2021 IL App (1st) 191194
No. 1-19-1194
Opinion filed August 31, 2021

FOURTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11 CR 15388
	)	
TERRELL RANDALL,	)	The Honorable
	)	Kerry M. Kennedy,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court, with opinion.
Justices Reyes and Martin concurred in the judgment and opinion.

OPINION

¶ 1 After a jury trial, defendant Terrell Randall was convicted of the first degree murder of Tonnisha Johnson. The jury also found that he personally discharged the firearm that caused Johnson's death. Defendant was sentenced to a total of 90 years in the Illinois Department of Corrections (IDOC).

¶ 2 On direct appeal, this court did not find persuasive defendant's claims, including his claim that the trial court erred by refusing to instruct the jury on second degree murder based on serious provocation. Specifically, this court found "there was no evidence of a serious

provocation in the record to support the giving of the instruction." *People v. Randall*, 2016 IL App (1st) 143371, ¶ 54. In addition, we found the evidence "overwhelming," where defendant testified under oath at trial that he shot the unarmed victim. *Randall*, 2016 IL App (1st) 143371, ¶ 62. Thus, we affirmed his conviction and sentence. *Randall*, 2016 IL App (1st) 143371, ¶¶ 73-74.

¶ 3 Defendant now appeals the second-stage dismissal of his postconviction petition, which is defendant's first petition. On this appeal, he argues: that his trial counsel was ineffective for informing jurors in his opening statement that second degree murder would be available to them as "an option," when it was not, and that appellate counsel was ineffective for failing to raise this issue on direct appeal.

¶ 4 For the following reasons, we do not find this claim persuasive and affirm the dismissal of his petition.

¶ 5 BACKGROUND

¶ 6 At trial, during opening statements, the State argued that defendant was on "a murderous rage." The evidence at trial established that defendant and his girlfriend, Tonnisha Johnson, went to a hotel room, where they drank alcohol, smoked marijuana, and engaged in sex, and that defendant subsequently shot Johnson in a parking lot near the hotel in the early morning hours of August 26, 2011, eventually causing her death. After shooting Johnson, defendant proceeded to a house where Amy Cartage, an ex-girlfriend of defendant, was staying. Defendant shot Cartage, as she stood outside the house. Although the evidence at trial showed that defendant shot two women during a relatively short period of time, the case on appeal concerns only the shooting death of Tonnisha Johnson. Cartage, the other woman shot by defendant, testified at trial.

¶ 7 In defendant's opening statement, defense counsel conceded that "[t]he facts are as the State said" and that defendant did, in fact, shoot Johnson and Cartage. However, he argued that what was "important" in this case was "what was in [defendant's] mind."

¶ 8 In his opening statement, defense counsel argued for both second degree murder and the affirmative defense of involuntary intoxication. Regarding second degree murder, counsel argued:

> "The evidence will show that *** [defendant] got involved in a fight, a physical as well as a verbal altercation with Miss Johnson. Which escalated and led them both to leave the hotel, at which point it escalated even further physically and verbally to a fight on the street, at which point he pulled the gun and he shot this woman. To that point there was no intent to murder.
>
> The law recognizes *** mitigation to the intent to kill. It's called second degree murder because an individual could be provoked to such an extent, to such an extent that he is no longer—no longer able to form the intent required to convict somebody of first degree murder[.]"

Later, counsel told the jury: "Second degree murder is always an option."

¶ 9 With respect to the defense of involuntary intoxication, counsel argued that, while at the hotel, defendant realized that he was intoxicated and Johnson admitted that she had given defendant three or four Ecstasy pills.[1] Counsel argued:

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[1]At trial, defendant testified that Johnson had admitted to him, prior to her death, that she had given him three or four Ecstasy pills. *Infra* ¶ 29.

> "Involuntary intoxication is a defense. It eliminates the requisite intent the State has to prove [defendant] of first degree murder. It wipes it out. He is not guilty of first degree murder."

In terms of supporting evidence for these defenses, counsel promised: "You are going to hear from [defendant], and he is going to explain what happened."

¶ 10 In conclusion, defense counsel asked the jury "to find [defendant] not guilty of first degree murder by reason of intoxication" and also "to consider second degree murder in this case due to the sudden and intense nature of the incident."

¶ 11 At trial, Tonia Worthen testified that she was the mother of the victim, Tonnisha Johnson, who was 28 years old in August of 2011. Worthen was living in Minnesota in 2011, while Johnson was living in Chicago. Mother and daughter talked on the phone every two or three days, including in the evening hours of August 25, 2011, prior to the murder. Johnson was speaking to her mother on a speaker phone, when Johnson told her mother she was with her friend Terrell, and a male voice said "my name is Terrell Randall." Worthen had never spoken with defendant before and had never heard of him at the time. At the end of the phone conversation, Johnson asked her mother to call back in 45 minutes at the same number, but Worthen did not have the opportunity to call back.

