2015 IL App (2d) 130888-U
No. 2-13-0888
Order filed December 10, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. YAPHET DAVIS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of DeKalb County. No. 99-CF-458 Honorable John F. McAdams, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's denial of defendant's postconviction petition following a third-stage evidentiary hearing was not manifestly erroneous

¶ 2 Following a jury trial, defendant, Yaphet Davis, was convicted of the first degree murder (720 ILCS 5/9-1(a)(2) (West 2000)) of Eddie Hall and was sentenced to a 32-year term of imprisonment. Defendant's conviction was affirmed on direct appeal. *People v. Davis*, No. 2-01-0558 (2002) (unpublished order under Supreme Court Rule 23). Defendant sought postconviction relief, counsel was appointed, and postconviction counsel filed several amended petitions. The matter advanced to the third stage. Following an evidentiary hearing, the trial

court denied defendant's amended postconviction petition. On appeal, defendant argues that trial counsel and appellate counsel were ineffective regarding (1) instructions given to the jury, the sufficiency of the evidence regarding the mitigating factors necessary to reduce the severity of the offense, the weight, during sentencing, the trial court gave mitigating evidence, and the legislative intent of the felony-murder rule to apply to the circumstances here; defendant also raises further specific ineffective-assistance claims regarding trial counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 During the evening of October 8, 1999, defendant and a friend went out to a club. When the club closed, defendant and his friend visited an apartment in the University Village apartment complex where they met a second friend. At the apartment, defendant argued with one of the men, and defendant and his friends were ejected. Outside, defendant threw a liquor bottle through the windshield of a parked van. Defendant and his friends were arrested for breaking the car window, and they spent the night in jail. In the morning, defendant's friend, Damion Abrams, brought defendant money, and defendant and his friends bonded out of jail.

¶ 5 Defendant and his friends returned to the University village apartment complex, and they ended up in the same apartment they had visited (and from which they were ejected) the previous night. In the apartment defendant and his friends were confronted by the victim, Hall, and three other men. Hall and his confederates demanded money to repair the van's windshield from defendant and his friends. Defendant's friends were struck twice in the face, but defendant, who had mentioned to another person in the apartment that he had thrown the bottle that broke the windshield, was dragged into the hallway of the apartment and beaten. Testimony at trial suggested that defendant was subjected to a lengthy beating of his face, head, chest, arm, and legs. Defendant's eye was bleeding and nearly swollen shut; his nose was broken, and his right

arm was injured. Hall and his confederates took whatever money was on defendant and his friends; they demanded defendant raise a further $400 before he and his friends would be allowed to leave the apartment.

¶ 6 Defendant was allowed to call, using the speakerphone in the apartment, for money. He called his girlfriend, who then added Abrams to the call. According to Abrams, defendant told him to bring $400 and asked Abram to bring his gat (gun). A tape of the phone call was produced to defendant for the first time during the trial, but was largely unintelligible; Abrams testified at trial that defendant asked him to bring his gun, but the request was not captured by the recording of the call. Defendant testified that, during the time he was held in the apartment and making his calls for money, Hall had armed himself with a knife from the kitchen and had held it to his throat. Others testified that they did not see Hall armed with a knife or other weapon.

¶ 7 Eventually, Abrams and several friends arrived at the apartment where defendant was being held. Defendant, accompanied by Hall and two other men, came out of the apartment. Testimony differed regarding the next events. Defendant may have given the money to Hall and his confederates; defendant may have refused to give the money at all; defendant may have given the money, but the recipient declared the money was short, and defendant snatched it back. At that point, Hall and his confederates started to advance toward defendant and his friends. Testimony suggested that Hall threatened defendant with further violence. Testimony also differed regarding the gun: some witnesses testified that defendant demanded a gun from Abrams after the production of the money went sour; others testified that Abrams simply gave defendant a gun with no prompting. Finally, testimony differed regarding where Hall was standing when defendant obtained the gun. The testimony suggested that Hall was between 5

and 20 feet distant from defendant; in any event, the testimony indicated that Hall was outside of arm's reach of defendant. When defendant raised the gun, Hall turned and began running away. Likewise, Hall's confederates also began running away. There was testimony that defendant chased Hall and began firing the gun; as well, there was testimony that defendant stood his ground and began to fire the gun; defendant testified that he shot at Hall's legs to discourage or frighten him away. The testimony and other physical evidence showed that Hall was fatally shot in the back as he was fleeing from defendant.

