2013 IL App (2d) 110775-U
No. 2-11-0775
Order filed March 19, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 06-CF-713
GARY W. SCHUNING,	)	Honorable John J. Kinsella,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

RULE 23 ORDER

¶ 1 *Held*: Defendant did not receive ineffective assistance of counsel where his attorney did not seek a self-defense instruction or an instruction on second-degree murder for one of the two victims.

¶ 2 After a jury trial, defendant, Gary W. Schuning, was found guilty of first-degree murder for the stabbing deaths of two people (720 ILCS 5/9-1(a)(1) (West 2006)). The trial court sentenced defendant to natural life imprisonment. The sole issue raised on appeal is whether his trial counsel was ineffective for failing to request an instruction on self-defense or, in the alternative, an

instruction on second-degree murder regarding one of the two victims. Because we reject defendant's claim that trial counsel was ineffective, we affirm both of defendant's convictions.

¶ 3 I. BACKGROUND

¶ 4 The two killings occurred at defendant's residence during the early morning hours of February 26, 2006. Throughout the investigation, defendant gave several statements to the police. Prior to trial, defendant moved to suppress various statements, and the trial court granted his motion as to some of the statements but denied it as to other statements. The State filed a certificate of impairment and timely appealed the court's ruling. In a published opinion, this court affirmed the trial court's ruling allowing some statements but suppressing others. *People v. Schuning*, 399 Ill. App. 3d 1073 (2010).

¶ 5 A. Opening Statements

¶ 6 Trial commenced on May 13, 2011. During opening statement, the State claimed that the evidence would show the following. After a night of "clubbing" with friends on February 25, 2006, the 23-year-old defendant went home and got into an argument with his mother, Doris Pagliaro. Defendant pushed Pagliaro down a flight of stairs, cut her throat, and stabbed her 40 times. He then dragged her body to her bedroom and closed the door. After that, he called three separate escorts to come to his home. Before the first escort arrived, defendant took towels and pillow cases to cover up the trail of blood that went from the living room to inside the bedroom. After the first escort left, a second escort was dropped off by a friend. After defendant had sex with the second escort, she went to the bathroom and became concerned by defendant's strange behavior. The second escort's friend also became concerned and rang the doorbell to defendant's house. The second escort left defendant's home only minutes before the arrival of the third escort, Kristi Hoenig. Once Hoenig

was inside defendant's house, she called her "pimp," who heard her cry, " 'What's that in your hand? Oh, my God. Oh, my God. Oh, my God.' " Then, the line went dead. Hoenig's "pimp" then called 911, and the Addison police officers arrived within minutes.

¶ 7 The State went on to say that at first, defendant tried to lie his way out of what happened by claiming that Hoenig had killed his mother and that he had stabbed Hoenig in self-defense. But officers confronted defendant with the 911 call, the fact that Pagliaro had been dead for some time before Hoenig, and the six stab knife wounds to Hoenig's back. Defendant then admitted that he argued with Pagliaro, pushed her down the stairs, stabbed her, dragged her body into the bedroom, and covered up the blood trail before the escorts arrived. With respect to Hoenig, however, defendant persisted in saying that she had attacked him and that he had to kill her in self-defense. According to the State, defendant admitted to killing Pagliaro and any claim of self-defense with respect to Hoenig was "absurd."

¶ 8 The defense presented an alternate theory that a "group" of people killed Pagliaro and Hoenig. Trial counsel stated that at 8:45 a.m. on February 26, defendant was having sex with an escort named Samantha Eme in his brother's bedroom so as not to wake up Pagliaro, who was asleep downstairs in her bedroom. The house was clean; Eme was paid; and the hour was up. Eme's friend, another escort named Neisha Sawyer, and her driver came to pick up Eme from defendant's residence. Also on the way to defendant's house was another escort, Amanda (Katie) Mathis, along with her "muscle," a security man named David Conover. Finally, yet another escort, Hoenig, was on her way to defendant's house with a woman named Tiffany Duff. Trial counsel went on to say that at 8:45 a.m., no one had been killed. Roughly 30 minutes later, at 9:15 a.m., police arrived at defendant's house in response to a frantic 911 call. Police walked into a "complete blood bath."

According to defense counsel, the entire case was about what happened during the 30 minutes before the police arrived.

¶ 9 Trial counsel continued that on the first floor, a long line of blankets and towels hid Pagliaro's blood, which was also splattered on the wall. Pagliaro was found stabbed, bound, and gagged. Upstairs, defendant was found on his back in his brother's bed, and he had been stabbed numerous times as well. When police entered the room, he threw a knife at the police. Defendant's fingerprints were found on that knife but not on any of the other nine knives located upstairs and downstairs in the house. Hoenig was also found on the floor of that bedroom, stabbed multiple times. Defendant told police that Hoenig took all of the knives, attacked Pagliaro, and then killed her. Defendant did not kill anyone. He was not claiming self-defense or that the killing was an accident. Instead, defendant came close to being the third victim in this case.

¶ 10 Trial counsel went on to say that the killers in this case consisted of a "group" of people, including Eme, who left her DNA on the handles of two knives. Hoenig had the misfortune of being at the wrong place at the wrong time. When Hoenig called her pimp, she did not realize the group was waiting, each of them with a knife, until it was too late. The group, seeing that Hoenig was on the phone, killed Hoenig but did not have time to finish killing defendant before they left. Defendant's hands were badly cut trying to save Pagliaro. The group left in the car that had been parked in defendant's driveway, and police missed the group by seconds.

¶ 11 Trial counsel concluded that the final tragedy in this case was the interrogation of defendant. After witnessing the horror of seeing Pagliaro killed, defendant could not remember what happened. Yet, the police managed to build a case with defendant's statements, despite his lack of memory.

¶ 12 B. Trial Evidence

¶ 13 The following evidence was adduced at trial. Addison police officers Emilio Chiappetta and John Sinkule were dispatched to defendant's residence on Sunday, February 26, 2006, around 9:15 a.m. After announcing their presence, they entered through the front door, which was unlocked. There was no sign of forced entry. Officer Chiappetta saw dried blood on the floor near the entrance near a towel or a blanket. The drywall was also damaged with dried blood on the wall.

