2013 IL App (1st) 120287-U

No. 1-12-0287

SIXTH DIVISION
March 15, 2013

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. 05 C4 40458
	)	
DAVID LEONARDO,	)	The Honorable
	)	Carol A. Kipperman,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

¶ 1 *HELD*: Defendant's postconviction petition failed to present an arguable claim for ineffective assistance of counsel and was, therefore, properly dismissed as frivolous and patently without merit following first-stage review.

¶ 2 Defendant, David Leonardo, appeals the first-stage dismissal of his petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(a)(1) (West 2010)).

Defendant contends his postconviction petition presented meritorious claims for ineffective assistance of counsel. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 Following a jury trial, defendant was convicted of first degree murder and sentenced to 60 years' imprisonment. On direct appeal, we affirmed defendant's conviction and sentence, finding the trial court's failure to strictly comply with the dictates of Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) was harmless error where the evidence of defendant's guilt was overwhelming and he failed to meet his burden of showing the error threatened the fairness of the trial or resulted in prejudice to his case. *People v. Leonardo*, No. 1-07-3072 (May 14, 2010) (unpublished pursuant to Illinois Supreme Court Rule 23).

¶ 5 In our May 14, 2010, order, this court provided the following summary of the facts underlying defendant's conviction:

> "Defendant's conviction arose from the shooting death[1] of Joshua Rutherford on December 18, 2004, which was witnessed by Helen Mirza, Adolf Ramos, and Luis Berumen. Mirza testified that in the early morning hours of the date in question, she was with Rutherford at Thornton's gas station at 23rd Street and Cicero Avenue in Chicago. Rutherford was driving Mirza's car and she was in the front passenger seat.

[1]An autopsy revealed that the victim suffered two gunshot wounds, one in the left shoulder and one in the right side of his head. The gunshot wound in the victim's left shoulder was fatal.

As they drove up to a gas pump to make a purchase, Mirza saw a red Chevrolet Blazer parked directly in front of their vehicle. At some point, Rutherford looked in the direction of the red Blazer and Mirza saw defendant exit the vehicle and approach her car on the driver's side. As defendant did so, another individual exited the Blazer and joined him on the driver's side of the vehicle driven by Rutherford. After a brief exchange of words, Mirza heard three gunshots, but was unable to see who fired them. She subsequently identified defendant from a photo array and lineup as the individual she saw at the gas station.

Ramos and Berumen corroborated Mirza's testimony. They added that on the evening in question they were inside the red Blazer parked at the gas station and observed defendant talking to the victim on the driver's side of Mirza's car. They also heard about three gunshots and saw defendant pointing a gun inside the vehicle towards the victim. Berumen testified that he saw defendant fire the last shot and, with his right hand, place a gun into the left pocket of his sweatshirt. As defendant entered the truck, he said 'yeah, we got that mother***.' Both Ramos and Berumen identified defendant in open court. On this evidence, the jury found defendant guilty of first degree murder." *Id.*, slip op. at 1-2.

¶ 6 On October 27, 2011[2], defendant filed his postconviction petition contending his trial

[2]Defendant's petition was due on October 26, 2011; however, defense counsel attached an affidavit to the petition indicating that, at 3:45 p.m. on October 26, an attempt was made to file

counsel was ineffective for pursuing an identity defense instead of self-defense and for failing to call Roberto Cruz, the fourth occupant of the Blazer on the night in question, as a witness. Defendant attached three documents to his petition, *i.e.*, two affidavits and a redacted supplemental police report.

¶ 7 In his affidavit attached to the petition, defendant attested that "from the beginning" he and his attorneys agreed to pursue a self-defense theory, but at "some point" prior to trial the attorneys determined the best defense theory was one of identity. According to the affidavit, defendant disagreed but deferred to his attorneys because he "felt he had no [other] choice"; however, defendant continued to believe that he should explain his side of the story, namely, that he feared for his life when he shot Rutherford. In defendant's affidavit, he averred that, if called to testify, he would have stated that "on the date of this incident, December 18, 2004, I was in fear of my life when Joshua Rutherford acted in an aggressive manner towards me, threatened me, and pulled an object in a manner that seemed like he was going to try to kill me with the object, which I thought may have been a gun." Defendant further attested that he never expressed happiness or pride after the shooting or "said anything to the effect of 'that's how we take care of business' or 'we got the mother***.' " According to his affidavit, defendant believed a jury would find him not guilty, "especially since Mr. Rutherford's own girlfriend testified

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the petition, but the building was unexpectedly closed due to a power outage. No issue was raised regarding the belated filing. The time limitation provided by the Act is not a jurisdictional bar, but rather an affirmative defense that can be raised, waived, or forfeited by the State. *People v. Stoecker*, 384 Ill. App. 3d 289, 291 (2008).