¶ 12 Worthen testified that she received another call from her daughter that same night around 1:30 a.m. Johnson said: "Mom, I am shot, mom. I can't breathe, mom." Then Johnson hung up the phone and Worthen tried to call her back, but Johnson did not answer. Worthen reported the incident to the police, drove to Chicago, and went to Christ Hospital. When she arrived there, Worthen observed her daughter lying in a bed with IVs in her arms and tubes in

her neck and mouth. Johnson was alive but unable to speak. Johnson died on September 6, 2011.

¶ 13 Amy Cartage testified that she was 22 years old at the time of the trial and had two children. She met defendant in February 2009, when she was 17 years old, and they began dating. Cartage and defendant split up the same year, and Cartage began to date a man named Kevin Newsome in July 2010. Defendant reconnected with Cartage in May 2011, at which time Cartage was pregnant with Newsome's child. At that time, defendant asked if he could date Cartage again, and she said no, although she said that they could be friends. Cartage gave birth to her first child in July 2011. After giving birth, Cartage discovered that Newsome was cheating on her, at which point her communications with defendant increased.

¶ 14 Cartage testified that she was spending the night at Newsome's house on the night of August 25 into August 26, 2011. That night, Newsome changed the voicemail on Cartage's phone to state, in his voice, "Hi. You have reached Mr. and Mrs. Newsome. Please leave a message." Cartage had a Cricket phone, for which she paid by the day. This phone expired around midnight. Even though it was disconnected, Cartage could still receive voicemails.

¶ 15 Cartage testified that she fell asleep at Newsome's house that night. She woke up around 4 a.m. to find that Newsome was not there, and she went outside to look for him. Cartage found Newsome asleep in a vehicle outside with another woman named Charmaine, who was in the driver's seat. Cartage knocked on the window of the vehicle and told Newsome to exit the vehicle. After Newsome exited, Charmaine drove away. Cartage and Newsome stood on the porch of Newsome's house and discussed how to fix their relationship.

¶ 16 During the conversation on Newsome's porch, Cartage turned and observed defendant walking toward her from the driveway. Defendant had a handgun pointed at them. Cartage

stepped down, put her arms out and said “no.” When Cartage said “no,” defendant pulled the trigger. Cartage observed the flash from the weapon, heard the gunshot, felt a burning sensation in her stomach and fell. She realized she had been shot when she looked down and observed blood. Then defendant shot Newsome, walked away, and drove off in his 1999 goldish-brown Malibu.

¶ 17 Cartage testified that an ambulance transported her to Christ Hospital, where she underwent surgery. Later that same day, Cartage realized she had received two voicemails from defendant. She had not listened to these messages before being shot. At trial, Cartage identified defendant’s voice on one of the voicemails, which was admitted into evidence and played in court before the jury. In the voicemail, defendant sounds angry that Newsome’s voice is on Cartage’s voicemail, and he states, “you’re going to play me like that.” On the voicemail, defendant calls Cartage names and threatens her. He says he is on the run from the police, but he is going to find her first. He ended the message by stating, “one of you all dying tonight.”

¶ 18 Cartage testified that she received a phone call from defendant on September 11, 2011. The call was recorded and also admitted into evidence and played for the jury. In the call, Cartage tells defendant she still loves him but begs him repeatedly to tell her why he shot her and why he shot Johnson. Defendant replies, “man, I don’t even know.” In the call, Cartage asks defendant what Johnson did to cause him to shoot her. He does not reply. During the call, defendant attempts to persuade Cartage to not testify against him. She replies that defendant shot her and she loves him, but she is going to testify. On cross-examination, Cartage testified that at some point defendant told her that he was drugged during the shootings.

¶ 19 Michael Narish, a crime scene investigator for the Illinois State Police, testified that he processed the crime scene of the Johnson shooting on August 26, 2011. The crime scene was

located on the east side of Cicero Avenue, just north of 154th Street in a parking lot. He received a call asking him to come to the scene at 2:30 a.m., and he arrived at 3:20 a.m. Upon his arrival, he was informed that the Oak Forest police had arrived to find a woman shot two times, and that paramedics had transported her to Christ Hospital. At the crime scene, he observed: a purse with the contents spilled out; a flip-flop shoe; a red, blood-like substance on the pavement; and two 9-millimeter Luger shell casings.

¶ 20 Sean Grosvenor, another Illinois State Police crime scene investigator, testified that he processed the crime scene of the Cartage shooting on South Honore Avenue in Markham on August 26, 2011. Grosvenor arrived at 6:35 a.m. and took a sample from a blood-like stain on the walkway leading up to the main entrance of the house in front of which the crime scene was located. He found a 9-millimeter Luger casing on the roof of the passenger's side of a red Nissan Sentra and a hole in the gutter on the east side of the entrance to the building. Grosvenor recovered a bullet from inside that gutter.

¶ 21 Oak Forest police investigator Casey Gallagher testified that on August 26, 2011, at 1:35 a.m. he received a call notifying him of a woman lying in the roadway in the South 15400 block of Cicero Avenue. He arrived to find a female victim, who was identified as Johnson, with an apparent gunshot wound to the abdomen. Johnson was breathing, conscious, and appeared to be in a lot of pain. She was moaning and having trouble communicating. Gallagher called for a paramedic unit. He asked Johnson what happened, and she replied "Terrell shot me." He asked, "who is Terrell?" and all the victim could say was "boyfriend." He asked her more questions, but she did not respond. Johnson's purse was in the parking lot, and her Illinois identification card was lying near the purse. There was a phone partially in the opened purse.

