2011 IL App (3d) 100209-U

Order filed November 22, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-10-0209 Circuit No. 05-CF-732
JUAN SANTANA,	)	Honorable Richard C. Schoenstedt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order summarily dismissing the defendant's post-conviction petition at the first stage for failing to state the gist of a constitutional claim was correct. The allegations of ineffective assistance of trial counsel were waived when they were not presented on direct appeal and the allegations of ineffective assistance of appellate counsel were frivolous and patently without merit.

¶ 2 The defendant, Juan Santana, was convicted on two counts of first degree murder and one count of aggravated arson following the deaths of Maria Nunez and Merary Nunez in a fire at their home in Joliet, Illinois. The trial court imposed a sentence of natural life on each of the

murder counts with a consecutive 30-year term on the aggravated arson conviction. His convictions and sentences were affirmed on direct appeal to this court. *People v. Santana*, No. 3--06--0807 (September 30, 2008) (unpublished order pursuant to Supreme Court Rule 23). Our supreme court denied the defendant's petition for leave to appeal. See *People v. Santana*, 231 Ill. 2d 649 (2009). The defendant subsequently filed a timely post-conviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-2.1 *et seq.* (West 2008)), wherein he raised eight claims of ineffective assistance of trial counsel and one claim of ineffective assistance of appellate counsel. The circuit court summarily dismissed the defendant's petition as being frivolous and patently without merit. The defendant appeals from that order. We affirm.

¶ 3 BACKGROUND

¶ 4 A review of the record indicates that the victims died in a fire that resulted from a fire bomb thrown through a window. The defendant and two accomplices were indicted for the crimes, and one of the accomplices testified against the defendant. The accomplice testified that he believed the defendant and the other accomplice were gang members. Another individual testified that he loaned his vehicle to the defendant and the two accomplices on the night of the fire. When the three individuals returned approximately 40 minutes later, the defendant allegedly told the witness that two Latin Kings lived near him, they were a nuisance, and he wanted to get rid of them. Another witness identified a vehicle driving away from the fire shortly after it started. That vehicle was later identified as the one that had been loaned to the defendant. Other witnesses testified to two instances of alleged gang motivated acts against the Nunez house, one occurring the week before the day of the fire and another occurring approximately six months earlier.

¶ 5 Also testifying in the defendant's trial was a police officer who was permitted to testify as an expert, over the defendant's objection, concerning gangs in Will County. The witness did not testify regarding any of the particular facts of the case against the defendant. He did, however, testify to the animosity between rival gangs and that the gangs often retaliate against each other with acts of violence, including arson, usually involving the use of a bottle filled with gasoline and a rag lit afire.

¶ 6 On direct appeal, the defendant raised two issues: (1) the admission of expert testimony regarding gangs denied him a fair trial; and (2) the prosecution's remarks in closing argument concerning street gangs and comparing gang activity to Al-Qaeda denied him a fair trial. This court affirmed the defendant's conviction and sentence.

¶ 7 In his post-conviction petition, the defendant alleged that his trial counsel was constitutionally ineffective for: (1) failing to move for dismissal or, in the alternative, a directed finding of not guilty of the felony murder count based upon the defendant's claim that the underlying felony and the acts causing the death were the same act; (2) failing to request a jury instruction on involuntary manslaughter where, under the charging instrument and facts, such an instruction was appropriate and failing to inform the defendant of the availability of the instruction; (3) failing to request an involuntary manslaughter instruction on the knowing murder counts as a lesser included offense to those charges; (4) failing to argue that the State presented insufficient evidence on each count of murder and aggravated arson; (5) failing to object to the admission of certain evidence regarding prior attempted arson and alleged gang activity at the victims' address as inadmissible or overly prejudicial; (6) failing to request a curative instruction under Illinois Pattern Jury Instruction (IPI), Criminal, No. 3.14 (4th ed. 2000), a limiting

instruction relating to evidence of uncharged conduct; (7) failing to argue that the 30-year sentence for aggravated arson should have been vacated as the lesser included offense of the felony murder conviction; and (8) failing to request a *voir dire* of potential jurors for possible gang bias. He further alleged that his appellate counsel was ineffective on direct appeal for failure to allege ineffective assistance of trial counsel for any of the eight alleged deficiencies.

