2017 IL App (1st) 143795-U

FOURTH DIVISION
March 23, 2017

No. 1-14-3795

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 5304
	)	
TERRENCE SPARKS,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing defendant's postconviction petition at the second stage of proceedings where he made a substantial showing of actual innocence and ineffective assistance of trial counsel, but defendant failed to make a substantial showing of his claim of a *Brady* violation and this claim was properly dismissed by the trial court.

¶ 2 Defendant Terrence Sparks appeals from the trial court's dismissal of his postconviction petition at the second stage of postconviction proceedings, arguing that he made a substantial showing of actual innocence and ineffective assistance of trial and appellate counsel. Specifically, defendant asserts that (1) he properly alleged a claim of actual innocence and a

violation of *Brady v. Maryland*, 373 U.S. 83 (1963), where he attached the affidavit of an eyewitness who supported defendant's trial testimony of self-defense; (2) trial counsel was ineffective for failing to request a jury instruction stating that a person is justified in the use of deadly force to prevent the commission of a forcible felony and appellate counsel was ineffective for failing to raise the issue on direct appeal; and (3) trial counsel was ineffective for advising defendant to decline an instruction on second degree murder without advising defendant of the disparate sentencing ranges for first degree murder and second degree murder.

¶ 3 Following a jury trial, defendant was found guilty of first degree murder in the January 2002 homicide of Maurice Fowler. Defendant was subsequently sentenced 35 years for first degree murder with a 25-year enhancement for use of a firearm in the commission of the crime, for a total of 60 years in prison. As this is defendant's third appeal, we will discuss only those facts relevant to defendant's postconviction petition. A more detailed discussion of the evidence presented at defendant's trial can be found in his direct appeal. *People v. Sparks*, No. 1-04-3288 (December 11, 2006) (unpublished order under Supreme Court Rule 23).

¶ 4 The following evidence was presented at defendant's jury trial.

> "Israel Medina testified at trial that in the early hours of January 26, 2002, he and Fowler were eating food on Medina's porch, located at 1406 North Kildare in Chicago. While they were there, Medina heard a car pull up and a door slam across the street, near a big apartment building located at 4258 West Hirsch.
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> Medina and Fowler walked to the grocery store at the corner of Hirsch and Kildare and looked to see who was yelling, but they did not see anyone. They turned and started to walk back

to Medina's house. When they reached the front gate, they heard yelling again. They turned and saw the same person yelling across the street. The person was yelling, "What's up?" in their direction. Fowler called out, "Who is that?" The person repeated, "Who is that?" back to Fowler. At that point, Fowler crossed the street and Medina followed.

Medina stated that they crossed the street because they thought the person yelling might be one of their friends. When they crossed the street, Medina got within two feet of this person, whom he identified as defendant. Medina said that defendant was wearing a black pea coat, dark gray pants, and a gray sweatband with a Nike symbol on it.

When they got close to defendant, defendant started to say, "What's up?" again. Medina realized he did not know defendant and had never seen him before that night. Medina asked Fowler if he knew defendant and Fowler stated that he did not. Medina told defendant, "Man, my fault, you know. I thought we knew you." Medina then started to step back from defendant. Medina then tripped on a broken piece of sidewalk and fell backwards. At that moment, defendant pulled a gun out of his coat pocket and fired.

Neither Medina nor Fowler was hit by the first shot. Medina got up and ran to hide behind a car. Defendant fired a second shot as Medina ran to hide. He turned back and saw

Fowler standing with his hands up in the air. Defendant started to walk toward Fowler and Fowler began to back up. Fowler then tripped over a small chain link fence and fell onto his back. Medina saw defendant hit Fowler in the face with the gun. Fowler had his hands up to block defendant. Defendant then stood up and fired a shot into Fowler. Medina saw Fowler's hands fall to his sides. He saw defendant fire two more shots into Fowler. Defendant looked around and then walked into the apartment building.

Defendant, testifying on his own behalf, described different circumstances. He arrived at 4258 West Hirsch at 4 a.m. He parked the car in front of the building and started to walk toward the building door. He then noticed two men coming toward him.

Defendant said he did not know the two men who approached him. He stated that one of the men was wearing a black hooded sweatshirt and had his hands in the pocket. That man ordered defendant to take his hands out of his pocket. The other man was just standing next to him. The man in the sweatshirt then demanded that defendant give him his keys. Defendant did not know if he meant house keys or car keys.

Defendant then saw that the man with the hooded sweatshirt had a gun. Defendant rushed him. The man tripped over a chain. Both men fell over and start fighting for the gun.

Defendant did not pay attention to the second man. Defendant said both of his hands were on the gun. Defendant does not know how many times the gun went off. After the gunshots stopped, defendant dropped the gun and ran to his apartment.

