2015 IL App (1st) 123136-U

FIRST DIVISION
MARCH 30, 2015

No. 1-12-3136

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.
	)	
	)	No. 09 CR 1753
v.	)	
	)	
DARIONE ROSS,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justice Connors and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's right to public trial was not violated when the trial court conducted a portion of *voir dire* in chambers. The trial court did not abuse its discretion in precluding evidence of an alternate suspect as speculative. The State's failure to disclose that its expert's opinion had changed shortly before trial, although a discovery violation, did not cause prejudice warranting new trial. The defendant's trial counsel's decision not to request separate verdict forms did not constitute ineffective assistance of counsel.

¶ 2 Defendant-appellant Darione Ross appeals from his conviction and sentencing after a jury found him guilty of first degree murder and attempt armed robbery.

BACKGROUND

¶ 3 On December 19, 2008, Milagro Rials (Milagro) and his cousin Latasha Rials (Latasha) drove together from Bloomington, Illinois to attend a party at Sander's Lounge, a bar at the corner of 59th Street and Union Avenue in Chicago, where several family members and friends gathered that evening to celebrate the birthday of Latasha's brother. Milagro and Latasha arrived at approximately 11:00 p.m. and socialized until the bar closed sometime between 1:30 and 2:00 a.m.

¶ 4 Milagro's friends and family exited the bar, heading to their vehicles and discussing plans to proceed to an "after-party." As Milagro was walking across the street towards his cousin's parked car, he was approached by a man with a gun who demanded that Milagro give him "everything." After Milagro refused, the man shot Milagro in the head, killing him. The shooter threw his gun away and fled from the scene. A separate gun, which had not been fired, was later found beneath Milagro's body. Witnesses flagged down a police car and described the suspect as a black male with his hair in braids and a black-and-gold sweater.

¶ 5 In the hours after the shooting, police spoke with several witnesses at the police station. Michella Anderson (Anderson), a cousin of Milagro, told Detective Robert Garza that she had recognized the shooter as someone who had formerly lived near her and her mother, in the area of 59th Street between Sangamon and Peoria streets. Based on Anderson's statements, police compiled photographs of individuals with addresses in the neighborhood she described. At roughly 10:00 p.m. on December 21, 2008, Detective Garza went to Anderson's house and showed her a group of 25 photographs, including a photograph of the defendant. Anderson

identified the defendant as Milagro's shooter. Shortly after Anderson's photo identification, police went to the defendant's home and arrested him.

¶ 6 At about 2:00 a.m. on December 22, the police brought several witnesses—Anderson, Doctorre Sharp (Sharp), Marinicka Pierce (Pierce), and Crystal Rials (Crystal) — to the police station to view a lineup of five men, including the defendant. Each of these four individuals separately identified the defendant as the shooter. Later on the same date, a fifth witness, Latasha, also viewed a lineup and identified the defendant as the shooter. A sixth witness, Dominique Davis (Davis), viewed a lineup containing the defendant but did not make any identification.

¶ 7 In a separate incident around the time of the shooting, at approximately 2:00 a.m. on December 20, police received a report of a fight at a liquor store at 7105 South Racine, approximately two miles from the site of Milagro's killing. In response to that report, police pursued a van containing individuals who had been at the liquor store, including a man named Antonio Scott (Scott). After the van crashed into a tree, Scott fled to a home in the vicinity of 59th Street and Sangamon Street, several blocks from the site of Milagro's shooting. According to interview notes with Scott recorded by the defendant's counsel, the home was the residence of the defendant's grandmother.[1] Shortly thereafter, the police apprehended Scott in the residence, and he was taken into custody in the early morning hours of December 20, 2008.

¶ 8 Scott matched the general description witnesses had given police of Milagro's shooter – in particular, he was a black male who wore his hair in braids and had a black and gold jacket.

[1] According to interview notes from defense counsel's interview with Antonio Scott, Scott knew the defendant. However, the record does not otherwise provide information on the nature of any relationship between Scott and either the defendant or the defendant's grandmother.

Scott, at least briefly, was considered a possible suspect in Milagro's murder. Police swabbed Scott's hands to check for gunshot residue, but the test results were negative. Also on the morning of December 20, the police placed Scott in a lineup viewed by Latasha. However, Latasha did not make any identification of Scott. Scott was released after a few hours in custody, and he was never charged in connection with Milagro's death. At a later date, Scott was incarcerated for an armed robbery, the details of which are not included in the record on the defendant's appeal.

¶ 9 The defendant was charged with first degree murder and attempt armed robbery in connection with Milagro's death. Before trial, the defendant argued that he should be permitted to introduce evidence of Scott as an alternate suspect. The court recognized that "in any given case the defense has a right to argue and present evidence someone else committed the crime" but noted that the evidence could not be remote or speculative. Defense counsel offered case law to the court on the issue of the admissibility of alternate suspect evidence, including *People v. Beaman*, 229 Ill. 2d 56 (2008).

¶ 10 The court asked defense counsel to make a proffer regarding the relevance of Scott. The defense stated that although Scott was arrested in relation to a separate incident, the detectives investigating Milagro's murder had questioned Scott, swabbed his hands for gunshot residue, and put Scott into a lineup viewed by a witness to the shooting. Defense counsel further claimed that police records reflected that Scott was mentioned as a suspect, even after the defendant's arrest, in a phone call from a detective to the crime lab.

¶ 11 The defendant argued that references to Scott were "not speculative" because Scott was arrested in the area of the shooting and matched the description of the shooter. Defense counsel

stated that Scott and the defendant were "about the same age, about the same build, about the same height" and both wore their hair in braids. Defense counsel also claimed that Scott had acknowledged in an interview that he was wearing a black and gold jacket when he was taken into custody, which matched initial descriptions of the shooter.

¶ 12 Asked by the court to explain the relevance of such evidence, the defendant argued that "[t]he relevance is they got the wrong guy." The defendant argued that the police improperly focused on him "when there [was] another man right there the same evening who matches the description" of the shooter, and that the police "let the real man slip through their fingers." The defendant argued that under *Beaman*, the Scott evidence was admissible because it tended to show Scott was a viable alternate suspect in Milagro's murder.

¶ 13 The State responded that the information on Scott was speculative, emphasizing that Scott was taken into custody as a result of an unrelated incident. Although the State stipulated that Scott had a black and gold jacket, was tested for gunshot residue, and was placed in a lineup to rule out involvement in Milagro's shooting, the State argued that nothing tied Scott to the murder and that such evidence was irrelevant and remote.

¶ 14 In issuing its ruling, the trial court stated that the test of admissibility of evidence that another committed the crime is "whether it tends to prove the particular offense charged" or that guilt is more or less probable. However, the court emphasized that such evidence could be excluded due to its remoteness, lack of relevance, or speculative nature, citing several legal authorities. Among other cases, the trial court cited *People v. Bruce*, 185 Ill. App. 3d 356 (1989) for the proposition that evidence should be excluded if "too remote or too speculative or [if] it fails to link a third person closely in the commission of the crime." The trial court concluded

that "not only does the evidence in this case not closely link Scott to the murder, it doesn't connect him to the murder at all." The trial court found the facts that the defendant and Scott were arrested in the same area, both wore hair in braids, and had similar jackets were "unrelated to the case all together." Although Scott was "arrested fairly close by and to some extent matched the description" of the shooter, the court found that it was "pure speculation" to suggest that Scott committed the homicide. The trial court precluded the defense from referring to Scott at trial.

