SECOND DIVISION
MARCH 31, 2011

1-09-2415

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 88 CR 2755
	)	
FRANCISCO SANDOVAL,	)	Honorable
	)	Timothy Joyce,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

Held: Defense counsel did not provide ineffective assistance of counsel by not filing a motion to suppress evidence of a police line-up identification of the defendant; by not objecting to a witness' in-court identification of the defendant; and in presenting the theory of defense at trial. The mittimus should be corrected to reflect an additional 160 days of pre-sentencing credit for time served in custody.

Following a jury trial in the circuit court of Cook County, the defendant, Francisco Sandoval, was convicted of murder and aggravated battery. Subsequently, he was sentenced to 35 years of imprisonment. On appeal, the defendant argues that: (1) defense counsel provided ineffective assistance of counsel because he failed to file a motion to suppress a witness' police line-up identification evidence, he failed to object to the same witness' in-court identification of the

defendant, and failed to present a credible defense to the jury; and (2) the defendant was entitled to an additional 177 days of sentencing credit for time served in pre-sentence custody. For the following reasons, we affirm the judgment of the circuit court of Cook County but correct the mittimus to reflect pre-sentence credit due to the defendant.

BACKGROUND

In 1977, the defendant was involved in an altercation with Armando Ruiz (Ruiz) at a church dance in Chicago, Illinois. On September 6, 1978, the defendant shot Ruiz and another victim, Elizabeth Banda-Dammar (Elizabeth), on the corner of 16th Street and Union Avenue in Chicago. Ruiz died and Elizabeth was hospitalized with multiple gunshot wounds. Shortly after the shooting, Elizabeth positively identified the defendant in a police photograph as the shooter.

Ten years later, in February 1988, the defendant was arrested in California and extradited to Chicago. At a police station in Chicago, the defendant was interviewed by the police and an Assistant State's Attorney, during which the defendant made an inculpatory statement indicating that he was involved in the shooting. Elizabeth also positively identified the defendant in a police line-up. On February 24, 1988, the defendant was charged with multiple counts of murder, armed violence and aggravated battery. On March 4, 1988, the defendant posted bail and was released on bond. The defendant then appeared on a few subsequent court dates, but failed to appear in court on September 14, 1988. Thereafter, a warrant was issued for the defendant's arrest.

On January 11, 2006, the defendant was re-arrested in California and brought back to Chicago. On April 6, 2006, the circuit court granted Joe Lopez, a private attorney, leave to file an appearance to represent the defendant and also granted the public defender leave to withdraw.

On September 20, 2006, the defendant filed a motion to suppress his inculpatory statement to the police (motion to suppress statement), arguing, *inter alia*, that the statement he made was "not voluntary and was the result of mental and/or physical coercion, duress, and threats made by the Chicago Police Officers," that the police officers "made false promises to the defendant and therefore the statement was obtained by trick, promises, and false pretenses," and that he "did not adequately, voluntarily and knowingly waive his right to counsel." On October 4, 2006, the original date set for a hearing on the motion to suppress statement, the parties informed the trial court that they could not proceed with arguing the motion because the State had tendered additional discovery to the defendant that day and certain discovery items had yet to be provided to the defendant. The State further informed the trial court that the defendant's motion to suppress statement was "not very specific in the allegations" and that defense counsel had agreed to amend it.

Following the completion of discovery, on June 29, 2007, defense counsel informed the trial court that he was unable to amend the motion to suppress statement with more specificity because the defendant could not recall the names of the individuals involved in obtaining his inculpatory statement.