¶ 14 From upstairs, the officers heard a male moaning. When they went upstairs into one of the bedrooms, they discovered Hoenig, deceased, lying on her back on the floor. She was partially nude, with blood surrounding her body. Defendant was lying on the bed, injured. He threw a knife in the officers' direction that landed a few inches from their feet and stuck in the carpet.

¶ 15 1. Defendant's First Statement to Police

¶ 16 Motioning his head towards Hoenig, defendant told the officers that she "attacked" Pagliaro; she got "all the knives and killed her." Defendant also said that he was doing " 'so good' " and was " 'on parole.' " Defendant told the officers that he had called an escort service, and that Hoenig had killed Pagliaro, who was in the downstairs bedroom.

¶ 17 On the bed where defendant was lying, there was a white purse "with items around the bed with money," including Hoenig's driver's license and defendant's credit card. A silver cell phone on the floor of that bedroom continued to ring. In addition, two bloody knives were located on the floor near the foot of the bed where defendant was lying, and a third knife was located near Hoenig's head. These three knives were in addition to the one defendant threw in the officers' direction. A fifth knife was found near a speaker in that bedroom.

¶ 18 Officers Chiappetta and Sinkule also found knives in the dining room. Two bloody knives were located on top of an open, escort magazine by a computer, and there was a large knife under the dining room table. In addition, dried blood appeared in numerous areas of the house. There were bloody footprints on the kitchen floor.

¶ 19 Other officers arrived and continued investigating the scene. In the first floor bedroom, Addison police officer Richard Kopec found Pagliaro lying on the floor covered by a sheet or a blanket. Pagliaro, who was lying on her back, had a gag in her mouth, a deep cut in her neck, and a knife protruding from her chest. Her body was ashen gray and the blood around her neck was dry. Kopec also discovered a tall shelving unit in the basement lying on the floor.

¶ 20 On cross-examination, officers Chiappetta and Sinkule testified that they noticed a watery trail on defendant's driveway, as though a car had been parked there with its engine running.

¶ 21 2. Defendant's Second Statement to Police

¶ 22 Defendant was transported to the hospital by emergency personnel. Defendant had multiple stab wounds to his chest and abdomen and underwent open heart surgery. Miriam Tourmai, the attending nurse, testified that the day after he was admitted, February 27, defendant was alert in the afternoon. On that day (February 27), Addison police officers Sean Gillhooley and Brian Goss interviewed defendant in the hospital at 2:26 p.m., and it was recorded. During the interview, defendant remembered talking to the officers the previous day.

¶ 23 Defendant told the officers that he had been drinking with some friends in Chicago and was given what he assumed to be cocaine, which he had never used before. After returning home, where he lived with Pagliaro, he called an escort service. An escort arrived at his house, and they had sex in his brother's bedroom. When the escort got up to use the bathroom, he heard Pagliaro ask, "Gary,

what the f**k are you doing upstairs." Then, the escort returned from the bathroom, carrying a knife and wearing only a t-shirt. The escort stabbed him, and defendant fought her off. Defendant panicked, stabbing her until she stopped moving. According to defendant, he then noticed Pagliaro lying at the bottom of the stairs, wrapped in a blanket. There was blood all over the wall.

¶ 24 Defendant's version of events changed after the officers told defendant that they thought that he was a nice kid; that his family needed answers; and that what he said did not make sense in light of the physical evidence. At this point, defendant admitted that he pushed Pagliaro down the stairs because she was screaming at him for being "wacked out of his mind" on cocaine. After that, he placed Pagliaro in her bedroom where she slept; she did not seem hurt. When the officers advised defendant that there was too much blood at the bottom of the stairs for a simple fall, defendant stated that the blood was caused by the escort. The officers asked defendant to explain how Pagliaro died before the escort. Defendant then admitted that he stabbed Pagliaro in the chest with a kitchen knife so that she would stop screaming. Next, he covered up the blood with towels so that the escort, who was on her way, would not see it. When the escort had asked what was on the wall, he said that he had had a party, and that someone had vomited.

¶ 25 Defendant denied planning to kill the escort but did so in self-defense. Upon further questioning, defendant said that the escort was performing oral sex on him and then went to the bathroom. He surmised that she saw some blood in the bathroom sink before emerging with a knife that he had left in there. The officers informed defendant that the escort's friend, who was talking to her on the phone, had heard the escort say, "What's that in your hand. Oh my God. Oh my God. Oh my God." Defendant then said that the escort came out of the bathroom holding a knife and saying, "What is this?" The escort then slit his wrists. The officers expressed doubt about

defendant's version of events, and defendant stated that the escort's suspicions were likely aroused when she realized there was no third woman present for a threesome. Defendant then admitted he grabbed a knife from underneath the bed before the escort stepped out of the bathroom. He intended to tell her to put down the knife but she came at him anyway. The escort stabbed him, but he inflicted the injuries on his wrists because he wanted to kill himself. Defendant also tried to stab his chest but could not "get through."

¶ 26 Defendant told the officers that he never planned on killing the escort, and that between the time he killed Pagliaro and Hoenig's arrival, another escort had come to his house as well. Defendant called a "shit load" of escorts and even drove one named "Katie" to the ATM with him to get cash. By that time, Pagliaro was not alive. He had sex with Katie, and then a "Black girl and a guy" picked her up. The next escort who arrived, Hoenig, was the one he killed. Defendant said that Hoenig stabbed him only once or twice. The rest of his injuries, including the ones on his chest, were self-inflicted. Defendant told the officers that he should be "put to sleep,"; that he would be in prison for the rest of his life; that he was insane; and that he wanted to be killed.

¶ 27 Several of defendant's friends testified regarding their activities with defendant on the night of the incident. During the evening of February 25, they all went to a club. Defendant was drinking shots and beer and using cocaine. Defendant also consumed a form of Ecstasy called "Blue Nike." According to defendant's friends, defendant had used cocaine on a weekly basis for the past few years. Amy Romo, who had a casual sexual relationship with defendant, testified that during the early morning hours of February 26, defendant repeatedly called, asking her to come over to have sex. Though Romo refused, defendant was adamant, to the point that Romo turned off her phone.

