2013 IL App (1st) 112304-U

SIXTH DIVISION
AUGUST 16, 2013

No. 1-11-2304

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. 04 CR 26713
	)	
OMAR SCOTT,	)	Honorable
	)	Arthur F. Hill,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing a first-stage *pro se* postconviction petition which alleges that appellate counsel was ineffective for not raising the prosecutor's improper closing remarks on direct appeal concerning the crime's impact on the victims' families. The remarks did not cause substantial prejudice since the evidence was overwhelming.

¶ 2 Defendant Omar Scott appeals the summary dismissal of his postconviction petition, on the sole ground that his appellate counsel was ineffective for failing to raise, on direct appeal, the prosecutor's improper comments during closing argument regarding the impact on the victims' families.

¶ 3 Defendant was charged with two counts of first degree murder, aggravated battery with a firearm, and unlawful use of a weapon by a felon (UUWF). The charges stemmed from a shooting at the Time Out Lounge on South Vincennes Avenue in Chicago at 1 a.m. on October 2, 2004, which resulted in the death of Ike Steptore and the partial paralysis of Gernard Fulton.

¶ 4 While the charges of first degree murder and aggravated battery were tried by a jury, the trial court granted defendant's motion to sever the unlawful use of a weapon by a felon charge and held a separate and simultaneous bench trial on that charge. The jury found defendant guilty of first degree murder for the death of Ike Steptore and aggravated battery with a firearm for the injury sustained by Gernard Fulton. The trial court additionally found defendant guilty of UUWF, and, after considering factors in mitigation and aggravation, sentenced defendant to consecutively serve 60 years for first degree murder and 15 years for aggravated battery with a firearm. While the transcript of the sentencing shows that the trial court also added a consecutive sentence of 3 years for UUWF, totaling 78 years in the Illinois Department of Corrections, this additional sentence does not appear on the mittimus.

¶ 5 On direct appeal, defendant argued that the trial court erred by refusing to rule on a motion *in limine* to bar the introduction of defendant's prior convictions as impeachment evidence and by allowing the admission of prejudicial testimony. We affirmed defendant's convictions, but corrected the mittimus by merging two first degree murder counts into a single sentence and by affirming the three-year sentence for UUWF. *People v. Scott*, 401 Ill. App. 3d 585, 602 (2010).

¶ 6 Defendant filed the instant *pro se* postconviction petition on April 1, 2011, in which he

argues that he received ineffective assistance of both trial counsel and appellate counsel. The trial court dismissed defendant's *pro se* petition for postconviction relief, finding his claims frivolous and patently without merit. On this appeal, defendant argues only that appellate counsel was ineffective for failing to raise the issue of the prosecutor's improper comments about the impact on the victims' families during rebuttal argument. Defendant argues on this appeal that the prosecutor's improper comments caused the jury to reject the second degree murder option. For the following reasons, we affirm.

¶ 7 BACKGROUND

¶ 8 I. Suppression Hearing

¶ 9 Defendant filed two pretrial motions: one to quash arrest, and one to suppress statements. The motion to quash arrest argued that defendant's fourth amendment rights were violated by an arrest made without the authority of a valid search warrant. The trial court denied this motion on March 31, 2006.

¶ 10 The motion to suppress statements argued that defendant was denied the opportunity to contact an attorney, was held in coercive conditions at Area 2 police headquarters, and did not receive his *Miranda* warnings before any of his interviews with detectives. The trial court denied defendant's motion to suppress statements after a hearing held on May 8, 2006.

¶ 11 II. Evidence at Trial

¶ 12 We describe the evidence at trial in detail because we later conclude that the evidence was overwhelming.

¶ 13 A. State's Evidence

¶ 14 The State presented testimony from 11 witnesses at trial: (1) Cordelia Steptore, wife of decedent Ike Steptore, (2) Gernard Fulton, a victim of the shooting, (3) Roderick Love, who witnessed the shooting, (4) Sergeant Dwayne Betts, the officer who apprehended defendant, (5) Officer Kevin Sheetz, who assisted Sergeant Betts in defendant's arrest, (6) Dr. Valerie Arangelovich, the forensic pathologist who reviewed the autopsy findings on decedent Steptore, (7) Joseph Dunigan, a crime scene examiner in the Chicago police department, (8) Robert Berk, a trace evidence analyst with the Illinois State Police, (9) Tonia Brubaker, a firearms examiner with the Illinois State Police, (10) Detective Darryl Shaw, the lead detective in the investigation, and (11) Assistant State's Attorney (ASA) Lou Longhitano, who handwrote a statement made by defendant.