¶ 8 ANALYSIS

¶ 9 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122--1 *et seq.* (West 2008)) provides the opportunity for criminal defendants to file a petition seeking relief if substantial violations of their federal or constitutional rights occurred. The Act sets forth a three-stage process. At the first stage, a trial court may summarily dismiss a petition only if it is frivolous and patently without merit. *People v. Gaultney*, 174 Ill. 2d 410 (1996). A post-conviction petition is considered frivolous and patently without merit if the allegations in the petition, when taken as true, fail to present the gist of a constitutional claim. *Id.* To state the gist of a constitutional claim, the defendant must plead some facts from which a valid claim can be discerned, and this standard incorporates the provision that the petition must be supported by affidavits, the record, and any other evidence. *Gaultney*, 174 Ill. 2d at 418. A petition contradicted by the record is frivolous and patently without merit. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). In judging whether a petition is frivolous and patently without merit, the trial judge may review and rely upon the record before him even though the alleged constitutional deprivation might concern matters outside the record. *People v. Ramirez*, 162 Ill. 2d 235 (1994). More succinctly, a petition for post-conviction relief may be dismissed at the first stage "only if the petition has no arguable basis either in law or fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12

(2009). The standard of review of a first-stage dismissal of a post-conviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 10 Here, the defendant's petition alleged that both his trial counsel and his appellate counsel provided ineffective assistance. As to the allegations regarding ineffective assistance of trial counsel, those claims have been forfeited. It is well settled that all issues which could have been raised on direct appeal but were not are forfeited and cannot be raised in a post-conviction proceeding. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Where *res judicata* or forfeiture preclude a defendant from obtaining relief, such a claim will necessarily be frivolous and patently without merit. *People v. Anderson*, 375 Ill. App. 3d 990, 1000 (2007). After thoroughly reviewing both the petition and the record, we conclude that all the defendant's claims regarding trial counsel's allegedly deficient performance could have been raised on direct appeal, and his failure to do so results in forfeiture of those claims in these proceedings. *Petrenko*, 237 Ill. 2d 499.

¶ 11 As to the allegations regarding ineffective assistance of appellate counsel, however, we find that the issue is not forfeited. Unlike claims for ineffective assistance of trial counsel, our supreme court has held that the forfeiture doctrine does not apply to claims of ineffective assistance of appellate counsel. *Petrenko*, 237 Ill. 2d at 499; *People v. Williams*, 209 Ill. 2d 227, 233 (2004). The question, therefore, is whether the defendant's claim of ineffective assistance of appellate counsel has an arguable basis in law or fact -- that is, whether the claim is based upon an indisputably meritless legal theory or factual allegations which are clearly baseless, fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17. We must review each claim of alleged ineffective

assistance of trial counsel to determine whether appellate counsel was ineffective in failing to raise any of them on direct appeal.

¶ 12 To establish the ineffective assistance of appellate counsel, a defendant must show that his counsel's failure to raise an issue was objectively unreasonable and that, but for this failure, there was a reasonable probability that his conviction would have been reversed. *People v. Stewart*, 141 Ill. 2d 107, 119 (1990). Appellate counsel is not obliged to brief every conceivable issue on appeal (*People v. Sanders*, 209 Ill. App. 3d 366, 377 (1991)), and it is not incompetence for counsel to refrain from raising those issues which counsel believes are without merit, unless counsel's appraisal of the merits is patently erroneous. *People v. Lostutter*, 227 Ill. App. 3d 1052, 1054 (1992). To sustain a claim of incompetency of appellate counsel in a post-conviction proceeding, a defendant must establish substantial prejudice to him which likely affected the outcome of his case. *People v. Franzen*, 251 Ill. App. 3d 809, 821 (1993).

