2013 IL App (2d) 121154-U
No. 2-12-1154
Order filed September 27, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JUAN HERRERA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 08-CF-2869 Honorable Jordan Gallagher and David R. Akemann, Judges, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction on felony murder charges was supported by the evidence; defendant's attorney was not ineffective by failing to move to suppress defendant's statement to the police on the ground that he had just been released from the hospital; and record showed that his waiver of his right to testify was knowing and voluntary.

¶ 2 The defendant, Juan Herrera, was convicted of felony murder, armed violence, possession of a controlled substance with intent to distribute, and possession of a controlled substance, and was sentenced to 46 years in prison. He now appeals, contending that: (1) the evidence was insufficient to support his convictions; (2) his trial counsel should have moved to suppress his statement to the

police on the ground that his waiver of his *Miranda* rights was not knowing and voluntary; and (3) his waiver of his right to testify at trial was not knowing and voluntary. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The following facts are taken from the testimony at trial and, except where noted, are undisputed.

¶ 5 On October 1, 2008, at about 6:50 p.m., Aurora police responded to a call of shots fired at 632 Root Street. One of the first police officers to enter, Brian Hester, smelled gunpowder as soon as he entered through the front door, which was open. He called out but no one seemed to be in the house. As he moved toward the rear of the house, he saw a smoke haze in the dining room and the kitchen, which was at the rear of the house. He also saw several spent bullets and bullet casings, and blood on the kitchen floor.

¶ 6 At the back wall of the kitchen there was a short flight of steps, perhaps three or four steps, leading down to a landing and the back door. More steps led downward from the side of the landing. The steps were the only way in or out of the basement. On the landing was a man's body, lying with the head toward the back door and the feet toward the steps to the basement. There was a large amount of blood under the body. The body was later identified as that of Hector Valtierrez. A .380 caliber automatic pistol lay on the landing next to the body. The slide was locked back, indicating that all of the bullets in the gun had been fired.

¶ 7 Hester stepped around the body and went down the steps into the basement, still looking for anyone who might be on the premises. He found no one, although later a woman and several children came down from the second floor of the house. Paramedics arrived and moved Valtierrez's body to the kitchen floor, where they attempted resuscitation without success.

¶ 8 Evidence technicians called to the scene collected spent bullets and bullet casings from the dining room, kitchen, landing, stairway area, and basement. The gun next to the body on the landing was the only gun found in the house. There were several open beer bottles on the first floor, and one in the basement: they were half full and still had condensation on them. A "brick" of slightly less than one kilo of cocaine was broken open and lying on the steps of the front porch. A cardboard box with markings suggesting that it was the packaging for a lockable file box was found in the basement. A cell phone was found in the driveway to a parking lot next to the house, and a maroon Chevy Blazer was parked in that lot.

¶ 9 Later that evening, the Aurora police received information that a gunshot victim had arrived at the Mercy Hospital emergency room. Detective Andrew Wolcott spoke briefly with the person (later identified as the defendant) while he was in a hospital bed in the emergency room. He had been shot twice. The defendant identified himself by a false name and said he had been shot while walking on the sidewalk. He then said that after he was shot, he "ran out." Wolcott asked him about the contradiction between saying that he had been shot outside and his reference to "running out," but the defendant did not respond and Wolcott said that he appeared to be lost in thought. Wolcott broke off questioning at that point. The defendant was later transported to Good Samaritan Hospital and underwent surgery. According to a stipulation admitted at trial, the defendant's hands were checked for gunshot residue while he was in the hospital. They tested positive, indicating that he had recently fired a gun.

¶ 10 Among the defendant's personal belongings at the hospital were two cell phones and a set of keys with a tag from a car rental agency. The keys turned out to be for the Chevy Blazer parked near the house where the incident occurred. The Blazer had been rented by Esteban Rodriguez.

¶ 11 The following day, Officer Hester went to Good Samaritan Hospital and viewed x-rays taken of the defendant's hip that showed a bullet. Hester compared the bullet in the x-rays with a bullet from his nine-millimeter gun and believed them to be similar, suggesting to him that the bullet in the defendant's hip was a .380 caliber bullet.

¶ 12 The autopsy of Valtierrez showed that he had sustained two gunshot wounds. The paths of the bullets suggested that Valtierrez had been facing the shooter, who had been somewhat above him when he was shot. One bullet traveled through the neck and upper chest, out the chest wall and into the left upper arm. The second bullet entered the left upper chest and traveled downward through the heart area and the liver, ending up in the right lower back. This shot was likely the immediate cause of death. The two bullets were removed from Valtierrez.

¶ 13 An Illinois State Police forensic expert, Nicole Fundell, examined the bullets, bullet fragments, and casings recovered at the scene. She determined that six of the casings were for .380 bullets, matching the gun that was found. She also matched two fired bullets to that gun. A second group of five .45 bullet casings, one casing fragment, and five .45 fired bullets (including the two bullets removed from Valtierrez) had similar markings, indicating that they all had been fired from the same .45 caliber gun. One .45 fired bullet and one .45 casing had different markings, indicating that they had been fired from a different .45 caliber gun. Thus, the evidence suggested that at least three different guns had been fired at the scene. Regarding Hester's comparison of the x-rayed bullet with one of his own nine-millimeter bullets, Fundell stated that .380 bullets and nine-millimeter bullets have the same base diameter. However, she believed it would be difficult to analyze bullets by comparing an x-ray of a bullet to a physical bullet.

¶ 14 The defendant was released from Good Samaritan Hospital on October 4, 2008, and was transported to the Aurora police station. There, he was interviewed by Wolcott and another detective, Jeffrey Sherwood. At this point the defendant was still using the false name he had given in the hospital. The interview was recorded, and the video recordings of the interview were played at the defendant's trial.

