2019 IL App (4th) 170220-U

NO. 4-17-0220

FILED
July 9, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
JAMES J. CHATMAN,	)	No. 13CF345
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Coryell,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Holder White and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding defendant's claim of ineffective assistance of counsel was (1) not barred under the doctrine of invited error and (2) better suited for a collateral proceeding where a record could be adequately developed.

¶ 2 Following a bench trial, the Macon County circuit court found defendant, James J. Chatman, guilty of first degree murder and possession of a weapon by a felon. Defendant appeals, arguing his trial counsel provided ineffective assistance by proceeding to trial without first investigating all possible exculpatory evidence. We decline to address defendant's claim as any decision would be advisory based on the record presented. Because defendant has not identified any other claim of error for this court to review, we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. Charges

¶ 5 In March 2013, the State charged defendant with three counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2012); 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012)) for the unlawful killing of James Nathaniel Johnson and one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)).

¶ 6 B. Prior Counsel

¶ 7 Between March 2013 and December 2015, defendant was represented by at least five different attorneys. One attorney retired, while the others withdrew due to conflicts. For a short period, defendant proceeded *pro se*. We note between May 2013 and August 2015, defendant sent several *pro se* letters, pleadings, and motions to either the trial court or the circuit clerk expressing his dissatisfaction with how long he had been in the county jail, his concern with a possible violation of his speedy-trial rights, and his desire that no continuances be granted.

¶ 8 C. Trial Counsel

¶ 9 In December 2015, the trial court appointed Daniel Hassinger to represent defendant. Hassinger represented defendant throughout the remainder of the proceedings below.

¶ 10 D. Motion for Gunshot Residue Testing

¶ 11 In February 2016, defendant, through counsel, filed a motion for gunshot residue testing. The motion alleged Johnson fired a handgun at defendant during the occurrence in which Johnson was fatally wounded and asserted it was "essential" to the defense that various items connected to Johnson be tested for gunshot residue. Specifically, the motion sought testing of (1) items being worn by Johnson on the night he died, including a sweatshirt, long-sleeved T-shirt, T-shirt, sweatpants, pajama pants, boxers, shoes, and socks; (2) nail clippings collected

during Johnson's autopsy; and (3) brown paper bags placed around Johnson's hands prior to his autopsy.

¶ 12 E. Agreed Order for Gunshot Residue Testing

¶ 13 On April 14, 2016, the trial court entered an agreed order granting defendant's motion for gunshot residue testing.

¶ 14 F. June 2016 Hearing

¶ 15 At a June 2016 hearing, defense counsel appeared without defendant. Counsel informed the trial court and the State:

> "[Defendant] informed me last night that he would now like me to withdraw a pretrial motion that we filed recently to have the Illinois State Police test certain evidence collected at the crime scene some three years ago now tested for the presence of gunshot residue. My client was on the record with the understanding these tests take some time, and his case would be continued for pretrial and the time would be charged against him. He has now informed me that due to my recent announcement of running for [state's attorney], he would like to withdraw this prior motion to have said evidence tested and would like to have a sooner trial date."

Without addressing counsel's statement, the court set the matter for further hearing.

¶ 16 Shortly after the hearing, defendant sent to the trial court a *pro se* motion to set a trial date. In the motion, defendant wrote:

> "Now [c]omes [t]he [d]efendant James Chatman and make

> the courts aware of that [I am] ready for trial. I am also aware of the motion[]s that [I] have on file and I [am] also aware retesting of the clothes with [Illinois State Police] could take some time. So with that being said I [am] willing to go forward and ask the courts to give me a trial date. I have talked with my lawyer about this matter and he informed me that [I] can't have a trial until my motion[]s on file are heard. I have a right to trial. The motion[]s that are on file can be explained during [j]ury selections. So [I am] asking the courts to grant my request and give me a trial date."

The court later struck defendant's *pro se* motion because he was represented by counsel.

¶ 17 G. July 8, 2016, E-mails

¶ 18 On July 8, 2016, the State and defense counsel communicated by e-mail concerning a trial date and the gunshot residue testing. The e-mails were later presented to the trial court as an exhibit attached to the State's response to defendant's motion for a new trial.

¶ 19 In the first e-mail, the State suggested an October 31, 2016, trial date as the results from the gunshot residue testing would be available by that date. Defense counsel responded, "I will be on vacation that week until after the election so I am not setting it then." The State sent a second e-mail suggesting an August 29, 2016, trial date.

¶ 20 H. July 8, 2016, Hearing

¶ 21 At a July 8, 2016 hearing, defense counsel appeared with defendant and informed the trial court and the State:

> "[W]e previously filed a motion to have evidence collected at the

> crime [scene] tested for gunshot residue. [Defendant] would like to—and the [c]ourt did enter an order ordering the State's Attorney's Office to have the evidence tested. However, *** defendant has requested that since I have announced my candidacy in an upcoming election, he wants to make sure that I am, in fact, his trial counsel and exercise his right to counsel of his choice. He would like to select a jury trial date today, and if the test or lab results come back before the trial, great we'll have them. If not, he wants to proceed with jury trial without having had those results back."

