2013 IL App (1st) 110819-U

SECOND DIVISION
June 11, 2013

No. 1-11-0819

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County.
	)	
v.	)	No. 09 CR 19109
	)	
TORRY CARROLL,	)	Honorable
	)	Thomas Davy,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

¶ 1 *Held*: Defendant's right to a speedy trial was not violated because the amended indictment did not include any new and additional charges. Defendant's trial counsel was not ineffective for failing to file a motion to quash arrest and suppress evidence. Defendant's counsel was not ineffective at the hearing on his posttrial motion.

¶ 2 Following a bench trial, defendant Torry Carroll was convicted of attempted first-degree murder and was sentenced to 28 years' imprisonment. On appeal, he argues that: (1) he was deprived of his right to a speedy trial; (2) his trial counsel was ineffective for failing to file a

motion to quash his arrest and suppress evidence; and (3) his trial counsel's performance in posttrial proceedings was ineffective. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant and his co-defendant, Robert Avery, were tried jointly for the attempted first-degree murder of DeFrantz Harrison and DeWayne Jackson. On June 25, 2009, Harrison and Jackson were driving near 107th and Langley in Chicago when two men approached the passenger side of their car and began shooting. Harrison was wounded and required surgery; Jackson was unharmed.

¶ 5 At the time of the shooting, Officer Corey Chapton and his partner were approximately two blocks away patrolling the area near 106th and Champlain as plain-clothes police officers. Chapton testified that he was wearing a bulletproof vest with his police star around his neck tucked into a pouch on the vest. Chapton testified that he heard the sound of gunshots to the east of his location. Chapton proceeded one block in the direction of the gunshots and encountered several "citizens" who told him, "there he is right there" and pointed further to the east. Chapton saw a young man about two blocks away wearing a white t-shirt and dark jeans. The man was running further east on 106th Street on the north side of the street and was clutching the right side of his pants. Chapton and his partner followed the man in their unmarked police car and the man continued running away from them. While he was running away, the man continued to look back at them. The man turned north on Maryland and Chapton's car followed him. The man then ran in front of Chapton's car across Maryland and jumped over the fence at an apartment complex on the corner. Chapton got out of his car and also jumped over the fence and ordered

the man to stop running. He continued to chase the man on foot, ordering him to stop running. The man then arrived at a patio and banged on a window to get inside. Chapton eventually caught the man and detained him. Chapton made an in-court identification of defendant as the man he detained.

¶ 6 While in the hospital, Harrison told a detective that one of the shooters was a black male matching defendant's description and he was wearing a white t-shirt and blue jeans. He identified defendant in a photo array. Harrison also identified Avery by name as the other shooter and identified him in a photo array. Jackson identified defendant in a line up as one of the shooters and told the detective he was known as "Tank." Jackson also identified Avery as the other shooter in a photo array and in a line up.

¶ 7 Defendant appeared for a preliminary hearing about a week after his arrest and the court found probable cause for his arrest. On July 21, 2009, a grand jury issued an indictment formally charging defendant. He was charged with the attempted first-degree murder of Harrison by shooting him "about the body with a firearm"; aggravated battery with a firearm; aggravated discharge of a firearm "in the direction of a vehicle *** known to be occupied by" Harrison; and two counts of aggravated battery for shooting Harrison.

¶ 8 Defendant was reindicted on October 30, 2009. The new indictment added four new counts[1] against defendant for the attempted first-degree murder of Harrison and Jackson, three of

[1] Contrary to defendant's representations in his brief, the new indictment did not in fact add "eight counts [of attempted murder], six of which alleged that [defendant] personally discharged a weapon." It added four new counts against defendant and four new counts against Avery.

which specifically stated that "during the commission of the offense, [defendant] personally discharged a firearm." It also added two additional counts of aggravated discharge of a firearm. On December 8, 2009, the State voluntarily dismissed the original indictment in a *nolle prosequi* motion and proceeded under the superseding indictment. After several agreed continuances, the case was tried before the court on October 6, 2010.

