FIRST DIVISION
October 11, 2016

No. 1-14-1602

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. 06 CR 6237
	)	
ELIJAH STEWART,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of post-conviction petition was proper; trial court did not err, nor was defendant prejudiced, by allowing jury to view photographic arrays or by not instructing jury on involuntary manslaughter.

¶ 2 Following a 2008 jury trial, defendant Elijah Stewart was convicted of first degree murder and sentenced to 50 years' imprisonment. We affirmed on direct appeal. *People v. Stewart*, No. 1-08-2602 (2011)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his *pro se* post-conviction petition, contending that it states arguable claims that his right to due process was violated by the court (1) allowing the

jury to view photographic arrays that included post-arrest "booking" photographs, and (2) not instructing the jury on the lesser-included offense of involuntary manslaughter. He also contends that appellate counsel was ineffective for not raising the photographic array claim on direct appeal. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with first degree murder for, on or about August 6, 2005, personally discharging a firearm causing Alex Vernon's death. Some counts alleged that he intentionally or knowingly killed Vernon, and others alleged that he knew his act created a strong probability of death or great bodily harm to Vernon.

¶ 4 At trial, the evidence established that Chicago police officers patrolling the far North Side on the early morning of August 6, 2005, heard a gunshot and saw several persons fleeing and exclaiming that someone had been shot. They found Vernon lying on the ground at a nearby intersection with a gunshot wound to his head, and officers found three witnesses in the crowd of onlookers.

¶ 5 Dayna Webster testified that she and various acquaintances including Vernon, Kenisha Smith, and Norma Lewis were sitting on the stoop of a far North Side home on the early morning of August 6, 2005. Neither Vernon nor anyone else in the group was visibly armed that night. Defendant approached the group, appearing to Webster to be under the influence of drugs or alcohol. He threw a beer bottle at a passing car and insulted its occupants. A fistfight began between defendant and two men from the group, and "defendant was getting beat up." Vernon was not in the fight, and indeed "broke the fight up" by pulling away the two men. Defendant walked away but returned a short time later with a gun in his hand. Webster ran and yelled that everyone else should run. When she heard a gunshot, she turned and saw defendant standing

over Vernon, who was lying on the ground. Defendant was still holding the gun, pointing down. Webster never saw him pointing the gun up into the air. As she stood shocked, defendant fled the scene westward. She then saw that Vernon was wounded. The police arrived a short time later. She went to the police station that night, told officers that she saw defendant with a gun, and viewed a photographic array from which she identified defendant.

¶ 6 The parties stipulated that Dayna Webster testified before the grand jury in January 2006 that she turned around upon hearing a gunshot and saw defendant standing over Vernon "with the gun *** up in the air. Not in the air, but like aiming it in the middle of the street."

¶ 7 Kenisha Smith testified that the group on the stoop was drinking alcohol and smoking marijuana, though she denied doing the latter herself. Defendant approached the group and, at one point, took a drink from the hand of one of the men. Defendant seemed to Smith to already be drunk. Defendant and the man walked a short distance away and began fighting, along with another man. The fight did not involve weapons, but the two men from the stoop got the better of defendant. Vernon stopped the fight by separating the parties. Defendant walked away but returned after two or three minutes with a gun in his hand. He walked up to Vernon, who was seated on a fire hydrant. The others had already fled on Webster's outcry. He stood face-to-face with Vernon, with his gun in his outstretched arm, and shot Vernon in the head. He fired a single shot and did not fire into the air. Smith fled to her home and did not speak with the police that night. In January 2006, she was interviewed by police and gave a signed statement that she heard the gunshot as she began to flee, then turned and saw defendant fleeing while Vernon was on the ground. She explained that she did not give a full account mentioning that she saw defendant fire the gun because she was scared and nervous and "didn't even really want to talk to" the police.