¶ 28 Defendant's brother, Steven Schuning, testified that he last saw defendant and his mom (Pagliaro) around 2 p.m. on February 25. He worked late that night, until 1 a.m., and then went to his aunt's house. Before he left, there were no singles magazines in the bathroom, no knives in his bedroom, and no damage to the living room wall.

¶ 29 Lawrence Sieber testified that he and Pagliaro were out until about midnight on February 25. The two had sexual relations that night, and semen found in Pagliaro was consistent with Sieber.

¶ 30 Next, the State elicited testimony regarding the escorts. Hoenig's boss, Gordon Trowers, testified via a videotaped deposition. Trowers owned Erotic Elegant Escorts. Around 6:30 a.m. on February 26, defendant called and requested an escort for him and his girlfriend for two hours. Trowers advised defendant of the cost, $1,220, and defendant asked that the charge be placed on a corporate card belonging to his girlfriend. Trowers asked to speak to the girlfriend, but defendant said she did not feel well and was lying down. When Trowers charged the credit card, the owner's name appeared as Pagliaro. Trowers called Hoenig on her cell phone to say she had a client. He also arranged for another escort, Tiffany Duff, to drive Hoenig to defendant's residence. Later, Hoenig called Trowers to tell him that she had arrived at defendant's residence. At first, Hoenig spoke in a low voice. Then, he heard her say, loudly, as in disbelief, "What's in your hand? Oh my God. Oh my God. Oh my God." After that, the line went dead. Trowers called her back three times, and, on the third try, someone answered. Trowers heard breathing, and then there was silence. Trowers called 911.

¶ 31 Duff testified that Trowers called her around 7 a.m. on February 26 to see if she would give Hoenig a ride to defendant's house in Addison. Duff, who lived in Chicago in the same building as Hoenig, agreed because she had a family reunion in the vicinity. At 7:30 a.m., she and Hoenig

picked up from Trowers the directions to defendant's house and the credit card information. Then, they stopped at a Walgreens drug store at Ontario and Clark. It took about 45 minutes to get to Addison. Hoenig was scheduled to spend two hours with defendant. Afterwards, Duff would either pick her up or Hoenig would call a cab.

¶ 32 After Duff dropped off Hoenig at 316 S. Hale, Trowers called Duff to say that she had dropped her off at the wrong address. Defendant lived at 316 S. Yale, which was less than one mile from 316 S. Hale. Not long after Duff arrived at her reunion, Trowers called to say that something bad had happened and that Duff should return to check on Hoenig. Duff drove from the reunion to defendant's house, which took about 45 minutes. When she arrived at defendant's house, there were police everywhere.

¶ 33 Duff allowed police to search her vehicle. Inside Duff's car, Officer Goss found a bag from Walgreens containing two boxes of condoms, one of which was open. There was also a Walgreens receipt dated February 26 at 7:59 a.m. from a Clark Street address in Chicago.

¶ 34 Twanna Butler owned an escort service called Glamor Girls. In the early morning hours of February 26, defendant called Butler, wanting to use a credit card for a blond escort. Butler contacted Amanda (Katie) Mathis around 6 a.m. Mathis went to defendant's residence with David Conover, her security guard and now husband, who waited outside of defendant's house in the car. After Mathis went inside, defendant told her to leave after 15 minutes; they did not have sex. At first, Mathis denied knowledge of the incident when talking to police. After she was shown a picture of defendant, however, she admitted smoking "weed with that guy." Mathis also gave police an accurate description of defendant's living room.

¶ 35 Neisha Sawyer testified that she lived with Samantha Eme; they were both escorts. In February 2006, defendant called and requested service. Sawyer and a third individual, probably a man, dropped off Eme at defendant's residence. Sawyer and the man did not pull into defendant's driveway; they drove to a parking lot and waited for Eme to call. After about 45 minutes, Sawyer had "like a bad feeling" because Eme was not answering her cell phone. They returned to defendant's house. Defendant came to the door and commented, "You're not white." Sawyer, who was wearing a silver fur coat, a fur headband, and fur lug boots, told defendant that she was there to pick up Eme. Defendant was grinding his teeth and his pupils were dilated. When Sawyer asked if he was high, defendant admitted taking "Blue Nike," an ecstasy pill. Eme emerged shortly thereafter.

¶ 36 Eme testified consistently with Sawyer. Defendant had requested a blond when he called. Sawyer's uncle, Daryl, drove both Eme and Sawyer to defendant's residence in a gold, Ford Explorer. Eme went inside defendant's residence alone. Defendant suggested going to an ATM because he did not have enough money. The two drove to an ATM in a newer, silver car, which took about 10 minutes. Defendant paid her, and they returned to his residence.

¶ 37 Eme recalled seeing brown smudges on the floor and on the wall near the entrance of the house. In addition, the floor was covered with blankets or towels. When she asked about it, defendant stated that he had had a party. Defendant and Eme went upstairs, used cocaine, and had sex; defendant wore a condom. Afterwards, she went to the bathroom. In a very short amount of time, defendant asked why she was taking so long. Defendant was interrupted, however, by Sawyer ringing the doorbell. Eme went downstairs to meet Sawyer and Daryl, neither of whom entered defendant's home. Eme did not stay at defendant's house for more than one hour.

¶ 38 The parties stipulated that defendant made a $101 withdrawal from an ATM on Addison Road at 8:04 a.m. on February 26.

¶ 39 Anita Crawford knew defendant and lived across the street from him. Around 8 a.m. on February 26, she was outside putting some things in her car when she saw a blond woman exit a gold SUV that was parked in front of defendant's house. There were two other people in the SUV, but Crawford could not see them due to the tinted windows. The blond woman went to defendant's door and either knocked or rang the doorbell. Defendant let her in. Not long after, the same blond woman exited defendant's house from a side door and got into the passenger side of Pagliaro's car. Crawford did not see who got into the driver's side. In the meantime, the gold SUV drove away. About 10 or 15 minutes later, Pagliaro's car returned, and the blond woman went back inside defendant's house through the side door. Again, Crawford was not able to see the driver. A short time later, just before 8:45 a.m., the gold SUV returned, and a woman wearing a furry hat, coat, and boots exited the vehicle and went up to defendant's door. Defendant met the woman at the door. He was wearing only sweat pants and acting "really hyper," as if doing "jumping jacks" while talking to the woman. Crawford then went inside to get her purse, and when she came back out, the SUV was gone.

