2012 IL App (2d) 111022
No. 2-11-1022
Order filed September 13, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-2613
ELAUTERIO PACHECO,	)	Honorable Mary Karen Simpson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE MCLAREN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: In denying defendant's motion to suppress statements he made to police, the trial court did not improperly consider defendant's denial that he made such statements, because it did not consider defendant's denial as substantive evidence and considered other factors including defendant's credibility. Evidence was overwhelming and the possibility of a different result was nil.

Defendant was not denied effective assistance of counsel where defense counsel presented a compulsion defense; although such defense was not available to defendant, defense counsel subjected the State's case to meaningful adversarial testing throughout the case.

¶ 1 Defendant, Elauterio Pacheco, appeals from his conviction of unlawful delivery of controlled substance (720 ILCS 570/401(a)(2)(D) (West 2008)). On appeal defendant contends that: (1) the trial court erred by denying his motion to suppress the statement he made to police officers; and (2) he was denied effective assistance of counsel by defense counsel's presentation and argument of a compulsion defense. For the reasons stated below, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On October 13, 2009, defendant was charged in a two-count indictment. Count I charged defendant with unlawful delivery of a controlled substance, a Class X felony, in violation of section 402(a)(2)(D) of the Criminal Code of 1961 (Code) (720 ILCS 570/402(a)(2)(D) (West (2008)), in that, on or about September 10, 2009, defendant knowingly and unlawfully delivered to another, more than 900 grams of a substance containing cocaine. Count II charged defendant with unlawful possession of a controlled substance, a class 1 felony, in violation of section 401(a)(D) of the Code (720 ILCS 570/401(a)(D) (West 2008)), in that, on or about September 10, 2009, defendant knowingly and unlawfully possessed more that 900 grams of a substance containing cocaine.

¶ 4 On October 22, 2010, defendant filed a "Motion to Suppress Statements." During the hearing on the motion to suppress, Elgin police detective Mario Elias testified as follows. Elias had worked as a police officer and detective in the field of narcotics for the past 15 years in connection with international, the United States, and numerous state, county and local governments. Elias was born in Cuba and spoke fluent Spanish. He had been qualified on numerous occasions in the Kane County and federal courts as an expert in the area of narcotics distribution.

¶ 5 Elias continued to testify as follows. He interviewed defendant at the Elgin police department on the day defendant was arrested in the instant case. Detective Doug Neff was also

present. Elias and Neff wore street clothes and neither detective had a gun or handcuffs. Defendant was not handcuffed. Defendant indicated that he spoke a little bit of English but that he was more comfortable speaking Spanish. Therefore, the interview was conducted in Spanish. Elias "read [defendant] his *Miranda* rights from a preprinted form and asked [defendant] if he understood his rights, and at that point [Elias] asked [defendant] to read the form." The form was in Spanish. Defendant told Elias that he could read Spanish. Defendant "[a]ppeared to read [the form] for about a minute and a half or so." Defendant did not ask any questions during that time. Defendant then signed the form. Elias indicated to defendant that signing the form meant that defendant understood his rights. Defendant never indicated that he did not understand the *Miranda* waiver. Defendant was calm, coherent, lucid, apologetic, and remorseful. He did not seem confused and he never asked for an attorney. The interview lasted about 20 minutes.

¶ 6 Elias also testified as follows. After defendant signed the *Miranda* form, defendant stated that he picked up two kilograms of cocaine from a friend that day "on consignment" and brought it to "Mr. Lara," who was going to sell it to his friend, and that defendant was "looking" to make about $500 per kilogram. Elias tried to "get more details about where he had received the cocaine from," but defendant would not answer. Defendant said he took full responsibility for his actions and that he was fearful for his family; people were being killed in Mexico for talking too much and he did not want to put his family in jeopardy. When defendant was asked questions about who supplied the cocaine, he appeared afraid.

