SECOND DIVISION
March 27, 2012

No. 1-09-3198
2012 IL App (1st) 093198-U

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.	)	06 CR 15267
	)	
ANDRE PATTERSON,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

Held: Defendant's right to a speedy trial was not violated by an amendment to the indictment because the amended charge was not a new and additional charge. Trial court's findings of fact made in denying defendant's motion to quash arrest and suppress evidence and motion to suppress identification were not against the manifest weight of the evidence. Regarding defendant's motion to suppress statements, trial court did not err in ordering a *Frye* hearing regarding expert testimony and defense counsel was not ineffective.

¶1 At a bench trial, defendant Andre Patterson was found guilty of second-degree murder and aggravated battery with a firearm. Defendant appeals and raises issues related to (1) denial of his right to a speedy trial on the aggravated battery with a firearm charge, (2) lack of probable cause to arrest, (3) an unduly suggestive lineup, and (4) various errors and ineffective assistance of counsel claims surrounding a pretrial motion to suppress his confession. We affirm.

¶2 I. BACKGROUND

¶3 The material facts surrounding the crime are effectively undisputed on appeal because all of the issues that defendant raises relate only to alleged pretrial procedural errors. The victims, Anthony Beard and Woodrow Smith, were shot near the intersection of Belmont and Sheffield in November 2004. Beard died of his wounds, but Smith survived and later identified defendant as the shooter. Defendant was eventually apprehended and was identified in a photo array and a lineup, and he later gave a detailed confession in which he admitted to the shooting. The State's theory at trial was that defendant shot Beard and Smith, who were gang members from Indiana, because they were selling drugs in his territory. The State relied primarily on Smith's testimony and defendant's confession. Defendant asserted self-defense, claiming that the victims had been armed and had threatened him with a weapon prior to the shooting. Defendant's affirmative defense was partially successful, and the trial court convicted defendant of only second-degree murder in Beard's death and aggravated battery with a firearm as to Smith. The trial court sentenced defendant to consecutive terms of 15 and 10 years, respectively.

¶4 II. ANALYSIS

¶5 A. Speedy Trial

¶6 Defendant first argues that his right to a speedy trial was violated because the State amended the indictment to include the aggravated battery with a firearm charge after the 120-day speedy trial term had already lapsed. As a corollary to his argument, defendant alleges that his trial counsel was ineffective because she agreed to the amendment and failed to move for dismissal on speedy-trial grounds.

¶7 The record reveals that, among other things, defendant was originally charged in Count 6 of the indictment with aggravated battery against Smith under 720 ILCS 5/12-4(a) (West 2010).

Just before trial, the State moved to amend this charge to aggravated battery with a firearm under 720 ILCS 5/12-4.2(a)(1) (West 2010). Defense counsel did not object and instead waived re-swearing and re-verification. In response to an inquiry from the trial court, defense counsel stated on the record that she had discussed the amendment with defendant. Defendant was ultimately convicted of the amended count.

¶8 Defendant's argument is based on the statutory, rather than constitutional, right to a speedy trial. *Cf. People v. Phipps*, 238 Ill. 2d 54, 65 (2010) (noting that, although similar, constitutional and statutory speedy-trial rights are not coextensive). In Illinois, section 103-5(a) of the Code of Criminal Procedure of 1963 mandates that a person in custody must be brought to trial within 120 days, not counting delays agreed to or caused by the defendant. See 725 ILCS 5/103-5(a) (West 2010). The State may add additional charges or amend the original charges, but problems can arise if the State attempts to add or change a charge more than 120 days after the defendant is charged if that particular charge is subject to compulsory joinder with the original charges. Under section 3-3 of the Criminal Code of 1961, charges must be joined in a single prosecution if they arise out of the same conduct and are known to the prosecutor at the time the case is initiated. See 720 ILCS 5/3-3 (West 2010). Under the rule originally set forth in *People v. Williams*, 94 Ill. App. 3d 241, 248-49 (1981), if a new charge is subject to compulsory joinder with the original charges, then

> "the time within which trial is to begin on the new and additional charges is subject to the same statutory limitation that is applied to the original charges. Continuances obtained in connection with the trial of the original charges cannot be attributed to defendants with respect to the new and additional charges because these new and additional charges were not before the court when those

> continuances were obtained." (Internal quotation marks omitted.) *Phipps*, 238 Ill. 2d 54, 66 (2010) (quoting *Williams*, 94 Ill. App. 3d at 248-49).

