FOURTH DIVISION
December 22, 2016

No. 1-14-0889

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 04 CR 7690
	)	
DENNIS EDWARDS,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Burke concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of post-conviction petition was proper; claim that State showed defendant's video statement to jury in open courtroom out of presence of court, opposing counsel, and defendant is refuted by the record and fanciful.

¶ 2 Following a 2010 jury trial, defendant Dennis Edwards was convicted of first degree murder and sentenced to 22 years' imprisonment.[1] We affirmed on direct appeal. *People v. Edwards*, No. 1-11-0308 (2013)(unpublished order under Supreme Court Rule 23). Defendant

[1] Defendant had a 2006 trial that ended in a mistrial; we affirmed the denial of his post-mistrial motion to dismiss arguing double jeopardy. *People v. Edwards*, 388 Ill. App. 3d 615 (2009).

now appeals from the summary dismissal of his 2014 *pro se* post-conviction petition, contending that it states an arguable claim that the State showed his video-recorded statement to the jury out of the presence of the court, defense counsel, and defendant. We affirm.

¶ 3 Defendant was charged with the first degree murder of Ada Allen on or about March 6, 2004. At trial, Rachel Schram testified that she went to defendant's home with Allen. After Schram took heroin and cocaine in defendant's bathroom, she saw defendant and Allen argue at length. After Allen broke into defendant's bedroom and began breaking his property, defendant grabbed Allen in an attempt to stop her. As Allen then left defendant's home, she struck him repeatedly with her purse and fist. Allen "somehow" ended up on the ground outside defendant's home, with defendant above her choking her. While Schram heard Allen making gasping or choking sounds, she did not look to see if defendant was choking Allen with his hands or an arm. Despite Schram's protestations, defendant continued until police arrived, by which time Allen was silent.

¶ 4 Two police officers – a city officer and a university officer – who responded separately to reports of the incident testified that defendant was still choking the apparently-lifeless body of Allen with his arm when they arrived. The medical examiner who performed Allen's autopsy testified that she died of strangulation, with no signs that she died of a heart attack or high-blood-pressure episode despite her chronic high blood pressure and enlarged heart. Allen tested positive for cocaine and for alcohol in excess of the legal limit for driving under the influence, DUI.

¶ 5 Defendant gave a videotaped statement in March 2004 admitting to putting Allen in a choke-hold with his arm during their argument and that he released the hold when she stopped

moving. However, he maintained that he had released his hold before officers arrived. A videodisc copy of the 2004 videotaped statement was shown to the jury at trial. A police officer testified that defendant, upon being arrested in 2008 for DUI in an unrelated vehicular collision, made vulgar and insulting remarks to the officer before spontaneously admitting that he choked a woman to death on March 6, 2004.

¶ 6 Defendant testified to his account of the incident, in which Allen was still moving when he stopped struggling with her. He denied making the 2008 spontaneous confession. Forensic pathologist Dr. Werner Spitz testified as a defense expert, opining after reviewing Allen's medical record and autopsy that she did not die of strangulation but exhaustion of her heart due to her pre-existing conditions exacerbated by cocaine and alcohol.

¶ 7 The trial took more than one day and was set to resume on November 3, 2010, at 10:30 a.m. When trial resumed on the 3rd, the court berated defense counsel for being late. The court remarked that "the jury has been sitting since 10:30 in the morning. I ultimately sent them to lunch around 12:00 or 12:15 so that we wouldn't be wasting even more of their time." The court maintained that it had no news of counsel's delay until about 12:15 p.m., while counsel maintained that he was attending court in another courtroom during that time and that he called the trial judge's chambers at about 10:30 a.m. but the call went to voicemail.

¶ 8 Following closing arguments, the jury was given its instructions, including second degree murder by sudden and intense passion resulting from serious provocation by Allen. Over defense objection, the exhibits provided to the jury during deliberations included a videodisc of his 2004 statement. Following deliberations, the jury found defendant guilty of first degree murder.

¶ 9 In his post-trial motion, defendant argued that the videodisc should not have been played at trial or provided to the jury during deliberations, because the confession should have been excluded and because the videodisc was not the original videotape. The court denied the motion, noting that the videotape had to be copied to videodisc as a videotape player was no longer available, a witness testified to the videodisc being an exact copy of the videotape, and counsel had viewed the videotape earlier and saw the videodisc being played at trial.

