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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF	)	Appeal from the
ILLINOIS,	)	Circuit Court of
	)	Cook County.
	)	
Respondent-Appellee,	)	
	)	No. 16 CR 11329 01
v.	)	
	)	
RODOLFO SALAZAR,	)	Honorable
	)	Marc W. Martin
Petitioner-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the trial court’s dismissal of defendant’s claims of ineffective assistance of trial counsel was not against the manifest weight of the evidence, we affirm; where the trial court made no ruling on petitioner’s claim of ineffective assistance of appellate court counsel, we reverse and remand for further proceedings.
- ¶ 2 Rodolfo Salazar, petitioner-appellant, appeals from the dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2022)). On appeal, he contends that postconviction counsel’s assistance was not reasonable where she failed to make

the necessary amendments to overcome procedural bars and properly present his ineffective assistance of trial counsel claims and to present his claim of ineffective assistance of appellate counsel to the court.

¶ 3 For the reasons that follow, we affirm the trial court’s decision on defendant’s ineffective assistance of trial counsel claims and reverse and remand for further second stage proceedings on his claim of ineffective assistance of appellate counsel.

¶ 4 I. BACKGROUND

¶ 5 The facts of this case were set out in our decision on defendant’s direct appeal. We recite here only so much of those facts as is relevant to the issues on appeal.

¶ 6 Following a jury trial, defendant Rodolfo Salazar was found guilty of multiple counts of predatory criminal sexual assault of a child, aggravated criminal sexual assault, and child pornography and sentenced to a total of 85 years’ imprisonment.

¶ 7 At trial, E.B. testified that she was born on January 21, 2002, and that she lived with her mother and siblings. Defendant, who was the paternal uncle of her two younger siblings, assumed a “fatherly role” in the lives of E.B. and her siblings because their fathers were absent. E.B. and her siblings frequently spent the night at defendant’s house, particularly on Saturday, Sunday, Tuesday, and Wednesday nights.

¶ 8 In the summer of 2014, when defendant lived in Melrose Park and E.B. was “about” 11 years old, defendant began to “take advantage” of her when she was alone. Defendant instructed E.B. to photograph and record herself taking her clothes off and on in the bathroom. At an overnight visit that summer, E.B. was sleeping in defendant’s bedroom when he entered, climbed on top of her, pulled down her pajama pants, and inserted his penis into her vagina for five to six minutes.

¶ 9 On January 10, 2015, E.B. was staying overnight at defendant's house when he took "advantage" of her again. He recorded video of that sexual encounter and subsequent sexual encounters on one of his cell phones, a white Samsung, which E.B. identified as People's Exhibit 1. E.B. identified a disc containing videos defendant had taken of her as People's Exhibit 2. She testified the videos clearly and accurately reflected the events that took place between her and defendant on the dates the videos were recorded.

¶ 10 The State played the videos for the jury. E.B. testified that the first video showed defendant "setting up" as she entered the room on January 10, 2015. The second video, also from January 10, 2015, showed his penis and her vagina. E.B. testified the other four videos showed defendant's penis and her vagina on December 19, 2015, December 20, 2015, and February 10, 2016, and defendant's penis and E.B.'s mouth on February 21, 2016. E.B. testified she was "around" 14 years old in December 2015, but when the State suggested she may have only been 13 years old, E.B. agreed. E.B. testified that the video dated December 19, 2015, was taken at defendant's house in Franklin Park, although she believed he moved there in the summer of 2016. E.B. testified that in February 2016, she was 14 years old. E.B. testified defendant owned several Samsung and Apple phones but used the white Samsung in Exhibit 1 to record the videos. She recognized the phone as it had a cracked screen and she had seen the videos on the phone.

¶ 11 Cook County Sheriff's Police Department detective Sheryl Collins testified that an analysis of defendant's phone (Exhibit 1) revealed timestamped videos. January 10, and December 19, 2015, were both Saturdays; December 20, 2015, and February 21, 2016, were both Sundays; and February 10, 2016, was a Wednesday. On cross-examination, Collins testified she was certain that the evidence recovered from the phone was not "edited, altered, or changed in any manner."

¶ 12 Cook County Sheriff's Police Department sergeant and certified forensic examiner John Dziedzic testified that he examined two Samsung phones, one of which he identified in court as the white Samsung phone. Dziedzic performed two kinds of extractions on the phone: a logical extraction and a file system extraction. Dziedzic transferred the data he recovered from the phone, including video files, onto a disc he identified as People's Exhibit 4. As requested by the State, Dziedzic transferred six video files onto a separate disc he identified as People's Exhibit 2.

¶ 13 Dziedzic also extracted metadata associated with the video files, which provided information about when they were created, accessed, and modified. Dziedzic identified People's Exhibit 5 as a grid of the data associated with the six video files. From the file names of the videos, he identified their putative creation dates as follows: January 10, 2015 (two video files); December 19, 2015; December 20, 2015; February 10, 2016; and February 21, 2016. Based on other data regarding user activity on the phone, Dziedzic found it "highly probable" that the December 2015 and February 2016 dates of four of the videos were accurate.

