THIRD DIVISION
MARCH 12, 2014

No. 1-11-2993

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 98 CR 31306
	)	
ISRAEL RUIZ,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's postconviction petition was properly dismissed, because (1) there was no showing that appellate counsel was ineffective for failing to challenge the trial court's refusal to give an instruction for second-degree murder, where there was insufficient evidence to support such an instruction; (2) appellate counsel was not ineffective for failing to challenge the giving of an improper version of a jury instruction, where the issue was forfeited and the evidence of the defendant's guilt was overwhelming; and (3) the petition was devoid of affidavits or other evidence supporting the defendant's claim as to counsel's failure to investigate and call alleged witnesses in support of the defendant's motion to suppress.

¶ 2 A jury found the defendant, Israel Ruiz, guilty of first-degree murder (720 ILCS 5/9-1(a)(2) (West 1998)) and aggravated discharge of a firearm (720 ILCS 5/2401.2(a)(2) (West

1998)), and the trial court sentenced him to concurrent terms of 40 and 15 years' imprisonment, respectively. His conviction and sentence were affirmed by this court on direct appeal (*People v. Ruiz*, 342 Ill. App. 3d 750 (2003)), after which he sought relief *pro se* under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), alleging ineffective assistance of counsel. The trial court dismissed his third-amended petition, and he now appeals, raising the following issues: (1) that his counsel on direct appeal was ineffective for failing to challenge the trial court's refusal to give a jury instruction for second-degree murder; (2) that appellate counsel was ineffective for failing to challenge the giving of an improper version of Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 3.15); and (3) that trial counsel was ineffective during proceedings on the defendant's motion to suppress his statement, because he failed to investigate and call witnesses who could have corroborated the defendant's assertion that he was mistreated by the police.

¶ 3 The facts underlying the defendant's conviction are set forth in our opinion on direct appeal, and we repeat and supplement them here as necessary to address the postconviction issues. The defendant and his co-defendants, Michael Mejia and Rafael Carrasco, were indicted and tried jointly for the first-degree murder of Nathaniel Walls, and the aggravated discharge of a firearm at Walls' three year old son, Malik Walls. The State prosecuted the first-degree murder charge under three theories: (1) knowing or intentional murder in violation of section 9–1(a)(1) of the Criminal Code of 1961 (Code)(720 ILCS 5/9–1(a)(1) (West 1998)); (2) murder by creating a strong probability of death or great bodily harm in violation of section 9–1(a)(2) (720 ILCS 5/9–1(a)(2) (West 1998)); and (3) felony murder in violation of section 9–1(a)(3) (720 ILCS 5/9–1(a)(3) (West 1998)). The jury in the defendant's case returned a general verdict of guilty for both first-degree murder and aggravated discharge of a firearm.

¶ 4 The evidence at trial established that in the evening hours of November 7, 1998, Nathaniel Walls was standing outside of the townhouse complex where he lived, holding Malik. The complex was located near an intersection that was the dividing line between the "territories" of two rival street gangs, the Latin Counts (LCs) and the Gangster Disciples (GDs). As Walls waited for Malik's mother, Nicole Mace, he was shot in the head from across the street. He fell face down on top of Malik, injuring him. Walls died from his injuries several hours later.

¶ 5 Several minutes after the shooting, three police officers stopped a Ford Expedition that was cruising slowly with its headlights off down an alley less than a block from the shooting. A young woman leaned out of the vehicle and shouted, “them black GD’s over there were just shooting at us.” The vehicle then sped around the police car and drove away, with the police in pursuit. During this pursuit, the police officers saw the vehicle stop in the middle of an alley less than two blocks from the shooting, and saw one of the occupants throw a handgun from the window. The police ultimately stopped the vehicle and apprehended the occupants, which included the defendant, Mejia and Carrasco, as well as Vanessa Rios and Araceli Garcia. The weapon was recovered, and later confirmed by ballistics evidence to be the same gun used to kill Walls. The defendant, Mejia and Carrasco were shown to be members of the LC gang.

