2026 IL App (1st) 240752-U

No. 1-24-0752

Order filed October 8, 2026

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

AARON RUTIGLIANO,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County
No. 15 CR 0333801
The Honorable Sophia Atcherson, Judge, Presiding

JUSTICE OCASIO delivered the judgment of the court.
Presiding Justice Lyle concurred in the judgment.
Justice Navarro dissented.

ORDER

¶ 1 *Held*: Defendant's postconviction petition and its supporting documentation made a legally sufficient showing that he was denied his right to the effective assistance of counsel by trial counsel's failure to present expert testimony supporting defendant's imperfect self-defense theory.

¶ 2 Aaron Rutigliano was convicted of the first degree murder Antonio Gamboa after a jury rejected his testimony that he acted in response to his subjective perception that he was in deadly peril. In this postconviction proceeding, he alleges that trial counsel was ineffective for not

competently presenting and supporting the theory that he was guilty only of the mitigated offense of second degree murder. The circuit court dismissed the petition on the State's motion after finding that it did not make a substantial showing that Rutigliano was denied effective assistance. We find that the petition's allegations and supporting evidence, taken as true, make out a legally sufficient claim of ineffective assistance, so we reverse and remand for an evidentiary hearing.

¶ 3 I. BACKGROUND

¶ 4 A. Gamboa's Killing

¶ 5 On February 1, 2015, Darud Akbar and his girlfriend Mia McNair hosted a Super Bowl party at Akbar's condo in the South Loop. McNair, who worked at a restaurant, invited several coworkers: Danielle Fernandez, Daisy Martinez, Gianna Pena, and Breanne Lash. Fernandez and Martinez brought their boyfriends, Rutigliano (who was dating Fernandez) and Gamboa (who lived with Martinez). Rounding out the group were Akbar's niece Dawn Moore and McNair's friend Shiquetta Ector.

¶ 6 At the party, Rutigliano indulged in some spiked punch and a marijuana blunt that several attendees shared. Nothing unusual happened during the first half. After the halftime show, Fernandez asked Rutigliano whether he wanted to leave to go to another party they had been invited to. He declined.

¶ 7 Not long after that, something changed. Rutigliano began whispering urgently to Fernandez that they had to leave and squeezing her arm uncomfortably hard. She asked him why they had to go, and he insisted that she knew why. His statements became stranger, saying something about needing "to put the weed in a box" or else someone might try and kill him. Then they became alarming. "[T]his is what I've been training for," he told her. "[W]e could kill them all." He slowly took a knife that was on the kitchen counter next to them and put it in his back pocket.

¶ 8 The back-and-forth between Rutigliano and Fernandez had started attracting the other partygoers' attentions. Although the witnesses differed as to the details, there was no dispute that they both went to the floor. According to Rutigliano, it was because she pushed away from him,

causing both to fall. According to everyone else, it was because he forcibly restrained her by her arm or by her hair and then pushed her when she tried to get away. Three of the others—Pena, Martinez, and Gamboa—rushed to Fernandez's aid. Rutigliano testified at trial that his glasses fell off during the fall, so all he saw was "everyone closing in." Pena grabbed him by the shoulders to pull him away, and he swung the knife, which was now in his hand, around at her, lacerating her abdomen. Rutigliano shoved Martinez away, cutting her hand in the process.

¶ 9 Then Gamboa came up. One witness (McNair) testified that he pushed Rutigliano from behind, while another (Moore) testified that he just gave him a calming touch on the forearm. Rutigliano testified that someone grabbed him from the side. Whatever the truth, Rutigliano turned and attacked Gamboa. He pushed Gamboa against a wall, held him against it by the neck, and started stabbing him in the face, the chest, and other parts of his body. Martinez hurled a glass vase at Rutigliano, hitting him in the head. When he did not respond to the first one, she threw another. After stabbing Gamboa more than 20 times, Rutigliano released him, and he slumped to the floor.

¶ 10 Some of the partygoers, including McNair and Akbar, had remained on the couch they were sitting on. Rutigliano turned toward them. He grabbed McNair when she tried to flee, prompting Akbar to tackle him. Even after Akbar had wrestled him to the ground, Rutigliano continued struggling to break free. In an effort to subdue him, Akbar and McNair each stuck kitchen knives in his stomach. It had no effect. It took Akbar and McNair's combined efforts to keep Rutigliano pinned to the ground until paramedics and police arrived, and Akbar refused to get off of him until an officer handcuffed Rutigliano. Still, it took eight people to get him on a gurney, as he fought relentlessly, kicking and trying to bite the paramedics. Even after being strapped to the gurney, he continued trying to escape his restraints. According to one of the paramedics, Rutigliano was disoriented and combative, resisting their efforts to get him to the hospital for treatment despite having two knives in his torso.