¶ 14 Regarding the two videos dated January 10, 2015, Dziedzic noted the phone model of People's Exhibit 1 was not publicly available for purchase until March 2015. Dziedzic provided several explanations for how the January 2015 file dates could predate the phone model's March 2015 release, including that defendant could have had early access to the phone or the files could have been recorded on a different phone and moved to the white Samsung. Dziedzic also noted that it was possible that the phone's battery discharged in February 2016, causing the phone to revert back to the "factory time." Thus, "that video very well may have been taken at a different time."

¶ 15 On cross-examination, Dziedzic testified that the video file names were indicators from the "system" of when the videos were created. He testified that it was possible that a video dated

January 10, 2015, was not actually made on that date, and that the phone from which it was recovered reset itself sometime after February 21, 2016. Dziedzic stated that the modify dates on the files would be accurate as long as the system time of the device was accurate but agreed that a system reset could have affected the accuracy of the dates of the videos dated January 10, 2015.

¶ 16 On redirect examination, Dziedzic testified that, even if the system did reset itself after February 21, 2016, that would not change any information or file number, name, or path for a file that had already been created. The data within files already on the phone would remain unchanged even after a system reset.

¶ 17 Defendant testified that sometime after his brother and E.B.'s mother separated, defendant established a friendly relationship with E.B.'s family and allowed the children to stay at his house. Defendant and E.B. had a "more than good" relationship in which he did everything she wanted. As one of his jobs, defendant purchased broken cell phones to repair and resell. Defendant denied purchasing People's Exhibit 1. He stated it was not his phone but admitted owning similar phone models.

¶ 18 On cross-examination, defendant was shown the six videos. He identified himself in the two videos dated January 10, 2015. He acknowledged that one video showed him setting up a cellphone in a bedroom and the other showed him placing his penis in E.B.'s vagina. Defendant denied that People's Exhibit 1 was used to film the videos but testified he used a phone "similar to that."

¶ 19 Defendant admitted the December 2015 videos showed him having sex with someone but would not confirm it was with E.B. Defendant also questioned whether the December 20, 2015, video was recorded on that date. He testified the video dated February 10, 2016, showed him

placing his penis into E.B.'s anus. Defendant denied he was the man in the February 21, 2016, video with E.B., and that the video was taken in his house.

¶ 20 Following closing arguments, the jury was instructed and retired to deliberate. Here on appeal, defendant has raised three separate instances of “prosecutorial misconduct” related to the State’s closing argument. We have reserved recitation of those arguments for discussion later in the analysis section of our disposition.

¶ 21 The jury found defendant guilty on all counts and on appeal to this court, we affirmed. *People v. Salazar*, 2021 IL App (1st) 182036-U.

¶ 22 On November 7, 2022, defendant filed the instant initial petition for postconviction relief in which he raised three separate claims: (1) ineffective assistance of “trial counsel” for failing to “seek expert opinion,” (2) ineffective assistance of “trial counsel” for failing to object to “prosecutorial misconduct,” and (3) ineffective assistance of “appellate counsel” for “failing to brief that all [of his] charges were not proven beyond a reasonable doubt.”

¶ 23 On February 24, 2023, the trial court docketed the petition and appointed the public defender to represent defendant.

¶ 24 On August 16, 2024, postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) in which she certified that she had: (1) consulted with the petitioner; (2) examined the record of proceedings, including the common law record, report of proceedings and the appellate court record; (3) read the appellate court disposition in *People v. Salazar*, 2021 IL App (1st) 182036-U; and (4) considered petitioner’s “claims in his *pro se* postconviction petition including the ineffective assistance of trial counsel and the ineffective assistance of appellate counsel.” Counsel additionally certified that she would not prepare a

supplemental petition, and that she believed no amendments were necessary for presentation of petitioner's contentions.

¶ 25 On October 25, 2024, the State filed a motion to dismiss the petition. In the motion, the State argued that defendant claimed that he “received ineffective assistance of counsel for 1) failure to seek an expert opinion regarding the low quality of the video evidence received from a cell phone, and 2) failure to object to prosecutorial misconduct.” Regarding the video evidence claim, the State argued that because defendant testified at trial that he was in the video, it was “ridiculous” to fault the attorney for not having an expert testify about the poor quality of the video. The State concluded that, in light of defendant's own testimony, an expert witness would not have made a difference in the outcome of trial. With respect to defendant's prosecutorial misconduct claim, the State argued that because defendant had admitted culpability, it's statement that this was not a case of “who done it” was merely stating a fact based on the evidence.

¶ 26 Absent from the State's motion to dismiss was any mention of defendant's additional prosecutorial misconduct claim that in its rebuttal argument, (1) the State implied that based on the evidence, there was no longer the presumption of innocence and (2) the State improperly vouched for its expert witness. Significantly, the State's motion to dismiss does not include either an acknowledgment of or an argument regarding defendant's third postconviction claim of ineffective assistance of appellate counsel.

