2013 IL App (1st) 110747-U

FIRST DIVISION
March 4, 2013

No. 1-11-0747

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. RODERICK ALLEN, Petitioner-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County No. 04 CR 19905 Honorable Arthur F. Hill, Jr., Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: On appeal from the summary dismissal of a postconviction petition, petitioner failed to show that he filed the memorandum of law which petitioner claimed the circuit court failed to consider. Petitioner failed to show that he obtained a ruling on his motion for corrections to the trial record. Petitioner forfeited his claims that: (1) he was improperly denied a speedy trial; (2) he was improperly denied an expert witness and an investigator; (3) the trial court improperly admitted an

> autopsy photograph and allowed it to be seen during jury deliberations; and (4) he was entitled to standby counsel. Petitioner failed to present the gist of a constitutional claim of perjury, ineffective assistance of appellate counsel, or of cumulative error.

¶ 2 Petitioner, Roderick Allen, appeals an order of the circuit court of Cook County summarily dismissing his *pro se* petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). He contends that the circuit court erred in dismissing his petition because his claims were not barred by the rule of forfeiture and were not otherwise frivolous or patently without merit. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 The record of defendant's trial is set forth fully in this court's opinion on direct appeal. *People v. Allen*, 401 Ill. App. 3d 840 (2010). Because much of this evidence is relevant to the arguments raised in these postconviction proceedings, we find it helpful to reproduce our prior recitation of facts and recount the procedural history of the case here:

> "Defendant was convicted of the first-degree murder of the victim, his sister, Debbie Whitebear. The record indicates that on August 7, 2004, defendant entered his mother's home at 9043 South Cornell Avenue in Chicago and stabbed his sister several times in the chest, causing her death. Defendant's theory of the case, which he maintained throughout pretrial, trial and posttrial proceedings, was that he stabbed the victim to protect their elderly mother from the victim's abuse and that his siblings were keeping the existence of a real estate trust, of which defendant was the beneficiary, secret from him. Defendant's theory also included his belief that his father, Claude W. Allen, Jr., who was

deceased, was responsible for the disappearance of numerous missing persons, which he urged police officers and the State's Attorney's office to investigate. Defendant additionally maintained that Claude W. Allen, Jr., was not his real father and his real father was an individual named Carl Lewis, from whom he stood to inherit the proceeds of a real estate trust.

The pretrial proceedings in this case were quite lengthy due in part to defendant being found not mentally fit to stand trial as well as defendant proceeding *pro se.* Judge Thomas R. Sumner presided over defendant's pretrial proceedings. On September 2, 2004, Assistant Public Defender John Coniff was appointed to represent defendant. Defendant objected to the public defender's representation. The half sheet indicates that a behavioral clinical examination was ordered by the court.

Dr. Deborah Ferguson, a licensed clinical psychologist, interviewed defendant and submitted her report, which was dated December 27, 2004. Her report indicated that she found defendant fit to stand trial, but was unable to render an opinion regarding defendant's sanity at the time of the offense. The report also noted that although defendant denied having any delusions or paranoia, he blamed his life circumstances on the fact that his 'step-father' was never prosecuted for being a serial killer and his belief that his siblings had conspired to prevent him from receiving an inheritance from a real estate trust. The report noted that it was unclear whether these beliefs were delusional in nature or had some basis in fact.

The court ordered another behavioral clinical examination, which was conducted by Dr. Jonathon Kelly, a psychiatrist, on January 3, 2005. Dr. Kelly's report indicated that defendant was fit to stand trial, but did not reach an opinion regarding defendant's sanity at the time of the offense.

On January 27, 2005, defendant filed a *pro se* motion for withdrawal of the public defender. Defendant's attached affidavit indicated that he was displeased with the court proceedings that had occurred, his counsel was in collusion with the prosecutor and the prosecutor had tried to intimidate him and retaliate against him. He made further reference to a prior court proceeding in which he accused assistant State's Attorneys and a trial judge of ignoring 'the documented exploits of a serial child killer, one Claude W. Allen, Jr. *** and proceeded to maliciously prosecute the then and now defendant, Roderick T. Allen, in order to facilitate Claude Allen's efforts to cheat Roderick Allen of an inheritance.'

Also on that date, the court ordered another behavioral clinical examination regarding defendant's sanity in part because of defendant's request to represent himself. Pursuant to the court's order, Dr. Nishad Nadkarni, a psychiatrist, interviewed defendant on February 23, 2005, and found defendant fit to stand trial.

In March 2005, defendant filed several *pro se* motions including a motion concerning the criminal background of Claude W. Allen, Jr., as well as a motion seeking all financial records of his mother and siblings with respect to a real estate trust.

Defendant also sought documents relating to an altercation he had with his brother, Quintin Allen.

Dr. Peter Lourgos, a psychiatrist, interviewed defendant on April 19, 2005, and found defendant unfit to stand trial. Specifically Dr. Lourgos stated '[a]lthough Mr. Allen is able to state his charge, describe the roles of various courtroom personnel, and describe basic courtroom procedures, he appears to be harboring numerous persecutory delusions regarding his attorney, the [S]tate's [A]ttorney, and the judge.' Dr. Lourgos further stated that defendant's 'written motion and requests to the court are replete with delusional material *** [which is] substantially impairing his ability to effectively assist counsel in his defense.'

