FIFTH DIVISION
APRIL 29, 2016

No. 1-14-3731

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 5217
	)	
LONIEL KNIGHT,	)	Honorable
	)	Michele M. Pitman,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Burke concurred in the judgment.

O R D E R

¶ 1 *Held*: Request for substitution of judge properly denied; defendant's belief that judge bore him ill will due to an erroneous admonishment does not by itself constitute prejudice. The trial court did not err in denying defendant's posttrial ineffective-assistance claims presented in an evidentiary hearing.

¶ 2 Following a bench trial, defendant Loniel Knight was convicted of first degree murder, attempted first degree murder, and aggravated battery and sentenced to consecutive terms in the Illinois Department of Corrections (IDOC) of 45 and 26 years and a concurrent two-year term, respectively. On appeal, we remanded for the trial court to conduct a preliminary inquiry into

defendant's *pro se* posttrial claims of ineffective assistance of trial counsel. *People v. Knight*, No. 1-07-2254 (2009) (unpublished order under Supreme Court Rule 23). On remand, the trial court held an inquiry into defendant's claims and denied relief thereon. On appeal, we reversed the denial of defendant's claims and remanded for appointment of new counsel to argue them. *People v. Knight*, 2012 IL App (1st) 102428-U. Defendant now appeals from orders denying (a) his motion for substitution of judge, and (b) relief on his ineffectiveness claims following an evidentiary hearing, contending that both orders are erroneous. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with first degree murder, attempted first degree murder, aggravated discharge of a firearm, and aggravated battery for allegedly fatally shooting Kenneth Mitchell, and shooting at and wounding James Barnes, on or about February 6, 2005.

¶ 4 In an October 2006 discovery answer, the State represented that it had "no knowledge, at this time, that any of the potential witnesses have any criminal convictions."

¶ 5 On January 10, 2007, the State told the court that it made a plea offer – consecutive prison terms of 30 years for first degree murder and 6 years for attempted murder – and asked the court "to admonish the defendant pursuant to *People v. Curry*," 178 Ill. 2d 509 (1997), because if defendant rejected the plea offer and went to trial, the minimum prison sentence defendant faced was 51 years (45 years for first degree murder with a firearm enhancement and 6 years for attempted murder) in contrast to the 36 years being offered. The court ascertained from defendant that he rejected the offer and admonished him that the court could not impose the offered 36-year sentence following a finding of guilty because the State "offered you something that is reduced by [*sic*] what I can sentence you if you are found guilty"; defendant replied that

he understood. The court also admonished defendant that, if found guilty at trial, he would receive minimum consecutive prison terms of 45 years, with no credit for good behavior, for first degree murder by firearm and 6 years for attempted murder, or at least 51 years' imprisonment. The court reiterated that "what they offered you I would not be able to sentence you to after a trial," and defendant replied that he understood. The court found "Defendant admonish[ed] pursuant to *People v. Curry*."

¶ 6 Defendant was convicted in a June 2007 trial and sentenced in a July 2007 hearing to consecutive prison terms of 45 and 26 years for first degree murder and attempted murder – both including a firearm enhancement – and concurrent prison terms of four and two years for aggravated discharge and aggravated battery.[1] Trial counsel filed a postsentencing motion arguing that the evidence that a single course of conduct – a volley of 11 shots fired in a matter of seconds – killed Mitchell and wounded Barnes rendered erroneous defendant's consecutive sentencing and the application of a firearm enhancement to both the murder and attempted murder sentences. The record on appeal does not indicate a hearing on or disposition of that motion.

¶ 7 On appeal, we found that defendant raised *pro se* posttrial ineffectiveness claims but the trial court did not address them. Specifically, defendant asked for a continuance to seek new counsel to raise ineffectiveness claims and the court replied that he could raise such claims on appeal. After defendant said he had "a little conflict of interest" with counsel and declined to meet with counsel during a recess, the court asked defendant if he wanted to proceed to

[1] The record does not include a transcript of the trial, posttrial, or sentencing proceedings, nor any hearing on the postsentencing motion. We summarized the trial evidence and the sentencing hearing in our earlier orders.

sentencing, and he replied that he did. *Knight*, No. 1-07-2254, at 4-5. We found that the court made an inadequate inquiry into defendant's claim and thus remanded for the court to conduct a preliminary *Krankel* inquiry into defendant's claims. Specifically, we remanded:

> "for the limited purpose of allowing the trial court to conduct the necessary preliminary investigation into defendant's *pro se* ineffective assistance of counsel claim. If the court finds defendant's claim to be spurious, the court may deny defendant's oral motion and leave his convictions and sentences standing." *Knight*, No. 1-07-2254, at 14-15.