¶ 9 Numerous witnesses testified on behalf of the State, including Harrison, Jackson, and Chapton. The State also called Ellen Chapman, a forensic scientist in the Illinois State Police crime lab, to testify. She examined gunshot residue samples taken from defendant's hands after his arrest. Chapman testified that a particle containing the elements lead, barium, and antimony could only come from the discharge of a firearm. If she detects three such particles containing all of those elements in a gunshot residue sample, then the sample is considered positive for gunshot residue. Chapman testified that when examining defendant's samples, she only detected two such particles. She stated that particles can be removed from an individual's hands when they come in contact with his clothes, a fence, grass, or while he is in the process of being handcuffed by a police officer. She also testified that if an individual rubbed his hands together, the particles could fall off of his hands. Chapman's report also contained the statement of a police officer who indicated that defendant attempted to rub his hands together while handcuffed in the police car.

¶ 10 On cross-examination, Chapman admitted that she has conducted many gunshot residue tests under similar circumstances where the subject has been handcuffed and placed in a squad car and has gotten positive results. Chapman again admitted that in the sample taken from

defendant, she did not detect the minimum three particles necessary to conclude that defendant positively had gunshot residue on his hands.

¶ 11 On redirect, the State asked Chapman whether, despite there being fewer than three particles in his sample, he could have "possibly" discharged the firearm. The court sustained defense counsel's objection to that question. Chapman then testified that she could not "say yes or no" as to whether defendant discharged a firearm, but confirmed that he had two particles on his hand that contained the combination of elements only found after the discharge of a firearm.

¶ 12 On re-cross, Chapman admitted that the two particles could have been transferred to defendant's hands by coming in contact with something that had gunshot residue on it, like a fence, handcuffs, or anything in the police officer's possession. In response to a question from the court, Chapman testified that the three-particle threshold for deeming a sample positive for gunshot residue is a standard developed by the Illinois State Police crime lab as opposed to being a nationally-recognized standard.

¶ 13 In closing arguments, defense counsel challenged the forensic evidence. She argued that if defendant had fired a weapon shortly before his arrest, thousands of particles of gunshot residue would have been dispersed; however, only two particles were found on his right hand. She also argued there were many opportunities for those two gunshot residue particles to have been transferred from the police officer, the handcuffs, or the squad car to defendant's hands. Nevertheless, the court found defendant guilty.

¶ 14 Defense counsel then filed a posttrial motion in which she argued that the court "erred in considering the two particles [of gunshot residue] found on [defendant's] hands as reliable

evidence" because the Illinois State Police guidelines require the presence of three particles to be considered a positive test for gunshot residue. She also argued that because defendant's sample did not meet the minimum threshold for a positive test, the testimony concerning the two gunshot residue particles should not have been admitted into evidence and the State acted improperly in soliciting that evidence.

¶ 15 At the hearing on the motion, defense counsel sought to recall Chapman to testify and asked the court to consider that testimony in ruling on her posttrial motion. She represented to the court that she would ask Chapman about how the crime lab "comes to that determination of the threshold of three unique particles" and other questions related to that topic. The court asked counsel why those questions were not posed to Chapman at trial. In response, counsel stated that "I did not have them in my mind at the time. And whether that was my error or my lack of knowledge or my lack of notice as to what she was going to be testifying to, I never assumed that someone from the crime lab would testify as to something below their level of standard."

¶ 16 Counsel clarified that she was not arguing that the State's discovery failed to indicate what Chapman's testimony would be. Rather, she stated that "my understanding based on the discovery was that [Chapman] was going to testify that [defendant] may not have discharged a firearm. I didn't know that [Chapman] was going to testify that there was [*sic*] two unique particles. When the threshold is a certain amount, I would assume that anything found below that threshold would be inadmissible and that's when I did object."

¶ 17 The court then noted that it asked Chapman about the nature of the three-particle standard for a positive finding and allowed the attorneys the opportunity to ask related questions. The

following colloquy then occurred.

"DEFENSE COUNSEL: [Chapman] did say there was [*sic*] validation standards and after the [c]ourt's ruling I talked to Ms. Chapman and I asked her some further inquiries about those validation studies. *** My goal is to make sure that [defendant] has all the opportunities afforded to him and protections afforded to him that he should have; and if I erred in not asking a question at trial, then I'm asking this [c]ourt to let me have the opportunity now to ask the question that should have been asked at trial so that your Honor has all the evidence in front of himself to make the appropriate ruling.

THE COURT: And should I give [the State] an opportunity to ask questions regarding [the co-defendant] maybe to get me to change my mind on that part of the trial?

You can't do do-overs. You ask the questions that are asked at trial.