¶ 15 1. Cordelia Steptore

¶ 16 Cordelia Steptore, Ike Steptore's wife, testified as a life/death witness for the State. Cordelia last observed her husband alive at 10 p.m. on October 1, 2004, before he left for the Time Out Lounge to celebrate the birthday of Cordelia's brother-in-law. She subsequently went to the lounge and observed her still-conscious husband as he was being placed into an ambulance. She rode in the ambulance with her husband to Christ Hospital in Oak Lawn, where he died from his injuries around 11 a.m. on October 2.

¶ 17 2. Gernard Fulton

¶ 18 Gernard Fulton testified that she met a friend at the Time Out Lounge sometime between 10 p.m. and 10:30 p.m. on the evening of October 1, 2004. Gernard danced with a man who

introduced himself to her as Ike. At approximately 1 a.m. on October 2, Gernard had stopped dancing and walked over to the bar when she heard the commotion of two men arguing behind her and near the dance floor. Gernard did not turn around to observe the argument, but she felt a hot sensation in the left side of her back as she was gathering her things to leave. An ambulance transported Gernard to Christ Hospital, where surgeons removed one bullet from her spine and performed a spinal fusion. After surgery, Gernard was paralyzed from the neck down. She spent 12 days at the hospital before being transferred to the Rehabilitation Institute of Chicago, where she underwent two months of intensive therapy to learn how to walk again and take care of herself. Gernard began to walk one year after the shooting, but her left arm and hand were still paralyzed and she could no longer live independently.

¶ 19 3. Roderick Love

¶ 20 Roderick Love was Ike Steptore's brother-in-law. He arrived at the lounge around 10:30 p.m. on October 1, 2004, to attend a family birthday party. Ike entered the Time Out Lounge at 11 p.m. Sometime around 1 a.m., Roderick observed Ike and defendant become embroiled in a heated argument in which "a little shoving" took place. Roderick testified that he did not witness any punches, but defense counsel showed him a statement he made to police in which he claimed that he witnessed Ike and defendant pushing and punching one another. Another man, known to Roderick only as "Rock," also approached Ike and defendant. Roderick told defendant, "Let it go, it's family," and defendant responded, "It's no damn family of mine!" Having said those words, defendant raised a handgun from his side. Roderick responded by grabbing defendant's shooting arm, and defendant fired two shots as he struggled to raise his arm. Ike fell onto Roderick, and

then defendant fired a third shot before running out the bar's front door. Lifting his shirt, Ike revealed bullet holes in his stomach. Roderick remained at the bar after Ike had been transported to the hospital in order to speak with the police officers who had responded to the shooting. At 7:20 a.m. on October 2, 2004, Roderick viewed a lineup comprised of five men behind a glass partition and identified defendant as the shooter. Roderick made an oral statement to Detective Shaw and ASA Lou Longhitano at Area 2 police headquarters at 8:40 p.m. on October 3, 2004, which was memorialized by the ASA into a handwritten statement.

¶ 21 4. Sergeant Betts

¶ 22 Dwayne Betts served as a police sergeant for six years. When he was off duty, he entered the crowded Time Out Lounge at 1 a.m. to meet with his best friend, Sergeant Ed Johnson. The two were having drinks at the front of the bar when a bar patron yelled, "They are fighting back here!" Betts heard shots ring out from the dance floor as the DJ announced last call. Betts remembered hearing three shots fired in rapid succession, but he did not observe the shooter. However, Betts did observe defendant attempting to flee out the bar's door from the area where the shots had been fired. Betts exited the building and continued to observe defendant quickly walking away from the bar down Vincennes Avenue. Betts followed defendant and yelled, "Police, police, stop there, police!" Defendant initially did not obey the sergeant's commands, and Betts observed defendant throw a handgun into an adjacent grassy lot. Once defendant finally did stop walking, Betts placed him on the ground and handcuffed him with the assistance of Officer Sheets. Betts later discovered defendant's handgun in the adjacent grassy lot.

¶ 23 5. Officer Sheetz

¶ 24 At around 1:10 a.m. on October 2, 2004, Police Officer Kevin Sheetz and his partner, Sofona Mitchell, were driving past the Time Out Lounge on routine patrol when Sheetz heard loud noises coming from the lounge and witnessed many people exiting the lounge in "a very fast fashion." Sheetz exited the police vehicle and was directed to defendant, who was walking northbound on Vincennes. Sergeant Betts was walking behind the suspect with his gun drawn. Sheetz ran in the direction of defendant to assist Betts. Like Betts, Sheetz observed defendant throw his handgun into the grassy lot. Sheets later observed Betts' discovery of the weapon.

