2013 IL App (1st) 120652-U

FOURTH DIVISION
December 12, 2013

No. 1-12-0652

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. 02 CR 1171
	)	
TERRY POWE,	)	The Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 Held: Dismissal of second-stage postconviction petition affirmed where defendant has failed to make a substantial showing of the ineffective assistance of trial counsel for failure to investigate and present available evidence of the victim's violent character. Trial court affirmed.

¶ 2 Defendant Terry Powe appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). On appeal, he contends that his petition made a substantial showing of the ineffective assistance of trial counsel. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of first degree murder for the shooting death of Devon Wiley. The trial court sentenced him to 50 years' imprisonment. On direct appeal, this court affirmed defendant's conviction. *People v. Powe*, No. 1-06-0309 (2008) (unpublished order under Supreme Court Rule 23). Many of the facts herein are taken from our original order on direct appeal. *People v. Powe*, No. 1-06-0309 (2008) (unpublished order under Supreme Court Rule 23). Because the facts of the offense are fully set out in that order, we restate here only those facts necessary to an understanding of defendant's current appeal.

¶ 5 I. The Trial

¶ 6 The following evidence was presented at trial. On the evening of November 15, 2001, 19-year old victim Wiley was shot and killed at 4703 South Drexel Avenue in Chicago. The victim's brother, Marcel Wiley, testified that he was with the victim and their cousin Jermaine Witherspoon at 47th Street and Cottage Grove Avenue. As Marcel walked toward his car, he saw his ex-girlfriend, Kiesha Dixon, and defendant, who was her new boyfriend, approaching in a green Ford Taurus. Marcel did not know defendant, but had seen him a "couple times." He identified defendant in open court. Defendant and Kiesha got out of the car, and Marcel and Kiesha proceeded to argue. During the course of this argument, Marcel poured a beer on Kiesha and then threw the bottle to the ground. Kiesha retrieved the bottle and broke it over Marcel's head, causing him to bleed. Marcel told the victim what had happened, and the victim got angry. Kiesha's mother, Audrey Dixon, brought defendant and Kiesha into her nearby apartment. Marcel testified that neither he nor the victim were armed, but that he saw defendant lift his shirt

and display a gun tucked into his waistband. Marcel further testified that, after defendant and Kiesha left, the victim broke defendant's car window. Witherspoon left on foot, and the victim and Marcel drove to their aunt's house nearby.

¶ 7 At their aunt's house, defendant and Kiesha blocked Marcel into his parking space with defendant's car. Marcel and the victim exited through the passenger door, ducking down in case defendant were to shoot. Their aunt was not home, so Marcel and the victim waited about five minutes in the hallway and then returned to their car.

¶ 8 Two blocks away, Marcel stopped, southbound, at a four-way intersection, and noticed that defendant, in the green Taurus, was stopped, eastbound, at the same intersection. Marcel testified that defendant followed him, chasing him "like the cops," "bumper to bumper, chasing me. I am trying to get away." During this high-speed chase, defendant continued to chase Marcel even after Marcel performed a U-turn in an attempt to escape. Marcel denied that either he or the victim had a weapon in the vehicle. He also denied that he was ever behind or beside defendant's car.

¶ 9 Eventually, Marcel stopped in a bank parking lot because he was nearly out of gas. He testified that he thought he could resolve the argument, since it was just an "ex-girlfriend" type of argument. Both he and the victim exited their vehicle. Marcel, the victim, and Kiesha argued about Marcel's injured head. Marcel testified that defendant and Kiesha remained in their vehicle throughout the argument, that it was a purely verbal exchange, and that Marcel and the victim remained about eight feet from the passenger's side of the vehicle. When the argument appeared to be over, the victim instructed Marcel to move his car because it was blocking the ATM

machine. Marcel testified that, as he moved the car forward, he heard gunshots. Then, he saw the green Taurus driving away and saw the victim on the ground. The police arrived soon thereafter. Marcel identified defendant as the shooter in a photo array two days later, and again in a line-up on December 11, 2001.

¶ 10 On cross-examination, Marcel admitted he had argued with Kiesha a few days before the shooting in the hallway outside of her apartment, and Marcel had left when Kiesha threatened him with a knife. The victim was waiting outside.

¶ 11 Marcel also admitted on cross-examination that, at the scene of the shooting: (1) Kiesha told them to "meet her on Langley," that she would "have her guys" and "shoot us up"; (2) the victim admitted to defendant that he broke the window; and (3) Tyrone Smith arrived on the scene as Marcel was getting into his car.

¶ 12 Tyrone Smith, an admitted felon and friend of the victim, testified that on the night of the shooting, he heard shouting coming from the bank parking lot across Drexel Boulevard. As he walked toward the commotion, he saw defendant and Kiesha inside the car, and the victim standing about 15 feet from defendant's car. He testified he did not hear the victim make any threats, nor see any weapons in the victim's hand, but he did hear the victim challenge defendant and Kiesha to get out of the car and fight. Smith approached, unarmed, and told the victim to leave. The victim continued to argue with Kiesha. Smith walked away, urging the victim to follow him across the boulevard, but the victim did not follow. Smith crossed the northbound lanes of the boulevard and was about 50 feet away when he turned to again urge the victim to follow him. At that time, he heard two shots, and saw defendant lean from the driver's seat and

shoot out of the passenger side window. He saw defendant drive away. Smith later identified defendant as the shooter in a police line-up, and again in open court.