¶ 22 The trial court questioned defendant whether "everything Mr. Hassinger just said [was] correct," to which defendant responded, "Not everything, no." Defendant explained:

> "I would like to, yeah, go ahead with—I'd like to get a trial date set, but I'd also wait and would like to—if those—if those tests do come back before trial or go to trial, I'd like to hear those results. Also, if they're not back then, I'd like to argue that in front of my jury selections. So still I would like to, you know what I'm saying, speak about that—about the—the testing of the clothing during jury selections."

In response to defendant's explanation, the court stated, "I'm not going to say what we're going to do if they aren't back by the trial date. We'll cross that bridge when and if we get there." Defendant agreed with the court's reservation.

¶ 23 The trial court questioned the State as to the status of the gunshot residue testing. The State stated the crime lab indicated "they're not sure whether testing will be able to be completed based on the age of the case, but if they are able to retest, they need two months to complete it. [Gunshot residue] testing requires a lengthier time to complete than DNA testing due to a backlog." The State also noted it believed it would be "fundamentally unfair for [the defense] to say they want to proceed without the testing and then somehow use that against the State." The court again indicated it was reserving a ruling on that issue.

¶ 24 When scheduling the matter for a jury trial, the State noted a discussion occurred with defense counsel about setting the matter for either "August 29 or October 31, which are both before the election date the defendant seems so concerned about." Upon inquiry by the trial court, the parties confirmed Election Day was on November 8. Defense counsel informed the court he would be on vacation from "October 31 through that next week." The State again noted the discussion about setting the matter for August 29 and stated, "I mean, they're going to have to go without the [gunshot residue] but that's their decision." The court inquired if the defense had any problem with the August 29 date other than the possible absence of gunshot residue results, to which defense counsel responded, "No. We prefer that date." The court set the matter for a jury trial "by agreement" for August 29.

¶ 25 After setting the matter for a jury trial, defense counsel requested the trial court to confirm it was not ruling "on the admissibility of whether or not the defendant can comment on gunshot residue lab results or the fact that the lab results are not back yet until the time of trial." Counsel stated:

"[Defendant's] concern is, is this case is over three years

> old, the police messed up and didn't send it all to get tested at the lab, and now he's running up against spending three and a half years locked up in jail and still no test results."

The court made clear it was reserving "the issue of whether the defense be allowed to comment on the lack of [a gunshot residue] report in the event the crime lab has not finished its testing by [the] trial date."

¶ 26 I. Motion to Waive Possible Conflicts

¶ 27 On August 3, 2016, the State filed a motion for defendant to waive possible conflicts with his counsel's representation. In part, the State sought a waiver of any conflict concerning counsel's candidacy for state's attorney. The State noted, as an example, defendant could possibly claim his counsel did not zealously cross-examine law enforcement witnesses so as not to alienate them during his election campaign.

¶ 28 J. August 2016 E-mails

¶ 29 In August 2016, the State and defense counsel communicated by e-mail concerning the gunshot residue testing. The e-mails were later presented to the trial court as an exhibit attached to the State's response to defendant's motion for a new trial.

¶ 30 On August 9, 2016, the State wrote:

> "Crime lab said that the two most likely items to find [gunshot residue] on Nate Johnson would be his sweatshirt and the bags on his hands. They could possibly have that done by the 29th. They do not have time to test other items. Is it agreeable with you for them to proceed with testing on those two items?"

¶ 31 On August 10, 2016, the State wrote:

> "I just left another message with the crime lab giving them confirmation that they should proceed with testing on the victim's sweatshirt and bags from his hands. I'm waiting for a call back. The person I've been communicating with is the coordinator who is located in Springfield. He doesn't have control over the Chicago lab—which is the lab which actually tests the [gunshot residue].
>
> If they are not able to have testing done by the 29th, what are your thoughts about continuing this case to September 26th? I'm very concerned about an ineffective assistance claim down the road, in the event of a conviction, with proceeding forward with the [gunshot residue] results when it was requested by the defense. Chatman could allege that the trial proceeded when exculpatory evidence could have been discovered."

¶ 32 On August 11, 2016, defense counsel emailed the State, and then, the State emailed defense counsel. Defense counsel wrote:

> "I understand your position. He has told me that he will absolutely object to any continuances. If you are going to file a motion to continue on that basis let me know and I can come over any time to argue it."

In response, the State wrote:

> "Ok. The thing is, he doesn't have the right to object to

continuances but he will have the right to claim he was given bad legal advice in the event of conviction regarding [gunshot residue]. I will file a motion to continuance if necessary."

¶ 33 K. August 18, 2016, Hearing

¶ 34 At an August 18, 2016, hearing, the trial court addressed the State's motion for defendant to waive possible conflicts with his counsel's representation. The following inquiry occurred concerning counsel's candidacy for state's attorney:

"THE COURT: *** I'm just going to make sure that you are aware that Mr. Hassinger has put in to run for Macon County State's Attorney's Office. Are you aware of that?

