FIFTH DIVISION
August 30, 2013

No. 1-10-2739

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. 07 CR 6585
	)	
CURTIS SHIELDS,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction and sentence are affirmed. Defendant was not denied due process when the trial court excluded evidence of defendant's low I.Q. where defendant did not raise the affirmative defense of insanity or mental defect; the trial court did not abuse its discretion when it admitted multiple prior inconsistent statements by a witness; the prosecutor's conduct at trial did not deprive defendant of a fair trial; defendant did not receive ineffective assistance of counsel based on the failure to call certain witnesses; defendant's sentence of natural life imprisonment is constitutional.

¶ 2 Following a jury trial in the circuit court of Cook County defendant Curtis Shields, was convicted of two counts of first degree murder and sentenced to natural life imprisonment. Defendant raises several contentions of error on appeal. We find that none of defendant's complaints of error warrant reversal of defendant's conviction or sentence. Accordingly, defendant's conviction and sentence are affirmed.

¶ 3 BACKGROUND

¶ 4 The State charged defendant Curtis Shields, together with codefendants Darryl Washington and Leon Shields, defendant's brothers, with two counts of first degree murder and one count of armed robbery. Prior to trial, the State filed a motion *in limine* to bar the defense from eliciting any testimony of the defendant's purported mental retardation or from referencing defendant's mental retardation during closing arguments. In support of its motion *in limine*, the State argued: (1) defendant had specified alibi as his defense, thus, mental capacity was not relevant to any issue at trial, (2) the defendant had not listed any witnesses that could testify to his mental capacity, and (3) any witness testimony concerning defendant's mental capacity would be an attempt to invoke sympathy from the jury for the defendant. Defense counsel countered: (1) evidence of defendant's mental retardation was relevant to aid the jury in determining whether he had the mental state described in the charges against him, and (2) defendant's I.Q. of 53 is relevant to the question of accountability and whether he knowingly agreed to aid, solicit or encourage another in the commission of an offense.

¶ 5 The trial court granted the State's motion *in limine* on the ground that the defense did not

claim insanity as an affirmative defense. The trial court stated, in pertinent part, as follows:

> "The problem with the defendant's argument is that if you take it through to its logical conclusion, which is that my mental capacity is such that I ought not be held responsible for this crime, I ought not be held responsible for being accountable for this individual's conduct or this individual's conduct, and seeks to ultimately put forth the defense that you might want to call diminished mental capacity. ***.
>
> The problem with that is that there is no such defense in the State of Illinois. There is, of course, the defense of insanity, which would permit the defendant or any person to present evidence if they wished to present it that because of some mental disease or defect, perhaps mental retardation at this purported level might constitute such a defect, that the defendant thereafter lacked the capacity to appreciate the criminality of his conduct or, for that matter, his accountability for another's conduct.
>
> And that circumstance with regard to his purported mental level, for lack of a better phrase, would certainly be relevant in that situation, but because the defense hasn't raised that defense or listed any such witnesses who would testify to such a defense, we don't have that situation.
>
> Consequently, the court is left with the only conclusion, that evidence regarding the defendant's mental status, his I.Q., any level of retardation that is claimed is essentially irrelevant."

¶ 6 In her opening remarks, defendant's attorney stated that she did not have to call any witnesses but would do so because there are "two sides to every story." She stated that the area where the crimes occurred is an open air drug market. One of the victims, Marty Williams, who goes by the nickname "Little J," was a drug dealer. Defense witness Monique White, who lives a block away from the crime, would testify that she observed Williams sell drugs every day. Counsel stated:

> "Miss Reynolds will tell you that she saw two young black men, and she saw them well enough to describe what they were wearing. She saw them running, and she heard some profanity, which was, let's get the fuck out of here. She described what they were wearing and she saw where they ran to.
>
> What they were wearing is what she would call – and this is, I know, offensive, but this is her description – Dago tees or those cut tee shirts, low hanging blue jeans with the boxers showing. The car she described them getting into was a sedan, a black, older model sedan, plain with no trim.
>
> ***
>
> But the car that [State's witnesses] Jermaine Echoles and Curtis Adams and these other felons that the State will be bringing to you in contrast to the law-abiding witnesses, the car they want to describe being involved in this is a Chevy Blazer. A Chevy Blazer is not a sedan. It's on a truck bed. And there is a Chevy Blazer in Curtis Shields' life, because his girlfriend Brenda Franklin had one.
>
> But the description of the car, you'll find from the evidence in this case, morphs over that summer from the sedan described by the law-abiding citizens to this Blazer described by the felons and the drug users that are later brought into the station and give statements in this case.
>
> In addition, the witnesses contradict each other. The young lady, Tyesha Webb, who says she's in this Blazer when this happens contradicts Curtis Adams about the order in which they went to places that night, who was where, then who got picked up where, whether her cousin was there or not."

¶ 7 The witnesses defendant's attorney mentioned in her opening statement did not testify at trial. Defendant's attorney also abandoned her strategy to show that the offenders drove a sedan rather than a Blazer.

¶ 8 At trial, paramedic Robin Alvarez testified for the State that at 12:35 a.m. on June 8,

2006, she responded to a call in an alley behind 4310 W. Crystal, in Chicago. Alvarez attended to an injured man, 36-year-old Darrin Harkins, who refused to allow Alvarez to take his vital signs or answer questions. Alvarez observed "some contusions to his head, nothing very major," and transported Harkins to the hospital. Harkins was later moved to another hospital where he died on June 18, 2006. A medical examiner concluded that his death was caused by craniocerebral injuries due to blunt trauma. The fatal injuries were inflicted at the same time but the examiner could not determine whether an object was used or whether the injuries were inflicted by the hands or feet of another person.

¶ 9 Jose Luis Garcia Gonzalez testified that around 6 a.m. on June 8, 2006, he discovered an injured man in the alley behind his house. Gonzalez called the police. At trial, he identified a photograph of 22-year-old Marty Williams as the injured man. Williams died on June 19, 2006. The medical examiner concluded that his death was caused by cerebral hemorrhages due to blunt trauma. The injuries were consistent with Williams having been struck by an object or hands and fists.