¶ 6 The State provided testimony of Rios, Garcia, and Mace, along with the testimony of eyewitnesses, Roy Billups, Brian Ellison, Jose Ortiz, and Douglas Garth. Garcia testified that on the night of the shooting, she was waiting in a vehicle outside of a friend's house when the defendant came out of the house along with Rios, Mejia, and Carrasco. Garcia saw Rios hand an object to the defendant, at which point the defendant and Mejia walked away and Carrasco and Rios got into the vehicle with Garcia. According to Garcia, Carrasco began driving, eventually passing the defendant and Mejia who were walking down the street. Carrasco then turned the

vehicle into an alley and stopped, and at this point, Garcia looked over her shoulder and saw the defendant and Mejia about 30 feet away. At some point thereafter, Garcia heard three or four gunshots and saw the defendant and Mejia running towards the back of the vehicle. Garcia described the gunshots as close and "coming towards" them. The vehicle backed up and picked up the defendant and Mejia, who reported that they were being shot at by GDs. As they drove away, a gun was passed to Rios, and the defendant and the others in the vehicle told Rios to throw the gun out the window. Garcia testified that the police stopped the vehicle at the end of the alley and that she told the officers that the GDs were shooting at them.

¶ 7 Rios testified that on the night of the shooting, she was driving around in a Ford Expedition with the defendant, Mejia, Carrasco and Garcia, when they were pulled over by the police and arrested. However, Rios denied knowing anything about a gun or gang territory. Rios's grand jury testimony was then admitted as substantive evidence. Before the grand jury, Rios testified that several hours prior to the shooting, she, the defendant, Mejia, Carrasco, Garcia and others were at a friend's house. Rios was told to retrieve a gun from upstairs and give it to the defendant. Rios complied, and the defendant and Mejia left the house on foot, while Rios and the others got into the Expedition and drove to the area of the shooting. Rios described the area as the territory of the GDs who she stated were rivals of the LCs. According to Rios, a week or two before the shooting, a member of the GDs had shot one LC in the head and another in the back. Rios testified that they drove the vehicle into a lot, and she looked in the rearview mirror and saw a green car with two black males jumping out. Rios told Carrasco to drive to retrieve the defendant and Mejia "before anything happened to them." At that point, Rios heard four gunshots, and testified that Carrasco put the vehicle in reverse. Rios then saw the defendant

and Mejia run towards the vehicle from around the corner. The two got into the vehicle, and the defendant then threw the gun out the window.

¶ 8 Nicole Mace testified that at the time Walls was shot, he was standing up the street with Malik, telling her to "come on." Mace then heard between five and seven gunshots, and someone yelling "GD now, motherfucker?" She then heard a car speed off. Mace took cover next to a building, and when she came back, she saw Walls lying on the ground on top of Malik.

¶ 9 Billups and Ellison testified that on the night of the shooting, they were on the second floor of Ellison's home on the block where the shooting occurred. As they looked out of the window, they saw two Hispanic males, one wearing a red and white shirt and the other in a dark jacket, standing on the sidewalk. Both witnesses identified the man in the red and white shirt as the defendant. According to Billups, the man in the red and white shirt pulled out a gun and started firing. Billups testified that the defendant fired about eight or nine shots and then ran away along with the other man. Billups saw the defendant run to the end of a nearby garage and then into an alley. Ellison testified that when the shooting began, he ran downstairs to get his children, so he did not see who was shooting. Several hours after the shooting, the defendant was positively identified in a lineup as the shooter by Billups, and also by Ortiz, who lived in the area. Another local resident, Garth, testified that he heard shots and went to his window, at which point he heard approximately five more shots, and observed a man in red and a "flash of red."

¶ 10 At the police station following his arrest, the defendant gave four separate and contradictory statements regarding his involvement in the shooting. The State introduced the testimony of assistant State’s Attorney (ASA) Ron DeWald, Officer Gary Butler, and assistant State's Attorney (ASA) Paul Quinn, as to three of these statements. ASA DeWald interviewed

the defendant the following morning and testified that the defendant admitted that he had been "riding around" with Carrasco, Mejia, Rios and others in the area of the shooting. However, the defendant denied ever getting out of the car, seeing a gun or hearing any gunfire. When ASA DeWald confronted the defendant with Rios's statement that there had been a gun in the car, the defendant responded that Rios had the gun and that she must have done the shooting.

