2013 IL App (4th) 120713-U

NO. 4-12-0713

FILED
April 17, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Cass County
SHIRLEY SKINNER,	)	No. 09CF129
Defendant-Appellant.	)	
	)	Honorable
	)	Scott H. Walden,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann concurred in the judgment.
Justice Appleton dissented.

ORDER

¶ 1 *Held*: (1) Rule 606(b) of the Illinois Rules of Evidence (Ill. R. Evid. 606(b) (eff. Jan. 1, 2011)) bars the jurors from testifying they, during deliberations, discussed the fact defendant did not testify or present evidence.

(2) The postconviction petitioner under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2010)) failed to provide specific factual allegations to support her claim the jury improperly considered during deliberations a juror's gun expertise.

(3) The petitioner failed to prove she was denied the effective assistance of counsel, as she did not prove counsel failed to perform a reasonable investigation.

(4) Petitioner's ineffective-assistance-of-counsel claims fail where she did not prove there was a reasonable probability the outcome of the trial would have been different had defense counsel pursued a theory of defense of self, others, or property.

¶ 2 In December 2011, defendant, Shirley Skinner, filed a petition under the Post-

Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2010)), challenging her conviction for first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)). In her petition, defendant alleged (1) she was denied the right to a fair trial when jurors held against her both the decision not to testify and defense counsel's failure to present witnesses; (2) jurors improperly considered "non-evidence" introduced by a juror; and (3) she was denied the effective assistance of trial counsel as counsel failed to investigate and interview witnesses, which would have shown counsel should pursue a theory of defense of self, others, or property. In support, defendant attached memoranda of juror interviews and statements by "critical first responders."

¶ 3 The State filed a motion to dismiss, and in July 2012, the trial court dismissed defendant's petition. Defendant appeals, arguing the dismissal was erroneous and she is entitled to an evidentiary hearing under the Act. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Defendant's Trial

¶ 6 In May 2010, defendant was convicted by jury of the November 2008 first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)) of her granddaughter's estranged husband, Steven Watkins. Defendant was also convicted of solicitation of murder (720 ILCS 5/8-1.1(a) (West 2008)). The solicitation-of-murder conviction was overturned on direct appeal. *People v. Skinner*, No. 4-10-0517 (June 13, 2011) (unpublished order under Supreme Court Rule 23).

¶ 7 At trial, the State introduced evidence showing Steven, while in defendant's residence on November 25, 2008, died from a single gunshot wound to the back of his head. According to the State's evidence, Steven married Jennifer Watkins in 2006. They had one daughter, S.W. She was almost three years old at the time of defendant's trial. In approximately

May 2008, Steven filed for divorce. At that time, Steven resided in a trailer with his older daughter. Jennifer and S.W. resided with her family, including defendant, in Ashland, Illinois.

¶ 8 The evidence established animosity between Steven and Jennifer and her family. Steven's mother, Penny Watkins, testified Jennifer took S.W. to Steven's house for visits that lasted 90 minutes to 2 hours. According to Penny, during those visits, Jennifer would not permit Steven or S.W.'s half-sister to play with S.W. Steven was scheduled to have a visit with S.W. on November 25, 2008.

¶ 9 Two volunteer first responders were the first to arrive at the scene after defendant was shot. Wesley Charles Knapp II, one of the paramedics, testified he was dispatched to defendant's home around 5:30 p.m. According to Knapp, when he arrived, he was waved into the home by several people. He saw defendant, who was frantic and "walking around" in the kitchen area. In another part of the residence, to the defendant's right, Knapp observed defendant's husband Kenneth Skinner, Jennifer, and a baby. Defendant said, "I shot him. Is he dead?" At that point, Knapp had not seen a body. Defendant repeated the statement several times and gestured toward the body. Knapp observed Steven's body on the floor approximately 20 feet from the entry. The body was facedown. A large pool of blood surrounded the head. Knapp believed nothing medically could be done for Steven. Defendant repeatedly said, "He shouldn't have come in here, you know." Knapp tried to calm defendant and to determine whether she had any medical conditions that needed treatment. Defendant told him she had no medical issues, but defendant's daughter, Debra Webster, told him otherwise. Knapp observed defendant had two parallel scratches between her thumb and forefinger. Knapp testified blood was not "running down her hand." No one told him defendant fell or was pushed into a wall. He did remember

seeing something on the wall, but he could not recall if the item was broken or damaged.