¶ 13 In his post-conviction petition, the defendant sets forth eight issues which he contends should have been raised on direct appeal. As we have noted above, these issues would not normally be cognizable in their own right in a post-conviction proceeding because they were not raised in the direct appeal. Nevertheless, we will review them here for the purpose of determining whether the issues were so patently meritorious that the failure of appellate counsel to raise them on direct appeal constituted incompetence of appellate counsel. As shown below, we have determined that these issues lack merit and that, therefore, defendant did not suffer any prejudice from appellate counsel's failure to raise them in the direct appeal.

¶ 14 As to the defendant's claim that trial counsel should have moved for dismissal of the felony murder conviction or should have moved for a directed finding of not guilty, we find no basis in law for that claim. In order for a conviction for felony murder to stand, the predicate felony underlying the charge of felony murder must have some independent motivation or purpose apart from the murder itself. *People v. Davison*, 236 Ill. 2d 232, 244 (2010); *People v. Morgan*, 197 Ill. 2d 404, 447 (2001) ("where the acts constituting forcible felonies arise from and are inherent in the act of murder itself, those acts cannot serve as predicate felonies for a charge of felony murder"). However, where the predicate underlying crime for felony murder is arson, and a victim's death is the result of the defendant's setting a fire which caused the death, even though the defendant committed only one act in starting the fire, the intent or felonious purpose in starting the fire may be independent or apart from killing the victim. *People v. Phillips*, 383 Ill. App. 3d 521, 538-39 (2008). Thus, there is no basis in law for the defendant's ineffective assistance claim unless the facts adduced at trial could support an argument that the defendant's motivation in committing arson was to kill the victims. Here, there was no evidence presented to support a finding that the defendant started the fire with the intent to kill the two victims. The facts establish only that the defendant started the fire with an intent or motivation to intimidate a rival gang to leave the neighborhood.

¶ 15 Because there is no arguable basis in law or fact to support the claim of ineffective assistance of trial counsel in failing to move for dismissal or a directed verdict on the felony murder counts, the claim of ineffective assistance of appellate counsel for failing to raise the issue on direct appeal is frivolous and patently without merit. *Petrenko*, 237 Ill. 2d at 502.

¶ 16 As to the claims that trial counsel should have requested a jury instruction for involuntary manslaughter, we also find no arguable basis in law or fact to support those claims. Involuntary manslaughter, requiring a mental state of recklessness with regard to a death, and felony murder, which does not reference any mental state with respect to a death, are not sufficiently related under the charging instrument so as to call for an involuntary manslaughter instruction, nor is involuntary manslaughter a lesser included offense of felony murder. *Phillips*, 383 Ill. App. 3d at 545-46.

¶ 17 As to whether trial counsel was deficient for failing to request an involuntary manslaughter instruction for the two counts of knowing murder, the mere fact that involuntary manslaughter is a lesser included offense to knowing murder is not a sufficient basis in law for seeking the instruction, since an instruction on a lesser included offense is justified only where some evidence exists to support the giving of the instruction. *People v. Jones*, 175 Ill. 2d 126, 132 (1997). Moreover, a manslaughter instruction should not be given unless the record contains some evidence to support a finding that the defendant acted recklessly in performing the acts which caused the victim's death. *People v. Jones*, 219 Ill. 2d 1, 32 (2006). A person is reckless or acts recklessly when he consciously disregards a substantial and unjustifiable risk, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. 720 ILCS 5/4--6 (West 2008). Here, there was no evidence in the record which would have arguably supported an involuntary manslaughter instruction. The evidence established that the defendant or an accomplice threw a gasoline bomb through a window into the victims' house in the middle of the night. In order to warrant an involuntary manslaughter instruction, the defendant would have had to establish that there is a proper

standard of care which a reasonable person would exercise when fire bombing a residence, which is, of course, not possible. Additionally, he needs to present some evidence to support an argument that his actions were nothing more than a gross deviation from that standard. Again, it would not be possible to present such evidence to the jury. In fact, the only evidence the defendant presented at trial was evidence attempting to establish an alibi. Given the complete lack of any evidence to support a request for an involuntary manslaughter instruction, the claim that appellate counsel was constitutionally ineffective for failing to raise the issue on appeal is quintessentially frivolous and most patently without merit.