Joshua Rutherford was going for a knife, among other things that were in the reports." Defendant further attested that, if called as a witness, Cruz would have supported a self-defense theory.

¶ 8 In his affidavit, defendant additionally attested that his attorneys "assured [him] that the law would allow [him] to get a second-degree murder instruction even if [he] did not testify or present witnesses in support of a self-defense claim." According to defendant's affidavit, he would have insisted on testifying at trial had he known that he would be prevented from submitting a second degree murder instruction by abandoning the self-defense theory.

¶ 9 Defendant also attached to his postconviction petition an affidavit purportedly by Roberto Cruz. The copy of the affidavit in the record is of poor quality. The affiant's signature appears to be "Roberto," but the surname cannot be deciphered. Our reading of the affidavit provides the affiant attested that, on December 17, 2004, he was with friends from the hours of 11 p.m. until 2 a.m. According to the affiant, after arriving at a gas station, "we were threatened & accosted by the victim of this shooting. The victim made threatning [*sic*] remarks to myself and David Leonardo. After a brief argument the victim was attempting to reach under his seat, and at that time David and myself were under the impression he had a gun. We heard gunfire and someone fired a shot in ***."

¶ 10 In the redacted police report attached to defendant's postconviction petition,[3] the officer

[3]Defendant asserted that the report was obtained under the Freedom of Information Act and, therefore, the name and identifying information of the individual providing the statements were redacted.

provided that an individual issued a statement in reference to a homicide, such that she and the victim were stopped at the Thornton's gas station waiting for the third passenger to return from purchasing gas. The victim began to look out the front driver's side window when two Hispanic males from a red Blazer began to approach their car. While approaching, defendant asked the victim "what the f*** are you looking at?" The victim replied that he was not looking at anything. Defendant then asked the victim "who do you roll with? [The victim] replied 'nobody, what about you?' " According to the reported statement, defendant informed the victim that he was with "26" from "31st and Avers" at which time the victim said he "use[d] to be a 26 from 27th and Avers." The victim asked defendant to reveal his "3 dots" tattoo and defendant said "I ain't got no dots." When defendant and the other individual from the Blazer finally reached the vehicle, the victim said " 'what's up' as he reached for a knife on the floor of his vehicle." In the statement, the individual said that "she observed the red [Blazer] that had been facing southbound was now facing northbound [and] she then said 'let['s] go'!" The individual reported hearing three shots before the victim "sped southbound through the parking lot." The victim then yelled "I've been hit" and crashed the car into the rear wall of the gas station car wash.

¶ 11 The trial court dismissed defendant's petition at the first stage of postconviction review. In so doing, the court said:

> "I have reviewed the detailed post-conviction petition and will dismiss it on the grounds that it is frivolous and patently without merit. Most of the petition deals with trial strategy.

> There's further a section on here which deals with the Defendant's waiver of his right to testify. At the time the Defendant waived his right to testify, I questioned him and specifically asked him if it was his decision not to testify and he stated it was. I further asked him if he was made any promises or if he was threatened in any way and he said no.
>
> Because it was his decision, after discussing with his attorney not to testify, and because as I said the remainder of the post-conviction petition is based upon trial strategy, the court dismisses it as frivolous and patently without merit."

This timely appeal followed.

¶ 12 DECISION

¶ 13 Defendant contends the trial court erred in dismissing his postconviction petition where he presented cognizable claims for ineffective assistance of defense counsel.

¶ 14 The Act provides a criminal defendant with an opportunity to raise constitutional challenges to his conviction. 725 ILCS 5/122-1 (West 2010). At the first stage of postconviction proceedings, the trial court must review the defendant's petition and determine whether it is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). In order to make that determination, a trial court must take as true all well pled facts in the petition and accompanying affidavits. *People v. Enis*, 194 Ill. 2d 361, 376 (2000). In *People v. Hodges*, 234 Ill. 2d 1 (2009), our supreme court advised that:

> "[A petition] is 'frivolous or *** patently without merit' pursuant to section 122-2.1(a)(2) only if the petition has no arguable basis either in law or in fact. A

> petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. [Citation.] Fanciful factual allegations include those which are fantastic or delusional." *Id*. at 16-17.

