2019 IL App (1st) 161537-U

No. 1-16-1537

Third Division
June 26, 2019

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Respondent-Appellee,	)	No. 05 CR 17702
v.	)	
GREGORY OWENS,	)	Honorable Kenneth J. Wadas,
Petitioner-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: First-stage dismissal of postconviction petition is affirmed, where petitioner's claims of ineffective assistance of counsel and prosecutorial misconduct lack merit, or otherwise waived.

¶ 2 Petitioner-Appellant, Gregory Owens, appeals from the trial court's dismissal of his *pro se* postconviction petition. Petitioner contends that the trial court erred in summarily dismissing his petition because he raised meritorious claims of ineffective assistance of counsel and prosecutorial misconduct which were sufficient to survive first-stage postconviction review. For the reasons that follow, we affirm the judgment of the trial court.

¶ 3 I. BACKGROUND

¶ 4 The underlying facts of this case have already been adequately set forth in the orders involving the petitioner's direct appeal (see *People v. Owens*, No. 1-10-0061 (2011) (unpublished order under Illinois Supreme Court Rule 23)), and appeal after re-sentencing (see *People v. Owens*¸ 2015 IL App (1st) 132667-U). Therefore, we recite only those facts necessary to the disposition of this postconviction petition.

¶ 5 Petitioner was charged with six counts of first degree murder for the shooting of Oscar Kelsey on February 3, 2005. The case proceeded to a jury trial and the facts adduced at trial were as follows.

¶ 6 On February 2, 2005, at approximately 8:30 p.m., Jamieique Yancey drove Kelsey, her boyfriend, to Teresa Hudson's home located at 9835 South Merrion Avenue in Chicago, Illinois.[1] There, in the basement of Hudson's house, Kelsey, Kelsey Jones, and another individual played a dice game. Yancey testified that the group was gambling and Kelsey began losing money and took the dice away from the game. Hudson then told Kelsey to leave her house and when he refused to do so, she called petitioner, Kelsey's friend, and asked him to come over.

¶ 7 When petitioner arrived, he told Kelsey to leave Hudson's home, and they began to argue. Meanwhile, Yancey left the house and took Kelsey's coat and bottle of vodka to her car. She then called Kelsey's friend, Buddha, and asked him to help persuade Kelsey to leave the house. Upon Buddha's arrival, Yancey and Buddha went inside the house. Yancey testified that when she entered the house, Kelsey was arguing with Hudson and petitioner.

[1] All events pertinent to the offense took place at a townhouse owned by Teresa Hudson, located at 9835 South Merrion in Chicago, Illinois. Residing at the premises, as of February 3, 2005, were Hudson, Kelsey Jones, Hudson's son Myson Hudson, Charles Morris, and petitioner.

Yancey grabbed Kelsey and pulled him out of the house. As they exited the house, Kelsey slammed the front door and kicked the door's screen, which caused the glass of the screen door to shatter. Kelsey then turned around, went back inside, and continued arguing with petitioner. Yancey again followed Kelsey inside the house and saw him "exchanging words" with petitioner. Yancey testified that Kelsey and petitioner were not physically fighting but were "in each other's faces." Kelsey did not have a weapon. Yancey left the house again and this time heard gunshots, but did not see petitioner shoot Kelsey.

¶ 8 Jones, petitioner's cousin, testified consistently regarding the events leading up to the shooting. Jones testified that on February 3, 2005, he was playing pool and gambling in the basement with Kelsey and another individual. Hudson told the group to stop gambling and told Kelsey that she did not want him inside her house and asked him to leave. Kelsey refused and the group continued to gamble. Petitioner arrived at the house and Kelsey began arguing with both petitioner and Hudson.

¶ 9 As petitioner and Kelsey argued, Hudson went to her second floor bedroom. Kelsey followed her to the bedroom, shouted profanities, called her names, picked up a television, and "smash[ed] it on [Hudson's] head." One of the individuals in the house took the television from Kelsey, and Kelsey went downstairs to the front room where he and petitioner continued to argue. Jones testified that Kelsey "put his hands in [petitioner's] face" and the pair "started to tussle" until someone separated petitioner and Kelsey. Kelsey then kicked the front door, causing the door's glass to break and "ran outside."