¶ 8 Defendant and his friends left the scene. Once again, differing testimony indicated that defendant was excited and gloating about the shooting or that defendant was upset about the shooting.

¶ 9 Following the presentation of evidence, the jury was instructed on first and second degree murder; the trial court refused to give an instruction on involuntary manslaughter. Pertinently here, the jury was also instructed that:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.
>
> However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm."

¶ 10 The jury returned a verdict of guilty of first degree murder. The trial court sentenced defendant to a 32-year term of imprisonment. Defendant's conviction and sentence was upheld on direct appeal to this court. *Davis*, No. 2-01-0558 (2002) (unpublished order under Supreme Court Rule 23).

¶ 11 In June 2005, defendant filed a *pro se* postconviction petition. Defendant explained that, although his petition was filed late, the lateness should be excused because he had engaged University Research Services to file his postconviction petition. The Illinois Attorney General had determined that University Research Services was defrauding inmates and unlawfully engaged in the practice of law. The trial court excused the late filing and appointed the public defender to represent defendant in the postconviction proceedings.

¶ 12 After the appointment of postconviction counsel, defendant's petition languished for eight years. Several assistant defenders were assigned, and with each new lawyer, the presentation of defendant's postconviction claims was delayed. In addition, the State and defendant reached an agreement whereby the State would concede to the postconviction petition, a new trial would be ordered, and defendant would plead guilty to second degree murder, receiving a 20-year sentence resulting in his release from prison after sentencing credit had been applied. The agreement was not executed and, in 2012, a new State's Attorney was elected, and he repudiated the deal. Defendant filed a motion to enforce the agreement, but the trial court denied the motion. Defendant neither appealed that order nor included the issue in this appeal.

¶ 13 Ultimately, on May 1, 2013, an amended petition was filed. The amended petition combined defendant's *pro se* petition plus all of the amendments filed by the various postconviction counsels during the pendency of the proceedings in this matter. Finally, beginning on May 20, 2013, the evidentiary hearing on the amended postconviction petition commenced. Following the hearing, the trial court denied defendant's amended postconviction petition. Defendant timely appeals.[1]

[1] We note that, during the pendency of this appeal, defendant sought leave to discharge

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant raises several contentions that he received ineffective assistance of counsel, both trial and appellate (the same attorney represented defendant at trial and on direct appeal), either regarding a specific substantive claim or in a more general fashion. Defendant first contends that the jury was not properly instructed in all of the facets of self defense and use of force in defending against a forcible felony. Next, defendant questions the sufficiency of the evidence supporting his conviction in light of the assertion that he provided sufficient mitigating evidence to decrease the severity of his conviction. Defendant next contends that the trial court failed to properly weigh mitigating factors such as strong provocation, excuse or justification of his conduct, or a third party induced his conduct. Next, defendant contends that the trial court failed to apply the law in conformity with legislative intent when the victim's confederates were not charged with murder under the felony murder doctrine and he was charged in their stead. Last, defendant contends that trial counsel was ineffective for failing to sufficiently investigate and interview potential witnesses and for failing to object to defendant's restraint by wearing a stun belt in front of the jury during the trial. We address each issue in turn.

¶ 16 A. Postconviction Hearing Standards

¶ 17 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)) gives a criminal defendant a way to challenge his conviction or sentence based on a substantial violation of his constitutional rights. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). A postconviction proceeding is not a direct appeal from the judgment of conviction, but it is a collateral attack on

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appointed counsel and to proceed *pro se*. We granted defendant's motion, and appointed counsel, the Office of the State Appellate Defender, was allowed to withdraw.

the proceedings in the trial court. *Id.* A defendant must make a substantial showing of a constitutional violation in order to be entitled to postconviction relief. *Id.* Issues actually decided on direct appeal are precluded by *res judicata*; issues that could have been raised on direct appeal, but were not, are deemed forfeited. *Id.*

¶ 18 The Act sets forth a three-stage process for adjudicating postconviction petitions in noncapital cases. *Id.* In this case, defendant's amended postconviction petition advanced to a third-stage evidentiary hearing. 725 ILCS 5/122-6 (West 2004). Generally, following a third-stage evidentiary hearing where fact-finding and credibility determinations are involved, the trial court's judgment will not be disturbed unless it is manifestly erroneous. *Beaman*, 229 Ill. 2d at 72. On the other hand, if the trial court does not engage in fact-finding and credibility determinations, no new evidence is provided, and the issues presented are purely questions of law, we will review the trial court's judgment *de novo*. *Id.* We return to a deferential review, however, if the trial court had special expertise or familiarity with the trial or sentencing and that familiarity had some bearing on the trial court's disposition of the postconviction petition. *Id.*