On November 5, 2007, a hearing on the motion to suppress statement was held[1] during which a Spanish interpreter was present. Defense counsel argued that the defendant's inculpatory statement was involuntarily made as a result of assertions made by the police that "if he cooperated that no

[1]The hearing on the motion to suppress began on November 5, 2007, but was held over the course of two other dates–January 23, 2008 and April 29, 2008–because the matter was continued several times.

charges would be filed because it was self[-]defense," and that the defendant could not have waived his constitutional rights "because nobody told him in Spanish what his rights were and he doesn't speak English well enough to understand." At the hearing, both the State and defense counsel presented the testimony of several witnesses. Judy Mondello (Mondello) testified on behalf of the State that she was an Assistant State's Attorney in February 1988. On February 12, 1988, at approximately 11p.m., Mondello, along with Detective Steve Peterson (Detective Peterson), interviewed the defendant at a police station in Chicago. Mondello testified that she *Mirandized* the defendant, and that the defendant chose to speak with her. Mondello then spoke with the defendant in English, who responded to her questions in English. The conversation lasted approximately 10 to 20 minutes. At the end of her conversation with the defendant, Detective Peterson left the interview room and Mondello questioned the defendant alone about his treatment by the police while in custody. The defendant informed Mondello that he had been treated well, that he had been given water, and that he was neither threatened by the police nor promised anything in exchange for his inculpatory statement. After Detective Peterson returned, the defendant chose to memorialize his inculpatory statement. Mondello then prepared a handwritten statement relating to the events of the shooting as described by the defendant. The handwritten statement contained the *Miranda* rights, which the defendant read aloud in English and signed to indicate his understanding of it. Mondello stated that she, the defendant and Detective Peterson "went word for word through the statement," and that the defendant initialed next to any changes that were made. Mondello, Detective Peterson and the defendant signed each page of the statement. Mondello further testified that during her interview with the defendant, the defendant never spoke Spanish to her and that she had no problems

communicating with him. Neither she nor Detective Peterson informed the defendant that "if he cooperated he would not be charged [with the crime] because it was self[-]defense." During the interview, the defendant did not ask to have an attorney present nor did he ask for an interpreter.

Detective[2] Peterson testified at the hearing that in February 1988, he and his partner, Detective Tom Sherry (Detective Sherry), traveled to California to extradite the defendant, who was in custody at the Los Angeles County Jail. Detective Peterson testified that the defendant spoke English during their plane trip back to Chicago, and did not appear to have any problems understanding Detective Peterson. However, Detective Peterson refrained from speaking to the defendant about the shooting while in California or en route to Chicago. Upon their arrival back in Chicago, the defendant was taken to a police station where he was placed in an interview room. Detective Peterson then advised the defendant of his *Miranda* rights in English, to which the defendant indicated that he understood those warnings and informed Detective Peterson that he wanted to talk about the events of the 1978 shooting. The defendant spoke English to Detective Peterson during the conversation. Detective Peterson testified that once Mondello arrived, she conversed with the defendant "a little bit" in both English and Spanish, but that she *Mirandized* the defendant in English. The defendant then informed Mondello that he understood the *Miranda* warnings and indicated that he wished to discuss the details of the 1978 homicide. The entirety of the defendant's conversation with Mondello lasted approximately 15 to 20 minutes, after which

[2]At the time of the hearing on the motion to suppress statement, Detective Peterson was the "Commander of the Area 4 Detectives." For consistency, we address him as Detective Peterson.

Detective Peterson left the interview room for a few minutes. Once Detective Peterson returned to the interview room, Mondello made a "handwritten reduction of the statement that the [d]efendant had made," which was consistent with the details of Detective Peterson's earlier conversation with the defendant. The inculpatory statement was then read aloud and signed by the defendant, Mondello and Detective Peterson. Detective Peterson denied threatening the defendant in any way in exchange for his inculpatory statement, nor did he tell the defendant that he would not be charged for the crime because he acted in self-defense. On cross-examination, Detective Peterson stated that he did not offer the defendant "to have somebody read him the [*Miranda*] rights in English."

The defendant testified, through a Spanish interpreter, that he was 57 years old, had only a third grade education and that he only knew "some words" in English but could not read in English. At the hearing, defense counsel showed the defendant a copy of his inculpatory statement to the police, and the defendant testified that he could not read what was written. Although he understood "a little more English" at the time of the hearing than he did in 1988, the defendant testified that he could only understand a few words in the inculpatory statement. He stated that in February 1988, he was interviewed by a police officer who spoke primarily in English to him. The defendant testified that he only signed the inculpatory statement because the police officer informed him that he "would go home." On cross-examination, the defendant denied being advised of his *Miranda* rights in 1988, but admitted that nobody informed him that he would not be charged for the offense if he cooperated with the police.

