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2012 IL App (3d) 100890-U

Order filed September 14, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-10-0890
	)	Circuit No. 07-CF-656
HUGO SANCHEZ,	)	Honorable Amy Bertani-Tomczak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Schmidt and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The evidence was sufficient to support the defendant's conviction for first degree murder; (2) the trial court did not err in instructing the jury on an accountability theory; (3) defense counsel was not ineffective due to a conflict of interest; and (4) defense counsel was not ineffective for failing to properly impeach a prosecution witness or for failing to present certain evidence.

¶ 2 Following a jury trial, the defendant, Hugo Sanchez, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and sentenced to 35 years' imprisonment plus 3 years of

mandatory supervised release. The defendant maintains that the evidence presented at trial was insufficient to establish his guilt beyond a reasonable doubt. In the alternative, he seeks a new trial claimant that: (1) the trial court erred in instructing the jury on an accountability theory; (2) his counsel was ineffective due to a conflict of interest; and (3) his counsel was ineffective for failing to properly impeach a prosecution witness or for failing to present certain allegedly exculpatory evidence.

¶ 3 BACKGROUND

¶ 4 On September 10, 2006, Regina De Los Santos was found strangled to death in the basement apartment she shared with her husband, Jesus Regules, and a man named Pablo Alejandro. The defendant lived across the street from Regina. The defendant was charged by indictment with two counts of first degree murder. Count 1 of the indictment alleged that the defendant strangled Regina without lawful justification and with the intent to kill her, thereby causing her death. 720 ILCS 5/9-1(a)(1) (West 2006). Count 2 alleged that the defendant strangled Regina without lawful justification knowing such act created a strong possibility of death or great bodily harm to Regina. 720 ILCS 5/9-1(a)(2) (West 2006).

¶ 5 Jesus Regules testified for the State during the defendant's trial. Jesus testified that he and Regina resided in the basement at 504 Krakar Street in Joliet with a man named Pablo. A man named Jorge Gracia lived upstairs, together with his wife, their children, and a male cousin who had just arrived from Mexico. On September 9, 2006, Jesus left for work at 3:30 p.m. after resting with Regina all day. When he arrived home at approximately 2 a.m. on September 10, Jesus went to the back door and found that the door had been broken. He entered the house, went to his room, and found his wife dead. He called for Gracia, who called the police. Jesus

noted that there was blood on the inside part of the door to the rear of the house and that his wife's purse was missing.

¶ 6 Joliet police officer Alan Vertin was dispatched to 504 Krakar at approximately 2 a.m. When he arrived, Vertin noticed that a metal door in the rear of the residence was open towards the inside of the house and that the wooden door frame was broken where the locking mechanism would be. Officer Vertin testified that the door appeared to have been "busted in." Sergeant Joseph Egizio, one of the first detectives to arrive on the scene, also testified that the rear door appeared to have been forced open, as the wood framing was splintered and heavily damaged, and the metal locking mechanism and clasp were broken away from the door and sitting on the landing of the staircase. Egizio testified that Regina's body was nude except for a piece of clothing around her neck. There was a pool of blood under her head and a knife near her buttocks which appeared to have blood on it.

¶ 7 Jason Harris, a paramedic, arrived on the scene at approximately 2 a.m. Harris found Regina's body lying on a bed in the basement. Harris testified that, when he examined Regina's body, he believed he detected signs of rigor mortis, which, according to Harris, does not begin for a minimum of three hours after death.

¶ 8 Officer Christopher Moore and three other police detectives arrived at the residence at approximately 2:20 a.m. Moore observed that the rear door had been kicked in, the latch plate was on the floor, and the wood on the door frame was splintered. He described the basement area as having a common area with a kitchenette with makeshift bedrooms separated by curtains. Regina's body was found on a bed in the basement.

¶ 9 Donald Hall, an evidence technician, testified that he began processing the murder scene at approximately 5 a.m. He noticed gouge marks on the ceiling above the bed where Regina's body was found. He checked the basement apartment for fingerprints, blood spatter, and anything that might contain DNA. He also checked the point of entry for fingerprints, with no results. Blood was found on the bed, on the inside of the door that was kicked in, on two of the curtains that separated the makeshift bedrooms, on the floor, on the toilet seat, and on clothing. Detectives also found 9.1 grams of cocaine in the garage of the residence and a large kitchen knife in the dish drawer in the first floor kitchen that was similar to the knife found next to Regina's body.

¶ 10 Joliet police officer Jeffrey Fornoff also processed the murder scene as an evidence technician. Fornoff arrived at approximately 3 p.m. on September 10, 2006. He collected what appeared to be blood from the shower curtain that was being used as a door for the bedroom. Fornoff testified that there was no blood anywhere in the bedroom, aside from the blood found on the bed. However, blood was found and collected from below the doorknob on the door at the top of the stairs. Moreover, the toilet seat appeared to have blood on it and was collected into evidence.

¶ 11 At the direction of a detective, Fornoff photographed the defendant on September 17, 2006, one week after the murder. At that time, the defendant had a small scratch on the outside of his wrist on his right arm, a small laceration on the top of his forearm that had scabbed, and a scratch near his left elbow. There were no marks on the defendant's face or torso. Fornoff photographed the scab, laceration, and scratch on the defendant's arms.