¶ 15 On June 26, 2012, a panel of 14 jurors was selected out of a pool of 60 potential jurors. The majority of the *voir dire* was in open court before the full venire. Prior to beginning the individual questioning, the trial court announced that if any question raised personal matters that an individual did not wish to discuss "in front of 65 people you don't know, we will talk about it in chambers." The court noted this was especially appropriate in responding to the question of whether an individual had been the victim of, or accused of, a crime.

¶ 16 The trial court conducted questioning in open court, before the full venire, of 40 randomly selected individuals. Several of these individuals indicated they would have difficulty serving as impartial jurors. The court conducted further *in camera* questioning of 13 individuals who had expressed such concerns, two of whom had specifically asked to answer questions in private.

¶ 17 The *in camera* questioning of the 13 individuals was conducted in the presence of counsel for the defendant and the State and was transcribed by a court reporter. Specifically, the court questioned: (1) an individual who expressed concern as to whether the death penalty could be imposed; (2) an individual stating she could not be fair because she had been a victim of a

burglary; (3) a potential juror who claimed his religious beliefs prevented him from being fair and indicated he knew detectives involved in the case; (4) an individual who revealed she had been the victim of sexual abuse and that the defendant bore a resemblance to her abuser; (5) a potential juror who had been a victim of stalking and whose ex-boyfriend had been shot; (6) an individual who claimed a work-related scheduling conflict; (7) a potential juror who stated she had a son in jail; (8) a potential juror who stated he could not be impartial because he knew several police officers and assumed the defendant's guilt; (9) a potential juror who said she could not be impartial because she was "emotional"; (10) a juror who disclosed he had been accused of domestic violence and disorderly conduct; and (11) a potential juror who said her sister was a victim of domestic violence. Two additional individuals were questioned in chambers after the State informed the court that those individuals had past arrests that they had not disclosed during their questioning before the full venire.

¶ 18 During the *in camera* questioning, the trial court specifically informed counsel that they could also ask further questions of each individual. At no point did the defendant's counsel object to the questioning of any potential juror. Two of the potential jurors who answered questions in chambers – the individual who expressed concern about the death penalty, and the individual who had previously been accused of crimes—were selected to serve on the defendant's jury.

¶ 19 The State's case commenced on June 27, 2012. Latasha testified that, on the night of the shooting, she, Milagro, and her cousin Crystal exited Sander's Lounge about 1:30 a.m. and began walking to her car, which was parked across the street. At the time, they were planning to go to an "after party" at Crystal's residence. Latasha stated that she had walked ahead of Crystal and

Milagro to enter the car to get out of the cold. After she was in the car, she looked up and saw Milagro and another man, whom she identified as the defendant, standing face-to-face. She testified that she saw the defendant pull a gun and shoot Milagro, who had put his hands up "like he was trying to stop the bullet from coming in his face." Latasha testified she heard "three to five shots" and saw Milagro fall face first. According to Latasha, the defendant momentarily paced back and forth before dropping the gun over a nearby fence and fleeing the scene.

¶ 20 Latasha testified she flagged down a police car and described the shooter as a male with braids and a black jacket. She also informed the police where she saw the shooter drop the gun. Two days later, she viewed a lineup at the police station and identified the defendant as the shooter. On cross-examination, Latasha denied that Milagro had a gun in his hands and maintained that his hands were up when he was shot. Although she and other family members had met with police on the night of the shooting, she denied that she had discussed the case with other eyewitnesses between the shooting and her lineup identification of the defendant.

¶ 21 The State next called Crystal, one of Milagro's sisters, who had also attended the gathering at Sander's Lounge. Crystal testified that she left the bar about 1:40 a.m. with Milagro, Latasha, and Sharp. Crystal recalled walking behind Sharp and Milagro when she heard Sharp yell that someone was robbing Milagro. She turned and saw a man "slap my brother with the pistol and come up and shoot him in the head." She identified the defendant as the shooter, claiming she had been able to see his "whole body, his face, his hair, everything about him." Crystal recalled that the defendant threw away the gun and began to run in her direction. Crystal testified that she jumped in front of the defendant and asked "why did you just shoot my brother," but that the defendant continued to run across the street and blended into the crowd

outside the bar. Crystal recalled telling the police that the shooter was a black male with braids who wore a coat with a hood, and that the shooter was a bit shorter than her height. At about 2:00 a.m. on December 22, she identified the defendant as the shooter in a police lineup.

¶ 22 The State next called Sharp. Sharp testified that she was walking with Milagro from the bar when the defendant approached Milagro and "told him to give me everything you got." Sharp testified that she recognized the defendant as a resident of the neighborhood of 59th Street and Sangamon Street, where she had lived for about eight months and had known the defendant as "Twin." Sharp also testified that she had seen the defendant in the bar earlier that evening, but had not spoken to him.

¶ 23 Sharp testified that Milagro had responded to the defendant that he did not have anything, at which point the defendant "slapped him with the gun" and then shot him in the head. She then saw the defendant pause and throw away the gun before running. Sharp testified that in the early hours of December 22, 2008, she had identified the defendant in a lineup. On cross-examination, she stated she did not see Milagro pull out a gun.

¶ 24 Next, the State called Davis, another cousin of Milagro who had been at the lounge on the night of the shooting. Davis recalled walking out of the lounge with Anderson. As she was getting into a car, she recalled hearing Milagro say words to the effect of "I don't have anything" and then heard Sharp say that Milagro was being robbed. Through the car's window, she saw someone standing in front of Milagro and saw sparks fly from a gun. Davis saw the shooter run in the direction of the bar but did not get a good look at him. On December 22, she viewed a police lineup but was not able to make any identification. On cross-examination, Davis stated she had not seen Milagro with a gun.

¶ 25 The State next called Pierce. Pierce testified that a little before 2:00 a.m. she was outside the lounge talking with friends when she heard someone say that Milagro was being robbed. When she looked up, she saw a man holding a gun and "fire from the gun." She testified the shooter first appeared to be in shock but then ran back in the direction of the crowd outside the bar. Pierce testified that she saw the shooter's face as he was running in her direction, and identified the defendant as the shooter. Pierce further testified that she had seen the defendant earlier inside the bar. She recalled telling him "I know you from somewhere," but that the defendant had not responded. Pierce also testified that she was contacted by police in the early morning of December 22, 2008 and identified the defendant in a lineup. On cross-examination, Pierce also denied seeing Milagro pull out a gun.

¶ 26 The State next called Anderson, who had also been at the bar on the night of the shooting. Anderson testified that she had known the defendant for "four or five years," as she had once lived on the same block as the defendant's mother. At the time of the shooting, she did not know the defendant's real name, but knew him as "Smoke." Anderson stated that on the night of the shooting, she had seen the defendant and spoke to him at the party.

¶ 27 Anderson recalled that as she was leaving the party, she heard Sharp yell that Milagro was being robbed and turned to see the defendant facing Milagro. She testified she saw the defendant shoot Milagro in the face, after which he tossed the gun behind a gate and fled. Anderson recalled describing the shooter to police as "a short dark skinny guy with braids." She spoke to police again in the early morning hours of December 21, where she told Detective Garza that she had recognized the defendant as someone from her former neighborhood. Later that evening, Anderson recalled that Detective Garza came to her home and asked her to look at

a number of photographs, including one of the defendant, whom she identified as Milagro's shooter. Hours later, in the early morning of December 22, she again identified the defendant in a police lineup.