¶ 10 Jermaine Echoles testified that Harkins called him at about11 p.m. on June 7, 2006, and asked to meet at the corner of Crystal and Kildare. Echoles rode his bike to the corner and met Harkins and Williams. As the three men walked past the alley between Crystal and Potomac, a black four-door SUV came to a screeching halt a couple of feet past them. The front and back doors on the driver's side flew open. Echoles recognized the driver, who held something like a nightstick in his hand, as someone he had seen around the neighborhood. At trial, Echoles identified defendant as the driver of the SUV. Echoles identified the passenger as a man he knew

as "Nook," and testified Nook had a bat or stick in his hand. Evidence revealed that the man Echoles knew as "Nook" is codefendant Darryl Williams.

¶ 11 Echoles testified that defendant and Nook rushed into the alley. Echoles jumped off his bike and ran west through the alley, ahead of Harkins and Williams. Echoles observed Nook hit Williams with a bat and fall down. Harkins tried to help Williams but the SUV driver struck him with a stick. Harkins swung back, but the SUV driver continued to hit him until he fell to the ground. Echoles testified that he then observed two other men run across the alley. Echoles ran away from these men going through the alley. When he was almost to Crystal, no more than five or six minutes later, he saw the same black SUV. As the truck started to make a U-turn, he ran back to the alley and then to Kostner, where he saw a friend, "Little Mike," driving by. Echoles jumped into Little Mike's car. Echoles called Williams' cell phone and an unfamiliar male voice answered and said, "I'm in the alley, I'm scratched in the alley. I'm right here in Potomac alley."

¶ 12 Echoles testified that he spoke to police a couple of days later, but told them he could not identify the attackers. A couple of months later, he went back to the police station and asked to speak to the same detective. The detective showed Echoles a photo array where he recognized a picture of Nook. The picture was of Darryl Washington. The next day, Echoles returned to the police station to view two line-ups where he identified Nook and defendant.

¶ 13 Police arrested defendant on August 20, 2006.

¶ 14 Brenda Franklin testified she dated defendant in June of 2006. She owned a black Blazer SUV at that time. Franklin testified that defendant came into her bedroom one night and asked if he could use her car. She gave him the keys and then went back to sleep. Defendant returned the

keys later that night. Franklin did not observe any blood stains or anything unusual after defendant borrowed her car. Police processed the car and did not detect blood on any swabs of the car or the floor mats.

¶ 15 Curtis Adams testified that he could not recall where he was on the evening of June 7, 2006. The State asked Adams a series of questions about the beatings near Crystal and Potomac. Adams repeatedly answered that he did not recall those events. On cross-examination, Adams testified that he met with police in the summer of 2006. Adams told the officers that he did not know anything about the murders. They kept telling him that they knew he was there and that he would be in trouble if he did not cooperate. Adams testified that one officer told him they could charge him with the murders. Adams testified he was scared and decided to cooperate. He denied supplying the details contained in a statement given to an assistant State's Attorney. He testified he signed a statement so he could leave.

¶ 16 Chicago police detective Dino Amato testified that he interviewed Adams but denied threatening him. Detective Amato testified that Adams told him he was at 16th Street and Komensky at 10 p.m. on June 7, 2006, when defendant pulled up in a black Blazer and asked him if he wanted to take a ride to the West Side because his brother Nook had gotten into some trouble. On the way they picked up two women, then met Nook and Leon Shields. Leon carried a large stick and Nook had a smaller black stick, about 18-inches long. Leon and Nook got into the car then the group drove north on Kildare.

¶ 17 Detective Amato testified that Adams told him they noticed three people on the west side of Kildare. Someone said, "There they go right there." The vehicle stopped. Leon, Nook and

defendant exited the car and chased the three people. Adams stayed in the car with the girls. A short time later, Adams got out and peered down the alley where he observed Nook striking someone with a stick and the defendant holding another individual while Leon struck the individual with a stick. Adams urged them to return. He walked back to the car when the beating continued.

¶ 18 Detective Amato testified that Adams told him that Leon, Nook and defendant returned a short time later with their clothing covered with blood. As they drove away, a phone rang and defendant answered. The voice on the other end said, "Where you at," to which defendant responded, "I'm in the alley all stretched out." Adams told Detective Amato that defendant dropped off the others, returned Brenda's car and picked up his own white van, then took him home.

¶ 19 Detective Amato testified that he was present when Adams repeated his statement to Assistant State's Attorney (ASA) Heather Alwin, who wrote down a summary of what Adams told her about the events. Adams read, corrected and signed the statement. Adams also testified before a grand jury. Adams' testimony to the grand jury matched his statement to police and ASA Alwin.

¶ 20 The jury found defendant guilty of two counts of first degree murder and the trial court sentenced him to natural life in prison. After sentencing, defendant filed a series of *pro se* motions for a new trial claiming, *inter alia*, ineffective assistance of counsel for failing to pursue an insanity defense, failing to call certain witnesses, failing to properly cross examine Jermaine Echoles, failing to pursue a strategic course based on information from "Agent Rucker," an

Illinois Department of Corrections parole agent, and that defendant's attorney ordered him not to testify.

¶ 21 In a hearing on defendant's *pro se* motions for ineffective assistance of counsel, the trial court stated:

> "I just don't see it. I think you had excellent representation. ***.
>
> The fact of the matter is that the circumstances make it clear to me the insanity defense would have been unavailing for many of your reasons discussed by [defendant's trial counsel] Ms. McBeth.
>
> *** The failure to call your mother and father and your employer to establish mental retardation obviously unavailing in any event because of my ruling on the motion to make mental retardation [irrelevant] in the first place.
>
> Cross examination by the defense of Jermaine Echoles and Curtis Adams was frankly exemplary. The fact that it didn't win the day is not a function of any shortcoming on the part of your defense counsel, a function of the fact the evidence proved you guilty beyond a reasonable doubt.
>
> ***
>
> I don't begrudge the fact that as a matter of trial strategy Ms. McBeth and Mr. Teague did not pursue an alibi defense that was never clearly stated to them in the first place."

¶ 22 The trial court denied defendant's motions for a new trial. This timely appeal followed.

