2012 IL App (1st) 102624-U

SIXTH DIVISION
August 17, 2012

No. 1-10-2624

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 09 CR 4986
TIMOTHY BROWN,	)	Honorable Vincent M. Gaughan
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 ***Held*:** Trial court decision affirmed where defendant did not receive ineffective assistance of counsel where counsel's choice of jury instructions was a matter of trial strategy that did not prejudice defendant. The trial court did not violate defendant's right to counsel of his choice by denying defendant's request for a continuance where defendant did not request additional time to hire counsel and where defendant did not have counsel ready, willing and able to represent him. The trial court conducted a proper inquiry into defendant's posttrial motion alleging ineffective assistance of counsel. Defendant's mittimus corrected.

¶ 2 Following a jury trial, defendant Timothy Brown was convicted of first degree murder and sentenced to consecutive terms of 39 years for the murder conviction and 25 years for personally discharging a firearm that proximately caused the death of another person. On appeal,

defendant contends that: (1) he received ineffective assistance of trial counsel; (2) the trial court violated his right to be represented by counsel of his choice by denying his request for additional time to hire private counsel for posttrial motions; (3) the trial court erred in holding a full adversarial hearing instead of conducting a preliminary inquiry or determining whether defendant should be appointed new counsel in regards to his *pro se* motion for new trial based on ineffective assistance of counsel; and (4) his mittimus should be corrected to reflect only one murder conviction. We affirm and order the mittimus be corrected.

¶ 3 BACKGROUND

¶ 4 On February 12, 2009, defendant was arrested and indicted for the first degree murder and armed robbery of the victim, Anthony Murdock. Prior to his trial, codefendant Terrell Outlaw pled guilty to reduced charges of armed robbery and conspiracy to commit murder in exchange for his testimony at defendant's trial.

¶ 5 The following evidence was presented at trial.

¶ 6 Alan Murdock (Alan), the victim's cousin, testified that on November 4, 2008, he, his cousins (the victim and John McQuarter), Michael Jefferson and Jonathan Ray (Jonathan) drove to an apartment building to pick up Joseph Ray (Joseph). Upon reaching the apartment building and finding Joseph, the group joined a dice game in the stairwell of the building. Alan saw one of the men playing dice take a gun from his pocket and pass it around the group. The gun was eventually passed to defendant. Alan testified that defendant was the last person he saw holding the gun. He next saw defendant leave the dice game and return approximately fifteen minutes later. Defendant was coming up the stairs while holding a gun to the back of another person whom Alan did not recognize. The gun was the same as the one Alan previously saw being passed around. Defendant eventually pushed the other person to the side, waved the gun at the group and said, "don't move, give me ***." At that point, the victim and Jefferson looked at each other and ran through the open door of a nearby apartment. Jefferson entered first with the

victim close behind. Defendant then shot the gun in the direction of the door the victim had just entered. Defendant waved the gun at Alan and took money from his pockets.

¶ 7 Alan ran through the same apartment as the victim and Jefferson and exited out the back door. He saw the victim run down the stairs, climb the gate and fall to the ground. Alan followed down the stairs and jumped the gate also. As Alan and the victim jogged away, the victim fell face first to the ground and said "I'm shot. I'm shot." At that point, Alan saw the defendant and another person jump the gate and come toward them. Defendant was pointing his gun at Alan, saying "come here, come here." Alan took the victim's phone and walked down the street. He yelled "get off. Get off" when he saw defendant and the other person go through the victim's pockets. Defendant and the other person eventually left the scene. As he was leaving, defendant shot the gun one more time.

¶ 8 On cross-examination, Alan acknowledged that he was drinking alcohol at the dice game and that he had been convicted of aggravated robbery in April 2006 and of unlawful use of a weapon by a felon in December 2009. On re-direct examination, Alan testified that nobody told him that defendant was the shooter and that Alan only told the police what he saw.

¶ 9 Michael Jefferson testified to substantially the same sequence of events leading up to the shooting as Alan. According to Jefferson, defendant left the dice game before the shooting and was the last person Jefferson saw with the gun. Jefferson identified the person acting as defendant's hostage as Outlaw and the gun that defendant was holding as the same chrome and black gun he saw being passed around. When Jefferson and the victim ran into the nearby apartment, the victim ran to the left while Jefferson ran to the right into someone's room and hid in a closet. A few minutes later, Jefferson ran out of the front of the apartment and entered a car with McQuarter. They found the victim and drove him to the hospital.

¶ 10 Jefferson acknowledged that he was convicted of aggravated battery in 2006. On cross-examination, he also acknowledged that he was drinking alcohol on the night of the shooting and

that he saw Outlaw holding the same gun he saw being passed around the group. Finally, Jefferson acknowledged that he only heard the gunshot and did not actually see the shooting.

¶ 11 Jonathan Ray testified to substantially the same sequence of events as Alan. Jonathan saw defendant and Outlaw at the dice game and later saw them come up the stairs. Jonathan testified that defendant was living in the apartment on the third flood of the building on that date and Jonathan recognized defendant and Outlaw even though they had shirts tied around their faces. Defendant then pointed a gun at the group and said, "don't nobody move." After Jefferson and the victim ran into the second floor apartment, Jonathan saw defendant point a gun toward that same apartment and fire a shot from a few feet away. Jonathan approached defendant, pushed down the gun and said, "what you doing? These my guys."

