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FIRST DIVISION
FILED: MAY 7, 2012

No. 1-10-2860

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. 08 CR 4659
)	
PAUL MANNING,)	Honorable
)	Colleen McSweeney-Moore,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Karnezis concurred in the judgment.

ORDER

Held: The defendant's conviction is affirmed, because the State presented sufficient evidence to prove attempt murder and aggravated kidnaping, and because the defendant could not establish that he received ineffective assistance of counsel.

¶1 The defendant, Paul Manning, appeals from his jury trial conviction and subsequent sentence for attempt first degree murder (720 ILCS 5/8-4 (West 2008); 720 ILCS 5/9-1 (West 2008)) and aggravated kidnaping predicated on his discharging a firearm during the course of a kidnaping (720 ILCS 5/10-2(a)(8) (West 2008)). On appeal, the defendant argues that (1) his attempt murder conviction should be reversed because the State failed to prove his intent to kill; (2) his aggravated kidnaping conviction should be reversed because the State failed to prove his intent to confine the

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victim secretly; (3) his aggravated kidnaping conviction should be reduced to kidnaping because he did not discharge a firearm during the kidnaping; and (4) his counsel was ineffective for failing to present a closing argument. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 2 The defendant was indicted for several crimes, including multiple counts of aggravated kidnaping. The aggravated kidnaping counts included charges based on his kidnaping his victim while armed with a firearm, as well as charges based on his personally discharging a firearm while kidnaping his victim. However, before the defendant's trial, the State entered a nolle prosequi on all of the aggravated kidnaping charges save for the charge predicated on his personally discharging a firearm during a kidnaping.

¶ 3 At trial, the victim, Sandra Weeks, testified that the defendant, who was a former boyfriend, called her several times on February 5, 2008. After finishing her work that day, she went shopping and then drove to her apartment complex. As she gathered her belongings, she saw the defendant knocking on her car window with a gun and asking to speak with her. Weeks declined and moved to the passenger side of her car, but the defendant ran to that side of the car and again knocked on the window with his gun. Weeks recalled that the passenger-side window broke while he knocked on it, and, as it shattered, she moved back to the driver's side of the car. Weeks testified that the defendant reacted by returning to the driver's-side window to knock with his gun. In the meantime, Weeks called 911 and tried to go back to the passenger's side. In a recording of Weeks's 911 call admitted into evidence, Weeks can be heard screaming hysterically.

¶ 4 Near the same time, Weeks heard "loud popping noises" and saw bullet holes appear in her windshield. Weeks then noticed feathers from her coat in the air, and she felt "burning" in her left arm and "some chest pain." At that point, Weeks testified, the defendant entered the car and seized and broke her phone. The defendant then "started up the car and drove off" with Weeks in the passenger side of the car. Weeks said that she began to feel short of breath, and she heard the defendant say "that he was trying to figure out what to do next." According to Weeks, she asked the defendant to drive her to the hospital, and he agreed on the condition that she would attribute her

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wounds to another shooter.

¶ 5 Weeks testified that she believed she lost consciousness before awaking to see that the car had been parked at the defendant's aunt's house. She saw the defendant leave the car with the gun in his hand, then return to the car five minutes later. At that point, Weeks said, the defendant drove her to the hospital. She estimated that the trip took approximately 25 to 30 minutes, even though a direct trip should have taken approximately 10 minutes. Once she was away from the defendant and receiving treatment, Weeks reported that the defendant had shot her. Weeks testified that she had been shot five times in total, and she identified bullet wounds in her left upper arm, two chest wounds from different bullets, a hip wound, and a wound on her right upper arm. She agreed on cross-examination that the defendant did not attempt to shoot at her when the two were together in the car.

¶ 6 One of Weeks's neighbors, Anthony Perry, testified that he heard noises in the parking lot on the night of the incident and, upon looking out his window, saw someone firing a gun at a car. Perry said that he heard seven or eight shots fired. As he saw the car drive away, Perry called 911.

¶ 7 Police witnesses testified that they recovered gunshot residue from the defendant's hands and found Weeks's clothes with bullet holes in the right arm, left arm, right chest, and middle chest. The State also presented testimony that police discovered two bullets inside Weeks's car and seven spent shell casings near the site of the shooting, including two inside the car. The parties stipulated that, if called to testify, a physician who treated Weeks would state that Weeks sustained gunshot wounds to her right arm, left arm, left anterior chest, and right chest.