¶ 12 Jorge Gracia testified that, on September 9, 2006, he lived at 504 Krakar in the upper part of the house with his wife, three children, and a man named Gabriel Sanchez, who had come from Mexico. Regina, her husband Jesus Regules, and Pablo Alejandro lived downstairs. Regina, Jesus, and Pablo were friends with the Gracias, and they were allowed to come upstairs to cook or to use any of the things in the upper part of the residence.

¶ 13 Jorge testified that, on the day of the murder, he ate eggs with Gabriel Sanchez before he left to go fishing at 1 p.m. When Jorge returned home at 5:30 p.m., Gabriel was still there.[1] Jorge then left to go to a dance at approximately 6:45 p.m. At that time, Gabriel was home watching soccer on television. When Jorge returned home at approximately 1:50 a.m., he saw Gabriel sleeping on the couch. While watching television in his own room, Jorge heard Jesus yelling as he came up the stairs. Jesus told Jorge that someone had entered the house and that Regina was downstairs naked. They went downstairs together. Jorge pulled the curtain to one side and saw Regina naked. He told Jesus not to touch anything and went upstairs to call the police.

¶ 14 Jorge testified that the defendant was present at 504 Krakar for Jorge's daughter's birthday party one week before the murder. Moreover, Jorge testified that his wife would socialize with the defendant's sister, who lived with the defendant at 503 Krakar. According to Jorge, his wife and Regina would go to the defendant's residence together. When asked how many times Regina and the defendant's sister would have been together at the defendant's residence prior to September 9, 2006, Jorge responded that "[t]hey would get together regularly, everyday. [*sic*]"

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[1] Jorge's wife and children were not home that weekend.

¶ 15 Pablo Alejandro testified that he left home for work at 10:30 a.m. on September 9, 2006. Before he left, he saw Regina cleaning the kitchen. Pablo initially testified that he worked until 11:30 a.m., but later testified that he finished working at 7:30 p.m. Pablo testified that, after work, he went to a friend's house and drank approximately twelve beers. He then returned to 504 Krakar to get money for more beer. He arrived at the house with a friend who is "not here anymore." When he arrived, he noticed that the door to the house was broken. He went downstairs to his room to get his money. Pablo initially testified that he did not look into Jesus's and Regina's room at that time. However, after the State's Attorney told him that he needed to be truthful, Pablo testified that he looked into Regina's room and saw her naked and not moving. Pablo stated that, when he left the house, he told his friend about Regina and about the door being broken, but he did not call the police because he was afraid. Pablo left with his friend and went to buy more beer. He bought another twelve pack of beer and drank it.

¶ 16 When Pablo returned home again at 2 a.m., the police were already present. During his initial statement to the police, Pablo did not mention that he saw Regina's body earlier in the evening. When Pablo was interviewed by Detective Tizoc Landeros four days after the murder, he told Landeros that he had seen Regina's body when he came home to get money for beer. When asked during cross-examination whether he told Landeros that he saw Regina's body at that time, Pablo initially testified that he did not. However, immediately after giving this testimony, Pablo testified that he could not remember if he changed his story after Landeros spoke with Pablo's friend, Carlos Dzul. He then testified that he did tell Landeros that he looked into the room and saw Regina's body, and then claimed that he did not remember.

¶ 17 Elizabeth Sanchez testified that she lived across the street at 503 Krakar Avenue with the defendant, who was her boyfriend at the time of the murder. Also living in the house were the defendant's sister, her husband, and their three children, and the defendant's father. Elizabeth testified that, on September 9, 2006, the defendant came home from work at either 2 p.m. or 3:30 p.m. and began fixing his car at approximately 4 p.m. Elizabeth testified that the defendant left the house at approximately 6 p.m. and did not say where he was going. Elizabeth stated that she did not notice any scratches on the defendant's arms or face before he left. While he was gone (between approximately 6 p.m. and 10 p.m.), Elizabeth received a phone call from her parents informing her that someone had broken into their home at 16 Argyle Avenue in Joliet.

¶ 18 Elizabeth testified that the defendant returned home at approximately 10 p.m. She stated that, when the defendant returned, his hair was wet and his clothes were "half wet and half dry," even though it was not raining. She did not notice any scratches on Hugo at that time. Elizabeth asked the defendant if he was involved in the break-in at her parents' house. The defendant responded that he was not. Elizabeth, the defendant, and the defendant's sister then immediately went to Elizabeth's parent's house. While they were there, Elizabeth noticed that the defendant had a scratch on his face and a scratch on the inside of one of his wrists.

¶ 19 Elizabeth testified that her father asked the defendant if he had broken their window, and the defendant denied it. Elizabeth stated that, two days later, she asked the defendant again if he had broken her parents' window. According to Elizabeth, the defendant said "yes," but also said that he "didn't remember." Elizabeth claimed that she asked the defendant what he meant by that and why he did it, but she did not get an answer. Elizabeth testified that, the day after the murder, she washed the clothes that the defendant had been wearing on the night of the murder.

¶ 20 Tizoc Landeros, a detective with the Joliet Police Department, also testified for the State. Landeros testified that, when he arrived at the murder scene at approximately 3 a.m. on September 10, 2006, he assisted in interviewing Pablo Alejandro in Spanish. After speaking with Pablo, Landeros spoke with Carlos Dzul, the friend who was with Pablo after work that evening. He then interviewed Pablo again. Pablo went to the police station along with Jesus and Gabriel Sanchez. The police interviewed Gabriel Sanchez on the morning of the murder and again three days later. According to Landeros, Gabriel Sanchez was still considered a suspect at that time. However, Landeros testified that Gabriel Sanchez was later ruled out as a suspect.

