SIXTH DIVISION
July 15, 2016

No. 1-15-0139

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. 12 CR 17496
	)	
MELVIN LABOY,	)	Honorable
	)	Sharon M. Sullivan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed defendant's conviction of attempted first-degree murder, finding the State proved him guilty beyond a reasonable doubt, the trial court did not err in denying his posttrial motion, and his trial counsel provided effective assistance.

¶ 2 The State charged defendant, Melvin Laboy, with six counts of attempted first degree murder, one count of aggravated battery, and four counts of aggravated unlawful use of a weapon in connection with the shooting of the victim, Angel Burgos. The trial court convicted defendant on all counts, merged them into one of the attempted murder counts, and sentenced him to 31 years in prison. Defendant appeals, contending: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred by denying his motion to reconsider or to grant a new trial; and (3) his trial counsel provided ineffective assistance. We affirm.

¶ 3 I. Trial Testimony

¶ 4 The victim testified at trial that he was 38 years old and had previously been convicted of possession of a stolen motor vehicle in 2005 and in 2008 and had used aliases in connection with his crimes. In 2010, the victim had a girlfriend, Magdalena Dehortas, and they were the parents of a son. The victim and Ms. Dehortas were friendly with defendant and his girlfriend, Michelle Fernandez, and they sometimes socialized together.

¶ 5 On March 30, 2012, the victim and Ms. Fernandez "got together," after which the victim and Ms. Dehortas broke up in May 2012. The victim and Ms. Fernandez then began "seeing each other more," even though Ms. Fernandez was living with defendant. In June 2012, Ms. Dehortas and her brother, along with the victim's daughter and step-sister, confronted Ms. Fernandez and "split" open her head. Later that month, the victim and Ms. Fernandez told defendant to move out of the house he shared with Ms. Fernandez; defendant complied. The victim then moved in with Ms. Fernandez in a house at 2155 North Latrobe Avenue in Chicago.

¶ 6 On September 6, 2012, the victim used crack cocaine and heroin and then slept the whole day on September 7, 2012. In the morning on September 8, 2012, the victim met with Ms. Dehortas and their son for about 15 minutes near a post office by Grand and Armitage. The victim walked home and saw Ms. Fernandez and her daughter in the backyard with defendant. Ms. Fernandez was telling defendant to leave.

¶ 7 The victim was angry defendant was there because there was "an order of protection on him." The victim walked toward defendant and asked him what he was doing. Defendant moved toward the front of the house and ran north on Latrobe Avenue, and then west on Palmer Street toward Hansen Park, out of the victim's sight. The victim walked back toward Ms. Fernandez and told her to call defendant so that they could all try to "stop this before it escalates

to something else." Ms. Fernandez called defendant and left a message on his answering machine.

¶ 8 The victim walked to the front of his house, looked left and right, but did not see defendant. The victim then walked to the corner of Latrobe Avenue and Palmer Street, where he saw defendant on Palmer Street walking towards the back of an alley bordering his house. Defendant was wearing a black backpack, a Pittsburgh Pirates shirt, shorts, and gym shoes.

¶ 9 The victim called to defendant and told him to come over so they could "speak as men." Defendant began walking toward the victim on the same sidewalk where the victim was standing. When defendant got within 10 to 15 feet of the victim, defendant crossed into the street, pulled a gun out of his waistband, and fired it in the victim's direction. The bullet hit the ground near the victim, and the victim then turned around, ran in a zigzag pattern, and went into a nearby gangway, where defendant continued to fire about seven shots at him. As the victim jumped a gate at the end of the gangway, defendant shot him in the stomach and he fell to the ground, bleeding.

¶ 10 The victim rolled over to his side, saw Ms. Fernandez in the back yard, and told her to call the police. Then he got up, walked to a nearby bush, and waited there. The police arrived and the victim identified defendant as the shooter. The victim was transported to the hospital, where police showed him a photo array and he identified a photograph of defendant.

¶ 11 Michelle Fernandez testified that on September 8, 2012, she was living with the victim and her daughter at 2155 North Latrobe Avenue. Ms. Fernandez had previously dated defendant from 2008 to 2012.

¶ 12 On September 8, 2012, defendant called Ms. Fernandez and she told him not to call her anymore. Later that day, Ms. Fernandez looked out her window and saw defendant in the back yard of her house. The victim was not home, as he had gone to visit with his son.