¶ 10 According to Rick Hand, the other first responder, when he and Knapp arrived, he saw three or four people in one part of the house. When he thought the patient was among those individuals, he started walking toward them. He was directed toward defendant. Hand and Knapp saw Steven's body on the floor. Defendant said, "I shot him," and "He shouldn't have come back here." Hand did not ask defendant about the statements. Hand and Knapp provided medical treatment to defendant. Hand noticed two small parallel cuts on the back of one of defendant's hands. The cuts had dried blood. Hand observed no bruising. They attempted to calm defendant, who was very upset. While treating her, defendant gestured toward the corner and said, "I fell into this." She pointed at "some kind of decorative item" that appeared broken. He did not remember whether he treated defendant's hand.

¶ 11 The two paramedics who arrived shortly after Hand and Knapp arrived at the scene, Robert Daniel and Patricia Blair, also testified. Daniel testified the 9-1-1 call indicated a woman was in the home with shortness of breath and chest pains following an incident of domestic violence. According to Daniel, defendant seemed "[a]gitated, almost hysterical." Defendant answered questions coherently. Daniel drove defendant to the hospital in the ambulance. During the ride, defendant's daughter rode along and repeatedly told defendant not to say anything. Daniel drove 80 miles per hour because he was concerned about defendant's health and heart condition.

¶ 12 According to Blair, the first thing she observed upon arrival was defendant sitting in a chair. She was on the telephone. After defendant passed the telephone to someone else, defendant said, "I shouldn't have done this." Defendant's "vitals were in normal ranges, her pulse

was elevated a little bit, and she was agitated and crying." Defendant's daughter, who rode in the ambulance, repeatedly told her mother not to say anything.

¶ 13 Blair testified defendant had an injury on her hand; defendant reported the injury occurred that evening. Defendant's hand looked like it had been pinched. It was not bleeding. Blair was uncertain whether the wound was open.

¶ 14 Nolan Lipsky, Jennifer's lawyer in the divorce proceedings with Steven, testified Jennifer did not want Steven to have visitation with S.W. A September 2008 court order mandated Steven have unsupervised visitation two evenings a week and on every other weekend. A hearing on the issue was scheduled for November 26, 2008. On cross-examination, Lipsky testified defendant did not speak with him about strategies for the divorce proceedings.

¶ 15 A police officer, Larry Cave, testified regarding a visitation-related incident on October 30, 2008. According to Officer Cave, he was dispatched to the Skinner residence after, he believed, Steven called the county. Upon arrival, Officer Cave observed Steven standing across the street from the residence. Steven told the officer he had scheduled visitation and showed the officer the documentation. Officer Cave approached the Skinner residence; Steven remained across the street. When Officer Cave knocked on the door, he was greeted by Kenneth and Debra's husband, Bob Webster. After Officer Cave told the men the reason for his visit, the men began screaming at Steven. Steven did not respond. Officer Cave further testified Steven had been denied visitation repeatedly. On that night, Officer Cave was told the child had been taken to a doctor due to an illness.

¶ 16 Michael Oyer, an Illinois State Police Sergeant and crime-scene investigator, found no signs of forced entry. In his investigation, Sergeant Oyer examined the front entry and

a wall sconce and planter. The wall sconce was approximately eye level to Sergeant Oyer, who is 5 feet 10 inches tall. The sconce remained on the wall, but three "light poles or posts" had been broken off and were hanging by the wire. Sergeant Oyer used a magnifying glass during his examination of the sconce and did not see blood. Sergeant Oyer saw "no other signs or defects of damage to anything."

¶ 17 Gwendolyn Thomas, Steven's attorney in his divorce proceedings against Jennifer, testified Steven contacted her in January 2008 because Jennifer was denying him contact with S.W. In September 2008, the court awarded Steven unsupervised visitation. A hearing to review the visitation schedule was set for November 26, 2008.

¶ 18 A private investigator testified he had been hired to witness S.W.'s reaction to Steven when he was to pick her up at 4:45 p.m. on November 25, 2008. Around 3:30 p.m. on that date, Debra called the private investigator to tell him his services were not needed.

¶ 19 Chief James Birdsell testified, when he arrived at defendant's residence, he saw defendant and Knapp sitting. He noticed a Glock pistol approximately seven to nine feet from defendant. A spent cartridge protruded from the ejection port. Defendant was crying. Chief Birdsell observed two parallel skinned marks on defendant's right hand.

¶ 20 Chief Birdsell testified he learned Jennifer purchased the Glock pistol in October 2001. Chief Birdsell further testified no one who resided in defendant's residence cooperated with him in identifying who shot Steven. On cross-examination, he agreed it was possible the wall sconce broke when defendant fell against it and the wall.