The court held a hearing on May 10, 2005, in which it ordered Drs. Ferguson, Kelly and Nadkarni to review defendant's *pro se* motions and update their opinions regarding his fitness.

The court held a fitness hearing on June 1, 2005. Defendant was represented by the public defender at the hearing. Drs. Ferguson, Kelly and Lourgos testified that defendant was not fit to stand trial. They all agreed that defendant understood the charges against him and the courtroom proceedings, but questioned whether he would be able to assist in his defense. They all diagnosed defendant with psychotic delusional disorder. Defendant's delusions included his belief that his sister, his counsel, the judge and the prosecutor were working together to 'railroad' him, and his numerous *pro se* filings were 'out of touch with reality.' However, Dr. Nadkarni stated that he found defendant fit to

stand trial. Dr. Nadkarni based his opinion on the fact that defendant provided rational and logical reasons for his *pro se* motions and defendant had written some of the information in his motions based on his anger with how his case was proceeding in court. The jury found defendant unfit to stand trial, but determined that he could be restored to fitness within a year of treatment. Defendant was remanded to the Department of Mental Health and remained at the Chester Mental Health Center for six months where he was treated without medication.

On February 1, 2006, Dr. Kelly found defendant fit to stand trial. Specifically, Dr. Kelly found that defendant 'has an understanding of the charges against him, consequences of a plea, judgment or sentence, the functions of the participants in the trial process and the nature and purposes of proceedings *** and found defendant able to assist in his defense.' Defendant, through counsel, stipulated to the report. The court made a finding that defendant had been restored to fitness and therefore was fit for trial.

In June 2006, defendant again filed numerous *pro se* motions, including a motion to proceed *pro se*. The trial court advised defendant that he would be held to the same standards as an attorney, to which defendant replied he understood. The court then noted, 'I believe that because of the motions that you've filed and things that you've done so far, notwithstanding the fact that you were referred to the Department of Mental Health, it appears to me that you may be capable of doing this on your own.' The court then discharged defendant's attorney.

Defendant's additional *pro se* motions included a motion to dismiss based on a speedy trial violation, a motion alleging a *Brady* violation with respect to the fitness hearing jury, and several motions for substitution of judge. Throughout the pretrial proceedings defendant filed approximately 13 motions for substitution of judge, which were all denied.

At a hearing on May 8, 2007, the court told defendant:

> 'Mr. Allen, I'm going to tell you this. I've been trying to make sense of where you're going with much of this. A lot of this we've covered and I'm not sure you are understanding what's going on here in terms of – I'm trying not to prevent you from asserting your defense but I really have some concerns and I'm just going to say this for the record. I have some concerns about what's going on here in terms of what it is that you are doing and how you are proceeding and your perception about our proceedings here and so I have a *bona fide* doubt once again about whether or not you are fit to stand trial. And, I'm going to have you examined once again. Just to be certain.'

Dr. Kelly examined defendant on May 23, 2007, and found defendant fit for trial.

Defendant's case was transferred to Judge Arthur F. Hill, Jr., for a jury trial that commenced on November 13, 2007. The court reviewed the waiver of counsel with defendant and defendant confirmed that he still wanted to represent himself. The report of proceedings indicates that defendant informed the court that he was 51 years old and

had graduated from the University of Illinois in 1981 with an engineering degree. The court told defendant:

> 'I can see that you are a very articulate and very intelligent man. And I say these things first off so the record is clear, also to let you know that I have a bit of a feel for you in terms of your intelligence and your articulation.'

At trial, Paula Powers, who is also defendant's sister, testified that their mother, Frances Allen, suffered from Alzheimer's and dementia and the victim, their sister, Debbie, had moved into their mother's home to help take care of her. Powers became their mother's legal guardian through guardianship proceedings after their mother had been diagnosed with Alzheimer's and dementia. According to Powers, their mother did not allow defendant inside the house because defendant had threatened to kill Debbie for the last 20 years. She further stated that Debbie had numerous restraining orders filed against defendant. On cross-examination, defendant asked Powers if she knew of anyone else claiming to be defendant's father, to which she responded in the negative.

Mary Exson testified that she is Frances Allen's caregiver. She stated that on the morning of August 7, 2004, she and Frances left the house to go to the store. When they left, she saw defendant standing outside the house. When they returned, defendant was still standing outside the house. Defendant helped his mother out of the car and up the stairs to the front porch. Frances wanted to keep talking with defendant but Exson tried to get her to come inside the house. Exson knew that defendant was not allowed inside the house. Debbie came out of the house and grabbed Frances to get her inside the house.

Defendant entered the house and hit Debbie several times in the back of the head and neck, knocking her to the ground. Defendant straddled Debbie, held his hand over her neck and removed a knife from his pocket. Exson ran outside and yelled for help. She saw defendant pull down a window curtain and then Frances came out of the house. On cross-examination, defendant questioned Exson about Debbie's pets that lived in the house, stating that there were three cats and three dogs. Exson denied any knowledge of Debbie using her dog to abuse Frances. Exson also stated that Debbie had told her of a prior instance in which defendant tried to attack Debbie.

