2011 IL App (1st) 082675-U

FIFTH DIVISION
August 26, 2011

1-08-2675

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. MICHAEL RUIZ, Petitioner-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois. No. 95 CR 27514 The Honorable Kenneth J. Wadas, Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Justices Howse and Epstein concurred in the judgment.

O R D E R

¶ 1 *HELD*: The trial court properly dismissed petitioner's *pro se* postconviction petition because petitioner was unable to demonstrate that he was denied his right to effective assistance of counsel based on his appellate counsel's failure to raise 3 issues on direct appeal.

¶ 2 Following a jury trial, petitioner Michael Ruiz was convicted of two counts of attempted murder of a police officer, two counts of attempted murder, and one count of armed robbery. Petitioner received a sentence totaling 105 years in prison. On direct appeal, this court affirmed petitioner's convictions, but remanded for re-sentencing as

more fully discussed in *People v. Ruiz*, 312 Ill. App. 3d 49 (2000). Petitioner was then sentenced to 80 years imprisonment, which this court affirmed in an unpublished order. Petitioner filed a post-conviction petition, which the trial court dismissed. This appeal followed.

¶ 3 BACKGROUND

¶ 4 Petitioner was convicted on February 9, 1998 of armed robbery, attempted murder and attempted murder of a police officer. The charges grew out of petitioner's robbery of the LaSalle Cragin bank, the ensuing shoot-out with police, and petitioner's flight from police. Because we have previously addressed petitioner's claims and their factual underpinnings, we will only discuss the facts relevant to this appeal. For a more detailed discussion of the evidence adduced at petitioner's trial, see *People v. Ruiz*, 312 Ill. App. 3d 49 (2000).

¶ 5 The evidence adduced at petitioner's trial indicates that on the morning of September 1, 1995, petitioner and his brother drove to the LaSalle Cragin Bank in a red Mitsubisih with the intention of stealing a bag full of money from a Brinks armored vehicle. Petitioner wore a bulletproof vest with dark clothing on top, sunglasses, and a ski mask, and carried a handgun. At the time, a Brinks Incorporated messenger was making a cash delivery inside the bank. Petitioner followed the messenger into the bank and placed his handgun to the messenger's head and took a bag containing $140,000 cash and ran out from the bank.

¶ 6 As he fled the bank, two Chicago police officers independently attempted to stop petitioner. Gunshots were exchanged and petitioner shot both officers and was himself

shot in the hand. Petitioner then attempted to surrender to one officer, but Petitioner claimed that the officer then opened fire on him again. Petitioner fired back and fled into the vehicle being driven by his brother. The vehicle sped away from the scene of the shooting and, after turning a corner, collided head on with another vehicle. Petitioner, incorrectly believing that the driver of the other vehicle was a police officer, picked up a shotgun and fired at the vehicle. Following the crash, police apprehended petitioner and his brother. Police recovered four weapons from the red Mitsubishi, including the shotgun and the handgun used by petitioner in the robbery.

¶ 7 Police later obtained a warrant to search petitioner's home. An officer testified that he recovered several firearms, stocks, grips, and magazines, boxes of ammunition, holsters, and an ammunition belt from the home. Before they were introduced into evidence, petitioner made a motion *in limine* seeking to prohibit the State from using the actual weapons at trial, arguing that the weapons themselves could "inflame the passions" of the jury, and instead requested that only pictures of those weapons be shown to the jury.[1] The trial court denied this motion, stating that "assuming the weapons can be tied to the defendant, *** the probative value ouweights the prejudicial value, and the State will be allowed to use said weapons." The trial court further held that a "reasonable inference can be drawn from the size of the weapons and the amount of weapons and the jury can make an inference as to what the intent of [petitioner] was."

¶ 8 At trial, petitioner testified on his own behalf. During cross-examination, the

[1]It appears from the record that this motion referred only to the weapons recovered from the vehicle and with petitioner at the scene of the robbery, as well as parts for those weapons found in petitioner's home, rather than all the weapons discovered in the home.

