

No. 1-11-0900

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10CR15041
)	
RUBEN SANCHEZ,)	Honorable
)	Thomas M. Davy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant's conviction upheld where he was not denied his constitutional right to self-representation; court-appointed counsel did not provide ineffective assistance; he was not denied his right to conflict-free counsel; and he was afforded a fair and impartial trial.

¶ 2 Following a jury trial, defendant Ruben Sanchez was convicted of aggravated driving under the influence of alcohol and sentenced to 18 months' imprisonment. On appeal, defendant challenges his conviction and the sentence imposed thereon arguing: (1) he was improperly

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denied his constitutional right to proceed *pro se* during the lower court proceedings; (2) the representation provided by his court-appointed counsel was ineffective; (3) he was denied his right to conflict-free counsel during post-trial proceedings; and (4) the State's rebuttal argument deprived him of his constitutional right to a fair and impartial trial. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3

I. BACKGROUND

¶ 4 On August 10, 2010, defendant was arrested following a traffic stop. At the time of the stop, defendant was driving on a suspended license. He was subsequently charged with numerous offenses in connection with the stop including aggravated driving under the influence of alcohol, possession of cannabis, aggravated assault of a peace officer and resisting/obstructing a peace officer.

¶ 5 Defendant first appeared before the court in connection with the charges on September 13, 2010. At that time, the court inquired whether defendant was represented by private counsel. When defendant replied that he had not retained private counsel, the court indicated that it would appoint the public defender to act on his behalf. Thereafter, the following conversation took place in open court:

"[Defendant]: I guess I'll be defending myself. I got—

[Court]: Mr. Sanchez, you don't guess you are going to be defending yourself. It is something that the court decides for you. Now the first thing I always do when someone starts off by saying they guess they will be defending themselves is ask do you have any mental problems in your past history?

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[Defendant]: I'm presently taking psych. medications, but I'm interested in a speedy trial.

[Court]: In which case, sir, I'll order a psychiatric evaluation to determine your fitness for trial as well as your fitness to represent yourself, and at this point, I'll appoint the Public Defender's office to represent you for purposes of the arraignment.

[Court]: Mr. Sanchez, because your response that you are on medication has raised an issue of fitness, I'll continue this case *** for a forensic clinical services evaluation.

[Defendant]: And I'm still asking for a speedy trial.

[Court]: And the fitness issue, Mr. Sanchez, trumps the demand for a speedy trial."

¶ 6 Thereafter, on September 20, 2010, in accordance with the court's order, Doctor Erick Neu, a psychiatrist with Illinois Forensic Clinical Services, examined defendant to determine his mental fitness. At the conclusion of the examination, Doctor Neu submitted a written report containing his conclusions to the court. In pertinent part, Doctor Neu opined that defendant was "currently fit to stand trial as well as fit to represent himself *pro se*." Doctor Neu explained the basis for his opinion as follows: "There is no evidence of any serious mental illness or defect that would compromise his ability to understand the nature of the proceedings against him or to assist in his defense." Doctor Neu acknowledged that defendant was on psychotropic medication, but expressed no opinion as the effect of the medication on defendant's fitness and indicated that a staff psychiatrist would address the medication component of defendant's fitness.

¶ 7 Doctor Nishad Nadkarni, a staff psychiatrist at Forensic Clinical Services, was the doctor

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assigned to examine defendant and render an opinion regarding his fitness to stand trial and fitness to represent himself with medication. In a written report, Doctor Nadkarni concluded that defendant was fit to stand trial and fit to represent himself so long as he complied with his prescribed medication. Doctor Nadkarni explained: "The defendant demonstrates a good understanding of the charge against him, strong comprehension of the nature of courtroom proceedings, and correctly identifies the roles of various courtroom personnel. Furthermore, Mr. Sanchez demonstrates an adequate capacity to assist assigned counsel in his defense and to maintain appropriate courtroom demeanor, if he so chooses. Mr. Sanchez is currently described Prozac (an antidepressant), 20 mg in the morning; Risperdal (antipsychotic), 1 mg at nighttime; and Klonopin (anti-anxiety), 0.5 mg. daily. He does not evidence any side effects or difficulties from his medication regimen that would impair his fitness or functioning. It is further my opinion that Mr. Sanchez continues compliance with psychotropic treatment in order to maintain his fitness status."

