2017 IL App (1st) 143544-U

FIFTH DIVISION
December 22, 2017

No. 1-14-3544

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11 CR 18468
	)	
MIGUEL HERNANDEZ,	)	
	)	Honorable
Defendant-Appellant.	)	Bridget Jane Hughes,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where: (1) defense counsel was properly disqualified; (2) no discovery violation occurred; (3) defendant was tried by a fair and impartial jury; and (4) defense counsel was not ineffective.

¶ 2 Following a jury trial, defendant Miguel Hernandez was found guilty of first degree murder and attempted first degree murder. The jury further found that defendant personally discharged a firearm that caused death and he was sentenced to 60 years' imprisonment in the

Illinois Department of Corrections for first degree murder to run consecutive with his sentence of 18 years' imprisonment for attempted murder. On appeal, defendant contends the trial court erred in granting the State's motion to disqualify defense counsel, thereby depriving him of his sixth amendment right to counsel of choice. Defendant further argues that the State violated the discovery rules by not disclosing a witness' identification of defendant as the shooter, the trial court failed to ensure he was tried by a fair and impartial jury, and defense counsel was ineffective for failing to elicit certain testimony. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On October 14, 2012, defendant was charged by indictment with the attempted murder of Eric Galarza Sr. (Galarza), first degree murder in the shooting death of five-year-old Eric Galarza Jr. (Eric Jr.), and aggravated discharge of a firearm. Defendant retained private counsel Liam Dixon (Dixon) to represent him.

¶ 5 Motion to Disqualify

¶ 6 Prior to arraignment, Dixon informed the State that he had previously represented Galarza ten years before.[1] Specifically, Dixon represented Galarza on three charges for aggravated discharge of a firearm where Galarza pled guilty and was sentenced to 9 years' imprisonment. The State then moved to disqualify Dixon arguing there was a *per se* conflict due to his prior representation of Galarza. At the hearing on the motion, the State argued that it would be prejudicial in that counsel would have obtained knowledge which would assist him in cross-examination and would know of Galarza's prior violent acts and gang membership, which are relevant issues in the case. Dixon represented that his client was waiving the *per se* conflict and desired to continue with Dixon's representation. Dixon further informed the court that he could not recall his representation of Galarza which occurred over ten years earlier. The State

[1] The record indicates that Dixon represented Galarza between 10 and 12 years prior.

agreed that a defendant can waive a *per se* conflict, but maintained that an actual conflict remained due to the presumption that Dixon obtained information about Galarza that was privileged and thus it would limit his ability to effectively cross-examine Galarza.

¶ 7 The trial court, despite the representation that defendant had waived the conflict, granted the motion finding there was a *per se* conflict of interest because Dixon had previously represented Galarza. The trial court specifically found that Dixon had received privileged information that would prevent him from conducting a vigorous cross-examination. It was only after ruling that the trial court inquired of defendant whether or not he would waive the conflict and admonished him of the consequences of doing so. Defendant expressly stated he understood, maintained his desire for Dixon to represent him, and waived the conflict. Despite defendant's waiver, the trial court stated that it needed to balance the interest in counsel of choice and prejudice to defendant in that the charge was first degree murder and counsel would have difficulty representing defendant fully and reaffirmed its decision to disqualify Dixon.

¶ 8 Thereafter, defendant brought a motion to reconsider. The trial court again entertained argument. Dixon maintained that there was no actual conflict with his representation of defendant. According to Dixon, he represented Galarza over 10 years ago, did not continuously represent him, and had not had any conversations with him since. Dixon represented to the court that he did not believe he would have any divided loyalties when cross-examining Galarza, but, in light of the circumstances, proposed that he could obtain a co-counsel who had no relationship with Galarza who could conduct the cross-examination and also participate in the trial, generally. In response, the State argued that there was still a "potential" for a conflict where the jury could be swayed upon learning of Dixon's prior representation and that Dixon's representation could provide grounds for overturning a conviction.

¶ 9 The trial court, relying on *People v. Holmes*, 141 Ill. 2d 204 (1990), denied the motion to reconsider finding there was a "potential for conflict" due to Dixon's past professional relationship with the State's key witness, Galarza. The trial court reiterated that Dixon had received privileged information and did not believe having a co-counsel cross-examine Galarza would cure the defect. The trial court further indicated that it was concerned that Galarza was an integral witness as he was present at the scene, a named victim, and the father of the victim, accordingly Dixon's prior representation could prejudice the State. Moreover, the trial court expressed its concern that defendant could use Dixon's prior representation of him to form the basis of an ineffective assistance of counsel claim on appeal. Defendant was subsequently represented by different private counsel and thereafter the trial court commenced jury selection.

¶ 10 Jury Selection

¶ 11 Prior to *voir dire* of the first panel of prospective jurors, the trial court admonished the entire venire not to discuss the case with anyone, including amongst themselves. Then, outside the presence of the venire, the parties agreed that the trial court should inquire whether the potential jurors could remain fair and impartial where defendant and/or the witnesses in the case may be members of a gang. Thereafter, *voir dire* of the first panel occurred and six individuals were selected from the first panel to serve on the jury. The trial court then excused these individuals for the remainder of the day.

¶ 12 *Voir dire* of the second panel then commenced where potential juror Kozel[2] was questioned. Subsequent to Kozel being examined, Kozel informed the court that "there was a conversation about gang retribution" between potential jurors. In response, the trial court inquired if Kozel could still be fair and impartial regardless of whether the defendant or witnesses were gang members, to which Kozel replied that he could. Outside the presence of the

[2] Kozel's name is also spelled "Kozil" in the record.

venire, the State moved for Kozel to be dismissed for cause due to its impression that Kozel's concern about gang retaliation was "his and his alone." Defense counsel agreed that Kozel should be dismissed and indicated he was also concerned of his, and potentially the venire's, inability to follow the trial court's instruction not to discuss the case. Defense counsel requested the trial court further inquire as to the truthfulness of Kozel's statement and moved to dismiss the entire venire.