¶ 11 The defendant was subsequently interviewed by Officer Butler, to whom he gave a different version of the shooting. Butler testified that the defendant acknowledged riding in the Expedition with Carrasco and the others and then leaving on foot with Mejia. The defendant stated that, as they were walking, a black car pulled up next to them, and the driver said something that the defendant couldn't understand. Mejia then pulled a handgun out from his waist band, handed it to the defendant, and ran away. The defendant stated that in the meantime, the driver of the car was exiting "as if he was also armed," prompting the defendant to begin running and firing the gun at the same time. The defendant and Mejia then encountered the Expedition, entered the vehicle and drove away, after which they were stopped by the police. According to Butler, the defendant never stated that anyone other than him had fired a weapon.

¶ 12 The defendant gave another version of events to ASA Paul Quinn. According to ASA Quinn's testimony, the defendant stated that he and Mejia were out walking when they came to the dividing intersection between the LC and GD territories. The defendant looked across the street and could see three teenagers whom they knew to be GD's. The defendant stated that two of the men began whistling and running around and another started off down a gangway. Mejia then pulled a gun out of his waistband, handed it to the defendant, and ran down the street. The defendant stated that he took the gun, raised it with his right hand and pointed it at the teenagers across the street and fired several shots at them and then turned and ran. The defendant denied

seeing any weapons on any of the three men across the street. The defendant and Mejia ran into the alley and got into the waiting vehicle. ASA Quinn testified that the defendant refused to provide a signed statement of these occurrences; but when asked by Quinn why he gave a statement, the defendant responded that he wanted them to know that he "shot the wrong guy."

¶ 13 After his conviction was affirmed on appeal, the defendant filed a postconviction petition, and the trial court appointed counsel to represent him. The defendant subsequently requested leave to proceed *pro se*, which the trial court granted. Thereafter, the defendant filed the third-amended postconviction petition at issue in this appeal. The State moved to dismiss the petition, and following a hearing, the motion was granted. The defendant's motion to reconsider was denied, and this appeal followed.

¶ 14 On appeal, the defendant contends that the trial court erred in dismissing his post-conviction petition at the second stage, because he made a substantial showing of a violation of his constitutional rights. Specifically, he points to three instances of ineffective assistance of counsel which he asserts warrant reversal of this case for an evidentiary hearing. We address each in turn.

¶ 15 A postconviction petition is a means by which a criminal defendant may obtain redress from a conviction that resulted from a denial of his rights under the federal and state constitutions. *People v. Wrice*, 2012 IL 111860, ¶ 47; *People v. Rissley*, 206 Ill. 2d 403 (2003). The Act provides a three-step process for the adjudication of petitions for postconviction relief. 725 ILCS 5/122–1 *et seq*. (West 2010). At the first stage, the trial court independently determines whether the petition is frivolous or patently without merit. *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Once the petition passes this stage, it moves on to stage two, where the court may appoint counsel for an indigent defendant. 725 ILCS 5/122–4 (West 2000). At stage

two, the State has the opportunity to either answer or move to dismiss the petition (725 ILCS 5/122–5 (West 2000)), and the trial court determines whether the petition makes a substantial showing of a constitutional violation. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). If the petition is not dismissed at stage two, it proceeds to stage three, where the trial court conducts an evidentiary hearing. 725 ILCS 5/122–6 (West 2000); *Id.* The defendant is not entitled to an evidentiary hearing as a matter of right; rather, a hearing is required "only when the allegations of the petition, supported by the trial record and accompanying affidavits," make a substantial showing of a constitutional violation. *Id.* at 105, quoting *People v. Hobley*, 182 Ill.2d 404, 427–28 (1998). In reviewing the dismissal of a petition at the second stage, we accept all well-pleaded facts as true; accordingly, our review is *de novo*. *Makiel*, 358 Ill. App. 3d at 105, citing *People v. Coleman*, 183 Ill.2d 366, 380–81 (1998).

