2023 IL App (4th) 220718-U

NO. 4-22-0718

FILED
June 1, 2023
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Peoria County
MICHAEL BERNARD WILLIAMS,	)	No. 13CF909
Defendant-Appellant.	)	
	)	Honorable
	)	Kevin W. Lyons,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice DeArmond and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant failed to make a substantial showing of a constitutional violation and was not denied reasonable assistance of postconviction counsel.

¶ 2 In February 2018, defendant, Michael Bernard Williams, filed *pro se* a postconviction petition. In June 2018, the Peoria County circuit court advanced defendant's petition to the second stage of the postconviction proceedings and appointed defendant counsel. Postconviction counsel filed an addendum to defendant's petition, and the State filed a motion to dismiss the petition. In a May 2022 written order, the court granted the State's motion to dismiss. Defendant appeals, asserting he made a substantial showing of ineffective assistance of counsel based on defense counsel's failure to seek severance of the two charges in this case and to request Illinois Pattern Jury Instructions, Criminal, No. 2.04 (4th ed. 2000) (hereinafter IPI Criminal No. 2.04). He also contends that, if his aforementioned claims were not properly

preserved, then he was denied the reasonable assistance of postconviction counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant by indictment with aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) for his role in a shooting on September 27, 2013. The shooting happened in a parking lot of the Pierson Hills apartment complex in Peoria, Illinois, where defendant, Eric Brownlee, Scott Lang, Gregory Williams, Ray Anderson, Chayla McNeal, and several other people were gathered. McNeal, who was the mother of Brownlee's children, lived in an apartment in the complex. Brownlee went to McNeal's apartment to clean up. After rejoining the parking lot party, Brownlee was shot in the leg. The police arrested defendant later that night. In January 2014, defendant obtained private defense counsel.

¶ 5 Before trial, the State filed a motion *in limine* to exclude the testimony of defendant's expert witness, Steven Howard, who was purportedly an expert in gunshot residue. Defense counsel did not file a motion seeking to exclude evidence regarding defendant's prior felony conviction. He also did not file a motion to sever the two charges.

¶ 6 In November 2014, the circuit court held a jury trial on the two charges. At the beginning of *voir dire*, the court read the indictments to the potential jurors. Thereafter, the court set forth the four basic principles of law known as the *Zehr* principles (see *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984)). Those principles are the following: (1) the defendant is presumed innocent; (2) the State is required to prove the defendant guilty beyond a reasonable doubt; (3) the defendant is not required to prove his innocence; and (4) the defendant is not required to testify and, if the defendant chooses not to do so, the jurors cannot hold it against the defendant. *Zehr*, 103 Ill. 2d at 477, 469 N.E.2d at 1064. The court then called up 12 potential

jurors. It then questioned those potential jurors in groups of four or until a panel of four was accepted by both parties. The court's last question was a recitation of the *Zehr* principles, and then it asked each of the four potential jurors whether he or she accepted and understood the four principles as required by Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). The court repeated the *Zehr* principles in complying with Rule 431(b) eight more times.

¶ 7 During his opening statement, defense counsel did not indicate defendant was going to testify but did state he was going to present evidence defendant was not the shooter from eyewitnesses at the party. Defense counsel pointed out Brownlee, while at the scene, was unable to identify who shot him. He also noted no gunshot residue was found on defendant's hands, defendant's fingerprint was not found on the cartridge, and defendant did not have a motive to shoot Brownlee. Defense counsel concluded by stating the evidence would show defendant did not shoot Brownlee.

¶ 8 Before the State presented testimony, it introduced by stipulation the foundation for the 9-1-1 recording and the recording itself. After the recording was played, the State sought to admit the certified record of defendant's felony conviction. Defense counsel objected, stating its admission was premature. The circuit court admitted conditionally the certified record of defendant's prior conviction.