On cross-examination, defendant said he did not remember everything that happened. He did not know if the other man was shot after the first gunshot was fired. Defendant stated that the gunshots were all fired in rapid succession. Defendant admitted that he did not call the police after the shooting to report the attempted robbery and struggle. Defendant said he left the gun at the scene when he left.

Dr. Edmond Donoghue testified that he is the chief medical examiner for Cook County. He stated that he did not perform the autopsy on Fowler, but he read and is familiar with the case file. The medical examiner who performed the autopsy was no longer employed with Cook County.

There were four gunshot wounds to Fowler. The first wound was an entrance wound in the left lower abdomen involving the small intestine and the inferior vena cava, which is the largest vein in the body, and the left iliac artery, which is a large blood vessel. A deformed, medium-caliber copper bullet was recovered from the muscle of the left lower back, just above the left buttock. This wound caused massive bleeding and coursed from front to

> back and slightly downward. The second wound was a gunshot entrance wound to the left lower back which exited the body on the left upper quadrant of the abdomen. The third wound entered the back of the hand and exited the palm. The final gunshot wound was through the base of the left thumb.
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> There was no evidence of close-range firing for any of these wounds. Close-range firing is less than 18 inches away. The victim's stomach was empty. The toxicological tests showed no signs of drugs, but the victim's blood-alcohol level was just below twice the legal limit. His wounds were consistent with someone on the ground with his hands in the air and being shot from above. It is possible that one of the bullets traversed the hands and entered the body, making it consistent with three gunshots. There was nothing in the report indicating any bruises or lacerations on the head, but it is possible that an individual could be struck right before he died and there would be no bruises. Dr. Donoghue stated that the cause of death was multiple gunshot wounds and that manner of death was a homicide." *People v. Sparks*, 393 Ill. App. 3d 878, 879-81 (2009).

¶ 5 On direct appeal, defendant argued that (1) the trial court improperly allowed testimony regarding Israel Medina's prior consistent statements to the police, which served to bolster Medina's credibility and denied defendant a fair and impartial trial; and (2) the State engaged in prosecutorial misconduct during closing and rebuttal arguments by implying that defendant and

his trial counsel fabricated his defense and commenting on defendant's invocation of his right to remain silent. This court affirmed defendant's conviction and sentence. See *Sparks*, No. 1-04-3288 (December 11, 2006) (unpublished order under Supreme Court Rule 23).

¶ 6 In September 2007, defendant mailed his *pro se* postconviction petition to the circuit court, alleging multiple claims including a violation of his confrontation rights when Dr. Donoghue testified about Fowler's autopsy report that was prepared by a different medical examiner, and his trial and appellate counsel were ineffective for failing to object to this violation; actual innocence based on an affidavit from an uninvolved occurrence witness stating that she witnessed the shooting and saw Medina and Fowler attempt to rob defendant; and the State improperly withheld evidence of defendant's innocence when it failed to disclose the witness who stated she spoke to police the night of the shooting. In November 2007, the trial court dismissed defendant's petition at the first stage of postconviction proceedings. The court also assessed defendant $105 in filing fees and court costs.

¶ 7 Defendant appealed, and this court reversed the dismissal of his postconviction petition at the first stage, finding that defendant presented the gist of a meritorious claim of actual innocence. We did not reach the remaining claims because partial summary dismissals are not permitted under the first stage of postconviction proceedings. *Sparks*, 393 Ill. App. 3d at 886-87. We also vacated the assessment of filing fees and court costs. *Id.* at 887. We remanded for further proceedings under the Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2006)).

¶ 8 On remand, defendant was appointed an assistant public defender, but subsequently a private attorney substituted. In April 2011, the State filed a motion to dismiss defendant's

postconviction petition, arguing that the witness's affidavit did not constitute new evidence because it was cumulative to defendant's testimony.

¶ 9 Defendant's attorney was experiencing health problems and retired in 2013. An assistant public defender was appointed to represent defendant. In July 2014, defendant filed a supplemental postconviction petition asserting two additional claims: (1) trial counsel was ineffective for advising defendant to forego a second degree murder instruction without informing defendant of the disparate sentencing ranges for first degree and second degree murder; and (2) trial counsel was ineffective for failing to request a jury instruction regarding the use of deadly force to prevent the commission of a forcible felony and appellate counsel was ineffective for failing to raise this issue on direct appeal. An affidavit from defendant was attached to the supplemental petition, stating that his trial counsel failed to inform him that second degree murder carried a sentencing range of 4 to 20 years, with day-for-day credit. Defendant stated that if he knew of the lower sentence for second degree, then he would have requested the instruction on second degree murder.