This is certainly not newly discovered evidence; is that correct, [defense counsel]?

DEFENSE COUNSEL: No. It is not newly discovered evidence, Judge. It was newly discovered to us.

THE COURT: When? From the last court date?

DEFENSE COUNSEL: Yes, after the trial, Judge. It was questions regarding the validation study that indicated to me that the validation studies came up with the number [of] three [particles] because they had found a particle on its

> own in a place where it was unexpected. I think that's information that the Court should know when you are taking the two particles as corroboration or circumstantial evidence of guilt.
>
> THE COURT: Well, how is it newly discovered?
>
> DEFENSE COUNSEL: It is newly discovered to me. Judge, I'm admitting that I erred in not asking the question; and if that was my fault, then so be it; but right now we have [defendant] facing some very serious charges and in the interest of justice I'm asking that you consider the evidence or consider the testimony in your finding *** on my motion for a new trial.
>
> THE COURT: Well, I don't recall in any cases regarding newly discovered evidence that the [c]ourt says when the attorney slap himself or herself on the forward [*sic*] and says, "Doh," that suddenly it is newly discovered evidence; but, in the interest of preserving the record, over the State's objection, I'll allow you to call Ms. Chapman."

¶ 18 In her testimony, Chapman explained that requiring three particles for a positive gunshot residue test is based on background studies the Illinois State Police has conducted as to the likelihood that gunshot residue particles can be found randomly in the crime lab. She explained that requiring three particles in a sample is based on scientific principles and ensures that the finding is not coincidental.

¶ 19 Defense counsel then argued that the court should reconsider its guilty verdict as to defendant. Her argument was based on the fact that in this simultaneous trial, defendant was

found guilty and the co-defendant was acquitted. She argued that Harrison and Jackson testified that they saw defendant and the co-defendant on the night of the shooting. The only difference in the evidence that resulted in defendant's conviction was the circumstantial evidence of defendant's flight and the two gunshot residue particles, which she argued were insufficient to sustain the verdict. Alternatively, she argued that the court reconsider the guilty verdict on the attempted murder count because there was no evidence of specific intent presented.

¶ 20 The court denied defendant's posttrial motion. It specifically considered the additional testimony given by Chapman, but concluded that the State had nevertheless met its burden. The court then proceeded to sentencing and concluded that because defendant was found to have personally discharged a firearm in the commission of the attempted first-degree murder offense, he was eligible for an "add on" to his sentence. The court determined that the applicable sentencing range was between 26 and 50 years' imprisonment. After considering the arguments in aggravation and mitigation, the court sentenced defendant to 28 years' imprisonment on the attempted first-degree murder conviction. He now appeals his conviction.

¶ 21 ANALYSIS

¶ 22 Defendant first argues that his statutory right to a speedy trial was violated because the second indictment on which he was prosecuted was filed more than 120 days after his arrest, in violation of section 103-5 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103-5 (West 2010)). The State counters that defendant has forfeited the issue because he failed to file a motion to dismiss the indictment.

¶ 23 We first address the State's claim of forfeiture, as we are required to do. *People v.*

Hillier, 237 Ill. 2d 539, 549 (2010). To claim a speedy trial violation, a defendant must establish that he was not tried within the time permitted by statute and that he did not cause or contribute to any delays in proceeding to trial. *People v. Wigman*, 2012 IL App (2d) 100736, ¶ 28. The defendant must raise this claim in a motion to dismiss the indictment pursuant to section 114-1(a)(1) of the Code (725 ILCS 5/114-1(a)(1) (West 2010)). *Wigman*, 2012 IL App (2d) 100736, ¶ 28. Failure to do so results in forfeiture of review of the issue on appeal. *Wigman*, 2012 IL App (2d) 100736, ¶ 28 (citing *People v. Pearson*, 88 Ill. 2d 210, 218 (1981)). Here, defendant did not file a motion to dismiss the indictment before trial and, therefore, the claim is forfeited. See *Wigman*, 2012 IL App (2d) 100736, ¶ 28. Nor did defendant argue for plain error review of the issue and, therefore, we must honor the procedural default. *Hillier*, 237 Ill. 2d at 545.