¶ 8 The parties next appeared before the court on October 12, 2010, and stipulated to the findings and opinions set forth by Doctors Neu and Nadkarni in their forensic clinical services reports. Based on the stipulations, the court made a "finding of fitness, then, with medication." The court, however, declined to permit defendant to proceed *pro se*, explaining: "[B]ased on the cases dealing with *pro se* representations since Mr. Sanchez is on psychotropic medication, I'm going all the way up to the United States Supreme Court, which says that judges do not have to allow people to represent themselves if there are issues and there would certainly be issues here. The request of Mr. Sanchez to represent himself will be denied."

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¶ 9 On November 8, 2010, at the next status hearing, defense counsel was ill and a substitute appeared on her behalf and requested "a status date of November 18th." The court granted the request, but defendant voiced his objection and conversed with the court as follows:

"[Defendant]: Your honor, I don't agree with that. If anything, I would prefer to set it for trial.

[Court]: Are you going to go to trial with Mr. Elliot, who is—

[Defendant]: I will go to trial by myself.

[The Court]: You will not. You're fit with medication. There is no way in the world you're representing yourself.

[Defendant]: I'm not going by agreement. Set it for trial on the 18th.

[Court]: It is not going to trial on the 18th. [Counsel] is not here.

[Defendant]: Okay, set it for trial next month. The fact is I asked for [a] speedy trial in the beginning. I already have ninety days inside the County Jail. I don't intend on staying there for a year.

[Court]: There is no reason that you should be staying there for a year."

¶ 10 Defendant continued to receive court-appointed representation throughout pre-trial proceedings. On January 24, 2011, both parties answered ready for trial. Before commencing *voir dire*, the court conversed with defendant as follows:

"[Court]: There had been—at one point Mr. Sanchez wished to represent himself. Mr. Sanchez, you're satisfied with the representation of your attorneys today?

[Defendant]: Yes, sir, your Honor."

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¶ 11 After ensuring that defendant was satisfied with the performance of his court-appointed counsel, a jury was selected and trial commenced on the aggravated driving under the influence charge.

¶ 12 At trial, Chicago police officer Garcia testified that on August 10, 2010, at approximately 11:45 p.m., he and his partner, Officer Murphy, were conducting routine patrol in the area of 93rd Street and Baltimore Avenue. They were wearing plain clothes and traveling in an unmarked police car. During their routine patrol, Officer Garcia observed a white Astro van proceed through the intersection of 93rd Street and Baltimore Avenue without stopping at the stop sign. Officer Garcia maneuvered his vehicle to follow the white Astro van. After observing the van fail to stop at another intersection, Officer Garcia activated his vehicle's emergency lights and siren. The driver of the Astro van, however, refused to stop and proceeded through a third intersection without stopping. Officer Garcia continued to follow the van and observed as it crossed the center line separating two lanes of traffic three times while driving over a bridge. Because the driver of the van refused to stop, Officer Garcia sped up his vehicle to drive along side the van. He was able to see inside the van and observed defendant sitting in the driver's seat of the vehicle. Defendant stuck his middle finger in Officer Garcia's direction.

¶ 13 Officer Garcia then maneuvered his vehicle behind defendant and continued following him. Defendant turned down a gravel road before stopping close to a trailer home. After parking his vehicle, defendant exited the vehicle. Officer Garcia observed that defendant's body was "swaying forward as if he was about to fall," and that he was using his left hand to hold onto the frame of the van to balance himself. Officer Garcia approached defendant on foot. As he got

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closer to defendant, Officer Garcia observed a can of what he believed to be an alcoholic beverage on the floorboard of the vehicle. Defendant's eyes appeared to be bloodshot and his speech was slurred. Officer Garcia attempted to effectuate a DUI arrest and ordered defendant to the ground. Defendant did not initially comply and he clenched his hands to his side in "a combative manner." Defendant ordered Officer Garcia not to touch him and refused to get on the ground. Officer Garcia then attempted to grab defendant's left hand; however, defendant swung his fist at him. Officer Garcia was able to move to the side and avoided being punched in his face. Following defendant's display of aggression, Officer Garcia proceeded to give defendant "an open hand strike" to his face. He explained that he did so because defendant had become "an assailant at that point and [he] needed to affect [sic] the arrest and for [his] safety [he] needed to control [defendant]." Officer Garcia emphasized that this was an approved procedure to subdue violent subjects.