Kenneth Brooks testified that he was working in the yard several houses away from Frances Allen's house when he saw a woman come out of the house yelling 'help' and 'he's got a knife.' Brooks alerted a neighbor, Shirley Brown, who was a police officer. Brooks saw another woman come out of the house and then someone inside slammed the front door shut and closed the front window curtain.

Officer Shirley Brown testified that when she approached the house she tried to get in the front door and back door but they were both locked. She further stated that she made two telephone calls to 9-1-1.

David Welsh, a firefighter with the Chicago fire department, testified that when he arrived on the scene, he saw the victim lying face-down in a pool of blood. She had multiple stab wounds to the chest area around the heart.

Defendant was apprehended later that evening. Detective John Fassl testified that he interviewed defendant at the police station that evening. After advising defendant of

his *Miranda* rights, defendant stated that he had gone to his mother's house that morning, but Debbie would not let him inside. He walked around the neighborhood and then returned to the house and sat on the front porch. When his mother returned from the store, he helped her out of the car but Debbie would not let him inside the house and he became upset. He admitted to pushing Debbie and stated, 'I just snapped.' Defendant declined to talk further. Detective Fassl noticed some spots on defendant's shorts that appeared to be dried blood. He placed the shorts in an evidence bag for testing.

Lisa Fallara testified she is a forensic scientist in the areas of biology and DNA analysis and is employed with the Illinois State Police Forensic Science Center. She tested the shorts defendant had been wearing for the presence of blood and found that they tested positive. She sent the shorts to a private forensic company for further testing. Michael Cariola, a representative from the Bode Technology Group, testified that the blood found on the shorts matched the victim's blood sample.

Dr. Valerie Arangelovich testified that she conducted an autopsy on the victim. The victim had three stab wounds to her chest and multiple incised wounds on her hands, which are also referred to as defensive wounds. Dr. Arangelovich determined the cause of death was from multiple stab wounds and she classified the manner of death as homicide. On cross-examination, Dr. Arangelovich stated that she did not find any evidence of the victim having been grabbed by the neck or hit in the back of the head or neck.

Defendant testified on his own behalf. He admitted to stabbing the victim twice, but speculated that an officer who came on the scene later inflicted the third stab wound. He stated that he stabbed Debbie in order to protect their mother from Debbie's ongoing abuse. Defendant claimed that Debbie forced their mother to engage in acts of bestiality with Debbie's dog, Debbie fed their mother substances that were not fit for human consumption and that on one occasion, their mother was left on the floor for several hours because she was unable to get up. On cross-examination, defendant admitted that his mother had not told him about any abuse, but that he could tell she had been abused by the look on her face and they way she leaned on him when he helped her up the stairs that day.

The jury found defendant guilty of first degree murder and home invasion." *Id.* at 842-47.

¶ 5 On direct appeal, petitioner argued that: (1) the cause must be remanded for a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986); (2) he was not mentally competent to represent himself *pro se* pursuant to *Indiana v. Edwards*, 554 U.S. 164 (2008); (3) his waiver of trial counsel was invalid; (4) the State's comments in its opening statement and closing argument were prejudicial; and (5) the trial court should have used a separate verdict form for felony murder instead of a general verdict form for murder. *Id*. at 842. This court affirmed the judgment of the circuit court. *Id.* at 857. Petitioner petitioned the Illinois Supreme Court for leave to appeal, which the court denied on September 29, 2010. *People v. Allen*, 237 Ill. 2d 562

(2010). The United States Supreme Court denied petitioner's request for a writ for *certiorari*. *Allen v. Illinois*, 131 S. Ct. 2959 (2011).

¶ 6 On November 16, 2010, petitioner filed the *pro se* petition for relief under the Act which is the subject of this appeal. On February 8, 2011, the circuit court entered a detailed order considering petitioner's claims and summarily dismissing them as frivolous or patently without merit. Petitioner then filed a timely notice of appeal to this court.[1]

¶ 7 ANALYSIS

¶ 8 On appeal, petitioner contends the circuit court erred in summarily dismissing his petition. The Act (725 ILCS 5/122-1 through 122-8 (West 2010)) provides a petitioner with a collateral means to challenge a conviction or sentence for violations of federal or state constitutional rights. *People v. Jones*, 211 Ill. 2d 140, 143 (2004). Once a petitioner files a petition under the Act, the trial court must first, independently and without considering any argument by the State, decide whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). To survive dismissal at this initial stage, the postconviction petition "need only present the gist of a constitutional claim," which is "a low threshold" that requires the petition to contain only a limited amount of detail. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Moreover, a petition need not make legal arguments or cite to legal authority. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). However, "while a *pro se* petition is not expected

[1] Although petitioner's notice of appeal does not bear a date stamp from the Clerk of the Circuit Court, the accompanying notice of filing is date-stamped March 1, 2011.

to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent. " *Id*. at 254-55.

