 3 and 5 of the indictment, the only counts remaining after the first trial. Count 3 charged defendants with felony murder of Shakir Beckley predicated on armed robbery; count 5 charged him with felony murder of Beckley predicated on aggravated battery with a firearm.

¶ 7 The trial evidence established that the fatal shooting of Shakir Beckley and the wounding of Vernard Davis resulted from two gang-related incidents. Witnesses testified that defendant, Vernard Davis (Vernard), and Mycal Davis (Mycal) were members of the Apache Stone gang. Lance Edwards was a longtime friend of defendant, but he was a member of the Vice Lords

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street gang. On April 10, 2002, defendant brought Edwards over to Mycal's place. A physical altercation ensued between defendant and Vernard because Vernard and Mycal were upset that defendant brought a rival gang member to a house where Apache Stones were socializing. Vernard and others felt that defendant was not being loyal to the Apache Stone gang. Vernard administered a beating to defendant who left, leaving behind his jacket, cell phone and keys. Subsequently, Vernard phoned defendant to set up a meeting so defendant could retrieve his personal possessions.

¶ 8 On the evening of April 13, defendant drove his car to that meeting accompanied by Edwards and two other men, Apache Stone Tavares Hunt and Natari Gordon. Hunt was armed with an AK-47 assault rifle; Gordon was also armed. Shakir Beckley, who was driving an SUV parked in the 1400 block of East 89th Street, had offered Vernard a ride. As Beckley, Vernard, and Terrill Evins (also an Apache Stones member) were walking toward the SUV, defendant, Edwards, and Hunt approached them. Hunt put the AK-47 rifle to Evins's head and told the three men to walk to the SUV. Hunt told Evins to empty his pockets and Evins gave up his money. Beckley's chain was taken from his neck. Natari Gordon, holding a pistol, opened a door of the SUV and ordered everyone to place their valuables on the seat. Edwards punched Vernard in the face and the two men had a "tussle," during which Vernard was pistol-whipped by Gordon and kicked by defendant. When Vernard attempt to run away, he was shot in the shoulder and stomach. The shots were fired by Hunt, and one of the shots struck Beckley in the neck, killing him. After Vernard was shot, he lay down on the ground and played dead. He saw defendant, Edwards, Gordon and Hunt leave in defendant's car.

¶ 9 Both in opening statement and in closing argument, the State portrayed the shooting incident of April 13 as an act of retribution against Vernard for the beating he administered to defendant on April 10. Beckley was portrayed as an innocent victim in the wrong place at the wrong time.

¶ 10 The jury returned a verdict finding defendant guilty of felony murder, and he was again sentenced to 22 years in prison.

¶ 11 On appeal, defendant raised only one contention, that he was denied a fair trial by the admission of gang evidence. This court rejected his claim of error and affirmed his conviction. *People v. Shaw*, 2012 IL App (1st) 101548-U.

¶ 12 Following disposition of his direct appeal after retrial, defendant filed a *pro se* petition for postconviction relief. His petition contended that he received ineffective assistance from his trial counsel, citing *Strickland v. Washington*, 466 U.S. 668 (1984) and *People v. Patterson*, 217 Ill. 2d 407, (2005). Defendant also asserted that appellate counsel in his second appeal was ineffective in failing to raise on appeal those instances of ineffective counsel. The ineffective assistance of trial counsel claim included the assertion that "[t]rial counsel failed to file a pre-trial motion to dismiss the charge of felony murder where the charge of felony murder is predicated on the charge of Aggravated Battery with a firearm upon the same victim (shakir Beckley [*sic*])." Defendant argued that petitioner was not charged in counts 3 or 5 with an offense against Vernard Davis, and that the only victim named in the indictment was Shakir Beckley. Defendant argued that trial counsel knew prior to the trial that the two felony murder counts (counts 3 and 5) could not stand because:

"the state cannot try [defendant] for the felony murder of Shakir Beckley, when petitioner is also charged with the underlying forcible felony that the felony murder of Shakir Beckley is predicated on (The Aggravated Battery with a Firearm of victim (Shakir Beckley). A conviction for felony murder is proper only if the predicate felony involves 'conduct with a felonious purpose other than the killing itself.' In other words, a felony murder conviction will not lie if the predicate felony consists of conduct that is inherent in the killing. People v. Morgan, 197 Ill. 2d 404, 758 N.E.2d 813 (2001)."