¶ 10 The State filed an amended motion to dismiss to respond to the new claims in the supplemental petition. The State asserted that the claims of ineffective assistance were *res judicata* and defendant failed to make a showing that his trial and appellate counsel were ineffective. After a hearing on the motion to dismiss, the trial court granted the State's motion and dismissed defendant's postconviction petition. The court made the following findings.

> "I will indicate the affidavit filed really doesn't help this case. As a matter of fact it kind of nibbles away at the self-defense theory and the trial strategy used at trial was self-defense. In fact it didn't work doesn't serve well to the defendant in this case. He'd

> like to have a different approach towards self-defense or second degree in this particular matter, but that was a strategy adopted at trial. I don't find it ineffective."

¶ 11 This appeal followed.

¶ 12 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2012)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2012); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Id*. at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005).

¶ 13 At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage. Counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2012)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West

2012)). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. See *Coleman*, 183 Ill. 2d at 381. If no such showing is made, the petition is dismissed. "At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If, however, a substantial showing of a constitutional violation is set forth, then the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2012).

¶ 14 We previously discussed the affidavit of Kashandra Daniels, which was filed with defendant's *pro se* postconviction petition, in defendant's appeal from his first stage dismissal.

> "In an affidavit attached to defendant's *pro se* supplemental postconviction petition, Kashandra Daniels stated that on January 25, 2002, she lived at 4258 West Hirsch in Chicago. She was dropped off at 3:30 a.m. by her boyfriend. She was standing in the foyer of the building when she noticed a man she now knows as defendant walking toward the outer door of the complex. Before defendant reached the door, two men walked up to defendant and pulled a gun on defendant. While Daniels did not know defendant at the time, she did know Fowler and 'his side-kick Israel.' She stated that '[b]oth of them were well known to be worth watching, since [Fowler] was not very bright and Israel did all of the thinking for him.' She saw Fowler pull the gun out and then observed

defendant ‘attack’ Fowler while Medina ‘started backing away from the tussle.’ She heard a shot, and then what sounded like two or three more shots. Daniels then ran to the inner door of her building and went to her apartment.

The next thing Daniels knew ‘there were police all over the place asking questions.’ Daniels stated that she told the officer who was in front of her building what she witnessed ‘about an hour or so after the shooting.’ She said she told the officer that the man had a girlfriend that lived in the building and she had seen him coming and going in the building for several months, but did not know his name. The officer took her name and told her to wait and speak with a plainclothes detective. She saw Medina speaking with a plainclothes officer. After waiting for about an hour, Daniels spoke with a white detective ‘who had stripe [*sic*] and everyone called him Sarge.’ He took her name and said he would contact her again. Daniels stated that Medina later told her that he saw her come home and knew that she had seen what happened because he looked right at her in the foyer between the two doors. After the police left, Medina told Daniels that she ‘had better keep [her] mouth shut.’ Daniels said she did, but when she heard Medina ‘got locked up,’ she told defendant's girlfriend what she saw. Defendant's girlfriend asked her to write it down and sign it with a notary. Daniels concluded by stating that ‘I know what I saw and I

> swear this is the truth. I could not come forth sooner because I knew Israel would try to hurt me.' " *Sparks*, 393 Ill. App. 3d at 884-85.

¶ 15 Defendant argues that he has made a substantial showing of actual innocence because Daniels's affidavit constituted new, noncumulative evidence of his innocence, and the trial court erred in dismissing his petition at the second stage of proceedings. The State responds that Daniels's affidavit does not constitute newly discovered evidence because if Daniels was in the foyer of the building, as she stated in her affidavit, then it would have been "impossible" for defendant not to have seen her and the existence of another eyewitness was information that defendant could have given his attorney. The State also dismisses Daniels's statement that she did not come forth sooner because Medina threatened her as "ridiculous" since Daniels also said she initially spoke with police officers immediately after the shooting. The State maintains that Daniels's testimony would not have affected the outcome of the trial.

¶ 16 The State raised these same arguments in defendant's previous appeal, which this court rejected.

> "In *People v. Washington*, 171 Ill. 2d 475, 489 (1996), the supreme court held that a postconviction petitioner may pursue a claim of actual innocence based on newly discovered evidence. To succeed under that theory, the supporting evidence must be new, material, and noncumulative, and it must be of such conclusive character that it would probably change the result on retrial. *Id.* Newly discovered evidence must be evidence that was not available at defendant's trial and that the defendant could not have

discovered sooner through diligence. *Barrow*, 195 Ill. 2d at 541. 'Claiming evidence is cumulative involves a determination that such evidence adds nothing to what is already before the jury.' *People v. Molstad*, 101 Ill. 2d 128, 135 (1984).

