2012 IL App (4th) 100998-U

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NO. 4-10-0998

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
DAVIEON L. HARPER,	)	No. 09CF526
Defendant-Appellant.	)	
	)	Honorable
	)	Michael D. Clary,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Presiding Justice Turner and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's statutory speedy-trial rights were not violated, and he was not denied the effective assistance of counsel in relation to his speedy-trial rights.

(2) The evidence was sufficient to sustain defendant's convictions of armed robbery and felony murder.

(3) The trial court did not commit plain error by admitting and allowing the jury to view photographs depicting the victim's body and the crime scene. Defendant's ineffective-assistance argument with respect to this evidentiary matter, requiring proof *de hors* the record on appeal, cannot be resolved here but may be addressed in a later postconviction proceeding.

¶ 2 In September 2010, a jury found defendant, Davieon Harper, guilty of armed robbery and felony murder. In November 2010, the trial court sentenced him to 30 years' imprisonment.

¶ 3 Defendant appeals, arguing the trial court committed errors involving (1) his

statutory speedy-trial rights, (2) the sufficiency of the evidence against him, and (3) the use of photographic evidence. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On October 24, 2009, Timothy Shutes was killed by a close-range shotgun blast to his head. That same night, defendant was arrested in connection with Shutes's killing. On October 26, 2009, the State charged defendant in a three-count information with (1) unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), (2) armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2008)), and (3) first degree felony murder (720 ILCS 5/9-1(a)(3) (West 2008)). On November 20, 2009, the grand jury indicted defendant, charging the same three offenses. In September 2010, the charge of unlawful possession of a weapon by a felon was dismissed on the State's motion at defendant's trial.

¶ 6 At trial, brother and sister Randy and Ieca Smalley testified about the events that led to Shutes's death as follows. Shutes was their friend and Ieca's boyfriend. Randy was released from jail on October 23, 2009. The next day, Ieca and Shutes requested that Randy arrange for them to buy some marijuana, some of which Shutes intended to redistribute. Through defendant's brother, Donterrace Harper, whom Randy had recently met in jail, Randy was put in contact with defendant. Randy arranged that Shutes would purchase some marijuana for $3,500 through defendant and his unidentified contact. In preparation of the transaction, Shutes placed the cash and, at Ieca's request, a handgun in a bag.

¶ 7 Defendant met Randy, Shutes, and Ieca as planned but informed them that the location of the drug deal had been changed and that they could take only one car. At defendant's request, Ieca, who was pregnant, was left behind. Defendant drove Shutes and Randy to a park.

Shutes sat in the rear, passenger-side seat with the money bag on the floorboard in front of him, and Randy sat in the front passenger seat. On the way to the park and after they arrived, Randy observed defendant send and receive several text messages. He witnessed a phone conversation between defendant and his contact, part of which was conducted over speaker phone. Randy heard defendant ask the contact whether he had "the stuff" and the contact ask whether they had the money. Waiting for the contact to arrive at the park, defendant made some small talk with Shutes.

¶ 8 After several minutes of waiting in the parked car, a man armed with a sawed-off shotgun approached the rear, passenger side of the car and opened the door. He demanded that Shutes give him the bag with the money. Shutes refused and a struggle ensued. While Shutes struggled with the gunman, according to Randy, defendant produced a gun in his right hand, stuck it in Randy's side, and verbally threatened to kill him if he tried to move. With his left hand, defendant grabbed Randy, turned him to face the passenger-side door, and held him in that position. Randy watched Shutes punch and kick the gunman. The gunman struck Shutes with the shotgun and then shot him in the head at close range. Randy later identified the gunman as defendant's cousin, Lafayette Harper.

¶ 9 After Shutes was shot, by Randy's account, defendant released Randy. Defendant and the gunman then spoke briefly outside the car before they ran off in separate directions. Randy left to call the police and, having done so, returned to check on Shutes. When he returned, Randy observed defendant gather Shutes's body into his car. Defendant noticed Randy and informed him he was taking Shutes to the hospital.

