SECOND DIVISION
February 28, 2017

No. 1-14-2042

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. 06 CR 19160
	)	
RALPH LEWIS,	)	Honorable
	)	Thomas P. Fecarotta, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pierce and Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment dismissing defendant's postconviction petition at the second stage affirmed where defendant did not make a substantial showing of a violation of his constitutional right to effective assistance of trial or appellate counsel.

¶ 2 Following a jury trial, Ralph Lewis, the defendant, was found guilty of first-degree murder, aggravated battery, aggravated possession of a stolen motor vehicle, and unlawful restraint. He was sentenced to a total of 45 years' imprisonment. We affirmed the judgment of the trial court in defendant's direct appeal. *People v. Lewis*, No. 1-09-1033 (2010) (unpublished order pursuant to Illinois Supreme Court Rule 23). Defendant appeals from the circuit court's

order granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/22-1 *et seq*. (West 2014)). Defendant contends that his postconviction petition made a substantial showing that his trial counsel failed to effectively advise him as to the plea offer and that his appellate counsel was ineffective for failing to raise reasonable doubt in his direct appeal. Defendant seeks reversal of the trial court's judgment and requests that we remand the cause for the appointment of counsel and an evidentiary hearing under the Act. For the following reasons, we affirm.

¶ 3 On July 23, 2006, defendant slammed a truck into the side of a car, which caused 16-year-old Cory Diamond's death and Elliot Cellini to suffer permanent injury. Defendant was charged with multiple counts of first-degree murder, aggravated possession of a stolen motor vehicle, theft, aggravated battery, aggravated fleeing or attempting to elude a police officer, and unlawful restraint.

¶ 4 During pretrial proceedings on June 7, 2007, defendant waived his right to counsel and proceeded with his defense *pro se*. At a court status date on July 17, 2007, defendant stated, "I tried to resolve the case today because I asked [the State] to speak to me to see what would [the State] give me." The State confirmed that it had "had discussions about a resolution" with defendant, and the court continued the case to "allow [defendant] to continue with any negotiations or discussions with the State as well as do what you want to do with looking at your discovery." Defendant continued to represent himself and prepare for trial until February 22, 2008, when the court complied with his request that counsel be re-appointed to represent him.

¶ 5 In defendant's direct appeal to this court, we set forth the evidence presented at trial, which we now repeat in relevant part due to the nature of defendant's claims. *Lewis*, No. 1-09-1033.

¶ 6 On July 23, 2006, defendant drove with his friend, Cordellro Webb, to Gurnee Mills in a U Haul truck. At Gurnee Mills, defendant met Daysha Freeman, and she agreed to join him for dinner after work. After a stop at a nearby Home Depot, defendant drove with his two passengers at a high rate of speed. Freeman repeatedly asked defendant to let her out as he sped through streets and on an expressway, heading into Wheeling. When defendant refused to let Freeman out, she used her cell phone to call police. At the intersection of Schoenbeck Road and Dundee Road, defendant ran a red light and plowed into the side of a car driven by Elliott Cellini. The crash propelled Cellini's car about 100 yards down Dundee Road while the U Haul ran into a post near the intersection. Police arrested defendant and Webb near the crash site. Police found in the truck goods in shopping bags from several different Gurnee Mills stores. Ambulances took Cellini and his two passengers, Diamond and Brandon Forshall, to local hospitals. Diamond died and Cellini sustained extensive injuries that left him comatose for three weeks. Forshall and Freeman sustained minor injuries in the crash.

¶ 7 Freeman's testimony reflected that she repeatedly pled with defendant to slow down or stop and let her out and shouted at him, "that he was going to kill us if we kept going that fast," but that defendant said, "[I] can't go to jail." Freeman called the police from the speeding truck and the State played the recoding of those calls.

¶ 8 Police officers and civilians who saw the U Haul truck after it left Home Depot and before the crash testified about their close encounters with the truck. After the defendant left the

expressway, he drove the U Haul down several streets, speeding through red lights, and frequently using the median lane or lanes for traffic headed in the opposite direction. Five witnesses said defendant drove the U Haul in the wrong lanes and headed straight at their cars. The witnesses estimated the U Haul's speed in the range of 60 to 80 miles per hour in areas with speed limits of 30 to 45 miles per hour. Two officers following the U Haul came close enough that in videotaping their pursuit of the U Haul, they videotaped the crash. The State played both videotapes for the jury.

¶ 9 After the State rested, the trial court denied defendant's motion for a directed finding. Defendant elected not to testify at his trial and rested his case.

