THIRD DIVISION
October 19, 2016

No. 1-14-1739

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. 05 CR 401
	)	
MICHAEL TAYLOR,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant did not state an arguable claim of his trial counsel's deficient representation for failing to present a witness at trial because he did not supplement his post-conviction petition with an affidavit from that individual. Moreover, defendant failed to state an arguable claim that two jurors should have been excused for cause where the *voir dire* examination of those jurors rebuts defendant's claim.

¶ 2 Following a jury trial, defendant Michael Taylor was convicted of four counts of criminal sexual assault. The trial court sentenced defendant to four consecutive six-year terms in prison.

On appeal, defendant contends that his *pro se* post-conviction petition stated two arguably

meritorious claims that warrant further proceedings, namely that: (1) his trial counsel was ineffective in failing to investigate and call Stanford Daniels as a witness at his trial, and (2) his appellate counsel was ineffective for failing to argue on direct appeal that because two jurors expressed biases against defendant during *voir dire*, the trial court erred in denying the defense's request that those individuals be excused for cause.

¶ 3 Defendant was charged with multiple counts of criminal sexual assault and aggravated criminal sexual abuse relating to various acts involving a minor, W.T., in 2004. The following testimony presented at defendant's trial is relevant to the two issues raised in this appeal. Facts relating to the jurors' potential bias will be discussed below alongside our consideration of that issue.

¶ 4 At trial, W.T. testified that, starting in February 2004, he lived at a homeless shelter in Chicago called the Oneness Center with his mother, Beatrice, and his younger brother for six or seven months. Defendant was their case manager. After the family lived with Connie Wade, a friend of Beatrice's, for about two weeks, defendant asked W.T. in September 2004 if he would like to stay with him, and W.T. agreed.

¶ 5 The charges in this case arose from three incidents between October 5 and November 11, 2004. W.T. was 13 years old at that time. W.T. testified that defendant lived in a three-bedroom apartment with two roommates, but one roommate moved out with a week after W.T. began living there, and W.T. slept in that vacated bedroom. Defendant slept in his room. Defendant's other roommate was Daniels, to whom W.T. referred as "Stan."

¶ 6 During the first week that W.T. lived with defendant, W.T. slept in defendant's bed. W.T. testified that defendant told him to sit on defendant's bed and watch a pornographic video. At

defendant's direction, W.T. reclined on the bed and defendant moved his hand on W.T.'s penis until W.T. ejaculated.

¶ 7 In the second incident, W.T. was in his bedroom, which was next to Daniels' bedroom, and was jumping on his bed. Defendant told him to stop and W.T. responded that defendant should "kiss my ass." Defendant then applied Vaseline to W.T. and inserted his finger into W.T.'s anus and also inserted the handle of a hairbrush into that area for about 20 seconds. W.T. said he did not tell anyone that day what defendant had done.

¶ 8 The third incident took place when defendant kissed W.T. in various places, including his anus and put his mouth on W.T.'s testicles and penis for about 20 seconds. W.T. testified that he did not tell anyone that day about what defendant did because he was ashamed and "felt like this shouldn't happen."

¶ 9 In addition to those three incidents, W.T. testified as to another encounter that occurred in defendant's bedroom. After W.T. told defendant that he got a poor math grade, defendant responded that education was important. Defendant then played a pornographic video and asked W.T. if he wanted to masturbate with him. W.T. responded no. W.T. testified that defendant told him as "punishment" he had to undress and sit in a chair while defendant masturbated. W.T. testified that defendant bought him clothing, shoes and a radio. Defendant was charged with these crimes when W.T. told his older brother, who came home from college at Thanksgiving and visited W.T. at defendant's apartment.

¶ 10 On cross-examination, W.T. stated he talked to Daniels at times and felt comfortable but did not trust Daniels. W.T., defendant and Daniels did not spend any time together but W.T. spoke to Daniels alone on occasion.

¶ 11 C.T. testified he was sexually abused by defendant in 1998 when he was 17 years old and defendant was a minister.[1] Defendant had agreed to help C.T. get a job and apply to college.

¶ 12 Defendant testified that he was a Baptist minister and was 53 years old at the time of trial. He worked at the homeless shelter in 2004 and helped the residents improve their life situations. Defendant said he asked the shelter's director for permission to have W.T. live with him. Defendant denied sexually assaulting W.T. but admitted to sexual contact with C.T.