¶ 8 Norma Lewis testified that the group was sitting on the stoop when defendant, who seemed drunk, walked up and spoke at length until Lewis told him to either leave or be quiet. Defendant grabbed a drink from one man's hand and walked away, and a fight ensued between defendant and three men from the stoop, including Lewis's boyfriend. While defendant "wasn't falling down, *** it was three of them on one," so defendant came out the worse in the fight. Vernon did not participate in the fight but stopped it by pushing the others away from defendant. Defendant walked away but returned about ten minutes later, drew a revolver from under his shirt, and pointed it at the group on the stoop. The three men from the fight fled when Webster cried out. Lewis heard a gunshot, turned around, and saw Vernon fall to the ground in front of the fire hydrant. Defendant pointed the gun at a couple of people before walking away towards the west. Lewis gave an account to police that night and viewed a photographic array from which she identified defendant as the man who shot Vernon. She was interviewed again in September 2005 and signed a statement; in that account, defendant returned with the gun after only about two minutes. Lewis acknowledged being on probation for possession of a controlled substance with intent to deliver, upon a 2008 guilty plea.

¶ 9 An autopsy revealed that Vernon died of a gunshot wound straight to his forehead fired from at least two feet away; that is, not a shot fired at an angle nor a shot fired upwards into the air that then fell or ricocheted into Vernon's forehead.

¶ 10 On August 10, 2005, officers found a revolver behind a residence about a block west of the shooting scene. It contained three live bullets and a spent shell. Forensic testing showed that the recovered revolver fired the bullet removed from Vernon's head. The forensic scientist explained that a revolver can be fired in single-action with the hammer cocked back and then

released when the trigger is pulled, or double-action where a "long pull" of the trigger cocks the hammer back and releases it. However, the recovered revolver had a broken hammer spur making it difficult but not impossible to cock the hammer and fire the gun in single-action.

¶ 11 Defendant was arrested on February 7, 2006, in Phoenix, Arizona, and was brought back to Chicago upon a warrant.

¶ 12 The defense made a motion for a directed verdict, arguing that defendant was under the influence of alcohol or drugs at the time of the shooting, so that the State failed to prove he knew the consequences of his actions. The court denied the motion, finding that the evidence showed that two or three men had an altercation with defendant, he left after they "got the better of him" but then returned and fired a single shot, striking Vernon in the forehead, then left the scene and "apparently then left the State. Clearly knew what he was doing at the time both before the shooting, during the shooting, [and] after the shooting."

¶ 13 Shirley Johnson, defendant's godmother, testified for the defense that she lived with Darlene Murphy about a block from the scene of the shooting. Johnson saw defendant shortly before nightfall on August 5, 2005, at her home. He drank most of a pint of cognac. Johnson did not see defendant again until the early morning of the 6th when Murphy awoke her and told her to come see defendant. Defendant appeared to have been "beat up" as his face was bruised and swollen and his mouth was bleeding. He was "incoherent," with his speech incomprehensible. He seemed to be "high" or "more than drunk." He took multiple pills in Johnson's presence. Defendant left in a taxi and did not return to Johnson's home after August 2005. Johnson acknowledged her prior conviction in 2005 for selling firearms without a license. She denied lying to protect defendant. Vernon was the cousin of her daughter. Johnson admitted that she did

not go to the police but first gave her account to a defense investigator shortly before the July 2008 trial.

¶ 14 The parties stipulated that a defense investigator would testify that, in his July 2008 interview of Johnson, she did not mention defendant drinking cognac, taking multiple pills, or being incoherent.

¶ 15 Chantil Morris, defendant's half-sister, testified that she saw defendant at about 6 a.m. on August 6, 2005, at her suburban home. His face was "beat up," including "knots" or welts on his face, and his shirt was ripped, but his speech was clear. He was there for only a few minutes, and Morris did not see how he arrived or left. She did not see him again until at least February 2006.

¶ 16 In the jury instruction conference, defense counsel requested instructions on involuntary manslaughter and second degree murder as lesser-included offenses. Upon the court's questions, defendant affirmed his understanding that such instructions were his choice rather than counsel's and he faced up to 20 years in prison for second degree murder and 5 years for involuntary manslaughter. For involuntary manslaughter, counsel argued that defendant's actions were reckless due to being under the influence of alcohol or drugs and to his injuries from the altercation. Following arguments, the court granted instructions on second degree murder but not for involuntary manslaughter, finding that the intentional act of firing a gun cannot be reckless. Noting that intoxication is a defense only if intoxication was involuntary and deprived one of the capacity to appreciate the criminality of his conduct or to conform his conduct to the law, the court found that defendant was voluntarily intoxicated and acted knowingly when he returned to the scene with a gun and fired it.

