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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07—DV—630
)	
CHARLES BURTON,)	Honorable
)	Thomas J. Riggs,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: The trial court properly dismissed defendant's postconviction petition alleging that appellate counsel was ineffective for failing to argue that the State and the trial court shifted the burden of proof at trial; although defendant's forfeiture at trial didn't prevent appellate counsel from raising the issue, the issue lacked merit, as the State merely asserted that defendant's theory was implausible, and the trial court merely so found.

Charles Burton appeals the second-stage dismissal of his petition filed under the Post-Conviction Hearing Act (725 ILCS 5/122—1 *et seq.* (West 2008)). He alleges that his appellate counsel was ineffective for failing to raise issues concerning comments that the State made in closing

argument that Burton contends improperly shifted the burden of proof, leading to his conviction of domestic battery (720 ILCS 5/12—3.2(a)(1) (West 2006)). We affirm.

I. BACKGROUND

On April 14, 2007, Burton was charged with two counts of domestic battery that alleged that he pushed down his wife, Rosa Burton, causing injuries. A bench trial was held.

At trial, the evidence showed that, at the time of the incident, Burton and Rosa were involved in divorce proceedings. On April 13, 2007, Burton arrived home with their son and walked upstairs, where he found their six-year-old daughter asleep on the bed in the master bedroom while wearing her coat. Rosa was packing some of the children's clothing.

According to Rosa, their daughter had fallen asleep with her coat on, and Burton removed the coat and angrily told Rosa not to pick up the children the next day because he was taking them. Rosa testified that she was scared and called the police. Rosa testified that Burton then picked up their daughter and said that he was taking the children. Rosa reached out for their daughter, but did not touch either their daughter or Burton. Burton then pushed her shoulder area forcefully with his free hand, causing her to fall back and hit her head on a metal bed rail. Rosa noticed that she was bleeding and then followed Burton down the stairs. Seven to ten minutes later, the police arrived. Rosa was taken to the hospital, where she was treated and released.

An investigating officer testified that, when he arrived, Rosa was bleeding from a cut on the top of her head. He said that both Burton and Rosa were upset. The officer testified that Rosa told him that Burton had begun walking away during the incident and pushed her when she reached for their daughter.

Burton testified that, when he arrived home, he found their daughter in her coat, sweating, and he asked Rosa what was going on. Rosa did not respond, so he took off their daughter's coat to prepare her for bed. He then told Rosa that he would be taking the children to his mother's house. According to Burton, Rosa again did not respond, so he raised his voice and again said that he would be taking the children the next day. Rosa told him to tone it down and called the police. Burton testified that, when he picked up their daughter, Rosa grabbed his arm, causing him to lose his balance. He said that he brought his free arm up to their daughter and turned away in order to exit the room. He said that the turn was not forceful and that he never made contact with Rosa's shoulder area and did not push her down. He testified that he never became angry with Rosa, did not see or hear her fall, and did not see any injuries on her. Burton said that he did not know how Rosa got injured.

In its closing argument, the State began by stating that the matter was one of the credibility of the witnesses. The State argued that Rosa testified credibly and that Burton's explanation was not credible. The State said that it did not find it plausible that Rosa would have sustained her injuries when Burton made no physical contact with her. The State then said: "I think at this time, her injuries speak for herself***. I think the injury to her head, clearly, she was pushed or fell back, into the bed, at that point, resulting in those injuries ***. I think we've met our burden at this time."

Burton then argued that Rosa's testimony was not credible, pointing to what he believed was an inconsistency between Rosa's testimony that Burton pushed her and then walked away afterward and her statement to police that Burton was walking away when she reached out. The defense theory appeared to be that Burton was walking away and had to turn when Rosa grabbed him, causing her to fall. The defense argued that there was no intent to harm Rosa.