¶ 9 The State presented the testimony of (1) McNeal, an eyewitness; (2) Morris Franklin, a Peoria police officer; (3) David Smith, a Peoria police officer; (4) Lang, an eyewitness; (5) Wallace Johnson, a security officer at the Pierson Hills apartment complex; and (6) Jason Leigh, a Peoria police detective. Since the State's evidence is not at issue in this appeal and the prior appellate court order in this case sets forth the contents of that testimony (*People v. Williams*, 2016 IL App (3d) 150274-U, ¶¶ 7-13), we do not recite the State's evidence.

However, we do note defendant sought to impeach Lang with Lang's own affidavit but the trial court ruled the affidavit inadmissible because it was not timely disclosed.

¶ 10 Before Leigh's testimony, the State raised the admissibility of the certified record for defendant's prior felony conviction. Defense counsel noted, "I think we stipulated there was a prior conviction. Other than—I would object to any evidentiary support of that. It would draw too much attention to—." The circuit court cut defense counsel off and stated it would not give the certified record to the jury and would just tell the jury the parties had stipulated to the admission of a copy of defendant's conviction.

¶ 11 After Leigh's testimony, a stipulation was entered into evidence which provided the results of the gunshot residue test from defendant's hands indicated he "may not have discharged a firearm with either hand. If he did discharge a firearm, then the particles were removed by activity, were not deposited, or were not detected by the procedure." The stipulation also stated no fingerprints were found on the shell casings found at the scene. The circuit court also entered into evidence the stipulation regarding defendant's prior felony. The court instructed the jury defendant's conviction could only be considered for the fact he had a prior felony conviction. Thereafter, the State rested, and defense counsel moved for a directed verdict, which the court denied.

¶ 12 Before the presentation of defendant's evidence, the circuit court addressed the State's motion *in limine* to bar Howard's expert testimony on gunshot residue. Howard was to testify that, because a reasonable degree of professional certainty existed there would be some gunshot residue on a person's hand after shooting a weapon and defendant had no gunshot residue on his hand, defendant was therefore not the shooter. After hearing the parties' arguments, the court granted the State's motion and barred Howard's testimony.

¶ 13 Defendant presented the testimony of the following: (1) Ariel Ivory, an acquaintance of defendant's; (2) Anderson, an eyewitness; (3) Gregory, an eyewitness; (4) Leonard Schmidt, an eyewitness; (5) Tiffany Issac, an eyewitness; and (6) Brownlee, the victim. Anderson, Gregory, Schmidt, and Issac all gave similar testimony about a mysterious man in a hoodie or a hat shooting Brownlee. Brownlee testified he was not having a problem with defendant on the night of the shooting and had never had a problem with him. Brownlee heard scuffling and saw some people come from between the cars. He then heard a pop and realized he had been shot in the leg. When he looked up, Brownlee saw defendant and the gunman wrestling for the gun. When asked if he could identify the shooter, Brownlee stated, "Not in here. Not in here." Brownlee said Williams did not shoot him. On cross-examination, Brownlee admitted he told the detectives on October 26, 2013, when he was in the hospital, defendant shot him. He explained defendant was angry because Brownlee had taken his liquor. Defendant pulled a gun and shot Brownlee in the leg. Defendant then stood over Brownlee and threatened to kill him.

¶ 14 In rebuttal, the State recalled Leigh and presented the testimony of Michael Bornsheuer, an investigator with the Peoria County State's Attorney's Office. After the conclusion of the rebuttal evidence, defense counsel moved for a directed verdict. The circuit court denied his motion, and the attorneys made their closing arguments. Defense counsel argued a reasonable doubt existed he shot Brownlee given the weaknesses in the State's case, the lack of physical evidence connecting defendant to a gun, and the testimony of defendant's witnesses.

¶ 15 At the conclusion of the trial, the jury found defendant guilty of both charges. Defense counsel filed a motion for a new trial. At a joint March 2015 hearing, the circuit court

denied defendant's posttrial motion and sentenced him to consecutive prison terms of 18 years for aggravated battery with a firearm and 6 years for unlawful possession of a weapon by a felon.

