2017 IL App (1st) 160458-U

No. 1-16-0458

Order filed August 21, 2017

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 12804
	)	
JOSE AGUIRRE,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's rejection of defendant's posttrial claim of ineffective assistance of trial counsel was not manifestly erroneous.

¶ 2 Following a bench trial, defendant Jose Aguirre was found guilty of possession of a controlled substance with intent to deliver, a "Super Class X" offense. He then discharged his two privately-retained attorneys and hired two new attorneys, who filed a motion for a new trial

based on ineffective assistance of trial counsel. Following a hearing, the trial court denied the posttrial motion. Defendant was thereafter sentenced to 20 years in prison. On appeal, defendant contends that the trial court improperly denied his motion for a new trial based on ineffective assistance of counsel. He asserts that trial counsel was ineffective for failing to pursue a motion to suppress; answering ready for trial when the defense had not yet received a requested copy of a search warrant; not requesting an interpreter for him; not explaining to him that he had a right to testify; guaranteeing him that if he took a bench trial he would be found not guilty, but if he took a jury he would be convicted; engaging in "fraud" regarding attorney fees; admitting to wrongdoing in opening statements; and not raising the affirmative defense of entrapment.

¶ 3 For the reasons that follow, we affirm.

¶ 4 The record establishes that prior to and during his bench trial, defendant was represented by private attorneys Thomas Bennett and David Goldman. About two and a half years before trial, defendant's attorneys filed a motion to quash arrest and suppress evidence. In the motion, the attorneys alleged that defendant's warrantless arrest was unreasonable and unsupported by probable cause. The half-sheet reflects that "Δ" withdrew the motion about nine months later. A year before trial, one of defendant's attorneys filed a "motion to produce," seeking the name, address, and date of birth of the "citizen informant" mentioned in the State's supplemental answer to discovery, on the basis that this person witnessed defendant's arrest. The State filed a response, arguing that the informant's identity was not necessary to defendant's case, and defense counsel filed a reply. The half-sheet reflects that the trial court granted defendant's motion.

¶ 5 On the day of trial, April 15, 2015, the court admonished defendant, in English, that he had a right to a jury trial and confirmed that he was requesting that the court, as opposed to a jury, make the decision concerning his guilt or innocence. The court and defendant engaged in the following exchange:

> "THE COURT: Is that what you would like to do?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: I'm showing you a jury waiver. Is this your signature on the bottom of this form?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: By signing this form, are you indicating you give up your right to a jury trial?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: I find that [defendant] has knowingly and intelligently waived his right to a jury trial and that jury waiver will be accepted."

¶ 6 Following this exchange, the attorneys made opening statements. The State argued the evidence would show that the police were at a residence based on information they had learned "from an individual" about a drug transaction that was supposed to transpire; that a surveillance officer saw defendant arrive at the location, try to shove an object into his clothing, and approach the building; that when defendant saw enforcement officers, he put the object under a floor mat in the vestibule; and that the object turned out to be a large amount of cocaine. Defense counsel asserted that a search warrant had been issued and executed for the residence earlier on the day in question; that a person present in the apartment told the police he knew someone who could

bring him drugs; that the police told him to make a call; and "the evidence will show that -- I believe, that he called [defendant]." Counsel argued that the police never mentioned the executed warrant in their report; that there was a discrepancy as to the location of defendant's arrest; that an independent witness would testify defendant was arrested outside the building and never went inside; and that there would be many discrepancies in the police officers' testimony.

¶ 7 Chicago police officer Armando Silva testified that about 6 p.m. on June 20, 2012, he and Officer David Salgado were conducting surveillance from the front picture window of the first floor unit of a two-flat residence at 3126 West 54th Place. Silva explained that the police had received information from a "concerned citizen" that a drug transaction would be happening in that area. Specifically, the police had been informed that a Hispanic man, approximately 30 years old, with a goatee, multiple tattoos, and a green four-door vehicle, would be bringing narcotics to the building. Enforcement officers, with whom Silva was in constant communication, were stationed outside the building. After an hour and 10 minutes of surveillance, Silva saw defendant, a Hispanic man in his 30s with tattoos and a goatee, approach in a green four-door Toyota Camry. The "concerned citizen," who was with Silva, identified defendant as the person who was going to bring the narcotics.

¶ 8 Silva watched defendant park in front of the two-flat, get out of the car, look both ways, and start walking toward the building. Defendant was holding a "larger" object in his right hand and attempting to place it under his shirt. Silva did not see anyone else on the street. He radioed enforcement officers with a description of defendant, his car, and his movements. Within seconds, the enforcement officers arrived. Silva heard one of the enforcement officers announce his office, but defendant had entered the vestibule, so Silva could not see what was happening.

