

No. 1-15-2811

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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 13639 (02)
)	
EMMANUEL WARE,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
JUSTICES HALL and LAMPKIN concurred in the judgment.

ORDER

- ¶ 1 *Held:* We affirmed the trial court’s first-stage summary dismissal of defendant’s postconviction petition which alleged ineffective assistance of appellate counsel for failing to raise error in the denial of a mistrial motion based on an alleged confrontation clause violation.
- ¶ 2 Defendant-appellant, Emmanuel Ware, appeals the first-stage dismissal of his *pro se* postconviction petition (petition), arguing that the petition raised the gist of a meritorious claim of ineffective assistance of appellate counsel for failing to challenge the trial court’s denial of his motion for mistrial based on a confrontation clause violation. We affirm.

¶ 3 In defendant's direct appeal, we set forth a detailed recitation of the evidence adduced at trial. See *People v. Emmanuel Ware*, 2014 IL App (1st) 120485. We present only those facts which are relevant to this appeal.

¶ 4 Defendant and codefendant Anthony Johnson were charged in connection with the July 1997 armed robberies at II Kilos Barber and Beauty Salon in Chicago (salon).

¶ 5 Prior to trial, defendant filed a motion *in limine* which sought to prevent police officers from testifying that, during their investigation, codefendant named defendant as his accomplice which, in turn, led them to defendant. The court stated that the officers could testify to arresting codefendant and that they had a conversation with him. However, "what he said to them verbatim can't come into evidence, but the State can say after your conversation with [him] what focus did your investigation take, and they would be able to say they were looking for E Man, *et cetera*, looking for an identity of an E Man and their investigation proceeded that way."

¶ 6 At trial, the evidence established that, at around 7 p.m. on July 10, 2009, defendant and codefendant entered the salon armed with guns. Defendant pointed his gun at a customer and ordered everyone else present to get down and to give up their belongings. Codefendant collected the property and money from six individuals in the salon.

¶ 7 One of the State's witnesses, Deondre Bush, testified that, just before the robbery, he was sitting in a salon chair, waiting to get his hair cut. Two men, one of whom he identified in court as defendant, entered the salon armed with guns. Defendant pointed a gun at Mr. Bush's head and back and stated: "you know what time it is." Codefendant went around to the women's side of the salon to collect belongings, and then returned to the men's side to do the same. Mr. Bush gave defendant cash and, after approximately 10 minutes, the two men fled.

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¶ 8 Lataisha Jackson, a cousin of the owner of the salon, was in the apartment above the salon during the incident and was watching surveillance monitors. The next day, July 11, 2009, Ms. Jackson saw codefendant on Homan Square, went to the police station, and reported information regarding the armed robberies to police officers, one of whom was Officer Gregory Barnes. She provided the police with the surveillance footage, and the police ultimately located and detained Codefendant.

¶ 9 During the direct testimony of Officer Barnes, the following exchange took place between an Assistant State's Attorney (ASA) and Officer Barnes:

“[ASA:] After the co-offender was in custody, what, if anything, did you do with respect to this investigation?

[OFFICER BARNES:] A name was provided by the co-offender.”

¶ 10 Defendant objected and the circuit court sustained the objection. Defendant moved for a mistrial, arguing that the hearsay testimony of Officer Barnes which, in effect, identified defendant as an accessory to the armed robbery, was a violation of the motion *in limine* order. Before the court heard arguments on the motion for mistrial, Officer Barnes further testified that he had never personally interviewed codefendant during the investigation.

¶ 11 The court denied the motion for a mistrial, explaining:

“It should not have happened based upon prepping the officer. He should have been strictly told that he couldn't say on the stand anything that he heard from the co-defendant. It did come out in some fashion. I don't have it verbatim of course, in some fashion that they got a name from the co-defendant something of that nature. However I sustained the objection. The follow up question was asked was this guy on the stand never even talked to the co-defendant period. So he didn't get a name from anybody. I

think that's clear to the jury, too. Certainly I don't think it would rise even to be close to the level of a mistrial based on the facts of this particular case. At this juncture I have lost track of how many incorrect [sic] identifications have been made against this defendant by all the people that were in the barber shop and the beauty salon. So I don't think that this is coming in front of the jury where the next question was quite clearly the officer never even spoke to this person, so clearly don't think that there's any prejudice here."

¶ 12 The defense declined the trial court's offer to specifically instruct the jury to disregard the testimony or give other limiting instructions.

