

NOTICE
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2012 IL App (4th) 100119-U

Filed 3/21/12

NO. 4-10-0119

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Adams County |
| DAVID R. BENTZ, |) | No. 08CF585 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | William O. Mays, |
| |) | Judge Presiding. |

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Turner and Justice Cook concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in finding defendant initiated further discussion with detectives and, later, knowingly and intelligently waived his right to counsel and his right to remain silent.

Defense counsel was not ineffective for failing to invoke marital privilege when defendant's wife testified one week before defendant set fire to their apartment he told her he would destroy everything she owned if she left him.

¶ 2 Defendant appeals from his conviction for three counts of first-degree felony murder and two counts of aggravated arson. Prior to his jury trial, he filed a motion to suppress his confession to the police on the ground it was obtained in violation of his right to counsel. The motion was denied. Defendant appeals the denial of his motion, contending the police resumed talking to him after he requested assistance of counsel, he did not reinitiate contact with the police and he was not re-admonished of his rights to counsel and to remain silent.

¶ 3 During the trial, defendant's wife testified she and defendant argued a week before he set fire to their apartment and he warned her she "would have nothing left" because he "would destroy everything" she had. Defendant appeals, contending his counsel was ineffective for failure to invoke the marital privilege during his wife's testimony and his failure to raise the issue in post-trial motions.

¶ 4 We find neither of defendant's arguments to be persuasive and affirm his convictions.

¶ 5 I. BACKGROUND

¶ 6 On October 27, 2008, defendant, David Bentz, was charged with three counts of first-degree felony murder (720 ILCS 5/9-1(a)(3)(West 2008)) and two counts of aggravated arson (720 ILCS 5/20-1.1 (West 2008)) after a fire was set in defendant's apartment on October 25, 2008, and three tenants of the apartment building died in the fire. On March 6, 2009, defendant filed a motion to suppress his confession to police on the ground it was obtained in violation of his right to counsel. On April 22, 2009, a hearing was held on the motion. The following facts were elicited at that hearing.

¶ 7 At about 6 p.m. on Saturday, October 25, 2008, Quincy police detectives Gabriel Vanderbol and Anjanette Stovall went to the residence of Teresa Lamberson to question defendant, the "prime suspect" in an "incendiary" fire originating in defendant's second floor apartment at about 3 a.m. that same day. The fire claimed the lives of three third-floor residents and injured a Quincy firefighter. Defendant had been staying with Lamberson since the afternoon of Thursday, October 23, 2008, after he was served with an order of protection requiring him to stay away from his wife, Heather Cole-Bentz, and her daughter and to vacate

their apartment. The detectives advised defendant they wanted to question him about a fire in his apartment earlier that day. He stated he did not know anything about a fire but voluntarily accompanied them to the Quincy police department. En route to the department, the detectives told defendant he was not under arrest.

¶ 8 At the police department, defendant was interviewed for 5 hours and 17 minutes, after being advised of and waiving his *Miranda* rights at 6:26 p.m. The interviews with defendant were both videotaped and orally taped. The police department made transcripts of the interviews and both the transcripts as well as the original recordings were placed into evidence by the State at the suppression hearing. Live testimony by Detective Vanderbol was also presented.

¶ 9 Defendant told Vanderbol he and Heather had moved most of their belongings from apartment no. 2 to the adjacent apartment no. 3 the preceding weekend. He denied he had been inside the apartment since he was served with the order of protection on October 23. Defendant claimed he locked the apartment door with his key when he vacated the premises pursuant to the court order. He had the key with him during the interview. Heather misplaced her key somewhere inside the apartment but the key was not labeled as belonging to the apartment.