¶ 10 After Kelsey left, petitioner retrieved a handgun from the front right pocket of his pants, turned the safety off, and walked towards the door before putting the gun back after someone told him that the gun was not necessary. After petitioner placed the gun in his pocket, Kelsey

came back inside the house with his hands in his pockets. Petitioner's friends stepped in front of Kelsey and pushed him against a wall. Jones heard petitioner tell people to get Kelsey before petitioner hurts him. Petitioner shot Kelsey after Kelsey broke free and walked towards him.

¶ 11 Myson Hudson also testified about the events that transpired on February 3, 2005. Myson testified that he was in his bedroom when he heard his mother, Hudson, yelling that she did not want gambling taking place inside the house. Myson went downstairs to the kitchen and saw Hudson arguing with Kelsey. Yancey, Jones and Morris were in the kitchen and petitioner had not yet arrived at the house. Hudson then called petitioner and asked him to come to the house. When petitioner arrived at the house, Hudson went to one of the bedrooms upstairs. Kelsey followed her and tried to throw a television at her, but Charles Morris stopped him. Kelsey then went downstairs, argued with defendant, exited the house, kicked the front door causing the glass to break, and re-entered the house. Myson testified that Kelsey walked up to the petitioner "with his hands in his pocket[s], like he gonna do something." Myson acknowledged that he told detectives he saw petitioner remove a handgun from his waistband, point it at Kelsey, and place the gun barrel against Kelsey's head. After shooting Kelsey, Myson heard petitioner say that he was sick of him before leaving the house.

¶ 12 Morris was also present. Morris testified that around 10 p.m. on February 2, 2005, he was upstairs and heard people "arguing down in the basement." He heard the front door slam and heard four gunshots but did not see the shooting. When Morris went downstairs, he saw Jones and Myson standing next to Kelsey, who was lying in the front doorway. Morris called the police.

¶ 13 Doctor Michel Humilier of the Cook County Medical Examiner's Office performed the autopsy on Kelsey. He testified that Kelsey suffered from seven gunshot wounds: two to his back, four to his adomen and one to his neck. One of the abdominal gunshot wounds was consistent with Kelsey being shot while he was on the ground and the shooter was at his feet. The gunshot wound to Kelsey's neck showed signs of searing, which indicated the gun was within an inch of Kelsey when it was fired.

¶ 14 Detective David Shaw testified that he investigated Kelsey's murder. On several occasions, he attempted to locate petitioner but to no avail. However, on June 26, 2005, Shaw learned that petitioner was in Little Rock, Arkansas. Shaw obtained an arrest warrant, traveled to Arkansas and placed petitioner in custody.

¶ 15 Petitioner testified that he knew Kelsey for over two years and they were good friends. Petitioner acknowledged that he carried a gun, and testified that he saw Kelsey carrying a gun "about every day" prior to the shooting. Petitioner further testified that on February 3, 2005, he was on his way to his cousin's birthday party when he received a phone call from Hudson to return to the house to pick up Kelsey. Petitioner went to the house with his friends and asked Kelsey to leave but he refused. Kelsey then argued with Hudson, put his hands on her face, shouted at her, and "was muscling her." Petitioner and another person grabbed Kelsey and pulled him away. Hudson went upstairs to the second floor. Kelsey tried to follow Hudson, but petitioner grabbed him. Kelsey then began to argue with petitioner. Petitioner stated that Kelsey was "right in [his] face," looking for a confrontation. Kelsey grabbed petitioner and tried to "toss [him] around." Morris and another person separated them.

