SECOND DIVISION
November 20, 2012

No. 1-10-3222

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. 05 CR 4265
	)	
JOSEPH MARYLAND,	)	Honorable
	)	Mary Colleen Roberts,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris and Justice Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: Court did not err in summarily dismissing defendant's post-conviction petition alleging ineffective assistance of appellate counsel for not challenging the sufficiency of the evidence of his intent to kill. There was ample evidence of such intent from the fact that he pointed a loaded gun at the victim's head and repeatedly pulled the trigger, and a rational jury could reasonably discount defendant's testimony that he had emptied the gun's firing chamber and intended to merely scare the victim.

¶ 2 Following a 2006 jury trial, defendant Joseph Maryland was convicted of attempted first degree murder and sentenced to 12 years' imprisonment. We affirmed on direct appeal. *People v. Maryland*, No. 1-06-3518 (2009)(unpublished order under Supreme Court Rule 23).

Defendant now appeals from the summary dismissal of his 2010 *pro se* post-conviction petition, contending that he stated an arguably meritorious claim of ineffective assistance of counsel for not challenging the sufficiency of the evidence on direct appeal. He also contends, and the State agrees, that the mittimus should be corrected to properly reflect the count of conviction.

¶ 3 Defendant was charged with three counts of attempted first degree murder for, on or about January 1, 2005, allegedly pointing a gun at Sandra Carson, Gabriella Maryland, and Dennis Williams and pulling the trigger. He was also charged with one count of aggravated domestic battery and two counts of aggravated battery for, on the same date, striking his wife Maryland on the head with a handgun when Maryland was at work as an employee of the Chicago Transit Authority (CTA).

¶ 4 The evidence at trial was that, at about 1 p.m. on the day in question, Maryland was working at the CTA's Adams/Wabash rail station when defendant – who she was in the process of divorcing – lured her to the station platform by pressing the button that summons CTA personnel for passenger assistance. He put a gun to her side and threatened that "now we're both going to die." He dragged her by the hair down a flight of stairs before pointing the gun at her face and pulling the trigger several times. However, the gun did not fire. Maryland testified that defendant "was pulling the top part of the gun back" and "looked at the gun like maybe something was wrong with the gun." She and defendant struggled for the gun, and he struck her on the head with it repeatedly.

¶ 5 When fellow CTA employee Carson came to Maryland's aid as she was being beaten, defendant pointed the gun at her, as he did at William Stennis, a passenger who tried to pry him away from Maryland, and another man who tried to intervene. Carson heard the gun click while it was pointed at her, as defendant and Maryland struggled for the gun. When Carson, Stennis, and the other man had fled, defendant again pointed the gun at Maryland's head and pulled the trigger. When two CTA employees intervened, including Williams armed with a hooked stick

used by CTA employees, defendant pointed his gun at them as well. Williams heard the gun click as it was pointed at Maryland and "thought" that it clicked while pointed at himself; Maryland heard the gun click when it was pointed at Williams. Maryland broke from defendant's grasp and defendant fled the station. He was then seen by responding police officers pointing the gun at his own head and pulling the trigger. When the gun did not fire, he "cycled" or pulled back the slide of the firing chamber then put the gun in his mouth and pulled the trigger again; the gun again did not fire. He refused to drop his weapon when ordered by officers and kept walking away while pointing the gun at his head. He was nearly unaffected by four taser shots but was finally subdued.

¶ 6 Upon his arrest, defendant had a box containing 43 bullets in his coat pocket. The gun did not have a live round in the firing chamber but had six rounds in the magazine. The gun was examined and test-fired by the State Police crime laboratory, and State and defense firearms experts concurred that the gun was functional and had been properly maintained.

¶ 7 Defendant testified that he owned the gun in question since his Army service in the 1970s, when he learned how to use and maintain it. He kept the gun and a box of ammunition in a bag in his car. When he went to the Adams/Wabash station to talk to Maryland about their child, he feared the gun and ammunition would be stolen if he left them in the car so he carried them with him. However, before entering the station, he emptied the gun's firing chamber and removed two bullets from the top of the magazine. When he called Maryland to the platform, she was dismissive and started to walk away. He became upset and wanted to scare Maryland, so he threatened to kill her, pulled out his gun, and pulled the trigger, knowing that the gun would not fire because there was no round in the chamber. He denied sliding the chamber slide at any time while in the station, and stated that he cocked the hammer strictly for "psychological" effect on Maryland. He claimed that they fell down the stairs in the struggle for the gun, but admitted that he pulled her by the hair the rest of the way down the stairs. He also admitted that he may

have pulled the trigger while pointing the gun at Carson and did pull the trigger while the gun was pointing in Williams's direction. When he pulled the trigger as he pointed the gun at himself, it was an involuntary reaction to the taser shots rather than a conscious act, though he did want to kill himself at that time.