¶ 40 Dr. Jeff Harkey, a forensic pathologist, performed autopsies on Hoenig and Pagliaro. Hoenig's clothing was cut in several places, and she had 18 stab wounds. A 4½-inch deep stab wound to Hoenig's back penetrated her lung. Hoenig died of blood loss due to multiple stab wounds. Regarding Pagliaro, her hands were tied behind her back, her mouth was gagged, and a knife protruded from her chest. Either bruises or abrasions appeared on Pagliaro's eyes, cheek, jaw, inside lip, wrists, shoulder, and knees. Her tibia was fractured, which was consistent with a fall.

Pagliaro suffered 26 stab wounds, four of which were to her neck, severing her carotid artery and jugular vein. She also had between 8 and 12 incised wounds clustered in her upper left chest area. Pagliaro died of multiple stab and incised wounds. Harvey further testified that using a knife without a guard can cause injuries to the inside of the user's hand because the hand slips over the blade.

¶ 41 Douglas Saul, a biologist at the Du Page County Crime Lab, testified regarding DNA tests he conducted on multiple items. A swab of material from Hoenig's nipple and left thigh had a DNA profile strongly consistent with defendant, as did the handle and blade of one of the knives found on the computer table in the dining room. The handle of that knife also had a minor profile consistent with Eme. The second knife on the computer table in the dining room had blood with a DNA profile strongly consistent with Pagliaro. The handle of that knife had a mixture of DNA, with the major donor being strongly consistent with Pagliaro and the minor profile being consistent with defendant. A swab of material from Hoenig's jeans contained a mixture of genetic material, with the major portion belonging to Hoenig and the minor portion belonging to Eme. Knives found in the dining room under the table and by a floor mat had blood on the handle and on the blade with a DNA profile strongly consistent with Pagliaro.

¶ 42 The knife in the upstairs bedroom that defendant threw in the direction of the investigating officers had blood with a DNA profile strongly consistent with defendant and a minor profile consistent with Hoenig. The handle of the knife found on the floor of that bedroom had a major DNA profile strongly consistent with defendant and a minor profile consistent with Hoenig; the blade of that knife had blood with a DNA profile strongly consistent with Hoenig. Two knives were found on the floor near the bed of that room. The blade and handle of one of those knives had blood with a DNA profile strongly consistent with defendant, whereas the handle of the other knife had a

mixture of defendant's and Hoenig's DNA. The mixture on the handle had a major profile strongly consistent with defendant and a minor profile consistent Hoenig. The blade of that knife had a DNA profile strongly consistent with defendant. Another knife found on the floor near a speaker in that bedroom had blood on the blade with a DNA profile strongly consistent withe Pagliaro. The handle of that knife also had a major DNA profile strongly consistent with Pagliaro and a minor profile consistent with Eme.

¶ 43 In addition, three condoms were tested for DNA. Some of the condoms had material with a DNA profile strongly consistent with Eme and a minor profile consistent with defendant. Saul agreed that the DNA results that were consistent with Eme on the knives and Hoenig's jeans were weak because the samples were small. Conversely, the presence of Eme's DNA on the condoms was strong. According to Saul, a man removing a condom after vaginal sex could transfer the female's DNA to his hands and then to other objects because a vagina is rich in DNA.

¶ 44 The parties stipulated that no fingerprints of any value were found on the knife in Pagliaro's chest, and that defendant's fingerprints were found on the knife thrown in the direction of Officers Chiappetta and Sinkule.

¶ 45 Defendant testified on his own behalf. On February 25, he and some of his friends went to a club named Ontourage. Defendant drank heavily and used cocaine. From there, they went to a club called Wet that stayed open until 4 a.m. Defendant bought some cocaine and used it. Defendant did not remember leaving Wet or driving home; his next memory was waking up in a hospital. Defendant had been told many things about what happened. However, his memory amounted to "nothing," and he did not know what to believe. When asked if he killed Pagliaro,

defendant had no idea what happened; he would never hurt her. Defendant could not say whether he did or did not kill Pagliaro. He "did not have the memory to say if [he] did or did not."

¶ 46 Defendant also had no memory of Hoenig; he had no idea whether he killed her. Defendant also had no memory of having sex with Eme. In fact, he did not remember meeting Eme or Mathis prior to his trial. Defendant did not remember throwing a knife at police. He did not know why he told the police on February 27 that he killed Pagliaro and Hoenig. He was in a lot of pain in the hospital, and the officers were telling him that he did remember, and that the physical evidence was going to show that he did these things.

¶ 47 3. Defendant's Third Statement to Police

¶ 48 At this point, trial counsel played for the jury a recorded interview of defendant that occurred at the hospital on February 28. At the beginning of the interview, defendant did not recall talking to the officers the day before in regard to the February 27 recorded interview. The officers told defendant he could "play that game." Eventually, however, defendant admitted pushing Pagliaro down the stairs. He thought she might have been convulsing, because she was twitching and moving all around, which is why he put something in her mouth and tied her up. Defendant stabbed her in the chest until she stopped moving, and dragged her by the feet to her bedroom.

¶ 49 When questioned about the first escort, defendant said they had sex three times and used three condoms. Defendant then remembered a "Black girl" knocking on his door to say that time was up. Defendant stepped outside and waved at the vehicle, which he thought was a gold Explorer. About 30 minutes or more later, Hoenig arrived. The first escort saw the blood on the wall and said it looked like defendant had had a crazy party. Hoenig also asked about the mark on the wall, and defendant said it was "puke."

¶ 50 Defendant could not remember if he wore a condom when having oral sex with Hoenig. Hoenig came out of the bathroom with a knife in her hand and then "came after" him. Defendant tried to stop her and grab the knife, which is how he received the cuts all over his hand. He stabbed her until she stopped moving.

