2017 IL App (1st) 151448-U

FIRST DIVISION
December 4, 2017

No. 1-15-1448

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	) Appeal from the Circuit Court of) Cook County, Criminal Division
v.	) No. 09 CR 86800
CESAR BECERRA, Defendant-Appellant.	) Honorable Thomas J. O'Hara,) Judge Presiding

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it denied defendant's motion to suppress the statement made to police. The State proved beyond a reasonable doubt that defendant was guilty of first degree murder. Defendant's trial counsel was not ineffective.

¶ 2 Following a bench trial, defendant Cesar Becerra was found guilty of first degree murder and sentenced to 50 years in prison. On appeal, defendant argues that: (1) the trial court erred when denying defendant's motion to suppress his statement, (2) the State failed to prove his guilt beyond a reasonable doubt, and (3) defendant was denied his right to effective assistance of counsel. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant Cesar Becerra was charged by indictment with eight counts of first degree murder, two counts of unlawful use of a weapon by a felon, and twelve counts of aggravated unlawful use of weapon following the fatal shooting of Jose Garza on September 21, 2008. Defendant was arrested on April 15, 2009, and was being held in the Webb County Jail in Loredo, Texas, pursuant to an arrest warrant for the murder of Jose Garza.

¶ 5 Prior to trial, defendant filed a motion to suppress the statement he made to assistant State's Attorney Terry Reilly and Investigator Joe Thomas from the Cook County State's Attorney's Office while defendant was being held in custody in the Webb County Jail. At the hearing, ASA Reilly testified that, on April 16, 2009, he along with Investigator Thomas travelled to Loredo, Texas, to speak with defendant. Prior to meeting with defendant, no one from the Webb County Sherriff's Office informed them that defendant did not wish to speak with them. Reilly testified that defendant was brought into the interviewing room in the jail, and he and Investigator Thomas introduced themselves. Defendant was advised regarding his rights and he signed the Webb County Jail prisoner consent form to speak and an Illinois notice of rights form. Defendant stated that he understood his rights and he agreed to speak with them. ASA Reilly testified that defendant did not tell them that he wished to have an attorney or that he did not wish to speak with them. Investigator Thomas conducted the interview while ASA Reilly observed.

¶ 6 ASA Reilly testified that neither he nor Investigator Thomas told defendant that if he did not cooperate, they would have his children taken away from foster care; that defendant's father and "Marisol" should be arrested, or that the Harvey Police Department would pick him up and he would not make it back alive. Reilly did not recall knowing anything about defendant's wife

and children. The interview was conducted from 12:30 p.m. to 5:00 p.m., and included frequent breaks. Reilly indicated that he did not travel to Texas with video equipment. He stated that he would have tried to obtain equipment had defendant requested to memorialize the statement. Reilly asked defendant if he wanted to memorialize the statement on a video or audio tape, but defendant declined. Reilly stated that he understood that interviews conducted out-of-state, under the statute, were not required to be videotaped.

¶ 7 Defendant testified that, on April 17, 2009, he was being held in the Webb County Jail in Loredo Texas. Prior to meeting with ASA Reilly, a Webb County sheriff told him that people from the Cook County State's Attorney office were there to speak with him. The sheriff told him "not to speak with them." Defendant replied, "[g]o tell them to go fuck themselves." Minutes later, the sheriff returned and asked him about his children being in Lutheran Social Services. Defendant testified that he did not tell anyone about his children and he thought the only way the sheriff could have known about his children was through the assistant State's Attorney. Defendant claimed that the sheriff advised him to talk to the people from the State's Attorney's Office so that nothing happened to his children. Defendant stated that he felt that he had no choice but to talk to them.

¶ 8 Defendant testified next that, when he met Reilly and Thomas, they made threats regarding his children and they forced him to sign the waiver of his *Miranda* rights and appointment of counsel. According to defendant, when he asked for an attorney, he was told that, because he was in Texas, and because the case involved an Illinois matter, no attorney can come. Defendant stated that he did not want to talk to them, but they continued to question him and to make threats regarding his children, ex-wife, mother and sister. Defendant agreed to speak with them and to sign the forms, because he felt that he had no other choice. Defendant claimed that

he noticed a leather camcorder case on the desk that was pulled out at the end of the interview, and he was offered to record his statement, but he declined.