¶ 17 In deciding which exhibits to send back to the jury, defendant objected to the photographic array viewed by Webster on the basis that he was not challenging that he was the shooter. The court asked what the prejudice would be from sending the array to the jury, and counsel replied "I don't think it's relevant at all." When the court asked "Anything about police numbers?" the State replied "everyone's in street clothes. They don't have any IR numbers or CB numbers." The court allowed the array to go to the jury, finding it relevant to show how defendant appeared when Webster identified him. Defendant also objected to the jury having the array viewed by Lewis, and the court allowed that array to go to the jury. The record on appeal includes both exhibits, consisting of the same six photographs in each array; none of the photographs include a sign, placard, or markings of any kind in either the foreground or background. Lewis's array indicates that she made an identification on August 6, 2005.

¶ 18 During closing arguments, the State argued that defendant acted at least knowingly if not intentionally in shooting Vernon in the head, and that his actions in disposing of the gun and going to Arizona demonstrated his intent by his consciousness of guilt. The State argued that the unarmed "fistfight" was inadequate provocation: defendant walked away from the fight but returned with a gun and shot Vernon, who was not in the fight. The State argued that it was irrelevant whether defendant was intoxicated as he acted voluntarily and knowingly. Defendant argued that he shot Vernon when he was intoxicated and after he had been beaten by a group of men. While defendant left the scene, he was still intoxicated, and still angry and agitated from the attack, when he returned with a gun. He was trying to shoot the men who attacked him, counsel argued, but shot Vernon instead, and his consciousness of guilt was from this "horrible mistake." Defendant asked the jury for a verdict of second degree murder.

¶ 19 The jury was instructed on first and second degree murder, including that the latter is shown if defendant killed "under a sudden and intense passion resulting from serious provocation by some other person he endeavors to kill, but he negligently or accidentally kills the deceased." Following deliberations, the jury found defendant guilty of first degree murder.

¶ 20 In his post-trial motion, defendant challenged the sufficiency of the evidence and the denial of his requested jury instructions but raised no challenge to the jury viewing the photographic arrays. The court denied the post-trial motion, finding in relevant part that its earlier rulings on jury instructions were proper. Following a sentencing hearing, the court sentenced defendant to 50 years' imprisonment, including a 25-year firearm enhancement.

¶ 21 On direct appeal, defendant contended that the trial court failed to ask the jurors if they agreed with the principles set forth in Supreme Court Rule 431(b) (eff. July 1, 2012), erred in refusing to rule on his motion *in limine* regarding his prior conviction unless and until he testified, and failed to ensure that defendant personally agreed to jury instructions on second degree murder. We affirmed in a summary order. *People v. Stewart*, No. 1-08-2602 (2011) (unpublished order under Supreme Court Rule 23).

¶ 22 Defendant filed the instant *pro se* post-conviction petition in February 2014. In relevant part, he claimed that the trial court abused its discretion by (1) allowing the jury to view photographic arrays including booking photographs, thus apprising the jury that defendant had prior criminal history, and (2) not instructing the jury on the lesser-included offense of involuntary manslaughter. He alleged ineffective assistance of appellate counsel for not raising certain claims on direct appeal, including the photographic-array claim but not the involuntary

manslaughter claim. He alleged ineffective assistance by trial counsel but did not include claims relating to the photographic arrays or involuntary manslaughter instructions.

¶ 23 The circuit court summarily dismissed the petition in April 2014. The court found that the photographic arrays were properly admitted and sent to the jury, defendant was speculating as to any inference the jury would have made from having "mugshots" in the arrays, defendant did not challenge at trial that he shot Vernon and thus was not prejudiced by the arrays, and he could have raised the array issue on direct appeal upon the record but did not and thus forfeited it. The court similarly found that appellate counsel was not ineffective for not raising the photographic-array claim. The court found that defendant could have raised the involuntary manslaughter instruction claim on direct appeal and thus forfeited it, and that he was not entitled to such an instruction where the evidence that defendant approached Vernon and shot him in the forehead precluded recklessness. This appeal timely followed.