¶ 51 4. Defendant's Fourth Statement to Police

¶ 52 Defendant also gave a videotaped statement to police on March 7, which was played for the jury. In this interview, defendant told officers that he thought he returned home on February 26 around 3:30 or 4 a.m. Defendant argued with Pagliaro about using her credit card for an escort, and he tried to drag her upstairs. Pagliaro said "just f**k me" and "get it over with" and then fell down the stairs. Defendant admitted stabbing her with a knife and then gagging her with something from her room. After that, defendant called 10 to 15 escort services.

¶ 53 At first, defendant said that Hoenig came out of the bathroom with a knife. When the police asked if the knife would show her fingerprints, defendant then changed his story and admitted that Hoenig never had a knife in her hand and never stabbed him. Defendant grabbed a knife because Hoenig pushed him. According to defendant, "things were not going right with the payment situation and stuff." After he stabbed Hoenig, he undressed her to make it appear as though they had sex. Defendant also admitted stabbing himself.

¶ 54 After the video was played, the questioning of defendant resumed. On cross-examination, defendant admitted that his original story that Hoenig killed Pagliaro and then came after him was a lie because he could not remember what happened. Defendant did not know why he said this to the officers. Defendant admitted that some of the details he gave to police did not originate from the police or from suggestive questioning on their part. For example, he told officers that he did not plan

on killing Hoenig because between killing Pagliaro and Hoenig's arrival, a different escort named "Katie" (Mathis) came over. Defendant also provided details such as using three condoms and seeing a Black girl from an escort service, who was wearing a furry coat, come to his house in a bronze Explorer.

¶ 55 Ruth Kuncel, a clinical psychologist, spent 22 hours with defendant. Kuncel opined that defendant provided police with an internalized, coerced, and false confession. Kuncel testified that defendant likely had very little independent recollection of events based on the severe physical and emotional distress he was experiencing at the time. Defendant's background of a demanding stepfather and grandfather made him susceptible to "good cop, bad cop" interrogation. In addition, he had very poor short-term memory and was prone to confabulation, a phenomenon in which elements that were not there originally are added to a story. In questioning defendant, police used interrogation techniques such as befriending him, calling him a liar if he deviated from the police story, guilting him by stating his family needed closure, and minimizing his conduct. In Kuncel's opinion, defendant did not have anti-social personality disorder but did exhibit personality traits of a psychopath.

¶ 56 The State offered one witness in rebuttal, psychologist Orest Wasyliw, who evaluated defendant. Wasyliw found no basis for the opinion that defendant's confession was false. Defendant responded appropriately to questioning, made consistent statements, denied doing some things, and changed his account when confronted with contradictory evidence.

¶ 57 C. Closing Arguments

¶ 58 During closing arguments, the State argued that defendant was guilty of the first-degree murders of Pagliaro and Hoenig. The State created a time line for the jury as to what transpired

during the early morning hours of February 26. It also explained how the DNA evidence showed that defendant was guilty. All of the knives that were tested contained the DNA of Pagliaro and Hoenig. Two of those knives also contained an "extremely low quantity" of Eme's DNA. The State argued that this made sense because defendant used three condoms during his sexual relations with Eme. According to the State, defendant "used three condoms, and got Eme's DNA from those condoms on his hands, as he removed them and transferred Eme's DNA, in minuscule quantities, to those two knives." The State argued that defendant's story changed from Hoenig killing Pagliaro to him admitting to both murders.

¶ 59 Trial counsel countered that defendant did not kill Pagliaro or Hoenig; instead, a group killed them. As proof of this theory, trial counsel argued that the knife found on the computer desk had defendant's blood on the blade and Eme's DNA on the handle. In addition, trial counsel pointed out that defendant's fingerprints and DNA were *not* found on the knife in Pagliaro's chest. Instead, defendant's fingerprints were found only on the knife he tossed in the officers' direction. Trial counsel explained the lack of fingerprints on the knives in general by arguing that the group wore gloves. While it was impossible to know who comprised the group that killed Pagliaro and Hoenig, trial counsel argued that Mathis and Eme were involved, and possibly Sawyer, who came to pick up Eme. It was suspicious, according to trial counsel, that neither Sawyer nor Eme remembered for sure whether Sawyer's uncle Darryl was their driver that night. Trial counsel could not be sure why the group killed Pagliaro.

¶ 60 The cuts on defendant's hand were his attempt to "catch the knife" and protect Pagliaro. Shortly after Pagliaro was killed, Hoenig arrived at defendant's door. Trial counsel argued that the group did not know whether Hoenig heard the "the screams, the yells, the fall down the stairs," and

all of the commotion going on inside. As a result, the group dragged Pagliaro into her bedroom and tried to conceal the mess. When Hoenig entered, she walked into a bad situation. Hoenig called Trowers from defendant's room and repeatedly said "Oh my God," as the group came into the room and killed her. According to trial counsel, defendant, the last witness, now needed to be eliminated. Defendant did not try to commit suicide but was attacked by the group. The group did not have time to finish the job, however, and they exited defendant's house and drove away in the car waiting for them outside. Defendant threw the knife at the investigating officers because he thought he was still under attack.

¶ 61 During rebuttal, the State argued that the defense theory was not plausible for several reasons. First, defendant confessed three times. Second, the evidence showed that Pagliaro was killed some amount of time before Hoenig was killed, rather than immediately before Hoenig was killed, as defense counsel argued. Third, there was no motive for the group to kill Pagliaro and Hoenig. Fourth, defendant admitted that he tried to commit suicide and that the wounds were self-inflicted. Fifth, Harkey testified that a person can cut their hand when they stab someone repeatedly because the knife gets wet with blood, slides down, and cuts the palm of the hand. Defendant had a cut on the palm of his hand.

¶ 62 The jury found defendant guilty of murdering both Pagliaro and Hoenig. In addition, the jury found that the offenses were accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. A sentencing hearing occurred on July 27, 2011, and defendant was sentenced to a term of natural life imprisonment. Defendant timely appealed.

¶ 63 II. ANALYSIS

¶ 64 A. Ineffective Assistance of Counsel

¶ 65 Defendant raises one argument on appeal, which is that his trial counsel was ineffective for failing to seek a jury instruction on self-defense or, alternatively, second-degree murder with regard to Hoenig's death.