¶ 23 ANALYSIS

¶ 24 A. Due Process

¶ 25 Defendant claims the trial court denied his constitutional right to due process, to present a

defense, and to confront the evidence against him when it granted the State's motion *in limine* and categorically prohibited him from presenting any evidence of his purported mental retardation. A defendant is entitled to all reasonable opportunities to present evidence which might create doubt as to his guilt. *People v. Hoffman*, 146 Ill. App. 3d 823, 831 (1986). However, a trial court may properly exclude evidence when its relevancy is so speculative as to impart little probative value. *Id*. Motions *in limine* are addressed to the trial court's inherent power to admit or exclude evidence; generally, a reviewing court will not disturb the trial court's ruling on motions *in limine* absent an abuse of discretion, so long as the trial court exercises its discretion within the bounds of the law. *People v. Voit*, 355 Ill. App. 3d 1015, 1023 (2004). An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. *Id*.

¶ 26 On appeal defendant argues the trial court's order on the State's motion *in limine* prohibited him from properly defending the "intent" element of first degree murder, based on either his own acts, accountability, or felony murder. To convict a defendant of first degree murder, the State must prove either an intentional killing (720 ILCS 5/9–1(a)(1) (West 2006)) or a knowing killing (720 ILCS 5/9–1(a)(2) (West 2006)). *People v. Dunmore*, 389 Ill. App. 3d 1095, 1111 (2009). In this case the jury could have found defendant guilty based on accountability for codefendants' acts or based on felony murder. "To show accountability, the State was required to establish beyond a reasonable doubt that: (1) defendant solicited, ordered, abetted, agreed or attempted to aid another in the planning or commission of the crime; (2) defendant's participation took place before or during the commission of the crime; and (3) the

defendant had the concurrent intent to promote or facilitate the commission of the crime." *People v. Garrett*, 401 Ill. App. 3d 238, 243 (2010).

> "In order to prove that a defendant had the intent to promote or facilitate a crime, the State must establish beyond a reasonable doubt that either: (1) he shared the criminal intent of the principal offender; or (2) there was a common criminal design. Accountability may be established through a person's knowledge of and participation in the criminal scheme, even though there is no evidence that he directly participated in the criminal act itself. A defendant's mere presence at the scene of the crime is insufficient to prove accountability, even if the individual has knowledge that a crime is being committed or flees from the scene ***." (Internal quotation marks and citations omitted.) *People v. Velez*, 388 Ill. App. 3d 493, 512 (2009).

¶ 27 The felony murder statute subjects an offender to a first degree murder charge if another person is killed during the commission of a forcible felony. *People v. Davison*, 236 Ill. 2d 232, 239 (2010). "The lack of an intent to kill for felony murder distinguishes it from the other forms of first degree murder ***." *People v. Davis*, 213 Ill. 2d 459, 471 (2004). "The State *** must show that the defendant intended to commit the underlying felony." *People v. Causey*, 341 Ill. App. 3d 759, 769-70 (2003).

¶ 28 On appeal defendant argues that evidence of a mental deficiency, such as mental retardation, is admissible to show that the defendant did not form the requisite intent to commit the crime. The State, citing *People v. Hulitt*, 361 Ill. App. 3d 634 (2005), contends that defendant is attempting to present the doctrine of diminished capacity as a defense to first degree murder, but the doctrine is no longer law in Illinois. In *Hulitt*, the trial court granted the State's motion *in limine* barring testimony from a psychologist as to the defendant's mental capacity.

Hulitt, 361 Ill. App. 3d at 636. The defendant claimed she did not intend to raise an insanity defense. Instead, she wanted the psychologist to testify that she suffered from postpartum depression and could not have intentionally or knowingly killed her daughter. *Id*. The trial court found that the defendant was attempting to resurrect a diminished capacity defense, which was struck by the legislature in 1995. *Id*. On appeal, the defendant argued that she was not attempting to resurrect the former definition of insanity or attempting to claim diminished capacity, instead, she was attempting to show that she did not have the requisite intent to commit first degree murder.

¶ 29 This court affirmed the trial court's decision, explaining that the doctrine of diminished capacity allowed a defendant to offer evidence of a mental condition in relation to the defendant's capacity to form the intent required for commission of the charged offense. *Id*. at 640. We described the defense as follows:

> "Diminished capacity is considered a partial defense because it is not presented as an excuse or justification for a crime but, rather, as an attempt to prove that the defendant, because she was incapable of forming the requisite intent of the crime charged, is innocent of that crime but likely guilty of a lesser included offense." *Id*. at 641.

¶ 30 Despite defendant's claims to the contrary, we find that, like in *Hulitt*, defendant is attempting to resurrect the former insanity statute that allowed for a defense of diminished capacity. *Id*. As we stated in *Hulitt*: "Defendant could not raise it as an affirmative defense and, therefore, should not be permitted to raise it in the guise of a reasonable doubt argument." *Id*. Defendant also cited *People v. Strader*, 278 Ill. App. 3d 876 (1996), in which the court held that

the trial court erred in barring testimony by an expert that, based upon a combination of factors related to his mental state at the time of the offense, the defendant acted out of a sudden and intense passion. Initially, we note that *Strader* is not controlling because the defendant in *Strader* asserted affirmative defenses based on mental capacity. In the instant case, defendant chose not to assert any recognized affirmative defenses based on mental capacity. Also unlike *Strader*, here defendant never followed the proper procedure to have an expert testify as to his mental condition. Accordingly, we cannot say the trial court's ruling on the State's motion *in limine* was arbitrary, fanciful, or unreasonable. We find that the trial court did not commit error in its ruling on the State's motion *in limine*.

¶ 31 Nonetheless, *Strader* does stand for the proposition that, in an appropriate case, exclusion of evidence of a defendant's mental condition, as it relates to whether the defendant actually possessed the level of intent required by the offense charged, might constitute reversible error. *Id*. at 883 (citing *People v. Elder*, 219 Ill. App. 3d 223, 225-26 (1991)). However, in *Strader*, the court held that while "the trial court erred in barring Dr. Taliana's testimony, and although we strongly criticize the court's restriction of defendant's case, the error does not entitle defendant to a new trial in light of the overwhelming evidence of guilt." *Id*. at 885. The facts before us do not present an appropriate case to find that the trial court's barring of evidence of defendant's mental state at the time of the offense, to negate evidence that defendant formed the intent to commit the offenses charged, rises to the level of reversible error.