Considering the attempted murder and aggravated battery of, and aggravated discharge towards, Barnes as a one-act, one-crime issue, we also vacated defendant's conviction for aggravated discharge but not his aggravated battery conviction. *Knight*, No. 1-07-2254, at 10-14.

¶ 8 Following remand, the court held a hearing in March 2010 with trial counsel Daniel Wolff and Marshall Weinberg present as well as defendant. The court stated for the record that defendant had mentioned concerns about trial counsel during the sentencing hearing but then agreed with the court that he wanted to proceed to sentencing. Defendant now raised three claims of ineffective assistance of trial counsel. He claimed that counsel misstated the sentencing range following the State's 36-year plea offer, in that he faced at least 71 years' imprisonment instead of the admonished minimum of 51 years, and asserted that he would have accepted the plea offer had he known the correct minimum sentence. Defendant also claimed that counsel failed to investigate witness backgrounds for impeachment purposes; that is, Lloyd Witcliffe's[2] criminal history. Defendant claimed that counsel told him that Witcliffe had no record but Witcliffe

[2] Our prior orders including summaries of the trial evidence use "Witcliffe," while the record on appeal refers to "Whitcliff."

testified at trial to three felony convictions; the court noted that it therefore heard the impeaching evidence, but defendant replied that he would have chosen a jury trial had he known. Lastly, defendant claimed that he informed counsel of two witnesses who would have supported his self-defense claim – Elaine Moore and Jimmy Armstrong – but counsel failed to investigate them.

¶ 9 The trial court asked trial counsel to address these claims. Wolff stated that he and Weinberg discussed the State's plea offer with defendant, but defendant told them that he wanted to proceed because he wanted a plea or finding of second degree murder and "was steadfast" that he would not plead guilty to first degree murder, so that defendant "never indicated any desire to accept the State's offer." Wolff explained that "the entire goal of our defense in this case," agreed to "from the beginning" by counsel and defendant, was a finding of second degree murder rather than acquittal. As to criminal history, Wolff and Weinberg "advised [defendant] of the backgrounds of the witnesses as soon as we became aware of them," the court "was made fully aware of the criminal history of the witnesses," counsel "never convinced [defendant] to take a jury or a bench trial" but he made his own decision, and he chose a bench trial because he believed there was a chance the court would find him guilty of second degree murder. Wolff searched for and spoke with potential witnesses Moore and Armstrong – Moore said that she did not see anything, did not recall anyone else with a gun, and had told the same to the police, and Armstrong "would not have corroborated anything that [defendant] testified to" – and Wolff and Weinberg agreed that neither witness would have "helped" defendant's claim of defense of others. Wolff told the court that he had relayed the accounts of Moore and Armstrong to defendant, who agreed that they would not be called as witnesses.

¶ 10 Replying in support of his claims, defendant reiterated that he was admonished of a minimum sentence of 51 years and noted that the court made the same misstatement. Defendant acknowledged the court's admonishment that he could not receive the State-offered sentence following a trial, but maintained that he would have accepted the 36-year plea had he known he faced at least 71 (rather than 51) years' imprisonment. Defendant reiterated that counsel told him that "none of the State's witnesses had a criminal background" so he chose a bench trial, explaining that if he knew Witcliffe had a weapons conviction, he could have shown a jury "that it was possible that he could have taken the gun off the victim when *** he went back over to the body after the shooting happened before the police arrived." Lastly, defendant acknowledged counsel telling him that they interviewed Moore and Armstrong but denied that he agreed to not call them as witnesses; defendant asserted "my understanding" that Armstrong was going to testify while Moore told him that she would testify.

¶ 11 The court took the evidence under advisement until May 11, 2010, stating that it would review its notes and the record. On that day, the court noted that it reviewed the transcript of January 10, 2007. Defendant told the court that it was Wolff who erroneously told him of a 51-year minimum sentence. Wolff explained that he did not convey or suggest sentencing numbers to defendant because "I could not tell him what the sentence would be, other than in my experience, the minimum sentences are not handed out after a trial after *** an offer is turned down." Wolff stated that the trial strategy had been to argue "that the entire burst of shots was one single act, which would [have] resulted in concurrent not consecutive sentences" and to seek second degree murder and acquittal for attempted murder due to a lack of transferred intent. The court told trial counsel that the issue was not whether defendant would actually receive a

minimum sentence after trial but the *Curry* requirement that a defendant rejecting a plea below the minimum sentence for the offenses as charged must be informed of the minimum sentence for all counts charged. The court noted that the transcript of the *Curry* hearing reflected an erroneous minimum-sentence admonishment of 51 years rather than the correct 71 years. Regarding the second claim, Weinberg told the court that he expressly advised defendant that choosing to testify and choosing a bench or jury trial were his decisions and not counsels' choice. Wolff stated that, in counsels' various discussions with defendant, they explained how a jury may perceive a person firing over a dozen shots into a crowd and opined that such evidence would be better heard by a judge. Regarding the potential witnesses, Wolff explained that Armstrong's grand jury testimony – several shots were fired from a vehicle defendant was standing next to, then Armstrong fled indoors where he heard further shots outside – would have contradicted the defendant's single-volley theory.