¶ 13 Ms. Fernandez went to the backyard to talk with defendant, and then the victim arrived, walked toward defendant, and asked him why he was at the house. Defendant did not respond, but instead ran away. The victim asked Ms. Fernandez to call defendant, and she left him a voice mail.

¶ 14 The victim left the back yard and walked to the front of the house. While still in the back yard, Ms. Fernandez looked toward Palmer Street, which was the street in front of her house, and she saw defendant standing there with a dark backpack. Ms. Fernandez walked to the front of the house and saw the victim running. Defendant was chasing behind him with a firearm in his hand and he was firing multiple shots at the victim.

¶ 15 Ms. Fernandez threw herself on the ground until she no longer heard any gunshots, then walked to the back yard to look for her daughter, who had been playing there. She found her daughter and took her inside the house, then went back outside and saw the victim in a neighbor's yard hiding behind some bushes. He was bleeding from the stomach. Ms. Fernandez called 911.

¶ 16 On cross examination, Ms. Fernandez stated that after the victim approached defendant in the back yard, defendant ran away. The victim went to the front of the house and Ms. Fernandez heard gunshots. She did not see who fired those first shots and did not actually see the victim get shot.

¶ 17 On redirect examination, Ms. Fernandez testified:

"Q. [Y]ou've testified on cross examination that you didn't see who fired those first shots, correct?

A. No.

Q. After you heard those first shots, did you see anyone firing a gun at [the victim]?

A. Yes, I saw [defendant] firing at [the victim]. And the bullet that finally hit him I did not see it because he was in the middle of two houses and I was on the other side."

¶ 18 Jayr Nunez testified that just after 12 p.m. on September 8, 2012, he was on the second floor of his house in the area of Latrobe Avenue and Palmer Street when he heard some people talking outside. Mr. Nunez looked out the window and saw two men arguing; he could not hear what they were saying to each other. They were about five feet from each other when one of the men, who was wearing a black book bag, showed a gun, aimed it at the other man, and fired at him. The person who was being shot at turned around and ran toward a gangway. The shooter ran after him and continued to shoot. Mr. Nunez heard about six shots.

¶ 19 Mr. Nunez momentarily lost sight of the two men, but then saw the shooter coming out of the gangway onto the corner of Latrobe Avenue and Palmer Street. The shooter ran west on Palmer Street. The shooter was facing away from Mr. Nunez the entire time, and so he did not see the shooter's face.

¶ 20 Detective Cheryl Bronkema testified she responded to the scene of the shooting at approximately 12:45 p.m. on September 8, 2012, and observed five shell casings and one fired bullet. Based on her observations of the shell casings and bullet, she opined that the shooter used a large caliber, semi-automatic weapon. Detective Bronkema also was given the name of the

shooter as well as a description of the clothes he was wearing, specifically, dark shorts and a black backpack.

¶ 21 Detective Bronkema went to the hospital, spoke with the victim at about 4:40 p.m., and showed him a photo array. He identified a photograph of defendant as the shooter.

¶ 22 Officer Joseph Lipa testified that at about 12:25 p.m. on September 8, 2012, he and his partner heard a flash message of a shooting at 2155 North Latrobe Avenue and received a physical description of the shooter as well as a description of the clothes (dark shirt and a backpack) he was wearing. About one minute later, they went to the area and saw defendant, who met the physical description of the shooter, in a nearby alley at 2208 North Lockwood Avenue about five houses away from the location of the shooting. The officers stopped and spoke with defendant, who gave them his name, but they let him go because his clothes (red shirt, no backpack) did not match the clothing description.

¶ 23 Later that afternoon, Office Lipa received information that the shooting was domestic-related and that the shooter was named Melvin Laboy. Realizing that they had earlier spoken defendant, whose name is Melvin Laboy, Officer Lipa went to the police station, retrieved a photograph of defendant, and determined that he was the person with whom the officers had spoken with in the alley immediately after the shooting. Defendant was subsequently arrested at 3:25 p.m. on September 8, 2012, in the 4000 block of West Diversey Parkway.

¶ 24 Officer Myron Seltzer, an evidence technician, testified he went to the police station at about 5:42 p.m. on September 8, 2012, and administered a gunshot residue (GSR) test to defendant. The test was sealed in a kit and sent to the Illinois State Police crime lab. Ellen Chapman, a forensic scientist with the Illinois State Police, testified that GSR is forcefully expelled from a firearm when it is discharged and that it lands on the firearm and on the person

who fired the weapon. A person who has shot a gun, and who has GSR on his hand, can inadvertently transfer the GSR particles to another person by touching him.