¶ 21 On September 17, 2006, Landeros interviewed the defendant and Elizabeth Sanchez. A portion of the transcript of the defendant's interview was admitted into evidence. The defendant told Landeros that he did not know Regina or Jorge Gracia well and that he would only go to their house if there were a party or a fight on television. He stated that he had seen Regina over at his house but that he would not usually speak with her other than greetings. Landeros testified that, when he interviewed Elizabeth Sanchez, she told him that the defendant obtained the scratch on his wrist while working on his vehicle.[2] Elizabeth never told Landeros that the defendant had any scratches on his face or eye area or that his clothes were partially wet when he arrived home the night of the murder.

¶ 22 Dr. Brian Mitchell performed the autopsy on Regina's body. Dr. Mitchell testified that the cause of death was strangulation with five stab wounds to the neck contributing to the death. Dr. Mitchell was not able to determine the time of death. After examining pictures of the

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[2] When she testified at trial, Elizabeth denied telling Landeros that the defendant told her that he got the scratch on his wrist from working on his car.

scratches on the defendant's arms, Dr. Mitchell testified that the scratches could have been caused by fingernails, scraping against a sharp object in either the home or the car, glass, or car parts.

¶ 23 The investigating police detectives obtained buccal swabs from Jesus Regules, Pablo Alejandro, Gabriel Sanchez, and Jorge Gracia, and sent these swabs to the lab. They also collected oral, vaginal, and anal swabs from Regina's body which were tested for the presence of semen. Lyle Boicken from the Illinois State Police Crime Lab testified that semen was identified in both the vaginal and the anal swabs. There was an insufficient amount of male DNA in the vaginal swab to provide an identification pursuant to the initial tests performed. However, when different testing standards were used, male DNA from someone other than Regina's husband was found in the vaginal swabs. The defendant was excluded as the source of this DNA, as were Jorge, Pablo, and Gabriel. The anal swabs contained a mixture of DNA from both Regina and from a male. Boicken testified that Regina's husband could not be excluded as having contributed DNA to the mixture found on the anal swab. Pablo, Gabriel, and Jorge were excluded.[3]

¶ 24 Blood found on the curtains in the basement apartment where Regina was murdered was found to contain Regina's and Pablo's DNA. DNA extracted from the basement doorknob did not match the defendant or any of the other profiles collected. Blood found on Gabriel Sanchez's blue jeans matched his own DNA profile. No blood was found on the defendant's clothing.[4]

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[3] The record does not indicate whether the defendant was also excluded as a possible source of the DNA found on the anal swabs.

[4] As noted above, Elizabeth Sanchez testified that, the day after the murder, she washed

¶ 25 Boicken testified that fingernail specimens and scrapings taken from both of Regina's hands were analyzed and tested positive for the presence of blood. DNA evidence was also extracted. Katherine Sullivan, a forensic biologist who worked for the Illinois State Police Crime Lab, testified that the defendant's DNA profile matched a DNA profile found on Regina's right-hand fingernail clippings. There was not enough DNA in the left-hand clippings to provide an identification. On cross- and recross-examination, Sullivan testified that DNA can be transferred, "in theory," by touching someone or by coming into contact with something that someone else has touched, such as a table. However, on redirect, Sullivan testified that the amount of DNA in the swabs taken from the fingernails in Regina's right hand was "more than [she] would have expected from a casual contact or touch DNA sample." Although Sullivan admitted on recross that the amount of DNA she found in Regina's fingernail clippings could, "in theory," come from someone using the same hand towel, bathroom or kitchen, she testified that "in practice that's not what [she] routinely see[s]" in the samples she tests.

¶ 26 Francis Senese, a forensic scientist and the latent print group supervisor for the Illinois State Police Crime Lab, testified regarding his collection and analysis of palm prints found at the murder scene. Senese found two palm prints on the mattress cover upon which Regina's body

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the clothes that the defendant had been wearing on the night of the murder. Boicken testified that, if the defendant's clothes had been laundered and worn again, that would "potentially harm *** totally" the ability to see any preexisting blood stains on the clothes. Boicken also stated that washing the clothes could potentially inhibit the ability to chemically detect blood on them, depending on how long the clothes were washed and how many clothes were washed at the time.

was found. He compared these prints to the palm prints of the defendant, Jesus, Pablo, Carlos Dzul, Jorge, and Gabriel. No identification was made. In Senese's opinion, the palm prints found on the mattress cover were made by someone other than the defendant and the other five men whose prints were obtained and compared. Senese also testified that he could not obtain any prints that were suitable for comparison from the knife found near the body or from the toilet seat.

¶ 27 Several stipulations were read into evidence, including stipulations that the distance between the defendant's house at 503 Krakar and Elizabeth's parents' house at 16 Argyle was 1.9 miles, that this distance could be walked in approximately 35 minutes and driven in approximately 5 minutes, that the defendant broke Elizabeth's parents' glass patio door with a brick paver, and that no evidence of any blood was found at that location.