¶ 12 The court ascertained from defendant that he was not aware until sentencing that the *Curry* admonishments of 51 years were erroneous, and confirmed that the three issues raised in these proceedings were the claims he would have raised at sentencing. Defendant reiterated that he would have chosen a jury trial had he known of Witcliffe's criminal record.

¶ 13 The State argued that defendant's claims were not meritorious: he could not have intended before sentencing to raise the erroneous *Curry* admonishments if he was unaware before sentencing that they were erroneous; the court was aware at trial of Witcliffe's criminal record; and counsel had informed defendant of the accounts of Moore and Armstrong.

¶ 14 The court found that defendant's ineffectiveness claims lacked merit and ordered its prior order to stand. The court noted that this case was remanded for consideration of the

ineffectiveness claims defendant was going to raise at sentencing but found that the *Curry* admonishment claim could not have been one of them. The court found that defendant "clearly wanted [or] was interested in a second degree [murder] finding, and he chose to take a bench trial looking at a second degree finding." Lastly, the court noted defendant's acknowledgement that counsel apprised him of interviewing Moore and Armstrong and found that calling them as witnesses was a matter of counsels' trial strategy.

¶ 15 On appeal, we found that we had not limited our remand to claims raised before sentencing and as a matter of judicial economy the court should have considered "at one hearing all ineffective assistance claims directed at the same attorney." *Knight*, 2012 IL App (1st) 102428-U, ¶ 54. We found that the *Curry* claim demonstrated trial counsels' possible neglect of defendant's case so that new counsel should have been appointed, and defendant's assertion in court that he would have accepted the offer if correctly admonished of his minimum sentence was sufficient to show that the failure to appoint new counsel was not harmless error. *Knight*, 2012 IL App (1st) 102428-U, ¶¶ 60, 64. We reversed the dismissal of defendant's ineffectiveness claim and remanded for appointment of new counsel to argue his claim. We also directed that the mittimus be corrected to reflect our earlier vacatur of the aggravated discharge conviction.

¶ 16 Following remand, defendant filed in October 2012 a *pro se* motion for substitution of judge. He argued that the judge demonstrated prejudice by finding him not credible when his credibility would be key in the postremand proceedings, by ignoring his *Krankel* claims and not complying with this court's mandate to consider them and vacate the aggravated discharge conviction, and by hearing from the State while defendant was not represented by counsel.

¶ 17 The court amended the mittimus on October 30, 2012, to vacate the aggravated discharge conviction. The court appointed counsel for defendant in November 2012, who was replaced by private counsel in May 2013.

¶ 18 In March 2013, appointed counsel filed an amended motion for substitution of judge, arguing that the two remands of this case indicate "the judge's inability to fairly and competently preside over this case," and reiterating the judge's finding that defendant was not credible. Counsel also argued that the *Krankel* hearing without counsel for defendant "pitted defendant against the court, state, and [defendant's] trial counsel *** in spite of the appellate court's direction for the trial court to appoint new counsel." Counsel further argued that the court refused to vacate the aggravated discharge conviction.

¶ 19 The court – presided over by a different judge than the judge at issue – heard the motion for substitution in August 2013. Counsel reiterated the arguments from the motion as amended, emphasizing the judge's erroneous *Curry* admonishment as being "more than just a mistake," while the State argued that the judge's errors found on appeal were not evidence of her prejudice against defendant. The court denied substitution, finding defendant's belief that the judge could not be fair to him to be speculative. The court noted that judges sometimes overlook corrections of the mittimus when the case is remanded for a more substantial matter, and attributed erroneous *Curry* admonishments to "a math problem" in applying sentencing enhancements rather than evidence of a judge's unfairness.

¶ 20 Counsel filed an amended motion for a new trial raising ineffectiveness claims in October 2013. The amended motion reiterated the three claims raised by defendant *pro se*, regarding the erroneous *Curry* advice by trial counsel, witness Witcliffe's criminal record, and proposed

witnesses Moore and Armstrong. Counsel added an additional claim: that defendant was re-indicted but not re-arraigned, and trial counsel's failure to object to the failure to re-arraign allowed defendant's right to a speedy trial to be violated. The motion acknowledges (and the record bears out) that the State proceeded under original indictment 05 CR 5217 – defendant was tried, convicted, sentenced, and has appealed under that indictment – rather than re-indicted case 05 CR 11149. The amended motion was supported by defendant's signed but unsworn statement. He stated that, in October 2006, the State filed a misleading discovery response that none of its witnesses had a criminal history. When he received "this false information" and advice from Wolff, defendant changed his choice from a jury to a bench trial. He did not learn of Witcliffe's criminal history until Witcliffe testified at trial, after defendant had waived his right to a jury trial, and he would not have waived that right had he known of this history.