¶ 19 B. Ineffective Assistance Standards

¶ 20 Defendant's postconviction claims involve issues of ineffective assistance of trial and appellate counsel. A claim of ineffective assistance of counsel is reviewed under the familiar two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under the *Strickland* analysis, a defendant must show both that his attorney's representation fell below an objectively reasonable standard and that he was prejudiced by his counsel's deficient performance. *People v. Curry*, 178 Ill. 2d 509, 518-19 (1997). The *Strickland* standard applies to ineffective-assistance claims against both trial and appellate counsel. *People v. Lear*, 175 Ill. 2d 262, 269 (1997). The reviewing court may decide the ineffective-assistance claim by finding

that the defendant was not prejudiced by his counsel's performance without needing to determined whether that performance was deficient (and vice versa). *Id.*

¶ 21 In a postconviction setting, a claim of ineffectiveness of counsel has important ramifications. Usually, a claim decided on direct appeal is barred by *res judicata*, and a claim that could have been raised but was not is forfeited; however, the doctrines of *res judicata* and forfeiture will be relaxed if required by fundamental fairness where the defendant alleges ineffective assistance of counsel (trial or appellate), or where the facts relating to the issue are outside of the record. *People v. English*, 2013 IL 112890, ¶ 22. With these concepts in mind, we turn to defendant's specific contentions.

¶ 22 C. Jury Instruction

¶ 23 Defendant contends that he received ineffective assistance of trial and appellate counsel due to trial counsel's failure to submit a jury instruction providing that it would have been a defense to the charge of murder if defendant reasonably believed that the force he used was necessary to prevent the commission of a forcible felony. For the reasons that follow, we disagree.

¶ 24 As an initial matter, we note that the trial court held that this claim was forfeited because an issue involving jury instructions could have been raised on in the trial court and on direct appeal. Indeed, we note that, in his direct appeal, defendant contended that the trial court erred in refusing a jury instruction on involuntary manslaughter. *Davis*, No. 2-01-0558, slip op. at 26 (unpublished order under Supreme Rule 23). Defendant could have raised the issue on direct appeal, and his failure to do so ordinarily results in the forfeiture of the issue. *Beaman*, 229 Ill. 2d at 71. However, defendant ascribes the failure to raise this jury-instruction issue to trial and appellate counsel's ineffectiveness. Where the defendant alleges prejudice accruing from the

ineffective assistance of trial or appellate counsel that could not be addressed on direct appeal the principles of *res judicata* and forfeiture give way to concepts of fundamental fairness and we may address the defendant's postconviction claim. *English*, 2013 IL 112890, ¶ 22. Accordingly, we determine that the trial court erred in holding that defendant forfeited the jury-instruction issue because defendant alleged that the forfeiture was due to counsel's ineffective assistance allowing us to reach this issue. We now turn to defendant's specific argument.

¶ 25 Illinois law specifies the instances in which a person may be justified in using force against another. Section 7-1 of the Criminal Code of 1961 (Code) (720 ILCS 5/7-1 (West 2000)) provides that:

> "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defendant himself or another against such other's imminent use of unlawful force. However, he justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony."

We note that, in order to fully apply section 7-1, the person's belief must be reasonable. If the person's belief in the circumstances justifying the use of deadly force is unreasonable, then it reduces a first degree murder into a second degree murder. 720 ILCS 5/9-2(a)(2) (West 2000).

¶ 26 Defendant contends that his trial counsel was ineffective for not pursuing the defense that he was defending himself and others against the commission of a forcible felony. According to defendant, his trial counsel should have requested that the trial court instruct the jury regarding his right to defend himself against the commission of a forcible felony. The pattern jury instruction corresponding to section 7-1 provides:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend [(himself) (another)] against the imminent use of unlawful force.
>
> [However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent [(imminent death or great bodily harm to [(himself) (another)]) (the commission of _____)].]" Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 24-25.06).