State requested that petitioner put on all of the clothing he was wearing at the time of the robbery. The trial court granted this request over petitioner's objection to its relevance, but did not make petitioner put on the bulletproof vest he was wearing at the time. Petitioner put on the items and the prosecutor stated:

> "Step in front of the jury. And now, if I was the Brinks guy, *** show them what you did when you went into the bank.
>
> Why don't you use your finger because I'm not going to hand you a gun."

Petitioner objected to the last statement by the prosecutor, which the trial court sustained and instructed the jury to disregard, but it permitted the demonstration to continue and petitioner demonstrated how he approached the messenger, weapon in hand, and grabbed the bag of money.

¶ 9 The jury convicted petitioner of two counts of attempted murder of a police officer, two counts of attempted murder, and one count of armed robbery, and the trial court sentenced him to 20 years imprisonment for armed robbery, 30 years for each count of attempted murder, and 55 years for each count of attempted murder of a police officer. The 55 year sentences were to be served concurrently, and consecutively to the 20 and one of the two 30 year sentences, for a total of 105 years.

¶ 10 On direct appeal, petitioner argued that (1) the evidence did not support one of his convictions for attempted murder of a police officer, (2) the sentencing statute was void because it violated the single subject rule of the Illinois Constutition, (3) the trial court abused its discretion by sentencing him to 30 years on each count of attempted murder, and (4) the trial court erred in its determination of which sentences were to be served

consecutively and which were to be served concurrently. We affirmed petitioner's convictions, but reversed both his sentences for attempted murder of a police officer as well as the determination of which sentences were to be served consecutively. See *People v. Ruiz*, 312 Ill. App. 3d 49 (2000).

¶ 11 On remand, the trial court sentenced petitioner to 50 years for each count of attempted murder of a police officer, to be served concurrently, and consecutively to his 30 year sentence for attempted murder. Petitioner again appealed, arguing that the trial court's imposition of a 30 year sentence for each count of attempted murder. This court affirmed petitioner's sentence in an unpublished order.

¶ 12 On February 5, 2003, petitioner filed a *pro se* petition for postconviction relief, in which he argued 13 bases of relief, including ineffective assistance of appellate counsel for its failure to raise the other 12 issues on direct appeal. Counsel was appointed to represent petitioner, and she filed a certificate in compliance with Supreme Court Rule 651(c) indicating that after speaking with petitioner and reviewing his petition, no additional claims or amended petition was necessary.

¶ 13 The State filed a motion to dismiss the petition on June 11, 2008 and a hearing on that motion was held on September 17 of that year. Following argument from both parties, the trial court dismissed the petition, finding that all claims raised by petitioner in his petition could have been raised on direct appeal, but were not. The trial court further held that because appellate counsel "selectively, carefully analyzed which issues he was going to raise on appeal, and was successful at least on one of them," petitioner was unable to satisfy the standard set forth in *Strickland*. This appeal followed.

¶ 14 DISCUSSION

¶ 15 On appeal, petitioner contends that the trial court erred in dismissing his *pro se* post conviction petition because he made a substantial showing that his appellate counsel was ineffective for failing to raise 3 issues on direct appeal. Petitioner contends that these errors, in the aggregate, represent "a pervasive pattern of [prosecutorial] misconduct which resulted in unfair prejudice. He alleges that he was denied a fair trial when: (1) the State introduced evidence of guns found in his home, (2) the trial court granted the State's request that petitioner put on the clothing he wore the day of the robbery, and (3) the prosecutor made comments based upon his personal opinions during closing argument.[2] For the reasons that follow, we affirm.

¶ 16 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2000)) provides a means by which a defendant may challenge his conviction for a "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997). A postconviction action is a collateral attack on a prior conviction and sentence, and "is not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994).