¶ 7 During cross-examination, Elias testified as follows. Elias did not indicate in his report that he read the entire *Miranda* form to defendant or whether he asked defendant whether he could read Spanish. Elias did not ask defendant to read the *Miranda* form aloud in Spanish. Defendant

appeared to be reading the form because defendant "was looking down, running his finger through it as if he's reading." After defendant read the form, defendant said that he understood his rights. Elias did not ask defendant specific questions about his rights. Neff may have been wearing a mask to protect his identity.

¶ 8 Defendant testified at the hearing on the motion to suppress as follows. Defendant was 29 years old at the time of the hearing. Defendant was born in Sinaloa, Mexico. He grew up in a small house with 10 or 12 others and attended school for four to six months. He had to work to help his mother. No one taught him how to read or write. He learned to read a little bit in school. He taught himself how to write his name. He came to the United States when he was 20 years old to work to help his mother. He found work as a roofer. He had no experience with the police except when he was issued a traffic ticket. When he was arrested for the offenses at issue, he was frightened because the officers' guns were drawn. He was handcuffed while in the police squad car. The police brought defendant to a room and left him there for "a night or 24 hours." The door was locked. Defendant was nervous. One of the men who came to speak to defendant wore a ski mask. They spoke to him in Spanish. Defendant understood Spanish. The officers never read anything to defendant. One of the officers handed defendant a piece of paper but did not explain to defendant what it was, and he did not ask defendant to read the paper. The officer "just gave [the paper] to me and said sign it." Defendant did not feel like he had a choice. Defendant did not read the paper because "I don't understand very much, like reading" and because the officer "told me to sign it." When defendant answered questions asked by one of the officers, he was nervous.

¶ 9 During cross-examination, defendant examined the *Miranda* form and testified that the signature on the form was his. Defendant also testified as follows. While on the witness stand,

during the hearing, defendant had answered questions posed to him before the interpreter completed translation from English into Spanish. When defendant was asked if he told the police during his interview that he was not willing to talk about other people, defendant testified, "I don't know what you are talking about." Defendant denied telling the police that he was unemployed and needed money, and that he only sold a couple of ounces of cocaine at a time.

¶ 10 The signed *Miranda* form was admitted into evidence.

¶ 11 After argument on the motion to suppress, the trial court denied defendant's motion.

¶ 12 The State nol-prossed count II of the indictment and the charge was dismissed. On August 15, 2011, a two-day jury trial began. Defendant was tried by jury on count I only, unlawful delivery of a controlled substance.

¶ 13 At trial, Elgin police detective Miguel Pantoja testified as follows. In 2008 he was assigned as a narcotics detective with the Elgin police department and worked in an undercover capacity, investigating drug cases. On September 2, 2009, Pantoja was investigating Raul Lara and purchased 8.3 grams of cocaine at the Acapulco restaurant in Elgin, Illinois. Pantoja told Lara that he wanted to buy two kilograms of cocaine and was "looking for some prices." Lara told Pantoja that he would contact his supplier and get back to him. Lara called Pantoja and said that he had spoken with his supplier and that he could "give me cocaine for $29,500 a kilogram." On September 8, 2009, Pantoja told Lara he would think about it and call back. On September 10, 2009, Pantoja called Lara back and agreed to buy two kilograms at $29,500 each. Although a court had granted an overhear order, Pantoja did not record the conversation because "the equipment did not work."

¶ 14 Pantoja also testified as follows. He called Lara on September 9, 2009, and recorded the conversation. The two men spoke in Spanish. They planned to meet at the Acapulco restaurant the

