FIFTH DIVISION
December 21, 2012

No. 1-10-3650

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 3417
	)	
JAVIER VALLADARES,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

¶ 1 *Held:* Defendant's claim of ineffective assistance of trial counsel based on counsel's decision to forgo opening and closing statements rejected; claim that trial court erred in denying his motion to suppress waived; trial counsel not ineffective for failing to raise suppression issue in post-trial motion as it would have been futile.

¶ 2 Following a bench trial, defendant Javier Valladares was proved guilty of aggravated battery and sentenced to two years' imprisonment. On appeal, he primarily contends that he was denied effective assistance of trial counsel based on counsel's failure to make opening and

closing statements. He also contends that the trial court erred in denying his motion to suppress statements, and that trial counsel was ineffective for failing to preserve this issue for review.

¶ 3 Prior to trial, defendant filed a motion to suppress three statements made after his arrest. He claimed that his arrest was made without authority or a valid search or arrest warrant, and that he did not speak English or understand the *Miranda* rights.

¶ 4 On October 30, 2008, the matter was brought before the court for status, and defendant, *pro se*, and the court engaged in the following colloquy:

> "THE COURT: Where is your attorney?
>
> [DEFENDANT]: I don't know, sir.
>
> THE COURT: Did you talk to him lately?
>
> [DEFENDANT]: Not since the last court date.
>
> THE COURT: Who is that? What's his name?
>
> [DEFENDANT]: John.
>
> ***
>
> THE COURT: Do you have a phone number where you can try calling him?
>
> [DEFENDANT]: That's what I'm trying to do now. "

The matter was then continued numerous times.

¶ 5 On February 22, 2010, a status hearing was held before a different judge, who informed defendant that it was his obligation to come to court every day, and asked him, "[d]o you understand that? Why are you not answering me? Do you understand that you have to speak in English, sir? Do you understand that?" The court then inquired of defendant's counsel,

> "[d]oes your client have a problem now with the English language?
>
> I need to get an interpreter. Pass for the interpreter. He's looking

> at me with a blank look. He needs to understand. We'll wait for the Spanish interpreter so I can give him trial *in abstentia*."

When the court reconvened, the judge admonished defendant regarding his obligation to come to court everyday. The record, however, is unclear as to whether an interpreter was present during these admonishments, or at the following continuances, during which defendant indicated at different times that he understood the court.

¶ 6 On June 23, 2010, a hearing was held on defendant's motion to suppress statements. The State initially informed the court that defendant had given four statements, but that it did not intend to use the fourth statement which was given to an assistant State's Attorney (ASA) with another detective present.

¶ 7 Defendant then testified through an interpreter that on January 29, 2008, he was arrested outside the tavern, Stocks and Blonds, near Wells and Washington Streets in Chicago. At that time, his ability to speak English, was at "60 percent, but if [he] got nervous, less than that." He further testified that when he drinks, it is more difficult for him to understand English, but that his job required him to communicate with people in English, and when he delivered packages, he could read the street signs.

¶ 8 Defendant also testified that on the night in question, he had been drinking a lot, and could not recall being arrested, or being questioned by police. He explained that when he exited the tavern, the cold air hit him, and the next thing he recalled was being removed from a police car.

¶ 9 Defendant further testified that the police spoke to him in English, but that he just told them, "I don't know," and that he wanted a lawyer. He only understood "a little" of what was being said, and believed police were discussing immigration. He also testified that he does not remember, but probably answered them in English, and asked them in Spanish if he needed an

attorney. Defendant acknowledged that he has been arrested eight other times, and claimed that he was never advised of his *Miranda* rights during those arrests.

¶ 10 When defendant was asked if he recalled anyone explaining that he had the right to remain silent, anything that he says can and will be used against him in a court of law, and that he has a right to an attorney, he responded, "[p]robably yes. The way you said it maybe, but I started talking." He further testified that those rights were explained to him in English, but then stated that he only understood the word lawyer and stated to a woman, "I don't know nothing [*sic*.]."