¶ 13 The trial court agreed with defendant's concerns and stated "[Kozel's] mannerisms and the way he conducted himself lead me to believe that his concerns were his alone. He was not credible about people talking. I am just striking him for cause." Nevertheless, the trial court indicated it would question Kozel further at the end of the day.

¶ 14 Subsequently, the trial court extensively examined Kozel regarding his conversations with other members of the venire. Kozel informed the trial court that he did not speak with "anybody that has been picked." Although Kozel did state he spoke with three or four women who he could not remember. The trial court then attempted to clarify that Kozel spoke with three women regarding gang retaliation and Kozel responded, "I didn't speak to them, I mean there were just conversations that people were worried about gangs." The trial court further inquired about the content of the conversation. Kozel evaded the trial court's question stating that it was generally regarding gang retaliation and, upon further questioning, Kozel no longer maintained that he spoke with "three or four" women, but one woman. When asked to merely point out the woman he spoke with Kozel responded, "I can't" and thereafter clarified it was because he could not remember.

¶ 15 Defendant then again moved to dismiss the venire and his motion was denied. With the entire venire in the courtroom, the trial court inquired of the venire whether anyone had been

discussing the case. No one raised their hand. The trial court then instructed them again not to have any conversations about the case and not to discuss the facts of the case amongst themselves. Kozel was ultimately not selected to serve on the jury.

¶ 16 Trial

¶ 17 The State's evidence at trial established the following. On October 7, 2011, Christina Ignacio (Christina), her sister Denisse Galarza (Denisse), Galarza (Denisse's husband), and the Galarzas' three children Eric Jr., Luis, and Jayleen, resided on the 900 block of Elma Avenue in Elgin, Illinois. At 7 p.m. that evening, they all entered a vehicle with the intent to go to the grocery store. The vehicle was parked in front of their residence. Christina drove the vehicle with Galarza in the front passenger seat while Denisse and the children were in the back seat. As Christina executed a U-turn, shots were fired at the vehicle. Denisse observed defendant, her second cousin, underneath a streetlight, facing the vehicle. Denisse did not notice a firearm in defendant's hand, but testified she observed flashes of light coming from his direction. Denisse further testified that she did not see any other individuals. Galarza testified he also observed defendant shooting in his direction. Christina, who did not observe the shooter, then accelerated and heard Denisse scream, "It was Yagi. It was Yagi. I saw him. I saw him." Galarza, however, did not recall Denisse identifying the shooter as Yagi at that time. Testimony at trial established that defendant went by the name of "Yagi."

¶ 18 Denisse then observed that Eric Jr. was bleeding from above his eye and called 911. The 911 operator informed them to go to the nearest gas station. When Christina pulled into the gas station, the police officers were already there. Christina testified she informed the officers that Denisse had identified the shooter as Yagi. These statements, however, were not memorialized in any police report.

¶ 19 Eric Jr. was taken to Sherman Hospital in critical condition with a gunshot wound to the head and later died. While at the hospital Galarza informed the police that the shooter looked like defendant, but admittedly did not fully cooperate with them because he wanted to "seek[] revenge on my own." Galarza (a former Latin Kings gang member), however, did explain to the officers that defendant (a current Latin Kings gang member) might have been seeking revenge due to the fact that Galarza had been a confidential informant and turned State's evidence against certain Latin Kings gang members.

¶ 20 Denisse testified she initially lied to police by providing them with a different name because she had an outstanding warrant for a DUI at the time and wanted to remain with Eric Jr. Denisse, however, later informed the police officers of her true identity. Denisse also informed the officers at the gas station that she "thought" it was defendant, but did not specifically identify defendant because Galarza instructed her not to say anything. Denisse testified that while she was at the hospital she did provide a description of the shooter to the police. She described the shooter was a Hispanic male with a medium build and bald.

¶ 21 A neighbor of the Galarzas, Rolando Lopez (Rolando), testified that on October 7, 2011, at 7 p.m. he heard five or six gunshots and then observed a male in baggy, dark clothes running across the street away from the 900 block of Elma. Rolando further testified he noticed a black Toyota Tundra execute a U-turn and follow the same route as the individual he observed running. Cory Morgan (Morgan), a neighbor who lived around the corner from the 900 block of Elma, testified that on October 7, 2011, at 7 p.m. she was sitting outside her residence with her boyfriend Tim when she heard six of seven "pops or booms." Morgan then observed the individual walking in front of her residence. She watched as he removed his blue shirt and revealed a white tank top underneath. The man was ten to fifteen feet away from her when he

looked in her direction and she noticed his face. Morgan described the man as a shorter Hispanic male with low-cut hair and a husky build. The following day, Morgan identified defendant in a photo array and was "80 percent" sure he was the individual she noticed pass her residence. Five days after that, Morgan identified defendant in a physical lineup. Morgan testified she was "a hundred percent" certain of the physical lineup identification and also identified defendant in court as the individual who walked past her residence.

¶ 22 The testimony at trial further established that at 7:20 p.m. on October 7, 2011, defendant telephoned his co-worker, Carlos Lopez (Carlos), and invited him to Gameworks in Schaumburg. Carlos testified he arrived at Gameworks at 8 p.m. and noticed defendant with two other individuals. Defendant asked Carlos to speak privately with him and in doing so requested Carlos hide a handgun for the night. Defendant informed Carlos that someone would call him from a "224 number" to pick up the weapon the following day. Carlos further testified he observed defendant take the handgun out from the floor of a Toyota Tundra, wrap it in a navy blue shirt, and place it inside a white grocery bag. Thereafter, Carlos placed the bag containing the weapon in his storage shed. At 9:15 p.m. defendant called Carlos and inquired if Carlos hid the handgun. Carlos said he had.