¶ 28 On cross-examination, Anderson further testified that during the party at the bar she had asked the defendant if he remembered her, but the defendant had acted as if he did not know her. Anderson testified that the defendant was directly in front of Milagro when he shot him, but she did not recall seeing the defendant strike Milagro with a gun. Anderson also denied knowing whether Milagro had a gun that evening.

¶ 29 The State next called several police officers and forensic specialists. Officer Herman Williams Jr. stated he and his partner were the first police at the crime scene and were told that the shooter was a black male with a black and gold sweater. Officer Williams recalled that Milagro's body had been found lying face down. When investigators turned Milagro's body over, Officer Williams observed a gun near Milagro's right foot.

¶ 30 Another responding officer, Officer Kevin Graves, testified that a witness directed him to the area where the shooter had tossed his gun. About 20 to 30 feet from Milagro's body, Officer Graves found a gun lying in the snow in the fenced-in front yard of a single family home across the street from the bar. Officer Graves put on gloves and recovered the gun as evidence.

¶ 31 Detective Dewilda Gordon testified that on December 22, she spoke with Latasha and asked her to come to the police station to view a lineup. Latasha identified the defendant from a lineup that contained four other men. On cross-examination, Detective Gordon admitted that the defendant was the only person in the lineup wearing his hair in braids.

¶ 32 Carl Brasic, a forensic investigator for the Chicago Police Department, testified he arrived at the scene at 3:20 a.m. on the morning of the shooting. He observed a gun under Milagro's right leg, as well as a fired cartridge near the body. Brasic testified that a cartridge comes from a semiautomatic weapon, the same type of gun recovered by Officer Graves. Brasic testified that the gun under Milagro's body had no live cartridges in its chamber, which indicated that the weapon was not ready to fire. Brasic also swabbed Milagro's hands to be tested for gunshot residue.

¶ 33 Jeanne Hutcherson, a latent print examiner for the Illinois State Police, testified she had examined the two weapons recovered from the crime scene, but did not find identifiable fingerprints on either gun. She testified that she would not expect a weapon left in the snow to show any fingerprints. Lisa Kell, a forensic scientist, similarly testified that swabs taken from the gun recovered in the snow were not sufficient to compare with a DNA sample collected from the defendant, and thus no conclusions could be drawn as to whether the defendant handled the gun.

¶ 34 The State also called Ellen Chatman, another forensic scientist with the Illinois State Police. Chatman had analyzed swabs taken from Milagro's hands and found that the swabs from both hands contained gunshot residue particles. Chatman opined that these findings would be consistent with Milagro being shot at close range while putting his hands up.

¶ 35 The State next called Detective Garza, who testified he had interviewed several witnesses on the night of the shooting. On December 21, he spoke to Anderson, who told him the shooter "was a male black with braids who lived around the area of 59th and Sangamon [Street], Peoria [Street]." He had compiled 25 photos of persons matching that description from that area, then

proceeded to Anderson's residence. When shown a photograph of the defendant, Anderson identified him as Milagro's killer. The police went to the defendant's residence later that evening. Detective Garza testified that as police approached, the defendant "looked out the front window and fled to the back of the residence" before police entered and arrested him.

¶ 36 After the defendant's arrest, Detective Garza testified that he arranged a lineup with five men, including the defendant. He brought Anderson, Crystal, Sharp, and Pierce to the police station in the early morning hours of December 22. Detective Garza testified that, one at a time, he brought each witness to a viewing room. Within minutes of each other, each of the four witnesses identified the defendant as the shooter. Detective Garza also testified that Davis viewed a lineup at a later time, but that she did not make any identification.

¶ 37 Defense counsel cross-examined Detective Garza regarding what witnesses told him in interviews on the night of shooting. Detective Garza could not recall whether Crystal told him that Milagro was struck in the face with a pistol, and acknowledged this was not mentioned in police reports. He recalled that Anderson told him that she had spoken to the offender that evening at the bar but did not recall her telling him that she knew the defendant as "Smoke." Detective Garza also conceded that the defendant was one of only two of the five people in the lineup with braids.

¶ 38 The State then called Angela Horn, a forensic scientist specializing in firearm identification. She testified that she had analyzed the fired cartridge found near Milagro, as well as the bullet recovered from Milagro's body, and concluded that they came from the .380 caliber semiautomatic handgun recovered from the snow.

¶ 39 Next, the State called Dr. Joseph Lawrence Cogan, who had been employed by the Cook County Medical Examiner's office. Dr. Cogan testified that he had performed an autopsy on Milagro and located a gunshot entry wound near the left ear. He also found injuries to Milagro's face, including a small contusion over the right eye, an abrasion over the left eye, and a laceration of the upper lip. Dr. Cogan testified that the abrasion would be consistent with Milagro striking his head on cement. Dr. Cogan also testified that Milagro's lip injury could be consistent with being struck in the face with a gun.

¶ 40 Dr. Cogan also testified regarding the phenomenon of "stippling," explaining that when a gun is fired, it emits soot and gunpowder that can leave marks on a victim's body. Dr. Cogan testified that "stippling" marks from gunpowder indicate a short distance between the gun and the victim, as gunpowder from a handgun travels about 18 inches. Dr. Cogan testified that a photograph of Milagro's left ear showed stippling marks, indicating that the firearm was discharged at "close range, 18 inches or less." Dr. Cogan acknowledged that his December 20, 2008 autopsy report had specifically stated that he did not observe any stippling. Dr. Cogan testified that he "only appreciated the stippling when I saw this – the photograph of the ear after many years."

¶ 41 After Dr. Cogan's direct examination, defense counsel requested a sidebar and stated that Dr. Cogan had "just changed his opinion on the stand" with respect to the presence of stippling. The defendant contended the State had committed a discovery violation by not disclosing this change in opinion prior to trial. The defense counsel argued the change was significant as it indicated that Milagro was shot at close range, and that defense counsel would have consulted with an expert had they known Dr. Cogan was going to testify that there was stippling. The State

argued that there was no discovery violation, claiming it "was under no obligation" to disclose the change in opinion, as there had been no revisions to any written report.

¶ 42 The defendant asked for a mistrial or to strike Dr. Cogan's testimony; the court denied both requests. The defendant then asked for a continuance to consult with his own expert on the stippling issue. As it was approximately 4:00 p.m. on a Friday, the court told defense counsel to "see if you can locate an expert by Monday. If you find one, if you want to call [Dr.] Cogan back, I will tell him to come back on Monday for additional questioning." The court added: "I don't think this is really that Earth shattering about whether this is stippling or otherwise" and that "[t]o me, it is sort of a nonissue, stippling versus non-stippling."

¶ 43 Following the sidebar, on cross-examination, Dr. Cogan acknowledged that his autopsy report from December 2008 had explicitly stated that he found no stippling. Dr. Cogan stated he had reached the conclusion that there was stippling shortly after meeting with the State's attorney on June 22, 2012, a few days before trial. He recalled that after meeting with the State, he went to the medical examiner's office and requested copies of the photograph of Milagro's left ear "to get a better look because [the State's] copies were not that good." The medical examiner's office provided Dr. Cogan "clear pictures showing the stippling." Dr. Cogan acknowledged that he had informed the State of his change in opinion shortly thereafter. The State rested after Dr. Cogan's testimony.

¶ 44 The defendant called police officers to testify regarding the details of eyewitness testimony. Sergeant Kevin Barry testified that he had interviewed Sharp on the night of the shooting. She told him that the offender was wearing a fitted cap and was slightly shorter than

she was. Sergeant Barry had also recorded that Sharp told him that the offender had slapped Milagro with a pistol and that she had heard three shots.