¶ 21 The court held a hearing on the motion in December 2013. Trial counsel Daniel Wolff testified that he has been an attorney for about 47 years, had worked as a deputy chief for the State's Attorney, and was certified to represent defendants in death-penalty cases. His practice is strictly criminal law, and he has defended numerous murder cases. Defendant's family had employed Marshall Weinberg (who shared an office with Wolff but was not his partner) to represent him, and Wolff then became co-counsel. Defendant was in custody throughout the proceedings so Wolff and Weinberg met with him in jail, although Wolff could not recall how many times. Wolff could not recall when the State made its 36-year plea offer but recalled defendant being admonished in court regarding the plea, including that defendant faced a minimum 51-year sentence if convicted in a trial. When asked if he had ever advised defendant of the 71-year minimum sentence, Wolff replied that defendant's "position was from the first

time I met him until after that offer and into the trial that he didn't want to discuss anything involving first degree murder [or] first degree attempted murder" because defendant told Wolff "that he had fired the weapon in defense of a friend of his who was about to be shot." Defendant told Wolff "he wasn't pleading guilty to anything other than a second degree" murder charge. When postplea counsel repeated the question, Wolff replied "I never mentioned a specific number to" defendant because in Wolff's opinion "if he went to trial he would not be getting any minimum sentences."

¶ 22 When asked if he recalled learning of witness Witcliffe's imprisonment on the day of trial, Wolff replied "I was aware of that," but Wolff could not recall if he was aware of it before trial or only at trial. Wolff was shown the State's discovery answer, which included that no witness had a criminal history, but his recollection was not refreshed. Wolff recalled knowing before trial that a witness had a criminal record, but he was not certain that Witcliffe was that witness. Wolff could not recall if he was aware of any witness's criminal history before defendant waived his right to a jury trial. Wolff recalled the postsentencing motion and explained his belief that the trial court could have found a single act, from the single volley of shots, rather than two separate acts and thus impose concurrent sentencing. The motion argued that the court had discretion to impose a sentence of less than 71 years, and Wolff clarified that "in essence" he was asking the court to reconsider its finding of two separate acts.

¶ 23 On cross-examination, Wolff described his trial strategy as self-defense; his discovery answer disclosed a self-defense theory, defendant testified to self-defense, and Wolff believed he argued self-defense in his opening statement. In addition to not accepting a plea to anything more than second degree murder, defendant told Wolff that he would accept a plea only to an offense

with day-for-day good-time credit; the State's 36-year offer was neither. When the State made the offer, defendant "was very animated," refused to consider it, and excoriated the State for making the offer. The State made no offer for second degree murder or with day-for-day credit; trial counsel sought such a deal, but the State refused. At trial, defendant waived his right to a jury trial and Witcliffe testified on the first day in a jail uniform. The State informed the court that Witcliffe was a convicted felon serving a "boot camp" sentence, and Wolff elicited Witcliffe's convictions on cross-examination. Whether Witcliffe was a convicted felon was not a factor in defendant choosing a jury or bench trial. Instead, defendant made that choice based on trial strategy: Wolff advised him that a judge would be more willing to find self-defense than a jury under the circumstances of multiple shots fired at a group of people. Wolff also told defendant that it was his choice (not counsel's) whether to be tried by a judge or jury. Wolff believed that the argument of a single course of conduct from a volley of shots was a legal argument better addressed to a judge than a jury.

¶ 24 While Wolff could not recall how many times he and Weinberg met with defendant in jail, there were "numerous" visits where they "spent considerable time" discussing potential witnesses and strategy, and defendant never wavered from his claim that he acted in self-defense and was not guilty of first degree murder. Defendant wanted trial counsel to investigate particular witnesses who would testify that someone other than defendant also had a gun at the scene. Moore was one of these witnesses and Wolff interviewed her, but she said that she "didn't see anything in regards to someone with a weapon." Wolff did not call Moore as a witness due to this interview. The other person Wolff sought and interviewed at defendant's behest was Armstrong, and Wolff read his accounts to the police and grand jury as well as interviewing him.