¶ 11 Defendant further testified that he did not remember telling Officer Galassi outside 48 North Wells Street that evening that he punched and kicked someone about the head. The only thing he recalled said to him in English was that he was in a fight, to which he responded, "say what," and the guy then made a punching motion. When he was photographed and fingerprinted, he was given directions in English which were easy to follow.

¶ 12 Officer Robert Galassi testified that he responded to a call regarding an aggravated battery at 48 North Wells Street at 10:30 p.m. on January 29, 2008. When he arrived there, he arrested defendant, who was coherent at that time, and read him his *Miranda* rights while he was sitting in the squad car. After he read each right, he asked defendant if he understood, and defendant responded, in English, "yes." Defendant did not indicate that he wanted an attorney, and when asked if he wished to answer questions, he indicated, "yes." Defendant then told him in English what had occurred. The officer brought defendant to the police station where he again advised defendant of his rights, which defendant indicated that he understood. Defendant agreed to speak to the officer, and "spoke in clear, concise English." During the interviews, there was no indication that defendant had difficulty understanding or speaking the English language.

¶ 13 Detective Landgraff testified that when he met with defendant at 3 a.m. on January 30, 2008, he first determined that an interpreter was not needed, then advised him of his *Miranda*

rights. Defendant indicated that he understood these rights after each one was read to him, then claimed that he could not remember things and was not forthcoming. Defendant did not indicate that he had trouble understanding the detective or that he wanted the assistance of an interpreter, or an attorney. The detective observed that defendant had been drinking, but that he was coherent and his speech was not slurred to any great extent.

¶ 14 The trial court subsequently denied defendant's motion to suppress. In doing so, the court stated that credibility was the issue, that defendant had contradicted himself numerous times, but indicated that he was able to communicate with police in English, and spoke English on his job. The court believed the officers' testimony, and that "[d]efendant truly does not remember what occurred as his answers were all over the place in his testimony, and so for that reason the motion is denied."

¶ 15 At trial, the defense indicated that it had no affirmative defenses or other witnesses to call and would rely on the State's inability to prove defendant guilty beyond a reasonable doubt. The State then presented a brief opening statement during it noting that the court would hear about defendant's statement to Detective Gustafson. Defense counsel then waived an opening statement.

¶ 16 Chicago police officer Corey Sheldou testified that at 10:30 p.m. on January 29, 2008, she responded to a call of a battery near Washington and Wells Streets. When she arrived there, she saw two people, Nicholas Baker and Evan Burrows, chasing defendant down Wells Street, and then grabbed and held him. Officer Sheldou identified defendant as the man the two witnesses stopped. She further testified that the men told her that the victim was further down the block, and she then observed the victim, Cary Sykora, sitting on the ground bleeding and his right eye hanging from its socket.

¶ 17 Chicago police detective Steven Gustafson testified that he and two detectives met with defendant at the station about 1 p.m. on January 31, 2008. Defendant was first advised of his *Miranda* rights, which he indicated that he understood, and "responded naturally" to the questions without indicating that he had a hard time understanding English. Detective Gustafson further testified that defendant told him in English that he had been out drinking shots of tequila, which makes him crazy, and when he received the bill, he became upset, and went outside where he attacked a man, but did not recall the details of the fight.

¶ 18 ASA Marshall then arrived at the station, read defendant his *Miranda* rights, and interviewed him with Detective Gustafson. The detective did not have any difficulty understanding defendant, who never requested an interpreter, and described the incident to the ASA similarly to what he had earlier told the detective. Detective Gustafson further testified that defendant smelled of alcohol, but was coherent.

¶ 19 The parties stipulated that defendant's shoes were submitted to the Illinois State Police Crime Lab, and found to have the victim's blood on them. The trial was continued for two weeks, and when it reconvened, the parties also stipulated that there was a 711 store at 48 North Wells Street, near where the fight took place, and a surveillance video was obtained from that store which recorded the incident in question.

¶ 20 Eyewitnesses Nicholas Baker and Evan Burrows testified that as they exited a bar on Wells Street and were headed to Washington Street, they observed an altercation on the sidewalk. Baker observed a Hispanic individual hitting and kicking a white person.