¶ 45 The defense then called Sergeant Jessica Jones, who had interviewed Anderson on December 22, 2008. Sergeant Jones did not recall Anderson telling her that she had known the defendant for four to five years or that she knew him as "Smoke." Sergeant Jones had also interviewed Crystal, but did not recall Crystal saying that the offender had hit Milagro in the face, or that she had claimed to have seen the shooter's face. Sergeant Jones had also interviewed Sharp, but did not recall Sharp saying anything about the offender's height, whether he wore a hat, or that she had known the offender as "Twin." Sergeant Jones also recalled that Pierce had not given any description of the shooter's face.

¶ 46 On cross-examination, Sergeant Jones acknowledged that Sharp had told her she had seen the offender "many times from 59th and Sangamon," including in the bar on the night of the shooting. She also agreed that Pierce had reported that she saw the shooter run past her. Sergeant Jones also testified that Crystal had reported that she saw the offender walk up to Milagro and that she heard Sharp say that Milagro was being robbed. Sergeant Jones also agreed that Anderson had reported that "she recognized the offender from the neighborhood."

¶ 47 On July 2, 2012, defense counsel informed the court they had consulted with an expert witness based in North Carolina, Dr. Peter John Stephens, who had reviewed photographs of Milagro's ear and would opine that they did not show stippling. Dr. Stephens testified on July 3, 2012, and opined that a person would need to be two to five feet from a fired gun to show stippling marks from gunpowder. He further testified that soot markings would appear on a victim only at a much closer range, between half an inch and one foot.

¶ 48 Dr. Stephens testified that, while he was in North Carolina, defense counsel had e-mailed him photographs of Milagro's ear. When he first reviewed those photographs, his opinion was that the markings were petechia, which he described as marks caused by ruptured capillary blood vessels. However, on the day of his testimony he had reviewed "the actual evidentiary photographs," which were of better quality. After reviewing these images, he had changed his opinion and now believed the markings were, in fact, indicative of stippling. Dr. Stephens estimated that the markings indicated a distance of four to five feet between Milagro and the gun. He further testified that he did not believe the gun was closer than 18 inches, because he did not observe soot markings. The defense rested after Dr. Stephens' testimony.

¶ 49 In closing argument, the State contended that the defendant approached Milagro in an attempt to rob him, then struck and shot him when Milagro refused to give in to his demand. The State argued that Milagro had his hands up in a defensive posture, based on Latasha's testimony and the finding of gunshot residue on his hands. The State emphasized that within days of the crime, five people had identified the defendant as the shooter.

¶ 50 Defense counsel argued to the jury that this was a case of mistaken identity. The defense focused on Anderson's testimony that she had recognized someone at the bar whom she believed to be the defendant, but the person did not respond to her. The defense argued that there was a "snowball effect" from her initial mistaken belief that she had seen the defendant in the bar, which had led other family members to testify that defendant was the shooter. The defendant argued that detectives failed to investigate anyone else once Anderson told them she recognized the defendant. Defense counsel thus argued that the real killer was "[s]omeone who looks like" the defendant, whom Anderson had misidentified in the bar on the night of the shooting.

¶ 51 The jury found the defendant guilty of first degree murder and attempt armed robbery. After the court entered judgment on the verdict, on August 13, 2012, the defendant filed a motion for new trial. Among other claims, the posttrial motion asserted that the trial court erred in precluding the defendant from presenting evidence of an alternate suspect, and also asserted error in the trial court's refusal to declare a mistrial or to strike Dr. Cogan's testimony on stippling.

¶ 52 On September 11, 2012, the defendant was sentenced to a prison term of 45 years for first degree murder and a five-year term for attempt armed robbery. On the same date, the defendant filed a notice of appeal.

¶ 53 ANALYSIS

¶ 54 The defendant raises four distinct claims of error on appeal. First, he claims his constitutional right to a public trial was violated because the trial court conducted a portion of *voir dire* in chambers. Second, he asserts the trial court erred in precluding him from introducing evidence regarding Scott as an alternate suspect. Third, he argues that he is entitled to a new trial because the State failed to disclose that Dr. Cogan had changed his opinion regarding the presence of stippling. Finally, the defendant claims that he was denied effective assistance of counsel because his trial counsel failed to request that the jury receive separate verdict forms for the different types of first degree murder instead of a general verdict form.

¶ 55 We first address the claim that the defendant was denied the right to a public trial because a portion of *voir dire* was conducted in chambers. The defendant claims that the trial court failed to identify an overriding interest to justify closing this portion of proceedings from the public

and failed to consider any alternatives to such closure. He contends that the resulting denial of the right to a public trial cannot be harmless and requires a new trial.

¶ 56 The United States Supreme Court has held that the sixth amendment right to a public trial "extends to the *voir dire* of prospective jurors." *Presley v. Georgia*, 558 U.S. 209, 213 (2010); see also *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 50 (holding that presumption of openness applied to jury selection and that it was unconstitutional to close six weeks of *voir dire* without considering alternatives.) In *Presley*, the trial court, over defendant's objection, had excluded members of the public from the courtroom during jury selection proceedings. In finding error, the United States Supreme Court relied on its prior statements in *Waller v. Georgia*, 467 U.S. 39 (1984), that a party seeking closure of proceedings " 'must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to promote that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.' " *Id.* at 213-14 (quoting *Waller*, 467 U.S. at 48). The *Presley* court found error because the trial court had failed to "consider all reasonable alternatives to closure." *Id.* at 215.

¶ 57 In this case, the defendant acknowledges that his trial counsel never raised any objection to the court conducting any portion of the *voir dire* in chambers rather than open court. Nevertheless, he contends that the argument is not subject to forfeiture, relying on the statements in *Presley* that "trial courts are required to consider alternatives to closure even when they are not offered by the parties" and that "[t]he public has a right to be present whether or not any party has asserted the right." *Presley*, 558 U.S. at 214. The defendant also argues that, even if forfeited, the error is reviewable under the plain error doctrine.

¶ 58 Our court recently addressed identical arguments arising from similar facts in *People v. Jones*, 2014 IL App (1st) 120927. The *Jones* defendant likewise asserted a violation of the right to public trial where, after certain individuals raised issues about their ability to serve in open court *voir dire*, the trial court conducted further questioning in chambers. The trial court spoke to three potential jurors in chambers. *Id.* ¶¶ 15-23. One individual had requested to speak to the judge "one on one" about a "personal" matter after the court asked if anyone had a conflict preventing him or her from serving. *Id.* ¶¶ 15, 19. Another individual had expressed doubt that he could "decide this case solely on what he saw and heard in the courtroom" because a close friend had been killed. *Id.* ¶¶ 16, 21, 23. A third potential juror had stated that English was not his first language and had expressed difficulty in understanding the State's burden of proof. *Id.* ¶¶ 17, 20, 22. The *Jones* defendant asserted that the trial court erred in failing to make specific findings justifying *voir dire* in chambers, failing to consider alternatives, and by questioning individuals in chambers who had not requested to speak privately. *Id.* ¶ 38.