THE DEFENDANT: Yes, I'm aware of that. And me and my attorney and then—the last time I was in court, came to an agreement we was going to have a trial and get this over with. I have been here three and a half years, and we're going to get this over before that November thing even comes up. So that's why he's still my attorney. So that's what I'm here today for to get this trial date, keep going, and get this over with and done.

THE COURT: Okay. Mr. Chatman, so you would waive any potential conflict with Mr. Hassinger running for state's attorney?

THE DEFENDANT: I'm not waiving nothing as far as that. Like I said, he's my attorney. He's been my attorney. ***

> And I don't have a problem with this, but I'm not signing any paperwork from here on concerning what the State's talking about now as far as some state's attorney—running for state's attorney. That didn't have nothing to do with my case. I'm here for trial and get this resolved and that's what I'm here for.
>
> THE COURT: I guess the question is then you're aware that he has put in for the state's attorney position and you still want Mr. Hassinger to represent you.
>
> THE DEFENDANT: Yes, sir. That was spoken, like I said, before. I understand what you just said and, yes, and that's why the last time we was here we set a date between September and August and the State and my attorney agreed on August 29 trial. So that's what I'm looking forward to, Your Honor, and that's what—that's what I have to say about that."

Based on this inquiry, the court found defendant was aware of his counsel's candidacy for state's attorney. The court also, by agreement of the parties, rescheduled the jury trial for September 26, 2016, due to "the unavailability of [a] material witness."

¶ 35 L. Additional Answer to Pretrial Discovery Order

¶ 36 On September 1, 2016, the State filed an additional answer to a pretrial discovery order. The State provided an August 29, 2016, Illinois State Police laboratory report prepared by forensic scientist Scott Rochowicz. According to the report, the Chicago lab received Johnson's sweatshirt and the brown paper bags that covered Johnson's hands on August 10, 2016.

Rochowicz then examined and conducted a gunshot residue analysis on Johnson's sweatshirt. Based on his analysis, Rochowicz concluded the sampled areas of Johnson's sweatshirt "may not have contacted a [primer gunshot residue] related item or may not have been in the environment of a discharged firearm. If they were, then the particles were not deposited, were removed by activity, or were not detected by the procedure." The report noted Rochowicz did not examine the brown paper bags.

¶ 37 M. Notice of Affirmative Defense

¶ 38 On September 1, 2016, defendant filed a notice of affirmative defense of use of force in defense of person. Defendant alleged he would "assert that he is not guilty of the offenses charged because he reasonably believed that such force or acts were necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony if he did not perform the conduct alleged in the informations."

¶ 39 N. Bench Trial

¶ 40 On September 26, 2016, defendant waived his right to a jury trial, and then, the trial court commenced a bench trial. The trial lasted four days. The evidence showed, around 11 p.m. on March 10, 2013, defendant, a convicted felon, shot a firearm multiple times at 20-year-old James Nathaniel Johnson who was behind a closed door, and one of the shots struck and killed Johnson. The shooting occurred in a two-bedroom apartment on the second story of a house on College Street in Decatur. At the time defendant discharged his gun, defendant was located in the hallway of the apartment and Johnson was located inside the northwest bedroom. The primary issue at trial was whether defendant acted in self-defense when he shot at Johnson. The defense also briefly suggested in closing argument Kioshe McGowan, who was present in

the northwest bedroom at the time Johnson was shot, caused Johnson's death.

¶ 41 Maleea Kareotes, defendant's partner of 24 years, testified she drove defendant and his brother, Anthony Chatman, at defendant's direction to the house on College Street. She observed a handgun in defendant's waistband when she dropped him and Anthony off near the house. Soon after dropping the men off, Kareotes heard gunshots, and then, defendant and Anthony returned to the vehicle. Kareotes testified defendant described what had occurred. Defendant said he "pushed open a door and there was some girls in there and then went to open another door and somebody shut the door up and shots were fired." Defendant said he shot through the door at Johnson, the "guy that robbed my son," and the gun jammed when he did so. Kareotes testified defendant was messing with the gun in the vehicle because it was still jammed. Kareotes did not remember defendant saying Johnson fired first. She did remember defendant saying "something about somebody fired on the inside of a door." When they returned to Kareotes' house after the shooting, defendant went out the back door and then returned without the gun. Kareotes testified less than a week prior to the night of the shooting, she and defendant had a conversation about their son being robbed. During that conversation, defendant said he was "going to take care of it." Kareotes acknowledged she previously lied to the police about defendant's whereabouts on the night of the shooting. Kareotes was charged with obstructing justice for lying to the police but the State agreed to drop the charge in exchange for her testimony. Kareotes also acknowledged she used cocaine on the night of the shooting.

¶ 42 Anthony Chatman testified defendant and Kareotes picked him up in a vehicle and then defendant told him they were going to a drug house to make some money. Kareotes dropped Anthony and defendant off at the house on College Street. Steven Taylor answered the

door to the apartment. Defendant went inside while Anthony, who had been living out of state, and Taylor stood at the door catching up. While speaking with Taylor, Anthony observed defendant looking into the bedrooms. Anthony heard two gunshots, and then, he and Taylor ran. Anthony testified he did not see defendant with a gun. Anthony and defendant met up outside by Kareotes's vehicle and then left. Anthony testified "whoever was in that [bedroom] started shooting" and then defendant tried to shoot but his gun would not discharge. Anthony acknowledged he did not tell the prosecutor the story that shots were fired from inside the room when speaking with the prosecutor prior to trial. Anthony had previously been convicted of armed habitual criminal and was granted immunity to testify at defendant's trial.