¶ 10 At the hospital, defendant had some contact with police officers. These officers

testified at defendant's trial. Defendant told officer Pat Bostwick that Shutes had been shot and accompanied Officer Bostwick to the police station at his request. As defendant was considered a witness, not a suspect, no *Miranda* warnings were given. Defendant volunteered a statement. He indicated that he arranged a drug transaction and drove Shutes and Randy to the park. Immediately after arriving at the park, he observed an unknown black male open the rear passenger-side car door and demand that Shutes "give it up." Defendant heard a single gunshot, then saw Randy exit the car and run away. Defendant stated he then threw the gun he carried for protection onto the roof of a nearby structure and drove Shutes to the hospital. After he gave this statement, defendant was unable to answer questions due to shortness of breath. While in the interview room, defendant gave Officer Bostwick his cell phone.

¶ 11 Police officers testified regarding the physical evidence collected from the crime scenes—the park and defendant's car—and the many photographs taken of Shutes and the crime scenes. A biological sample from a cigarette butt recovered at the park contained genetic material identified as probably belonging to defendant. A handgun later identified by Randy as the one defendant used to hold him up was found on the roof of a structure in the park as defendant had described in his statement. Shutes's handgun and bag (but no money) and a sawed-off shotgun with genetic material on the barrel that likely belonged to Shutes were turned over to police by a woman who found them in her yard six days after the shooting. Fingerprints identified as defendant's and Lafayette's were found on the rear passenger-side door handle of defendant's car. Officers also recovered some bodily substances, documented in photographs, from the car and the park.

¶ 12 Lafayette's cell phone records were subpoenaed. They showed that defendant and

Lafayette exchanged several calls in the minutes leading up to and following the shooting. These calls had been erased from the call log on defendant's cell phone.

¶ 13 The jury found defendant guilty of armed robbery and felony murder. In November 2010, the trial court denied defendant's motion for judgment notwithstanding the verdict or a new trial and sentenced defendant to 30 years' imprisonment for murder. In December 2010, the court denied defendant's motion to reconsider sentence.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant raises arguments concerning (1) his statutory speedy-trial rights, (2) the sufficiency of the evidence against him, and (3) the use of crime-scene and autopsy photographs at his trial. In relation to his arguments concerning his speedy-trial rights and the use of photographic evidence, defendant further argues he was denied the effective assistance of counsel. We disagree with each of defendant's arguments.

¶ 17 A. Speedy Trial

¶ 18 Defendant first argues the trial court erred in failing to discharge defendant pursuant to the speedy-trial statute or, alternatively, his trial counsel provided ineffective assistance by failing to adequately demand trial when the cause was continued several times. Defendant claims the court erred by failing to attribute certain pretrial delays to the State rather than defendant and in granting the State's motion for a continuance to perform genetic testing.

¶ 19 The speedy-trial statute provides, in part, "Every person in custody in this State for an alleged offense shall be tried *** within 120 days from the date he was taken into custody unless delay is occasioned by the defendant ***." 725 ILCS 5/103-5(a) (West 2008). A

defendant is entitled to be discharged from custody if he is not brought to trial within the speedy-trial period. 725 ILCS 5/103-5(d) (West 2008).

¶ 20 "Delay shall be considered to be agreed to by the defendant unless he *** objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (West 2008). "Delay occasioned by the defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried *** and on the day of expiration of the delay the said period shall continue at the point at which it was suspended." 725 ILCS 5/103-5(f) (West 2008). "A delay is attributable to the defendant when his act in fact causes or contributes to the delay." *People v. Myers*, 352 Ill. App. 3d 684, 687, 816 N.E.2d 820, 823 (2004). When two causes for a delay can be identified, one brought about by the State and the other by the defendant, "the fact that the delay was partially attributable to the defendant will be sufficient to toll the statutory term." *Id.* at 688, 816 N.E.2d at 823-24. A continuance to which the defendant assents, for example, is an affirmative act of delay by the defendant that tolls the speedy-trial period. *Id.* at 688, 816 N.E.2d at 823. However, the defendant cannot be said to have caused or contributed to a delay if the record is silent on the question. *Id.* at 688, 816 N.E.2d at 824. That is, the defendant's mere failure to object to the State's request for a continuance "cannot be considered an agreement or waiver of the right to a speedy trial by the defendant." *Id.*