¶ 28 The defendant called four witnesses who were present at his residence on the evening of September 9, 2006. Gabriel Cerna, who was residing there at the time, testified that the defendant fixed his vehicle after he returned home from work at approximately 4 p.m. to 4:30 p.m., ate dinner with everyone else in the house at approximately 5:30 p.m. to 6 p.m., and left the residence on foot at approximately 7:30 p.m. to go buy cigarettes from the store. According to Cerna, the defendant returned around 9:30 p.m. wearing the same clothing, and he was not wet at the time. Cerna testified that, about 30 minutes later, the defendant left for Elizabeth's parents' house with Elizabeth and the defendant's sister and brother-in-law.

¶ 29 Francisco Vasquez, the defendant's nephew, also lived at 503 Krakar and was there on the night of the murder. Vasquez testified that the defendant left to get cigarettes at approximately 6:45 p.m. to 7:00 p.m. and returned at approximately 9:05 p.m. to 9:30 p.m. According the

Vasquez, the defendant's clothing was neither wet nor bloody at the that time. Vasquez also saw the defendant leave again to go to Elizabeth's parents' house.

¶ 30 Miguel Alvarado, the defendant's brother-in-law, was also present that night. Alvarado testified that everyone began to eat dinner at approximately 6 p.m. and that the men went inside to watch soccer around 7 p.m. Alvarado testified that the defendant left the house shortly before Alvarado left at approximately 7 p.m. to 7:30 p.m.

¶ 31 Manuela Vasquez, the defendant's sister, testified as to the living arrangements at 503 Krakar. Manuela testified that, because there was only a half bathroom in the basement where the defendant lived, the defendant would have to come upstairs to use the bathroom and shower. According to Manuela, the defendant would also eat and watch television upstairs with everyone else in the house. Manuela testified that, on September 9, 2006, the defendant came home around 4 p.m. and began working on his car between 4 p.m. and 5 p.m. She recalled the defendant leaving the house at approximately 6:40 p.m. to 7 p.m. and returning around 9 p.m. to 9:15 p.m. Manuela testified that, when the defendant returned, he had a "normal" sweat going, as it was a hot September day. Thereafter, Elizabeth received a phone call and she, Manuela, Manuela's husband, and the defendant went to Elizabeth's parents' house to "take care of a situation." According to Manuela, they all returned home around 10 p.m. to 10:40 p.m.

¶ 32 Manuela also testified that she and Regina would visit each others' houses and that Regina came over close to every day. Manuela stated that, on September 9, 2006, Regina was at 503 Krakar from breakfast (at around 9 a.m.) until approximately 3 p.m.

¶ 33 Crisoforo Sanchez, Elizabeth's father, testified that he received a phone call from the defendant on September 9, 2006, at approximately 6 p.m. The defendant asked Crisoforo where

he was. Crisoforo told him that he was at a party. The defendant also asked where Crisoforo's brother Nabor was because the defendant had loaned Nabor some money. Crisoforo testified that the defendant did not get mad on the phone. When Crisoforo arrived home at approximately 8 p.m., he noticed that the back door window was broken. He called the police. He also called his daughter looking for the defendant. Crisoforo testified that he met with the defendant and Elizabeth at his home and asked the defendant if he had broken the window. The defendant denied breaking the window. Crisoforo stated that the defendant's shirt and hair were wet. On cross-examination, Crisoforo clarified that the defendant was wet from water rather than sweat and that it was "cold that day." According to Crisoforo, Elizabeth and the defendant left Crisoforo's house at approximately 10 p.m. to 10:30 p.m. Crisoforo stated that he never had any problems with the defendant.

¶ 34 The jury found the defendant guilty of first degree murder. He was subsequently sentenced to 35 years' imprisonment. This appeal followed.

¶ 35 ANALYSIS

¶ 36 1. Sufficiency of the Evidence

¶ 37 The defendant argues that the evidence presented at trial was insufficient to establish his guilt beyond a reasonable doubt. When presented with a challenge to the sufficiency of the evidence, it is not the function 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 proven beyond a reasonable doubt. *Id.* Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *People v. Bush*, 214

Ill. 2d 318, 326 (2005); *People v. Saxon*, 374 Ill. App. 3d 409, 416 (2007). This deferential standard of review applies whether the evidence is direct or circumstantial. *People v. Pintos*, 133 Ill. 2d 286, 291 (1989); *Saxon*, 374 Ill. App. 3d at 416. Determinations of the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact. *Saxon*, 374 Ill. App. 3d at 416. If the evidence is capable of supporting different inferences, it is best left to the trier of fact for resolution. *Id.* A reversal is warranted only if the evidence is so improbable or unsatisfactory that it leaves a reasonable doubt as to defendant's guilt. *People v. Ehlert*, 211 Ill. 2d 192, 202 (2004).