¶ 43 Steven Taylor testified he answered the door to the apartment and spoke with Anthony while defendant went inside. Taylor heard one shot while defendant was inside the apartment and then observed defendant run out of the apartment holding a gun. Taylor went upstairs and found Johnson lying on the floor and being held by Aimee Kornewald. Kioshe McGowan was in the same room as Johnson and Kornewald. Taylor did not see a gun in the room or in McGowan's possession. Taylor did not remove anything from the apartment. Taylor testified Johnson had been behaving suspiciously on the day of the shooting, as though he was trying to hide something, and he kept looking out the windows of the apartment.

¶ 44 Jimmy Mabon testified he was in the living room of the apartment when Taylor went to answer the door. Mabon observed defendant, who he had known for almost 30 years, enter the apartment. Defendant glanced in the living room and then looked in the southwest bedroom, where Kornewald and others were present. Defendant went to the northwest bedroom, where McGowan and Johnson were present. Defendant tried to enter the bedroom but Johnson

was holding the door from the other side. Mabon observed the two men struggle over the door. Defendant pulled out a gun. Mabon heard the gun "click twice" without firing. Mabon then saw defendant "play[] with the automatic part of it and then it proceeded to fire." Defendant shot at least twice but possibly three times. Mabon did not see anyone else in the apartment fire a gun. Mabon left the apartment, taking nothing with him. Mabon testified Johnson usually carried a gun but he did not see him with a gun that evening. Mabon denied telling a detective he had heard shots from a second gun being fired. Mabon acknowledged he smoked crack the day of the shooting but asserted he stopped smoking one and a half to two hours before the shooting and was not high at the time of the shooting. Mabon had previously been convicted of theft.

¶ 45 Tammy Spears testified she was in the southwest bedroom with Aimee Kornewald and Laverta Smith when defendant glanced into the southwest bedroom and then went to the northwest bedroom. Defendant knocked on the door to the northwest bedroom, which then opened and immediately closed. Defendant "pointed [the gun], pulled it back and it was jammed." Defendant attempted to fix the gun, during which time Spears went towards the corner of the southwest bedroom. Spears then heard approximately four or five gunshots. Spears left the apartment immediately after the shooting. Spears testified she did use drugs on the night of the shooting.

¶ 46 Aimee Kornewald testified she was in the southwest bedroom with Spears and Smith. The door to the southwest bedroom was open, and Kornewald could see a man standing in front of the northwest bedroom holding a gun. She could not see the man's face. She heard the door to the northwest bedroom slam, then three or four shots, a pause, and then more shots. All of the shots came from the man in front of the door. She heard the man tell Mabon that he was

shooting because the "white boy did something to his son." Kornewald identified the voice as belonging to defendant, who she had known for 10 to 15 years. Defendant left, and Kornewald ran to Johnson and called 911. Kornewald gathered drugs off the floor of northwest room and gave them to Mabon. In the 911 call, Kornewald can be heard telling someone to "get it and go." Kornewald testified she was referring to drugs. Kornewald testified she had seen Johnson with a gun on previous occasions but she could not find Johnson's gun that night. Kornewald did not take anything from the room. Kornewald admitted to smoking crack cocaine with Spears and Smith on the day of the shooting. She also admitted to using heroin that day. Kornewald had previously been convicted of possession of a controlled substance.

¶ 47 Laverta Smith testified she was in the southwest bedroom with Kornwald and Spears when she observed a man approach first the southwest bedroom and then the northwest bedroom. The man stood in the hallway in front of the northwest bedroom. Smith heard gunshots and then left the apartment. Smith testified she had not used drugs the night of the shooting. Smith had previously been convicted of violating a bail bond, possession of a controlled substance, and mail fraud. She also had a pending trespass charge.

¶ 48 Kioshe McGowan testified he was sleeping on the floor in the northwest bedroom when he was awoken by a hit or kick at the door. Johnson, who was also in the room, jumped up, looked out the door, and then pushed his body against it to close it. McGowan heard between three and five gunshots, and then, Johnson fell backwards, saying he was hit. McGowan called for help and then left the apartment. He did not take anything with him. McGowan did not see Johnson with a gun, and no one fired a gun from within the northwest bedroom. McGowan went to the police station a couple hours later, where his hands were swabbed for gunshot residue. The

gunshot residue testing results were negative. McGowan acknowledged he consumed marijuana and alcohol on the night of the shooting. McGowan also acknowledged he wrote an affidavit in support of defendant in May 2014 after he had been arrested on an unrelated charge and placed in a jail cell with defendant. McGowan testified defendant pressured him to write the affidavit and the affidavit was not true. McGowan testified he later went on a "crisis watch" while in jail to avoid defendant. He wrote a "declaration" in April 2015 averring he wrote the affidavit under duress, which was filed with the trial court. McGowan had previously been convicted of armed robbery, possession of a weapon by a felon, and possession of a controlled substance with intent to deliver.