¶ 9 After hearing the testimony and arguments, the trial court denied defendant's motion to suppress. The court found the testimony of ASA Reilly to be credible, that defendant waived his privilege against self-incrimination, and that defendant's statement was voluntarily given.

¶ 10 In relevant part, the following evidence was presented at defendant's trial. On September 20, 2008, the victim, Jose Garza, left his home where he lived with his mother at approximately 10:00 p.m. to go to a party. The next morning, Nereida Garza learned that her son, Jose, had been shot and killed.

¶ 11 Jesus Gonzalez and Cristobal Tiscareno testified regarding the events that took place on September 20 and 21, 2008. Gonzalez testified that, on September 20, 2008, he, his friend Jose Garza, and defendant were at Cristobal Tiscareno's house in Harvey, talking and drinking alcohol. At about 10 p.m., they left Tiscareno's house, drove to Garza's house, and then transferred to Garza's car. They drove to Club 390 in Chicago Heights and remained there drinking for several hours. As the four men were about to leave, defendant and Garza began to argue. The four men left the club and drove away in Garza's vehicle with Garza driving. Gonzalez took over driving the vehicle, with Garza in the front passenger seat, and Tiscareno and defendant in the back seat. Defendant and Garza continued to argue, and Gonzalez saw defendant put his finger in the back of Garza's head. Gonzalez pulled the car over twice and told defendant and Garza to stop arguing.

¶ 12 Gonzalez testified that he did not remember exactly what the argument was about, but he knew there was a lot of name calling especially by defendant. Gonzalez parked his car near Tiscareno's house on Fairfield. While Gonzalez was trying to park the car, defendant jumped

out of the car and walked down the alley heading toward his house. Garza and Tiscareno got out of the car and urinated by a tree near the car. When Gonzalez was about to get back into the car, he noticed that defendant had returned and was approaching Garza. Gonzalez testified that Garza was standing on the passenger side of the car with the door open, and heard defendant say "now what bitch." Gonzalez saw Garza raise both his hands, and saw defendant pulled out a rifle and shoot defendant in the chest. Garza grabbed his chest, hit the back of the door and fell to the ground. Gonzalez then heard another shot. Defendant pointed the gun at Gonzalez, and he ran down the alley. Gonzalez testified that he then heard another gunshot. Gonzalez had his wife call 911. When the police arrived he was brought back to Tiscareno's house. Gonzalez testified that Garza was not armed with a gun or a weapon that evening and that Garza was not the type of person to carry a gun.

¶ 13 On cross-examination, Gonzalez admitted that Garza was in the Latin Kings gang. Gonzalez had been in the Latin King gang in his past. Gonzalez testified that, when he spoke to Detective Escalante on September 21, 2008, he did not recall if he told him whether defendant hit the curb when he was driving, nor if defendant poked Garza in the head. Further, he said it took defendant ten minutes to return, and that, when defendant returned, Gonzalez was in the car trying to get the vehicle started.

¶ 14 Tiscareno testified consistently with the testimony of Gonzalez. Tiscareno testified that he saw defendant jumping out of the vehicle and walking away. Garza, Tiscareno and Gonzalez exited the vehicle to urinate. Tiscareno began walking toward his home when he heard defendant say "Now who's the bitch?" Tiscareno turned around and saw defendant walk toward Garza holding a rifle. Tiscareno saw defendant fire the first shot at Garza's upper chest or face area. Tiscareno testified that he asked defendant "what the fuck are you doing?" and defendant pointed

a gun at him, causing him to run. Tiscareno testified that he then saw defendant approach Garza and heard another gunshot. Tiscareno ran toward his house and called 911. While inside his house, he heard another gunshot.

¶ 15 The police investigated the crime scene, and no weapon was found on the victim's person or in the immediate vicinity. Medical examiner James Filkins testified that he performed the autopsy on the victim. He determined that the cause of death was multiple gunshot wounds, and that the manner of death was homicide.

¶ 16 The parties stipulated that on April 15, 2009, Detective Manny Escalante was notified by the Webb County Sheriff's Office in Loredo, Texas, that defendant was being held on an arrest warrant that had been issued on September 27, 2008. On April 22, 2009, Detective Escalante went to Loredo and transported defendant back to Illinois.

¶ 17 Prior to defendant's testimony, defense counsel made an opening statement asserting that the victim was armed with a gun, and that the victim, Gonzalez, and Tiscareno were aggressive toward defendant and defendant acted in self-defense. Defendant testified that, on September 20, 2008, he was 36 years old, a resident of Harvey, Illinois, and a former member of the Latin Kings street gang. He testified that in January 2008, he was involved in a physical altercation with Christopher Tiscareno, and Tiscareno attacked him, tackled and kicked him causing him to break his ankle.