¶ 21 Baker and Burrows further testified that they viewed the 711 video, and that it accurately depicted what they had observed. Baker testified that the video further depicted Burrows repeatedly trying to stop the Hispanic person from continuing to hit and kick the white person

while he called police. Burrows testified that he told defendant that the victim was obviously hurt, and that he should leave him alone, but defendant continued to attack him.

¶ 22 Baker and Burrows also testified that the video showed another of their friends, Joseph Jufree, coming to help. When sirens were heard, defendant fled, and Burrows and Baker pursued him, caught him, and held him for police.

¶ 23 Burrows identified defendant in court as the attacker. He then stated, however, that he would not be able to identify defendant without having been shown the photograph of him beforehand, and based on this testimony, the court struck Burrows' in-court identification of defendant.

¶ 24 At the close of evidence, the State indicated that it would waive its opening closing argument and reserve rebuttal. Defense counsel then indicated that he waived closing argument, and no further argument was presented.

¶ 25 The court found defendant guilty of aggravated battery. In doing so, the court stated that it had no doubt that defendant was the attacker because both witnesses chased and caught him. Within moments, police arrived and placed defendant in custody, and Officer Sheldou identified defendant in court as the man who was being held by the witnesses.

¶ 26 Defense counsel filed a motion for a new trial, and argued, *inter alia*, that neither witness identified defendant as the person who attacked the victim, that the victim could not identify his attacker, and that the reason none of the witnesses could identify the attacker was because they were all under the influence of alcohol. Counsel also questioned whether the victim in the video was Sykora, noting that the video was of poor quality. As for the shoes, counsel maintained that defendant could have stepped in the victim's blood in a puddle, and that defendant's presence near the crime scene did not mean he committed the crime.

¶ 27 The court denied the motion finding that the video clearly depicted a person being brutally beaten, and that the only reason they could not see defendant's face in the video was because he often had his side or back to the video camera. The court stated that the good Samaritans pursued defendant without losing sight of him and caught him, and that it had no doubt that defendant was the offender. The court also stated that it found the officer and two witnesses credible.

¶ 28 On appeal, defendant initially contends that he was denied effective assistance of trial counsel for failing to make opening and closing arguments while the burden was still on the State, and where the two days of trial were separated by two weeks. The State responds that defendant's claim is speculative, not properly made on direct appeal, and should be raised in a post-conviction petition. Since we find that we can address this issue without considering matters outside the record, we may consider defendant's claim on direct appeal. *People v. Poole*, 2012 IL App (4th) 101017, ¶7.

¶ 29 Under the two-prong test for examining a claim of ineffective assistance of counsel, defendant must establish that his attorney’s performance fell below an objective standard of reasonableness, and that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). The scrutiny of defense counsel's performance is highly deferential due to the inherent difficulties of making the evaluation, and the reviewing court must indulge in a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *People v. Robinson*, 299 Ill. App. 3d 426, 433 (1998).

¶ 30 Here, defendant's claim of ineffective assistance of trial counsel is based on counsel's decision to waive opening and closing arguments. He maintains that the error is emphasized by the fact that there was a two week period between the two days of trial which dimmed the court's

memory of what transpired the first day. He further claims that there were questions about his identification as the offender, which counsel argued at the proceeding on his motion for a new trial.

¶ 31 We initially observe that the waiver of opening statement has been repeatedly recognized as a matter of trial strategy, as is waiver of closing arguments in most circumstances, particularly where, as here, there was a bench trial. *People v. Conley*, 118 Ill. App. 3d 122, 127-28 (1983) (and cases cited therein). Here, counsel specifically stated that he was not going to present an opening argument because his strategy was to rely on the State's inability to prove defendant guilty beyond a reasonable doubt. He later moved for a directed verdict on one of the three counts of aggravated battery that defendant had been charged with by the State, and then, after the State waived its opening closing argument, defense counsel waived closing argument, and the case went to the court for decision. Under these circumstances, counsel's decision may reasonably be construed as trial strategy which will not support a claim of deficient performance. *Strickland*, 466 U.S. 668; *Conley*, 118 Ill. App. 3d at 128.