¶ 11 Several witnesses surmised that Rutigliano was not in his right mind. Fernandez gave a videotaped statement in which she said she "knew something was very wrong" and that Rutigliano was "babbling and talking crazy" before "freaking out." Ector testified that he looked like he was

possessed. Moore said that he was "a little hysterical" or "angry." Martinez testified that he was "talking crazy" while pinned to the ground. Akbar heard him yell "all different kind[s] of things," some that were among the craziest things he had ever heard. Rutigliano called out for Fernandez and threatened to kill them all. He also asked Akbar and McNair why they were on him and asked if they could let him up. Some of the remarks were bizarre: "[S]ex is a drug," he yelled, and he also made unspecified remarks about Jesus. McNair testified that Rutigliano responded to being stabbed by yelling, "You can't kill me because I have diabetes. My blood is thick. You guys can't kill me."

¶ 12 B. Trial and Sentencing

¶ 13 During opening statements, defense counsel told the jury that there would be very little dispute about what happened that night, only about why it happened. He predicted that the evidence would show that Rutigliano "in a split second went crazy" and asserted that "[t]here wasn't anything to explain this event other than an individual absolutely lost it." He concluded by suggesting that "this is anything but a first degree murder."

¶ 14 Rutigliano testified in his own defense. Like the other witnesses, he testified that the party was uneventful during the first half of the game. He recalled taking five hits from one or two blunts that were passed around. He said that he smoked marijuana frequently (at the time, anyway) and that it normally made him feel "euphoric" and allowed him to think outside of the box. Around halftime, however, he started feeling unusual. He testified that he started feeling "incredible unease" in the pit of his stomach. A "wave" of tension came over him. His voice started to "cut off" like he had a lump in his throat. He started to panic and became afraid that he was going to be attacked or killed. Motivated by his rising fear, he slipped a knife from the kitchen counter into his back pocket.

¶ 15 He tried to convey what he was feeling to Fernandez, who was sitting next to him. His mouth had gone dry, and his voice was quavering. In a whisper, he told her that he was afraid that someone was going to attack him or even kill him and that they needed to leave. Fernandez was not

understanding what he was saying, so he reached out, held her arm, and leaned in close to tell her again. At trial, he acknowledged that he was being emphatic, but he denied grabbing her arm "real hard." She pulled away from him, and they both fell out of their chairs to the floor. He did not remember grabbing Fernandez by the hair or pushing or throwing her against anything.

¶ 16 Rutigliano testified that lost his glasses in the fall. That, combined with the fall itself, made his feeling of fear and panic go "through the roof." He started looking for them on the ground so he could see what was happening when someone came up from behind and grabbed him. He thought he was being attacked. Knife in hand, he turned and swiped it, trying to "fend them off." Another person came forward and attacked him, so he waved the knife in front of him to keep everybody away from him.

¶ 17 Yet another person—Gamboa, though Rutigliano did not realize it at the time—attacked him, grabbing him from the side. He and his perceived assailant wrestled. Rutigliano pushed him against the wall and started stabbing him. He testified that he "didn't aim for anything," but he acknowledged that he stuck the knife four inches deep into Gamboa's skull and stabbed him straight in the eye. He admitted that he continued stabbing until the person crumpled to the floor. He testified that, while he was grabbing and stabbing Gamboa, he believed that Gamboa was going to attack and harm him. He recalled watching his knife arm pull back and push forward and then seeing his opponent slumping to the ground.

¶ 18 Rutigliano testified that he took a step back and dropped the knife, and then someone attacked him from behind. They wrestled, rolling on the ground. Rutigliano was trying to escape, to get out of the apartment, but his attacker held him down. Another person came, and he was stabbed twice in the stomach, but he continued fighting. He did not remember the police and paramedics arriving, though he did recall people strapping him to a gurney. He tried to fight them because he thought they were trying to kill him.

¶ 19 Rutigliano testified that he was nearsighted and that he had astigmatism in each eye. He then identified a pair of glasses shown to him as one of several pairs that he had at the time he killed Gamboa, but not the pair he was wearing that night. After successfully offering the glasses as a

defense exhibit, counsel asked to publish them so the jury could pass them around and look through them. At a sidebar, the court sustained the State's objection that the glasses had not been disclosed in discovery. The defense moved for a mistrial, which the court denied. It told counsel that he could elicit Rutigliano's prescription. After the sidebar, Rutigliano testified that he had been prescribed contact lenses of −5.5 diopter in one eye and −5.75 diopter in the other. Asked to look at the closest juror without his glasses on, he explained that he could tell that someone was there but that what he saw looked like watercolor paints fading or bleeding together.

¶ 20 On redirect examination, Rutigliano testified that he did not attribute his feeling of terror or panic to his use of marijuana earlier that night and that he did not know what caused it.

¶ 21 The defense also called three character witnesses, all of whom had known Rutigliano personally or professionally for several years. They testified that he was calm, peaceful, and easygoing, and that the charged conduct was inconsistent with the person they knew.

¶ 22 At the instructions conference before closing argument, the defense asked for an instruction on unreasonable-belief second degree murder. The court indicated that it would give that instruction over the State's objection. Over the defense's objection, the court also indicated that it would instruct the jury that "[a] voluntary intoxication or drug condition is not a defense to the charges in this case."