¶ 13 Further evidence at trial established the subsequent events. After codefendant was detained, Mr. Bush identified defendant in a photo array as the man who held a gun to his head and back during the robbery. Later, while on duty, Officer Barnes observed defendant outside a building located at 1665 South Homan Avenue. The officer transmitted a flash message to police in the area. Defendant fled into the building upon seeing the police approaching him. Officer Barnes and another officer entered the building, ordered defendant to stop, and then pursued him to a third floor apartment. Officer Barnes forced entry into the apartment and observed defendant exiting a bathroom. The officer recovered a gun which was inside a toilet tank in the bathroom.

¶ 14 On July 12, 2009, Mr. Bush went to the police station to view a lineup and identified defendant. Six others, including: Devon Edwards, Terrence Woodards, Rodney Ragsdale, Tiffany Phinn, Jeffery Myles, and Jean King, identified defendant from lineups as one of the two men who committed the robbery at II Kilos. Ms. Jackson, however, identified codefendant, but did not identify defendant. Ms. Phinn identified a photograph of the gun recovered from the toilet tank as the same type of gun used by codefendant during the robbery.

¶ 15 After deliberations, the jury found defendant guilty of six counts of armed robbery. The circuit court found defendant eligible for extended-term sentencing and sentenced him to 50 years' imprisonment on each count, ordering the sentences to be served concurrently.

¶ 16 On direct appeal to this court, defendant argued, *inter alia*, that his extended term sentences should be vacated because defendant did not have a prior Class X felony conviction. See *People v. Ware*, 2014 IL App (1st) 120485-U. This court affirmed defendant's convictions, but held that he was not extended-term eligible and reduced defendant's 50-year sentences to 45 years.

¶ 17 On January 25, 2015, defendant filed the petition which argued, *inter alia*, that the State committed prosecutorial misconduct by eliciting testimony from Officer Barnes as to codefendant's statement and that the trial court erred in denying a mistrial. Defendant also argued that appellate counsel was ineffective for failing to challenge the denial of the mistrial on direct appeal.

¶ 18 In a written order, the circuit court summarily dismissed the petition finding that there had been no evidence that the State intentionally violated the motion *in limine* and that defendant had not been prejudiced by the testimony of Officer Barnes in light of the overwhelming evidence against him, including a surveillance video which showed defendant and codefendant committing the armed robberies. For the same reasons, the trial court also found no abuse of discretion in the denial of the motion for mistrial and, as a result, the claim of ineffective assistance of appellate counsel for failing to raise the issue in defendant's direct appeal was meritless. This timely appeal followed.

¶ 19 On appeal, defendant argues that the petition stated the gist of a meritorious claim that his appellate counsel was ineffective for failing to argue that the trial court abused its discretion by

denying his motion for a mistrial after Officer Barnes violated the motion *in limine* order and testified that codefendant provided police with a name.

¶ 20 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2014)), provides a method by which a person under criminal sentence may assert that the conviction was the result of a substantial denial of his rights under the United States Constitution or the Illinois Constitution or both. A circuit court may summarily dismiss a postconviction petition if it determines that the petition is “frivolous or is patently without merit.” 725 ILCS 5/122-2/1(a)(2) (West 2014). A petition is frivolous or patently without merit only if it has “no arguable basis either in law or in fact.” *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16. A petition lacks an arguable basis in fact if it is based upon a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Id.* at 16-17. The summary dismissal of a postconviction petition is a legal question that is subject to *de novo* review. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010).

¶ 21 Because, “[p]roceedings on a postconviction petition are collateral to conviction; ‘issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered waived.’ ” *People v. Allen*, 2015 IL 113135, ¶ 20 (quoting *People v. Pitsonbarger*, 205 Ill.2d 444, 456 (2002)).

¶ 22 Defendant’s underlying claim, that the trial court erred by not granting a mistrial, is based entirely on circumstances contained in the record and which could have been raised on direct appeal. See *People v. Romero*, 2015 IL App (1st) 140205, ¶ 25. However, the doctrine of *res judicata* and forfeiture, in postconviction proceedings are relaxed where the forfeiture “stems from the ineffective assistance of appellate counsel.” *People v. Williams*, 208 Ill. 2d 227, 233

(2004) (citing *People v. Whitehead*, 169 Ill.2d 355, 371-72 (1996)). Thus, we may consider the issue that the denial of a mistrial was an abuse of discretion in the framework of ineffectiveness of appellate counsel.

¶ 23 We determine ineffectiveness of appellate counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. English*, 2013 IL 112890, ¶ 33 (citing *Strickland*, 466 U.S. at 668). Under that standard at the first stage, a defendant must show that it is arguable both “that appellate counsel’s performance was deficient and that, but for counsel’s errors, there is a reasonable probability that the appeal would have been successful.” *Id.* (citing *Strickland*, 466 U.S. at 694).