¶ 18 Defendant testified that, on September 20, 2008, at approximately 8:00 p.m., defendant went to Tiscareno's trailer. Tiscareno, Gonzalez, and Garza were also there. At about 10 p.m., all four men left Tiscareno's home intending to go to Club 390. On the way to the club, they stopped at Garza's home. Defendant was concerned that they were in Gangster Disciples territory, but Garza reassured him not to worry because Garza was an "Inca" of the Latin Kings,

a position of power in the area. The four men transferred into Garza's vehicle, went to a liquor store, and then, at about 11 p.m., they arrived at Club 390. Garza paid for the cover charge and for several rounds of drinks. Defendant testified that Garza was drinking and his demeanor changed and he became louder. At about 1:00 a.m., defendant told the other men that he wanted to leave the club. He asked to leave again at about 2:00 a.m., and Garza told him not to be a "pussy" or "a little bitch." Defendant stated that he had no choice but to wait.

¶ 19 Defendant testified that, at closing time, Garza tried to talk to one of the strippers and get one more drink, but the stripper did not want to talk to him. Garza got angry when the woman bought a drink for defendant and Tiscareno. Defendant stated that he was afraid of Garza because he knew that he was an "Inca" and he was in the presence of several Latin Kings members. The four men left the club, got in the car with Garza driving. While making a turn, Garza hit the median and scraped the bottom of his car. Gonzalez then took over driving, with Garza moving to the front passenger seat, Tiscareno behind the passenger seat, and defendant behind the driver. Defendant told Garza, "Man, stupid ass shouldn't have been driving drunk. We already told you." According to defendant, Garza turned around, was swearing at him, and tried to slap him. Defendant stated that Garza threatened to beat him and he was scared.

¶ 20 Gonzalez stopped the car by the Harvey Police station and, when they were all out of the car, defendant claimed that he saw Garza reach under the passenger seat, and retrieve a gun that he placed in his waistband. According to defendant, Garza threatened him. Gonzalez told them to get back in the car, that they would "take it to the trailer courts." Defendant stated that he was scared and could not run. Defendant stated that when they drove to the first stop sign by the trailer court, defendant jumped out of the car. Defendant heard Garza yelling "Get that motherfucker." Defendant ran to his friend Geromino's trailer where he had been staying.

Defendant retrieved a rifle from under the trailer next to Geromino's trailer known to him to be hidden there by the Latin Kings. Defendant entered Geronimo's trailer and, while inside he heard dogs barking outside and saw the other three men approaching the trailer and yelling to "get the fuck out." Defendant stated that he fled the trailer, exiting through the back door which was not visible to the other three men. Defendant fled to a wooded area where he hid for approximately one hour.

¶ 21 When he returned to the trailer court, he hid the rifle underneath a vehicle parked in front of his sister's trailer home. He heard a car door opened and saw Garza getting out of the car. Defendant testified that he saw Garza reaching for his waist where defendant had seen him put a gun earlier that night. Defendant grabbed the rifle and opened fire on Garza. Defendant claimed he did not know how many times he shot; he did not aim and did not know which bullet hit Garza first. When he first started shooting, defendant was 20 feet away from Garza and continued to walk up to Garza by the car. Defendant stated that he stopped shooting when he no longer heard Garza threatening to kill him. Defendant indicated that no one shot at him and that he was the only person shooting. Defendant ran into the wooded area and threw the rifle. He then fled to Lansing, Illinois, then to Texas and then to Mexico. Defendant testified that he knew his family was in danger, so he turned himself in.

¶ 22 Defendant testified next to the events that took place at the Webb County Jail, and claimed that he gave an involuntary statement and that he was forced to sign a waiver. His testimony at trial mirrored his previous testimony given during the hearing on the motion to suppress his statements regarding the involuntary nature of his statement. Defendant admitted that, after signing the consent to speak form and the *Miranda* rights forms where he initialed each *Miranda* right, defendant told Reilly and Thomas about the shooting. Defendant testified

that, during the conversation with Thomas and Reilly, he told them about the argument that occurred at the night club, and that Garza told him "don't be a pussy. Don't be a bitch." Defendant also claimed that he told them that Garza was mad, and that he was cursing him out. Defendant also asserted on cross-examination that he told them that he saw Garza retrieve a gun and put it in his waistband. Defendant indicated that he did not remember firing a shot at Garza while he was lying on the ground, or telling them that he walked up to Garza, who was on the ground, stood over him with a rifle and fired. Defendant denied shooting Garza in the face and denied telling Investigator Thomas that he did.

