2018 IL App (2d) 160338-U
No. 2-16-0338
Order filed September 11, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Respondent-Appellee,	)	
v.	)	No. 09-CF-2212
EDWARD JOHNSON,	)	Honorable Rosemary Collins,
Petitioner-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Hudson and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's postconviction petition was properly dismissed at the first-stage.

¶ 2 Following a jury trial, the defendant, Edward Johnson, was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2008)). He was sentenced to 50 years' imprisonment for the murder conviction and two consecutive mandatory terms of natural life imprisonment for the aggravated criminal sexual assault convictions. We affirmed the defendant's convictions and sentence on direct appeal. See *People v. Johnson*, 2014 IL App (2d) 121004. The defendant subsequently filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act

(Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). The defendant's petition was summarily dismissed as frivolous and patently without merit by the trial court. The defendant appeals from this order. We affirm.

¶ 3 BACKGROUND

¶ 4 On August 25, 2010, the defendant was charged by superseding indictment, in relevant part, with two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2008)) and first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) of the victim, V.F. The charges alleged that the defendant used force or threatened force to commit a sexual act upon the victim and that he had killed the victim by striking her in the head. One of the counts for aggravated criminal sexual assault alleged that the defendant placed his penis in the victim's vagina (count VII), and another alleged that the defendant placed his penis in the victim's anus (count IX).

¶ 5 Prior to trial, the defendant filed a motion to admit a third-party confession pursuant to *Chambers v. Mississippi*, 410 U.S. 284 (1973). In the motion, the defendant alleged that on May 30, 2008, Karl Beck reported to the police that, a couple weeks before, William Jamison, Beck's stepfather, approached Beck wearing a shirt with blood on the front of it. Jamison told Beck that a woman had flashed money in front of him so he struck her in the back of the head with a metal object and took her money. Beck told the police that Jamison told him this the day after the victim's body was found. Jamison denied what Beck had reported to the police.

¶ 6 In its written response to the motion, the State explained that Beck had also stated that two friends were with him when Jamison told him about striking the woman. Beck told the police that one was a Mexican male who only spoke Spanish, who was named Gonzalez but went by the name of Lopez. Beck admitted he could not speak Spanish and had no explanation as to how he communicated with his friend. Beck said the other friend was named John, but he

did not know John's last name. Beck said that John lived in a yellow house at a specific address. However, the specific address did not exist and the police could find no yellow houses in the vicinity. Beck initially said Jamison used a metal object from the railroad tracks to strike the victim, but later indicated that Jamison said it was a metal pipe.

¶ 7 The State further indicated that Beck also told the police that he had seen the victim in Rockford a couple of days before her body was found. He helped her cross a street, so she bought him cigarettes. The police went to the shop where the victim allegedly bought Beck cigarettes. The store owner was shown a picture of Beck but did not recognize him. The police also spoke to Beck's mother, Pam Watkins. Watkins said that Beck had a history of making up stories and that Beck did not get along with Jamison. A police officer who personally knew Beck was aware that Beck had a learning disability and was in special education classes throughout high school.

¶ 8 The State argued that the confession was not admissible because it was not reliable. Jamison denied making the confession and there was no DNA match between the victim and Jamison. Beck's friends who allegedly witnessed the confession could not be identified or located. Further, it was nonsensical that Beck would have a friend that only spoke Spanish, when Beck himself could not speak Spanish. The other alleged friend, according to Beck, lived at an address that did not exist. Additionally, Beck's statements were contradictory as he initially indicated Jamison used a metal object from the railroad to strike the victim but later said it was a metal pipe. The State also noted that Beck had mental impairments and a contentious relationship with Jamison.

¶ 9 At the hearing on the motion to admit the third-party confession, the defendant argued that Jamison's confession contained details that only the perpetrator would know. First, Jamison said that the victim was flashing money. The defendant argued that two days before her death,

the victim withdrew $800 from her bank account. The money was not found on the victim or in her apartment. Second, Jamison mentioned that the victim was struck with a metal object which was consistent with the autopsy results. Following argument, the trial court denied the motion. The trial court found that Jamison's alleged statement, even if true, was not sufficient to relate it back to the victim's death as it could have referred to an attack on a different woman. Also, it was unclear when the statement was made. If it was made a day after the victim was found dead, it would seem unlikely that Jamison would still be walking around with blood on his shirt. The trial court noted that there was no other corroborating evidence. The friends and the bloody shirt were never located and the store owner where the victim purchased cigarettes did not recognize Beck. Finally, the trial court noted that Beck had learning disabilities and a history of conflict with Jamison.