¶ 22 Oak Forest detective Robert Frias arrived at the 15400 block of South Cicero Avenue between 1:30 a.m. and 1:50 a.m. Other police and emergency personnel were on the scene and Johnson was in an ambulance. Frias entered the ambulance and attempted to speak to Johnson, who was being treated by paramedics while lying on her back on a stretcher and wearing an oxygen mask. Frias asked Johnson who shot her, and she said "Terrell." He asked for other information about Terrell, but she only responded by saying "Terrell." After Johnson stopped responding, she was taken to Christ Hospital. Frias followed the ambulance to the hospital, where he spoke to members of Johnson's family. After speaking to Johnson's family members, Frias determined that defendant was a suspect. An investigative alert was established for a 1999 gold or tan Chevy Malibu with a certain license plate number. The parties stipulated that, as of August 26, 2011, defendant was the registered owner of a gold or tan 1999 Chevy Malibu with that certain license plate number.

¶ 23 Frias testified that he became aware at 12:45 p.m. on August 26, 2011, that defendant's vehicle was located in Lansing, Illinois, at a Howard Johnson motel. Frias and other investigators went to the Howard Johnson motel and arrested defendant in the lobby. Inside of defendant's vehicle, Frias found a black metal 9-millimeter Interarms brand semiautomatic handgun. The firearm had one round in the chamber and three in the magazine. Officers searched defendant's motel room but recovered nothing of evidentiary value.

¶ 24 Jeffrey Parise, a firearms examiner for the Illinois State Police forensic science laboratory, tested the recovered ballistic evidence. Parise obtained the two fired Luger cartridge casings from the scene of the Johnson shooting, the fired bullet and fired Luger cartridge case from the Cartage shooting scene, and the firearm recovered from defendant's

vehicle. Parise opined that all of the fired evidence came from the firearm found in defendant's vehicle.

¶ 25 Dr. Adrienne Segovia performed the autopsy on Johnson. The parties stipulated at trial that Johnson was 28 years old, 5 feet 4 inches tall, and weighed 197 lbs. Johnson suffered two gunshot wounds to her back causing her death. The State rested after presenting this evidence.

¶ 26 Defendant testified on his own behalf that, in August 2011, he lived on the south side of Chicago with his mother and was attending Olive Harvey College. About a month and a half earlier, he had met Johnson and they had developed a sexual relationship. On August 25, 2011, Johnson called him and said she wanted to have some fun. He picked her up around 5 p.m., and they went to a liquor store, and then to the house of defendant's friend, Carmichael Upshaw, who lived at 78th Street and Essex Avenue in Chicago. Johnson was using defendant's phone to call people. Defendant and Johnson were drinking alcohol and smoking marijuana, when Johnson said she wanted some "X" (Ecstasy). Upshaw said he would obtain it if they gave him $50. Upshaw called a friend, and Johnson purchased the Ecstasy from him. Defendant gave Johnson the money to purchase the Ecstasy, but he never observed Johnson in possession of the Ecstasy that night. Although he never observed the Ecstasy itself, he knew Johnson had received it.

¶ 27 Defendant testified that he and Johnson next drove around and purchased more liquor. They then went to the Terrace Hotel in Oak Forest and obtained a room. At the hotel, they "started drinking and having a good time." They had purchased a fifth of Remy 1738, all of which they proceeded to drink, and they became intoxicated. At the hotel, Johnson said she had to make a phone call. Because her phone did not have any more minutes, she used

defendant's phone to call her mother. Defendant recalled speaking to Johnson's mother but could not remember what he said. At the hotel, defendant and Johnson engaged in oral sex.

¶ 28 Defendant testified that, about 15 minutes after engaging in oral sex, he went to the bathroom. When he came out of the bathroom, Johnson asked him why he had pictures of a girl on his phone. She was referring to pictures of Cartage, whom defendant described as his ex-girlfriend. Defendant had risqué pictures of Cartage on his phone. After observing the pictures, Johnson was upset and "flipped out," which led to a physical altercation between the two of them. Defendant testified that they were "tussling with each other"; "she was swinging on me, I was blocking like—I'm one-forty, she's like one-ten. So she was swing [*sic*] on me and I was blocking her and pinning her down most of the time, just laughing."

¶ 29 Defendant testified that, about 15 minutes later, he told her there was "something wrong, I'm sweating real bad, there is something wrong." As he described it, "my heart started beating real fast. It wasn't a feeling from drinking and weed, from marijuana." Defendant told Johnson to call an ambulance. In response, Johnson told him he was "being a p***, she only gave me three or four of 'em," by which he assumed she meant three or four of the pills. He was still panicking, and he hit her in the body, not the face. She swung back, but the fight did not last long. He could not breathe and they stepped outside for air. They walked to defendant's vehicle, and defendant asked Johnson to drive him to the hospital. She told him "no, you need to lighten up." He was asking her "why would you give me this stuff." She grabbed her cell phone and started calling people, saying she was going to get them to "F" defendant up. She called at least three or four numbers. At this point, they were in defendant's vehicle and he felt as though he had been drugged.