¶ 27 On January 10, 2025, the parties appeared for argument on the State's motion to dismiss. At the hearing, postconviction counsel confirmed that she had filed her 651(c) certificate, that she had reviewed defendant's petition, but that she was not filing a written response.

¶ 28 The State, in support of its motion to dismiss, stated that “[t]he petitioner presents two arguments,” and identified the first one as being a claim of ineffective assistance of counsel for

failing to call an expert witness regarding the “grainy nature of a phone video that was presented.” The other argument, as identified by the State, was that the trial court allowed the prosecutor to make an argument that “basically, because this is not a whodunit, he can say I don’t know who is in the video.”

¶ 29 Following the State’s argument, the court inquired as to whether the State was waiving forfeiture as “[c]losing arguments would have been apparent from the record.” The State, in response, stated that “[i]t should have been raised on the record,” however, the State did not put it in their motion. In reply to the State’s argument, postconviction counsel recounted her efforts on behalf of defendant, asked that the court “review the claims presented in [defendant’s] *pro se* petition to evaluate the merits, and upon that review, deny the State’s motion to dismiss.”

¶ 30 The following month, on February 21, 2025, the trial court proceeded with a ruling on the petition. Neither postconviction counsel nor the State accepted the trial court’s invitation to offer additional argument prior to the court’s ruling. Before ruling, the court set out the applicable rules governing the review and disposition of second stage postconviction proceedings and the parties’ burdens. The court then stated:

“Here the defendant has filed a postconviction petition of making two claims. The first was that his attorney was ineffective for failing to call a witness regarding a cell phone video. The second claim is also ineffective assistance of counsel and argues that his lawyer was ineffective for failing to object to argument made by the State during closing arguments at the jury trial.”

At the conclusion of ruling on the two claims, the court stated that the “[p]ost-conviction petition is dismissed in full.” The court’s written order indicates that the State’s motion to dismiss the petition was granted and that the petition was dismissed “for [the] reasons stated in open court.”

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 Before proceeding, we set forth the relevant legal principles which inform our analysis of this second stage dismissal.

¶ 34 A. The Post-Conviction Hearing Act

¶ 35 The Act allows a defendant to collaterally attack a conviction by asserting that it resulted from a substantial denial of his constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2022); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). “The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal.” *People v. Barrow*, 195 Ill. 2d 506, 519 (2001).

¶ 36 At the first stage of a postconviction proceeding, the trial court reviews the petition independently of the State, taking the allegations therein as true. *Hodges*, 234 Ill. 2d at 10. The court determines whether the allegations as presented in the petition are frivolous or patently without merit. *Id.* If the petition is not dismissed within the 90-day period after its filing, the circuit court must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2022). “Partial summary dismissals are not permitted by the Act, and if even one claim raised in a *pro se* postconviction petition is not frivolous or patently without merit, the entire petition must advance for further proceedings under the Act.” *People v. Rivera*, 198 Ill. 2d 364, 370-71 (2001).

¶ 37 At the second stage, the court may appoint counsel to represent an indigent defendant, and the State may file a motion to dismiss or an answer to the petition. *People v. Domagala*, 2013 IL 113688, ¶ 32 (citing 725 ILCS 5/122-4, 122-5 (West 2022)). To survive dismissal, the defendant must make a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); 725 ILCS 5/122-6 (West 2022). “The substantial showing of a constitutional violation

that must be made at the second stage is ‘a measure of the legal sufficiency of the petition’s well-pleaded allegations ***, which if proven at an evidentiary hearing, would entitle petitioner to relief.’ ” (Internal citations omitted.) *People v. Dupree*, 2018 IL 122307, ¶ 29. Accordingly, in reviewing the petition at this stage, the circuit court must not engage in fact-finding or credibility determinations but must take as true all well-pleaded facts that are not positively rebutted by the original trial record. *Domagala*, 2013 IL 113688, ¶ 35.

¶ 38 At this stage, should the State fail to either motion for dismissal of the petition or to answer, the petition proceeds to third-stage proceedings. *Pendleton*, 223 Ill. 2d at 472. The circuit court’s ruling on a second-stage motion to dismiss is reviewed *de novo*. *People v. Johnson*, 2024 IL App (1st) 220419, ¶ 65.

¶ 39 Finally, at the third stage, the defendant may present evidence in support of the petition. 725 ILCS 5/122-6 (West 2022). As in the case of second-stage proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). At a third-stage evidentiary hearing, where fact-finding and credibility determinations are involved, reversal of the court’s decision may only occur where the court’s decision is manifestly erroneous. *People v. Childress*, 191 Ill. 2d 168, 174 ((2000).

¶ 40

B. Arguments

¶ 41 Defendant presents two major contentions on appeal. He first contends that postconviction counsel was unreasonable for failing to make necessary amendments to overcome procedural bars and properly present his claims. In support of this contention, he presents two separate arguments. He first argues that counsel failed to provide evidentiary support for his claim that an expert should have been called to address the State’s video evidence or to explain why no supporting document was attached. As his second argument, he asserts that postconviction counsel failed to “reshape”

his ineffective assistance of counsel “for failing to object to prosecutorial misconduct claim” into an ineffective assistance of appellate counsel claim for failing to address the issue in his direct appeal. As his second contention, defendant argues that postconviction counsel was unreasonable for failing to present his claim of ineffective assistance of appellate counsel to the court.