¶ 25 6. Valerie Arangelovich

¶ 26 Dr. Valerie Arangelovich testified that she has served as a forensic pathologist at the Cook County Medical Examiner's Office since July 2004 and has been licensed to practice medicine since 2003. The chief medical examiner at the time of the murder, Dr. Edmond Donahue, had performed Ike's autopsy. However, Dr. Donahue had retired and taken a new position elsewhere before trial began. Dr. Arangelovich reviewed Dr. Donahue's post-mortem examination report for the purpose of testifying at trial, and the defense did not challenge her expertise. The report noted two recent injuries. Ike had one wound in the lower left side of his abdomen which resulted from a medium caliber, copper-jacketed lead bullet that was recovered from the left side of his back in a flattened state. The other wound resulted from a bullet of similar caliber that entered the left side of the chest and existed through the left side of the back without damaging any vital organs. The bullet from the second wound was not recovered.

¶ 27 7. Trace Evidence Analyst Berk

¶ 28 The State's next witness, Robert Berk, testified that he had 20 years of experience as a trace evidence expert. Berk analyzed defendant's October 2004 gunshot residue test samples in February 2005 and determined that the samples tested positive for gunshot residue. Berk found eight unique gunshot residue particles and 27 consistent gunshot residue particles. The control sample did not test positive for gunshot residue, suggesting that the positive test results did not result from separate environmental contamination. Defendant's submitted questionnaire furthermore did not indicate that he regularly participated in activities which would lead to a greater likelihood of environmental contamination (for example, trap shooting). The test results suggested within a reasonable degree of scientific certainty that defendant either discharged a firearm, contacted an item that had gunshot residue on its surface, or was in the environment of a firearm when it was discharged.

¶ 29 8. Firearms Examiner Brubaker

¶ 30 Tonia Brubaker testified that she worked for the Illinois State Police since April 1995, specializing in the field of firearms identification. As part of this investigation, she received a semiautomatic handgun, a magazine, eight unfired cartridges, and one spent cartridge casing. Brubaker conducted a "dry fire" test in which she pulled the trigger of the firearm when it was unloaded. She later loaded the handgun and discharged rounds into a laboratory water tank, determining that the handgun functioned as it was designed. Brubaker also ran a trigger pull test on the firearm and determined that six and a half to seven pounds of pressure was required to depress the trigger. Defendant's handgun was recovered with a spent cartridge casing left in the

firing chamber: Brubaker explained that a limp wrist could have prevented the ejection of that cartridge casing.

¶ 31 9. Detective Shaw

¶ 32 Detective Darrel Shaw, a veteran Chicago police detective with 19 years' experience, testified that he was the detective assigned to this investigation. Defendant was given his *Miranda* rights and confirmed his understanding of them prior to commencing his first interview with Shaw at 9:20 a.m. on October 2. In that interview, defendant claimed that he did not have a gun and he did not shoot Ike. Shaw then arranged for six witnesses to view separate lineups between 5:28 p.m. and 9:45 p.m. on October 2. In a lineup conducted at 7:20 p.m., Roderick Love identified defendant as the shooter. Upon learning of the identification during a second interview taking place at 11:45 p.m., defendant told Shaw that a quarrel erupted when defendant accidentally walked into Ike. Defendant grabbed his handgun when he believed it was falling from his waistband, accidentally causing it to discharge several times and strike Ike.

¶ 33 10. ASA Longhitano

¶ 34 Assistant State's Attorney (ASA) Lou Longhitano testified that he served as the trial supervisor on the felony review unit at the time of defendant's arrest. ASA Longhitano first interviewed defendant on the evening of October 3. ASA Longhitano recited defendant's *Miranda* rights prior to the interview, and defendant verbally indicated that he understood his rights. Defendant then gave ASA Longhitano an oral statement in which he claimed that he accepted a firearm from a friend only after arriving at the bar. Defendant also told ASA Longhitano that he and Ike began a shoving match when defendant accidentally bumped into Ike

on the dance floor, and that defendant accidentally discharged his firearm during the shoving match while grabbing it in an effort to prevent it from falling out of his waistband. The ASA memorialized defendant's statement by writing it out longhand, and defendant then read and signed each page.

¶ 35 Following ASA Longhitano's testimony, the State rested its case. The defense moved for directed verdict on the ground that the State had failed to prove that defendant acted with the intent required for first degree murder and aggravated battery. Defense's motion was denied.