¶ 25 Ms. Chapman testified she analyzed defendant's GSR collection kit and found the GSR sample from the back of defendant's right hand had "a minimum of three tri-component GSR particles, and a number of consistent GSR particles." Ms. Chapman concluded from these findings that defendant had either fired a gun, been in contact with a GSR-related item, or was "in the environment" of a discharged weapon.

¶ 26 Dr. Richard Fantus testified he examined the victim in the hospital on September 8, 2012, and found two bullet holes, one over his clavicle on the right side and another near his bellybutton. Dr. Fantus determined that the bullet passed through his anterior chest wall and anterior abdominal wall; as it passed through the chest wall, the bullet was close enough to the ribs and muscles of the chest that the impact created a laceration and bruising to the underlying right lung. No bullet fragments remained inside the victim. The victim was released from the hospital after 24 hours; no surgery was required.

¶ 27 II. Photographic Evidence

¶ 28 The trial court admitted into evidence photographs of the crime scene. Defendant contends on appeal that one of the photographs (State's exhibit number 5) casts doubt on Ms. Fernandez's testimony regarding her witnessing of the shooting, as the photograph depicts a privacy fence connecting a house and garage on Palmer Street, which allegedly would have prevented Ms. Fernandez from seeing defendant standing on Palmer Street from her backyard, as she testified to at trial. State's exhibit number 5 is contained in the record on appeal. The privacy fence depicted therein is partially obscured by three cars parked in front of it, such that we cannot determine the condition of the fence and whether it would have prevented Ms.

Fernandez from being able to see defendant on Palmer Street from where she was in her backyard. There was no testimony that the privacy fence would have prevented Ms. Fernandez from seeing defendant on Palmer Street from her backyard. Further, the angle of the photograph (which views the privacy fence, not from Ms. Fernandez's point of view in her back yard, but from the corner of Palmer Street and Latrobe Avenue) also prevents us from determining whether she would have been unable to view defendant on Palmer Street from her position in her back yard.

¶ 29 III. Verdict, Sentencing, and Posttrial Motion

¶ 30 The trial court convicted defendant on all counts and merged all his convictions into count four, attempted first degree murder.

¶ 31 Defendant filed an amended motion for a new trial or, in the alternative, a motion to reconsider the guilty finding. In the motion, defendant asserted that the victim perjured himself when he testified at trial on June 11, 2014, that the last time he used cocaine, heroin, or other illegal drugs was on September 6, 2012, and that since then he had been "sober and set free from substance abuse." Defendant noted that two weeks after his trial testimony, the victim was arrested for a residential burglary that had occurred on September 13, 2013, and that the victim gave an oral statement to the police in that case in which he admitted that his "substance abuse was high" at the time of the residential burglary and he admitted to taking heroin. Defendant argued that the victim's admission to police that he was a substance abuser who took heroin in September 2013 shows that he perjured himself at trial, when he testified that he had not taken any illegal drugs from September 7, 2012, through June 11, 2014.

¶ 32 Defendant further argued in his motion that the arrest report in the residential burglary case indicated that the victim was a self-admitted member of the Maniac Latin Disciples, information defendant did not have at the time of trial.

¶ 33 The State responded that upon learning of the victim's arrest for residential burglary, it notified defendant immediately. The State argued that the trial court should deny defendant's posttrial motion because, even if the trial court were to discount the victim's testimony due to his alleged perjury regarding his drug use, the testimony from the other witnesses at trial was sufficient to convict defendant. The State also argued that the victim's gang membership was irrelevant. The trial court denied defendant's posttrial motion and sentenced him to 31 years' imprisonment.

¶ 34 IV. Defendant's Appeal

¶ 35 On appeal, defendant first contends the evidence presented at trial was insufficient to prove him guilty of attempted first degree murder beyond a reasonable doubt. Second, defendant argues that the evidence discovered subsequent to trial shows that the victim was a gang member and that he committed perjury regarding the extent of his drug use, and that this new evidence necessitated the granting of defendant's post-trial motion for reversal or a new trial. Finally, defendant contends his trial counsel provided ineffective assistance. We consider each argument in turn.

¶ 36 A. Whether the Evidence Presented at Trial Proved Defendant Guilty

¶ 37 When presented with a challenge to the sufficiency of the evidence, the relevant inquiry is whether, after viewing all the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). The reviewing court may not substitute its

judgment for the trier of fact. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 18. "The weight to be given the witnesses' testimony, the credibility of the witnesses, 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." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 38 To support a conviction for attempted first degree murder, the State must show that, while possessing the criminal intent to kill the victim, defendant performed an act constituting a substantial step toward the commission of murder. *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 39. Intent is a state of mind that can be established by proof of surrounding circumstances, including the character of the assault and the use of a deadly weapon. *Id*. Such intent may be inferred when defendant has voluntarily and willingly committed an act, the natural tendency of which is to destroy another person's life. *Id*.