¶ 15 The interview began at about 6:35 p.m. and concluded about two and a half hours later. The recording of the interview reflects that, although the defendant spoke slowly (especially at the beginning of the interview), he answered immediately after each question and his slow manner of speaking did not appear to be due to any difficulty in comprehending the questions or formulating answers. As the interview went on, the defendant began speaking more quickly as he gave his account. He kept his left foot, which he identified as the one he had difficulty moving, resting on the footrest of the wheelchair he was sitting in. Although his facial expressions included a brief grimace at one point, overall they did not display that he was in pain.

¶ 16 The detectives began by asking how the defendant was doing and offering him food and drink. The defendant said he was fine. Answering casual questions, the defendant said that the hospital food had been good and they had treated him well. He had been transported by helicopter, which was quick but affected his stomach. He referred to "a lot of drugs, medicine." He could move one of his feet but the other one was "not good." He related that the doctors had told him that the bullets had to stay in there, but it was no problem. He would get used to it, and would walk straight.

¶ 17 The detectives read the defendant his rights and confirmed that he could read, and handed him the waiver of rights. At that point the defendant asked if the police were "here for [*sic*] help me or bring me down?" The police said that they wanted to know what had happened and how he had

gotten shot. Sherwood advised the defendant that, at any time, the defendant could say that he didn't want to talk any more. The defendant stated, "Whatever I'm gonna say, it is the truth, what if I got a lawyer[?] I'm gonna say the same thing? So it is the same ***." The defendant carefully read over the *Miranda* waiver form and appeared to be thinking about it. He then said that he did not want to sign the waiver, but he understood his rights and was willing to talk to the police.

¶ 18 The defendant said that he lived in Wisconsin, but had just flown into town from California, where his girlfriend lived. He arrived on Tuesday (September 30) around 2 p.m. He planned to see a Diana Reyes concert on Saturday night, then go to Minnesota and then back to California. He was staying with a friend, whom he referred to as "Miguel" throughout the interview, except for one occasion when the defendant called him "Raul" and then said that he meant Miguel. (This friend was later identified as Raul Saucedo-Cervante.) The friend lived in a big house about an hour and a half away, although the defendant was not paying attention to where they went as they drove.

¶ 19 The defendant and Saucedo-Cervante first went to the house on Root Street on September 30, the day before the incident. Saucedo-Cervante appeared to be friendly with the homeowner (later identified as Ernesto Vasquez) and the three men sat in the living room, drinking beer and watching TV. The defendant did not pay much attention to Vasquez because he did not know him. The defendant saw Vasquez's wife and children there. They ate dinner and left after about an hour. Vasquez and Saucedo-Cervante did not discuss any drug deal or plans for the next day.

¶ 20 The next day, he again went to the house with Saucedo-Cervante. Saucedo-Cervante had been driving him around in a Blazer. When they arrived, Vasquez was already there. They again sat in the living room, drinking beer. Another man (later identified as Rodriguez) arrived. The defendant did not know anyone except Saucedo-Cervante. Rodriguez showed them that he had a

.45 Ruger. The gun was passed around. The defendant thought Rodriguez was trying to sell it, and commented that it was a nice gun and asked how much it was. Rodriguez said it was not for sale and took the gun. Some other people he didn't know (later identified as Valtierrez and Jorge Diaz, whom the defendant called "the skinny guy") arrived at the back door. He was given the gun and told to hold onto it, and everyone else went into the basement. He waited in the living room. Then Saucedo-Cervante came running back upstairs, and ran out the front door. The defendant was curious about what was happening, so he went toward the back of house.

¶ 21 As to what happened next, the defendant first told police that someone put a gun to his head and took the gun he had been holding, and racked the slide to chamber a round, and then someone from the basement began firing at him. He was hit and fell to the floor. The skinny guy who had taken his gun then threw a gun onto the floor and the defendant grabbed it, thinking that he could use it to defend himself, but it was out of bullets. He ran outside. The same guy followed him and again pointed a gun at him, so he yelled for help and ran, and ended up at the hospital. The guy who had pointed a gun at him "took off" in a car.

¶ 22 The police showed the defendant pictures for identification. The defendant identified Saucedo-Cervante, Rodriguez, Vasquez, and Vasquez's wife. The defendant then went back over what happened. The defendant did not personally know Rodriguez, although Rodriguez had come to Saucedo-Cervante's house the night before because Saucedo-Cervante owed him some money. The next day, after Rodriguez showed the gun to people in the living room, someone said, "Here they come," and everyone got up to go to the back door. "He" then asked the defendant to hold the gun, and the defendant agreed. The others went to the kitchen and down to the basement. He stayed upstairs. The defendant had seen the basement of the house because he went there earlier to go to

the bathroom. He described "a lady" who saw the gun on him, and said he fooled around, saying "I look like a bad ass[,] huh?" He thought she went to the room where the kids were. He heard footsteps and saw Saucedo-Cervante run outside. He again recounted going to the kitchen because he was curious, having the gun taken off him by the skinny guy, getting shot, and running outside. He stated that the skinny guy ran out behind him, carrying "two guns and something else" that he didn't see. The skinny guy got in a truck and left.

¶ 23 The police said they were going to take a short break, and asked if the defendant would like a candy bar or some water. The defendant asked for water. The break lasted about a half hour. Toward the end of the break the defendant looked at his watch. When the police reentered the interview room, the defendant received his water and commented, "Pain starts over here." He said, however, that it was not yet time for him to take more medication.

¶ 24 The questioning continued. The defendant said that he and Saucedo-Cervante had been driving around in a black or "dirty color" car, a Blazer. When Saucedo-Cervante ran outside, he did not leave in the car because he had given the defendant the keys. The defendant did not know where he went. The defendant did not take the car when he was shot because he was afraid; instead he tried to ask the neighbors for help but no one would help him.