¶ 10 On direct appeal, defendant contended that (1) the trial court erred when it responded to a jury question about the legal definition of "great bodily harm" by creating a definition, (2) the State's closing arguments improperly attacked the credibility of defendant, and of Dr. Spitz based on his expert fee, and (3) the trial court erred in admitting defendant's 2008 outbursts as they were irrelevant and prejudicial. We affirmed, finding that (1) the court correctly answered the jury's question with a definition that did not misstate the law, (2) a testifying defendant's credibility is a proper point of argument, (3) the unpreserved claim regarding Dr. Spitz was not plain error because the evidence was not closely balanced, and (4) defendant's outbursts preceding his spontaneous confession to killing Allen were admissible to show his emotional state when he confessed, and their admission was harmless because of the overwhelming evidence of his guilt.

¶ 11 Defendant filed a *pro se* post-conviction petition in December 2013, raising various claims, including that he gave an inadmissible videotaped statement following lengthy interrogation and requests for counsel, and that an edited version of this statement – about 30 minutes edited down to 18 minutes – was shown during the delay on November 3, 2010, while

the judge was in chambers and defendant and his counsel were not present. Attached to the petition was the July 2011 affidavit of defendant's brother Kenneth Edwards averring that he arrived for court on November 3, 2010, at about 10 a.m. "At approximately 10:30 a.m.," an Assistant State's Attorney (ASA) "showed a tape of my brother to the jurors on the monitor facing the jurors without the Judge," defendant, or his counsel present. Kenneth averred that this occurred in the courtroom: "I noticed that not all the jurors were watching the video, but I sat down myself and watched it from behind the glass outside the court room." He averred that defendant did not arrive at court until 11:30 a.m. and his counsel did not arrive until about noon. Also attached to the petition was Kenneth's 2013 affidavit averring in relevant part that "[a]round 10:30 a.m. the [ASA] started showing a tape of my brother's interrogation-statement to the jurors while the Judge," counsel, and defendant were not present.

¶ 12 The court summarily dismissed the petition on February 13, 2014, finding the instant claim to be conclusory, forfeited by not being raised on direct appeal though it could have been, and not meritorious. The court also found that the record belies any claim that defendant's 2004 statement was inadmissible for violation of his right to counsel. This appeal followed.

¶ 13 On appeal, defendant contends that his petition was erroneously dismissed because it states an arguable claim that a prosecutor showed the jury his video confession out of the presence of the court, defense counsel, and defendant.

¶ 14 A post-conviction petition may be summarily dismissed within 90 days of filing if the court finds it frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition should not be summarily dismissed unless it has no arguable basis in law or fact because

it relies upon an indisputably meritless legal theory contradicted by the record, or upon a fanciful factual allegation. *People v. Allen*, 2015 IL 113135, ¶ 25. Well-pled factual allegations in a petition and supporting evidence must be taken as true unless positively rebutted by the record. *People v. Sanders*, 2016 IL 118123, ¶ 48. Whether to dismiss a post-conviction petition is a legal question, and we make our own independent assessment of the allegations of the petition and its supporting documents. *Id.*, ¶ 31. Our review of a summary dismissal is *de novo*. *Id.*; *Allen*, ¶ 19.

¶ 15 Here, the record shows that the jury appeared for trial by 10:30 a.m. on November 3, 2010, when the ongoing trial was scheduled to resume. The affidavit of defendant's brother that an ASA showed defendant's video statement to the jury in the courtroom "at approximately 10:30 a.m." with the judge absent is thus rebutted by the record. It is highly improbable at best that the court would have adjourned, leaving the jury alone in the courtroom with an ASA, almost immediately after trial was set to resume. Defendant's argument to the contrary notwithstanding, we also find it fanciful that an ASA would do something as self-evidently contrary to courtroom procedure as showing a video to a jury in an open courtroom in the absence of both the judge and opposing counsel, especially in light of the fact that defendant's video statement was admitted into evidence at trial, played to the jury at trial, and made available to the jury during its deliberations. We conclude that the court did not err in summarily dismissing defendant's petition.

¶ 16 Accordingly, the judgment of the circuit court is affirmed.

¶ 17 Affirmed.