¶ 9 In considering the petition, the trial court may examine the court file of the criminal proceeding, any transcripts of the proceeding, and any action by the appellate court. 725 ILCS 5/122-2.1(c) (West 2010). A postconviction 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); see 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition lacking an arguable basis in law or fact is one "based on an indisputably meritless legal theory or a fanciful factual allegation." *Id*. A claim completely contradicted by the record is an example of an indisputably meritless legal theory. *Id*. Fanciful factual allegations include those that are fantastic or delusional. *Id*. at 17. All well-pleaded facts must be taken as true unless "positively rebutted" by the trial record. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). In addition, a postconviction petition may be dismissed at the first stage of proceedings as frivolous and patently without merit when the claims raised therein are barred by *res judicata* or forfeiture. *People v. Blair*, 215 Ill. 2d 427, 442 (2005). "The doctrine of *res judicata* bars consideration of issues that were previously raised and decided on direct appeal." *Id*. at 443. Forfeiture refers to "issues that could have been raised, but were not, and are therefore barred." *Id*. This court reviews the trial court's dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Simms*, 192 Ill. 2d 348, 360 (2000). "Although the trial court's reasons for dismissing [the] petition may provide

assistance to this court, we review the judgment, and not the reasons given for the judgment." *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010).

¶ 10 Petitioner raises a number of claims on appeal.[2] We address each claim in turn.

¶ 11 I. Petitioner's Memorandum of Law

¶ 12 Petitioner initially claims that the trial judge erred in failing to consider his memorandum of law as "evidence" supporting his petition. However, there is no such memorandum of law in the record on appeal. An appellant has the burden to present a sufficiently complete record of the

[2] Petitioner voluntarily withdrew three claims in response to this court's October 28, 2011 order directing petitioner to file a brief in compliance with the page limitations set forth in Illinois Supreme Court Rule 341(b) (eff. July 1, 2008). We also note that petitioner's handwritten brief fails to comply in most respects with the requirements set forth in Illinois Supreme Court Rule 341(a) (eff. July 1, 2008). A *pro se* litigant must comply with the rules of procedure required of attorneys, and a court will not apply a more lenient standard to *pro se* litigants. *People v. Adams*, 318 Ill. App .3d 539, 542 (2001). "Nevertheless, we will not dismiss an appeal for briefing deficiencies 'if a reading of the entire brief makes it possible for the court to determine the questions or issues sought to be raised.' " *Id*. (quoting *People ex rel. Carter v. Touchette*, 5 Ill. 2d 303, 305 (1955)). Given that petitioner's brief is organized and cites to the record and appropriate legal authority, this court has chosen not to strike the brief in this appeal. However, if petitioner continues to refuse the assistance of legal counsel, this court reserves the right to strike any of his written submissions which are prepared in an improper format.

proceedings below to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *People v. Steward*, 406 Ill. App. 3d 82, 87 (2010) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). Thus, we presume the trial judge either gave the memorandum of law due consideration or lacked the memorandum to consider in the first instance.

¶ 13 In his reply brief, petitioner notes that his petition refers to the memorandum and suggests that the trial judge should have informed him of the apparent absence of the memorandum. However, the fact that the memorandum is not included in the record on appeal does not require the conclusion that the memorandum was not filed or considered by the trial judge. Moreover, the Act requires that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010). Absent any showing that the memorandum of law was attached to the petition or that the petition explained the absence of the memorandum, petitioner cannot show that any factual portion of the memorandum should be deemed "other evidence" supporting the petition. It is presumed that the order entered by the trial court was in conformity with the law. At any rate, the petitioner likely included the legal discussion petitioner contained in the missing memorandum was likely included in his appellate brief for this court's *de novo* review.

¶ 14 Accordingly, petitioner has failed to show reversible error on this point.

¶ 15 II. Corrections to the Transcripts of Proceedings

¶ 16 Petitioner next claims that the trial judge erred in dismissing his petition without considering his proposed corrections to the transcripts of proceedings. Petitioner argues that "fundamental fairness demands that the appeal be decided on the basis of the proceedings as they actually occurred in the trial court." *People v. Allen*, 109 Ill. 2d 177, 186-87 (1985). In this case, the postconviction petition asserts that the transcripts of proceedings were falsified and attaches a motion for an evidentiary hearing on at least 100 proposed corrections to the trial transcripts. However, petitioner fails to show that he ever scheduled the motion for a hearing below, thereby forfeiting the issue for review.[3] *People v. Thompkins*, 161 Ill. 2d 148, 159 (1994). As with the first issue, petitioner attempts to shift a burden to the trial judge that properly rests with the petitioner. Thus, petitioner has failed to demonstrate error on this point.

¶ 17 III. Right to a Speedy Trial

¶ 18 Petitioner next argues that he presented a gist of a claim regarding his denial of his constitutional right to a speedy trial. Petitioner could have raised this issue in his direct appeal. Accordingly, applying the rule of forfeiture, we conclude the trial court did not err in concluding that this claim was frivolous and patently without merit. *Blair*, 215 Ill. 2d at 442.