¶ 18 Moreover, the argument that the defendant intended to merely scare the occupants of the house into leaving the neighborhood does not justify an involuntary manslaughter instruction. A claim that one was merely trying to scare a victim when purposefully performing a deadly act is insufficient to support a claim that one's actions are reckless and not intentional so as to justify an involuntary manslaughter instruction. See *People v. Nicholas*, 351 Ill. App. 3d 433, 446 (2004) *rev'd on other grounds*, 218 Ill. 2d 104 (2005).

¶ 19 The defendant next claims that appellate counsel was incompetent in failing to argue on appeal that the State's evidence was insufficient to prove him guilty of knowing murder, felony murder, and aggravated arson beyond a reasonable doubt. Although issues regarding the sufficiency of the evidence are not proper in post-conviction proceedings, such evidentiary issues are cognizable for the limited purpose of determining whether appellate counsel's failure to raise the sufficiency of the evidence on direct appeal constituted ineffective assistance. *Franzen*, 251 Ill. App. 3d at 822.

¶ 20 When considering a challenge to the sufficiency of the evidence, a court of review must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). It is well settled that a reviewing court should not reverse a criminal conviction for lack of sufficient evidence unless the evidence is so palpably contrary to the verdict or so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 21 In this case, the evidence establishing the defendant's criminal culpability for the charged offenses came primarily from Sergio Anguiano and Jose Rodriguez. Rodriguez testified that he loaned his jeep to the defendant, Anguiano, and Ignacio Jacobo; and when they returned approximately 40 minutes later, the defendant told Rodriquez that he wanted to get rid of two Latin Kings who lived nearby. Rodriguez also testified that the defendant later warned him not to cooperate with the police who were investigating the fire and deaths -- suggesting that Rodriguez's family would be harmed if he cooperated. Anguiano, an alleged accomplice who was initially charged along with the defendant but agreed to testify against the defendant, testified that he drove the defendant and Jacobo to a point approximately one block from the Nunez house, after which the two left Anguiano in the vehicle and returned approximately five minutes later. He then drove back to Rodriquez's apartment. Anguiano also testified that he was subsequently approached by the defendant who told him not to say anything to the police regarding the incident.

¶ 22 In addition to the testimony of Rodriquez and Anguiano, Shuana Chevalier testified that, at the time of the fire at the Nunez residence, she was standing nearby when she heard the sound

of glass breaking and saw the glow of a fire. She then saw two men running from the Nunez residence and decided to follow them. She saw the two men get into a vehicle, which she followed until she could get the vehicle plate number. The vehicle was later identified as the one that Rodriguez had loaned minutes earlier to the defendant, Anguiano, and Jacobo.

¶ 23 Viewing the evidence in the light most favorable to the prosecution, we find that the evidence was sufficient to convict the defendant of the charged crimes beyond a reasonable doubt. We recognize that the testimony of Anguiano, an accomplice witness, has inherent weaknesses and should be accepted only with caution and suspicion. Nevertheless, the testimony of an accomplice witness, whether corroborated or uncorroborated, is sufficient to sustain a criminal conviction. *People v. Tenney*, 205 Ill. 2d 411, 429 (2002). In addition, Rodriguez's testimony that, upon returning from the trip that coincided with the fire bombing of the Nunez residence, the defendant commented that he wanted to "get rid of" the two Latin Kings who lived nearby, again, when viewed in the light most favorable to the prosecution, could establish that the defendant was responsible for the fire that killed the two victims. The defendant's claim that the statement should only be interpreted to indicate his desire to have the neighbors taken away at some point in the future, while a possible explanation for his statement, would require us to review the evidence in a light different from that which we must review the record in appeals regarding sufficiency of the evidence claims. This we cannot do. *Collins*, 106 Ill. 2d at 261.

