2018 IL App (1st) 160056-U

No. 1-16-0056

Order filed July 26, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 11 CR 174
	)	
DWAYNE JACKSON,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition not erroneous where he did not state an arguable claim of ineffective assistance of appellate counsel.

¶ 2 Following a 2012 jury trial, defendant Dwayne Jackson was convicted of first degree murder and sentenced to 35 years' imprisonment. We affirmed on direct appeal. *People v. Jackson*, No. 1-12-3250 (2014)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his 2015 *pro se* postconviction petition, contending

that it was erroneous because he stated an arguable claim of ineffective assistance of appellate counsel. Specifically, he contends that counsel did not raise on direct appeal a claim that the trial court had erroneously barred a witness from testifying to defendant's mental state around the time of the killing. For the reasons stated below, we affirm.[1]

¶ 3 Defendant was charged with first degree murder for fatally stabbing Melvin Terry with a knife on or about November 30, 2010, and raised the defense of not guilty by reason of insanity at trial.

¶ 4 At trial, Carolyn Bates testified that she is defendant's mother and was Terry's friend for decades. Bates and defendant lived in Terry's apartment in November 2010. On the evening of November 29, Bates, Terry, and defendant were home alone. Defendant was drinking beer. After Bates and Terry ate dinner, Terry went to his bedroom while Bates sat down in the living room. Defendant "wanted to do a lot of talking" with Bates on matters they had discussed "about 50 times that day or the day before and the day before that." Bates did not want to speak with defendant, and he agreed at first. However, he returned a short time later seeking to talk, so Bates went into Terry's bedroom and closed the door.

¶ 5 Defendant came to the bedroom door and knocked repeatedly, telling Bates that she "was gonna talk to [defendant] that night because he had a lot of questions that needed answering." He also said that "he was gonna bump our old asses" or "old selves off," which she took to mean that he would kill Bates and Terry. Defendant did this for "a long time." He left the apartment but returned some time later and knocked forcefully on the bedroom door. As the lock on that door was easily defeated, Bates barred the door with an exercise bench and sat on it. At one

[1] Pursuant to Supreme Court Rule 352(a) (eff. July 1, 2018), this case was taken for consideration without oral argument by separate order.

point, defendant told Bates that "he was gonna leave the back door open and the kitchen door which goes down to the fire escape *** and make a scene like somebody else had come there and did it. Because he was smarter than me and he knew that they would believe him." When defendant repeatedly kicked the bedroom door, Bates woke Terry and told him to call the police. Terry declined at first, saying that "he'll quiet down in a little bit." Bates explained that she and Terry believed that defendant would eventually calm down as he had on prior occasions.

¶ 6 However, he did not calm down. Terry phoned the police, and defendant began kicking the door much harder. Terry told Bates that he was going to "make him go" and tried to open the door as defendant pushed on it, but the exercise bench kept them apart. Terry and defendant tried to grab each other, grappling briefly with neither visibly holding a weapon. However, Terry stopped struggling and clutched his chest before falling at Bates's feet, while defendant continued kicking the door. Bates phoned the police and noticed during the call that Terry was bleeding. When Bates asked defendant what he did to Terry, he replied "I didn't do anything to him, mother dear" or "Nothing, mother dear." Bates stayed in the room until an ambulance arrived and took Terry away. By the time the police came, defendant was not in the apartment. Two or three days later, defendant phoned Bates to ask her for money. They agreed to meet the next day at a restaurant, but Bates told the police of the appointment rather than attending.

¶ 7 On cross-examination, Bates testified that defendant required months of hospitalization and rehabilitation when he was four or five years old, after being struck by a car and a truck. In his teenage years, he had a "fine" relationship with Bates but not his stepfather, who struck him and caused him to "run away" for "a couple of days." (Terry was not his stepfather.) Defendant left Bates's home when he was 19 years old and had only sporadic contact with her for years.

She did not notice a "dramatic" change in defendant in his 20s, though he "used to have his little tantrums, but nothing that severe." Bates opined that defendant was "acting strange" on the night in question "after he started taking that medicine."

¶ 8 When Bates testified that defendant "was talking to other people that were in his mind," the court sustained a State objection on the basis that "this is beyond her knowledge, what's in his mind." When Bates testified that defendant has "imaginary friends," the court sustained a State objection on grounds of foundation. When Bates testified that defendant would speak when nobody else was present, the court overruled a State objection and allowed the answer. When Bates was asked when defendant was "talking to his friends," the State's objection was sustained as to foundation.