¶ 32 In so finding, we have examined *Herring v. New York*, 422 U.S. 853 (1975), and *People v. Wilson*, 392 Ill. App. 3d 189 (2009), relied upon by defendant, and find that reliance misplaced. In *Herring*, the Supreme Court held that defendant was denied his right to the assistance of counsel where the trial judge refused to allow defense counsel to present closing argument. *Herring*, 422 U.S. at 856-59. Here, counsel made the decision, and *Herring* is therefore inapposite.

¶ 33 In *Wilson*, 392 Ill. App. 3d at 198, 201-02, also cited by defendant, defense counsel was found ineffective for failing to make a closing argument in a jury trial where the State made a closing argument. This court observed that it is a rare case in which choosing not to make a closing argument in a *jury trial* would be sound strategy. (Emphasis added.) *Wilson*, 392 Ill.

App. 3d at 200. Here, defendant was tried by the bench, and counsel chose to rely on the announced inability of the State to prove defendant guilty to the requisite standard. In addition, unlike *Wilson*, 392 Ill. App. 3d at 198, 201-02, where counsel made an opening statement in which he maintained that there would be inconsistencies in the witnesses' testimony, but then failed to support that claim by presenting a closing argument after the State presented a closing reconciling any inconsistencies, defense counsel made none. *Wilson,* therefore, is factually distinguishable from this case.

¶ 34 Furthermore, defendant cannot show prejudice resulting from counsel's election to forgo argument where the evidence against him was overwhelming. *People v. Everhart*, 405 Ill. App. 3d 687, 697 (2010). The record shows that two eyewitnesses, Baker and Burrows, attempted to pull defendant, the attacker, off the victim, but he repeatedly freed himself and continued to kick the victim about the head. When they heard police sirens, defendant fled and Baker and Burrows pursued him for a short distance, then caught and held him until police arrived and took him into custody. Officer Sheldou testified that she had observed Baker and Burrows pursuing defendant, and took him into custody, and identified defendant in court as the offender. Clearly, this evidence was more than sufficient to identify defendant as the attacker, and the blood of the victim found on defendant's shoes corroborated this fact. Under these circumstances, defendant cannot satisfy the prejudice prong of the *Strickland* test, and his claim of ineffective assistance necessarily fails. *Everhard*, 405 Ill. App. 3d at 698.

¶ 35 In reaching this conclusion, we find, contrary to defendant's contention, that counsel's presentation of extensive post-trial argument instead of at trial when he had the burden of proof in his favor does not call for a different result. As noted above, this was a bench trial where the evidence against defendant was overwhelming. Accordingly, we find that defendant was not prejudiced by counsel's decision to forgo argument at trial. *Conley*, 118 Ill. App. 3d at 128.

¶ 36 Defendant briefly maintains that the trial court should have disregarded Officer Sheldou's testimony "identifying Sykora as the victim," because it was hearsay as there was "no way of knowing how [Officer] Sheldou knew that Sykora was the victim's name." Defendant did not object to this testimony below, and, accordingly, has waived the issue for review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Moreover, Officer Sheldou saw Sykora immediately after he was beaten and clearly was able to identify him in court as the victim.

¶ 37 Defendant next maintains that the trial court erred in denying his motion to suppress statements where his waiver of his *Miranda* rights was not voluntarily, intelligently and knowingly made based on the fact that he spoke little English and was intoxicated, which made his limited ability to speak and understand English even worse. We initially observe, contrary to the State's contention, that defendant raised the issue of his intoxication before the trial court at the hearing on the motion (*People v. Blankenship*, 353 Ill. App. 3d 322, 324 (2005)); however, we agree that he has waived the issue for review because he did not raise it again in his post-trial motion as required *(Enoch*, 122 Ill. 2d at 186).