¶ 13 Police did not recover any weapons at the scene.

¶ 14 Defendant was arrested December 10, 2001. Assistant State's Attorney Barbara Plitz testified that she met with defendant at the police station on December 13, 2001, and defendant made a videotaped statement. This videotaped statement was admitted into evidence and published to the jury.[1] In it, defendant admitted he shot the victim while the victim was standing outside the passenger door of defendant's car. Defendant had been dating Kiesha for six weeks. Defendant and Kiesha drove to Kiesha's house at about 7 p.m. On arrival, they saw Kiesha's ex-boyfriend Marcel, along with the victim, Witherspoon, and another individual. Kiesha and defendant exited the vehicle, and Marcel and Kiesha argued about their break-up. Marcel told defendant that he had nothing to do with the argument. Marcel poured his beer on Kiesha, then threw the bottle on the ground. Kiesha picked it up and broke the bottle over Marcel's head. Defendant got between them. The victim, who had not been near Kiesha and Marcel during the argument, approached and told defendant to "get his hands off" Marcel or he "would do something." During this time, Witherspoon and the other individual were across the street. Kiesha's mother approached and separated defendant and the victim. Defendant and Kiesha went upstairs with Kiesha's mother. Marcel went to his car "like he was going to start it up," but

[1] We note for the record that there is no transcript of defendant's videotaped confession in the record on appeal. For purposes of this appeal, this court reviewed the video itself, which video does appear in the record.

instead reached under the seat "like he was reaching for a weapon or something." Upstairs, defendant called his cousin and told him he was "trapped."

¶ 15 Kiesha and defendant stayed upstairs for about five minutes. When they returned to the car, defendant saw that the driver's back window was broken. He was angry. He and Kiesha drove away, stopping to talk to Smith, who denied knowing who broke the window. Defendant and Kiesha continued looking for Marcel and the victim, who soon pulled behind them in another car. Marcel and the victim followed them, then pulled to the side of their car. Defendant thought they were going to shoot, and he ducked down. He never saw a weapon. Defendant then moved a gun that he kept in his car "for protection" from under his car seat to the cup holder next to him. He turned the car around, and the other car followed.

¶ 16 Marcel and the victim drove to the bank and exited their vehicle. Defendant followed them to the bank parking lot, intending to "shoot him in the leg or something," but instead, defendant "made a mistake and shot him in the body." Before defendant fired the gun, Marcel got in his car and drove away, leaving the victim behind. The victim walked toward defendant's car, doing "something with his shirt like he had a gun or something." Defendant then admitted that he shot the victim, explaining again that, "I was trying to shoot him in the leg." Defendant never saw a gun. After the shooting, defendant and Kiesha left the scene. Two days later, defendant disposed of the gun in Lake Michigan.

¶ 17 The State rested.

¶ 18 Kiesha's mother, Audrey Dixon, testified for the defense. She testified that, a few days before the shooting, Marcel and Kiesha had an argument at the door to Audrey's apartment,

during which they "tussled," and Kiesha brandished a knife. On the night of the shooting, she saw Marcel "pop" a cigarette at Kiesha and then pour a beer on Kiesha. She watched Kiesha hit Marcel in the head with a beer bottle. Audrey noted that Marcel, the victim, Witherspoon, and another person were all present during this altercation. Once inside the apartment, defendant expressed concern that the victim and his friends would surround the building.

¶ 19 Kiesha testified that, days before the shooting, Marcel came to her apartment and pushed her while she was holding a baby. In response, she brandished a knife at him and, as Marcel fled down the stairs, he lifted his shirt and she saw the handle of a gun. She testified that the victim was downstairs, honking the car horn. She recounted this to defendant, who was not present at the time. She further testified that, on the night of the shooting, she and defendant saw Marcel, the victim, Witherspoon, and another man near her house. Marcel was angry that she had a new boyfriend. Marcel poured his beer on her head and threw his cigarette toward her. She then picked the beer bottle off the ground and hit him over the head with it. The bottle broke when she hit him with it, and the glass cut his face. Kiesha argued with the victim while defendant stood quietly nearby. Kiesha and defendant then went inside the building for approximately 10 minutes. When they left the building, they noticed one of defendant's car windows had been broken.

¶ 20 Kiesha testified that she and defendant drove away and soon came upon the victim and Marcel in a white car. The victim and Marcel chased them in their car, staying behind them throughout a high-speed chase. Kiesha and defendant did a U-turn, and Marcel and the victim still followed them. Kiesha and defendant, followed by Marcel and the victim, then pulled into

the bank parking lot and began to argue. Kiesha told Marcel that, if he wanted to fight, he should meet her elsewhere, where her friends were. Marcel got in his car and drove away, leaving the victim behind. The victim and Kiesha continued to argue, and the victim told her, "If you get out that car I'm gonna slap you" and, "on my Grandfather's grave I'm gonna to [*sic*] kill you all." The victim was standing more than 12 feet from the car, on the passenger side, moving back and forth. Kiesha and defendant remained inside the vehicle. Kiesha testified, "then I seen [the victim] reach towards his hip and I just ducked down [because I thought he was going to draw a gun]." Defendant reached across Kiesha and shot the victim through the passenger window. Kiesha and defendant drove away. Kiesha testified that neither the victim nor his friends touched defendant or her that night, other than when Marcel poured his beer on her. Specifically, on cross-examination, Kiesha testified:

> "[ASSISTANT STATE'S ATTORNEY] Q: You're saying your boyfriend [defendant] wasn't saying anything, right?
>
> [KIESHA DIXON] A: Yes.
>
> Q: You were doing all the arguing?
>
> A: Yes, I was.
>
> Q: And would it be fair to say that this started out as a verbal dispute, you're arguing back and forth verbally, is that correct?
>
> A: Yes.
>
> Q: Nobody touched your boyfriend [defendant], did they?
>
> A: No.