¶ 10 The court's instructions to the jury included the offenses of first-degree murder and reckless homicide. The jury found defendant guilty of first-degree murder, aggravated battery, aggravated possession of a stolen motor vehicle, and unlawful restraint.

¶ 11 Defense counsel filed a motion for a new trial, which the court denied. Defendant also filed a *pro se* "motion to dismiss indictment" and a *pro se* "supplemental motion for a new trial," both of which the court denied.

¶ 12 The trial court sentenced defendant to 45 years' imprisonment for first-degree murder (720 ILCS 5/9-1(a)(2) (West 2006)), and concurrent terms of 7 years for aggravated battery (720 ILCS 5/12-4(a) (West 2006)), 15 years for aggravated possession of a stolen vehicle (625 ILCS 5/4-103.2(a)(7)(A) (West 2006)), and 3 years for unlawful restraint (720 ILCS 5/10-3 (West 2006)).

¶ 13 Defense counsel filed a motion to reconsider sentence, arguing that defendant's sentence was "excessive in view of [his] background and the nature of his participation in the offense" and

that "[t]he sentence improperly penalized [d]efendant for exercising his right to trial." The trial court denied the motion.

¶ 14 In defendant's direct appeal, appellate counsel argued that the trial court erred in that it: (1) admitted excessive evidence of uncharged crimes; (2) permitted gory morgue photographs to be used in jury deliberations; (3) permitted prejudicial closing argument from the prosecution about the suffering of the victims' families; (4) admitted excessive evidence about the reactions of Corey Diamond's family to his death; and (5) failed to question the venire in accord with Supreme Court Rule 431(b). *Lewis*, No. 1-09-1033, slip op. at 1.

¶ 15 This court found that the trial court abused its discretion by allowing the State to present needless detail about uncharged crimes, but that defendant was not prejudiced by the error. *Id.* at 13. We found that defendant forfeited appellate review of the remaining issues and that he did not meet his burden of persuasion under the plain-error doctrine. *Id.* at 1-2. Specifically, we found no error and therefore, no plain error regarding the prosecutor's comments at closing and no plain error regarding the trial court's decision to permit the jury to view the morgue photographs. *Id.* at 17-18. We held that the trial court erred in admitting excessive evidence of Diamond's family's response to his death and in its Rule 431(b) questioning of the venire. *Id.* at 9, 15. In our plain-error analysis, we found:

> "Because of the minor distinctions between the *mens rea* for reckless homicide, knowledge that one's acts will likely cause great bodily harm, and the *mens rea* for murder, knowledge that one's acts create a 'strong probability' of great bodily harm, we cannot say that inferences from the evidence

> overwhelmingly established the *mens rea* required for a murder conviction." *Id.* at 10.

However, we held that defendant did not meet his burden of showing that the guilty verdict might have resulted from the excessive evidence of Diamond's family's response to his death, or that the Rule 431(b) violation challenged the fairness of the trial and the integrity of the judicial process. *Id.* at 11, 15. Therefore, we affirmed the judgment of the trial court. *Id.* at 1, 18.

¶ 16 Defendant subsequently filed a *pro se* postconviction petition arguing, *inter alia*, he received ineffective assistance of counsel during plea negotiations and in his direct appeal. Defendant maintained that he received ineffective assistance of trial counsel because he rejected a 27-year plea offer based on misinformation from his trial counsel, and proceeded to a jury trial which resulted in a 45-year sentence. Defendant also contended that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence in his direct appeal. Defendant averred that the facts in the petition were true and correct and attached his own affidavit.

¶ 17 In his affidavit, defendant stated that while he was initially represented by counsel, he directed his attorney to "contact the State and attempt to negotiate a plea bargain because [he] wanted to simply get the case over with and avoid having a trial." He was offered a 30-year plea deal, which counsel told him not to accept. "[His] attorney explained that the State would have a hard time convicting [him] because of how the indictment was worded. They explained that the State would have to prove [he] actually knew the victim." When defendant asked about the transferred intent doctrine, he was told that it did not apply to him and again told to reject the 30-year plea deal. "Before [he] was able to make a final decision of whether or not to accept the 30 year plea, [he] asked the court to allow [him] to act pro se because of complication's [*sic*] [he]

was having with the attorney's [*sic*] assigned to [his] case." The court granted defendant's request on June 7, 2007.