¶ 10 Defendant initially said he last saw Heather on Monday, October 20, 2008, when she left the apartment and moved into her mother's house. He later admitted he saw her at the college she attended on October 22, 2008, the day before he was served with the restraining order. Heather gave him a ride back to the apartment and she told defendant she was going to file for divorce on Friday, October 24, 2008. Defendant "got mad and busted out" the passenger-

side window of her vehicle by hitting it several times with the palm of his hand. He admitted he and Heather had been fighting for several months and he was charged with an offense for throwing a soda can through the window of the residence of one of Heather's friends when she would not let him in to talk to Heather. He stated he was "bummed" by Heather's decision to file for divorce.

¶ 11 Vanderbol did not initially inform defendant of the fatalities and the injuries to the firefighter. He told defendant there was "some fire damage" to his apartment and asked defendant of his whereabouts on October 24 and 25. Defendant told Vanderbol he borrowed money from his friend Chris Pendergist and about 8:30 p.m. on October 24 walked from Lamberson's house to a bar where he drank six to ten beers. He returned to Lamberson's house to get some pool cues about 9:30 p.m. and returned to the bar. He stayed at the bar until around closing and "got pretty drunk." He walked back to Lamberson's and called Pendergist several times from her telephone. Defendant stated he then walked to Pendergist's house where they partied with a couple of girls whose names he did not know. He remained at Pendergist's house during the day on October 25 and returned to Lamberson's about an hour before the police arrived.

¶ 12 Vanderbol told defendant he knew defendant was the only one with a key to the apartment, there was no sign of forced entry and the fire was set. He asked defendant to tell him what happened. Defendant replied he locked the apartment door when he left on Thursday, October 23, when he "left with the sheriff's department" but violated the order of protection by returning to the apartment between 8 and 9 p.m. that night to retrieve his computers, a cordless phone, and a nice leather coat. When he left he did not lock the door as his hands were full. He

took the computers to Pendergist's house. Defendant stated he did not know anything about the fire or how it started because he had not been there since Thursday night.

¶ 13 Vanderbol told defendant he was going to interview Pendergist to confirm defendant's story. Defendant asked if he was a suspect and Vanderbol stated he was. He told defendant he knew he had been at the apartment on Saturday October 25 because there was no forced entry and he was the only one with a key. Defendant initially said Pendergist was with him when he went to the apartment on Thursday night and witnessed he did not lock the apartment door. He said Pendergist drove him to the apartment but did not go inside with him. Defendant stated he told Pendergist he did not lock the door because his hands were full.

¶ 14 Vanderbol asked defendant if he told Heather he was "going to destroy everything" in the apartment so she would have "nothing" and defendant stated he simply told her he "would empty out the apartment tonight, there won't be anything in it." Defendant said he smoked but he was "pretty sure" he was not smoking when he was in the apartment. He said he rolled his own cigarettes and would not have had time to do so while he was collecting his electronic equipment. Defendant stated he did not see any of the other residents of the building when he was there on Thursday night. He denied returning to the apartment on Saturday.

¶ 15 Approximately one and a half hours after the interview commenced, Vanderbol accompanied defendant outside so he could smoke a cigarette. Defendant also got a drink of water and used the rest room. Vanderbol told defendant he would not be talking to him if he did not have a reason for doing so.

¶ 16 Defendant then asked Vanderbol whether he needed to talk to a lawyer. Vanderbol asked defendant if he was saying he would not talk anymore without a lawyer.

Defendant stated Vanderbol was trying to put him somewhere he wasn't. Vanderbol then asked defendant again if he was saying he didn't want to talk anymore without a lawyer. Defendant stated he was no longer comfortable talking to Vanderbol. Vanderbol told him he was trying to reach Pendergist to confirm defendant's story. Vanderbol asked defendant if he wanted to talk to him without an attorney or if he wanted to wait until after Vanderbol talked to Pendergist.

Defendant asked how he would go about getting an attorney. Vanderbol replied he needed to know if defendant wanted to talk without an attorney. Defendant replied he did not feel comfortable doing so. Vanderbol told defendant to have a seat but Vanderbol was done talking to him and he could not answer any questions for defendant. Vanderbol stated he did not want to talk without an attorney, that was the whole point of reading him his rights and he couldn't talk to defendant or answer any questions if he did not want to talk without an attorney present.