Q: And these guys that were there, pretty big guys right?

A: Yes, they is.

Q: They could have hit this guy and nothing would - - he would have just fell down to the ground, wouldn't he?

A: Yes.

Q: Your boyfriend [defendant] is lot smaller than those guys isn't he?

A: Yes.

Q: They didn't touch him did they?

A: No, they didn't - - not then, no.

Q: And they didn't touch you other than Marcel pouring that beer on your head, right?

A: Right."

¶ 21 Defendant did not testify. The defense rested.

¶ 22 At the jury instructions conference, the defense requested both a self-defense and second degree murder instruction, based on both unreasonable belief in self-defense and provocation. The State objected. After arguments, the court reviewed the evidence, noting that the testimony conflicted regarding the vehicle chase. It also noted that defendant indicated in his statement that he followed Marcel and the victim into the bank parking lot with the intention of shooting the victim in the leg. Based on defendant's statement, the trial court concluded that defendant came into the bank lot as the aggressor and that the evidence was insufficient to support a self-defense

or second degree murder instruction. The court explained:

> "THE COURT: The Court finds that based on the defendant's testimony the defendant came [to the bank parking lot] as the aggressor to the parking lot. His testimony was that he pulled up behind the victim and his brother Marcel intending to shoot him, even though it was in the leg. When the victim got out of the car, approached him, even though he did not see a gun, he assumed he was going for a gun going to his waist, and he pulled out his gun. Notwithstanding the defendant's testimony that he had the gun, he was going, he pulled up behind him in the lot intending to shoot him, that made him the aggressor based on his testimony.
>
> * * *
>
> Provocation was not sufficient, there was not unreasonable belief to support a lesser instruction, there is no evidence of - - evidence fails to enter to recognize the category [*sic*] to support the provocation instruction, the self-defense does not exist legally.
>
> Counsel's motion to instruct the jurors on second degree and self-defense is denied."

¶ 23 The court heard defendant's motion to reconsider on the following day. Defense counsel again argued that the court should instruct the jury on self-defense and second degree murder, and alleged the court had erred by making factual determinations and credibility findings. The

court responded that it did not make credibility findings, but "looked at the facts and assessed the facts, and considered the law in light of the facts." The court then denied the motion to reconsider, noting that it would be "absurd" to allow a self-defense instruction "every time a person kills somebody, just because they saw a gesturing at their waist[.]"

¶ 24 The jury was instructed on first degree murder via IPI 7.01 and IPI 7.02. These instructions inform, in relevant part, that a person is guilty of first degree murder when he kills another individual if, in so doing, he:

> "intends to kill or do great bodily harm to that individual *** or he knows that such acts create a strong probability of death or great bodily harm ***." Illinois Pattern Jury Instruction, Criminal, No. 7.01 (Modified) (4th ed. 2000).

Additionally, the instructions inform the jury that the State must prove defendant, *inter alia*, intended to kill or do great bodily harm to the victim when he performed the acts which caused the death, or that he knew his acts created a strong probability of death or great bodily harm to the victim. Illinois Pattern Jury Instruction, Criminal, No. 7.02 (Modified) (4th ed. 2000).

¶ 25 During jury deliberations, the court received the following note from the jury:

> "Definition of Self Defense?
>
> Definition of great Bodily Harm?"

Defense counsel moved for a mistrial. The court denied the motion and issued the following responses:

> "Definition of Self Defense? Will not be provided. It does not

apply.

Definition of great Bodily Harm? There is not one available.

Please continue to deliberate."

¶ 26 The jury convicted defendant of first degree murder.

¶ 27 Defendant filed a motion for a new trial, arguing that the trial court erred in refusing to instruct the jury on second degree murder and self-defense; in determining that defendant was the initial aggressor, as that was an issue for the jury to decide; in ruling that the State could impeach defendant with his prior criminal history if he testified; in allowing the State to cross-examine defense witnesses about being present in the courtroom for other witnesses' testimony; and in refusing to allow testimony as to the victim's gang membership. After hearing arguments on the motion, the court denied the motion, finding no errors that would require a new trial.

¶ 28 The trial court sentenced defendant to 50 years' imprisonment.

¶ 29 ii. The Direct Appeal

¶ 30 On direct appeal, defendant contended: (1) the trial court's refusal to instruct the jury on the affirmative defense of self-defense and on second degree murder based on unreasonable self-defense deprived him of his right to a fair trial; (2) the trial court erred where it refused to provide the definition of "great bodily harm" in response to a jury request; and (3) his mittimus should be corrected to reflect the correct number of pre-sentencing credit days and proper conviction. In February 2008, this court affirmed defendant's conviction and corrected the mittimus. *People v. Powe*, No. 1-06-0309 (2008) (unpublished order under Supreme Court Rule 23).