¶ 42 Although postconviction counsel is routinely appointed at the second stage, there is no constitutional right to counsel in postconviction proceedings. *People v. Custer*, 2019 IL 123339, ¶ 30. Instead, in these proceedings, the right to counsel is a matter of “legislative grace.” *Id.* Thus, a postconviction defendant is entitled only to the level of assistance granted by the Act, which is labeled a “reasonable” level of assistance. *People v. Flores*, 153 Ill. 2d 264, 276 (1992). “Reasonable assistance” is a lower standard than the “effective assistance” to which a defendant is constitutionally entitled at trial and on direct appeal. *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 50.

¶ 43 In evaluating whether postconviction counsel provided reasonable assistance, we are mindful that counsel’s purpose is “not to protect postconviction petitioners from the prosecutorial forces of the State but to shape their complaints into the proper legal form and to present those complaints to the court.” *People v. Addison*, 2023 IL 127119, ¶ 19. To ensure that postconviction petitioners receive reasonable assistance, Rule 651(c) mandates specific duties that postconviction counsel is required to undertake in postconviction proceedings. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Specifically, counsel is required to certify that he or she has (1) consulted with the petitioner to ascertain his contentions of deprivation of constitutional rights, (2) examined the record of the proceedings at the trial, and (3) made any amendments to the *pro se* petitions that are necessary for an adequate presentation of the petitioner’s contentions. Ill. S. Ct. R. 651(c) (eff. July 1, 2017). Postconviction counsel’s certification of compliance with the rule “creates a

rebuttable presumption that counsel provided the petitioner with a reasonable level of assistance, absent an affirmative showing in the record.” *People v. Urzua*, 2023 IL 127789, ¶ 54.

¶ 44 The burden rests with the defendant to overcome the presumption of reasonable assistance by showing that counsel failed to substantially comply with the dictates of the rule. *People v. Gallano*, 2019 IL App (1st) 160570, ¶ 26. Where counsel fails to comply with Rule 651(c), a petitioner need not show that the omission caused him or her prejudice. *Addison*, 2023 IL 127119, ¶¶ 35, 38. Regardless of whether the issues raised in the petition have merit, where postconviction counsel fails to render reasonable assistance, remand is required. *Suarez*, 224 Ill 2d. at 52.

¶ 45 However, postconviction counsel is not required to raise new claims not advanced in the defendant’s *pro se* petition. *Pendleton*, 223 Ill. 2d at 476 (postconviction counsel may raise additional issues if he or she chooses, however, there is no obligation to do so); *People v. Collins*, 2021 IL App (1st) 170597, ¶ 40. In fact, counsel need not necessarily amend the *pro se* petition at all. *People v. Nesbitt*, 2023 IL App (1st) 211301, ¶ 37. Neither is counsel required to raise frivolous claims on the defendant’s behalf. *Gallano*, 2019 IL App (1st) 160570, ¶ 30.

¶ 46 In *People v. Davis*, 156 Ill. 2d 149 (1993), our supreme court discussed the scope of postconviction counsel’s duty under Rule 651(c). The court stated:

“The procedure demonstrates that it is the substance of the *petitioner’s* claims, in his initial post-conviction pleading, which, in the first instance, determines the fate of the petitioner’s claims. The post-conviction court’s determination concerning the merit of those claims is based solely upon the *petitioner’s* articulation of the same.

Post-conviction counsel is only required to investigate and properly present the *petitioner’s* claims. Had the legislature intended otherwise, it would, logically, have provided for the appointment of counsel prior to the filing of the original petition.

Counsel's responsibility is to adequately present those claims which the *petitioner* raises.”
(Emphasis in original.) *Id.* at 163-164.

Both the scope of duties of appointed counsel under Rule 651(c) and counsel's compliance with the rule are subject to *de novo* review. *People v. Frey*, 2024 IL 128644, ¶ 21.

¶ 47 We first address defendant's contention that assistance was not reasonable for counsel's failure to provide evidentiary support for his claim that an expert witness was required to address the lack of clarity in the State's video evidence. He maintains that the claim requires some offer of proof about what the expert could have testified to or how the expert could have otherwise aided the defense. He argues that “the claim required a showing of prejudice.” Citing *People v. Wallace*, 2018 IL App (5th) 140385, ¶ 30, defendant correctly notes that although counsel need not file an amended petition in every case, they must make the necessary amendments for adequate presentation of the defendant's contentions. He argues that postconviction counsel's failure to plead and provide support for his claim was unreasonable.