following day, September 10. Before the meeting, Lara called Pantoja at approximately 10:31 a.m. and asked how much longer it would take before Pantoja arrived at their meeting. The call was recorded. Pantoja drove alone in an unmarked pick-up truck and parked in the Acapulco restaurant at about noon. Lara arrived in a Dodge Neon, which was driven by Lara's wife, and pulled up next to the passenger side of Pantoja's truck. Lara entered Pantoja's vehicle. Elias was nearby in a Mercedes to assist in undercover capacity; to "display a money flash roll to Lara." At some point, Pantoja called Elias and Elias parked in front of Pantoja's car. Pantoja and Lara exited Pantoja's truck and walked to the passenger side of Elias' Mercedes. Elias showed Lara money that was in a backpack and Elias drove away. Lara and Pantoja returned to Pantoja's truck and Lara made phone calls. Pantoja and Lara then went inside the Acapulco restaurant at approximately 12:15 p.m. Lara did not have the cocaine at the restaurant and Lara told Pantoja that his supplier would not go the restaurant. Pantoja did not want to go to the supplier's house on Crystal Street because it seemed dangerous. The men left the restaurant and Pantoja met with the other detectives and officers to discuss how to proceed. The meeting between Pantoja and Lara was recorded. The recordings were admitted into evidence and the translations of the recordings were published to the jury.

¶ 15 Pantoja further testified that when the detectives and officers met up, they determined that, because the supplier's house seemed to be in a safe area, Pantoja should go there and proceed with the deal and meet "whoever else is with Lara." Pantoja called Lara and told Lara that he was coming to the house on Crystal Street to purchase the cocaine. Pantoja drove alone and parked in front of the house. Lara walked from the house toward Pantoja's truck and entered it. Lara told Pantoja that he wanted him to meet "somebody." Lara exited the vehicle, walked back to the house and came back with defendant. Defendant and Pantoja discussed that the cocaine was not at the house and that

defendant had to drive to Hanover Park to get it. Defendant then walked back toward the house. At some point, defendant drove away in a Jeep. Lara and Pantoja waited in Pantoja's truck until defendant returned. When defendant returned, defendant opened the driver's side door of his Jeep. At the same time, Lara walked to the front passenger side of defendant's Jeep. Lara and defendant had a discussion and then Lara and defendant walked toward Pantoja's truck. Lara, holding a grocery bag, opened the front passenger door of Pantoja's truck, sat down, and "hand[ed] [Pantoja] the cocaine." After Pantoja made sure that the bag contained cocaine, he called the other detectives who were in the area and "gave the arrest signal." Defendant and Lara were taken into custody and Pantoja gave the cocaine to Detective Craig Tucker.

¶ 16 During cross-examination, Pantoja testified as follows. He had made untrue statements to Lara. Pantoja falsely told Lara that he was from Milwaukee and that he had been in the hospital as part of a robbery attempt. Pantoja did not know who Lara was talking to during the numerous phone calls Lara made to his "supplier." Many people were at the house on Crystal, including Lara's wife, sister-in-law, brother-in-law, and others, but Pantoja could not run background checks on them because he did not know their names. Pantoja never saw defendant handle the bag that contained the cocaine. Defendant never asked Pantoja about money.

¶ 17 Elias essentially repeated the testimony he gave at the suppression hearing. However, Elias added the following. After the arrest signal was given, defendant was taken into custody and Elias interviewed defendant. Elias explained to defendant that he was under arrest for delivery of a controlled substance and that he had actually been dealing with an undercover police officer. Defendant seemed to understand that charge.

¶ 18 Elias also testified regarding his involvement leading up to defendant's arrest. This testimony essentially corroborated Pantoja's testimony. Elias stated that, while Pantoja was at the Crystal Street location, Elias was in the area and spoke with him periodically on the phone; however, Elias could not see Pantoja.

¶ 19 During cross-examination, Elias testified as follows. During a briefing on the day defendant was arrested, defendant's name was never mentioned. Elias did not see defendant at the Acapulco restaurant. Elias did not see defendant at the Crystal Street location. During the interview, Neff had a mask on. Elias did not ask defendant about his "schooling," or whether he understood Spanish. Elias could not recall if he asked defendant if he could read Spanish. Elias did not ask defendant to read the *Miranda* form aloud. Although their interview could have been recorded, Elias did not record it. Elias testified that thousands of people have been killed due to the drug trade since 2009.