The upshot of the *Williams* rule is that if the State attempts to add a "new and additional" charge (that is, one subject to compulsory joinder with the original charge) more than 120 days after first charging a defendant, then the new charge must be dismissed as a violation of the defendant's right to a speedy trial on that charge. See *People v. Williams*, 204 Ill. 2d 191, 207 (2010).

¶9 There is no dispute that the State amended Count 6 more than 120 days after it initiated the prosecution, so the only issue is whether the aggravated battery with a firearm charge was a new and additional charge. This is a question that we review *de novo*, and in *Phipps* the supreme court explained the rationale behind the *Williams* rule and the proper analysis for this scenario:

> "The analysis involves a comparison of the original and subsequent charges. [Citation.] The purpose of the rule set forth in *Williams* is to prevent 'trial by ambush.' [Citation.] ***
>
> The rationale for the rule, therefore, centers on whether the defendant had adequate notice of the subsequent charges to allow preparation of a defense. The focus is on whether the original charging instrument gave the defendant sufficient notice of the subsequent charges to prepare adequately for trial on those charges. If the original charging instrument gives a defendant adequate notice of the subsequent charges, the ability to prepare for trial on those charges is not hindered in any way. Thus, when the State files the subsequent charge, the defendant will not face 'a Hobson's choice between a trial without adequate preparation and further pretrial detention to prepare for trial. [Citation.] Rather,

> the defendant may proceed to trial on the subsequent charges with adequate preparation instead of being forced to agree to further delay. In those circumstances, the rationale for declining to attribute to the defendant delays in connection with the original charges does not apply." *Phipps*, 238 Ill. 2d at 67-68.

¶10 The original charge in this case alleged that defendant:

> "committed the offense of AGGRAVATED BATTERY, in that HE, IN COMMITTING A BATTERY, INTENTIONALLY OR KNOWINGLY WITHOUT LEGAL JUSTIFICATION CAUSED GREAT BODILY HARM TO WOODROW SMITH, TO WIT: SHOT WOODROW SMITH, IN VIOLATION OF [720 ILCS 5/12-4(A)] ***."

The amended charge was all but identical, with the exception of changing the title to read "aggravated battery with a firearm" and changing the statutory citation to section 12-4.2(A)(1).

¶11 Defendant's primary argument is that the amended charge is new and additional because not only must the state prove different elements than would be required for a charge of merely aggravated battery, but also that the potential penalties of the charges are completely different. Compare 720 ILCS 5/12-4(A) (West 2010) (aggravated battery, a Class 3 felony), with 720 ILCS 5/12-4.2(A)(1) (West 2010) (aggravated battery with a firearm, a Class X felony). The problem with defendant's approach to this issue, however, is that it is both unsupported by precedent and is contrary to the supreme court's express language in *Phipps*. Whether or not the elements or possible penalty for a new charge are different from the old one is simply not dispositive for the question of whether the charge is subject to compulsory joinder and is therefore "new and additional" for speedy trial purposes. Although it is true that, as defendant

points out, the supreme court noted that the two charges at issue in *Phipps* "had essentially the same elements and provided for the same penalty," the supreme court also stated that "[t]he critical point for our speedy-trial analysis, however, is *** whether the original indictment gave defendant adequate notice to prepare his defense to the subsequent charge." *Phipps*, 238 Ill. 2d at 68-69.

¶12 The original charge clearly alleged that defendant had shot Smith, placing defendant on notice of the material facts that the State intended to prove at trial. Regardless of whether the State ultimately attempted to prove defendant guilty of aggravated battery or aggravated battery with a firearm, defendant was aware that the State intended to prove that he had wounded Smith by means of discharging a firearm. Amending the charge did not require the State to offer new or different evidence at trial, and we do not see how defendant's preparation for trial might have changed had he been informed of the aggravated battery with a firearm charge sooner. What is more, defendant ultimately pursued a defense of self-defense at trial. Regardless of whether defendant was tried on the original charge or the new one, from defendant's perspective the only issue in contention at trial was whether he had legal justification for shooting Smith. Defendant has not offered us any persuasive explanation for what he might have done differently in preparing his defense.

