FOURTH DIVISION
September 4, 2014

1-12-0750

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 9846
	)	
ANTAWAN JOHNSON,	)	Honorable
	)	Michele M. Simmons,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County's order granting the State's motion to dismiss the second amended petition for postconviction relief is affirmed. Appellate counsel's alleged failure to raise errors in the jury instructions did not constitute ineffective assistance of counsel because those claims lack substantive merit; petitioner received reasonable assistance of counsel during postconviction proceedings; and the trial court was aware of all of petitioner's claims in his second amended postconviction petition.

¶ 2 The postconviction petitioner, Antawan Johnson, was convicted of the 2001 murder of Cortez Bell after a 2005 jury trial in the circuit court of Cook County. In 2008, petitioner initiated proceedings seeking relief pursuant to the Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Petitioner amended his pleadings twice, the court appointed counsel to represent him, and, in 2011, the State moved to dismiss. Following a hearing, the court granted the State's motion and dismissed the petition. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The State charged petitioner, Antawan Johnson, and a codefendant, Naja Triplett, with first-degree murder for the shooting death of Cortez Bell. At trial the State theorized that members of a street gang to which both defendants belonged were involved in a dispute over territory that resulted in Triplett being beaten. In response to the beating and the ongoing territorial dispute, petitioner and his codefendant shot at a group of their fellow gang members as they gambled on the street resulting in the death of one of them.

¶ 5 The defense in the underlying case was that petitioner lost money he borrowed from one of the men while gambling with the group and offered to sell him two guns. When the two defendants went to retrieve the weapons the other gang members confronted defendants for the purpose of robbing them rather than completing the purchase. Petitioner allegedly fired a warning shot into the air and his codefendant then unexpectedly fired at the crowd of fleeing men.

¶ 6 This court affirmed petitioner's conviction on direct appeal. *People v. Franklin*, No. 1-05-2189 (2007) (unpublished order under Supreme Court Rule 23). We will set out only the facts pertinent to this appeal as taken from the order disposing of petitioner's direct appeal.

¶ 7 The shooting occurred on June 16, 2001. Petitioner came upon a dice game on the street in Chicago Heights. According to the State's witness Airion Smith, petitioner offered two guns for sale but received no takers. Smith loaned petitioner money to join the game, which petitioner eventually lost. The codefendant in this case, Naja Triplett, arrived after petitioner lost the borrowed money. Petitioner and Triplett spoke, and they both left the area. Later, Smith testified, he and another man also left the game and later saw petitioner and the codefendant each with long guns. Smith testified he saw both men aim their guns across the street toward where the others were playing dice and fire three or four shots.

¶ 8 Another State witness, Knox, testified he saw Smith and the other man running and heard shots. Knox ran away until the shooting stopped, then Knox returned to find the murder victim lying on the ground. Knox testified about an affidavit he signed over three years after the shooting in which he averred that after petitioner and the codefendant offered to sell guns to the men playing dice, one of the gamblers, Eric Gill, convinced the group to rob petitioner and the codefendant, but "everything went wrong." Knox testified he wrote in the affidavit what petitioner's brother had given him to write, but he did not know anyone named Eric and that no one named Eric was with him on the day of the shooting. Knox testified that his grand jury testimony that petitioner and the codefendant fired the shots was correct.

¶ 9 Police testified to a signed statement by petitioner in which petitioner stated he fired into the crowd of men. According to petitioner's written statement, he and the men playing dice were members of the same gang and there was an ongoing internal gang feud over territory. That feud caused his codefendant to suffer a beating four days before the shooting. Petitioner stated that because of the feud and the beating he and his codefendant obtained their guns and fired at two men in the dice game including the victim.

¶ 10 Petitioner testified in his own behalf at the trial. Petitioner testified he and his codefendant went to retrieve the guns because petitioner had a buyer for them. When they returned an hour later through the backyard of a home, they encountered a group of men led by Eric Gill. Gill asked to see the guns and the codefendant asked to see the money. Gill asked if the guns were loaded and the codefendant showed him that his was. Petitioner testified he heard a noise behind him and turned to see two men from the dice game (including Smith) approaching from behind. According to petitioner's testimony at trial, Eric Gill then tried to grab the codefendant's gun. Petitioner testified he fired a shot into the air and the men ran. Then, the codefendant replaced the bullet he had shown to Gill into the gun and fired into the crowd. Petitioner and the codefendant then ran away together.