¶ 39 Viewed in the light most favorable to the prosecution, the testimony of the State's witnesses was sufficient for any rational trier of fact to find that defendant intended to kill the victim for engaging in a sexual affair with defendant's girlfriend, Ms. Fernandez, and for later kicking defendant out of the home he shared with Ms. Fernandez and moving in with her. Defendant took the substantial step toward the commission of the murder by intentionally firing his weapon at the victim multiple times, even as he ran away, and striking him in the stomach. Accordingly, the State sufficiently proved defendant guilty of attempted first degree murder beyond a reasonable doubt.

¶ 40 Defendant cites the rare cases where reviewing courts reversed criminal convictions because the witness testimony was so completely lacking in credibility that it left a reasonable doubt of defendant's guilt, notwithstanding the deference normally accorded the trier of fact (see

People v. Schott, 145 Ill. 2d 188 (1991); *People v. Jakes*, 207 Ill. App. 3d 762 (1990); *People v. Herman*, 407 Ill. App. 3d 688 (2011); *People v. Gonzalez*, 2015 IL App (1st) 132452). This is not one of those cases. Accordingly, reversal is not warranted.

¶ 41 B. Whether the Newly Discovered Evidence Necessitated the Granting of the Posttrial Motion

¶ 42 Next, defendant contends the trial court erred by denying his posttrial motion to reconsider, or for a new trial, based on the newly discovered evidence that the victim allegedly had perjured himself at trial regarding the extent of his drug use, and that he was a member of a gang. Our standard of review is for an abuse of discretion. *People v. Arze*, 2016 IL App (1st) 131959, ¶ 86; *Compton v. Country Mutual Insurance Co*., 382 Ill. App. 3d 323, 330 (2008).

¶ 43 The newly discovered evidence of the victim's gang membership was irrelevant to the shooting and did not necessitate a reversal of defendant's conviction or a new trial, because the evidence indicated that the shooting was the result of a domestic dispute caused by the victim's dating and living with Ms. Fernandez, and was not related to any gang rivalries.

¶ 44 With respect to the newly discovered evidence that the victim allegedly had perjured himself at trial regarding the extent of his drug use, defendant argues that if the victim would lie about the extent of his drug use to make himself appear more credible, "there is every reason that he would also lie about other things, including who shot him."

¶ 45 In denying defendant's posttrial motion, the trial court stated that it had reviewed the trial transcript to ensure that the victim had not lied when identifying defendant as the shooter. The trial court noted: there were five casings and a bullet found at the crime scene, which was consistent with the testimony of the victim, Ms. Fernandez, and Mr. Nunez that multiple shots were fired; Mr. Nunez's testimony about seeing two men approaching each other, with one of them firing at the other and chasing him down a gangway was consistent with the victim's

testimony; Ms. Fernandez testified, consistently with the victim, that defendant fired his weapon at him multiple times, and she also testified consistently with the victim and Mr. Nunez that defendant was wearing a dark backpack at the time; Dr. Fantus testified to a bullet hole in the victim's stomach, consistent with his account of being shot there by defendant; and Ms. Chapman's testimony regarding the GSR found on defendant's hand was corroborative of the victim in that it showed defendant either discharged a weapon, contacted a GSR item, or was in the environment of the discharge.

¶ 46 The trial court found that the evidence as a whole supported its earlier finding that defendant was guilty of attempted murder, and it denied defendant's posttrial motion. The trial court committed no abuse of discretion in so ruling.

¶ 47 Defendant also argues on appeal for a new trial based on the State allegedly violating his right to due process by failing to exercise due diligence when it presented the victim's false testimony regarding the extent of his drug use. Defendant cites *People v. Cornille*, 95 Ill. 2d 497 (1983).

¶ 48 In *Cornille*, defendant was convicted of arson. *Id*. at 499. Nearly two years after defendant's trial, a newspaper reporter interviewed the State's expert witness, a consultant in fire investigations who had given crucial testimony for the State at trial. *Id*. at 500. The expert witness admitted in the interview that he had lied about his credentials as an arson-investigating expert when testifying at defendant's trial as well as at other arson trials. *Id*. Defendant subsequently filed a postconviction petition based on the witness's false testimony concerning his credentials as an expert witness. *Id*. Our supreme court held that under the 'unique' circumstances of the case (*id*. at 511), defendant was entitled to a new trial. *Id*. at 515.