¶ 8 After the State rested its case and the trial judge denied the defendant's motion for a directed finding, the defense rested without presenting evidence. The State presented closing argument, but defense counsel declined to do so.

¶ 9 During deliberations, the jury sent the court a note indicating that it had deadlocked on one count. The judge responded by asking the jury to continue deliberating. The jury later sent a second note declaring its deadlock and asking for a definition of the term "intent." The judge responded by

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providing a definition of intent. The jury later returned a verdict finding the defendant guilty of attempt first degree murder and of aggravated kidnaping. A third conviction, for aggravated battery with a firearm, was merged with the attempt murder conviction. On the attempt murder conviction, the judge sentenced the defendant to 30 years' imprisonment, plus 25 years for personally discharging a firearm during the offense. On the aggravated kidnaping charge, the judge sentenced the defendant to 30 years' imprisonment, plus 25 years for personally discharging a firearm. The judge ordered that the sentences run consecutively. In response to a motion to reconsider sentence, the judge vacated the 25-year add-on for aggravated kidnaping, because "the facts [were] clear that the defendant had already shot the victim prior to the commission of the aggravated kidnaping." The defendant now appeals.

¶ 10 The defendant's first argument on appeal is that the State failed to prove him guilty beyond a reasonable doubt of attempt first degree murder. The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304 (2004) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). However, it is not the role of the reviewing court to retry the defendant, and a conviction will not be set aside unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178 (2006). The determination of the weight to be given the witnesses' testimony, their credibility, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact. *Sutherland*, 223 Ill. 2d at 242. When a defendant challenges the sufficiency of the evidence, the appellate court must determine "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 crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see also *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E.2d 262 (2005).

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¶ 11 Citing to *People v. Smith*, 191 Ill. 2d 408, 411, 732 N.E.2d 513 (2000), the defendant argues that we should apply a de novo standard of review to his challenge to his attempt conviction. The defendant relies on the following quote from *Smith*: "Because the facts are not in dispute, defendant's guilt is a question of law, which we review de novo." *Smith*, 191 Ill. 2d at 411. The defendant's reliance on this quote is misplaced, for two reasons. First, unlike in *Smith*, the facts in this case are in dispute. The crux of the defendant's challenge to his attempt conviction is his dispute with the jury's finding that he possessed the intent required to support an attempt murder conviction. Second, the quoted passage from *Smith* came in the context of an argument regarding the interpretation of a criminal statute, not an evidentiary challenge. See *Smith*, 191 Ill. 2d at 412 (addressing a defendant's challenge to his conviction by interpreting the relevant statute); see also *People v. Anderson*, 364 Ill. App. 3d 528, 531-34, 848 N.E.2d 98 (2006) (concluding that *Smith* and other cases state that de novo review is appropriate in some criminal appeals, but questioning the approach). Accordingly, we reject the defendant's invitation to review his attempt murder conviction de novo, and we instead adhere to the above-stated standards.

¶ 12 "A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2008). As relevant here, a defendant commits the offense of first-degree murder where he "kills an individual without lawful justification" and, "in performing the acts which cause the death," "he either intends to kill or do great bodily harm to that individual *** or knows that such acts will cause death to that individual ***." 720 ILCS 5/9-1(a) (West 2008). In order to sustain a conviction for attempt first-degree murder, however, a defendant's intent to inflict great bodily harm is not sufficient; the State must show that the defendant acted with an intent to kill. *People v. Harris*, 72 Ill. 2d 16, 377 N.E.2d 28 (1978); *People v. Trinkle*, 68 Ill. 2d 198, 369 N.E.2d 888 (1977).

¶ 13 The defendant argues that the State failed to prove beyond a reasonable doubt that he intended to kill Weeks. As the defendant acknowledges in his brief, "[i]ntent is a state of mind and thus is usually difficult to establish by direct evidence." *People v. Parker*, 311 Ill. App. 3d 80, 89,

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724 N.E.2d 203 (1999). "Accordingly, specific intent to kill may be, and normally is, inferred from the surrounding circumstances, such as the character of the attack, the use of a deadly weapon, and the nature and extent of the victim's injuries." (Citations omitted.) Parker, 311 Ill. App. 3d at 89. The defendant asserts that application of these factors to his case belies the State's position that he acted with intent to kill. We disagree.