¶ 11 On April 2, 2008, petitioner filed his initial *pro se* petition for postconviction relief. The initial postconviction petition asserted petitioner's conviction resulted from constitutionally deficient proceedings and requested additional time to amend the petition and to submit supporting documentation. On April 10, 2008, petitioner filed an amended *pro se* postconviction petition asserting claims based on the State having argued a theory of accountability for the murder and securing a jury instruction on the theory of accountability

even though the charging instrument did not allege accountability, and on defense counsel's failure to question the jury regarding any bias toward gangs. Petitioner pursues none of those claims in this appeal. The circuit court appointed counsel on the first amended postconviction petition.

¶ 12 After the circuit court appointed counsel, petitioner filed a second amended *pro se* postconviction petition. At a hearing in these proceedings, petitioner informed the court he wished to proceed *pro se*. The second amended petition included the original claims and added the two claims that are the subject of this appeal. First, the second amended petition (hereinafter "second amended petition" or "petition") alleged the trial judge deprived petitioner of his right to due process and a fair trial when the judge refused to instruct the jury on the lesser-included offense of reckless discharge of a firearm. Second, the petition alleged the judge deprived petitioner of his right to due process, a fair trial, and compulsory process when the judge refused to instruct the jury on spoilation of evidence based on the investigating police officer's destruction of his notes of the investigation.

¶ 13 The State filed a motion to dismiss the petition. The State's written motion to dismiss listed all of the claims in the petition, but at the hearing on the motion the State addressed only those claims petitioner raised in the first amended petition. Petitioner's postconviction counsel did not file a written response.

¶ 14 Following a hearing the trial court continued the matter for disposition. When the parties returned to court, the court granted the State's motion. The court's oral ruling addressed claims from the first amended petition but did not expressly address the additional

clams raised in the second amended petition--specifically the lesser-included offense and spoilation instruction claims.

¶ 15 This appeal followed.

¶ 16 ANALYSIS

¶ 17 The second amended petition alleged, in pertinent part, ineffective assistance of appellate counsel and moved to the second stage of postconviction proceedings. At the second stage of postconviction proceedings the petitioner bears the burden of making a substantial showing of a constitutional violation; and during second-stage proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *People v. Rivera*, 2014 IL App (2d) 120884, ¶ 7. A "substantial showing" requires that the petitioner's allegations, taken as true and not positively rebutted by the record, establish a violation of the petitioner's constitutional rights. See *People v. Hall*, 217 Ill. 2d 324, 335 (2005); *People v. Moleterno*, 254 Ill. App. 3d 615, 620 (1993) (allegations of specific fact supported by affidavits or other evidence, taken as true, must indicate that the petitioner's rights have been violated to merit an evidentiary hearing). "A trial court's determination regarding the sufficiency of the allegations contained in a post-conviction petition is reviewed *de novo*." *People v. Page*, 193 Ill. 2d 120, 131 (2000).

¶ 18 A. Instruction Errors

¶ 19 Petitioner argues that his second amended postconviction petition makes a substantial showing that his appellate counsel should have raised as error on appeal (1) the trial court's refusal to instruct the jury on the lesser included offense of reckless discharge of a firearm, and (2) the court's refusal to sanction the State for a discovery violation with a spoilation

instruction. Petitioner argues the failure to raise those issues on direct appeal prejudiced him because each was reversible error. However, appellate counsel is not ineffective for choosing not to raise meritless issues:

> "A *** claim of ineffective assistance of counsel is analyzed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). [Citation.] *** A defendant who argues that appellate counsel was ineffective for failing to argue an issue must show that the failure was objectively unreasonable, and that the defendant was prejudiced by the decision. [Citation.] Appellate counsel is not required to brief every conceivable issue on appeal, and counsel is not incompetent for choosing not to raise meritless issues. [Citation.]" (Internal quotation marks omitted.) *People v. Maclin*, 2014 IL App (1st) 110342, ¶ 32.

¶ 20 "[T]he inquiry as to prejudice requires that the reviewing court examine the merits of the underlying issue [citation], for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal [citations]." *People v. Simms*, 192 Ill. 2d 348, 362 (2000). With these standards in mind, we turn to a consideration of the merits of each claim petitioner asserts appellate counsel should have raised on direct appeal.

¶ 21 1. Lesser Included Offense Instruction

¶ 22 Our supreme court established a two-step approach to determine whether a defendant is entitled to an instruction on a lesser included offense. "First, the court must determine whether the charging instrument describes the lesser offense." *People v. Kidd*, 2014 IL App

(1st) 112854, ¶ 45. "It is not fatal that every element of the lesser offense is not explicitly contained in the indictment, as long as the missing element can be reasonably inferred." *Id.* "Second, the court must determine whether the evidence presented at trial would permit the jury to rationally find the defendant guilty of the lesser offense but not guilty of the greater offense." *Id.*

> "A trial court has discretion in deciding whether to give a jury instruction. [Citation.] The court's failure to give an instruction constitutes an abuse of discretion where there is some evidence to support giving the instruction. [Citation.] Very slight evidence upon a given theory of a case will justify the giving of an instruction. [Citation.] In deciding whether the evidence supports an instruction, the court does not weigh the evidence presented at trial; it simply determines whether there is some evidence supporting the instruction. [Citation.] The facts and circumstances of each case determine whether an *** instruction is warranted." (Internal quotation marks omitted.) *People v. Smith*, 2014 IL App (1st) 103436, ¶ 77.