¶ 36 B. Defense Case

¶ 37 The defense called John Edwards, who testified that he was distantly related to defendant by marriage, and that he was present at the bar when the shooting occurred. He and defendant had "a couple" of drinks prior to the shooting. Edwards was sitting at a table with his wife when he observed Ike approach defendant at the bar and throw punches at him. Edwards testified that Ike landed at least two punches on defendant's face, but on cross-examination he admitted that defendant's face did not have any bruises or marks as it appeared in a photograph taken the night of the shooting. Edwards responded to Ike's attack on defendant by stepping between the two men and telling Ike, "Man, slow down!" Ike reached over Edwards and, at that moment, Edwards heard gunshots. Edwards subsequently left the bar without contacting the police.

¶ 38 C. Closing Arguments

¶ 39 During her own closing argument, defense counsel said the following regarding the jury's duty not to be swayed by sympathy or prejudice:

"When you look at that instruction, the very, very first page

it says, and it was part of your oath also, that neither sympathy nor prejudice shall sway you when you're making that deliberation. You saw a woman who -- Miss Fulton testified, who obviously has suffered a lot. She's had to go through a lot but that's not why those words are there. You've got to decide did -- you've got to decide did the State prove beyond a reasonable doubt that [defendant] committed what he was charged with? That's why you took the oath and we trust that you're going to follow that oath to look at the evidence. I mean no one can help but feel sympathy for Miss Fulton, but your job is to look at that evidence, what you've been presented with and make that decision and we trust that you'll make the right decision, that you will find [defendant] not guilty of first degree murder, not guilty of aggravated battery with a firearm."

The following exchange occurred during the State's rebuttal:

"ASA: Miss Fulton and Ike Steptore's family, they don't want sympathy.

DEFENSE COUNSEL: Objection, Judge, to what their families want.

ASA: Response to their argument.

THE COURT: It was in the argument.

Overruled.

ASA: This isn't about sympathy. This is about justice. This is about loved ones being affected by a man who took a gun to solve a problem that should have never, ever been used to solve that problem. It's three and-a-half years ago --

DEFENSE COUNSEL: Objection.

ASA: -- but it is like yesterday --

THE COURT: Overruled.

ASA: -- to the victims of this case and their family. Justice is today. Today."

Not long afterward, defense counsel again objected to the following assertions by the State:

"ASA: When you deliberate -- if you deliberate for five minutes and come back with a verdict of first degree murder, you would have given this man probably four minutes plus more consideration of him –

DEFENSE COUNSEL: Objection.

ASA: -- than he gave Ike Steptore.

THE COURT: Overruled."

The defense argued in its closing that defendant deserved an acquittal because he acted in self-defense, or, alternatively, that defendant deserved no more than second degree murder. After deliberating less than one hour, the jury found defendant guilty of first degree murder and

aggravated battery with a firearm. The trial court additionally found defendant guilty of unlawful use of a weapon by a felon.

¶ 40 IV. Conviction, Sentencing, and Direct Appeal

¶ 41 The trial court entered judgment on the jury's verdict and its UUWF finding. The defense then filed a posttrial motion for new trial, which the trial court denied. Having considered factors in mitigation and aggravation, the trial court sentenced defendant to consecutively serve 60 years in the Illinois Department of Corrections for first degree murder and 15 years for aggravated battery with a firearm. The trial court also imposed a three-year sentence for UUWF, also to be served consecutively, totaling 78 years.

¶ 42 On direct appeal, defendant argued his constitutional right to testify in his own defense was effectively denied by the trial court's denial of defendant's motion *in limine* seeking to bar prior convictions for purposes of impeachment. *People v. Scott*, 401 Ill. App. 3d 585, 589 (2010). Defendant also argued that the trial court's decision to allow certain testimony of the decedent's widow and the surviving shooting victim denied him a fair trial. *Scott*, 401 Ill. App. 3d at 599. Regarding the second issue, we decided that the admission of the disputed testimony did not amount to plain error. *Scott*, 401 Ill. App. 3d at 601.We affirmed and corrected the mittimus by merging two first degree murder counts into a single sentence and affirming a consecutive sentence for three years for UUWF. *Scott*, 401 Ill. App. 3d at 602.

¶ 43 V. Postconviction Petition

¶ 44 Defendant filed his *pro se* petition for postconviction relief on April 1, 2011, claiming that trial counsel had failed to: (1) object to the trial court's *voir dire* questions regarding the *Zehr*

principles, (2) impeach certain witnesses, (3) challenge defendant's absence during part of the proceedings, (4) file certain motions, (5) reasonably investigate defendant's case before trial, and (6) object to prosecutor's prejudicial statements during rebuttal. Defendant further claimed that appellate counsel failed to raise the issue of trial counsel's ineffectiveness and failed to argue that the State failed to prove defendant's guilt beyond a reasonable doubt. Defendant did not attach any affidavits containing statements from his past attorneys or from any individuals beside himself. On June 29, 2011, the trial court acted within the statutory 90-day period to dismiss defendant's *pro se* postconviction petition as frivolous and patently without merit (725 ILCS 5/122-2.1(a) (West 2008)), and this appeal followed.