¶ 12 While Jonathan was looking into the second floor apartment to see if everybody was okay, defendant and Outlaw left the second floor of the building by the front stairs. Jonathan followed them outside and ran toward the back of the building, where he saw the victim fall. Defendant and Outlaw were holding their guns as they ran to the victim and went through his pockets. Jonathan yelled "no, no, that's my brother, don't do that." As defendant and Outlaw fled, Jonathan ran to the victim and saw that he had been shot.

¶ 13 Jonathan further testified that he went to the hospital to check on the victim. While at the hospital, he spoke to detectives but did not tell them about the shooting because he wanted revenge. He explained that he had a daughter by the victim's sister and that he considered the victim to be his brother. When Detective Flagg showed Jonathan a picture of defendant the next morning, Jonathan told him what happened and identified defendant as the shooter.

¶ 14 Jonathan acknowledged that he was convicted of retail theft in 2009. On cross-examination, he also acknowledged that he talked to a police officer at the hospital but testified that he did not recall telling the officer that the shooter was an unknown black male. Jonathan further acknowledged that before speaking with Detective Flagg, he spoke with Patricia Alan

(Patricia), Alan's mother, and Shamika Walker, a member of the victim's family. However, he testified that neither Patricia nor Walker told him to identify defendant as the shooter. He also explained that he did not tell Joseph, McQuarter or Jefferson to identify defendant as the shooter.

¶ 15 John McQuarter, the victim's cousin, testified to substantially the same sequence of events leading up to the dice game as Alan and Jonathan. McQuarter knew that the victim was carrying cash during the dice game because he saw the victim pull money out of his pocket. About halfway through the game, McQuarter went outside to make a phone call. Fifteen minutes after he returned, the victim asked him to go to the store. McQuarter agreed and went outside to the truck with Joseph.

¶ 16 McQuarter heard someone order him to turn around as he was walking to the truck. He turned and saw defendant standing about three feet away, pointing a gun at his chest. Defendant asked him, "where is the guy with the chain." While McQuarter stood there shocked, Joseph pushed the gun away and asked defendant "what is you doing." Defendant then entered the building through the front door. McQuarter called the victim's phone to let him know that defendant was coming up with a gun, but the victim did not answer. McQuarter then called Alan, who answered and yelled, "they shot Tony."

¶ 17 On cross-examination, McQuarter acknowledged that he was drinking alcohol during the dice game. He also acknowledged that he saw another person with a gun at the game and that he did not witness the shooting because he was outside. McQuarter admitted that he was convicted of aggravated robbery in 2006 and had two other prior felony convictions.

¶ 18 Joseph Ray testified that he had been playing dice at the apartment building with five to six other people, including someone named Sherman, when a group of men from Round Lake, Illinois, arrived and joined the game. The game continued for about an hour and Joseph noticed defendant and Outlaw, both of whom McQuarter had grown up with, watching the game. Joseph also saw Sherman pass a 9-millimeter caliber handgun to "someone." While defendant and

Outlaw were still at the game, Joseph left to go to the store. On his return, he saw defendant and Outlaw running from the back of the building to the front while holding guns. Defendant and Outlaw pointed their guns and said "some words" to "someone" outside before running into the building. Joseph followed them, heard a shot and ran inside. When he reached the second floor, he saw Jonathan push down the gun defendant was pointing and ask defendant "what the f*** are you doing?"

¶ 19 Joseph and Jonathan then ran outside. When they reached the back of the building, Joseph saw the victim on the ground and defendant and Outlaw going through his pockets. Joseph ran toward the victim while yelling at defendant and Outlaw to leave the victim alone. Defendant and Outlaw then fled.

¶ 20 On cross-examination, Joseph acknowledged that before he spoke to the police, he discussed what happened that night with Jonathan. However, Joseph testified that Jonathan did not tell him to identify Outlaw in the lineup or photo array.

¶ 21 Codefendant Terrell Outlaw testified that on November 4, 2008, defendant was living with defendant's family in the apartment building where the shooting occurred. That night, Outlaw and defendant had been shooting dice in front of the building. The game moved indoors to the second floor of the building and was joined by the group from Round Lake. Outlaw testified that defendant gave him a gun for safe-keeping while defendant was shooting dice. After losing their money in the game, defendant and Outlaw went to the third floor of the building. At that point, Outlaw was still holding the gun defendant gave him. Defendant then told him "we fittin' to rob the dice game" and instructed Outlaw to make sure "don't nobody come in." Defendant told Outlaw to go downstairs and then entered the third-floor apartment where he lived. About ten or twenty minutes after Outlaw reached the front porch, defendant and another friend came to the front of the building through a gangway on the side of the building. Defendant was holding a .9-millimeter caliber gun and Outlaw was still holding the gun

defendant gave him. Dendant said that he would go upstairs, tell everyone to lie down and give him everything. He instructed Outlaw to "watch the person in the car" and to make sure that nobody entered the building. Defendant entered the apartment building and, 10 or 20 minutes later, Outlaw heard defendant say "get down" followed by a gunshot coming from upstairs.