Armstrong was "unclear" and professed not to recall his accounts to the police or grand jury, but his earlier account was of two distinct volleys of shots, contradicting the defense theory of a single volley constituting a single act. Wolff thus chose to not call Armstrong as a witness. There had been two indictments in this case and defendant was not arraigned on the latter, but "we proceeded on the original indictment"; bond was never set on the second indictment, defendant was held on the bond for the original indictment, and he was tried upon the original indictment. Defendant never requested that counsel demand trial on the original indictment, and Wolff never discussed the second indictment with him.

¶ 25 On redirect examination, Wolff testified that his discovery answer did not expressly disclose a defense that the State could not prove the elements of first degree murder or attempted murder, because Wolff considered that implicit in a plea of not guilty. Wolff discussed the discovery answer with defendant in the course of hour-long discussions of trial strategy during three or more jail visits. Wolff could not recall discussing the posttrial motion with defendant between trial and the filing of the motion, nor discussing the postsentencing motion with defendant between sentencing and the filing of the motion, but did recall that he did not visit defendant in jail to discuss the postsentencing motion.

¶ 26 Defendant testified that he was in jail from his arrest in February 2005 on the charges in case 05 CR 5217 until his sentencing. His mother called the law firm of Turner and Wolff, and Wolff came to court. While defendant was also represented by Weinberg, he dealt more with Wolff and believed him to be lead counsel on his case. Wolff and Weinberg visited defendant in jail only about two or three times between his arrest and sentencing, and each visit was about an hour. Defendant had other meetings with trial counsel at the courthouse, but they were brief.

Defendant learned of the State's 36-year plea offer from Wolff shortly before the January 2007 hearing, and Wolff told him that the minimum sentence as charged was 51 years; he was not informed otherwise in court. Defendant denied telling Wolff that he would not accept an offer for more than second degree murder, or even that he and Wolff discussed second degree murder, and claimed that he did not know the difference between first and second degree murder until trial.

¶ 27 Defendant had told Wolff that he believed victim Mitchell had a gun and defendant fired in belief that Mitchell would shoot defendant's friend. Defendant observed Witcliffe at trial, after waiving his right to a jury trial, and was surprised to see him in a jail uniform because trial counsel had told him that none of the State witnesses had a criminal record. Had defendant known that Witcliffe had a weapons conviction, in light of his testimony that he went to Mitchell's body before the police arrived, defendant would have chosen a jury trial. Defendant did not discuss the defense discovery answer, posttrial motion, or postsentencing motion with Wolff or Weinberg before each was filed. They had never discussed the difference between a single volley and multiple volleys of shots, nor that distinction as being the basis for defendant choosing a bench trial. Defendant learned of the second indictment in this case, which brought the same charges as the original indictment, only when it was nol-prossed; he was never arraigned on the second indictment.

¶ 28 On cross-examination, defendant testified that he testified at trial to a single continuous burst of gunfire over five or six seconds. While defendant did not review the discovery answer, he was indeed raising the disclosed defense of self-defense, and the answer also disclosed Moore as a potential witness. Defendant was uncertain whether he observed Witcliffe in a jail uniform before or after he waived his right to a jury trial, but acknowledged his signed jury waiver

bearing the June 2007 date of the first day of trial. Defendant did not seek to revoke his jury waiver after learning of Witcliffe's record. While the State elicited that Witcliffe had prior felony convictions, Wolff elicited his specific offenses including a weapons offense. When asked why knowledge of Witcliffe's felony convictions would have caused defendant to choose a jury trial, he noted Witcliffe's testimony that he went to Mitchell before the police did and argued that his prior gun use would show his tendency to use guns. Defendant conceded that the court heard this evidence, and admitted that he had no prior experience with a jury trial upon which to base his assumption that a jury would consider this evidence differently than the court. Wolff had not advised defendant to reject the 36-year offer, and defendant would have been 75 years old after 51 years in prison in contrast to 95 years old after a 71-year sentence. Defendant was tried on the original indictment, and bond was never set nor a trial demand made on the second indictment.

¶ 29 On redirect examination, defendant testified that he chose a bench trial in open court in December 2006. Defendant maintained that he had acted in self-defense, knew that he would leave prison at age 60 if he took the 36-year offer, knew he was taking a risk by going to trial, and believed that his 71-year sentence was effectively a life sentence, but "thought that I had a chance to come home again." On re-cross examination, defendant admitted that Wolff never told him he would receive a 51-year sentence but denied that Wolff told him he was unlikely to receive a minimum sentence.