> "Every sane man is presumed to intend all of the natural and probable consequences flowing from his own deliberate act. Therefore, if one voluntarily and willfully does an act the direct and natural tendency of which is to destroy

> another's life, the natural and irresistible conclusion, in the absence of qualifying facts, is that the destruction of such other persons's life was intended." *People v. Simmons*, 399 Ill. 572, 578 (1948).

¶ 32 In this case defendant borrowed a vehicle and recruited assistance because one of his brother's had gotten into trouble. Defendant then drove an appreciable distance to pick up his brothers because of the "trouble" defendant knew to exist. When defendant's brothers joined defendant and Adams, defendant's brothers were armed and, a short time later, defendant became a direct participant in their attack on Harkins and Williams. Defendant exited the vehicle at the same time as the codefendants, chased the victims with the codefendants, and delivered a blow to one of the victims while his brother attacked the second. Defendant then extended his participation in the crime by holding his victim while his brother continued the assault.

¶ 33 The evidence of defendant's intent, with regard to his own conduct and his accountability for his brothers' conduct, is overwhelming. In light of defendant's repeated, deliberate, wanton, and malicious acts in furtherance of the crime, defendant's low I.Q. is not a qualifying fact to overcome the irresistible conclusion that defendant possessed sufficient intent to sustain his convictions. See *Simmons*, 399 Ill. at 579 (jury was justified in finding that attack was malicious, that the defendant intended the natural consequences of his wanton act, and was thus guilty of the crime of assault with intent to murder). *Arguendo*, if the trial court had committed error in its judgment on the motion *in limine*, we would find the error was harmless.

¶ 34 B. Ineffective Assistance of Counsel

¶ 35 Next, defendant argues his trial counsel was ineffective for failing to put forth witnesses promised during her opening statement. To prevail on a claim of ineffective assistance

of counsel, a defendant must show: (1) his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because without those errors, there was a reasonable probability his trial would have resulted in a different outcome. *People v. Ward*, 371 Ill. App. 3d 382 (2007); *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, 466 U. S. at 694. It is the defendant's burden to affirmatively prove prejudice. *Strickland*, 466 U.S. at 693.

¶ 36 Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 446 U.S. at 689; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Mistakes in strategy or tactics alone do not normally amount to ineffective assistance of counsel, nor does the fact that another attorney may have handled things differently. *Ward*, 371 Ill. App. 3d at 434 (citing *People v. Palmer*, 162 Ill. 2d 465, 476 (1994)). Decisions on what evidence to present and which witnesses to call on a defendant's behalf rest with trial counsel and, as matters of trial strategy, are generally immune from claims of ineffective assistance of counsel. *People v. Deloney*, 343 Ill. App. 3d 621, 634 (2003). The only exception to this rule is when counsel's chosen trial strategy is so unsound that counsel fails to conduct any meaningful adversarial testing. *Id*. A decision to abandon a trial strategy made during trial may be reasonable under the circumstances and the decision not to provide promised testimony may be warranted by unexpected events. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 80 (2011). Thus, a defense counsel's failure to provide testimony promised during

opening statements is not ineffective assistance of counsel *per se*. *Wilborn*, 2011 IL App (1st) 092802, ¶ 80.

¶ 37 In her opening statement, defendant's attorney stated: (1) the defense would show that the victims were killed in an "open air drug market," (2) witness Monique White would testify that victim Marty Williams sold drugs on the corner where he died, (3) Ms. Reynolds would testify that she observed two black men run into a plain, older-model, black sedan without trim and she could describe their clothing, and (4) Curtis Adams and Tyesha Webb would sharply disagree on the sequence of events that evening and on whether Webb's cousin came with them or not.

¶ 38 Defendant's attorney did not call White, Reynolds or Webb to testify at trial. The defense presented no evidence to show that anyone else was at the scene of the offense other than the victims, defendant, codefendants, Adams, and Echoles. In support of his claim of prejudice, the defendant relies on *People v. Bryant*, 391 Ill. App. 3d 228 (2009). In *Bryant*, defense counsel's strategy, as he mentioned in his opening statement, was to show that the defendants were asleep when the murder occurred and they could not have possibly participated. *Id*. However, defense counsel did not present any evidence whatsoever to show that the defendants were asleep when the murder occurred or that they did not participate. *Id*. at 239-40. The court found that defense counsel's failure to call any witnesses in support of the defense was a matter of trial strategy but based on the facts of the case, the strategy was not sound, and the defendants suffered prejudice. *Id*. at 239. The court found that after promising that the defendants would testify as to what happened on the night of the murder, it was not reasonable for them not to testify, especially

when the defense theory did not change. *Id*. at 240-41. In the end, the jury had to ignore the defense theory that the defendants were asleep while two others committed the murder because defense counsel failed to present any evidence in support of this theory. *Id*.

¶ 39 The instant case is distinguishable from *Bryant* because defendant's trial counsel did not completely fail to present any evidence in support of her theory of defense. Counsel attempted to show that the State's witnesses were not credible and that defendant was blindly led by his brothers into this "open air drug market" where the murders occurred. Regarding the failure to call the witnesses mentioned during defense counsel's opening statement, counsel stated in a posttrial hearing that she planned to present the witnesses in an attempt to rebut potential evidence from the State regarding Leon Shield's contacts to the area of the crime. However, the State did not attempt to bring in this evidence, so defense counsel abandoned these witnesses. At the posttrial hearing defense counsel stated:

> "As your Honor may remember, there is other evidence that the State didn't present. I wasn't sure if they were going to present it. I talked about it in my opening statement, where Monique White's house was. Monique White was the girlfriend of Leon Shields. I put that information in to show that it was not Curtis who had a motive to do this, but Darryl; and it was not Curtis who had a girlfriend in the area, but Leon. So that to try to support our defense that he may have been there, but he didn't know what his brothers were going to do. He may have gone there innocently, but he is not responsible because he didn't get out of the truck and beat the men."

