FOURTH DIVISION
February 10, 2011

No. 1-09-1855

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. 99 CR 16821
	)	
JEFFERY BAILEY,	)	
	)	Honorable
Defendant-Appellant.	)	Brian Flaherty,
	)	Judge Presiding.
	)	

PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

HELD: Circuit court did not err by dismissing defendant's postconviction petition at the second stage of proceedings. Defendant did not make a substantial showing that trial counsel was ineffective for conceding his guilt where counsel did not concede his guilt to the charged offense and pursued a reasonable theory of second degree murder. Defendant did not make a substantial showing that trial counsel was ineffective for failing to object to the admission of the audio recording of a 911 call where that evidence was admissible. Defendant's mittimus should be corrected to reflect that he is entitled to 1,124 days of presentence custody credit.

Defendant Jeffery Bailey appeals the second-stage dismissal of his petition for relief

under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2004)). He contends that the circuit court erred by granting the State's motion to dismiss his petition because he made a substantial showing that defense counsel was ineffective for conceding his guilt and for failing to object to the admission of the audio recording of a 911 call and that his mittimus should be amended to accurately reflect his presentence custody credit. We affirm and amend the mittimus.

BACKGROUND

Defendant was charged with two counts of first degree murder for stabbing and killing Lenorris Jones-Watson on July 9, 1999. Following a bench trial, defendant was found guilty of first degree murder and sentenced to 34 years' imprisonment. On appeal, this court affirmed the trial court, holding that defendant's conviction for first degree murder should not be reduced to second degree murder because the only theory of second degree murder he advanced at trial was based on the mitigating factor of provocation resulting from mutual combat, and he did not meet his burden of establishing that factor by a preponderance of the evidence. *People v. Bailey*, No. 1-02-2550 (2003) (unpublished order under Supreme Court Rule 23). We also held that the trial court applied the correct standards in distinguishing first degree murder from second degree murder and did not abuse its discretion by admitting a hearsay statement made by Jones-Watson into evidence pursuant to the excited utterance exception to the hearsay rule. *Id.*

On November 18, 2004, defendant filed an amended *pro se* petition for postconviction relief, in which he alleged, *inter alia*, that trial counsel was ineffective for conceding his guilt and failing to assert that he acted in self-defense, and for entering into a stipulation regarding the

admission of an audio recording of a 911 call into evidence. On March 11, 2005, the circuit court appointed counsel for defendant, and on May 1, 2009, the State filed a motion to dismiss defendant's amended petition. On July 10, 2009, the circuit court conducted a hearing on the State's motion to dismiss, and granted the motion following argument. Defendant now appeals from the circuit court's grant of the State's motion to dismiss, and our review is *de novo*. *People v. Barrow*, 195 Ill. 2d 506, 519 (2001).

ANALYSIS

The Act provides a remedy for a defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Williams*, 209 Ill. 2d 227, 232 (2004). Proceedings are commenced by filing a petition in the court in which the conviction occurred, verified by affidavit. 725 ILCS 5/122-1(b) (West 2004). Dismissal of a petition is warranted at the second stage of proceedings where, taking all well-pleaded facts as true, the defendant fails to make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

Defendant first contends that the circuit court erred by granting the State's motion to dismiss his amended petition because he made a substantial showing that trial counsel was ineffective for conceding his guilt despite his conflicting testimony and vehement objection to a guilt-based trial strategy. The State asserts that defendant has waived this claim because he could have raised it on direct appeal, but did not. A postconviction petitioner generally forfeits any claims that could have been raised on direct appeal, but were not. *People v. Scott*, 194 Ill. 2d 268, 274 (2000). The waiver rule is relaxed, however, where the facts relating to the issue of

trial counsel's ineffectiveness do not appear on the face of the record. *People v. Owens*, 129 Ill. 2d 303, 308 (1989). In this case, the facts supporting defendant's claim that he objected to counsel's guilt-based trial strategy do not appear on the face of the record on appeal, and we therefore determine that defendant has not waived this claim by failing to raise it on direct appeal.