¶ 20 Neff testified as follows. On the day defendant was arrested, Neff was the "case agent" for the operation. Fifteen police officers were involved in the operation known as a "buy bust." Neff led both briefings that day; the briefing before Pantoja met Lara at the Acapulco restaurant and the briefing before Pantoja drove to the house on Crystal Street. At the briefings, Neff gave assignments, placed the overhear wire on Pantoja, and followed Pantoja's truck. Neff was responsible for keeping in contact with Pantoja and Elias. Neff was in the area of Pantoja's truck on Crystal Street, but did not see what happened.

¶ 21 During cross-examination, Neff testified as follows. The specific target of the "buy bust" operation was Lara and not defendant. During the briefings, defendant's name was never mentioned.

¶ 22 Tucker testified as follows. On the day of defendant's arrest, Tucker was parked in the parking lot outside the Acapulco restaurant during Pantoja's meeting with Lara. Tucker wore an

eavesdropping device and heard Pantoja's and Lara's conversation when they entered the Acapulco restaurant. Tucker also went to the Crystal Street house area and saw and heard some of the events. Tucker was assigned to "watch [Pantoja] and make sure everything is okay." After the arrest signal was given, Pantoja gave Tucker the bags that Lara had given to Pantoja. Tucker field-tested the contents, which tested positive for cocaine, and he processed the evidence. Tucker was also at both briefings that day. A forensic scientist also tested the contents of one of the bags. Tucker's remaining testimony was consistent with Pantoja's.

¶ 23 During cross-examination, Tucker testified as follows. Because Tucker did not speak Spanish, he did not understand Lara's and Pantoja's conversations at the Acapulco restaurant. Tucker did not hear defendant's name during the conversations at the restaurant or at the Crystal Street location or at the briefings, and did not see defendant at the Acapulco restaurant. Tucker could not hear the conversation between Lara and defendant while they were at defendant's Jeep, nor could he see what they were doing. However, Tucker saw Lara bring a bag to Pantoja.

¶ 24 Elgin police officer Colin Fleury testified as follows. Fleury was part of the security team on the day defendant was arrested. He was assigned to protect Pantoja and Elias and assist in making arrests. Fleury was present at the briefings that day. Fleury's remaining testimony was consistent with Pantoja's.

¶ 25 During cross-examination, Fleury testified as follows. Defendant did not fight with Fleury or resist in any way when the arrest was made.

¶ 26 The State rested. Defense counsel moved for a directed verdict. The trial court denied the motion.

¶ 27 Defendant testified as follows. He was born in Sinaloa, Mexico, and lived in a small house, on a farm with his grandparents. As a child, he worked on the farm instead of attending school and never learned to read or write. Defendant came to the United States when he was 19 years old and began working at a roofing company in Palatine, Illinois. Defendant worked for a man named Manuel who owed him $500. On the day of the alleged offense, Manuel called defendant and asked him to come over to his house. Defendant complied because he thought Manuel was going to pay him. Instead, when defendant arrived, Manuel told defendant that he had to talk to someone and act like he was selling drugs and that if he refused, defendant or his family would be in danger. Defendant was afraid because he knew that people were being killed in Sinoloa, Mexico. Defendant talked to the person and then drove to Route 59 and Schaumburg Road, as Manuel had instructed him to do. At that location, a man named Moreno gave defendant a bag and told defendant to take it back to the previous location. Moreno told defendant not to say anything and that "if something happened and I said something, that he would do something bad to my family, that he knew where I lived." Defendant was afraid, so he went back to Manuel's house in Elgin and called Manuel. Defendant got into Pantoja's truck with Lara, as Manuel told him to. Defendant had met Lara previously at Manuel's house. Soon after, defendant was arrested at gunpoint.