¶ 9 Defense counsel requested a sidebar and told the court that she was trying to elicit Bates's observations of defendant. The court noted that "if you want to bring out an instance of defendant's state of mind, which I believe is relevant here, you can't just throw a general question, 'have you ever.' Or you're trying to get her to talk about the operation of his mind, which she cannot do. *** If there is a conversation like that on November 30, lay the foundation." Counsel argued that "the 'friends' phrase is coming from Ms. Bates and I'm trying to get her to explain what that means so the jury understands." The court responded that "When you say 'what do you mean by friends," it's not what she means by friends. You're asking her to interpret the operation of his mind because it's he who is talking about friends." Counsel replied that "I am not trying to get her interpretation out." The court found that "you're mixing up observing and conversations. *** Observations, either ocular, smelling, hearing or otherwise are something she can testify to." Counsel argued that the testimony she was seeking to elicit "goes

to the defendant's state of mind at the time," and the court replied that "what she hears him say may be relevant, what he said. If he said 'I'm talking to my friends' or something. But to ask her what that means is not going to be allowed. I'm not having her interpret what he says."

¶ 10 After the sidebar, Bates testified that defendant said " 'we're gonna open the back door and fire escape door and make it seem like,' and then he would stop and he would say 'well, no no, they'll know that. I can't do that.' " He told Bates and Terry to prepare to "meet our maker" and pray. He also said "we got to finish her" and "this is gonna be just like American Psycho." He said "we" were going to do something though nobody was in the apartment but himself outside the bedroom and Bates and Terry inside it. To Bates, it "sound[ed] like he was having a conversation with someone else besides" her because there "wasn't anybody else there." Defendant had previously said that he would "bump you guys off" or the like but had not. Bates could not recall that defendant was hospitalized for anything but physical injury but was aware that he had "a psychiatric condition on November 29" and had been prescribed medication. The court sustained a State objection when Bates was asked if she knew if defendant took his medication. She testified that there was prescription medication in defendant's bedroom that was not Bates's or Terry's.

¶ 11 A forensic investigator testified that Terry's body was in the front bedroom, with two apparent puncture wounds to the chest and nothing in his hands, and an exercise bench was near the undamaged bedroom door. A medical examiner's stipulated testimony was that her autopsy of Terry found two stab wounds to his left chest, one fatal and the other superficial. A police officer testified that, when police arrested defendant on December 3 at a restaurant on Bates's information, he was calm, cooperative, and did not attempt to flee.

¶ 12 Dr. Michael Rabin testified for the defense as an expert in forensic psychology, without objection. He reviewed defendant's records from prior psychiatric hospitalizations and examined him for fitness to stand trial and sanity at the time of the offense. Defendant had been diagnosed with a psychotic or schizoaffective disorder and with bipolar disorder and schizophrenia, with symptoms including delusions and mood swings from extreme depression to "impulsive, pretty much unthinking" mania. Defendant reported auditory hallucinations – voices telling him to kill himself or others – in every hospitalization, and they worsened when he was not taking his medication or was abusing drugs or alcohol. In some hospitalizations, he was also diagnosed with substance abuse.

¶ 13 Dr. Rabin reviewed the records in this case including Bates's accounts of the incident. He noted her statement that defendant was talking to himself during the incident, and his remark that he would leave the door open to make it appear that someone else committed the crime. Dr. Rabin denied that the latter meant "that he consciously knew what he was doing was criminal," though it indicated "that he could get in trouble for what he's doing and he realizes it." Defendant had previously threatened to "bump them off" but had not acted on such remarks. Dr. Rabin opined that, when defendant told Bates and Terry they would "meet their maker," it showed he was prepared to fight or attack them but not that he knew doing so would be criminal as "at the time he was so psychotic, he could not make that judgment." Dr. Rabin also reviewed the video of defendant's post-arrest interview and found him "in a manic state" and "somewhat irrational" including walking around the room, reading the signs on the walls, and looking to one side and speaking as if to someone not there or to himself. The interview video was shown to the jury, with Dr. Rabin indicating the aforementioned behavior.