We review a trial court's dismissal of a postconviction petition *de novo*. *Id*. at 9.

¶ 15 Keeping these principles in mind, we turn to defendant's postconviction petition. To present a successful claim of ineffective assistance of trial counsel, a defendant must allege facts to show that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome of the trial, *i.e.*, that the defense counsel's deficient performance rendered the result of trial unreliable or the proceeding fundamentally unfair. *Id*. at 694. A defendant must satisfy both prongs of the *Strickland* test to establish ineffective assistance. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984).

¶ 16 I. Theory of Defense

¶ 17 Defendant contends that his trial counsel was ineffective for abandoning a self-defense theory and pursuing, instead, an identity theory of defense, especially where, if defense counsel had called defendant and Cruz as witnesses, they would have testified in support of the self-defense theory. Defendant maintains both he and Cruz would have testified that they saw the

victim reach for an object, believing it to be a handgun, and thought their lives were in danger. Moreover, defendant avers that the self-defense theory was supported by the supplemental police report attached to the postconviction petition, in which Mirza,[4] the victim's girlfriend, provided a statement to the police in which she reported that, as defendant and another individual approached the car carrying Mirza and the victim, the victim reached for a knife on the floor of the vehicle. Furthermore, defendant argues that the self-defense theory was supported by the State's evidence where Mirza testified that she saw a knife under the victim's car seat, but was unable to recall whether the victim was reaching for the knife when the shooting occurred, and where no witness contradicted the purported testimony of defendant and Cruz. Defendant additionally argues that the identity defense pursued by his counsel was a "clear loser from the beginning" because it was not supported by the evidence. Defendant, therefore, contends his counsel's performance fell below an objective standard of reasonableness. Moreover, defendant contends he suffered resulting prejudice because the jury could not consider instructions for self defense and second degree murder where defense counsel failed to put forth evidence of self defense.

¶ 18 Because defendant's petition was summarily dismissed as frivolous and patently without merit, on review, we first ascertain whether the petition alleged facts demonstrating an arguable basis that counsel's performance fell below an objective standard of reasonableness. See

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[4]Defendant recognizes that the identifying information in the police report was redacted, but argues that "it is obvious from the description in the statement" that the statement was provided by Mirza.

Hodges, 234 Ill. 2d at 17. It is well-established that decisions regarding whether to call certain witnesses, what evidence to present, and what theory of defense to pursue are matters of trial strategy that rest with the defense counsel. See Enis, 194 Ill. 2d at 381; People v. Wilborn, 2011 IL App (1st) 092802, ¶79. Neither mistakes in strategy nor the fact that another attorney would have handled a case in a different manner are sufficient to establish a defense counsel's incompetence. People v. Jones, 323 Ill. App. 3d 451, 457 (2001). A defense counsel's failure to present testimony promised during opening statements and a counsel's decision to abandon a trial strategy in the midst of trial are not ineffective per se; rather, these decisions may be unreasonable depending on the circumstances present at the time the decisions were made. Wilborn, 2011 IL App (1st) 092802, ¶¶79, 80. "In either case, a defendant must overcome a strong presumption that the challenged action or inaction of defense counsel may have been the product of sound trial strategy." Id. at ¶80. To overcome the strong presumption that the defense counsel's choice of strategy was sound, a defendant must demonstrate counsel's decision "appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." People v. King, 316 Ill. App. 3d 901, 916 (2000).

¶ 19 Taking all of defendant's factual assertions as true, we conclude defendant has failed to overcome the strong presumption that defense counsel's decision to pursue an identity defense theory was not sound trial strategy. While true that defense counsel indicated a plan to pursue a self defense theory at a pretrial motion to increase defendant's bond, it is clear from defense counsel's opening statements that theory of defense had been abandoned before the trial began.

¶ 20 In opening statements, defense counsel said:

"The incident occurred because the driver of the car, Joshua Rutherford, had said something to Adolf [Ramos] who had gotten out of [a Blazer] and was pumping gas. The incident was between Adolf and Joshua who was in the car. Adolf came back to the [Blazer] and mentioned to [defendant] and Cruz, what did that guy say? Go over there and see what's up.

And [defendant and Cruz] walked over to [defendant's] car. When they walked over to the [defendant's] car and they were talking, the other two individuals [Adolf and Luis Berumen] were in the other car. They drove and moved the [Blazer]. The [Blazer] was moved to a different location.