¶ 13 Defendant was found guilty on all counts. The trial court vacated the jury's guilty verdict on one count of aggravated criminal sexual abuse predicated on contact between defendant's hand and W.T.'s penis because the jury had not been instructed on that count. The trial court merged defendant's convictions on four counts of aggravated criminal sexual abuse into the convictions on four counts of criminal sexual assault. On appeal, this court affirmed defendant's convictions and sentence, finding that the evidence at defendant's trial "rather overwhelmingly established his guilt." *People v. Taylor*, 2012 IL App (1st) 110229-U, ¶ 56.

¶ 14 On January 30, 2014, defendant filed a *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2012)), which contains the claims at issue in this appeal. On April 22, 2014, the circuit court dismissed defendant's petition as frivolous and patently without merit. The court noted, *inter alia*, that defendant had not attached affidavits of Daniels or other potential defense witnesses to support his claims that his

[1] Prior to defendant's trial, the trial court denied the State's motion to admit proof of his sexual abuse of C.T. as substantive evidence to demonstrate defendant's propensity to commit such acts. Upon the State's interlocutory appeal, this court found the evidence of the prior crime was admissible to show defendant's propensity to commit a sexual offense. *People v. Taylor*, 383 Ill. App. 3d 591, 595 (2008).

trial counsel was ineffective for failing to present their testimony. As to the jury bias issue, the court found defendant had forfeited that argument for failing to raise it in his direct appeal. Defendant now appeals that ruling.

¶ 15 The Act provides a criminal defendant with a means to redress a substantial violation of his constitutional rights in his original trial or sentencing by filing a petition in the circuit court in which the original proceeding took place. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002); *People v. Rivera*, 198 Ill. 2d 364, 368 (2001). When a petition is filed under the Act, the circuit court can dismiss the petition within 90 days of its filing if the allegations in the petition are frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). This court reviews *de novo* the circuit court's summary dismissal of a post-conviction petition. *People v. Smith*, 2015 IL 116572, ¶ 9.

¶ 16 At this stage, the court is to consider "the petition's substantive virtue rather than its procedural compliance." *People v. Hommerson*, 2014 IL 115638, ¶ 11. The threshold for a petition filed under the Act to survive first-stage review is low "[b]ecause most petitions are drafted at this stage by defendants with little legal knowledge or training." *People v. Delton*, 227 Ill. 2d 247, 254 (2008). Thus, a *pro se* defendant presenting a post-conviction petition under the Act is only required to allege enough facts to support the "gist" of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009), citing *People v. Porter*, 122 Ill. 2d 64, 74 (1988). Accordingly, the petition need not include formal legal arguments or citations to legal authority. *Hodges*, 234 Ill. 2d at 9.

¶ 17 The "gist" of a claim has been defined as "something less than a completely pled or fully stated claim." *People v. Edwards*, 197 Ill. 2d 239, 245 (2001). The "gist" standard requires the

defendant to "only present a limited amount of detail" to survive the summary dismissal stage of post-conviction proceedings. *Id*., quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996).

¶ 18 Further refining that standard, our supreme court held in *Hodges* that "gist" was not the legal standard to be used by the circuit court in evaluating the petition but that it instead describes "what the defendant must allege at the first stage." *Hodges,* 234 Ill. 2d at 11. *Id*. The supreme court stated: "[T]he 'gist' of the constitutional claim alleged by the defendant is to be viewed within the framework of the 'frivolous and patently without merit' test" set out in section 122-2.1 of the Act. *Id*. The supreme court held in *Hodges* that a *pro se* petition may be summarily dismissed if it "has no arguable basis either in law or in fact." *Id*. at 11-12.

¶ 19 Defendant argues on appeal that he sufficiently stated the gist of an arguable claim of the ineffectiveness of his trial counsel for failing to investigate and call Daniels as a defense witness. Defendant asserted in his post-conviction petition that had Daniels been interviewed or called to testify, he would have testified that he lived in at the apartment where the abuse was alleged to have occurred.