¶ 23 Petitioner argues that reckless discharge of a firearm is a lesser included offense of first degree murder in this case under the charging instrument approach, and that under the version of events described by petitioner's testimony, a rational jury could have convicted him of reckless discharge of a firearm and acquitted him of murder premised on accountability for his codefendant's act of firing at the group of men. "A person commits the

offense of reckless discharge of a firearm when he (1) recklessly discharges a firearm, and (2) endangers the bodily safety of an individual." *People v. Collins*, 214 Ill. 2d 206, 212 (2005). Petitioner argues that the allegations in the instrument charging him with murder allege the main outlines of reckless discharge of a firearm. The State does not contest petitioner's argument that in this case reckless discharge of a firearm is a lesser included offense of first degree murder, but responds that the evidence adduced at trial would not permit a rational trier of fact to find defendant guilty of reckless discharge while acquitting him of first degree murder. We agree with the State.

¶ 24 Petitioner argues that based on his testimony, and only his testimony, a rational jury could have acquitted him of first degree murder and found that petitioner only committed the offense of reckless discharge of a firearm. Considering only his own testimony, petitioner argues that he is not accountable for his codefendant's act of shooting in the direction of the men who had approached petitioner and the codefendant with the apparent intent to rob them of the very guns petitioner had offered to sell, because doing so was not in furtherance of their common criminal design. He argues the common criminal design was only to sell the guns, not to perpetuate the internal gang conflict or to retaliate for the attack against his codefendant, and that the "codefendant's shooting was foreign to this design." Petitioner also argues that the criminal design terminated when the men began to flee. The State responds the codefendant committed "an intentional, lethal act." The State argues that a rational jury could not find petitioner guilty of reckless discharge of a firearm because even under petitioner's version of events the codefendant's conduct was not reckless. *People v. Sipp*, 378 Ill. App. 3d 157, 166 (2007) (when a defendant intends to fire a gun and points the gun in the

general direction of an intended victim and shoots the gun, his actions are not merely reckless).

¶ 25 We disagree with petitioner's argument that based on his testimony his codefendant's lethal conduct exceeds the limits of their common design. "The common design rule holds that where two or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts. [Citation.]" (Internal quotation marks omitted.) *People v. Fleming*, 2014 IL App (1st) 113004, ¶ 52. "[T]here is no question that one can be held accountable for a crime other than the one that was planned or intended, provided it was committed in furtherance of the crime that was planned or intended." *People v. Fernandez*, 2014 IL 115527, ¶ 19.

¶ 26 In this case petitioner and his codefendant had a common criminal design because together they were engaged in the crime of illegally selling loaded weapons. Because petitioner admits that he and his codefendant were engaged in a common criminal design, the question becomes whether the codefendant's act of firing at the men after petitioner's alleged warning shot was in furtherance of that common design. We find that it was; accordingly, accepting petitioner's testimony as true, we hold that no rational trier of fact could have found petitioner guilty of reckless discharge of a firearm and found him not guilty of murder based on a theory of accountability.

¶ 27 "A member of a group can become accountable for acts committed by other members of the group in furtherance of a common purpose, or as a natural or probable consequence

thereof, even though he did not participate in the overt act itself." *People v. Daniels*, 67 Ill. App. 3d 663, 670 (1978). Petitioner's own testimony as to the events of the crime, if believed, would not relieve petitioner of responsibility for his codefendant's act. The codefendant's act of firing at the fleeing men when the attempted gun sale aborted was in furtherance of what petitioner admits was their common criminal design. We reject petitioner's suggestion that the common criminal design ended once it became apparent the sale would not go as petitioner may have planned and the men fled after petitioner fired into the air. Whereas the hoped-for buyers' flight may have terminated the possibility of success it did not terminate petitioner's involvement in the crime.