¶ 45 ANALYSIS

¶ 46 On appeal, defendant argues that the trial court erred in dismissing his postconviction petition at the first stage. Although defendant's *pro se* petition raised several claims, he argues on appeal only that appellate counsel was ineffective for failing to raise the issue of two improper remarks made during the prosecutor's rebuttal argument. For the following reasons, we affirm.

¶ 47 I. Stages of a Postconviction Proceeding

¶ 48 A postconviction petition is a collateral attack on a prior conviction and/or sentence and therefore is limited to constitutional matters that either were not or could not have been previously adjudicated; it is not a substitute for a direct appeal. *People v. Rissley*, 206 Ill. 2d 403, 411-12 (2003). Generally, "issues that were raised on direct appeal from the underlying judgment of conviction, or that could have been raised but were not, ordinarily will not be considered in a postconviction proceeding." *People v. Wright*, 329 Ill. App. 3d 462, 467 (2002) (citing *People v.*

West, 187 Ill. 2d 418, 425 (1999)). The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) "provides a means by which a defendant may challenge his conviction or sentence for violations of *** constitutional rights." *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). To be entitled to postconviction relief, a defendant must show that he or she has suffered a substantial deprivation of constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5/122-1(a)(1) (West 2008); *Pendleton*, 223 Ill. 2d at 471 (citing *Whitfield*, 217 Ill. 2d at 183).

¶ 49 The Act provides for three stages in noncapital cases. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008); *Pendleton*, 223 Ill. 2d at 472. If the trial court does not dismiss the petition within that 90-day period, the trial court must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2008); *Pendleton*, 223 Ill. 2d at 472.

¶ 50 The Illinois Supreme Court has held that, at this first stage, the trial court evaluates only the merits of the petition's substantive claim, by determining whether the allegations in the petition, liberally construed, set forth the gist of a constitutional claim that would provide relief under the Act (*People v. Edwards*, 197 Ill. 2d 239, 244 (2007)), and not its compliance with procedural rules. *People v. Perkins* (229 Ill. 2d 34, 42 (2007)). The issue for the trial court to decide at this first stage is whether the petition presents "the gist of a constitutional claim." (Internal quotation marks omitted.) *Perkins*, 229 Ill. 2d at 42 (quoting *People v. Boclair*, 202 Ill.

2d 89, 99-100 (2002) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996))). If the trial court does not dismiss the petition, it will proceed to the second stage.

¶ 51 The Act provides that, at the second stage, counsel may be appointed for defendant if defendant is indigent. 725 ILCS 5/122-4 (West 2008); *Pendleton*, 223 Ill. 2d at 472. After defense counsel has made any necessary amendments to the petition, the State will usually move to dismiss it. *Pendleton*, 223 Ill. 2d at 472 (discussing 725 ILCS 5/122-5 (West 2008)); see also *Perkins*, 229 Ill. 2d at 43. If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). Again, a trial court is foreclosed "from engaging in any fact finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding." *Coleman*, 183 Ill. 2d at 380-81. However, the trial court reviews the record as a whole. *People v. Brown*, 236 Ill. 2d 175, 184-85 (2010).

¶ 52 If the State chooses not to file a dismissal motion, then the State "shall" answer the petition. 725 ILCS 5/122-5 (West 2008); *Pendleton*, 223 Ill. 2d at 472. If the trial court denies the State's motion to dismiss, the proceeding then advances to the third stage, which provides for an evidentiary hearing. 725 ILCS 5/122-6 (West 2008); *Pendleton*, 223 Ill. 2d at 472-73. At the hearing, the trial court "may receive proof by affidavits, depositions, oral testimony, or other evidence," and "may order the petitioner brought before the court." 725 ILCS 5/122-6 (West 2008).

¶ 53 In the case at bar, the trial court summarily dismissed defendant's postconviction petition at the first stage, finding defendant's claims were frivolous and without merit.

¶ 54 A *pro se* postconviction petition is frivolous or patently without merit only if it "has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009); *Brown*, 236 Ill. 2d at 184-85. A petition lacking an arguable basis in law or fact is one "based on an indisputably meritless legal theory or a fanciful factual allegation." *Brown*, 236 Ill. 2d at 185. A claim completely contradicted by the record is an example of an indisputably meritless legal theory. *Brown*, 236 Ill. 2d at 185. Fanciful factual allegations are those that are fantastic or delusional. *Brown*, 236 Ill. 2d at 185.