¶ 22 Outlaw testified that while he was running upstairs, he saw a lot of people coming downstairs, including defendant with his gun. Defendant and Outlaw went around to the back of the building, where Outlaw saw the victim being carried down the stairs by another person. Defendant ran to the victim and the person carrying him, pointed his gun at them and said, "don't move." Outlaw still had his gun but did not point it at anyone. The person carrying the victim ran and the victim fell to the ground. Defendant and Outlaw went through the victim's pockets. Outlaw testified that the victim said "don't shoot. Don't kill me." Defendant took some money out of the victim's pockets and hit the victim once on the head with his gun. Jonathan then came running through the field yelling, "Timothy, what you doing; Timothy, what you doing?" Defendant pointed his gun at Jonathan and told him to stop calling his name. When defendant's mother yelled, "Timothy, what you doing" from her outside porch, defendant and Outlaw ran back through the gangway. About 15 minutes later, they arrived at the nearby house of defendant's baby's mother, Taeshia. Defendant gave someone their guns to dispose of and gave money to "Prince" to find out what was happening at defendant's building. When Outlaw asked defendant about the shooting, defendant replied that "he was reaching for a gun."

¶ 23 Outlaw was arrested in February 2009. He testified that he was interviewed by detectives from the Chicago police department prior to his arrest and that he lied and told them that he did not know anything about the shooting or the robbery. He also testified that he was originally charged with armed robbery and first degree murder but that he pled guilty to the reduced charges of armed robbery and conspiracy to commit murder in exchange for his truthful testimony at defendant's trial.

¶ 24 On cross-examination, Outlaw acknowledged that he was previously convicted of aggravated unlawful use of a weapon involving a handgun. He also acknowledged that he was presently serving concurrent sentences of 18 years' imprisonment for armed robbery and 7 years' imprisonment for conspiracy to commit murder and that his original charge of first degree murder carried a sentencing range of between 35 and 75 years' imprisonment. After agreeing to testify, Outlaw was moved to the "witness quarters" of the jail where he was afforded several privileges not available to the general population. Outlaw stated that he was not testifying in exchange for those privileges. Outlaw also acknowledged that when he first talked to Chicago police after his arrest in February 2009, he told them that three guys had approached the game with a gun and said "don't move." He then changed his story and implicated defendant. He claimed that he never told Detectives Candelaria or Garza that the victim said "don't kill me," but that he did inform Assistant State's Attorney (ASA) James Murphy of the victim's comments when he took the plea agreement in open court.

¶ 25 At this point, the State requested permission to play the video recording of Outlaw's redacted testimony to rebut the defense's allegations of recent fabrication and motivation to lie. Finding that the "door's been opened," the trial court granted the State's request and allowed the recording to be played to the jury.

¶ 26 Detective Carlton Flagg testified that he went to 3525 West Jackson in Chicago to speak with Jonathan the day after the shooting. During their conversation, Jonathan identified a photo of defendant as the shooter. On February 12, 2009, Flagg learned that defendant was in custody. He contacted Alan, Jefferson and McQuarter and arranged for them to view a lineup of five participants, including defendant. Each witness viewed a lineup while accompanied by Flagg. Alan made a "tentative" identification of defendant, explaining to the detective that he was not sure because defendant's appearance seemed different. Jefferson was unable to identify anyone in the lineup. McQuarter positively identified defendant from the lineup as the shooter.

¶ 27 Detective Ernest Turner arrived at the scene shortly after the shooting. He noticed an expended shell casing in the stairwell leading to the second floor landing but did not find any other evidence. Following the shooting, Turner attempted to interview several people at the hospital, including Jonathan, Joseph, Alan, McQuarter, Walker and Patricia. However, none of them gave him any "real information." Turner received a phone call from Patricia during the morning of November 5, 2008, and she told him where to find Jonathan. Turner made arrangements for Detectives Flagg and Davis to meet with Jonathan. At around 1 or 2 p.m. on November 5, 2008, Turner returned to the building where the shooting occurred in order to locate defendant. He knocked on the third floor apartment and defendant's mother, Sherry Brown, answered the door. Brown said that she did not know where defendant was and that she had not seen him in several days. She said she would call the detective if she saw defendant or knew where he could be found. Brown never contacted Turner.

¶ 28 On cross-examination, Detective Turner acknowledged that no one at the hospital implicated defendant as the shooter. In fact, Jonathan told the detective that he was shooting dice when "an unknown black male walked up the stairway, pointed a gun at the group engaged in a dice game and ordered everyone *** not to move." Jonathan also told Turner that he heard one shot but did not see the offender because he was fleeing the scene.

¶ 29 Forensic investigator Brian Smith testified that he and his partner arrived at the scene of the shooting in the early morning hours of November 5, 2008. They recovered one fired RP .9-millimeter caliber cartridge case from the stairs leading up to the second floor. They did not recover any firearms or other weapons from the scene.

¶ 30 Officer Jimmie Smith testified that he arrested defendant at his mother's apartment on February 12, 2009. Defendant identified himself and did not try to flee or resist arrest.

¶ 31 Detective Robert Garza testified that he interviewed Outlaw at the police station on February 14, 2009. The interview was recorded by video and audio surveillance equipment.

