2014 IL App (1st) 12-1827-U
Sixth Division
Order filed: September 5, 2014

No. 1-12-1827

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 93 CR 10092
	)	
v.	)	
	)	
RAPHAEL REGALADO,	)	Honorable
	)	Noreen Valeria Love,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

Held: The summary denial of leave to file a successive postconviction petition was proper, where the defendant failed to demonstrate, under the cause and prejudice test, that the alleged error in jury instructions, which was *res judicata*, so infected the entire trial that the resulting conviction violates due process.

¶ 1 The defendant, Raphael Regalado, appeals from the summary denial of his *pro se* motion for leave to file a successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2010)). For the reasons that follow, we affirm.

¶ 2 This case arose from a gang-related shooting which caused the death of a bystander. In December of 1995, a jury found the defendant guilty of first degree murder, and the circuit court sentenced him to 60 years' imprisonment. The defendant appealed, arguing, in relevant part, that the court erred, under *People v. Lockett*, 82 Ill. 2d 546, 413 N.E.2d 378 (1980), by refusing his request for a jury instruction on second-degree murder even though it found sufficient evidence to warrant an instruction on self-defense. We rejected his argument and affirmed his conviction *(People v. Regalado*, No. 1-96-0500 (1997) (unpublished order under Supreme Court Rule 23)).

¶ 3 In March of 1998, represented by private counsel, the defendant filed a postconviction petition asserting, in relevant part, that his counsel on direct appeal was ineffective in failing to properly argue the basis for a second-degree murder instruction in the defendant's case. The court summarily dismissed the petition, and the defendant appealed. We reversed and remanded for further proceedings on an unrelated issue, but affirmed the dismissal of the defendant's claim regarding the second degree murder instruction, finding it barred under *res judicata. People v. Regalado*, No. 1-98-2009 (unpublished order under Supreme Court Rule 23). On remand, the State moved to dismiss the petition, and we affirmed. *People v. Regalado*, No. 1-00-2659 (2002) (unpublished order under Supreme Court Rule 23)).

¶ 4 On April 24, 2012, the defendant filed his motion for leave to file a successive postconviction petition which is the subject of this appeal. In his motion, the defendant alleged, among several other claims, that he had "clear and convincing evidence" of his actual innocence which was previously unavailable. The defendant also argued that, under the recent case of *People v. Washington*, 2012 IL 110283, 962 N.E.2d 902, the supreme court corrected a misinterpretation of *Lockett* within the appellate court, and stated unequivocally that a second-

degree murder instruction must uniformly accompany a self-defense instruction. Specifically, the defendant asserted that *Washington* abrogated the case of *People v. Anderson,* 266 Ill. App. 3d 947, 641 N.E.2d 591 (1994), upon which the appellate court relied here for its conclusion that the second degree murder instruction need only be given where the reasonableness of the defendant's subjective belief in the need to use force is actually in question. He further contended that, under *Washington,* the failure to give the requested instruction deprived him of his right to have the jury make the factual determination as to whether his subjective belief may have been unreasonable, and that this omission cannot be regarded as harmless error. See *Washington,* 2012 IL 110283, ¶¶ 47-48, 57. The court denied the motion, noting that the claims in the petition "failed to assert any newly discovered evidence that would likely affect the outcome of the trial."

¶ 5 The evidence at trial was detailed in our prior Rule 23 Order (*Regalado,* No. 1-96-0500 (1997)), but we summarize relevant facts briefly to assist in the resolution of this appeal. The shooting occurred on the night of April 5, 1993, at the intersection of 24th Place and Cicero Avenue. At the time the shots were fired, the victim was a passenger in a car headed southbound on Cicero, and was at or near the intersection with 24th Place, when bullets came from the west, striking and killing her. A short time earlier, a burgundy car being driven by the defendant was headed eastbound on 24th Place when it struck the open driver's door of a black Thunderbird, which was parked on the southwest corner of 24th Place and Cicero. There was a group of young men in or around the Thunderbird, one of whom then threw a bottle which struck and shattered the rear passenger window of the defendant's car, injuring one of its occupants. The defendant's vehicle then left the scene. Shortly thereafter, the occupants of the Thunderbird were outside the car attempting to close the car door, when a gray Camaro turned into an alley located just west of

where the Thunderbird was parked. After the car turned, witnesses heard three gunshots from the alley, followed by a short pause and then three more gunshots. The men from the Thunderbird, none of whom had guns, got down on the ground for cover. One of the witnesses, Trina Brownlee, a security officer, saw a vehicle make a wrong turn into the driveway of the business center where she was working. She approached the driver's side of the vehicle and found the victim lying on the passenger side of the back seat. The victim was later transported to the hospital where she died from her injuries.