¶ 49 Kashawn Dillon testified he was present in the lower apartment of the house on College Street. He heard four or five gun shots and then ran to a window. He observed two men running away. Dillon testified he was in jail at the same time as defendant and wrote a false affidavit at defendant's request. Dillon had previously been convicted of predatory criminal sexual assault, failure to report a change of address on three separate occasions, and obstructing justice.

¶ 50 Dovie Brown testified she was present in the lower apartment of the house on College Street. She heard four or five gunshots coming from upstairs and then saw two men running from the house. She also saw McGowan and Mabon leaving the apartment. They were not running and did not have a gun.

¶ 51 The State played excerpts of several recorded calls from the county jail. During those calls, defendant asked his family and friends to provide drugs or money to eyewitnesses to change their stories.

¶ 52 Detective Scott Cline, a crime scene investigator, testified the door to the northwest bedroom had four defects, which were identified as bullet holes going from the outside in, at downward angles, the lowest being at door handle height. Three .380-caliber Federal cartridge cases were found in the hallway outside the door, and three projectiles were found in the room. Given the defects in the door, one cartridge case and one projectile were missing. A small defect was located at the bottom of the door, a hole so narrow a trajectory rod could not go through it. The hole was at a downwards angle. Detective Cline used a finishing nail to measure the defect. He observed no damage to the flooring in the trajectory of the hole, which went from inside the bedroom to the hallway. Detective Cline agreed the hole could be consistent with a projectile from a small caliber firearm or a nail gun. Detective Cline acknowledged currency was recovered from Johnson's pant pockets.

¶ 53 Master Sergeant Todd Hartman testified the holes on the hallway side of the door were entry points. He also testified the hole on the bedroom side of the door was smaller than that of a .22-caliber bullet. He acknowledged the hole could have been caused by a fragment of a bullet. Sergeant Hartman testified he would expect to find a defect in the floor if the hole was caused by a bullet. No defect was detected in the floor.

¶ 54 Beth Patty, a former firearms examiner, testified some guns shoot bullets smaller than .22-caliber but those guns were uncommon and tended to be collectors' items.

¶ 55 Sergeant David Pruitt testified he discovered a plastic bag in the backyard of Kareotes's house on March 12, 2013. The bag contained live .380-caliber Federal rounds. Defendant's fingerprints were found on the plastic bag.

¶ 56 Officer Troy Kretsinger testified he drafted a complaint for a search warrant for

the apartment where Johnson died. In the complaint, he alleged four shots had been fired into the bedroom and one out of the bedroom. Officer Kretsinger acknowledged he had not gone to the scene before writing the complaint and based the allegation on information he received from patrol officers, who might not have had crime scene training. Those officers also indicated only two cartridge cases were discovered in the hallway, when in fact there were three.

¶ 57 Detective Jeremy Appenzeller testified he interviewed Kornewald after the shooting. During the interview, Kornewald acknowledged she told others in the apartment to remove paraphernalia and drugs from the northwest bedroom before the police arrived. Kornewald stated Johnson did not have a gun in his possession on the night of the shooting, which she found to be concerning as he always had a gun in his possession. Kornewald indicated she believed someone had taken the gun out of the apartment as she could not find it. Kornewald stated she wanted to know where Johnson's gun was located because she knew he was dead and "the last thing I *** wanted was a dead man with a gun next to him." At one point during the interview, Kornewald made a comment suggesting a gun was lying by Johnson. Detective Appenzeller testified it was clear from the context of the entire interview Kornewald meant drugs were laying by Johnson and not his gun. Detective Appenzeller testified Kornewald told him approximately nine times Johnson did not have a gun, several of which occurred immediately after she made the statement indicating a gun was laying by him.

¶ 58 Detective Appenzeller testified he conducted a photographic line up with Kornewald and Spears. Kornewald said she did not see the shooter's face but pointed to defendant's picture as the shooter she heard in the hallway and indicated she was "97 percent" sure it was defendant's voice she heard. Spears identified defendant as the shooter.

¶ 59 Detective Adam Jahraus testified he interviewed Mabon, Taylor, and Anthony after the shooting. During the interviews, (1) Mabon indicated he thought he heard one or two shots coming from inside the room after defendant cleared the jam in his gun and fired shots through the door, (2) Taylor said he heard between three and five shots, and (3) Anthony indicated he saw defendant with a gun at the apartment and acknowledged he was aware Johnson had robbed defendant's son prior to the shooting.

¶ 60 Detective Jahraus testified he filled out a crime lab request form to have certain items tested for gunshot residue on April 18, 2016, and the request would have gone out the following Thursday to the Illinois State Police Crime lab in Springfield. He turned over $422 discovered in Johnson's possession to Johnson's father without having the currency tested for gunshot residue.