¶ 23 After defendant rested, Investigator Joseph Thomas testified in rebuttal that he and ASA Riley met with defendant at the Webb County Jail in Loredo, Texas. Prior to speaking with defendant, defendant was given his *Miranda* rights. Defendant signed the Webb County Jail prisoner consent to speak form, and the *Miranda* warning or notice of rights form. Defendant said that he understood his rights and wished to speak to them. Thomas testified that, during their conversation with defendant, he did not tell them about any arguments that occurred at the night club before he got in the car to go home, or that Garza was mad and cursing at defendant, or that he called Garza "a stupid ass" because he drove drunk. Defendant did not tell them that, during the car ride home, Garza retrieved a gun and placed it in his waistband. Defendant told them that Garza was definitely hit the first time he shot, because he fell on the ground on his back, and defendant walked up to him, and while standing over Garza, pointed the rifle at him and pulled the trigger again. Defendant also indicated that he shot Garza in the face and he was face down when he left him. After the interview, defendant refused to give a video recorded or written statement.

¶ 24 The trial court found defendant guilty of eight counts of first degree murder while rejecting defendant's claim of self-defense. The court sentenced defendant to 25 years in prison for first degree murder with an additional 25 years in prison for personally discharging a firearm which caused death. Defendant's motion to reconsider the sentence was denied. This appeal followed.

¶ 25 ANALYSIS

¶ 26 Motion to Suppress Statements

¶ 27 In reviewing an order denying a defendant's motion to suppress evidence mixed questions of law and fact are presented. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). Factual findings made by the trial court will be upheld unless they are against the manifest weight of the evidence while the trial court's application of the facts to the issues presented and the ultimate question of whether the evidence should be suppressed is subject to *de novo* review. *Id.*

¶ 28 Defendant argues that the trial court erred in denying his motion to suppress the statements made to ASA Reilly and Investigator Thomas. Defendant asserts that his statement was coerced and made after he unequivocally invoked his right to remain silent. Defendant claims that he told a Webb County Jail officer to tell the two people from the State's Attorney Office who wanted to speak with him "to go fuck themselves." According to defendant, he invoked his right to remain silent when he made that statement to the sheriff and the sheriff assured defendant that he would relay this message. Defendant also argues that his questioning immediately following the clear assertion of refusal to speak violated his constitutional rights under the Fifth Amendment.

¶ 29 Where a defendant challenges the admissibility of an inculpatory statement through a motion to suppress, the State bears the burden of proving, by a preponderance of the evidence,

that the statement was voluntary. 725 ILCS 5/114–11(d) (West 2012); *People v. Richardson*, 234 Ill. 2d 233, 254 (2009). The State carries the initial burden of making a *prima facie* case that the statement was voluntary. Once the State makes its *prima facie* case, the burden shifts to the defense to produce some evidence that the confession was involuntary, and the burden reverts to the State only upon such production by the defense. *People v. Patterson*, 154 Ill. 2d 414, 445 (1992).

¶ 30 At the hearing for the motion to suppress, ASA Reilly testified no employee or anyone from the Webb County Sheriff's Office communicated to him or Investigator Thomas that defendant did not want to speak with them. When ASA Reilly and Investigator Thomas met with defendant, they informed defendant who they were, they read his *Miranda* rights, and defendant signed a consent to speak form indicating that defendant understood that he did not have to talk to anyone. Defendant also signed a notice of rights form listing the *Miranda* rights. Defendant acknowledged to ASA Reilly that he understood each of his rights, placed his initials after each *Miranda* right, and then agreed to speak to ASA Reilly and Investigator Thomas. ASA Reilly testified that defendant never told them that he wished to have an attorney or that he did not wish to speak with them. ASA Reilly also testified that neither he nor anyone in his presence told defendant that if he did not cooperate, his children would be taken from foster care, or that his family members would be arrested. Reilly testified that he did not recall learning anything about defendant's family.