The State also asserts that the dismissal of defendant's claims of ineffective assistance of counsel was justified because he did not attach any affidavits, records, or other evidence to support those claims. A postconviction petitioner is required to attach affidavits, records, or other evidence supporting his allegations to his petition, or explain the absence of such supporting materials. 725 ILCS 5/122-2 (West 2004). The failure to comply with section 122-2 alone justifies dismissal of a postconviction claim. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). However, a petitioner's failure to attach independent corroborating documentation or explain its absence may be excused where the petition contains facts sufficient to infer that the only affidavit the petitioner could have furnished, other than his own, was that of his attorney. *People v. Hall*, 217 Ill. 2d 324, 333 (2005). In this case, the only documentation defendant could have provided to corroborate his allegation that trial counsel ignored his objections to conceding his guilt would have either been an affidavit by himself or an affidavit by trial counsel. As such, defendant's failure to attach supporting materials to his petition or explain the absence of such materials is excused in this case.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing

professional norms and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, (1984). Defendant asserts, however, that he need not satisfy the *Strickland* test to establish ineffective assistance of counsel in this case because he has made a substantial showing that trial counsel's actions were presumptively prejudicial.

A defendant's trial is rendered presumptively unfair by the ineffective assistance of counsel where the defendant is denied counsel at a critical stage of his trial, counsel entirely fails to subject the State's case to meaningful adversarial testing, or the circumstances are such that even a competent attorney could not provide effective assistance. *United States v. Cronic*, 466 U.S. 648, 659-60 (1984). Although counsel's assistance may be deemed ineffective where counsel concedes the defendant's guilt without his consent, the defendant must meet a high burden before he can forsake the two-part test set forth in *Strickland*. *People v. Johnson*, 128 Ill. 2d 253, 269-70 (1989).

Defendant maintains that trial counsel's abandonment of a theory of self-defense and concession that he was guilty of murder during closing argument contradicted his testimony in support of a self-defense theory and was presumptively prejudicial. Defendant claims that his testimony supported a self-defense theory because he testified that he stabbed Jones-Watson after she had twice threatened him with a knife and in response to her efforts to hurt him. The State responds that counsel did not concede defendant's guilt to the charged offense of first degree murder and exercised sound trial strategy by arguing a theory of second degree murder based on mutual combat that was consistent with the evidence, including defendant's own testimony.

A person is justified in the use of force 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 or another. 720 ILCS 5/7-1(a) (West 1998). Once a defendant raises the affirmative defense of self-defense, the State then has the burden of proving beyond a reasonable doubt that he did not act in self-defense. *People v. Lee*, 213 Ill. 2d 218, 224 (2004). The elements of self-defense are:

> "(1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable." *Id.* at 225.

If the State successfully negates any of the elements of self-defense, the defendant's claim must fail and the trier of fact must find him guilty of either first or second degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 128 (1995). A person commits the offense of second degree murder when he commits the offense of first degree murder and was acting under a sudden and intense passion resulting from serious provocation or unreasonably believed that circumstances existed that would excuse his actions as a justifiable use of force. 720 ILCS 5/9-2 (West 1998). Mutual combat is a recognized category of serious provocation sufficient to support a conviction for second degree murder (*People v. Garcia*, 165 Ill. 2d 409, 430 (1995)), and has been defined as a fight or struggle willingly entered into by the parties or where the parties, "upon sudden quarrel and in hot blood," fight upon equal terms (*People v. Moore*, 343 Ill. App. 3d 331, 339 (2003)).

At trial, defendant testified that on July 9, 1999, he argued with Jones-Watson, his girlfriend, about financial matters and became upset when she shared those matters with her sister Banita over the phone. Defendant walked toward the phone, which was in the living room, and Jones-Watson ran into the kitchen. Defendant picked up the phone, told Banita to leave them alone, and hung up the phone. Defendant turned around and saw Jones-Watson standing in the doorway connecting the kitchen with the living room, about three or four feet away from him, and holding a knife. Defendant told Jones-Watson to give him the knife, and she told him to "kiss [her] ass." Defendant took the knife away from Jones-Watson, accidentally cutting her face and hand as he did so, and threw it into the kitchen sink. Jones-Watson began screaming "I hate you" and grabbed another knife. Defendant grabbed her arm and pushed her into the living room and testified that "next thing I know, I was stabbing [her]." Defendant explained that he was not thinking and was angry when he stabbed Jones-Watson and that he called 911 and requested help once he realized that she was not moving.