¶ 38 Applying these standards, we conclude that the evidence in this case was sufficient to support the defendant's conviction. The defendant's DNA was found in Regina's fingernail clippings. Katherine Sullivan, an expert from the Illinois State Police Crime Lab, testified that the amount of DNA extracted from the fingernails in Regina's right hand was "more than [Sullivan] would have expected from a casual contact or touch DNA sample." Although Sullivan conceded that the amount of DNA she found in Regina's fingernail clippings could, "in theory," come from casual contact such as using the same hand towel or touching something that someone else had touched, she testified that "in practice that's not what [she] routinely see[s]" in the samples she tests. Moreover, the evidence showed that the defendant had scratches on his arm and face shortly after the murder. The defendant's girlfriend testified that the defendant did not have these scratches when he left 503 Krakar on the night of the murder. She testified that she first noticed the scratches while she and the defendant were at her parents' house later that evening. Based on this evidence, the jury could have reasonably inferred that Regina scratched

the defendant during the struggle that resulted in her death and that the defendant's DNA got under Regina's fingernails at that time.

¶ 39 The defendant notes that Sullivan conceded that the defendant's DNA could have been transferred to Regina's fingernails through casual contact or by sharing the same hand towel, and he points to evidence in the record which arguably supports the inference that the defendant could have transferred his DNA to Regina in this fashion. Specifically, because the defendant's basement apartment at 503 Krakar had only a half bath, the defendant had to come upstairs to use the bathroom and shower. Moreover, the defendant regularly ate and watched television upstairs with everyone else who lived in the house. Regina came to the defendant's house to visit the defendant's sister almost every day, and she was at the defendant's house from 9 a.m. until 3 p.m. on the day of the murder. Moreover, the defendant had been at Regina's house for Jorge's daughter's birthday party only one week before the murder.

¶ 40 However, the jury was not required to draw the speculative inference that the defendant transferred his DNA to Regina through casual contact merely because the defendant and Regina spent some time in the same locations. Such an inference is particularly unwarranted in light of Sullivan's testimony that the amount of DNA found under Regina's fingernails was more than she would have expected from casual contact.[5]

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[5] The defendant also noted that Dr. Mitchell testified that the scratches on the defendant's arms could have been caused by the defendant's scraping against a sharp object in his home or car, by glass, or by car parts. However, Dr. Mitchell also testified that the scratches could have been caused by fingernails. The jury could have permissibly concluded from this testimony and from the other evidence discussed above that the scratches were caused by Regina's fingernails.

¶ 41 The evidence also supported the inference that the defendant had the opportunity to commit the crime. The defendant's girlfriend testified that the defendant left 503 Krakar at approximately 6 p.m. on the night of the murder and returned home at approximately 10 p.m. The parties stipulated that it would have taken the defendant 35 minutes to walk to and from Elizabeth's parents' house and that the defendant broke the back door window at Elizabeth's parents' house that evening. Cristofero Sanchez discovered that the door window was broken when he returned home at 8 p.m. Taken together, this evidence suggests that the defendant had ample time to walk from 503 Krakar to Elizabeth's parents' house, break the door window, walk back to 504 Krakar, commit the murder, and return home.

¶ 42 The defendant's witnesses gave a slightly different account of the timing. They testified that the defendant left sometime between 6:40 p.m. and 7:30 p.m. and returned home between 9 p.m. and 9:30 p.m. However, it was up to the jury to judge the credibility of the witnesses and to determine the weight to assign their testimony, and it would not have been unreasonable for the jury to credit Elizabeth's account over that of the defense witnesses. Moreover, in deciding a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution. *Collins*, 106 Ill. 2d at 261. Thus, it would be all the more improper for us to credit the testimony of the defense witnesses over that of Elizabeth, which was more favorable to the prosecution. In any event, even accepting the truth of the defense witnesses' testimony, the defendant would most likely have had time to break the window before Cristofero returned home at 8 p.m., commit the murder, and return home to 503 Krakar sometime between 9:05 p.m. and 9:30 p.m. Thus, even the time line provided by the defense witnesses supports a reasonable inference that the defendant had the opportunity to commit the murder.

¶ 43 The defendant argues that there was "overwhelming evidence" that someone else committed the crime. First, the defendant maintains that there was evidence implicating Pablo in the murder. Specifically, the defendant notes that: (1) Pablo's blood was found on the shower curtain room divider in the basement of 504 Krakar, where Regina's blood was also found; (2) Pablo claimed that he arrived home on the night of the murder, saw Regina's body, and left to get more beer without calling the police; and (3) when Pablo was interviewed by the police at 2 a.m., he did not tell the police that he had allegedly seen Regina's body earlier that evening. In addition, the defendant notes that Gabriel could have been home at the time of the murder and that Gabriel's own blood was found on the jeans he was wearing that night. Moreover, the DNA of an unidentified man was found inside Regina's vagina, and the defendant was excluded as a source of that DNA. Further, palm prints of an unidentified person were found on the mattress cover underneath Regina's body. A forensic scientist for the Illinois State Police Crime Lab testified that these palm prints were made by someone other than the defendant.

¶ 44 Contrary to the defendant's argument, this evidence does not undermine the inference of the defendant's guilt. At most, it suggests that someone else was involved in the crime. When all of the witness testimony and physical evidence is considered, the evidence is sufficient to justify the inference that at least two individuals were involved in committing the murder and that the defendant was one of them. Because the evidence presented in this case was not "so improbable or unsatisfactory that it leaves a reasonable doubt as to defendant's guilt" (*Ehlert*, 211 Ill. 2d at 2002), we will not disturb the jury's verdict.