¶ 6 Cicero police officers, Gene Talsma and Henry Feret, responded to a call from 24th and Cicero at the time of the occurrence. From their undercover vehicle, they heard gunshots, and saw a group of young males hiding behind a black Thunderbird. The young males pointed the officers toward the adjacent alley, where they observed a man identified as the defendant standing at the rear passenger side of a silver Camaro. At that point the officers saw the defendant, who was pointing an object in their direction, fire three shots and then jump into the front passenger side of the Camaro and drive off. There was no one else in the vicinity with a gun and no one else present in the alley. When the officers pursued the Camaro, the car stopped and the defendant exited with a gun in his hand. They apprehended the defendant, and Officer Talsma recovered a .44 caliber revolver with six spent casings. Officer Talsma noticed that the defendant's face was bleeding around his nose area and that he had a bandage taped to his nose.

¶ 7 Val Villanueva testified for the defense that he was a former member of the 26 Street gang. On the night of the occurrence, he was near the black Thunderbird when the burgundy car came around the corner and its occupants began flashing gang signs. Villanueva and his friends threw bottles at the car which then accelerated and hit the door of the Thunderbird. As Villanueva and the others were then trying to fix the door, he heard approximately nine or ten

shots coming from the vicinity of a bank located on the north side of 24th Place. He also heard approximately six shots from the alley. Villanueva could not identify who fired the gun. On cross examination, Villanueva admitted that, in a prior written statement he gave to the police, he did not tell the detective that he or anyone else threw bottles, nor did he state that he heard gunshots from the area of the bank.

¶ 8 The defendant testified that that night, he was driving with Kenny Esters, Jimmy Acevedo, and Ricky Mendez, when the men near the Thunderbird threw bottles at his car, striking Acevedo. While trying to speed away, the defendant hit the door of their car. He drove to Mendez's home and tended to Acevedo's injuries. After a few minutes, Mendez ran out of the house and the defendant went after him, following him into an alley. According to the defendant, Mendez fired a gun down the alley, and the defendant took the gun away, saying "let's get out of here." He then observed an individual whom he could not identify fire two to three shots at him from behind a bank on 24th. The bank was approximately 70 yards away. The defendant returned fire "straight down the alley" to the north as he ran away, and testified that he was not firing aimlessly, but was shooting because he needed to escape. He also denied shooting at the men standing near the Thunderbird. The defendant's cousin then approached, driving a gray Camaro, and the defendant jumped inside. As the Camaro sped away, the defendant heard more shots being fired. The defendant fell out of the car as it turned a corner, and was trying to run away when he was apprehended by the police.

¶ 9 At the jury instruction conference, the defendant requested that self-defense and second degree murder instructions be given to the jury. With regard to the second degree murder instruction, he argued that (1) the jury could find that he had fired as a result of "sudden and intense passion resulting from serious provocation" (see 720 ILCS 5/9-2(a)(1) (West 1996)) due

to the bottles that had been thrown at his car and/or the shots being fired down the alley, or, alternatively, that (2) he had fired down the alley in response to shots fired at him from an unknown assailant. The court allowed the instruction for self-defense, although noting that there was "minimal testimony" to support it, but denied the second degree murder instruction.

¶ 10 In his direct appeal, the defendant's assignment of error as to the second-degree murder instruction centered primarily on the contention that there was sufficient evidence to establish that had acted under a "sudden and intense passion" resulting from the bottles being thrown at his car. He also asserted, under *Lockett*, that the court was required to tender an instruction on second degree murder, because that case held that, where a self-defense instruction is found to be justified by the evidence, a second degree murder instruction must also be given. In rejecting the defendant's argument, we followed the logic of *Anderson*, 266 Ill. App. 3d 947, *appeal denied*, 159 Ill. 2d 571 (1995), that *Lockett* is inapplicable unless the reasonableness of the defendant's subjective belief in the need to use deadly force is actually at issue in the case. We concluded that the jury in this case was called upon to decide between two opposed factual scenarios: that of the defendant, that he shot at an unknown person who shot at him first, thus constituting self-defense, or that of the State, that he fired at the arresting officers and/or the unarmed men around the Thunderbird, thus rendering him guilty of murder. Concluding that these facts were analogous to those in *Anderson*, we held that a second-degree murder instruction was not warranted because there was no question of an unreasonable belief by the defendant.