The State argues that it is impossible for defendant to show that Daniels' testimony was newly discovered evidence 'since the fact that there was another eyewitness to this incident certainly was information that defendant could have supplied to his lawyer.' The State attempts to refute Daniels' story by making a series of credibility determinations. The State speculates that defendant saw Daniels, as it was 'impossible' for him not to have seen her. The State also points out that Daniels' story does not 'square' with the evidence at trial because Medina never mentioned seeing her during the crime. This last argument is unpersuasive because Medina would have no logical reason to identify Daniels as a witness if her story could have implicated Medina as an offender.

The State also asserts that Daniels' testimony would have been cumulative because defendant testified that he acted in self-defense when Fowler and Medina initiated the attack. We find this reasoning by the State to be flawed because Medina and defendant presented conflicting version[s] about the incident and Daniels was an uninvolved witness that supported defendant's testimony. The State also contends that Daniels' testimony would not have affected

> the outcome. We disagree. At trial, the jury was presented with two different explanations of the incident from Medina and defendant with each one saying the other side was the aggressor. If Daniels' testimony had been consistent with defendant's version of events, then it is conceivable that the jury could have acquitted defendant.
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> ***
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> After considering the requirements placed on defendant at the first stage of the postconviction proceedings, we conclude that defendant's legal theory is not indisputably meritless as to lack an arguable basis in law. Defendant has presented some evidence to support a legal theory of actual innocence based on newly discovered evidence. It is at least arguable that Daniels' affidavit of her witnessing the incident is new, material, noncumulative and could have changed the result of defendant's trial. Accordingly, we find that defendant has sufficiently alleged a claim of actual innocence that is arguable on its merits. However, we make no finding as to whether defendant's claim merits a third stage evidentiary hearing." *Sparks*, 393 Ill. App. 3d at 885-87.

¶ 17 While the question before us in the prior appeal did not require us to determine whether defendant's claim of actual innocence merits an evidentiary hearing, that is precisely the question before us at this time. "Although a post-conviction petitioner is not entitled to an evidentiary hearing as a matter of right, this court has repeatedly stressed that a hearing is required whenever the petitioner makes a substantial showing of a violation of constitutional rights." *Coleman*, 183

Ill. 2d at 381. "To accomplish this, the allegations in the petition must be supported by the record in the case or by its accompanying affidavits. [Citation.] Nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act." *Id.* "[T]he dismissal of a post-conviction petition is warranted only when the petition's allegations of fact—liberally construed in favor of the petitioner and in light of the original trial record—fail to make a substantial showing of imprisonment in violation of the state or federal constitution." *Id.* at 382. Moreover, "the Act contemplates that factual and credibility determinations will be made at the evidentiary stage of the post-conviction proceeding, and not at the dismissal stage," (*Id.* at 390-91) and we will presume the truth in Daniels's affidavit.

¶ 18 "The due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence." *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). " 'Procedurally, such claims should be resolved as any other brought under the Act.' " *Id.* (quoting *Washington*, 171 Ill. 2d at 489). "Substantively, the evidence in support of the claim must be newly discovered; material and not merely cumulative; and 'of such conclusive character that it would probably change the result on retrial.' " *Id.* (quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)).

¶ 19 Taking the facts as alleged in defendant's petition and Daniels's affidavit as true, Daniels presence in the foyer of the apartment building as a witness to the shooting is newly discovered. "Newly discovered evidence" is defined as "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence." *Ortiz*, 235 Ill. 2d at 334. We reject the State's assertion that it was "impossible" for defendant not to have seen Daniels, as there was no reference to Daniels prior to her affidavit. The State's assertion engages in a credibility determination which is inappropriate at this stage. Daniels stated that she did not

come forward earlier because she was afraid of Medina. Therefore, defendant could not have discovered Daniels's proposed testimony earlier.

¶ 20 Next, we consider whether Daniels's affidavit is material and noncumulative. We previously concluded in defendant's prior appeal that Daniels's proposed testimony is not cumulative of defendant's own testimony, and we reaffirm that position at this time. The testimony at trial presented a question to the jury of whether defendant was the aggressor or if Medina and Fowler were the aggressors. The testimony of a disinterested eyewitness that Medina and Fowler confronted defendant with a gun would be material evidence and noncumulative to defendant's own testimony. We are unpersuaded by the State's assertion that Daniels did not witness the entire incident. Daniels offers support for defendant's theory of the case, and we will not assess credibility at this time. Daniels's testimony provided corroboration for defendant's claim of self-defense.

¶ 21 Finally, we find that, taking Daniels's affidavit as true, defendant has made a substantial showing that this evidence would likely change the outcome on retrial. "New evidence need not be completely dispositive of an issue to be likely to change the result upon retrial. It need only be conclusive enough to probably change the result upon retrial." *People v. Davis*, 2012 IL App (4th) 110305, ¶ 62; see also *People v. Coleman*, 2013 IL 113307, ¶ 97. Again, we note that key question before the jury was whether defendant acted in self-defense. The testimony of an uninvolved eyewitness supporting defendant's claim of self-defense is conclusive enough to probably change the result upon retrial.