¶ 25 The police then told the defendant that his story was not adding up, and that he had had gunpowder residue on his hands from firing a gun. The defendant told the police that the powder was from the skinny guy firing the gun right next to his hands. The police told him that the amount of residue was consistent only with actually firing a gun, not being nearby, and that they had talked to a lot of people and knew this was "a drug deal gone bad." They mentioned the kilo of cocaine found on the front porch, and the defendant denied seeing it. He stated that, when the others gave

him the gun, "I was not going to kill nobody." He clarified that Rodriguez had given the gun to Saucedo-Cervante (he did not know why), who then gave it to him. The police told him that someone had been shot, the guy on the stairs, and the defendant said that it must have been the skinny guy who shot him. The police told him they did not think so, because the guy on the stairs and the skinny guy were buddies. The police told him they believed the defendant shot the guy on the stairs with a .45, but also that the guy on the stairs shot the defendant twice.

¶ 26 The defendant then said that "they" had started shooting first, and admitted shooting back "a lot," he did not know how many times. However, he continued to deny that he had had a role in the planned drug deal. He simply went to the kitchen because he was curious after Saucedo-Cervante ran outside, and then he got into a gunfight.

¶ 27 Confronted with the possibility that no one was in the kitchen or held a gun to his head, the defendant began rambling:

"[Defendant]: In the room, I saw the other guy standing right there, probably was my vision.

Det. Sherwood: What?

[Defendant]: Yesterday in the room in the hospital I saw the guy standing like in the corner right here.

Det. Sherwood: Yeah?

[Defendant]: I don't know if it was my vision, I don't know, probably was.

Det. Sherwood: You see a lot of things and I'm not seeing this. When you get in the kitchen, there's nobody in the kitchen or there's somebody in the kitchen?

[Defendant]: I don't remember, I don't remember."

The defendant then resumed answering questions, and said that he had gone into the kitchen because he "knew they were coming, and *** knew they were gonna do something." He had been shot first, and then he shot back to defend himself. He never saw who shot him. Then the defendant said that he had only seen the guy's gray shirt, not his face. The skinny guy did point a gun at him, but that was after the defendant was already outside the front door.

¶ 28 The police then asked again if there was anyone in the kitchen when the defendant went in there. The defendant said, "was my vision *** Probably my vision, 'cause I saw somebody there. I don't know vision, or—." Immediately after that, the defendant said, "Let's say it was nobody." He then admitted that when he had gone down to the basement earlier that day, Vasquez and Saucedo-Cervante had been there. They cut open one kilo of cocaine and he snorted some. The cocaine belonged to Saucedo-Cervante. He had brought it to the house with the defendant, in a "safety box" that the defendant had bought at Wal-Mart. The defendant did not know how many kilos were in the box, but the box was heavy, so probably more than one kilo.

¶ 29 The defendant then reflected that he was looking at a lot of time in prison and became reluctant to say any more. The police urged him to be honest, saying that it would be better for him. The defendant became morose: "I has [*sic*] this great life, because of this, I'm f***ed, no?" Sherwood said he should not look at it that way, and the defendant said, "I mean, if I shot a guy, I gotta [*sic*] go to jail for a long time." He then restated that he had not been given the gun to protect anyone or because anything was planned, but "probably" just in case something happened. The defendant asked if the guy he shot died, and the police said they did not know. They asked the defendant what made Saucedo-Cervante run out of the house, and the defendant theorized that "if they pulled guns out, probably they were going to steal the kilo or something *** Or the guns or

whatever they were dealing downstairs." The police suggested that "obviously" the defendant knew the other men were going downstairs to do a drug deal and the defendant agreed, saying that it was "hundred percent" understood.

¶ 30 As the police were wrapping up, they asked the defendant what happened to the gun he shot, and the defendant told them he left it inside the house. After being told that the only gun recovered inside the house was the one the defendant had been shot with, he theorized that the skinny guy had taken it, because the skinny guy had two guns when they were outside and "he point [*sic*] a gun at me again." Asked what he meant by "again," the defendant alluded to having "seen" the skinny guy point a gun at him in the kitchen earlier, "like the [woman] in the hat, and let's say it was not true, so outside that was yeah, that was real." The police interview concluded at about 9:08 p.m.

¶ 31 While the defendant was being processed, his fingerprints revealed his actual identity, as opposed to the false name he had been using until that point. The defendant was charged with four counts of first degree felony murder (720 ILCS 5/9-1(a)(3) (West 2008)), based on the following underlying felonies: armed violence (use of a gun to accomplish possession of a controlled substance with intent to distribute it) (count I); possession with intent to distribute (count II); simple possession (count III); and armed violence (use of a gun to accomplish simple possession) (count IV). In addition, the defendant was charged with the following: armed violence (720 ILCS 5/33A-2 (West 2008)) based on the use of a gun while possessing in excess of 900 grams of cocaine (count V); possession with intent (720 ILCS 570/401(a)(2)(D) (West 2008)) (count VI); and simple possession (720 ILCS 570/402(a)(2)(D) (West 2008)) (count VII).

¶ 32 Trial commenced on September 7, 2010, before Judge Jordan Gallagher, and continued before him on six additional days over the next few months. In addition to the police and forensic

witnesses whose testimony is summarized above, the State presented the testimony of Vasquez and Rodriguez. Vasquez began by conceding that he had been arrested, had pled guilty to a drug offense, and had been sentenced to 10 years in prison. (In searching the house, the police had found 23 pounds of marijuana in his basement.) If he testified truthfully, the other charges against him would be dropped.