¶ 17 In a noncapital case, the Act creates a three-stage procedure of postconviction relief. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). At the first stage, the trial

[2]In his postconviction petition, petitioner categorized his first two claims as evidentiary errors, arguing that the trial court erred when it "permitted the State to introduce evidence found during the search of Petitioners [sic] home" and "where the Court Order [sic] Defendant to put on the 'outfit' he wore at the time of the incident." His postconviction petition makes no mention of the "pervasive pattern of misconduct" that he now alleges in this appeal.

court must review the petition to determine if it is frivolous or patently without merit. If it is not, the petition advances to the second stage of postconviction proceedings where, such as here, the circuit court determines whether the petition and any accompanying documentation make a substantial showing of a violation of constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 244-46 (2001). "The scope of the postconviction proceeding is limited to constitutional matters that have not been, and could not have been, previously adjudicated. Accordingly, any issues which could have been raised on direct appeal, but were not, are procedurally defaulted and any issues which have previously been decided by a reviewing court are barred by the doctrine of *res judicata*." *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). However, the doctrines of *res judicata* and forfeiture are relaxed where the alleged forfeiture stems from the incompetence of appellate counsel. *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005).

¶ 18 A postconviction petitioner is not entitled to an evidentiary hearing as a matter of right; rather, to warrant an evidentiary hearing, the allegations in the petition must be supported by the record in the case. *People v. Coleman*, 183 Ill. 2d 366, 381(1998). "In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits are taken as true." *People v. Towns*, 182 Ill. 2d 491, 501 (1998). We review the second-stage dismissal of a post-conviction petition *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

¶ 19 Here, each of the first 12 claims put forward by petitioner in his postconviction petition are based on information contained in the record and could have been raised on direct appeal, but were not. On this appeal, however, petitioner addresses only the 3 of

those 12 by way of the 13th, asserting that his appellate counsel was ineffective for failing to raise them on direct appeal.

¶ 20 Claims of ineffective assistance of appellate counsel claims are governed by the same two pronged standard for assessing claims of ineffective assistance of trial counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *People v. Harris*, 206 Ill. 2d 1 (2002). With respect to such claims, our Supreme Court has held that in order to determine whether a petitioner's assistance of counsel was effective on appeal, a reviewing court must decide whether his underlying claims would have been successful if they had been raised on direct appeal, stating:

> ¶ 21 "[a] petitioner who contends that appellate counsel rendered ineffective assistance of counsel must show that the failure to raise an issue on direct appeal was objectively unreasonable and that the decision prejudiced petitioner. [Citation]. Unless the underlying issue is meritorious, petitioner suffered no prejudice from counsel's failure to raise it on direct appeal. [Citation]. We, therefore, must determine whether petitioner's underlying ineffective assistance of trial counsel claim would have been successful if raised on direct appeal." *People v. Childress*, 191 Ill. 2d 168, 175 (2000).

A petitioner's appellate counsel is not obligated to raise every conceivable issue on appeal, nor is he incompetent for failing to raise issues that he deems without merit.

People v. Easley, 192 Ill. 2d 307, 329 (2000). Unless an issue is meritorious, a petitioner has suffered no prejudice from his appellate counsel's failure to raise that issue on appeal. *Easley*, 192 Ill. 2d at 329.

¶ 22 Here, petitioner challenges appellate counsel's effectiveness for failing to challenge 3 specific errors at his trial on direct appeal. "Because we find the issue dispositive, we examine the underlying merits of defendant's claim to assess whether he was prejudiced by appellate counsel's failure to raise the issue on appeal." *People v. Jones*, 219 Ill. 2d 1, 23 (2006).

¶ 23 A. Regarding the Introduction into Evidence of Weapons Found in Petitioner's Home

¶ 24 Petitioner first argues that his appellate counsel rendered ineffective assistance when she failed to "bring the prosecutor's repeated introduction of irrelevant and inflammatory evidence" to the attention of the appellate court. Specifically, petitioner claims that the State's introduction into evidence of weapons, ammunition, and accessories recovered from petitioner's home was improper because it "only served to arouse the jury, and prejudice [petitioner's] position." Petitioner did not object to the introduction of this evidence at trial or in his post-trial motion, and now argues that because the alleged errors here were so serious that they denied him his right to a fair trial, the appellate court could have reviewed this alleged misconduct under the plain error doctrine. See *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005).