Vanderbol told defendant he could not leave and left the interview room. Vanderbol considered defendant to be in custody at that point.

¶ 17 Despite the fact the audio and video taping of defendant continued, no police officers were monitoring defendant while he was alone in the interview room. Defendant shouted he wanted something to eat and Stovall opened the door and asked what he wanted to eat. Defendant responded and then asked Stovall if he was being booked on violating the restraining order. Stovall said Pendergist was being interviewed and got defendant some water and snacks while he waited for his food order. When she returned about 20 minutes later with his food order, defendant asked her how long he was going to have to sit there and whether he would be booked for the restraining order. Stovall said she did not know and would find out.

¶ 18 After Stovall left the interview room, defendant is heard on the tape saying he

wanted use the bathroom or smoke. He knocked on the door and stated "I'm not the only one with keys. The guy that used to live there's got keys. Landlord's got keys." Officer Gibson answered defendant's knocks and when defendant asked if he could use the bathroom, stated he would let the detectives know. Gibson did not hear defendant's statement regarding other people possessing keys.

¶ 19 Stovall entered the interview room again and asked defendant if he was done with his food so she could clear it away. Defendant replied "I'm not the only one with keys." Stovall replied "Huh?" and defendant stated "[T]he guy that used to live there's got keys too." Stovall told defendant to sit down and left the room.

¶ 20 Vanderbol returned to the interview room and defendant told him he wanted a smoke. Vanderbol escorted defendant outside again to smoke. He did not speak to defendant in any way concerning the case while outside with defendant. When they returned to the interview room, Vanderbol told defendant he needed to be "crystal clear" if he wanted to talk without an attorney. Defendant stated he did not know because he felt Vanderbol was trying to place him somewhere he wasn't. Vanderbol told him he could not help with defendant's answer but he needed an answer. Defendant replied he was "willing to talk I guess." Vanderbol stated "Alright, you understand that obviously your rights I read to you are still, still good? You know that all the rights I read to you . . ." Defendant replied "Yeah . . .the attorney and . . ."

¶ 21 Vanderbol told defendant three people died in the fire and accused defendant of not being "completely truthful" with him because Pendergast had told him of an excited voice message he received from defendant about 3 a.m. on October 25. Defendant then stated he did not "do it on purpose" and asked who died in the fire. Vanderbol replied three people living on

the third floor died and defendant stated "I'm so screwed."

¶ 22 Defendant then admitted he had returned to the apartment in the early morning hours of October 25, he "was in kind of a rush," was "drunk" and "might have" had a cigarette he put down on one of the couches while unplugging his computer equipment. He stated he actually got his CDs on Thursday night and retrieved his computer on Saturday. He placed a circle on a diagram of the apartment and stated he saw the fire "going up the side of the couch." Defendant denied intending to start the fire and did not know what to do because he was not supposed to be there and he had nothing with which to extinguish the fire. He did not have a telephone to call the fire department.

¶ 23 Defendant said he left the apartment without warning any of the other tenants because he "was in a rush to get out of there" and "knew they'd get someone there to get it out." The fire wasn't that big when he left and he did not think it would spread quickly. Defendant stated he "didn't bother calling" the fire department when he arrived at Lamberson's house because he had heard sirens while he was walking to her residence. He then called Pendergist repeatedly and left a message "it was an emergency." He "hightailed it" over to Pendergist's house when Pendergist did not return his phone calls. Defendant told Pendergist he "caught the apartment on fire" but "didn't tell him it was an accident."