¶ 48 The State responds that defendant's claim is meritless because the decision of which expert witness to call or not call at trial is a matter of trial strategy, and besides, even had postconviction counsel identified a witness to rebut the State's evidence it would not have altered the outcome. The State recalls that defendant positively identified himself and his victim in the videos in question in his own testimony at trial. Hence, an expert's testimony regarding the quality of the video or the lack of identifiable faces would have been to no avail. Therefore, postconviction counsel had no duty to either identify an expert witness or to offer an explanation for the absence of an affidavit explaining the rationale for not presenting an expert.

¶ 49 We need not devote substantial time to this argument as it is totally lacking in merit. During the January argument on the State's motion to dismiss, postconviction counsel stated that she was

aware of defendant's claim that an expert should have been called due to the graininess of the video, the fact that there were no faces shown, as well as an issue regarding the date of the occurrence. She noted, however, that defendant testified in the matter and that she had reviewed the evidence, as well as consulted with the Forensic Clinical Services Department. Based upon her investigation, she elected not to hire an expert.

¶ 50 Our review of the record demonstrates that in his testimony, defendant admitted to sexual activity with the minor, and in that same testimony admitted that he had taken videos of that activity with cell phones. Moreover, the jury heard defendant's inculpatory testimony, as well as the testimony of E.B. In the face of the evidence presented at trial, we can think of no legitimate reason that postconviction counsel would attempt to marshal evidence in support of defendant's ineffective assistance of trial counsel claim. We agree with postconviction counsel's reasoning in not pursuing an expert. No amount of expert testimony on either the quality or dates of the videotaped evidence would have defeated defendant's own inculpatory testimony. As we stated earlier, postconviction counsel is not required to raise frivolous claims on defendant's behalf. *Gallano*, 2019 IL App (1st) 160570, ¶ 30. Based on our review, we find no basis to conclude that postconviction counsel's representation of defendant as it relates to expert testimony fell below the reasonableness standard on this issue.

¶ 51 Defendant next argues that postconviction counsel failed to "reshape" his ineffective assistance of trial counsel claim into an ineffective assistance of appellate counsel claim based upon appellate counsel's failure to raise the trial counsel ineffectiveness claim on appeal. Underlying this claim is defendant's argument that certain comments made by the State during closing argument amounted to prosecutorial misconduct, to which trial counsel failed to object. Trial counsel's failure to object amounted to ineffective assistance, a claim which appellate

counsel failed to raise on appeal. Now, at the postconviction stage, defendant argues postconviction counsel's representation fell below the reasonable assistance standard where postconviction counsel failed to "reshape" his trial court ineffective assistance claim into an appellate counsel ineffective assistance claim.

¶ 52 Citing *People v. Addison*, 2023 IL 127119, defendant argues that counsel's failure to amend the *pro se* petition to include appellate counsel's ineffectiveness or to otherwise argue against forfeiture of the issue amounted to unreasonable assistance. He maintains that, like in *Addison*, postconviction counsel needed to make the necessary amendments to his petition to overcome the procedural bars to the claims in his *pro se* petition.

¶ 53 The State responds that the trial court dismissed defendant's postconviction petition based on the substance of the claims and not based on defendant's procedural default. In distinguishing *Addison*, the State points out that it did not raise or argue procedural default in their motion to dismiss or at the associated hearing. The State notes that the trial court remarked that the State had waived any procedural default argument and further, during the hearing on the motion, the trial court remarked that no forfeiture argument appeared in the State's motion and that it was "too late."

¶ 54 We have reviewed the transcript of the January 10, 2025, hearing on the State's motion to dismiss. The following colloquy occurred:

“THE COURT: And the State is waiving forfeiture? Closing arguments would have been apparent from the record.

MR. MYER [ASSISTANT STATE'S ATTORNEY]: It should have been raised on the record Judge, and so I would agree that as well, but I didn't put [it] in my - -

THE COURT: It wasn't in your motion, so it's too late now.

MR. MYER: Yeah.”

¶ 55 Subsequently, on February 21, 2025, at the time of its ruling on the State’s motion, the trial court noted that although the issue could have been raised on direct appeal, it was not. Thus, the court stated that the issue was forfeited for purposes of postconviction proceedings. The court then immediately proceeded to note that the State has wide latitude in closing argument and that defendant had “failed to show that he was prejudiced by the State’s closing argument.”

¶ 56 Based upon our review of the record, particularly of the court’s comments at the January proceeding, it appears that the State waived any forfeiture claim related to defendant’s prosecutorial misconduct claim. We acknowledge the trial court’s comments during the February proceeding, but clearly, the court intended to honor the State’s waiver and to disregard any procedural bar, ultimately finding instead, that defendant failed to show prejudice.