¶ 23 The theory presented by the defense in closing argument was that something happened inside Rutigliano's mind that made him terrified that he was about to be attacked or killed, so he believed he was acting in self-preservation. Counsel conceded that this belief was wrong, but he argued that it was what Rutigliano's perception actually was at that time, and when his glasses fell off and people started surrounding him, it confirmed to him that "[t]he attack he feared was on." Counsel presented no theory as to what had happened to cause Rutigliano to descend into a fit of terror. "The case makes no sense and it never will make any sense," he argued. "Maybe science at some time in the future will be able to explain it to us but right now they're not able to come up with a conclusion." He asserted that Rutigliano "did not commit first degree murder" and asked the jury

to reach a verdict that "we can all live with." Counsel did not mention second degree murder or reference the instructions relevant to second degree murder.

¶ 24 About an hour and a half into deliberations, the jury asked the court, "To arrive at second degree murder[,] do you first need to agree to the first degree charge[?]" Ten minutes later, the jury asked the court whether the defendant being "not of sane [mind] *** would be considered a mitigating factor." With the agreement of both parties, the court declined to answer either question. Instead, it told the jury that it had had all of the instructions, and it directed the jury to follow those instructions and continue deliberating.

¶ 25 About an hour after receiving the court's responses, the jury reached a verdict. It found Rutigliano guilty of the first degree murder of Antonio Gamboa. It also found him guilty of aggravated battery to Gianna Pena, but it acquitted him on the charge that he attempted to murder her.

¶ 26 The court sentenced Rutigliano to 30 years for first degree murder consecutive to 2 years for aggravated battery.

¶ 27 C. Direct Appeal

¶ 28 On direct appeal, Rutigliano argued that (1) the evidence compelled a finding that he had proven imperfect self-defense by a preponderance of the evidence, and therefore was guilty only of second degree murder, and that (2) the trial court erred by instructing the jury that his voluntary intoxication was not a defense. *People v. Rutigliano*, 2020 IL App (1st) 171729, ¶ 1. The court affirmed. It unanimously found no error in the instruction that voluntary intoxication was not a defense to the charges, reasoning that it accurately stated the law and did not preclude the jury from considering evidence of Rutigliano's intoxication on his state of mind, including whether he believed (unreasonably or otherwise) that his actions were justified self-defense. *Id.* ¶¶ 72-73; *id.* at ¶ 90 (Mikva, J., concurring in part and dissenting in part). But the panel split on whether the evidence supported the jury's finding that he was guilty of first degree murder, not second degree murder.

¶ 29 The majority found that the jury's verdict was supported by the evidence, explaining that, while it was reasonable to infer from the evidence that Rutigliano acted out of fear, it was also reasonable to infer that he acted in anger and with the intent to kill unjustifiably. *Id.* ¶¶ 81-85. The dissenting justice did not agree that the evidence supported a reasonable inference that Rutigliano acted out of anger. In her view, the evidence, especially witness testimony about Rutigliano's sudden change in behavior and insistence both before and after the stabbing that people were trying to kill him, led to the "inescapable" conclusion that he acted out of a genuine, but unreasonable, belief that he needed to defend himself. *Id.* ¶¶ 92-95 (Mikva, J., concurring in part and dissenting in part). Based on the jury's questions about second degree murder, the dissenting justice suggested that the jury thought that the voluntary-intoxication instruction prohibited it from considering any effect that substance use might have had on what he believed was happening that night. *Id.* ¶ 94.

¶ 30 D. Postconviction Proceedings

¶ 31 Through counsel, Rutigliano filed a petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2020)), claiming that he had been denied his right to the effective assistance of counsel. It contained three specific allegations of incompetent representation.

¶ 32 First, the petition alleged that trial counsel failed to introduce expert testimony that Rutigliano's use of marijuana and alcohol on the night of the killing could have affected his state of mind a way in that would have supported a conviction for unreasonable-belief second degree murder rather than first degree murder. See 720 ILCS 5/9-2(a)(2) (West 2014). This allegation was supported by an affidavit submitted by Dr. Carl M. Wahlstrom, a forensic psychologist. Based on his review of the trial record and consultation with postconviction counsel, Dr. Wahlstrom opined that, at the time of the incident, Rutigliano experienced a panic attack that was exacerbated by his consumption of marijuana and alcohol at the party, resulting in "a rapid wave of consuming anxiety, emotional turmoil, and overwhelming confusion," which was intensified by "the substantial loss of a vital sensory function when his eyeglasses fell from his face." Dr. Wahlstrom further opined that a panic attack like the one he believed Rutigliano had experienced would lead

to "a period of acute psychotic decompensation" where "a person's ability to think, reason, and respond rationally to the immediate environment is diminished nearly to the point of being non-existent."

¶ 33 Second, the petition alleged that counsel failed to introduce evidence to substantiate the defense theory that Rutigliano's fear at the time he killed Gamboa was amplified by a loss of clear vision that happened when his glasses fell off. Specifically, it alleged that counsel could easily have, before trial, obtained documentation of Rutigliano's prescription, disclosed it to the prosecution, and then used it at trial to establish that Rutigliano's vision, when not corrected, was the equivalent of someone who would be considered legally blind. This allegation was supported by a January 2015 receipt indicating that Rutigliano had purchased contact lenses with prescriptions of −5.75 diopters in one eye and −5.25 diopters in the other, with additional correction for astigmatism in each eye. The petition further alleged that counsel should have called an ophthalmologist or an optometrist to explain the meaning of those numbers to the jury.