¶ 24 On May 5, 2009, the trial court entered a written order denying defendant's motion to suppress, finding defendant was advised of his *Miranda* rights initially in a proper manner and defendant waived them. Later, defendant "somewhat" invoked his right to counsel although it was not completely unequivocal. Questioning ceased as Detective Vanderbol went to interview another witness. When Detective Stovall came to clean up after defendant was given food, he

spontaneously said to her "the guy that used to live there's got keys too." Vanderbol took defendant to smoke a cigarette and when they returned asked if defendant wanted to talk without an attorney. Defendant stated he was willing to talk. Vanderbol reminded defendant of the rights he had already been told about and told him they still applied. The court found defendant was advised of his rights and exercised them; questioning rightfully ended and did not begin again until defendant reinitiated the questioning with his spontaneous statements; and, after being readmonished of his rights, indicated his desire to resume the interview.

¶ 25 At defendant's jury trial, witnesses testified they recalled seeing defendant and his wife, Heather, outside their apartment only a few days before the fire looking "angry" and "upset" and defendant pulled the spark plugs and distributor wires from inside Heather's vehicle. Arson investigators testified the fire was probably caused by human involvement, either purposeful or accidentally.

¶ 26 Heather testified both she and the landlord had keys to the apartment on the day of the fire but hers were in the apartment. She stated her marriage to defendant was "rocky" from the start. On September 11, 2008, she left to stay with friends. Defendant showed up at that residence and, when told he could not enter, threw a soda can through the front window. Heather also testified on October 22, 2008, she and defendant argued and defendant pulled the spark plugs out of her car but he replaced them so she could go to class. Defendant waited in her car until she was done with class. Heather drove defendant home and they argued again. Defendant eventually got out of the car and punched the passenger side window, causing it to shatter. Heather got an order of protection the next day, requiring defendant to leave their apartment.

¶ 27 Heather learned of the fire from detectives on October 25, 2008. She had not been

at the apartment since October 21, 2008. About seven months before the fire, defendant told her he had once burned down a building because he was upset. She did not know if the statement was true. The weekend prior to the fire, defendant told her if she ever left him, she would have nothing left and he would destroy everything.

¶ 28 Theresa Lamberson testified defendant was her son's friend. On October 23, 2008, she told him he could stay with her when he was served with the restraining order. That evening, defendant told her he was going to Chris Pendergist's house and then to his apartment to get a computer. When he returned, he told Lamberson he took the computer to a friend's house. On October 24, 2008, she accompanied defendant to a storage shed where she saw items including some belonging to Heather. That evening defendant told her he was going to a bar. He later returned to get pool cues and left again.

¶ 29 Lamberson woke up between 3:20 and 3:30 a.m. when defendant came into the house. She went back to sleep and was awakened by the telephone ringing and the caller asked for defendant but she could not find him. She could hear someone knocking on the caller's door. Lamberson looked at her caller ID and saw the number belonged to Pendergist and defendant had previously called that number. The next morning, Lamberson saw items on a chair that were not there the night before including CDs, defendant's coat and the restraining order.

¶ 30 Witnesses who saw defendant at the bar on the night of October 24, 2008, stated he was not drunk although he had 10 or 11 beers and was "feeling good."

¶ 31 Detective Stovall testified she responded to the fire scene around 4 a.m. with Detective Vanderbol. She learned of the order of protection against defendant. She spoke with Heather and learned defendant was staying with Lamberson. When Lamberson told them about

the telephone calls the previous night, Stovall obtained a search warrant for Lamberson's phone and confirmed three calls were made from her line to Pendergist between 3:20 and 3:23 a.m. followed by one from Pendergist at 3:44 a.m.

¶ 32 Pendergist testified he was a friend of defendant but had not seen him for two years prior to October 23, 2008. He went with defendant that night to defendant's apartment to get a bed out of a truck and computers out of the apartment. Defendant asked Pendergist not to tell anyone he was at the apartment in violation of the restraining order. They took the computers to Pendergist's house.