¶ 21 Any motion by the defendant that "eliminates the possibility that the case could immediately be set for trial" tolls the speedy-trial period. *Id.* at 688, 816 N.E.2d at 823. Not all motions cause delay; whether a motion causes or contributes to a delay "depends on the facts and circumstances of each case." *Id* at 688, 816 N.E.2d at 824. "Delays naturally associated with the

processing of defense motions suspend the speedy trial clock." *Id.*

¶ 22 Extensions of the usual 120-day period to account for reasonable delays in genetic testing may be permitted pursuant to the speedy-trial statute. In particular, the statute provides, "If the court determines that the State has exercised without success due diligence to obtain results of DNA [(deoxyribonucleic acid)] testing that is material to the case and that there are reasonable grounds to believe that such results may be obtained at a later day, the court may continue the cause on application of the State for not more than an additional 120 days." 725 ILCS 5/103-5(c) (West 2008). This court has held that this provision "allows the trial court to continue cases involving DNA testing for a maximum of 120 days beyond the initial 120-day period ***, for a total maximum period of 240 days, without violating a defendant's speedy-trial rights." *People v. Johnson*, 323 Ill. App. 3d 284, 289, 751 N.E.2d 621, 625 (2001).

¶ 23 Legal questions involving the interpretation of the speedy-trial statute are reviewed *de novo*. See *People v. Campa*, 217 Ill. 2d 243, 252, 840 N.E.2d 1157, 1164 (2005). However, a trial court's attribution of a delay, for speedy-trial purposes, to either party is entitled to deference, and we will uphold such a determination absent an abuse of discretion. *Myers*, 352 Ill. App. 3d at 688, 816 N.E.2d at 824. Similarly, a trial court's ruling on whether the State has exercised due diligence in discovering and processing DNA evidence will not be overturned on appeal "unless it amounts to a clear abuse of discretion." *People v. Swanson*, 322 Ill. App. 3d 339, 342, 751 N.E.2d 1182, 1184 (2001). Whether the State has shown due diligence must be determined on the particular circumstances presented by the record as it existed at the time of the motion for continuance. *Id.*

¶ 24 Here, defendant was in continuous custody, for speedy-trial purposes, from

October 24, 2009, when he was arrested, until September 20, 2010, when his trial began—a period of 330 days. See *People v. Hampton*, 394 Ill. App. 3d 683, 686 n.1, 916 N.E.2d 104, 108 n. 1 (2009) ("In calculating the total pretrial delay, a court must exclude the day of the arrest but include the day that the trial begins."). Defendant concedes he is responsible for delays from November 12, 2009, to November 30, 2009 (18 days); from February 16, 2010, to April 30, 2010 (73 days); and from August 27, 2010, to September 17, 2010 (21 days). These delays tolled the speedy-trial period by 112 days.

¶ 25 Defendant argues that two further delays should not have tolled or extended the speedy-trial period: (1) from January 29, 2010, to February 16, 2010 (18 days), on defendant's motion to continue; and (2) from May 24, 2010, to August 27, 2010 (95 days), on the State's motion to continue to obtain results of DNA testing. We disagree.

¶ 26 On April 16, 2010, the trial court held a hearing regarding the January 29, 2010, continuance and defendant's motion for discovery sanctions and to attribute delay to the State. Defendant argued he was forced to move to continue due to tardy discovery disclosures by the State—namely, grand jury transcripts disclosed on January 19, 2010. In arguing the motion for continuance, defense counsel had asserted he believed these transcripts provided a possible basis for dismissal. The State's responses to defendant's later discovery requests contained lab reports and photographs, some of which dated from November 2009. Defendant argued the State failed to provide discovery in a timely manner by comparing the dates of the discovery materials with the dates of the disclosures. The State asserted that discovery materials were reasonably turned over to defendant as they were received by the prosecutor's office. Any delays were due, according to the State, to the organization and processing of evidence by the police department

and the crime laboratory. The court denied defendant's motion, finding the continuance was not attributable to the State for speedy-trial purposes and the discovery delays did not warrant sanctions. It noted that defendant's motion to continue was an exercise of litigation strategy: defense counsel could have declared ready for trial and forced the State to try him on the disclosed evidence within the speedy-trial period but opted, instead, to continue the case to prepare a motion to dismiss and to review discovery before trial.