¶ 14 Dr. Rabin interviewed defendant in mid-2011, when he was receiving antipsychotic medication and was no longer acutely psychotic. He reported a very difficult childhood, with physical and emotional abuse by his stepfather (not Terry) culminating in a blow to the head at about 13 years old causing a concussion and prompting him to run away from home. As he lived on the street, he abused drugs and alcohol. He felt depressed and had a poor self-image all his life. He reported auditory hallucinations telling him that "he was no good, he was useless" and directing him to kill himself and attack others as they presented a threat to him. He reported several prior suicide attempts. On the evening in question, he was angry at Bates, though he could not recall why, and recalled "storming out of the house angry." Dr. Rabin attributed defendant's auditory hallucinations during the incident and in his post-arrest interview to his schizoaffective disorder rather than to drug or alcohol abuse. While Dr. Rabin admitted that defendant "could have been lying," he "relied on what [Bates] had to say about his behavior rather than on his account." Dr. Rabin also administered tests to defendant, finding long-standing depression manifesting "under even minor stress," a "coping deficit" or poor interpersonal skills, and indications of suicidal tendencies and hypervigilance or paranoia.

¶ 15 Dr. Rabin diagnosed defendant with schizoaffective disorder in remission with medication, and with polysubstance abuse in remission in a controlled environment, explaining that he was depressed but not "psychotically depressed." Dr. Rabin opined that defendant, due to his mental illness, lacked substantial capacity to appreciate the criminality of his conduct and so was insane at the time of this offense.

¶ 16 On cross-examination, Dr. Rabin admitted that a diagnosis of mental illness does not inherently constitute insanity. Dr. Rabin denied that, in the video, defendant seemed to be

pondering or contemplating his actions. When defendant said "kiss my ass goodbye, I'm going to the county," Dr. Rabin opined that he merely indicated his understanding four days after the incident that "he's in trouble," rather than indicating that he was contemplating the incident. When asked if defendant's remark that "this is some serious shit" indicated such contemplation, Dr. Rabin replied "not at all." Defendant received medication while hospitalized but admitted to not taking medication while on the street. During one hospitalization, he admitted that he stopped taking medication because, in part, he wanted to drink alcohol. Dr. Rabin admitted that defendant's substance abuse and refraining from taking medication were "volitional acts." Dr. Rabin was aware from the police reports that defendant left the scene of the incident, and admitted that fleeing the scene of a crime can indicate that one knew one's actions were wrong. Dr. Rabin's opinion that defendant's remark about leaving the door open to place suspicion on another did not indicate appreciation of criminality was based on his conclusion that defendant made the remark to his voices, which in turn was based on Bates's account.

¶ 17 Dr. Susan Messina testified for the State in rebuttal that she evaluated defendant's sanity upon the court's order. She reviewed prior evaluations, medical records, and police reports, and she interviewed defendant three times in late 2011 and early 2012. In the first interview, he was "superficially cooperative" in that he gave general or vague answers and was less than forthcoming about personal details, but he was increasingly cooperative in later interviews. Defendant was alert and seemed to understand Dr. Messina's questions. His mood was "neutral," without apparent mania or depression, and consistent with the topics being discussed. His thought processes seemed organized, without "loose associations or tangential speaking." He showed no delusions or paranoia, and no signs of hearing voices during the interview. He

reported having auditory hallucinations telling him that he was inferior and weak and should get a better job, when he was not taking his medication.

¶ 18 Initially, defendant recalled multiple hospitalizations and stated that he was taking medication but was not more specific. He described being hit in the head with a baseball bat while a child but did not say whether he received medical treatment. He "presented differently at different times" but was "eventually fairly forthcoming." He initially denied drug use and would admit only moderate drinking, but then admitted cocaine use and drinking as much alcohol as he could afford. He also admitted using marijuana and LSD as well as trying heroin. He admitted using alcohol, cocaine, and LSD at the time of the incident – in particular taking LSD but then feeling depressed and thus taking cocaine as a stimulant – and that he was not taking his medication at the time. He recalled "ranting and raving" to himself because he was angry, and attributed this to an "acid trip." He did not remember killing Terry but also could not affirm that he had not. He recalled searching unsuccessfully for something in his bedroom, then going to Terry's bedroom to speak to him and knocking on the bedroom door, then leaving the apartment still angry for not finding whatever he sought. He wandered the city, drinking alcohol for part of the time, until he called Bates because he had no money. He went to the meeting at the restaurant he chose, but she did not appear. Dr. Messina considered defendant's account coherent.