While [defendant] was talking to the individual through the window and Roberto Cruz was right next to him talking to the open window, gunshots were fired and they went through the rear passenger window and struck the victim, Joshua Rutherford.

We believe the evidence will show that the people in the [Blazer] fired the shots. That when they come in here and tell you they didn't have anything to do with it, it was [defendant] who did it. That's because they didn't go to the police after this incident. It was several months when the police implicated them, found the [Blazer], found pictures of Adolf in the station. That's when they went, picked them up. And to save themselves, they were involved in this incident. All four people there were in the [Blazer] [defendant, Cruz, Adolf, and Berumen] were

involved in this incident. They saved themselves by saying it was [defendant] who did the shooting.

The two people closest to the shooting, the girl that's in the car with Joshua, she is right there. She is going to tell you, we believe the evidence that is going to be is that she is going to tell you that the shots came from where [defendant] was standing, not that she saw him with a gun, not that she saw him fire the weapon, and that if [defendant] did do that, she would have seen that incident. She would have seen those facts.

Also you will hear from Roberto Cruz who is standing right next to [defendant] who never said [defendant] fired the weapon. He said the weapon–the sound came from where [defendant] was. The sound–that he never saw [defendant] with a weapon getting out of the car, firing or getting back into the car and that is because the gunshots probably came from Rutherford, not from Joshua Rutherford, from Adolf Ramos or Luis Berumen. We don't know.

They moved the [Blazer] to a different location right before the shooting occurred. They didn't come in and tell the police what happened. The police went and got them. That's how this case went down.

We're not asking you to condone this. This is a terrible, terrible event. A person was killed on the streets of Chicago, an innocent person, and this should never have happened. We're not asking you to condone that. What we're asking you to do is follow the instructions and conclude that [defendant] was not the

shooter in this case.

The facts in this case will raise a doubt, and when they raise a doubt as to how the shooting occurred, they raise a doubt whether [defendant] was a shooter."

¶ 21 Although defense counsel ultimately did not call Cruz to testify as promised in opening statements, we are reminded that defense counsel's failure to present Cruz's testimony and counsel's decision to abandon a trial strategy in the midst of trial were not ineffective per se. Wilborn, 2011 IL App (1st) 092802, ¶¶79, 80. Although we lack the benefit of knowing why defense counsel changed tactics, we do not find defendant is entitled to a second-stage evidentiary hearing where our review of the record demonstrates that defense counsel's performance was not so irrational and unreasonable that no reasonably effective defense attorney would have pursued such a strategy. King, 316 Ill. App. 3d at 916.

¶ 22 Defense counsel's strategy was to raise reasonable doubt as to the identity of the shooter. Defense counsel attempted to accomplish this task during the cross-examination of Mirza by calling into question her observation of the other occupants of defendant's car and their whereabouts when the shots were fired. Moreover, during Mirza's cross-examination, defense counsel highlighted the fact that she never saw defendant with a weapon and did not see the actual discharge of any weapon. Then, during the cross-examination of Ramos, defense counsel attacked the witness' credibility by highlighting the fact that he was under arrest for the victim's murder when he told the police that defendant was the shooter. In addition, defense counsel questioned Ramos' physical position when the shooting occurred relative to defendant's location and the location of both vehicles. Further, defense counsel noted that Ramos agreed with the

police account of the events only after three days of questioning and the police having "filled *** in with a lot of details." During the cross-examination of Berumen, defense counsel attacked his credibility on the basis that Berumen initially lied to the police while under arrest for the victim's murder and only admitted his involvement in the events after two or three days in custody. Finally, during the cross-examination of Assistant Medical Examiner Joseph Lawrence Cogan, defense counsel caused Cogan to admit he could not confidently describe the trajectory of one of the gunshots found on the victim, namely, whether the gunshot on the right side of the victim's head originated from front to back or back to front. Additionally, defense counsel secured Cogan's testimony that the evidence on the victim's body did not suggest the gunshot wounds were the result of close-range firing.

¶ 23 Our review of the record does reveal that, during arguments on a motion in limine, defense counsel indicated his continued intent to call Cruz as a witness, mentioning a forthcoming request for a second degree murder instruction based on an unreasonable belief in the need for self defense. However, defense counsel rested defendant's case without calling Cruz or any witnesses. Although we do not know when defense counsel decided to no longer call Cruz, the conversation during the motion in limine was held outside of the presence of the jury and, while before the jury, defense counsel maintained an identity theory of defense. In fact, during closing arguments, defense counsel argued:

> "You've got Luis [Berumen]. You've got Hit Man[5] [Adolf] Ramos saying there was no conversation with me between [defendant] and me before he walked

[5]Testimony revealed that Ramos' street name was "Hit Man."

over and I pulled around, made a U-turn to the other side of the pumps and I could only see the front of the victim's car and I saw [defendant] pointing into the window and shooting.