¶ 31 In contrast, defendant testified that, prior to his meeting with ASA Reilly, he had a conversation with a Webb County Sherriff who advised him not to speak with the people from the State's Attorney Office in Markham. Defendant testified that he told the sheriff, "go tell them to go fuck themselves." According to defendant, the sheriff returned 5 or 10 minutes later, asked

details and specific facts about his children, and advised defendant to talk to the ASA to make sure nothing would happen to his children. Defendant claimed that he felt that he had no choice but to speak with them. Defendant claimed that Investigator Thomas told him he had to sign the forms containing the waiver of his *Miranda* rights and appointment of counsel. Defendant also claimed that he told them "I plead the Fifth" and asked for an attorney, but was told he could not get one in Texas. Defendant claimed that he was still questioned and felt that he had no choice but to talk to them because they spoke about his family and friends.

¶ 32 The trial court denied defendant's motion. The court noted that it based its ruling on hearing the testimony of the witnesses, observing the witnesses and assessing their credibility. The court ruled that the State showed that the statement was voluntary and there was not sufficient evidence to show that it was involuntary.

¶ 33 We agree with the trial court's determination. In determining whether a confession was voluntarily made, the court must ascertain whether defendant's will was overborne at the time he made the confession or whether the confession was made freely, voluntarily, and without compulsion or inducement of any sort. *People v. Richardson*, 234 Ill. 2d 233, 254(2009). *Id.* When making this determination, the court should consider the following factors: the defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the presence of *Miranda* warnings; the duration of questioning; and any physical or mental abuse by the police officers, which includes the presence of threats or promises. *Id.* The court must consider the totality of the circumstances in arriving at this determination as no single factor is dispositive. *Id.*

¶ 34 Here, the trial court found that defendant's statement was voluntarily made after considering the witnesses' testimony and assessing their credibility. Defendant's claim that he and his family members were threatened was refuted by ASA Reilly at the suppression hearing. Reilly stated that he did not threaten anyone and that he did not recall any details about defendant's family members. Defendant was given his *Miranda* rights and the interview lasted approximately 5 hours and frequent breaks were taken. The court found testimony of ASA Reilly credible.

¶ 35 Defendant claims that the issue does not involve a question of credibility when the Webb County sheriff did not testify to confirm or deny defendant's assertion and therefore, the court should have accepted defendant's testimony in this regard. But, the trial court was not required to blindly believe defendant's testimony about the alleged conversation with the sheriff. It is "[t]he trial judge, who saw and heard all the witnesses * * * [is] in a much better position than are we to determine their credibility and the weight to be accorded their testimony." *People v. Siguenza–Brito*, 235 Ill. 2d 213, 229 (2009); see also *People v. Wittenmyer*, 151 Ill. 2d 175, 191–92 (1992); *People v. Woods*, 26 Ill. 2d 582, 585 (1963). Based on the totality of the circumstances, we will not disturb the trial court's determination that defendant's statement was voluntarily given and not coerced.

¶ 36 In addition, defendant made the alleged statement to the sheriff prior to any custodial interrogation. Defendant was not questioned but simply said that people from the State's Attorney's Office were there to see him. Therefore, the alleged statement to the sheriff is at most, an anticipatory invocation of his right to remain silent that does not render defendant's statement involuntary. See *People v. Villabolos*, 193 Ill. 2d 229, 240 (2000) (holding that the motion to suppress statements was properly denied because defendant could not have anticipatorily

invoked his Fifth Amendment right to counsel where he was not subject to custodial interrogation or the imminent threat of it).

¶ 37 Defendant argues next that the trial court erred when admitting his out-of-state unrecorded statement regarding the commission of first degree murder under 725 ILCS 5/103-2.1(e)(vii) (West 2012) because this section of the statute is unconstitutional as it violates defendant's due process and equal protection rights. Section 103-2.1 of the Criminal Code was enacted by the Illinois General Assembly in 2003, and was designed to provide for videotaping of custodial interrogations in police stations to be used as evidence at trial. See 725 ILCS 5/103-2.1(e) (West 2012). As an exception, section 725 ILCS 5/103-2.1(e)(vii) provides, in relevant part, that "nothing in this Section precludes the admission ***(vii) of a statement made during a custodial interrogation that is conducted out-of-state." Section (e) also provides: "[n]othing in this Section precludes the admission of a statement, otherwise inadmissible under this Section, that is used only for impeachment and not as substantive evidence." 725 ILCS 5/103-2.1(e) (West 2012).