¶ 34 Third, the petition alleged that, despite adopting a trial strategy aimed at obtaining a verdict for second degree murder, counsel did not articulate that theory to the jury and, at times, introduced evidence undermining it. The petition specifically noted that, despite focusing on Rutigliano's subjective state of mind, counsel never once referred to second degree murder or asserted that the evidence established the mitigating factor that Rutigliano subjectively believed, albeit unreasonably, that his killing of Gamboa was justifiable self-defense. It alleged that counsel's assertion that Rutigliano "did not commit first degree murder" was confusing at best because, per the jury's instructions, it could not consider second degree murder until it had found that the State had proven first degree murder beyond a reasonable doubt. The petition also faulted counsel for not explaining to the jury that the court's instruction that voluntary intoxication was not a defense to the charges, the jury was permitted to consider Rutigliano's voluntary intoxication when it deliberated on his state of mind.

¶ 35 The State moved to dismiss the petition. It supported its motion with a copy of a letter prepared by Dr. Stafford C. Henry, a forensic psychiatrist, that had been attached to the defense's

sentencing brief. The State argued that Dr. Henry's letter showed that counsel had looked into presenting expert testimony as part of the defense case but decided not to for strategic reasons.

¶ 36 The letter disclosed that, before trial and at the request of counsel, Dr. Henry did a "comprehensive forensic psychiatric evaluation" of Rutigliano. Beyond that, the letter does not indicate, and the record does not show, whether Dr. Henry was asked to provide his opinion as to any particular subjects or issues. Based on his evaluation, Dr. Henry's opined that "there was no evidence [that Rutigliano] was experiencing symptoms of a functional mood or psychotic disorder." (A panic attack is not a disorder. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, *Panic Attack Specifier*, 214 (5th ed. 2013).) He further opined that "mood-altering substances, specifically cannabis, likely played a role in the behavior for which Mr. Rutigliano was ultimately found guilty." He explained that cannabis, whether used alone or in combination with other substances, "can alter cognition, perception and/or behavior," that the "effects can be disinhibiting and/or perceptual," and that those effects "are believed attributable to the substance's (and/or their byproducts[']) action on neural function." After relating his expert conclusions, Dr. Henry commented that the fact that mood-altering substances can adversely influence behavior was "one of the many reasons why I have long held the belief, that illicit substance use of any kind, and maladaptive use of alcohol, especially in the quantities and frequency self-administrated by Mr. Rutiglianao [*sic*], should be both avoided and may be far from an innocuous endeavor."

¶ 37 Dr. Henry's letter does not indicate whether the "comprehensive forensic psychiatric evaluation" included an assessment of whether Rutigliano may have been experiencing a panic attack at the time of the charged offense or whether Rutigliano may have been experiencing some other psychological phenomenon that would explain, or at least be consistent with, his testimony that he was overcome with a sense that people were going to kill him.

¶ 38 After briefing and argument, the court granted the motion. This appeal follows.

¶ 39 II. ANALYSIS

¶ 40 On appeal, Rutigliano argues that his petition made a substantial showing that he was denied the effective assistance of counsel at trial. He presents three theories of ineffectiveness: (1) counsel should have called an expert to testify that, at the time of the charged offense, Rutigliano was in the midst of a panic attack that was either caused or exacerbated by his use of marijuana that night; (2) counsel should have introduced documentation of Rutigliano's prescription for corrective contact lenses to establish his limited visual acuity when not wearing glasses or contacts; and (3) counsel failed to cogently present Rutigliano's second-degree murder theory. Because we agree that Rutigliano's allegations about counsel's failure to present expert testimony made a legally sufficient showing of ineffective assistance, we reverse and remand without considering the remaining allegations.

¶ 41 A motion to dismiss a postconviction petition tests the legal sufficiency of the petition. *People v. Domagala*, 2013 IL 113688, ¶ 35. The question is whether the allegations, if proven at an evidentiary hearing, would establish a constitutional violation entitling the defendant to relief. *Id.* In making that determination, the petition's well-pleaded allegations and supporting affidavits are taken as true as long as they are not rebutted by the record. *People v. Robinson*, 2020 IL 123849, ¶ 45. At this stage, the court may not resolve any evidentiary questions. *Domagala*, 2013 IL 113688, ¶ 35. Instead, it should "make all reasonable inferences in the light most favorable to the defendant." *People v. Overton*, 2023 IL App (4th) 230110, ¶ 71; *accord People v. Williams*, 47 Ill. 2d 1, 5 (1970) (finding that a hearing was required where the sworn allegations warranted "a fair inference" of a constitutional violation). The sufficiency of the petition is a question of law, so review is *de novo*. *People v. Moore*, 2023 IL App (1st) 220919, ¶ 22.

¶ 42 The substantive law that Rutigliano invokes as the basis for his claim is the constitutional right to the effective assistance of counsel, which is guaranteed by both the state and federal constitutions. *Domagala*, 2013 IL 113688, ¶ 36; see U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Establishing a violation of the right to effective assistance requires showing two elements: deficient performance and prejudice. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 687). We therefore consider whether Rutigliano's petition and supporting documentation make a legally sufficient showing as to each of these elements.