¶ 21 At the close of the State's evidence, defendant moved for a directed verdict. Defense counsel argued "it's our position that there is so little evidence on those charges."

Defense counsel observed the statements made within the first 30 minutes of the shooting were made under circumstances where defendant "was almost in an incoherent state."

¶ 22 After the trial court denied defendant's motion, defense counsel rested and closing arguments ensued. Defense counsel unequivocally stated the defense: "There is not sufficient evidence to convict Shirley Skinner of the death of Steven." Defense counsel argued the State, in closing argument, placed great emphasis on the conduct of Jennifer and defendant's daughter as well as the"unbelievable divorce." Defense counsel emphasized no one testified defendant was involved in the divorce proceedings or in the custody dispute. Defense counsel argued the "poor and shoddy way this entire case was investigated," stating there were four photographs of the front door but not one of defendant's hand.

¶ 23 Defense counsel further argued the State's argument "made a very compelling case against other people other than [defendant]." Defense counsel highlighted the animosity between Steven and Jennifer and the fact Jennifer's DNA "could not be eliminated" from the gun, contending the State "presented a very nice case as to why Jennifer Watkins may have done it." Defense counsel emphasized the State had no "physical, scientific or forensic evidence" linking the weapon to defendant and maintained defendant's hand injury vindicated her because, despite the blood and cuts on defendant's hands, there was no deoxyribonucleic acid (DNA), blood, or other physical evidence linking defendant to the gun. Defense counsel argued the only evidence the State had were statements made by a 73-year-old grandmother who was suffering "some type of heart seizure."

¶ 24 The jury found defendant guilty of first degree murder. She was sentenced to a prison term of 55 years. Defendant appealed, arguing (1) the trial court should have granted her

motion to sever the charges of solicitation and first degree murder; (2) the evidence was insufficient to prove her guilty beyond a reasonable doubt of first degree murder; (3) the State engaged in misconduct that denied her a fair and impartial trial; (4) defense counsel was ineffective in that he failed to object when the trial court heard all arguments over objections off the record, failed to object to irrelevant and hearsay evidence, and failed to submit a jury instruction for second degree murder; and (5) defense counsel was ineffective in that he misunderstood the law.

¶ 25 This court upheld defendant's conviction for first degree murder. See *People v. Skinner*, No. 4-10-0517 (June 13, 2011) (unpublished order under Supreme Court Rule 23).

¶ 26 B. Defendant's Postconviction Claims

¶ 27 In December 2011, defendant filed her verified petition for postconviction relief. Defendant set forth two claims of relief: (1) she was denied an impartial jury when the jurors (a) held her failure to testify and to present evidence against her and (b) considered evidence not presented during her trial; and (2) she was denied her right to the effective assistance of counsel because her trial counsel failed to investigate and interview witnesses.

¶ 28 1. *Juror Interviews*

¶ 29 In support of her first argument, defendant attached notes from interviews with seven jurors. The interviews were conducted by clinical students from the DePaul University College of Law. The individual jurors reviewed the notes taken by the students and verified their accuracy by signing the notes. The students then prepared a summary of the interview notes. The interviewers signed affidavits verifying their notes and the fact the interviewees reviewed and signed them. The interviewees did not sign the summaries.

¶ 30 a. Juror Cynthia Wellman

¶ 31 According to the notes from the interview of Wellman, she stated the jurors were on the same page. Wellman indicated surprise defendant did not testify. She believed all the jurors thought if you are accused of murder you would have something to say. Wellman noted the jury had to work with the evidence before it but thought Jennifer probably did it. Wellman referenced an article she read after the trial in which defendant's son indicated he believed Jennifer shot Steven. In deliberations, there was not much to discuss. Wellman continually reiterated that there was a lot of doubt that defendant did it, but they did not get anything from the defense.

¶ 32 b. Juror Denise Edwards

¶ 33 According to Edwards, the jury deliberated for 15 minutes before the first vote. One juror voted "not guilty." After another 15 minutes, the jury was unanimous in its determination of guilt. Edwards indicated surprise defendant did not rebut the prosecution. She believed the other jurors felt the same. Edwards stated, looking back, she had doubts defendant killed Steven.

¶ 34 c. Alternate Juror Katheryn Herman

¶ 35 Herman indicated surprise over how quickly the guilty verdict was reached. She believed there were key points the defense could have made but did not make. Herman did not believe the jurors had any doubts.

¶ 36 d. Juror Kristin Koenig

¶ 37 According to Koenig, she was shocked and disappointed defendant did not attempt to defend herself. Everyone was disappointed she did not testify.