Lydia Lachugo (Lydia) testified for the defense at the hearing that she had known the defendant since 1974 and that her husband was the defendant's cousin. She stated that the defendant

only spoke Spanish to her and her family, and that she had never heard the defendant speak in English.

Ruben Sandoval (Ruben) also testified for the defense at the hearing that he had known the defendant for his entire life. Ruben testified that the defendant could not understand English in 1988, and that Ruben "used to order [the defendant's] food" when they dined out because the defendant did not speak English, with the exception of a few words such as "water" or "coffee."

Subsequently, the trial court denied the defendant's motion to suppress statement.

On May 27, 2009, a jury trial began during which several witnesses testified. Elizabeth testified that she was 18 years old when she was injured in the 1978 shooting. The State then engaged in the following exchange with Elizabeth:

> " [THE STATE]: Now, Elizabeth, I want you to look all the way to the left as you are facing. Do you see the person all the way to the left there?
>
> A: Yes, I do.
>
> Q: Do you recognize him?
>
> A: Yes, I do.
>
> Q: Can you please name something that he is wearing so we can know who you are referring to [?]
>
> A: He's got like – what is it – like an orange or peach shirt. Brown, light brown suit.
>
> Q: How are his hands?

A: They are on top of the other.

Q: For the record, Judge, an in[-]court identification of the defendant.

[THE COURT]: The record will so indicate."

Elizabeth then testified that she had first seen the defendant in 1977 at a church dance when he engaged in an altercation with members of her family, including her cousin, Ruiz. After the altercation in 1977, Elizabeth did not see the defendant again until the evening of September 6, 1978. On that night, Elizabeth was talking to Ruiz on the corner of 16th Street and Union Avenue, when she noticed a car, driven by the defendant, traveling slowly past them on 16th Street from a distance of approximately 10 or 20 feet away. The record indicates that at this point in the trial, Elizabeth pointed at the defendant again. Elizabeth testified that as the defendant drove by, she maintained eye contact with the defendant for about 10 to 20 seconds. Elizabeth then observed the car turn a corner onto Union Avenue and circle the block. The defendant's car then slowly traveled past Elizabeth and Ruiz a second time, during which Elizabeth again maintained eye contact with the defendant for approximately 20 seconds. Elizabeth then noticed that the defendant "looked like he was parking at the corner," and that she and Ruiz "decided to walk away from the corner and start walking west." As they looked back, Elizabeth observed the defendant standing at the street corner at approximately 30 to 45 feet away, and that he then pointed a gun at them and started shooting. Elizabeth testified that she was shot six times and that she fell on Ruiz, who was also shot. Elizabeth stated that the lighting conditions were "good" on the night of the shooting. Elizabeth further testified that on February 12, 1988, she viewed a police line-up during which she positively

identified the defendant as the shooter. She noted that she had not seen the defendant between the 1978 shooting and the police line-up in 1988.

On cross-examination, Elizabeth testified that during her hospitalization following the shooting, police officers came to interview her and that she identified the shooter in a photograph. She had noted to the police officers that the shooter's hair was "longer than was [shown] in the photograph."

Both Mondello and Detective Peterson testified similarly at trial as they did at the hearing on the motion to suppress statement. Mondello testified that in February 1988, while the defendant was in police custody, she "advised him of his *Miranda* [rights] to make sure that he understood that [she] was not his attorney and that he had the right to remain silent, and after each right [she] asked him whether or not he understood and he said yes." Mondello stated that after being advised of his *Miranda* rights in English, the defendant informed her that he wanted to make a statement regarding the shooting death of Ruiz. Mondello testified that the defendant conversed with her in English, and that he made an inculpatory statement regarding his involvement in the shooting. At trial, the entirety of the defendant's inculpatory statement was read into evidence by Mondello. On cross-examination, Mondello stated that during her 1988 interview of the defendant, she did not ask the defendant whether he understood the words "constitutional" or "State's Attorney."