¶ 27 The trial court's conclusion was not erroneous. Defendant has cited no case in which a defense continuance was attributed to the State due to discovery delays. This may be because, as the court found below, continuances to review discovery materials and prepare defense motions cannot be said to result solely from the State's asserted lack of diligence in producing discovery. That is, defendant was faced with a choice whether to continue his case, tolling the speedy-trial statute, or demand trial, relying on the evidence already produced and whatever remaining time he had to prepare for trial. Defendant chose to seek a continuance. That continuance was thus rightly attributable to defendant. In the context of a defendant's due-process argument, the supreme court aptly stated in *People v. Johnson*, 45 Ill. 2d 38, 43-44, 257 N.E.2d 3, 7 (1970):

> "The right to a speedy trial and the right to avoid a precipitous trial are separate but related rights. *** The fact that on occasion the accused might have to jeopardize the legislative benefits of the four-month rule by asserting his right to a continuance does not entail a denial of his right to a speedy trial. *** The election was defendant's to determine on the basis of what would better ensure

him a fair trial."

The court's judgment in this case, attributing the delay from the January 29, 2010, continuance to defendant, accords with the analysis in *Johnson*.

¶ 28 On May 24, 2010, the trial court held a hearing on the State's motion to continue to allow for genetic testing. The State's recent request to obtain a sample of defendant's DNA for comparison was also pending. In its motion for continuance, the State asserted that, on May 20, 2010, the Illinois State Police crime laboratory informed the office of the State's Attorney that DNA had been found on a cigarette butt, a bag, and a jacket that were recovered from the crime scene. The cigarette butt matched a profile stored in a nationwide DNA database. However, the name of the profiled suspect was unavailable and some further processing was required to establish a preliminary profile. After a preliminary profile was compiled, the sample would have to be compared with a standard from the suspected source. The samples from the bag and jacket contained a mixture of DNA from three unidentified people. The crime lab requested a sample of defendant's DNA for comparison with the samples found at the crime scene. At the hearing, the State represented that the DNA testing would, according to crime lab technician, take up to about three months.

¶ 29 Defendant argued that the State failed to show due diligence and materiality as required by the statute allowing extensions of the speedy-trial period for such continuances. The State asserted that it was unaware how feasible quicker testing would have been. It asserted that the bag from which a sample was obtained belonged to the victim; the presence of defendant's DNA on the bag could show his involvement in the robbery. The trial court granted the continuance for 95 days. It found that the testing was material because the presence of

defendant's DNA on the crime-scene evidence would aid the prosecution in its proof and the presence of a different suspect's DNA could help exonerate defendant. Moreover, it found the State exercised due diligence, stating, "[I]t's nothing that the State did to delay the crime lab from processing [the evidence]. It looks like it was delivered back in November, and they [(the crime lab technicians) have] been doing whatever they do with these things." The court also granted, without objection by defendant, the State's motion to obtain a DNA sample from defendant.

¶ 30 At the same hearing, defendant called for argument his motion to withdraw an earlier severance motion that had been granted. The State requested additional time to respond to the motion, which was filed only three days before the hearing. The trial court suggested allowing the State an opportunity to prepare for a hearing on the motion, to which defendant responded, referring to the court's grant of the State's continuance, "I have no problem since we've got three months to get everything done."

¶ 31 Initially, the State contends we need not reach the merits of defendant's argument because defendant, by indefinitely continuing the hearing on his motion to withdraw his earlier severance motion, contributed to the 95-day delay. According to the State, because the State and defendant were each responsible, in part, for the continuance, the delay was attributable to defendant for speedy-trial purposes. We disagree, however, since defense counsel clearly would not have allowed an indefinite delay had the trial court not already set a trial date 95 days later—he either would have withdrawn the motion or set an earlier hearing date. Thus, under the circumstances of this case, the delay cannot be said to be partially attributable to defendant.

¶ 32 Defendant argues, as he did below, that the State failed to show due diligence and materiality as required by statute. We conclude the trial court's findings on these issues were not

an abuse of discretion.