¶ 24 Moreover, we note that Anguiano and Rodriquez each testified that the defendant attempted to influence or intimidate them into not cooperating with the police who were investigating the victims' deaths. Evidence of a defendant's attempt to tamper with or impede a

witness can be deemed an admission of guilt by the defendant. See *People v. Smith*, 67 Ill. App. 3d 672, 677 (1978).

¶ 25 Given the totality of the record, and the standard upon which the record must be reviewed, we find that sufficient evidence was presented to sustain the defendant's convictions for murder and aggravated arson. We conclude, therefore, that appellate counsel was not incompetent for failing to raise a sufficiency of the evidence argument in the direct appeal.

¶ 26 In his next contention, the defendant argues that he received inadequate representation on appeal when appellate counsel failed to raise the issue of trial counsel's failure to object to the admission of certain evidence regarding prior attempted arson and alleged gang activity at the Nunez residence. Specifically, Adriana Perez, a surviving resident of the home that was fire bombed, testified that, a week before the fire, some men approached the house, displayed gang signs, and tried to start a fight with her brother who also lived at the Nunez residence. She also recounted an incident six months earlier when someone threw a flaming bottle of gasoline at her window in an attempt to set the house on fire. In the direct appeal, the defendant did not specifically maintain that it was error to admit this evidence. Rather, his appellate counsel argued that the trial court erred in admitting expert testimony regarding gangs and gang activity. In the direct appeal, this court noted that gang-related evidence may be admitted at trial if it is relevant and its probative value is not outweighed by its prejudicial effect. See *People v. Smith*, 141 Ill. 2d 40, 58 (1990). Gang activity is admissible to show common purpose or design, or to provide a motive for an otherwise inexplicable act. *Id.*

¶ 27 In finding that the expert gang testimony was admissible in the direct appeal, this court noted that Perez's testimony was sufficient to establish that the crime at issue was gang related;

thus, the expert gang testimony was proper. In the instant appeal, the defendant maintains that appellate counsel should have argued in the direct appeal that Perez's testimony was inadmissible as "other-crimes" evidence. See *People v. Thingsvold*, 145 Ill. 2d 441, 455-56 (1991) (State must show that the defendant committed or participated in an uncharged crime in order for such evidence to be admissible). The defendant maintains that Perez's testimony was inadmissible under the other-crimes doctrine as there was no showing that he had participated in the two prior events. We disagree. Evidence that is admissible for one purpose will not be deemed inadmissible for another purpose. *People v. Lucas*, 132 Ill. 2d 399, 430 (1989). Here, while Perez's testimony may not have been admissible as other-crimes evidence, it was admissible to establish gang-related activity so as to permit expert testimony concerning the gang-related nature of the offenses with which the defendant had been charged. Given the fact that the challenged evidence was deemed admissible in the direct appeal, we find that appellate counsel was not incompetent for failing to raise an alternative theory to challenge the admissibility of the same evidence.

¶ 28 The defendant next maintains that it was incompetent for appellate counsel not to raise in the direct appeal the failure of trial counsel to request a curative jury instruction regarding evidence of uncharged criminal conduct. When evidence is admitted showing that the defendant has been involved in an offense other than those charged in the indictment or complaint, an instruction should be given to the jury stating that the evidence is being admitted for a limited purpose, and it is for the jury to determine whether the defendant was involved in that offense and, if so, what weight should be given to that evidence as it relates to the limited purpose. IPI Criminal, No. 3.14 (4th ed. 2000); see *People v. Harris*, 288 Ill. App. 3d 597, 605 (1997).

¶ 29 Here, we find no error in the failure of trial counsel to seek a limiting instruction under IPI 3.14 as the instruction was not germane to the evidence presented. The evidence at issue, Perez's testimony regarding prior gang activity directed at the Nunez residence, did not purport to establish that the defendant had been involved in an offense other than those charged. It was admitted to explain merely that the Nunez residence was the scene of prior gang related activities, thus providing an explanation for why *anyone* would fire bomb the Nunez residence. As no attempt was made to establish that the defendant was involved in the prior activity, it was not necessary to give a limiting instruction to the jury.