¶ 30 Following closing arguments, the court took the case under advisement and, on April 24, 2014, denied defendant's amended posttrial motion. The court found that the speedy-trial claim lacked merit because defendant was tried on the original indictment, and that trial counsel interviewed Moore and Armstrong. The court found that defendant believed in and presented a

self-defense theory, which the court rejected. The court also found that there were multiple court sessions between the *Curry* admonishments and trial, including an April 2007 session where defendant and trial counsel stated that he was taking a bench trial; the court thus found to be "disingenuous" assertions that that defendant chose a bench trial just before trial when he signed his waiver or that trial counsel did not discuss the case with defendant. The court found no prejudice to defendant from the erroneous *Curry* admonishments; that is, nothing in the record indicated that he would have taken a plea offer beyond his self-serving assertion that he would have done so had he known of the 71-year minimum sentence. "The defendant had insisted, and insists to this day, that he was not guilty of first degree murder." The court found that the record substantiated Wolff's testimony that defendant was not interested in "any offer for first degree murder." The court cited *People v. Hale*, 2013 IL 113140, where a defendant similarly maintained his innocence and his assertion that he would have accepted a plea offer had he been correctly admonished regarding sentencing was found to be self-serving.

¶ 31 Defendant filed a motion to reconsider, arguing that *Hale* is distinguishable from the instant case because Hale was maintaining his innocence while defendant was not contesting that he shot Mitchell and Barnes and because Hale was erroneously admonished regarding his maximum rather than his minimum sentence. Defendant also argued that trial counsel must abide by a defendant's decision after giving him competent and fully-informed advice, which defendant's advice before his jury waiver was not because of the erroneous minimum-sentence admonishment but also the lack of knowledge of Witcliffe's criminal record.

¶ 32 The State responded to the reconsideration motion, arguing that *Hale* is indistinguishable because Hale claimed an erroneous admonishment of his minimum sentence and defendant has

maintained a self-defense theory both at trial and posttrial. In response to the argument that defendant was not given fully-informed advice, the State argued that (1) trial counsel Wolff testified that defendant's choice of a bench trial was based on matters other than the State witnesses' criminal records, and (2) while the *Curry* admonishments were incorrect, defendant had failed to show prejudice beyond his self-serving statement that he would have accepted the plea if correctly admonished.

¶ 33 The court heard and denied the reconsideration motion on November 14, 2014, finding that defendant failed to show prejudice on his ineffectiveness claims. This appeal followed.

¶ 34 Before proceeding to consider the merits of this appeal, we note that the record on appeal lacks the common-law record or transcribed proceedings in this case before our mid-2012 remand in case no. 1-10-2428. Thus, we do not have a record of the trial, posttrial, or sentencing proceedings. The record does include documents selected by defendant for a supplemental record, including transcripts of the January 2007 hearing with the erroneous *Curry* admonishments and the 2010 preliminary inquiry following our first remand. As appellant, defendant is obligated to provide us a sufficiently complete record of the trial court proceedings to support his claims of error, so that we must presume in the absence of such a record that the court's orders conformed to the law and had a sufficient factual basis. *People v. Carter*, 2015 IL 117709, ¶ 19. An issue relating to a court's factual findings and basis for its legal conclusions cannot be reviewed absent a report or similar record of the relevant proceedings. *Pekin Insurance Co. v. Campbell*, 2015 IL App (4th) 140955, ¶ 26. Conversely, our review is not precluded where the record on appeal contains all the evidence needed to dispose of the legal issues raised under the applicable standard of review; that is, where we are in the same position as the trial

court. *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 655 (2007). As elaborated below, we find the record adequate to decide the contentions before us.

¶ 35 On appeal, defendant first contends that his motion for substitution of judge was erroneously denied. He contends that the judge's prejudice against him is shown by the need for two remands and by the judge's refusal to correct the mittimus to vacate the aggravated discharge conviction, failure to appoint new counsel, and erroneous *Curry* admonishment.

¶ 36 We note that defendant did not raise this claim in his prior appeal, case no. 1-10-2428, though he could have raised it; the matters he now raises as evidence of the judge's prejudice were on the record then. As we were remanding for appointment of new counsel and further posttrial proceedings in case no. 1-10-2428, it was most appropriate that we decide whether our remand should be to the trial judge or a different judge. Generally, a claim that could have been raised in a prior appeal but was not is forfeited. *People v. Allen*, 2015 IL 113135, ¶ 20. Moreover, though a substitution motion following a remand is not precluded by the judge having made a substantive ruling at trial, a substitution motion must be filed at the earliest practical moment after the potential prejudice is discovered. *People v. Jones*, 197 Ill. 2d 346, 351 (2001). However, the State does not contend in its response that defendant's claim is forfeited or untimely and thus has forfeited such a challenge. *People v. Villa*, 2011 IL 110777, ¶ 21. Notwithstanding defendant's forfeiture or untimeliness, we find for the reasons stated below that the claim is meritless.