¶ 28 In *People v. Kessler*, 57 Ill. 2d 493, 494 (1974), the defendant and two companions planned to burglarize a tavern. The defendant waited outside while the other two entered the building, where they were surprised by the tavern owner. *Id.* The two were unarmed when they entered the building. *Id.* at 494. One of the men shot the tavern owner with a gun found on the scene. *Id.* The men returned to the car where the defendant waited and drove away. *Id.* at 495. The defendant was not the driver. *Id.* Police forced the car from the road and the two accomplices fled on foot while the defendant remained sitting in the vehicle. *Id.* While fleeing on foot, one of the men fired a shot at a pursuing police officer. *Id.* The trial court convicted the defendant of the burglary and two counts of attempted murder for the shots fired at the tavern owner and the police officer. *Id.* at 493-94. Our supreme court affirmed the trial court's judgment. *Id.* at 497-99.

¶ 29 The court noted that the accountability "statute, as it reads, means that where one aids another in the planning or commission of an offense, he is legally accountable for the conduct

of the person he aids; and that the word 'conduct' encompasses any criminal act done in furtherance of the planned and intended act." *Id.* at 497. The court found that the attempted murders were conduct of the others in connection with the offense the defendant was jointly committing. *Id.* at 499.

¶ 30 In this case, petitioner's argument that the crime ended when their plans were foiled by unforeseen developments is not persuasive. In *Kessler*, the planned offense was an unarmed burglary. Our supreme court found both attempted murders were in furtherance of the criminal design despite the fact that all three men had fled the actual scene of the crime and were engaged in a secondary flight from police when the second attempted murder occurred. *Id.* at 499. The defendant, whose conviction for the attempted murder of the police officer was affirmed, was not even engaged in the secondary flight but had remained in the vehicle after police forced it from the road. *Id.* at 495.

¶ 31 In *People v. Hudson*, 165 Ill. App. 3d 375, 376 (1988), the State charged the defendant with murder, but the jury convicted the defendant of the lesser included offense of voluntary manslaughter. The defendant in that case had been riding in a car with the defendant's brother, Robert Hudson, when they saw a man, Mabry, who Hudson stated was responsible for damaging the defendant's vehicle. *Id.* As the defendant approached, Mabry exited the vehicle in which he had been sitting and warned the defendant not to come any closer. *Id.* The defendant testified that Mabry produced a handgun and pointed it in the defendant's direction. *Id.* at 376-77. The defendant heard gunfire, dropped to the ground, and began firing his own weapon. The defendant failed to hit Mabry but when the shooting stopped Mabry was dead. The defendant looked up and saw Hudson walking from the side of

Mabry's vehicle. *Id.* at 377. Hudson had shot Mabry four times. *Id.* The trial court found the defendant guilty on a theory of accountability. *Id.* The defendant in *Hudson* did not specifically argue that his brother's act was not in furtherance of a common criminal design. Rather, the defendant argued that he did not possess the requisite mental state for accountability. *Id.* at 378. The *Hudson* court found that the trial court properly found the defendant guilty of voluntary manslaughter because the defendant and his brother were acting with the intent to commit an illegal act and the defendant was involved in the acts resulting in Mabry's death. *Id.* at 378-79.

¶ 32 In this case, petitioner does not dispute the existence of a common criminal design. In *Hudson*, in the course of executing a criminal design the perpetrators of the offense went on the defensive when the erstwhile victim became the aggressor. The facts petitioner alleged in this case are analogous to the facts in *Hudson* because in the course of the attempted gun sale, the perpetrators of that crime were forced into a defensive posture. Here, as in *Hudson*, as a result of those defensive efforts, someone was killed.

¶ 33 Based on the foregoing authorities, we find that the facts petitioner testified to in this case, if true, would not relieve defendant of responsibility for his codefendant's act. Petitioner's act in this case of firing his gun into the air, followed by the codefendant's act of firing into the crowd of men, is more closely related to the planned offense of attempting to sell loaded guns than was the attempted escape in *Kessler*. Petitioner and his codefendant were in the process of attempting to complete their crime (codefendant continued to request money from Gill and neither man fled the scene when men other than the purported gun buyer approached them), both were still at the scene of the offense, and the most liberal

construction of petitioner's testimony is that they were attempting to extricate themselves from the crime much like the burglars in *Kessler* were attempting to escape capture. Thus, we hold that both petitioner's and his codefendant's actions were in furtherance of their common criminal design.

¶ 34 Moreover, "the fact that the criminal acts were not committed pursuant to a preconceived plan is not a defense if the evidence indicates involvement on the part of the accused in the spontaneous acts of the group." *People v. Bracey*, 110 Ill. App. 2d 329, 337 (1969) (quoting *People v. Richardson*, 32 Ill. 2d 472, 476 (1965)). In this case, petitioner was involved in the codefendant's spontaneous act. Based on petitioner's testimony, when the men approached them for the purpose, defendant believed, of stealing their guns, neither he nor his codefendant fled. Rather, petitioner fired a shot into the air, giving his codefendant the opportunity to reload his weapon and fire at the men. Petitioner relies on *People v. Faught*, 343 Ill. 312 (1931)[1], for the proposition that his codefendant's act was not in furtherance of their criminal design because a killing is not necessarily inherent in a contraband sale. Petitioner's reliance is misplaced, and *Faught* does not support the proposition that the codefendant's act in this case was divorced from their common design to sell contraband.