Detective Peterson testified that on February 12, 1988, after the defendant gave an inculpatory statement regarding his involvement in the shooting, Detective Peterson conducted a physical line-up during which Elizabeth positively identified the defendant as the shooter. Detective Peterson noted that the defendant was given a choice as to what position to stand in during the police

line-up.

Cornelia Tensley (Tensley) testified on behalf of the State that she was a manager for the Clerk of the Circuit Court. She stated that according to court documents, the defendant posted bail on March 4, 1988. However, the defendant failed to appear in court on September 14, 1988, and did not reappear in court until January 13, 2006 following his second arrest.

The parties then stipulated that if called to testify, Officer Thompson would testify that he "recovered five .45 caliber cartridge cases from the sidewalk, street, and immediate vicinity at 709 West 16th Street," that he recovered "two .45 caliber bullets from the sidewalk at 709 West 16th Street," but that there were no fingerprint impressions suitable for comparison. The parties further stipulated that Dr. Konakci, if called to testify, would state that he performed the autopsy of Ruiz's body and that based on a reasonable degree of medical certainty, Ruiz suffered multiple gunshot wounds "penetrating the brain, the neck, the pulmonary artery, the heart, the left lung, and spleen."

After the State rested, the trial court denied the defendant's motion for a directed verdict.

The defense then presented the testimony of Lydia, whose testimony paralleled her testimony at the hearing on the motion to suppress statement. The defendant elected not to testify at trial.

Following the witnesses' testimony, a jury instruction conference was held outside the presence of the jury. The trial court denied defense counsel's proposed jury instructions on "voluntary manslaughter," holding that evidence did not support the giving of those instructions. Defense counsel then stated, "Judge, then we're going to ask for a mistrial because we have no defense without that instruction." The trial court then denied defense counsel's request for a mistrial.

Subsequently, the jury convicted the defendant of murder and aggravated battery. The

defendant's motion for judgment notwithstanding the verdict was denied. On August 7, 2009, the trial court sentenced the defendant to 35 years of imprisonment for murder and a concurrent 5-year sentence for aggravated battery, with 1144 days of credit for time served in pre-sentence custody.

On August 21, 2009, the defendant filed a notice of appeal before this court.

ANALYSIS

We determine the following issues: (1) whether defense counsel provided ineffective assistance of counsel to the defendant; and (2) whether the defendant was entitled to an additional 177 days of sentencing credit for time served in pre-sentence custody.

We first determine whether defense counsel provided ineffective assistance of counsel to the defendant.

The defendant argues that he received ineffective assistance of counsel because defense counsel failed to file a motion to suppress Elizabeth's police line-up identification evidence, failed to object to Elizabeth's in-court identification of the defendant, and failed to present a credible defense to the jury. Specifically, he contends that had defense counsel filed a motion to suppress Elizabeth's police line-up identification evidence, it would have had a reasonable probability of being granted. Further, he maintains that defense counsel was ineffective for failing to object to Elizabeth's in-court identification of the defendant because the State asked improper leading questions. The defendant also contends that defense counsel was ineffective because he "hinged his entire defense on the giving of voluntary manslaughter jury instructions."

The State counters that the defendant was not denied the effective assistance of counsel because there was no reasonable probability that a motion to suppress Elizabeth's police line-up

identification of the defendant on the basis that it was "unduly suggestive" would have been granted. Further, the State argues that defense counsel was not ineffective for failing to object to Elizabeth's in-court identification of the defendant because Elizabeth clearly recognized and identified the defendant twice in court. Moreover, the State maintains that what the defendant now claims should have been argued by defense counsel at trial was actually "largely presented to the jury" by defense counsel.

To prevail on a claim of ineffective assistance of counsel, the defendant: (1) must prove that the attorney's performance fell below an objective standard of reasonableness so as to deprive him of the right to counsel under the sixth amendment (performance prong); and (2) that this substandard performance resulted in prejudice (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687-94, 104 S. Ct. 2052, 2064-68 (1984). To prove prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. King*, 316 Ill. App. 3d 901, 913, 738 N.E.2d 556, 566 (2000). A reasonable probability is one that sufficiently undermines confidence in the outcome. *Id.*, 738 N.E.2d at 566. The defendant must satisfy both prongs to prevail on his claim of ineffective assistance of counsel. However, a reviewing court may analyze the facts of the case under either prong first, and, if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30, 882 N.E.2d 1124, 1136-37 (2008). In addition, in order to prevail on a claim that defense counsel failed to pursue a motion to suppress evidence of Elizabeth's police line-up identification, the defendant "bears the burden of showing that the motion would have been granted" and that "the trial outcome would have been different if the

evidence had been suppressed." *People v. Kelley*, 304 Ill. App. 3d 628, 636, 710 N.E.2d 163, 170 (1999).