¶ 45 2. Accountability Instruction

¶ 46 The defendant argues that the trial court erred in instructing the jury on accountability. A person is legally accountable for the conduct of another when "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate that commission, he solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5–2(c) (West 2006). Evidence of accountability may be circumstantial. *People v. Calderon*, 369 Ill. App. 3d 221, 235 (2006). Even the slightest evidence supporting an accountability theory justifies providing the jury with an accountability instruction. *Id.* Some accountability evidence, along with evidence that the defendant acted as a principal, is sufficient to support an instruction on each theory, even if the State advanced only one theory in its case in chief. *Id.*; see also *People v. Reeves*, 314 Ill. App. 3d 482, 488 (2000); *People v. Batchelor*, 202 Ill. App. 3d 316, 331 (1990). We will not disturb a trial court's decision to issue a jury instruction on accountability absent an abuse of discretion. *Reeves*, 314 Ill. App. 3d 482, 488; *Calderon*, 369 Ill. App. 3d at 235.

¶ 47 The defendant argues that the accountability instruction was given in error because there was no evidence suggesting that he intended to promote or facilitate Regina's murder or that he aided, abetted, or attempted to aid another person in the commission of the offense. We disagree. As noted above, the evidence supported a reasonable inference that the defendant's DNA was transferred to Regina's fingernails during a struggle, rather than through incidental contact. The evidence also suggested that the defendant had no alibi and had the opportunity to participate in the crime. Further, there was ample physical evidence suggesting that someone else had participated in the murder. Even the slightest circumstantial evidence supporting an

accountability theory justifies giving an accountability instruction. *Calderon*, 369 Ill. App. 3d at 235. Here, there was evidence suggesting that at least two individuals were involved in the commission of the offense and that the defendant was one of them. This evidence was sufficient to warrant a jury instruction on accountability.

¶ 48 3. Conflict of Interest

¶ 49 The defendant also argues that his trial counsel rendered ineffective assistance of counsel because he labored under a conflict of interest. Stephen Whitmore, the public defender who represented the defendant in this case, also represented Gabriel Sanchez in a forgery case.[6] The State listed Gabriel as a witness in the murder case against the defendant but never called him to testify. The defendant contends that Gabriel was a "key suspect" in the murder case who stood to benefit from the defendant's conviction. He argues that Whitmore's representation of Gabriel constituted a *per se* conflict of interest that was never brought to the attention of either the trial court or the defendant, thereby requiring automatic reversal of his conviction. We disagree.

¶ 50 A criminal defendant's sixth amendment right to the effective assistance of counsel includes the right to be represented by an attorney "whose loyalty to his or her client is not diluted by conflicting interests or inconsistent obligations" *People v. Taylor*, 237 Ill. 2d 356, 374 (2010); see also *People v. Hernandez*, 231 Ill. 2d 134, 142, (2008); *People v. Morales*, 209 Ill. 2d 340, 345 (2004). In determining whether a defendant received conflict-free representation, we

[6] The Joliet police learned that Gabriel possessed forged documents while investigating Regina's murder. Gabriel was later convicted of forgery, but he failed to appear for sentencing. A warrant was issued for his arrest. In denying the defendant's posttrial motion on the conflict of interest issue, the trial court noted that Gabriel was unavailable as a witness to both parties.

first determine whether counsel labored under a *per se* conflict. *Id.* A *per se* conflict is one in which facts about a defense attorney's status, by themselves, engender a disabling conflict. *Hernandez*, 231 Ill. 2d at 142; *People v. Spreitzer*, 123 Ill. 2d 1, 14 (1988). For example, a *per se* conflict exists if counsel simultaneously represents the defendant and a prosecution witness (*Hernandez*, 231 Ill. 2d at 143; *People v. Moore*, 189 Ill. 2d 521, 538 (2000)), or if counsel has an association with the prosecution or any person or entity assisting the prosecution (*Taylor*, 237 Ill. 2d at 374; see also *Hernandez*, 231 Ill. 2d at 143-44; *People v. Lawson*, 163 Ill. 2d 187, 210–11 (1994) (collecting cases)). If a *per se* conflict exists, the defendant is not required to show that his counsel's "actual performance was in any way affected by the existence of the conflict." (Internal quotation marks omitted.) *Hernandez*, 231 Ill. 2d at 143. Rather, prejudice is presumed. *People v. Miller*, 199 Ill. 2d 541, 545. Accordingly, unless a defendant waives the conflict, a *per se* conflict requires automatic reversal. *Hernandez*, 231 Ill. 2d at 143; *Morales,* 209 Ill. 2d at 345. Where, as here, the facts are undisputed, the question of whether a *per se* conflict exists is a legal question which we review *de novo*. *Hernandez*, 231 Ill. 2d at 143; *Morales*, 209 Ill. 2d at 345.

¶ 51 Whitmore's representation of Gabriel and the defendant did not give rise to a *per se* conflict. Our supreme court has identified only three situations where a *per se* conflict exists: (1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) when defense counsel contemporaneously represents a prosecution witness; and (3) when defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant. *Hernandez*, 231 Ill. 2d at 143-44 (collecting cases). None of those situations exists here. Although the prosecution listed Gabriel

as a witness, it never called him to testify against the defendant. The fact that the State at one time considered Gabriel a potential witness, standing alone, does not create a *per se* conflict. *Morales*, 209 Ill. 2d at 346 (finding no *per se* conflict even though defense counsel represented a person whom the State identified as a potential witness because the person did not testify and therefore "defense counsel never assumed the status of attorney for a prosecution witness").