¶ 28 Defense counsel requested the trial court to instruct the jury on the defense of compulsion. After argument, the trial court denied defense counsel's request, stating that there was no evidence of imminent threat or harm. After argument by counsel and jury deliberation, the jury found defendant guilty of the charged offense.

¶ 29 Defendant filed a motion for a new trial on September 6, 2011. After a hearing, the trial court denied defendant's motion on October 11, 2011. On the same day, defendant was sentenced

to 15 years' imprisonment and the trial court imposed a $300,000 drug fine, plus fees and costs. Defendant received a $5-per-day-credit for 761 days spent in pretrial custody. Defendant filed his notice of appeal on October 12, 2011.

¶ 30 II. ANALYSIS

¶ 31 A. Motion to Suppress

¶ 32 On appeal, defendant contends that the trial court erred by denying his motion to suppress the statements he made to the police while in custody. Defendant contends that we must review this issue *de novo*, while the State contends the standard of review is whether the trial court's decision was against the manifest weight of the evidence. Both parties are correct.

¶ 33 When reviewing a trial court's decision as to whether a defendant's confession was voluntary, we apply a bifurcated standard of review. *People v. Brown*, 2012 IL App (1st) 091940, ¶ 26. We accord great deference to the trial court's findings of fact and credibility determinations, and such findings and determinations will be reversed only if they are against the manifest weight of the evidence. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding is unreasonable, arbitrary, or not based on the evidence presented." *People v. Deleon*, 227 Ill. 2d 322, 332 (2008). However, we review *de novo* the ultimate question posed by the legal challenge to the trial court's ruling on a suppression motion. *People v. Nicholas*, 218 Ill. 2d 104, 116 (2005).

¶ 34 Defendant argues that, in assessing defendant's credibility, the trial court improperly considered Detective Elias's testimony regarding the substance of defendant's "statement to the police." Further, the trial court improperly considered defendant's testimony on cross-examination that he "denied making the statement[s]." Defendant cites *Lee v. Mississippi*, 332 U.S. 742 (1948);

People v. Norfleet, 29 Ill. 2d 287 (1963); and *People v. Wilson*, 66 Ill. App. 3d 330 (1978) to support his argument.

¶ 35 Nothing in *Lee*, *Norfleet*, or *Wilson* precludes a trial court from considering the statements a defendant makes to the police to assess credibility or determine whether the statements were voluntarily given. Further, it is well settled that a trial court may consider a defendant's testimony during a suppression hearing to determine credibility and to determine whether the alleged statement was voluntarily given. See, *e.g.*, *People v. Poole*, 222 Ill. App. 3d 689, 699 (1991). *Lee*, *Norfleet* and *Wilson* preclude a trial court from denying a defendant's motion to suppress based solely on the defendant's testimony that he did not confess. The trial court in this case did not deny defendant's motion to suppress based solely on his testimony that he did not confess.

¶ 36 Rather, in this case, the trial court denied defendant's motion to suppress after making the following findings of fact. Detective Elias testified that he read defendant his *Miranda* rights from a form and then gave that form to defendant. Defendant appeared to read the form because he ran his finger down the form. Defendant then signed the form. Defendant's "penmanship and writing of his name [was] extremely legible and done very nicely." The trial court believed Detective Elias' testimony that defendant was calm, apologetic and remorseful, and he never indicated that he did not understand what was going on. Defendant seemed coherent, lucid, and not confused and was able to answer all Elias' questions. During the hearing, defendant "had no difficulty understanding the questions that were asked of him, and when he did not understand, he came right out and said, 'I don't understand.' " When the question was asked again, defendant understood. Elias spoke Spanish to defendant during the interview. During the hearing, defendant was able to understand questions in English before translation into Spanish and understood the questions when they were

translated into Spanish. Defendant did not argue that he was coerced in any manner before he spoke with Elias. Further, defendant understood his rights because he exercised his right to refuse to answer certain questions regarding the source of the cocaine. Finally, the trial court questioned defendant's credibility because defendant denied answering questions that would have helped him. For example, defendant denied telling the police that he did not know Lara and that he sold only a couple of ounces of cocaine a month. Thus, the trial court did not rely, solely, if at all, on defendant's denial of a confession. Rather, in denying the motion to suppress, the trial court considered numerous factors, including defendant's denial that he made helpful statements to the police. Thus, *Lee*, *Norfleet* and *Wilson* are distinguishable from the case at bar. Further, we determine that the trial court's findings are not against the manifest weight of the evidence and it properly denied defendant's motion to suppress.