Later, he learned that defendant had been placed in custody and that an item of suspected cocaine had been recovered. He viewed the item, which he described as "between a golf ball and a tennis ball, something, like wrapped in Saran Wrap or some type of plastic." Another officer inventoried the item. The parties stipulated as to chain of custody.

¶ 9 On cross-examination, Silva acknowledged that on the date in question, he was part of a team that executed a search warrant at 3126 West 54th Place. When asked what time he arrived with the search warrant, the Assistant State's Attorney objected based on the warrant involving "a separate police investigation." The trial court overruled the objection and Silva answered that he would have to look at those records. Defense counsel then asked whether the search warrant was mentioned in the police reports concerning defendant's arrest. Silva responded that the search warrant was probably documented under a different police event number. Defense counsel repeated his question, the Assistant State's Attorney objected, and the following colloquy occurred:

> "[DEFENSE COUNSEL]: Judge, once again you would think that this is relevant, the information as to how the arrest of [defendant] took place and the background of the Chicago police report and somebody was preparing one. I would say that's significant impeachment by omission, but that's up to the Court to decide.
>
> [ASSISTANT STATE'S ATTORNEY]: And, Judge, if I could just respond, I think the officer's already testified to the background of -- or at least the relevant background of why he was there. He had received information from this individual.

> THE COURT: I understand. What this case involves is the recovery of drugs from a certain location. It's [the State's] position that the drugs got at that location when the defendant dropped them off. It's *** the defendant's theory of the defense that the drugs could have been there earlier, since this house or this address was the subject of a search warrant that was executed earlier in the day shortly before the defendant arrives. So his argument is that the drugs were there before the defendant got there. Your argument is that the defendant brought the drugs there.
>
> To the extent that there's any possibility whatsoever that the drugs were there before the defendant arrived, the defense is -- should be allowed to question him in furtherance of their theory. Your objection is overruled."

¶ 10 Silva then acknowledged that the police reports did not mention the search warrant. He agreed that the police had no information about defendant before the search warrant was executed, and that defendant's name first came up when it was given to them by an individual who was in the building when it was searched and drugs were found. Silva further admitted that this individual was the person who then called defendant, and that no recording was made of defendant's arrest. Silva stated that for safety, he referred to the individual as a "concerned citizen" in the police report, but agreed that he also could have been considered a "confidential informant." After Silva reaffirmed that his police report did not mention the search warrant, the following exchange occurred regarding the execution of the search warrant, defendant's arrest, and the production of documents:

"Q. Those incidents happened at the same place on the same date within an hour and ten minutes of each other; is that correct?

A. I don't know. The search warrant could have been a little bit earlier. We were on surveillance for an hour and ten minutes.

Q. Well, how long did it take you to execute the search warrant and find the drugs?

A. I would need to see those reports to see.

Q. I would, too. They were never tendered to us.

[ASSISTANT STATE'S ATTORNEY]: Objection, Judge. We don't have any reports. There was no mention of it in the reports. I think this issue of a search warrant was all dug up by the defense for their case. They haven't tendered us any report.

THE COURT: I don't know. Did you file a motion to produce or request the reports prior to today's date?

[DEFENSE COUNSEL]: We actually did, Judge. I believe when we were asking for -- When we first found it -- When the State's Attorney who filed his amended supplemental to discovery, Mr. Tristan, we asked him for it and we were never provided with it.

[ASSISTANT STATE'S ATTORNEY]: Well, Judge, I don't have a motion to produce and so I would object to any --

[DEFENSE COUNSEL]: We also had a motion to produce the informant who was present, and we were given that name but when we asked for other

reports, we were never given any. We were just given his last location, which was the penitentiary.

[ASSISTANT STATE'S ATTORNEY]: As I was saying, I don't have any kind of motion to produce. I have no record that we were ever requested to produce any kind of report that we didn't have knowledge of when we tendered discovery. And so I would object to any reference to -- or I guess statements of Counsel to the officer. We would like to see those reports, too. I think it's argumentative and I think it's improper.

[DEFENSE COUNSEL]: I'll withdraw it. I'll withdraw that last statement.

THE COURT: You need to move on."

¶ 11 On redirect examination, Silva clarified that the "concerned citizen" was referred to that way for his safety, and that he was not a registered informant with the police department. Silva also stated that this person was not the target of the search warrant that had been executed earlier on the day in question, and that he was not found to be in possession of any illegal narcotics or contraband.

¶ 12 Chicago police officer Marek Grobla testified that he was an enforcement officer with Officer Silva's team. As he and a fellow enforcement officer, Officer G. Hughes, approached the building in an unmarked police car, he saw defendant just about to walk up the front stairs. Grobla got out of the car and started running toward defendant, yelling, "Police. Stop." Defendant opened the building's front door and entered the vestibule. As Grobla ran toward the stairs, he could see defendant in the vestibule through its glass door. Defendant looked at Grobla, bent down, placed an object under the floor mat, and then started back toward the building's

front door. There was no one else in the vestibule. Grobla stated that he could not see what the object was, but it was the size of "maybe a baseball."