¶ 61 Detective Barry Hitchens testified he interviewed defendant after the shooting. During the interview, defendant denied any involvement with the shooting and stated he had never owned or fired a gun in his life, he was at home on the night of the shooting, he had not seen his brother since 2010, and no one in his family had recently been a victim of a crime.

¶ 62 Amanda Youmans, a forensic pathologist, performed an autopsy on Johnson. No bullets or bullet fragments were discovered in Johnson's body. Johnson was hit with a single bullet. The bullet entered the right side of the torso, went through the right side of the rib cage, perforated the liver, the diaphragm, the heart, the left lung, and then exited the left side of the chest. The bullet's direction of travel was "right to left, upward, and back to front." Johnson's clothing, his fingernail clippings, and the brown paper bags that were wrapped around his hands were given to the police. Youmans testified the purpose of wrapping the hands with the brown

paper bags was to "prevent any loss of trace evidence that may or may not be on the hands," such as gunshot residue.

¶ 63 Scott Rochowicz, a forensic scientist with the Illinois State Police crime lab in Chicago, testified about testing for gunshot residue, including the analysis and possible results. The presence of gunshot residue "indicates that either a person or an object was in the environment of a discharged firearm." The presence of gunshot residue on a person or object can result from direct exposure, discharging a firearm where the gunshot residue is blown on to the person or object, or from indirect exposure, where the gunshot residue is emitted into the environment and then cools and settles by gravity on to the person or object. The analysis of a gunshot residue test can result in three possible conclusions: positive, inconclusive, or negative. Rochowicz testified, in August 2016, he received Johnson's sweatshirt and the brown paper bags used to cover Johnson's hands. A few weeks after receiving the items, Rochowicz examined and analyzed Johnson's sweatshirt, which resulted in a negative conclusion. Rochowicz testified he did not examine or analyze the brown paper bags as it was "not our procedure to examine brown paper bags used to cover hands for the presence of gunshot residue." He explained:

> "[O]nce you cover a person's hands with a brown paper bag to be examined later on for gunshot residue, you have to remember that once [gunshot residue] is deposited on your hands, it's the activity that's done with those hands which would remove it. So once a person's hands are in brown paper bags, the hands are constantly in contact with the brown paper bags which removes the gunshot residue and then because the brown paper bags cannot be sealed

> properly, [gunshot residue] can escape, and you can also have potential [gunshot residue] coming into these brown paper bags also."

Rochowicz also testified the lab recommended only the outermost layer of clothing be tested and analyzed for gunshot residue.

¶ 64 During the cross-examination of Rochowicz, defense counsel asked Rochowicz if he would have tested the brown paper bags and additional pieces of clothing if he received a court order to do so. The State objected, and a discussion occurred between the parties and the trial court. Defense counsel acknowledged Rochowicz did not receive a court order to complete testing on the items but asserted the State was required to have the items tested based on the April 2016 order. The State acknowledged the April 2016 order but asserted it and defense counsel had later correspondences concerning which items were to be tested given the fact all items could not be tested by the scheduled trial date. Defense counsel asserted, "It was my understanding that when the trial date got moved from August 26 or 29 to September 26 that we would have all of the [gunshot residue] testing back." Counsel also, in summarizing the pretrial proceedings, stated:

> "[W]hen we went into court, [defendant] indicated he did not want to be deprived of his right to counsel of choice. He did not want to wait for the [gunshot residue] test results to come back, however, the order stayed in place. If we went to trial, and the items were submitted for testing, that he would then be given the opportunity to have the benefit of potentially exculpatory evidence."

The court, in effect, sustained the State's objection. In doing so, the court noted the record was unclear as to whether the State violated the April 2016 order but suggested, in the event of a conviction, defense counsel raise the issue in a posttrial motion.

¶ 65 Defendant testified he and Anthony went to the apartment so Anthony could sell drugs. Upon arriving, defendant went inside but Taylor prevented Anthony from doing so. Mabon asked defendant for some liquor that defendant was carrying, and then, defendant and Mabon went to the kitchen to get a cup. Johnson walked into the kitchen and told Mabon he was "running this shit," which defendant believed meant Johnson had paid Taylor to be the only one selling drugs in the apartment and defendant was not allowed to do so. Mabon "waived [Johnson] off with his hand." Johnson "got loud" to Mabon, saying, "Oh, you think this is a motherfucking game, n—." Johnson said he was "on the C," which defendant believed meant Johnson was part of a gang. Johnson told defendant, "I'll light this bitch up and light your ass up with it." At that point, Johnson was in the doorway to the northwest bedroom and defendant was standing in front of Mabon across from Johnson near the living room. Johnson pointed a revolver at defendant and Mabon and fired a shot. Defendant then took out his gun and started shooting, and Johnson "kicked or pushed the door." Johnson shot again. Defendant testified "by that time I had hit four holes in the door." Defendant thought Johnson was trying to kill him. Defendant tried to shoot again but his gun jammed. Johnson fired again, and defendant ran away. Defendant testified he heard two shots other than his own but had seen only the first of the shots fired. Defendant threw the gun out of the car window after the shooting. Defendant testified he did not believe Johnson had robbed his son and he did not make a statement to anyone suggesting he shot the person who robbed his son. Defendant asserted he lied to the police during his interview

because he was scared and the police did not say anything about finding a gun. Defendant testified he was trying to get the eyewitnesses to tell the truth in the calls recorded from the jail. Defendant asserted he always kept ammunition under a piece of wood outside Maleea's house.