¶ 14 To assert that he lacked the intent to kill, the defendant observes that his shots into Weeks's car were non-fatal, and he also points out that, after he fired the shots, he took her to the hospital instead of killing her. These facts, however, do nothing to undercut the State's theory that the defendant possessed the intent to kill at the time he shot into the car. See *People v. Mitchell*, 105 Ill. 2d 1, 10, 473 N.E.2d 1270 (1984) ("abandonment of the intent to kill, once the elements of attempted murder are complete, is no defense to the crime"). Indeed, the defendant's actions hardly admit of anything other than an intent to kill. The defendant wielded a deadly weapon, fired it at close range to Weeks while she was trapped in her car, and hit her in upper chest. The fact that he later aided Weeks does not change the fact that, prior to doing so, he shot her in the chest, and the evidence that he did so is enough to allow a rational trier of fact to conclude beyond a reasonable doubt that he acted with the intent to kill.

¶ 15 In so holding, we are not swayed by the defendant's citation to our supreme court's decision in *People v. Mitchell*. In *Mitchell*, the defendant struck her infant child several times, often causing the child to fall. *Mitchell*, 105 Ill. 2d at 7-8. After laying down "for a period," however, the child began to play again, and, save for some bruising, the child appeared to be normal when the mother put her to bed that night. *Mitchell*, 105 Ill. 2d at 8. The defendant struck the child again the next morning, and, shortly afterwards, the child suffered a seizure and lost consciousness. *Mitchell*, 105 Ill. 2d at 8. The defendant attempted to help the child by placing a cool cloth on her, and, when that did not work, the defendant took her to the hospital. *Mitchell*, 105 Ill. 2d at 8. Additional evidence disclosed that the defendant held an animosity towards the child and that the defendant had purchased an insurance policy on her child's life. *Mitchell*, 105 Ill. 2d at 8. Based on this evidence,

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the supreme court upheld the appellate court's decision to overturn the defendant's conviction for attempt murder. *Mitchell*, 105 Ill. 2d at 9-10. The supreme court reasoned that the defendant forwent an opportunity to complete the murder and attempted to help the child after the beating. *Mitchell*, 105 Ill. 2d at 10.

¶ 16 The defendant is correct that here, as in *Mitchell*, he forwent an opportunity to complete a murder, and he took his victim to the hospital for treatment. However, the remaining circumstances surrounding the incident here are appreciably different from those in *Mitchell*. In *Mitchell*, the defendant administered her beatings either with her hand or with a belt, neither of which is a weapon as lethal as a gun. Further, in *Mitchell*, the victim appeared to have recovered from her injuries, and the defendant appeared to have believed that the victim recovered from her injuries. From these facts, it would have been reasonable for a fact finder to infer that the defendant, having seen her victim appear to recover from previous attacks, concluded that her attacks would be non-lethal. Here, unlike in *Mitchell*, the defendant began his attack by using a degree of force much more likely to cause death, and there is no evidence that he saw Weeks recover (and thus demonstrate the non-lethal nature of his attack) prior to attacking again. For these reasons, we distinguish *Mitchell*, and we reject the defendant's argument that the State failed to prove his intent to kill beyond a reasonable doubt.

¶ 17 The defendant's second argument on appeal is that his conviction for aggravated kidnaping should be reversed because the State failed to prove beyond a reasonable doubt that he acted with the intent to secretly confine his victim. In order to sustain a conviction for aggravated kidnaping, the State must prove both that the defendant committed a kidnaping and that an aggravating factor was present. See 720 ILCS 5/10-2(a) (West 2008). Kidnaping occurs when a person knowingly and "secretly confines another against [her] will." 720 ILCS 5/10-1(a)(1) (West 2008). As noted above, in resolving a challenge to the sufficiency of the evidence, a reviewing court must consider the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the elements of the crime to have been proven beyond a reasonable doubt.

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Jackson, 443 U.S. at 319; Collins, 214 Ill. 2d at 217.

¶ 18 In arguing that the State presented insufficient evidence of his intent to secretly confine Weeks, the defendant relies on the undisputed fact that he took her to the hospital after shooting her. Accordingly, the defendant argues, the evidence not only failed to show his intent to conceal, but in fact demonstrated his intent "that her existence be known to all." We agree with the defendant that, by the end of the encounter, he harbored no intent to conceal Weeks. Our problem with the defendant's argument is that it overlooks his actions and words prior to driving Weeks to the hospital. Weeks testified that, when the defendant first entered her automobile and began driving, he destroyed her phone and stated aloud that he was "trying to figure out what to do next." Thus, at the time he began driving the car that contained his incapacitated victim, the defendant had not formed an intent to take her to a hospital. In fact, the defendant had not decided what he was going to do with Weeks. Further, by breaking Weeks's phone and driving from the scene, the defendant took steps to sever her contact with the outside world. From this evidence, the jury could easily have inferred, at the least, that the defendant sought to confine Weeks secretly until he could determine his course of action. For that reason, we reject the defendant's argument that no rational trier of fact could have found beyond a reasonable doubt that he intended to secretly confine his victim.