During this interview, Outlaw initially denied his involvement in the murder and did not identify defendant as the shooter. However, his story changed later that night when he implicated himself in the murder and identified defendant as the shooter.

¶ 32 Dr. Valerie Arangelovich, an assistant at the medical examiner's office, testified that she performed a postmortem exam on the victim's body on November 5, 2008. Her examination revealed that a bullet entered the victim's left back and exited his lower right chest. In her opinion to a reasonable degree of medical certainty, the victim died of this gunshot wound and the manner of death was homicide.

¶ 33 The State rested its case and defendant called his mother to testify on his behalf.

¶ 34 Defendant's mother, Sherry Brown, testified that she returned home from work at around 6:30 p.m. on November 4, 2008. Defendant was not living with her at the time and, although he visited "once in a while," he was not at home on the day of the shooting. Brown further testified that she did not go outside to yell at defendant on the evening of the shooting and that she did not see him in or outside her apartment building at any time on November 4, 2008. The only noises she heard that night were the cars circling the neighborhood and something that sounded like fireworks.

¶ 35 On cross-examination, Brown acknowledged that she never contacted Detective Turner but explained that it was because she had not seen defendant. Brown acknowledged that defendant had been arrested at her home on February 12, 2009, but believed that defendant was let in to her apartment by one of his sisters. She also acknowledged that defendant had been seeing a girl who lived near her building.

¶ 36 The defense next chose to proceed by way of stipulation. The parties stipulated that Outlaw entered into a plea agreement on April 7, 2010. The parties further stipulated that during this plea agreement, Outlaw never indicated to the court or to ASA Murphy that the victim said, "please don't kill me."

¶ 37 Following closing arguments, the jury found defendant guilty of first degree murder and of personally discharging the firearm that proximately caused the victim's death. The trial court sentenced defendant to consecutive terms of 39 and 25 years' imprisonment. This appeal followed.

¶ 38 ANALYSIS

¶ 39 Defendant first contends that trial counsel provided ineffective assistance of counsel. Claims of ineffective assistance of counsel are reviewed under the two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Evans*, 186 Ill. 2d 83, 93 (1999). To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance so prejudiced the defendant as to deny him a fair trial. *Strickland*, 466 U.S. at 687. The failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994).

¶ 40 With regard to the first prong, a defendant must overcome the strong presumption that, under the circumstances, the challenged action or inaction of counsel was sound trial strategy. *People v. Jones*, 322 Ill. App. 3d 675, 679 (2001). Effective assistance of counsel refers to competent, not perfect, representation. *Palmer*, 162 Ill. 2d at 476. Matters relating to trial strategy are generally immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999). The unsuccessfulness of the strategy "does not retrospectively demonstrate incompetence." *People v. Markiewicz*, 246 Ill. App. 3d 31, 48 (1993). To establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *People v. Johnson*, 206 Ill. 2d 348, 362 (2002).

¶ 41 Defendant claims that counsel was ineffective because he requested Illinois Pattern Jury Instruction, Criminal, No. 3.11 (Illinois Pattern Jury Instruction, Criminal, No. 3.11 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 3.11)), which allegedly informed the jury that Outlaw's

videotaped confession was admissible as substantive evidence. IPI Criminal 4th No. 3.11 states:

> "The believability of a witness may be challenged by the evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind ordinarily may be considered by you only for the limited purpose of deciding the weight to be given to the testimony you heard from the witness in this courtroom.
>
> However, you may consider a witness's earlier inconsistent statement as evidence without this limitation when
>
> [(1)] the statement was made under oath at a hearing;
>
> or
>
> [(2)] the statement narrates, describes or explains an event or condition that the witness had personal knowledge of;
>
> and
>
> the statement was written or signed by the witness;
>
> or
>
> the statement was accurately recorded by a tape recorder, videotape, recording, or a similar electronic means of sound recording;
>
> It is for you to determine whether the witness made the earlier statement, and, if so what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made."

Defendant argues that the following non-IPI limiting instruction should have been tendered instead:

> "Members of the jury, the prior statement of [witness' name] has been admitted for the limited purpose of rebutting a charge that (1) [his/her] [testimony

> is a recent fabrication] or (2) [he/she] [had a motive to testify falsely]. It may be considered only as it may or may not bear upon the believability of [witness' name]. It cannot be considered by you as independent proof that the defendant committed the crime alleged."

¶ 42 We find that defendant has failed to overcome the presumption that counsel's actions were a matter of sound trial strategy. Counsel's choice of jury instructions is a matter of trial strategy that cannot be used to support a claim of ineffective assistance of counsel unless the choice was objectively unreasonable. *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007). Moreover, counsel's decision to "rely on one theory of defense to the exclusion of others, is [also] a matter of trial strategy." *Id.*

¶ 43 Our review of the record establishes that defense's theory of the case was that the State's witnesses could not be believed because of discrepancies in their testimony and prior inconsistent statements they made to police. Counsel pointed to one such inconsistency in her cross-examination of Detective Turner. The cross-examination revealed that Jonathan had informed Turner that the shooter was an "unknown black male." However, Jonathan testified that he did not make such a statement to Turner. Another inconsistency counsel pointed to is Detective Garza's testimony showing that Outlaw had initially denied any involvement in the shooting. Outlaw even admitted to having initially lied to the detectives. Consistent with this strategy, the first paragraph of IPI Criminal 4th No. 3.11 informed the jury that the credibility of the State's witnesses could be challenged by their prior inconsistent statements. Therefore, it was reasonable for counsel to request that the jury be instructed with IPI Criminal 4th No. 3.11.