¶ 37 Section 114-5 of the Code of Criminal Procedure, governing motions for substitution of judge, provides that:

> "the State or any defendant may move at any time for substitution of judge for cause, supported by affidavit. Upon the filing of such motion a hearing shall be conducted as soon as possible after its filing by a judge not named in the motion; provided, however, that the judge named in the motion need not testify, but may submit an affidavit if the judge wishes. If the motion is allowed, the case shall be assigned to a judge not named in the motion. If the motion is denied the case shall be assigned back to the judge named in the motion." 725 ILCS 5/114-5(d) (West 2012).

For a defendant to prevail on such a motion, he must show facts and circumstances indicating that the trial judge is prejudiced against him; that is, actually prejudiced and not merely possibly prejudiced. *People v. Jones*, 219 Ill. 2d 1, 18 (2006). Prejudice is " 'animosity, hostility, ill will, or distrust towards this defendant.' " *Jones*, 219 Ill. 2d at 18 (quoting *People v. Patterson*, 192 Ill. 2d 93, 131 (2000)). On review, we will not disturb the trial court's determination on such a motion unless it is against the manifest weight of the evidence. *Jones*, 219 Ill. 2d at 18.

¶ 38 Here, we see no demonstration of " 'animosity, hostility, ill will, or distrust towards this defendant' " (*Jones*, 219 Ill. 2d at 18 (quoting *Patterson*, 192 Ill. 2d at 131)) in the judge at issue holding an extensive inquiry into defendant's ineffectiveness claim while not appointing new counsel. Our supreme court in *People v. Moore*, 207 Ill. 2d 68, 77-79 (2003), envisioned a preliminary *Krankel* inquiry – where a defendant perforce does not have new counsel – expressly including questioning of trial counsel and the defendant. The fact that the judge inquired at length and in depth is strong evidence *against* prejudice, and her misunderstanding of our mandate was erroneous but not a sign of " 'animosity, hostility, ill will, or distrust' " (*Jones*, 219 Ill. 2d at 18 (quoting *Patterson*, 192 Ill. 2d at 131)). We also find no prejudice in the judge's

failure to correct the mittimus to vacate the concurrently-sentenced aggravated discharge conviction; the record does not support defendant's argument that it was a refusal rather than mere oversight.

¶ 39 Defendant argues at length that the judge's erroneous *Curry* admonishment is particular evidence of her "animosity, hostility, ill-will, or distrust" of him. He argues that "there can be not [*sic*] trust in receiving a fair hearing when the judge conducting that hearing herself was at the root of the problem." We are unaware of any case holding, as defendant seems to argue, that an error by the trial court (rather than the State or defense counsel) constitutes *per se* prejudice. Moreover, defendant insinuates "that the trial judge would cover the tracks of everyone involved in the case from prosecutor, to defense counsel, to the Judge herself." We routinely hear claims of erroneous admonishments with no sign that the court tried to suppress the record of the claimed error. Defendant admits his allegation is his subjective belief – "Defendant had a clear belief that the trial judge would cover [her] tracks" – and we find that his belief is not objective evidence of the judge's prejudice. Lastly and most decisively, even as the judge denied relief on the *Curry* claim due to a misinterpretation of our mandate, she acknowledged that the admonishments were for a minimum sentence of 51 rather than the correct 71 years and thus made no effort to "cover the tracks of" herself or anyone else. In sum, the court's denial of substitution was not against the manifest weight of the evidence.

¶ 40 Defendant also contends that his ineffectiveness claims were erroneously denied, as he was prejudiced by counsel erroneously informing him (a) of his minimum sentence before he rejected a 36-year plea offer, and (b) that no State witness had a criminal record when witness

Witcliffe did. He contends that he would have accepted the plea offer had he known his actual minimum sentence and chosen a jury trial had he known of Witcliffe's weapons conviction.

¶ 41 In reviewing a claim of ineffective assistance of counsel, we apply the *Strickland* test whereby a defendant must show that counsel's assistance was both deficient in that it was objectively unreasonable under prevailing professional norms and prejudicial in that there is a reasonable probability that the result of the proceedings would have been different absent the deficiency. *Curry*, 178 Ill. 2d at 518-19 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). We review *de novo* whether a defendant's constitutional rights were violated, while we review findings of fact following an evidentiary hearing on a posttrial motion under the manifest weight of the evidence standard. *People v. Hale*, 2013 IL 113140, ¶ 24; *People v. Whiting*, 365 Ill. App. 3d 402, 406 (2006). A decision is against the manifest weight of the evidence when the opposite conclusion is apparent or the findings seem unreasonable, arbitrary, or not based on the evidence. *Whiting*, 365 Ill. App. 3d at 406.

