2018 IL App (2d) 150817-U
No. 2-15-0817
Order filed February 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BYRON E. ADAMS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lee County. No. 09-CF-206 Honorable Charles T. Beckman, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's summary dismissal of defendant's postconviction petition was proper. Affirmed.

¶ 2 In 2012, a jury convicted defendant, Byron E. Adams, of three counts of first-degree murder. This court rejected defendant's arguments on direct appeal. *People v. Adams*, 2015 IL App (2d) 130351-U (hereinafter, *Adams I*). Presently, defendant appeals the summary dismissal of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). Defendant specifically argues that the trial court improperly dismissed his ineffective-assistance-of-counsel claim, which alleged that trial counsel failed to advise him of the

possibility of submitting to the jury lesser-included offense instructions for involuntary manslaughter. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was convicted of murdering Margaret Atherton on September 11, 2009, in her home in Dixon. The details of defendant's interrogation were set forth at length in *Adams I*; however, we note that, while questioning defendant, investigators suggested to him that *if* Atherton's death had been accidental and had resulted from, for example, something like an affair-gone-bad scenario, then involuntary-manslaughter, as opposed to first-degree murder, charges might be proper. Defendant did not take this bait in the first three interrogation sessions, instead denying that he was in Atherton's town when she was killed. The State charged defendant with first-degree murder. Afterwards, *defendant* requested to meet a fourth time with investigators and, after naming his conditions, he thereafter explained that the incident happened, "kinda like y'all said" and it "was truly an accident." Defendant stated that he put two socks in Atherton's mouth and put a pillowcase over her head to stop her from yelling, but that he did not mean to kill her. Defendant stated that she was alive when he left. He then agreed he had tied Atherton's hands behind her back. The investigators explained that they were also concerned that the pillowcase was twisted around Atherton's head so tightly that it had to be cut off and, so, "it[] [was] not an involuntary murder type situation."

¶ 5 At trial, the evidence reflected that police found Atherton's body in an upstairs bedroom. She was face down on the bed; her hands were tied behind her back with a black necktie. A pillowcase was tightly twisted and knotted over her head, and an investigator used a scalpel to cut it off. Once the pillowcase was removed, a white object was visible in Atherton's mouth. The white object was later determined to be a pair of rolled-up socks. The forensic pathologist

testified that the cause of death was asphyxia resulting from strangulation by a combination of the socks in Atherton's mouth and the pillowcase over her head. The pathologist testified that, if the strangulation Atherton had suffered was constant, unconsciousness could occur within seconds and non-recoverable brain death within three or four minutes.

¶ 6 As summarized in *Adams I*, defendant's statement to investigators was played for the jury. Further, among other evidence, an officer testified that she overheard defendant saying that he would do to the inmate what he had done to "that white bitch." In closing arguments, defense counsel questioned the veracity of the State's evidence and argued that the State failed to place defendant at the crime scene. As mentioned, the jury convicted defendant of three counts of first-degree murder. The court sentenced him to 60 years' imprisonment. On direct appeal, we affirmed.

¶ 7 On June 29, 2015, defendant filed a postconviction petition, arguing, as relevant here, that trial counsel provided ineffective assistance by failing to inform him that he could have tendered a lesser-included-offense instruction and verdict forms for involuntary manslaughter. Defendant attached to the petition his own affidavit, averring that counsel never told him of this possibility.

¶ 8 On July 28, 2015, the trial court summarily dismissed the petition. As to the ineffective-assistance claim, the court noted that, to warrant an involuntary-manslaughter instruction, the record must contain some evidence that defendant recklessly performed acts likely to cause death or great bodily harm. The court considered factors suggesting recklessness and determined that they did not apply to the evidence. Specifically:

> "In this case, there was no evidence that the defendant acted recklessly, he forced the victim on her bed where he stuffed socks in her mouth to keep her from screaming and

> yelling. He tied her hands behind her back with a neck tie so she could not resist him. He placed a pillowcase over her head and twisted it at the neck until she died. The pillowcase was twisted so hard that the pillowcase had to be cut off her neck with a scalpel. The effect of defendant's twisting was to break blood vessels in the neck and face especially around the eyes and caused her [to] die of asphyixia. The defendant was much stronger than the victim and she was totally defenseless when he tied her hands behind her back and she was silenced when he stuffed the socks in her mouth. This was a particularly brutal crime committed by defendant and reckless[ness] is not shown by any evidence in this case."

¶ 9 The court concluded that trial counsel was not ineffective for failing to inform defendant of an involuntary-manslaughter instruction because, based on the trial evidence, no such instruction would have been given. Defendant appeals.