¶13 Because defendant received adequate notice in order to prepare his defense on the amended charge, there was no speedy-trial violation. In the absence of a violation, we need not consider whether defense counsel was ineffective for failing to move to dismiss on that basis.

¶14 B. Probable Cause

¶15 Defendant next argues that the trial court erroneously denied his motion to quash arrest and suppress evidence. The bulk of the evidence at the hearing came from Detective Lopeztello,

one of the police officers responsible for the investigation into the shooting. The detective testified that he first spoke to Smith, the only surviving victim, in February 2006, over a year after the shooting. Smith had apparently moved out of state after he was discharged from the hospital following the shooting. As the detective recounted it, Smith said that he saw defendant approach and fatally shoot Beard before Smith himself was shot as he turned to run away. Smith told the detective that he knew defendant from a prior altercation and that defendant was known as "40 Cal." Several weeks later, detectives showed Smith a photo array and he identified defendant as the shooter.

¶16 Defendant's argument at the hearing and now on appeal centers on an exchange that occurred during cross-examination of the detective:

> "[Defense counsel]. And isn't it true that you included in your report that you asked Mr. Smith how he could have possibly recognized any of the assailants with their faces concealed at the time of the shooting?
>
> [Det. Lopeztello]. Yes.
>
> Q. And Mr. Smith related to you that he had heard on the street that 40 Cal was responsible for this shooting?
>
> A. Yes.
>
> Q. You did not include in this report that his response was: I saw the face of the person who shot me?
>
> A. I believe before that response, he had identified the shooter.
>
> Q. I'm asking you in your report, the response to that question was not, I saw the person who shot me?
>
> A. I believe it is. I saw the person that shot my friend.

Q. I'm showing you on page 9 of that report. *** Can you show me where it says that his response to that question was: I saw the person who shot me?

A. Well his response to *that* question was, this is what he had heard." (Emphasis added.)

¶17 Defendant argued that the exchange demonstrated that Smith had not, in fact, seen the shooter's face. In defendant's view, the evidence showed that Smith had only heard second hand that "40 Cal" was the shooter. The trial court did not agree, instead making the following findings of fact:

"THE COURT: Based on the information that the police had, and that was a photo identification of the defendant as being the person who shot friend in the head several times, was the witness. Surviving victim said he ran. He didn't even identify defendant as the one who shot him. He said he ran, realized he's been shot, he was shot, and he fell to the ground. He identified him by the nickname 40 Cal. He identified his photograph. He signed his photograph, and based on his identification of the person who shot at his friend, your motion is respectfully denied."

¶18 The key question in dispute here is whether Smith identified defendant as the shooter based on his own personal recollection of the shooting or on a rumor. Although we review the existence of probable cause *de novo,* we must defer to the trial court's factual findings unless they are against the manifest weight of the evidence. *People v. Hopkins,* 235 Ill. 2d 453, 471 (2009). The basis of Smith's statement to the detective is a question of fact.

¶19 It has long been settled that rumor or suspicion are insufficient to establish probable cause for an arrest. See *Henry v. United States*, 361 U.S. 98, 101 (1959). Yet even if we were to give defendant the benefit of the doubt and assume that there is some evidence that Smith had only heard a rumor that 40 Cal was *Smith's* shooter, the overriding problem with defendant's argument on this issue is that the detective testified that Smith identified 40 Cal as the person who shot *Beard* prior to mentioning the rumor about his own shooter. The trial court found that Smith personally saw and identified defendant as Beard's shooter, which alone was sufficient to establish probable cause to arrest defendant for the crime. Moreover, as the trial court noted, Smith subsequently picked defendant out of a photo array as Beard's shooter. Contrary to defendant's argument, the trial court's comments indicate that it believed that Smith's comment about the rumor referred at most only to a rumor about who had shot Smith, not Beard. Other evidence at the hearing indicated that there were multiple assailants, so it is not unreasonable for the trial court to interpret the evidence in this way. Indeed, it seems from the detective's testimony that he was referring to Smith's responses to two different questions. The first was whether Smith saw Beard's shooter, to which he replied that it was defendant. The second was whether Smith saw his own shooter, to which he replied that he had only *heard* that defendant had also shot him.