¶ 14 After striking defendant once in his face, defendant lost his balance and leaned up against his van. Officer Garcia was then able to grab defendant's hand once again and "administered [an] emergency take down" to force defendant to the ground. Officer Garcia explained that he utilized an emergency take down because of defendant's "combative manners, for his demeanor" and because the only way to effectuate the arrest was to "have an emergency take down for emergency cuffing." Once defendant was prone on the ground, Officer Garcia was able to get defendant's left hand behind his back and cuff it. Defendant's right hand, however, was tucked under his stomach. Although Officer Garcia repeatedly ordered defendant to provide access to his right hand, defendant refused to do so. Due to defendant's continued resistance, Officer

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Garcia called for a Taser; however, he was able to cuff defendant's right hand before the Taser was used. While he was handcuffing defendant, Officer Garcia confirmed that he noticed the odor of alcohol on defendant's breath. His partner retrieved a 12-ounce can of Budweiser from the floor of defendant's van. The can still contained some liquid and it was emptied into a vial. The vial and the can were both subsequently inventoried in accordance with police protocol.

¶ 15 On cross-examination, Officer Garcia acknowledged some errors in the police report that he completed following defendant's arrest. Although the report stated that defendant failed to stop at stop signs at several intersections, the intersection of 93rd and Burley was not equipped with a stop sign; rather, that particular intersection had flashing lights. In addition, Officer Garcia did not indicate that defendant raised his middle finger in his direction in the report. Moreover, although he could not recall whether defendant was wearing a shirt at the time of his arrest, Officer Garcia acknowledged that defendant was not wearing a shirt in his arrest photo. He also confirmed that there appeared to be a large scar on defendant's stomach on the date of his arrest, but denied that defendant informed him that he could not get down on the ground because he had recently had stomach surgery.

¶ 16 Chicago police officer Etti testified that on August 11, 2010, she received a call to provide assistance to other officers and administer a breath test and explained that she was certified in the administration of Breathalyzer tests. Officer Etti met Officers Garcia and Murphy at the Fourth District police station before going to speak to defendant, who had been put into the station's processing room. When Officer Etti entered the room, she noted that the room smelled strongly of alcohol, and observed defendant lying on the floor. Officer Etti immediately

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asked defendant if he had injuries or required any medical attention, but defendant indicated that he did not require assistance. She then asked defendant if he would participate in some field sobriety tests, but defendant refused to do so. Defendant also refused to submit to a Breathalyzer test. During this time, Officer Etti observed that defendant's eyes were red and she characterized defendant's attitude as "very abusive" and uncooperative. He repeatedly used profanity. Because defendant appeared to be "severely intoxicated" and could not get off the floor, Officer Etti requested Officers Garcia and Murphy to call an ambulance. She wanted to ensure that defendant was not overly intoxicated. Although she was not able to administer field sobriety tests or a Breathalyzer before defendant was taken to the hospital, Officer Etti opined that she believed that defendant was under the influence of alcohol at that time. Her opinion that defendant was intoxicated was based upon defendant's erratic driving behavior, the strong odor of alcoholic beverage on his mouth, the redness of defendant's eyes, and his slurred and mumbled speech.

¶ 17 On cross-examination, Officer Etti confirmed that it is not possible to know how much alcohol someone has consumed merely by the odor of alcohol or by the appearance of redness in a person's eyes. Because she had never encountered defendant before, Officer Etti acknowledged that she did not know how defendant's eyes appeared on a normal daily basis.

¶ 18 Following Officer Etti's testimony, the State rested its case-in-chief. Defense counsel then made a motion for a directed finding. The court denied the motion, explaining: "There is testimony both of driving and of physical observations, physical observations of both Officer Garcia and Officer Etti, as well as the testimony of Officer Garcia in terms of the Defendant's

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driving as to the one charge that is here."

¶ 19 Defendant elected not to testify and the defense called no witnesses. After the parties completed closing arguments, the court provided the jury members with relevant instructions. Following deliberations, the jury returned with a verdict finding defendant guilty of the offense of aggravated driving under the influence of alcohol. Thereafter, the circuit court presided over a sentencing hearing. After hearing the arguments advanced in aggravation and mitigation, the court sentenced defendant to 18 months' imprisonment followed by a one-year period of mandatory supervised release. Defendant's post-trial motions were denied. This appeal followed.

¶ 20

II. ANALYSIS

¶ 21

A. Self-Representation

¶ 22 Defendant first argues that the trial court abused its discretion in denying his request to proceed *pro se*. Although defendant had been prescribed psychotropic medication, he maintains that the court did not find, and the record does not support a finding, that he was not competent to represent himself due to psychiatric illness. Accordingly, he argues that the trial court erred in denying his request to represent himself during the lower court proceedings.