¶ 16 While Kelsey and petitioner argued, Hudson was standing on the staircase, screaming at Kelsey. Kelsey grabbed petitioner by the throat and tried to hit him. Kelsey then ran up the stairs to the second floor. Petitioner said that he did not immediately follow Kelsey upstairs because he was out of breath. However, petitioner went upstairs after he heard Hudson yelling "get him off me." In one of the bedrooms, petitioner saw Kelsey hitting Hudson. Petitioner said that he heard Kelsey shout, "she just cut me... stabbed me... I [will] kill you." Kelsey then picked up a television from inside the bedroom and tried to throw it at Hudson. Morris grabbed the television, while petitioner grabbed Kelsey and pulled him downstairs to the front room.

¶ 17 In the front room, Kelsey "smacked" petitioner. The other people in the house separated them. Yancey then pulled Kelsey out of the house. Petitioner testified that Kelsey slammed the front door when he exited the house. A few seconds later, petitioner heard a loud crash and saw Kelsey's foot protruding from the bottom glass section of the screen door. Petitioner said that Kelsey then re-entered the house with his hand in his right pocket, like it "was wrapped around something." Petitioner testified that he did not see Kelsey with a gun, but he saw the handle of an object and "[i]t looked like a gun was hanging out [of] his pocket." Petitioner had his gun with him and told the other individuals in the house to "get [Kelsey], before he hurts somebody." Kelsey walked towards him and started to pull his hand out of his pocket. Petitioner then shot him once. Petitioner said that Kelsey then attempted to "rush" him and reach for his gun. At this time, petitioner "fired a few more shots." Petitioner said that he had his gun in his pocket during the entirety of the argument and did not pull it out until Kelsey re-entered the house.

¶ 18 On cross-examination, petitioner reaffirmed that he took his gun out only when Kelsey re-entered the house with his hands in his pockets. Petitioner said that Kelsey was about an inch away from the gun barrel when he fired the first shot and that Kelsey was facing him when he fired the second shot. Kelsey fell in front of the china cabinet in the front room and started crawling to the front door. Petitioner acknowledged that he did not know how many times he shot Kelsey and whether Kelsey was standing when he shot him the fifth time. After the shooting, petitioner left the house through the front door and went to a friend's house. The next day, petitioner traveled to Arkansas with his mother.

¶ 19 At the conclusion of trial, the trial court gave petitioner the opportunity to include an instruction for second degree murder. The trial court informed the petitioner that his "choices in essence [was] to go with instructing the jury that [he was] charged with first degree murder, self-defense is [his] defense in the case and giving them no option as to whether the case should be considered for second degree murder. This is an all or nothing guilty versus not guilty of first degree murder. " The other option, the court explained was to "give the jury the option to consider whether [he] was guilty of second degree murder as opposed to first degree murder." Petitioner chose the "guilty, not guilty first degree murder" instruction after allegedly asking his trial counsel for advice.

¶ 20 The jury found petitioner guilty of first degree murder, in violation of 720 ILCS 5/9-1(a)(1) (West 2008) and of personally discharging a firearm that caused Kelsey's death. The trial court subsequently sentenced petitioner to 70 years of imprisonment, which included 25-years imprisonment for the firearm enhancement. Petitioner's motions for a new trial and motion for reconsideration of his sentence were denied.

¶ 21 A. Direct Appeal

¶ 22 On direct appeal, petitioner challenged his sentence as excessive. *People v. Owens*, No. 1-10-0061 (2011) (unpublished order under Illinois Supreme Court Rule 23). On June 17, 2011, this court affirmed petitioner's conviction, but remanded for resentencing finding that "[t]he facts adduced at trial do not support such a lengthy term of imprisonment." *Owens*, slip order at *13. Specifically, this court found that the facts did not support a lengthy sentence of 70 years' imprisonment where petitioner was not the aggressor and shot Kelsey after a heated argument because he unreasonably believed he was acting in self-defense. *Id.* We also noted that in sentencing petitioner, the trial court stated that petitioner's conduct caused or threatened serious harm, which is an inherent factor of the offense of first degree murder. *Id.* Accordingly, we vacated the sentence and remanded for a new sentencing hearing. *Id.* We further noted that a proper sentence would be near the minimum sentencing range for first degree murder followed by the mandatory 25-year enhancement term. *Owens*, slip order at *13.