¶ 16 A defendant under criminal prosecution has a constitutional right to effective assistance of counsel throughout the trial and review stages of his case. *Strickland v. Washington*, 466 U.S.668, 104 S. Ct. 2052 (1984); *Makiel*, 358 Ill. App. 3d at 105. In order to demonstrate ineffective assistance, the defendant must prove both that: (1) his attorney's performance fell below an objective standard of reasonableness; and (2) this substandard performance was so prejudicial that there was a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *People v. Edwards*, 195 Ill.2d 142, 162 (2001). On appeal, counsel is not required to raise every conceivable issue (*People v. Tenner*, 175 Ill. 2d 372, 387 (1997)), and may refrain from raising issues which, in his judgment, are without merit, unless his judgment on the issue proves patently incorrect. *People v. Barnard*, 104 Ill.2d 218, 230 (1984).

¶ 17 The defendant first asserts that his counsel was ineffective on direct appeal for failing to challenge the trial court's refusal to give a second-degree murder instruction. As with all jury instructions, the decision of whether sufficient evidence exists to justify a second-degree murder instruction lies within the province of the trial court, and will not be disturbed on appeal absent an abuse of that discretion. See *People v. Mohr*, 228 Ill. 2d 53, 65 (2008); *People v. Hudson*, 222 Ill. 2d 392, 400-01 (2006). In order for a second degree murder instruction to be warranted, there need only be "some" or "slight" evidence in the record to legally justify that instruction. *People v. Castillo*, 188 Ill.2d 536, 540 (1999); *People v. Jones*, 175 Ill. 2d 126, 132 (1997). Nonetheless, it is the defendant's burden to show that sufficient evidence exists. *People v. Eason*, 326 Ill. App. 3d 197, 206 (2001). If supporting evidence does not exist, the requested instruction should not be given. *Mohr*, 228 Ill. 2d at 65.

¶ 18 A person commits the offense of second-degree murder when he commits first degree murder, and at the time of the killing, he believes that his use of force is necessary to prevent imminent death or great bodily harm to himself or another, but his belief is unreasonable. *People v. Reid*, 179 Ill. 2d 297, 308 (1997); *People v. Garcia*, 407 Ill. App. 3d 195, 203 (2011). In other words, a charge of murder may result in a finding of second-degree murder upon a showing of certain facts in mitigation, namely, evidence upon which a rational juror could find that the defendant believed, albeit unreasonably, that he was justified in using deadly force. *Id.* at 308. In determining whether an instruction for second degree murder is justified, factors that the court may consider include, but are not limited to, the defendant's testimony, intent or motive, the type of wound suffered by the victim, any previous history of violence, any physical contact between the defendant and victim, and the circumstances surrounding the incident. *People v. Everette*, 141 Ill. 2d 147, 158 (1990).

¶ 19 In the case at bar, the defendant argues that there was "more than" enough evidence suggesting that, when he fired his weapon, he subjectively believed he was in imminent danger of death or great bodily harm at the hands of the GDs. Thus, the denial of the second-degree murder instruction was an abuse of discretion, and counsel's failure to appeal that denial fell below an objective standard of reasonableness under *Strickland*. We disagree.

¶ 20 In support of his argument, the defendant relies primarily on his statement to Officer Butler, in which he asserted that, while he was walking in GD territory, a car drove up beside him, and the driver said something he did not understand, prompting Mejia to hand the defendant a gun and run away. The driver then "exited the car as if he was also armed," at which point the defendant began firing and running away. The defendant contends this scenario was supported by the testimony of Rios and Garcia, that GD's were shooting at them as the defendant and Mejia ran towards the Expedition.

¶ 21 We point out initially that the defendant did not assert that he believed his use of deadly force was necessary as a theory before the jury, relying instead on claims of mistaken identity as to the shooter or general attacks upon the sufficiency of the evidence. Nonetheless, we are unable to conclude that counsel was incompetent for failing to argue this issue on appeal. In the statement to Officer Butler, the defendant never suggested that he knew the individual who got out of the car or that he believed him to be a rival gang member. There is no evidence that the defendant thought the individual was armed, that he approached the defendant, or that he made any threatening gestures or statements from which the defendant could have concluded that he was in imminent danger. On these facts, and given the overwhelming evidence at trial militating against any any claim that defendant was in danger of imminent death or great bodily harm, it is highly unlikely that the trial court would have been found to have abused its discretion in

declining the requested instruction. See *Everette*, 141 Ill. 2d at 158; *People v. King*, 293 Ill. App. 3d 739 (1997). Accordingly, we cannot say that appellate counsel was ineffective for not raising this issue on appeal.