¶ 35 In *Faught*, the trial court instructed the jury as follows:

> "The court instructs the jury, as a matter of law, that in this case to constitute the crime of murder it is not necessary for the State

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[1] "Appellate court cases decided prior to 1935 are not binding authority and have no precedential value." *Basham v. Hunt*, 332 Ill. App. 3d 980, 993 fn.3 (2002).

> to show that it was, or may have been the original intent of the defendants, or either of them, to kill the deceased ***. It is sufficient *** that the defendants combined to do an unlawful act, and that the deceased was killed by the defendants, or either of them, in the attempt to execute such purpose." *Id.* at 315-16.

¶ 36 Our supreme court held that the instruction was erroneous "as applied to the evidence in this case" (*id.* at 317) because the jury may have construed the instruction in such a way as to prevent it from finding the defendant acted in self defense. *Id.* at 316-17. The evidence was that the murder victim was the initial aggressor against the defendant's companion when they went to the victim's home for the purpose of illegally purchasing liquor. *Id.* at 314. The court found that, assuming the crime did not justify the victim's "resort to violence" the jury might infer from the instruction that the defendant was guilty of murder because he had combined with his companion to unlawfully purchase liquor even if the victim was shot in self defense or the "homicide was the independent act of one of the confederates and foreign to the common design." *Id.* at 317.

¶ 37 The evidence provided by petitioner's testimony in this case does not give rise to a reasonable inference of self defense that is divorced from the object of the crime or foreign to the criminal design. Illegally selling loaded guns is an unlawful act that is of a dangerous character. *Id.* at 316. The murder in this case was not the codefendant's independent act. Rather, both the petitioner's act of firing into the air and the codefendant's act of firing at the men were part of the design to illegally sell guns. According to petitioner's testimony, the would-be purchaser, Smith, was not present when the men approached. Nonetheless, when

asked about the guns, the codefendant asked to see the money for the purchase. The man who asked about the gun, Gill, did not produce any money but asked if the gun was loaded with ammunition. Again, the codefendant continued to attempt to complete the sale by demonstrating that his gun was in fact loaded. Then Gill attempted to grab the gun from the codefendant and a struggle ensued. Defendant fired his gun into the air, the men started to run, and the codefendant fired into the crowd. The codefendant's shooting into the crowd is not the type of foreign act contemplated by the *Faught* court. Petitioner and his codefendant were acting to protect and further their criminal objective of selling the guns.

¶ 38 We hold that accepting petitioner's testimony as true, when viewed in light of the facts and circumstances of this case, the trial court did not abuse its discretion in refusing to instruct the jury on reckless discharge. *Smith*, 2014 IL App (1st) 103436, ¶ 77. The evidence presented at trial would not permit the jury to rationally find petitioner guilty of reckless discharge of a firearm but not guilty of murder based on accountability for his codefendant's act. Petitioner makes no argument that his codefendant's act under the circumstances described by petitioner's testimony would not subject either man to culpability for murder. *Kidd*, 2014 IL App (1st) 112854, ¶ 45. The codefendant's act of firing into the crowd was in furtherance of petitioner and his codefendant's admitted common criminal design as a matter of law. *Kessler*, 57 Ill. 2d at 494; *Hudson*, 165 Ill. App. 3d at 378-79. Because the issue of a lesser included offense instruction lacks substantive merit appellate counsel did not render ineffective assistance by failing to raise it on direct appeal. *Maclin*, 2014 IL App (1st) 110342, ¶ 32.

¶ 39 2. Spoilation Instruction

¶ 40 Next, petitioner argues that reasonably competent appellate counsel would have raised the trial court's refusal to give the jury a spoilation of evidence instruction and the failure to do so was prejudicial because (1) the State violated discovery rules, (2) a spoilation instruction was a proper sanction for that discovery violation, and (3) the discovery violation prejudiced petitioner. Petitioner argues that because the detective investigating this crime destroyed his interview notes and the detective's report is not a faithful reproduction of those notes, the State violated Illinois Supreme Court Rule 412(a) (eff. July 1, 1982). At trial, defense counsel requested the court instruct the jury as follows: "[I]f a party to this cause failed to preserve the evidence within his power to preserve, you may infer that the evidence would be adverse to that party if you believe each of the following elements ***."