¶ 38 Here, defendant's statement was not admitted into evidence in the State's case-in-chief. Instead, after defendant testified and was questioned during cross-examination, Investigation Thomas was called in rebuttal to testify regarding portions of defendant's statement to perfect the impeachment. Pursuant to section 725 ILCS 5/103-2.1(e), the exception challenged by defendant is not implicated because defendant's statement was not admitted as substantive evidence at trial. See 725 ILCS 5/103-2.1(e) (West 2012).

¶ 39 Since defendant's unrecorded statement was admissible as impeachment evidence regardless whether the challenged exception applied, we need not to address the defendant's constitutional challenge. 725 ILCS 5/103-2.1(e) (West 2012). Our decision not to address these

issues is consistent with the principle that reviewing courts should resolve disputes on nonconstitutional grounds. *People v. Jackson*, 2013 IL 113986, ¶ 14 ("This court has repeatedly cited the general principle that courts will address constitutional issues only as a last resort, relying whenever possible on nonconstitutional grounds to decide cases.").

¶ 40 Sufficiency of the Evidence Claim

¶ 41 The State must prove each element of an offense beyond a reasonable doubt. *People v. Sams*, 2013 IL App (1st) 121431, ¶ 9. The standard of review on a challenge of the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). It is not the reviewing court's function to retry the defendant. *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 40. The trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony, and resolves conflicts and inconsistencies in the evidence. *People v. Johnson*, 2015 IL App (1st) 123249, ¶ 21.

¶ 42 Defendant argues that the State failed to prove his guilt beyond a reasonable doubt. According to defendant, the State's two occurrence witnesses presented conflicting and inconsistent testimony and lacked credibility, and the rebuttal testimony of Investigator Thomas was not impeaching or credible. Defendant maintains that the State failed to refute defendant's self-defense claim.

¶ 43 Section 9–1 of the Criminal Code defines the offense of first-degree murder, in pertinent part:

> "(a) A person who kills an individual without lawful justification
>
> commits first degree murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another[.]" 720 ILCS 5/9–1 (West 2012).

¶ 44 Here, the State not only proved beyond a reasonable doubt that defendant committed the offense of first degree murder, but also proved beyond a reasonable doubt that defendant did not act in self-defense. Two eyewitnesses, Cristobal Tiscareno and Jesus Gonzalez, testified consistently that they saw defendant shoot Garza. Cristobal Tiscareno testified that he saw defendant approach Garza with a rifle in his hand, aim and shoot Garza in the upper chest and face area. Whether Tiscareno could only see defendant from the chest up as defendant indicates, did not prevent him from seeing defendant shoot the rifle as he positively testified. After the first shot, defendant pointed the gun at Tiscareno while he ran into his yard. When Tiscareno turned around he saw defendant walking "upon" Garza, standing on top of the victim, who was on the ground, pointing the gun downward and then he heard another gunshot. In sharp contradiction with defendant's claim that Tisacareno had no knowledge of whether the victim carried a gun because he did not frisk the victim, Tiscareno testified that neither he, the victim, or Gonzalez were armed with a gum, and that Garza was not the type of person to carry a gun.

¶ 45 Gonzalez's testimony corroborated Tiscareno's testimony. Gonzalez testified that Garza was standing near the passenger side of the car with the door open. As Garza began to raise his hands, defendant pulled out a rifle and shot defendant in the chest. Gonzalez saw Garza grabbing his chest and hit the back of the door, and when he fell to the ground, Gonzalez heard another shot. Gonzalez testified that defendant pointed the gun at him, and he ran down the alley. Gonzalez testified that he then heard another gunshot. Just as Tiscareno, Gonzalez testified that

Garza did not have a gun on his person.

¶ 46 Defendant argues that the "biased testimony of Gonzalez" adds little to the State's evidence in this case due to his friendship with Garza, because both Gonzalez and Garza were members of the Latin Kings gang, and because of Gonzalez' s different statements he made to one of the detectives. Defendant also claims that the rebuttal testimony of Investigator Thomas was neither impeaching nor credible.