¶ 23 The State responds that the trial court acted within its discretion and did not deprive defendant of his constitutional right to self-representation. Specifically, the State maintains that defendant never unequivocally expressed his desire to waive his right to counsel and proceed *pro se*. In addition, defendant explicitly expressed his satisfaction with the performance of his court-appointed counsel on the day of trial. Accordingly, the State argues that even if

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defendant's prior statements to the court pertaining to the issue of self-representation could be deemed unequivocal demands to proceed *pro se*, defendant's subsequent acceptance of counsel's performance rendered his prior requests waived.

¶ 24 A criminal defendant is afforded the constitutional right to represent himself in court proceedings. *Faretta v. California*, 422 U.S. 806, 835 (1975); *People v. Burton*, 184 Ill. 2d 1, 21 (1998). Because a defendant is also entitled to the representation of counsel at all critical stages of a criminal prosecution, a defendant seeking to exercise his right to self-representation must first relinquish his right to counsel. *Burton*, 184 Ill. 2d at 22. This relinquishment must be knowingly and intelligently made. *Faretta*, 422 U.S. at 835; *People v. Baez*, 241 Ill. 2d 44, 115-16 (2011). A knowing and intelligent choice is one that indicates full awareness of both the nature of the right abandoned and the potential consequences that flow from the decision to abandon the right. *Baez*, 241 Ill. 2d at 117. To ensure that a defendant's choice is knowing and voluntary, a criminal defendant should be made aware of the potential dangers and disadvantages of self-representation such that the record reflects that the defendant's choice is "made with his eyes open." *Baez*, 241 Ill. 2d at 117, (quoting *People v. Lego*, 168 Ill. 2d 561, 564 (1995)).

¶ 25 Because courts generally " 'indulge in every reasonable presumption against a defendant's waiver' of the right to counsel" (*People v. Baez*, 241 Ill. 2d 44, 115-116 (2011), (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977))), a defendant's waiver of his right to counsel must be also "clear and unequivocal, not ambiguous" in addition to being knowing and voluntary. *Baez*, 241 Ill. 2d at 116; *People v. Span*, 2011 IL App (1st) 083037, ¶ 59. Accordingly, unless a defendant "articulately and unmistakably" demands to proceed *pro se*, a defendant will be deemed to have

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waived his right to self-representation. *Baez*, 241 Ill. 2d at 116. This requirement serves two purposes as it: "(1) prevent[s] the defendant from appealing the denial of his right to self-representation or the denial of his right to counsel, and (2) prevent[s] the defendant from manipulating or abusing the system by going back and forth between his request for counsel and his wish to proceed *pro se*." *People v. Mayo*, 198 Ill. 2d 530, 538 (2002).

¶ 26 Given that the right to self-representation is constitutionally protected, it may only be denied in limited circumstances. See *Faretta*, 422 U.S. at 834 n. 46. For example, a defendant's request to proceed *pro se* may be denied where the request is untimely (*Burton*, 184 Ill. 2d at 24) or where the defendant engages in deliberate obstructionist misconduct (*Faretta*, 422 U.S. 834 n. 46). In addition, a court may deny a defendant's request to represent himself where there is evidence that the defendant suffers from a "severe mental illness to the point where [he is] not competent to conduct trial proceedings [on his own behalf]." *Indiana v. Edwards*, 554 U.S. 164, 178 (2008). A court, however, may not simply reject a defendant's request to proceed *pro se* because it deems the defendant's decision unwise. *Baez*, 241 Ill. 2d at 116. Rather, where a defendant's waiver of his right to counsel is unequivocal and his decision is knowingly and intelligently made, the court must accept the defendant's decision to represent himself. *Id.*

¶ 27 To determine whether a defendant has made an unequivocal, knowing and intelligent waiver of his right to counsel and truly wants to represent himself, it is necessary to examine the facts and circumstances particular to each case, paying close attention to the background, experience and conduct of the defendant. *Burton*, 184 Ill. 2d at 22; *Baez*, 241 Ill. 2d at 116. Even a defendant's subsequent conduct following a request to proceed *pro se* is relevant. *Burton*,

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184 Ill. 2d at 23-24; *Span*, 2011 IL App (1st) 083037, ¶ 61. That is because even if a defendant has given some indication that he desires to represent himself, he may nonetheless subsequently acquiesce to being represented by counsel by vacillating or abandoning his previous request to proceed *pro se*. See *Burton*, 184 Ill. 2d at 23 ("a defendant may forfeit self-representation by remaining silent at critical junctures of the proceedings"). A court's determination as to whether a defendant has made intelligent waiver of the right to counsel and has invoked his right to self-representation is reviewed for an abuse of discretion. *Baez*, 241 Ill. 2d at 116; *Span*, 2011 IL App (1st) 083037, ¶ 55. Keeping these principles in mind, we now address the merit of defendant's claim.