¶ 42 In *Curry*, 178 Ill. 2d at 517-18, 528-29, our supreme court recognized a right to effective assistance of counsel during plea negotiations – including to be reasonably informed regarding the direct consequences of accepting or rejecting a plea offer – that extends to a defendant's decision to reject a plea offer even if he then receives a fair trial. In particular, trial counsel must inform a defendant of the minimum and maximum sentences for the offenses as charged. *Curry*, 178 Ill. 2d at 528. To show prejudice in such cases, a defendant must present more than his own subjective and self-serving testimony that he would have accepted the plea offer but for counsel's erroneous advice. *Curry*, 178 Ill. 2d at 531. We require objective confirmation that defendant's rejection of the offer was based upon counsel's erroneous advice, such as a significant disparity

between the plea offer and the longer sentence a defendant faced following trial. *Curry*, 178 Ill. 2d at 532-33.

¶ 43 Since *Curry*, our supreme court followed United States Supreme Court decisions in *Missouri v. Frye*, 566 U.S. __, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, 566 U.S. __, 132 S. Ct. 1376 (2012), to hold that prejudice is shown from a plea offer being rejected or lapsing due to counsel's deficient performance where there is a reasonable probability both that the defendant would have accepted the earlier plea offer with effective counsel, and the plea would have been entered without the State canceling it or the court rejecting it. *Hale*, 2013 IL 113140, ¶¶ 19-20.

> "In the case at bar, the only evidence defendant offered regarding why he chose not to plead guilty was his own self-serving testimony that, if he had known that he 'could get consecutive sentencing,' he 'would have been inclined to take the 15 years then.' This testimony was deemed incredible by the circuit court. Based on an examination of *Curry*, we believe the circuit court's credibility determination herein was not against the manifest weight of the evidence. In *Curry*, much the same as in this case, the defendant testified that he would have accepted the State's plea offer of 4½ years had he known consecutive sentences, resulting in a maximum term of 12 years' imprisonment, were mandatory. This court found that the defendant's testimony, standing alone, was subjective, self-serving and insufficient to satisfy the *Strickland* requirement for prejudice." *Hale*, 2013 IL 113140, ¶ 24 (citing *Curry*, 178 Ill. 2d at 531).

The *Hale* defendant repeatedly professed his innocence and followed a trial strategy consistent with that innocence claim. *Hale*, 2013 IL 113140, ¶ 26. Also, while there was a disparity between the plea offer and the minimum sentence for all charged offenses, "there was also the

possibility, however remote, that defendant could receive the minimum 12-year consecutive term," and trial counsel testified that the defendant was not interested in pleading. *Hale*, 2013 IL 113140, ¶ 28. "This testimony from both defendant and [trial counsel], combined with the evidence of defendant's persistent belief in the possibility of acquittal at trial, compels us to conclude that defendant's rejection of the proffered plea was not based upon counsel's alleged erroneous advice but, as the State suggests, upon other considerations." *Hale*, 2013 IL 113140, ¶ 28.

¶ 44 Here, while defendant did not profess his innocence insofar as he admitted shooting Mitchell and Barnes, he consistently claimed self-defense including in the posttrial proceedings, and trial counsel consistently presented a self-defense theory. Defendant maintained a hope of going home again on a self-defense theory, and trial counsel shared that assessment insofar as they strived for a second degree murder conviction rather than convictions for first degree murder and attempted murder as charged. Second degree murder has a minimum prison sentence of 4 years and a maximum of 20 years (730 ILCS 5/5-4.5-30(a) (West 2012)), both considerably shorter than the 36-year plea offer. Thus, when (similarly to *Hale*) trial counsel testified that defendant was not interested in a plea offer to more than second degree murder, the record corroborates that testimony rather than defendant's self-serving testimony that he would have accepted the plea. We find that the trial court's factual conclusions were not against the manifest weight of the evidence and that this case is not significantly distinguishable from *Hale*.

¶ 45 We turn lastly to defendant's other claim argued on appeal: that he would have chosen a jury trial had he known of Witcliffe's weapons conviction. The record establishes that Witcliffe's criminal record was in the trial evidence and that trial counsel elicited his weapons conviction.

The trial court thus heard the argument, or at least the evidence therefor – Witcliffe went to Mitchell's body before the police arrived and had committed a gun crime – that defendant claims he would have raised to a jury had he known of Witcliffe's record before he chose a bench trial. In other words, to establish prejudice from not learning earlier of Witcliffe's record, defendant offers no more than his self-serving assertion that he would not have waived a jury trial. The court was not obligated to accept that assertion, and we conclude that the court did not err in denying relief on defendant's ineffectiveness claims.

¶ 46 Accordingly, the judgment of the circuit court is affirmed.

¶ 47 Affirmed.