¶ 13 The circuit court summarily dismissed defendant's *pro se* petition as frivolous and patently without merit. The court rejected defendant's independent-felonious-purpose argument, ruling: "The fight between the groups of men and subsequent murder of the victim were not the same act. The predicate felony in this instance is distinct from the murder, and therefore the indictment for felony murder based on a predicate felony indictment for aggravated battery to the victim is not unlawful." The court also rejected defendant's claim that his appellate counsel was ineffective for failure to raise the issue of failure to file a pretrial motion to dismiss the indictment. Pursuant to the *Strickland* test, a defendant claiming ineffective assistance of counsel must prove both that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. The two-pronged *Strickland* test applies to claims of ineffective appellate counsel. *People v. Jones*, 219 Ill.2d 1, 23 (2006). Where a defendant claims that his appellate counsel's failure to raise an issue on appeal was objectively unreasonable and prejudiced him, defendant suffers no prejudice unless the underlying issue is meritorious. *Id.* Here, the circuit court concluded that defendant had failed to make the requisite

showing of ineffective trial counsel or appellate counsel under either the performance prong or the prejudice prong of *Strickland*.

¶ 14 In the instant appeal, defendant has abandoned his argument that trial counsel was ineffective for failing to file a pretrial motion to dismiss the two-count felony-murder indictment. Defendant has forfeited that claim where he has not properly raised it on appeal by providing argument and citation to relevant authority as prescribed by Supreme Court Rule 341 (eff. Feb. 6, 2013). *People v. Guest*, 166 Ill. 2d 381, 414 (1995). For the first time, he now raises the claim that his *pro se* post-conviction petition presented "an arguable claim that trial counsel was ineffective for not requesting both a jury instruction on the independent felonious purpose rule and separate verdict forms, such that appellate counsel was arguably ineffective for not raising this issue on direct appeal." We agree with the State that the issue defendant now presents in this appeal must be deemed forfeited where it was not raised in his *pro se* postconviction petition. See *People v. Jones*, 211 Ill. 2d 140, 149-50 (2004); *People v. Cathey*, 2012 IL 111746, ¶ 21.

¶ 15 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) permits collateral constitutional challenges to criminal convictions and sentences. *People v. LaPointe*, 227 Ill. 2d 39, 43 (2007). The Act provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be dismissed summarily as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). In *Jones*, 211 Ill. 2d 140, 149-50 (2004), the supreme court held that the defendant's claims of constitutional error which were not raised in her original postconviction petition were

forfeited on appeal from the circuit court's summary dismissal of the petition. We hold that the same result obtains in the instant appeal.

¶ 16 Defendant attempts to evade forfeiture of the issue on appeal by arguing that both the issue raised in his postconviction petition and the issue now advanced on appeal come under the umbrella of the independent felonious purpose rule. He claims that his "petition, at its core, alleges that trial counsel failed to successfully argue that the independent felonious purpose rule precluded his conviction for felony murder predicated on aggravated battery with a firearm." He then reaches the conclusion that, "[l]iberally construed, [defendant's] petition therefore presents a claim that trial counsel was ineffective for not obtaining a jury instruction on the independent felonious purpose rule and separate verdict forms."

¶ 17 We reject the argument that even the most liberal construction of defendant's *pro se* petition could equate a pretrial challenge to an allegedly defective indictment with a challenge to the adequacy of jury instructions given after proofs were closed. The issue framed by defendant's *pro se* petition was that the indictment counts, which did not name a separate aggravated battery victim, must be read as assuming that the named victim of the felony murder, Shakir Beckley, was also the victim of the aggravated battery with a firearm, and that such a reading constituted an erroneous felony murder charge. The issue now raised on appeal, pertaining to trial counsel's failure to submit a jury instruction and verdict forms, involves totally separate considerations.

¶ 18 A reading of defendant's *pro se* petition reveals no intention on his part to raise any issue with respect to the jury instructions and verdict forms. On this point, we find controlling the holding in *People v. Mars*, 2012 IL App (2d) 110695. In *Mars*, defendant was found guilty of felony murder, and his conviction was affirmed on direct appeal. Defendant subsequently filed a

*pro se* postconviction petition alleging, *inter alia*, that his appellate counsel was ineffective by failing to argue that the murder victim's death was not causally related to the predicate felony. The circuit court dismissed the petition.