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[3] The State requests that we take judicial notice of this court's records in *People v. Allen*, No. 1-11-3061. Our records in that appeal show that petitioner alleged that he filed a different motion for transcript corrections in the circuit court after filing his notice of appeal in this case. Petitioner appealed the denial of that motion; this court dismissed that appeal on August 23, 2012.

¶ 19 Petitioner also claims he presented the gist of a claim that he was denied effective assistance of appellate counsel, who failed to raise a speedy-trial claim in his direct appeal. A criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant claiming ineffective assistance of counsel must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that, but for the deficient performance, the outcome of the proceedings would have been different. *Id*. at 687; *People v. Buss*, 187 Ill. 2d 144, 212-13 (1999). If a reviewing court finds that a defendant suffered no or *de minimis* prejudice, it need not decide whether counsel's performance was constitutionally deficient. *Buss*, 187 Ill. 2d at 213.

¶ 20 At the first stage of postconviction proceedings, a petitioner need establish only that it is arguable that counsel's performance fell below an objective standard of reasonableness and that it is arguable that the defendant was prejudiced. *People v. DuPree*, 397 Ill. App. 3d 719, 737 (2010). Appellate counsel is not required to raise every conceivable issue on appeal, and it is not incompetence of 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 prejudice requires that the reviewing court examine the merits of the underlying issue [citation] for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal." *Id*. at 362.

¶ 21 In this case, it is clearly not delusional to claim that counsel failed to argue the speedy-trial issue on appeal. Thus, we consider the merit of the legal claim. A defendant has a right to a speedy trial under the United States and Illinois Constitutions (U.S. Const., amends. VI, XIV; Ill.

Const.1970, art. I, § 8), as well as under Illinois law (725 ILCS 5/103-5 (West 2010)). However, "the statutory right to a speedy trial is not the precise equivalent of the constitutional right." *People v. Staten*, 159 Ill. 2d 419, 426 (1994). To establish a violation of the statutory right to a speedy trial, a defendant must show that he "has not been tried within the period set by statute and that defendant has not caused or contributed to the delays." *Id*. In contrast, a constitutional analysis requires consideration of: (1) the length of the delay in trial; (2) the reasons for the delay; (3) the defendant's assertion of the speedy-trial right; and (4) prejudice to the defendant caused by such delay. *Id*. "All four factors are closely related and no one factor is necessary or sufficient to a finding that the right to a speedy trial has been violated." *People v. Crane*, 195 Ill. 2d 42, 52 (2001). Whether a defendant's constitutional right to a speedy trial has been violated should be determined based on the totality of the circumstances. *Id*. at 48.

¶ 22 In this case, petitioner complains of a 19-month delay, from November 9, 2004, through June 8, 2006. In general, courts have recognized a delay approaching one year to be "presumptively prejudicial." *Id*. at 52-53 (citing *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972). Clearly, a 19 month delay is presumptively prejudicial. However, a finding of "presumptive prejudice" does not imply that the delay will be found to have actually prejudiced the defendant, but merely triggers the remainder of the speedy-trial inquiry. *Crane*, 195 Ill. 2d at 53.

¶ 23 Thus, we must next consider the reason for the delay. The State bears the burden of providing justification for any delay which has occurred. *Id*. Reasons which may be offered to explain a delay are assigned different weight. *Id*. (citing *Barker*, 407 U.S. at 531). For example, evidence that the State intentionally delayed prosecution to gain some tactical

advantage will weigh very heavily against the State, while more neutral reasons, though still charged against the State, will be weighed less heavily. *Crane*, 195 Ill. 2d at 53. Indeed, still other reasons for delay, such as the unavailability or inability to locate a competent witness, or a judge's illness, are generally held to be valid explanations, justifying a reasonable period of delay. *Id*. at 53-54 (citations omitted).

¶ 24 In this case, the State argues the delay is excused because the time period at issue encompasses the investigation, hearing and adjudication of petitioner's fitness to stand trial. Petitioner characterizes it as a period during which the trial court used the fitness evaluation to force appointed counsel upon him, in violation of his right to self-representation. Where good cause exists, a delay necessitated for the purpose of ascertaining a defendant's sanity and mental capacity to be subjected to criminal prosecution does not violate the accused's constitutional right to a speedy trial. *People v. Benson*, 19 Ill. 2d 50, 55 (1960); see also *People v. Oliver*, 367 Ill. App. 3d 826, 827-28 (2006) (administrative delays regarding fitness examinations are not charged to the court when considering the statutory speedy-trial right). The record in this case shows that petitioner was found unfit to stand trial by a jury and was not found restored to fitness until February 1, 2006. Accordingly, the record positively rebuts the petitioner's claim that the fitness proceedings were a mere subterfuge employed to defeat his constitutional rights.