¶ 22 For these reasons, we conclude that defendant has made a substantial showing of actual innocence based upon the newly discovered evidence of Daniels's proposed testimony and we reverse the trial court's dismissal of this claim and remand for a third stage evidentiary hearing.

¶ 23 Next, defendant contends that his postconviction petition made a substantial showing that the State failed to disclose exculpatory evidence, specifically Daniels as an occurrence witness, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

¶ 24 The United States Supreme Court held in *Brady* that the prosecution violates an accused's constitutional right to due process by failing to disclose evidence that is both: (1) favorable to the accused; and (2) material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); see also *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). The Illinois Supreme Court found:

> "This rule encompasses evidence known to police investigators, but not to the prosecutor. To comply with *Brady*, the prosecutor has a duty to learn of favorable evidence known to other government actors, including the police. [Citation.] The Supreme Court has, therefore, noted the special role played by the American prosecutor in the search for truth in criminal trials. [Citation.] The prosecutor's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. [Citation.]" (Internal quotation marks omitted.) *Beaman*, 229 Ill. 2d at 73.

¶ 25 "A *Brady* claim requires a showing that: (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either wilfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *Id.* at 73-74. "For the purpose of deciding whether to grant an evidentiary hearing on defendant's *Brady* claims, we accept the well-pleaded facts in his post-conviction petition and its accompanying affidavits as true." *People v. Hobley*, 182 Ill. 2d 404, 429 (1998).

¶ 26 Here, the basis for defendant's *Brady* claim is Daniels's affidavit, in which she stated that she spoke to two police officers the night of the shooting. She did not know their names, but indicated that one was called "Sarge," leading her to believe he was a sergeant. After being threatened by Medina, Daniels did not continue any conversations with the police investigation after that night. Because we have already concluded that Daniels's proposed testimony was material and so conclusive that the result would probably change on retrial, the only question on this claim is whether the State wilfully or inadvertently failed to disclose Daniels because the evidence was in its constructive possession. Defendant has not suggested any wilful action by the State, leaving the question as whether the State inadvertently failed to disclose Daniels. However, even if we take Daniels's statements that she spoke with police as true, there is not sufficient evidence to show a *Brady* violation by the State. Daniels did not name either officer she spoke with the night of the shooting, nor provide any physical description. It is insufficient to impute knowledge of Daniels as a witness without any correlation from her statements to the police or prosecutor. We conclude that defendant has not made a substantial showing of a *Brady* violation and we affirm the dismissal of this claim in defendant's postconviction petition.

¶ 27 Defendant next raises multiple claims of ineffective assistance of trial and appellate counsel. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Id.* at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v.*

Edwards, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Id.* at 697.

¶ 28 A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced defendant. *Rogers*, 197 Ill. 2d at 223. Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). Thus, the inquiry as to prejudice requires that the reviewing court examine the merits of the underlying issue, for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal. *Id*. Appellate counsel's choices concerning which issues to pursue are entitled to substantial deference. *Rogers*, 197 Ill. 2d at 223.

¶ 29 Defendant first asserts that his postconviction petition made a substantial showing that his trial counsel was ineffective for failing to request a jury instruction which stated that a person is justified in the use of deadly force to prevent the commission of a forcible felony, and appellate counsel was ineffective for failing to raise this claim on direct appeal.

¶ 30 "A defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence ***." *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997). "Very slight evidence upon a given theory of a case will justify the giving of an

instruction." *Id.* "A theory of self-defense may properly be raised even if a defendant's own testimony is inconsistent with that theory." *People v. Cacini*, 2015 IL App (1st) 130135, ¶ 45. "Nevertheless, '[the defendant] had a right *** to present as many defenses as he had or thought he had, and this is true if he offered conflicting defenses for the express purpose of confusing the jury.' Without approving of the defendant's methods or motives, this court found no error in submitting instructions on inconsistent defenses to the jury." *People v. Everette*, 141 Ill. 2d 147, 155-56 (1990) (quoting *People v. Jersky*, 377 Ill. 241, 267 (1941)). Nevertheless, "[i]t is well settled in Illinois that counsel's choice of jury instructions, and the decision to rely on one theory of defense to the exclusion of others, is a matter of trial strategy." *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007). "Accordingly, counsel's decision as to which jury instruction to tender can support a claim of ineffective assistance of counsel only if that choice is objectively unreasonable." *Id.*

¶ 31 Illinois Pattern Jury Instruction (IPI) 24-25.06 states:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend [(himself) (another)] against the imminent use of unlawful force.
>
> [However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent [(imminent death or great bodily harm to [(himself) (another)]) (the commission of ____)].]" Illinois Pattern Jury Instructions,

Criminal, No. 24-25.06 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 24-25.06).