¶ 47 But, in a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences, and to resolve any conflicts in the evidence. See *People v. McDonald*, 168 Ill. 2d 420, 448–49, (1995); *People v. Wittenmyer,* 151 Ill. 2d 175, 191–92 (1992); *People v. Slim*, 127 Ill. 2d 302, 307 (1989). A reviewing court will not reverse a conviction simply because the evidence is contradictory or because the defendant claims that a witness was not credible. *People v. Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 48 In finding defendant guilty of first degree murder, the trial court made several credibility determinations. The court was presented with all the inconsistencies and "weakness" in the testimony of the two eyewitnesses and the rebuttal testimony of Investigator Thomas. The court noted that the testimony of the two eyewitnesses was not impeached in important matters and found them credible. Again, it is the trial court's duty to resolve conflicts in the evidence and determine the credibility of the witnesses. *People v. Perry*, 91 Ill. App. 3d 988, 993 (1980).

¶ 49 The court also held that the testimony of Tiscareno and Gonzalez was corroborated by the physical evidence in the case. Indeed, consistent with Gonzalez's testimony, when the crime investigator arrived at the scene, the car was still running, the doors were open and the headlights were on. No weapon was found on the victim's person or in the immediate vicinity. The

cartridge casings were all fired from the same firearm, a rifle. The autopsy corroborated that the victim suffered from several gunshot wounds consistent with a shooting at close range. One of the gunshot wounds was also determined to being inflicted with the victim being on the ground and the shooter standing above the victim. Based on this record, and taking the evidence in the light most favorable to the prosecution, we find that the evince supporting defendant's conviction was not "so improbable, or unsatisfactory as to raise a reasonable doubt of guilt."

¶ 50 Defendant claim that he killed Garza in self-defense was properly rejected by the trial court. Self-defense is an affirmative defense, and once a defendant raises it, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving the elements of the charged offense." *People v. Lee*, 213 Ill. 2d 218, 225 (2004). The elements of self-defense include: "(1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable." *Id.* "If the State negates any one of these elements, the defendant's claim of self-defense must fail." *Id.* The issue of self-defense is always a question of fact determined by the trier of fact. *People v. Felella*, 131 Ill. 2d 525, 53 (1989).

¶ 51 Here, the trial court heard the evidence and found that the State had disproved defendant's theory of self-defense as defendant was not justified in shooting the victim. Defendant was the only witness to testify that Garza grabbed for a gun or in any way threatened its use against defendant. See *People v. Peterson*, 273 Ill. App. 3d 412, 424 (1995) ("when the only evidence of self-defense is the defendant's testimony, the trier of fact has discretion to accord that

testimony less weight because of its self-serving character"). The trial court noted that defendant's testimony was impeached substantially, and was contradicted by the eye witness testimony and by the physical evidence in the case. The evidence technician testified that no gun was found by the victim's body or in the vicinity. Defendant admitted that no one shot at him, and when Garza was lying on the ground, he did not see a gun. Moreover, rather than render aid and speak to the police to explain his self-defense case, defendant fled the scene and escaped to Mexico and turned himself in many months later. See *People v. Harris*, 225 Ill. 2d 1, 23 (2007) (evidence of flight may be admissible as proof of consciousness of guilt). Based on the entire evidence, we will not disturb the trial court's finding rejecting defendant's self-defense claim.

¶ 52 Similarly, we reject defendant's argument that he should have been found guilty of second degree murder. Under section 9–2 of the Criminal, a person commits second degree murder when he commits first degree murder and "[a]t the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing * * *, but his belief is unreasonable." 720 ILCS 5/9–2(a)(2) (West 2012). For a defendant to be guilty of second degree murder, the State must first prove the defendant guilty of first degree murder beyond a reasonable doubt. 720 ILCS 5/9–2(c) (West 2012). The burden then shifts to the defendant to prove the existence of the mitigating factor by a preponderance of the evidence. 720 ILCS 5/9–2(c) (West 2012). The State is not required to prove the absence of the mitigating factor beyond a reasonable doubt. *People v. Shumpert*, 126 Ill. 2d 344, 352 (1989).

¶ 53 The trial court specifically rejected defendant's argument that there was sufficient provocation to make a finding of second degree murder. The court found that defendant had a motive to kill the victim because he was angry for being insulted. According to the two eye witnesses, defendant addressed and insulted the victim prior to shooting him. The victim, other

than in defendant's testimony, did not display a weapon nor was one located after his death. After the shooting, defendant fled the scene. Based on all of the evidence in the record, it is entirely possible that a finder of fact could have found that defendant had failed to prove that he unreasonably believed he was acting in self-defense. We cannot find that the trial court's decision was such that no rational trier of fact could have reached the same conclusion. Therefore, we affirm defendant's first degree murder conviction.