Initially, we note that the defendant argues tangentially that defense counsel's "neglect" of the case was "obvious from a review of the record," arguing that the defendant's September 20, 2006 motion to suppress statement was "boilerplate," and citing several court dates during the pre-trial stages of the proceedings at which defense counsel requested a continuance of the case, failed to appear or was allegedly unprepared. We find these considerations to be irrelevant to the inquiry before us–which is to determine whether defense counsel was ineffective for not filing a motion to suppress evidence of Elizabeth's police line-up identification, for not objecting to Elizabeth's in-court identification of the defendant and whether defense counsel was ineffective in the manner in which he presented the theory of defense to the jury. Nonetheless, based on our review of the record, we find that on June 29, 2007, following the completion of discovery, defense counsel informed the trial court that he was unable to amend the motion to suppress statement with more specificity because the defendant could not recall the names of the individuals involved in obtaining his inculpatory statement. Further, as the State correctly points out, the record reveals that on some of the court dates of which the defendant now complains, co-counsel appeared on behalf of the defendant when defense counsel could not. Moreover, the defendant failed to describe any specific facts relating to the assertion that defense counsel appeared at these court hearings unprepared. Thus, we find no merit to the defendant's irrelevant and tangential arguments.

Turning to the issues at hand, we examine whether defense counsel was ineffective for not filing a motion to suppress evidence (motion to suppress evidence) of Elizabeth's police line-up

identification of the defendant.

The defendant specifically argues that the February 12, 1988 police line-up viewed by Elizabeth was "impermissibly suggestive," because the defendant appeared "significantly older than the other three men" in the line-up, the "dark bruises" visible on the insides of the defendant's arms suggested heroin abuse, and the defendant was "only one of only two men [in the police line-up] wearing short sleeves drawing further attention to the marks on his arms."

Participants in a police line-up "need not be physically identical." *Id.* at 637-38, 710 N.E.2d at 171. "Rather, differences in the appearance of [the] defendant and other line[-]up participants go to the weight of the evidence, not its admissibility." *Id.* at 638, 710 N.E.2d at 171.

In the case at bar, a photographic representation of the February 12, 1988 police line-up was presented at trial. The police line-up shows that four men, including the defendant, participated in the police line-up. Based on our review of the record, the four participants in the police-up all had generally similar physical features, and were all similar in height and bore similar facial hair and hair color. Any age differences among the four men were not so distinctive as to render the police line-up unduly suggestive. As the defendant points out, the police line-up also reveals that the defendant was 1 of 2 men who wore a short-sleeved shirt. However, we note that a third participant, who was wearing a long-sleeved shirt, had the sleeves "pushed up" in a way that also exposed his arms. We find nothing about the defendant's attire in the police line-up that would be unduly suggestive to Elizabeth in identifying the defendant. The defendant further contends that "dark bruises," which were visible on the insides of his arms during the police line-up, improperly implied that he was a heroin user. We reject such a speculative argument because there is nothing in the record to show

that Elizabeth positively identified him in the police line-up on the basis that she knew the shooter to have been a heroin user or that she concluded that heroin users were more capable of the crime in question. Rather, an "investigative report" of the defendant in the record shows that the "dark bruises" on the insides of his arms were actually tattoos. Moreover, we find *People v. Brinson*, a case cited by the defendant in support of his arguments, to be distinguishable from the instant case, where the *Brinson* witness never made a positive identification, and the photographic line-up in *Brinson* was tainted by a distinctive marking over the defendant's photograph and a discernible portion of the defendant's name on the photograph. *People v. Brinson*, 80 Ill. App. 3d 388, 392, 399 N.E.2d 1010, 1013 (1980). Thus, we find that the police line-up in this case was not "impermissibly suggestive" and that the defendant has failed to bear the burden of showing that the motion would have been granted.