¶ 28 Here, defendant made his first reference to self-representation at his arraignment, informing that court that he "guess[ed]" he would represent himself because he had not retained private counsel and was interested in a speedy trial. This can hardly be deemed a clear and unequivocal invocation of his right to self-representation, and we do not find that the court abused its discretion in denying defendant's request and ordering him to submit to a fitness examination given his admitted reliance on psychotropic medication. Thereafter, after being found fit to represent himself with medication, defendant did not immediately renew his request to proceed *pro se*; rather, court-appointed counsel continued to provide representation. It was not until a later court date, when court-appointed counsel was absent due to illness, that defendant made a second request to proceed *pro se*. The court denied the request, citing defendant's use of prescribed psychotropic medication. Although the court's cited rationale may be suspect (see *Edwards*, 554 U.S. at 178), we do not find that the court's ruling constituted an abuse of

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discretion. The record reflects that defendant's second request to proceed *pro se*, like his first request, was primarily based on his desire to have a speedy trial and avoid spending any additional time in jail rather than a true desire to represent himself at trial or his dissatisfaction with appointed counsel. Where as here, it is apparent from the record that defendant merely evidences a "conditional willingness to represent himself" the court does not err in denying the request. See, e.g., *Burton*, 184 Ill. 2d at 24-25 (finding that the defendant did not clearly and unequivocally invoke his right to self-representation because his request was not based on a true desire to represent himself but was based on his desire to obtain access to court records); *Span*, 2011 IL App (1st) 083037, ¶ 63 (finding that the defendant was not denied his right to proceed *pro se* where his request was based on his desire to avoid trial delays rather than a true desire to conduct his own defense). Moreover, even if we were to find that defendant's statements could be construed to be voluntary and unequivocal demands to proceed *pro se*, we would nonetheless still conclude that defendant was not denied his constitutional right to self-representation because he subsequently expressed his satisfaction with counsel's performance on the day of trial, thereby abandoning his prior requests to represent himself. See *Baez*, 241 Ill. 2d at 119 (recognizing that a defendant who gives some indication that he wants to proceed *pro se* may later abandon the request and acquiesce in the representation by counsel and finding no constitutional violation of the defendant's right to self-representation occurred where he affirmatively expressed his satisfaction with counsel after previously indicating that he desired to proceed *pro se*).

¶ 29 In so finding, we are unpersuaded by defendant's reliance on *People v. Woodson*, 2011 IL App (4th) 100223. In *Woodson*, the defendant explicitly requested to proceed *pro se* on three

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occasions, sent letters to the court expressing his displeasure with court-appointed counsel and filed motions seeking to fire counsel. *Woodson*, 2011 IL App (4th) 100223, ¶¶ 7-13. Unlike the defendant in *Woodson*, defendant here made no such strident unequivocal demands to represent himself. Moreover, defendant ultimately expressed his satisfaction with the representation provided by counsel. Accordingly, based on the record in the case at bar, there is no basis to conclude that defendant's constitutional right to self-representation was violated.

¶ 30

B. Ineffective Assistance of Counsel

¶ 31 Defendant next advances an ineffective assistance of counsel claim. Specifically, he contends that counsel rendered ineffective assistance when she failed to timely request and tender Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000) (IPI 3.11), which addresses impeachment of a witness by prior inconsistent statements. He argues that he was prejudiced by counsel's error because the "State's sole occurrence witness' trial testimony was impeached by his statements in his police report and the State's case hinged on the officer's credibility." Because the State's case was one based on witness credibility, he asserts that the outcome of his trial would had been different if the jury had been properly instructed.

¶ 32 The State responds that counsel "provided more than competent representation." The State argues that there were no "material" inconsistencies in the testimony provided by Officer Garcia to warrant instructing the jury in accordance with IPI 3.11. Moreover, the State contends that the defendant cannot show that he was prejudiced by counsel's failure to timely tender the instruction because there is nothing to suggest that the outcome of the trial could have been different had the jury been so instructed.