¶ 18 Defendant further averred that while acting *pro se*, he approached the State to negotiate a plea and received an offer of 27 years. "While considering the plea of 27 years, [defendant] asked the court to again appoint [him] counsel." After defendant directed his re-appointed counsel to seek a 20 to 22-year plea deal, counsel informed him that 27 years was the State's lowest offer. When defendant instructed counsel to accept the 27-year deal, counsel told him that he "would be a fool to accept the plea. Counsel explained that [defendant] wouldn't be convicted of first degree murder and directed [him] to reject the plea because [his] case was a classic reckless homicide case. Based on that, [defendant] rejected the plea and went to trial."

¶ 19 The trial court docketed the petition and appointed counsel. Defendant subsequently filed a *pro se* motion requesting leave to supplement his petition, which the court denied because he was represented by counsel at the time. Thereafter, counsel certified under Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), that the *pro se* petition adequately set forth defendant's claims of deprivation of his constitutional rights.

¶ 20 The State filed a motion to dismiss defendant's postconviction petition arguing, in relevant part, that defendant failed to satisfy both *Strickland* prongs because his trial counsel's "opinion as to the chances of winning at trial" could not support an ineffective assistance claim, that defendant's allegations were "conclusory and self-serving," and that the record was clear that defendant "did whatever he wanted during the pendency of this case." The State argued that defendant could not establish ineffective assistance of appellate counsel because the evidence against him was so overwhelming that he could not show that he was prejudiced by counsel's

failure to raise reasonable doubt in his direct appeal. The circuit court granted the State's motion to dismiss defendant's postconviction petition and defendant appealed.

¶ 21 On appeal, defendant contends that his postconviction petition raised factual questions deserving of an evidentiary hearing and that his petition made a substantial showing that he received ineffective assistance of counsel at trial and in his direct appeal.

¶ 22 In cases not involving the death penalty, the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2014)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights, and establishes a three-stage process for adjudicating a postconviction petition. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006); *People v. Lamar*, 2015 IL App (1st) 130542, ¶ 11. Because the instant appeal involves the dismissal of a postconviction petition at the second stage, we must determine whether the allegations in the petition, taken as true and liberally construed in favor of the defendant, make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). While all well-pled facts in the petition and affidavits are taken as true, nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to proceed to the third stage for a hearing under the Act. *Id.* (citing *People v. Coleman*, 183 Ill. 2d 366, 381 (1998)). We review the dismissal of a postconviction petition at the second stage *de novo. People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 23 Defendant first maintains that he received ineffective assistance of trial counsel because he was advised to reject a 27-year plea offer and proceeded to a jury trial, which resulted in a 45-year sentence.

¶ 24 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that: (1) the representation fell below objective standards of reasonableness; and (2) there is a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. *People v. Hall*, 217 Ill. 2d 324, 335 (2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Failure to establish either *Strickland* prong disposes of a defendant's claim. *People v. Henderson*, 2013 IL 114040, ¶ 11. To establish prejudice from advice of counsel within the context of a rejected plea offer, the defendant must show that there is a reasonable probability that, absent the deficient advice, he would have accepted the plea offer. *People v. Hale*, 2013 IL 113140, ¶ 18. This showing of prejudice requires an independent, objective confirmation that the defendant rejected the plea offer based upon counsel's erroneous advice, and not on other considerations. *Id*.

¶ 25 Here, after defendant waived his right to counsel on June 7, 2007, he continued to represent himself for more than eight months. Defendant avers that sometime during this period of self-representation, he negotiated with the State and received a 27-year plea offer. We agree with defendant that the record of the July 17, 2007, court status date provides objective confirmation that plea discussions took place. However, rather than accept the alleged offer, defendant continued to represent himself and prepare for trial until the public defender was re-appointed to represent him on February 22, 2008.

¶ 26 Defendant simply cannot show that he would have accepted the alleged 27-year plea offer but for the allegedly deficient advice of counsel (i) where he did not accept the 27 year offer while acting *pro* se when he was not represented by counsel, and (ii) where, after rejecting the 27-year plea offer, he directed his reappointed counsel to seek a 20 to 22 year plea deal.

Therefore, defendant cannot satisfy the prejudice prong of the *Strickland* analysis and we need not address the reasonableness of trial counsel's performance under the first prong. See *Hale*, 2013 IL 113140, ¶ 17. Accordingly, we find that defendant's postconviction petition did not make a substantial showing of a violation of his constitutional right to effective assistance of trial counsel.

¶ 27 Defendant next maintains that his petition made a substantial showing of a violation of his constitutional right to effective assistance of appellate counsel because counsel failed to challenge the sufficiency of the evidence to sustain his conviction for first-degree murder under section 9-1(a)(2) of the Criminal Code (Code) (720 ILCS 5/9-1(a)(2) (West 2006)). Viewing the trial evidence in light of this court's order in his direct appeal, defendant argues that if appellate counsel had challenged the sufficiency of the evidence, we may have reduced his first-degree murder conviction to reckless homicide.