¶ 59 As in this case, the *Jones* defendant had not objected during the *voir dire* but claimed that the holding in *Presley* obviated the need to object. *Id.* We rejected that argument, reasoning that although "*Presley* held that trial court must consider alternatives to closure 'even when they are not offered by the parties' and stated that the public has a right to be present at a trial whether or not any party has asserted the right [citation], defendant misreads *Presley* in arguing that these statements eliminate the necessity of lodging an objection." *Id.* ¶ 39 (quoting *Presley*, 558 U.S. at 214). Noting there had been objections before the trial court in both *Presley* and *Press-Enterprise*, we reasoned that "while trial courts are required to consider alternatives to closure even when no party offers any, the trial court must nonetheless have an objection before it." *Id.*

The defendant's briefing on appeal urges us to find that *Jones* was wrongly decided. However, we see no reason to depart from the analysis in *Jones* regarding forfeiture. Thus, as the defendant raised no objection at trial, this issue was forfeited.

¶ 60 The defendant nonetheless argues that, regardless of any forfeiture, we may consider the issue under the plain error doctrine. "The plain error doctrine allows a reviewing court to bypass normal forfeiture principles and consider an otherwise unpreserved error affecting substantial rights when either '(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence.' " *Jones*, 2014 IL App (1st) 120927, ¶ 40 (quoting *People v. Herron*, 215 Ill. 2d 167, 187 (2005)). In this case, the defendant contends that the second prong of the plain error doctrine applies, under which "a defendant must show that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process." *Id.* (citing *Herron*, 215 Ill. 2d 167 (2005)).

¶ 61 Again, this argument was expressly considered by our court in *Jones*, 2014 IL App (1st) 120927. In our assessment of the plain error doctrine in that case, we noted that although the right to public trial under the sixth amendment to the United States Constitution extends to *voir dire*, this right "is not absolute." *Id.* ¶¶ 41-42. We recognized that, as explained by the United States Supreme Court, the constitutional right to public trial "is designed to: (1) ensure a fair trial; (2) encourage the prosecution and the trial court to carry out their duties responsibly; (3) encourage witnesses to come forward; and (4) discourage perjury." *Id.* ¶ 41 (citing *Waller*, 467 U.S. 39, 46 (1984)). We also held that "a temporary closure may, under certain circumstances, not violate the sixth amendment because it was 'too trivial' to amount to a violation." *Id.* ¶ 42 (quoting *Peterson v. Williams*, 85 F.3d 39, 42-43 (2d Cir. 1996)).

¶ 62 Under the facts of *Jones*, we held that "the values underlying the sixth amendment right to public trial that were expressed in *Waller* were not significantly undermined" as there was nothing in the record to "indicate the defendant's trial was any less fair, or that the court officers or witnesses took their roles any less seriously" as a result of the *in camera* questioning. *Id.* Further, we found "no meaningful detriment to the integrity of the trial proceedings," and "no adverse effect either on encouraging witnesses to come forward or on discouraging perjury." *Id.* ¶ 45. Thus we held that the trial court did not abuse its discretion by briefly questioning certain potential jurors in chambers, and that in any event the closure "was too trivial to implicate the sixth amendment." *Id.*

¶ 63 Our analysis of the trial court's conduct in this case leads us to the same conclusion. Applying the "triviality standard" adopted in *Jones*, we review "the trial court's acts and the effects upon the trial to determine whether [the] defendant was denied the sixth amendment protections enumerated in *Waller*." *Id.* ¶ 42. We conclude that these protections were not harmed in this case. The portion of the overall *voir dire* conducted in chambers was relatively minor, considering that a total of 40 individuals were questioned in open court. Moreover, each of the individuals questioned *in camera* was first questioned in open court. Further, we do not find that the *in camera* questioning of any particular individual made defendant's trial less fair, or otherwise violated the sixth amendment values expressed in *Waller*. As we recognized in *Jones*, the mere fact that other members of the jury pool were prevented from hearing the answers of some members does not violate the right to a public trial. See ¶ 44 (citing *United States v. Bansal*, 663 F.3d 634, 661 (3d Cir. 2011)).

¶ 64 The defendant emphasizes that only two of the 13 potential jurors specifically asked to speak in chambers. Yet we cannot find the judge erred in questioning the 11 potential jurors *in camera*, as each had first indicated in open court that he or she might not be able to serve as an impartial juror. The trial court could reasonably conclude that further questioning of these individuals *in camera* was appropriate in order to more fully explore any grounds for bias that they might not have disclosed in front of the entire venire. *See Press-Enterprise*, 464 U.S. at 512 ("The jury selection process may *** give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that a person has legitimate reasons for keeping out of the public domain.").

¶ 65 In fact, the decision to conduct further questioning *in camera* of several jurors who expressed inability to be fair was clearly aimed toward protecting, not hindering, the defendant's right to a fair trial. Notably, each of the potential jurors questioned *in camera* who expressed an inability to remain fair and impartial toward the defendant were struck from the jury.[2] Moreover, any potential detriment to fairness was mitigated by the presence of defense counsel in chambers, who was also given the opportunity to ask questions of each individual. Thus, we do not conclude that the limited *in camera* questioning here compromised the defendant's right to a fair trial, or otherwise harmed the values underlying the sixth amendment right to public trial expressed in *Waller*. See *Jones*, 2014 IL App (1st) 120927, ¶ 41 (citing *Waller*, 467 U.S. at 46). As in *Jones*, we find that "the closure here was too trivial" to amount to a violation of the sixth

[2] Although two of the 13 individuals questioned *in camera* were selected to serve on the defendant's jury, neither of those jurors indicated any bias against the defendant. Rather, one had expressed opposition to the death penalty, and another had asked to speak in chambers to reveal that he had also been accused of crimes. Those jurors' disclosures do not suggest any bias in favor of the prosecution.

amendment. *Id.* ¶ 45. Accordingly, we do not find that the conduct of the *voir dire* of some members of the venire constituted a serious error under the second prong of the plain error doctrine.

¶ 66 We next address the defendant's argument that he is entitled to a new trial because the trial court excluded evidence regarding Scott. On appeal, the defendant argues that since his theory at trial was mistaken identification, evidence that the police had considered a different suspect "who resemble[d] the defendant but better fit the eyewitnesses' original description of the offender" was crucial to his defense.

¶ 67 At the outset, we note the State's argument that the defendant forfeited this claim on appeal. The State's claim of forfeiture is based on its view that the defendant's appellate argument, to the extent it focuses on a theory of "mistaken identity," is distinct from the "alternate suspect" argument raised by defense counsel at trial. According to the State, "[a] defense that a third individual was the real offender is not the same as a defense that the eyewitnesses mistakenly identified defendant." The State asserts that defense counsel failed to argue to the trial court that the Scott evidence was necessary to "support a theory that the [State's] eyewitnesses mistakenly identified defendant."

¶ 68 We find the State's claim of forfeiture to be meritless, as it attempts to draw a distinction without a difference. The State concedes that the defendant argued to the trial court that Scott, not the defendant, was the real killer. Clearly, if Scott was the real shooter, then the eyewitness identifications of the defendant as the shooter would necessarily be mistaken. Whether framed as a defense of "mistaken identification" or "alternate suspect," the very same evidence regarding Scott that was the subject of the trial court's ruling is at issue on appeal, and the defendant relies

on the same legal authorities that it submitted to the trial court, particularly our supreme court's decision in *People v. Beaman*, 229 Ill. 2d 56 (2008). Thus, we reject the State's argument that this issue was forfeited.

¶ 69 Turning to the merits, we note that the parties dispute the applicable standard of review. The defendant argues that because the exclusion of the Scott evidence deprived him of his "constitutional right to present a complete defense," we must review the issue *de novo*. The State argues that the deferential abuse of discretion standard applies to the exclusion of such evidence.