¶ 20 The petition further states:

> "As such, [Daniels] was privileged to the events taking place there. He knows both the defendant and the victim and had good relationships with both, engaged in daily conversations and was included in many, if not all of their activities.
>
> Mr. Daniels would have testified that having the victim there was not strange for the defendant. In fact, the defendant often if not regularly opened his home to those in need.

> As an eyewitness to the events happening in that apartment, Mr. Daniels would have testified that he never observed any, or had reason to believe, that sexual misconduct of any kind took place there."

¶ 21 Defendant further stated in his petition that Daniels would have attested to spending "numerous hours alone with the victim, and as a result developed a close relationship." Defendant stated that W.T. "often shared personal and family issues" with Daniels and that "a trust developed" between Daniels and W.T. "yet the victim never indicated any of the facts listed in the indictment to [Daniels] though he had lots of opportunities while the two of them were alone outside of the apartment walking the dog, or visiting the library or volunteering at the church food pantry." Defendant concluded his description of Daniels' potential testimony by stating that had Daniels been called to testify, Daniels would state that "he does not believe the allegations and that he believes they were motivated by money."

¶ 22 Section 122-2 of the Act provides that a post-conviction petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). As the State points out on appeal, defendant did not attach an affidavit from Daniels to his post-conviction petition. A defendant who claims that his trial counsel was ineffective for failing to investigate and call a witness must support his allegation with an affidavit from the proposed witness. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 30, citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000). The supreme court explained in *Enis* that if such an affidavit is not provided, then "a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *Id.*; see also *People v. Harris*,

224 Ill. 2d 115, 142 (2007) (affirming summary dismissal of post-conviction petition making similar claim that was only supported by the defendant's affidavit and not that of the potential witness).

¶ 23 The failure to supply such an affidavit has been deemed "fatal" and "by itself justifies the petition's summary dismissal" unless the defendant can provide an explanation for the affidavit's absence. *People v. Collins*, 202 Ill. 2d 59, 66 (2002) (and cases cited therein); *People v. Brown*, 2015 IL App (1st) 122940, ¶ 52. In defendant's petition, he asked the court to excuse him from providing affidavits of Daniels and other potential witnesses because he lacked "access to the witnesses due to his incarceration, and is unable to obtain affidavits without assistance from the court." However, the Act provides relief only to those individuals who are "imprisoned in the penitentiary." 725 ILCS 5/122-1(a) (West 2012). Therefore, the Act's affidavit requirement contemplates that a post-conviction petitioner likely will be incarcerated when offering a filing. Defendant's status as a prisoner does not excuse his failure to provide an affidavit of Daniels or offer an explanation for its absence. Defendant does not describe any effort made to obtain the required affidavit or any unsuccessful attempts to do so.

¶ 24 Moreover, the Act does not permit defendant's statements as set out above to stand in the place of a sworn affidavit from Daniels. The purpose of an affidavit required under section 122-2 of the Act is to "show [] that the verified allegations are capable of objective or independent corroboration." *Collins*, 202 Ill. 2d at 67. The affidavit requirement reflects the fact that those documents are sworn statements worthy of trust. See *People v. De Avila*, 333 Ill. App. 321, 327 (2002). Defendant's petition sets out what Daniels saw or did not see, according to defendant. However, without an affidavit from Daniels, this court cannot know what the actual substance of

Daniels' testimony would have been. Defendant's failure to attach an affidavit from Daniels to his petition defeats his claim that his trial counsel was ineffective for failing to call Daniels as a witness. Therefore, we do not reach the issue of whether defendant's petition stated the gist of a constitutional claim on this point.

¶ 25 Defendant's second main contention on appeal is that he stated the gist of an arguable claim of the ineffectiveness of his counsel on direct appeal. Defendant asserts that appellate counsel should have argued that the trial court erred in denying his challenges to two jurors for cause. He argues those jurors were biased against him because both had friends or family members who were sexual assault victims and both were equivocal during *voir dire* as to whether they could consider defendant's case fairly.

¶ 26 That claim is stated somewhat differently in defendant's post-conviction petition. While including the claim of the jurors' potential bias, defendant asserted in his petition that his trial counsel was ineffective in failing to have both of those jurors stricken for cause.