¶ 38 e. Juror Susan Swick

¶ 39 According to Swick, the jurors made comments about defendant's not testifying. Swick indicated no one was the expert on any issue and the jurors had no trouble understanding the instructions.

¶ 40 f. Juror DiAnne Hughes

¶ 41 Hughes wondered why the defense did not call Debbie to testify. She believed defendant should have testified. According to the notes, Hughes said since defendant did not testify, the jurors did not know that maybe she killed him in self-defense. Hughes then said defendant's not testifying definitely was a factor in the jury's decision.

¶ 42 Hughes stated one of the jurors, Sam Parks, may have done additional research. She believed this due to comments he made after trial that made her think he had. The following is an excerpt from the interview summary.

> "The fact that the defense attorney didn't put any witnesses on played a big part in the decision. She thought that was even more odd than [defendant's] not testifying. She was surprised that nobody came to [defendant's] defense and testified about the kind of good person she is."

¶ 43 g. Juror Sam Parks

¶ 44 According to Parks, he was frustrated by the fact defendant did not testify. He also wanted to hear from the other household members. Parks stated, for the defense to expect me to believe defendant did not do it was an insult to my common sense. He believed defendant's lawyers did not give him an opportunity to determine why defendant shot Steven. The

interview notes further contain the following excerpt: "During deliberations, he brought up the fact that he knows about guns. [Parks] stated that he talked about his expertise on guns during deliberations."

¶ 45 2. *Witness Affidavits*

¶ 46 a. Rick Hand's Affidavit

¶ 47 In his affidavit, Hand averred he was a first responder on the night Steven was shot. Dispatch failed to inform him anyone had been shot. When he arrived at defendant's residence, he noticed Steven's car was parked in front of the house on the street. The engine was running.

¶ 48 According to Hand, the front door was closed when he and Knapp arrived. Defendant answered the door. She was visibly shaken. Defendant said, "I shot him. Is he dead? He shouldn't have come back here." Hand realized a body was on the floor approximately 30 feet from the front door. Hand observed a handgun on a box between where he stood and the body. "The gun was stove-piped."

¶ 49 Hand averred, after he called 9-1-1 regarding the body, defendant began to get more upset. Defendant repeated, "I shot him." Hand did not believe defendant wished Steven dead. At some point, Kenneth, who was on the telephone, handed the telephone to defendant. Defendant then stopped talking. Hand stated the following: "There was a lot of confusion at the scene. I am not sure what happened that night to lead up to [Steven's] being shot. [Steven] may have pushed [defendant], but I am not sure."

¶ 50 b. Chuck Knapp's Affidavit

¶ 51 According to Knapp's affidavit, he was a first responder with Hand. The front

door was closed when they arrived. Defendant seemed upset, concerned, and frantic. Defendant "was shaking and tearing up." She stated, "I shot him; is he dead?" He did not remember whether defendant said anything else.

¶ 52 c. Memorandum regarding a Meeting with Christine Birdsell

¶ 53 On September 25, 2010, students from DePaul University College of Law went to Chief Birdsell's residence to speak to him about Steven's shooting. Chief Birdsell was unavailable, so the students interviewed his wife, Christine. According to the notes, not signed by Christine, Christine believed the Skinner family members were "the most arrogant people she'[d] ever met." Christine knew Steven and his family since Steven was a young boy. She called him "the nicest guy."

¶ 54 3. *The State's Motion To Dismiss*

¶ 55 In March 2012, the State moved to dismiss defendant's postconviction petition. The State argued Illinois Rule of Evidence 606(b) (Ill. R. Evid. 606(b) (eff. Jan. 1, 2011)) bars defendant from proving her allegation the jurors improperly considered (1) her decision not to testify, and (2) a juror's expert opinion. The State further argued defendant cannot show counsel was ineffective, because the decision to pursue a defense of actual innocence was reasonable and defendant has not shown the alleged justification defenses she argues should have been presented would have had a reasonable probability of success.

¶ 56 The trial court agreed with the State and granted its motion. The court agreed one of the juror statements was troubling, but found the statements inadmissible under Rule 606(b). The court rejected defendant's argument the jury's consideration of her failure to testify was "an outside influence" that rendered Rule 606(b)'s bar inapplicable. The court also highlighted the

importance of the finality of jury decisions and of not meddling in every detail of jury deliberations. Regarding the allegations about Sam Parks's statement he discussed his gun expertise during deliberations, the court observed such statement lacked specificity as "[h]e could have been talking about deer hunting." The court noted the statement by juror Swick that no one was the expert on any issue. The court further found Parks's statement would be inadmissible under Rule 606(b), as it was not an outside influence.