¶ 44 Defendant claims that the second paragraph of IPI Criminal 4th No. 3.11 was improper because it instructed the jury that it could consider Outlaw's videotaped statement as substantive evidence. However, both parties agreed at trial that the videotaped statement was a prior *consistent* statement. IPI Criminal 4th No. 3.11 only informed the jury how to treat prior

inconsistent statements. Since jurors are presumed to follow the instructions given to them (*In re Detention of Lieberman*, 379 Ill. App. 3d 585, 605 (2007)), IPI Criminal 4th No. 3.11 cannot be read as referring to or giving the jury permission to treat the videotaped statement as substantive evidence. There is a statement in the record, however, that meets the criteria set forth in the second paragraph of IPI Criminal 4th No. 3.11. Outlaw testified that during his plea agreement, he told ASA Murphy that the victim pleaded, "don't shoot. Don't kill me." However, the parties later stipulated that during his plea agreement, Outlaw did not inform anyone of the victim's alleged plea for his life. Therefore, the second paragraph of IPI Criminal 4th No. 3.11 could have referenced this prior inconsistent statement, which was made under oath at a hearing. Thus, IPI Criminal 4th No. 3.11 could have helped defendant's case by permitting the jury to believe that the victim did not plead for his life. For these reasons, we cannot say that defense counsel's decision to request IPI Criminal 4th No. 3.11 was objectively unreasonable.

¶ 45 Furthermore, counsel's performance was not made deficient by her decision to not request a limiting instruction. Courts are warned to be hesitant in tendering non-IPI instructions, especially when it would call attention to certain portions of the evidence. *People v. Vanda*, 111 Ill. App. 3d 551, 568-69 (1982); *People v. Bigham*, 226 Ill. App. 3d 1041, 1045 (1992). The videotaped statement called attention to damaging evidence indicative of defendant's guilt. Because Outlaw's videotaped statement was consistent with his trial testimony, the limiting instruction would have made it more likely that the jury believed his damaging in-court testimony. The State never argued that the videotaped statement should have been considered as substantive evidence. Thus, it is reasonable for defense counsel to have chosen to "not risk drawing more attention to the testimony by asking for a limiting instruction. Such a decision is trial strategy [and] is not subject to appellate review." *People v. Fields*, 202 Ill. App. 3d 910, 915-16 (1990). Because counsel's request of IPI Criminal 4th No. 3.11 and her decision to not request a limiting instruction can be seen as part of a reasonable trial strategy, defendant has

failed to satisfy the first prong of the *Strickland* test.

¶ 46 Defendant still argues that the failure to seek a limiting instruction to which one is entitled is not a matter of discretion or trial strategy. Defendant relies upon *People v. Jackson*, 357 Ill. App. 3d 313, 323 (2005) (which ultimately relied on *Markiewicz*, 246 Ill. App. 3d at 48), and *People v. Lowry*, 354 Ill. App. 3d 760, 766-67 (2004), as support for this argument. However, *Markiewicz* references a specific limiting jury instruction regarding the jury's use of evidence of other crimes. *Markiewicz, 246* Ill. App. 3d at 48 ("It is not a matter of discretion or trial strategy for a defense attorney to fail to seek an instruction when extensive evidence of another crime is admitted, even for a limited purpose."). *Markiewicz* does not mention limiting instructions on the use of prior consistent statements or limiting instructions in general. In addition, *Lowry* explicitly states that certain matters, including "what [jury] instructions to tender," fall within trial strategy. See *Lowry*, 354 Ill. App. 3d at 766-67. Neither case supports defendant's proposition that failure to request a limiting instruction is not a matter of trial strategy.

¶ 47 Defendant has also failed to show that counsel's allegedly deficient performance so prejudiced defendant as to deny him a fair trial. *Strickland*, 466 U.S. at 687. As noted above, IPI Criminal 4th No. 3.11 was consistent with a reasonable trial strategy and it did not inform the jury that it could consider Outlaw's videotaped statement as substantive evidence. Thus, defendant was not prejudiced by IPI Criminal 4th No. 3.11. Defendant was also not prejudiced by counsel's failure to request a non-IPI limiting instruction. The limiting instruction would have informed the jury that it could not consider the prior consistent statement as substantive evidence but only as that prior statement "may or may not bear upon the believability of [the witness]." Requesting the limiting instruction would have been more prejudicial to defendant's case because it would have strengthened the credibility of the State's main witness against him. The State also never argued that the videotaped statement should be considered substantive

evidence. The videotaped statement was cumulative of Outlaw's trial testimony. In light of the fact that the statement was cumulative of the other damaging evidence presented at trial, we cannot say that the result of defendant's trial would have been different even if the jury considered the videotaped statement as substantive evidence.