¶ 57 As we have determined that defendant’s prosecutorial misconduct claim was not defaulted, we find *Addison*, upon which defendant relies, to be inapposite. Succinctly, in *Addison*, 2023 IL 127119, ¶¶ 24-25, postconviction counsel amended the *pro se* defendant’s petition to include his ineffective assistance of trial counsel claim but failed to include his previously included ineffective assistance of appellate counsel claim. The State argued that the claim was forfeited. *Id.* Counsel did not then make a routine amendment to the petition, which would have handily overcome the State’s forfeiture argument. *Id.* The trial court ultimately dismissed the petition without reaching the merits of the defendant’s ineffective assistance of appellate counsel claims. *Id.* Our supreme court, in reversing dismissal, held that postconviction counsel failed to shape the defendant’s claims into proper form, thereby rebutting the presumption of reasonable assistance as contemplated by Rule 651(c). *Id.*

¶ 58 Although we reject defendant’s procedural bar argument, we note that in the State’s motion to dismiss, it limited its argument to the State’s “who done it” comment. However, in his petition, defendant complains additionally about comments in which the State allegedly vouched for the veracity of its expert witness and also shifted the burden of proof to the defense. Notwithstanding the State’s omission of the alleged improper comments, we presume that the trial court, having stated that it had reviewed the record, was aware of each of defendant’s prosecutorial misconduct claims and determined that defendant had “failed to show that he was prejudiced by the State’s closing argument.”

¶ 59 Defendant, apparently entrenched in his argument regarding forfeiture, does not additionally challenge the court’s ruling on the merits of his prosecutorial misconduct claims. Here on appeal, as defendant fails to argue error on the merits, we deem any error in the trial court’s ruling on defendant’s prosecutorial misconduct claims forfeited and therefore need not address them. Forfeiture aside, we agree that defendant was not prejudiced by the State’s comments during closing argument. Thus, as we discuss below, postconviction counsel’s failure to “reshape” defendant’s ineffective assistance of trial counsel claim into one asserting ineffective assistance of appellate counsel did not render postconviction counsel’s assistance unreasonable.

¶ 60 It has long since been settled that a prosecutor has wide latitude in making a closing argument and may comment on the evidence and any fair, reasonable inferences it yields. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Even so, they may not argue assumptions or facts not based on the evidence. *Id.* In reviewing challenges to comments made during closing argument, we do not focus on comments in isolation, but we, instead, review the challenged comments in the context of the closing argument in its entirety. *Id.* Prosecutors are entitled to respond to comments the

defense makes during its closing argument that clearly invite a response. *People v. Kliner*, 185 Ill.2d 81, 154 (1998).

¶ 61 Pointing to the State’s “who done it” comment during closing argument, defendant argues in his petition that there was a reasonable probability that the “jury found him guilty because they wrongfully believed the case was not a ‘who done it’ and required an objection by trial counsel to preserve [defendant’s] right to a fair trial.” He notes that his defense at trial was that he was “not” the person in the videos presented to the jury.

¶ 62 We find no basis to conclude that the State’s closing argument went beyond the bounds of what was permissible. Again, the jury heard E.B.’s testimony, as well as defendant’s. They observed the videos and heard the voices of both defendant and E.B. in those videos. The jury was free to accept or to reject some or all of the videos as competent evidence of the charged offenses. Apparently, the jury found the videos, most of which depicted defendant in an offending posture, sufficient to support its verdict. The State’s “who done it” comment was a proper characterization of what the video evidence itself revealed.

¶ 63 Defendant next argues that the following comments, made in the State’s rebuttal argument, improperly shifted the burden of proof to the defendant.

“And from every single witness on that stand and actual evidence, videos, not just words.

We have proven our case in each and every single way. That is correct.”

Defendant maintains that these comments by the State implied that there was no longer a need to assume that defendant was presumed innocent.

¶ 64 In its closing argument, defense counsel stated:

“The State has made very specific allegations in this case. And they must prove each one of those elements beyond a reasonable doubt on every single element on every single charge.”

Taken in context, the State’s comments in rebuttal were an appropriate response to defendant’s closing argument.

¶ 65 Finally, defendant argues that the State improperly vouched for the veracity of the testimony of its expert witness, Dziedzic. He recites the following comments made by the State in its rebuttal argument:

“Yes he came here and as a true expert, and someone who’s truthful also told you that yes, this one was not available at some point and at some point it reset itself.

* * *

And as a good expert, someone who is incredibly truthful and smart, he told you I looked.”

¶ 66 We believe that the State’s comments made during rebuttal were a proper response to defendant’s earlier comments. In his argument, defense counsel stated:

“Sergeant Dziedzic, who I think that we can all agree is an expert in his field. You heard defense stipulate that he is an expert in his field. But what he couldn’t say with one hundred percent certainty, and despite the State’s argument that we don’t need a hundred percent, beyond a reasonable doubt is one hundred percent.”

¶ 67 Based upon our review of the record, the State’s comments did not exceed the bounds of what was permissible. Thus we, like the trial court, do not find that defendant was prejudiced by the State’s closing argument. Accordingly, we must reject defendant’s claim of unreasonable

assistance of postconviction counsel for failing to reshape his trial counsel ineffectiveness claim into an appellate counsel ineffectiveness claim.

¶ 68 As his second contention on appeal, defendant argues that the trial court's failure to address his claim of ineffective assistance of appellate counsel was error, requiring remand of these proceedings. The State argues that the trial court dismissed the petition in its entirety, and that this court should affirm the court's disposition. Rather than concede that the court made no ruling on defendant's third claim, which is what the record clearly reflects, the State offers a series of meritless bases upon which it apparently believes support affirmance of the court's dismissal of the petition in its entirety.