¶ 66 Under the two-prong test for assessing whether trial counsel was ineffective articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result would have been different. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). "In demonstrating, under the first *Strickland* prong, that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct must be considered sound trial strategy." *Id*. Under the second prong, a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome. *Id*. In order to establish ineffective assistance of counsel, a defendant must satisfy both the performance and prejudice prongs of *Strickland*. *Id*. at 144-45.

¶ 67 Defendant argues that there was evidence at trial supporting instructions on self-defense or, in the alternative, second-degree murder. Such evidence, according to defendant, consists of his four statements to police and the "serious knife wounds" that he suffered, which required him to have surgery and be hospitalized. Defendant is correct that in *People v. Everest*, 141 Ill. 2d 147, 156 (1990), our supreme court noted that a defendant is entitled to instructions on those defenses which the evidence supports, even in instances where the evidence is "slight" or where it is inconsistent with defendant's own testimony. Here, the State does not argue that there is no evidence supporting an instruction on self-defense or second-degree murder. Rather, it argues that the decision not to

pursue these defenses was a matter of sound defense strategy. In analyzing defendant's claim, it is helpful to begin by summarizing defendant's four statements to police as well as the defense theory advanced by trial counsel.

¶ 68 In his first (February 26) statement to officers Chiappetta and Sinkule, who initially responded to the scene, defendant told them that Hoenig had grabbed "all the knives" and killed Pagliaro. In his second (February 27) statement, which occurred the following day when he was in the hospital, defendant said that he killed Hoenig in self-defense when she came out of the bathroom with a knife. Initially, defendant said that Hoenig stabbed him and slit his wrists. When the officers questioned defendant's version of events, defendant then admitted killing Pagliaro and covering up the evidence before Hoenig arrived. Defendant denied planning to kill Hoenig. However, he changed his story regarding his injuries, claiming that Hoenig had stabbed him only once or twice but that the rest of the injuries to his wrists and chest were self-inflicted because he wanted to kill himself.

¶ 69 In his third (February 28) statement the next day, defendant was still in the hospital. Defendant again admitted killing Pagliaro and again said that Hoenig exited the bathroom with a knife in her hand. According to defendant, Hoenig "came after" him, and his hands were cut while trying to catch the knife. Defendant admitted stabbing her until she stopped moving. In his fourth (March 7) statement, defendant once again admitted killing Pagliaro and once again said that Hoenig came out of the bathroom with a knife in her hand. When the officers asked if the knife would show Hoenig's fingerprints, however, defendant admitted that she never had a knife in her hand and never stabbed him. He also admitted inflicting stab wounds on himself.

¶ 70 During opening statements, the State argued that in light of defendant's admission that he killed Pagliaro, it was "absurd" to believe that defendant killed Hoenig in self-defense. During his opening statement, trial counsel chose not to present a theory of self-defense. Instead, trial counsel argued the theory that defendant did not kill anyone; that he was not claiming self-defense or that the killings were an accident; and that rather than being the killer, he was nearly the third victim. According to trial counsel, a "group" of people killed Pagliaro and Hoenig. One of the group was Eme, whose DNA was found on the handles of two knives. Counsel further argued that after witnessing the horror of seeing Pagliaro killed, defendant could not remember what happened, yet the police managed to build a case against him. Consistent with this theory, trial counsel attempted to poke holes in Eme's and Mathis's testimony during cross-examination, and he called psychologist Kuncel, who opined that defendant provided police with a false, coerced confession.

¶ 71 During closing arguments, trial counsel again presented the theory that a "group" killed Pagliaro and Hoenig, which consisted of Mathis, Eme, and possibly Sawyer, who came to pick up Eme. In support of this theory, trial counsel argued that defendant's DNA was not found on the knife in Pagliaro's chest, and that his fingerprints were only found on the knife he threw in the officers' direction. The theory was that Pagliaro awoke to all of these strangers in the house, who killed her. Then, Hoenig arrived and was killed because she may have been a witness to Pagliaro's murder. Defendant's hand injuries were caused by his attempt to catch the knife and protect Pagliaro. Trial counsel argued that defendant did not try to commit suicide; rather, he was the victim of the group's attack. Defendant was portrayed as a son who loved his mother and could never hurt her. Counsel also elicited testimony from the officers that upon arriving at the scene, they noticed a watery trail in defendant's driveway, as though a car had been sitting there with the engine running.

Counsel argued that the get-away car left this trail, and that the group drove away minutes before the police arrived.

¶ 72 In arguing that trial counsel was deficient for failing to tender instructions on self-defense or second-degree murder, defendant acknowledges that whether to rely on a particular theory of defense is a matter of trial strategy. See *People v. Martin*, 236 Ill. App. 3d 112, 123 (1992) (generally, counsel's decision to argue one theory of defense to the exclusion of another is considered trial strategy, and defense trial strategy will not support an ineffective claim unless the strategy is unsound). Still, defendant argues that an equally plausible theory to Hoenig being killed by the group was that Hoenig was part of the group that killed Pagliaro, and that defendant killed her in self-defense (or in an unreasonable belief as to the need for self-defense) because he thought Hoenig was attacking him. Defendant reminds this court that defenses may be inconsistent. See *Everest*, 141 Ill. 2d at 156. In addition, he points out that during his testimony, he did not deny killing Hoenig; rather, he testified that he had no memory of killing her. As a result of his lack of memory, defendant argues that his statements to police as to how Hoenig died take on significance. In his statements, as summarized above, defendant admitted killing Hoenig.

¶ 73 Beginning with self-defense, it is an affirmative defense (720 ILCS 5/7-14 (West 2006)), the raising of which necessarily constitutes an admission by the defendant that he committed the crime for which he is being prosecuted (*People v. Chatmon*, 381 Ill. App. 3d 890, 897 (2008)). See 720 ILCS 5/7-1(a) (West 2006) ("A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force"). On the other hand, second-degree murder is a lesser mitigated offense of first-degree murder. *People v. Rodriguez*, 336 Ill. App. 3d 1, 17

(2002). It is distinguished from self-defense only in terms of the nature of the defendant's belief at the time of the killing. *Id;* see 720 ILCS 5/9-2(a)(2) (West 2006) (a person commits the offense of second-degree murder when he commits the offense of first-degree murder and "if at 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"). Therefore, if the defendant's belief as to the use of force was reasonable, self-defense may apply; conversely, if the defendant's belief was unreasonable, a second-degree murder conviction may be appropriate. *Rodriguez*, 336 Ill. App. 3d at 17.