¶ 19 Defendant appealed, arguing that his appellate counsel had been ineffective not only for failing to challenge the State's causation evidence, but also for failing to argue that the indictment should have been dismissed because it charged offenses subject to compulsory joinder with an earlier indictment and violated the defendant's right to a speedy trial. The *Mars* court addressed the causation issue at length and concluded that the defendant failed to set forth an arguable basis under *Strickland's* first prong that trial counsel's performance was deficient. However, the appellate court declined to address the remaining issues, because they had not been included in the postconviction petition and were presented for the first time on appeal. Noting that *pro se* petitions must be given a liberal construction, the appellate court observed: "However low the threshold [for survival], the petition must 'clearly set forth' the respects in which the petitioner's constitutional rights were violated. [Citation.] This means that the pleading must bear some relationship to the issue raised on appeal. Liberal construction does not mean that we distort reality." *Id.* ¶ 32. Viewing the defendant's *pro se* petition in context, the appellate court could not conclude, no matter how liberally the issue of defective indictment was construed, that the defendant actually raised a claim relating to appellate counsel's failure on direct appeal to raise issues of compulsory joinder and speedy trial.

¶ 20 Moreover, in the present case, we observe that defendant's *pro se* petition, like the *pro se* petition in *Mars*, is well-crafted, organized, and coherent, and it accurately cites applicable case law. Defendant has appended relevant portions of the trial transcript. Here, as in *Mars*, "we do

not have to comb through a morass of irrelevancies to try to figure out what defendant meant to raise as constitutional violations. He was aware of legal concepts \*\*\* and he was capable of articulating the type of relief he thought he was entitled to, such as reversal on appeal." *Id.* ¶ 33.

¶ 21 Here, the postconviction petition as drafted by defendant was based solely on the allegation of the insufficiency of the indictment and defense counsel's failure to file a motion to dismiss that indictment, together with appellate counsel's failure to raise that specific issue on direct appeal. The petition made no reference to the ineffective counsel claim urged in the instant appeal and stated no facts in support of that claim. We are reluctant to hold that defendant's trial counsel was ineffective for failing to take an action that defendant's postconviction petition never alleged should have been taken. There is nothing in the record which would excuse defendant's failure to raise the issue now presented, and defendant does not suggest any reason why this issue was not raised in his postconviction petition.

¶ 22 Moreover, even if we were to consider the merits of defendant's claim, he would fare no better. We do not find that a separate jury instruction on independent felonious purpose was necessary in this case. Taken as a whole, the instructions given instructed the jury that it was required to find an independent felonious purpose for the offenses of aggravated battery with a firearm or armed robbery. Specifically, the jury was instructed that "[a] person commits the offense of first degree murder when he kills an individual if, in performing the acts which cause the death, he is committing the offense of aggravated battery with a firearm or armed robbery." Illinois Pattern Jury Instruction, Criminal, No. 7.01 (4th ed. 2000). The jury was also given Illinois Pattern Jury Instruction, Criminal, No. 11.23 (4th ed. 2000), defining aggravated battery with a firearm, and Illinois Pattern Jury Instruction, Criminal, No. 14.05 (4th ed. 2000), defining

armed robbery. In addition, the jury received Illinois Pattern Jury Instruction, Criminal, No. 7.02 (modified) (4th ed. 2000), which stated:

"To sustain the charge of first degree murder, the State must prove the following propositions:

First: That the defendant, or one for whose conduct he is legally responsible, performed the acts which caused the death of Shakir Beckley; and

Second: That when the defendant, or one for whose conduct he is legally responsible, did so, he was committing the offense of aggravated battery with a firearm to Vernard Davis or armed robbery.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

¶ 23 The jury was further instructed:

"To sustain the charge of first degree murder, it is not necessary for the State to show that it was or may have been the original intent of the defendant or one for whose conduct he is legally responsible to kill the deceased, Shakir Beckley.