¶ 23 B. Re-Sentencing

¶ 24 On remand, the trial court held a full resentencing hearing where mitigating and aggravating factors were presented. The trial court resentenced petitioner to 50 years of imprisonment, which included the 25-year firearm enhancement. In doing so, the court stated that there were only two factors in aggravation that applied to petitioner. The court further found that petitioner did not contemplate this act, and acted under strong provocation which were mitigating factors even though he failed to establish self-defense. Petitioner subsequently filed a motion to reconsider sentence, alleging that the 50-year sentence was excessive. The trial court denied the motion.

¶ 25 Petitioner again appealed the propriety of his sentence. On July 16, 2015, we affirmed, finding that the 50-year sentence which included the firearm enhancement fell within the statutory range for the offense of murder. *People v. Owens*, No. 1-13-2667 (2015) (unpublished order under Supreme Court Rule 23). We also noted that the trial court did not consider a factor inherent in the offense and did not abuse its discretion by imposing the near minimum sentence. *Id.* ¶¶14-15. Lastly, we found that the petitioner waived his argument that the trial court improperly considered the IDOC disciplinary records by failing to object to the records below. *Id.* ¶ 18.

¶ 26 C. Post-Conviction Petition

¶ 27 On December 15, 2015, petitioner filed a 97 page, handwritten, *pro se* petition for post-conviction relief. The petition raises 12 claims that can be grouped into three general categories: (1) claims of prosecutorial misconduct; (2) claims of trial court error; and (3) claims of ineffective assistance of counsel. On February 19, 2016, the trial court summarily dismissed the postconviction petition, finding that petitioner's claims were frivolous and patently without merit. Petitioner now appeals.

¶ 28 II. ANALYSIS

¶ 29 On appeal, petitioner only contends that the trial court erred in dismissing his petition at the first-stage of postconviction review where he made meritorious claims of ineffective assistance of counsel and prosecutorial misconduct. Petitioner contends that his counsel rendered ineffective assistance by misinforming him as to the potential sentence he was facing, and that this misinformation caused him to forego an instruction on second degree murder. Petitioner also claims that he was denied a fair trial because of the numerous instances of prosecutorial misconduct by the State during rebuttal and closing arguments.

Claims of prosecutorial misconduct include: (1) repeatedly misstating evidence in closing argument; (2) improperly defining and minimizing the reasonable doubt standard; and (3) diverting the jury's attention from petitioner's action to an evaluation of him as a person. For the reasons that follow, we disagree.

¶ 30 The Post-Conviction Hearing Act "provides a mechanism by which criminal defendants can assert that their convictions were the result of substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both." *People v. Morgan*, 187 Ill. 2d 500 (1999). A postconviction proceeding is not an appeal from the judgment of conviction, but rather is a collateral attack on the trial court proceedings. *People v. Tate,* 2012 IL 11214, ¶ 8. A postconviction proceeding consists of three stages. *Id.* ¶ 9. At the first stage of postconviction proceedings, the trial court independently reviews the petition, taking the allegations as true, and determines whether "the petition is frivolous or is patently without merit." *People v. Hodges*, 234 Ill. 2d at 1, 10 (2009)(quoting 725 ILCS 5/122-2.1(a)(2)(West 2010)). A petition should be summarily dismissed as frivolous or patently without merit only when it "has no arguable basis in either fact or law." *Id.* at 11-12. We review the summary dismissal of a postconviction petition *de novo*. *Tate*, 2012 IL 11214, ¶ 19. Thus, we review the trial court's judgment rather than the reasons for its judgment. *People v. Collier*, 387 Ill. App. 3d 630, 634 (2008).

¶ 31 A. Ineffective Assistance of Counsel

¶ 32 We review ineffective assistance of counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance was objectively unreasonable under prevailing professional norms and (2) there is a "reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 33 Petitioner contends that trial counsel rendered ineffective assistance by failing to properly advise him of the sentencing range for first degree murder. Specifically, petitioner alleges that counsel misinformed petitioner that he would only get 20 years if he was convicted of first degree murder, but failed to inform him that the enhancement term for personally discharging a firearm would carry an additional 25 years pursuant to 730 ILCS 5/5-8-1(a)(1)(d)(iii)(West 2010). Petitioner contends that this erroneous information led him to reject a second degree murder instruction, in effect making it an involuntary choice.