¶ 70 We agree with the State with respect to the standard of review. The defendant cites federal cases discussing the constitutional right to present a complete defense, as well as our supreme court's statement that the "standard of review for determining whether an individual's constitutional rights have been violated is *de novo*." *People v. Burns*, 209 Ill. 2d 551, 560 (2004) (analyzing whether respondent seeking discharge from commitment is entitled to an independent psychiatric evaluation as a matter of due process). However, the authorities cited by the defendant do not establish that admissibility determinations must be subject to *de novo* review whenever a defendant claims that the exclusion of evidence prevented him from establishing a complete defense. Rather, it is well-settled that a deferential standard of review applies to the trial court's decisions on relevance and admissibility in criminal cases. Our supreme court has held, in the course of reviewing the exclusion of evidence offered to show that another suspect may have committed the crime, that "[i]t is the function of the circuit court to determine the admissibility of evidence, and a reviewing court will not reverse the circuit court's ruling on a motion *in limine* absent an abuse of discretion." *People v. Kirchner*, 194 Ill. 2d 502, 539 (2000) (reviewing exclusion of evidence that murder weapon was in possession of third party). "An

abuse of discretion exists only where the trial court's decision is arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court." *People v. Ramsey*, 239 Ill.2d 342, 429 (2010).

¶ 71 As with other evidence, that regarding an alternate suspect must be relevant to be admissible. *Kirchner*, 194 Ill. 2d at 539. ("In order to be admissible, evidence must be legally relevant, that is it must tend to make the existence of any fact in consequence *** more or less probable.") (Internal quotation marks omitted.) "Although a defendant in a criminal case may offer evidence that tends to show that someone else committed the offense with which he is charged, such evidence should be excluded on the basis that it is irrelevant if it is too remote or too speculative." *Kirchner*, 194 Ill. 2d at 539-40.

¶ 72 The principle that relevant —but not remote or speculative —evidence of an alternative suspect is admissible was reiterated by our supreme court in *People v. Beaman*, 229 Ill. 2d 56 (2008). The defendant in this case argued to the trial court, and again urges on appeal, that *Beaman* supports admission of the Scott evidence. However, we agree with the trial court that *Beaman* is distinguishable.

¶ 73 In *Beaman*, the State had argued at trial that Alan Beaman murdered his ex-girlfriend after discovering that the victim had begun a relationship with Beaman's former roommate, Michael Swaine. 229 Ill. 2d at 64-65. In a post-conviction petition, Beaman asserted that the State had violated its constitutional obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose evidence concerning a third man as an alternate suspect, referred to as "John Doe." *Beaman*, 229 Ill. 2d at 66. An evidentiary hearing revealed that the State had failed to disclose ample evidence implicating Doe, including that: (1) Doe had previously been in a

romantic relationship with the victim and told police they had planned to renew that relationship; (2) Doe had been charged for domestic battery of another girlfriend, who told police that Doe acted erratically due to his use of steroids; and (3) Doe admitted that that he had supplied the victim with drugs and that the victim owed him money. *Id.* at 66-68.

¶ 74 In its analysis of whether the withheld evidence "would have assisted [Beaman] in presenting Doe as an alternative suspect" so as to support a *Brady* violation, our supreme court reiterated that "[e]vidence of an alternative suspect should be excluded as irrelevant" if it is "too remote or speculative." *Id.* at 75-76 (citing *Kirchner*, 194 Ill. 2d at 539-40). The *Beaman* court further stated that the inquiry required consideration of the strength of the State's evidence against Beaman: "The impact or strength of the undisclosed evidence can only be determined by also viewing the strength of the evidence presented against [defendant.]" *Beaman*, 229 Ill. 2d at 77 (citing *Holmes v. South Carolina*, 547 U.S. at 319, 331 (2006)). Similarly, in determining whether the withheld evidence was "material" under the *Brady* inquiry, the court also stated that "the impact of the alternative-suspect evidence on the verdict cannot be determined without viewing the strength of the evidence presented by petitioner as well as the evidence presented by the State." *Beaman*, 229 Ill. 2d at 78 (citing *Holmes*, 547 U.S. at 331).

¶ 75 Our supreme court concluded that the withheld evidence was favorable to Beaman, as the "combination of the undisclosed evidence with the disclosed evidence tending to establish Doe as a viable alternative suspect cannot be considered remote or speculative, particularly in light of the State's evidence against petitioner." *Beaman*, 229 Ill. 2d at 79 (noting that much of the State's evidence against Beaman was "based on inferences" and "did not provide particularly strong evidence of his guilt"). The court went on to find the undisclosed evidence was material

because Beaman "could have established Doe as a strong alternative suspect." *Id.* at 81. In reversing Beaman's conviction, our supreme court noted "the tenuous nature of the circumstantial evidence against [Beaman], along with the nondisclosure of critical evidence." *Id.*

¶ 76 In this case, the defendant relies largely on *Beaman* in arguing that the Scott evidence was relevant and should not have been excluded. The defendant argues that Scott, like "John Doe" in *Beaman*, was considered by police as an alternative suspect. The defendant further claims that, just as the *Beaman* court found Doe's history of domestic violence relevant, Scott's conviction for armed robbery indicates Scott had the motive and capability to commit a similar crime. The defendant goes so far as to argue that there is "even more evidence pointing to Scott as an alternative suspect than there was in *Beaman*" because "Scott was arrested in the near vicinity of the crime around the time of the crime and almost perfectly matched the description of the offender as a male black with braids in a black-and-gold sweater."

¶ 77 We do not find that the Scott evidence at issue in this case resembles the alternate suspect evidence in *Beaman*. The evidence in *Beaman* was significantly more indicative of Doe's potential guilt, and thus substantially more relevant and less remote. The evidence in *Beaman* did not merely place Doe in the vicinity of the crime or suggest that he bore some physical resemblance to the killer. Rather, the *Beaman* evidence established personal links between Doe and the victim—Doe had sought to renew a romantic relationship with the victim and also acted as her drug dealer. *Beaman*, 229 Ill. 2d at 76-77. That evidence also suggested personal motives for Doe to target the victim, that is, jealousy over her romantic relationship with another man, and the fact that she owed him money. *Id*. at 80. In contrast, in this case there is nothing to

suggest that Scott had any prior dealings with Milagro or had any particular motive to rob or kill him.

¶ 78 Further, to the extent the defendant emphasizes that Smith was arrested for armed robbery after Milagro's death, we note that evidence of other crimes is not admissible merely to show an individual's propensity to commit crime. See *People v. Pikes*, 2013 IL 115171, ¶ 11. Although evidence of other crimes may be "admissible to show *modus operandi*, intent, motive, identity, or absence of mistake," *id.*, the record in this case does not include any details of Scott's alleged robbery to assess whether it would be admissible for any proper purpose.

¶ 79 We also consider the strength of the State's evidence against the defendant in assessing whether the Scott evidence was properly excluded. The United States Supreme Court, in holding that evidence of a third party's guilt cannot be excluded based solely on the strength of the prosecution's evidence against defendant, stated that "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006). In *Beaman*, our supreme court found that this statement from *Holmes* was "applicable to whether the undisclosed evidence here is favorable and material," such that [t]he "impact or strength of the undisclosed evidence [regarding Doe] can only be determined by also viewing the strength of the evidence presented against [Beaman]." *Beaman*, 229 Ill. 2d at 77. The *Beaman* court concluded that the "tenuous" nature of the State's evidence "supports admission by [Beaman] of the similarly probative" evidence implicating Doe. *Id.* at 78.