¶ 31 In analyzing defendant's argument on direct appeal that he was deprived of his right to a fair trial where the trial court only instructed the jury on first degree murder where sufficient evidence had been presented at trial to merit instructions on both the affirmative defense of self-defense and on second degree murder based on unreasonable belief of self-defense, we specifically stated:

> "It was defendant's burden to raise evidence sufficient to establish self-defense (*People v. Morgan*, 187 Ill. 2d 500, 533 (1999)), which is a right an individual is entitled to exercise in those situations where he reasonably believes that force is necessary to prevent death or great bodily harm to himself or another. 720 ILCS 5/7-1 (West 2006). Here, defendant admitted in his videotaped statement that, upon arrival to the bank parking lot, he intended to shoot the victim or Marcel in the leg. This statement was uncontradicted by any other evidence at trial. Further, the defendant shot the victim, who was standing many feet away, from the relative security of his own vehicle. This was also uncontradicted by any evidence at trial. That defendant formed the intent to shoot before the bank altercation began, and before the victim allegedly reached toward his waistband to draw a weapon, and then shot the victim from a position of relative security demonstrates that the shooting did not result from a reasonable

belief that such force was necessary to prevent imminent death or great bodily harm to himself. See 720 ILCS 5/7-1 (West 2006). The trial court did not abuse its discretion in refusing to instruct the jury on self-defense where self-defense was not supported by the record.

Moreover, in determining whether a defendant has successfully raised the issue of self-defense, we may consider evidence including the defendant's testimony; whether there was any physical contact between the defendant and the victim; and the circumstances surrounding the incident. *Everette*, 141 Ill. 2d at 158. Here, although defendant did not testify at trial, his videotaped statement included a series of events wherein he observed an argument between his girlfriend and the victim's brother, and then was involved in a car chase with the victim. Then, he followed the victim into the bank parking lot intending to shoot, argued with the victim, and then shot the victim, who was standing outside, from the relative security of his own vehicle. Both defendant and Kiesha admitted that [the victim] never touched them, and neither Kiesha nor defendant ever saw the victim with a weapon. These circumstances do not establish that force was necessary. Nor does the victim's alleged threats that 'if

> you get out that car I'm gonna slap you' and 'on my Grandfather's grave I'm gonna to [*sic*] kill you all,' delivered by the victim standing alone, unarmed, many feet from the car to defendant and Kiesha who were inside the car, justify the killing. That the victim did 'something with his shirt like he had a gun or something' before the shooting does not convince us that defendant thought the shooting was necessary to prevent imminent death or great bodily harm. See 720 ILCS 5/7-1 (West 2006). The trial court did not abuse its discretion where it determined that the evidence was insufficient to merit an instruction on self-defense. See *People v. Jones*, 219 Ill. 2d 1, 31 (2006)." *People v. Powe*, No. 1-06-0309 (2008) (unpublished order under Supreme Court Rule 23).

¶ 32 We also rejected defendant's argument that the trial court erred in refusing to instruct the jury on second degree murder based on an unreasonable belief in self-defense. *People v. Powe*, No. 1-06-0309 (2008) (unpublished order under Supreme Court Rule 23). Defendant argued that the trial court made improper credibility determinations during the jury instructions conference upon which it based its refusal to issue a lesser instruction. We rejected this argument, noting that, while trial court may not refuse an instruction based on its view of a witness' credibility, there is a "minimum standard" which must be met before an instruction is required, which standard was not met in the case at bar. *People v. Powe*, No. 1-06-0309 (2008) (unpublished order under Supreme Court Rule 23). We found:

> "We find that the trial court here, rather than making a credibility determination, was addressing the insufficiency of evidence supporting a second degree murder instruction. Defendant's admission that he intended to shoot when he entered the bank parking lot behind the victim did not support the existence of even an unreasonable belief in self-defense. We find no error in the trial court's determination that the threshold for issuing the instruction had not been met." *People v. Powe*, No. 1-06-0309 (2008) (unpublished order under Supreme Court Rule 23).

We then distinguished two cases upon which defendant relied in his argument:

> "Defendant's reliance on *People v. Carter*, 193 Ill. App. 3d 529 (1990) and *People v. Timberson*, 188 Ill. App. 3d 172 (1989), does not persuade us differently. In *Carter*, another district of this court held that a self-defense instruction was warranted where the defendant knew the victim carried a gun, the victim had admonished the defendant to carry a gun, the defendant testified that he shot the victim because he appeared to be reaching for the gun, and the victim himself testified that he was turning his body when he was shot. *Carter*, 193 Ill. App. 3d at 533. Moreover, trial testimony suggested that the victim was armed at the time of the shooting. *Carter*, 193 Ill. App. 3d at 533. In *Timberson*, another

> district of this court held that a self-defense instruction was warranted where the defendant and five other witnesses testified at trial that the victim approached the group of them in a threatening manner, then reached for something in his waistband and they each thought he was reaching for a gun or a weapon. *Timberson*, 188 Ill. App. 3d at 176. Both cases are inapposite to the case at bar, where defendant admitted in his videotaped statement that he arrived at the bank parking lot intending to shoot, neither defendant nor Kiesha saw a weapon, and there was no testimony that the victim was known to carry a gun." *People v. Powe*, No. 1-06-0309 (2008) (unpublished order under Supreme Court Rule 23).

¶ 33 After defendant's conviction was affirmed on direct appeal, defendant filed a petition for rehearing, which was denied by this court. In May 2008, defendant filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on September 29, 2008. *People v. Powe,* 229 Ill. 2d 649 (Table) (2008).