¶ 40 Defendant argues that the failure to call Webb actually implied to the jury that Webb's testimony corroborated Adams' testimony, because his attorney told the jury their testimony would conflict. It appears that Webb's testimony would have contradicted Adams on collateral

matters rather than on his recitation of the actual events. Defense counsel could have reasonably abandoned her strategy to attack Adams' credibility in this way based on events at trial. Defendant points to nothing to support his speculation that the failure to call Webb had the effect of bolstering Adams' testimony. Therefore, defendant has not met his burden to overcome the strong presumption that the decision not to call Webb was the product of sound trial strategy. *Wilborn*, 2011 Il App (1st) 092802, ¶ 80. Further, the "unexpected event" of the State's failure to present certain evidence that defense counsel expected the State to produce warranted defense counsel's decision not to call witnesses she mentioned during her opening statement. Regardless, counsel's testimony proves that the decision not to call the witnesses was a strategic decision based on the evidence the State actually produced, rather than simply a failure to subject the State's evidence to meaningful adversarial testing. We cannot say that no reasonably effective defense attorney, facing similar circumstances, would not have pursued such a strategy. *Wilborn*, 2011 IL App (1st) 092802, ¶ 81 ("A defendant may overcome the strong presumption that defense counsel's choice of strategy was sound if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy.") (Internal quotation marks and citations omitted.)

¶ 41 The State produced evidence that defendant was present at the crime scene and an active participant in the crimes. The State presented two out-of-court statements, along with testimony from Echoles, that showed defendant exited the vehicle and participated in the beatings. This evidence includes Echoles' testimony that he observed defendant beat Harkins repeatedly, and Adams' multiple statements that he observed defendant hold one of the victims while Nook beat

the man. The record shows that defense counsel considered putting forth certain defenses related to defendant's alleged participation in the crimes, then abandoned that course when there was not enough evidence to support the defenses. These are matters of sound trial strategy. See *Wilborn*, 2011 Il App (1st) 092802, ¶ 80 (sound trial strategy embraces the use of established rules of evidence and procedure to avoid, when possible, the admission of incriminating statements, harmful opinions, and prejudicial facts). Based on the record, we cannot say that there is a reasonable probability of a different result sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, 466 U.S. at 694. As a result, we cannot say defendant received ineffective assistance.

¶ 42 C. Cumulative Prior Inconsistent Statements

¶ 43 Next, defendant argues the trial court denied him a fair trial by permitting the State to introduce cumulative prior inconsistent statements. Defendant concedes that Adams' prior inconsistent statements to a police officer, an assistant State's Attorney and then again to the grand jury, were all admissible under section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2006)). However, defendant claims he was prejudiced by the admission of cumulative prior statements. The State responds defendant failed to properly preserve this issue at trial because defense counsel objected to the admission of two prior inconsistent statements on specific grounds other than their cumulative prejudicial effect. *People v. Lewis*, 165 Ill. 2d 305, 335-36 (1995). Defendant responds that prior to his objections based on section 115-10.1, counsel objected to the State's direct examination of witness Adams as repetitive and unfair. A review of the record reveals that defense counsel's objection to

admitting the statements at trial was based on section 115-10.1 of the Code, regarding the admissibility of prior inconsistent statements, not the erroneous admission of cumulative evidence. Accordingly, defendant has forfeited the claim. *Id*.

¶ 44 Defendant requests we review the issue under the plain error doctrine. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). A reviewing court will only apply the plain error doctrine when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In plain error review, the burden of persuasion rests with the defendant. *Id*. The first step in applying the plain error doctrine is to determine whether any error occurred at all. *Id*.

¶ 45 "Evidence is considered cumulative when it adds nothing to what was already before the jury." *People v. White*, 2011 IL App (1st) 092852, ¶ 44 (2011). We review the trial court's decision to admit evidence for an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would agree with the position adopted by the trial court. *Id*.

¶ 46 Based on *People v. Smith*, 139 Ill. App. 3d 21, 33 (1985), defendant claims the repetition of the statements over-persuaded the jury as to their truth, regardless of their actual merit, due to the sheer force of repetition. Defendant concedes this court rejected a similar argument in *People*

v. Johnson, 385 Ill. App. 3d 585, 608 (2008), but argues that *Johnson* should be rejected because it fails to acknowledge or explain its distinction between bolstering a prior inconsistent statement through repetition and bolstering trial testimony through repetition. In *Johnson*, the defendant claimed that repetition of a witness's prior statements violated "the evidentiary rule" against repetition of a prior consistent statement. *Id*. at 608. This court found that "[t]he defense is confusing apples with oranges, or more specifically, inconsistent statements with consistent ones." *Id*. The court explained:

> "The defense is absolutely right that there is a long-established evidentiary rule against admission of a prior consistent statement ***. However, at issue here are prior inconsistent statements, or statements inconsistent with the witness's trial testimony.
>
> Consistency is measured against a witness's trial testimony: inconsistent statements are inconsistent with trial testimony; consistent statements are consistent with it. The rule against admission of consistent statements exists because they needlessly bolster the witness's trial testimony. Obviously, inconsistent statements cannot bolster a witness's trial testimony. Thus, application of the rule makes no sense here." (Internal citations omitted.) *Id*.

¶ 47 We decline defendant's invitation to reject *Johnson*. The court's reasoning is sound and does account for the difference in treatment between prior inconsistent statements and cumulative consistent statements. Adams' prior inconsistent statements were not cumulative. See *White*, 2011 IL App (1st) 092852, ¶ 44 ("presentation of the grand jury testimony was not merely cumulative of what was already before the jury. Rather, weeks or months after providing a written statement to assistant State's Attorneys ***, the witnesses provided separate testimony,

under oath, to the grand jury.") Based on *Johnson*, *Smith* is inapposite because *Smith* concerns a prior consistent statement, not a prior inconsistent statement. *Smith*, 139 Ill. App. 3d at 33. The *Smith* court warned that the inclusion of prior consistent statements may improperly influence the jury because "repetition lends credibility to testimony that it might not otherwise deserve." *Smith*, 139 Ill. App. 3d at 33. Here, unlike the prior *consistent* statement in *Smith*, we have the introduction of multiple prior *inconsistent* statements, which a trial court may properly allow. *People v. Maldonado*, 398 Ill. App. 3d 401, 423 (2010); *White*, 2011 IL App (1st) 092852, ¶ 53; *People v. Santiago*, 409 Ill. App. 3d 927 (2011); *People v. Perry*, 2011 IL App (1st) 081228 (2011); *Johnson*, 385 Ill. App. 3d at 608.