¶ 54 Ineffective Assistance of Counsel Claim

¶ 55 Defendant argues next that he was denied effective assistance of counsel at trial. Specifically, defendant claims that counsel was ineffective for: failing to argue at the suppression hearing that he asserted his right to remain silent to the Webb County Sheriff, failing to perfect the impeachment of Gonzalez, failing to investigate and present video surveillance from Club 390 and the Webb County Jail, and for failing to object to the defective attempt to use the testimony of Investigator Thomas to impeach defendant's testimony.

¶ 56 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, "a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). We apply the two-pronged *Strickland* test where the trial court has entered a second-stage dismissal of an ineffective assistance of counsel claim. *People v. Alberts*, 383 Ill. App. 3d 374, 377 (2008); *Coleman*, 183 Ill. 2d at 400.

¶ 57 Unless the defendant makes both showings under *Strickland*, we cannot conclude that he received ineffective assistance. See *People v. Munson*, 171 Ill. 2d 158, 184 (1996). Courts may

resolve ineffectiveness claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance. *People v. Hale*, 2013 IL 113140, ¶ 17; *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998); *Graham*, 206 Ill. 2d at 476 ("[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient.").

¶ 58 We find that the counsel's performance was not unreasonable. Counsel's decision regarding what matters counsel chose to stress when arguing defendant's motion to suppress is just a matter of strategy generally immune from claims of ineffective assistance of counsel. *People v. Vasquez*, 368 Ill. App. 3d 241, 257 (2006). In addition, as amply discussed above, even if counsel stressed more extensively defendant's statement made to the sheriff, the outcome of the motion to suppress would not have been different.

¶ 59 Next, defendant claims that counsel failed to perfect the impeachment of Gonzalez concerning the prior statement he gave to one of the detectives. Defendant faults his trial counsel for failing to introduce at trial Gonzalez's prior statement made to Detective Escalante. But, while Gonzalez did not recall exactly what he told the detective, he nevertheless testified that he recalled being asked those questions and giving those answers. Accordingly, the actual statement did not have to be introduced at trial and counsel's performance was not unreasonable. See *People v. Purrazzo*, 95 Ill. App. 3d 886, 896-97 (1981).

¶ 60 Defendant also claims that counsel failed to investigate and present any video surveillance form Club 390 and the Webb County Jail. But, the record does not reflect that any such video surveillance existed. Defendant's claim is based on pure speculation and is rejected. See *People v. Redmond*, 341 Ill. App. 3d 498, 516 (2003) (rejecting a claim of ineffective assistance of counsel where defendant merely speculated as to the contents of a potential

witness' testimony).

¶ 61 Lastly, defendant claims that counsel failed to object to Investigator Thomas' method of impeachment through a series of questions in which Thomas was "led to either agree or disagree that [d]efendant was given certain information during the purported April 17, 2009 interview." Decisions regarding "what matters to object to and when to object" are matters of trial strategy. *People v. Perry*, 224 Ill. 2d 312, 344 (2007). Notably, the record reflects that defense counsel did object during Investigator Thomas' direct examination. The objections were overruled as Thomas' rebuttal testimony was properly presented to perfect the impeachment elicited during defendant's cross-examination. Defendant was asked direct questions whether he told Thomas and Reilly certain details. Thomas' testimony went line by line contradicting defendant's testimony on those matters. Accordingly, defendant cannot show that counsel's performance was unreasonable.

¶ 62 Moreover, defendant's ineffective assistance of trial counsel claims fail because he cannot show that he was prejudiced by counsel's alleged deficient performance. In order to establish the prejudice prong, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Graham*, 206 Ill. 2d at 476. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Enis*, 194 Ill. 2d 361, 376 (2000).

¶ 63 Here, the evidence of defendant's guilt was subtstatial. Two eye witnesses testified consistently that defendant shot the victim several times. The physical evidence corroborated the witnesses' account of how the crime was committed. Furthermore, defendant fled the country following the commission of the offense, returned and turned himself in several months later. The State presented substantial evidence of defendant's guilt, and even assuming *arguendo* that

trial counsel's performance was unreasonable for the reasons argued by defendant, defendant failed to establish that there is a reasonable probability that the result of his trial would have been different. Accordingly, defendant's claim that his trial counsel was ineffective has no merit.

¶ 64 CONCLUSION

¶ 65 Based on the foregoing we affirm defendant’s conviction and sentence for first degree murder.

¶ 66 Affirmed.