¶ 57 The trial court also found unconvincing defendant's argument she was denied the effective assistance of counsel based on the alleged failure to investigate. The court acknowledged defense counsel "was in a tight spot" on how to proceed with the defense, but it did not believe counsel's defense fell below the objective standard of reasonableness. The court further found, based on the affidavits and the record, had defendant proceeded with a different defense, there would have been no difference in the trial's outcome.

¶ 58 This appeal followed.

¶ 59 II. ANALYSIS

¶ 60 A. Standard of Review

¶ 61 This case involves a second-stage dismissal under the Act. At the second stage of postconviction proceedings, the State may answer a petition or move to dismiss. 725 ILCS 5/122-5 (West 2010). If the State files a motion to dismiss, the trial court, when considering such motion, "is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity [that] would necessitate relief under the Act." *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). In making that determination, the court considers all well-pleaded facts as true. *Coleman*, 183 Ill. 2d at 380-81, 701 N.E.2d at

1071. A petition will survive a motion to dismiss an advance to a third-stage evidentiary hearing "only where the allegations of the [postconviction] petition, supported where appropriate by the trial record or accompanying affidavits, make a substantial showing that a defendant's constitutional rights have been violated." *People v. Morgan*, 187 Ill. 2d 500, 528, 719 N.E.2d 681, 697 (1999). This court reviews second-stage dismissals *de novo*. *Coleman*, 183 Ill. 2d at 388-89, 701 N.E.2d at 1075.

¶ 62 B. Defendant's Allegations of Juror Misconduct

¶ 63 1. *The Jury's Alleged Improper Consideration of Defendant's Failure To Testify*

¶ 64 Defendant argues the jurors improperly weighed defendant's failure to testify. Defendant begins by emphasizing her constitutional rights not to testify and not to have the decision not to testify held against her. See *United States v. Rodriguez*, 116 F.3d 1225, 1226 (8th Cir. 1997) ("The Fifth Amendment guarantees a criminal defendant the right to remain silent and the right not to have adverse inferences drawn from the exercise of that right."). Defendant maintains three jurors "actively considered [her] decision not to testify and held it against her during deliberations." In particular, defendant highlights Hughes's statement the failure to testify was a factor in the jury's decision as well as statements by other jurors indicating surprise and disappointment defendant did not testify.

¶ 65 The State argues defendant cannot prove her claims because Rule 606 of the Illinois Rules of Evidence bars admission of juror testimony—the evidence she needs to prove her claim. According to the State, Rule 606 bars a juror from testifying regarding his "mental processes" in deliberations.

¶ 66 Defendant counters by arguing Rule 606(b) permits jurors to testify when the jury

considers "extraneous prejudicial information" or "outside influence." Defendant argues her decision not to testify is outside evidence not produced during trial.

¶ 67 Rule 606(b) states as follows:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or concerning the juror's mental processes in connection therewith. But a juror may testify (1) whether any extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received concerning a matter about which the juror would be precluded from testifying." Ill. R. Evid. 606(b) (eff. Jan. 1, 2011).

¶ 68 In contrast, the State relies on a number of decisions in which state and federal courts interpreted a rule like Illinois Rule of Evidence 606 and held those versions of Rule 606 barred juror testimony on whether the juries improperly considered a defendant's failure to testify. In *Rodriguez*, 116 F.3d at 1226, the defendant argued his fifth amendment rights were violated when the jury, during its deliberations, discussed the fact he did not testify. The

defendant based his argument on a statement by his counsel's secretary, who heard from at least one juror defendant's failure to testify had been discussed by jurors who lamented had the defendant testified he "could have 'shed a lot of light on the facts of the allegations against him.' " *Rodriguez*, 116 F.3d at 1226. While the defendant argued his failure to testify should be considered as an "outside influence" under Federal Rule of Evidence 606(b) and jurors should be permitted to testify regarding such influence, the Eighth Circuit Court of Appeals did not agree. *Rodriguez*, 116 F.3d at 1226-27. The court observed, due to "the need to protect the secrecy of the jury," the law resisted permitting jurors to testify regarding the deliberations. *Rodriguez*, 116 F.3d at 1226. The court emphasized influence that is "extrinsic" or "extraneous" includes "publicity received and discussed in the jury room, matters considered by the jury but not admitted into evidence, and communications or other contact between jurors and outside persons." *Rodriguez*, 116 F.3d at 1227 (quoting *United States v. Bassler*, 651 F.2d 600, 602 (8th Cir. 1981)). The court found the following: "That [defendant] did not testify is not a fact that jurors learned through outside contact, communication, or publicity. It did not enter the jury room through an external, prohibited route. It was part of the trial, and was part of the information each juror collected." *Rodriguez*, 116 F.3d at 1227. The court further focused on the fact the Advisory Committee notes to Federal Rule of Evidence 606 indicates Congress rejected a version of the rule that would have permitted jurors to testify regarding objective matters occurring during the deliberation. *Rodriguez*, 116 F.3d at 1227 n.2.