¶ 10 II. ANALYSIS

¶ 11 Defendant argues on appeal that the trial court erred in dismissing his postconviction claim that trial counsel was ineffective for failing to inform him of his right to tender an involuntary-manslaughter instruction. Defendant contends that the record contained sufficient evidence of recklessness to support the instruction. Specifically, he argues that, in finding no evidence of recklessness, the trial court ignored that, during his statement to police, defendant admitted to killing Atherton, but insisted that her death was accidental. If believed, defendant asserts, the jury could have found that his actions reflected a reckless disregard for the risk that Atherton would suffocate. Finally, defendant notes that, in determining whether there exists some evidence to justify the instruction, a trial court is not to weigh the credibility of that

evidence, and he contends that an uncorroborated confession can be "some evidence" to warrant a lesser-included instruction.

¶ 12 The Act provides a method by which criminal defendants can assert that their convictions and sentences were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. See 725 ILCS 5/122-1 *et seq*. (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Postconviction proceedings contain three distinct stages. *Hodges*, 234 Ill. 2d at 10. At the first stage, the stage at issue in this appeal, the trial court must independently review the petition, taking the allegations as true, and determine whether the claim in the petition is frivolous or patently without merit. *Id*. A postconviction petition may be summarily dismissed as frivolous or patently without merit only if it has no arguable basis either in law or in fact. *Id*. at 16. A petition that has no arguable basis in law or in fact is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id.* An indisputably meritless legal theory is one that is completely contradicted by the record, and a fanciful factual allegation is one that is fantastic or delusional. *Id*. at 16-17. We review *de novo* the summary dismissal of a postconviction petition. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 13 The right to request an instruction on a lesser offense belongs to the defendant. *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994). However, for a postconviction petition to state a claim of ineffective assistance of trial counsel, it must allege facts showing both that: (1) counsel's performance "fell below an objective standard of reasonableness" (performance prong); and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); see also, *People v. DuPree*, 397 Ill. App. 3d 719, 735 (2010). A reasonable probability that the

result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. At the first stage of postconviction proceedings, a petition alleging ineffective assistance may not be summarily dismissed if it: (1) is arguable that counsel's performance fell below an objective standard of reasonableness; and (2) it is arguable that the defendant was prejudiced. Failure to satisfy one prong defeats the claim. *Id.* at 697. An attorney's performance may be deficient where he or she violates the defendant's right to decide ultimately whether to tender a lesser-included offense instruction. *DuPree*, 397 Ill. App. 3d at 735. However, to establish prejudice, the petition must allege facts to show that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). Here, defendant's claim ultimately fails because the petition does not state facts to establish arguable prejudice.

¶ 14 Defendant argues that, as long as there existed "some evidence" in the record which, if believed by the jury, would have reduced the offense to involuntary manslaughter, the instruction would have been proper. Defendant, citing *People v. Blan*, 392 Ill. App. 3d 453, 459 (2009), also argues that his uncorroborated confession qualifies as "some evidence." Indeed, defendant correctly notes that our supreme court recently stated that:

> "the appropriate standard for determining whether a defendant is entitled to a jury instruction on a lesser-included offense is whether there is *some evidence* in the record that, if believed by the jury, will reduce the crime charged to a lesser offense, not whether there is *some credible* evidence. It is not the province of the trial court to weigh the evidence when deciding whether a jury instruction is justified. [Citations.] Requiring that credible evidence exist in the record risks the trial court invading the function of the

jury and substituting its own credibility determination for that of the jury." (Emphases in original.) *McDonald*, 2016 IL 118882, ¶ 25.

¶ 15 In our view, the question here hinges on what constitutes "some evidence," and whether the sufficiency of "some evidence" of the lesser offense is to be determined in total isolation from the remaining record or whether it is considered in light of the remaining record. Defendant's arguments and the specific language quoted from *McDonald* above suggest the former. Be that as it may, we note that, despite the court's holding that the evidence warranting an instruction need only be "some," need not be credible, and should not be weighed, its application of the above standard arguably did just that. Or, at a minimum, the court's application of the standard did not ignore the context of the defendant's proffered evidence as it related to the evidence *as a whole*. For example, the defendant in *McDonald* claimed that certain evidence supported recklessness and a lesser-included instruction; the court said that "weighing against these factors," however, was other evidence that belied recklessness and it concluded that, given "the *dearth* of evidence of recklessness" (emphasis added.) (not, we note, the absence of evidence), the trial court did not err in refusing to give the involuntary-manslaughter instruction. See *id.*, 2016 IL 118882, at ¶¶ 56-57. Further, the defendant in *McDonald* argued that the court also erred in failing to give a jury instruction on second-degree murder based upon serious provocation, and he set forth evidence that he alleged reflected provocation. Again, the court determined that, "even if, as [the] defendant contends, [the victim] hit him, defendant's response was completely out of proportion to the provocation." The court recited evidence reflecting a lack of provocation, and concluded that there was "*insufficient* evidence of serious provocation" (emphasis added.) (again, we note, not the absence of such evidence) to warrant the instruction. *Id.* at ¶¶ 65-67.