¶ 74 While defendant argues that either of these instructions should have been offered in the alternative, he recognizes that had trial counsel tendered a self-defense instruction to the jury, a second-degree murder instruction would also have been required. See *People v. Washington*, 2012 IL 110283, ¶ 56 (when the evidence supports the giving of a jury instruction on self-defense, an instruction on second-degree murder must be given as a mandatory counterpart).

¶ 75 In any event, we determine that trial counsel's decision not to pursue a theory of self-defense and/or second-degree murder was sound for several reasons. First, defendant's statements to police were inconsistent regarding Hoenig. The differing versions ranged from Hoenig killing Pagliaro; Hoenig exiting the bathroom with a knife and stabbing defendant; Hoenig never having a knife and never stabbing defendant but only pushing him; and defendant's wounds being self-inflicted. A self-defense theory or second-degree murder theory would have forced defendant to admit that he killed Hoenig even though significant portions of his statements did not support the theory that he killed her with a reasonable (or unreasonable belief) that his conduct was justified. As stated, defendant's statements culminated in defendant admitting that Hoenig did not even have a knife and that his wounds were self-inflicted. Given that defendant's statements incriminated him as much or perhaps

even more than they supported a self-defense and/or a second-degree murder theory, trial counsel likely determined that it was better to argue that defendant was completely innocent, and that the group killed Hoenig after killing Pagliaro. See *People v. Martin*, 236 Ill. App. 3d 112, 123 (1992) (where counsel reasonably believes that a defense is merciless, he may strategically refrain from seeking an instruction).

¶ 76 Second, presenting the theory that defendant was an innocent victim whose statements were false and coerced allowed trial counsel to discredit *all* of defendant's statements instead of having to explain away the incriminating portions. Discrediting the statements as a whole allowed trial counsel to argue that defendant, despite his statements to police, did not kill Pagliaro or Hoenig. As stated, while some portions of defendant's statements supported the theory that defendant killed Hoenig in self-defense (or in an unreasonable belief as to the need for self-defense), some portions did not support that theory, and three of the four statements contained admissions that defendant killed Pagliaro. Therefore, had trial counsel used defendant's statements to support a self-defense theory with the killing of Hoenig, he would have had the impossible task of arguing that certain portions of defendant's statements were credible and other portions were not, including the three statements in which defendant admitted killing Pagliaro. By advancing the theory that all of the statements were false and coerced, and that defendant did not remember what happened that night, trial counsel was not forced to defend certain portions of the statements and reject others.

¶ 77 In furtherance of this theory, trial counsel elicited the testimony of psychologist Kuncel, who testified that defendant likely had very little independent recollection of events based on the severe physical and emotional distress he was experiencing at the time. Kuncel opined that defendant provided police with an internalized, coerced, and false confession. In addition, trial counsel honed

in on the fact that two of defendant's statements were made in the hospital shortly after his surgery, which further weakened their credibility. Finally, defendant's testimony was consistent with this theory in that he did not remember anything after leaving the night club until he woke up in the hospital. This theory allowed trial counsel to portray defendant as a son who loved Pagliaro, who lost all memory of the events, and who was coerced by police into making a false confession.

¶ 78 Third, instructions on self-defense and/or second-degree murder were not merely inconsistent with the defense theory presented, such instructions were totally incompatible with the defense theory that the group killed Hoenig because she was a possible witness to the killing of Pagliaro. Trowers testified that after Hoenig arrived at defendant's house, she called him and said, as in disbelief, "What's in your hand? Oh my God. Oh my God. Oh my God." Then, the line went dead and officers arrived at the scene not long after. The State repeatedly emphasized Trowers's testimony as clear evidence of defendant's guilt. While defendant argues that it was equally plausible that Hoenig was part of the group that attacked Pagliaro, Trowers's testimony did not support such a theory. Instead, Hoenig's distress call to Trowers supported the theory that Hoenig was not the aggressor but was in trouble and being attacked. The theory was that the group killed Hoenig and then tried to kill defendant but ran out of time because they knew Hoenig's phone call gave them limited time to finish the job. The life-threatening injuries defendant suffered lent credibility to the theory that defendant, like Pagliaro and Hoenig, was a victim who had been brutally attacked. See *People v. White*, 2011 IL App (1st) 092852, ¶70 (defense counsel may have concluded that a self-defense theory would have been incompatible with the theory presented, since it would require defendants to admit to the shootings; and, the same was true for the decision to forego the second-degree instruction: counsel could have reasonably believed that the instruction would have

converted a likely acquittal into a likely conviction of the lesser crime). Similar to *White*, defense counsel in this case reasonably believed that not only was a self-defense theory incompatible with the defense theory presented, but that presenting a second-degree murder instruction would have increased the likelihood of a second-degree murder conviction as opposed to an acquittal of first-degree murder.

¶ 79 Fourth, the fingerprint and DNA evidence supported the defense theory that defendant had nothing to do with Hoenig's death. Defendant's fingerprints were not found on any of the knives except the one he threw in the officers' direction, and defendant's DNA was not found on the knife in Pagliaro's chest. Conversely, Eme's DNA was found on the handle of one of the knives found on the computer table, and defendant's blood was on the blade. Eme's DNA was also found on the handle of another knife. Trial counsel used defendant's lack of fingerprint evidence on the knives and Eme's DNA on two knife handles to further the theory that Eme and the group killed Pagliaro and Hoenig.