¶ 34 iii. The Postconviction Process

¶ 35 Defendant then filed a *pro se* postconviction petition in March 2009. In this petition, he alleged his trial counsel was ineffective for: (1) failing to investigate, adequately interview, and use evidence from witnesses known to counsel; and (2) failing to introduce evidence of the victim's violent character. To this petition, defendant attached his own affidavit, an affidavit from his girlfriend Kiesha Dixon, and an affidavit from Kiesha's mother Audrey Dixon.

Specifically, defendant argued in his petition that trial counsel failed to investigate his case to discover evidence of the victim's background, character, and reputation in the community as a bully known to carry guns, to have gang ties, and to have violently abused numerous individuals in the community. Defendant asserted that the victim was viewed as an aggressive person who often acted impulsively when confronted by others, that defendant knew of the victim's violent reputation, gang involvement and character, but defense counsel failed to effectively present the facts and lay a foundation for the second-degree murder instruction. The postconviction court docketed the petition for second stage proceedings and appointed the Cook County Public Defender's office to represent defendant.

¶ 36 Defendant filed his amended post-conviction petition on August 4, 2011, which petition is at issue here. In this amended petition, defendant alleged that his trial counsel was ineffective for: (1) failing to investigate, adequately interview, and use evidence from witnesses known to counsel; and (2) failing to secure the self-defense jury instruction for the jury. Defendant referenced the affidavits attached to his initial *pro se* petition. In his affidavit, defendant averred, in pertinent part, that:

> "3. [Defendant] knew that the victim of the crime in which he was charged, tried and convicted, was member of the street gang known as the Black P. Stone Nation and they did in fact control the neighborhood through gang tactics and activities;
>
> 4. [Defendant] knew that the victim of said crime had been recently released from the Illinois Department of Corrections, that such

victim had influence within said Black P. Stone Nation, carried guns and had on numerous occasions actively engaged in gang beatings and act of intimidation in and around the neighborhood;

5. That [defendant] was in fact afraid of such victim and knew that the victim had threatened his girlfriend, had physically abused her and was upset with Affiant over his relationship with her after she refused to continue in a relationship with him;

* * *

8. The Affiant knew that as a result of the victim's role and influence within the street gang known as the Black P. Stone Nation, that his life was in jeopardy and that he had to clear out of the area, in addition to the fact that the victim often hung out with his brothers and they often acted together in conducting violent acts upon others in the neighborhood, where they all had a reputation for violence and savagery;

9. The Affiant was pursued by the victim and his brothers in a car and when the Affiant made a U-turn and came up behind the victim he stopped, and the victim got out of his car and began to move towards the Affiant, at such time it was the perception of the Affiant that his life was in danger and he shot to avoid what he believed to be imminent danger, yet had no intent to commit the

act of murder[.]"

Additionally, defendant averred in a second affidavit that his attorney "was told that there were witnesses available who would support the Affiant's claim of self defense, and he was given the names of Ms. Kiesha Dixon and Ms. Audrey Dixon," and:

> "5. Said [attorney] knew or should have known of the violent background of the alleged victim, his active involvement in a street gang that roamed the neighborhood, his community drug dealing, possession of weapons, numerous gang fights with rival gangs that often occurred in the neighborhood, as well as the alleged victim's criminal history that was readily available from both the police and the Illinois Department of Corrections;
>
> ***
>
> 7. Said [attorney] was specifically told that the Affiant had feared for his life and that of his girlfriend at the time [of the shooting], and had clearly explained the circumstances which gave rise to such fears, explaining the presence of several gang members in and around the neighborhood at the time, and the verbal threats made on the life of both the Affiant and his girlfriend by the alleged victim;
>
> 8. Clearly, [attorney] knew fully of the background of the alleged victim, and any proper investigation on his part would have

> revealed the anti-social, predatory lifestyle of the alleged victim in this particular case[.]"

¶ 37 In her affidavit, Audrey Dixon averred, *inter alia*, that she personally knew the victim for eight years before his death, and that he was a "known gang member," whom she had seen carry a gun on various occasions. She averred that the victim "had a very bad reputation in the community, and because of his gang involvement many people in the community are afraid of him or intimidated by him. At various times during the preceding eight years, I have personally observed [the victim] as a [gang member] attack individuals, strike individuals with his fist, and on some occasions pull a gun on them and threaten them." She continued "[i]f anyone had asked me about my personal knowledge regarding the background of [the victim], I would have provided them with the information contained in this affidavit, and I am prepared to state these same facts in open court, if called to do so."

¶ 38 Kiesha Dixon averred in her affidavit that:

> "I have been personally aware of [the victim] and the manner of character he has for approximately eight or nine years, prior to his death. I have known him to be an active member of the street gang known as the black P. Stone Nation, and he was known around the community as a dangerous person, who usually carried guns upon his person.
>
> On different occasions through out the years in which I have known of [the victim] he was always physically aggressive,

quick to fight, and always eager to participate in some form of street violence.

I am personally aware of him having been involved in numerous gang fights within the community with rival gangs; as well as several fights with individuals who were not from the neighborhood, whom he would intimidate and at times even pull guns on and threaten.

I was aware of the fact that [the victim] had a criminal history and prior to his death, had in fact just been recently released from prison, for the offense of robbery.

Around the neighborhood, [the victim] was known as a bully, and he usually ran with a pack which usually included his brothers or a few individuals who were also active gang members with the Black P. Stone Nation.

Many people in and around the community feared [the victim], due in part to his explosive temper, gang involvement, and the general knowledge that he was often armed with a gun as he roamed the neighborhood."