¶ 69 The following is a sampling of the State's argument in support of affirmance: (1) at the first stage of the proceedings, the court found defendant's ineffectiveness claim frivolous and patently without merit and therefore postconviction counsel could not have reframed the claim to make it meritorious; (2) given defendant's trial admissions, advocating that the trial evidence was insufficient to convict "was a fool's errand" incapable of satisfying the tests in *Strickland*; (3) although both the trial court and the State only verbally acknowledged two claims of ineffective assistance of trial counsel, the State's motion to dismiss sought to dismiss the petition in its entirety, "without qualifiers," including the ineffective assistance of appellate counsel claim; (4) even though the trial court did not address the third claim in its oral dismissal ruling, it unquestionably dismissed defendant's petition "in full," which necessarily included the ineffective assistance of appellate counsel claim; (5) postconviction counsel presented the claims it deemed of arguable merit and elected not to present the one wholly rebutted by the record; and, finally (6) remand for further proceedings on defendant's third claim would be "inappropriate because there is nothing outside the scope of the record that would cure the fatal defect in defendant's position."

¶ 70 We reject the State's several bases for affirmance. Clear from the record is that the State presented argument for dismissal of only two of defendant's claims in his postconviction petition. During hearing at the second stage, and prior to announcing its ruling, the court offered both parties the opportunity to argue. Neither party accepted, deciding instead to stand on their written pleadings. The court then expressly stated that it had two claims before it, trial counsel's failure to obtain an expert witness to offer testimony on quality of the video evidence and trial counsel's failure to object to instances of prosecutorial misconduct. At no time did either postconviction counsel or the State remind the court of the defendant's third claim, ineffective assistance of appellate counsel. Thus, we conclude that there was no ruling on defendant's third claim, notwithstanding the State's present expressed intent or its characterization of the court's ruling to the contrary.

¶ 71 We know of no authority, and the State cites to none, where, even before the State has had an opportunity to motion for dismissal, the trial court may exclude from advancement any single claim among others to be advanced. We are mindful that even if one claim has merit, the entire petition must advance. *Rivera*, 198 Ill. 2d at 370-71 (partial summary dismissals are not permitted by the Act, and if even one claim raised in a *pro se* postconviction petition is not frivolous or patently without merit, the petition, in its entirety, must advance for further proceedings). Further, the State's argument that counsel could not reframe the argument to render it meritorious as a basis upon which to find postconviction counsel's assistance reasonable has been rejected by our supreme court on more than one occasion. See *People v. Jones*, 43 Ill. 2d 160, 162 (1969) ("We have held it to be error to dismiss a post-conviction petition on the pleadings, *** where there has been inadequate representation by counsel, though the Pro se petition itself fails to present a substantial constitutional claim." (Citations omitted.)).

¶ 72 Additionally, where there has been neither a motion to dismiss a particular claim, nor a ruling by the court on the same, we believe it premature for this court to remark on its merits. Such would have been appropriate for the State in crafting its motion to dismiss. For this court to do so here would run afoul of settled case law which holds that upon a finding that postconviction counsel failed to render reasonable assistance, remand is required regardless of the merits of the claim. *People v. Carson*, 2024 IL App (1st) 221644, ¶ 22 (where there is a question as to whether postconviction counsel rendered reasonable assistance, remand is required regardless of whether defendant's claims have merit); *Addison*, 2023 IL 127119, ¶¶ 35, 41, 44 (where postconviction counsel fails to comply with dictates of Rule 651(c) to provide reasonable assistance, remand is required, irrespective of whether the claims have merit); *People v. Madison*, 2023 IL App (1st) 221360, ¶ 48 (same).

¶ 73 Accordingly, whether defendant's claim can satisfy the requirements of *Strickland*, as questioned by the State, is a matter which, in the first instance, lies with the trial court. See *People v. Burrows*, 148 Ill. 2d 196, 232 (1992) (to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate objectively unreasonable performance and prejudice). We make no pronouncements here on the merits of defendant's ineffective assistance of appellate counsel claim.

¶ 74 Further, we glean from the record, which we have reviewed in its entirety, the intent of the court and the parties in addressing defendant's postconviction petition. At the January proceeding, the court clearly stated that it had two allegations before it, both of which concerned assistance of trial counsel. In dismissing the petition, it appears to us that the court continued to perceive and, intended to dismiss two claims, not three. The same reasoning applies to the State's motion to dismiss as well as to its argument at the hearing on the petition. The State apparently overlooked

defendant's third claim, and in moving for dismissal, sought to dismiss only defendant's claims of ineffective assistance of trial counsel. Had the State intended dismissal of defendant's third claim, the opportunity to do so was available once the petition was advanced to the second stage.