¶ 28 Courts measure claims of ineffective assistance of appellate counsel against the same standard as allegations of ineffective assistance of trial counsel. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). A defendant who contends that appellate counsel rendered ineffective assistance by failing to argue an issue on appeal, must show that the failure to raise that issue was objectively unreasonable and that the decision prejudiced the defendant. *People v. Easley*, 192 Ill. 2d 307, 328-29 (2000). However, appellate counsel is not required to brief every conceivable issue. *Id.* at 329. The decision to refrain from raising issues which are meritless in counsel's judgment is only incompetent if appellate counsel's appraisal of the merits is patently wrong. *Id.* Where the underlying issue lacks merit, a defendant cannot show that he suffered prejudice from counsel's failure to raise it on appeal. *Childress*, 191 Ill. 2d at 175.

¶ 29 The relevant inquiry when a defendant challenges the sufficiency of the evidence to sustain a finding of guilt is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009). To sustain defendant's conviction for first-degree murder under section 9-1(a)(2) of the Code, the State was not required to prove that "defendant had the specific intent to kill or do great bodily harm or that he kn[ew] with certainty" that someone would die as a result of his acts. *People v. Howery*, 178 Ill. 2d 1, 42 (1997). Rather, there had to "be evidence from which the trier of fact could infer that the defendant knew, *at minimum*, that his acts created a strong probability of great bodily harm to another individual; that the defendant acted; and that the act resulted in the death of another." (Emphasis in original.) *People v. Alsup*, 373 Ill. App. 3d 745, 754 (2007) (quoting *People v. Mifflin*, 120 Ill. App. 3d 1072, 1077 (1984)). Proof of the requisite mental state for murder under section 9-1(a)(2) may be inferred from the facts and circumstances of the evidence and intent may be inferred from the facts and circumstances surrounding the defendant's acts. *Howery*, 178 Ill. 2d at 43.

¶ 30 Here, the evidence presented at trial and relied upon by this court on direct appeal was sufficient for any reasonable trier of fact to find defendant guilty of first-degree murder beyond a reasonable doubt. The record reflects that while defendant drove the U Haul, he sped down streets and the expressway. Freeman's testimony established that she was in the U Haul and that she repeatedly pled with defendant to slow down or stop. Freeman shouted, "that he was going to kill us if we kept going that fast," but that defendant responded, "[I] can't go to jail." She called the police and her calls were played for the jury. Several witnesses who had close

encounters while the defendant was driving the U Haul testified that when he left the expressway, the defendant drove down several streets, drove through red lights, and frequently used the median lane or lanes for traffic headed in the opposite direction. Five witnesses said the defendant drove the U Haul in the wrong lanes and headed straight at their cars. The witnesses estimated the defendant's speed in the range of 60 to 80 miles per hour in areas with speed limits of 30 to 45 miles per hour. The State played the jury a videotape of the crash taken by officers who pursued the defendant in the U Haul. Defense counsel argued that defendant was reckless but that his conduct fell short of first-degree murder. The jury was instructed on both offenses.

¶ 31 Defendant points out that on direct appeal, while addressing the applicability of plain error, this court noted how closely balanced the evidence was on the issue of whether defendant committed reckless homicide or first-degree murder. However, in our plain-error analysis, we explained that because of the minor distinctions between the *mens rea* for reckless homicide and the *mens rea* for murder, we could not "say that inferences from the evidence overwhelmingly established the *mens rea* required for a murder conviction." *Lewis*, No. 1-09-1033, slip op. at 10. We then held that defendant did not meet his burden of showing that the guilty verdict might have resulted from the admission of excessive evidence on the Diamond's family's response to his death, or that the Rule 431(b) violation challenged the fairness of the trial and the integrity of the judicial process. *Id.* at 11, 15. In this appeal, we cannot say that, viewing the reasonable inferences from the trial evidence in a light most favorable to the State, no reasonable trier of fact could find, beyond a reasonable doubt, that defendant knew his conduct in speeding toward oncoming traffic and running multiple red lights created a strong probability of great bodily harm. Therefore, defendant cannot show that appellate counsel's decision not to challenge the

sufficiency of the evidence was patently wrong, or that he was prejudiced by counsel's decision. Accordingly, we find that defendant has not made a substantial showing of a violation of his right to effective assistance of appellate counsel.

¶ 32 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.