¶ 24 A petition alleging ineffective assistance of appellate counsel may not be summarily dismissed if it is arguable that counsel’s performance fell below an objective standard of reasonableness and it is arguable that the defendant was prejudiced. *People v. Cathey*, 2012 IL 11746, ¶ 23. Appellate counsel is not required to raise every conceivable issue on appeal and it is not incompetent for counsel to refrain from raising issues that are without merit. *People v. Edwards*, 195 Ill. 2d 142, 163-64 (2001). Where the underlying claim lacks merit, a defendant cannot be said to have received ineffective assistance of appellate counsel due to appellate counsel’s failure to raise the claim on direct appeal. *People v. Johnson*, 206 Ill. 2d 348, 378 (2002).

¶ 25 As to the merits of the underlying claim, defendant argues that his right to confront his accusers was violated when Officer Barnes testified that the police received a name during a custodial interview of codefendant and, thus, a mistrial should have been granted.

¶ 26 The trial court has broad discretion to determine the propriety of granting a defendant’s motion for a mistrial. *People v. Hall*, 194 Ill. 2d 305, 341 (2000). The trial court’s denial of a

defendant's motion for a mistrial will not be disturbed on review absent a clear abuse of that discretion. *People v. Nelson*, 235 Ill. 2d 386, 435 (2009). The trial court abuses its discretion when its decision is arbitrary, fanciful or “unreasonable to the degree that no reasonable person would agree with it.” *People v. Kladis*, 2011 IL 110920, ¶ 23.

¶ 23 A mistrial should be declared only where an error of such magnitude has occurred that the defendant was denied his right to a fair trial, and continuing the proceedings would defeat the ends of justice. *Nelson*, 235 Ill. 2d at 435; *Hall*, 194 Ill. 2d at 341. Where a timely objection to improper testimony is made during trial, the trial court can usually correct the error by sustaining the objection and instructing the jury to disregard the testimony. *Id.* at 342. Where the trial court instructs the jury to disregard certain testimony, any possible prejudice to the defendant from that testimony can be sufficiently cured. *People v. Biggs*, 294 Ill.App.3d 1046, 1051 (1998) (citing *People v. Wiley*, 165 Ill.2d 259, 291–94 (1995)). We presume that the jury followed the trial court's instructions. *People v. Taylor*, 166 Ill.2d 414, 438 (1995).

¶ 27 We note that the trial court here sustained defendant’s objection to the testimony at issue and, further, offered to instruct the jury to disregard that testimony. Defense counsel declined this offer.

¶ 28 Defendant argues this case is controlled by *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, the United States Supreme Court held that the admission of a statement that expressly implicates the defendant in the crime, at a joint trial, by a nontestifying codefendant, violates the defendant’s constitutional right to confront the witnesses against him. *Id.* at 137. In doing so, the Court determined that the prejudice from the admission of such statements is not cured by a limiting instruction that prohibits the jury’s consideration of codefendant’s statement against defendant. *Id.*

¶ 25 Contrary to defendant's argument, in the 50 years since *Bruton* was decided, the courts of this state have repeatedly held that a *Bruton* violation can be harmless. See, e.g., *People v. Rosochacki*, 41 Ill. 2d 483, 493-94 (1969); see also *People v. Czaplá*, 2012 IL App (2d) 110082, ¶ 20.

¶ 26 In the case before us, we likewise find that the alleged *Bruton* violation—if there was one in this case—was harmless. The evidence that defendant committed the armed robberies is overwhelming. Several witnesses identified defendant as one of the men who committed the armed robberies at the salon. Mr. Bush identified defendant from a photo array and an in-person lineup. Five other eyewitnesses to the armed robberies also identified defendant in lineups. Another witness testified that the gun found with defendant was similar to the gun used by codefendant during the incident. Furthermore, the eyewitness testimony was corroborated by video surveillance showing the armed robberies as they occurred. Accordingly, there is no reasonable possibility that the jury would have reached a different verdict if the alleged *Bruton* violation had not occurred. See *People v. Sample*, 326 Ill. App. 3d 914, 924-25 (2001).

¶ 27 Because the *Bruton* violation, if any, was harmless, we cannot conclude that the trial court abused its discretion when it refused to grant a mistrial. *Nelson*, 235 Ill. 2d at 435. Because there was no abuse of discretion, there is no possibility that defendant would have been granted relief if he had raised the issue on direct appeal. Accordingly, because the underlying claim lacks merit, it is not arguable that defendant was prejudiced and appellate counsel was ineffective for failing to raise the issue on appeal. See *Edwards*, 195 Ill. 2d at 164-65. Therefore, because defendant's claim of ineffective assistance of appellate counsel fails, the circuit court did not err when it honored his procedural default and dismissed the petition.

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

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¶ 29 Affirmed.