¶ 41 Defense counsel argued the detective's notes "documented conversations he had with many witnesses that we were not able to see because he destroyed them." Before this appeal counsel did not assert that as a result of the inability to turn over the notes the State committed a discovery violation. The petition argued that the trial court abused its discretion when it permitted the State to provide an incomplete response to petitioner's discovery request because the State failed to produce the detective's notes, and in light of the incomplete discovery the failure to instruct the jury as requested denied petitioner's right to a fair trial. In this appeal, petitioner argues for the first time that the instruction would have been a proper discovery sanction and that the failure to cure the discovery violation with an appropriate

sanction prejudiced him. The State does not challenge petitioner's ability to raise that argument for the first time on appeal.

¶ 42 In *People v. Mohr*, 228 Ill. 2d 53, 65 (2008), our supreme court held that the rule that review of a putative instruction error is waived absent an objection at trial and raising the issue in a posttrial motion "does not state that a defendant must object to the instruction on identical grounds--only that the defendant must object during and after trial." The court rejected the State's forfeiture argument because in that case the defendant's trial objection was "close enough" to his posttrial argument. *Id.* The court held that "[t]he fact that the defendant objected to [the instruction] at trial and again in his posttrial motion is enough to preserve the issue on appeal." *Id.* Here, we find the fact that petitioner requested an instruction based on the information the defense did not receive from the State and he raised the issue in his postconviction petition are sufficient to preserve the question of whether the instruction would have been an appropriate discovery sanction. In light of the foregoing and in the absence of an objection by the State we will address the merits of petitioner's argument that appellate counsel was ineffective for failing to raise the trial court's failure to give the spoilation instruction on the grounds doing so would have been a proper discovery sanction.

¶ 43 An instruction of the type defense counsel requested in this case could be an appropriate sanction for a discovery violation. See *People v. Danielly*, 274 Ill. App. 3d 358, 368 (1995) (finding a similar instruction "serves as an effective protection to defendants from any uncertainty that might arise from missing evidence" and also "serves as an incentive for the police to exercise due care in their handling of evidence"); *People v. Camp*, 352 Ill. App. 3d 257, 262 (2004) (holding trial court may "consider a variety of *** options" for a discovery

violation including "instructing the jury that the absence of the [evidence] requires an inference that the *** contents are favorable to defendant"). The failure to give an appropriate jury instruction as a sanction against the State for failing to comply with a discovery order is subject to harmless error analysis. *People v. Grover*, 93 Ill. App. 3d 877, 878 (1981) ("The State failed to comply with discovery orders. [T]he only sanctions the trial court could have imposed would have been to grant the defendant a mistrial or to instruct the jury to disregard the objected-to testimony. *** While the trial court should have instructed the jury to disregard the objected-to testimony, this error was harmless given the cumulative nature of the objected-to testimony"). Instruction errors are harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed. *People v. Washington*, 2012 IL 110283, ¶ 60. The same harmless error analysis applies when the alleged instruction error involves negative inferences the jury may draw against the State. *People v. Cameron*, 189 Ill. App. 3d 998, 1006 (1989) (where trial court erroneously instructed jury regarding negative permissible inferences from the defendant's possession of contraband the court held that "[i]n view of the strength of the evidence of defendant's guilt, the giving of the instruction does not require reversal").

¶ 44 We have no need to decide whether a discovery violation occurred or whether the defense's proffered instruction would have been an appropriate sanction. We hold that the result of the trial would not have been different had the jury received the instruction, therefore the alleged error was harmless. *Washington*, 2012 IL 110283, ¶ 60. Petitioner argues the failure to give the jury the tendered instruction was not harmless because "this was a close, muddled case of credibility" and, had appellate counsel raised the instruction errors this court

likely would have reversed. In response to petitioner's claim the evidence was close, thus the instruction error was not harmless, the State points to this court's disposition of the direct appeal of petitioner's conviction in which this court held that "the evidence in this case was not so closely balanced to support plain error review or defendant's ineffective assistance of counsel claim."

¶ 45 In the direct appeal this court addressed whether petitioner's forfeited claim that the trial court erroneously instructed the jury as to the use of a prior inconsistent statement could be reviewed under the plain error doctrine. Petitioner replies that for plain error review, he had the burden of proof, but for the harmless error analysis, the State has the burden of proof. Petitioner argues that because the determination in the direct appeal that the evidence was not close was made under a different standard, this issue is not *res judicata*.