¶ 25 A trial court's decision to allow the introduction of evidence is reviewed for an abuse of discretion, which occurs "only where the trial court's ruling is arbitrary, fanciful,

unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20-21 (2000). When deciding whether to admit or deny the admission of weapons not involved with a crime, "[t]he long-standing rule in Illinois is that '[a] weapon generally may not be admitted into evidence unless there is proof to connect it to the defendant and the crime or unless the defendant possessed the weapon when arrested for the crime.'" *People v. Evans*, 373 Ill. App. 3d 948, 960 (2007), quoting *People v. Maldonado*, 240 Ill. App. 3d 470, 478 (1992). Our courts have found that such evidence is improper because it "only serve[s] to arouse the jury and prejudice the defendant's position." *Evans*, 373 Ill. App. 3d at 960, citing *People v. Smith*, 413 Ill. 2d 218, 223 (1952). However, they have also held that the "improper admission of such weapons is typically regarded as harmless error." *Evans*, 373 Ill. App. 3d at 960, citing *People v. Padgett*, 248 Ill. App. 3d 1018, 1025 (1993) (holding that the error of admitting irrelevant weapons into evidence was not prejudicial as the evidence did not contribute to the defendant's conviction since the defendant's guilt was overwhelming); *People v. Jackson*, 154 Ill. App. 3d 241, 246 (1987) (holding that despite error, reversal was not warranted because it was made clear that unconnected weapon was not the murder weapon)

¶ 26 Here, the State points to nothing in the record which would support a finding that the weapons and other items recovered from petitioner's home were related to the crime for which he was on trial, nor does it argue that they are. Instead, the State insists that even if the admission of these items was erroneous, the error stemming from their admission was harmless in light of the overwhelming evidence of petitioner's guilt. We

agree.

¶ 27 Here, as in *Evans*, any errors relating to the admission into evidence of weapons found in petitioner's home which were unrelated to the crimes for which he was charged were harmless in light of the overabundant evidence of his guilt. Petitioner admitted to planning and carrying out the robbery of the Brinks messenger at gunpoint and also to firing weapons at multiple individuals, two of whom were police officers. Petitioner was identified by multiple witnesses who testified that they saw him rob the messenger and discharge the weapons. The only issues in dispute at petitioner's trial were whether he was justified in firing upon his victims and whether he knew they were police officers. Given the overwhelming evidence of his guilt, we find that the admission into evidence of the weapons found in petitioner's home was harmless error. Because this error was harmless, we need not further determine whether there was plain error because petitioner cannot establish that he was prejudiced. *Herron*, 215 Ill. 2d at 181-82. Consequently, we cannot say that petitioner's appellate counsel was ineffective under *Strickland* for failing to raise this issue on appeal.

¶ 28 B. Regarding the Allowance of the Courtroom Demonstration

¶ 29 Petitioner next contends that he was denied a fair trial when the trial court granted the State's request that he put on the ski mask, glasses, hat, and gloves he wore during the robbery and reenact portions of the robbery, and that his appellate counsel was ineffective for failing to raise this issue on direct appeal. He argues that the demonstration lacked probative value and was highly prejudicial, and therefore should not have been permitted.

While petitioner objected to this demonstration at trial, he failed to renew his objections in his post-trial motion and again concedes that this claim can only be reviewed under the plain error doctrine.

¶ 30 The State contends that the trial court was well within its discretion to allow this demonstration because petitioner's appearance following the robbery was probative of whether or not he was a fleeing felon at the time he fired upon the officers, and therefore whether he was entitled to a self-defense instruction.

¶ 31 A trial court has a wide degree of discretion in permitting courtroom demonstrations, and absent an abuse of that discretion, resulting in prejudice to a defendant, a trial court's decision to allow or deny a courtroom demonstration will stand. *People v. Hayes*, 353 Ill. App. 3d 355, 357 (2004), *People v. Dowds*, 253 Ill. App. 3d 955, 957 (1993). No abuse of discretion will be found when a demonstration is based upon evidence or testimony admitted at trial. *People v. Malone*, 211 Ill. App. 3d 628, 640 (1991), *People v. Bush*, 100 Ill. App. 3d 5, 15 (1981). In reviewing the trial court's exercise of its discretion, we are primarily concerned with whether the demonstration would be "(1) probative of the facts in issue and (2) conducted under substantially similar conditions and circumstances as those which surrounded the original transaction or occurrence." *People v. Aliwoli*, 42 Ill. App. 3d 1014, 1022 (1976).