¶ 24 On appeal, defendant contends that his post-conviction petition should not have been summarily dismissed because it stated two arguable claims that the trial court deprived him of due process: by allowing the jury to view photographic arrays that included booking photographs, and by not instructing the jury on involuntary manslaughter. He also contends that appellate counsel was ineffective for not raising these claims on direct appeal.

¶ 25 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 its supporting evidence must be taken as true unless they are positively rebutted by the record. *People v. Sanders*, 2016 IL 118123, ¶ 48. Whether to dismiss a post-conviction petition is a legal question, where we make our own independent assessment of the allegations of the petition and supporting documentation. *Id.*, ¶ 31. Thus, our review of a summary dismissal is *de novo*. *Id.*; *Allen*, ¶ 19.

¶ 26 Generally, ineffective assistance is shown when counsel's performance was both objectively unreasonable and prejudicial to the defendant. *People v. Tate*, 2012 IL 112214, ¶ 19. However, a petition alleging ineffective assistance may not be summarily dismissed if (a) it is arguable that counsel's performance was objectively unreasonable and (b) it is arguable that the defendant was prejudiced thereby. *Id*. A defendant is not prejudiced by appellate counsel's failure to raise a non-meritorious claim. *People v. House*, 2015 IL App (1st) 110580, ¶ 76. "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *Id*., citing *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 27 As the State correctly notes, defendant did not raise the photographic array claim in his post-trial motion and thus did not preserve it for direct appeal. Thus, appellate counsel would have had to raise the claim under plain error. However, we find no error in the trial court allowing the jury to view the photographic arrays, and thus appellate counsel was not arguably ineffective for not challenging the court's decision.

¶ 28 First and foremost, the record does not support the proposition at the base of defendant's contention: that the photographs would apprise the jury that he had a prior criminal history.

Nothing in the photographs indicates that they are booking photographs or "mug shots;" as stated above, none of the six photographs includes any marking or signage of any kind. The arrays merely establish that photographs of defendant and other men of similar appearance, from whatever source, were available to the police on the day of the shooting. Defendant's argument notwithstanding, photographs of "unsmiling – even sullen-looking" persons who are not looking directly at the camera are hardly limited to police records.

¶ 29 Secondly, evidence of booking photographs (assuming *arguendo* that is what the arrays contain) is admissible if it tends to prove a fact at issue, evidence is not inadmissible merely because there is other evidence regarding that issue, and the court may permit all admitted evidence relevant to any material fact to go to the jury. *People v. Mays*, 176 Ill. App. 3d 1027, 1038-40 (1988); *People v. Denwiddie*, 50 Ill. App. 3d 184, 192-93 (1977). While defendant argues that "[t]here was no legitimate reason for the jury to" see the arrays, the trial court allowed the arrays to go to the jury because they established what defendant looked like when Webster and Lewis identified him shortly after the Vernon shooting, as opposed to his appearance at his Arizona arrest or at trial years later. This is not a case where the other-crimes evidence "had nothing to do with the case on trial," it was "relevant to the identification and apprehension of defendant for the case on trial." *Mays*, at 1039.

¶ 30 Appellate counsel was also not arguably ineffective because defendant was not arguably prejudiced by the admission of the arrays. The uncontroverted evidence was that defendant was not only the shooter but shot Vernon in the forehead voluntarily and intentionally rather than merely negligently or recklessly. The autopsy evidence was that Vernon was killed by a straight shot to the forehead that could not have resulted from firing a gun up into the air or at an angle to

Vernon's forehead. Three witnesses testified that defendant walked away from the fight or beating but returned to the scene holding a gun, approached Vernon, a single gunshot was heard, and immediately thereafter defendant left with Vernon lying on the ground. Smith additionally testified to seeing defendant shoot Vernon by firing with his outstretched arm; she explained why she did not give such an account earlier, and her testimony was consistent with the autopsy evidence. Under these circumstances, we find it fanciful to claim that the first degree murder verdict resulted from seeing defendant's photograph in the arrays rather than from duly weighing the entirety of the trial evidence.