¶ 55 The standard by which first-stage dismissals of postconviction petitions are reviewed is *de novo*. *Hodges*, 234 Ill. 2d at 9. A *de novo* review entails performing the same analysis a trial court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 569 (2011).

¶ 56 II. Ineffective Assistance of Counsel Standard

¶ 57 The Illinois Supreme Court has found that, to determine whether a defendant was denied his or her right to effective assistance of counsel, an appellate court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 690-92 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, a defendant must prove both (1) that his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness; and (2) that absent these errors, there was a reasonable probability that his trial would have resulted in a different outcome. *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94).

¶ 58 Under the first prong of the *Strickland* test, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness "under prevailing professional

norms." *Colon*, 225 Ill. 2d at 135; *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Under the second prong, the defendant must show that "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220; *Colon*, 225 Ill. 2d at 135. In other words, the defendant must show that he was prejudiced by his attorney's performance.

¶ 59 A postconviction petition alleging ineffective assistance of counsel may not be dismissed in the first stage if: (1) the counsel's performance *arguably* fell below an objective standard of reasonableness; and (2) the counsel's performance *arguably* resulted in prejudice against the defendant. *People v. Brown*, 236 Ill. 2d 175, 185 (2010) (citing *Hodges*, 234 Ill. 2d at 17).

¶ 60 To prevail, the defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "That is, if an ineffective assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). We do not need to consider the first prong of the *Strickland* test when the second prong cannot be satisfied. *Graham*, 206 Ill. 2d at 476.

¶ 61 Ineffective assistance of appellate counsel is determined under the same standard as a claim of ineffective assistance of trial counsel. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (citing *People v. West*, 187 Ill. 2d 418, 435 (1999)). Appellate counsel is not required to raise

every conceivable issue on appeal, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit. *Edwards*, 195 Ill. 2d at 163-64 (citing *People v. Johnson*, 154 Ill. 2d 227, 236 (1993)). Accordingly, unless the underlying issue has merit, there is no prejudice from appellate counsel's failure to raise an issue on appeal. *Edwards*, 195 Ill. 2d at 164 (citing *People v. Childress*, 191 Ill. 2d 168, 175 (2000)).

¶ 62 III. Second Degree Murder

¶ 63 On appeal, defendant argues that, absent the prosecutor's allegedly improper remarks, the jury would have found him guilty of second degree murder instead of first degree murder. A defendant may be found guilty of second degree murder if, at the time of the killing, "he is acting under a sudden and intense passion resulting from serious provocation by the individual killed," or "he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles states in Article 7 of this Code, but his belief is unreasonable." 720 ILCS 5/9-1.2(a) (West 2004). Article 7 of the Criminal Code of 1961 justifies the use of deadly force when the defendant "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILCS 5/7-1(a) (West 2004). In the defense's closing, defense counsel argued that defendant had an unreasonable belief in self-defense because Ike was punching defendant, who is a smaller man. Defense counsel also argued that Ike provoked defendant by "coming after him."

¶ 64 IV. The Underlying Issue of Prosecutorial Misconduct During Closing Argument

¶ 65 Defendant claims that the prosecutor made two improper statements to the jury during closing argument. First, defendant argues that the prosecutor improperly appealed to the jurors' sympathy for the victims' families. The prosecutor stated:

> "This isn't about sympathy. This is about justice. This is about loved ones being affected by a man who took a gun to solve a problem that should have never, ever been used to solve that problem."

According to defendant, the prosecutor's reference to the victims' families functioned as an appeal for the jury to decide the case on the basis of sympathy for the victims rather than the relevant evidence. Defendant further argues that the reference prejudiced him because the evidence presented to the jury was closely balanced, such that the jury otherwise could have found defendant guilty of second degree murder by determining that defendant acted under either intense passion or an unreasonable belief in the need to defend himself. 720 ILCS 5/9-2 (West 2002).

¶ 66 Second, defendant argues that the prosecutor improperly sought to inflame the jurors' passions by emphasizing the suddenness of the killing and asking the jury to deliberate swiftly. The prosecutor stated before the jury:

> "[I]f you deliberate for five minutes and come back with a verdict of first degree murder, you would have given this man probably

> four minutes plus more consideration of him *** than he gave Ike Steptore."

The jury then deliberated for less than one hour before finding defendant guilty of first degree murder and aggravated battery with a firearm. According to defendant, the prosecutor's reference to the suddenness of the killing and act of inferring to the jury that defendant's actions should not be condoned by a long deliberation by the jury "gave the jury reason to grant Scott only the briefest of deliberations."