¶ 32 As noted, there is no dispute as to petitioner's participation in the robbery or the ensuing shootout, which petitioner conceded at trial. The State, however, contends that the reason for the courtroom demonstration was to prove that the shootout occurred while petitioner was a fleeing felon, and therefore he was not entitled to a self defense

instruction. This was the only reason given by the State to justify the demonstration. Accordingly, we fail to see how having petitioner don items of clothing he wore during the commission of the robbery would have been probative of the facts in issue at trial, namely whether or not petitioner was a fleeing felon at the time he shot at the victims, and thus was not entitled to a self-defense instruction.

¶ 33 However, for the reasons discussed above with respect to the erroneous admission of the weapons found in petitioner's home, the evidence of petitioner's guilt was overwhelming and, accordingly, the erroneous admission of the courtroom demonstration was harmless. Therefore, because any error attributable to the trial court's granting of a courtroom demonstration would have been harmless, we cannot say that petitioner's appellate counsel was ineffective for not raising this issue on direct appeal.

¶ 34 C. Regarding Statements in the Prosecutor's Closing Argument

¶ 35 Petitioner’s third and final claim is that his appellate counsel was ineffective for failing to raise the issue of prosecutorial misconduct based on statements made by the prosecution during its closing argument. Petitioner takes issue with several of the prosecutor's remarks that he claims were "calculated solely to arouse the prejudice and inflame the passions of the jury."

¶ 36 During his closing argument, the prosecutor recalled the events surrounding the shooting. He argued that the jury was faced with a "credibility case," and that it would "have to look at the credibility of all the witnesses." He further added without objection that the State's witnesses, namely the security guards and police officers involved in the

robbery, "are heros, and heros are rare in today's society."

¶ 37 The prosecutor further argued in his closing statement that because petitioner chose to testify and chose to put on a defense, the jury would have to analyze petitioner's credibility and compare it to the State's witnesses and all the other evidence. The prosecutor added, "[t]his is not difficult to figure out. The other night I was home and I was explaining the facts of this case to my wife. And she said, what –" Petitioner objected to this statement, and the court sustained the objection. The prosecutor continued, however, adding "I'm telling her this in front of my four-year-old who *** says to me, 'Daddy, how can the good guys be the bad guys –" Petitioner objected again, but the record indicates that the trial court did not rule on the objection or prevent the prosecutor from continuing with his anecdote.

¶ 38 The prosecutor continued, "[e]verybody in this courtroom knows. Everyone knows that this is not self-defense. And if my four-year-old can figure it out, so can everyone else. *** But if you believe it is *** then this is what I would tell you to do. Give [petitioner] his bulletproof vest back, all his ammunition, give him back his gun and let him go, if you want to buy into his ridiculous version of what occurred."

¶ 39 Petitioner asserts that these statements made by the prosecutor amount to reversible error. We disagree.

¶ 40 "The law gives a prosecutor wide latitude in argument and he may comment on facts and legitimate inferences that may be drawn therefrom." *People v. Hart*, 214 Ill. 2d 490, 513 (2005), citing *People v. Williams*, 192 Ill. 2d 548, 573 (2001). Our review of a challenge to remarks made by a prosecutor in closing must consider those remarks "in

the context of the entire closing statements of the parties." *Williams*, 192 Ill. 2d at 573. In order to justify reversal, any errors in closing argument must result in substantial prejudice to a defendant "such that the result would have been different absent the complained-of remark." *Williams*, 192 Ill. 2d at 573, quoting *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993). "The regulation of the substance and style of the closing argument is within the trial court's discretion, and the trial court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion." *People v. Byron*, 164 Ill. 2d 279, 295 (1995).

¶ 41 Petitioner first objects to the prosecutor's characterization of the police officers and others involved in the shooting as "heroes" and "good guys." Generally, a prosecutor may not vouch for the credibility of a witness or express his personal opinions about the case, unless his comments can be fairly inferred from the evidence. *People v. Jackson*, 399 Ill. App. 3d 314, 318 (2010), *People v. Hayes*, 183 Ill. App. 3d 752, 756 (1989).