¶ 48 Nor has defendant pointed to evidence that the admission of the statements prejudiced him. "In fact, this court has found that even when the State presented a prior inconsistent statement that was 'unnecessarily repetitive' of another, the repetition did not rise to the level of prejudice." *White*, 2011 IL App (1st) 092852, ¶ 45. Echoles' testimony also corroborated much of the substance Adams' statements. Accordingly, we cannot say the trial court abused its discretion when it allowed multiple prior inconsistent statements into evidence. Since we cannot find the trial court erred, there is no plain error, thus, the defendant has forfeited the claim. *Piatkowski*, 225 Ill. 2d at 565.

¶ 49 D. Prosecutorial Misconduct

¶ 50 Next, defendant claims he was denied a fair trial by improper argument by the State. The State contends that defendant has forfeited this claim by failing to object at trial and failing to raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). We will

review the issue for plain error.

¶ 51 Prosecutors are afforded wide latitude in closing argument and may argue facts as well as reasonable inferences drawn from the evidence. *People v. Jenkins*, 333 Ill. App. 3d 534, 540 (2002). Comments by counsel constitute reversible error only when they engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments. *People v. Nieves*, 193 Ill. 2d 513, 533 (2000). If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*. *Wheeler*, 226 Ill. 2d at 121.

¶ 52 Defendant claims the State: (1) misstated the testimony of its witnesses to make their inconsistent accounts appear consistent, (2) misstated the defense theory of the case, and (3) invited the jury to convict out of passion.

¶ 53 1. Misstatement of Testimony

¶ 54 Defendant claims the State wrongly asserted in rebuttal that Echoles' and Adams' testimony was consistent when it was actually inconsistent. Echoles testified that two men were involved in the beatings while Adams said three, and Echoles testified that defendant was holding a nightstick while Adams said defendant was never armed. A review of the record shows that Echoles, like Adams, testified that there were four men at the scene of the beatings. Echoles testified that he observed Nook strike Williams, the defendant strike Harkins, then two

other men came running toward him through the alley. In Adams' multiple statements, he said there were four men in the SUV, including himself. He stated that he got out of the SUV and encouraged the defendant, Nook and Leon to return to the vehicle. So, according to Adams, when he exited the SUV, there were four men from the SUV in the alley, including himself. The State's argument that there was no discrepancy as to how many men from the SUV entered into the alley was a reasonable inference drawn from the testimony.

¶ 55 Defendant claims the State misstated the evidence when it remarked in rebuttal that Leon took the bludgeon from defendant and struck Harkins while the defendant held Harkins. A review of the record shows that there is no direct evidence that Leon took the bludgeon from defendant. However, we cannot say the State's statement cannot be reasonably inferred from the evidence. *Jenkins*, 333 Ill. App. 3d at 540. "The inference to be drawn need not be the only conclusion logically to be drawn; it suffices that the suggested inference may reasonably be drawn." *People v. Martin*, 401 Ill. App. 3d 315, 323 (2010).

¶ 56 Echoles testified he observed defendant exit the SUV carrying a stick. Adams' multiple statements show that Nook and Leon each entered the SUV carrying sticks. It may be reasonably inferred from this evidence that either Leon or Nook gave defendant one of their sticks while in transit or that Leon took defendant's stick at the scene. Adams testified that he remained behind a short time after the defendants exited the vehicle. A reasonable inference from all of the evidence is that while Adams was in the vehicle he could not see what was happening. A reasonable jury could infer that while out of Adams' sight, defendant, having obtained a weapon from Leon, struck Harkins first, then, by the time Adams arrived, defendant had returned the

weapon to Leon and held Harkins so that Leon could strike him.

¶ 57 Even if we were to say the State's remark was improper, we are unable to find that the jury could have reached a contrary verdict had the improper remark not been made. *People v. Linscott*, 142 Ill. 2d 22, 28 (1991). Echoles' testimony and Adams' multiple statements show that defendant was an active participant in the beatings. Echoles testified that he observed defendant hit Harkins with a stick. Adams stated he observed defendant hold one of the victims while Nook struck him with a stick. Both Echoles and Adams testified that defendant answered Williams' cell phone and appeared to try and lure Echoles back into the alley after the beatings occurred. The State adduced ample evidence of defendant's guilt such that the argument that the witnesses testified consistently, which the jury could have reasonably inferred anyway, was not a material factor in defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. In addition, as the State argued, Illinois Pattern Jury Instruction Number 1.03, informed the jury that closing arguments are not evidence.

¶ 58 2. Misstatement of the Defense Theory

¶ 59 Defendant next claims he was denied a fair trial based on the following comments from the State in closing argument:

> "Ladies and gentlemen, the law applies equally to all. If we are here to say that we don't care about the lives of these two young men *** because somebody had some drugs in their system, is that what we are saying: Are we saying that these two young men are not worthy of the protection of the law? Because if we are saying that, that's not what the law says. The law applies equally to everyone, and I will ask you once again to please only consider what is in evidence. These two young men were not doing anything at the time that they were ambushed by the defendant and

> his partners in crime."

¶ 60 In rebuttal, the State argued:

> "Now, you heard over and over about that's an area of drugs, a drug area, a narcotics area. In fact, we stipulated Marty Williams' body did have amphetamines and cannabinoids in his system. Drugs, drugs in his system. However, it is insulting to think that this defendant gets to get away with it because Marty Williams' or Darrin Harkins' lives are not worth it."