¶ 46 "In harmless error analysis, it is the State that bears the burden of persuasion with respect to prejudice, while, in plain error analysis, it is the defendant that bears the burden of persuasion." *People v. Donahue*, 2014 IL App (1st) 120163, ¶ 111. When performing a harmless error analysis to determine whether an instruction error requires reversal, this court asks whether "the quantum of evidence presented by the State against the defendant rendered the evidence 'closely balanced.' [Citation.]" *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). "The primary difference between plain and harmless error is one of burdens." *Donahue*, 2014 IL App (1st) 120163, ¶ 111. Which party had the burden of persuasion has no effect on this court's determination of whether or not the evidence is closely balanced. The substantive determination remains the same. *People v. Johnson*, 218 Ill. 2d 125, 141 (2005) ("[P]lain-error analysis requires the same kind of inquiry as does harmless-error review"). But see *People v.*

Thurow, 203 Ill. 2d 352, 363 (2003) (finding that prior United States Supreme Court decision finding error did not rise to the level of plain error suggested the Court will eventually conclude that the same error can also be harmless but holding that the prior decision did not constitute a precise judgment on the latter question).

¶ 47 We adhere to this court's earlier finding that the evidence in this case is not close and that the State adduced overwhelming evidence of petitioner's guilt. We find that it has been demonstrated that the outcome of trial would not have been different with the instruction regarding the detective's notes. *Washington*, 2012 IL 110283, ¶ 60. In this appeal petitioner argues that the evidence is close because every State witness had credibility problems. However, this court previously noted on direct appeal that "[w]here the jury's determination is dependent upon eyewitness testimony, its credibility determinations are entitled to great deference and will be upset only if unreasonable." Even had the trial court tendered the proffered jury instruction, the jury could have accepted the State's witnesses' testimony and the jury's credibility determinations would be afforded great weight. *People v. Dunmore*, 389 Ill. App. 3d 1095, 1101 (2009). Petitioner was not prejudiced because the instruction would not have impacted the weight of the evidence or credibility of the State's witnesses sufficiently to cause a different result.

¶ 48 As we noted on direct appeal, petitioner gave a signed statement confessing to shooting at the dice players. But that statement itself does render the alleged instruction error harmless. Had the trial court instructed the jury as requested, the most "favorable inference" the jury might have drawn based on the instruction was that police identified additional witnesses or suspects. As this court previously noted on direct appeal, two eyewitnesses

corroborated petitioner's custodial statement admitting that he fired at the men, whereas no evidence corroborated petitioner's trial testimony that he did not. This court found that inconsistencies in petitioner's trial testimony "supported a finding that he lacked credibility and his testimony should not receive great weight." Conversely, the State's witnesses testified consistently with each other and with petitioner's statement admitting he committed the offense. Petitioner has not pointed to major inconsistencies within the witnesses' testimony as to the offense, but only to inapposite discrepancies and purportedly illogical inferences. Further, this court found overwhelming evidence to support the jury's finding of guilt despite any credibility issues and particularly despite the existence of an affidavit by one witness reciting a different version of events than that witness's trial testimony where the witness testified that the affidavit merely contained information that was given to the affiant.

¶ 49 In light of the evidence of petitioner's guilt and the lack of credibility of petitioner's testimony, the outcome of the proceedings would not have been different had the jury been instructed that it may (but was not required to) infer that the detective's missing notes identifying witnesses were favorable to petitioner. Petitioner argues that this court would have been free, on direct appeal, to discount his custodial statement admitting firing into the crowd of men had appellate counsel raised the alleged instruction errors. However, the question for purposes of the harmless error test is whether the failure to tender defense counsel's instruction prejudiced defendant because the outcome of the trial likely would have been different had the jury been so instructed. *Washington*, 2012 IL 110283, ¶ 60. We find that it has been demonstrated that the outcome of trial would not have been different with the instruction regarding the detective's notes. *Id.*

¶ 50 The evidence against petitioner was not closely balanced and any error in refusing to give the spoilation instruction was harmless. An appeal of this issue would not have been successful. Accordingly, petitioner cannot prevail on his claim of ineffective assistance of appellate counsel for failing to raise this issue and the trial court's dismissal of the second amended postconviction petition was proper. *People v. Oliver*, 2013 IL App (1st) 120793, ¶¶ 30, 31.

¶ 51 B. Sufficiency of Postconviction Counsel's Performance

¶ 52 Next, petitioner argues that his appointed postconviction counsel failed to advocate his position and, therefore, this court should reverse the dismissal of the petition and remand for further proceedings. Petitioner argues that rather than advocate on his behalf, postconviction counsel "took a detached, neutral stance" and effectively confessed the State's motion to dismiss by distancing herself from petitioner thereby signaling that his petition lacked merit.