¶ 30 Defendant testified that, after making the calls, Johnson exited the vehicle and defendant followed. They were still arguing and pushing each other. Defendant carried a firearm as a means of protection from "the streets." He testified that he never had a plan of using the handgun on Johnson but only planned to have sex with her. Defendant testified that "the fight [was] escalating, and the next thing you know, I shot her." Defendant shot Johnson approximately 10 minutes after they exited his vehicle.

¶ 31 Defendant testified that he next went back to his vehicle and left. As he testified, "I didn't know what was going on. I have only known her for forty-five days, why would I—I didn't know what was going on." Defendant called Cartage. He described Cartage as not only his ex-girlfriend but also as his best friend, and he needed to talk to her. He left her a message. Defendant testified that there were "plenty of" calls, but that the State played only one of them at trial (the voicemail discussed above). When he called Cartage, he heard a man's voice on the phone, and that "really threw me over the top, and from then on, I just, I just snapped." He went to Cartage's house[2] but testified that he had no idea what he was going to do when he arrived. When he arrived, he observed Cartage and Newsome outside. He walked up to them and shot Cartage in the leg. He then entered his vehicle and drove around. He did not remember all the things that happened in detail. He testified that he did not want to kill Cartage and that he did not know where he was going when he was driving around:

> "Basically is,—I knew I was drugged, I know this for a fact. From one o'clock to four o'clock, two women getting shot, it is not me, it is really not. I mean, she probably painted murderous intentions, but no, that is not me. I love [Cartage], and I loved

[2] On cross-examination, defendant clarified that he shot Cartage at Newsome's house, not at Cartage's house.

[Johnson]. I didn't even, you know, I planned—I went to the hotel to have a good time, not to shoot anybody. Two hours later I would never believe it, two hours later I would have shot somebody."

¶ 32 On cross-examination, defendant testified that he had his handgun in the hotel room, but he changed his testimony and clarified that he did not bring his firearm to the hotel room but first grabbed it when he and Johnson were in his vehicle arguing, before they exited his vehicle and before he shot Johnson. He clarified that he shot Cartage at Newsome's house, not at Cartage's house. He admitted that he sent Cartage a message before coming to Newsome's house in which he called her "the dumbest b*** [he] ever met." Defendant testified that he spoke to police officers at some point about what happened but not to the Oak Forest Police Department the day after he was arrested. He testified that he never told the police that he was with a person named Rebee.[3] He did not know who Rebee was. He never told detectives that he was drinking 1800 Cuervo. He never told detectives that he dropped Johnson off at 173rd Street and Christopher. He did not tell the police that he went to the city to meet a person named Stevie. He did not tell the police that he went to 63rd Street and Merrill Avenue. He never told police that a girl named China cooked for him. Defendant further testified that he did not explain his actions on August 26, 2011, to Cartage during the September 11, 2011, call because his lawyer had told him not to talk about it.

¶ 33 On redirect examination, defendant's trial counsel asked defendant if he had given his license plate number, his name, and his identification card at both hotels he checked into on the night of August 25 and the early morning of August 26, 2011. After asking these questions,

[3]As described below, Oak Forest Police Officer Rich Belcher testified that defendant told the police that he was with a person named Rebee, and various other things referenced in this paragraph, after they arrested him.

defendant's trial counsel requested a sidebar and the jury was excused. At the sidebar, defendant's trial counsel explained that, while defendant had shown his own identification card to the hotel clerk, he had used a credit card that was linked to another person's account, although it had defendant's name on it. Defendant's trial counsel expressed concern that defendant's fraudulent credit card use was suggestive of other crimes, such as identity theft, and that the State would try to impeach him with such other crimes evidence.

¶ 34 At the sidebar, the State explained that defendant had signed the name of a different person, Joseph Jackson, at the Terrace Motel. When questioned by the hotel clerk about his signature, defendant said his name was Joseph Jackson. The State explained that there was a video of the transaction showing these facts. Although the State did not bring up the subject of defendant's use of false credit card and identification information on cross-examination, the State argued at sidebar that defendant's trial counsel had opened the door for this line of questioning on recross-examination. The State played the video of defendant checking in for the court at sidebar.

¶ 35 In response, defendant's trial counsel explained at sidebar that the point of asking defendant about checking in was to demonstrate that "there was nothing unusual about any of the events that led up to the fight which escalated to the actual shooting." Defendant's trial counsel argued that defendant would be prejudiced by other crimes evidence, which would not be relevant because the State's theory was not that the murder was planned. The State responded that the video showed that defendant was lying on the stand when he answered his counsel's questions about checking in at the hotel. Contrary to what defendant said, the video demonstrated that defendant used a fake name, and gave a fake license plate number and incorrect information about the model and year of his vehicle.

¶ 36 The court allowed the State to introduce the other crimes evidence on recross-examination. As the court explained at sidebar, the fact that defendant potentially committed perjury on redirect examination was "very relevant" for the jury in making a determination regarding his credibility.