¶ 10 Between June 1 and June 7, 2012, the trial court conducted a jury trial. The State's evidence established that, on May 17, 2008, the victim's body was discovered on the concrete porch of an abandoned brick business building at 210 W. Jefferson in Rockford. The victim was lying on her back with dried blood on her face and in her hair. Her pants were somewhat twisted and her shirt had been slightly pulled up. The zipper on her pants was slightly down but the pants themselves were fastened at the waist. Her bra was undone. At the morgue, a deputy coroner discovered that she had green paint flakes lodged in her pubic hairs and on her thighs. The paint flakes appeared to be consistent with paint flakes on the porch where her body was discovered.

¶ 11 The victim's autopsy indicated that she had abrasions above her left eye, on her left temporal area, and on her nose. There were also lacerations on her lips, an abrasion and contusion on her left arm, and a small laceration on her posterior right scalp. A pathologist determined that many of the external injuries were the result of blunt force trauma, consistent

with a hit or punch and inconsistent with a fall. The injury to the back of her head was consistent with her head being smashed into a hard object, like concrete. All of the injuries were recent and would have occurred around the time of death. The pathologist found no trauma, lacerations, or bruising to the victim's pubic or anal area. The pathologist explained, however, that a lack of such injuries did not in itself demonstrate whether the victim had been sexually assaulted. The pathologist acknowledged that semen can flow from the vaginal area to the anus without any penetration of the anus.

¶ 12 A forensic scientist examined the victim's vaginal and anal areas and found the presence of semen. There were large amounts of semen found on the vaginal swabs but there was not as much on the anal swabs. The semen matched the defendant's DNA profile. Based upon the amount of sperm found on the victim, the forensic scientist determined that the victim could have engaged in sex up to a day prior to her death, or 12 to 24 hours before the collection of evidence from her body. The forensic scientist acknowledged that if an individual was up and walking around, gravity could cause semen to drain from the vagina.

¶ 13 The defendant denied killing the victim or sexually assaulting her. He had no specific memory of having sex with her. However, he admitted that it was a possibility. The State also introduced evidence that the defendant had assaulted three other women. The defendant responded to all of those allegations.

¶ 14 At the close of the trial, the jury found the defendant guilty of first-degree murder and aggravated criminal sexual assault. Following the denial of his posttrial motion, the trial court sentenced the defendant to 50 years' imprisonment for the murder conviction, to be served consecutive to mandatory natural life sentences on the two aggravated criminal sexual assault counts. On direct appeal, this court affirmed the defendant's convictions and sentence. *Johnson*, 2014 IL App (2d) 121004.

¶ 15 On January 27, 2016, the defendant filed a *pro se* postconviction petition. In part, the defendant argued that appellate counsel was ineffective in not challenging the trial court's denial of his motion to admit a third-party confession. The defendant also argued that appellate counsel was ineffective for not challenging the sufficiency of the evidence on count IX, which alleged that the defendant sexually penetrated the victim's anus.

¶ 16 On April 15, 2016, the trial court summarily dismissed the defendant's *pro se* petition as frivolous and patently without merit. The trial court found that there was no third-party confession and thus no violation of the defendant's constitutional rights by the exclusion of that which did not occur. The trial court also found that defense counsel was not ineffective in failing to challenge the sufficiency of the evidence on count IX. The trial court entered an order dismissing the defendant's petition. The defendant filed a timely notice of appeal.

¶ 17 ANALYSIS

¶ 18 On appeal, the defendant argues that the trial court erred in summarily dismissing his *pro se* postconviction petition. The Act provides a method for a criminal defendant to assert that his or her conviction was the result of "a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2014). The Act provides for three stages of proceedings. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the trial court must independently review the petition within 90 days of its filing and decide if "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). If the court determines that the petition is frivolous or patently without merit, the court must dismiss it in a written order. *Id.*

¶ 19 To survive summary dismissal, a petition need present only the "gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The "gist" standard is "a low threshold." *Id.* To set forth the "gist" of a constitutional claim, the petition "need only present a

limited amount of detail" (*id.*) and thus need not set forth the claim in its entirety (*People v. Edwards*, 197 Ill. 2d 239, 244-45 (2001)). A claim is frivolous or patently without merit if it is based on an indisputably meritless legal theory or fanciful or delusional factual allegations. *Hodges*, 234 Ill. 2d at 16. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. *Id.* Fanciful factual allegations include those which are fantastic or delusional. *Id.* All well-pleaded facts not positively rebutted by the trial record are taken as true. *People v. Sparks*, 393 Ill. App. 3d 878, 883 (2009). Our review of the trial court's dismissal of the defendant's petition is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 20 The defendant argues that the trial court erred in dismissing his petition because he stated the gist of a constitutional claim for ineffective assistance of appellate counsel. The defendant first argues that appellate counsel was ineffective in not challenging the sufficiency of the evidence as to count IX. Specifically, the defendant contends that the evidence was not sufficient to prove, beyond a reasonable doubt, that he had sexually penetrated the victim's anus. The defendant next argues that appellate counsel was ineffective in not challenging the trial court's denial of his motion to admit a third-party confession.