On cross-examination, defendant stated that he was about six feet tall, weighed 225 pounds, and had been a boxer all his life, and that Jones-Watson was five feet, five inches tall and weighed about 134 pounds. Defendant wrestled with Jones-Watson on the living room floor to try to get the knife away from her and "snapped out" and stabbed her nine times after he took the knife away from her. Defendant called 911 and told the operator that he had stabbed his girlfriend, screamed "you are going to die," and said "I am going to fucking jail for life." He explained that he stabbed Jones-Watson "during the course of a battle."

Trial counsel began his closing argument by commenting that "[t]his is not a case of self

defense. I acknowledge that. It is not a case of self defense at all." Counsel proceeded to argue that the trial court should find defendant guilty of second degree murder instead of first degree murder because he was acting under a sudden passion caused by mutual combat when he stabbed Jones-Watson.

We determine that defendant's trial testimony does not support a theory of self-defense. "The use of deadly force is not justified where the victim, even though initially the aggressor, has been disarmed or disabled." *People v. Lee*, 243 Ill. App. 3d 1038, 1043 (1993). Defendant testified that Jones-Watson twice threatened him with a knife and that he wrestled with her on the living room floor and took the knife away from her after she had threatened him the second time. Defendant, who had been a boxer all his life and was about seven inches taller and 90 pounds heavier than Jones-Watson, then stabbed her nine times with that same knife.

Thus, although defendant testified that Jones-Watson was the initial aggressor, he also testified that he had disarmed her prior to killing her. As such, defendant became the aggressor when he used the knife that he had taken away from Jones-Watson to stab her, and his own testimony therefore negates the necessary element of self-defense that he not be the aggressor. *People v. Stokes*, 185 Ill. App. 3d 643, 657 (1989). In addition, defendant's testimony that Jones-Watson was unarmed when he killed her, as well as his testimony regarding the size differential between them and his background as a boxer, negate the necessary elements that the danger of harm was imminent and the use of deadly force was necessary when he killed her. *Lee*, 243 Ill. App. 3d at 1043. Also, defendant's testimony that "next thing I know, I was stabbing [Jones-Watson]," that he was not thinking and was angry when he stabbed her, and that he "snapped

out" and stabbed her nine times after he had taken the knife away from her, if believed, would prove that he killed Jones-Watson out of anger, and not that he "subjectively believed a danger existed that required the use of the force applied" (*Lee*, 213 Ill. 2d at 225) and acted in self-defense.

Having determined that defendant's trial testimony does not support a theory of self-defense, we therefore also determine that counsel did not contradict that testimony by arguing a theory of second degree murder and abandoning a self-defense theory during closing argument. As such, we further determine that defendant has not made a substantial showing that counsel's actions were presumptively prejudicial such that he need not satisfy the two-part *Strickland* test to establish counsel's ineffectiveness.

In reaching that determination, we have considered *People v. Hattery*, 109 Ill. 2d 449 (1985), cited by defendant, and find it distinguishable from this case. In *Hattery*, 109 Ill. 2d at 464-65, our supreme court held that counsel was ineffective under *Cronic* for failing to subject the State's case to meaningful adversarial testing where the defendant entered a plea of not guilty to the charge of first degree murder, and counsel's trial strategy was to show that the defendant was guilty of first degree murder, but undeserving of the death penalty. In this case, however, counsel did not concede defendant's guilt to the charged offense of first degree murder and counsel subjected the State's case to meaningful adversarial testing by arguing a theory of second degree murder. *People v. Labosette*, 236 Ill. App. 3d 846, 855 (1992).

Having determined that prejudice cannot be presumed in this case, we now consider whether defendant's claim of ineffective assistance of counsel satisfies the two-part *Strickland*

test. In order to establish counsel's deficient performance, the defendant must overcome the strong presumption that the challenged action might have been the product of sound trial strategy. *People v. Simms*, 192 Ill. 2d 349, 361 (2000). A failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994).

Defendant asserts that he made a substantial showing that counsel was deficient for conceding that he was guilty of second degree murder in spite of his refusal to consent to counsel's abandonment of a self-defense theory of defense. The State responds that counsel's decision to argue that defendant was only guilty of second degree murder was a reasonable strategic decision in light of the overwhelming evidence which directly refuted any plausible claim of self-defense.