¶ 61 Defendant argues he was prejudiced by these statements because he never asserted these claims, contending that the State's comments here are similar to those in *People v. Emerson*, 97 Ill. 2d 487, 497 (1983), where the State commented on inadmissible evidence in closing argument and the defendant argued that the State suggested that the defense attorneys created defenses. In *Emerson*, our supreme court found that the defendant was prejudiced by the State's comments regarding the defendant's conduct that was not admissible at trial, because they left the jury to speculate as to facts the State suggested existed but which were not in evidence. *Id*. ("the inference that defendant had been guilty of improper conduct at the time of the arrest left the jury free to speculate as to the nature of that misconduct"). Here, unlike *Emerson*, the State did not comment on inadmissible evidence or suggest the existence of evidence of guilt that could not be brought before the jury. *Id*. Thus, unlike *Emerson*, the State did not make an insinuation which left the jury to speculate. *Id*. ("This court has recognized that an insinuation which leaves the jury to speculate may be more prejudicial than erroneously admitted specific proof.") Nor can the State's arguments be fairly construed as an attempt to shift the focus from the evidence to a defense tactic to "dirty up the victim." *Id*. at 498. The defense itself brought the

matters on which the State commented to the attention of the jury. The State and the defense stipulated that Williams had drugs in his system. Defense counsel argued in her opening statement that the area where the beatings occurred was an open-air drug market and Williams was a drug dealer. Accordingly, we cannot say the State's comments were misleading or that the defendant was prejudiced by these comments such that it is impossible to say whether or not a verdict of guilt resulted from these comments. *Nieves*, 193 Ill. 2d at 533.

¶ 62 3. Comments Designed to Inflame the Passions of the Jury

¶ 63 Defendant claims he was prejudiced when the State: (1) asked the jury to place themselves in the position of victim Harkins, and (2) made remarks that dwelled on the victims' families. The State commented in its closing argument:

> "Imagine – you heard from the medical examiner that the victim, Darrin Harkins, weighed 171 pounds. Imagine this force [the defendant] coming at you, not only *** with his own brute strength, but with the help of an instrument, an instrument of murder, an instrument of murder that he was beating with his strength on 171 pounds."

¶ 64 Defendant, relying on *People v. Hope*, 116 Ill. 2d 265 (1986), argues these comments arouse the sympathies of the jury and bear no relation to his guilt or innocence. *Hope* is inapposite because it involved the admission of testimony concerning the victim's spouse and family. Nonetheless, the State concedes that it is generally improper for the State to ask the jury to place itself in the place of the victim. *People v. Wood*, 341 Ill. App. 3d 599, 614 (2003) ("the State is not free to 'invite the jurors to enter into some sort of empathetic identification with' the victim.") "Although improper, reversal is not warranted because the remarks were not so

prejudicial as to deprive defendant of a fair trial." *Id*. Here, as in *Wood*, the evidence of defendant's guilt is overwhelming. Therefore, we cannot say that this isolated remark caused substantial prejudice to defendant.

¶ 65 In its closing argument, the State stated, in pertinent part, as follows:

> "On June 11 and June 19, Debra Williams and Annie Harkins had the unenviable task of going to the morgue and identifying their sons to the medical examiners and to the police. Ladies and gentlemen, Miss Williams and Miss Harkins come here today seeking justice. [Objection overruled.] You can deliver that justice with your verdict. You can do that because you have the evidence and you have the law that supports you in that verdict.
>
> We are asking you to return the only true verdict in this case. And this verdict is supported by the evidence, and it is the verdict that justice demands here. And we ask you to return the verdict of guilty. Thank you."

¶ 66 In *Hope*, our supreme court instructed that evidence of whether the deceased left a spouse and a family has no relationship to the guilt or innocence of the accused and normally serves only to prejudice the defendant in the eyes of the jury. *Hope*, 116 Ill. 2d at 275-76. But our supreme court also noted that "common sense tells us that murder victims do not live in a vacuum and that in most cases, they leave behind family members." *Id*. at 275-76 (quoting *People v. Free*, 94 Ill. 2d 378, 415 (1983)). Thus, every mention of a deceased's family does not *per se* entitle the defendant to a new trial. *Id*. at 276. "In certain instances, *depending upon how this evidence is introduced*, such a statement can be harmless ***." (Emphasis in original.) *Id*.

¶ 67 In this case, we find the State's comments regarding the victims' families were also harmless. The evidence concerning the victims' families was brought to the jury's attention

incidentally, and not in a manner as to permit the jury to believe it material. *Hope*, 116 Ill. 2d at 278. Contemporaneous with the statements regarding the victims' families, the State urged the jury to return a verdict to deliver justice for the effect of defendant's crime on the families, and that the verdict the State sought was supported by the evidence; which, the trial court instructed, did not include the State's arguments. The State's argument was proper. "The State may comment unfavorably on the evil effects of crime and urge a fearless administration of the law ***." *Id*. at 277-78. Based on the record before us, we cannot say defendant was prejudiced by the State's closing argument. The jury's verdict did not depend on the complained of statements. The State adduced sufficient evidence to established defendant's guilt independent of the complained-of comments. *Id*. at 275.

¶ 68 E. Constitutionality of Defendant's Sentence

¶ 69 Next, defendant claims his statutorily mandated life sentence (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2006)), is unconstitutional as applied to a mentally retarded man. The jury found defendant guilty of two counts of first degree murder (720 ILCS 5/9-1(a)(2) (West 2006)). Defendant's two murder convictions carried a mandatory sentence of natural life in prison (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2006)). The sentencing statute is presumed constitutional, and to overcome this presumption, the party challenging the statute must clearly establish that it violates the constitution. *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). Section 5/5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections has been found constitutional as applied to juvenile principals, adult accomplices, and adult defendants convicted under a theory of accountability. *People v. Winters*, 349 Ill. App. 3d 747, 750-51 (2004) (and cases cited therein). The Eighth Amendment

of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *People v. Brown*, 2012 Il App (1st) 091940, ¶ 55 (2012) (citing *Robinson v. California*, 370 U.S. 660, 666 (1962); U.S. Const., amend. VIII). Article I, section 11, of the Illinois Constitution of 1970 provides: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." *Id*. (quoting Ill. Const. 1970, art. I. §11). Both the U.S. and Illinois constitutions incorporate the concept of "proportionality in criminal sentencing." *Id*. at ¶ 56. A proportionality analysis under either constitution involves a consideration of evolving standards of decency and fairness to determine the validity of any particular sentence. *Id*. Defendant argues that determining whether a sentence is constitutionally proportionate requires consideration of the defendant as well as his personal culpability in the offense. Defendant argues that as a mentally retarded individual, he is inherently less personally and morally culpable than an adult with average intelligence.