¶ 16 Defendant appealed. On appeal, defendant argued (1) the State failed to prove him guilty beyond a reasonable doubt, (2) the circuit court erred when it refused to admit the Lang affidavit, (3) the court erred by rejecting defendant's gunshot residue expert, (4) he was denied effective assistance of counsel, and (5) the court committed plain errors during defendant's trial. The reviewing court affirmed defendant's convictions and sentences. *Williams*, 2016 IL App (3d) 150274-U.

¶ 17 In February 2018, defendant filed a *pro se* postconviction petition raising 11 claims. One of the claims asserted ineffective assistance of counsel based on counsel's failure to request an IPI instruction addressing the fact defendant did not testify. In June 2018, the circuit court advanced defendant's petition to the second stage of postconviction proceedings and appointed defendant counsel. Postconviction counsel filed an addendum to defendant's petition and argued, among other things, defense counsel was ineffective for failing to pursue the severance of the trial on the aggravated battery with a firearm and unlawful possession of a weapon by a felon charges.

¶ 18 The State filed a motion to dismiss defendant's petition and addendum. In May 2021, the circuit court held a hearing on the State's motion to dismiss. Thereafter, postconviction counsel filed a motion for leave to present supporting material. Postconviction counsel sought to have the court consider the case of *People v. Howard*, 2021 IL App (3d) 180441-U. In a May 13, 2022, written order, the court granted the State's motion to dismiss. The court considered the *Howard* decision and found it distinguishable.

¶ 19 On August 25, 2022, defendant filed a timely motion for leave to file a late notice

of appeal under Illinois Supreme Court Rule 606(c) (eff. Mar. 12, 2021), which this court granted. See Ill. S. Ct. R. 651(d) (eff. July 1, 2017) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 651(a) (eff. July 1, 2017).

¶ 20 II. ANALYSIS

¶ 21 Defendant appeals the dismissal of his postconviction petition at the second stage of the proceedings, contending he made a substantial showing of ineffective assistance of defense counsel. The State contends defendant forfeited these issues by failing to raise them on direct appeal. See *People v. English*, 2013 IL 112890, ¶ 22, 987 N.E.2d 371 (stating "issues that could have been raised on direct appeal, but were not, are forfeited"). However, in his postconviction petition, defendant asserted forfeiture should not apply to his postconviction claims because his counsel on direct appeal was ineffective for failing to raise the claims. See *English*, 2013 IL 112890, ¶ 22 (noting the forfeiture doctrine is relaxed where the forfeiture stems from the ineffective assistance of appellate counsel). Postconviction counsel's addendum is a continuation of defendant's *pro se* petition, and thus the blanket claim of ineffective assistance of appellate counsel applies to it as well. Thus, we address the merits of defendant's two postconviction claims raised on appeal. Additionally, we note our addressing defendant's claims renders meritless defendant's assertion of unreasonable assistance of postconviction counsel because it alleged counsel failed to preserve his ineffective assistance of defense counsel claims.

¶ 22 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq*. (West 2018)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007

(2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007. At the first stage, the circuit court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2018). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2018). If the court does not dismiss the petition, it proceeds to the second stage, where the court may appoint counsel for an indigent defendant. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008. At both the second and third stages of the postconviction proceedings, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. A substantial showing means the allegations, if proven at an evidentiary hearing, would entitle the petitioner to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35, 987 N.E.2d 767. In this case, the State did file a motion to dismiss, and the court granted that motion.

¶ 23 With the second stage of the postconviction proceedings, the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Postconviction Act. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). At this stage, "all well-pleaded

facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008). However, when a petitioner's claims are based upon matters outside the record, our supreme court has emphasized the Postconviction Act does not intend such claims be adjudicated on the pleadings. *People v. Simms*, 192 Ill. 2d 348, 360, 736 N.E.2d 1092, 1105 (2000). At a dismissal hearing, the court is prohibited from engaging in any fact finding. *Coleman*, 183 Ill. 2d at 380-81, 701 N.E.2d at 1071. Thus, the dismissal of a postconviction petition at the second stage is warranted only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 388, 701 N.E.2d at 1075. We review *de novo* the circuit court's dismissal of a postconviction petition at the second stage. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 24 This court analyzes ineffective assistance of counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). To obtain relief under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound

trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. The *Strickland* Court noted that, when a case is more easily decided on the ground of lack of sufficient prejudice rather than that counsel's representation was constitutionally deficient, the court should do so. *Strickland*, 466 U.S. at 697.