¶ 13 Grobla testified that when he arrived at the front door, defendant was just coming outside. After defendant passed Grobla, Hughes placed him in handcuffs. Grobla then went into the vestibule and recovered the object that was under the floor mat. He gave the object, which he described as about the size of a baseball and wrapped in plastic, to another officer to inventory.

¶ 14 The parties stipulated that if called as a witness, the forensic scientist who analyzed the recovered item would testify that it tested positive for 112.1 grams of cocaine.

¶ 15 After the State rested, defendant made a motion for a directed finding, which the trial court denied.

¶ 16 Belen Garcia testified that about 6 p.m. on the day in question, she and a friend, Mara Maqueros, were on their way to the building in question to buy marijuana. As they neared the building, Garcia observed defendant approaching the front steps. About 10 squad cars arrived out of nowhere and a "whole bunch" of police officers started running toward the building. When the police grabbed defendant and started banging on the door, Garcia decided "that was my cue to turn around and not get there." When asked if she ever saw defendant go inside the building, Garcia specified that he never went in the home, as the police "grabbed him at mid stairway."

¶ 17 On cross-examination, Garcia explained that she went to the building's first floor apartment to buy marijuana from a man she knew as "Lencho" two or three times a week, and that she had first met defendant at the apartment two days before the day in question. Garcia clarified that she was walking on the sidewalk when she witnessed defendant's arrest, that she was pushing a stroller, that Maqueros had her five children with her, and that a "bunch of people

were out." Garcia also stated that she was in front of the house next door when defendant reached the stairs, a distance she estimated was "maybe" 15 feet from defendant. After Garcia saw an officer grab defendant, she turned around and left the area, so she did not know what happened next. Garcia admitted that she spoke with an investigator from the State's Attorney's office about the incident in October 2013, but denied telling the investigator that she saw several police officers arrive at the house and enter it, or that after a few minutes, the police left the house with defendant and placed him in a squad car. Garcia acknowledged that she and defendant "came together to court" for trial.

¶ 18 After defendant rested, the parties stipulated to the testimony of Tom Finn, an investigator with the State's Attorney's office. Finn would have testified that in October 2013, he interviewed Belen Garcia. She told Finn that on the day in question, she was down the street from the house when she saw several police officers enter it, and then after a few minutes, saw the police leave the house with defendant and place him in a squad car.

¶ 19 Also in rebuttal, the State re-called Officer Grobla, who testified that when he arrived on the scene, he did not observe anyone on the sidewalk or the street. Specifically, he did not see two women with a stroller and five children.

¶ 20 Chicago police officer David Salgado testified that around 6 p.m. on June 20, 2012, he and Officer Silva were conducting surveillance from the front living room window of the building in question. Salgado saw defendant pull up to the address in a car, get out, and walk up the front stairs. Once defendant entered the vestibule, Salgado lost sight of him. However, he was able to see 15 feet to the left and the right of the building, and never saw two women with a stroller and five children on the sidewalk on either side of the street.

¶ 21 On cross-examination, Salgado acknowledged that he first arrived at the residence early in the morning to execute a search warrant, and then left to process the evidence recovered during the search and do paperwork. While at the police station, he interviewed an "individual" who suggested that he could phone defendant, and then made that phone call. When asked whether he saw defendant "place any drugs down at that address," Salgado stated that he observed defendant holding an object when he was walking up the stairs.

¶ 22 During closing arguments, defense counsel emphasized that the case involved a question of credibility. Counsel noted details that the police officers indicated they could not recall. He further argued that Grobla, who was the only witness to testify that defendant placed something under the floor mat, was impeached by "an independent witness off the street" who testified that defendant never entered the building but, rather, was stopped by the police before he could get inside. The State agreed that the case hinged on credibility, but asserted that the evidence it had produced was credible and consistent, while Belen Garcia's testimony was impeached, unreliable, and untrustworthy.

¶ 23 The trial court found defendant guilty of possession of a controlled substance with intent to deliver. In doing so, the court specifically stated that it found the police officers more credible than Garcia. The case was continued to May 29, 2015, for posttrial motions and sentencing.

¶ 24 Attorneys Bennett and Goldman filed a motion for a new trial on May 29, 2015. The half-sheet reflects that on that same date, the trial court granted Bennett and Goldman leave to withdraw, granted attorney Michelle Gonzalez leave to file an appearance for defendant, entered and continued Goldman's motion for cash bond refund until the next court date, and continued the case until June 29, 2015, for posttrial motions and sentencing. On that date, attorney John

Paul Carroll entered an appearance for defendant, and the trial court once again continued the case for posttrial motions, sentencing, and Goldman's motion for cash bond refund.