¶ 37 When the jury returned, the State asked defendant if he had used his real name, his real license plate number, and his correct vehicle information when checking in at the Terrace Motel. Defendant testified that he did give his real name, his real license plate number, and his correct vehicle information to the hotel clerk. The State then introduced the receipt and registration card from the Terrace Motel. Defendant confirmed that it was the receipt from the Terrace Motel and that it contained the registration card that he filled out. He then testified that the name on the receipt was Joseph Jackson and that he gave a fake license plate number and a fake description of his vehicle, by saying that he drove a 1995 Chevrolet Caprice when he actually drove a 1999 Chevrolet Malibu. When the State asked defendant, "So when you answered those questions to your attorney you lied, is that correct?" he responded, "technically, it wasn't a lie."

¶ 38 On re-redirect examination, defendant explained the discrepancy in his identifying information at the hotel:

> "DEFENDANT: Okay, this is how it go. I got—I'm no saint, I was doing credit cards, I had a reader, I load up credit cards, I steal profiles.
>
> I had loaded up Joseph Jackson on my credit card. I didn't steal no credit card, use my credit card, loaded up another credit card, so whenever I swipe his credit card that name going to come up.

> I clearly—I never normally just check into a hotel, but [Johnson] wanted to stay with me that night, so this whole thing, I checked into the hotel with my credit card, and the credit card said [defendant's name]. But when you swipe the strip through the reader, it is going to say whoever's profile the—
>
> DEFENSE COUNSEL: The point [is], eventually you gave them your real identity?
>
> DEFENDANT: Yes, I did. The credit card was mine.
>
> DEFENSE COUNSEL: But the ID was given, right?
>
> DEFENDANT: Yes, it was.
>
> DEFENSE COUNSEL: So the clerk back at the hotel knew your real name, right?
>
> DEFENDANT: I used my real name and my real ID."

On re-recross-examination, defendant admitted that he signed the name Joseph Jackson on the receipt at the hotel. The defense then rested its case.

¶ 39 After defendant testified, the State called three witnesses in rebuttal. First, John Adams testified that he was the desk clerk at the Terrace Motel in Oak Forest, on August 25, 2011, when defendant checked in around 10 p.m. Adams asked defendant for $53 and his identification card. Defendant presented an identification card with the name Joseph Jackson and paid with a credit card in that name. Then he presented another identification card with the name Terrell Randall on it. Defendant had a gold vehicle and there was another person in the vehicle. Adams received no complaints about fighting or screaming from defendant's room. Sometime after midnight, Adams observed defendant on the outside security camera. Adams later observed a female exit defendant's vehicle and go past the office heading towards Cicero Avenue. Then defendant ran past the office towards Cicero Avenue. Adams testified that, at that point, defendant looked scared. Five or ten minutes later, Adams observed defendant go

back to his vehicle alone and drive away. The motel had a video surveillance system, and a video from that night was admitted into evidence and published to the jury. According to Adams, the video at 1:26 a.m. shows defendant going after the victim, and at 1:27 a.m. his vehicle leaves the lot with only defendant in it.

¶ 40 Next, Detective Frias testified that he observed defendant in Howard Johnson's parking lot when defendant was arrested and there were no visible injuries on defendant's face or body. Frias found no Ecstasy pills in the victim's purse or in her clothing.

¶ 41 Finally, Oak Forest police officer Rich Belcher testified that he interviewed defendant at 7:50 p.m. on August 26, 2011. He read defendant his rights. Defendant had no visible injuries on his face or his hands, which were the only parts of defendant that Belcher could observe. Defendant told him that, on August 25, he met Johnson at a park somewhere in Hazel Crest. They were drinking Cuervo 1800 Tequila. A friend or acquaintance of Johnson named Rebee came over and sat with them. Defendant had never met Rebee. Defendant left the park between 7 p.m. and 8 p.m. and dropped Johnson in the area of 173rd Street and Christopher Drive because she was sick from drinking. They left Rebee at the park. After dropping Johnson off, defendant drove to the area of 63rd Street in Chicago and met a friend named Steve, and they went to his house. Defendant did not know Steve's last name or address. A girl named China was at Steve's house and cooked them food. Defendant could not remember when he left Steve's house.

¶ 42 Additionally, the State introduced a certified copy of conviction for defendant from November 16, 2010, for the unlawful use of a weapon by a felon.

¶ 43 Following the close of evidence, the trial court held a jury instructions conference. The defense requested instructions on both involuntary intoxication and second degree murder.

Over the State's objection, the trial court agreed to give the involuntary intoxication instruction based on defendant's testimony that he believed Johnson may have given him some pills that caused his reaction. With respect to the second degree murder instruction, defense counsel argued that there was some evidence that defendant was acting under a sudden and intense passion resulting from a provocation. Specifically, counsel contended that the physical altercation between defendant and Johnson, combined with her deliberately drugging him and her threats to call some people to come and "F" him up, were a sufficient provocation, either as mutual combat or as a substantial physical injury or assault.