¶ 8 Following closing arguments, instructions, and deliberations, the jury found defendant guilty of the attempted murder of Maryland and of aggravated domestic battery while finding him not guilty of attempted murder regarding Carson and Williams.

¶ 9 In his unsuccessful post-trial motion, defendant alleged in relevant part that the charges had not been proven beyond a reasonable doubt. Defendant was sentenced as stated above, with the mittimus reflecting that he was convicted under Count 1 regarding Carson.

¶ 10 On direct appeal, appellate counsel contended that defendant was deprived of a fair trial when the trial court denied his request to present to the jury his entire written post-arrest statement, rather than merely the portions thereof introduced by the State.

¶ 11 In July 2010, defendant filed the instant *pro se* post-conviction petition alleging in relevant part that there was insufficient evidence to convict him of attempted murder in that the State failed to show his intent to kill Maryland. He also claimed that appellate counsel was ineffective for not contending the same on direct appeal.

¶ 12 On September 30, 2010, the court summarily dismissed the petition, finding that there was sufficient trial evidence to convict defendant of attempted murder, in that he pointed a loaded gun at Maryland and pulled the trigger, while the court was not obligated to accept at face value his testimony that he intended to scare Maryland rather than kill her. Therefore, appellate counsel was not ineffective for not raising a meritless issue. This appeal timely followed.

¶ 13 On appeal, defendant contends that the summary dismissal of his petition was erroneous because he stated an arguably meritorious claim that appellate counsel rendered ineffective assistance by not contending on direct appeal that there was insufficient evidence to convict

defendant of attempted murder. Specifically, he contends that there was insufficient evidence of his intent to kill Maryland, and indeed evidence that his intent was otherwise.

¶ 14 Under section 122-2.1 of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1 (West 2010)), the circuit court may examine the trial record and any action by this court in evaluating a post-conviction petition within 90 days of its filing, and must summarily dismiss the petition if it is frivolous or patently without merit. A *pro se* petition is frivolous or patently without merit only if it has no arguable basis in law or fact; that is, if it is based on an indisputably meritless legal theory, such as one completely contradicted by the record, or a fanciful factual allegation, such as one that is fantastic or delusional. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). On a claim of ineffective assistance of counsel, whether trial or appellate, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced him; in other words, that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *Id*. at 496-97. A petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *Id*. at 497. The summary dismissal of a post-conviction petition is reviewed *de novo*. *Id*. at 496.

¶ 15 A person commits attempted first degree murder when, with the intent to kill another, he makes a substantial step towards killing another. *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 44. Intent to kill is a state of mind that can be inferred from the circumstances, including the character of the assault and the use of a deadly weapon, so that intent to kill may be inferred from the act of firing a gun at a person because the natural tendency of such an act is to destroy another person's life. *Id*. at ¶ 41; *People v. Garcia*, 407 Ill. App. 3d 195, 201 (2011). One can therefore commit attempted murder by pointing a firearm at an intended victim and pulling the trigger even

if the firearm does not discharge for some reason, such as a malfunction. *People v. Files*, 260 Ill. App. 3d 618, 630 (1994).

¶ 16 When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking 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. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). On review, we do not retry the defendant and we accept all reasonable inferences from the record in favor of the State. *Id*. at 8. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly, the trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Beauchamp*, at 8.

¶ 17 Here, we conclude that defendant's sufficiency claim has no arguable basis in law as it is completely contradicted by the record. Thus, appellate counsel did not arguably fall below the objective standard of reasonableness, nor was defendant arguably prejudiced by the absence of this particular claim on direct appeal. In sum, the summary dismissal of the petition was proper. It is central to our analysis that inherently there is no evidence or issue *dehors* the trial record where the contention is that counsel should have raised a claim on direct appeal based upon the trial record.

¶ 18 Taking the evidence in the light most favorable to the State, as we must, we find that there was ample evidence of defendant's intent to kill Maryland. He threatened to kill her, then pointed a gun at her head and pulled the trigger several times. While there was no round in the

chamber, the gun was loaded and was later found to be in working order. It was well with the jury's role as rational finder of fact to discount defendant's testimony that he intentionally emptied the chamber and intended to merely scare Maryland, and we do not find its decision on this point so unreasonable or unsatisfactory as to engender reasonable doubt.

¶ 19 Defendant also contends, and the State agrees, that his mittimus should reflect that he was convicted and sentenced for the attempted murder of Maryland under Count 2 rather than under Count 1 regarding Carson as it now erroneously states.

¶ 20 Accordingly, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the clerk of the circuit court is directed to correct the mittimus to reflect that defendant was convicted of attempted first degree murder under Count 2. The judgment of the circuit court is affirmed in all other respects.

¶ 21 Affirmed; mittimus corrected.