¶ 16 It is important to consider the context here, as opposed to those faced by the courts in *McDonald* and in *Blan*, which both considered on direct appeal the trial court's failure to give the lesser-included instructions. In this appeal, defendant raises the lesser-included-offense argument in the context of a postconviction claim of ineffective-assistance, which requires a legal theory not completely contradicted by the record and arguable prejudice. *Hodges*, 234 Ill. 2d at 10; *Strickland*, 466 U.S. at 697. At this stage, we assume that: (1) counsel did not, and should have, advised defendant of the right to tender an involuntary-manslaughter instruction, such that his performance was deficient; and (2) had he been informed of the right to tender an involuntary-manslaughter instruction, defendant would have exercised that right. However, the involuntary-manslaughter instruction would *not* have been properly given because the "some evidence" defendant proffers, his uncorroborated statement that the death was accidental, was insufficient to warrant the instruction because it presents a meritless legal theory, *i.e.*, involuntary manslaughter is completely contradicted by the record. As the instruction was not proper, there was no arguable prejudice to defendant from counsel's alleged deficiency and the ineffective-assistance claim fails.

¶ 17 Defendant's first-degree murder convictions encompassed the jury's findings that he committed acts intending to kill or do great bodily harm and did so knowing that his acts created a strong probability of death or great bodily harm. See 720 ILCS 5/9-1(a) (West 2008). Knowledge is a conscious awareness that one's conduct is practically certain to cause a particular result. 720 ILCS 5/4-5 (West 2008). In contrast, involuntary manslaughter consists of dangerous acts, committed recklessly, that unintentionally result in death. See 720 ILCS 5/9-3(a) (West 2008). Reckless behavior occurs when a person consciously disregards a substantial risk that a result will follow. See 720 ILCS 5/4-6 (West 2008). Although not dispositive, certain

factors may be considered when determining whether conduct was reckless, such that an involuntary-manslaughter instruction is warranted, including whether there was disparity of size and strength between the defendant and the victim, the severity of the injuries, the duration of the incident, whether the defendant used a weapon, and whether the victim was defenseless. *McDonald*, 2016 IL 118882, ¶ 52. "[A]n involuntary[-]manslaughter instruction is generally not warranted where the nature of the killing, shown by either multiple wounds or the victim's defenselessness, shows that defendant did not act recklessly." *People v. DiVincenzo*, 183 Ill. 2d 239, 251 (1998).

¶ 18 Here, as summarized by the trial court, the nature of the killing shows that defendant did not act recklessly. *Id.* Atherton was *completely* defenseless. Defendant overpowered her with size and strength, forcing her face down on her bed. He shoved rolled up socks into her mouth. He shrouded her head with a pillowcase and twisted it so tightly that it was cut off with a scalpel. That death was practically certain to occur was evidenced by defendant's decision to completely block Atherton's airways *and* tie her hands behind her back, such that there was no way for her to free herself to avoid suffocation. The severity of injuries, beyond Atherton's loss of life, included broken blood vessels in her neck and face, especially around her eyes, due to asphyxiation. Defendant's statement to an inmate, overheard by an officer, that he would do to him what he had done to that "white bitch," reflects non-accidental actions.[1]

[1] Even defendant's statement to investigators that Atherton's death was accidental should be considered in its greater context. Before giving that statement, defendant repeatedly denied he was present at the scene. Only after being charged with first-degree murder did defendant request to speak again with officers, offering a statement that was crafted to conform to the scenario posed by investigators as one that *might* reflect lesser culpability (a theoretical scenario

¶ 19 In sum, defendant's postconviction claim was properly summarily dismissed because it presents a meritless legal theory because recklessness is otherwise completely contradicted by the record. Thus, even if counsel had informed defendant of the right to pursue an involuntary-manslaughter instruction, it would not have been properly given. Consequently, there is no arguable prejudice to defendant from counsel's alleged deficient performance.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of Lee County.

¶ 22 Affirmed.

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which did not conform to the evidence). Moreover, defendant's theory at trial, as expressed by defense counsel and in keeping with defendant's original statements to investigators, was *not* that defendant did not intend to kill Atherton but, rather, that he did not do *anything*. Therefore, the involuntary-manslaughter instruction would have been grossly inconsistent with that defense. Notably, defendant's postconviction petition does *not* allege that, if informed of his right to the instruction, he would have requested a change in trial strategy (which is *counsel's* decision (see, *e.g.*, *People v. Campbell*, 264 Ill. App. 3d 712, 732 (1992) ("[t]rial strategy includes an attorney's choice of one theory of defense over another")) or done anything differently in terms of presentation of evidence, such as personally testifying at trial. Thus, the reality is that, had the instruction been tendered, the jury would have considered it in light of defendant's claim that he did not do anything and the remaining evidence that belied recklessness.