¶ 33 On the evening of October 24, 2008, Pendergist went to a party and came home about 1 a.m. and fell asleep. Defendant called and left a voice mail asking Pendergist to call him back right away because there was an emergency. When Pendergist called, defendant rang his doorbell. Defendant was very drunk, hugged Pendergist, told him he was the only person he could trust and stated he might have "f---d up." Defendant told Pendergist he had been at a bar and went to his apartment because he forgot some computer disks. While at the apartment, he sat on a couch and lit the other couch on fire with a cigarette lighter. He wasn't sure if the couch would burn due to its fabric so he watched it. Defendant stated he wanted to destroy the couch because it was new. He thought his wife was being hateful to him, so he wanted to destroy all of her possessions.

¶ 34 The next morning, Pendergist drove by defendant's apartment building, took pictures and showed them to defendant. Defendant acted like he did not care and went back to sleep. Pendergist learned that night at the police station people died in the fire. He lied to the police because defendant was his friend and he did not want him to go to jail.

¶ 35 On November 18, 2008, Pendergist wrote a letter to Detective Stovall stating what really happened. Pendergist had pending criminal charges and could have received up to 60 years in prison if convicted. He entered into a plea agreement whereby he would be sentenced to a maximum of eight years in exchange for his truthful testimony against defendant.

¶ 36 Detective Vanderbol testified during his police interview, defendant gave five different versions as to when he was last at his apartment and what he knew about the fire. In his last explanation, defendant admitted there was fire on the side of a couch and marked its location on a layout of the apartment consistent with the arson investigator's findings. Defendant left the apartment as quickly as he could after he noticed the fire without notifying anyone. He knew other people lived in the building. He went to Lamberson's house without calling the fire department because he heard sirens and stated the department was already responding to the fire. Defendant later went to Pendergist's house and told him he "caught the apartment on fire" and "didn't tell him it was an accident."

¶ 37 Craig Banks testified he lived in defendant's apartment building, noticed smoke coming under his bedroom door between 2:30 a.m. and 3:00 a.m. on October 25, 2008, and left the building immediately.

¶ 38 Chandra Rideout testified she lived across the street from defendant's apartment building and saw a glow from the fire between 2:25 and 2:40 a.m. After the fire department arrived, she saw four men exit the first floor door and jump into a grey or grey-blue Marquis and speed off towards downtown Quincy. Each of the men wore a ball cap, hoodie and jacket, and carried a small gym bag. She did not see defendant.

¶ 39 Doug Brissey testified he also lived across the street from defendant's apartment

building at the time of the fire. He called 9-1-1 about 3:15 a.m. after hearing breaking glass and seeing the second floor on fire. He saw a very tall man with black soot all over his face who walked down the street by himself.

¶ 40 Defendant's full police interview was played for the jury. Detective Stovall testified in rebuttal that Banks told her he noticed the smoke around 3:00 a.m. She also testified there was no access to the second and third floors of the apartment building from the first floor.

¶ 41 On October 2, 2009, defendant was convicted of all offenses charged. On December 3, 2009, defendant's post-trial motions for judgment notwithstanding the verdict or, alternatively, motion for a new trial were denied and defendant was sentenced to natural life imprisonment. On January 13, 2010, defendant's motion to reduce sentence was denied. This appeal followed.

¶ 42 **II. ANALYSIS**

¶ 43 **A. Reinitiation of Police Interview and Waiver of *Miranda* Rights**

¶ 44 An individual subject to custodial interrogation must be informed of his fifth-amendment rights prior to any questioning. These rights include the right to consult with an attorney and, if he cannot afford an attorney, the right to have one appointed for him. *People v. Outlaw*, 388 Ill. App. 3d 1072, 1079, 904 N.E.2d 1208, 1216 (2009) . These are part of a suspect's *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436, 471-73, 86 S. Ct. 1602, 1626-27 (1966). When an accused invokes his right to have counsel present during custodial interrogation, he may not be further questioned without the presence of counsel unless he himself initiates further communication with the police. *People v. Woolley*, 178 Ill. 2d 175, 197, 687 N.E.2d 979, 990 (1997). Defendant argues the trial court erred in denying his motion to suppress his confession because

the police resumed talking to him after he requested assistance of an attorney. Defendant contends he did not reinitiate contact with the police nor was he re-admonished of his rights.