¶ 27 The State argues that defendant's petition only raised this argument as to the two allegedly biased jurors in the context of trial counsel's performance and that any deficiencies of trial counsel were barred by defendant's failure to raise them on his direct appeal. The State asserts that defendant did not include a claim of the ineffectiveness of his appellate counsel in his petition. In response, defendant contends that at this initial stage of post-conviction proceedings, he is only required to set out the factual basis for an arguable claim and was not required to use the term "ineffective assistance of appellate counsel."

¶ 28 The pertinent portion of defendant's petition refers only to his trial counsel by name and does not mention appellate counsel or place his claim in the context of his direct appeal. As we

have recognized above, a post-conviction petition is not required to state formal legal arguments. See *Hodges*, 234 Ill. 2d at 9; see also *People v. Mars*, 2012 IL App (2d) 110695, ¶ 32 (noting that "a *pro se* defendant will likely be unaware of the precise legal basis for his claim"). However, while petitions are to be construed liberally and "viewed with a lenient eye," the pleading "must bear some relationship to the issue raised on appeal." *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 48. Defendant points out that the only element missing from his petition is the "purely legal argument" that his appellate counsel failed to raise the issue on direct appeal. However, we do not read defendant's petition to encompass a claim regarding the performance of appellate counsel.

¶ 29 Even if the claim as stated in defendant's petition is liberally construed to challenge the effectiveness of appellate counsel, defendant's claims are not arguably meritorious because they are contradicted by the record. See *Hodges*, 234 Ill. 2d at 17 (an indisputably meritless legal theory that warrants the summary dismissal of a post-conviction petition is one that is completely contradicted by the record). Based on the entire colloquy as to those two jurors, we do not find it was arguable that defendant's appellate counsel could have raised a meritorious claim that his challenges for cause were improperly denied.

¶ 30 Defendant claimed in his petition that he was denied a fair trial because the circuit court denied his counsel's requests to remove for cause two jurors who indicated they could not be fair in his case. For purposes of this order, we refer to those two jurors as "Juror A" and "Juror B".

¶ 31 In deciding a defendant's claim of an unfair trial, a reviewing court must consider the juror's entire *voir dire* examination and consider his statements as a whole and not in isolation in

determining whether the juror is biased. *People v. Ramsey*, 239 Ill. 2d 342, 419 (2010); *People v. Sheley*, 2014 IL App (3d) 120012, ¶ 22.

¶ 32 In response to the trial judge's question during *voir dire*, Juror A, Juror B and two other venire members indicated that they had a friend or family member who had been a sexual assault victim. During further questioning by the trial court, Juror A said he would "be prejudiced in favor of the assaultee." When questioned further in chambers, Juror A stated that in 2004, his then-girlfriend was sexually assaulted. When asked if that would affect his ability to be a juror in defendant's case, Juror A responded:

> "I would like to believe that it would not but I have learned over the course of my life that I'm not fully aware of prejudice that I have of things so it can influence. But I think of myself as a private person. I am a scientist, hearing evidence and making considerations based on what I know to be true other than what I think to be true."

The colloquy continued:

> "MS. PREYAR [defense counsel]: And as far as hearing evidence that Mr. Taylor is a registered sex offender, how would that affect you in your ability to deliberate fully to evidence in this case [*sic*]?
>
> JUROR A: I believe that I know that in terms of law each case is separate. I believe that people as long as they have paid their debt for a crime, they should be given an opportunity to start fresh. Not be haunted by something they have atoned for. I can't guarantee that it would not be a component to my thinking.
>
> THE COURT: What would be a component of your thinking.
>
> JUROR A: Past events would not be a component to my thinking."

The court then questioned Juror A:

"THE COURT: Sir, if I were to give you instruction in a court order that you are only to [] consider the evidence that you hear in this case and not draw adverse emphasis from speculation matters that are not before the court, would you be able to follow that instruction?

JUROR A: I believe so.

THE COURT: If [the evidence were to show that defendant] was a registered sex offender, you are telling me you're not sure whether you can be fair or not, is that what you are telling me?

JUROR A: Am I sure I believe I could. I think of myself as a fair person. I believe yes I could be. I'm just being open with my answer.

THE COURT: Will you follow the order of this court?

JUROR A: Yes, I will.

THE COURT: Even if those orders are adverse or different from your personal belief as to how you think things should be?

JUROR A: I will do what the law tells me to do. The law, if you give me an argument I will analyze it based on the evidence that I heard and not with outside forces."