¶ 34 Additionally, petitioner claims that counsel incorrectly advised him that second degree murder was a lesser-included offense of first degree murder. Petitioner alleges that counsel stated "if he chose to have a second degree murder instruction, he would not be going home because no jury would find him guilty of first degree murder." However, petitioner maintains that second degree murder is a lesser-mitigated offense of first degree murder rather than a lesser-included offense. As such, "a defendant can only be found guilty of second degree murder if the State has first proven all the elements of first degree murder" and that "advancing a theory of second degree murder [would] not expose the [petitioner] to any more potential criminal liability." Thus, in essence, petitioner argues that counsel's performance was objectively unreasonable where counsel misinformed petitioner regarding jury instructions and sentencing ranges, effectively denying him his right to make an informed decision about how to proceed at trial.

¶ 35 Petitioner's claim fails at the outset because he had no right to decide whether he wanted the instruction. We find *People v. Zareski*, 2017 IL App (1st) 150836 to be instructive. Like petitioner, the defendant in *Zareski* argued that his trial counsel provided ineffective assistance by failing to advise him of the sentencing ranges for first and second degree murder. *Zareski*, 2017 IL App (1st) 150836, ¶ 77. Thus, leading defendant to waive his right to an instruction on second degree murder. *Id.* The *Zareski* court held that defendant did not have a personal right to decide whether he wanted a second degree instruction and trial counsel did not provide ineffective assistance. *Id.* ¶ 80. The court noted that "[i]ncluded in the rights belonging exclusively to the defendant is the right to decide whether to submit an instruction on a lesser-included offense." *Id.* ¶ 78. However, relying on our supreme court's decision in *People v. Wilmington*, the *Zareski* court acknowledged that the right to decide whether to submit instructions did not apply to second degree murder. *Id.*

¶ 36 In *Wilmington*, the issue before the supreme court was whether the trial court erred in granting defense counsel's request for an instruction on second degree murder without inquiring whether defendant agreed to the tender of such instructions. *Wilmington*, 2013 IL 112938, ¶ 44. Our supreme court held that the right to consent or decide whether to submit instructions did not apply to second degree murder because it is not a lesser-included offense of first degree murder but rather a "lesser-mitigated offense." *Id.* ¶ 48. The court reasoned that "[w]hile a defendant who tenders a lesser-included offense instruction exposes himself to potential criminal liability, which he otherwise might avoid if neither the trial judge nor the prosecutor seeks the pertinent instruction, that is not the case with second degree murder instruction, as a defendant can only be found guilty of second degree murder if the State has first proven all the elements of first degree murder." (Internal quotation marks omitted.) *Id.*

¶ 37 Interpreting our supreme court's holding in *Wilmington,* this court in *Zareski* held that "[d]efendants who ask for a lesser-included instruction are exposing themselves to additional risk, akin to other risk-taking decisions like whether to take a plea or testify at trial. The decision is a personal one." *Zareski*, 2017 IL App (1st) 150836, ¶ 78. On the other hand, instructions on second degree murder pose no additional risks and put the decision "in [the] much bigger category of strategic choices to be made by the defense attorney." *Id.* As such, we find that petitioner did not have the personal right to decide whether he wanted a second degree murder instruction and "[w]ithout that right, whatever advice he did or did not receive from trial counsel was of no moment." *Id.* ¶¶ 77-78. Therefore, we find that petitioner did not forego a second degree murder instruction as it was not his decision to make and trial counsel did not provide ineffective assistance in advising petitioner, whatever that advice may have been, on the sentencing range.

¶ 38 Like the defendant in *Zareski*, petitioner attempts to avoid *Wilmington* by arguing that in *People v. Brown*¸ 2014 IL App (4th) 120887, a post-*Wilmington* case, the court found that a defendant had the personal right to decide whether to tender a second degree murder instruction. However, this fourth district case does not address *Wilmington*'s applicability, and therefore we are not inclined to find it as persuasive authority.