¶ 44 The trial court found that there was not even slight evidence to support a second degree murder instruction, reasoning that there was no adequate provocation where defendant's response was not at all proportional to Johnson's slapping him a few times. The trial court found that the altercation between Johnson and defendant did not amount to mutual combat, especially where defendant responded to the physical altercation with a deadly weapon. The court recounted defendant's testimony that the whole altercation between them had ended before he followed her with a firearm, and no reasonable person would find their interaction to be adequate provocation.

¶ 45 Within 15 minutes of starting deliberations, the jury sent back a note saying, "If we sign a not guilty verdict, will that bring down the charge to second degree murder? [In opening] statements defense asked for lower charge." The trial court responded, "No. You have all the instructions and all the verdict forms. Continue to deliberate."

¶ 46 Based on the foregoing evidence, the jury found defendant guilty of first degree murder and also found that defendant discharged a firearm proximately causing the death of Johnson. Defendant was sentenced to a total of 90 years in IDOC, which included 50 years for first

degree murder and 40 years for personally discharging a firearm that led to death. At sentencing, the State argued, and the trial court found, that the statutory aggravating factor for causing or threatening serious harm was present. On direct appeal, this court affirmed defendant's conviction and sentence.

¶ 47 After the direct appeal, defendant retained counsel who filed a postconviction petition alleging, among other things, that defendant's trial counsel was ineffective for telling jurors that second degree murder was an " 'option' " when it was "not." The petition was supported by a one-line affidavit from defendant averring that the petition's "contents" were "true and accurate to the best of [his] knowledge." Postconviction counsel subsequently filed an amended petition adding a claim that appellate counsel was also ineffective for failing to raise this issue, among others, on direct appeal. The amended petition was similarly supported by a one-line affidavit from defendant verifying the amended petition's contents "as true and accurate to the best of [his] knowledge."

¶ 48 In response to the State's motion to dismiss, defendant submitted a handwritten affidavit, in which he averred:

> "1. I, Terrell Randall, being first duly, sworn, swears the following facts are true:
>
> A. I am the defendant in this cause.
>
> B. I viewed police reports in this case which stated that the mother of Tonnisha Johnson, Tonia Worthem, told the police that on the day her daughter Tonnisha was shot, she received a voicemail indicating that her son had been shot.
>
> C. Immediately prior to the shooting, Tonnisha Johnson struck me 3 or 4 times in [the] head with both an open and closed fist.
>
> D. Tonnisha then called persons unknown [*sic*] and told them 'come f*** him up.'

E. At this I was in fear of serious bodily harm from both Tonnisha and these person or persons unknown."

Accompanying the above affidavit was a typed one-line affidavit from defendant averring that the "contents" of the handwritten affidavit were "true and accurate to the best of [his] knowledge."

¶ 49 On May 31, 2019, the trial court granted the State's motion to dismiss, and defendant filed a notice of appeal on the same day. This timely appeal followed.[4]

¶ 50 ANALYSIS

¶ 51 I. Postconviction Stages

¶ 52 Defendant submitted his petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)), which provides a statutory remedy for criminal defendants who claim that their constitutional rights were violated at trial. *People v. Edwards*, 2012 IL 111711, ¶ 21. The Act provides for three stages of review by the trial court. *People v. Domagala*, 2013 IL 113688, ¶ 32. At the first stage, the trial court may summarily dismiss a petition only if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2018); *Domagala*, 2013 IL 113688, ¶ 32.

¶ 53 At the second stage, counsel is appointed if a defendant is indigent. 725 ILCS 5/122-4 (West 2018); *Domagala*, 2013 IL 113688, ¶ 33. In the case at bar, defendant retained counsel prior to submitting his petition. After counsel determines whether to amend the petition, the State may file either a motion to dismiss or an answer to the petition. 725 ILCS 5/122-5 (West

[4] Postconviction counsel asked the trial court to appoint the State Appellate Defender to represent defendant on this appeal, which the trial court so ordered.

2018); *Domagala*, 2013 IL 113688, ¶ 33. In the case at bar, counsel filed an amended petition to add a claim of ineffectiveness of appellate counsel.

¶ 54 At the second stage, the trial court must determine "whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). If the defendant makes a "substantial showing" at the second stage, then the petition advances to a third-stage evidentiary hearing. *Domagala*, 2013 IL 113688, ¶ 34. At a third-stage evidentiary hearing, the trial court acts as fact finder, determines witness credibility and the weight to be given particular testimony and evidence, and resolves any evidentiary conflicts. *Domagala*, 2013 IL 113688, ¶ 34.

¶ 55 II. The Second Stage

¶ 56 Defendant's petition in this case was dismissed at the second stage.

¶ 57 The issue at a second stage hearing is whether the petitioner made a substantial showing such that an evidentiary hearing is warranted. *People v. Sanders*, 2016 IL 118123, ¶ 37. At the second stage, the allegations in the petition are "liberally construed in favor of the petitioner." *Sanders*, 2016 IL 118123, ¶ 31. "All well-pleaded factual allegations must be taken as true ***." *Sanders*, 2016 IL 118123, ¶ 37. "[T]here are no factual issues" at the second stage. *Sanders*, 2016 IL 118123, ¶ 31. "Credibility determinations may be made only at a third-stage evidentiary hearing." *Sanders*, 2016 IL 118123, ¶ 42.