¶ 25 The third factor to consider is petitioner's assertion of his speedy-trial right. The record shows that petitioner asserted his right prior to the preliminary hearing in which appointed counsel filed his appearance. On the other hand, the record also shows that after petitioner was found fit to stand trial, petitioner renewed his demand for a speedy trial on June 8, 2006, but

nevertheless engaged in extensive *pro se* pretrial litigation. In particular, petitioner also filed a motion for substitution of judge on June 8, 2006, which was the third of thirteen *pro se* motions for substitution of judge petitioner filed prior to his trial. Viewing this record in the light most favorable to the petitioner, *i.e.*, fully weighting the initial demand made during a period when petitioner's fitness may have been in doubt and discounting his actions made after the time period petitioner specifies on appeal, we conclude that this factor weighs in petitioner's favor.

¶ 26 The fourth factor to consider is the prejudice to petitioner caused by the delay. Petitioner asserts his rights were prejudiced because the delay caused the loss of testimony from his mother, Frances Allen, who was found incompetent to testify during his trial on November 14, 2007. However, the record shows that Paula Powers testified that Frances Allen had been diagnosed with dementia and Alzheimer's disease years before August 7, 2004, and was in the "later stages" at the time of the offense. Powers also testified that Allen had continuous home care at the time of the offense because she was unable to live alone. Indeed, the postconviction petition notes that a police officer testified at trial that Allen was incoherent on the day of the homicide.[4] Thus, the record positively rebuts the suggestion that the delay at issue here contributed materially to Allen's inability to testify at petitioner's trial.

[4] Petitioner claims that recordings of certain telephone conversations between himself and Allen would contradict on this point, but petitioner did not attach any such evidence to his petition or include such evidence in the record on appeal.

¶ 27 Based on the totality of the circumstances, we conclude that the delay of which petitioner complains was excused by the ongoing fitness proceedings and did not prejudice petitioner's rights. Accordingly, we conclude that the claim lacks legal merit and that the trial judge did not err in concluding that petitioner failed to establish the gist of a claim for ineffective assistance of counsel.

¶ 28 IV. The Motion for an Investigator and Expert Assistance

¶ 29 Petitioner further claims he stated the gist of a constitutional claim that the trial judge erred in denying his motion for an expert witness or investigator at trial. As with the speedy-trial claim, petitioner could have raised this issue in his direct appeal, rendering the claim forfeited. *Blair*, 215 Ill. 2d at 442. As with the speedy-trial claim, we turn to address petitioner's parallel claim of ineffective assistance of counsel. "In Illinois, it is well established that a denial of funds to an indigent for the securing of expert witnesses in defense of criminal charges may violate constitutional protections in certain circumstances." *People v. Lawson*, 163 Ill. 2d 187, 220 (1994). "[A] standard has evolved that there must be some showing that the requested expert assistance is necessary in proving a crucial issue in the case and that the lack of funds for the expert will therefore prejudice defendant." *Id.* at 221.

¶ 30 In this case, petitioner claims that it was crucial to his defense to obtain expert testimony regarding the victim's stab wounds and the autopsy photograph shown to the jury. However, as the State correctly notes, at trial, petitioner admitted to stabbing his sister and relied on the theory of self-defense. Indeed, petitioner testified in detail regarding the manner in which he stabbed his sister. Thus, petitioner's assertions that an expert was required to explain the stab wound

pattern or to contradict what is shown by the autopsy photographs are positively rebutted by the record. No reasonable probability exists that the outcome of the direct appeal would have been different had appellate counsel raised this issue.

¶ 31 Petitioner also claims that it was crucial to his defense that he be able to find occurrence witnesses to contradict Mary Exson's testimony on the charge of home invasion. Petitioner was convicted of the type of home invasion involving the entry without authority of the dwelling place of another by a person not a peace officer acting in the line of duty, knowing that one or more persons is present and intentionally causing injury to any person within such dwelling place. 720 ILCS 5/12-11 (a)(2) (West 2006). Petitioner's own testimony corroborates Exson's testimony that petitioner entered the home knowing others were present and attacked his sister. Even assuming for the sake of argument that petitioner was initially invited into the home, petitioner's testimony establishes the elements of home invasion. *E.g.*, *People v. Racanelli*, 132 Ill. App. 3d 124, 134-135 (1985); *People v. Hudson*, 113 Ill. App. 3d 1041, 1045 (1983). Given this record, no reasonable probability exists that the outcome of the direct appeal would have been different had appellate counsel raised this issue. Thus, we conclude that petitioner has failed to show the gist of an ineffective assistance of counsel claim on this point.

¶ 32 V. Admission of the Autopsy Photographs

¶ 33 Petitioner claims that the trial court erred in admitting morgue photographs and allowing them to be seen by the jury during deliberations. Petitioner acknowledges that this issue was not raised in his direct appeal, but notes the rule of forfeiture is relaxed where fundamental fairness so requires. *People v. Williams*, 209 Ill. 2d 227, 233 (2004). Introduction of potentially

prejudicial autopsy photos, while it might be damaging to the defense, is not the kind of error that constitutes a deprivation of fundamental rights. See *People v. McCarter*, 385 Ill. App. 3d 919, 940 (2008) (any error in admission of prejudicial photographs does not constitute a breakdown in the adversarial system sufficient to be deemed plain error). Thus, we conclude that the claim is forfeited. *Blair*, 215 Ill. 2d at 442.