¶ 37 Defendant cites *People v. Galarza*, 391 Ill. App. 3d 805 (2009), and *People v. Torres*, 200 Ill. App. 3d 253 (1990), to support his argument that "the contents of a defendant's statements to the police are inadmissible on a suppression motion." In *Galarza*, the defendant argued that this court lacked jurisdiction because the State could not establish that its ability to prosecute was substantially impaired because the substance of the defendant's statements were not known. *Galarza*, 391 Ill. App. 3d at 810. We settled the issue of jurisdiction by stating that the record indicated that the defendant's motion to quash his arrest and suppress evidence established that he made statements that connected him with the offense at issue. *Id*. This court then noted, as *dicta*, that "the content of a defendant's statements is immaterial." *Id*. Further, we stated, "error arises when a trial court considers the content of the statements as it rules on a motion to suppress." *Id*. at 311. In this case, the trial court did not consider, substantively, the content of defendant's statements. Rather, the trial

court assessed defendant's credibility and understanding of the questions asked of him. Thus, *Galarza* is distinguishable from this case.

¶ 38 In *Torres*, the appellate court did not address the issue regarding whether the trial court considered the substance of the statement the defendant sought to suppress because the defendant failed to show she was prejudiced by the testimony. *Torres*, 200 Ill. App. 3d at 265. Thus, *Torres* does not support defendant's argument.

¶ 39 B. Ineffective Assistance of Counsel

¶ 40 Next, defendant argues that he was denied effective assistance of counsel by defense counsel's presentation and argument of a compulsion defense. Defendant argues that defense counsel adopted the compulsion defense by placing defendant on the stand and arguing that defendant delivered the cocaine to an undercover police officer because he and his family were threatened. Defendant argues that defense counsel's adoption of the compulsion defense was ineffective because there was no evidence of imminent threat of death or great bodily harm, the trial court refused to instruct the jury regarding the defense, and defense counsel conceded during closing argument that defendant delivered cocaine to an undercover police officer. Defendant contends that defense counsel's actions ensured that defendant would be convicted. Defendant argues defense counsel failed to subject the prosecution's case to adversarial testing.

¶ 41 Where a defendant claims ineffective assistance of counsel he must prove both that: (1) defense counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) the defendant suffered prejudice as a result of defense counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because a defendant must satisfy both prongs of this test, the failure to establish either prong of the *Strickland* test is fatal to the defendant's claim.

Id. at 697. However, prejudice is presumed where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659 (1984).

¶ 42 Defendant cites *People v. Hattery*, 109 Ill. 2d 449 (1985), to support his argument that because defense counsel conceded defendant's guilt he failed to subject the prosecution's case to adversarial testing and, therefore, prejudice is presumed. In *Hattery*, defense counsel admitted during opening statement that the defendant was guilty of three murders, presented no theory of defense, presented no evidence at trial, and made no closing argument. *Id*. at 458-59. The supreme court reversed the defendant's murder convictions, holding that no showing of prejudice under the *Strickland* test was required because prejudice was presumed. *Id*. at 465.

¶ 43 However, in *People v. Johnson*, 128 Ill. 2d 253, 269 (1989), the supreme court stated that it is not " *per se* ineffectiveness whenever the defense attorney concedes his client's guilt to offenses in which there is overwhelming evidence of that guilt but fails to show on the record consent by defendant." *Johnson*, 128 Ill. 2d at 269. Rather, defendant "faces a high burden" of demonstrating his counsel's complete failure to subject the State's case to meaningful adversarial testing "before he can forsake the two-part *Strickland* test." Id. at 269-70.