¶ 25 On August 7, 2015, attorneys Gonzalez and Carroll filed a motion for a new trial based on ineffective assistance of trial counsel. The motion alleged that although Bennett and Goldman knew defendant had a limited understanding of English, they only spoke to him in that language and failed to inform the court that he needed an interpreter at trial; that Bennett and Goldman guaranteed defendant if he took a bench trial, he would be found not guilty, but if he chose a jury trial, he would be found guilty; that Bennett and Goldman should not have withdrawn the motion to quash and suppress; that Goldman inappropriately admitted during opening statements that an individual called defendant to bring drugs to the apartment; that Bennett and Goldman failed to subpoena the police reports concerning the search warrant and should not have answered ready for trial when they had not received the search warrant documents; that Bennett and Goldman never interviewed the confidential informant; and that Bennett and Goldman failed to discuss the affirmative defense of entrapment with defendant. The trial court continued the case for a hearing on defendant's motion for a new trial and Goldman's motion for cash bond refund.

¶ 26 At the hearing, defendant appeared with Gonzalez and Carroll. Defendant's trial attorneys, Bennett and Goldman, and a Spanish language interpreter were also present. The trial court opened the hearing by asking defendant whether he could understand her, and defendant responded, "Now I can because there's someone interpreting." He further indicated that he wanted Gonzalez and Carroll to represent him in the proceedings.

¶ 27 Defendant began by calling Goldman as a witness. Goldman testified that on the day of trial, he answered ready, did not ask for a continuance, and had all the discovery documents the

State had tendered. However, he acknowledged that he did not have all the discovery documents he had requested. Specifically, Goldman had not received the search warrant for the apartment or "reports" about the informant. Goldman had been given the informant's name and location, though, and stated that Bennett had interviewed him.

¶ 28 Goldman testified that the motion to quash and suppress was premised on defendant's arrest being illegal. It was his original theory that the police stopped defendant as he approached the building and searched him, and that any evidence recovered from him should be suppressed. When asked for the reason he withdrew the motion, Goldman stated, "That the police reports, the witness, and my client, now your client, never admitted that the cocaine was on him when the police stopped him and searched him." He further explained, "Because due to case law unless there are proceeds taken off of [defendant], then those are the only things that can be suppressed. Anything that he would abandon or put down in view of the police officers would be considered abandoned by legal theory, I believe, and not suppressible." Goldman stated that the defense theory shifted over time based on conversations with defendant and facts that developed through investigation, and that he and Bennett "don't waste time of the court on theories that don't follow the law." While he could have argued that defendant's arrest outside the building was illegal, because nothing was recovered from defendant's person, he would not have been able to ask for any evidence to be suppressed under that scenario. Goldman stated that on the day he withdrew the motion, he told defendant he was doing so because he and Bennett did not think it was a viable strategy. When asked whether he had seen "on the police reports" that defendant's home address was listed as the same address as the building that was searched, Goldman answered negatively.

¶ 29 Goldman acknowledged that he had never asked the trial judge for an interpreter for defendant. He testified that he had represented defendant since 2004, and that he had "never spoken anything but English with him and in all other cases [when] I represented him, it's never become an issue." Goldman admitted that he was not aware defendant had received only a third grade education in Mexico, but stated he knew defendant was born in Texas and commented that in a prior case, he had successfully suppressed a kilo of cocaine and defendant "didn't seem to have a problem understanding that."

¶ 30 Goldman indicated that he was familiar with the affirmative defense of entrapment, and admitted that he never discussed the theory with defendant. He denied that he had guaranteed defendant he would be found not guilty if he took a bench trial, but guilty if he chose a jury trial. When asked why he did not insist on having the confidential informant brought to court, Goldman answered, "It was strictly a matter of trial strategy."

¶ 31 In answer to questions posed by the court, Goldman explained that after interviewing Belen Garcia, he believed the motion to quash and suppress would not be successful. He came to this conclusion because defendant never admitted he had drugs on him and Garcia never said she saw the police take drugs from him. Goldman also explained that he had not considered raising the affirmative defense of entrapment because, although he had used the defense in other cases, here, "Because of [defendant's] prior background and I know what the State could have done to him with his background, I didn't -- and he would have had to testify, I think, and it just really would have flown out the window."

¶ 32 Through an interpreter, defendant testified that he went to school in Mexico for first through fourth grade, and in the United States for eighth and ninth grade. He stated that he

speaks Spanish and a little bit of English. With Goldman and Bennett, he would "speak to them in English, whatever I could speak in English," and he "absolutely" did not always understand what they said to him. Defendant testified that neither Goldman nor Bennett explained to him that he had a right to testify at trial, and that Bennett guaranteed him the judge would find him not guilty, but a jury would convict him.