¶ 23 Carlos testified that the following day he received a phone call from a 224 number around 10 a.m. One of the men who was at Gameworks the night before picked up the weapon and drove away. A few minutes later, defendant called Carlos to see if the individual had indeed picked up the weapon. Carlos testified that defendant later admitted he had shot at a man who had "snitched on them," but hit a child by accident. Carlos did not initially inform police of this fact, but subsequently provided them with all of the information which he testified to at trial. Carlos also identified a photograph of Luis Acevedo (Acevedo) as one of the men who was at

Gameworks and who came to retrieve the handgun the following day.

¶ 24 The following physical evidence was recovered at the crime scene: (1) six shell casings in the parkway near the front of Galarza's home; (2) a bullet fragment and copper jacket just across the street from Galarza's home; (3) a piece of bullet in a tree near Galarza's home; and (4) tire tracks along the curb just west of Galarza's residence. The vehicle driven by Christina had five bullet holes and a flat right rear tire. The parties stipulated that a black Toyota Tundra registered to defendant's father (Miguel Hernandez Sr.) drove through a toll booth eastbound on I90 at Route 25 at 7:13 p.m. on October 7, 2011, without paying the toll. In addition, video surveillance footage from the evening of October 7, 2011, taken at Gameworks was entered into evidence which portrayed defendant, Carlos, Acevedo, and defendant's father at the facility.

¶ 25 By way of stipulation, Joseph Raschke, a special agent with the Federal Bureau of Investigation, testified as an expert in historical cellular site analysis. Raschke testified that he completed cell phone analyses for cell phones belonging to defendant, defendant's father, defendant's girlfriend (Juanita Ortiz), Acevedo, and Carlos. Relevant to this appeal, Raschke's testimony indicated that defendant's cellular telephone used the cellular tower that was less than one mile away from the 900 block of Elma Avenue in Elgin between 4:10 p.m. to 7:02 p.m. on October 7, 2011. Thereafter, the cell phone towers utilized by defendant's phone between 7:24-7:29 p.m. indicated movement towards Schaumburg, Illinois. From 7:29 p.m. through 8:45 p.m., defendant's cell phone was in the vicinity of Gameworks in Schaumburg.

¶ 26 The analysis relating to Acevedo's cell phone indicated the following: (1) from 6:08 p.m. to 6:11 p.m. on October 7, 2011, three calls were made in Elgin; (2) one call was made at 7:49 p.m. from the vicinity of Gameworks in Schaumburg; (3) the cell tower utilized by his phone number at 10:27 a.m. through 10:33 a.m. on October 8, 2011, demonstrated the phone was in the

vicinity of Carlos' residence in Des Plaines, Illinois.

¶ 27 Raschke further testified that he conducted a comparison of phone numbers belonging to defendant, Carlos, and Acevedo who each made calls to one another between October 7 and October 8, 2011. Racheke's testimony indicated that they were in contact with each other prior to and after the occurrence of the offense.

¶ 28 The State rested and defendant moved for a directed verdict, which was denied. Defendant then presented the following evidence. Timothy Crenshaw, who was standing on his porch with Morgan at 7 p.m. on October 7, 2011, observed an individual walking around the corner wearing a white shirt and proceeded to walk towards them, but did not see his face. Officer McMahon[3] testified that while at the gas station Christina initially identified herself as Juanita Ignacio to the police, and described the shooter as a short, bald man standing at the corner near the house, and did not tell Officer McMahon that she heard Denisse yell, "It's Yagi shooting at us." Officer McMahon further testified that he indicated in his report that Christina had a warrant out for her arrest. On cross-examination, however, Officer McMahon testified he had only two months police experience at the time of this investigation and it was "possible" that he confused Christina and Denisse in his report. Furthermore, he realized when he returned to the station that Christina did not have a warrant out for her arrest. Officer McMahon, however, did not correct his report. Detective Tom Wolek testified that Christina did not inform him she heard Denisse yell, "It's Yagi shooting."

¶ 29 Defendant testified that he joined the Latin Kings when he was 17 years old. In the afternoon of October 7, 2011, Acevedo approached him and his father while they were cleaning the Toyota Tundra. Acevedo was also a member of the Latin Kings who defendant throughout

[3] Officer McMahon's first name is not included in the record.

the trial referred to as "dangerous" and a "hardcore criminal." Defendant further testified that due to rumors he had heard he was afraid of Acevedo.[4]

¶ 30 Defendant, Acevedo, and defendant's father then got into the Toyota Tundra to go to a bar. Defendant knew that Acevedo wanted to have a conversation with him. Defendant testified he had not been attending Latin Kings meetings regularly and had been trying to distance himself from the Latin Kings.

¶ 31 Defendant began driving to the bar, but Acevedo instructed him to stop in the street near Galarza's house instead. At the time, defendant was unaware he had parked near Galarza's home. Acevedo informed defendant that he was going to "serve somebody," *i.e.* participate in a drug transaction. While defendant waited in the vehicle for Acevedo he heard five or six gunshots. Defendant ducked because he initially believed the shots were being fired in his direction. Defendant then began driving away. As he drove away he observed Acevedo running on the street. Acevedo had a white, sleeveless undershirt on and a blue shirt wrapped around his hand. The blue shirt was concealing a handgun. Defendant stopped the vehicle and picked Acevedo up.