¶ 44 In *People v. Shatner*, 174 Ill. 2d133, 143-44, 146 (1996), the supreme court held that, where defense counsel concedes the defendant's guilt, but serves as the defendant's advocate through the entire proceeding, ineffectiveness will not be presumed. In *Shatner*, the court noted that, unlike in *Hattery*, defense counsel presented opening and closing arguments, cross-examined almost all of the State's witnesses, presented witnesses for the defense, made objections and moved for a mistrial. *Id*. at 145-46.

¶ 45 Further, in *People v. Woods*, 2011 IL App (1st) 092908, ¶ 27, the appellate court held that prejudice was not presumed where defense counsel conceded the defendant's guilt because defense counsel argued a theory of defense in opening and closing arguments, cross-examined the State's witnesses, presented witnesses on behalf of the defendant, and moved for a directed finding. The court stated, "[c]onsequently, the holdings in *Hattery* and *Cronic* do not apply. Further, we cannot presume that counsel was ineffective and we must apply the *Strickland* test to determine whether counsel's performance was deficient." *Id*. ¶ 29.

¶ 46 Here, as in *Shatner* and *Woods*, defendant failed to meet the high burden necessary to forgo the *Strickland* test. Defendant argues that the State's case was not subjected to meaningful adversarial testing because defense counsel presented and argued a compulsion defense which conceded defendant's delivery of drugs but failed to present evidence of imminent death or great bodily harm. However, the record does not support defendant's argument that defense counsel's performance was equivalent to counsel's performance in *Hattery* or that defense counsel failed to subject the State's case to meaningful adversarial testing.

¶ 47 In this case, before the trial began, defense counsel filed a motion to suppress defendant's statements to the police. Through an interpreter, defendant testified in support of his motion to suppress. During his opening statement, defense counsel did not concede his client's guilt. He stated that the evidence would show that the undercover officer bought cocaine from Lara and not defendant, that phone conversations occurred between the undercover officer and Lara, and that Lara set the price and location of the drug deal. Although defense counsel stated that defendant was present when the "transaction" took place, defense counsel did not concede defendant's guilt.

¶ 48 Further, defense counsel cross-examined all of the State's witnesses. Defense counsel elicited from the State's witnesses that they did not hear defendant's name mentioned during the briefings, meetings, or deals with Lara. Further, defense counsel elicited from the State's witnesses that Lara, not defendant, brought the bag of cocaine to Pantoja's truck before the arrest.

¶ 49 During closing argument, defense counsel argued the following. The State had the burden of proof and it had to prove beyond a reasonable doubt that defendant delivered the cocaine. The State's failure to produce cell phone records placed into doubt that Lara and defendant knew each other or that defendant controlled the drug deal. Defendant was a simple, uneducated man of limited intelligence who was nervous when he testified, and he denied knowing Lara. Defense counsel called into doubt Elias' testimony regarding defendant's inculpatory statements by questioning why there were no recordings of the interview. Thus, defendant's trial did not approach the "adversarial breakdown of the *Hattery* proceedings, where defense counsel acted not as an advocate for the accused, but as a proponent for the prosecution." *Shatner*, 174 Ill. 2d at 146. Accordingly, we decline to presume prejudice by reviewing defendant's ineffective assistance of counsel claim pursuant to *Cronic*. Instead, we will review the claim pursuant to the two-prong *Strickland* test. See *In re Dante W.*, 383 Ill. App. 3d 401, 415 (2008).

¶ 50 The evidence against defendant was overwhelming. To prove a charge of possession of a controlled substance with intent to deliver, the State must prove three elements: (1) the defendant's knowledge of the presence of narcotics; (2) the defendant's immediate possession or control of the narcotics; and (3) the defendant's intent to deliver the narcotics. *People v. Sanchez*, 388 Ill. App. 3d 467, 473 (2009). The Act defines the words "deliver" and "delivery" as follows:

> " 'Deliver' or 'delivery' means the actual, constructive or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." 720 ILCS 570/102(h) (West 2008).