A counsel's strategic choices are virtually unchallengeable. *Id.* at 476. The decision to rely on one theory of defense to the exclusion of others is a matter of trial strategy, and allegations arising from matters of trial strategy will not support a claim of ineffective assistance of counsel. *Labosette*, 236 Ill. App. 3d at 856. In this case, counsel's strategic decision to argue a theory of second degree murder instead of a theory of self-defense was reasonable where, for the reasons stated above, defendant's testimony was not consistent with a theory of self-defense. In addition, although counsel's strategy to advance a second degree murder theory turned out to be unsuccessful, there was some support for that theory in defendant's testimony that he wrestled with Jones-Watson on the living room floor to get the knife away from her, that he stabbed her "in the course of a battle," and that he was not thinking and was angry when he stabbed her. A

counsel's decision to pursue a particular trial strategy is not deemed incompetent merely because it was unsuccessful, *Palmer*, 162 Ill. 2d at 479.

In light of defendant's testimony, we determine that counsel made a reasonable strategic decision to argue a theory of second degree murder instead of a theory of self-defense. Although that strategy ultimately proved to be unsuccessful, we cannot say that counsel's performance was deficient. We therefore conclude that defendant has not made a substantial showing that counsel was ineffective for conceding his guilt to second degree murder.

Defendant next contends that he made a substantial showing that trial counsel was ineffective for failing to object to the admission into evidence of an audio recording of the 911 call he made shortly after he stabbed Jones-Watson and that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal because a proper foundation had not been laid to support the recording's admission. Sound recordings are admissible into evidence if a proper foundation has been laid to assure the authenticity and reliability of the recordings, and an adequate foundation for the admission of a tape recording is established where a witness to the material recorded testifies that the tape accurately portrays the conversation in question. *People v. Aliwoli*, 238 Ill. App. 3d 602, 623 (1992).

The record shows that following its opening statement, the State submitted a stipulation agreed to by the parties stating that Paulette Sczecina, a 911 communications officer for the city of Blue Island, received a 911 call at 7:53 p.m. on July 9, 1999, from a male caller located at 1900 Broadway, Apartment 3-A. During the 911 call, Sczecina dispatched the Blue Island police department and fire department to 1900 Broadway and did not hang up the phone line until the

police department had secured the scene. The parties further stipulated that the entire 911 call had been recorded, that People's Exhibit 1A was "an exact reproduction of the recorded 911 call," and that the chain of custody was properly maintained at all times as to People's Exhibit 1A. The recording of the 911 call was then published to the trial court.

Defendant asserts that the stipulation entered into by the parties did not provide a proper foundation for the recording of the 911 call because it merely confirmed that the duplication of the original recording was accurate, and not that the original recording was an accurate portrayal of the actual conversation. Defendant also asserts that he was prejudiced by the admission of the challenged evidence because, although other inculpatory statements had been admitted into evidence, only the comments attributed to him in the recording of the 911 call suggested that he had intended to kill Jones-Watson.

We initially note that the parties stipulated that the evidence at issue was "an exact reproduction of the recorded 911 call," and not that it was a reproduction of *a record* of the 911 call. Thus, the stipulation indicates that the evidence is an exact reproduction of the call itself, rather than a duplication of the original recording, as defendant asserts. Moreover, defendant admitted during cross-examination that the record of the 911 call accurately reflected that he said "you are going to die" and "I am going to fucking jail for life" during the call. Thus, defendant, who was a witness to the 911 call, testified that the record of that call accurately portrayed the allegedly prejudicial portions of the conversation in question. As such, there was a proper foundation to at least admit the portions of the record of the 911 call that were prejudicial to defendant, and we therefore conclude that trial counsel was not ineffective for failing to object to

the admission of that evidence.

Defendant further contends, and the State agrees, that although he was entitled to receive 1,124 days in presentencing custody credit, his mittimus incorrectly reflects that he is entitled to 1,022 days in presentencing custody credit. The record shows that defendant was arrested on July 9, 1999, and remained in custody for a total of 1,124 days until he was sentenced on August 6, 2002. A defendant shall be given credit on his sentence for the time spent in custody as a result of the offense for which the sentence was imposed. 730 ILCS 5/5-8-7(b) (West 1998). We therefore order that the mittimus be corrected to reflect 1,124 days of presentence custody credit. Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999).

Accordingly, we affirm the order of the circuit court of Cook County dismissing defendant's postconviction petition at the second stage of proceedings and order that his mittimus be amended.

Affirmed; mittimus amended.