¶ 24 However, defendant did argue that his trial counsel was ineffective for failing to move for dismissal. In order to establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance was deficient and that he was prejudiced by that deficiency. *People v. Phipps*, 238 Ill. 2d 54, 65 (2010). In order to determine whether counsel was ineffective in failing to assert a speedy trial violation, we must first determine whether such an objection was warranted. *Phipps*, 238 Ill. 2d at 65.

¶ 25 As stated above, section 103-5(a) provides that a person in custody must be tried within 120 days of being taken into custody, excluding any delays agreed to or caused by the defendant. 725 ILCS 5/103-5(a) (West 2010). The State may file amended or additional charges, but if they are filed beyond the 120-day speedy trial period, they must conform with the principles articulated in *People v. Williams*, 94 Ill. App. 3d 241, 248-49 (1981). *People v. Van Schoyck*,

232 Ill. 2d 330, 340 (2009). That is, " 'where new and additional charges arise from the same facts as did the original charges and the State had knowledge of these facts at the commencement of the prosecution, the time within which trial is to begin on the new and additional charges is subject to the same statutory limitation that is applied to the original charges.' " *Phipps*, 238 Ill. 2d at 66 (quoting *People v. Williams*, 94 Ill. App. 3d 241, 248-49 (1981)). However, this rule only applies where the original and subsequent charges are subject to compulsory joinder, meaning that the State is required to prosecute all charges based on the same act in a single prosecution. *Phipps*, 238 Ill. 2d at 66; see also 720 ILCS 5/3-3(b) (West 2010). The rationale for this rule is to prevent "trial by ambush," which could result in the State "lull[ing] the defendant into acquiescing to pretrial delays on pending charges, while it prepared for a trial on more serious, not-yet-pending charges." *Phipps*, 238 Ill. 2d at 67 (quoting *People v. Williams*, 204 Ill. 2d 191, 207 (2003)). Thus, if the subsequent indictment contains "new and additional" charges, and they were subject to compulsory joinder, then the subsequent charges must be tried within the 120-day speedy trial period that commenced when the defendant was initially taken into custody. However, if the subsequent indictment merely amends the existing charges, then the defendant is deemed to have "sufficient notice of the subsequent charges to prepare adequately for trial on those charges." *Phipps*, 238 Ill. 2d at 67.

¶ 26 We must first determine whether the subsequently filed charges against defendant are "new and additional" charges. *Phipps*, 238 Ill. 2d at 67. We do so by comparing the original and subsequent charges. *Phipps*, 238 Ill. 2d at 67.

¶ 27 Defendant was initially charged in July of 2009 with the attempted first-degree murder of

Harrison by shooting him "about the body with a firearm." The subsequent indictment filed in October of 2009 added four new counts of attempted first-degree murder, three of which specifically stated that "during the commission of the offense, [defendant] personally discharged a firearm."

¶ 28 According to defendant, by accusing him of attempted first-degree murder in which he "personally discharged a firearm," the State alleged a "more serious offense" that it was required to include in the original indictment under compulsory joinder principles. Its failure to do so meant that the State was prohibited from prosecuting him on the subsequent charges. As a corollary to this argument, he contends that the personal discharge language in the subsequent indictment constituted a "new and additional" offense that the State is barred from prosecuting because it was brought beyond the 120-day speedy trial period.

¶ 29 We disagree. In *People v. Van Schoyck*, the supreme court explained that a criminal statute typically sets forth the elements of the offense in one section and provides sentencing classifications based on other factors in a separate section. *People v. Van Schoyck*, 232 Ill. 2d 330, 337 (2009). The sentencing classifications are merely factors that enhance the punishment, but do not create a new offense. *Van Schoyck*, 232 Ill. 2d at 337. Accordingly, the addition of sentencing classifications in a subsequent charging instrument are not sufficient to convert the original charges to "new and additional" charges for purposes of the speedy trial statute. *Van Schoyck*, 232 Ill. 2d at 339.

¶ 30 In this case, section 8-4(a) of the Criminal Code of 1961 sets forth the elements of the offense of attempt. 720 ILCS 5/8-4(a) (West 2010). Section 8-4(c)(1)(C) provides a specific

sentence enhancement for "an attempt to commit first-degree murder during which the person personally discharged a firearm," elevating the punishment from an offense punishable by "fine or imprisonment" to a "Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/8-4(c)(1)(C) (West 2010). As such, the subsequent indictment did not charge defendant with any "new and additional" offenses. Accordingly, compulsory joinder principles are not implicated here and the State was not barred from prosecuting him on the subsequent indictment. *Van Schoyck*, 232 Ill. 2d at 339.