Luis Berumen says well, I'm in the backseat of the car. I heard three shots and I turned around and I'm still at the same pump. I haven't moved. We haven't turned, we haven't made [a] U-turn and I turn and I see [defendant] shooting into the window of the car. And that's what happens when you're–when two people are lying about the same story because they can't get the story straight and they are afraid of what the truth is.

There's the quality of the evidence the State chose to put on, these thugs, these people who lied to the police, denied everything when they're obviously–the police obviously they're the murderers. That's the story they gave. And they're the only two people who put a gun in [defendant's] hands.

You know what else tells us that they're lying? The physical evidence, the body. Joshua Rutherford tells us that that's not true, that it couldn't have happened that way. The shell casings–the car was parked at pump 9 and 10. Joshua's car was at pump 9 and 10. And I'll show you defense Exhibit 1 in the closing argument. The shell casings were 40 feet away. They were beyond pump 12. So the shooter had to be some distance behind Joshua Rutherford's car shooting obliquely through the rear driver's window because that's how you explain Joshua being shot in the back and being shot from the opposite side of his head that

> everyone says [defendant] was standing. And it wasn't a close-range shot because there is no evidence of that. ***.
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> It would have been impossible for [defendant] to shoot Joshua on the right side of his head. He was on the left side of Joshua. They were having a conversation. Joshua was talking to [defendant] at the time the shots were fired. It doesn't make sense that [defendant] was the shooter. It doesn't match the physical evidence."

Accordingly, the record demonstrates defense counsel advocated for his client throughout trial by attempting to raise reasonable doubt as to the identity of the shooter. Moreover, defense counsel's closing argument highlighted the evidence obtained through cross-examination in support of the identity theory. The record, therefore, demonstrates it was trial strategy not to call Cruz as a witness because Cruz would have testified that the shots came from defendant's direction and the self-defense theory had been abandoned prior to trial.

¶ 24 A defendant is entitled to competent, not perfect representation (*People v. Hayes*, 2011 IL App (1st) 100127, ¶38), and defendant received that here. This case was unlike *People v. Baines*, 399 Ill. App. 3d 881, 897 (2010), where a collection of performance errors, primary of which included impeaching the defendant, demonstrated that the defense counsel lacked familiarity with the facts of the case and rudimentary trial procedures and lacked any clear trial strategy in order to provide meaningful representation.

¶ 25 Our case is similarly distinguishable from *People v. Bryan*t, 391 Ill. App. 3d 228 (2009), where the defense counsel there not only failed to follow through on promises to call witnesses

during opening statements, but also failed to elicit evidence during cross-examination to support the theory of defense. *Id*. at 242-43. The *Bryant* court held that the counsel was ineffective where the trial court had to repeatedly guide the defense counsel and correct mistakes made during his cross-examination despite obvious weaknesses in the State's case. *Id*. at 233-34. In this case, defense counsel did not fail to adduce available evidence to support an otherwise unsupported defense. *Id*. at 241.

¶ 26 Because we have found defendant failed to present an arguable basis for deficient performance, we need not review whether defendant arguably suffered prejudice resulting from that performance. See *Albanese*, 104 Ill. 2d at 527.

¶ 27 II. Jury Instruction

¶ 28 Defendant next contends "additionally and/or alternatively" that his postconviction petition sufficiently pled a claim for ineffective assistance of counsel for erroneously advising defendant not to testify at trial.

¶ 29 Again, to survive the first stage of postconviction review, a defendant's petition must arguably allege that counsel's performance fell below an objective standard of reasonableness and that defendant suffered resulting prejudice. *Hodges*, 234 Ill. 2d at 17.

¶ 30 A defendant has a constitutional right to testify, and that right may be waived only by the defendant. People v. Cleveland, 2012 IL App (1st) 101631, ¶65. However, "when a defendant contends on appeal that he was precluded from testifying at trial, his conviction cannot be reversed on the basis that he was prevented from exercising that right unless he contemporaneously asserted his right to testify by informing the trial court that he wished to do

so." *People v. Smith*, 176 Ill. 2d 217, 234 (1997).