¶ 45 A waiver of *Miranda* rights is valid where (1) the decision to relinquish the rights was voluntary and (2) it was made with a full awareness of the nature of the rights abandoned and the consequences of their abandonment. *People v. Crotty*, 394 Ill. App. 3d 651, 662, 914 N.E.2d 1269, 1279 (2009). The validity of the waiver is a question of fact, determined by the totality of the circumstances. *Crotty*, 394 Ill. App. 3d at 662, 914 N.E.2d at 1279. The State has the burden of proving the validity of the waiver by a preponderance of the evidence, and once the State makes a *prima facie* case, the burden shifts to the defendant to show his waiver was not knowing and intelligent. *Crotty*, 394 Ill. App. 3d at 662, 914 N.E.2d at 1279.

¶ 46 Review of a trial court's ruling on a motion to suppress involves mixed questions of fact and law. *Outlaw*, 388 Ill. App. 3d at 1080, 904 N.E.2d at 1216. Great deference is given to the trial court's factual findings and those findings will only be reversed if they are against the manifest weight of the evidence. *Outlaw*, 388 Ill. App. 3d at 1080, 904 N.E.2d at 1216-17. However, the legal determination of whether suppression is warranted under those facts is reviewed *de novo*. *Outlaw*, 388 Ill. App. 3d at 1080, 904 N.E.2d at 1217.

¶ 47 In this case, the evidence is clear defendant was advised of his *Miranda* rights, waived his rights and talked to the police. When defendant initially arrived in the interview room, Vanderbol asked him if he was familiar with his *Miranda* rights and defendant replied those rights were read to him "[e]very time [he] got arrested." Defendant had lengthy experience with the criminal justice system including convictions in four states. Defendant stated he could

read and had graduated high school. Vanderbol read each of the *Miranda* rights aloud to defendant and asked whether defendant understood them after each one was read. Defendant stated he did and signed a waiver of rights at 6:26 p.m. He admitted violating the order of protection and stated he had the only key to the apartment. After Detective Vanderbol told him the fire "was set," and there was no forced entry into the apartment, defendant initially first stated he did not lock the door behind him when he violated the order of protection on October 23. Around 7:50 p.m., defendant was allowed to smoke a cigarette, get a drink of water and use the washroom. Upon returning to the interview room, Vanderbol stated to him he had "reason" to be talking to him and defendant replied he was not "comfortable" talking without an attorney. At the same time, defendant stated "I went and got the computer last night" (the night of the fire) and asked Vanderbol when the fire started. Vanderbol refused to answer given defendant's statement he did not want to talk without an attorney and explained that was "the whole point" of reading him the *Miranda* rights. Vanderbol then left the interview room.

¶ 48 No other questions were asked of defendant concerning the fire investigation and nothing was spoken about it. Defendant asked for, and was provided with food and drink. At approximately 10 p.m., defendant stated to Detective Stovall, when she came to clear away his discarded food containers, he was "not the only one with keys" because the former tenant had them as well as the landlord. This remark was made spontaneously by defendant. Defendant's remark was directly related to his earlier discussion with Detective Vanderbol about whether his apartment was locked when the fire started.

¶ 49 Vanderbol did not immediately begin questioning defendant again when he returned to the interview room. At defendant's request, he took defendant outside to smoke

another cigarette. When they returned to the interview room, Vanderbol told defendant he had to make "crystal clear" whether he wanted to talk without an attorney. Vanderbol demanded a yes or no response. Defendant first stated he was unsure. Vanderbol told him he could not discuss the case with him and, in response to defendant's queries on whether he should get an attorney, Vanderbol told him he could not make that decision for him. Defendant then stated he was "willing to talk I guess" because he hadn't done anything. Vanderbol asked defendant if he understood the rights previously read to him were "still good," and defendant replied "yeah."