¶ 66 Prior to closing arguments, defense counsel moved to have all of the physical evidence found in the apartment suppressed due to the State's failure to (1) preserve the cash found in Johnson's pocket and (2) have all the items in the agreed order tested for gunshot residue. As to the second basis, counsel asserted defendant made the decision to go to trial with or without the results from the gunshot residue tests not knowing the State had not sent any items to the lab until August and that many of the requested items were not sent at all. Counsel argued the State's failure to submit the items for testing earlier violated defendant's "substantive due process rights" by preventing him from having "potentially exculpatory evidence tested which would allow him to present a more effective affirmative defense of self-defense." In so arguing, counsel acknowledged he reviewed a September 1, 2016, discovery report with defendant and they observed the brown bags were not tested but asserted they did not know the other items were not sent to the crime lab.

¶ 67 In response, the State argued (1) the currency found in Johnson's pocket was immaterial to the issues at trial and (2) it timely commenced the process to have all the items discussed in the agreed order to be tested for gunshot residue but then defense counsel elected to pursue an earlier trial date and agreed to only certain items being tested. As to the second basis, the State noted defense counsel was aware the lab indicated the two most likely items to have gunshot residue were Johnson's sweatshirt and the brown paper bags and then learned on September 1, 2016, only Johnson's shirt was tested for gunshot residue. The State asserted

defense counsel could not complain his client's rights were violated where he decided to proceed to trial knowing the additional items had not been tested. The State argued: "He can't now stand here and claim that his client's constitutional rights were deprived when he's the one that agreed to it and had this trial been set for October 31st, we would have all the items he wanted tested complete, but he's going to be on vacation, that's not the State's problem."

¶ 68 The trial court denied defendant's motion. The court noted Rochowicz's testimony indicating the limited evidentiary value of (1) the brown bags, which were not subject to being sealed; (2) the T-shirt and long-sleeved T-shirt, which were under Johnson's sweatshirt; and (3) the currency, which was inside Johnson's pocket. The court also noted, "And I think there's pretty much been an acquiesce to the property not being tested in exchange for getting the case to trial."

¶ 69 Following closing arguments, the trial court found the evidence did not support self-defense and found defendant guilty of the charged offenses.

¶ 70 O. Motion for a New Trial

¶ 71 In October 2016, defendant filed a motion for a new trial, arguing, in part, his "right to present evidence in his defense was violated by the State's delayed submission of evidence of forensic testing." Specifically, defendant complained the State did not submit the items for gunshot residue testing until almost three months after the agreed order was entered.

¶ 72 The State filed a response to defendant's motion for a new trial. In part, the State asserted it promptly requested the police department to send the requested items to be tested for gunshot residue and the police department sent the items to the crime lab four days after the agreed order was entered. The State also asserted defense counsel was aware only two items

were submitted for testing and only one of those items was tested when he demanded to proceed to trial and it was "disingenuous" for counsel "to now claim his client's right to present evidence in his defense was violated when the defense knowingly demanded to proceed to trial prior to the completion of testing to accommodate defense counsel's vacation schedule."

¶ 73 P. November 2016 Hearing

¶ 74 At a November 2016 hearing, the trial court denied the motion for a new trial and then sentenced defendant to two consecutive terms of imprisonment: 60 years' imprisonment for first degree murder plus a 25-year firearm enhancement and 2 years' imprisonment for unlawful possession of a weapon by a felon. Defendant filed a motion to reconsider his sentence, which the court later denied.

¶ 75 This appeal followed.

¶ 76 II. ANALYSIS

¶ 77 On appeal, defendant argues his trial counsel provided ineffective assistance by proceeding to trial without investigating all possible exculpatory evidence. Specifically, defendant contends trial counsel's decision to rush to trial without investigating into whether key physical evidence existed to support a self-defense theory was objectively unreasonable and that deficient performance resulted in prejudice as he went to trial without knowing whether there was physical evidence to corroborate his claim he acted in self-defense. Defendant asserts counsel should have delayed trial to obtain gunshot residue testing for all of the items discussed in the agreed order and the only reason counsel failed to do so was because his personal concern with the upcoming election.

¶ 78 The State contends defendant's claim should be barred under the doctrine of invited error as the record makes clear the decision not to wait for test results on all of the items discussed in the agreed order was made by defendant and defendant's counsel simply acceded to defendant's wishes and instructions. Alternatively, the State contends the decision to proceed to trial without first obtaining testing of the additional items was a matter of reasonable trial strategy given the likelihood the results would come back negative and the fact waiting for those results would force defendant to wait even longer for a trial and, even if the decision was unreasonable, defendant did not suffer any prejudice as any potential value of additional testing was limited in light of the overwhelming evidence showing defendant did not act in self-defense.