¶ 22 Next, the defendant contends that appellate counsel was ineffective for failing to challenge on direct appeal the giving of an outdated version of IPI Criminal 4th No. 3.15, which informs the jury as to how to properly weigh the testimony of identification witnesses. The defendant acknowledges that the matter was forfeited, but contends that it amounted to plain error. Again we disagree.

¶ 23 The given instruction provides as follows:

> "When you weigh the identification testimony of a witness, you should consider all of the facts and circumstances in evidence, including, but not limited to, the following: The opportunity the witness had to view the offender at the time of the offense; ***or*** the witness's degree of attention at the time of the offense; or the witness's earlier description of the offender; ***or*** the level of certainty shown by the witness when confronting the defendant; ***or*** the length of time between the offense and the [****] identification confrontation."
> (Emphasis added.)

¶ 24 In general, challenges to the giving of a jury instruction are forfeited where the defendant fails to make an objection at trial or raise the issue in his post-trial motion. *Ruiz*, 342 Ill. App. 3d 750, citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). When properly preserved for review, the giving of the above instruction using the disjunctive "or" between each of the enumerated

criteria has been found to be error. *People v. Herron*, 215 Ill. 2d 167 (2005). We may review a challenge to this instruction despite forfeiture, but only if the defendant shows that the evidence was so closely balanced that the error alone threatened to tip the scales of justice against him. *Id*.; see also *People v. Piatkowski*, 225 Ill. 2d 551, (2007). When error occurs in a close case, we opt to "err on the side of fairness, so as not to convict an innocent person." *Herron*, 215 Ill. 2d at 193.

¶ 25 In this case, the evidence was not closely balanced. In fact, as we determined on direct appeal, it can be summed up as overwhelming. The defendant armed himself with a handgun and proceeded into the area of the shooting, where he was seen walking with a weapon around the time of the occurrence. One witness with an unobstructed view of the shooting positively identified the defendant as the shooter. Three witnesses identified the defendant in a lineup within hours of the occurrence. The gun thrown from the vehicle in which he was riding proved to be the murder weapon. While this case did include eyewitness testimony placing the defendant at the scene as the shooter, he admitted the same thing in his own statement to ASA Quinn, when he acknowledged firing the weapon towards rival gang members, but stated that he had shot the "wrong guy." Accordingly, counsel's forfeiture of this issue did not amount to plain error, and appellate counsel was not ineffective for not raising the issue.

¶ 26 Last, the defendant challenges counsel's performance in the context of his motion to suppress his statements. In his petition, the defendant claims his counsel should have investigated and called three witnesses who allegedly could have provided support for his contention that he had been mistreated during questioning.

¶ 27 A review of the record indicates that the petition fails to have attached an affidavit from any of these three witnesses or any other individual who could have substantiated his claims.

The Act requires that a post conviction petition include affidavits, records, or other evidence supporting its allegations, or state why these are not attached. 725 ILCS 5/122-2 (West 2010); *People v. Hodges*, 234 Ill. 2d at 10; *Rissley*, 206 Ill. 2d at 412. The purpose of this requirement is to establish that a petition's allegations are capable of objective or independent corroboration. *People v. Delton*, 227 Ill. 2d 247, 254 (2008), citing *People v. Collins*, 202 Ill.2d 59, 67, (2002). We note that the trial court did not specifically address the omission of the affidavits, but permitted this case to advance to the second stage of the Act despite the absence of the requisite factual support. We further note the defendant's explanation for such omission, that one of the alleged witnesses is deceased, another has been deported, and the third is evading the defendant. Regardless, there is no basis for an evidentiary hearing if there is no support in the record for the defendant's claims beyond his own statements. Accordingly, we find his claims to be without merit.

¶ 28 For the foregoing reasons, we affirm the decision of the circuit court dismissing the defendant's petition.

¶ 29 Affirmed.