¶ 49 In so holding, our supreme court noted that lower federal courts have almost uniformly held that "it is only the *knowing* use of false testimony by the prosecution or other agents of the State which violates due process." (Emphasis added.) *Id*. at 509. The court, however, also noted the appellate court decision in *People v. Shannon*, 28 Ill. App. 3d 873 (1975), which held:

" '[T]he use of the State's judicial process to enforce a right of the People, the violation of which is based upon the perjured testimony of a private individual, constitutes State action whether or not the State knew that the testimony was perjured. Known to the State or not, the use of its judicial process to convict and imprison on perjured testimony is a miscarriage of justice which is abhorrent to fundamental fairness and as such is intolerable.' " *Cornille*, 95 Ill. 2d at 510-11 (quoting *Shannon*, 28 Ill. App. 3d at 878).

¶ 50 Instead of applying either the "knowing use" standard or the *Shannon* standard, though, our supreme court applied a "due diligence" standard for determining whether a due process violation had occurred when the expert testified falsely at defendant's trial. *Id*. at 513. Specifically, our supreme court found that the State had shown a lack of due diligence by failing to verify the expert's qualifications before he testified at defendant's trial. *Id*. The court further found that the expert was "not merely an occurrence witness whose presence at the trial was determined by his relationship to the facts of the case." *Id*. Instead, the court held:

> "The State selected him to offer the jury his expert opinion on the causes of the fire and relied upon the credibility imparted by his expertise to win an otherwise closely balanced case. As the prosecution made the mistake of producing an expert witness who was an imposter, it is only fair to charge it with responsibility for the imposter's false testimony." *Id*.

¶ 51 Accordingly, our supreme court found "there was sufficient involvement by the State in the false testimony offered by [the expert] to satisfy the State-action requirement of the due process clauses of the State and Federal constitutions." *Id*. at 514.

¶ 52 More recently, our supreme court has held that, "[i]n the absence of an allegation of the knowing use of false testimony, or at least some lack of diligence on the part of the State, there has been no involvement by the State in the false testimony to establish a violation of due process." *People v. Brown*, 169 Ill. 2d 94, 106 (1995) (citing *Cornille*, 95 Ill. 2d at 513). Without such State involvement, "the action of a witness falsely testifying is an action of a private individual for which there is no remedy under the due process clause." *Id.*

¶ 53 In analyzing the "knowing use" and "due diligence" standards under the due process clause, the appellate court has held that "[a] careful analysis of the decision in *Cornille* would focus the application of the 'due diligence' standard in place of the 'knowing use' standard to situations where witnesses are deliberately selected by the State and where the State has latitude to procure the necessary testimony from sources of its own choosing. A typical situation would involve the testimony of an expert witness. There, the State may be charged with responsibility to do a sufficient background check so as to justify the [witness's] qualifications to testify in the area of his professional expertise. This requirement, however, is not readily transferable to occurrence witnesses, where you take the witness as you find him." *People v. Nowicki*, 385 Ill. App. 3d 53, 99 (2008).

¶ 54 In the present case, the victim was an occurrence witness, not an expert witness deliberately selected by the State, and, thus, we apply the "knowing use" standard rather than the "due diligence" standard in determining whether defendant was denied his right to due process by the victim's allegedly perjured testimony. There is no evidence anywhere in the record that

the State knew it was eliciting false testimony from the victim at trial. Accordingly, no due process violation occurred here.

¶ 55 Further, even if a due process violation occurred, the error was harmless given all the other evidence against defendant. *Id*. at 99 (harmless error analysis applies to allegations of improper use of perjured testimony).

¶ 56 Next, defendant contends he was denied his right to due process because the trial court misremembered the evidence when denying his posttrial motion. See *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75 ("the failure of the trial court to recall and consider evidence that is crucial to a criminal defendant's defense is a denial of the defendant's due process").

¶ 57 First, defendant contends the trial court misremembered the evidence when it found that Mr. Nunez's testimony was consistent with the victim's testimony. We find no error, as Mr. Nunez's testimony that the shooter was wearing a black bookbag and fired multiple shots at the other man as he fled down a gangway was consistent with the testimony of the victim.