¶ 52 The defendant argues that Whitmore's representation of Gabriel nevertheless created a *per se* conflict because Gabriel was a "key suspect" who stood to benefit from the defendant's conviction. We disagree. First, it is far from obvious that Gabriel was a suspect. Although DNA and other evidence found at the crime scene implicated the defendant and at least one other unidentified person, no physical evidence tied Gabriel to the murder. In fact, Gabriel was excluded as the source of the male DNA found in the vaginal and anal swabs, and the palm prints found on the mattress cover could not be matched to Gabriel's palm print. Thus, even though Gabriel was considered a potential subject during the initial stages of the police investigation, there was virtually no evidence tying him to the murder at the time of the trial. Not surprisingly, Detective Landeros testified that Gabriel had been ruled out as a suspect. Thus, Whitmore's representation of Gabriel did not amount to a *per se* conflict. See *People v. Loera*, 250 Ill. App. 3d 31, 36-37 (1993) (finding no *per se* conflict arising from defense counsel's representation of a person who was initially listed as a suspect on a police report due to a mistaken identification but who was not a "serious suspect" at the time of trial).[7]

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[7] In any event, even if Gabriel were still considered a suspect, he would not necessarily benefit from the defendant's conviction. The evidence at trial suggested that more than one person was involved in the crime. Thus, the defendant's conviction would not preclude a

¶ 53 In the alternative, the defendant argues that Whitmore's representation of Gabriel constituted an actual conflict of interest. To show an actual conflict, a defendant must point to "some specific defect in his counsel's strategy, tactics, or decision making attributable to [a] conflict." *Hernandez*, 231 Ill. 2d at 144 (internal quotation marks omitted); see also *Morales*, 209 Ill. 2d at 349; *Spreitzer*, 123 Ill. 2d at 18. Speculative allegations and conclusory statements are not sufficient to establish that an actual conflict of interest affected counsel's performance. *Hernandez*, 231 Ill. 2d at 144; *Morales*, 209 Ill. 2d at 349.

¶ 54 In attempting to establish an actual conflict, the defendant argues that Whitmore failed to bring out certain "damaging, suspicious, and guilty-conscience laden statements" that Gabriel made to the police during interrogation. Specifically, when he was interviewed by police a few days after the murder, Gabriel told Detective Landeros that "technology" sometimes finds innocent people guilty and that it might "fail" him in this case. Gabriel also admitted that it was "unusual" for him to stay home alone all day as he did on the day of the murder, but he explained that he was tired that day from working all week and that he wanted to relax and watch soccer. Moreover, Gabriel could not explain why he decided not to accompany Jesus and Jorge downstairs to view Regina's body after Jesus screamed that someone had killed her. There is no evidence that the public defender's office tried to locate Gabriel before the trial, and Whitmore never tried to put Gabriel's statements to Landeros before the jury. The defendant maintains that Gabriel's suspicious statements "would have established reasonable doubt," and that Whitmore's failure to present these statements to the jury shows that he labored under an actual conflict that impaired his performance.

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subsequent prosecution of Gabriel if evidence were found implicating Gabriel in the crime.

¶ 55 We disagree. The statements that Gabriel made to Detective Landeros do not unambiguously convey a guilty conscience. To the contrary, throughout his interview with Landeros, Gabriel repeatedly stressed that he did not kill Regina. His concern that he might be falsely implicated by "technology" does not suggest a consciousness of guilt, and his explanation for why he stayed home alone on the day of the murder is not patently implausible. Moreover, as noted above, there was no physical evidence implicating Gabriel in the murder, his palm print did not match the palm prints found at the murder scene, and he was excluded as the source of the DNA found on the vaginal and anal swabs. Thus, it would have been futile for the defense to point the finger at Gabriel, and Whitmore's decision not to pursue that strategy was not unreasonable.

¶ 56 4. Ineffective Assistance of Counsel

¶ 57 The defendant also argues that his trial counsel rendered ineffective assistance of counsel by failing to properly impeach Pablo Alejandro and by failing to present certain exculpatory evidence. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). More specifically, a defendant must show that his counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; see also *People v. Cathey*, 2012 IL 111746, ¶ 22 (2012).

¶ 58 The defendant argues that his counsel was ineffective because he failed to impeach Pablo Alejandro with certain statements that Alejandro made to Detective Landeros shortly after the murder. Landeros summarized his interview with Pablo Alejandro in a police report. In that report, Landeros wrote that: (1) Pablo changed his story every time Landeros spoke with him and often added information upon further questioning; (2) Pablo initially did not disclose that Regina lived in the basement apartment at 504 Krakar, and he avoided talking about Regina; (3) Pablo claimed not to have seen Regina for a week prior to the murder; (4) Pablo initially said that Jorge and his wife lived upstairs from him but either denied that anyone else lived upstairs or said that he did not know whether anyone else lived there; (5) when Landeros asked Pablo what the killer would tell Landeros once the police had him in custody, Pablo replied that the killer would say that "Pablo sent him there to kill the lady."[8] The defendant maintains that his counsel's failure to present these statements to the jury amounted to ineffective assistance. In addition, the defendant argues that his counsel rendered ineffective assistance by failing to ask Landeros if he checked under Pablo's mattress for the money Pablo claimed to have kept there at the time of the murder. The defendant argues that this question would have been relevant and admissible to establish Pablo's "motive and opportunity" to commit the crime because Regina's purse was missing when Jesus discovered Regina's body.