¶ 67 However, even if the prosecutor's remarks were improper, the outcome of the trial would have been the same in light of the overwhelming evidence. Defendant cannot show prejudice from counsel's failure to raise the issue of prosecutorial misconduct on direct appeal. *Edwards*, 195 Ill. 2d at 164 (citing *Childress*, 191 Ill. 2d at 175).

¶ 68 A. Standard of Review

¶ 69 There is conflicting precedent regarding whether the proper standard of review for prosecutorial misconduct in a closing argument should be *de novo* or abuse of discretion. *People v. Land*, 2011 IL App (1st) 101048, ¶ 149 (comparing *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) ("Whether statements made by a prosecutor at closing argument were so egregious that they warrant new trial is a legal issue that this court resolves *de novo*."), with *People v. Blue*, 189 Ill. 2d 99, 132 (2000) ("we conclude that the trial court abused its discretion" by permitting certain prosecutorial remarks in the closing argument)). Because our holding would be the same under either standard, we need not resolve the standard of review at this time. *People v. Land*, 2011 IL App (1st) 101048, ¶ 149 (citing *People v. Phillips*, 392 Ill. App. 3d 243, 275 (2009)) and

People v. Johnson, 385 Ill. App. 3d 585, 603 (2008); *People v. Robinson*, 391 Ill. App. 3d 822, 840 (2009)).

¶ 70 B. Substantial Prejudice

¶ 71 A reviewing court grants prosecutors wide latitude in making closing arguments. *Wheeler*, 226 Ill. 2d at 123; *Blue*, 189 Ill. 2d at 127. The State has the ability during its closing argument to comment on the evidence and all fair, reasonable inferences that the evidence yields. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). A court reviewing claims of prosecutorial misconduct may consider the entirety of the closing arguments offered by both the prosecution and the defense in order to place the prosecutor's statements in context. *Wheeler*, 226 Ill. 2d at 123; *People v. Johnson*, 208 Ill. 2d 53, 113 (2003); *People v. Tolliver*, 347 Ill. App. 3d 203, 224 (2004). Statements that a prosecutor makes during the rebuttal closing argument are not improper when they are invited or provoked by defense counsel. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). A reviewing court will reverse on the basis of prosecutorial misconduct during closing argument only if the prosecutor's remarks created "substantial prejudice," such that those improper remarks constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123; *Johnson*, 208 Ill. 2d at 64; *People v. Easley*, 148 Ill. 2d 281, 332 (1992) ("The remarks by the prosecutor, while improper, do not amount to substantial prejudice."). In reviewing a prosecutor's statements during rebuttal arguments, an appellate court will reverse a conviction only if the remarks "were so prejudicial that real justice was denied or that the verdict resulted from the error." *People v. Perry*, 224 Ill. 2d 312, 347 (2007) (citing *People v. Johnson*, 218 Ill. 2d 125, 141 (2005)). The defendant therefore must be able to identify improper remarks by the

prosecutor that are so substantial that a reasonable jury could have reached a different verdict if the remarks were not made. *People v. Meeks*, 382 Ill. App. 3d 81, 84 (2008).

¶ 72 C. Remarks at Issue

¶ 73 Although some of the prosecutor's remarks may have come close to the impermissible line, neither of defendant's arguments persuade us that defendant suffered substantial prejudice from the remarks in light of the overwhelming evidence. First, the prosecutor did not make an improper remark when he said "This isn't about sympathy, this is about justice," because defense counsel invited the remark by introducing discussion of sympathy in her closing. See *Glasper*, 234 Ill. 2d at 204 . Moreover, "[i]t is entirely proper for the prosecutor to dwell upon evil results of crime and to urge fearless administration of the law." *People v. Harris*, 129 Ill. 2d 123, 159 (1989) (citing *People v. Owens*, 102 Ill. 2d 88, 105-06 (1984); *People v. Jackson*, 84 Ill. 2d 350, 360 (1981) and *People v. Wright*, 27 Ill. 2d 497, 500-01 (1963)).