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¶ 33 Every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). The right to effective assistance of counsel entails "reasonable, not perfect, representation." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. To prevail on a claim of ineffective assistance of trial counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010).

¶ 34 With respect to the first prong, matters of trial strategy are generally immune from ineffective assistance of counsel claims and the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001); *People v. Shelton*, 401 Ill. App. 3d 564, 584 (2010). Generally, matters of trial strategy encompass a wide variety of subject matters and include "whether to offer certain evidence or call particular witnesses, whether and how to conduct cross-examination, what jurors to accept or strike, what motions to make, whether to see substitution or recusal of a judge, and what [jury] instructions to tender." *People v. Lowery*, 354 Ill. App. 3d 760, 766-67 (2004); see also *People v. Mims*, 403 Ill. App. 3d 884, 890 (2010) ("Defense counsel's choice of jury instruction is considered a tactical decision, within the discretion of defense counsel"). Although the failure to offer a jury instruction may be presumed to be trial

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strategy, such a decision cannot be regarded as sound strategy where the instruction was essential to ensure a fair determination of the case by the jury. *Lowery*, 354 Ill. App. 3d at 767.

Ultimately, "[i]n recognition of the variety of factors that go into any determination of trial strategy, *** claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review.'" *Wilborn*, 2011 IL App (1st) 092802, ¶ 79, quoting *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002).

¶ 35 To satisfy the second prong, the defendant must establish that but for counsel's unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peebles*, 205 Ill. 2d 480, 513 (2002). A reasonable probability that the trial result would have differed is "a probability sufficient to undermine confidence in the outcome-or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *Evans*, 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008). Accordingly, if an ineffective assistance of counsel claim can be disposed of on the grounds that the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient. *People v. Graham*, 206 Ill. 2d 465-476 (2003).

¶ 36 Here, we find that defendant's ineffective assistance of counsel claim necessarily fails because he cannot establish that counsel's failure to timely tender IPI 3.11 prejudiced him. IPI 3.11 is an instruction pertaining to prior inconsistent statements and provides as follows:

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“The believability of a witness may be challenged by evidence that on some former occasion he [(made a statement) (acted in a manner)] that was not consistent with his testimony in this case. Evidence of this kind [ordinarily] may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom.

It is for you to determine whether the witness made the earlier statement, and, if so what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made.” Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000).

IPI 3.11 is "[a]ppropriately given when two statements are inconsistent on a material matter. ***

[T]he materiality of the prior inconsistent statement is an issue for the trial court to determine.

*** [A]n issue is material when the contradiction reasonably tends to discredit the testimony of the witness on such facts.' " *People v. Carmona-Olivara*, 363 Ill. App. 3d 162, 169 (2005), quoting *People v. Eggert*, 324 Ill. App. 3d 79, 82 (2001).

¶ 37 It is apparent from the record that defense counsel's failure to offer IPI 3.11 was an oversight rather than trial strategy. It was only after the trial court completed the jury instructions that counsel realized that she had failed to tender instruction IPI 3.11 because she had thought the State had already tendered that instruction at her request. Counsel sought to rectify the omission and conversed with the court outside of the presence of the jury as follows:

"Judge, for the record I forgot I had asked the State to prepare an impeachment

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instruction. I believe one had been prepared. It wasn't in my packet. I should have noticed it but I didn't. I realized it as I was going through the instructions while your Honor was reading them.

I believe that there were two points of impeachment, at least with Officer Garcia. One was the location of the stop sign, which he said that defendant went through and then he changed his testimony. He testified that defendant went through a flashing light at the intersection of 93rd and Hammond in his report he wrote that the defendant went through a stop sign at a different location. ***

There was also the impeachment by the omission where the officer testified that the defendant gave him the finger when he drove by and he admitted that he did not put that in his report."

¶ 38 In response, the State argued that the instruction was not appropriate because the alleged inconsistencies identified by defense counsel were not material. Specifically, the State argued that Officer Garcia's police report was simply a summary of the events leading up to defendant's arrest and the omissions contained therein did not have a tendency to contradict his trial testimony. After hearing from both attorneys, the trial court denied defense counsel's request to instruct the jury in accordance with IPI 3.11 explaining:

"I indicated that the instruction was submitted after closing argument and after I had read the other instructions that if, while I might have allowed it in prior, but it did not provide the attorneys, specifically this would be a defense instruction, the State to argue against the inferences made by the defense.