¶ 31 Additionally, because the State did not allege any "new and additional" offenses, and instead alleged the same conduct in the original and subsequent indictments, we may conclude that the original indictment gave defendant adequate notice to prepare his defense to the subsequent indictment. *Phipps*, 238 Ill. 2d at 69. That is, the original indictment charged defendant with attempted first-degree murder in which he "shot [the victim] about the body with a firearm." The subsequent indictment charged defendant with attempted first-degree murder and "during the commission of the offense, [defendant] personally discharged a firearm." There is no meaningful difference between the two indictments: they both convey the State's intent to prosecute defendant for an attempted murder during the course of which he discharged a weapon. Therefore, defendant's ineffective assistance of trial counsel claim is without merit because counsel's failure to move for dismissal on these grounds was not deficient or prejudicial.

¶ 32 Defendant next argues that his trial counsel was ineffective for failing to file a motion to quash his arrest and suppress evidence. Defendant contends that trial counsel should have challenged the lack of probable cause for his arrest; as a result, subsequent evidence of gunshot

residue and his identification by the victims would also have been suppressed.

¶ 33 An attorney's decision as to the appropriateness of filing a motion to quash and suppress evidence is a matter of trial strategy that should be afforded great deference and is not ordinarily challengeable in an ineffective assistance of counsel claim. *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 70; *People v. Rucker*, 346 Ill. App. 3d 873, 885 (2003). To succeed on such a claim in light of that deferential standard, a defendant must demonstrate that the unargued motion "is meritorious, and that a reasonable probability exists that the trial outcome would have been different" had the motion been granted. *People v. Henderson*, 2013 IL 114040, ¶ 15 (clarifying that the motion itself must be meritorious, not just reasonably likely to succeed). An attorney will not be found ineffective for failing to file a futile motion. *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 34 A warrantless arrest is valid only if there was probable cause to support it. *People v. Grant*, 2013 IL 112734, ¶ 11. Probable cause exists "when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *Grant*, 2013 IL 112734, ¶ 11. The existence of probable cause is governed by "commonsense considerations, and the calculation concerns the probability of criminal activity, rather than proof beyond a reasonable doubt." *Grant*, 2013 IL 112734, ¶ 11. That is, the police must have more than a mere suspicion that a crime has been committed but less than evidence sufficient to convict. *People v. Jones*, 374 Ill. App. 3d 566, 575 (2007) (citing *People v. Lippert*, 89 Ill. 2d 171, 178 (1982)).

¶ 35 The existence of probable cause depends on the totality of the circumstances at the time

of the defendant's arrest. *Grant*, 2013 IL 112734, ¶ 11. Among other things, probable cause may be based on information obtained from third parties, whether through anonymous or identified informants or through reports of ordinary citizens or eyewitnesses. *People v. Arnold*, 349 Ill. App. 3d 668, 672 (2004). Such information ordinarily must contain indicia of reliability, which means that other facts learned through the course of the police investigation must independently verify a substantial part of the information obtained from the third party. *Arnold*, 349 Ill. App. 3d at 672. However, absent indications to the contrary, information provided by an ordinary citizen is presumed to be reliable. *Jones*, 374 Ill. App. 3d at 574; see also *People v. Sanders*, 2013 IL App (1st) 102696, ¶ 15.

¶ 36 Additionally, the officer's factual knowledge based on his law enforcement experience is relevant to the analysis. *Grant*, 2013 IL 112734, ¶ 11. For example, when the police know that a serious crime has recently been committed, "less of a factual basis" is needed to establish probable cause. *People v. Hopkins*, 235 Ill. 2d 453, 476 (2009). Nevertheless, a court may consider a defendant's flight from police among other factors in determining whether probable cause exists. *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000).