¶ 11 In this appeal, the defendant's sole argument is that he was deprived of his due process rights by the court's refusal to instruct the jury as to second degree murder. He does not dispute that this issue was previously considered and decided in his direct appeal. However, he asserts that, in light of the decision in *Washington* that *Anderson* was wrongly decided, fundamental

fairness dictates that he be given leave to file his successive petition. For the reasons that follow, we reject the defendant's argument.

¶ 12 In *Washington*, a case on direct review, our supreme court was asked to consider whether its decision in *Lockett* stood for the proposition that, in murder cases where the evidence justifies a self-defense instruction, a second-degree murder instruction must be given as a mandatory counterpart if tendered by the defendant. The court resolved this question in the affirmative, reiterating *Lockett's* rationale that it is the province of the jury, rather than the judge, to weigh the evidence and decide whether the defendant's belief in the need for self-defense was reasonable, thus supporting an acquittal based upon self-defense, or unreasonable, supporting a finding of guilt based upon second-degree murder. The *Lockett* court stated that it could conceive of no circumstance where the evidence could support a jury finding that the defendant's subjective belief was reasonable and not also be sufficient to permit a finding that the belief was unreasonable. *Id.* at ¶ 29, citing *Lockett,* 82 Ill. 2d at 553.

¶ 13 In arriving at its determination, the *Washington* court specifically rejected the holdings of *Anderson* and *People v. Billups,* 404 Ill App. 3d 1, 935 N.E.2d 1046 (2010), two cases turning upon the resolution of diametrically opposed factual scenarios, on the basis that *Anderson* had "misrepresented" the holding in *Lockett* to require that the degree of reasonableness of defendant's subjective belief in the need to use force be at issue in the case in order to justify the giving of a second-degree murder instruction. *Washington* determined that *Lockett* did not "hold or even imply" that such a dispute must exist; rather, there must simply be evidence that a subjective belief existed. *Id.* at ¶¶ 45-48.

¶ 14 It is clear that, based upon the holding in *Washington,* this court's decision on direct appeal in this case was error. We agree with the State, however, that an incorrect ruling by this

court, standing alone, is not a basis to disregard the *res judicata* bar, as such would eviscerate the doctrine's application in postconviction cases. *People v. Shriner*, 262 Ill. App. 3d 10, 15, 634 N.E.2d 400 (1994); see also *People v. Dominguez*, 366 Ill. App. 3d 468, 475, 851 N.E.2d 894 (2006). The bar will only be relaxed in cases where the defendant can show, in relevant part, that fundamental fairness compels this result. *People v. English*, 2013 IL 112890 ¶ 22, 987 N.E.2d 371; *People v. Williams*, 209 Ill. 2d 227, 233, 807 N.E.2d 448 (2004). The defendant has not made such a showing in this case.

¶ 15 The purpose of the Act is to allow a defendant to assert that, in the proceedings which resulted in his conviction, there was a substantial denial of his rights under the federal or state constitutions. 725 ILCS 5/122–1(a) (1) (West 2010). A petition for post conviction relief is not an appeal from an underlying conviction, but rather is a collateral attack on the judgment. *People v. Davis*, 2014 IL 115595 ¶ 13, 6 N.E.3d 709; *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56, 793 N.E.2d 609 (2002)*; Shriner*, 262 Ill. App. 3d at 12. The scope of the proceeding is limited to constitutional issues relating to the conviction or sentence that were not or could not have been adjudicated on direct appeal. *Pitsonbarger*, 205 Ill. 2d at 456. To this end, the Act permits the filing of only one petition, unless the petitioner obtains leave of court. 725 ILCS 5/122–1(f) (West 2008); *Davis*, 2014 IL 115595 at ¶ 14. A petitioner faces "immense procedural default hurdles" in obtaining such leave, because supplemental petitions impede the finality of criminal litigation. *Davis*, 2014 IL 115595 at ¶ 14. Leave is granted only when fundamental fairness so requires, or, put another way, when the defendant demonstrates "cause" for his failure to bring the claim in his initial post-conviction proceeding, and "prejudice" which results from that failure. 725 ILCS 5/122–1(f) (West 2010); see *Pitsonbarger*, 205 Ill. 2d at 459 ("cause-and-prejudice test" the analytical tool to determine whether procedural bars must be relaxed so