¶ 32 Thereafter, defendant drove to Gameworks in Schaumburg, Illinois. As defendant drove, Acevedo ordered him to make a call. Defendant called Carlos and asked him to meet at Gameworks. Defendant testified he obeyed Acevedo's instructions because he was scared that Acevedo might shoot him.

¶ 33 Defendant, Acevedo, and defendant's father arrived at Gameworks and sat at the bar. Sometime later Carlos arrived. Defendant provided Carlos with the firearm, which was wrapped in a plastic bag and informed Carlos that someone with a 224 area code would be calling him

[4] Over defendant's objection, the trial court, however, did not allow testimony regarding the content of those rumors.

regarding the weapon. Carlos then left. After calling his girlfriend, Juanita, she arrived and defendant left Gameworks with her. Defendant did not pay attention to the fact he left his father with Acevedo and testified he just wanted to get away from Acevedo. Defendant then went to Juanita's house because he was too scared to return to his own house as he feared gang retaliation.

¶ 34 According to defendant, while he knew that the Latin Kings wanted to retaliate against Galarza for being a confidential informant, he had no knowledge that Acevedo intended to shoot Galarza that evening.

¶ 35 Verdict and Sentencing

¶ 36 After closing arguments and jury instructions, the jury deliberated and ultimately found defendant guilty of attempted first degree murder of Galarza and first degree murder of Eric Jr. The jury also found that defendant committed these offenses while personally discharging a firearm. Defendant was sentenced to 60 years' imprisonment for first degree murder to run consecutive to 18 years' imprisonment for attempted murder. This appeal followed.

¶ 37 ANALYSIS

¶ 38 Defendant raises four contentions on appeal: (1) the trial court erred in granting the State's motion to disqualify defense counsel, thereby depriving him of his sixth amendment right to counsel of choice; (2) the State violated the discovery rules by not disclosing a witness' identification of defendant as the shooter; (3) the trial court failed to ensure he was tried by a fair and impartial jury; and (4) defense counsel was ineffective for failing to elicit certain testimony favorable to defendant. We address each in turn.

¶ 39 I. Attorney Disqualified

¶ 40 Defendant asserts the trial court abused its discretion when it disqualified Dixon as his

attorney. According to defendant, the record fails to establish that Dixon's prior representation of Galarza had any connection to defendant's current offense. In addition, defendant asserts that the trial court's findings were inconsistent. Dixon notes that the trial court found his statement that he did not remember his representation of Galarza to be credible, yet at the same time determined that his cross-examination of Galarza would be limited by this information he no longer recalled. Defendant maintains that Dixon did not have an ongoing relationship with Galarza after he entered his guilty pleas. Defendant concludes that "the mere fact that Dixon represented Galarza once upon a time did not provide reasonable grounds to believe that there was a serious potential for conflict." Defendant asks us to reverse his conviction on these grounds and remand the matter for a new trial.

¶ 41 The State responds that the trial court properly granted the motion to disqualify Dixon where the evidence at the hearing established that there was a serious potential for conflict due to the fact Dixon previously represented Galarza in three criminal matters. The State further asserts that the trial court weighed the appropriate factors and correctly determined that the State overcame the presumption in favor of defendant's counsel of choice.

¶ 42 The sixth amendment guarantees a criminal defendant the right to assistance of counsel (U.S. Const., amend. VI), which encompasses the right to effective representation as well as the right to select and be represented by one's preferred attorney. *Holmes*, 141 Ill. 2d at 217 (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988)). The right to counsel of choice is not absolute and is circumscribed in several respects, which may include the disqualification of chosen counsel in the event of a conflict of interest. *Id.* "[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to

ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat*, 486 U.S. at 159. Nevertheless, "a trial court may exercise its discretion to deny a defendant's right to counsel of choice only if it could reasonably find that defense counsel has a specific professional obligation that actually does conflict or has a serious potential to conflict with defendant's interests." *People v. Ortega*, 209 Ill. 2d 354, 361 (2004). The trial court is in the best position to weigh and evaluate the facts and circumstances and the particular interests in each case to determine whether disqualification is warranted. *Holmes*, 141 Ill. 2d at 223. In that vein, "the trial court retains 'substantial latitude' to refuse a defendant's waiver of her trial counsel's actual or potential conflict of interest." *People v. Jackson*, 2013 IL App (3d) 110685, ¶ 18 (citing Wheat, 486 U.S. at 163. We thus review a trial court's decision to disqualify a defendant's chosen counsel for an abuse of discretion. *Ortega*, 209 Ill. 2d at 360. A trial court abuses its discretion "if it fails to apply the proper criteria when it weighs the facts, and our inquiry must consider both the legal adequacy of the way the trial court reached its result as well as whether the result is within the bounds of reason." *Id.*

¶ 43 Evaluating a motion to disqualify a defendant's chosen counsel involves a two-step process. *People v. Buckhanan*, 2017 IL App (1st) 131097, ¶ 27. First, a trial court must determine whether there is actual or serious potential for conflict. *Ortega*, 209 Ill. 2d at 361. If it finds a conflict, the second step is to determine whether the interests threatened by the conflict or potential conflict overcomes the presumption favoring defendant's chosen counsel. *Id.* In weighing the presumption against a defendant's interests, the trial court should consider four nonexclusive factors: (1) the likelihood that defense counsel will have divided loyalties, (2) the State's right to a fair trial, (3) "the appearance of impropriety should the jury learn of the conflict," and (4) the likelihood that defense counsel's continued representation "will provide