¶ 33 The trial court examined defendant through the interpreter. Defendant acknowledged that Goldman had represented him for 14 years on three different cases, and that they always communicated in English. Although none of those cases went to trial, pretrial motions were conducted, defendant was able to discuss those cases with Goldman "the little bit I could," and defendant was able to share with Goldman the names of his witnesses. When asked whether he was able to talk with Goldman about theories of defense, defendant answered, "Since I do not know about the law, I would just listen to him and I trusted him as an attorney." Defendant agreed that Bennett and Goldman represented him in the instant matter from July 2012 to May 2015, but insisted that when they talked about the case, because the discussions were in English, he did not understand everything. On the issue of fees, defendant told the court that he paid $13,000 to Goldman, $13,000 to Bennett, and an additional $3,000 to Bennett for an investigator and $1,000 to Bennett "so he could go see that witness." Defendant also said that he paid Goldman "little by little," and stated, "When I owed him -- still owe him $2,800, he was going to withdraw from my case."

¶ 34 In answer to questions posed by Goldman, defendant acknowledged that he signed a paper in February 2015 stating that his $9,000 bond refund would go to Goldman. However,

when questioned further on the matter by Carroll, defendant agreed that he did not want Goldman to receive that money.

¶ 35 The trial court denied defendant's motion for a new trial, finding it lacked merit. In explaining its decision, the court first stated it believed defendant could speak and understand English. The court noted that it had questioned defendant about his jury waiver in English, and that he answered the questions posed to him without displaying any inability to understand. The court also observed that defendant had been coming to the courtroom for almost three years and had not required the assistance of an interpreter during that time. Based on these circumstances, the court indicated it was not persuaded that defendant was unable to understand his attorneys, talk to them about his theory of defense, or inform them of his witnesses and what happened on the day of his arrest. Accordingly, the court found that the allegation of ineffectiveness for failing to recognize the need for an interpreter completely lacked merit.

¶ 36 The court further stated that based on the facts presented at trial, it did not believe a motion to quash and suppress had merit. Specifically, the court stated that where the enforcement officer testified he saw defendant put an object that was later determined to be drugs under the floor mat, and where defendant did not have an expectation of privacy in the vestibule, it did not think defendant would have prevailed on a motion to quash and suppress. Therefore, the court found that the attorneys' withdrawal of the motion was not negligent, but rather, mindful of the law.

¶ 37 Finally, with regard to the entrapment defense, the trial court found that based on defendant's prior "drug activity," the State could argue that the defendant was previously

inclined to sell drugs. Thus, the court was of the opinion that an entrapment defense would not have prevailed.

¶ 38 Having disposed of the motion for a new trial, the court moved on to sentencing. After hearing the attorneys' arguments and defendant's statement in allocution and considering the presentence investigation report, the trial court sentenced defendant to 20 years in prison. In announcing sentence, the trial court commented on defendant's understanding of English as follows:

> "I also find aggravating his attempt to persuade the Court today that he did not speak English even though he has appeared before this Court for the last two and a half years speaking English, even though this particular Court has communicated with him in English. I find his attempt to perpetrate a fraud on this Court to be aggravating."

¶ 39 The trial court also noted that due to the amount of drugs involved, defendant's offense was a "Super X" felony, and emphasized that defendant's criminal history included 11 prior felony convictions. Finally, the trial court stated that it would "sign the [cash bond refund] to attorney to David Goldman."

¶ 40 The trial court subsequently denied defendant's motion to reconsider. Defendant appealed.

¶ 41 On appeal, defendant contends that the trial court improperly denied his motion for a new trial based on ineffective assistance of counsel. He asserts that his trial attorneys were ineffective for (1) failing to pursue the motion to suppress; (2) answering ready for trial when the defense had not yet received a requested copy of the search warrant; (3) not requesting an interpreter for

defendant; (4) not explaining to defendant that he had a right to testify; (5) guaranteeing defendant that if he took a bench trial he would be found not guilty, but if he took a jury trial he would be found guilty; (6) engaging in "fraud" regarding attorney fees; (7) admitting to wrongdoing in opening statements; and (8) not raising the affirmative defense of entrapment.

¶ 42 As an initial matter, we note the State's argument that defendant's brief entirely fails to satisfy the requirements of Supreme Court Rule 341 (eff. Feb. 6, 2013), in that it lacks adequate citation to relevant authority. The State is correct that defendant's brief is inadequate in that despite raising eight separate allegations of ineffectiveness, it only cites five cases, four of which are referenced simply for general propositions of law: *Strickland v. Washington*, 446 U.S. 668 (1984) (cited for the standard for claims of ineffective assistance of counsel); *People v. Albanese*, 104 Ill. 2d 504 (1984) (cited for the proposition that a claim of ineffectiveness may be resolved on *Strickland*'s prejudice prong alone); *U.S. v. Cronic*, 466 U.S. 648 (1984) (cited for the proposition that prejudice may be presumed under *Strickland* where trial counsel wholly fails to subject the State's case to meaningful adversarial testing); *People v. Phillips*, 371 Ill. App. 3d 948 (2007) (cited for the proposition that the decision whether to testify ultimately belongs to the defendant, not his lawyer, and is not a matter of trial strategy); and *People v. Whiting*, 365 Ill. App. 3d 402 (2006) (cited as a case with "almost similar facts").