¶ 33 The trial court's due-diligence finding was supported by the State's assertion that it had not delayed the crime lab's processing of the forensic evidence. Defendant's contention that the State had not proceeded in a timely manner was based on the facts that (1) the evidence arrived at the crime lab in November 2009 and its preliminary examination was not completed until May 2010 and (2) the State failed to request a sample of defendant's DNA until May 2010. Absent any evidence of a purposeful delay, the court did not err in finding that the crime lab got around to the evidence as soon as it could based on its internal procedures. Further, the State was unaware, until the crime lab's report of its preliminary findings, of any DNA evidence recovered from the crime scene that would have required comparison with defendant's DNA. *Cf. People v. Treece*, 159 Ill. App. 3d 397, 409, 511 N.E.2d 1561, 1568 (1987) (holding the State had probable cause to obtain the defendant's DNA sample as soon as a human hair was discovered at the scene of the sex crime he was accused of committing). The State's delay until it had this information to request a standard from defendant was reasonable and does not affect our conclusion that the trial court did not abuse its discretion in finding the State's efforts amounted to due diligence. Further, defendant asserts the State could have expedited the testing by alerting the crime lab that defendant's DNA was held in a DNA database. On this record, however, nothing suggests this information would have sped up the crime lab's testing process.

¶ 34 Defendant lacks a basis for his claim that the State could have done anything to expedite the forensic testing, aside from other cases in which the State was shown to expedite them. However, this court has reiterated its intention to review requests for these extensions on a case-by-case basis rather than by imposing a set of guidelines strictly defining the statutory due-

diligence standard. *People v. Colson*, 339 Ill. App. 3d 1039, 1047-48, 791 N.E.2d 650, 656 (2003). Here, the crime-scene evidence was timely delivered to the crime lab. The crime lab had to test the evidence for the presence of genetic materials, run preliminary tests to develop a DNA profile, compare any DNA found on the evidence to samples stored in a nationwide database, and perform an analysis comparing the genetic materials found on the crime-scene evidence to standards from defendant, the victim, the suspected shooter, and others. Immediately after the crime lab informed the prosecutor's office that DNA had been found on the evidence and standards were required for further comparison that could take approximately three months to complete, the State moved for a continuance. The trial court did not err in finding the State's efforts amounted to due diligence.

¶ 35 Next, defendant argues the testing was immaterial to his prosecution because he had already admitted his presence at the crime scene and other witnesses were able to testify to his presence there and his participation in the crimes. Defendant here conflates materiality with cumulativeness. Evidence can be material without being essential or noncumulative. The requested testing was material because genetic evidence placing defendant at the crime scene and showing that both he and the shooter handled the money bag would have tended to show the State's allegations to be more likely true than untrue. Concerning the redundancy of the testing with other evidence, the State identifies legitimate reasons for preferring the DNA evidence—namely, that defendant had filed a motion to suppress his statement to police placing him at the crime. Further, defendant's redundancy argument ignores the possibility going into the testing, noted by the trial court, that the results would identify an alternative suspect, exonerating defendant. Moreover, we note, the testing allowed the State to preempt an argument by

defendant that reasonable doubt of his guilt could be inferred from the absence of forensic evidence tying him to the crime scene.

¶ 36 The trial court did not abuse its discretion in attributing the delay from January 29, 2010, to February 16, 2010, to defendant or in extending the speedy-trial period by an additional 95 days on the State's motion to allow for genetic testing. In all, defendant was responsible for at least 130 days' delay. Adding the 95-day extension, the 120-day period was tolled or extended for at least 225 days. Thus, no more than 102 of the 330 days defendant spent in custody before his trial counted toward the 120-day limit and defendant's statutory speedy-trial rights were not violated. We therefore need not consider the State's assertion that other delays—specifically, (1) between defendant's arraignment and the first pre-trial setting and (2) between the filing of and hearing on his motion to withdraw his earlier severance motion—were mistakenly attributed to the State. And as no error occurred, we need not consider whether, under the plain-error doctrine, reversal is appropriate despite defendant's failure to preserve this argument for appeal. Similarly, we need not consider defendant's argument that his defense counsel provided ineffective assistance by failing to argue, at the hearing on defendant's motion for discharge under the speedy-trial statute, that the 95-day extension should not have been granted.