¶ 33 As to the second juror at issue, Juror B responded during his initial questioning by saying that "I would like to say yes that I would be fair." Juror B answered "yes" to the court's inquiry of whether he would be able to follow the law as given to him by the court without bias or prejudice to either side.

¶ 34 When questioned further, Juror B stated that his best friend was sexually assaulted and that his great-grandfather had molested a grandchild. When asked by defense counsel if that would affect his ability to be "impartial and fair" in defendant's case, Juror B replied:

> "I don't know for sure. It's kind of an emotional issue. Pragmatically I'd like to be honest and not knowing the details of the allegation, stuff like that, I'm not sure."

¶ 35 Defense counsel then asked Juror B if, given that sensitive issue, Juror B would "be able to follow the law as given to you as oppose[d] to following whatever emotional response you might have." Juror B responded: "[]Phrasing it that way yes, I would be able to take [the court's] direction."

¶ 36 The State then questioned Juror B:

> "MS. SHEA [assistant State's Attorney]: You are aware that Michael Taylor had nothing to do with those crimes that your grandfather committed?
>
> JUROR B: Absolutely.
>
> MS. SHEA: You will put those aside and just follow the law as the judge gives you in this case?
>
> JUROR B: Yes."

¶ 37 The standard for juror impartiality is whether the jurors had such fixed opinions that they could not impartially judge the guilt of the defendant. *People v. Runge*, 234 Ill. 2d 68, 103 (2009). The party claiming that a juror has a disqualifying state of mind has the burden to show the actual existence of that state of mind in the juror so as to raise a presumption of partiality. *People v. Ephraim*, 323 Ill. App. 3d 1097, 1105 (2001).

¶ 38 To the extent that both Juror A and Juror B provided uncertain responses when first being questioned, an equivocal response to an inquiry does not require that a juror be excused for cause. *Ephraim*, 323 Ill. App. 3d at 1105. In addition, "[a]n equivocal response by a prospective juror does not necessitate striking the prospective juror for cause where the prospective juror later states that he will try to disregard his bias." *Id.*, quoting *People v. Hobley*, 159 Ill. 2d 272, 297 (1994). When the *voir dire* is considered as a whole, Juror A and Juror B did not indicate that they could not be impartial; rather, they stated they would evaluate defendant's case based on the evidence presented and the law. Compare *People v. Johnson*, 215 Ill. App. 3d 713, 724 (1991) (challenges against three jurors for cause who had relatives or friends who were prior crime victims should have been granted when each juror stated in *voir dire* that he could not be fair and impartial). Here, the record affirmatively demonstrates that both Juror A and Juror B stated at the conclusion of their questioning that they would consider defendant's and follow the principles of law provided by the court. Accordingly, there is no arguable basis for defendant's claim that he was convicted by a biased jury. Therefore, there is no arguable claim that appellate counsel was ineffective for failing to raise that issue on appeal.

¶ 39 Defendant nevertheless contends that the fact that Juror A served as the jury's foreman put him in "a position to exert a powerful influence on the jury's deliberations." There is no basis to conclude that Juror A influenced the opinions of his fellow jurors more than any of the other members of the jury. Compare *People v. Stremmel*, 258 Ill. App. 3d 93, 113-14 (1994) (jury foreman who was a veteran Rockford police officer at trial where 11 Rockford police officers testified and where case turned on credibility the jury foreman's former partner, the foreman "could have had a disproportionate influence on his fellow jurors").

¶ 40 Defendant further asserts that Juror A's influence on the jury was shown by the fact that the jury issued a guilty verdict on a count on which it was not instructed, namely a count alleging aggravated criminal sexual abuse based on contact between defendant's hand and the victim's penis. (The trial court vacated that verdict.) However, defendant fails to offer any support for his claim that Juror A unduly pressured the jury into issuing an incorrect verdict on that count or that the verdict on that count was anything other than an oversight.

¶ 41 In summary, defendant's post-conviction petition did not state an arguable claim of trial counsel's failure to present Daniels as a witness. Moreover, defendant did not state an arguable claim that his appellate counsel should have argued on direct appeal that the trial court erred in denying the defense's request to excuse two jurors for cause.

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

¶ 43 Affirmed.