¶ 43 Due to defendant's failure to comply with Rule 341, this court would be justified in striking his brief and dismissing the appeal. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 77. However, while the insufficiency of defendant's brief hinders our review, meaningful review is not completely precluded, as, for the most part, the merits of the case can be ascertained from the record on appeal. This court may entertain the appeal of a party who files an insufficient brief

"so long as we understand the issue [the party] intends to raise and especially where the court has the benefit of a cogent brief of the other party." *Twardowski v. Holiday Hospitality Franchising, Inc*., 321 Ill. App. 3d 509, 511 (2001). Here, the State has filed a cogent brief, and it is clear that defendant is challenging the trial court's rejection of his posttrial claims of ineffective assistance of trial counsel. Accordingly, we choose to reach the merits of defendant's appeal.

¶ 44 In order to succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Where, as here, a defendant raises a posttrial claim of ineffective assistance and the trial court reaches a determination on the merits of the claim, this court will reverse only if the trial court's action was manifestly erroneous. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. " 'Manifest error' is error that is clearly plain, evident, and indisputable." *Id*.

¶ 45 Defendant's first claim of ineffectiveness involves the motion to quash arrest and suppress evidence, which his trial attorneys filed but then withdrew. Defendant argues that such a motion would have been supported under either factual scenario presented at trial. He asserts that if the cocaine was recovered from underneath the floor mat, the issue of his expectation of privacy in the vestibule was a question that would have had to have been resolved by the trial court. In the alternative, defendant argues that if the cocaine was recovered outside of the building, then probable cause for his arrest and the search of his person would be at issue. Defendant concludes that there was "absolutely no articulable strategy to withdraw that crucial motion" and accuses Goldman of withdrawing the motion because he was lazy and "had his eye only on the bail refund."

¶ 46 The decision whether to pursue a motion to quash arrest and suppress evidence is considered trial strategy. *People v. Spann*, 332 Ill. App. 3d 425, 432 (2002). As such, an attorney's decision in this regard typically will not support a claim of ineffective assistance of counsel. *People v. Henderson*, 2012 IL App (1st) 101494, ¶ 8. As relevant here, an attorney's decision not to pursue such a motion will not be grounds to find incompetent representation when the motion would have been futile. *Id.*

¶ 47 Goldman testified that he withdrew the motion to quash arrest and suppress evidence because there was no evidence that the drugs were found on defendant's person, and because defendant had no expectation of privacy in the area where the evidence indicated the drugs were actually recovered: the vestibule of a two-flat building at 3126 West 54th Place. Although Carroll stated at the posttrial hearing that the police reports showed defendant's home address as 3126 West 54th Place, the arrest report included in the record on appeal actually lists defendant's residence as 1319 S. Clarence Avenue. Thus, there is no evidence that defendant lived at the building where the drugs were recovered. The trial court agreed with Goldman's evaluation that a motion to quash and suppress would have lacked merit, and determined that the decision to withdraw the motion did not constitute ineffectiveness. Given that the uncontroverted evidence at trial was that defendant placed the drugs under the floor mat in the vestibule of a building where he did not live and the police recovered the drugs from that location, we cannot find that the trial court's conclusion was manifestly erroneous.

¶ 48 Defendant's second allegation of ineffectiveness is that his attorneys should not have answered ready for trial when they had not yet received a copy of the search warrant, which they had requested during discovery. Defendant alleges that Goldman could have subpoenaed this

document, but failed to do so. He asserts that "Clearly, Goldman was not ready for trial," but otherwise does not explain how he was prejudiced by the absence of a copy of the search warrant.

¶ 49 We agree with the State that this allegation lacks merit because the requested search warrant did not involve defendant and had no effect on the evidence against him. Moreover, the trial transcript reveals that Goldman was able to effectively and extensively cross-examine Officer Silva about the search warrant even without having a physical copy of the document in his possession. Although the trial court did not specifically address this allegation of ineffectiveness at the hearing on the posttrial motion, it is apparent from its decision that it found the claim without merit. This determination is not manifestly erroneous.