¶ 37 B. Sufficiency of the Evidence

¶ 38 Defendant next argues the State failed to prove him guilty beyond a reasonable doubt of armed robbery and felony murder. Specifically, defendant contends that Randy's testimony of defendant's participation in the crimes was too implausible and tainted by bias to support the State's accountability theory. We disagree.

¶ 39 Where a defendant challenges the sufficiency of the evidence upon which he was

convicted, we will affirm so long as, "viewing the evidence in the light most favorable to the State, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Internal quotation marks omitted.) (Emphasis in original.) *People v. Wheeler*, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007). We will not set aside a verdict on grounds of insufficient evidence unless the proof "is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *Id.* at 115, 871 N.E.2d at 740.

¶ 40 When a jury's guilty verdict depends on eyewitness testimony, the reviewing court will affirm if "a fact finder could reasonably accept the testimony as true beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 279, 818 N.E.2d 304, 308 (2004). The reviewing court must not retry the defendant. *Id.* The jury's determination that testimony is reliable is entitled to deference as "it was the fact finder who saw and heard the witness." *Id* at 280, 818 N.E.2d at 308. Thus, the reviewing court, while not bound by the verdict, should reverse "only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Id.*

¶ 41 Defendant cites several cases in which an appellate court overturned a conviction based on the weakness of a witness's testimony. In *People v. Smith*, 185 Ill. 2d 532, 545-46, 708 N.E.2d 365, 371 (1999), for example, the supreme court reversed the defendant's murder conviction, finding the evidence was insufficient. Only one witness identified the defendant as the shooter. *Id.* at 542, 708 N.E.2d at 370. However, her testimony conflicted with that of other witnesses deemed more reliable; she was repeatedly impeached with prior inconsistent statements, her habitual drug use at the time of the murder, and her activities after the murder,

which the court determined were inconsistent with having witnessed the crime; and her accusation of the defendant was essential to her sister's exoneration of involvement in the murder. *Id.* at 542-44, 708 N.E.2d at 370-71. The supreme court found her testimony so implausible and tainted by bias that no reasonable person could have believed it. *Id.* at 545, 708 N.E.2d at 371. The remaining circumstantial evidence, which failed to identify the defendant as the shooter, was insufficient to sustain the defendant's conviction. *Id.* See also, *e.g.*, *People v. Coulson*, 13 Ill. 2d 290, 296-97, 149 N.E.2d 69, 99 (1958) (holding the witness's story—that the defendant and four others took his wallet at gunpoint, then allowed him to enter his home unsupervised to retrieve more money without calling the police—"taxes the gullibility of the credulous" to the point that the defendant's conviction could not be affirmed); *People v. Ash*, 102 Ill. 2d 485, 493, 468 N.E.2d 1153, 1156 (1984) (overturning the defendant's conviction because the supreme court could not find "an absolute conviction of truth in the accomplice testimony" of a witness).

¶ 42 Defendant argues Randy's testimony is too incredible to support defendant's convictions. Initially, defendant argues, in light of his weight of 430 pounds, defendant could not have contorted his body in the confines of an automobile as necessary to perform the acts described in Randy's testimony—producing a gun and holding it to Randy's side with his right hand while manipulating Randy with his left hand to face the passenger-side door.

¶ 43 This argument is unpersuasive. Defendant's claim requires us, on the state of this record, to speculate grossly about the limitations of defendant's physical abilities and the relative sizes of defendant, Randy, and defendant's Dodge Intrepid. The jurors observed defendant's size; we presume they accounted for it and applied their own common sense when weighing and

considering Randy's testimony. Moreover, to the extent defendant argues his own size would have rendered him physically unable to manipulate Randy, who is more than 6 feet tall and weighs 240 pounds, with one arm, the asserted fact that Randy was being held at gunpoint allows the reasonable inference that little actual exertion was required to coerce Randy as described.