The Committee Note explains that the bracketed paragraph (beginning with "however") should be used when there is some evidence that the force used by the defendant was likely to cause death or great bodily harm. IPI Criminal 4th No. 24-25.06, Committee Note. Additionally, the Committee Note instructs the user to insert the applicable forcible felony into the blank. *Id.*

¶ 27 In spite of the directions on using this pattern jury instruction, the trial court actually instructed the jury without mentioning the prevention of a forcible felony:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.
>
> However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm."

¶ 28 Defendant argues that his counsel at trial was ineffective for failing to insist on the inclusion of the forcible-felony language in the relevant jury instruction, and his appellate counsel (who was also his trial counsel) was ineffective for not raising the issue on direct appeal.

The trial court disagreed and held that defendant failed to establish either prong of the *Strickland* analysis. The trial court specifically held:

> "ineffective assistance of counsel claims are governed by the two-prong *Strickland* standard. [Defendant's] claims fail because: (1) [the] prejudice prong [was] not met due to the overwhelming evidence of guilt. See *People v. Enoch*, 122 Ill. 2d 176, 201-02 (1988) (rejecting the defendant's ineffective assistance of counsel claim based on counsel's failure to preserve a trial error for review where the defendant did not demonstrate prejudice); [and] (2) the choice of defense and jury instructions are a matter of trial strategy.
>
> It is well settled in Illinois that counsel's choice of jury instructions, and the decision to rely on one theory of defense to the exclusion of others, is a matter of trial strategy. *People v. Labosette*, 236 Ill. App. 3d 846 (4th Dist. 1992); *People v. Douglas*, 839 N.E.2d 1039 (1st Dist. 2005). Accordingly, counsel's decision as to which jury instruction to tender can support a claim of ineffective assistance of counsel only if that choice is objectively unreasonable. *Id.*
>
> Here, [defendant] has failed [to] show how the jury instructions chosen were objectively unreasonable."

¶ 29 Defendant, for his part, does not seem to directly address the deficiency portion of the *Strickland* analysis. Rather, defendant seems to suggest that, because he has demonstrated prejudice, meaning it was reasonably likely that he could have obtained a different result, such as an outright acquittal or conviction of a lesser offense, had counsel included the forcible-felony language in the jury instruction, then it would also be objectively unreasonable to choose the "wrong" defense and jury instruction and omit the pattern instruction's forcible-felony language

from the actual jury instruction given. The reasoning that we infer defendant offers is flawed; moreover, if we accepted it, it would compress the *Strickland* analysis into a single element, namely, whether the defendant can demonstrate prejudice rather than whether the defendant can demonstrate both prejudice and deficient performance. Because defendant's appellate argument does not address whether his trial and appellate counsel's performance fell below an objective standard of reasonableness, defendant cannot demonstrate that counsel's performance was ineffective under *Strickland*. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("[p]oints not argued are waived"); *Lear*, 175 Ill. 2d at 268-69 (to prevail on an ineffective assistance claim, the defendant must show both that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defendant, meaning that the outcome of the trial would have been different without counsel's errors; an ineffective assistance claim may be resolved on either basis alone). Accordingly, because defendant does not actually address his counsel's performance, defendant's postconviction claim of ineffective assistance based on the inadequate jury instruction fails.

¶ 30 The effective forfeiture of the jury-instruction claim notwithstanding, defendant also cannot demonstrate prejudice, for purposes of an ineffective assistance claim, accruing from the omission of the commission-of-a-forcible-felony language from the self-defense jury instruction because there was no error in not including the commission-of-a-forcible-felony language. At the heart of defendant's argument he contends that he was defending himself from the commission of a forcible felony, either kidnapping or a variety of robbery. Defendant points out that, in Illinois, the offender's flight from pursuit or escape to a place of safety is deemed to be a continuation of the offense itself. *People v. Hickman*, 59 Ill. 2d 89, 94 (1974). Defendant argues that Hall's attempt to take the $400 from defendant represented a continuation of the offense.

Defendant reasons that the offense was still ongoing at the time he shot at Hall's legs because Hall and his confederates had not yet completed their escape, and thus, he was entitled to defend himself from the commission of the forcible felony pursuant to section 7-1.

¶ 31 Setting aside whether defendant has adequately shown that the offender's flight or escape is considered a continuation of the offense,[2] we believe that the circumstances in the record indicate that the kidnapping or the robbery was actually complete before defendant became the aggressor and shot at Hall.