¶ 32 The committee note states: "When applicable, insert in the blank the forcible felony." Committee Note to IPI Criminal 4th No. 24-25.06. Both armed robbery and aggravated battery are forcible felonies. See 720 ILCS 5/2-8 (West 2012).

¶ 33 The jury received part of IPI 24-25.06, as it related to the use of force to prevent imminent death or great bodily harm to defendant. Trial counsel did not request IPI 24-25.06 be given as it related to prevent the commission of a forcible felony, and the trial court did not give this portion of the instruction. Defendant's post-trial attorney alleged in a supplemental motion for a new trial that the trial court erred in failing to instruct the jury that defendant was justified in the use of force to prevent to the commission of an aggravated battery or other forcible felony, citing IPI 24-25.06, and that trial counsel was ineffective for failing to request this instruction. The issue was not raised on direct appeal.

¶ 34 As we have discussed, the evidence at trial consisted of conflicting testimony as to who was the aggressor. Medina testified that defendant called out to Fowler and Medina, and when they approached, defendant pulled a gun and began firing with no justification. In contrast, defendant testified that he parked his car and was walking into the apartment building of his girlfriend when approached by Fowler and Medina. Fowler pulled a gun from his sweatshirt pocket and demanded defendant's keys. Defendant then "attacked" Fowler and the gun fired multiple times during the struggle.

¶ 35 The State maintains that the jury instruction relating to preventing the commission of a forcible felony would have been "superfluous" because if the jury believed defendant's

testimony, then they would have believed he acted in self-defense. Thus, according to the State, defendant cannot show prejudice for the failure to request this instruction. We disagree.

¶ 36 Defendant had the right to instruct the jury on multiple theories of his defense, including whether defendant could use deadly force if he feared death or great bodily harm as well as to resist a forcible felony. The giving of the forcible felony instruction would have presented a valid alternative theory and was not superfluous. While the choice of jury instructions is generally a matter of trial strategy, given the facts of this case and the defense of self-defense, we find that defendant has made a substantial showing that it was objectively unreasonable for his trial counsel to fail to request the giving of IPI 24-25.06 as it related to the commission of a forcible felony when the evidence presented supported the instruction. Additionally, given the nature of the evidence presented, with conflicting accounts of the shooting, defendant has made a substantial showing that he was prejudiced by his attorney's failure to request this jury instruction informing the jury of another basis for self-defense, such that was a reasonable probability that the results of the trial would have been different if the instruction had been given.

¶ 37 Likewise, we find that defendant has made a substantial showing that appellate counsel was ineffective for failing to raise the issue. Jury instructions were apparent in the record on direct appeal, as well as post-trial counsel's motion for a new trial raising an allegation of ineffective assistance of trial counsel for failing to request IPI 24-25.06. As we have discussed, the evidence supported this instruction. While we recognize that appellate counsel is not required to raise every issue on appeal, the closely balanced nature of the case along with the record support makes a substantial showing that counsel was objectively unreasonable for failing to raise this preserved issue on direct appeal. Further, based on the facts of this case, defendant has

made a substantial showing that there was a reasonable probability that the results of his direct appeal would have been different, and he would have received a new trial. Therefore, we reverse the dismissal of this claim of ineffective assistance of trial and appellate counsel and remand for third stage evidentiary hearing.

¶ 38 Defendant also contends that his trial counsel was ineffective for failing to inform him about the disparate sentencing ranges for first degree murder and second degree murder when advising defendant to decline a jury instruction for second degree murder. Defendant's motion for a new trial included this claim, but it was not raised on a direct appeal.

¶ 39 Defendant has not asserted ineffective assistance of appellate counsel, but attached his own affidavit detailing the alleged failure of his trial counsel to apprise him of the disparate sentencing ranges. In his affidavit attached to his supplemental postconviction petition, defendant stated that his trial counsel "never discussed with [him] the possibility of a jury instruction on second degree murder. He did not discuss second degree murder at all, including the difference between first and second degree murder and the difference in sentencing ranges." Defendant further stated that his attorney told him that the State "was offering a second degree murder instruction to try to give the jury another way to convict [him]." Defendant asked his attorney for his opinion, and counsel told defendant that he thought that defendant "could beat the case straight out based on self-defense, and that the State's evidence had not been strong enough to prove [defendant] guilty of it, and that second degree was a way for them to get [him] (to find [him] guilty). But if given the choice between first and self-defense, the jury was likely to let [defendant] go home." He said his attorney advised him to reject the second degree murder instruction, which he did. Defendant stated that he was unaware of the sentencing range, and he "did not think that it would be very different from the range for first degree. If [he] had been

aware of the sentencing range for second degree murder (4 -20 years served at 50%, with no firearm enhancement), [he] would have told the court that [he] wanted the jury to be instructed on second degree murder." Defendant said that he would have made this decision if he had known the sentencing range, even if his attorney let him to believe that he would be acquitted.