¶ 39 Having found that the decision to tender instructions on second degree murder is not a personal one, we find that petitioner's claim of ineffective assistance of counsel essentially challenges his counsel's trial strategy. In order to prove that counsel's performance was objectively unreasonable under prevailing professional norms, "defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy." *People v. Moore,* 358 Ill. App. 3d 683, 689 (2005). "Counsel's decision to advance an all-or-nothing

defense has been recognized as a valid trial strategy and is generally not unreasonable unless that strategy is based upon counsel's misapprehension of the law." *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007).

¶ 40 Here, the record shows that counsel was pursuing an all-or-nothing trial strategy. The trial court informed the petitioner that he could either "go with instructing the jury that [he was] charged with first degree murder, self-defense is [his] defense in the case and giving them no option as to whether the case should be considered for second degree murder. This is an all or nothing guilty versus not guilty of first degree murder " or he could "give the jury the option to consider whether [he] was guilty of second degree murder as opposed to first degree murder." Petitioner chose the "guilty, not guilty first degree murder" instruction after allegedly asking his trial counsel for advice. According to petitioner, trial counsel responded "if you include the instruction, you won't be going home tonight. You'll be giving the jury a window to jump out of. They don't have proof of [first] degree murder."

¶ 41 As noted above, the decision to pursue an all-or-nothing strategy is generally not unreasonable unless it is based on counsel's misapprehension of the law. Here, petitioner asserts that counsel told him that "if he chose to have a second degree murder instruction, he would not be going home because no jury would find him guilty of first degree murder." This statement was made in context of counsel's belief that there was not much evidence or testimony to support a finding of guilt for first degree murder, not that counsel misapprehended the law with respect to self-defense and second degree murder. Therefore, counsel could have decided that he would give petitioner a chance at a complete acquittal with an all-or-nothing first degree murder instruction. The mere fact that this strategy proved unsuccessful and petitioner was convicted of first degree murder does not mean counsel

performed unreasonably and rendered ineffective assistance. See *People v. Milton*, 354 Ill. App 3d 283, 290 (2004)("Counsel's choice [of defense theory] does not constitute ineffective assistance of counsel simply because it was unsuccessful."). Accordingly, we find that counsel did not act unreasonably. Petitioner has failed to satisfy the first prong of the *Strickland* test, thus, his claim of ineffective assistance of counsel has no merit and was properly dismissed by the trial court.

¶ 42 B. Prosecutorial Misconduct

¶ 43 Petitioner claims that he was denied a fair trial because of numerous instances of misconduct by the State during closing arguments, which included: (1) misstating evidence; (2) improperly defining and minimizing the reasonable doubt standard; and (3) diverting the jury's attention from petitioner's action to an evaluation of him as a person.

¶ 44 As a preliminary matter, we note that a "postconviction proceeding is not a substitute for a direct appeal, nor is it a second direct appeal. Rather, it is a vehicle for asserting constitutional claims that could not be raised on direct appeal." *People v. Harris*, 224 Ill. 2d 115, 128 (2007). As such, "issues that could have been presented on direct appeal, but were not, are deemed waived for purposes of post-conviction review." *People v. Haynes*, 192 Ill. 2d 437, 465 (2000). However, the procedural bars of waiver may be relaxed where: (1) "facts relating to the claim do not appear on the face of the original appellate record"; (2) alleged waiver "stems from the incompetence of appellate counsel"; or (3) "fundamental fairness so requires." *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005). Here, petitioner has waived review of his claims by failing to raise them on direct appeal. In addition, no waiver exception applies. The facts relating to petitioner's claim arise out of occurrences at trial and appear on the face of the original appellate record. Moreover, although petitioner claims that appellate

counsel was ineffective for failing to raise these claims on direct appeal, his allegations are meritless as discussed in this order. Nor do we find that "fundamental fairness" requires relaxation of the waiver rule.