¶ 39 The State filed a motion to dismiss defendant's postconviction petition in November 2011. In February 2012, after hearing arguments from the parties, the postconviction court granted the State's motion to dismiss, and denied defendant's petition for postconviction relief.

¶ 40 Defendant appeals the second stage dismissal of his postconviction petition.

¶ 41 ANALYSIS

¶ 42 On appeal, defendant contends that the second-stage dismissal of his petition must be reversed because his pleadings and affidavits substantially established he was deprived of the effective assistance of trial counsel. Defendant specifically maintains that his trial counsel was ineffective for failing to investigate and present available evidence regarding the victim's violent character pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984). He argues that, had trial counsel properly investigated and presented said evidence, the court would have allowed the self-defense and second degree murder instructions as requested by defendant. We disagree because, even if this were error, defendant is unable to show resulting prejudice.

¶ 43 The Post-Conviction Hearing Act provides a remedy to a criminal defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002); 725 ILCS 5/122-1 *et seq.* (West 2010). An action for postconviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). Postconviction relief is a collateral proceeding designed to allow inquiry into constitutional issues that could not have been previously adjudicated. *People v. Franklin*, 167 Ill. 2d 1, 9 (1995). Proceedings are initiated by the filing of a petition verified by affidavit in the circuit court in which the conviction took place (725 ILCS 5/122-1(b) (West 2010)), and ultimately may consist of up to three distinct stages (*People v. Pendleton*, 223 Ill. 2d 458, 471-72

(2006)). If a petition is not summarily dismissed by the trial court, it advances to the second stage, where an indigent defendant is provided assistance by counsel. *People v. Hobson*, 386 Ill. App. 3d 221, 230-31 (2008).

¶ 44 The current petition was dismissed after the second stage of review. At the second stage of the process, the State is required to either answer the pleading or move to dismiss. 725 ILCS 5/122-5 (West 2010). Where, as here, the State files a motion to dismiss, the trial court must rule on the legal sufficiency of the defendant's allegations, taking all well-pleaded facts as true. *People v. Ward*, 187 Ill. 2d 249, 255 (1999). To survive the State's motion to dismiss, the postconviction petition must make a substantial showing that defendant's constitutional rights were violated. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If, upon consideration of the petition, with any accompanying documentation and in light of the State's answer, the trial court determines that the requisite showing of a constitutional violation has been made, a third-stage evidentiary hearing must follow. *Hobson*, 386 Ill. App. 3d at 231. We review the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Lander*, 215 Ill. 2d 577, 583 (2005).

¶ 45 To establish a claim of ineffective assistance of counsel, a defendant must show that (1) his attorney's representation fell below an objective standard of reasonableness; and (2) he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984); *People v. Coulter*, 352 Ill. App. 3d 151, 157 (2004). To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v.*

Martinez, 348 Ill. App. 3d 521, 537 (2004); *People v. Burks*, 343 Ill. App. 3d 765, 775 (2003). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *People v. Palmer*, 162 Ill. 2d 465, 475-76 (1994). Effective assistance of counsel in a constitutional sense means competent, not perfect, representation. *People v. Easley*, 192 Ill. 2d 307, 344 (2000). Courts indulge in the strong presumption that counsel's performance fell within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 690; *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007). "Based on the second-stage procedural posture of the instant case, the relevant question is whether the allegations of the petition, supported by the trial record and the accompanying affidavits, demonstrate a substantial constitutional deprivation which requires an evidentiary hearing." *People v. Makiel*, 358 Ill. App. 3d 102, 106 (2005) (citing *Coleman*, 168 Ill. 2d at 381).

¶ 46 Initially, the State argues that defendant raised the same issue in his direct appeal, albeit couched in different terms. The State argues that defendant is rephrasing the previously addressed issue of whether the jury should have been given instructions on self-defense and second degree murder, even though this court has already determined that there was insufficient evidence to support these instructions.

¶ 47 *Res judicata* and the doctrine of waiver limit postconviction relief to constitutional claims that have not been and could not have been raised earlier. *Pitsonbarger*, 205 Ill. 2d at 455-56. Thus, rulings on issues that were previously raised at trial or on direct appeal are barred from consideration by the doctrine of *res judicata*, and issues that could have been raised in the earlier proceedings, but were not, are considered waived. *Pitsonbarger*, 205 Ill. 2d at 456; 725 ILCS

5/122-3 (West 2010); see also *Makiel*, 358 Ill. App. 3d at 105 (Any issues which were decided on direct appeal are barred by *res judicata*; any issues which could have been raised on direct appeal are defaulted.). This rule is relaxed where issues of fundamental fairness are involved, where the alleged waiver stems from the incompetence of appellate counsel, as well as instances where "the facts relating to the claim do not appear on the face of the original appellate record." *Makiel*, 358 Ill. App. 3d at 105. Where defendant's post-conviction claim relies on evidence outside the original appellate record, waiver is not implicated. *People v. Enis*, 194 Ill. 2d 361, 375-76 (2000).

¶ 48 We agree with the State that the issue in the case at bar is remarkably similar to that which we addressed on direct appeal. We side with defendant, however, in determining that this issue is not waived, as the doctrines of *res judicata* and waiver are relaxed where, as in the case at bar, the facts relating to the claim do not appear on the face of the original appellate record. See, *e.g.*, *Makiel*, 358 Ill. App. 3d at 105.