¶20 Even so, faced with competing evidence on this point, it was the trial court's job to resolve the factual conflict. The trial court found that Smith had identified defendant as Beard's killer based on his own personal knowledge rather than a rumor. Based on the record, the meaning of Smith's statement to the detective is at best unclear. Without more, we cannot say that the trial court's finding was against the manifest weight of the evidence. As a result, because the trial found as a matter of fact that an eyewitness to the shooting identified defendant

as Beard's shooter, the trial court was correct to find as a matter of law that probable cause existed to arrest defendant.

¶21 C. Motion to Suppress Identification

¶22 Defendant next argues that his motion to suppress Smith's identification of him in the physical lineup as the shooter should have been granted. The trial court conducted an evidentiary hearing on this issue at which Smith and two detectives testified. Smith testified that, although he was shot from behind, he was able to see everything from his position on the ground. Smith stated that he recognized defendant as someone whom he previously had an altercation with. Smith also testified that he was near sighted and half blind in his right eye. Smith testified that he picked out defendant as the shooter in a photo array that he viewed in May 2006, about a year and a half after the shooting. Smith also testified that he had viewed a physical lineup about a week later in which he identified defendant as the shooter.

Detective Gildea testified that he presented the photo array to Smith and that Smith picked defendant out as the shooter. Notably, Detective Gildea also testified that Smith mentioned that defendant had his hair in braids at the time of the shooting. The detective also recounted the physical lineup, in which there were five individuals including defendant. They were all black males between the ages of 18 and 42, and they were all seated in order to account for height differences. Detective Gildea stated that at neither the photo array nor the lineup was Smith told whom to identify.

¶23 The trial court found that neither the lineup nor the photo array was suggestive and denied the motion to suppress identification. In the process, the trial court made the following findings:

"And some weeks later the defendant is placed in a line-up, *** it contains five persons who are all African-American. Defendant does not have braids, he has hair long enough I would suppose it could be braided; however, he is not the only person in braids. A year and a half from the time of the incident to the time of the identification works both ways.

There's nothing to say that any of these other four gentlemen could not have had braids on the date of the shooting. The 42-year-old-male has a shaven head at the top; one of the 18-year-olds does not appear, and the picture again speaks for itself, appears he could be anywhere from 20 to 30 years old.

The other persons in the line-up, their hands are showing and they have numbers on their hands which usually indicates that they were in custody, and there is nothing to suggest that as often times they were civilians or police officers who were used as fillers. They all appear obviously to be in custody. The defendant's hands are not showing, he's the only one with his arms crossed and thereby not revealing any numbers on his hands.

There is nothing to suggest that *** Smith was told who to identify. He testified in this case that he knew the person and had words with the person that he knew as 40-Cal prior to this shooting. In spite of that, the police not had only a photo spread in which [defendant] was identified by went further for a physical line-up in which the five persons were seated.

It's not overly-suggestive in any way and the Court finds the motion to suppress the identification based on it it being suggestive or unnecessarily conducive to mistaken identification is respectfully denied."

¶24 This issue, like the previous issue, deals with whether the trial court properly denied a motion to suppress evidence, so we review the trial court's ultimate decision *de novo* but defer to its factual findings unless they are against the manifest weight of the evidence. See *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). "The determination as to whether a pretrial confrontation in a specific instance is 'so unnecessarily suggestive and conducive to irreparable mistaken identification that [defendant] was denied due process *** depends on the totality of the circumstances surrounding it.' [Citation.] Defendant bears the burden of proving that such a confrontation resulted in a denial of due process." *People v. Richardson*, 123 Ill. 2d 322, 348 (1988).

¶25 Defendant has dropped his challenge to the photo array on appeal, so we concern ourselves only with the trial court's findings on the lineup. Defendant largely repeats his arguments from his motion in the trial court, arguing that the physical discrepancies between defendant and the individuals in the lineup rendered it impermissibly suggestive. Because this is a factual issue, however, we must largely defer to the trial court's factual findings. We have reviewed the hearing testimony and the photograph of the lineup, and although defendant's appearance differs in some ways from that of the other members of the lineup, this fact alone is not sufficient to render the lineup unduly suggestive. See *People v. Simpson*, 172 Ill. 2d 117, 140 (1996). Moreover, to the extent that defendant argues that there was a great difference in the height, weight, and age of the participants, this argument is speculative. Other than the photograph, there was no evidence at the hearing regarding heights and weights. Even the photograph is not particularly helpful in divining such information, and the tattoo on defendant's arm is all but impossible to make out because defendant's arms are crossed. Even assuming that the tattoo is distinctive enough to be suggestive, defendant only speculates that it was readily

visible when Smith made his identification, and there is no evidence in the record to support this argument.