¶ 38 Defendant also claims that his trial counsel was ineffective for failing to raise the issue in a post-trial motion. See *e.g. People v. Hernandez*, 362 Ill. App. 3d 779, 787 (2005); *People v. Feazell*, 248 Ill. App. 3d 538, 544-45 (1993). We find, nonetheless, that defendant cannot establish ineffective assistance of counsel under *Strickland* where raising the issue again in a post-trial motion would have been futile *(People v. Gornik*, 227 Ill. App. 3d 272, 280 (1992)) because defendant cannot show that he was prejudiced to the extent that he would have been granted a new trial had the motion been filed (*Feazell*, 248 Ill. App. 3d at 545).

¶ 39 We observe that statements made during a custodial interrogation cannot be admitted into evidence unless the suspect is given *Miranda* warnings and intelligently and knowingly waives his right against self-incrimination. *People v. Matney*, 293 Ill. App. 3d 139, 146 (1997). Here,

there is no dispute that defendant was given his *Miranda* warnings, and the only issue is whether he voluntarily, knowingly and intelligently waived them. For the reasons that follow, we find that he did.

¶ 40 The record shows that prior to trial, the court and defendant had a conversation in English without the assistance of an interpreter as to who his attorney was and where he was at the time. Defendant clearly and concisely responded in English, displaying good command of the English language. When his trial neared, he implied that he needed an interpreter by staring at the judge and not answering any questions. Although defendant subsequently testified at trial through an interpreter, the record showed that he understood English where he testified that he communicated in English on his job, and could read street signs when he went out for deliveries. In addition, he contradicted his claim that he did not understand the *Miranda* warnings where, after defense counsel asked him if he understood the *Miranda* rights, he indicated "[p]robably yes. The way you said it maybe."

¶ 41 Moreover, Officer Galassi noted that during both of his interviews with defendant, there was no indication that defendant had any difficulty or trouble understanding or speaking English, that he spoke "in clear, concise English." Defendant further showed that he was fully aware of his rights by answering yes after each warning and when asked if he wanted to give a statement, he did so voluntarily. *People v. Laurant*, 131 Ill. App. 2d 193, 198 (1970). Based on the testimony provided by the police and defendant, we find that defendant's understanding of English was sufficient to allow him to knowingly and intelligently waive his *Miranda* rights.

¶ 42 In addition, we note Detective Landgraff's observation that defendant had been drinking, but that he was coherent and his speech was not slurred to any great extent. Contrary to defendant's contention, Detective Gustafson did not testify that defendant was more coherent in the afternoon. Rather, defense counsel made that comment during his questioning of Officer

Sheldou to which the officer made no response. Furthermore, the fact that defendant claimed that he could not later recall what took place, does not render his waiver unknowing and unintelligent where the record also shows that he was advised of his rights, answered "yes" to each of them, thereby indicating his understanding, and provided a clear and concise statement in English. *See Laurant*, 131 Ill. App. 2d at 197-98 (despite defendant's claim that he did not recall being advised a certain right, he was found to be fully aware of his rights, when given, where he answered, "yes" after each warning and gave a statement). In light of the above, we find that trial counsel was not ineffective for failing to raise the motion to suppress issue in his post-trial motion because it would have been futile. *People v. Durgan*, 281 Ill. App. 3d 863, 868 (1996); *Gornik*, 227 Ill. App. 3d at 280.

¶ 43 Defendant finally maintains that the State engaged in misconduct by admitting into evidence a fourth statement made by him after his arrest, which the State represented that it would not use at trial. Defendant refers to the statement he made to Detective Gustafson admitting that he attacked a man. Our review of the record shows, however, that defendant did not object at trial or in his post-trial motion to the use of the statement, and, accordingly, he has waived this issue for review. *Enoch*, 122 Ill. 2d at 186. Moreover, defendant has not asked for plain error review, and has thus, forfeited such review. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010). We also reject defendant's contention that his trial counsel was ineffective for failing to object and include the error in a post-trial motion, where the admission of defendant's statement into evidence was merely cumulative to the overwhelming evidence of his guilt; and, accordingly, we conclude that counsel was not ineffective for failing raise this objection at trial. *Durgan*, 281 Ill. App. 3d at 868.

¶ 44 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 45 Affirmed.