¶ 43 A. Deficient Performance

¶ 44 To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The reasonableness of counsel's conduct is measured by the prevailing professional norms of the criminal defense bar. *Id.* at 688. We consider counsel's conduct based on the circumstances that existed at the time counsel made the challenged decisions. *Id.* at 690.

¶ 45 The choice of a theory of defense is generally a strategic question entrusted to counsel's sound professional judgment. *People v. Bell*, 2021 IL App (1st) 190366, ¶ 110 (citing *People v. Guest*, 166 Ill. 2d 381, 394 (1995)); but see *McCoy v. Louisiana*, 584 U.S. 414, 422 (2018) (explaining that decisions about the ultimate objective to be pursued belong to the defendant, not to counsel). Here, the record shows that the defense's strategy was to persuade the jury to accept Rutigliano's testimony about his subjective perceptions during the charged incident and therefore return a verdict finding him guilty of second degree murder, not first degree murder.

¶ 46 That choice of strategy, which Rutigliano does not challenge, carried with it an unusual procedural challenge for the defense. Second degree murder does not work like a typical offense. It is defined by statute as first degree murder accompanied by one of two specific mitigating circumstances. 720 ILCS 5/9-2(a) (West 2014). It is therefore a mitigated form of first degree murder. See *People v. Jeffries*, 164 Ill. 2d 104, 122 (1995). At trial, the State carries no burdens with respect to second degree murder. It need only prove, beyond a reasonable doubt, the elements of first degree murder. *People v. Castejon*, 2025 IL App (1st) 221918, ¶ 16. The burden is on the defense to prove, by a preponderance of the evidence, one of the mitigating circumstances. *Id.* This

means that, in a second degree case, the defense cannot simply sit back and hold the State to its burden. It has to make its case to the jury.

¶ 47 Rutigliano does not challenge the broad strategic choice of aiming for conviction on second degree murder. Instead, his claim is that counsel's execution of that strategy was deficient. We agree with Rutigliano that his petition, taken as true, makes a legally sufficient showing that counsel's execution of his chosen strategy was professionally unreasonable.

¶ 48 1. Failure to Present Expert Witness

¶ 49 First, we find that Rutigliano's petition shows that it was objectively unreasonable for counsel not to present testimony from a qualified expert that Rutigliano's cannabis use likely caused or exacerbated a panic attack that led him to perceive himself as being in mortal danger at the time he stabbed Gamboa to death.

¶ 50 Expert testimony that Rutigliano's account was consistent with him experiencing a panic attack that was either induced or made worse by his use of cannabis that night would have provided vital corroboration for that subjective account by grounding it in medical reality. Without expert support, Rutigliano's account of experiencing a sudden onset of mortal fear caused by nothing that was happening around him might well have seemed implausible to a juror. With expert support, that same account would have become much easier to credit.

¶ 51 The State does not dispute that, had counsel identified an expert who would have testified to the opinions set out in Dr. Wahlstrom's affidavit, it would have been objectively unreasonable for counsel not to present that expert in support of the defense theory. Instead, the State suggests that, having solicited and obtained an opinion from Dr. Henry, counsel made a reasonable professional judgment that no further expert assessments were necessary. But at this stage of proceedings, we are required to draw all reasonable inferences in the light most favorable to the defendant. *Overton*, 2023 IL App (4th) 230110, ¶ 71. When the record does not show whether a particular decision made by counsel was the result of strategy or incompetence, the defendant is entitled to an evidentiary hearing. See *People v. Cabrera*, 326 Ill. App. 3d 555, 564-65 (2001) (holding that an

evidentiary hearing was required where the record did not show why counsel failed to call exculpatory witnesses).

¶ 52 Here, the record discloses that Dr. Henry offered only a vague opinion that Rutigliano's use of marijuana "likely played a role in the behavior for which [he] was ultimately found guilty"—a conclusion that required no particular expertise to draw. He did not opine, as Dr. Wahlstrom would have, that Rutigliano experienced a panic attack that led to "a period of acute psychotic decompensation" during which his "ability to think, reason, and respond rationally to the immediate environment [was] diminished nearly to the point of being non-existent." It is reasonable to infer that minimum standards of competence required counsel not to settle for an expert opinion that offered so little insight into why his client had, for no obvious reason, committed a horrifying murder. Likewise, it is reasonable to infer that a professionally competent investigation would have led counsel to consult with Dr. Wahlstrom or another psychiatrist who, unlike Dr. Henry, would have provided a solid medical explanation for Rutigliano's actions.

