SECOND DIVISION
October 18, 2016

No. 1-14-2721

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 09 CR 21812
	)	
BERLY VALLADARES,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of postconviction petition was proper; trial court did not err, nor was defendant prejudiced, by not further instructing the jury on accountability in response to its note.

¶ 2 A jury convicted defendant Berly Valladares of first degree murder and aggravated battery with a firearm and he was sentenced to consecutive prison terms of 55 and 15 years. We affirmed on direct appeal. *People v. Valladares*, 2013 IL App (1st) 112010. Valladares now appeals from the summary dismissal of his 2014 *pro se* postconviction petition, contending it states an arguable claim that the court deprived him of full and fair jury deliberations by not

further instructing the jury in response to its question. We affirm. Valladares has forfeited any ineffective assistance claims against trial, post-trial, and appellate counsel regarding the jury note and, in any event, we find that the trial court's answer to the jury note was legally correct.

¶ 3 Background

¶ 4 Valladares and codefendant Narcisco Gatica were charged with the first degree murder of Francisco Valencia, and the attempted first degree murder and aggravated battery with a firearm of Daisy Camacho. At Valladares's 2010 trial, the State proceeded on first degree murder and aggravated battery with a firearm.

¶ 5 Following closing arguments, the jury was given its instructions. In addition to the charges, the jury was instructed to determine whether Valladares, or someone for whom he was legally responsible, was armed with a firearm during the commission of first degree murder. Illinois Pattern Jury Instructions, Criminal, Nos. 28.01-28.04 (4th ed. 2000) ("IPI 28.01-28.04"). On accountability, the trial judge instructed:

> "A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of an offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of an offense. The word 'conduct' includes any criminal act done in furtherance of the planned and intended act." Illinois Pattern Jury Instructions, Criminal, No. 5.03 (4th ed. 2000) ("IPI 5.03").

¶ 6 While deliberating, the jury sent a note asking the court "What is the definition (or please clarify) 'during the commission of the offense'? pertaining to the offense of first degree murder of Francisco Valencia the defendant was armed with a firearm?" Defense counsel suggested

replying that the jury heard the evidence and should continue deliberating. The parties agreed that the answer also should remind the jury that it had the law. The court suggested "please refer to your instruction and continue to deliberate," and neither party objected. The court replied to the note: "Please refer to your instructions and continue to deliberate."

¶ 7 The jury found Valladares guilty of first degree murder and aggravated battery with a firearm. Valladares's post-trial motion, filed by new counsel, raised claims including ineffective assistance of trial counsel but no challenge to the court's answer to the jury note nor an ineffectiveness claim regarding the jury note. The trial court held an evidentiary hearing, after which it denied the motion, finding, in relevant part, that it properly instructed the jury on accountability.

¶ 8 On direct appeal, Valladares claimed ineffective assistance of trial counsel for not meeting with him, not filing a motion to suppress his statements, and agreeing to the admission of gang evidence. Valladares also contended that the jury instructions did not properly instruct the jury on the law of accountability. Lastly, he raised a *corpus delicti* challenge. *Valladares*, 2013 IL App (1st) 112010 ¶ 2. As to the instructions on accountability, Valladares challenged the court's pre-instruction during *voir dire* and its denial of Valladares's non-pattern instruction on accountability. *Id*. ¶¶ 97, 106. (During *voir dire*, the court asked the potential jurors "[T]he court may instruct you at the close of evidence that a person who plans, aids, or agrees to aid others in the commission of a crime is legally responsible for any crime committed in furtherance of that plan by any of those other persons. Would you follow the law if it is given to you in this case?")

¶ 9 We held that these decisions were proper or harmless, and there was no reason for the trial court to give something other than the legally-accurate pattern instruction on accountability.

Id. ¶¶ 105, 109. As to *corpus delicti*, we found the evidence sufficient to convict Valladares on an accountability basis, finding his statements were corroborated by his trial testimony, gang affiliation, and the telephone and video evidence. *Id*. ¶ 120.

¶ 10 Valladares filed his *pro se* petition in May 2014. In relevant part, he claimed that the trial court abused its discretion by not replying to the jury note by answering or clarifying the jury's question. He raised claims of ineffective assistance of trial counsel, but none concerned the jury note. The petition raised no claims of ineffective assistance by appellate counsel.