¶ 80 In sum, trial counsel made the strategic decision to argue that defendant was innocent and that the State failed to prove its case. Though trial counsel was not successful in convincing the jury, it does not mean he was deficient for pursuing this theory. See *White* 2011 IL App (1st) 092852, ¶70 (although the defendants' attorneys were not ultimately successful in their strategic decision to argue that the State failed to prove its case, it does not mean that the attorneys performed unreasonably and rendered ineffective assistance); see also *Martin*, 236 Ill. App. 3d at 124 (it was not objectively unreasonable to only give the jury the choice of convicting the defendant of first-degree murder or acquitting him of any crime; it is often a valid trial strategy to not give a lesser-offense instruction in order to prevent a compromise verdict and to force the jury to debate the

defendant's guilt or innocence); see also *People v. Jones*, 234 Ill. App. 3d 1082, 1098 (1992) (trial counsel was not ineffective for failing to tender jury instructions on self-defense or voluntary manslaughter where the instructions would have damaged the defendant's credibility; the theory of self-defense was inconsistent with the theory put forth at trial that the defendant was not involved in the shooting and his confession was coerced).

¶ 81 Finally, the two cases relied upon by defendant are distinguishable. In the first case, *People v. Jaffe*, 145 Ill. App. 3d 840 (1986), the defendant was convicted of the murder of Patricia Dean and the attempted murder of her husband, Ghazi Dean. In *Jaffe*, the defendant and Ghazi provided conflicting stories as to the events surrounding Patricia's death. *Id*. at 844. The defendant testified that he received permission to stay at the couple's residence and that he arrived there sometime after midnight. *Id*. at 852. After knocking on the door, the defendant let himself in, entered the semi-dark living room, and was confronted by a wild-eyed Ghazi, who was holding a pistol in his right hand. *Id*. Ghazi pointed the gun at the defendant, and a fight ensued. *Id*. As a result of the struggle, the defendant lost consciousness for several minutes. *Id*. at 852-53. The defendant then woke up and ran for his life. *Id*. at 853. Even though self-defense was the only defense raised by the defendant to the attempted murder charge, trial counsel did not tender any self-defense instructions to the jury. *Id*. at 852-53. The defendant appealed, and the reviewing court found that counsel was deficient. *Id*. at 853. Because self-defense was the "sole defense" to the attempted murder charge, the court determined that counsel's failure to tender any instructions on the defense could not be explained on the basis of a trial strategy. *Id*.

¶ 82 The court in *Jaffe* also went on to find that defendant satisfied the prejudice prong of *Strickland*, because even if the jury believed the defendant's testimony that he used force to protect

himself and grabbed the gun after Ghazi had pointed it at him, the jury would have found him guilty of attempted murder on the basis that the defendant knew that grabbing a gun and wrestling with the gunman created a strong probability of great bodily harm. *Id*. at 855. Absent instructions on self-defense, the court reasoned that a conviction would result even if the jury concluded that the defendant reasonably believed such force was necessary to prevent imminent death or great bodily harm to the defendant. *Id*. The State filed a petition for rehearing, arguing that the defendant could not establish prejudice. *Id*. at 860. According to the State, once the reviewing court affirmed the defendant's murder conviction of Patricia, no jury on retrial could acquit the defendant of the attempted murder charge of Ghazi. The court disagreed, noting that the attempted murder charge was based on different facts which occurred in a different room of the house, and that the defendant offered no specific testimony regarding Patricia's murder. *Id*. The court determined that the jury could have convicted the defendant of Patricia's murder on the basis of some of Ghazi's testimony and also concluded that a reasonable doubt existed regarding the defendant's commission of attempted murder. *Id*.

¶ 83 Defendant cites *Jaffe* in anticipation of the State's probable argument regarding the prejudice prong of *Strickland*, which is that no reasonable jury would acquit defendant of Hoenig's murder on retrial. However, we have already resolved this case on the deficiency prong. The case at bar is distinguishable from *Jaffe* in that self-defense was not the sole defense available to defendant. As explained above, trial counsel rejected a self-defense and/or a second-degree murder theory in favor of a theory of total innocence and false, coerced confessions to the police. Because trial counsel's strategy was sound, we need not consider defendant's arguments premised on *Jaffe* regarding the prejudice prong.

¶ 84 In the second case, *People v. Peery*, 11 Ill. App. 3d 730 (1973), the defendant was convicted of stabbing his wife to death. The defendant testified that his wife said she had made up her mind to kill him and that she reached into the sink and then struck him on the head with a heavy object. *Id*. at 733. The next thing the defendant remembered was walking home, calling the police, and submitting peacefully to arrest. *Id*. During the jury instruction conference, trial counsel submitted an instruction on the lesser included offense of voluntary manslaughter, but the court rejected the proposed instruction based on the facts of the case. *Id*. While defendant cites this case for the proposition that an accused asserting self-defense need not remember and testify to administering the fatal wounds, this case is distinguishable in a key respect.

¶ 85 The issue in *Peery* was whether there was any evidence which, if believed by the jury, would reduce the offense from murder to manslaughter. *Id*. Though the State makes the argument that *Peery* differs from the case at bar because the defendant in *Peery* did not remember stabbing his wife, whereas defendant here denied any involvement in the killings, this is not entirely accurate. In this case, defendant, like the defendant in *Peery*, could not remember what happened and did not know if he did or did not kill Pagliaro and Hoenig. Trial counsel used defendant's lack of memory to support the theory that defendant was innocent and that his statements were coerced. However, as stated above, there was evidence in defendant's statements to police that would have supported a self-defense and/or a second-degree murder theory. Despite such evidence, trial counsel opted to pursue a theory other than self-defense. Therefore, the issue in *Peery*, which was whether the defendant was entitled to a manslaughter instruction after requesting it, is not present here. Because *Peery* did not consider whether trial counsel was ineffective for failing to tender certain instructions to the jury, it does not aid defendant's argument on appeal.

¶ 86 Having determined that defendant failed to satisfy the deficiency prong of the *Strickland* test, it is not necessary to consider the prejudice prong. See *People v. Jackson*, 205 Ill. 2d 247, 263 (2001) (where the defendant failed to establish that counsel was deficient, it was not necessary to consider the prejudice prong of the *Strickland* test).

¶ 87 III. CONCLUSION

¶ 88 For the reasons stated, trial counsel did not provide ineffective assistance of counsel, and the judgment of the circuit court of Du Page County is affirmed.

¶ 89 Affirmed.