grounds for overturning [the] conviction." *Id.* at 361-62 (citing *Holmes*, 141 Ill. 2d at 226-27). These factors, however, are not exhaustive; "A court should seek to fairly consider all the interests that are affected by a conflict in a given case." *Id.* at 362. Furthermore, when weighing the interests, "courts consider the likelihood that a conflict will actually occur, since 'a conflict that would seriously undermine counsel's effectiveness is not a basis for disqualification if it has little likelihood of occurring.' " *Buckhanan*, 2017 IL App (1st) 131097, ¶ 27 (quoting *United States v. Turner*, 594 F.3d 946, 952 (7th Cir. 2010)). The trial court " 'must recognize a presumption in favor of [defendant's] counsel of choice.' " *Holmes*, 141 Ill. 2d at 223 (quoting *Wheat*, 486 U.S. at 164). Thus, it is the State's burden to overcome the presumption by demonstrating there is either an actual conflict of interest or a serious potential for conflict. *Buckhanan*, 2017 IL App (1st) 131097, ¶ 26.

¶ 44 Our first question is whether the trial court could have reasonably found at least a serious potential for conflict arising from Dixon's representation of defendant. See *Ortega*, 209 Ill. 2d at 364. We acknowledge that the State initially framed the issue in terms of whether Dixon's representation of defendant created a *per se* conflict. A *per se* conflict is one in which " 'facts about a defense attorney's status *** engender, *by themselves*, a disabling conflict.' (Emphasis in original.)" *People v. Morales*, 209 Ill. 2d 340, 346 (2004) (quoting *People v. Spreitzer*, 123 Ill. 2d 1, 14 (1988)). Then, despite defendant's express waiver, the trial court initially ruled that there was a *per se* conflict because Dixon had previously represented the victim. The concept of a *per se* conflict, however, applies only to cases where a defendant claims ineffective assistance of counsel due to his attorney's conflict. *Holmes*, 141 Ill. 2d at 220-20. This is not such a case and, therefore, the trial court's initial determination that a *per se* conflict existed is erroneous. See *Ortega*, 209 Ill. 2d at 364. At the motion to reconsider, however, the trial court

acknowledged its error and reviewed the matter under the proper legal standard.

¶ 45 We find *Holmes* is dispositive. In *Holmes,* the State filed a motion to remove the defendant's attorney, Leo Holt (Holt), from the case due to a conflict of interest. *Holmes*, 141 Ill. 2d at 212-13. Holt had previously represented Ulrich Williams (Williams), the State's key witness, in various criminal matters. *Id.* at 213. The defendant responded that no conflict existed and that, even if one did, he waived his right to conflict-free counsel. *Id.* At the hearing on the motion, Holt admitted that from 1972 through 1978 he had represented Williams on several criminal charges, and that five years prior to the current proceeding he had had communications with Williams which would be covered by the attorney-client privilege. *Id.* The trial court determined that a conflict of interest existed which was impossible to waive, and removed Holt from the case. *Id.* Our supreme court upheld the trial court's determination that Holt should be disqualified. *Id.* at 228.

¶ 46 Keeping in mind our deferential standard of review, we conclude that the trial court did not abuse its discretion when it disqualified Dixon. While the trial court recognized a presumption in favor of defendant's counsel, after its application of the *Ortega* factors that presumption was outweighed by the risk of a potential conflict. In its examination of the *Ortega* factors, the trial court stressed that Galarza was an integral witness in the case and the seriousness of the charge. To that end, the trial court determined the State would be prejudiced by the knowledge Dixon gained during his prior representation of Galarza. The trial court, however, also considered the prejudice to defendant in that Dixon would not be able to fully cross-examine him and did not believe that having a co-counsel present would fully remedy that prejudice. Lastly, the trial court considered that defendant would likely use Dixon's prior representation of Galarza as a basis for overturning the conviction on appeal as defendant would

likely assert that Dixon provided him with ineffective assistance. The trial court's decision was not fanciful, arbitrary, or unreasonable.

¶ 47 Like *Holmes*, a serious potential for conflict exists in the present case because Dixon previously represented not just a witness in this case, but *the victim*. As the victim, if the case were to go to trial the likelihood that Galarza would testify was high, and the trial court aptly recognized that it would put Dixon in the precarious position of cross-examining his former client. See *Jackson*, 2013 IL App (3d) 110685, ¶ 21. This implicates the second and third *Ortega* factors as Dixon's prior representation of the victim in the case could result in counsel's cross-examination being "improperly restricted and the adversarial process frustrated." *Holmes*, 141 Ill. 2d at 226. Moreover, the appearance of impropriety to the jury could occur if the State were to question Galarza regarding Dixon's prior representation. We observe that the trial court's disqualification of Dixon was not made "with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between parties are seen through a glass, darkly." *Wheat*, 486 U.S. at 162. We find that the evidence before the trialcourt at that time was sufficient to overcome the presumption in favor of defendant's counsel of choice. See *White*, 395 Ill. App. 3d at 829. In this context and with the limited facts that were before the trial court, we cannot say that the trial court abused its discretion when it determined that Dixon's prior representation created a serious potential for conflict. See *Jackson*, 2013 IL App (3d) 110685, ¶ 21.

¶ 48 II. Issues with Christina's Testimony

¶ 49 Defendant next argues that he was denied a fair trial because the trial court overruled his objection to exclude Christina's testimony that she yelled, "It was Yagi" while shots were being fired at the vehicle she occupied. Specifically, defendant sets forth the following arguments, (1)

the State committed a discovery violation for its failure to disclose this testimony prior to trial and did so in bad faith and (2) Christina's statement should not have been admitted at trial because it was unreliable and its late disclosure unfairly prejudiced defendant. In the alternative, defendant contends that trial counsel was ineffective for (1) failing to request the Court impose discovery sanctions on the State for its failure to disclose Christina's statement, (2) not moving to exclude such testimony based on its unfairly prejudicial effect, and (3) failing to request a mistrial. We address each contention in turn.