¶ 33 Vasquez lived with his family in the house where the shooting occurred. He met Rodriguez in 2005. In June 2008, a few months before the incident in question, he was introduced to Saucedo-Cervante and agreed that he would solicit drug deals for Saucedo-Cervante. About three weeks before the date of the shooting, Saucedo-Cervante arranged to use Vasquez's home for a drug deal. Saucedo-Cervante, Vasquez, and Rodriguez were present, along with the buyer (Valtierrez) and the buyer's wife. Saucedo-Cervante brought one kilo of cocaine, which Valtierrez bought for $25,000. Rodriguez paid Vasquez $500 after the deal.

¶ 34 A few weeks later, Saucedo-Cervante came to Vasquez's house with the defendant, whom Vasquez had never met. They watched TV and talked, and ate dinner. They stayed for an hour at most.

¶ 35 The next day (October 1, 2008), Saucedo-Cervante called Vasquez and said that he and Rodriguez had agreed to do a drug deal at the house. Vasquez said he could not be there until 5:30 p.m. Vasquez then called Rodriguez, who told him that the deal would take place at Vasquez's house because the buyers did not want to travel to Ottawa (where Saucedo-Cervante lived). Vasquez complained that he had not agreed in advance that his house could be used, and Rodriguez said he would pay Vasquez $5,000: $1,000 for each kilo of cocaine involved in the deal.

¶ 36 Vasquez arrived at his house at 5:30. Saucedo-Cervante and the defendant arrived about 10 minutes later. They sat in the living room and drank beer. They called Rodriguez, who arrived about 6:10 p.m. He joined the others in the living room. Rodriguez brought a .45 automatic gun, which he showed and passed to Vasquez, saying it was for protection. Vasquez looked at it and passed it to the defendant. The defendant removed the magazine, took a bullet out of the chamber, and examined the gun, then put the magazine back into the gun. He passed the gun to Saucedo-Cervante, who returned the gun to Rodriguez. At some point, Saucedo-Cervante went outside to get the cocaine and returned with a safe. Rodriguez wanted to see the cocaine, so they all went to the basement. There, Rodriguez cut open one kilo of cocaine, and he and the defendant sampled it. They went back upstairs. The buyers (Valtierrez and Diaz) arrived. Rodriguez let them in the back door, and they went into the basement, followed by Vasquez and Saucedo-Cervante. The defendant stayed upstairs. In the basement, Rodriguez and Valtierrez were nearest to the cocaine, which had been placed on top of a washer or dryer. Diaz was behind Valtierrez, and Saucedo-Cervantes was behind Diaz, on the third step from the bottom of the basement stairs. Vasquez walked past everyone to go to the bathroom.

¶ 37 When Vasquez came out of the bathroom, he saw Valtierrez sample the cocaine that had been cut open. Valtierrez then said that this was what they had come for and announced that it was a robbery. He and Diaz pulled out guns. Saucedo-Cervantes immediately pushed Diaz to the ground and ran up the stairs. Valtierrez ran up the stairs after him. Diaz shot twice toward Vasquez with a gun that was larger than the .380 that Valtierrez had, but Diaz did not hit him. Vasquez hid behind Rodriguez and the dryer. He heard many shots upstairs. Diaz grabbed the safe and the open kilo of cocaine and ran upstairs. Vasquez heard him run out the front door. Vasquez then went upstairs.

He saw Valtierrez, shot, on the stair landing. The back door was shut. Vasquez saw his wife. He left the house and saw Valtierrez's wife in front of the house. He was arrested later that night.

¶ 38 On cross-examination, Vasquez stated that the defendant had no drugs or any gun either of the times Vasquez saw him. He thought Valtierrez and Diaz saw the defendant when they came in the back door; the defendant had gone with everyone else toward the back of the house to let Valtierrez and Diaz in.

¶ 39 Rodriguez testified that he met Vasquez about a year before the shooting. He then met Saucedo-Cervante through Vasquez, about three weeks or a month before the shooting. They agreed that they would deal cocaine: Saucedo-Cervante would be the supplier, and Rodriguez would be the middleman who would set up transactions.

¶ 40 Rodriguez tried to set up a deal between Saucedo-Cervante and Valtierrez on three occasions. On the first occasion, Valtierrez asked for one kilo. Rodriguez called Vasquez, who brought over a kilo, but Valtierrez said he did not like it and would not take it. On the second occasion, the deal took place at Vasquez's house and was successful. Valtierrez brought his wife and bought one kilo of cocaine for $25,000. Saucedo-Cervante paid Rodriguez and Vasquez each $1,000 from the proceeds.

¶ 41 A few days before the shooting, Rodriguez went out to Saucedo-Cervante's house, which was a nice, big house in the country. He wanted to talk about another deal with Valtierrez. Valtierrez wanted 10 kilos, but Saucedo-Cervante said that was too much and was only willing to supply five. In addition, Rodriguez had rented a Blazer at Saucedo-Cervante's request, and he was getting reimbursed. He saw the defendant at Saucedo-Cervante's house, but no one introduced him and Rodriguez thought perhaps he was a cousin.

¶ 42 On October 1, 2008, Rodriguez arrived at Vasquez's house between 5:30 and 6 p.m. Vasquez, Saucedo-Cervante, and the defendant were there. Rodriguez had bought a new gun, a .45 Ruger, a few weeks earlier "for protection." He brought it with him and showed it to the people at the house. Everyone looked at it and handled it, and then it was passed back to Rodriguez. Rodriguez did not go to the basement or sample the cocaine.