¶ 25 A. Severance of Charges

¶ 26 In his postconviction petition, defendant asserted trial counsel was ineffective for failing to move to sever the charges in this case. The State asserts whether to move to sever the charges is a matter of trial strategy and not deficient performance.

¶ 27 Section 114-8(a) of the Code of Criminal Procedure of 1963 governs the severance of criminal charges and provides the following:

> "If it appears that a defendant or the State is prejudiced by a joinder of related prosecutions or defendants in a single charge or by joinder of separate charges or defendants for trial the court may order separate trials, grant a severance of defendants, or provide any other relief as justice may require." 725 ILCS 5/114-8(a) (West 2012).

Whether to sever charges for trial rests within the trial court's sound discretion, and the court is to exercise its discretion "so as to prevent injustice." *People v. White*, 129 Ill. App. 3d 308, 315, 472 N.E.2d 553, 558 (1984).

¶ 28 In support of his contention the trial court would have granted a motion to sever, defendant cites *People v. Edwards*, 63 Ill. 2d 134, 140, 345 N.E.2d 496, 499 (1976), where the Illinois Supreme Court held the trial court abused its discretion by denying the defendant's

motion to sever an unlawful use of weapons charge from an armed robbery charge. The court explained a strong probability existed the defendant would be prejudiced in his defense of the armed robbery count since the weapons count required the State to prove a previous burglary conviction. *Edwards*, 63 Ill. 2d at 140, 345 N.E.2d at 499.

¶ 29 The *Edwards* decision did not analyze the issue of severance of charges in the context of an ineffective assistance of counsel claim. Defendant recognizes a defense counsel's decision to seek or not seek a severance of charges is generally regarded as a matter of trial strategy. See *People v. Poole*, 2012 IL App (4th) 101017, ¶ 10, 972 N.E.2d 340. However, he notes a defense counsel's performance has been found deficient where the defense counsel's strategy was unsound. See *People v. McMillin*, 352 Ill. App. 3d 336, 346-47, 816 N.E.2d 10, 19 (2004). "Generally, defense counsel are presumed to pursue sound trial strategies." *McMillin*, 352 Ill. App. 3d at 344, 816 N.E.2d at 17. That presumption is overcome when "no reasonably effective criminal defense attorney, confronting trial's circumstances, would engage in similar conduct." *McMillin*, 352 Ill. App. 3d at 344, 816 N.E.2d at 17.

¶ 30 We find defendant failed to make a substantial showing no reasonable criminal defense attorney would have declined to file a motion to sever. This court has recognized a major disadvantage of a severance is it provides the State with two bites at the apple. *Poole*, 2012 IL App (4th) 101017, ¶ 10. For example, "[a]n evidentiary deficiency in the first case can perhaps be cured in the second." *Poole*, 2012 IL App (4th) 101017, ¶ 10. As such, Illinois law has recognized "defense counsel may choose to pursue an 'all or nothing' trial strategy, in which the defendant is acquitted or convicted of all charges in a single proceeding." *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 28, 75 N.E.3d 503. Accordingly, even when the trial court would grant a motion to sever based on the facts of the case, a reasonable defense attorney may choose

to not file a motion to sever the charges. "The mere fact that an 'all-or-nothing' strategy proved unsuccessful does not mean counsel performed unreasonably and rendered ineffective assistance." *Fields*, 2017 IL App (1st) 110311-B, ¶ 28.