¶ 48 The cases defendant cites in support of finding prejudice are clearly distinguishable. The "so highly prejudicial" testimony found to have denied the defendant his right to a fair trial and impartial jury in *People v. Kimbrough*, 131 Ill. App. 2d 36, 45 (1970), was testimony that the court found to bear too heavily on the defendant's guilt or innocence. Here, the videotaped statement was consistent with Outlaw's testimony at trial and was corroborated by a number of witnesses that saw defendant actually shoot the gun or testified that he was the last person they saw with the gun prior to the shooting. Accordingly, we cannot find that the videotaped statement in this case had the same effect on defendant's guilt or innocence as it did in *Kimbrough*. In *People v. Barton*, 286 Ill. App. 3d 954 (1997), the State introduced a witness's testimony given at a prior trial during the subsequent trial in her absence. That testimony included the State's impeachment of the witness through the use of the witness's prior written statement to the police. Given that nothing else in the witness's prior in-court testimony advanced the State's case, the court determined that the sole reason for the State introducing the testimony was to highlight the prior written statement that implicated the defendant and to use it as substantive evidence. *Barton*, 286 Ill. App. 3d 954, 960-62 (1997). Here, the State had a legitimate purpose in introducing the videotaped statement to rebut the allegations made during Outlaw's cross-examination.

¶ 49 Defendant next contends that the trial court violated his right to be represented by counsel of his choice when it denied his request for additional time to hire private counsel for posttrial motions. The record shows that during his sentencing hearing, defendant presented the court with his *pro se* motion for new trial, alleging ineffective assistance of counsel. The following

colloquy took place:

"MS. DAVIS: I previously mentioned to this Court in the presence of prosecution Mr. Brown has indicated to me that he wishes to hire different counsel for purposes of post trial motions. He has prepared a four page motion for retrial due to ineffective assistance of counsel where I am named. He has given me that and asked me to present that to the court.

THE COURT: No problem. Who is the attorney you have on this.

THE DEFENDANT: My mother.

THE COURT: No, no. I am asking what you have done. Is your mother here today?

THE DEFENDANT: No, but she is supposed to.

THE COURT: You are making uncorroborated statements. Have you personally talked to any attorney?

THE DEFENDANT: David Weiner.

THE COURT: You have talked to Mr. Weiner.

THE DEFENDANT: Yes, sir.

THE COURT: When was that?

THE DEFENDANT: This was a week ago. I can't remember the date, the exact date. 15th.

THE COURT: Has anybody seen Mr. Weiner appear in this court today.

MR. MURPHY: No, Judge.

* * *

THE COURT: All right. There is case law that if the allegations in the motion for new trial are predicated upon ineffective assistance of counsel what we can do is once everybody has got copies of that we can let Mr. Brown present that

himself.

Mr. Weiner has not appeared here. All right. And he is a very conscien[tious] attorney. So there is nothing to corroborate that Mr. Brown has an attorney. We are going forward today."

After proceeding with the sentencing, the trial court made the following statement:

"First of all, I think we should take some time to address your [defendant's] motion. I just don't have to but just in the interest of fairness you[r] allegations in your pro se motion for new trial based on ineffective assistance of counsel when you do that *** the attorney client privilege no longer exists because you have accused your attorney of wrongdoing. So she will be allowed to talk about conversations she had with you. But we just want you to know that. ***

So I am going to continue this till tomorrow for Mr. Brown's motion for new trial at 9:00 a.m. ***"

The following day, defendant still did not have private counsel present to represent him and did not request additional time to retain counsel for posttrial motions

¶ 50 The sixth amendment guarantees a criminal defendant's right to counsel. U.S. Const., Amend. VI. The Supreme Court of the United States has held that this right includes "the right of a defendant who does not require appointed counsel to choose who will represent him." *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). However, the right to choice of counsel is limited under certain circumstances. One such limitation is that a defendant does not have a right to counsel of his choice when he cannot afford counsel and instead requires that counsel be appointed to represent him. *Gonzalez-Lopez*, 548 U.S. at 151; *People v. Tucker*, 382 Ill. App. 3d 916, 920 (2008) ("A criminal defendant has no right to select an attorney he cannot afford").

¶ 51 The decision to grant or deny a request for a continuance is within the sound discretion of the trial court. *People v. Chapman*, 194 Ill. 2d 186, 241 (2000). This court has specifically

found that the "denial of a motion for continuance to obtain new counsel is not an abuse of discretion if new counsel is not specifically identified or does not *stand ready, willing, and able to make an unconditional entry of appearance instanter*." [Emphasis added.] *People v. Burrell*, 228 Ill. App. 3d 133, 142 (1992); *People v. Childress*, 276 Ill. App. 3d 402, 411 (1995); *Tucker*, 382 Ill. App. 3d at 920. If any of the aforementioned requirements are missing, a denial of the motion for continuance is not an abuse of discretion. *People v. Young*, 207 Ill. App. 3d 130, 134 (1990).

¶ 52 In this case, defendant does not point to a specific location in the record where he requested additional time to hire new counsel for posttrial motions. Our review of the record also shows that he never asked the court for additional time to hire counsel. Still, after going forward with the sentencing hearing, the court granted defendant a continuance for his *pro se* motion. On the following day, defendant still had no private counsel present and again did not request additional time to hire counsel. Since defendant never requested additional time and the court granted a continuance even without a request from defendant, we cannot find that the trial court violated defendant's right to be represented by counsel of his choice.