¶ 40 "Second degree murder is a lesser mitigated offense of first degree murder." *People v. Brown*, 2014 IL App (4th) 120887, ¶ 24 (citing *People v. Jeffries*, 164 Ill. 2d 104, 122 (1995)). A defendant is guilty of second degree murder if the elements of first degree murder are established but a statutory mitigating factor also exists, such as, "[a]t the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing ***, but his belief is unreasonable." 720 ILCS 5/9-2(a)(2) (West 2012). Here, defendant set forth a defense of self-defense, which meant to find defendant guilty of second degree murder, the jury could have found he believed the circumstances justified the shooting, but his belief was unreasonable. The sentencing range for first degree murder is 20 to 60 years, with a 25-year enhancement because defendant discharged a firearm that caused death. See 730 ILCS 5/5-4.5-20 (West 2012); 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012). In contrast, second degree murder is a class 1 felony, with a sentencing range of 4 to 20 years. See 730 ILCS 5/5-4.5-30(a) (West 2012). Additionally, while a prisoner convicted of first degree murder must serve the full sentence and shall receive no sentence credit (730 ILCS 5/3-6-3(a)(2)(i) (West 2002)), a prisoner serving a second degree murder sentence is eligible to receive day-for-day good conduct credit (730 ILCS 5/3-6-3(a)(2.1) (West 2002)).

¶ 41 The Illinois Supreme Court has held that "when the evidence supports the giving of a jury instruction on self-defense, an instruction on second degree murder must be given as a mandatory counterpart. A failure to do so deprives the jury of the ability to make a factual

determination as to whether the defendant had a subjective belief in the necessity for the use of force in self-defense but that belief was unreasonable." *People v. Washington*, 2012 IL 110283, ¶ 56 (citing *People v. Lockett*, 82 Ill. 2d 546 (1980)). Thus, if defendant had requested the second degree murder instruction, then the trial court would have been required to do so.

¶ 42 Defendant relies on the Fourth District's decision in *Brown*, 2014 IL App (4th) 120887, for support. In *Brown*, the reviewing court considered the dismissal of the defendant's postconviction petition at the first stage of proceedings. In his petition, the defendant had asserted that his trial counsel was ineffective for incorrectly advising him as to the potential sentence he faced for the first degree murder of two individuals. Counsel incorrectly informed the defendant he was subject to a term of years, but the defendant was subject to mandatory natural life if convicted of first degree murder of two individuals. The defendant argued that if he had been properly informed of the potential sentences, then he would have requested the second degree murder instruction at trial. *Id.* ¶ 20. The reviewing court concluded that the defendant had set forth an arguable claim of ineffective assistance of trial counsel and remanded for second stage proceedings. *Id.* ¶ 27.

¶ 43 The court first found that the record supported the defendant's claim that his attorney misinformed him about the potential sentences. "However, defendant was provided with incorrect information regarding the sentence he faced. As such, his ability to make an informed decision regarding the instruction may have been impaired. Thus, we find counsel's performance arguably fell below an objective standard of reasonableness." *Id.* ¶ 21.

¶ 44 Next, the *Brown* court considered whether the defendant arguably was prejudiced by his attorney's performance. The defendant argued that there was a reasonable probability that if the jury had been instructed on second degree murder, then they would have found him guilty of

second degree instead of first degree murder. The State maintained that the decision not to request the second degree murder instruction was trial strategy. The court observed that while trial strategy, the attorney's misapprehension of the potential sentence may have caused him to advise the defendant not to request the instruction. *Id.* ¶ 23. The court reasoned that

> "the trial court determined the evidence supported giving a self-defense instruction. The court also found sufficient evidence supported giving a second-degree-murder instruction if so requested. While conflicting testimony was presented as to what transpired, evidence exists to support defendant's version of events. The presence of that evidence shows defendant's allegations are not completely rebutted by the record. As such, it is arguable a reasonable probability exists the jury, if presented with a second-degree-murder instruction, would have convicted defendant of second degree murder instead of first degree murder." *Id.* ¶ 26.

¶ 45 Defendant argues that, similar to *Brown*, he could not make an informed decision regarding whether to instruct the jury on second degree murder because his trial attorney failed to tell him the sentencing range for second degree murder. The State contends that *Brown* is distinguishable because the attorney in *Brown* misinformed the defendant that he could receive a term of years, but instead he was subject to mandatory natural life. The State asserts that in this case, "we have no such misstatements by trial counsel." We disagree with the State, the difference in what defendant was told (*Brown*), or not told (here), is not the determining factor. The crux of the issue is whether a defendant was fully informed of potential sentences, such that he could make an informed decision in declining the second degree murder instruction. In

Brown, the defendant was misinformed about the potential sentence of the charged offense. Here, defendant alleges that he was not informed about the disparate sentencing ranges. In both cases, the defendants lacked complete information to make an informed decision to decline a second degree murder instruction where evidence supported such an instruction.