¶ 19 Based on Dr. Messina's record review and interviews of defendant, she concluded that he was sane at the time of the offense; that is, not suffering from a mental illness causing him to not appreciate the criminality of his actions. She diagnosed him with polysubstance dependence and rule-out mood disorder, the former not being a mental illness. She reviewed Dr. Rabin's report, and explained that she did not diagnose defendant with schizoaffective disorder because of his

long history of substance abuse and because she is reluctant to diagnose a mood disorder until the patient is no longer taking mood-altering substances.

¶ 20 On cross-examination, Dr. Messina testified that she reviewed a 2009 report from psychiatrist Dr. Jonathan Kelly noting that defendant was taking medication and would show symptoms of mental illness if not taking it, and that he reported auditory hallucinations and demonstrated paranoia, so that Dr. Kelly diagnosed defendant with alcohol dependence and a mood disorder with psychotic symptoms in partial remission. She also reviewed a 2008 report from Dr. Kelly noting that defendant reported auditory hallucinations and prior head trauma, demonstrated paranoia, and was not taking medication, so that Dr. Kelly diagnosed defendant with alcohol dependence in remission, ruled out a mood disorder, and noted a history of antisocial and schizotypal personality features. On redirect examination, Dr. Messina added that Dr. Kelly found defendant fit to stand trial in both reports and sane in the 2009 report.

¶ 21 The jury was instructed on first degree murder and insanity so that its verdict options were not guilty, not guilty by reason of insanity, guilty, and guilty but mentally ill. Following deliberations, the jury found defendant guilty but mentally ill of first degree murder.

¶ 22 In his posttrial motion, defendant claimed in relevant part that the court deprived him of his right to cross-examine State witnesses in general and Bates in particular. He claimed that the court unduly limited counsel's ability to elicit from Bates defendant's statements and demeanor before and during the incident "despite the defendant having laid proper foundation for hearsay statements," and her knowledge of whether defendant took his medication before the incident. Following arguments, the court denied the motion, reiterating its ruling that counsel had tried to improperly elicit from lay witness Bates "the operation of the defendant's mind."

¶ 23 On direct appeal, defendant contended that the court (1) erred in not instructing the jury on intent in response to a jury note during deliberations asking about intent, and (2) imposed an excessive sentence. In addressing the first contention, we noted that "there was ample evidence that defendant intended to 'bump our old selves off,' as Bates recalled him saying and as he did to Terry, but the issue intensely and ably debated at trial was whether he appreciated the criminality of doing so at the time he did so." *Jackson*, No. 1-12-3250, ¶ 45.

¶ 24 Defendant filed his *pro se* postconviction petition in September 2015. He claimed that he was deprived of his right to cross-examine State witnesses. He claimed that the court erroneously limited Bates's testimony regarding her knowledge of his medication on the day in question. He also claimed that appellate counsel rendered ineffective assistance by not raising on direct appeal all the issues raised in the posttrial motion.

¶ 25 The court summarily dismissed the petition in October 2015. Regarding the trial court limiting Bates's testimony, the court found that defendant did not specify what Bates was barred from testifying to, nor did he show whether she had personal knowledge that would have allowed her to testify as defendant wanted, nor did he establish how he was prejudiced by the absence of that testimony. Noting that an issue is not meritorious merely because trial counsel raised it in a posttrial motion, the court found that defendant failed to show that the issues raised in the posttrial motion but not raised by appellate counsel on direct appeal were meritorious.

¶ 26 On appeal, defendant contends that the summary dismissal of his postconviction petition was erroneous because he stated an arguable claim of ineffective assistance of counsel for not raising on direct appeal a claim that the trial court erroneously barred Bates from testifying to defendant's mental state on the night of the killing.

¶ 27 A postconviction petition may be summarily dismissed within 90 days of its filing if "the court determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). A petition may be summarily dismissed if it has no arguable basis in law or fact because it relies on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Boykins*, 2017 IL 121365, ¶ 9. At the first stage, well-pled factual allegations are accepted as true unless contradicted by the record. *People v. Brown*, 2017 IL 121681, ¶ 27; *Boykins*, ¶ 9. We review *de novo* the summary dismissal of a postconviction petition. *Boykins*, ¶ 9.