¶ 45 To determine whether the "fundamental fairness" exception applies, the reviewing court employs a "cause-and prejudice" test. *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2001). To demonstrate cause, a petitioner must identify an objective factor that impeded "defense counsel's efforts to raise the claim on direct review." *People v. Simpson*, 204 Ill. 2d 536, 552 (2001). Prejudice, on the other hand, is an error so infectious to the proceedings that the resulting conviction violates due process. *Pitsonbarger*¸ 205 Ill. 2d at 464. In this case, petitioner does not even allege that his defense counsel's ability to raise a specific claim was impeded. Therefore, we find that the "fundamental fairness" exception does not apply and petitioner's claims of prosecutorial misconduct are waived.

¶ 46 Even if "fundamental fairness" would dictate a review of petitioner's claims of prosecutorial misconduct, we find that petitioner's claims lack merit. When reviewing claims of prosecutorial misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and defense attorney, in order to place the remarks in context. *People v. Phillips*¸392 Ill. App. 3d 243, 275 (2009). Generally, prosecutors are afforded wide latitude in closing argument. *People v. Wheeler*¸ 226 Ill. 2d 92, 123 (2007). "In closing, the prosecutor may comment on the evidence and any fair reasonable inferences it yields." *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). However, a prosecutor may not argue assumptions or facts not based on the evidence during closing argument. *People v. Terry*, 312 Ill. App. 3d 984, 993 (2000). "In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a

[petitioner] such that it is impossible to say whether or not a verdict of guilt resulted from them." *Wheeler*, 226 Ill. 2d at 123. Substantial prejudice occurs "if the improper remarks constituted a material factor in [petitioner's] conviction." *Id.*

¶ 47 1. Misstatement of Evidence

¶ 48 Petitioner asserts that the State misstated various parts of the testimony presented at trial. Specifically, he argues that the State misstated that: (1) no one except petitioner saw Kelsey come back into the house with his hand in his pocket; (2) everyone testified that the victim slammed the door; (3) no one saw Kelsey go up to petitioner before petitioner shot him; and (4) petitioner was the only one that said on the stand that he was scared. Petitioner contends these misstatements improperly undermined petitioner's credibility, by falsely portraying him as the sole witness to testify to numerous facts supporting his assertion that he acted in self-defense. The State concedes that the "prosecutor's recollection of the evidence" was "inaccurate" but argues it did not result in substantial prejudice to petitioner. We agree.

¶ 49 Here, the trial court informed the jury that counsels' arguments were not evidence and it is presumed that jurors follow the instructions provided by the trial court. See *People v. Boston*, 2018 IL App (1st) 140369, ¶ 103. Furthermore, whether petitioner slammed the door or kicked it is of little significance because it did not lead the jury to convict petitioner for first degree murder. Neither did the misstatements that petitioner was the only person who saw the victim with his hand in his pocket, no one saw Kelsey approach the petitioner, and petitioner said he was scared. This is because there was substantial evidence to support petitioner's conviction. On direct appeal, this court held that the record failed to support the reasonableness of petitioner's belief that deadly force was necessary. This court found it significant that the record shows that during the argument, Kelsey was outnumbered at least

four to one inside the house, petitioner was armed whereas there was no evidence that Kelsey had a weapon. Further, someone in the house said "it wasn't necessary" when petitioner retrieved the gun from his pocket. Although petitioner testified that Kelsey was walking towards him when he shot him, Jones testified that "Kelsey could not have seen it coming because he was facing" away from petitioner. Jones also testified that Kelsey was hit with the first shot and then tried to run toward the front door when he was shot three more times by the petitioner. Therefore, the State's misstatements did not undermine petitioner's credibility in asserting self-defense. Rather, other evidence contradicted or undermined petitioner's claims of self-defense. As such, we find that remarks made by the State did not result in "substantial prejudice" or that they constituted a "material factor" that led to petitioner's conviction.