¶ 43 Rodriguez looked out the window and saw that Valtierrez and someone else were arriving. Saucedo-Cervante asked for the gun again, and Rodriguez gave it to him. Saucedo-Cervante then gave the gun to the defendant. Rodriguez let the buyers in the back door and everyone went to the basement. In the basement, Valtierrez sampled the cocaine and then pulled out a gun and announced that it was a robbery. Saucedo-Cervante took off running. Valtierrez chased him. Rodriguez hid and did not see who was shooting. He heard "small bangs, then the bigger bang." When the gunfire stopped, he and Vasquez were the only ones in the basement. Vasquez left first, then Rodriguez went upstairs. He saw Valtierrez "gurgling" on the landing. Vasquez's wife was in the kitchen. He went out the front door and saw Valtierrez's wife. He was arrested and charged with felony murder and possession. He pled guilty to possession and agreed to testify, and received a sentence of 15 years' imprisonment; his lawyer told him that otherwise it would be a minimum of 35 years.

¶ 44 After the State rested its case, the defendant's attorney advised the trial court that the defendant did not wish to testify. The trial court admonished the defendant that he had the right to testify but that he did not have to. Further, if he chose not to testify, his decision would not be held against him and his silence would not be taken as evidence of guilt. The defendant said that he understood, and confirmed that he had decided not to testify. The defense then entered two stipulations pertaining to the defendant's medical records and testing that revealed that the

defendant's fingerprints were not on the opened kilo of cocaine. After closing arguments, the trial court took the case under advisement.

¶ 45 On March 18, 2011, the trial court found the defendant guilty of all counts, and also found that the defendant had personally discharged a firearm, proximately causing Valtierrez's death. A few months later, Judge Jordan Gallagher (before whom the trial had been conducted) died, and the case was reassigned to Judge David Akemann. The defendant filed a *pro se* posttrial motion alleging, among other things, ineffective assistance of counsel for failure to move to suppress the defendant's statement to the police and for failure to present the defendant's testimony at trial because he had not knowingly and voluntarily waived the right to testify. New counsel appeared for the defendant and an amended posttrial motion was filed. On April 25 and May 10, 2012, the trial court heard testimony and arguments on the posttrial motion.

¶ 46 Regarding his desire to testify at trial, the defendant said that he had met with his attorney many times in jail to discuss his potential testimony and the defendant always assumed that he would testify. They never discussed the possibility that he would not testify. He wanted to testify although he told the trial court otherwise. When the trial court asked him if he wanted to testify, he turned to his lawyer and asked him what to do. He answered the trial court the way he did because his lawyer told him it was the right answer. Although he could understand basic things about the court proceedings, he was having trouble understanding the interpreter and what was happening in court, and he told his lawyer this.

¶ 47 The defendant's trial attorney testified that he had been practicing law since 1991, and 90 percent of his work was criminal matters. He had handled three murder trials before a jury and three bench murder trials. He began representing the defendant in the Aurora police department, even

before the defendant was transferred to jail. As a general rule, he explained the right to testify to clients, including the practical ramifications of doing so. He met with the defendant in jail or court dozens of times, during which he regularly discussed potential testimony. He did so because the defendant could not raise self-defense in a felony murder trial. His defense strategy in this case was to argue that the defendant was not part of the drug deal. If the defendant testified, it was not clear whether he could successfully and truthfully maintain this strategy on cross-examination. In the attorney's opinion, the defendant was likely to make it appear that he was part of the drug deal if he testified truthfully, based on things the defendant knew. The attorney explained to the defendant more than once that he believed the defendant would only hurt himself by testifying, but ultimately it was the defendant's choice whether to testify. He did not recall the defendant turning to him when the trial court asked the defendant about testifying. The defendant had never told him that he needed to testify; rather, the defendant said he would testify if the attorney thought it was the right decision.

¶ 48 Regarding the circumstances of his statement to the police, the defendant testified that he had been shot through the shoulder and pelvis only three days before he was interviewed, and he was still in pain, and on some of the pain medication, at the time of that interview. He did not recall being interviewed or waiving his *Miranda* rights and agreeing to talk with the police. He remembered some but not all of the trial. In general, he could not remember things very well. However, he never told his lawyer that he did not remember making a statement. Although he told his lawyer that he was always in pain, he never stopped any court proceeding because of the pain. He did not tell his lawyer that he did not understand what was going on at trial.

¶ 49 The defendant's lawyer testified that he had discussed the statement and recordings with the defendant, but the defendant had never said that he could not understand what was going on or what

he was doing. The defendant was bandaged and limping when the attorney first saw him, and the attorney assumed he was taking some sort of pain medication. The defendant never said that the pain medication had affected his ability to understand things. The defendant conversed with him in English although the attorney also spoke Spanish, and the attorney never had problems communicating with the defendant in English. He did not believe there was a good faith basis for a motion to suppress. However, if the defendant had told him that he had been unable to understand or remember during the interview, the attorney would have filed a motion to suppress.

¶ 50 The trial court issued a written decision on June 15, 2012, denying the posttrial motion. After conducting a sentencing hearing, the trial court sentenced the defendant to 46 years' imprisonment (21 years for the felony murder plus a mandatory 25-year add-on because the defendant personally discharged the firearm that caused Valtierrez's death). After his motion to reconsider the sentence was denied, the defendant filed this appeal.

¶ 51 II. ANALYSIS

¶ 52 A. Sufficiency of the Evidence

¶ 53 The defendant's first argument on appeal is that the evidence did not prove beyond a reasonable doubt that he was involved in the drug deal that took place, so as to be accountable for the felony murder that arose out of that drug deal. In making this argument, he asserts that the testimony of the other defendants, Vasquez and Rodriguez, should be disregarded because they were not credible.

¶ 54 In evaluating the sufficiency of the evidence, it is not the province of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id*. (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The weight to be given to the witnesses' testimony, the determination of their credibility, and the reasonable inferences to be drawn from the evidence are all matters within the jurisdiction of the trier of fact. *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *Collins*, 106 Ill. 2d at 261-62. Likewise, the resolution of any conflicts or inconsistencies in the evidence is also within the province of the fact finder. *Collins*, 106 Ill. 2d at 261-62. This standard applies whether the evidence is direct or circumstantial and whether the verdict is the result of a jury trial or a bench trial. *People v. Cooper,* 194 Ill. 2d 419, 431 (2000). We will set aside a criminal conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Smith*, 185 Ill. 2d at 542.