¶ 50 Third, defendant contends that Goldman and Bennett were ineffective for not requesting an interpreter for him. At the posttrial hearing, the trial court expressly rejected this claim, noting that defendant had been appearing in her courtroom for almost three years without ever requiring the assistance of an interpreter, and finding that he could speak and understand English. While the record contains no transcripts of the proceedings that occurred before the day of trial, the transcript of defendant's jury waiver on the day of trial supports the trial court's finding, as it reflects that the trial court asked defendant questions in English and defendant answered them in English without indicating that he had any difficulty understanding either the jury waiver in particular or the proceedings in general.

¶ 51 In its role as the trier of fact, the trial court was uniquely suited to evaluate defendant's posttrial claim that he needed an interpreter. See *People v. Mehmedoski*, 207 Ill. App. 3d 275, 281 (1990) ("The trial court was in the best position to determine defendant's ability to

understand and communicate in English and to understand the proceedings."). Although defendant testified at the posttrial hearing that he only spoke a little bit of English and absolutely did not always understand what Goldman and Bennett said to him, Goldman testified that he had represented defendant since 2004, had always spoken English with defendant, and language was never an issue. The trial court, which saw and heard these witnesses testify, chose to believe Goldman over defendant, which was its prerogative in its role as the trier of fact. See *People v. Moody*, 2016 IL App (1st) 130071, ¶ 52; see also *People v. Evans*, 54 Ill. App. 3d 883, 886 (1977) (noting that where the question presented is one of credibility of the witnesses who testified at a hearing on a posttrial motion, it is the function of the trial court to determine the witnesses' credibility and this court may not substitute its judgment for that of the trier of fact). We conclude that the trial court's rejection of this claim of ineffective assistance of counsel was not manifestly erroneous.

¶ 52 Fourth, defendant contends that Goldman and Bennett were ineffective because they never explained to him that he had a right to testify at trial and failed to ask the court to inquire of him whether he wanted to testify. He asserts in his brief that he wanted to testify and did not make a voluntary waiver of his right to do so. We note that although defendant testified at the posttrial hearing that neither Goldman nor Bennett explained to him that he had a right to testify at trial, he never stated at the hearing that he had wanted to exercise this right.

¶ 53 While the trial court did not specifically address this allegation of ineffectiveness at the hearing on the posttrial motion, it is apparent from its decision that it did not believe defendant's testimony that Goldman and Bennett never explained this right to him, or that he did not know that he had a right to testify at trial. Given defendant's familiarity with the trial process, as

indicated by his criminal history of 11 prior felony convictions, as well as the deference we must give to a trial court's credibility findings (see *Moody*, 2016 IL App (1st) 130071, ¶ 52), we cannot say that the trial court's determination on this claim is manifestly erroneous.

¶ 54 Fifth, defendant alleges that Bennett "guaranteed" him that if he took a bench trial, the judge would find him not guilty, but if he took a jury trial, a jury would find him guilty. The trial court did not specifically address this allegation at the posttrial hearing. However, it is clear from the trial court's denial of the posttrial motion that it did not believe defendant's testimony on this point. Again, given the deference to be afforded a trial court's credibility determinations (see *Moody*, 2016 IL App (1st) 130071, ¶ 52), we find that the trial court's rejection of this claim of ineffectiveness is not manifestly erroneous.

¶ 55 Sixth, defendant makes an allegation of ineffectiveness that he has titled "Fraud." His entire argument on this point is as follows:

> "[Defendant] said he paid both Bennett and Goldman $13,000 in fees and that he paid Bennett an additional $3,000 for an investigator and $1,000 for him to go interview witness Garcia, for a total of $30,000. When [defendant] owed Goldman just $2,800, Goldman threatened to withdraw from the case. [Defendant] paid Goldman the remaining $2,800. [Defendant] always paid the attorneys in cash. [Defendant] did not want to give his bail bond money to Goldman.
>
> When Goldman questioned [defendant], his question[s] were only about money and the one sentence [defendant] had signed on a piece of paper. Goldman did not inquire about the accusations of [defendant] about the $30,000 in cash

> already paid; or about the trial outcome guarantees of Bennett; or about [defendant] not being told by his attorneys about his right to testify; or about the abrupt withdrawal of the motion, etc. None of the litany of complaints by [defendant] were rebutted or disputed by Goldman or Bennett. Goldman only questioned [defendant] about the most important aspect of the case: the additional $9,000 for Goldman." (Internal citations to the record omitted.)

Defendant has not explained how these allegations constitute ineffective assistance of counsel, much less "fraud," and cites no authority in this section of his brief.

¶ 56 "A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository into which the appealing party may dump the burden of argument and research." *People v. Hood*, 210 Ill. App. 3d 743, 746 (1991). As explained above, Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) requires that an appellant's brief contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." The failure to cite any authority or to articulate an argument will result in forfeiture of that argument on appeal. *People v. Oglesby*, 2016 IL App (1st) 141477, ¶ 205. As a result of defendant's failure to clearly state his argument or cite any relevant authority, his allegation of "fraud" is forfeited. *Id.*; *People v. Hall*, 2012 IL App (2d) 111151, ¶ 12 (an argument that consists of "two conclusory paragraphs" does not merit consideration on appeal).