¶ 69 In *United States v. Tran*, 122 F.3d 670, 673 (8th Cir. 1997), the court rejected the argument the jury's consideration of the defendant's failure to testify was consideration of "extraneous prejudicial information" about which a juror would be permitted to testify under an

exception to Federal Rule of Evidence 606. The defendant, in seeking an evidentiary hearing, submitted affidavits from two jurors. One juror averred the following: " 'The fact that [defendant] did not testify was discussed by the jury during our deliberations' and 'was one of the major arguments used by some of the jurors to convince the undecided jurors to vote to find [defendant] guilty.' " *Tran*, 122 F.3d at 672. The *Tran* court followed *Rodriguez* and concluded the defendant's failure to testify was not "extraneous prejudicial information," because the jury knew of that fact as a result of its presence at trial and "not as a result of something disclosed to them that had not occurred in the courtroom." *Tran*, 122 F.3d at 673.

¶ 70 Both the Sixth Circuit Court of Appeals and an Iowa appellate court reached the same decisions. In *United States v. Kelley*, 461 F.3d 817, 830-31 (6th Cir. 2006), the court found a juror's statement, "[i]f they were innocent, they would have testified," was barred by Federal Rule of Evidence 606. In *State v. Blair*, 798 N.W.2d 322, 327-28 (Iowa Ct. App. 2011), the court found Iowa's version of Rule 606 barred a juror's affidavit that stated "the deciding factor among the panel was that [defendant] did not testify, thus he must be guilty."

¶ 71 Defendant distinguishes these cases by simply arguing they are not binding and emphasizing neither an Illinois court nor the Seventh Circuit Court of Appeals has decided the issue. This argument implies a Seventh Circuit decision would be precedential or carry more weight than decisions of other federal circuit courts. This court is bound only to follow the Illinois Supreme Court and the United States Supreme Court. See *Seibring v. Parcell's Inc.*, 178 Ill. App. 3d 62, 70, 532 N.E.2d 1335, 1340 (1988).

¶ 72 Defendant's lone attempt to provide case law on the issue is a citation to *Oswald v. Bertrand*, 374 F.3d 475, 479 (7th Cir. 2004), after stating the following in her brief: "The

individually-held opinion of any given juror regarding [defendant's] failure to testify or present evidence became an impermissible influence once communicated to the other jurors during deliberations." *Oswald* does not support this conclusion, and this is a misstatement of Oswald's meaning. *Oswald* concerns the trial court's failure to exclude jurors *before* the trial began when a potential juror's statements indicated a number of the jurors had concluded defendant was guilty. See *Oswald*, 374 F.3d at 479-80.

¶ 73 The State's argument is more convincing. We agree with the analysis in *Tate* and *Rodriguez*. Those courts concluded the jury became aware of defendant's decision not to testify inside the courtroom, not as a result of outside influence or extraneous prejudicial information. Rule 606(b) prohibits the jurors in this case from testifying to the matters in their statements on this issue. The trial court properly found an evidentiary hearing was not warranted on this ground.

¶ 74 Further, not one of the juror's statements prove any juror unconstitutionally held defendant's failure to testify against her. The summaries of the interview notes show one or more of the jurors: (1) were surprised or disappointed defendant did not testify; (2) believed if someone is *accused* of murder that person would have something to say; or (3) defendant's not testifying was a factor in the decision. The closest defendant comes to meeting her burden of proof is the statement by Hughes that defendant's "not testifying definitely was a factor in their decision." The use of "factor" is vague. The jurors' statements, including those by Hughes, show the jury believed the evidence presented by the State was sufficient to prove defendant guilty beyond a reasonable doubt. When no additional evidence is presented to rebut that evidence, the absence of such evidence, whether by defendant's not testifying or not presenting additional

evidence is a "factor" in the ultimate decision. At no time does Hughes or any other juror allege the jury considered defendant's not testifying or not presenting evidence to be proof or evidence of her guilt. While the jury should not have discussed the fact defendant did not testify, defendant's allegations do not establish the jury held her decision not to testify against her.