¶ 55 To establish that a defendant is accountable for a criminal offense as an accomplice, the State need not prove that the defendant initiated or oversaw the offense. In Illinois, a defendant is accountable for another person's criminal conduct when, "[e]ither before or during the commission of an offense," the defendant aids, assists, or attempts to aid the other person in the planning or commission of the offense, with the intent to "promote or facilitate" the commission of the offense. 720 ILCS 5/5-2(c) (West 2010). This intent to facilitate may be found where the defendant and the person or persons who committed the offense shared a common plan or purpose. *Cooper*, 194 Ill. 2d at 434. Proof of the common purpose or design may rest on the circumstances surrounding the commission of the criminal offense; it need not be a verbal agreement. *Id*. at 435. Circumstances suggesting a common design include a defendant's presence during the crime without dissociating himself from it, maintaining a close association with the perpetrator after the crime, leaving the scene of the crime, and failing to report the crime. *People v. Mullen*, 313 Ill. App. 3d 718, 725 (2000).

"A conviction under accountability does not require proof of a preconceived plan if the evidence indicates involvement by the accused" in the criminal acts of others. *Cooper*, 194 Ill. 2d at 435. As the defendant has raised a sufficiency-of-the-evidence argument as to his conviction under accountability principles, we must consider the evidence presented in the light most favorable to the State, and must affirm if any rational trier of fact could have found that the essential elements of accountability were proved beyond a reasonable doubt. *People v. Redmond*, 341 Ill. App. 3d 498, 511 (2003).

¶ 56 Here, the defendant argues that the testimony of Vasquez and Rodriguez was contradictory and should be viewed with suspicion because they were accused of involvement in the same criminal offense and testified as a condition of their plea deals. However, the discrepancies between their accounts were minor. Some concerned peripheral details, such as when Vasquez and Rodriguez first met, and whether Vasquez was paid for the first (one-kilo) deal by Rodriguez or Saucedo-Cervante. Other discrepancies, such as Rodriguez's denial that he ever sampled the cocaine on the date of the shooting (while Vasquez says that Rodriguez and the defendant both did), or Vasquez's assertion that the only drug deals he participated were the two involving Rodriguez and Valtierrez (belied by the fact that the police found 23 pounds of marijuana in Vasquez's basement), may reflect attempts to minimize their own misbehavior. However, their testimony regarding the defendant was largely exculpatory, not inculpatory: they both testified that they did not know him, that he did not bring a weapon to the scene, and that he stayed upstairs during the drug deal in the basement. Thus, viewing the testimony of the accomplices with suspicion, as the defendant argues we must, would not serve to undercut the evidence supporting his conviction.

¶ 57 Instead, the evidence showing that the defendant agreed to participate in the drug deal (by serving as a lookout or perhaps as "muscle") came almost entirely from his own statement and the physical evidence. The defendant had in his possession the keys to the Blazer—the vehicle in which the defendant, his friend Saucedo-Cervante, and the cocaine all arrived at the scene. Before the police ever asked him about the box found in the basement (the outer container for the safe), the defendant volunteered that he bought the safe, loaned it to Saucedo-Cervante, and that Saucedo-Cervante used it to transport the cocaine to the deal. While some of the testimony implicating the defendant in the drug deal—that the defendant had gone to the basement and sampled the cocaine brought by Saucedo-Cervante—came from Vasquez, this testimony merely corroborated the defendant's own independent admission that this had occurred. Likewise, although Rodriguez testified that Saucedo-Cervante asked for the gun before they went downstairs and then gave it to the defendant, this testimony merely provided corroboration of the defendant's admission that Saucedo-Cervante gave him Rodriguez's gun when the others went downstairs. The defendant further stated that he understood that the others would be engaging in a drug deal.

¶ 58 In light of all of this evidence, which we must view in the light most favorable to the State (*Collins*, 106 Ill. 2d at 261), the defendant's conviction as an accomplice in the underlying drug deal was properly supported. The defendant was present during the drug deal without dissociating himself from it, although he knew it was occurring. He agreed to hold a weapon during the commission of the crime, albeit slightly removed (one floor away) from where the drug deal actually was to take place. Moreover, he left the scene of the crime and failed to report the crime, instead repeatedly denying all knowledge of the crime during the first portion of his police interview. All

of these facts show involvement in the crime. *Mullen*, 313 Ill. App. 3d at 725; see also *Cooper*, 194 Ill. 2d at 435. Accordingly, we reject the defendant's challenge to the sufficiency of the evidence.

¶ 59 B. Ineffective Assistance of Counsel: Failure to Move to Suppress Statements

¶ 60 The defendant next argues that he received ineffective assistance of trial counsel because his attorney did not move to suppress his statements to the police. In order to prevail on such a claim, the defendant must demonstrate "that the unargued suppression motion was meritorious and that there is a reasonable probability" that the outcome of the trial would have been different if the evidence had been suppressed. *People v. Harris*, 182 Ill. 2d 114, 146 (1998); see also *People v. Henderson*, 2013 IL 114040, ¶ 15.

¶ 61 In order to show that a motion to suppress his statements to the police would have been meritorious—that is, that such a motion would have succeeded (*Henderson*, 2013 IL 114040, ¶ 12)—the defendant must establish that his statements were not knowing and voluntary in the legal sense of those terms. The defendant argues that both the pain he was in as a result of being shot, and the pain medication he was taking, affected his mental capacity and his ability to understand the *Miranda* warnings he was given and the questions he was asked.