¶ 32 Turning first to the kidnapping, defendant argues that a substantial purpose of the kidnapping statute is to deter the offender from committing a subsequent felony against a kidnapped victim. For this proposition, defendant relies on *People v. Earl*, 104 Ill. App. 3d 846, 849 (1982). *Earl*, however, was answering the question of whether a simple kidnapping must be complete before a subsequent felony against the victim can be considered to enhance the offense into aggravated kidnapping. *Id.* Instead, the gist of the offense of kidnapping is the secret confinement of the victim. *People v. Reeves*, 385 Ill. App. 3d 716, 726 (2008). Defendant argues that the kidnapping was ongoing because he was subject to a robbery or armed robbery

[2] We note that *Hickman* is concerned with the application of the felony-murder rule and may not represent a general rule that the offender's escape is deemed part of the offense. See, *e.g.*, *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 48 (the offense of residential burglary is complete upon entering the dwelling place of another with the necessary intent; the commission of the intended offense is irrelevant). We also note that defendant has not argued that the jury should have been instructed regarding felony murder or that he should have been charged under the theory of felony murder, which would seem to limit the applicability of his argument.

when he was taken out of the apartment when Abrams arrived with the money defendant requested, or else Hall was attempting to collect the ransom. We disagree.

¶ 33 The evidence showed that defendant ultimately retained the ransom money, but it was unclear whether defendant turned that money over to Hall or one of his confederates and later recovered it, whether defendant outright refused to turn over the money, or whether defendant turned it over and then snatched it back. Regardless of that issue, defendant then brandished a handgun and Hall and his confederates raised their hands and began leaving. The evidence showed that Hall was between 5 and 20 feet from defendant. The evidence was conflicting as to whether defendant began to shoot at Hall or whether he chased after Hall and then began to shoot at him. Based on this evidence, it is clear that the kidnapping was completed before defendant began to shoot at Hall. If Hall was receiving a ransom in order to complete the kidnapping, when defendant refused, or when defendant snatched back the money, the offense had been foiled by defendant's decision to engage in self-help. If defendant turned over the money, Hall's object was completed and defendant was in a place of relative safety, surrounded by his friends and having access to a car in which to depart. Further, when defendant raised his gun, Hall and his confederates were well beyond arm's reach and immediately raised their hands and retreated. Based on this analysis, we hold that Hall either completed obtaining the ransom and defendant's intervention of brandishing a handgun rendered him the aggressor, or that defendant's refusal to give or recovery of the money foiled and completed the offense before the ransom could be collected. When defendant brandished the weapon, Hall and his confederates retreated, indicating their abandonment of the offense at that point; likewise, after defendant brandished the gun and began to chase or chase and shoot, he became the aggressor.

¶ 34 The analysis of the robbery proceeds along the same lines. Hall's attempt to take the money was either successful or defendant frustrated the attempt by refusing to turn over the money or by snatching it back. Further, when defendant raised his weapon, Hall and his confederates abandoned their attempt to completing the robbery and retreated. Thus, when Hall brandished the weapon, the robbery had been foiled and Hall and his confederates were leaving.

¶ 35 Under either of the forcible felonies suggested by defendant, the offenses were completed or foiled. Defendant did not need to do more and was safe from further criminal activity by Hall and his confederates at that point. Because the commission of a forcible felony had ceased, defendant's actions transformed him from the victim into the aggressor in a new set of actions. Further, because the kidnapping or the robbery was completed, foiled, or abandoned, defendant was no longer defending himself from the imminent use of unlawful force or the commission of a forcible felony. Accordingly, he was not entitled to use force against Hall. Because he was not entitled to use force against Hall, the trial court would not have been able to instruct the jury with the forcible-felony language of the pattern jury instruction (IPI Crim. 4th No. 24-25.06). Because the instruction could not have been given based on the evidence in the record, defendant could not have been prejudiced, in a *Strickland* sense, due to his attorney's failure to request or insist upon the forcible-felony language. Accordingly, because defendant cannot demonstrate prejudice accruing from the lack of the forcible-felony language in the jury instruction, he cannot succeed on his postconviction ineffective-assistance claim.

¶ 36 Defendant cites *People v. Milton*, 72 Ill. App. 3d 1042, 1049 (1979), for the proposition that, where the evidence supports giving an instruction incorporating the use of deadly force to resist a forcible felony, such as armed robbery, it is reversible error not to so instruct the jury.

Milton is inapposite because here, the evidence did not support giving the relevant instruction, so it was not error not to give the instruction.