¶ 46 As previously stated, at this stage of proceedings, we are to presume defendant's affidavit is true and may not make any credibility assessments. Assuming that trial counsel failed to inform defendant of sentencing range for second degree murder, we find that defendant has made a substantial showing that his attorney's performance fell below an objective standard of reasonableness. The failure to apprise defendant that he faced a minimum sentence of 45 years for first degree murder compared with a maximum sentence of 20 years, with the opportunity to earn day-for-day credit, for second degree murder hindered defendant's ability to make a reasoned decision in declining a second degree murder instruction where the evidence supported such an instruction.

¶ 47 We then turn to whether defendant has made a substantial showing of prejudice. The State responds that defendant cannot make a substantial showing of prejudice because the instruction on second degree murder would not have changed the result. According to the State, if the jury believed defendant's testimony, then it would have found him not guilty. However, the supreme court in *Washington* rejected the same reasoning when advanced in that case.

¶ 48 In *Washington*, the defendant was convicted of first degree murder and aggravated battery of a firearm. The shooting occurred after a car accident in which family members for both parties involved appeared on the scene and the events became heated. The victim's family members testified that the defendant fired a gun as people were walking away, but the defendant and his witnesses testified that a struggle took place. The trial court denied defense counsel's

request for second degree murder instruction, but agreed to instruct the jury on self-defense. *Washington*, 2012 IL 110283, ¶¶ 1-15. On appeal, the supreme court first reiterated that when the evidence supports an instruction on self-defense, then the trial court must give an instruction on second degree murder if requested. *Id.* ¶ 56.

¶ 49 The supreme court then considered whether the failure to instruct the jury on second degree murder was harmless. The court first held that the failure to give a second degree murder instruction was not subject to automatic reversal because "[a]utomatic reversal is only required where the error is deemed 'structural,' *i.e.*, a systemic error that serves to erode the integrity of the judicial process and undermine the fairness of a trial." *Id.* ¶ 59. The court observed that structural errors are very limited, which "include the complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of the right of self-representation at trial, denial of a public trial, and defective reasonable doubt instructions." *Id.*

¶ 50 The supreme court noted that "[i]n contrast, instructional errors are deemed harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed." The State argued that the failure to give a second degree murder instruction was harmless because the result would not have been different.

> "The State's position appears to be that since the jury rejected defendant's claim of self-defense, it would not have believed that defendant had an unreasonable belief in the need for the use of force in self-defense. While there was evidence that contradicted defendant's claim of a reasonable belief in self-defense, the evidence in this case was conflicting. *** It is the jury's function to weigh the evidence, assess the credibility of the witnesses, resolve

> conflicts in the evidence, and draw reasonable inferences therefrom. *People v. Williams*, 193 Ill. 2d 306, 338, (2000). The trial court determined that there was sufficient evidence in the record of a reasonable belief on defendant's part to justify giving an instruction on self-defense. Pursuant to *Lockett* and its progeny, it was a question of fact as to whether defendant's belief was reasonable or unreasonable. By refusing to give a second degree murder instruction, the trial court took the factual determination from the jury. Based on this record, we cannot say that the result of the trial would not have been different had the jury received a second degree murder instruction." *Washington*, 2012 IL 110283, ¶ 60.

¶ 51 Similar to its position in *Washington*, the State in this case argues that the result of the proceeding would not have been different if the jury was instructed on second degree murder because it already rejected defendant's claim of self-defense. The State's position invites this court to speculate as to the jury's findings of fact. We point out that "[t]he trier of fact is free to accept or reject as much or as little of a witness's testimony as it pleases." *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 22. We cannot say whether the jury believed Medina entirely, or believed defendant in part, but did not find that his belief in self-defense was warranted. Given the evidence presented at trial, which supported an instruction on self-defense, we find that defendant has set forth a substantial showing that there is a reasonable probability that result of the trial would have been different if the jury had received a second degree murder instruction.

Accordingly, we reverse the trial court's decision to dismiss defendant's claim of ineffective assistance of counsel and remand for a third stage of evidentiary hearing.

¶ 52 Based on the foregoing reasons, we reverse the trial court's dismissal of defendant's claim of actual innocence and claims of ineffective assistance of trial counsel, and affirm the dismissal of defendant's claim of a *Brady* violation. We remand for a third stage evidentiary hearing as directed in this order.

¶ 53 Reversed in part, affirmed in part. Remanded.