We also find that the defendant failed to show that the trial outcome would have been different if the evidence had been suppressed, in light of the fact that the defendant made an inculpatory statement to the police about his involvement in the shooting, and in light of the fact that Elizabeth, during her 1978 hospitalization following the shooting, had made a positive identification of the defendant as the perpetrator. Therefore, we hold that defense counsel was not ineffective for not filing a motion to suppress evidence that had no reasonable probability of success and the outcome of the trial would not have been different had Elizabeth's identification of the defendant in the police line-up been suppressed.

Likewise, we hold that the defendant has failed to satisfy the *Strickland* standard in arguing that defense counsel was ineffective for failing to object to Elizabeth's in-court identification of the

defendant. At trial, Elizabeth stated unequivocally that she recognized the defendant. The record also shows that after the initial in-court identification, later in the trial, she again identified the defendant as the shooter.

The defendant now argues that there was no independent basis for Elizabeth's identification of the defendant because the State, at trial, posed leading questions to Elizabeth before she stated that she recognized the defendant. Thus, the defendant argues, this "in-court identification" amounted to "nothing more than the State pointing out a particular person in the courtroom to [Elizabeth] and then confirming that they were both looking at the same individual." The defendant maintains that even if Elizabeth *had* made an in-court identification, it would not have had a sufficient indicia of reliability to sustain the admission of her police line-up identification. We disagree.

"A single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *People v. Slim*, 127 Ill. 2d 302, 307, 537 N.E.2d 317, 319 (1989). Factors used in evaluating the reliability of a witness' identification include: "(1) the opportunity the victim had to view the criminal act at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Id.*, 537 N.E.2d at 319.

We find that Elizabeth's identification of the defendant was reliable. Elizabeth had ample opportunity to view the defendant at the time of the shooting, when she observed the defendant standing approximately 30 to 45 feet away and pointing a gun at Ruiz and her. Minutes prior to the

shooting, Elizabeth observed the defendant's car traveling past the location where she and Ruiz stood, and noticed that the car began circling the block. Elizabeth specifically testified that she maintained eye contact with the defendant each time he drove past them. Thus, Elizabeth's degree of attention at the time of the crime was high. Further, Elizabeth identified the defendant in a police photograph during her hospital stay shortly after the shooting, and even noted to the police officers that the shooter's hair was "longer than was [shown] in the photograph." During the 1978 photograph identification and the 1988 police line-up identification, Elizabeth positively identified the defendant as the shooter and did not express any doubt as to his identity. While the length of time between the 1978 shooting and the 1988 police line-up identification was long, we find that, as discussed, Elizabeth had identified the defendant as the shooter shortly after the shooting. Therefore, Elizabeth's identification of the defendant bore a sufficient indicia of reliability to sustain the admission of her police line-up identification.

Even assuming, as the defendant argues, that Elizabeth's in-court identification was deficient, we find that the defendant suffered no prejudice when defense counsel failed to object to Elizabeth's in-court identification. As discussed, Elizabeth made a positive identification of the shooter during her hospitalization shortly after the shooting, and evidence was presented at trial that the defendant made an inculpatory statement regarding his involvement in the crime. Thus, because the defendant has failed to show how the outcome of the trial would have been different had defense counsel objected to Elizabeth's in-court identification, the defendant's claim for ineffective assistance of counsel on this basis must fail.

The defendant further argues that defense counsel was ineffective because he "hinged his

entire defense on the giving of voluntary manslaughter jury instructions." Specifically, the defendant argues that defense counsel's "failure to perceive that [voluntary manslaughter jury] instructions did not fit the facts of the case constituted deficient performance, and his inability to remedy his error by developing a new theory of defense prejudiced [the defendant]." He contends that defense counsel, in his closing argument, should have argued that Elizabeth did not properly identify the defendant because the police line-up was impermissibly suggestive, that she lacked the ability to identify him after over 30 years had passed, and that the defendant's inculpatory statement was unknowingly and involuntarily made because it was in English. The defendant maintains that these arguments collectively could have shown that the State failed to prove him guilty beyond a reasonable doubt.