¶ 37 Defendant also cites *Adams v. State*, 727 So. 2d 997 (Fla. App. 1999), and *Carson v. State*, 686 N.E.2d 864 (Ind. App. 1997), both for the same proposition as *Milton*. These cases, too, are inapposite, because the evidence here did not support giving an instruction regarding a defendant's right to use deadly force in the defense from the commission of a forcible felony.

¶ 38 Defendant also cites to *People v. Lowery*, 178 Ill. 2d 462 (1997). *Lowery* held that, in considering the applicability of the felony-murder rule, Illinois follows the proximate cause theory, meaning that a defendant will be liable for murder under the felony-murder rule for any death proximately resulting from the unlawful activity—notwithstanding the fact that the killing was by one resisting the crime. *Id.* at 465. This would mean that Hall's confederates, in joining with Hall and committing a kidnapping against defendant, could be charged with murder, based on defendant's fatal shooting of Hall. However, the liability of other parties under the felony-murder rule does not speak to the propriety of the forcible felony language in the jury instructions.

¶ 39 Additionally, in *Lowery*, the defendant was the person who initiated the offense against Maurice. Maurice turned the tables on the defendant and obtained the defendant's gun. As the defendant fled, Maurice shot at the defendant, killing a passerby. *Id.* at 464. Here, defendant occupies the position of Maurice, but *Lowery* does not explore any liability Maurice faced for his actions; rather, it determines that the perpetrator of the initial offense may be liable for the erstwhile victim's actions in resisting the offense. *Id.* at 466. *Lowery* is further distinguishable because defendant did not turn the tables on Hall and his confederates; rather, defendant was rescued, provided with a gun, and chose to exact revenge after he had foiled either the delivery

of the kidnapping ransom or the completion of a robbery. In any event, nothing in *Lowery* suggests that defendant should have received the jury instruction he claims was necessary in his postconviction petition. For these reasons, then, we reject defendant's argument about the necessity of the forcible-felony language in the jury instructions.

¶ 40 D. Sufficiency of the Evidence

¶ 41 Defendant next argues that sufficient evidence was produced to prove the existence of mitigating factors to reduce the severity of defendant's conviction from first-degree murder to second-degree murder. We review such a claim on direct appeal by considering whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present. *People v. Romero*, 387 Ill. App. 3d 954, 968 (2009). While this contention could have been raised on direct appeal, but was not, defendant contends that appellate counsel was ineffective for failing to raise the matter. Accordingly, we review the issue to determine whether defendant was prejudiced by appellate counsel's failure to raise it on direct appeal. *Lear*, 175 Ill. 2d at 269.

¶ 42 Defendant is correct that there was evidence adduced which, if believed by the jury, could have established that defendant was acting under a sudden and intense passion resulting from serious provocation, or that he unreasonably believed he was acting in justifiable self defense (or in the prevention of a forcible felony). See 720 ILCS 5/9-2(a) (West 2000). We do not, however, review this evidence to determine whether, in our judgment, defendant has presented some evidence; rather, we consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present. *Romero*, 387 Ill. App. 3d at 968. Under this standard, defendant cannot prevail.

¶ 43 The State presented extensive evidence regarding defendant's circumstances both the night before and in the hours before Hall's killing. The State presented evidence that defendant called Abrams and requested that he bring defendant's handgun. Evidence was also adduced that defendant snatched the money from Hall or a confederate followed by defendant demanding the gun from Abrams. Additionally, evidence was adduced that, upon defendant showing the gun, Hall and his confederates immediately retreated, hands raised, thereby signifying either the failure of their attempt to rob defendant or obtain the ransom money for his release, or their abandonment of their criminal activities toward defendant. Evidence was further adduced that defendant chased Hall before he began shooting. All of this evidence, viewed in the light most favorable to the prosecution, suggests that defendant was acting on a plan conceived during his confinement, that he would shoot Hall, the man who had inflicted the most severe portion of the beating defendant endured. Thus, we hold that a rational trier of fact could have found that the mitigating factors from section 9-2(a) of the Code were not present.

¶ 44 Because a rational trier of fact could have found that the mitigating factors were not present, defendant is unable to demonstrate prejudice resulting from appellate counsel's failure to raise the claim on direct appeal. Because defendant cannot demonstrate prejudice, he cannot show ineffective assistance of counsel, and his postconviction claim fails. *Lear*, 175 Ill. 2d at 269.