¶ 30 The defendant argues, nonetheless, that IPI 3.14 must be given whenever evidence is presented that the defendant was a gang member. See *People v. Jackson*, 357 Ill. App. 3d 313, 321 (2005) (gang involvement is "conduct" within the meaning of the limiting instruction and should be given whenever facts are admitted to establish that defendant is a gang member). We disagree. As the court noted in *Jackson*, failure to give IPI 3.14 to the jury is generally harmless error, since "the only instructions necessary to ensure a fair trial include the elements of the crime charged, the presumption of innocence, and the question of burden of proof." *Jackson*, 357 Ill. App. 3d at 321 (citing *People v. Hooker*, 253 Ill. App. 3d 1075, 1085 (1993)). Given our finding that no limiting instruction was required, we find that appellate counsel was not incompetent for failing to raise the issue on direct appeal.

¶ 31 The defendant next maintains that appellate counsel was incompetent in failing to raise as an issue on direct appeal the trial counsel's failure to move to vacate the 30-year sentence imposed on the aggravated arson conviction. He maintains that where a defendant is convicted and sentenced on a charge of felony murder, he cannot also be convicted and sentenced on the

underlying predicate felony. *People v. Smith*, 183 Ill. 2d 425, 432 (1998). While that proposition of law is correct, it is also correct that no such limitation arises if the defendant is found guilty of intentional or knowing murder as well as an offense which was charged as the underlying predicate offense to a charge of felony murder. *People v. Smith*, 233 Ill. 2d 1, 18 (2009). Here, our review of the record reveals that the judgment of conviction was entered, and sentence was imposed on the knowing murder counts rather than the felony murder counts. Accordingly, since the defendant was convicted of knowing murder and aggravated arson as separate offenses and, since sentence was imposed on the knowing murder convictions and not the felony murder convictions, the defendant was properly sentenced to a consecutive 30-year sentence for aggravated arson. Given our finding that the defendant was properly sentenced on the aggravated arson conviction, we find that appellate counsel was not incompetent for failing to raise the issue on direct appeal.

¶ 32 The defendant lastly maintains that his appellate counsel was constitutionally deficient in failing to raise a claim on direct appeal that his trial counsel was incompetent for failing to request a *voir dire* examination of potential jurors to determine possible bias against gang members. Relying upon *People v. Strain*, 194 Ill. 2d 467 (2000), the defendant maintains that it is reversible error for the trial counsel to fail to inquire into possible gang related bias of potential jurors. However, the defendant reads *Strain* too expansively. While *Strain* held that it was error for the trial court to deny defense counsel's request to examine potential jurors as to gang bias (*Strain*, 194 Ill. 2d at 477), our courts have declined to extend *Strain* to require reversal where defense counsel does not pose questions to potential jurors regarding gang activity. *People v. Leason*, 352 Ill. App. 3d 450, 456 (2004) (decision not to pose gang bias questions during *voir*

dire is a matter of trial strategy); *People v. Benford*, 349 Ill. App. 3d 721, 733 (2004) (defense counsel may reasonably conclude, as a matter of trial strategy, that questioning prospective jurors about gang bias would unduly emphasize the gang issue and outweigh any potential prejudice that venire members may have). Where there was an arguable basis in the record for trial counsel not to question prospective jurors regarding possible gang bias, it cannot be error for appellate counsel to decide not to raise the issue on appeal. *Lostutter*, 227 Ill. App. 3d at 1054.

¶ 33 CONCLUSION

¶ 34 Because the defendant's post-conviction petition has failed to establish the gist of a constitutional deprivation, we hold that the trial court properly dismissed the defendant's post-conviction petition at the first stage. Thus, we affirm the judgment of the circuit court of Will County.

¶ 35 Affirmed.