The words "with or without consideration" in the above definition make clear that a sale or purchase is not required for a "delivery."

¶ 51 The State presented evidence that Lara introduced defendant to Pantoja, as the person who would get Pantoja two kilograms of cocaine. Defendant told Pantoja that he was going to drive to Hanover Park to get the cocaine. When defendant returned, Lara walked to defendant's Jeep, retrieved a bag containing cocaine, and gave it to Pantoja. Given the overwhelming evidence of defendant's guilt, he has failed to establish prejudice under the second prong of *Strickland*. See *Strickland*, 466 U.S. at 694. Therefore, defendant cannot establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *id*. Accordingly, defendant cannot establish ineffective assistance of counsel. See *id*. at 697.

¶ 52 Although we need not address whether defendant established the first prong of the *Strickland* test, defendant cannot establish that defense counsel's performance was deficient. Our holding in this case is consistent with the supreme court's holding in *People v. Ganus*, 148 Ill. 2d 466 (1992). In *Ganus*, the defendant was convicted of first-degree murder. The court held that the defendant failed to establish either prong of the *Strickland* test even though defense counsel attempted to establish the defense of compulsion, a defense not available for first-degree murder. *Ganus*, 148 Ill. 2d at 471-72. The court stated:

> "What the instant case presents is a situation where the defendant literally had no defense. Evidence of his guilt was overwhelming. His counsel conceived a compulsion defense which, though not a legal defense, could or might have persuaded a jury not to convict. Jury nullification is always a possibility. It is not inconceivable that a compulsion defense might have evoked empathy, compassion or understanding and sympathy in the minds of the jurors. It is a truism that if a man is drowning, he will grasp at a straw that comes floating by. A weak or insufficient defense does not indicate ineffectiveness of counsel in a case where a defendant has no defense. In this case it would appear that defense counsel used his imagination and resourcefulness to come up with something where he had nothing to go on." *Ganus*, 148 Ill. 2d at 473-74.

See also, *People v. Bloomingburg*, 346 Ill. App. 3d 308 (2004) (defendant failed to establish ineffective assistance of counsel even though defense counsel conceded that the defendant shot the victim in the head and presented defense of self-defense that was unavailable to the defendant).

¶ 53 In this case, defendant elected to go to trial on the unlawful delivery of a controlled substance charge and the evidence against him was overwhelming. Defense counsel's strategy, in part, was "to argue jury nullification by appealing to the jurors' sympathy and sense of fairness." See *Woods*, 2011 IL App (1st) 092908, ¶ 34. Defense counsel did not improperly argue that the jury should ignore the law. Rather, given the circumstances of the case, he presented a defense portraying defendant as someone who was "uneducated," taken "advantage of," "powerless," and "vulnerable" and that defendant "feared for his family." Defense counsel further argued that in defendant's "world these threats were real." Although the trial court refused to instruct the jury regarding the defense of compulsion, defense counsel reasonably attempted to evoke the "empathy, compassion

or understanding and sympathy" of the jurors. *Ganus*, 148 Ill. 2d at 473-74. In light of the circumstances presented in this case, defendant has failed to establish that defense counsel's performance was deficient. See *Woods*, 2011 IL App (1st) 092908, ¶ 34. Thus, defendant has failed to establish that defense counsel was ineffective.

¶ 54 III. CONCLUSION

¶ 55 In conclusion, the trial court properly denied defendant's motion to suppress his statements. Further, defendant failed to establish that was denied effective assistance of counsel. Accordingly, we affirm defendant's conviction.

¶ 56 For the reasons stated, the judgment of the circuit court of Kane county is affirmed.

¶ 57 Affirmed.