successive petition may be considered on merits); *People v. Flores,* 153 Ill. 2d 264, 279, 606 N.E.2d 1078 (1992) ("cause and prejudice" test ensures effectuation of fundamental fairness). "Cause" denotes an objective factor external to the defense which impeded counsel's ability to raise the claim in an earlier proceeding. *Davis,* 2014 IL 115595 at ¶ 14. "Prejudice" refers to a constitutional error which "so infected the entire trial that the resulting conviction or sentence violates due process." *Id.,* citing 725 ILCS 5/122-1(f) (West 2012). Both elements of the test must be satisfied to justify relief under the Act. *Davis* at ¶ 14 . Our review from the summary denial of a motion for leave to file a supplemental petition is *de novo.* See *People v. Delton,* 227 Ill. 2d 247, 255, 882 N.E.2d 516 (2008).

¶ 16 Assuming, but not deciding, that this court's erroneous decision on direct appeal could satisfy the "cause" requirement, the defendant has failed to demonstrate prejudice of the magnitude contemplated under the cause and prejudice test. As an initial matter, he has failed to cite cases supporting his assertion that the omission of the second degree murder instruction "so infected the entire trial that his resulting conviction violates due process" under *Davis.* A due process violation does not automatically follow every time an ambiguous, inconsistent, or deficient instruction is given to the jury. See *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991) (quoting *Cupp v. Naughten,* 414 U.S. 141, 147, 94 S. Ct. 396, 38 L.Ed.2d 368 (1973) (violation occurs only where instruction so infected trial that resulting conviction violates due process)). The degree of prejudice from an erroneous instruction, even one which misstated the State's burden of proof, is evaluated not in isolation, but in the context of all of the events at trial, including the proffered evidence and testimony, and the remaining given instructions. See *U.S. ex rel. Huckstead v. Greer,* 737 F.2d 673, 677 (7th Cir. 1984), citing *United States v. Frady*, 456 U.S. 152, 169, 102 S. Ct. 1584, 1595, 71 L.Ed.2d 816 (1983).

¶ 17 In fact, in *Washington,* upon which the defendant heavily relies, the court held that the failure to instruct the jury on second degree murder is not the type of error which is subject to automatic reversal. *Id.,* at ¶ 59. The court then proceeded to engage in a harmless error analysis, as the case was in the posture of direct appeal. *Id.*; *accord, Billups,* 2012 IL App 081383. The court observed that automatic reversal occurs only upon a finding of structural error, that "very limited" category of "systemic error that serves to erode the integrity of the judicial process and undermine the fairness of a trial." *Washington,* 2012 IL 110283, ¶ 59. Instructional errors in general are not deemed to be structural errors, but trial errors. See *Hedgpeth v. Pulido,* 555 U.S. 57, 60-61, 129 S. Ct. 530, 532, 172 L. Ed. 2d 388 (2008) (collecting cases); *Rose v. Clark,* 478 U.S. 570, 579, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (erroneous burden-shifting instruction did "not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction."); *People v. Watt,* 2013 IL App (2d) 120183, *appeal denied,* 2014 IL 117100.

¶ 18 In this case, the jury was properly instructed on self-defense, which was the defendant's theory of the case. Further, we cannot find that the evidence was closely balanced. The defendant argued to the jury that he fired straight down the alley, toward the north, in response to shots fired at him from that direction by an unknown assailant about 70 yards away. The State's theory, conversely, was that he fired at the men around the Thunderbird, all undisputedly unarmed, in an easterly direction, killing the victim in her car to the east. The jury accepted the State's version of events, and we are unable to conclude that the outcome would have been different had the second degree murder instruction been given. The police and two disinterested witnesses provided unimpeached testimony in support of the State's theory, and although the trial court permitted the defendant's instruction as to self-defense, it noted that there was minimal evidence to support it. Based upon these facts, we are unable to conclude that the omission of

the requested instruction, standing alone, "so infected the entire trial that the resulting conviction or sentence violates due process." Accordingly, we affirm the dismissal of the defendant's successive postconviction petition, finding his argument barred by *res judicata*.

¶ 19 In light of our determination, we do not reach the State's retroactivity argument.

¶ 20 Affirmed.