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And so I think at this point it would not be proper to read to the jury without an opportunity for the attorneys to argue and argument is completed.

Additionally, even though the jury will not be given an instruction on this, it was certainly argued to them that Officer Garcia testified differently on the stand th[a]n what he, or they will have the opportunity to observe the photographs to determine if, in fact, he did testify differently. So for those reasons denied off the record and we will now put in the record that I am denying IPI 3.11 to be read to the jury after the conclusion of the arguments and the instructions."

¶ 39 Although the parties dispute the materiality of these alleged inconsistencies, there is no dispute that they were brought to the attention of the jury. As the court correctly observed, defense counsel cross-examined Officer Garcia about his failure to include the detail that defendant made an obscene gesture with his middle finger in his police report. In addition, counsel also brought to the jury's attention the fact Officer Garcia testified that defendant drove through a stop sign at an the intersection had actually been equipped with flashing red lights rather than a stop sign. Defense counsel also emphasized these inconsistencies during closing argument, reminding the jury that not all of the details of defendant's arrest were contained in Officer Garcia's police report.

¶ 40 Although the jury did not receive the impeachment instruction, we do not find that they were left without adequate guidance as to how to evaluate Officer Garcia's testimony. Among the instructions that the jury did receive was IPI 1.02, which provides:

"Only you are the judges of the believability of the witnesses and of the weight to be

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given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his age, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in light of all of the evidence in the case."

Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000).

¶ 41 Courts have previously found that a failure to instruct the jury in accordance with IPI 3.11 is not cause for reversal where the other jury instructions correctly and sufficiently covered the applicable legal principles. See, e.g., *People v. Cannon*, 150 Ill. App. 3d 1009, 1018-20 (1986) (finding that the trial court's failure to instruct the jury on prior inconsistent statements did not amount to error where the jury was provided instructions in accordance with IPI 1.02); *People v. Larry*, 218 Ill. App. 3d 658, 666-67 (1991) (same); see also, *People v. Luckett*, 273 Ill. App. 3d 1023, 1035 (1995) (finding no error in failing to provide the jury with IPI 3.11 because the jury was not left without adequate guidance as to how to evaluate inconsistent statements given that "[i]t is obvious to the layman that any contradiction of a witness' testimony calls into question the accuracy of that testimony, and if that testimony is disbelieved as to one matter, the veracity of the remainder is cast into doubt").

¶ 42 Ultimately, because the jury was informed of the contradictions in Officer Garcia's testimony and were instructed how to evaluate the testimony of the trial witnesses in accordance with IPI 1.02, we do not find that defendant was prejudiced by counsel's oversight in failing to tender instruction 3.11 to the court in a timely manner. Accordingly, we conclude that defendant was not denied effective assistance of counsel.

¶ 43

C. Conflict-Free Counsel

¶ 44 Defendant next argues that he was denied his right to conflict-free counsel during post-trial proceedings. Defendant observes that counsel raised the issue of her own ineffectiveness in a post-trial motion. Accordingly, because counsel was forced to argue her own ineffectiveness, he contends that counsel was “operating under an actual conflict of interest,” and thus the court erred in failing to appoint new counsel to represent him for post-trial proceedings.

¶ 45 The State, in turn, responds that defendant’s contention that trial counsel labored under an actual conflict of interest is belied by the record because counsel voluntarily raised the issue of her own ineffectiveness. Where the issue of ineffectiveness is not raised by a defendant in a *pro se* motion but, is instead, raised and litigated by counsel, the State contends that there is no actual conflict of interest.

¶ 46 Encompassed in the constitutional right to effective assistance of counsel is the right to conflict-free representation. *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008); *People v. Perkins*, 408 Ill. App. 3d 752, 761 (2011). Courts have recognized two types of conflicts: *per se* conflicts and actual conflicts of interests. *People v. Taylor*, 237 Ill. 2d 356, 374 (2010); *Perkins*, 408 Ill. App. 3d at 761.