¶ 53 Even if counsel's decision to forego additional investigation is deemed reasonable, the fact remains that counsel failed to do anything with the expert opinion that he did have in hand. Dr. Henry's opinion was vague, but it was not useless. His expert testimony would have lent at least some support to the defense's second degree strategy. If nothing else, it would have put an expert's imprimatur on the natural surmise that Rutigliano's perception and cognition had been affected by his use of cannabis at the party. The State suggests that counsel did not call Dr. Henry because he concluded that Rutigliano was not suffering from "a functional mood or psychotic disorder." The lack of a diagnosis meant that Dr. Henry's testimony would not be as useful as Dr. Wahlstrom's would have been, but it did not contradict or undermine the defense theory that Rutigliano subjectively believed his actions were justifiable self-defense, so it would not have been counterproductive. If there was some other strategic consideration at play, the record does not disclose it. See *Cabrera*, 326 Ill. App. 3d at 564-65. Again, this case comes to us on appeal from a motion to dismiss the petition, which means that we assume the allegations of the petition are true and draw all reasonable inferences in Rutigliano's favor. *Overton*, 2023 IL App (4th) 230110, ¶ 71.

¶ 54 In short, Rutigliano's petition, taken as true and viewed in the light most favorable to him, shows that expert testimony that would have enhanced counsel's theory of defense—an issue on which the defense bore the burden of proof—was available yet not presented at trial. Whether that was due to inadequate investigation or poor trial preparation, it is a fair inference that counsel's failure to secure and present such testimony fell below the objective standard of professional competence required of criminal defense attorneys. The petition therefore makes a legally sufficient showing of deficient performance.

¶ 55 2. Failure to Articulate Second Degree Murder Theory

¶ 56 Second, we find that Rutigliano has made a substantial showing that defense counsel's presentation of the second degree murder theory to the jury was professionally unreasonable. As we have noted, the record makes clear that the defense strategy was to persuade the jurors to convict Rutigliano of the mitigated offense of second degree murder, which required the defense to prove by a preponderance of the evidence that Rutigliano killed Gamboa under a subjective, but unreasonable, belief that his actions were justifiable as self-defense.

¶ 57 Despite selecting a strategy that required the defense to assume a burden of proof, counsel never acknowledged that burden or articulate why the defense had satisfied it. The pattern instructions in cases where the defense seeks a verdict of second degree murder are notoriously confusing to non-lawyers.[1] Counsel made no effort to walk the jury through those instructions or relate them to the evidence. He did not try to explain to the jury the distinction between reasonable and unreasonable belief. More than once, he suggested that the State had the burden of proving that Rutigliano intended to commit murder, which was contradicted by the instructions the jury received only minutes later. He did not ask the jury to return a verdict for second degree murder

[1] In a study done more than a quarter century ago that involved mock jury trials, the researchers tried to use the pattern instructions for second degree murder. They were forced to rewrite the instructions themselves and provide participants with a flow chart after "pilot work revealed that the actual Illinois Pattern Instructions were incomprehensible." Tamara M. Haegerich and Bette L. Bottoms, *Empathy and Jurors' Decisions in Patricide Trials Involving Child Sexual Assault Allegations*, 24 J. L. & Hum. Beh. 421, 428 (2000).

or even to find that the defense had proven that Rutigliano subjectively believed that his actions were justified self-defense. In fact, counsel never said "second degree" in either his opening statement or his closing argument, choosing circumlocutions such as "this is anything but a first degree murder" and "[a] verdict we all can live with." There might be a sound basis for avoiding explicitly asking the jury to convict your client of second degree murder in a case that involves a plausible self-defense claim, but this case was not it.

¶ 58 We also cannot ignore that, during deliberations, two jury notes reflected confusion over the court's instructions regarding second degree murder (a situation that sometimes seems to be the rule rather than the exception). The first note divulged uncertainty over whether the jury should consider second degree murder if they could not agree on first degree murder, a question that the instructions theoretically answered already. The second note asked whether Rutigliano not being sane would be a mitigating factor, another question that the instructions supposedly covered. It ought to have become apparent to counsel at that point that, despite hearing closing arguments and receiving the court's instructions, the jury did not understand how the law applied to the defense's theory of the case. Counsel agreed that the court's response should be to tell the jury that it had its instructions already, foregoing the opportunity to clarify the confusing instructions on which the defense relied on entirely.

¶ 59 Given the facts of this particular case, it would be fair to infer that counsel's presentation fell below the level of objectively reasonable professional assistance contemplated by *Strickland*. At this stage of proceedings, that is enough to make a legally sufficient showing of deficient performance to survive a motion to dismiss.

¶ 60 B. Prejudice

¶ 61 To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is merely one that is substantial enough to undermine confidence in the proceeding's outcome. *Id.* In assessing whether counsel's errors

prejudiced the defendant, we consider the totality of the evidence before the jury and how counsel's errors might (or might not) have affected the assessment of that body of evidence, the inferences to be drawn from it, and the jury's ultimate findings. *Id.* at 695-96. After "taking due account of the effect of the errors" on any affected findings, we then decide whether the defendant has shown "that the decision reached would reasonably likely have been different absent the errors." *Id.* at 696.

¶ 62 Rutigliano's theory of prejudice is straightforward. He argues that, had counsel competently represented him, there is a reasonable probability that the jury would have found that he had established imperfect self-defense by a preponderance of the evidence and, accordingly, convicted him of second degree murder, not first degree murder.