¶ 34 However, petitioner raises a parallel claim of ineffective assistance of counsel. Photographs of a decedent may be admitted to prove the nature and extent of injuries and the force needed to inflict them, the position, condition and location of the body, the manner and cause of death, to corroborate a defendant's confession, and to aid in understanding the testimony of a pathologist or other witness. *People v. Kitchen*, 159 Ill. 2d 1, 34 (1994). While photographs may sometimes be cumulative of the testimony of a witness, photographs may also aid the jury in understanding the testimony. *People v. Chapman*, 194 Ill. 2d 186, 220 (2000). If photographs are relevant to prove facts at issue, they are admissible unless their nature is so prejudicial and so likely to inflame the jury that their probative value is outweighed. *Kitchen*, 159 Ill. 2d at 35. Even a gruesome photograph is admissible if it is relevant to corroborate oral testimony or to show the condition of the crime scene. *People v. Armstrong*, 183 Ill. 2d 130, 147 (1998). The decision to admit photographs into evidence is a matter left to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. *Kitchen*, 159 Ill. 2d at 34. An abuse of discretion occurs only when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. See *People v. Ortega*, 209 Ill. 2d 354, 359 (2004); *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 35 In this case, petitioner does not claim that the photographs are unduly gruesome or inflammatory. Rather, petitioner claims that a photograph showing swelling to the victim's jaw is not consistent with the autopsy report, which did not list such swelling as an injury, or Dr. Arangelovich's testimony on this point. Petitioner suggests that the State improperly relied on the photograph to argue that petitioner struck the victim with his fist (which petitioner denies), when the photograph was not probative on the issue. However, the record on appeal establishes that the charges against petitioner were based on his attacks on his sister using a knife. The issue of whether petitioner also struck his sister with his fist is a collateral one. Accordingly, no reasonable probability exists that the outcome of the direct appeal would have been different had appellate counsel raised this issue. Thus, we conclude that petitioner has failed to show the gist of an ineffective assistance of counsel claim on this point.

¶ 36 VI. Alleged Perjury by the Deputy Medical Examiner

¶ 37 Petitioner next claims that the trial court erred in dismissing his claim that Dr. Arangelovich gave perjurious testimony regarding the autopsy. A conviction obtained by the knowing use of perjured testimony violates the defendant's right to due process. *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). This court should set aside any conviction so obtained if the defendant shows "any reasonable likelihood that the false testimony could have affected the jury's verdict." *Id.* "In order to establish a violation of due process, the prosecutor actually trying the case need not have known that the testimony was false; rather, knowledge on the part of any representative or agent of the prosecution is enough." *Id.* at 348. "[T]he prosecution is charged

with knowledge of its agents, including the police." *People v. Smith*, 352 Ill. App. 3d 1095, 1101 (2004).

¶ 38 The petition in this case alleges two types of perjury or use of false evidence. Petitioner points to supposed discrepancies between Dr. Arangelovich's testimony, her written report and a hospital report tendered in pretrial discovery regarding the wounds to the victim's heart. "Mere inconsistencies in testimony do not establish perjury or that the State knowingly used perjured evidence." *People v. Amos*, 204 Ill. App. 3d 75, 85 (1990). Moreover, while a strict standard of materiality is used in evaluating perjury claims, such that the conviction must be set aside if any reasonable likelihood exists that the false testimony could have affected the jury's judgment (*Coleman*, 183 Ill. 2d at 391-92), given the record on appeal in this case, the issue of the number of wounds to the victim's heart was not material.

¶ 39 Petitioner also claims that one of the photographic exhibits has been substituted and that portions of Dr. Arangelovich's testimony were falsified to match the bogus photograph. However, petitioner must "set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent. " *Delton*, 227 Ill. 2d at 254-55. Petitioner has failed to do so on this point. Accordingly, the petition fails to present the gist of a constitutional claim.

¶ 40 VII. Jury Instructions

¶ 41 Petitioner further claims he received ineffective assistance of appellate counsel where counsel failed to argue that the trial judge improperly denied petitioner's requests for jury instructions on self-defense against another and second degree murder based on imperfect self-

defense. A person is justified in the use of force in self-defense against another that is intended or likely to cause death or great bodily harm when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony. 720 ILCS 5/7-1(a) (West 2006). A person commits second degree murder based on the mitigating factor of imperfect self-defense when he commits the offense of first degree murder, and he believes, at the time of the murder, that the circumstances are such that they justify the use of deadly force under the principles of self-defense, but defendant's belief is unreasonable. 720 ILCS 5/9-2(a)(2) (West 2006). A defendant is generally " 'entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.' " *People v. Everette*, 141 Ill. 2d 147, 156 (1990) (quoting *Mathews v. United States*, 485 U.S. 58, 64 (1988)). An instruction for self-defense should be given in a homicide case where there is some evidence in the record, however slight, which if believed by the jury, would support a claim of self-defense. *Everette*, 141 Ill. 2d at 157; *People v. Lockett*, 82 Ill. 2d 546, 551 (1980). Moreover, if the evidence supports a self-defense instruction, it will also support a second-degree murder instruction. *Lockett*, 82 Ill. 2d at 551. In determining whether defendant was entitled to second degree murder instructions because there was sufficient evidence of an unreasonable belief that self-defense was justified, a court may consider factors including, but not limited to, the following: the defendant's testimony, intent or motive, the type of wound suffered by the victim, any previous history of violence between defendant and victim, any physical contact between the defendant and victim, and the circumstances surrounding the incident. See *Everette*, 141 Ill. 2d at 158. However, these