¶26 Even leaving all of that aside, there is a fatal flaw in defendant's argument that the trial court pointed out: Smith *knew* defendant prior to the shooting. This is not a case where the victim and the defendant are strangers and minor physical discrepancies between the lineup participants are likely to influence the victim's identification. Instead, Smith testified that he knew defendant from a previous altercation. Under these circumstances, we cannot say that the trial court's findings regarding the lineup were against the manifest weight of the evidence. The trial court's denial of defendant's motion was therefore not error.

¶27 D. Motion to Suppress Confession

¶28 Defendant's final argument involves several related issues regarding a motion to suppress his confession. After his arrest, defendant was interrogated and ultimately confessed to the shooting. Defendant filed two concurrent but separate motions on this issue. The first motion argued that the confession was unconstitutional because defendant was unable to understand his *Miranda* rights, meaning that any statement that he gave was involuntary. The second motion advanced a statutory argument, claiming that the confession was inadmissible because it was not fully videotaped in compliance with 725 ILCS 5/130-2.1 (West 2010). Only the *Miranda*-based motion is at issue on appeal.

¶29 The defense theory for this motion depended almost entirely on expert testimony by Dr. Joan Leska that defendant was not only psychologically unable to understand the *Miranda* warnings but was also highly susceptible to suggestion. Part of Dr. Leska's testimony dealt with defendant's performance on a test called the Gudjonsson Suggestibility Scale (GSS), which purportedly tests for susceptibility to suggestion. After Dr. Leska testified, the State objected to

Dr. Leska's testimony on this point and moved both for a *Frye* hearing on the admissibility of the test and to strike Dr. Leska's testimony about the test. The case was continued for some time while the parties prepared for the hearing. When the motion hearing finally resumed over six months later, the following exchanges occurred:

"THE COURT: This is a motion to suppress statements that we began August 27th of 2008. At that time Joan Leska testified. It was continued various dates for cross-examination.

In the interim state filed a motion for a Frye hearing and to strike the testimony of Joan Leska regarding [susceptibility] testing. I will rule on that after we complete the motion to suppress statement.

***

[Defense counsel], I will give you an opportunity to strike this witness's testimony that she gave it you want to now prior to cross-examination. If you want to strike her testimony that was put forth for the motion to suppress statements, I will allow you to do that.

[Defense counsel]: Regarding?

THE COURT: Regarding everything she said.

I will give you an opportunity to strike that and not put it towards your motion to suppress the statements.

[Defense counsel]: Can I have a moment to think about that?

THE COURT: Sure.

[Defense counsel]: For clarity I wouldn't be able to strike portions of her testimony at any point?

THE COURT: If you want the Court to consider her testimony, I'm going to consider her testimony in its entirety, direct examination and whatever cross-examination based on her direct the state chooses to go into. That's why I'm giving you an opportunity at this point to strike her testimony on direct examination in its entirety.

***

I'm certainly not suggesting that you do anything. I'm just giving you that opportunity because prior to the case being called, you indicated you may not want to call her for certain things and you are just going to want her to say other things, and it's not coming in piecemeal. If you want her to testify, I'm weighing her credibility with regards to everything she has to testify to.

***

I think I can safely say no one, including the Court expected Joan Leska to say what she said in her direct testimony. Based on what she said in her direct testimony, the state had an obligation to ask for a Frye Hearing with regard to certain things she said. ***

***

[Defense counsel]: We're going to strike her testimony with regards to the motion to suppress statements.

THE COURT: Okay.

[Defendant], do you understand that your attorney is striking Joan Leska's testimony as if I never heard it; do you understand that?

[Defendant]: Yes.

THE COURT: And you are in agreement with that?

[Defendant]: Yes."