¶ 58 At the second stage, a court considers only the proofs attached by defendant to his petition and the record of his original trial proceedings. *Sanders*, 2016 IL 118123, ¶¶ 45, 48. The Act requires a petitioner to attach to his petition "affidavits, records, or other evidence supporting the petition's allegations or state why the same are not attached." *Sanders*, 2016 IL 118123, ¶ 45 (citing 725 ILCS 5/122-2 (West 2014)). The court must accept as true both the

petition's allegations and its supporting evidence "unless they are positively rebutted by the record of the original trial proceedings." *Sanders*, 2016 IL 118123, ¶ 48.

¶ 59 When no evidentiary hearing is held, a reviewing court's standard of review is *de novo*. *Sanders*, 2016 IL 118123, ¶ 31 (a second-stage dismissal is reviewed *de novo*). *De novo* consideration means that we will perform the same analysis that a trial judge would perform. *People v. Carrasquillo*, 2020 IL App (1st) 180534, ¶ 107.

¶ 60 III. *Strickland* Test

¶ 61 On this appeal, defendant claims that his trial counsel rendered ineffective assistance due to remarks during his opening statement, and that his appellate counsel was ineffective for failing to assert trial counsel's ineffectiveness on this ground.

¶ 62 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the familiar two-prong *Strickland* test: (1) that his counsel's performance was deficient and (2) that this deficient performance prejudiced the defendant. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

¶ 63 Combining both the standard for a second-stage dismissal with the standard for ineffective assistance of counsel, a defendant at this stage must make (1) a substantial showing that counsel's performance was objectively unreasonable under prevailing professional norms and (2) a substantial showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *Domagala*, 2013 IL 113688, ¶ 36.

¶ 64 "A reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Enis*, 194 Ill. 2d 361, 376 (2000).

¶ 65 Although the *Strickland* test is a two-prong test, our analysis may proceed in any order. To prevail, a defendant must satisfy *both* prongs. *People v. Colon*, 225 Ill. 2d 125, 135 (2007); *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Thus, if a defendant cannot satisfy one prong, no further analysis is needed. *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 66 "The *Strickland* standard applies equally" to claims concerning trial and appellate counsel. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). If a defendant claims that appellate counsel was ineffective for failing to raise a claim of trial error, a defendant must show not only that appellate counsel's performance was deficient but also that there is a reasonable probability that the underlying claim of trial error would have succeeded on direct appeal. *Petrenko*, 237 Ill. 2d at 497. If the underlying claim would not have succeeded on direct appeal, then "there is no arguable legal basis" for defendant's claim of ineffective assistance of appellate counsel, and dismissal is "proper." *Petrenko*, 237 Ill. 2d at 501-02. For the reasons discussed below, we find that defendant's underlying claim would not have succeeded on direct appeal and, thus, there is no arguable basis for a claim regarding appellate counsel.

¶ 67 Defendant claims that his trial counsel was ineffective for making a promise to the jury during his opening statement that was not kept.

¶ 68 Normally, what to argue in an opening statement is a matter of trial strategy, and " 'matters of trial strategy are generally immune from claims of ineffective assistance of counsel.' " *People v. Custer*, 2019 IL 123339, ¶ 39 (quoting *People v. Dupree*, 2018 IL 122307, ¶ 44); see *People v. Logan*, 2011 IL App (1st) 093582, ¶¶ 56-57 (counsel's "chang[ing] his mind" about calling alibi witnesses promised during opening was a reasonable trial strategy after he discovered that "defendant had given [counsel] inaccurate information").

¶ 69 IV. Second Degree Murder

¶ 70 Specifically, defendant claims that his trial counsel was ineffective when counsel told jurors in his opening statement that second degree murder would be an option for them at the end of trial, and it was not.

¶ 71 To be found guilty of second degree murder, a defendant must prove a statutorily-specified mitigating factor by a preponderance of the evidence. *People v. Castellano*, 2015 IL App (1st) 133874, ¶ 149. However, before a jury may consider whether a defendant proved a mitigating factor by a preponderance, the jury must find, first, that the State proved beyond a reasonable doubt that defendant committed first degree murder. 720 ILCS 5/9-2(c) (West 2018); *Castellano*, 2015 IL App (1st) 133874, ¶ 3. On this appeal, defendant does not claim that the State failed in its initial burden of proving him guilty beyond a reasonable doubt of first degree murder.

¶ 72 Section 9-2 of the Criminal Code of 1961 (Code) provides for two forms of second degree murder, the first of which occurs when: "at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed." 720 ILCS 5/9-2(a)(1) (West 2018). The Code defines "[s]erious provocation" as "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2018); *People v. McDonald*, 2016 IL 118882, ¶ 59. The only acts that have been recognized by our supreme court as constituting a serious provocation are: (1) substantial physical injury or substantial physical assault; (2) mutual combat; (3) illegal arrest; and (4) adultery. *McDonald*, 2016 IL 118882, ¶ 59; *Castellano*, 2015 IL App (1st) 133874, ¶ 108.