¶ 19 The defendant's third argument on appeal is that his conviction for aggravated kidnaping must be reversed, or reduced, because there was no evidence that he discharged a weapon during the kidnaping. Although he was charged on several theories of aggravated kidnaping, the only charge that was presented to the jury required that the State prove that, during the kidnaping, he discharged a firearm that caused great bodily harm to his victim. See 720 ILCS 5/2-10(a)(8) (West 2008). According to the defendant, "Weeks, who provided the State's only evidence on this point, testified to the contrary—that once [the defendant] got into the car, and thus, commenced the alleged kidnaping, he did not discharge his firearm."

¶ 20 We reject the defendant's premise that the kidnaping began only once he got into Weeks's car. The facts adduced at trial demonstrated that the defendant was able to drive Weeks around because

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he incapacitated her, and he incapacitated her by shooting her at close range with his firearm. The defendant's firing his gun and causing Weeks' great bodily harm, then, was a crucial and inseparable part of the kidnaping.

¶ 21 The defendant's only response to this point is that the assertion that a shooting was part of the kidnaping transaction "runs afoul of one-act[,] one[-]crime principles." Aside from mentioning the one-act, one-crime rule, the defendant offers no argument on the point. In any event, we disagree with his position.

¶ 22 Our supreme court has explained the one-act, one-crime doctrine as follows:

"Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. 'Act,' when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." *People v. King*, 66 Ill.2d 551, 566, 363 N.E.2d 838 (1977); see also *People v. Artis*, 232 Ill. 2d 156, 161, 902 N.E.2d 677 (2009).

"Under *King*, a court first determines whether a defendant's conduct consisted of separate acts or a single physical act. Multiple convictions are improper if they are based on precisely the same physical act." *People v. Rodriguez*, 169 Ill. 2d 183, 186, 661 N.E.2d 305 (1996). "If the court determines that the defendant committed multiple acts, the court then goes on to determine whether any of the offenses are lesser included offenses." *Rodriguez*, 169 Ill. 2d at 186. If so, then, under *King*, multiple convictions are improper; if not, then multiple convictions may be entered." *Rodriguez*, 169 Ill. 2d at 186.

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¶ 23 We begin our one-act, one-crime analysis by determining whether the defendant's conduct consisted of separate acts or a single physical act. The definition of an "act" under the one-act, one-crime rule is "any overt or outward manifestation which will support a different offense." *King*, 66 Ill. 2d at 566. Under that standard, there were several physical acts involved in the defendant's encounter with Weeks. The defendant shot at Weeks seven times, and she sustained bullet wounds from at least four of those shots. Each of those shots constitutes a separate physical act for purposes of the one-act, one-crime rule. See *People v. Crespo*, 203 Ill. 2d 335, 342, 788 N.E.2d 1117 (2001) ("each of [the victim's] stab wounds could support a separate offense"); *People v. Dixon*, 91 Ill. 2d 346, 355-56, 438 N.E.2d 180 (1982) (holding that a defendant who repeatedly struck his victim with a club committed multiple acts).

¶ 24 Since the defendant committed multiple acts, our next step is to determine whether either attempt murder or aggravated kidnaping is a lesser included offense of the other. To determine if one offense is a lesser-included offense of another, we must apply the abstract elements approach. *People v. Span*, 2011 IL App (1st) 083037, ¶89 (citing *People v. Miller*, 238 Ill. 2d 161, 173-74, 938 N.E.2d 498 (2010)). Under the abstract elements approach, a court must compare the statutory elements of the charged offenses to determine whether all of the elements of one offense are included within the second offense and the first offense contains no element not included in the second offense. *Span*, 2011 IL App (1st) 083037, ¶89 (citing *Miller*, 238 Ill. 2d at 166). As charged here, attempt murder requires an act that is a substantial step towards murder undertaken with intent to kill, while aggravated kidnaping requires discharge of a firearm while knowingly and secretly confining the victim. Thus, aggravated kidnaping does not require intent to kill, and attempt murder does not require secret confinement, and neither is a lesser-included offense of the other. For these reasons, we reject the defendant's argument that one-act, one-crime principles preclude our considering his shooting Weeks as part of his aggravated kidnaping. See *People v. Walls*, 224 Ill. App. 3d 885, 898-99, 586 N.E.2d 792 (1992) (holding that convictions of aggravated criminal sexual assault based on stabbing and armed violence did not violate one-act, one-crime principles, because