¶ 21 To determine whether a defendant was denied the effective assistance of counsel, we apply the two-prong test developed by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must show both that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant such that he was deprived of a fair trial. *Strickland*, 466 U.S. at 687. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000). At the first stage of postconviction proceedings, however, a defendant need only establish that it is arguable counsel's performance fell below an

objective standard of reasonableness and he arguably was prejudiced as a result. *People v. DuPree*, 397 Ill. App. 3d 719, 737 (2010).

¶ 22 Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence for 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. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). Thus, the inquiry as to the prejudice prong of *Strickland* requires that the reviewing court examine the merits of the underlying issue, for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal. *Id.*

¶ 23 The defendant first argues that appellate counsel was ineffective in not challenging the sufficiency of the evidence on count IX on direct appeal. To determine whether the defendant was prejudiced by this failure, we will determine whether the defendant would have prevailed had defense counsel challenged the sufficiency of the evidence on direct appeal. *Id.*

¶ 24 When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, "'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard of review gives deference to the fact finder who bears the responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences and conclusions from the evidence. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. *Id.* It is sufficient if all of the evidence taken together satisfied the trier of fact beyond a reasonable doubt of the defendant's guilt. *Id.* In weighing evidence, the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all

possible explanations consistent with innocence and raise them to a level of reasonable doubt. *Id.* However, the fact finder's decision is "neither conclusive nor binding," and we will reverse a conviction where the evidence is so unreasonable, improbable, or so unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *People v. Ostrowski*, 394 Ill. App. 3d 82, 92 (2009).

¶ 25 Count IX charged the defendant with aggravated criminal sexual assault under section 12-14(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/12–14.1(a)(1) (West 2010)). That section required the State to prove, among other things, that the defendant committed an act of sexual penetration with the victim. 720 ILCS 5/12-14(a)(2) (West 2010). The Code defines "sexual penetration," in pertinent part, as "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person." 720 ILCS 5/12-12(f) (West 2010). "Evidence that the defendant's sex organ only touched an area near the complainant's sex organ or anus is insufficient to establish the element of penetration." *People v. Atherton*, 406 Ill. App. 3d 598, 609 (2010).

¶ 26 The defendant argues that the evidence was insufficient to prove that he sexually penetrated the victim's anus. He points out that there were no eyewitnesses and no confession. The defendant acknowledges that there was semen found on the victim's anal swab. The defendant notes, however, that there was a large amount of semen found on the vaginal swabs but a significantly smaller amount on the anal swab. The defendant cites trial testimony that semen can flow from the vaginal area to the anus without the anus itself having been penetrated, and testimony that gravity can cause semen to drain out of the vaginal vault. Based on this testimony, the defendant argues that the State did not prove that the semen found near the victim's anus was the result of sexual penetration rather than from semen dripping from the victim's vagina to her anus. The defendant contends that the victim's body was likely moved

several times by the perpetrator while putting the victim's clothes back on, and by the paramedics prior to the swabs being taken, thus facilitating the flow of semen from the vagina to the anus.

¶ 27 We hold that the evidence presented at trial was sufficient for the jury to find, beyond a reasonable doubt, that the defendant sexually penetrated the victim's anus. The issue of penetration is a question of fact to be determined by the jury. *People v. Herring*, 324 Ill. App. 3d 458, 464 (2001). "[T]he trier of fact is entitled to draw all reasonable inferences from both direct and circumstantial evidence, including an inference of penetration." *People v. Raymond*, 404 Ill. App. 3d 1028, 1041 (2010). We acknowledge the testimony cited by the defendant that it is possible for semen to flow from the vaginal area to the anus. Nonetheless, the jury was not required to disregard inferences which arose normally from the evidence before it, nor search out all possible explanations consistent with innocence. On direct appeal we held that there was overwhelming evidence that the defendant had sexually assaulted the victim. *Johnson*, 2014 IL App (2d) 121004, ¶ 59. This included testimony from a woman who was previously anally assaulted by the defendant. The jury at defendant's trial heard the witness testimony as well as the forensic evidence. While it could have been inferred by the jury that the semen may have drained to the victim's anus, the jury determined that the defendant sexually penetrated her anus. It was the jury's responsibility to consider the evidence presented and resolve any conflicts in that evidence, and we will not substitute our judgment for the jury's finding. *Jackson*, 232 Ill. 2d at 280-81.