¶ 74 Yet the prosecutor did make an emotional appeal for sympathy when he stated that the case was about the victims' families being affected by defendant's actions, and that they still feel as if the shooting had just occurred even though it was three and a half years later. Defense counsel did not invite a reference to the victims' families in her closing, and intentional references to the victims' families that appeal to the emotions of the jurors and lack relevance to defendant's guilt or innocence are improper when they are not made incidentally. *People v. Hope*, 116 Ill. 2d 265, 278-79 (1986) (prosecutor's intentional introduction of testimony with references to decedent's family was improper (citing *People v. Bernette*, 30 Ill. 2d 359, 371 (1964))). In addition, the prosecutor told the jury that five minutes of deliberation would be more than the

single minute of consideration defendant gave Ike. While a prosecutor may "urge the fearless administration of justice and the detrimental effect of crime" (*People v. Cloutier*, 156 Ill. 2d 483, 507 (1993) (citing *People v. Barrow*, 133 Ill. 2d 226, 228 (1989))), the prosecutor's remark here carried the implication that the jury itself was entitled to commit an injustice by deliberating for only "five minutes."

¶ 75 However, the jury did deliberate for at least an hour and did not follow the prosecutor's path of persuasion. Defendant's arguments here are not persuasive because the prosecutor's improper remarks did not result in substantial prejudice to defendant. We already found on direct appeal that the evidence against defendant was not closely balanced. *Scott*, 401 Ill. App. 3d at 601 ("The evidence in the present case was not closely balanced ***."). Defendant never disputed that he was at the scene or that he fired the weapon that killed Ike and wounded Fulton. Defendant argues on this appeal only that he did not kill with the level of intent necessary for first degree murder. Yet the eyewitness testimony and the forensic evidence presented at trial overwhelmingly rebutted defendant's contention that a jury might have found defendant guilty of the lesser offense of second degree murder had the prosecutor refrained from making the improper remarks during his rebuttal closing.

¶ 76 Roderick's testimony and the corroborating forensic evidence demonstrates that defendant killed Ike deliberately and without provocation. Defendant first raised his weapon after rejecting Roderick's call to stand down, responding "[Ike is] no damn family of mine!" It is important to note that defendant's words are not those of a frightened man. Defendant then fired not one but three rounds. Firearms Examiner Brubaker's testimony revealed that each individual gunshot

required the application of six and a half to seven pounds of pressure to depress the trigger. Roderick furthermore testified that defendant fired the final shot even as Roderick struggled to push down defendant's shooting arm, and Brubaker confirmed that the spent cartridge case found in the firing chamber of defendant's weapon suggests that defendant pulled the trigger in a moment of struggle. Roderick entreated defendant to "let it go," but defendant rejected Roderick's plea and fought against Roderick in order to fire three shots. Although defense witness John Edwards testified that Ike punched defendant in the face at least twice before defendant opened fire, his testimony is directly contradicted by the photographs taken the night of the shooting in which defendant's face bears no marks or bruises. Edwards also testified that defendant had only "a couple" drinks the night of the shooting, and neither Edwards nor anyone else ever claimed at trial that defendant was impaired. The evidence is overwhelming that defendant killed Ike without serious provocation or an unreasonable belief that he was acting in self-defense. A reviewing court therefore could not have disturbed the jury's verdict when, in light of the State's overwhelming evidence, the verdict did not result from the prosecutor's improper closing remarks. See *Meeks*, 382 Ill. App. 3d at 84; see also *People v. Burton*, 338 Ill. App. 3d 406, 420 (2003) ("The long-settled test for reversing a conviction based upon a prosecutor's remarks is 'whether the jury would have reached a contrary verdict had the improper remarks not been made.' " (quoting *People v. Heard*, 187 Ill. 2d 36, 73 (1999))). The prosecutor's remarks therefore did not arguably cause substantial prejudice.

¶ 77 Defendant consequently does not present " 'the gist of a constitutional claim' " for ineffectiveness of appellate counsel. *Perkins*, 229 Ill. 2d at 42 (quoting *Boclair*, 202 Ill. 2d at 99-

100). Prosecutorial misconduct during closing argument requires a showing of substantial prejudice, but the overwhelming evidence contained in the record rebuts defendant's contention that substantial prejudice resulted from the prosecutor's remarks. When the prosecutor's closing remarks did not substantially prejudice defendant at trial, defendant suffers no prejudice from appellate counsel's failure to raise the issue on appeal. *Edwards*, 195 Ill. 2d at 163-64. The record therefore completely contradicts defendant's claim that his appellate counsel was ineffective, and the trial court properly dismissed defendant's *pro se* postconviction petition at the first stage. See *Brown*, 236 Ill. 2d at 185.

¶ 78 CONCLUSION

¶ 79 We cannot find that defendant stated the gist of a constitutional claim of ineffective assistance of appellate counsel. The appellate counsel's failure to raise the issue of prosecutorial misconduct did not arguably prejudice defendant when the evidence presented at trial was overwhelming. We therefore affirm the trial court's first-stage dismissal of defendant's *pro se* petition for postconviction relief.

¶ 80 Affirmed.