¶ 31 Defendant's other claim is that the trial court deprived him of due process by refusing to instruct the jury on the lesser-included offense of involuntary manslaughter. He also contends that we should find the gist of a claim of ineffective assistance of appellate counsel regarding the desired jury instructions because the petition alleges that appellate counsel was ineffective and defendant is a layman not expected to make properly-framed legal claims in his petition.

¶ 32 The State responds that defendant forfeited the jury instruction claim by not raising it on direct appeal and then not claiming in his petition that appellate counsel was ineffective for not raising it on direct appeal. A claim that can be raised on the trial record is forfeited by not raising it on direct appeal, but may be raised as a matter of appellate counsel's ineffectiveness. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). The general rule that a claim not raised in a post-conviction petition cannot be raised for the first time on appeal from its dismissal applies to ineffective assistance claims raised for the first time on appeal from a summary dismissal of a *pro se* petition. *Id.* at 502-03. The *Petrenko* defendant's *pro se* petition, like the instant *pro se* petition, included an ineffective assistance claim but not the particular claim that was thereby

forfeited. Under *Petrenko*, we must conclude that defendant forfeited the instant contention of ineffective assistance of appellate counsel by not raising it in his petition.

¶ 33 Assuming *arguendo* that defendant had not forfeited the involuntary manslaughter instruction claim, and noting that the State joins issue on the merits after making its forfeiture argument, we would conclude that there was no error. Giving jury instructions is a matter for the sound discretion of the trial court. *People v. Beasley*, 2014 IL App (4th) 120774, ¶ 14. A defendant is entitled to a lesser-included offense instruction only if the trial evidence is such that a jury could rationally find him guilty of the lesser offense yet acquit him of the greater. *Id*., citing *People v. Medina*, 221 Ill. 2d 394, 405 (2006). An instruction on a lesser offense is justified when there is some credible evidence to support the giving of the instruction. *Beasley*, ¶ 15. However, a defendant is not entitled to reduce first degree murder to involuntary manslaughter by asserting " 'a hidden mental state known only to him and unsupported by the facts.' " *People v. Luna*, 409 Ill. App. 3d 45, 49 (2011), quoting *People v. Jackson*, 372 Ill. App. 3d 605, 614 (2007). Illinois courts have thus consistently held that a defendant who intended to fire a gun, pointed it in the general direction of his intended victim, and fired was not merely reckless and is not entitled to an involuntary-manslaughter instruction even if he asserts that he did not intend to kill anyone. *People v. Minniefield*, 2014 IL App (1st) 130535, ¶ 83; *Luna*, at 49.

¶ 34 Here, defendant's claim is that the jury should have had the option to decide that his fatal firing of the gun resulted from mere recklessness. He cites the propositions that handling a gun while intoxicated, and pointing a gun at another, constitute reckless conduct for involuntary manslaughter purposes. *People v. Lemke*, 349 Ill. App. 3d 391, 396, 398 (2004). However, the uncontradicted trial evidence is that defendant did not merely handle a gun or point it at another

but voluntarily aimed his gun in his outstretched arm at Vernon's head and voluntarily fired. Defendant argues that Smith's testimony that he did so is not credible because she did not give such an account earlier. However, her account is corroborated by Webster seeing defendant standing over Vernon's body immediately after the gunshot and, most strongly, by the forensic evidence that Vernon was shot head-on in the forehead. Conversely, there was no evidence – as opposed to speculation based generally upon defendant's intoxication – that defendant accidentally discharged the gun as he pointed it at Vernon. In that regard, this court has noted that "[i]n and of itself, the evidence establishing that the revolver had to be manually cocked before it would fire *** supports the inference that the defendant's act of firing the gun was a deliberate act despite his intoxication." *People v. Lemke*, 384 Ill. App. 3d 437, 446 (2008). Similarly, the evidence that the revolver used to shoot Vernon required either a difficult cocking of the hammer or a "long pull" of the trigger to fire supports the inference that defendant fired the gun deliberately. In sum, there was no evidence that defendant acted merely recklessly in fatally shooting Vernon and thus an involuntary-manslaughter instruction was, and is, inappropriate.

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

¶ 36 Affirmed.