¶ 50 Initially, the State maintains that the discovery issue has been forfeited for defendant's failure to include the issue in his posttrial motion. We agree. To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). While our review of the record reveals that defendant did object at trial, he nevertheless failed to raise this issue in his posttrial motion. Accordingly, the issue is forfeited.

¶ 51 This court, however, may review an issue for plain error where the issue was not properly preserved. Illinois Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain-error rule "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the

integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). Defendant carries the burden of persuasion under both prongs of the plain-error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). However, "[t]he first step of plain-error review is to determine whether any error occurred." *Id.* Therefore, we will review the issue to determine if there was any error before considering it under the plain-error doctrine.

¶ 52 Defendant argues that the State committed a discovery violation in bad faith because the State failed to disclose Christina's testimony prior to trial pursuant to Illinois Supreme Court Rule 412 (eff. Mar. 1, 2001). In response, the State maintains that no discovery violation occurred because Christina's statement was never memorialized and that defendant's contention that the State acted in bad faith is pure conjecture as the record fails to support such an argument.

¶ 53 Illinois Supreme Court Rule 412 (eff. Mar. 1, 2001) governs discovery in criminal proceedings and requires the State to produce certain information and materials that are within its control prior to trial. *People v. Lowry*, 354 Ill. App. 3d 760, 769 (2004). In pertinent part, the rule provides:

> "(a) Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:
>
> (i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements." Ill. S. Ct. R. 412 (eff. Mar. 1, 2001).

The purpose of this rule requiring the State to disclose materials and information within its

possession is to protect criminal defendants from surprise and unfairness, and allow for adequate preparation for trial. *People v. Hood*, 213 Ill. 2d 244, 258 (2004) (quoting *People v. Heard*, 187 Ill. 2d 36, 63 (1999)); *Lowry*, 354 Ill. App. 3d at 770. Because Rule 412, however, only applies to "memoranda containing substantially verbatim reports of their oral statements," and "memoranda reporting or summarizing their oral statements" (Ill. S. Ct. R. 412(a)(i) (eff. Mar. 1, 2001)), purely oral statements made by witnesses that are not memorialized are not subject to Rule 412's disclosure requirements, absent bad faith on the part of the State (*People v. Mahaffey*, 128 Ill. 2d 388, 418-19 (1989); *People v. Williams*, 262 Ill. App. 3d 808, 823-24 (1994)). The State's duty to disclose pursuant to Rule 412 is a continuing one and, accordingly, the State is required to promptly notify the defendant of any material or information that is discovered up to, and during, trial. *People v. Hendricks*, 325 Ill. App. 3d 1097, 1103 (2001).

¶ 54 In the event of a discovery violation, Illinois Supreme Court Rule 415 (eff. Oct. 1, 1971) permits a trial court to apply an array of sanctions. See Ill. S. Ct. R. 415(g)(i) (eff. Oct. 1, 1971) ("If at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances."). In certain circumstances, when the trial court is faced with a serious discovery violation, it may find that the most appropriate remedy is to declare a mistrial. See, *e.g.*, *People v. Edwards*, 388 Ill. App. 3d 615, 629-33 (2009). Nonetheless, declaring a mistrial is a "drastic sanction" (*People v. Morgan*, 112 Ill. 2d 111, 135 (1986)), and a party's discovery violation warrants a new trial only if the defendant is prejudiced by the violation and the court fails to eliminate the prejudice (*People v. Stewart*, 227 Ill. App. 3d 26, 29

(1992)). While a trial court's decision whether or not to declare a mistrial will be upheld absent an abuse of discretion (*People v. Sims*, 167 Ill. 2d 483, 505 (1995)), the issue of whether a discovery violation occurred, however, is subject to *de novo* review (*Hood*, 213 Ill. 2d at 256).

¶ 55 Here, in response to defendant's discovery request, the State identified Christina as a person it may call as a witness to the trial and indicated it tendered any written statements or memoranda reporting or summarizing oral statements made by the witnesses to the defense in open court. In addition, defendant indicated in his answer to discovery that he "may call as witnesses any of those persons named in the police reports *** and any other documents tendered to defense counsel by the State." Defendant also acknowledged that he had been previously tendered written or recorded statements of witnesses by the State. At trial, although Christina testified she informed prosecutors that she heard Denisse yell, "It was Yagi," the State informed the trial court that "[a]bsolutely" no written statements existed. As Christina's statements were never memorialized or summarized, we conclude the State abided by Rule 412 and the trial court correctly ruled no discovery violation occurred.

¶ 56 Nevertheless, defendant asserts the State failed to disclose Christina's statements in bad faith. Specifically, defendant argues that, "[i]f the State did not reduce Christina's critical testimony to writing, the only sensible explanation is that it did not want to disclose it." This is pure conjecture. There has been no showing that a written report concerning this matter was ever made. Nor has there been a showing that the State intentionally prevented such a report from being made, in an attempt to surprise defendant at trial. *Williams*, 262 Ill. App. 3d at 824. Thus, there has been no discovery violation in this case. See *People v. Strobel*, 2014 IL App (1st) 130300, ¶ 11.

¶ 57 Defendant further argues that the State failed to meet its continuing disclosure obligation

under Rule 415 where the police report did not disclose Christina's statement that she heard Denisse say, "It was Yagi," but instead inaccurately indicated that Christina identified the shooter as a short, bald man. According to defendant, the State was aware of this discrepancy prior to trial and had an obligation to disclose it. Defendant maintains that he relied on this inaccurate report when preparing for trial to his detriment.