¶ 80 In contrast, the State's evidence against the defendant in this case is not tenuous, but is significantly stronger than the evidence regarding Scott. The State presented the testimony of

several eyewitnesses who identified the defendant as the shooter, both in police lineups and again in court. On the other hand, the defendant relies on evidence that Scott was in the general vicinity of the crime, fit the initial description of a black male with a gold and black jacket, and otherwise resembles the defendant's height, build, and hairstyle. As the State observes in its brief, "[t]here could be any number of young men in that area who bore similar physical attributes" on the night in question. However, there is simply no direct evidence implicating Scott in Milagro's death.

¶ 81 We note that, in making its ruling, the trial court cited authorities stating that alternate suspect evidence must "closely link" the suspect to the crime in order to be admitted. See, *e.g.*, *People v. Bruce*, 185 Ill. App. 3d 356, 364 ("[I]f the evidence *** fails to link a third person closely with the commission of the crime [citation], then the trial court should exclude the evidence."); *People v. King*, 61 Ill. App. 3d 49, 52 (1978) ("[E]vidence connecting a third person with the commission of the crime may only be shown if and when the third person had been closely linked to the commission of the crime."). On appeal, the State similarly argues that evidence of an alternate suspect is admissible "only if the third party has been closely connected" to the crime. The defendant argues that the trial court applied an overly stringent standard, contending that there is "no requirement that the defense provide direct evidence that Scott committed the crime." The defendant notes that "no direct link to the crime was required" to establish relevance of the John Doe evidence in the *Beaman* decision.

¶ 82 We agree with the defendant that our supreme court's precedent does not require the defendant to show a particularly "close" connection to the alternate suspect in order to admit such evidence. Rather, the test for admissibility is relevance, or whether it "tends to make the

existence of any fact in consequence more or less probable than it would be without the evidence." *Beaman*, 229 Ill. 2d at 75-76 (citing *Kirchner*, 194 Ill. 2d at 539).

¶ 83 However, our review of the record makes clear that the trial court did not improperly rely on a heightened "closely linked" standard to exclude the Scott evidence. Rather, the trial court quoted supreme court decisions making clear that the test for alternate suspect evidence is the standard relevance inquiry, and that "speculative" evidence may be excluded. See, *e.g.*, *People v. Lewis*, 165 Ill. 2d 305, 341-42 (1995) ("[W]hether what is offered as evidence will be admitted or excluded depends upon whether it tends to make the question of guilt more or less probable. [Citation.] Where the offered evidence is uncertain or speculative, the trial court, in its discretion, may properly reject it."). After citing these authorities, the trial court concluded that the Scott evidence should be excluded because it was irrelevant, finding that it "doesn't connect [Scott] to the murder at all" and amounted to "speculation." Given the tenuous and circumstantial nature of the evidence against Scott, especially contrasted with the five witness identifications implicating the defendant, we cannot say that the trial court was unreasonable in concluding that the Scott evidence was too speculative to justify admission. Thus, we do not find that the trial court abused its discretion in precluding the defendant from referring to Scott as an alternate suspect.

¶ 84 Next, we address the defendant's contention that the State violated the discovery rules by failing to disclose that Dr. Cogan had changed his conclusion regarding the presence of stippling. The defendant contends that that a new trial is warranted since the trial court refused to either declare a mistrial or to strike Dr. Cogan's testimony.

¶ 85 We first examine the applicable rules to determine whether a violation did, in fact, occur.[3] Illinois Supreme Court Rule 412(a)(i) requires that, upon written motion of defense counsel, the State must identify the "persons whom the State intends to call as witnesses, together with their relevant written or recorded statements." Ill. S. Ct. R. 412(a)(i) (eff. March 1, 2001). Rule 412(a)(iv) similarly requires the State to disclose "any reports or statements of experts" made in connection with the case. Ill. S. Ct. R. 412(a)(iv) (eff. March 1, 2001). Illinois Supreme Court Rule 415(b) establishes a continuing duty to disclose such information, providing that when "a party discovers additional material or information which is subject to disclosure, he shall promptly notify the other party or his counsel of the existence of such additional material." Ill. S. Ct. R. 415 (b) (eff. Oct. 1, 1971). Our supreme court has stated that "Supreme Court Rules 412 and 415 require a prosecutor to disclose to the defendant any errors in documents that have been tendered to the defense as soon as the prosecution has such knowledge." *People v. Harris*, 123 Ill. 2d 113,151 (1988).

¶ 86 In this case, we agree with the defendant that a discovery violation occurred. Once Dr. Cogan changed his opinion regarding stippling, the previously disclosed autopsy report, which had explicitly denied the presence of stippling, was rendered erroneous. The State does not dispute that it became aware of Dr. Cogan's change in opinion approximately a week before trial. Indeed, Dr. Cogan testified that his change in view was prompted by his meeting with the prosecutor in preparation for his testimony. At that point, the State should have notified the defendant that Dr. Cogan's autopsy report no longer accurately reflected his view on stippling.

[3] Notably although the State argued to the trial court that it had no obligation to disclose Dr. Cogan's change in opinion, the State on appeal does not dispute that a discovery violation occurred.

¶ 87 However, whether the State should have disclosed Dr. Cogan's change in opinion does not end the inquiry, as the "failure to comply with discovery requirements does not in all instances necessitate a new trial." *Harris*, 123 Ill. 2d at 151. Rather, our supreme court has instructed that "[a] new trial should only be granted if the defendant is prejudiced by the discovery violation and the trial court failed to eliminate the prejudice." *Id.* at 151-52. "Among the factors to be considered in determining whether a new trial is warranted are the strength of the undisclosed evidence, the likelihood that prior notice could have helped the defense discredit the evidence, and the willfulness of the State in failing to disclose." *Id.* at 152.

¶ 88 Considering these factors, we do not find that the defendant suffered prejudice in this instance. With respect to the strength of the undisclosed evidence, we do not find that Dr. Cogan's stippling opinion was so important to the State's case that the defendant was prejudiced by its non-disclosure. Although that opinion supported the proposition that Milagro was shot at close range, the State had introduced independent evidence supporting this conclusion. Several witnesses testified that the shooter approached Milagro and stood within a few feet of him; in fact, two of those witnesses testified that the shooter was close enough to strike Milagro in the face with the gun before shooting him. This was corroborated by Dr. Cogan's testimony that Milagro suffered facial wounds that could be consistent with being struck by a hard object. In addition, the State's forensic investigator testified that Milagro had gunshot residue on his hands, which corroborated witness testimony that Milagro was shot at close range as he raised his hands near his face. Given the independent evidence tending to show that Milagro was shot at close range, we do not find that Dr. Cogan's stippling opinion was crucial on this point.

¶ 89 Likewise, the factor of "the likelihood that prior notice could have helped the defense discredit the evidence," *id.*, at 152, also weighs against a finding of prejudice here. It is telling that after the court granted the defendant a continuance to hire his own expert, that expert came to the same conclusion as that reached by Dr. Cogan – that there was stippling near the bullet entry wound. Indeed, the defendant on appeal acknowledges that it is unlikely that the defense could have discredited Dr. Cogan's opinion that stippling was present.