instructions should not be given if the evidence clearly demonstrates that the crime was murder and there is no evidence upon which a jury might find that the defendant acted in self defense or was guilty of second-degree murder. *Lockett*, 82 Ill. 2d at 551-52. "[W]e must be wary so as not to permit a defendant to demand unlimited instructions based upon the merest factual reference or witness' comment. *Everette*, 141 Ill. 2d at 157 (citing *People v. Bratcher*, 63 Ill. 2d 534, 541 (1976)). Appellate counsel would evaluate the issue knowing that the question of whether sufficient evidence exists in the record to support the giving of a jury instruction is a question of law subject to *de novo* review. *People v. Washington*, 2012 IL 110283, ¶ 19 (citing *Everette*, 141 Ill. 2d at 157).

¶ 42 In this case, the petitioner alleges that his sister had poisoned their mother and forced their mother to engage in acts of bestiality with his sister's dog. Indeed, petitioner alleges that he made numerous attempts to involve the police and various family members to stop this alleged abuse. However, the portions of petitioner's testimony cited in the petition do not support the allegation that petitioner believed these harms were imminent on the date of the homicide. Rather, petitioner testified that his mother had not told him about any abuse, but that he could somehow tell she had been abused by the look on her face and they way she leaned on him when he helped her up the stairs that day. In *Bratcher*, our supreme court concluded that the defendant's comment that he felt the police officers he struck "were going to whip him" was "insufficient to warrant submitting the issue of self-defense to the jury, especially in light of the defendant's own testimony which reveals a clearly opposite motivation for his action." *Bratcher*, 63 Ill. 2d at 539. In this case, petitioner's conclusion was patently speculative and his theory of

the case revealed another potential motive for the offenses, *i.e.*, petitioner's belief that his siblings were keeping secret the existence of a real estate trust, of which he was the beneficiary. Petitioner could never have convinced a reasonable jury that he was acting in self-defense. Furthermore, petitioner testified at trial that he left the scene of the homicide and discarded his blue shirt in a garbage can. Although petitioner claimed he was not attempting to elude the police, such evidence tends to negate a claim of self defense. See *People v. Turcios*, 228 Ill. App. 3d 583, 597 (1992); *People v. Carter*, 135 Ill. App. 3d 403, 410 (1985). In addition, Powers testified at trial that their mother did not allow petitioner inside the house because he had threatened to kill his sister Debbie for the last 20 years. Powers further testified that Debbie had numerous restraining orders filed against defendant. Given this record and the factors listed in *Everette* and *Bratcher*, any decision by appellate counsel to omit the instructional issue was not patently wrong. Thus, we conclude that petitioner has failed to show the gist of an ineffective assistance of counsel claim on this point.

¶ 43 VIII. Standby Counsel

¶ 44 In addition, petitioner alleges that the trial court erred in denying his request for standby counsel. Petitioner could have raised this issue in his direct appeal. The issue is not one of fundamental fairness, as a criminal defendant does not have a right to standby counsel. *People v. Gibson*, 136 Ill. 2d 362, 375, 383 (1990); *People v. Ware*, 407 Ill. App. 3d 315, 349 (2011). Moreover, the transcript of proceedings addressing the issue of standby counsel reveals that petitioner adamantly opposed the appointment of his prior assistant public defender as standby counsel. A defendant does not have the right to choose his court-appointed attorney or insist that

a particular assistant public defender represent him at trial where the defendant is unsatisfied because of, among other things, a disagreement over trial strategies or a deteriorated attorney-client relationship. See *People v. Baez*, 241 Ill. 2d 44, 106 n.5 (2011); *People v. Abernathy*, 399 Ill. App. 3d 420, 426 (2010); *In re Cathy M.*, 326 Ill. App. 3d 335, 340-41 (2001). Petitioner does not claim ineffective assistance of appellate counsel (who argued that petitioner should not have been allowed to proceed *pro se*). Petitioner's claim does not involve matters necessarily outside the record. Accordingly, applying the rule of forfeiture, we conclude the trial court did not err in concluding that this claim was frivolous and patently without merit. *Blair*, 215 Ill. 2d at 442.

¶ 45 IX. Cumulative Error

¶ 46 Petitioner's final argument is that the errors he alleged, taken individually or collectively, denied him a fair trial and prevented the jury from fairly weighing the evidence and testimony. However, because we have rejected every individual claim of error, cumulative-error analysis is not necessary. See *People v. Perry*, 224 Ill. 2d 312, 356 (2007); *People v. Jackson*, 205 Ill. 2d 247, 283 (2001).

¶ 47 CONCLUSION

¶ 48 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 49 Affirmed.