¶ 58 In response, the State maintains the report (which did not contain Christina's statement) was accurate where Officer McMahon testified Christina did not tell him she heard Denisse say, "It was Yagi." The State further argues that defendant was not prejudiced where he was provided with ample opportunity to cross-examine Christina and impeached her with Officer McMahon and Detective Wolek's testimony, thereby casting doubt on her credibility as a witness. Thus, the State was not required to notify defendant of the inconsistencies in the report.

¶ 59 We first observe that the discovery tendered by the State to the defense is not included in the record. This includes the police reports regarding both Christina and Denisse. Because defendant alleges that the State violated the discovery rules for failing to correct the police report, without said report we cannot conclude whether the State failed to comply with the discovery requirements. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984).

¶ 60 Even assuming the State's failure to correct the report was an error, defendant was not surprised or prejudiced by the discovery violation. See *People v. Harris*, 123 Ill. 2d 113, 151-52 (1988). Defendant here was given ample opportunity to extensively cross-examine Christina and did so. See *id.* at 152 (no error occurs where the defendant was given the opportunity to extensively cross-examine the witness, and as a result cast severe doubt on their credibility as a witness in the case). We further observe that defendant indicates in a footnote to this argument that, "[t]he report's author most likely confused Christina for Denisse, who did describe the

shooter as a short, bald man. The report also indicated there was a warrant out for Christina; she did not [*sic*], but Denisse did." We cannot see how such a report would cause defendant surprise or prejudice where it was apparent on its face that there was an error. Moreover, the record discloses that Officer McMahon's testimony was consistent with his report where he testified Christina did not tell him Denisse identified the shooter as Yagi and the report contained no mention of Denisse's statements to Christina. Accordingly, defendant has failed to meet his burden that he was unduly prejudiced by this alleged error. See *People v. Taylor*, 409 Ill. App. 3d 881, 908 (2011) ("The burden of showing surprise or prejudice is upon the defendant, and the failure to request a continuance is a relevant factor in determining whether the testimony actually surprised or unduly prejudiced the defendant.").

¶ 61 Defendant next argues that Christina's hearsay testimony was inadmissible because its late disclosure and unreliability created a substantial risk of unfair prejudice to him, and that risk substantially outweighed the testimony's probative value. As with the discovery violation, defendant failed to object on the grounds that Christina's hearsay testimony was unfairly prejudicial or argue it in a posttrial motion. See *Enoch*, 122 Ill. 2d at 186 (to preserve an issue for review, defendant must object both at trial and in a written posttrial motion). Accordingly, we review his contention for plain error. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967).

¶ 62 Regarding the statement's unreliability, defendant contends that Christina's account was uncorroborated, never memorialized in a police report, denied by the police officer who initially spoke to Christina, and disclosed (at most) one month prior to trial to the prosecutor. The admission of hearsay testimony is harmless if such testimony is fully corroborated by the declarant's testimony at trial and the defense has the opportunity to cross-examine the declarant. *People v. Davis*, 337 Ill. App. 3d 977, 991 (2003).

¶ 63 We first observe that in allowing Christina to so testify the trial court inherently determined the statement was reliable and admissible as an excited utterance. See *People v. Lerma*, 2016 IL 118496, ¶ 5 n. 1 (citing *People v. Nevitt*, 135 Ill. 2d 423, 442 (1990)). Second, after the trial court allowed Christina to so testify, defense counsel was provided with the opportunity to cross-examine her as well as question the police officers and other witnesses in order to call into question the credibility of Christina's statement. See *People v. Logan*, 352 Ill. App. 3d 73, 80 (2004). The issues defendant raises regarding the reliability of Christina's statement were ultimately for the jury to weigh and consider. See *People v. Ward*, 2011 IL 108690, ¶ 34 ("The jury's function is to assess the credibility of the witnesses, weigh the evidence presented, resolve conflicts in the evidence, and draw reasonable inferences from the evidence." Internal quotation marks omitted). Thus, we find no error occurred as to the admission of Christina's statement.

¶ 64 In the alternative, defendant maintains that his counsel was ineffective for failing to (1) request the Court impose discovery sanctions on the State for its failure to disclose Christina's statement, (2) exclude such testimony based on its unfairly prejudicial effect, and (3) request a mistrial. As we have concluded that no discovery violation occurred and Christina's testimony was not admitted in error, it follows that defense counsel cannot be ineffective as defendant alleges. Thus, defendant's claim fails. See *People v. White*, 2011 IL App (1st) 092852, ¶ 63. Furthermore, to the extent defendant has raised any other arguments not specifically addressed herein, we have reviewed those claims for error and determined no error occurred.

¶ 65 III. Tainting of the Venire

¶ 66 Defendant next argues that he was denied a fair trial where the venire was tainted because a prospective juror Kozel informed the trial court that he discussed the potential for gang

retaliation with other members of the venire against the trial court's admonishment not to discuss the case. Defendant maintains that, although potential juror Kozel was not selected to be part of the jury, his comments with other venire persons created a prejudicial atmosphere for the remaining venire that affected the jury's fairness and impartiality.

¶ 67 We review a claim that the trial court's actions prevented the selection of an impartial jury under an abuse of discretion standard. *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 89. The primary responsibility for initiating and conducting *voir dire* lies with the trial court; the manner and scope of that examination falls within the court's sound discretion. *People v. Wilson*, 303 Ill. App. 3d 1035, 1041-42 (1999). *Voir dire* is conducted to assure the selection of an impartial jury, free from bias or prejudice, and grant counsel an intelligent basis on which to exercise peremptory challenges. *People v. Dixon*, 382 Ill. App. 3d 233, 243 (2008). A trial court abuses its discretion only if the trial court prevents the selection of a jury that harbors " 'no bias or prejudice which would prevent them from returning a verdict according to the law and evidence.' " *Id.* (quoting *People v. Strain*, 194 Ill. 2d 467, 476 (2000)).