¶ 49 As to the merits of the dismissal of defendant's petition, however, we find that defendant has failed to make a substantial showing that he was denied the ineffective assistance of trial counsel where counsel allegedly failed to investigate and present available evidence of the victim's violent character because, even if we were to find counsel's representation ineffective, defendant would still be unable to show resulting prejudice. See *Palmer*, 162 Ill. 2d at 475-76 (failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim).

¶ 50 Defendant is correct that *Lynch* provides the seminal law regarding the admissibility of

character evidence in cases where self-defense has been raised. In *Lynch*, our supreme court held that when self-defense "is properly raised, evidence of the victim's aggressive and violent character may be offered for two reasons: (1) to show that the defendant's knowledge of the victim's violent tendencies affected [his] perceptions of and reactions to the victim's behavior; and (2) to support the defendant's version of the facts where there are conflicting accounts of what happened." *People v. Nunn*, 357 Ill. App. 3d 625, 631 (2005) (reviewing and summarizing holding of *Lynch*). Accordingly, under the first approach, the evidence is relevant only if the defendant knew of the victim's violent acts. See *Nunn*, 357 Ill. App. 3d at 631; see also *Lynch*, 103 Ill. 2d at 200 (in this first prong, only the facts the defendant knows can be considered and "evidence of the victim's character is irrelevant to [the] theory of self-defense unless the defendant knew of the victim's violent nature"). Under the second approach, the defendant's knowledge is irrelevant, but there must be conflicting accounts of what occurred in order for the evidence to be admissible. See *Nunn*, 357 Ill. App. 3d at 631 (whether the defendant knew of the evidence at the time of the event does not matter); accord *Lynch*, 104 Ill. 2d at 200-01. *Lynch* applies only where the theory of self-defense is properly raised. *People v. Morgan*, 197 Ill. 2d 404, 456 (2001).

¶ 51 Defendant here believes both prongs of *Lynch* apply to this instant cause. Specifically, defendant argues that:

> "both rationales apply for the introduction of *Lynch* evidence. [Defendant] explained in his affidavit that he was aware of [the victim's] violent tendencies and gang membership, and that such

> knowledge affected [defendant's] reactions to [the victim's] behavior that night. [Defendant] stated he was afraid of [the victim] and that 'as a result of [the victim's] role and influence within the street gang known as the Black P. Stone Nation, that his life was in jeopardy. . . .' Had the circuit court heard evidence that [defendant] knew of [the victim's] reputation for violence, it is likely to have found [defendant's] belief reasonable that [the victim] was reaching for a gun when he reached for his waistband after threatening to kill [defendant] and Kiesha. Further, as in *Lynch*, [defendant] laid an adequate foundation for this evidence by asserting his defense of self-defense in opening statements.
>
> The introduction of the *Lynch* evidence was also warranted because there were conflicting accounts of the confrontation, in particular, who was the aggressor."

¶ 52 We first reject defendant's reliance on the first prong of *Lynch*, that which allows evidence of the victim's aggressive and violent character to be offered to show that the defendant's knowledge of the victim's violent tendencies affected his perceptions of and reactions to the victim's behavior. See *Lynch*, 104 Ill. 2d at 200. Defendant does not argue that he was prevented from testifying, and thus was unable to bring his state of mind to the jury's attention. Our inquiry under this prong is concerned with defendant's state of mind in the moments leading up to the shooting. We have two things in front of us from which we may attempt to determine

defendant's state of mind: his video confession, which was admitted at trial, and his affidavits, which were attached to his petition. In his video confession, defendant admitted he *followed* the victim into the bank parking lot *with the intention of shooting him* in the leg. In his affidavit, defendant averred, in pertinent part:

> "8. The Affiant knew that as a result of the victim's role and influence within the street gang known as the Black P. Stone Nation, that his life was in jeopardy and that he had to clear out of the area, in addition to the fact that the victim often hung out with his brothers and they often acted together in conducting violent acts upon others in the neighborhood, where they all had a reputation for violence and savagery[.]"

The affidavit and the video confession seem to contradict one another, as, although defendant avers that he knew "his life was in jeopardy and that he had to clear out of the area," he nevertheless followed the victim into the bank parking lot with the pre-formed intention to shoot the unarmed victim in the leg. Neither the video confession nor the affidavit do anything to advance defendant's cause as to the first *Lynch* prong.

¶ 53 Nor would the evidence have been admissible under the second *Lynch* prong, that is, that evidence of the victim's aggressive and violent character may be offered to support the defendant's version of the facts when there are conflicting versions of events. *Lynch*, 104 Ill. 2d at 200. On appeal, defendant argues that "Kiesha and Audrey's affidavits provide crucial, credible evidence that [defendant] possessed an actual, reasonable fear that [the victim] intended

to kill him on the day he was shot." Initially, we note that neither Kiesha nor Audrey could have testified to defendant's state of mind. Aside from that, however, the affidavits themselves do not satisfy the *Lynch* requirements where, here, the account of what happened was not conflicting in its most material aspects. Specifically, the conflicting testimony was as to who was chasing whom: was defendant chasing the victim, or was the victim chasing defendant during the car chase? That inquiry, however, does not go to the heart of the matter at issue here: whether, due to his prior knowledge of the victim's aggressive character, gang membership, propensity for violence, and history of carrying guns, defendant feared for his life in the bank parking lot and killed the victim as a result of that fear. This question, however, was answered by defendant in his video confession, in which defendant confessed to a series of events wherein he observed an argument between his girlfriend and the victim's brother, and then was involved in a car chase with the victim. Then, he followed the victim into the bank parking lot intending to shoot, argued with the victim, and then shot the victim, who was standing outside, from the relative security of his own vehicle. Nothing in Kiesha nor Audrey's affidavits refutes this evidence.