¶ 37 Here, the evidence in the trial record indicates that a challenge based on lack of probable cause would not have been meritorious. First, Chapton's pursuit of defendant was nearly contemporaneous with the commission of a serious crime that involved gunfire. He and his partner were two blocks away from the shooting when it occurred and they proceeded immediately toward the gunshots. Chapton then encountered a group of ordinary citizens who told him, "there he is right there," and they pointed to defendant who was running down 106th

Street, clutching the side of his pants as he ran. As the police would soon learn through their investigation, defendant was identified by the two shooting victims as the man who opened fire on them. Chapton, wearing a bulletproof vest and his police badge, pursued defendant and ordered him to stop. Defendant repeatedly looked back at Chapton, but continued to run away from him. At one point, defendant crossed in front of Chapton's police car and then jumped over a six-foot-high fence of an apartment complex in an effort to evade Chapton before Chapton eventually arrested him.

¶ 38 Probable cause has been found under nearly identical circumstances. *People v. Belton*, 257 Ill. App. 3d 1, 6-7 (1993) (finding probable cause where the police knew that a serious crime had been committed, the defendant was identified by witnesses who told police "there he is now," the defendant fled on foot after being identified, and the police apprehended the defendant after chasing him); see also *Hopkins*, 235 Ill. 2d at 477 (finding probable cause where the defendant matched the description of the perpetrator of a serious crime and was located near the scene within 15 minutes after it occurred); *Jones*, 374 Ill. App. 3d at 575 (same). Moreover, contrary to defendant's contention, the information Chapman received from the citizens identifying the fleeing defendant is presumptively reliable. *Belton*, 257 Ill. App. 3d at 7; *Jones*, 374 Ill. App. 3d at 574; see also *Sanders*, 2013 IL App (1st) 102696, ¶ 15. Nevertheless, their identification was independently verified through the victims' identification of defendant as the shooter. *Sanders*, 2013 IL App (1st) 102696, ¶ 15. Thus, in accordance with our case law, there is no reason to believe that a motion to quash arrest and suppress evidence would have been meritorious in this case; rather, it would have been futile to file one here. See *Henderson*, 2013

IL 114040, ¶ 15; *Givens*, 237 Ill. 2d at 331. Accordingly, trial counsel was not ineffective for failing to file such a motion in this case and defendant's claim fails.

¶ 39 Finally, defendant argues that his trial counsel was ineffective because she "essentially argued at the hearing on [defendant's] posttrial motion that she was ineffective at trial for failing to adequately cross-examine" Chapman about the gunshot residue evidence. Defendant contends that counsel's argument based on her own ineffectiveness was a "*per se* conflict of interest" that required her to withdraw.

¶ 40 As discussed above, to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that this deficiency prejudiced the defendant such that the outcome of the trial would have been different absent counsel's deficient performance. *Givens*, 237 Ill. 2d at 331. If it is easier to dispose of an ineffective assistance claim on the ground that it lacks sufficient prejudice, then we may proceed directly to the second prong without having to address counsel's deficient performance. *Givens*, 237 Ill. 2d at 331.

¶ 41 Even if we were to assume that counsel's performance was deficient for failing to adequately cross-examine Chapman at trial, counsel vigorously argued to the trial court for an opportunity to recall Chapman and ask additional questions that she would have asked at trial. Despite the court's initial misgivings about allowing counsel a "do-over," it ultimately allowed her to recall Chapman and cross-examine her about the nature of the gunshot residue testing done at the police crime lab. The court ultimately denied counsel's posttrial motion, specifically noting that it considered the additional testimony, but nevertheless found defendant guilty. Thus, regardless of counsel's purported deficiency, it was cured when the court allowed her to recall

the witness and still, that additional testimony did not change the outcome of the trial. Accordingly, defendant suffered no prejudice and his ineffective assistance claim fails. See *Givens*, 237 Ill. 2d at 334.

¶ 42 We also reject defendant's alternative claim that we remand the matter for a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181, 189 (1984) to address counsel's ineffectiveness. He argues that the court should have recognized that trial counsel labored under a *per se* conflict of interest and ordered the appointment of independent counsel. First, we note, as we have in the past, that trial counsel's argument based on her own ineffectiveness is not a *per se* conflict of interest. *People v. Perkins*, 408 Ill. App. 3d 752, 762 (2011) (citing *People v. Jones*, 219 Ill. App. 3d 301, 304 (1991)). Additionally, at no point in the proceedings below did defendant make a *pro se* claim of ineffective assistance of counsel sufficient to trigger the court's duty to conduct a *Krankel* hearing. *People v. Taylor*, 237 Ill. 2d 68, 76-77 (2010).

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, we affirm defendant's conviction.

¶ 45 Affirmed.