¶ 75 We reject out of hand that postconviction counsel "elected" not to present defendant's third claim. The assertion is rebutted, not only by the Rule 651(c) affidavit, but also by counsel's comments to the court. In her affidavit, counsel certified that she had considered defendant's claim, including the "ineffective assistance of trial counsel and the ineffective assistance of appellate counsel;" that she would rely on the claims as asserted in the petition and that she did not believe any amendments necessary for adequate presentation of defendant's contentions. As we read postconviction counsel's certification, she intended that all three of defendant's ineffective assistance claims, for both trial and appellate counsel, move forward. She made no contrary indication to the court at the time of either the January or February proceedings.

¶ 76 Finally, we reject the State's position that remand in this case would be inappropriate because "nothing outside the scope of the record can cure the fatal defect in defendant's position." As our supreme court noted in *Suarez*, 224 Ill. 2d at 51-52, we are not inclined to address questions that are properly determined in the first instance by the circuit court. Should the circuit court determine that further proceedings beyond the second stage are required for final disposition of defendant's claim, that is a determination which, in the first instance, is for the circuit court to decide.

¶ 77 Generally, claims of unreasonable assistance of postconviction counsel are reviewed against the backdrop of Rule 651(c). However, Rule 651(c)'s certificate requirement is not the exclusive mechanism for ensuring reasonable assistance. *People v. Smith*, 2022 IL 126940, ¶ 25 (an attorney's admitted lack of preparation for the dismissal hearing deemed to fall short of the

rule's reasonable assistance requirement); *People v. Jean*, 2024 IL App (1st) 220807 (postconviction counsel's presentation of a substantive claim, raised for the first time at hearing on the State's motion to dismiss was deemed not reasonable assistance). Clearly, postconviction counsel's failure to react to the State's failure to move for dismissal of defendant's third claim, and her failure to draw the court's attention to overlooking the claim cannot be deemed reasonable assistance. No amount of amending the petition for "adequate presentation of the defendant's contentions" matters if postconviction counsel then fails to ensure the court's notice and proper consideration of the same.

¶ 78 Here, after certifying to the court that she had reviewed the petition and that she believed the petition sufficiently set forth defendant's bases for relief, without amendment, we believe that it was incumbent upon counsel, who was present during both oral argument and the court's ruling on the petition, to, at the very least, bring to the court's attention the existence of defendant's third claim in support of postconviction relief. We are hard-pressed to conclude that counsel's duty to "adequately present" defendant's claims did not include the duty to ensure that, at the second stage of the proceedings, the court was aware and gave due consideration to each of the claims asserted in the petition. Thus, as it relates to defendant's third claim, we believe that defendant did not receive reasonable assistance.

¶ 79 We find instructive *People v. Wilson*, 39 Ill. 2d 275 (1968), a case decided prior to the 1969 amendments to Rule 651(c) which implemented the supreme court's decisions with respect to the duties of postconviction counsel. Ill. S. Ct. R. 651, Committee Comments (rev. Nov. 30, 1984); see, e.g., *People v. Garrison*, 43 Ill. 2d 121 (1969); *People v. Jones*, 43 Ill. 2d 160 (1969); *People v. Slaughter*, 39 Ill. 2d 278, 286 (1968). In *Wilson*, the defendant filed a postconviction petition, which the circuit court dismissed upon the State's motion. 39 Ill. 2d at 276. In his petition, the

defendant asserted that at trial, his constitutional rights had been violated based on, *inter alia*, the prosecution's intimidation of a witness who testified against the defendant to avoid being charged with perjury and a jail sentence. *Id.* On appeal of the dismissal order to our supreme court, the defendant asserted that representation by the assistant public defender who appeared on his behalf in the postconviction proceedings was "so inadequate as to violate his constitutional rights." *Id.* at 276-77. We note in passing that prior to the 1971 amendments to Rule 651, appeals in postconviction proceedings were directly to the supreme court. Ill. S. Ct. R. 651, Committee Comments (rev. November 30, 1984).

¶ 80 The supreme court observed that the record showed that at the hearing on the motion to dismiss the petition there was no mention of any of the defendant's postconviction petition allegations and that postconviction counsel said nothing at the hearing. *Wilson* at 277. The State identified the judge who had accepted the defendant's guilty plea and described the sentence imposed for the offense. *Id.* The trial court then dismissed the petition. *Id.*

¶ 81 Although the supreme court deemed reversal to be the proper remedy, the court expressed no opinion on the merits of the defendant's postconviction contentions, or whether he had waived any of his claims. *Id.* at 277. The court stated merely that the defendant was entitled to the assistance of a lawyer in the presentation of his original petition or in the preparation of an amended one if amendment was indicated. *Id.* Accordingly, because the defendant did not receive the "assistance of counsel," the judgment was reversed and the cause remanded for further proceedings.

¶ 82

III. CONCLUSION

No. 1-25-0343

¶ 83 For the reasons stated, we affirm the trial court's judgment on defendant's ineffective assistance of trial counsel claims and remand the case for appointment of new counsel and second stage proceedings on his claim of ineffective assistance of appellate counsel.

¶ 84 Affirmed in part, reversed in part and remanded.