¶30 Defendant raises three separate but related claims regarding the motion to suppress his confession. First, defendant argues that the court should not have halted the proceedings and ordered a *Frye* hearing because the admissibility of GSS was accepted at the time. Second, defendant argues that the trial court should have allowed defense counsel to strike only the parts of Dr. Leska's testimony related to GSS rather than requiring her to either strike all or none of the testimony. Third, defendant argues that defense counsel's decision to strike Dr. Leska's testimony rather than pursue a *Frye* hearing and continue the motion to suppress his confession amounts to ineffective assistance of counsel.

¶31 Regarding the first issue, defendant relies almost entirely on *People v. Nelson*, 235 Ill. 2d 386 (2009), which he argues stands for the proposition that GSS is generally accepted in Illinois. Defendant argues that the trial court should have taken judicial notice of *Nelson*, and that it erred by ordering a *Frye* hearing because the admissibility of GSS had already been settled.

¶32 There is a dual standard of review regarding the admissibility of expert scientific testimony. Abuse of discretion review applies when the question is whether "an expert scientific witness is qualified to testify in a subject area, and whether the proffered testimony is relevant in a particular case." *In re Commitment of Simons*, 213 Ill. 2d 523, 530 (2004). *De novo* review applies when we must determine "whether a Frye hearing is required and, if so, whether the scientific technique at issue is generally accepted in the relevant scientific community." *Id.* Defendant's argument implicates the second type of inquiry, so our review proceeds *de novo*.

¶33 There are two problems with defendant's reliance on *Nelson* as proof that GSS is generally accepted. First, *Nelson* was decided in December 2009, fourteen months *after* the trial

court ordered a *Frye* hearing in this case and ten months after defense counsel voluntarily struck Dr. Leska's testimony. Because *Nelson* had not yet been decided, the trial court obviously could not take judicial notice of that decision. Defendant seems to have belatedly realized this problem, and he asserted at oral argument that the trial court should have taken judicial notice of the *Nelson* trial court's decision. But this leads us to the second problem with his argument. On the merits, *Nelson* has nothing to do with the admissibility GSS in Illinois. Although in that case the trial court conducted a *Frye* hearing and found that GSS was generally accepted, the supreme court did not pass judgment on the admissibility of GSS testing, instead focusing on whether the trial court had erred by applying what the supreme court termed the "*Frye*-plus-reliability test." See generally *Nelson*, 235 Ill. 2d at 423-33. Whether or not GSS is generally accepted was not at issue in *Nelson* because the State did not contest that point. See *id.* at 432. *Nelson* is therefore of little help in determining whether the trial court erred by ordering a *Frye* hearing.

¶34 Aside from his *Nelson* argument, in his reply brief defendant refers us to a number of decisions cited in the State's brief regarding the admissibility of GSS in other jurisdictions. These citations do not end the matter, however, because states are split on whether GSS is generally accepted and should be admitted. Compare, *e.g.*, *Misskelley v. Arkansas*, 323 Ark. 449, 475 (1996) (inadmissible), with *Oregon v. Romero*, 191 Ore. App. 164 (2003) (admissible).

¶35 Given that at the time the trial court ordered the *Frye* hearing no higher court in Illinois had definitively ruled on the admissibility of GSS and other jurisdictions were effectively split on the subject, the trial court's decision to proceed with a *Frye* hearing was proper. Indeed, the supreme court has reversed in similarly uncertain circumstances and ordered hearings to be held. *Cf., e.g.*, *People v. McKown*, 226 Ill. 2d 245, 275 (2007). There was therefore no error in this case.

¶36 The second issue that defendant raises is more complex. Defendant's argument is essentially that the trial court had no reasonable basis for refusing to allow defense counsel to strike only the GSS portions of Dr. Leska's testimony. Defendant notes that the trial court gave no reason for its decision on this point in the record. To the extent that the decision was based on the belief that the GSS testimony required a *Frye* hearing to determine its admissibility, defendant extends his argument in the first issue and asserts that this is an erroneous understanding of Illinois law.

¶37 We need not consider this issue because defendant has forfeited review of it. It is well settled that in order to preserve an issue for review, a defendant must both object at trial and include the issue in a posttrial motion. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). Defense counsel, however, did not object when the trial court struck Dr. Leska's testimony. Although defendant argues that defense counsel essentially objected because she asked to only strike Dr. Leska's testimony in part, he does not present any authority for the proposition that such a request amounts to an objection. In fact, quite the opposite happened: defense counsel decided to voluntarily strike the entire testimony after considering the matter, and the trial court expressly confirmed with defendant on the record that he understood and agreed to his attorney's decision.