¶ 54 In addition, defendant fails to address the reasons why the trial court did not allow instructions for self-defense and second degree murder. The court heard arguments from both parties at the jury instructions conference, then reviewed the evidence, noting that the testimony conflicted regarding the vehicle chase. It also noted that defendant indicated in his statement that he followed Marcel and the victim into the bank parking lot with the intention of shooting the victim in the leg. Based on defendant's statement, the trial court concluded that defendant came into the bank lot as the aggressor and that the evidence was insufficient to support a self-defense

or second degree murder instruction. The court explained:

> "THE COURT: The Court finds that based on the defendant's testimony the defendant came [to the bank parking lot] as the aggressor to the parking lot. His testimony was that he pulled up behind the victim and his brother Marcel intending to shoot him, even though it was in the leg. When the victim got out of the car, approached him, even though he did not see a gun, he assumed he was going for a gun going to his waist, and he pulled out his gun. Notwithstanding the defendant's testimony that he had the gun, he was going, he pulled up behind him in the lot intending to shoot him, that made him the aggressor based on his testimony.
>
> * * *
>
> Provocation was not sufficient, there was not unreasonable belief to support a lesser instruction, there is no evidence of - - evidence fails to enter to recognize the category [*sic*] to support the provocation instruction, the self-defense does not exist legally.
>
> Counsel's motion to instruct the jurors on second degree and self-defense is denied."

Even if counsel had somehow gotten more evidence in front of the court regarding the victim's gang membership, propensity for violence, and history of carrying guns, this would not have changed the outcome of the jury instructions conference. Instead, the trial court clearly relied on

defendant's confession in which he admitted to being the aggressor in that he followed the victim into the bank parking lot with the specific intention to shoot the victim. More evidence regarding the victim's alleged propensity for violence would not have changed this outcome.

¶ 55 We also note here that the jury was not deprived of information regarding the victim's alleged violent character. Rather, it is clear from the record the jury knew full well that every individual involved in the dispute on November 15, 2001, was violent. Marcel and Kiesha had a history of violence, which history was presented to the jury in the form of testimony that Marcel pushed Kiesha while she was holding a baby in her arms and that Kiesha threatened Marcel with a knife. In addition, the jury heard testimony regarding the fight between Marcel and Kiesha that took place the night of the shooting in which Marcel poured a beer over Kiesha's head and flicked his lit cigarette at her, and Kiesha broke a beer bottle over Marcel's head, cutting his face. The victim watched this occur, got angry about it, and allegedly broke defendant's car window. At the bank parking lot, following a wild car chase, the victim told the Kiesha he would slap her if she got out of the car, and threatened to "kill you all." Certainly, the jury in this case was not under the impression that the victim nor any other individual in this ongoing dispute was a peaceable person. Nonetheless, he was correctly portrayed throughout the trial as an unarmed victim who was shot and killed after being followed into a parking lot after a car chase.

¶ 56 Finally, we address defendant's apparent misperception regarding his direct appeal. Defendant apparently believes this court, in our decision on direct appeal, "noted *** that *Lynch* evidence may have tipped the scale in terms of the appropriateness of the trial court's refusal to tender self-defense and second-degree murder instructions, distinguishing the case at hand from

[defendant's] supporting case law with the fact that 'there was no testimony that [the victim] was known to carry a gun.' This is a misreading of our previous decision. In the portion of the decision to which defendant here points, we merely distinguished facts from two cases on which defendant had relied from the facts of defendant's situation; we did not invite defendant to bring a *Lynch* claim. In that decision, we noted:

> "Defendant's reliance on *People v. Carter*, 193 Ill. App. 3d 529 (1990) and *People v. Timberson*, 188 Ill. App. 3d 172 (1989), does not persuade us differently. In *Carter*, another district of this court held that a self-defense instruction was warranted where the defendant knew the victim to carried a gun, the victim had admonished the defendant to carry a gun, the defendant testified that he shot the victim because he appeared to be reaching for the gun, and the victim himself testified that he was turning his body when he was shot. *Carter*, 193 Ill. App. 3d at 533. Moreover, trial testimony suggested that the victim was armed at the time of the shooting. *Carter*, 193 Ill. App. 3d at 533. In *Timberson*, another district of this court held that a self-defense instruction was warranted where the defendant and five other witnesses testified at trial that the victim approached the group of them in a threatening manner, then reached for something in his waistband and they each thought he was reaching for a gun or a weapon. *Timberson*, 188

> Ill. App. 3d at 176. Both cases are inapposite to the case at bar, where defendant admitted in his videotaped statement that he arrived at the bank parking lot intending to shoot, neither defendant nor Kiesha saw a weapon, and there was no testimony that the victim was known to carry a gun." *People v. Powe*, No. 1-06-0309 (2008) (unpublished order under Supreme Court Rule 23).

Defendant's expansive reading of that case, though creative, is unhelpful to him here.

¶ 57 We find no error in the dismissal of defendant's second-stage postconviction petition where the trial court properly found that defendant failed to make a substantial showing that he was deprived of the effective assistance of trial counsel.

¶ 58 CONCLUSION

¶ 59 For all of the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 60 Affirmed.