¶ 63 The State argues that Rutigliano cannot have been prejudiced by counsel's errors because the evidence at trial showed that he was the initial aggressor. It is true that self-defense is generally not available to someone who is committing a forcible felony or who provokes the use of force that he claims entitlement to defend against. See 720 ILCS 5/7-4(a), (c) (West 2014). But a defendant who establishes self-defense is entitled to an acquittal, not a conviction for second degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 128 (1995). A trier of fact does not reach second degree murder unless it has already rejected a self-defense claim. See *id.* at 128-29. The key question when second degree murder is at issue, then, is not whether the killing was justified. Instead, to mitigate first degree murder to second degree murder, the defendant must only prove by a preponderance of the evidence that, "at the time of the killing, he or she believe[d] the circumstances to be such that, *if they existed*, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his or her belief is unreasonable." (Emphasis added.) 720 ILCS 5/9-2(a)(2) (West 2014). In other words, a conviction for second degree murder is appropriate when the circumstances that would give rise to self-defense did not exist, but the defendant believed that they did.

¶ 64 Contrary to the State's argument, it was not a foregone conclusion that the jury would reject second degree murder. The evidence supporting the conclusion that he subjectively believed he

was justified in using lethal force was strong enough that, on direct appeal, the dissenting justice believed that no jury could rationally fail to find that Rutigliano had proven imperfect self-defense. See *Rutigliano*, 2020 IL App (1st) 171729, ¶¶ 91-96 (Mikva, J., dissenting). The witnesses agreed that Rutigliano's behavior changed dramatically and for no apparent reason, corroborating his testimony that, shortly before he fatally stabbed Gamboa, he was overcome by a sudden and unexplained sense of dread. His specific testimony that he believed that someone was going to kill him—a circumstance that, if true, would justify the use of lethal force—was corroborated by Fernandez's testimony that he said as much at the very start of the incident, before others became involved, and by McNair's testimony that he was still screaming that the others were trying to kill him after she and Akbar pinned him down. "This was uncontradicted contemporaneous testimony as to what the defendant believed at the time he acted." *Id.* ¶ 93 (Mikva, J., dissenting). Even without expert testimony, the jury could have easily found him guilty of second degree murder.

¶ 65 Consequently, the question of prejudice in this case boils down to whether there is a reasonable probability that, had counsel rendered professionally reasonable assistance, the jury would have returned a verdict of second degree murder. We think that there is.

¶ 66 Most significantly, the plausibility of Rutigliano's testimony about his own state of mind would have been seriously bolstered had defense counsel called an expert forensic psychiatrist like Dr. Wahlstrom to opine that Rutigliano was experiencing a panic attack during the charged incident and to explain to the jury why that panic attack happened and how it affected his state of mind, including by giving rise to an entirely unjustified yet nevertheless honestly felt "surge of intense fear." Such expert testimony would have provided the jury with a medical explanation for what Rutigliano said that he had subjectively experienced. It also would have explained why nobody else experienced a significant shift in behavior despite smoking the same blunt Rutigliano did. It would have, in short, made sense of what was an otherwise inexplicable outburst of lethal violence. That, in turn, would have guided counsel's presentation of the case. It would have been far easier to contextualize Rutigliano's refusal to attribute his actions to substance use as an acceptance of moral responsibility, not some kind of admission that he was of sound mind during the incident. It

would have given counsel a theory to actually argue in closing argument that went beyond surmising that "something" must have happened to affect Rutigliano's perceptions.

¶ 67 Even Dr. Henry's vague testimony would have helped. At a minimum, Dr. Henry would have been able to explain to the jury how cannabis use might have altered Rutigliano's perception and thought process during the incident and offered his opinion as an expert forensic psychologist that the fact that Rutigliano smoked marijuana at the party "likely played a role" in his fatal attack on Gamboa.

¶ 68 Furthermore, as discussed earlier, the jury's notes to the court demonstrate that at least some members of the jury did not fully understand how their deliberations on the murder charge should proceed. That indicates that counsel's inadequate presentation left the jury insufficiently educated about the defense theory—a theory that the defense bore the burden of proving. They also demonstrate that at least one member of the jury believed that Rutigliano's mental capabilities had been seriously compromised and even questioned whether that could be considered to be a mitigating factor. Based on the uncontradicted evidence presented at the trial that Rutigliano's conduct suddenly changed without explanation, it is not unreasonable to believe that the failure to present expert testimony coupled with counsel's failure to articulate the differences in the elements of first and second degree murder at any point during the trial led the jury to find him guilty of first degree murder rather than second degree murder.

¶ 69 The possibility that expert testimony and a better articulation of the defense theory might have swayed the jury in Rutigliano's favor, resulting in a conviction for second degree murder rather than first degree murder, is substantial enough to undermine our confidence in the verdict. See *Strickland*, 466 U.S. at 694. We therefore hold that Rutigliano has made a legally sufficient showing of prejudice to survive a motion to dismiss, entitling him to an evidentiary hearing on his ineffective-assistance claim.

¶ 70 III. CONCLUSION

¶ 71 Taking the allegations as true and drawing all reasonable inferences from those allegations in Rutigliano's favor, his postconviction petition raised a legally sufficient claim that he was deprived of his constitutional right to the effective assistance of counsel. The circuit court therefore erred by granting the State's motion to dismiss.