¶ 50 The fact Vanderbol did not reread defendant's *Miranda* rights to him has little impact on the validity of defendant's waiver. The rights were read to him less than four hours earlier and defendant stated he was familiar with them due to prior encounters with police interrogations. He invoked his right to counsel two hours prior, showing he was aware of his rights. He reconsidered by reinitiating conversation about the offense at issue by stating he was willing to talk to Vanderbol. The *Miranda* warnings were not so remote and stale defendant was not aware of the rights he was waiving. See *People v. Garcia*, 165 Ill. 2d 409, 425-26, 651 N.E.2d 100, 108 (1995). Defendant reinitiated discussion of facts or events relative to the interview concerning the charged offenses. This was in contrast to the fact, after invoking his *Miranda* rights, the only communication with the police involved food, cigarette, and bathroom breaks. The totality of the circumstances indicates a man who intelligently made the decision to speak again to detectives knowing he had the right to invoke his rights at any time. Defendant's incriminating statements made after that were voluntarily made after waiving his *Miranda* rights. The trial court's decision to deny defendant's motion to suppress was legally and factually correct.

¶ 51

B. Ineffectiveness of Counsel

¶ 52 Defendant argues his trial counsel was ineffective for failing to assert the marital privilege barring his wife Heather's testimony against him. The jury heard testimony from Heather that one week before the fire he told her she if she ever left him she would have nothing left and he would destroy everything. She also testified defendant had once told her he had set fire to a building because he was upset.

¶ 53 The marital privilege provides, in pertinent part, a husband and wife may testify for or against each other, but may not testify as to "any communication or admission made by either of them to the other or as to any conversation between them during marriage, except in cases in which either is charged with an offense against the person or property of the other * * *" 725 ILCS 5/115-16 (West 2008). Defendant contends defendant's charges of aggravated arson did not constitute any offenses against Heather personally or her property.

¶ 54 The aggravated arson charges against defendant stated he knowingly damaged the apartment building where he and Heather lived and (1) he reasonably should have known one or more persons were present therein; and (2) a fireman present at the scene acting in the line of duty was injured as a result of the fire. 720 ILCS 5/20-1.1(a)(1), (3) (West 2008). Defendant contends these charges do not involve Heather or her property. Testimony was presented at trial as to the ownership of the building and it was not Heather who owned the building. Nor was she the firefighter injured. Thus, her testimony should have been barred and defense counsel should have objected to the admission of it.

¶ 55 Defendant correctly asserts an attorney can be found to provide ineffective representation for failing to invoke the marital privilege because failure to do so results in waiver. See *People v. Hommerson*, 399 Ill. App. 3d 405, 412, 927 N.E.2d 101, 110 (2010).

Failure to raise the issue in post-trial motions (which defense counsel also failed to do) also results in forfeiture of the issue. *People v. Hall*, 194 Ill. 2d 305, 335, 743 N.E.2d 521, 539 (2000).

¶ 56 In this case, however, Pendergist testified defendant told him his motivation for starting the fire in his and Heather's apartment was to destroy all of Heather's property because of the order of protection she obtained against him. The crime was intended to be against Heather's property. Unfortunately for defendant and his victims, its consequences reached farther than that and he was charged with the offenses against the third parties. Heather's testimony would come in under the exception to the marital privilege for crimes against the spouse's property. Further, due to Pendergist's testimony as to Defendant's motive for the fire, there was no prejudice to defendant in admitting Heather's testimony. In the absence of error, defendant cannot establish the prejudice necessary for a showing of ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

¶ 57 III. CONCLUSION

¶ 58 For the foregoing reasons, the judgment against defendant is affirmed. As part of our judgment, we grant the State its statutory assessment of \$50 against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2010).

¶ 59 Affirmed.