¶ 62 1. Statement in the Hospital

¶ 63 In analyzing whether a meritorious motion to suppress could have been filed, we treat as separate the two occasions on which the police spoke with the defendant. The first time was in the hospital emergency room, when Wolcott spoke briefly with the defendant. At that point, the defendant was in the process of receiving treatment for his gunshot wounds, and a reasonable person would assume that the defendant's mental processes would be impaired as a result. Indeed, at trial Wolcott testified that he voluntarily broke off questioning after the defendant ceased responding and

"appeared to be thinking"—which, as the defendant argues, may be another way of saying that he seemed "out of it." Accordingly, it is possible that the defendant's counsel could have filed a meritorious motion to suppress this statement. However, we need not actually determine the merit of any such motion because even if it were meritorious, the defendant has not shown that the failure to move to suppress the statement in the hospital caused him any prejudice.

¶ 64 In order to show that the failure to file the motion constituted ineffective assistance of counsel, the defendant must also show that there was a reasonable probability that the outcome of the trial would have been different if the evidence had been suppressed. *Harris*, 182 Ill. 2d at 146. The defendant's statement to Wolcott in the hospital was extremely limited, consisting of a half-dozen responses about the fact that he had been shot, that the shooting had occurred on the sidewalk, that he had then "run out," and that he was from out of town. Although one of these responses (that he had been shot on the sidewalk) was later proven false and therefore provided some impeachment of the defendant's credibility, the overall probative value of these responses was low, and nothing in the trial court's rulings indicates that it placed any weight on the in-hospital statement either in reaching its initial judgment or in denying the posttrial motion. Indeed, at oral argument the defendant conceded that the admission of the statement was not particularly prejudicial. In light of this, we find that the defendant has not shown a reasonable probability that suppressing the statement he made in the hospital would have affected the outcome of the trial. Accordingly, his attorney's failure to file a motion to suppress this statement did not constitute ineffective assistance of counsel. *Id*.

¶ 65 2. The Statement at the Police Station

¶ 66 The defendant's interview at the police station occurred three days later, on October 4, 2008, after he had been released from the hospital. The recordings of the interview were played at trial, and one of the officers present (Wolcott) testified regarding the interview. According to the recordings and transcripts of the interview, the defendant appeared lucid and coherent, able to understand questions and give intelligent answers. Although the defendant mentioned in the interview that one of his feet hurt and that he was still taking pain medication, nothing about his demeanor or responses indicated that his ability to understand the proceedings was compromised.

¶ 67 The defendant argues that his medical records (which showed his injuries and that he was given morphine upon admission to the hospital on October 1) were in the possession of his trial counsel, but that counsel made no use of them. However, at the hearing on the posttrial motion, the attorney testified that the defendant never told him of any difficulty comprehending questions during the interview, and the attorney had viewed the recordings of the interview but did not feel a motion to suppress was warranted. Our own review of the recordings indicates that this was not an unreasonable conclusion. We also note that, in connection with one of his posttrial motions, the defendant submitted an Aurora police department intake form. The form included the question, "Are you on medications now?" In response, the defendant checked the space for "yes" and listed the following medications: "tab Norco, Toradol, Ventanyl." No dosages were listed, however, nor was there any indication of when the defendant had last taken these medications. At the hearing on the posttrial motion, the defendant did not testify regarding the medications he was taking at the time of the interview, and he presented no expert opinion that the medication or pain would be sufficient to result in mental impairment. *Cf. People v. Koesterer*, 44 Ill. App. 3d 468 (1976) (defendant's

statement found to be involuntary when expert testified that the drugs which defendant had taken "massive doses" of would cause a person to hallucinate and be irrational).

¶ 68 A defendant's statement will be considered voluntary and knowing "when the answers to the questions are intelligent, direct, and positive, and there is no indication that defendant was distracted by pain or that his mind was diverted from the statement he was giving." *People v. Pote*, 5 Ill. App. 3d 856, 859 (1972). Where a defendant's "statement itself is a clear and lucid account of the facts prior to and at the time" of the crime, "[i]ts clarity and accuracy negate any inference that defendant was confused, incapacitated or mentally distracted." *People v. Muniz*, 31 Ill. 2d 130, 138 (1964) (rejecting a claim that trial court erred in admitting defendant's confession). The evidence does not support the defendant's argument that he was impaired by pain or medication at the time he gave the statement at the police station.

¶ 69 As an aside, we note that some of the defendant's responses during the interview suggest some confusion about certain aspects of the events surrounding the gunfight: his references to the possibility that he saw a woman in a hat in the kitchen before the shooting, or that Diaz pointed a gun at him in the kitchen. During the interview, the defendant questioned the veracity of his own recollections about this, ultimately deciding that they were the result of his "vision." These responses indicate that the defendant may have been confused or even hallucinating *at the time of the shooting*. (Given the defendant's admission that he had sampled the cocaine in the basement and that it was "good stuff," it may not be surprising that he experienced some mental impairment immediately afterward. When blood was drawn during his admission to the hospital, it tested positive for cocaine.) However, *at the time of the interview*, even as he attempted to puzzle out whether these "visions" were real, he displayed no difficulty in thinking rationally or responding

coherently. Accordingly, while these responses perhaps could provide a basis for questioning the accuracy of the account given by the defendant in his statement, they do not provide a basis for suppressing that statement.

¶ 70 Both parties cite *Pote*, a similar case, in support of their positions. In *Pote*, 5 Ill. App. 3d at 857, the defendant was a Chicago police officer who had been involved in a shooting. Later that same night the defendant blacked out and was hospitalized due to possible coronary insufficiency. Two days later, while the defendant was still in the hospital, an Assistant State's Attorney (accompanied by another police officer and a court reporter) questioned the defendant regarding the shooting. The defendant was charged with murder and his attorney moved to suppress the statement made in the hospital.