¶ 28 A defendant's claim that counsel failed to render effective assistance is governed by a two-pronged test, whereby the defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness and (2) the defendant was prejudiced by that performance. *Brown*, ¶ 25. The same test applies to claims of ineffectiveness of appellate counsel, who is not required to raise issues that he or she reasonably determines are not meritorious but instead expected to exercise professional judgment in selecting the claims to raise on direct appeal. *People v. English*, 2013 IL 112890, ¶¶ 33-34. A petition alleging ineffective assistance may not be summarily dismissed if it is arguable that (1) counsel's performance fell below an objective standard of reasonableness and (2) the defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶ 19.

¶ 29 A defendant is insane, that is, "is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct." 720 ILCS 5/6-2(a) (West 2016). However, a defendant who at the time of his conduct at issue was suffering from a mental illness – a "substantial disorder of thought, mood, or behavior" – that "impaired that person's judgment, but not to the

extent that he is unable to appreciate the wrongfulness of his behavior" is not relieved of criminal responsibility and may be found guilty but mentally ill. 720 ILCS 5/6-2(c), (d) (West 2016).

¶ 30 A lay witness can testify based on a rational perception of what she observed but generally cannot testify to an opinion based on scientific, technical, or other specialized knowledge. *People v. Jackson*, 2017 IL App (1st) 142879, ¶ 48, citing Ill. R. Evid. 701 (eff. Jan. 1, 2011). In some circumstances, a lay witness may offer her opinion if the facts cannot otherwise be adequately presented, but such an opinion must be based on her personal observations and recollection of concrete facts rather than specialized knowledge. *Jackson*, ¶ 49. When the trier of fact can draw inferences and conclusions just as well as the witness, "the witness's opinion is superfluous." *Id*. Similarly, lay opinion testimony is improper and prejudicial when it goes to the ultimate question of fact to be decided by the jury. *Id*. In contrast to a lay witness, an expert witness – with experience and qualifications providing knowledge beyond the average person – can testify to opinions reached by reasoned analysis based on accepted scientific theories. *Id.*, ¶ 50. Deciding whether a witness is qualified as an expert witness is a matter for the trial court's discretion. *Id.*

¶ 31 A defendant has the right to confront or cross-examine State witnesses, but that right is not absolute or unlimited. *People v. Palmer*, 2017 IL App (1st) 151253, ¶ 25. The extent of cross-examination is a matter for the sound discretion of the trial court that this court reverses only for a clear abuse of discretion resulting in manifest prejudice to the defendant. *People v. Chambers*, 2016 IL 117911, ¶ 75. In reviewing whether a defendant was allowed sufficient cross-examination, we evaluate what the defense was allowed to do rather than what it was prohibited from doing. *People v. Arze*, 2016 IL App (1st) 131959, ¶ 113.

¶ 32 Here, we find no prejudice from appellate counsel's alleged ineffectiveness because we find no prejudice from the trial court ruling at issue. The court allowed the defense to elicit from Bates her observations of defendant's behavior and statements on the night in question. She testified to his remarks, including remarks addressed to "we" though nobody else was present. The court did not allow the defense to elicit from Bates her interpretation or opinion of what was in defendant's mind but allowed her to testify to opinion – that he "sound[ed] like he was having a conversation with someone else besides" Bates – closely based on her observations. The jury also heard extensive testimony from Dr. Rabin, who formed and testified to expert opinions of defendant's mental health and sanity based in significant part on Bates's account. On trial evidence including the testimony of Bates and Dr. Rabin, the jury found defendant mentally ill.

¶ 33 Moreover, the issue at trial was whether defendant was insane: whether mental illness rendered him unable to appreciate the criminality or wrongfulness of his actions that night. See 720 ILCS 5/6-2 (West 2016). The jury heard evidence from Bates on this point: she testified to defendant's remark that "we're gonna open the back door and fire escape door and make it seem like" someone else entered the apartment and killed Terry and Bates. Regardless of who defendant directed the remark to, a reasonable trier of fact could infer from the remark that defendant knew that there would be blame to place from his actions and intended that it not fall upon himself. His absence from the apartment when the police arrived corroborates this reasonable inference. We conclude that it is not arguable on this record that the outcome of the direct appeal proceedings would have been different had counsel raised the contention at issue.

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

¶ 35 Affirmed.