¶ 75 2. *The Jury's Alleged Improper Consideration of a Juror's Gun Expertise*

¶ 76 Defendant next contends the jury improperly considered and relied upon on "testimony" by a self-defined expert, juror Sam Parks, during deliberations. Defendant maintains Parks introduced his expertise, a fact not admitted at trial, into the jury room and his comments were improperly relied upon when deciding defendant's fate.

¶ 77 Defendant, both in her petition and in her opening brief, makes sweeping statements regarding Parks's alleged statements. For example, in the opening brief, defendant states defendant "was, in fact, testifying to the jury as if he were a certified expert in munitions." Defendant further contends the jury relied on such evidence. Such statements are not supported by any evidence in the record or evidence filed in support of the postconviction petition. The only evidence supporting defendant's arguments appears in the notes from the Parks's interview, which state the following: "During deliberations, he brought up the fact that he knows about guns. [Parks] stated that he talked about his expertise on guns during deliberations."

¶ 78 These two conclusory and vague sentences do not amount to "a substantial showing that [] defendant's constitutional rights have been violated." *Morgan*, 187 Ill. 2d at 528, 719 N.E.2d at 697. These sentences do not support the sweeping statements in the brief. "To be entitled to an evidentiary hearing, a petitioner must show specific and factual assertions." *People v. Dopson*, 2011 IL App. (4th) 100014, ¶ 18, 958 N.E.2d 367. Defendant, who had access to

Parks and could have requested more specific information, has not shown what Parks told the jurors or whether the other jurors gave any consideration, much less relied upon, any statements made by Parks. In fact, one juror's statement indicates no one was an expert on any issue. This flaw is fatal. We cannot assume prejudice without knowledge of the circumstances. Defendant has not met her burden. The trial court properly concluded these allegations do not warrant an evidentiary hearing.

¶ 79 Defendant misrepresents the purpose of an evidentiary hearing in this portion of her brief. She argues the following: "At the very least, Illinois Rules of Evidence, the Illinois Supreme Court, and the U.S. and Illinois Constitutions require that Mrs. Skinner be afforded an evidentiary hearing *to determine the scope of improper influence* Sam Parks exerted over the deliberating jury and the injurious effect of the improper consideration by the jury of the exercise of her constitutional rights." (Emphasis added) A third-stage evidentiary hearing is not an investigatory tool through which defendant may interview witnesses to learn whether Parks's statements were improper or prejudicial or whether the jury gave any credence to such statements. Defendant should have, at the second stage, known "the scope of improper influence" and provided specific, factual allegations to prove that scope. See *Dopson*, 2011 IL App. (4th) 100014, ¶ 18, 958 N.E.2d 367.

¶ 80 C. Defendant's Allegations of Ineffective Assistance of Counsel

¶ 81 Defendant last argues she was denied the effective assistance of counsel when her trial attorney failed to investigate. Defendant maintains "[e]vidence discovered after reviewing [her] conviction and conducting basic witness interviews makes it clear that her trial counsel failed to adequately investigate her case." Defendant acknowledges strategic choices are not

typically reviewable but contends such decisions are not protected when there is an "absence of information."

¶ 82 A claim for ineffective assistance may be made on the basis counsel failed to prepare adequately for trial by not investigating or by failing to interview witnesses who could exonerate the defendant. *People v. Gray*, 2012 IL App (4th) 110455, ¶ 41, 982 N.E.2d 227. To prove a claim of ineffective assistance of counsel, a defendant must show *both* (1) counsel's "representation fell below an objective standard of reasonableness," and (2) a reasonable probability exists, absent such error, the outcome of the trial would have been different. *People v. Young*, 341 Ill. App. 3d 379, 383, 792 N.E.2d 468, 472 (2003). Because both prongs must be proved for a defendant to succeed on an ineffective-assistance claim, we may resolve the claim upon finding the defendant cannot prove just one of the prongs, without considering the other. See *People v. Little*, 335 Ill. App. 3d 1046, 1052, 782 N.E.2d 957, 963 (2003).

¶ 83 In making the argument defense counsel unreasonably failed to investigate, defendant points to the affidavits by Hand and Knapp to support her claim. She maintains he "did not interview the State's key witnesses who were the first responders at [defendant's] home," and "he did not question the Chief of Police who conducted the police investigation." These are the linchpin allegations regarding the alleged failure to investigate.