¶ 79 Claims of ineffective assistance of counsel are evaluated under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192. "[A] defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must demonstrate his counsel's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004). To establish prejudice, the defendant must demonstrate "that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 229 Ill. 2d 1, 4, 890 N.E.2d 424, 426 (2008). "When a claim of ineffective assistance of counsel was not raised at the trial court, this court's review is *de novo*." *People v. Sturgeon*, 2019 IL App (4th) 170035, ¶ 85.

¶ 80 As an initial matter, the State suggests, relying primarily on *People v. Velez*, 388 Ill. App. 3d 493, 903 N.E.2d 43 (2009), defendant's claim of ineffective assistance should be barred under the doctrine of invited error as the record makes clear the decision not to wait for test results on all of the items discussed in the agreed order was made by defendant and defendant's counsel simply acceded to defendant's wishes and instructions. Defendant disagrees, contending *Velez* is distinguishable as he was not told by the trial court his personal acquiescence to a decision that belonged to counsel alone—the decision whether to seek a continuance—would bar him from ever being able to litigate the issue again and, to the degree it is not distinguishable, it was wrongly decided as the doctrine of invited error is not a bar to review a claim of ineffective assistance of counsel.

¶ 81 In *Velez*, the defendant argued his trial counsel provided ineffective assistance by abandoning a motion to suppress that counsel had previously filed. *Id.* at 502. The State asserted review of the defendant's claim was barred under the doctrine of invited error as counsel withdrew the challenged motion "and [the] defendant, after being admonished, expressly agreed with its withdrawal." *Id.* at 503. The court noted the record revealed (1) "the [trial] court was careful to explicitly admonish [the] defendant that withdrawal of the motion would bar it from ever being litigated, then or in the future" and (2) the "defendant assured the court that he wished to withdraw the motion based on his own free will." *Id.* Based on its review of the record, the court found the defendant "unequivocally knew the consequences of the request to withdraw the motion and agreed nonetheless." *Id.* at 504. As such, the court agreed with the State and held the doctrine of invited error barred review of the defendant's claim. *Id.* at 503-04. Nonetheless, the

court proceeded to review the merits of the defendant's claim as "waiver" was "a limitation on the parties and not the court ***." *Id.* at 504.

¶ 82 Without deciding whether *Velez* was correctly decided and the doctrine of invited error could serve as a bar to review a claim of ineffective assistance of counsel, the facts of this case are distinguishable from those presented in *Velez*. Unlike *Velez*, the record in this case fails to show defendant clearly understood the implications of insisting on going to trial without first obtaining gunshot residue testing on all of the items discussed in the agreed order. We decline to hold defendant is barred from pursuing his claim of ineffective assistance under the doctrine of invited error.

¶ 83 Turning to the merits, we find it would be premature to address defendant's claim of ineffective assistance based on the record presented. See *People v. Veach*, 2017 IL 120649, ¶ 46, 89 N.E.3d 366 ("[I]neffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is incomplete or inadequate for resolving the claim."). Specifically, we find the record is inadequate to determine whether additional gunshot residue testing would have had an impact on the outcome of the proceedings below.

¶ 84 Again, to establish prejudice defendant must demonstrate "that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." *Houston*, 229 Ill. 2d at 4. Defendant contends, had the additional items discussed in the agreed order tested positive for gunshot residue, there would have been a "better than negligible" chance he would have been acquitted based on reasonable self-defense. Defendant also contends, had the additional items tested negative for gunshot residue, the outcome still might have been different as counsel would have had sufficient information to

adjust his strategy to argue unreasonable self-defense, which could have resulted in a second degree murder conviction. We note defendant does not address what the impact would have been had the items tested inconclusive or had varying test results. As the State highlights throughout its brief on appeal, defendant's claim is entirely speculative based on the record presented. Defendant's claim is premised upon unknown test results. At this time, any decision as to whether the results of any testing would have had an impact on the outcome of the proceedings below would require conjecture and be advisory in nature. See *People v. Scott*, 2011 IL App (1st) 100122, ¶¶ 30-32, 958 N.E.2d 1046 (finding any opinion as to whether the defendant could establish he was prejudiced by his counsel's failure to pursue possible exculpatory deoxyribonucleic acid testing would be advisory as no testing had been performed). We decline to render such a decision.

¶ 85 Defendant briefly requests, without any supporting authority, we order gunshot residue testing on the additional items. We decline defendant's request. Established statutory avenues already exist where defendant can pursue his claim and seek additional testing to develop the record. In fact, in all of the cases defendant cites on appeal, the claims of ineffective assistance were raised in a collateral petition where the nature of the relevant evidence was determined prior to an evidentiary hearing. See *Hinton v. Alabama*, 571 U.S. 263, 270 (2014); *People v. Sutherland*, 194 Ill. 2d 289, 296-97, 742 N.E.2d 306, 310-11 (2000); *People v. Davis*, 203 Ill. App. 3d 129, 136-37, 560 N.E.2d 1072, 1076-77 (1990).

¶ 86 Because defendant has not identified any other claim of error for this court to review, we affirm the trial court's judgment.

¶ 87 III. CONCLUSION

¶ 88 We affirm the trial court's judgment. We award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 89 Affirmed.