¶ 68 The trial court was well within its discretion when it found that the venire was not tainted and that all the jurors retained their ability to remain fair and impartial. The trial court ultimately found Kozel was not credible and, even in light of that ruling, went on to extensively examine Kozel to determine whether or not the venire had been tainted. The examination revealed that Kozel was inconsistent in his statements to the court, evasive during the court's questioning, and ultimately not credible. Furthermore, it is apparent from the record that Kozel was attempting to evade jury service. Moreover, after examining Kozel, the trial court addressed the entire venire and asked whether anyone had spoken about the case. No one raised their hand. The trial court then readmonished the venire not to speak about the case to anyone. Defendant thus presents us

with no evidence that the venire was tainted.

¶ 69 Defendant further asserts that the trial court's question and readmonishment did not remove any taint from the venire where the six jurors who had already been selected were not so questioned and admonished. Defendant does not take into consideration the fact that these jurors were previously vetted by the trial court, the prosecutor, and defense counsel. These jurors were asked whether they could remain fair and unbiased in a case involving gang members and they each responded that they could. Thus, defendant has failed to demonstrate that these six jurors were tainted and the trial court did not abuse its discretion when it declined to dismiss the entire venire. See *People v. Short*, 2014 IL App (1st) 121262, ¶¶ 87-88.

¶ 70 IV. Ineffective Assistance of Counsel

¶ 71 Lastly, defendant argues his counsel was ineffective for failing to elicit testimony that would have supported his case by explaining why defendant was afraid of Acevedo and providing an explanation for why he drove Acevedo to the scene of the shooting and assisted in disposing of the weapon used in the commission of the offense. According to defendant, once the State withdrew its objections to defendant's testimony regarding his conversations with Acevedo and how they affected his state of mind, defense counsel should have elicited defendant's previously excluded testimony, but he did not. Defendant asserts defense counsel's inaction prejudiced him as he was not provided the opportunity to explain why he was at the scene of the crime and why he assisted Acevedo in disposing of the firearm. Defendant contends that with this testimony the jury could have concluded that Acevedo was the shooter.

¶ 72 In response, the State maintains defense counsel did elicit testimony that defendant drove Acevedo to the scene and hid the weapon because Acevedo manipulated him into doing so through a combination of deceit and fear. The State indicates it did not withdraw its objections

to all of defendant's testimony regarding Acevedo, only the objection regarding the introduction of evidence relating to the reason Acevedo was near the scene of the shooting, *i.e.* that he was "serving drugs."

¶ 73 A defendant has a sixth amendment right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. An accused is entitled to capable legal representation at trial. *People v. Wiley,* 165 Ill. 2d 259, 284 (1995). To establish a claim of ineffective assistance of counsel, a defendant must prove both (1) deficient performance by counsel and (2) prejudice to defendant. *People v. Smith*, 195 Ill. 2d 179, 187-88 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To satisfy the first prong of the *Strickland* test, a defendant must demonstrate his counsel's performance fell below an objective standard of reasonableness, as measured by prevailing norms. *Smith*, 195 Ill. 2d at 188. "To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy." *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). To satisfy the second prong, prejudice is demonstrated if there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *People v. Albanese,* 104 Ill. 2d 504, 525 (1984); *People v. Echols*, 382 Ill. App. 3d 309, 312 (2008). A probability rises to the level of a " 'reasonable probability' " when it is " 'sufficient to undermine confidence in the outcome' " of the proceeding. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002) (quoting *Strickland*, 466 U.S. at 694). The failure to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *Peeples*, 205 Ill. 2d at 513. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Albanese*, 104 Ill. 2d at 527.

¶ 74 We first acknowledge defendant's inaccurate description of the record. In his direct examination of defendant, defense counsel attempted to elicit testimony that would go towards defendant's state of mind including in part Acevedo's role within the Latin Kings, the rumors defendant heard about Acevedo, why Acevedo wanted to talk to him, what Acevedo said when he instructed defendant to drive to Galarza's neighborhood instead of the bar, and that he did not call the police after the shooting because Acevedo had threatened his life. The State objected to this line of questioning and the trial court sustained those objections as hearsay. Defense counsel also attempted to elicit testimony from defendant that Acevedo made defendant stop the vehicle near Galarza's house in order to conduct a drug transaction. The State objected and the trial court sustained the objection finding the content of defendant's testimony to be too prejudicial. Upon further reflection, however, the State withdrew its objection to defendant's testimony that Acevedo was at the crime scene to conduct a drug transaction.

¶ 75 While defendant argues on appeal that the State withdrew all of its objections at this time, the record indicates otherwise. The context of the record makes clear that the State only intended to withdraw its objection as to why Acevedo was at the scene of the shooting (to execute a drug transaction). Thus, because the State did not withdraw its other objections, defendant's claim that defense counsel was ineffective for failing to "circle back" and to elicit defendant's previously excluded testimony fails. Regardless, our review of the record also indicates that defense counsel did elicit testimony from defendant detailing why defendant was afraid of Acevedo and providing the jury with an explanation for why he drove Acevedo to the scene of the shooting and helped him dispose of the weapon afterwards. Consequently, defendant is unable to establish either that his counsel's performance was deficient or that he suffered prejudice. See *People v. Edwards*, 218 Ill. App. 3d 184, 198-99 (1991) (defense

counsel was not ineffective where counsel did elicit testimony the defendant argued was not elicited).

¶ 76 CONCLUSION

¶ 77 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 78 Affirmed.