¶ 84 The affidavits of Hand and Knapp do not assert none of defendant's two trial attorneys or someone on their behalf failed to interview or speak to them. Defendant cites nothing in the record to support her claim these individuals were not interviewed. We know from the transcript one of the defense counsel had not interviewed Knapp, but we do not know whether cocounsel or investigators interviewed Knapp or Hand. No facts support such a claim,

rendering improper any consideration of these unsupported allegations. See generally *Morgan*, 187 Ill. 2d at 528, 719 N.E.2d at 697 (showing allegations in the petition must be supported by the trial record or accompanying affidavits).

¶ 85 Defendant, in making this argument and in her statement of facts, misrepresents the testimony as showing Chief Birdsell and Hand and Knapp "believed" Steven may have forced himself into the home in an attempt to show that defense counsel, had he interviewed such individuals, would have found evidence supporting a theory of self-defense or defense of others. For example, in the statement of facts, defendant states Chief Birdsell "believed that [Steven] may have tried to force his way into the Skinner home." Defendant again makes this misrepresentation in the argument portion of her brief. The pages defendant cites in support do not indicate Chief Birdsell held this belief. The first of the cited pages are from crime scene investigator Michael Oyer's testimony, during which he agreed he examined the front door for signs of forced entry "because [Chief Birdsell] told [him] that there was some belief that the decedent had made a forced entry." The other cited pages, the pages from Chief Birdsell's testimony, indicate, at best, it was *reported* to him when he was dispatched Steven had forced himself into the residence.

¶ 86 Regarding Knapp and Hand, defendant states Knapp and Hand, the first responders, "believed [defendant] was injured when she was pushed into a wall sconce." She relied on this misrepresentation again her argument. In support, defendant cites two pages from Hand's testimony. Nothing on these pages indicates either Knapp or Hand so testified or believed. Defendant further states both Knapp and Hand testified "they *** believed that [defendant] may have been shoved into a wall sconce." Again, defendant cites four pages from their testimony in

"support." None of these pages support such a conclusion. At best, the testimony shows defendant said she "fell into this" and gestured toward the corner. Defendant cites no testimony showing Knapp or Hand believed defendant shoved her.

¶ 87 Defendant is left with her claim defense counsel provided ineffective assistance of counsel by choosing to argue the State failed to prove defendant guilty due to a lack of physical evidence and motive over a defense of self, others, or property. We need not decide whether such a decision was reasonable, because defendant has not proved a reasonable probability exists, had counsel pursued one of the other defenses, the outcome of the trial would have been different. See *Young*, 341 Ill. App. 3d at 383, 792 N.E.2d at 472.

¶ 88 The evidence related to the justification defenses is scant. None of defendant's family members who were in the home were willing to testify regarding the events that led to Steven's death. The record shows these individuals invoked their rights to remain silent. Defendant did not testify. Sergeant Oyer testified to finding no evidence of forced entry. There was a broken wall sconce and an injury to defendant's hand. Knapp testified defendant said Steven should not have entered the house. The fact Chief Birdsell had been told via dispatch the husband had entered the residence and knocked down the grandmother carries little weight, as the record shows Jennifer made the 9-1-1 call.

¶ 89 In her postconviction petition, defendant added no evidence that sufficiently supports these defenses. Neither she nor any of the other individuals who were in the house provided an affidavit explaining the events. Hand's affidavit avers when he arrived at defendant's residence, he found Steven's car had been left running. This assertion adds little, as the evidence shows Steven would not be at the residence long on this day in late November, because he was

there either to either take S.W. for her visit or to be denied his right to see her. Hand also speculates in his affidavit it is possible Steven pushed defendant, but he says, "I am not sure." The memorandum written by Annie O'Reilly of her notes following the interview of Christine Birdsell, Chief Birdsell's wife, adds nothing. It is unsworn testimony that is irrelevant.

¶ 90 The evidence falls woefully short of sufficiently showing a reasonable probability the outcome of the trial would have been different had defense counsel chosen one of these defenses. The trial court did not err in granting the State's motion to dismiss.

¶ 91 III. CONCLUSION

¶ 92 We affirm the trial court's judgment. We grant the State its statutory assessment of $75 against defendant as costs of this appeal.

¶ 93 Affirmed.

¶ 94 JUSTICE APPLETON, dissenting.

¶ 95 While I concur in the majority's resolution of the issues raised concerning the conduct of the jury during its deliberations, I would find that the alleged failure of trial counsel to interview the first responders to the scene of the murder is sufficient to require further inquiry in the postconviction process. Whether the testimony of Hand and Knapp could have established a viable defense of defense of home, and thereby sustain an allegation of ineffective assistance of counsel, is a question that deserves to be resolved.