In rebuttal, the State argued that the testimony of Rosa and the officer were actually consistent in that they both showed that, at some point, Burton turned around and pushed Rosa into the bed. The State said: “I think whether he briefly turned with the child or not, is a small fact in this ***. I think what was consistent throughout the duration of the trial was her testimony and the officer’s that without any physical contact by her, the defendant pushed Rosa Burton, causing her to fall back.” The State then repeated its belief that the defense theory was not believable, stating: “It’s not plausible how these injuries just miraculously show up, too.” The State argued that Burton was not credible when he said that he made no physical contact with Rosa, wasn’t angry, and had no idea how she was injured. The State then repeated that it believed that it had met its burden in the case.

The court found Burton guilty, stating in part: “the defendant’s explanation is that he really has no explanation, but, granted, he doesn’t have to prove anything, but if he does testify, then his testimony is subject to the same criteria and same test as anyone else’s.” The court found that Burton’s explanation was not credible, while it found Rosa’s testimony to be consistent and credible. Burton was sentenced to one year of conditional discharge, a fine, and costs, and he appealed.

Burton’s counsel did not pursue the appeal, and we dismissed it. On July 28, 2009, Burton filed a postconviction petition, alleging that his appellate counsel was ineffective for failing to argue that the State and the trial court improperly shifted the burden of proof to him. He argued that he was denied due process because the State wrongly referred to the injuries speaking for themselves and the court wrongly based its finding of guilt on the argument that Burton failed to show how Rosa sustained her injuries.

The State responded that Burton's counsel should have pursued the appeal, but it argued that there was no basis for disturbing the conviction because the burden of proof was not shifted to Burton. A hearing was held on the petition, and the court found that the issue at trial was one of credibility and that the burden of proof was not shifted. As a result, the postconviction petition was dismissed. Burton appeals.

II. ANALYSIS

Burton contends that his appellate counsel was ineffective for failing to argue that the State and the trial court wrongly shifted the burden of proof to him, resulting in a denial of due process. He argues that, by focusing on the nature of Rosa's injuries and Burton's lack of an explanation for how they occurred, the State and the court forced him to prove that he did not push Rosa.

The State contends that Burton's arguments on the matter are forfeited because he did not object at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, that forfeiture did not preclude appellate counsel from raising the issue. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Thus, it does not preclude Burton's claim that appellate counsel was ineffective for failing to do so.

The Act provides a remedy to criminal defendants who have suffered substantial violations of their constitutional rights. *People v. Barcik*, 365 Ill. App. 3d 183, 190 (2006). The Act provides a three-stage mechanism. At the first stage, the trial court must independently review the petition within 90 days of its filing and determine whether it is frivolous or patently without merit. 725 ILCS 5/122—2.1(a)(2) (West 2008). At this stage, the petition need present only a limited amount of detail so as to set forth the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the petition survives initial review, the process moves to the second stage, where the trial court appoints counsel for the defendant, if necessary (725 ILCS 5/122—4 (West 2008)),

and the State may file a motion to dismiss or an answer. 725 ILCS 5/122—5 (West 2008). At the second stage, to survive dismissal, the petition must make a substantial showing of a constitutional violation. *Edwards*, 197 Ill. 2d at 246. The trial court is foreclosed from engaging in any fact finding, and all well-pleaded facts are to be taken as true at the second stage of the proceedings. *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009) (citing *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998)). The propriety of a dismissal at the second stage is a question of law that we review *de novo*. *People v. Simpson*, 204 Ill. 2d 536, 547 (2001).

“To succeed on a claim of ineffective assistance of trial counsel, a defendant must satisfy the following two-pronged *Strickland* test: a defendant must allege facts which demonstrate that counsel’s representation fell below an objective standard of reasonableness and that [a] reasonable probability exists that, but for counsel’s errors, the result of the trial would have been different.” *People v. Alberts*, 383 Ill. App. 3d 374, 377-78 (2008) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). “Claims of ineffective assistance of appellate counsel are also evaluated under the *Strickland* test.” *Id.* at 379. If the underlying issue is not meritorious, then the defendant has suffered no prejudice. *Id.* Further, counsel is not unreasonable for refraining from raising issues that in his or her sound judgment are without merit. *Id.*

“Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*.” *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). “A prosecutor generally has wide latitude in closing arguments and may comment on the evidence and any reasonable inferences arising from the evidence, even if the inferences reflect negatively on the defendant.” *People v. Robinson*, 391 Ill. App. 3d 822, 839 (2009) (citing *People v. Perry*, 224 Ill. 2d 312, 347 (2007)). “We consider statements in the context of the closing

arguments as a whole instead of examining the contested phrases in a vacuum.” *Id.* “In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them.” *Wheeler*, 226 Ill. 2d at 123. “Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant’s conviction.” *Id.* “If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor’s improper remarks did not contribute to the defendant’s conviction, a new trial should be granted.” *Id.* In a bench trial, a substantial number of improper statements made by the State may require a new trial. See *People v. Nuccio*, 43 Ill. 2d 375, 396 (1969).

“The State always has the burden of proving, beyond a reasonable doubt the elements of the crime, and it is improper for the State to suggest that it has no burden of proof or to attempt to shift the burden of proof to the defendant.” *Robinson*, 391 Ill. App. 3d at 841. “Indeed, the defense is under no obligation to present any evidence.” *People v. Phillips*, 127 Ill. 2d 499, 527 (1989). However, once a defendant does present evidence, the State may comment on it. See *id.* Likewise, “if defense counsel’s closing argument provokes a response, the defendant cannot complain that the State’s reply in rebuttal argument denied him a fair trial.” *Robinson*, 391 Ill. App. 3d at 841.

An attack on a particular theory of defense generally does not indicate an improper shift of the burden of proof. *Phillips*, 127 Ill. 2d at 526. “There is a great deal of difference between an allegation by the prosecution that defendant did not prove himself innocent and statements questioning the relevance or credibility of a defendant’s case.” *Id.* at 527. “Not every prosecutorial statement questioning relevance or credibility rises to an impermissible shifting of the burden.” *Id.*

For example, a prosecutor may challenge a defendant's credibility and the credibility of his defense theory, as well as the persuasiveness of the defense, and this includes referring to the defense theory as "ridiculous." *Robinson*, 391 Ill. App. 3d at 840.

Here, the State did not impermissibly shift the burden of proof. The State's comments about Rosa's injuries and Burton's failure to explain them were made in the context of discussing weaknesses in Burton's theory of defense, particularly that Burton stated that he did not hear or see Rosa fall and had no idea how she obtained her injuries. It was permissible for the prosecution to comment on the lack of plausibility of Burton's defense. Further, the State specifically made its arguments in relation to its own burden of proof, stating twice, both during closing and during rebuttal, that it felt that it met its burden. Thus, there was no misconduct.

The court also did not impermissibly require Burton to prove that he did not commit the crime. When reviewing a bench trial, the appellate court will presume, in the absence of anything in the record to the contrary, that evidence was considered by the trial judge only with respect to the purpose for which it was competent. *People v. Lacey*, 24 Ill. 2d 607, 611 (1962). Here, the court stated that the issue was one of credibility, and it based its ruling on its finding that Rosa was a credible witness, while Burton's defense lacked credibility. The court referenced Rosa's injuries and Burton's lack of an explanation as part of that credibility determination. There is no reason to believe that the court applied the wrong burden of proof, particularly when the court also specifically noted that Burton was not required to prove anything.

Burton also argues that the State misstated evidence in closing by referring to the investigating officer's testimony as if he was a witness to the incident. But the State only briefly referenced the officer's testimony in rebuttal to address Burton's argument that there were

inconsistencies in Rosa's testimony. The State argued that Rosa's testimony was credible because she told the officer essentially the same account of events as she told the court. The State never said that the officer was an eyewitness, and the officer's testimony made clear that he was not an eyewitness. Accordingly, there was no impropriety in the State's reference to the officer's testimony during closing.

III. CONCLUSION

The State and the court did not shift the burden of proof to Burton. Thus, there was no prejudice by the failure of his appellate counsel to raise the issue on appeal, and the court properly dismissed the postconviction petition. Accordingly, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.