¶ 53 Also, defendant did not have new counsel "ready, willing, and able" to represent him at the sentencing hearing or for posttrial motions. Defendant never actually told the court that he had retained private counsel and only stated that he had previously "talked" with an attorney. Defendant did not have counsel in court ready to appear on his behalf when he first presented his posttrial motion to the trial court. The trial court continued defendant's motion to the following day and, when the parties appeared in court, defendant still did not have counsel ready to appear on his behalf. Therefore, defendant was not denied his right to counsel of his choice.

¶ 54 Defendant also claims that his financial inability to hire private counsel for trial is irrelevant because hiring one for posttrial motions is presumably less expensive than hiring one for an entire jury trial. At no time during his posttrial hearings did defendant indicate that his

financial status had changed and that he now had the ability to hire private counsel. Moreover, defendant acknowledged that he would not be able to afford the cost of appeal. Accordingly, since an indigent defendant is not entitled to choice of counsel, the trial court did not deny defendant's right to choice of counsel. *See Gonzalez-Lopez*, 548 U.S. at 151.

¶ 55 Defendant next contends that the trial court erred in holding a full adversarial hearing in response to his *pro se* motion for new trial. The record shows that at the start of his sentencing hearing, defendant presented his *pro se* motion for new trial, alleging ineffective assistance of counsel, and an accompanying explanatory letter to the court. The court proceeded with the sentencing and continued defendant's *pro se* motion to the following day. The following day, defendant was given the opportunity to orally present his complaints regarding the ineffective assistance of his trial counsel. Defendant alleged, in part, that: (1) defense counsel never discussed pre-trial motions, strategy and the theory of defense with defendant; (2) defense counsel never filed a motion to suppress evidence and that such failure was not strategic; (3) defense counsel failed to subpoena an exculpatory witness; (4) defense counsel prevented defendant from testifying at trial through use of fear and intimidation and otherwise attempted to convince defendant to plead guilty on multiple occasions; (5) defense counsel ignored defendant's wishes for a bench trial; (6) defense counsel failed to impeach and otherwise discredit State witnesses during cross-examination; and (7) defense counsel did not behave in defendant's best interests and acted unethically without giving due diligence to her preparation of the case.

¶ 56 The State then called defense counsel to the stand and defense counsel was given the chance to respond to defendant's allegations. Responding to questions from the State, the court and defendant, defense counsel explained that: (1) she discussed the case with defendant on numerous occasions; (2) defendant was unable to provide evidence of an alibi defense; (3) counsel filed a pre-trial motion to quash arrest and suppress evidence after discussing it with

defendant; (4) counsel discussed with defendant the lack of a legal basis for filing a motion to suppress identification; (5) counsel or her investigator talked with the allegedly exculpatory witness as well as other witnesses and decided not to call them because they either declined to have any involvement in the case or because their testimony would have helped the State's case; (6) counsel had an investigator attempt to interview each of the State witnesses; and (7) defendant indicated on multiple occasions that he did not wish to testify and wanted a jury trial. At the conclusion of the hearing, the court denied defendant's motion and made the following findings:

> "Concerning the motion to suppress identification, this was trial strategy. It had been discussed with Mr. Brown. The people that did identify Mr. Brown had known him since fourth grade and the other person was Mr. Terrell Outlaw.
>
> Concerning Mr. Jonathan Ray, during cross-examination many things had been perfected concerning Mr. Ray. 'I didn't say anything to the police about not seeing the shooter.' That was proved to be incorrect. So there was strenuous cross-examination.
>
> Mr. Ray *** said the reason on direct that he didn't tell the police was he was going to handle it himself, which he never did, which is more talk than anything. That was brought out.
>
> Then the other witnesses concerning Mr. Quarters, he was also strenuously cross-examined. He admitted that he didn't see the shooting. And the other witnesses concerning identification was brought out on cross-examination or direct, that they were tentative.
>
> Concerning representation, the things that you have pointed out, [Mr. Brown], that are true would be trial strategy.
>
> ***

> Both here I find that the evidence was overwhelming and proof beyond a reasonable doubt was there. And also I [find that n]either prong *** of Strickland was *** satisfied. ***"

¶ 57 Defendant now claims that the trial court erred because it held a full adversarial hearing, where defendant was forced to represent himself while his former counsel was called to testify against him. Defendant contends that instead the trial court should have (1) conducted a preliminary inquiry into defendant's *pro se* motion for new trial based on ineffective assistance of counsel, or (2) determined whether new counsel should be appointed on the motion. *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny do not require the trial court to conduct a preliminary inquiry *or* determine whether the defendant should be appointed new counsel upon receiving such a motion. Case law has established and affirmed that the trial court is required to conduct a preliminary inquiry *in order to* determine whether the defendant should be appointed new counsel for a *hearing* on the defendant's *pro se* motion alleging ineffective assistance of counsel:

> "[w]hen a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed. [Citations.] The new counsel would then represent the defendant at the hearing on the defendant's *pro se* claim of ineffective assistance. [Citations.]" *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003).