¶ 57 Seventh, defendant alleges that Goldman was ineffective for making an admission of wrongdoing in opening statements. He asserts that Goldman should have attacked the State's

position that the informant called defendant, rather than admitting in opening statements that his client was the person the informant called. Defendant argues:

> "Without that admission, there was no proof that [defendant] was the drug supplier, instead of, for instance, an unsuspecting and uninvolved delivery man. The question then, is how was that damning admission a sound strategy? How does admitting [defendant's] knowledge and participation in the criminal enterprise aid the defense in securing a not guilty? It doesn't aid at all but establishes a critical piece of evidence for the state, which the state could not have established since the informant was never called to testify."

¶ 58 A review of the record reveals that in opening statements, Goldman stated the evidence would show that a search warrant was executed at the building earlier on the day in question, and that a person present at that time told the police he knew someone who could bring him drugs. Goldman then stated, "[T]he police, the evidence will show, told him to make a call. And the evidence will show that -- I believe, that he called [defendant]." We disagree with defendant that absent this statement by Goldman, there was "no proof" that defendant was a drug supplier. At trial, Officer Salgado testified that after the search warrant was executed, a person who was present in the building during the search suggested he could call defendant. Officer Silva testified that this person provided a detailed description of a man who would be bringing narcotics to the building, and that when defendant arrived not long thereafter, he and his car fit the description given. Officer Grobla then saw defendant place an object under the floor mat of the vestibule, and that object turned out to consist of 112.1 grams of cocaine. It was this evidence that proved defendant guilty, not the remark made by Goldman in opening statements.

¶ 59 Further, even if we were to agree that Goldman's statement was an "admission of wrongdoing," we are not convinced, given the brevity and context of the comment, that Goldman's performance fell below an objective standard of reasonableness, or that there is a reasonable probability that the result of the trial would have been different had Goldman not made the statement in question. This was a bench trial, heard by a judge who is presumed to know the law (*People v. Gaultney*, 174 Ill. 2d 410, 420 (1996)), including the tenet that opening statements are arguments, not evidence (*People v. Jaimes*, 2014 IL App (2d) 121368, ¶ 56). We cannot find that Goldman's statement made any difference in the outcome of defendant's trial. Accordingly, the trial court's rejection of this allegation of ineffectiveness was not manifestly erroneous.

¶ 60 Defendant's final allegation is that trial counsel was ineffective for failing to raise the affirmative defense of entrapment. The statute defining entrapment provides as follows:

> "A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was pre-disposed to commit the offense and the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense." 720 ILCS 5/7-12 (West 2014).

¶ 61 Goldman explained at the posttrial hearing that he did not raise entrapment as an affirmative defense "Because of [defendant's] prior background and I know what the State could have done to him with his background, I didn't -- and he would have had to testify, I think, and it just really would have flown out the window." The trial court agreed with this assessment, noting

that given defendant's prior "drug activity," the State could argue that defendant was previously inclined to sell drugs and an entrapment defense would not have prevailed.

¶ 62 The presentence investigation report reveals that defendant was convicted of possession of a controlled substance in 2006 and manufacture, delivery, or possession with intent to deliver a controlled substance in 2001. This criminal history would support a finding of predisposition for committing a drug offense. See *People v. Glenn*, 363 Ill. App. 3d 170, 173 (2006) (when assessing predisposition in drug cases, factors to be considered include familiarity with drugs). Accordingly, we agree with Goldman and the trial court that had trial counsel raised an entrapment defense, it is not reasonably probable that it would have succeeded and that the outcome of the trial would have been different. The trial court's rejection of this allegation of ineffectiveness was not manifestly erroneous.

¶ 63 Whether a defendant's posttrial claims of ineffective assistance of counsel are meritorious is a question that is necessarily grounded in the specific facts of the case. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008). Accordingly, it is appropriate for this court to give deference to the trial court's factual findings (*id.*) and, as explained above, we will not overturn those findings unless they are against the manifest weight of the evidence. *Tolefree*, 2011 IL App (1st) 100689, ¶ 25. Here, the trial court was very familiar with defendant and his demeanor, as well as Bennett's and Goldman's performance before and throughout the trial. The trial court was in a superior position to evaluate the credibility of defendant's assertions of ineffectiveness based on its knowledge of defendant's appearance and demeanor and Bennett's and Goldman's actions during all the various proceedings. We are not persuaded that this case involves manifest

error, that is, error that is clearly plain, evident, and indisputable. See *id*. Accordingly, we affirm the denial of defendant's posttrial motion claiming ineffective assistance of counsel.

¶ 64 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 65 Affirmed.