¶ 70 Defendant's argument that the sentence is unconstitutional, premised on his allegation he is less culpable for the crimes based on his mental retardation, is not persuasive given the evidence produced at trial. We disagree that defendant lacks sufficient culpability to render application of the mandatory life sentencing statute unconstitutional. In *People v. Miller*, 202 Ill. 2d 328 (2002), the trial court refused to impose the statutorily mandated sentence on a 15-year-old defendant because the trial court found the sentence offends the Illinois Constitution's proportionate penalties clause and the United States Constitution's cruel and

unusual punishment clause. *Miller*, 202 Ill. 2d at 336. In affirming the trial court, our supreme court noted the level of participation of the young defendant in the crime. *Id*. at 341. The murder in *Miller* occurred after two individuals approached the defendant and asked him to be a look out while they dealt with people walking through their neighborhood they thought were rival gang members. *Id*. at 330. One minute later, the individuals fired gunshots at two victims, killing them. *Id*. at 331. According to our supreme court: "this case presents the least culpable offender imaginable, a 15-year-old who had 'about a minute from the time this plan began until the act was completed by other persons' " to decide whether to participate. *Id*. at 341.

¶ 71 The instant case is distinguishable from *Miller*. While the defendant argues he is mentally retarded and as such is the least culpable offender, his claims are refuted by the record. The evidence shows that on the night of the murders, the defendant drove his girlfriend's SUV to the scene, instead of using his own vehicle. He then picked up Adams and told him he was heading to the West Side because Nook got into some trouble. At the scene, defendant exited the SUV with a weapon, then beat Harkins with that weapon. He also held the victim while Leon beat that victim with a weapon. When Echoles called Williams' cell phone after the beatings, defendant answered and, it may be reasonably inferred, tried to lure Echoles back to the alley. After the beatings, defendant returned the SUV, then drove Adams home in his own vehicle.

¶ 72 Based on this evidence, we cannot say that defendant was the least culpable offender involved in the crime. Unlike the 15-year-old defendant in *Miller*, who was asked to be a lookout just one minute before the shootings occurred, defendant actively participated from beginning to end in a planned scheme to inflict harm upon the victims. Therefore, we cannot say

defendant's sentence of natural life in prison is unconstitutionally disproportionate and excessive.

¶ 73 F. Posttrial Allegations of Ineffective Assistance

¶ 74 Finally, defendant claims the trial court failed to adequately review his *pro se* posttrial allegations of ineffective assistance of trial counsel, requiring a remand for further proceedings pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). Specifically, defendant argues the trial court overlooked his claim that his attorney was ineffective for ordering him not to testify at trial. In *People v. Moore*, 207 Ill. 2d 68 (2003), the court explained the procedures that trial courts should use to resolve *pro se* posttrial claims of ineffective assistance of counsel. The court stated that the trial court is not required to automatically appoint new counsel in every case, rather, the trial court should evaluate the factual basis of the defendant's claim. *Moore*, 207 Ill. 2d at 77-78. The trial court can simply ask trial counsel about the circumstances surrounding the claim or ask defendant questions about his claim. *Id*. at 78. Alternatively, the trial court can base its determination on its personal knowledge of counsel's performance at trial or on the facial insufficiency of the defendant's allegations. *Id*. at 79. If a defendant's claim lacks merit or relates only to matters of trial strategy, the trial court may deny the motion without appointing new counsel. *Id*. at 78.

¶ 75 The trial court held a lengthy hearing on defendant's posttrial motions. The trial court was aware of the requirements of *Moore* and in fact quoted those requirements during the hearing. The trial court did not question defendant directly as to his claim that his attorney ordered him not to testify. However, the trial court provided defendant with an opportunity to discuss anything in the motion. Defendant responded to questions regarding certain allegations

in his motion, such as his claim that trial counsel was ineffective for failing to pursue the alibi defense, but defendant did not assert that trial counsel ordered him not to testify.

¶ 76 At trial, the court addressed defendant directly and informed him that he had the right to take the stand and testify or not to testify. Defendant indicated that he understood. The judge told him that the jury would be instructed that it could not hold it against defendant if he did not testify. Defendant indicated that he understood. The judge asked him if he had discussed the issue with his counsel and he said yes. When specifically asked if he wanted to testify or not testify, defendant told the judge that he did not wish to testify. The judge asked defendant if anyone had promised him anything or had threatened him in any way. Defendant answered that no one had. The judge asked defendant if he was making the decision of his own free will. Defendant stated that he was.

¶ 77 Based on the record before us, we find that the trial court conducted an adequate inquiry under *Moore* into defendant's claim that counsel ordered him not to testify. The record shows the trial court read and carefully considered defendant's *pro se* motions for a new trial, and that the court was well aware of its obligations under *Krankel* and *Moore*. We find sufficient evidence to hold that the trial court based its decision on that portion of the motion alleging defendant's attorney ordered him not to testify on the court's personal knowledge of defendant's statements at trial and, consequently, the facial insufficiency of defendant's claim. *Moore*, 207 Ill. 2d at 79. On appeal, defendant responds that despite his statements at trial, at that time he was "still under counsel's influence." This argument is unpersuasive. As the State points out, defendant's trial counsel had a duty to advise defendant regarding whether or not to testify –

there is no duty for trial counsel to not advise her client. Defendant affirmatively stated his decision not to testify.

¶ 78 The trial court had personal knowledge that defendant's posttrial claim of ineffective assistance based on an allegation trial counsel ordered defendant not to testify was facially insufficient and lacked merit. Thus, the trial court properly denied the motion without appointing new counsel. *Moore*, 207 Ill. 2d at 78.

¶ 79 CONCLUSION

¶ 80 For all of the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 81 Affirmed.