¶ 44 Defendant further notes the State did not present evidence that any bodily substances were observed on his person following the shooting, bringing Randy's account further into doubt. However, there are possible explanations for the lack of such evidence from the record. Perhaps officers noted nothing suspicious about the presence of such matter on defendant's person since they knew he was in the car when Shutes was shot, and they decided not to collect his clothing as evidence; or such evidence was available but neither party chose to present it at trial; or defendant, despite being in the position described by Randy, was shielded somehow from the splatter (Randy, it seems, was not observed to be covered in bodily substances, either). Moreover, to the extent defendant invites our speculation into the circumstances of these crimes and to the extent we are admonished to view the evidence in the light most favorable to the State, it is at least equally implausible that defendant would not have been touched by splatter from Shutes's shotgun wound if, as defendant now claims, he was seated in a normal driving position when Shutes was shot—given defendant's touted "girth," the driver's seat was likely not large enough to shield him entirely.

¶ 45 At any rate, the State was not required to prove that defendant was struck with bodily substances as an element of either armed robbery or felony murder. The inconsistency—if any—with Randy's testimony is insufficient to cause us to doubt the jury verdict. It does not rise, for example, to the level of doubt in *Smith*, where the witness's testimony of how the shooting

occurred was wholly irreconcilable with the other witnesses' accounts.

¶ 46 Defendant also claims Randy's testimony is unreliable because Randy did not mention to officers during the investigation that defendant had used a gun during the robbery. However, Randy was never asked by investigators whether defendant used a gun; he was able to identify the gun defendant had discarded in the park; and the jury was presented with impeachment evidence showing that Randy had not mentioned the gun before. Randy consistently maintained throughout the investigation and the trial that defendant physically prevented him from intervening in Shutes's struggle with the gunman. Even if the jury discounted his testimony regarding defendant's brandishing a gun, the jury could have found Randy's remaining testimony implicating defendant was credible. The evidence on which the jury presumably relied is not so unbelievable as to give rise to doubt of defendant's guilt.

¶ 47 Finally, relying on *Ash*, defendant asserts that we should apply the enhanced standard of credibility required of accomplice testimony to Randy's account. However, unlike cases scrutinizing an interested witness's testimony for "an absolute conviction of its truth," such as *Ash*, Randy was not threatened with criminal charges before reporting the crime to the police and nothing suggests that Randy was involved in plotting or carrying out the armed robbery. *Cf. People v. Williams*, 65 Ill. 2d 258, 266, 357 N.E.2d 525, 529 (1976) (discrediting the testimony of a witness who "agreed to make a statement only after the police informed him that he would be charged with the murder of the cab driver"). To the contrary, Randy was the first person to alert the police to the crime. In fact, there is no evidence whatsoever implicating Randy in the robbery, not even defendant's statement to the police. *Cf. People v. Harris*, 182 Ill. 2d 114, 145, 695 N.E.2d 447, 462 (1998) (refusing to give an accomplice-witness instruction where there was

no probable cause to believe that the witness was guilty of the offenses charged as even the defendant's statements did not implicate the witness). Rather, defendant asks us to infer that Randy was interested in accusing defendant of being involved in the robbery and murder because, essentially, there was no reason (other than his friendship with the victim, who was also believed to be the father of his sister's expected child) *not* to suspect him of planning or aiding in the robbery. This assertion calls for too much conjecture to be compelling.

¶ 48 In all, defendant's sufficiency of the evidence argument is too speculative to persuade us to overturn his convictions. The evidence of his participation in the crimes, including Randy's testimony, is extensive and credible: to wit, defendant's cousin, with whom he exchanged phone calls and text messages around the time of the crime, was identified as the shooter; the shooter apparently knew where in the car the money was located, suggesting inside knowledge; the shooter and defendant spoke immediately after the attack; defendant attempted to hide his own gun (before, apparently, thinking better of it later); and defendant erased the record of his phone calls with his cousin before turning in his phone to police. The jury verdict reflects the most plausible explanation of these events: that defendant collaborated with his cousin to rob two strangers of $3,500 and in the course of the robbery his cousin killed one of the victims in a struggle over the money.

¶ 49 C. Use of Photographic Evidence

¶ 50 Defendant argues the trial court committed plain error in admitting and allowing the jury to view, by his count, 99 photographs depicting the crime scenes and Shutes's body. Specifically, defendant claims the probative value of these photographs was substantially outweighed by their prejudicial effect on the jury's deliberations. Alternatively, he argues his

trial counsel provided ineffective assistance by failing to object to their admission and to sending some of the photographs to the jury room during deliberations. Defendant cannot show plain error or ineffective assistance of counsel. However, as defendant has an opportunity to present additional evidence in a later postconviction proceeding, we decline to rule on his ineffective-assistance claim at this time.