¶ 11 The trial court summarily dismissed the petition in a written order on July 25, 2014. The court found that many of Valladares's claims could have been raised on direct appeal on the trial record but were not, and thus were forfeited, and Valladares was not alleging ineffective assistance of appellate counsel to overcome forfeiture. Also, the trial court found the jury note claim was one of the forfeited claims and, moreover, trial counsel acquiesced in the court's answer to the note. Moreover, the court found the jury was fully and clearly instructed on the relevant law, and answering the note with further instruction would have served no useful purpose but instead would have confused or misled the jury.

¶ 12 Analysis

¶ 13 Valladares contends that his petition was erroneously dismissed because it states an arguable claim that the trial court deprived him of full and fair jury deliberations by not further instructing the jury in response to its note. He also contends that his petition should be construed to include ineffective assistance claims regarding the court's response to the jury note.

¶ 14 In response, the State argues that Valladares forfeited these claims by not preserving them in the trial court and then not claiming in his petition that counsel was ineffective for not

raising or preserving them. A claim that can be raised on the trial record is forfeited by not raising it on direct appeal, but may be raised later 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 postconviction 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 *pro se* petition here, included ineffective assistance claims but not the particular claim that was thereby forfeited. Furthermore, the petition contains no claims of ineffectiveness of any kind by appellate counsel. We conclude, under *Petrenko*, that Valladares forfeited ineffective assistance claims against trial, post-trial, and appellate counsel regarding the jury note.

¶ 15 We also agree with the State that Valladares forfeited the claim actually raised in the petition. Valladares, through counsel, agreed to the court's response to the note. Where a defendant acquiesces in the trial court's answer to a jury note, he has forfeited a challenge to that answer unless he or she claims that acquiescence resulted from ineffective assistance of counsel. *People v. Averett*, 237 Ill. 2d 1, 23-24 (2010). As stated above, Valladares forfeited any ineffectiveness claims regarding the jury note.

¶ 16 Assuming *arguendo* that Valladares had not forfeited these claims, and noting that the State joins issue on the merits after making its forfeiture argument, we would conclude that there was no error. A postconviction 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 on an indisputably meritless legal theory contradicted by the record, or on 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 postconviction 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.

¶ 17 Generally, ineffective assistance is shown when counsel's performance was objectively unreasonable and prejudicial to the defendant. *People v. Tate*, 2012 IL 112214, ¶ 19. A petition alleging ineffective assistance may not be summarily dismissed if it is arguable that (a) counsel's performance was objectively unreasonable and (b) the defendant was prejudiced. *Id*. A defendant is not prejudiced by 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)).

¶ 18 Jurors are typically entitled to have their questions answered, and the trial court has a duty to instruct the jury when clarification is requested, the original instructions are insufficient, or the jurors are manifestly confused. *Averett*, 237 Ill. 2d at 24. The trial court, however, has discretion to decline to answer a jury inquiry in certain circumstances: (i) if the jury instructions are readily understandable and sufficiently explain the relevant law, further instructions would serve no useful purpose or even potentially mislead the jury; (ii) the inquiry involves a question of fact; or (iii) an answer would entail expressing the trial court's opinion that would effectively direct the jury's verdict. *Id*. The trial court also is not required to further define words in a jury

instruction that have a commonly-understood meaning, particularly when the pattern jury instructions do not provide that an additional definition is necessary. *People v. Hicks*, 2015 IL App (1st) 120035, ¶¶ 54-56. The trial court has discretion in determining how best to respond to a jury question, and we review its decision for abuse of discretion. *Averett*, 237 Ill. 2d at 24; *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 27. In particular, we first determine whether the trial court should have answered the jury question, conducting our review on an abuse-of-discretion basis, and then determine whether the court's response was legally correct, a matter of law reviewed *de novo. McSwain*, 2012 IL App (4th) 100619, ¶ 27.

¶ 19 The jury asked the court to define a commonly-understood phrase, "during the commission of an offense." There is no provision for defining "during" or "during the commission of an offense" in IPI 5.03, IPI 28.01-28.04, or the notes. We find the trial court was not obligated to further define that phrase. We also find that the trial court's answer to the jury note—an impartial reminder that the jury had been duly instructed and should continue deliberating—was legally correct.

¶ 20 Affirmed.