¶ 50 2. Reasonable Doubt Standard

¶ 51 Petitioner argues that the State improperly defined reasonable doubt when it stated, "Reasonable doubt. That's our burden, ladies and gentlemen, and we accept that burden. It is not beyond a shadow of doubt. It is not beyond a scintilla of a doubt. It is not beyond all doubt. It is beyond a reasonable doubt." Petitioner argues that the State further erred in this regard when it argued, "[h]e is trying to hold us to a higher burden. We have the burden and we accept it, and we have made the burden in this case. And the burden of reasonable doubt was overcome when the defendant shot and killed Oscar Kelsey in cold blood." Petitioner contends that this comment minimized the State's burden of proving beyond a reasonable doubt. We disagree.

¶ 52 In *People v. Bryant*¸ 94 Ill. 2d 514, 523, this court held that a prosecutor's comments that the State's burden is "not unreasonable" and "met each and every day" did not reduce the

State's burden of proof. Nearly similar comments to the ones made in this case were also made by the prosecution in *People v. Phillips*¸ 127 Ill. 2d 499, 528 (1989), and *People v. Gacho*¸ 122 Ill. 2d 221 (1988), which were held not to have reduced the State's burden. Unlike *People v. Starks*¸ 116 Ill. App. 3d 384, 394 (1983), where the prosecutor asserted that the State had no burden, we find that the comments here fell within the bounds of proper argument.

¶ 53 3. Diverting the Jury's Attention

¶ 54 Petitioner argues that the State made improper comments when it stated that "[when] you evaluate self-defense, you look at the reasonableness of his beliefs, the reasonableness of his conduct, and you don't apply the reasonable thug standard. It is the reasonable man standard, woman standard, reasonable person standard. There was no imminent use of force." Relying on *People v.* Scaggs, 111 Ill. App. 3d 633 (1982), petitioner argues that the State improperly diverted the jury's attention from his actions at the time of the shooting to an evaluation of him as a person, specifically a "thug." However, we find petitioner's reliance on *Scaggs* to be misplaced. In *Scaggs*, this court held that the prosecutor's closing argument clearly diverted the jury's attention from defendant's actions at the time of the shooting to an evaluation of defendant as a person. *Scaggs*, 111 Ill. App. 3d at 637. The court reasoned that the jury was encouraged to consider matters irrelevant to self-defense, including *inter alia* the fact that defendant regularly carried a gun, defendant drag raced, and defendant gambled. *Id.* The court found the prosecutor's argument in closing to be highly prejudicial and a clear misstatement of the law of self-defense. *Id.*

¶ 55 Unlike in *Scaggs w*here the prosecutor's closing argument included numerous facts about the defendant that sought to divert the jury's attention to an evaluation of defendant as

a person, the State here used the term "thug" once and then continued to state the reasonable person standard. The word "thug" alone does not divert the jury's attention to an evaluation of petitioner as a person. Taken in context, the prosecutor was not trying to divert the jury's attention to petitioner as a person. The State in its closing described the facts of the case, the petitioner's actions, and then stated that "[w]hen you evaluate self-defense, you look at the reasonableness of his beliefs, the reasonableness of his conduct," and the reasonable person standard. These are matters relevant to the issue of self-defense and whether petitioner's actions were reasonable. Therefore, we find that the State's comments did not divert the jury's attention from petitioner's actions.

¶ 56 Petitioner further contends that this court should not consider the State's misconduct in isolation but must consider the combined or cumulative effect. However, having found that each claim of misconduct lacks merit, we find that considering the combined or cumulative effect of the alleged instances of misconduct would not yield a different result.

¶ 57 C. Trial and Appellate Counsel

¶ 58 Lastly, petitioner argues that his trial and appellate counsel were ineffective for respectively failing to preserve and raise his claim of prosecutorial misconduct. Petitioner further asserts appellate counsel was ineffective for failing to raise an ineffective assistance challenge regarding trial counsel. This court has already concluded that the underlying prosecutorial misconduct and ineffective assistance of counsel claims are meritless. Therefore, there was no basis for the trial counsel to preserve the issue and appellate counsel to raise it. Furthermore, it is established that "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." *People v. Easley*, 192 Ill. 2d 307, 329 (2000).

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 61 Affirmed.