¶ 45 E. Sentencing Factors in Mitigation

¶ 46 Defendant next contends that the trial court did not properly weigh certain factors in mitigation when imposing sentence. The trial court held that this claim was waived or barred by *res judicata*. On direct appeal, defendant contended that the trial court did not properly weigh the mitigating factors adduced at defendant's sentencing hearing. On direct appeal, we

addressed defendant's claim that the trial court erred in weighing the mitigation evidence. *Davis*, No. 2-01-0558, slip op. at 44-45. We also note that defendant does not argue that trial counsel overlooked the factors he emphasizes in his postconviction petition, or that appellate counsel failed to raise these factors on direct appeal. Because defendant does not argue that counsel was ineffective, there is no avenue to relax the bar of *res judicata*. See *English*, 2013 IL 112890, ¶ 22 (doctrine of *res judicata* or waiver will be relaxed where the error is due to trial or appellate counsel's ineffective assistance). Accordingly, we hold that the postconviction court properly determined that this claim was barred by *res judicata*.

¶ 47 F. Legislative Intent of the Felony-Murder Rule

¶ 48 Defendant's next issue presents difficulties in understanding and expressing succinctly. The upshot of defendant's argument is that he should not have been charged with Hall's murder because the circumstances of the case present a classic felony-murder scenario. Section 9-1(a)(3) provides the statutory underpinning for the felony-murder rule. 720 ILCS 5/9-1(a)(3) (West 2000). Our supreme court expressed the felony-murder rule clearly: "A felon is liable for those deaths which occur during a felony and which are the foreseeable consequence of his initial criminal acts." *Lowery*, 178 Ill. 2d at 470. According to defendant, it was Hall's confederates who should have been charged with the murder of Hall because they were undertaking the kidnapping or robbery of defendant at the time defendant shot and killed Hall, and defendant's actions were a foreseeable consequence of their criminal endeavor. According to defendant, because the felony-murder rule contemplates the punishment of those whose actions set in motion the death of another, he should not have been held responsible for the murder of Hall.

¶ 49 Defendant's argument is not entirely off point. Hall's confederates would appear to face possible liability under the felony-murder rule for Hall's death. However, the fact that another person may face criminal liability does not serve to extinguish the liability defendant may face for his own acts. There is nothing in the murder statute or the case law that suggests that defendant's personal liability for his actions resulting in the death of Hall is foreclosed if another also may face liability for that death. In other words, even though defendant may have a correct insight regarding the liability Hall's confederates faced for murder, he is focusing his attention in the wrong place, because we are solely interested in defendant's liability for Hall's death in this case; nothing anyone else did is pertinent unless it impacted defendant's personal liability for Hall's death. Thus, Hall's actions and Hall's confederates' actions toward defendant are relevant, but their personal responsibilities and criminal liabilities are beyond our inquiry.

¶ 50 Defendant argues that, because the intent of the felony-murder rule is to punish the felon and not the victim of the felony, the State's prosecution of him was fatally flawed from the outset. Further, because the State was effectively prosecuting the wrong person, we should deem that the State never effectively established personal jurisdiction over defendant for the prosecution of Hall's death. We disagree.

¶ 51 We have determined above that the determination that Hall's crime, either kidnapping or robbery, was foiled and therefore completed when defendant brandished his weapon was not against the manifest weight of the evidence. Hall and his confederates were well beyond arm's reach according to the evidence in the record, and they were fleeing. Defendant, although previously the victim of Hall and his confederates, became the aggressor. Because defendant's actions were aggressive and purposeful, he cannot escape liability for them. Moreover, defendant was charged and convicted under section 9-1(a)(2) of the Code; defendant does not

directly argue that he was improperly charged under the statute, or that he was actually prosecuted under the felony-murder rule; defendant argues only that he should not have been charged or prosecuted under the felony-murder rule. He was not, and his argument is misplaced.

¶ 52 Moreover, defendant's argument implicates the discretion of the State's Attorney in deciding the offenses to be charged. It has long been held that it is solely the responsibility of the State's Attorney "to evaluate the evidence and other relevant factors to determine what offenses can and should properly be charged." *People v. Edgeston*, 243 Ill. App. 3d 1, 11 (1993). Defendant seeks to constrain the State's Attorney's charging discretion by arguing that he should not have been charged because Hall's confederates should have been charged instead under the felony-murder rule. This argument is foreclosed by the long-standing rule set forth in *Edgeston*.