¶ 28 Accordingly, even if appellate counsel had raised a challenge to the sufficiency of the evidence, the evidence was more than sufficient to support defendant's conviction on count IX and such an argument would not have changed the results of the proceeding on direct appeal. *People v. Barrow*, 195 Ill. 2d 506, 523 (2001). Counsel was not ineffective for failing to raise

this non-meritorious issue on direct appeal and the defendant's claim of ineffective assistance of appellate counsel necessarily fails. The trial court, therefore, did not err in dismissing this claim as frivolous and patently without merit.

¶ 29 The defendant's next contention on appeal is that appellate counsel was ineffective in failing to challenge the trial court's denial of his motion to admit a third-party confession. The admission of evidence is within the sound discretion of the trial court and should not be reversed absent a clear showing of abuse of discretion. *People v. Bowel*, 111 Ill. 2d 58, 68 (1986) (quoting *People v. Ward*, 101 Ill. 2d 443, 455-56 (1984)). "Generally an extrajudicial declaration not under oath, by the declarant, that he, and not the defendant on trial, committed the crime is inadmissible as hearsay though the declaration is against the declarant's penal interest." *Bowel*, 111 Ill. 2d at 66. An exception to this rule exists where justice requires that the declaration be admitted. *Id.*

¶ 30 In *Chambers v. Mississippi*, 410 U.S. 284, 300-01 (1973), the United States Supreme Court held that a declaration against penal interest is admissible where there is sufficient indicia of trustworthiness in that (1) the statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the statement was corroborated by other evidence; (3) the statement was self-incriminating and against the declarant's interest; and (4) there was adequate opportunity for cross-examination of the declarant. In *Bowel*, 111 Ill. 2d at 67, the Illinois Supreme Court stated that these four factors are not to be considered requirements of admissibility, but rather they are to be regarded simply as indicia of trustworthiness. These four factors should merely be used as a guideline for determining whether "the declaration was made under circumstances that provide 'considerable assurance' of its reliability by objective indicia of trustworthiness." *Id.* (citing *Chambers*, 410 U.S. at 300-01). "Accordingly, the existence or nonexistence of the four factors present in *Chambers* is not determinative of the issue but, rather,

the ultimate decision as to admissibility is determined by the totality of the circumstances." *People v. Jones*, 302 Ill. App. 3d 892, 898 (1998).

¶ 31 In the present case, the trial court did not err in denying the motion to admit the third-party confession. While the first, third, and fourth Chambers factors were arguably established by Beck's statements to the police, Beck's statement was not corroborated by other evidence. Jamison denied making the statements and the police were not able to find either of the two friends who were with Beck when Jamison allegedly confessed. Beck's mother told the police that Beck had a history of making up stories and that he did not get along with Jamison. Also, the store owner where the victim allegedly purchased cigarettes for Beck did not recognize a picture of Beck.

¶ 32 Additionally, some aspects of Beck's story undermined its reliability. While Beck thought Jamison's statement was made the day after the murder, there was no explanation as to why Jamison would still be wearing a bloody shirt the next day. Further, Beck first told police that Jamison had struck the victim with something from the railroad tracks but later told police that Jamison had struck the victim with a metal pipe. Also, as noted by the trial court, Jamison's alleged statement, even if true, was not sufficient to relate it back to the victim's death as it could have referred to an attack on a different woman.

¶ 33 The defendant argues that the confession was corroborated because the victim had withdrawn $800 dollars from her bank account two days prior to the discovery of her body, the money was not found on her person or in her residence, and that this was enough to corroborate Jamison's statement. However, using this logic, Jamison could have stolen money from the countless other women that had withdrawn money from their bank accounts within the two days prior to the victim's death. The mere fact that the victim withdrew money from her bank account is not enough to overcome the other factors negating the reliability of the alleged confession.

Given the totality of the circumstances surrounding Beck's statement, we cannot say that the trial court abused its discretion in denying the defendant's motion to admit the third-party confession. Accordingly, appellate counsel was not ineffective for failing to raise this non-meritorious issue on direct appeal and the trial court did not err in dismissing this claim as frivolous and patently without merit.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 36 Affirmed.