¶ 53 "Because no constitutional right to counsel exists in postconviction proceedings, such a right *** is wholly statutory and is defined in the *** Act. [Citation.]" *People v. Marshall*, 375 Ill. App. 3d 670, 679 (2007). "A defendant is entitled only to the level of assistance required by the Act." *People v. Lander*, 215 Ill. 2d 577, 583 (2005). The Illinois Supreme Court amended Rule 651(c) to set out the specific duties of second-stage postconviction counsel. Those amendments reflected our supreme court's decisions addressing "the essential need for appointed counsel at the second-stage of postconviction proceedings." *Marshall*, 375 Ill. App. 3d at 680. "Thus, Rule 651(c) is designed to ensure that a defendant receives the required reasonable level of assistance from postconviction counsel. [Citation.] A filed Rule 651(c) certificate creates a presumption of compliance that can be rebutted by the record." *Id.* "It

falls on the defendant to overcome that presumption by demonstrating counsel's failure to substantially comply with the duties mandated by Rule 651(c)." *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23.

¶ 54 Petitioner has failed to demonstrate postconviction counsel's failure to comply with her duties as mandated by Rule 651(c). Petitioner complains that counsel placed too much focus on her compliance with Rule 651(c). However, we do not find that the statements about which petitioner complains regarding counsel's Rule 651(c) compliance were inappropriate. Because petitioner only has a right to the reasonable level of assistance required by the Act, and petitioner has failed to rebut the presumption that he received that level of assistance, petitioner's claim is without merit.

¶ 55 We note, however, that the subjective attack on counsel for not appearing to be zealous in her advocacy of the petition is unfair and unwarranted. Petitioner complains that postconviction counsel emphasized that the claims raised in the petition were petitioner's claims of constitutional deprivations and not her own. Counsel's statements were absolutely correct and wholly appropriate. "Post-conviction counsel is only required to investigate and properly present the *petitioner's* claims. Had the legislature intended otherwise, it would, logically, have provided for the appointment of counsel prior to the filing of the original petition. Counsel's responsibility is to adequately present those claims which the *petitioner* raises." (Emphases in original.) *People v. Davis*, 156 Ill. 2d 149, 164 (1993). The essential role of appointed counsel, which enables the Act to perform its function, is to ascertain the basis of the petitioner's complaints, shape those complaints into appropriate legal form, and present them to the court. *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968). There is no fair argument

that counsel's method of presentation to the court did not fulfill her role or which demonstrates that counsel failed in her statutory duties.

¶ 56 C. Trial Court's Ruling

¶ 57 Petitioner's final argument on appeal is that the trial court did not read the second amended petition because when the court dismissed the petition it orally addressed only two of the five contentions of error raised in the second amended petition. Moreover, the two claims the court did discuss were claims found in petitioner's first amended petition (and later incorporated into the second amended petition). Petitioner argues that as a result of the alleged failure to read the second amended petition, the trial court denied petitioner his right to be heard as required by due process and his right to have the allegations in his petition taken as true as required by the Act.

¶ 58 We will presume that the trial court properly examined the record unless the record indicates otherwise. *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 114. The lack of factual findings does not preclude appellate review because "it is the 'judgment' of the lower court that is reviewed, and 'not what else may have been said.' [Citation.]" *In re Rita P.*, 2014 IL 115798, ¶ 51. "Thus, although factual findings may provide an explanation or reason for the trial court's decision, it is the correctness of the court's ruling, and not the correctness of its reasoning, that is under review." *Id.* Petitioner does not argue that the court's decision did not dismiss every claim in his second amended petition. Our review of that decision is *de novo*. *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 13. Therefore, the trial court did not need to discuss every claim in the second amended petition when making its ruling.

Regardless, the record does not indicate that the trial court failed to read the operative petition.

¶ 59 Petitioner admits that the State's motion to dismiss listed all five allegations in the second amended petition. At the hearing on the motion to dismiss it is clear the State chose not to address every claim raised in the petition rather than having overlooked them. Petitioner also admits that his postconviction counsel argued the trial court had abused its discretion by refusing to instruct the jury on reckless homicide in addition to, in her words, "several other issues." The trial court continued the matter for a ruling on the motion to dismiss after argument by the parties. The court stated this was to give the court time "to review the record, review the defendant's claims, consider [the] motion." The court stated that on the next court date following the hearing on the motion to dismiss, "We'll *** see how far I get through what the defendant has filed."

¶ 60 The method by which the trial court proceeded on the State's motion to dismiss, the contents of the State's motion, the parties' arguments, and the court's own statements belie the contention the court did not read the second amended postconviction petition. For all of the foregoing reasons we find that the record does not overcome the presumption that the court properly examined the pleadings.

¶ 61 CONCLUSION

¶ 62 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 63 Affirmed.