It is sufficient if the jury believes from the evidence beyond a reasonable doubt that the defendant and one for whose conduct he is legally responsible combined to do an unlawful act, such as to commit armed robbery or aggravated battery with a firearm, and that the deceased was killed by one of the parties committing that unlawful act." Illinois Pattern Jury Instruction, Criminal, No. 5.03A.

¶ 24 Defendant did not object to the given instructions. The defense did propose two jury instructions: Illinois Pattern Jury Instructions, Criminal, No. 702X (4th ed. 2000) and a non-IPI instruction on mere presence at the scene. The court denied the request for the proposed instructions, neither of which is relevant to the issue on appeal. Defendant does not suggest in this appeal what jury instruction his trial counsel should have offered on the independent felonious purpose rule, and we note that there is no IPI instruction for it.

¶ 25 It is the task of a reviewing court to determine whether the jury instructions, when considered together, fully and fairly announce the law applicable to the theories of the State and the defense. *People v. Viramontes*, 2014 IL App (1st) 130075, ¶ 37, citing *People v. Mohr*, 228 Ill. 2d 53, 65 (2000). Here, the instructions given by the court, when read together, adequately apprised the jury that it was required to find that defendant, or one for whose conduct he was legally responsible, acted with the felonious purpose of either aggravated battery with a firearm to Vernard Davis or armed robbery that was independent of a felonious purpose for murder. Therefore, a separate jury instruction on independent felonious purpose was unnecessary.

¶ 26 The instructions given to the jury also defeat defendant's claim that defense counsel should have requested separate verdict forms. Defendant claims that if a separate verdict form as to each predicate felony had been given, the jury "might have not been unanimous on either count and acquitted [defendant] of felony murder." Without separate verdict forms, defendant argues, "the State was allowed to pursue a strategy that evidently rested on the lack of a need for juror unanimity on the predicate felonies." Defendant cites no persuasive authority to support his claim that when multiple predicate felonies are alleged, juror unanimity is required on the predicate felonies. Here, the jury was instructed to find whether defendant and Hunt combined

"to commit armed robbery or aggravated battery with a firearm, and that the deceased was killed by one of the parties committing that unlawful act." The trial evidence established beyond a reasonable doubt that defendant was legally responsible for Hunt's conduct, regardless of which predicate offenses Hunt committed. The jurors were not instructed, and were not required to be instructed, that they must be unanimous on either of the two predicate felonies. Defendant also erroneously claims that the State "did not even have to convince all twelve jurors that [defendant] committed either of the underlying felonies." This is incorrect. The jury was properly instructed that it *was* required to find the commission of *either* of the predicate felonies.

¶ 27 Defendant also contends that a separate verdict form was required for the predicate felony of armed robbery because the evidence was "close regarding whether [defendant] acted to plan, promote or facilitate an armed robbery, or whether he was merely present around the time when others committed an armed robbery." In making this argument, defendant ignores the fact that he brought Hunt and Gordon with him to 89th street to promote or facilitate a crime against Vernard and, consequently, was legally responsible for Hunt and Gordon's conduct in committing both predicate felonies. *People v. Fernandez*, 2014 IL 115527, ¶ 21. Moreover, during the armed robbery, when Hunt pointed his AK-47 rifle at Evins, defendant instructed Hunt that Evins was "cool" and, consequently, Hunt refrained from robbing Evins. Clearly, defendant aided and abetted Hunt and Gordon in the commission of the armed robbery. Even if the armed robbery was not part of defendant's plan until he arrived at 89th street, the evidence showed that defendant was legally responsible for their conduct. *Id.*

¶ 28 Trial counsel's performance was not deficient where a request for separate predicate felony verdict forms was unnecessary. Moreover, defendant is unable to show he was prejudiced

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where he has failed to demonstrate a reasonable probability that the outcome of his trial would have been different had trial counsel requested separate verdict forms.

¶ 29 As defendant has failed to show that his allegation of ineffective trial counsel is meritorious and that we would have found as such had the allegation been raised in his direct appeal, he has also failed to establish that appellate counsel was deficient. *People v. Garcia*, 405 Ill. App. 3d 608, 620 (2010).

¶ 30 Accordingly, for the reasons set forth above, we affirm the trial court's summary dismissal of defendant's *pro se* postconviction petition.

¶ 31 Affirmed.