¶ 90 With respect to the factor of "the willfulness of the State in failing to disclose," *id.*, it appears that the State's attorney learned of Dr. Cogan's changed opinion several days before trial. In our view, while it was a short time, it was enough time for the State to make the disclosure and it was improper for the prosecutor to withhold the information. That being said, as stated by our supreme court in *Harris*, "[a]lthough we do not condone the [action] of the State in failing to divulge" the change in Dr. Cogan's opinion, "we nevertheless conclude that the defendant[] here did not suffer sufficient prejudice as a result of the State's misconduct so as to justify reversal." *Id.* at 151. Accordingly, we do not find that the defendant is entitled to a new trial on this basis.

¶ 91 Similarly, we note that we do not find that the trial court abused its discretion when it declined to grant a mistrial or strike Dr. Cogan's testimony. "The correct sanction to be applied for a discovery violation is a decision appropriately left to the discretion of the trial court" as it "is in the best position to determine an appropriate sanction based upon the effect the discovery violation will have upon the defendant." *People v. Kladis*, 2011 IL 110920, ¶ 42. In this case, although the trial court declined to sanction the State for the undisclosed change in Dr. Cogan's opinion, the trial court did allow the defendant latitude to find his own expert to testify on the issue. We cannot say that this was an unreasonable approach, since, as discussed above, the trial

court could reasonably conclude and already did that the non-disclosure of the changed opinion did not prejudice the defendant.

¶ 92 Finally, we address the defendant's claim that his trial counsel's failure to request separate verdict forms regarding intentional, knowing and felony murder denied him his right to effective assistance of counsel. He argues that had the jury received separate forms, it could have found him guilty of felony murder, which would have precluded his separate conviction and sentence for the lesser-included felony of attempt armed robbery.

¶ 93 Whether a defendant has been denied effective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Under that standard, a "defendant must show both that (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance so prejudiced the defense as to deny defendant a fair trial. [Citations.] The failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim." *People v. Calhoun*, 404 Ill. App. 3d 362, 383 (2010). "To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel." *People v. Braboy*, 393 Ill. App. 3d 100, 104-05 (2009). To satisfy the prejudice prong of the two-part test, a defendant must show "a reasonable probability that, but for counsel's insufficient performance, the result of the proceeding would have been different." *Id.* at 105.

¶ 94 Our supreme court has held that it is reversible error for a trial court to deny a defendant's request for separate verdict forms regarding the different types of first degree murder. *People v. Smith*, 233 Ill. 2d 1 (2009). *Smith* involved the cases of two defendants who were each charged

with intentional murder, knowing murder, and felony murder, as well as underlying felony offenses. *Id.* at 5. The defendants' requests for separate verdict forms were denied, and in each case the jury returned a general guilty verdict for first degree murder and the underlying felony. *Id.* As a result, the *Smith* defendants received sentences for murder as well as consecutive terms for the felony convictions. *Id.*

¶ 95 Our supreme court explained that although section 9-1(a) of the Criminal Code of 1961[4] describes three "types" of murder – intentional murder, knowing murder and felony murder – these "are merely different ways to commit the same crime" of first degree murder. (Internal quotation marks omitted.) *Id.* at 16. Although these are all forms of the same offense, the court recognized "there may be different sentencing consequences based on the specific theory of murder proven." *Id.* at 17. Specifically, as "the predicate felony underlying a charge of felony murder is a lesser-included offense of felony murder," a defendant convicted of felony murder may *not* be additionally convicted or sentenced for the predicate felony. *Id.* Because the jury's findings as to the specific type of murder "could result in different sentencing consequences, favorable to the defendant," the court held that "specific verdict forms must be provided upon request and the failure to provide them is an abuse of discretion." *Id.* at 23.

[4] The statute provides that a person who kills without lawful justification commits first-degree murder, if in performing acts causing death, "(1) he either intends to kill or do great bodily harm *** or knows that such acts will cause death ***; or (2) he knows that such acts create a strong probability of death or great bodily harm ***; or (3) he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1 (West 2008).

¶ 96 Our supreme court has since clarified that "the holding of *Smith* was conditioned on the trial court's refusal to grant such a request and did not establish a rule that the court must act *sua sponte* to give a specific verdict form." *People v. Davis*, 233 Ill. 2d 244, 273 (2009). In addition, our court has repeatedly held that *Smith* "is limited to situations in which the trial court actually denied a request for separate verdict forms," and is inapplicable where no such request was made to the trial court. *Braboy*, 393 Ill. App. 3d at 108; see also *People v. Mabry*, 398 Ill. App. 3d 745, 755 (2010) ("we decline to extend *Smith* to situations where counsel did not request separate verdict forms"); *People v. Allen*, 401 Ill. App. 3d 840, 855 (2010) ("*Smith* is limited to situations in which the trial court actually denied a request for separate verdict forms.").

¶ 97 We have also specifically rejected an ineffective assistance of counsel claim premised on the failure to ask for separate verdict forms. See *Braboy*, 393 Ill. App. 3d 100. In *Braboy*, the defendant claimed prejudice because it was reasonably probable that the jury would have convicted him of felony murder had separate verdict forms been given, which would have precluded him from being sentenced for the underlying felony. *Id.* at 104. Although we recognized that, under *Smith*, specific verdict forms must be provided upon request, we found that rule inapplicable "because counsel did not request separate verdict forms [and] the trial court was not asked to rule on whether separate verdict forms should be provided to the jury." *Id.* at 108. We concluded that the defendant could not meet the deficient performance prong of the *Strickland* test, as he "failed to overcome the presumption that counsel's decision not to request specific verdict forms was trial strategy." *Id.*

¶ 98 We reached the same result in *People v. Calhoun*, 404 Ill. App. 3d 362 (2010), noting that "counsel's decision to proceed with a general verdict form in lieu of specific verdict forms,

falls within the realm of trial strategy and will be considered objectively reasonable 'where the law did not and does not place a mandatory burden on counsel to request separate verdict forms.'" *Id.* at 383 (quoting *Braboy*, 393 Ill. App. 3d at 108). We found that Calhoun "failed to overcome the presumption that counsel's failure to request special verdict forms was part of a reasonable trial strategy," noting that defense counsel may have feared that a special verdict form would make it easier for the jury to convict under the theory of felony murder, given the "overwhelming evidence of defendant's participation in the underlying kidnapping." *Id.* at 383-84. We further reasoned that counsel could have concluded "that his client had a better chance of prevailing on intentional murder since the focus on the element of intent would provide the jury with more latitude to reach a more lenient verdict." *Id.* at 384.

¶ 99 In this case, we likewise conclude that the defendant cannot overcome the strong presumption that such decisions are strategic decisions of counsel. We cannot conclude that trial counsel's decision not to request specific verdict forms was not valid trial strategy. As stated in *Calhoun*, the defendant's counsel could reasonably have been concerned that a special verdict form would easily have allowed the jury to find the defendant guilty of felony murder "strictly on the mechanical basis of [his] involvement" in the underlying felony, regardless of any intent to kill. *Id.* at 384. This is especially plausible since the evidence suggested, and the State explicitly argued, that Milagro's homicide arose from an attempted robbery rather than a premeditated murder. Since the defendant cannot overcome the presumption that counsel's decision was part of a valid trial strategy, the defendant has not established that "counsel's performance fell below an objective standard of reasonableness." *Calhoun*, 404 Ill. App. 3d at 383-84. As we have concluded that the first prong of the *Strickland* test is not met, we need not

address the second prong of prejudice required under the standard. *Id.* at 384 (citing *Strickland*, 466 U.S. at 687). Thus, the defendant's claim of ineffective assistance of counsel fails.

¶ 100 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 101 Affirmed.