¶ 42 Petitioner failed to object to the characterization of the State's witnesses as "heros" at trial, nor has he requested that we review this issue under the plain error doctrine. We therefore consider this issue forfeited. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (an appellant forfeits plain error review on appeal by failing to allege plain error). Even if we were to review this claim, however, we still could not say that it would amount to error. When viewed in the broader context of his closing argument, the prosecutor's characterization of the officers and security guards as heroes was not improper as he could have fairly inferred from the evidence that off duty police officers attempting to stop an armed fleeing bank robber acted heroically. Moreover, even if these statements

were made in error, based on our previous discussions of the evidence in this case, there is no indication that the jury in his trial would have reached a different verdict and consequently, any such error would have been harmless.

¶ 43 Petitioner further contends that the prosecutor's use of an anecdote regarding a discussion in front of his 4 year old child amounts to reversible error. While the State argues that no error could have occurred because the trial court sustained petitioner's objection to these comments, the record indicates that petitioner objected again, but the trial court made no ruling on his renewed objection, and permitted the prosecutor to freely state that "if my four-year-old can figure it out, so can everyone else."

¶ 44 Petitioner relies on *People v. Barraza*, 303 Ill. App. 3d 794 (1999) in support of his contention that these statements about conversations with his child amount to reversible error. In that case, the defendant argued in his closing argument that the victims' testimony was incredible because they waited over two years to report alleged sexual abuse committed by the defendant. In its rebuttal, the prosecutor related a lengthy conversation he had with his young daughter about sexual abuse, telling the jury that "although he had repeatedly told his daughter to tell him if she received a 'bad touch,' she stated that if she were touched inappropriately she would not tell anyone about it because it would be too uncomfortable to talk about it." *Barraza*, 303 Ill. App. 3d at 796. The court found that this anecdote was designed to "to bolster the victims' credibility and elicit sympathy for them" and was therefore improper. *Barraza*, 303 Ill. App. 3d at 798. Compounding this error was the fact that (1) the State's case consisted almost entirely of the uncorroborated testimony of the victims, whose credibility the jury doubted, and (2)

the court's instruction confused the jury when it admonished them that the prosecutor's remarks "should be considered an 'example,' then a 'hypothetical,' and finally 'fiction.'" *Barraza*, 303 Ill. App .3d at 798.

¶ 45 The statement of the prosecutor's four year old, even if it had actually been made, was never offered into evidence. Even if it had been offered, it would have been inadmissible hearsay and legally irrelevant. It was improper for the prosecutor to refer to it in the closing argument. That being said, its inclusion does not compel the result reached in *Barraza*. Unlike that case, here the trial court, in addition to sustaining one defense objection to the anecdotes, clearly and repeatedly admonished the jury that statements not based on the evidence should be disregarded, thus avoiding the problem of confusing or conflicting instructions like in *Barraza*. Further unlike *Barraza*, the evidence in this case was not closely balanced, nor were there credibility issues with the State's witnesses, thus minimizing the adverse effect of the prosecutor's statements. There was no dispute that petitioner robbed a man at gunpoint and shot 3 individuals while fleeing from police who were attempting to apprehend him. Moreover, in its context, the prosecutor's anecdote about his four year old merely illustrated his position that the case was a simple one. Thus, the prosecutor's anecdote about the opinions of his 4 year old child "resulted in substantial prejudice to [petitioner], such that absent those remarks the verdict would have been different." *People v. Cisewksi*, 118 Ill. 2d 163, 175 (1987). Therefore, because petitioner was not prejudiced by the prosecutor's remarks in closing argument, we cannot say that his appellate counsel was ineffective for refusing to raise this issue on direct appeal.

¶ 46 CONCLUSION

¶ 47 Accordingly, petitioner is unable to show that any of the aforementioned claims would have been successful had they been raised on direct appeal, and therefore we cannot say that he was denied his right to effective assistance of appellate counsel based on the failure to raise them. Thus, we affirm the trial court's dismissal of his post-conviction petition.

¶ 48 AFFIRMED.