¶38 We may review forfeited claims of error only under the plain-error doctrine, under which the defendant bears the burden of persuasion. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Yet a defendant cannot carry his burden of persuasion if he does not argue for plain error. See *id.* at 545-46. In this case, even after the State asserted in its response brief that defendant had forfeited this issue, defendant continued to maintain in his reply brief that the issue was, in fact,

preserved, and he did not advance a plain-error argument. Because this issue is forfeit and defendant has not argued plain error, we will not discuss it further.

¶39 The final issue that defendant raises is essentially a backstop for the previous two arguments. Defendant argues that defense counsel's decision to strike Dr. Leska's testimony rather than pursuing a *Frye* hearing and continuing the motion to suppress his confession amounts to ineffective assistance of counsel. In order to prevail on this claim, defendant must show that his counsel's performance was deficient and that the deficient performance was prejudicial. See *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). The performance prong is satisfied if "counsel's performance was objectively unreasonable under prevailing professional norms," and the prejudice prong is satisfied if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Id.* at 496-97.

¶40 We need only consider the performance prong here. It is well settled that "[t]here is a strong presumption that trial counsel's actions were the result of trial strategy rather than incompetence, and a court of review, therefore, will not second-guess decisions which involve counsel's discretion or strategy." *People v. Humphries*, 257 Ill. App. 3d 1034, 1041 (1994) ; see also *People v. Segoviano*, 189 Ill. 2d 228, 248 (2000) ("Counsel has the ultimate authority to direct trial strategy and we will generally not sustain a claim of ineffectiveness of counsel based on inadequate trial strategy except where counsel entirely fails to conduct any meaningful adversarial testing." (Internal quotation marks omitted.)). In this case, we benefit by having in the record defense counsel's explanation for her decisions. During the motion *in limine* hearing at which the State moved to preclude Dr. Leska's testimony at trial, defense counsel explained

why she elected to strike Dr. Leska's testimony and abandon the pretrial *Frye* hearing and the *Miranda*-based motion to suppress:

> "[Defense counsel]: Judge, you heard her direct testimony [at the suppression hearing]. She wasn't cross-examined. She testified as to the tests and the results, and then it stopped because you wanted her to be examined to see if he was suicidal because she had made the comment that he had reported to her during her interview that he had some thought of suicide. And you asked her if she had reported this to anyone, and she told you she had told me. I contacted the jail. And he was examined at the time. You stopped the proceeding at that point and ordered that he be examined. And she was never subject to cross-examination.
>
> The State raised the issue of a [Frye] hearing regarding the [GSS testing] after she had already testified. *I made a tactical decision, Judge, to withdraw her testimony at that time because I wasn't really arguing that [the confession] wasn't a voluntary act*. My argument goes more to the weight to be given the statement, not that someone's will is overcome, but the credibility of the statement. And that's why I would choose to call her at trial when I did not use her at the motion.
>
> [The State]: So if I get this right, Judge, it is not towards the voluntariness, it is just the credibility?
>
> [Defense counsel]: It goes to the weight and credibility of the statement which is different than voluntariness ***." (Emphasis added.)

¶41 As defense counsel explained, her decision was a tactical matter: Dr. Leska's testimony and the *Miranda*-based motion to suppress defendant's confession were simply not necessary to defense counsel's overall trial strategy. Indeed, even after abandoning the *Miranda*-based motion, defense counsel still had another chance to suppress defendant's confession via the statute-based suppression motion. Moreover, by striking Dr. Leska's testimony from the suppression hearing, defense counsel was able to, if she chose, present Dr. Leska at trial with an entirely clean slate and without being concerned about whether the State might attempt to impeach Dr. Leska with testimony from the suppression hearing. Under these circumstances, defense counsel's choice was reasonable. Because defense counsel's actions were reasonable, defendant cannot prevail on his ineffective assistance of counsel claim.

¶42 III. CONCLUSION

¶43 As explained above, defendant was not denied his right to a speedy trial by the amendment to the charges in the indictment, and we find no error in the trial court's pretrial rulings.

¶44 Affirmed.