We find the defendant's argument to be unpersuasive. One of the most powerful pieces of evidence against the defendant in this case was his inculpatory statement which revealed his involvement in the shooting. The record before us shows that defense counsel sought to suppress the defendant's inculpatory statement by filing a pre-trial motion to suppress statement, which was denied by the trial court. Further, during closing argument, defense counsel clearly attacked the voluntariness of the defendant's inculpatory statement, by arguing that the defendant did not speak or understand English and that the defendant was not provided an interpreter prior to his signing the inculpatory statement. As discussed, there is nothing in the record to suggest that the police line-up was improper or that Elizabeth's identification of the defendant lacked a sufficient indicia of reliability. Thus, we hold that the defendant failed to show a reasonable probability that, but for defense counsel's conduct, the result of the proceeding would have been different. Therefore, the

defendant has not shown how he was prejudiced by defense counsel's performance and he cannot meet the *Strickland* standard to support his claim of ineffective assistance of counsel.

We next determine whether the defendant was entitled to an additional 177 days of sentencing credit for time served in pre-sentence custody.

The defendant argues that he was entitled to a total of 177 days of pre-sentencing credit, which includes the day he was arrested and the day he was sentenced by the trial court.

The State concedes that the defendant was entitled to additional days of pre-sentencing credit, but disputes the number of days which the defendant should receive. Instead, the State maintains that the defendant's mittimus should only be changed to reflect an additional 160 days of pre-sentencing credit. The State further argues that the day of sentencing should not be used in calculating the total number of days of pre-sentencing credit.

We initially note that the parties dispute the exact date of the defendant's final arrest. The defendant argues that he was arrested on December 26, 2005, noting that at the pre-trial hearing on the motion to suppress statement, the State posed the following question to the defendant on cross-examination: "On December 26th of 2005 you were picked up in California, right?" The State, however, argues that the record shows that the defendant was arrested in California on January 11, 2006. Based on our careful review of the record, we find that the defendant's arrest report, criminal history report and criminal history data sheet all indicate an arrest date of January 11, 2006. The record also shows that the defendant remained in custody after his arrest until his sentencing on August 7, 2009. Thus, despite the State's error at the hearing on the motion to suppress statement, we must calculate the number of pre-sentencing days of credit based on the record regarding January

11, 2006, the date that the defendant was arrested.

A defendant shall be given credit "for time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-8-7 (West 2006). "The credit requirement of section 5-8-7(b) is meant to account for all time served in confinement for a particular offense." *People v. Latona*, 184 Ill. 2d 260, 270, 703 N.E.2d 901, 906 (1998). This includes time spent in custody prior to sentencing from the time of the defendant's arrest. See *People v. Ligons*, 325 Ill. App. 3d 753, 759, 759 N.E.2d 169, 174 (2001). A reviewing court may correct the mittimus without remanding the cause to the trial court. *People v. Hill*, 402 Ill. App. 3d 920, 929, 932 N.E.2d 173, 182 (2010). Our supreme court has recently held, in *People v. Williams*, that the day on which a defendant is sentenced and committed to the Department of Corrections "is to be counted as a day of sentence and not as a day of pre[-]sentence credit." *People v. Williams*, No. 109361, slip op. at 5-7 (January 21, 2011).

Here, the total number of days the defendant spent in custody by August 6, 2009 was 1304 days. On August 7, 2009, the day of sentencing, the mittimus was issued and made effective by the trial court, which reflects that the defendant was awarded a total of 1144 days of pre-sentencing credit. Thus, excluding the day of sentencing–August 7, 2009–in the calculation, we find that the defendant is entitled to an additional 160 days of pre-sentence credit for time spent in incarceration, for a total of 1304 pre-sentence days.

Accordingly, for the foregoing reasons, we: (1) affirm the defendant's conviction and sentence; and (2) order the mittimus corrected to reflect 1304 days of pre-sentencing credit for time served.

Affirmed; mittimus corrected.