¶ 31 In this case, the record is clear that defendant waived his right to testify. The trial court asked whether defendant understood that he had a right to testify and inquired whether, after consulting with counsel, defendant wished to waive that right of his own accord, absent force or threat. Defendant unanimously replied in the positive. Despite the supreme court's clear statement that a trial court has no duty to advise a defendant, represented by counsel, of his right to testify nor to ensure an on-the-record waiver (*Id*. at 234-35), the trial court in this case did both.

¶ 32 Nevertheless, defendant argues that he only waived his right to testify because defense counsel erroneously advised defendant that he retained the ability to submit a second degree murder instruction to the jury despite failing to present evidence regarding self defense. As a result, defendant contends he did not intelligently waive his right to testify. Defendant notes that there are no cases directly on point, but argues that the *Smith* court indicated it would analyze the question before us "in the same manner as courts decide whether a jury waiver was based on erroneous legal advice." We disagree.

¶ 33 In *Smith*, the supreme court held that the defendant was not entitled to a new capital sentencing hearing on the basis that the record failed to reflect he waived his right to testify where the defendant failed to contemporaneously assert his right to do so and the trial court was not required to advise the defendant of his right or to incorporate his waiver into the record. *Id*. at 236. Contrary to defendant's assertion, the supreme court expressly distinguished the situation in which a trial court does not advise a represented defendant of his right to testify and

does not obtain an on-the-record waiver from those instances where a trial court must ensure the validity of a jury waiver and the voluntariness of a guilty plea. *Smith*, 176 Ill. 2d at 234-35. It is clear that waiving the right to testify is treated differently than jury waivers and the entry of guilty pleas. As such, we additionally find that *People v. Smith*, 326 Ill. App. 3d 831 (2001), as cited by defendant, is distinguishable because the trial court's ruling of deficient performance was based on the defendant choosing to waive his right to a jury trial based on his counsel's erroneous advice, not a waiver of the right to testify. *Id*. at 848.

¶ 34 Here, defendant was aware before closing arguments that the desired second degree murder instruction would not be submitted to the jury, yet he remained silent and steadfast in his desire not to testify. See People v. Thompkins, 161 Ill. 2d 148, 178 (1994). "It is incumbent upon a defendant to assert his right to testify such that his right can be vindicated during the course of trial." Cleveland, 2012 IL App (1st) 101631, ¶65. A defendant's silence on the matter of being called to testify may be understood as acquiescence in the defense counsel's decision to rest without calling the defendant as a witness. Id. at ¶66. We, therefore, conclude defendant waived his right to testify by not withdrawing his previous waiver after learning he received erroneous advice before closing arguments were heard. As a result, defendant cannot support an ineffective assistance claim on that basis.

¶ 35 III. Cumulative Error

¶ 36 Defendant finally contends he was denied effective assistance based on his trial counsel's cumulative errors, namely, failing to call favorable witnesses (*i.e.*, defendant and Cruz), failing to impeach Mirza with prior police statements, and making damaging remarks during opening

statements that were contradicted during closing arguments.

¶ 37 We, once again, are reminded that at the first stage of postconviction review a defendant's petition must arguably demonstrate that counsel's performance fell below an objective standard of reasonableness and that defendant suffered resulting prejudice. *Hodges*, 234 Ill. 2d at 17.

¶ 38 We previously determined that defense counsel was not ineffective for failing to call defendant and Cruz as witnesses; therefore, we turn to defendant's remaining claims of ineffectiveness. Because defense counsel pursued an identity theory of defense, we cannot say the decision not to impeach Mirza with a prior inconsistent statement regarding the victim having reached for a knife prior to the shooting was not trial strategy. As such, defendant has failed to overcome the strong presumption that the defense counsel's choice of strategy was sound where counsel's decision was not "so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." King, 316 Ill. App. 3d at 916. Finally, our review of defense counsel's opening statements and closing arguments does not reflect the incoherence proposed by defendant. Instead, the remarks demonstrate defense counsel's theory that defendant was not the shooter, evidencing an intent to raise a reasonable doubt in the mind of the jurors. We, therefore, find defendant's postconviction petition does not lend itself to second-stage review.

¶ 39 CONCLUSION

¶ 40 In sum, we conclude that defendant's postconviction petition alleging a number of bases of ineffective assistance of counsel was properly dismissed as frivolous and patently without merit.

¶ 41 Affirmed.