¶ 51 Defendant acknowledges that his failure to object to the admission and use of this evidence amounts to forfeiture but maintains they can be reviewed for plain error. To the contrary, defense counsel went beyond merely failing to object and invited any possible error, precluding plain-error review. See *People v. Harding*, 2012 IL App (2d) 101011, ¶17, 966 N.E.2d 437, 441. When defense counsel "affirmatively acquiesces to actions taken by the trial court," the defendant's only remedy is through an ineffective-assistance claim. *People v. Bowens*, 407 Ill. App. 3d 1094, 1101, 943 N.E.2d 1249, 1258 (2011).

¶ 52 Our conclusion that defendant invited any error in the admission or publication of evidence finds support in the record. The State sought to admit evidence, including the photographs at issue on appeal, at the close of its case-in-chief. Regarding a group exhibit of photographs of defendant's car and the park taken after the shooting, defense counsel stated, "Your Honor, I don't know that I'm going to object to the admission. Obviously, I think there's substantial questions [*sic*] on what goes to the jury. Some of these photographs are described as being the same thing, or another of the same shot." The trial court reiterated that the only question at that time was their admission, and defense counsel reiterated that he would not object. Defense counsel stated he would not object "to admission" of another group exhibit of photographs depicting defendant's car; regarding photographs of Shutes's autopsy, defense

counsel simply stated, "No objection."

¶ 53 Defendant's attorney further stated he would not object to the prosecutor's displaying Shutes's autopsy identification photograph to the jury during closing arguments. He added, "I absolutely agree [the prosecutor] gets to send at least one photo of the victim back [to the jury room] with the wounds." Later, when the parties discussed which exhibits to give the jury for deliberations, defense counsel capitulated to giving the jurors all the photographs defendant now complains of. Specifically, to the prosecutor's request to give the jury a selection from one group exhibit of photographs, counsel replied, "I think there's incredible duplication, but it's not a big deal. The ones [the prosecutor] suggested are fine." To the prosecutor's request that some other photographs be sent to the jury, defense counsel stated, "Again, there's massive duplication, but I don't think there's real prejudice."

¶ 54 Defendant's trial attorney invited the trial court to grant the State's motions to admit and to allow the jury to view the photographs at issue. This removed these actions by the court from the purview of the plain-error doctrine.

¶ 55 Defendant's ineffective-assistance argument remains. To show ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was so deficient that it "fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). "To prove that counsel's performance was deficient, a defendant must overcome the strong presumption that the challenged action or inaction was the product of sound trial strategy." *People v. Pelo*, 404 Ill. App. 3d 839, 870, 942 N.E.2d 463, 490 (2010). Generally, a

postconviction proceeding, not a direct appeal, is the appropriate forum for ineffective-assistance claims turning on evidence that is not in the record—*e.g.*, testimony by the attorney—refuting the presumption that defense counsel's deficient performance was the product of strategy. See *e.g.*, *id.* at 871, 942 N.E.2d at 490.

¶ 56 The record before us is insufficient to sustain defendant's ineffective-assistance argument. It contains "nothing to review" concerning defense counsel's trial strategy with respect to the photographic evidence at issue. See *id.* As in *Pelo*, we decline to find that counsel's consent to showing the jurors these photographs was ineffective *per se* as it appears his actions may arguably have fallen within the bounds of reasonable trial strategy. Defendant's attorney's statements indicate that he considered objecting to allowing the jury to view the disputed photographs but determined they were not too prejudicial. This decision may have reflected a strategy to argue, for instance, that the cumulative evidence regarding the manner and cause of death was intended to distract the jurors from the lack of proof that defendant planned or aided in the armed robbery that resulted in Shutes's killing. With no evidence refuting the presumption that counsel acted pursuant to sound trial strategy, defendant's ineffective-assistance claim cannot be proved at this stage and we decline to consider it. Rather, defendant should have a chance to establish both elements of ineffective assistance of counsel in a proceeding under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2010)).

¶ 57 III. CONCLUSION

¶ 58 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment as costs of this appeal.

¶ 59 Affirmed.