¶ 73 In his opening statement, counsel appeared to argue for serious provocation based on (1) mutual combat or (2) substantial physical injury or assault. Counsel argued that defendant "got involved in a fight, a physical as well as a verbal altercation" with the victim, which

"escalated even further physically and verbally to a fight on the street, at which point he pulled the gun and he shot this woman. To that point there was no intent to murder." The only evidence that counsel promised in support of this defense was defendant's own testimony. Counsel promised: "You are going to hear from [defendant], and [he is] going to explain what happened."

¶ 74 However, when defendant testified, instead of supporting a claim of mutual combat or substantial assault, he undercut it. Instead of describing mutual combat or substantial assault, defendant testified that he was laughing at the victim's attempts to strike him. Defendant testified: "So she was swing[ing] on me and I was blocking her and pinning her down most the time, just laughing." Although the parties had already entered a stipulation agreeing that the victim weighed 197 pounds, defendant contradicted the stipulation and testified: "I'm one-forty, she's like one-ten."

¶ 75 We do not know what conversations counsel had with defendant that led counsel to believe that the evidence—namely, defendant's own testimony—would definitely support a claim of mutual combat or substantial assault. Defendant's affidavit in support of his postconviction petition[5] is more in line with such a defense than his trial testimony. In his affidavit, defendant averred, in relevant part:

> "C. Immediately prior to the shooting, Tonnisha Johnson struck me 3 or 6 times in [the] head with both an open and closed fist.
>
> D. Tonnisha then called persons unknown and told them 'come f*** him up.'

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[5]This affidavit was not attached to his original or amended petitions; rather, it was submitted in response to the State's motion to dismiss the petition.

E. At this I was in fear of serious bodily harm from both Tonnisha and these persons or persons unknown."

Although his postconviction petition averred that he "was in fear of serious bodily harm" from the victim, defendant testified at trial that her attempts to strike him were so pathetic that they made him laugh. The only other affidavits submitted in support of his postconviction claims were defendant's perfunctory one-line affidavits swearing to the truth of his petitions. However, defendant's amended petition merely recounted testimony and evidence from the trial record and did not supply any additional facts or information.

¶ 76 In the absence of an affidavit to the contrary concerning counsel's pretrial knowledge or preparation, we cannot find ineffective assistance where it was defendant's own testimony that failed to support the anticipated defense. The burden is on defendant to make a substantial showing at the second stage that would then require an evidentiary hearing to resolve any credibility disputes, and defendant has not satisfied this burden. See *Sanders*, 2016 IL 118123, ¶ 37. The one factual affidavit he submitted in support leaves no need for an evidentiary hearing because, even if every word of it is true, it does not make a substantial showing that it was counsel's performance that was deficient. Defendant has not overcome the "strong presumption that the challenged action *** may have been the product of sound trial strategy" at the time that it was made. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 80. "[C]laims of ineffective assistance of counsel must be judged *** not in hindsight, but from the time of counsel's conduct ***." *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002).

¶ 77 Defendant claims on appeal that counsel in his opening statement was arguing for a new and novel theory of the law, namely, serious provocation based on involuntary intoxication. That is a mash-up of two separate defenses. Although counsel did argue that the

two defenses—involuntary intoxication and substantial "fight[ing]"—enhanced and aggravated each other, he did argue for each defense. At the very end of his opening statement, he asked the jury "to find [defendant] not guilty of first degree murder by reason of intoxication that I described, as well as you need to consider second degree murder in this case due to the sudden and intense nature of the incident. Thank you." Thus, we find this argument unpersuasive.

¶ 78 Defendant emphasizes that, during their deliberations, the jurors sent out a note asking if second degree murder was an option. This jury note shows that the jury was paying close attention to the evidence and the arguments, but defendant himself had foreclosed the option of second degree murder with his own testimony.

¶ 79 For the foregoing reasons, defendant has not made a substantial showing that counsel's performance was objectively unreasonable under prevailing professional norms. See *Domagala*, 2013 IL 113688, ¶ 36. In addition, we cannot find a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. See *Domagala*, 2013 IL 113688, ¶ 36. The evidence of first degree murder in the case at bar was overwhelming, where defendant admitted under oath at trial that he shot the unarmed victim, that her attempts to strike him made him laugh, and that he was intoxicated after his voluntary use and consumption of alcohol and marijuana. Our prior opinion found the evidence "overwhelming" also based on the fact that defendant was "impeached due to both the false alibi he gave at the time of the arrest and his contradictory testimony during cross-examination." *Randall*, 2016 IL App (1st) 143371, ¶ 62. As a result, defendant has not made a substantial showing of either prong of the *Strickland* test.

¶ 80 CONCLUSION

¶ 81 In sum, we affirm the trial court's second-stage dismissal of defendant's postconviction petition.

¶ 82 Affirmed.

No. 1-19-1194

Cite as:	*People v. Randall*, 2021 IL App (1st) 191194
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 11-CR-15388; the Hon. Kerry M. Kennedy, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff, and Maggie A. Heim, of State Appellate Defender's Office, of Chicago, for appellant.
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