¶ 71 At the suppression hearing, the defendant testified that he had no memory of any events at the hospital and no recollection of having given a statement. An emergency room physician testified that the defendant had received a tetanus shot, which would not affect the defendant's memory, when he first arrived at the hospital in the early morning hours on the night of the shooting. About two hours later, he was given a capsule of Darvon, a pain reliever, in response to his complaints of chest pain; this medication would not affect memory. The defendant received 75-milligram doses of Demerol in the afternoon and evening of the next day. The effects of these doses could be expected to last from two to four hours. No Demerol was administered to the defendant the following day prior to the questioning, and the doctor did not believe that the earlier doses of Demerol would still have any effect on that day. The doctor spoke to the defendant on the day of the questioning, and found him alert, not confused or suffering any loss of memory, and able to understand and answer questions. An attending physician and the Assistant State's Attorney also testified that on the day

of the questioning they had each spoken with the defendant, and he was alert, oriented, free of any pain or complaints, and able to answer questions promptly and rationally. *Id*. at 858. It was undisputed that the Assistant State's Attorney had informed the defendant of his *Miranda* rights prior to questioning him. *Id*. at 859. The trial court granted the motion to suppress the statement, and the State appealed.

¶ 72 The appellate court reversed, finding that the expert testimony regarding the effects of the drugs the defendant had taken, the testimony that the defendant was alert, responsive, and pain-free, and the "clarity of the answers made by the defendant himself" all were evidence that the defendant's statement was voluntary and knowing. *Id*. at 860. The reviewing court also noted that the statement was substantially the same as what the defendant had told his fellow police officers about the incident before he was hospitalized. Accordingly, the defendant's professed lack of memory about making the statement did not warrant its suppression. *Id*.

¶ 73 The defendant argues that here, unlike in *Pote*, the only evidence regarding his mental state during the interview came from his own testimony at the hearing on his posttrial motion, when he testified that he could not recall any of the interview. This is incorrect: the recordings and transcripts of the interview were themselves evidence of his mental state at the time. This evidence, which was presented at trial, was at least as probative as the opinions of doctors and the Assistant State's Attorney that were offered in *Pote*, in that it allowed the trier of fact to directly evaluate the defendant's responses during the interview. As for the defendant's argument that he had no recollection of the interview, Illinois courts have long rejected that argument. See, *e.g.*, *id*. (in the face of evidence that he was alert, intelligent, and coherent at the time of the statement, "it is just not enough for defendant to say that he simply doesn't remember anything about it").

¶ 74 "A person's statement will be suppressed on the ground of intoxication or drug use only if, when the statement was made, the person was so grossly intoxicated as to be incapacitated. Lesser degrees of intoxication or drug use go merely to the weight to be given to the confession." *People v. Glass*, 232 Ill. App. 3d 136, 149 (1992) (citations omitted). As the defendant cannot establish that he was so impaired by pain or medication as to have been incapacitated, any motion to suppress his statement would not have been meritorious, and thus his claim of ineffective assistance of counsel must fail. *Henderson*, 2013 IL 114040, ¶ 12.

¶ 75 Waiver of the Right to Testify

¶ 76 The defendant's final argument on appeal is that he did not knowingly and voluntarily waive his right to testify at trial. This argument is not supported by the record and lacks merit.

¶ 77 "[W]hen a defendant contends on appeal that he was precluded from testifying at trial, his conviction cannot be reversed on the basis that he was prevented from exercising that right unless he contemporaneously asserted his right to testify by informing the trial court that he wished to do so." *People v. Smith*, 176 Ill. 2d 217, 234 (1997). Here, the record is clear that the trial court advised the defendant of his constitutional rights to testify and not to testify, and asked the defendant whether the defendant had decided not to testify. The defendant said yes. This waiver of the right to testify was clear and unequivocal. Accordingly, the defendant's convictions cannot be reversed on the ground that he was prevented from exercising his right to testify. *Id*.

¶ 78 Nor does the record provide any support for an argument that the defendant received ineffective assistance of counsel relating to his decision not to testify. See *People v. Whiting*, 365 Ill. App. 3d 402, 408 (2006) (issue of whether defendant was denied the right to testify at trial may be treated as raising the effectiveness of his or her counsel). A defendant cannot prevail on such an

argument unless he can show that he contemporaneously informed his counsel that he wished to testify at trial. *Id*. at 407. "Advice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless evidence suggests counsel refused to allow the defendant to testify." *People v. McCleary*, 353 Ill. App. 3d 916, 923 (2004).

¶ 79 Here, the defendant raised this issue in his posttrial motion, was appointed a different attorney so that the issue could be fully addressed, and testified at the hearing on his motion. At no point did he provide any evidence that he had told his attorney that he wished to testify. Rather, he simply stated that he wanted to testify and thought he was going to testify. His attorney advised him not to, and so he told the trial court that he had decided not to. Although he did not understand everything that happened at trial, he always understood that it was his right to testify or not to testify.

¶ 80 This evidence does not show that the defendant's waiver of his right to testify was not knowing or voluntary. To the contrary, it shows that the defendant had the benefit of advice from counsel in making his decision and understood that he had the right to disregard it. Moreover, the trial court provided the defendant with ample opportunity to voice any wish to testify he may still have had after speaking with his counsel, and the defendant did not indicate any reluctance or indecision in stating that he chose not to testify. As the evidence does not show that defense counsel refused to allow the defendant to testify (*McCleary*, 353 Ill. App. 3d at 923), nor that the defendant could not comprehend the choice of whether or not to testify (*Ward v. Sternes*, 334 F.3d 696, 705-06 (7th Cir. 2003)), his argument that he received ineffective assistance of counsel must fail.

¶ 81 III. CONCLUSION

¶ 82 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 83 Affirmed.