¶ 58 Next, defendant contends the trial court misremembered the evidence when it found that Ms. Fernandez ran to the front of the house and saw defendant with a gun. Defendant focuses on Ms. Fernandez's testimony on cross-examination that she was in the backyard when the shooting began, and that she did not see the bullet actually strike the victim. We find no error. The trial court accurately recalled Ms. Fernandez's testimony on direct and re-direct examination that after hearing shots fired while standing in the back yard, she went to the front of the house and saw defendant chasing after the victim and firing his gun at him. No one, other than defendant, was shooting at the victim. Ms. Fernandez explained on re-direct examination she did not see the victim actually get hit because at that point he had run "in the middle of two houses" and her vision of him was momentarily obstructed.

¶ 59 Finally, defendant contends the trial court misremembered the testimony of Dr. Fantus, Detective Bronkema, and Ms. Chapman. The trial court accurately stated that Dr. Fantus testified to where the bullet holes were located and to the bullet's trajectory, and that Detective Bronkema testified to finding five shell casings and a fired bullet. The trial court also accurately stated that Ms. Chapman testified that the GSR on defendant's right hand indicated that he had fired a gun, been in contact with a GSR item, or was in the environment of a discharged weapon. We find no error.

¶ 60 The trial court did not misremember the evidence when denying defendant's posttrial motion, and accordingly no due process violation occurred.

¶ 61 C. Whether Defense Counsel Provided Ineffective Assistance

¶ 62 Next, defendant contends his trial counsel provided ineffective assistance by failing to argue during closing that: (1) Ms. Fernandez could not have witnessed the shooting, and (2) Mr. Nunez's and the victim's testimonies contradicted each other with respect to how the far apart the victim and defendant were from each other at the time of the shooting and whether they were verbally arguing.

¶ 63 A claim of ineffective assistance of counsel is judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lawton*, 212 Ill. 2d 285, 302 (2004). To obtain relief under *Strickland,* a defendant must prove defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance prejudiced defendant by creating a reasonable probability that, but for counsel's errors, the trial result would have been different. *People v. Wheeler,* 401 Ill. App. 3d 304, 313 (2010).

¶ 64 Defendant's claim of ineffective assistance fails for lack of prejudice. The trial court here heard all the testimony, including any inconsistencies and contradictions among the witnesses regarding the shooting, as well as the photographic evidence of the crime scene, and determined that the evidence at trial was sufficient to find defendant guilty of attempted first degree murder. After defendant filed his posttrial motion and pointed out the newly discovered evidence of the victim's gang membership and that he allegedly had perjured himself at trial regarding the extent of his drug use, the trial court reexamined all the evidence and found Ms. Fernandez, Mr. Nunez, Dr. Fantus, Detective Bronkema, and Ms. Chapman to be credible and corroborative of the victim's testimony identifying defendant as the shooter. The trial court determined that all the evidence was sufficient to support defendant's conviction, and it denied defendant's posttrial motion. We cannot say the result of the trial or of the posttrial motion would have been any different had defense counsel made the closing arguments questioning whether Ms. Fernandez could have witnessed the shooting and pointing out the alleged inconsistencies between the victim's and Mr. Nunez's testimonies. Accordingly, we find no ineffective assistance of counsel.

¶ 65 Defendant also argues his counsel provided ineffective assistance by failing to argue during closing that it was possible the GSR on defendant's hands was transferred to him by the arresting officers. Given all the evidence against defendant, we cannot say the result of the trial (or of the posttrial motion) would have been different had this argument been made; accordingly, we find no ineffective assistance of counsel.

¶ 66 Defendant also argues his counsel was ineffective by failing to argue, in his posttrial motion, that the State violated his right to due process. As discussed earlier in this order, there was no due process violation here, and accordingly defendant's ineffective assistance argument fails.

¶ 67 Finally, defendant argues his counsel was ineffective for failing to argue, in the posttrial motion, that the victim's late disclosure of his gang affiliation prevented defendant from investigating whether the victim's gang membership related to the shooting. Review of the record indicates that defendant raised the victim's gang membership in the posttrial motion, and that in response the State argued it was irrelevant. The court found no cause for a new trial where all the other evidence corroborated the victim's account of the shooting and denied the posttrial motion. Defendant's claim of ineffective assistance fails where the victim's gang membership was irrelevant because the shooting here was the result of a domestic dispute instead of a gang rivalry, and where the results of the trial and posttrial motion would have been the same even if the gang evidence had been admitted at trial.

¶ 68 For the foregoing reasons, we affirm the circuit court.

¶ 69 Affirmed.