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[8] When Landeros asked Pablo why he would say something like that, Pablo responded that he was scared and believed that Landeros was going to arrest him and charge him with the murder even though he was innocent because he had been in the apartment and did not call the police.

¶ 59 The defendant faces a heavy burden in challenging his counsel's impeachment of Pablo Alejandro. "Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which cannot support a claim of ineffective assistance of counsel." *People v. Smith*, 177 Ill. 2d 53, 92 (1997); see also *People v. Pecoraro*, 175 Ill. 2d 294, 326-27 (1997) ("The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court.") The defendant can prevail on this claim only by "showing that counsel's approach to cross-examination was objectively unreasonable." *Pecoraro*, 175 Ill. 2d at 327; *People v. Lacy*, 407 Ill. App. 3d 442, 461 (2011).

¶ 60 Defendant cannot make such a showing here. First, Pablo's own testimony established that he returned to his apartment at 504 Krakar to get money for beer on the night of the murder, thereby establishing that he had an opportunity to commit the murder. He also testified that, when he returned to the apartment, he saw Regina lying on the bed naked, but he left the apartment without contacting the police. Moreover, Pablo's credibility was impeached at trial. During his direct examination, Pablo initially stated that he did not see Regina lying on the bed, but then almost immediately changed his story after the prosecutor reminded him that he needed to be truthful. During cross-examination, defense counsel asked Pablo whether he told Detective Landeros that he had seen Regina's body when he returned to the apartment on the night of the murder. Pablo initially admitted that he did not and then claimed that he did not remember. We cannot say that defense counsel's decision not to conduct additional impeachment was objectively unreasonable.

¶ 61 Moreover, even if counsel's failure to further impeach Pablo were objectively unreasonable, the defendant cannot show that he was prejudiced thereby. As noted above, the physical evidence supported the inference that the murder was committed by at least two men, one of whom was the defendant. Thus, even if further impeachment could have somehow established that Pablo was one of the killers, that fact would not have exonerated the defendant. At most, it would have suggested that Pablo and the defendant could have committed the murder together. Under these circumstances, no amount of additional impeachment of Pablo could have created a "reasonable probability that *** the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

¶ 62 The defendant also argues that his counsel was ineffective for failing to call Gabriel or to introduce Gabriel's statements to Detective Landeros into evidence. The defendant contends that he was prejudiced by this failure because Gabriel's statements to Landeros established that: (1) on the day of the murder, Gabriel was home all day and therefore could have committed the murder; and (2) Gabriel claimed to hear what sounded like wood dropping in the basement between 5 p.m. and 6 p.m. that evening, a time when the defendant claims he had an alibi.[9] (When he was first interviewed by police at the scene of the crime, Gabriel also said that he heard a door slam at approximately 6 p.m.) We disagree. Jorge Gracia testified that, on the night of the murder,

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[9] Elizabeth Sanchez testified that the defendant left 503 Krakar at approximately 6 p.m. on the night of the murder and returned at approximately 10 p.m. The defense witnesses each gave differing accounts of when the defendant left 503 Krakar and when he returned. According to their testimony, the defendant left sometime between 6:40 p.m. and 7:30 p.m. and returned sometime between 9 p.m. and 9:30 p.m.

Gabriel was home watching soccer on television when Jorge left to go to a dance at approximately 6:45 p.m. and that Gabriel was sleeping on the couch when Jorge returned at approximately 1:50 a.m. Thus, even without Gabriel's statements, there was evidence before the jury suggesting that Gabriel had an opportunity to commit the murder. In addition, given the evidence against the defendant and the lack of physical evidence implicating Gabriel, it would have been futile for the defense to suggest that Gabriel was the killer.

¶ 63 Moreover, Gabriel's claim that he heard a door slamming and what sounded like wood dropping in the basement on the night of the murder does not tend to exculpate the defendant. Gabriel told Detective Landeros that Jorge returned home from his fishing trip "between 5:00 and 6:00," and took a shower "after that." Gabriel claimed that he heard the wood-dropping noise while Jorge was in the shower, but he did not say exactly when Jorge began showering or how long he was in the shower. Thus, Gabriel's statement supports the inference that whatever caused the noise could have occurred after 6 p.m. Elizabeth Sanchez testified that the defendant left 503 Krakar (which was across the street) at approximately 6 p.m. Thus, Gabriel's statements would not necessarily have helped the defense. Also, whatever Gabriel heard that night, it is not clear that he heard the break-in. According to Landeros's report, the door that was forced open that night was only 8 to 10 feet away from the bathroom where Jorge was showering, but Jorge did not hear anything. In any event, defense counsel cannot be faulted for not trying to introduce Gabriel's statements to Landeros about the noises he heard that night. Those statements would be offered for the truth of the matters asserted by Gabriel and would, therefore, be inadmissible hearsay. The defendant does not identify a relevant hearsay exception that would allow for their

admission. For all these reasons, we cannot say that defense counsel's decision not to try to locate Gabriel or to introduce his statements to Landeros was objectively unreasonable.

¶ 64 CONCLUSION

¶ 65 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 66 Affirmed.