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the complainant was stabbed twice). As a result, we reject his argument that his aggravated kidnaping conviction must be reversed or reduced due to lack of evidence that he discharged a firearm during the kidnaping.

¶ 25 The defendant's final argument on appeal is that his counsel was ineffective for failing to present a closing argument. Both the United States and Illinois constitutions guarantee a criminal defendant the right to effective assistance of counsel. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶89. Claims of ineffective assistance are analyzed under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). Under that test, a defendant alleging ineffective assistance of counsel will prevail only where he is able to show that (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Albanese*, 104 Ill.2d 504, 525, 473 N.E.2d 1246 (1984) (adopting *Strickland*, 466 U.S. 668). A defendant must establish both of these prongs to succeed on a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

¶ 26 We agree with the State that, even if we were to assume under the first prong that counsel provided deficient representation by failing to present a closing argument, the defendant has not demonstrated a reasonable probability under the second prong that the deficiency changed the result of his trial. As the State observes, and for the reasons explained above, the evidence of the defendant's guilt was overwhelming in this case. Weeks gave a detailed account of his actions, and that account was verified by independent witnesses and very definitive physical evidence. The facts as Weeks described them unquestionably demonstrated the defendant's acting with the intent to kill her, as well as his shooting her in the course of a kidnaping. Aside from his repetition of arguments we reject above regarding the evidence of the defendant's intent, the defendant points to no argument counsel could have made to the jury to overcome this strong evidence, and we see none ourselves. For that reason, we reject the defendant's argument that he received ineffective assistance of counsel.

¶ 27 In so doing, we distinguish *People v. Wilson*, 392 Ill. App. 3d 189, 911 N.E.2d 413 (2009),

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a decision upon which the defendant places heavy reliance. In *Wilson*, the defendant was convicted of two counts of murder and one count of aggravated battery with a firearm following a trial in which the primary issue was the identity of the men who shot the victims. *Wilson*, 392 Ill. App. 3d at 192-97. One witness who identified the defendant as a shooter had, in prior testimony and interviews, identified only two other men or had said only that he saw three men with guns. *Wilson*, 392 Ill. App. 3d at 193. Another witness testified that he did not see the defendant in the building of the shooting but did see him afterwards (*Wilson*, 392 Ill. App. 3d at 193), and other witnesses cast doubt on whether the defendant was one of the shooters or was carrying a gun (see *Wilson*, 392 Ill. App. 3d at 194-95). There was also no physical evidence tying the defendant to the crimes. In light of these facts, this court held that defense counsel's failure to present any closing argument amounted to ineffective assistance. We emphasized that counsel had forgone an "opportunity *** to impress upon the jury the inconsistencies in the State's witnesses' identification testimony *** as well as the lack of physical evidence connecting the defendant to the offenses in this case." *Wilson*, 392 Ill. App. 3d at 200. We further noted that counsel could have emphasized that a gun found in the defendant's apartment was not connected to the crime at issue. *Wilson*, 392 Ill. App. 3d at 200. In short, we explained, "[t]he defendant's conviction *** came down to whether the jury believed the identification testimony of the State's eyewitnesses" (*Wilson*, 392 Ill. App. 3d at 201), and counsel gave up his best opportunity to challenge that evidence.

¶ 28 We have a much different situation in this case. Here, there were no significant inconsistencies in the State's case. Further, for the reasons stated above, the evidence against the defendant was overwhelming. Unlike in *Wilson*, the jury's decision here did not "come down to whether the jury believed" different aspects of confusing or inconsistent evidence. In short, to the extent counsel was deficient here for failing to present closing argument, the prejudice it caused the defendant cannot be fairly compared to the prejudice caused the defendant in *Wilson*. We therefore distinguish *Wilson* and adhere to our holding that the defendant has failed to demonstrate the prejudice required to succeed on his claim of ineffective assistance of counsel.

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¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 30 Affirmed.