See also People v. Nitz, 143 Ill. 2d 82, 134-35 (1991); *People v. Jackson*, 131 Ill. App. 3d 128, 139 (1985); *People v. Vargas*, 409 Ill. App. 3d 790, 801 (2011); *People v. McCarter*, 385 Ill. App. 3d 919, 940 (2008). In short, the trial court is not automatically required to appoint new

counsel when a defendant presents a *pro se* motion alleging ineffective assistance of counsel. *Moore*, 207 Ill. 2d at 77; *Chapman*, 194 Ill. 2d at 230; *Nitz*, 143 Ill. 2d at 134; *McCarter*, 385 Ill. App. 3d at 940.

¶ 58 During the initial *Krankel* inquiry, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible *** in assessing what further action, if any, is warranted on a defendant's claim." *Moore*, 207 Ill. 2d. at 78. Defense counsel is permitted to respond to the defendant's allegations by answering questions and otherwise explaining the facts and circumstances surrounding the defendant's allegations. *Id.* To give defense counsel an opportunity to respond, the State may call defense counsel as witness and subject defense counsel to its, the court's and defendant's questions. *People v. Dixon*, 366 Ill. App. 3d 848, 854 (2006).

¶ 59 In evaluating a defendant's claims, the trial court can rely upon (1) the defendant's trial counsel's answers and explanations, (2) a "brief discussion between the trial court and the defendant"; or (3) its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 22; *Moore*, 207 Ill. 2d at 78-79; *Chapman*, 194 Ill. 2d at 228-31.

¶ 60 Review of the record here shows that the trial court conducted a proper preliminary inquiry into defendant's *pro se* posttrial motion for new trial and allowed him the opportunity to detail his complaints. As noted above, defendant was given the opportunity to distribute to the court his written *pro se* motion for new trial and an accompanying explanatory letter. Given defendant's oral presentation of his complaints and his subsequent opportunity to question his trial counsel, it is clear that the trial court " 'afforded the defendant the opportunity to specify and support his complaints.' " *Moore*, 207 Ill. 2d at 80 (quoting *People v. Robinson*, 157 Ill. 2d 68, 86 (1993)). Furthermore, while a defendant is entitled to new counsel at a hearing on his *pro se* claim of ineffective assistance of counsel (*Moore*, 207 Ill. 2d at 78), he is not entitled to new

counsel at a *Krankel* inquiry. The exchange noted above was not an adversarial hearing but, rather, a preliminary *Krankel* inquiry. The fact that defense counsel was called by the State as a witness does not change the nature of this inquiry. *See Dixon*, 366 Ill. App. 3d at 876 (State called defense counsel as witness but appellate court held that finding of effective assistance of counsel was not manifestly erroneous and that the record did not reveal that appointment of counsel was necessary).

¶ 61 Moreover, the record shows that the trial court properly complied with the requirements of *Krankel* and its progeny in denying defendant's *pro se* motion for new trial alleging ineffective assistance of counsel. As noted above, the trial court inquired into defendant's allegations and took into account defense counsel's answers and explanations as well as the court's own knowledge of defense counsel's performance at trial and the insufficiency of defendant's allegations on their face. Upon these considerations, the trial court found that defendant's claims either lacked merit because witnesses were "strenuously cross-examined" or pertained to matters of "trial strategy." The trial court's finding is further supported by case law which has found that the decisions to call witnesses and of whether and how to conduct a cross-examination are generally matters of trial strategy that cannot support a claim of ineffective assistance of counsel. *Tolefree*, 2011 IL App (1st) 100689 at ¶ 34 (citing *People v. Anderson*, 266 Ill. App. 3d 947, 956 (1994)).

¶ 62 Lastly, defendant contends and the State concurs that defendant's mittimus should be corrected to reflect only one murder conviction since only one death resulted. The State additionally argues that the mittimus should also reflect a conviction for discharging a firearm that proximately caused the death of another. The mittimus currently shows a conviction of two counts of murder: count VII, intentional murder pursuant to section 9-1(a)(1) of the Criminal Code of 1961 (the Code) (720 ILCS 5/9-1(a)(1) (West 2010)); and count VIII, strong probability of murder pursuant to section 9-1(a)(2) of the Code (720 ILCS 5/9-1(a)(2) (West 2010)).

¶ 63 Our supreme court has found that "[m]ultiple convictions are improper if they are based on precisely the same physical act." *People v. Artis*, 232 Ill. 2d 156, 165 (2009). If " 'multiple murder convictions have been entered for the same act, the less culpable convictions must be vacated.' " *People v. Foreman*, 361 Ill. App. 3d 136, 156 (2005) (quoting *People v. Pitsonbarger*, 142 Ill. 2d 353, 366 (1990)). This court has the authority to correct the mittimus at any time without remanding the matter to the trial court. *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008) (citing *People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007)). Accordingly, we direct the clerk of the circuit court of Cook County to correct the mittimus to reflect a judgment entered on count VII for intentional first degree murder, with sentence imposed of 39 years pursuant to section 9-1(a)(1) of the Code (720 ILCS 5/9-1(a)(1) (West 2010)), and an additional 25 years' sentence enhancement pursuant to section 5-8-1(d)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(1)(d)(iii) (West 2010)), for a total sentence of 64 years.

¶ 64 CONCLUSION

¶ 65 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and direct that the mittimus be corrected.

¶ 66 Affirmed; mittimus corrected.