¶ 31 After reviewing the record, we disagree with defendant's assertion "nothing in the record suggests that trial counsel made a well thought out and strategic decision to not file a motion to sever." The record shows defense counsel's strategy was to demonstrate defendant was not the person who shot Brownlee. While the trial court did not allow Howard's testimony about gunshot residue and the lack of it on defendant's hand, defense counsel hired Howard, included Howard on defendant's witness list, and strenuously opposed the State's motion *in limine* to bar Howard's testimony. Moreover, in his opening statement, defense counsel stated the evidence would show defendant was not the shooter. He then called several witnesses who testified defendant was not the person who shot Brownlee, including Brownlee himself. We also disagree defense counsel made no attempt to minimize the prejudice to defendant caused by the prior felony conviction. Defense counsel objected when the State tried to admit the certified record of the felony conviction at the very beginning of the State's case. When the State again sought to admit the certified record of defendant's prior conviction, defense counsel noted the parties had stipulated to the fact defendant had a prior felony conviction but objected to any evidentiary support of it. In reply, the court noted the jury would not see the certified record. Thus, we find defense counsel did attempt to minimize the prejudice of the prior conviction to defendant.

¶ 32 Additionally, we do not find the *Fields* decision distinguishable from this case because defendant's counsel failed to file a motion *in limine* seeking to bar the admission of defendant's prior felony. In *Fields*, 2017 IL App (1st) 110311-B, ¶ 4, the defense counsel had

filed a motion *in limine* to bar the admission of two prior convictions of the defendant as impeachment evidence. The record in this case contains no evidence defendant wanted to testify, and thus impeachment of defendant's testimony was not an issue here. Moreover, after granting the defendant's motion *in limine* in *Fields*, the trial court asked the defense counsel how he intended to handle the armed habitual criminal charge, and the defense counsel responded he would agree with the State to stipulate to the fact the defendant had two qualifying prior convictions without specifying the exact nature of those convictions. *Fields*, 2017 IL App (1st) 110311-B, ¶ 4. As such, the offer to stipulate in that case was discussed on the record during pretrial because of the motion *in limine*. Thus, we disagree with defendant that defense counsel's stipulation at trial in this case was not evidence of an all or nothing strategy.

¶ 33 Moreover, the cases defendant cites in support of his argument are distinguishable from the facts in his case. In *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 58, 991 N.E.2d 396, the reviewing court found the defendant received ineffective assistance of counsel where defense counsel agreed to the joinder of the charges *in two separate cases*. In one case, the grand jury had indicted the defendant with two counts of unlawful possession of a weapon by a felon, and in the other, the State had charged defendant with misdemeanor domestic battery. *Johnson*, 2013 IL App (2d) 110535, ¶ 4. The domestic battery charge alleged the defendant repeatedly choked the victim and pushed her in the collarbone area, causing her to strike her back on a television entertainment center. *Johnson*, 2013 IL App (2d) 110535, ¶ 4. As such, the charges were not based on the same set of facts, and thus, the defense could not reasonably pursue an all or nothing strategy. Here, the unlawful possession of a weapon by a felon charge was brought in the same case as the aggravated battery charge and based on the same set of facts. Thus, unlike in *Johnson*, a reasonable defense counsel in this case could pursue an all or nothing

strategy.

¶ 34 In *People v. Williams*, 164 Ill. App. 3d 99, 116, 517 N.E.2d 745, 756 (1987), abrogated on other grounds by *People v. Morgan*, 197 Ill. 2d 404, 758 N.E.2d 813 (2001), this court agreed with the defendant his counsel erred by failing to file a motion to sever the unlawful use of a firearm by a felon from the other charges in the case. The court's only analysis on why defense counsel's action was erroneous was to cite *Edwards* and *People v. Bracey*, 52 Ill. App. 3d 266, 367 N.E.2d 351 (1977). *Williams*, 164 Ill. App. 3d at 116, 517 N.E.2d at 756. The court found defense counsel committed several other "unprofessional errors" but did not find the defendant was prejudiced by those errors due to the clearly overwhelming evidence of the defendant's guilt. *Williams*, 164 Ill. App. 3d at 116, 517 N.E.2d at 756. Given the brief analysis and brief summary of facts in the *Williams* decision, it is hard to determine why the reviewing court found defense counsel's performance was deficient for failing to file a motion to sever. Regardless, the *Williams* case was decided before the all or nothing approach was recognized as reasonable trial strategy.