¶ 53 Finally, defendant's argument is simply missing a key component. He has failed to identify anything that would exonerate his actions as a victim of criminal activity. Accordingly, defendant cannot succeed in his attempt to refocus the prosecution on others who may share criminal liability for the death of Hall. We reject defendant's arguments on this point.

¶ 54 G. Ineffective Assistance of Trial Counsel

¶ 55 Defendant last makes two claims of ineffective assistance of trial counsel: (1) counsel failed to adequately investigate the circumstances of a tape of the phone call between Abrams and defendant which was not disclosed to the defense until Abrams was about to testify; and (2) counsel failed to object to the requirement at trial that defendant wear a stun belt. While these contentions could have been raised on direct appeal, but were not, defendant contends that appellate counsel was ineffective for failing to raise these issues. Accordingly, we review the issues to determine whether defendant was prejudiced by appellate counsel's failure to raise them on direct appeal. *Lear*, 175 Ill. 2d at 269. We consider each claim in turn.

¶ 56 Defendant first argues that counsel was ineffective because he did not adequately investigate and interview witnesses involved in a recording of Abrams' phone call with defendant when defendant requested money and, according to Abrams statement, requested a gun. Abrams' statement, in which he asserted that defendant requested a gun, was taken nearly a year before trial, yet counsel was caught unaware of the statement at trial. Defendant argues that he did not actually request a gun, and the recording of the phone call as well as the other witnesses who were present during the call would have supported his contention. On the other hand, Abrams testified that defendant requested a gun, and that statement was not captured in the recording of the phone call. Thus, there would be an evidentiary question regarding whether defendant requested that Abrams bring him a gun.

¶ 57 In order to prevail on this claim, defendant must be able to show the existence of prejudice, meaning that there is a reasonable probability that the outcome of the trial would have been different without counsel's errors. *Lear*, 175 Ill. 2d at 269. Whether defendant requested the gun, or whether Abrams fortuitously provided it does not affect the outcome of the trial. If defendant requested the gun, it shows intent and planning to exact his revenge on Hall and his confederates. If defendant did not request the gun, there is still evidence that defendant foiled Hall's criminal endeavor when he brandished the gun and stopped or recovered the ransom or the proceeds of the robbery. Defendant's request for the gun or lack of a request does not change the analysis that Hall's criminal activity was completed, and defendant became the aggressor. Accordingly, defendant cannot show the requisite prejudice to prevail on an ineffective assistance claim, and his contention that trial counsel was ineffective for failing to interview witnesses and investigate the circumstances of the recording of the phone call fails.

¶ 58 Next, defendant contends that trial counsel was ineffective for failing to challenge the requirement that defendant wear a stun belt during the trial. Defendant contends that the belt was visible to the jury, and the jury was influenced by the appearance of the stun belt to render a verdict of guilty. The evidence presented at the hearing on the postconviction petition was equivocal, at best, regarding whether the jury could see the belt. Further, defendant presented no evidence that anyone in the court at the time of defendant's trial was actually able to see the stun belt, because testimony at the hearing showed that the belt was worn under the clothing, and the shirt had been bloused to be baggy at defendant's waist so as to obscure or hide the belt.

¶ 59 In any event, defendant's claim once again founders on the inability to demonstrate prejudice. An improper-shackling claim may be harmless beyond a reasonable doubt where the evidence supporting defendant's conviction was overwhelming. *People v. Robinson*, 375 Ill. App. 3d 320, 334 (2007). Here, despite defendant's contrary contentions, the evidence of his guilt was overwhelming. The evidence clearly shows that defendant shot Hall in the back as he was fleeing. Defendant argued on direct appeal that he was engaging in self-defense on direct appeal, and he argued in his postconviction petition that he was preventing a forcible felony. For the reasons in *Davis*, No. 2-01-0558, slip op. at 37-41, we reject his claim of self-defense, and for the reasons expressed above, we reject his claim that he was preventing the commission of a forcible felony. In the absence of these justifications or exonerations, we hold that the evidence of defendant's guilt was overwhelming and that the outcome of his trial would not have been affected even if her were able to present direct evidence that the jury observed his restraint by the stun belt.

¶ 60 III. CONCLUSION

¶ 61 For the foregoing reasons, we affirm the judgment of the circuit court of DeKalb County.

¶ 62 Affirmed.