¶ 72 The judgment is reversed, and the cause is remanded for further postconviction proceedings.

¶ 73 Reversed and remanded.

¶ 74 JUSTICE NAVARRO, dissenting:

¶ 75 I respectfully disagree with the majority's holding that Rutigliano made a substantial showing that he received ineffective assistance of trial counsel. I do not believe it was objectively unreasonable for defense counsel to rely on Dr. Henry's expert opinion and to forgo additional investigation in order to find an expert to testify that Rutigliano was experiencing marijuana-induced psychosis.

¶ 76 Where circumstances known to counsel at the time do not reveal a sound basis for further inquiry in a particular area, it is not ineffective for the attorney to forgo additional investigation. *People v. Orange*, 168 Ill. 2d 138, 150 (1995). Strategic choices made by counsel after having made a thorough investigation are "virtually unchallengeable." *People v. Towns*, 182 Ill. 2d 491, 514 (1998). Decisions concerning which witnesses to call at trial, and what evidence to present on a defendant's behalf are matters of trial strategy, which are generally immune from claim of ineffective assistance of counsel. *People v. Hamilton*, 361 Ill. App. 3d 836, 847 (2005).

¶ 77 Here, defense counsel consulted with Dr. Henry, who interviewed Rutigliano and reviewed Rutigliano's treatment records, police reports, and interview tapes. Dr. Henry opined that there was no evidence that Rutigliano was experiencing symptoms of a functional mood or psychotic disorder, but that mood-altering substances like marijuana likely played a role in his behavior that night. Rutigliano testified at trial that he did not attribute his panic or terror that night to the marijuana usage. Accordingly, based on the information available to defense counsel at the time,

he made the strategic decision to present a viable defense of unreasonable self-defense, and he was not obligated to conduct further investigation in an attempt to find an expert to testify that Rutigliano was experiencing marijuana-induced psychosis on the night in question.

¶ 78 The fact that Dr. Wahlstrom, years after the incident, and without meeting with Rutigliano, opined that Rutigliano was experiencing a panic attack exacerbated by marijuana and alcohol intake, does not render defense counsel's decisions at the time he made them ineffective. *People v. Peterson*, 2017 IL 120331, ¶ 80 (courts must make every effort to eliminate the distorting effects of hindsight).

¶ 79 Defense counsel's choice not to have Dr. Henry testify as a witness at trial was also not objectively unreasonable. *Hamilton*, 361 Ill. App. 3d at 847 (it is well-established that decisions concerning which witnesses to call at trial, and what evidence to present on a defendant's behalf are matters of trial strategy, which are generally immune from claim of ineffective assistance of counsel). Dr. Henry's opinion that Rutigliano was not experiencing any sort of mood or psychological disorder at the time of the incident could have been detrimental to Rutigliano's defense.

¶ 80 Additionally, consideration of the State calling a counter-expert when deciding to put an expert on the stand constitutes trial strategy. *Hamilton*, 361 Ill. App. 3d at 847 (trial counsel's failure to call an expert witness is not necessarily ineffective assistance of counsel because the State can call its own expert to offer a contrasting opinion). Defense counsel did present Dr. Henry's findings at sentencing, where he purportedly thought the information would be most valuable. Where this strategic decision was made after defense counsel made a thorough investigation, it is virtually unchallengeable. *Towns*, 182 Ill. 2d at 514.

¶ 81 Rutigliano simply has not shown how counsel's chosen strategy was so unsound that he failed to conduct any meaningful adversarial testing of the State's case. *People v. Guest*, 166 Ill. 2d 381, 394 (1995) (counsel's trial strategy will be found to be incompetent only when it is so unsound that "counsel entirely fails to conduct any meaningful adversarial testing"). To the contrary, defense counsel thoroughly examined each of the State's witnesses and called several witnesses

who knew Rutigliano to testify that his behavior on the night of the incident was out of character. Counsel was unable to raise an involuntary intoxication argument, so instead argued for and was granted jury instructions on self-defense based on an unreasonable belief, and second-degree murder. Counsel raised Rutigliano's use of alcohol and marijuana in making the argument that Rutigliano unreasonably believed he needed to defend himself.

¶ 82 Moreover, even if defense counsel's decisions were somehow found to be objectively unreasonable, Rutigliano has failed to show prejudice. There is not a reasonable probability that if an expert had testified that Rutigliano was suffering from marijuana-induced psychosis, without interviewing Rutigliano, the jury would have found him guilty of second-degree murder instead of first-degree murder. See *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 72 (defendant bears the burden of showing that but for counsel's errors, there is a reasonable probability that the result of trial would have been different). Rutigliano testified that he did not attribute his feelings of panic and terror on the night in question to his marijuana usage. Dr. Wahlstrom had never met with Rutigliano, whereas Dr. Henry had interviewed Rutigliano extensively. And finally, the State could have put on its own expert witness to counter Rutigliano's proposed expert witness. See *Hamilton*, 361 Ill. App. 3d at 847.

¶ 83 Accordingly, I would find that Rutigliano did not make a substantial showing at the second stage of postconviction proceedings that he received ineffective assistance of trial counsel.

¶ 84 I respectfully dissent.