¶ 35 Although unpublished, defendant cites *Howard*, 2021 IL App (3d) 180441-U, as persuasive authority and notes the trial court considered it. See *People ex rel. Webb v. Wortham*, 2018 IL App (2d) 170445, ¶ 27, 127 N.E.3d 106 (declining to ignore persuasive reasoning in an unpublished order discussed by the trial court). Regardless of its unpublished status, we find the case distinguishable. In *Howard*, 2021 IL App (3d) 180441-U, ¶ 29, the reviewing court found defense counsel had no sound defense strategy for failing to pursue the severance of the charges. There, when talking to the police, the defendant admitted to shooting the victim, and thus he had no hope of being found not guilty of unlawful possession of a weapon by a felon. *Howard*, 2021 IL App (3d) 180441-U, ¶ 29. Given that situation, the reviewing court found no strategic reason

existed to adopt an all or nothing approach or to avoid giving the State two opportunities to present its evidence against the defendant. *Howard*, 2021 IL App (3d) 180441-U, ¶ 29. Here, defendant did not admit to shooting the victim or possessing a weapon, and thus a guilty verdict for unlawful possession of a weapon by a felon was not a foregone conclusion. Thus, an all or nothing approach was a viable strategy in this case. Given the all or nothing approach was viable, the *Howard* court's discussion of the *Edwards* decision is irrelevant because defense counsel here made a strategic decision not to seek a severance that likely would have been granted under *Edwards*.

¶ 36 In analyzing the deficiency prong of the *Strickland* test, a strong presumption exists defense counsel's action or inaction "might have been the product of sound trial strategy." *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. Here, the record shows defense counsel had a clear strategy of attempting to show defendant was not the shooter and thus not guilty of both charges, and Illinois law recognizes an all or nothing approach to the severance of charges as reasonable trial strategy (*Fields*, 2017 IL App (1st) 110311-B, ¶ 28). Accordingly, we find defendant failed to make a substantial showing overcoming the presumption defense counsel's decision not to file a motion to sever the charges was sound trial strategy.

¶ 37 B. IPI Criminal No. 2.04

¶ 38 Defendant also contends defense counsel was ineffective for failing to request IPI Criminal No. 2.04. The State contends defendant did not make a substantial showing of both the deficiency and prejudice prongs of the *Strickland* test.

¶ 39 As to the prejudice prong, defendant failed to assert in the addendum to his postconviction petition how defense counsel's failure to request IPI Criminal No. 2.04 prejudiced him. Regardless, defendant cannot make a substantial showing of prejudice on the record before

us. IPI Criminal No. 2.04 instructs the jurors the fact the defendant did not testify must not be considered by them in any way in arriving at their verdict. During *voir dire*, which was the day before jury deliberations, the trial court accurately instructed the jury regarding defendant's right not to testify and to not consider defendant's choice not to testify in rendering a verdict. Moreover, in accordance with Rule 431(b), the court asked the jurors whether they understood and accepted four *Zehr* principles, including the principle defendant's choice not to testify could not be held against him. All of the jurors understood and accepted the principles. Thus, the principle contained in IPI Criminal No. 2.04 was one of the four principles which the jurors confirmed they understood and accepted. "We must presume the jury followed the law and instructions given." *People v. Nugen*, 399 Ill. App. 3d 575, 580, 926 N.E.2d 760, 765 (2010). Accordingly, we find defendant failed to make a substantial showing of ineffective assistance of counsel based on counsel's failure to request IPI Criminal No. 2.04.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the Peoria County circuit court's dismissal of defendant's petition at the second stage of the postconviction proceedings.

¶ 42 Affirmed.