¶ 47 A *per se* conflict “is one in which the ‘facts about a defense attorney’s status *** engender, by themselves, a disabling conflict.’ ” (Emphasis in original.) *People v. Morales*, 209 Ill. 2d 340 (2004) (quoting *People v. Spreitzer*, 123 Ill. 3d 1, 14 (1988)). A *per se* conflict of interest exists where: (1) counsel has a contemporaneous relationship with a victim, the prosecution or an entity assisting the prosecution; (2) counsel is contemporaneously representing

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a prosecution witness; and (3) counsel is a former prosecutor who has previously been personally involved in the prior prosecution of the defendant. *Hernandez*, 231 Ill. 2d at 143-44; *Morales*, 209 Ill. 2d at 345-46; *Perkins*, 408 Ill. App. 3d at 761. A *per se* conflict is grounds for automatic reversal and “there is no need [for a defendant] to show that the attorney’s actual performance was in any way affected by the existence of the conflict.” *Spreitzer*, 123 Ill. 2d at 15.

¶ 48 In cases involving actual conflicts of interests, however, prejudice is not presumed and a defendant must identify a “specific defect in his counsel’s strategy, tactics or decision making attributable to the conflict.” *Spreitzer*, 123 Ill. 2d at 18. Speculative allegations and conclusory statements are not sufficient to establish that counsel’s performance was affected by an actual conflict of interest. *Hernandez*, 231 Ill. 2d at 144; *Morales*, 209 Ill. 2d at 349.

¶ 49 Here, defendant concedes that counsel was not operating under a *per se* conflict of interest as this court has previously recognized that “an attorney arguing his own ineffectiveness does not fall within any of the[] three categories” that are recognized to be *per se* conflicts of interests. *Perkins*, 408 Ill. App. 3d at 761. Instead, defendant contends that counsel labored under an actual conflict of interest where she raised the issue of her own ineffectiveness in single sentence in a post-trial motion and failed to offer any argument in support of the motion before the trial court. The record belies his assertion.

¶ 50 Among the specific contentions of error identified in a post-trial motion filed by counsel on defendant's behalf was the following ineffective assistance of counsel claim: “Defense counsel was ineffective for failing to offer the impeachment instruction, IPI 3.11, during the instruction conference.” Although counsel elected to stand on the written motion and not provide additional

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oral argument in support of the motion, there is no evidence that this was due to an actual conflict of interest. Defense counsel had previously brought her failure to timely tender IPI 3.11 to the court's attention during trial. She explained that she thought the instruction had been tendered earlier and argued in favor of providing this additional instruction to the jury. Specifically, counsel cited the inconsistencies in Officer Garcia's testimony that justified instructing the jury in accordance with IPI 3.11. Thus, although counsel declined to provide any additional oral argument in support of the motion for a new trial, we note that she had already previously argued the underlying instruction issue at trial and preserved the issue for appellate review. Given that counsel voluntarily raised the issue of her ineffectiveness and asserted it on defendant's behalf, we do not find that defendant was denied his right to conflict-free counsel during post-trial proceedings. See, e.g., *Perkins*, 408 Ill. App. 3d at 762 (finding that the defendant was not denied his right to conflict-free counsel where counsel voluntarily and zealously argued his own ineffectiveness in a post-trial motion).

¶ 51

D. Rebuttal Arguments

¶ 52 Finally, defendant argues that he was denied his right to a fair and impartial trial when the prosecutor made statements highlighting defendant's failure to testify and improperly expressed her own opinions about the credibility of the witnesses during the State's rebuttal argument. He acknowledges that this issue was not properly preserved for appellate review as no contemporaneous objections were made to the purportedly improper statements at trial or in a post-trial motion, but urges this court to review his claim for plain error.

¶ 53 The State, in turn, responds that the prosecutor's rebuttal arguments were proper and did

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not deprive defendant of his right to a fair trial.

¶ 54 To properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). A defendant's failure to abide by both requirements results in forfeiture of appellate review of his claim. *Enoch*, 122 Ill. 2d at 186; *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007); *People v. Gabriel*, 398 Ill. App. 332, 353 (2010). Here, it is undisputed that defendant failed to object all of the allegations of prosecutorial misconduct or include them with specificity in his posttrial motion, and therefore failed to properly preserve this issue for appellate review.

¶ 55 The plain error doctrine, however, provides a limited exception to the forfeiture rule. 134 Ill. 2d R. 615(a); *Bannister*, 232 Ill. 2d at 65. It permits review of otherwise improperly preserved issues on appeal if the evidence is closely balanced or the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. 134 Ill. 2d. R. 615(a); *Bannister*, 232 Ill. 2d at 65. The first step in any such analysis is to determine whether any error actually occurred *People v. Walker*, 232 Ill. 2d 113, 24-25 (2009); *Gabriel*, 398 Ill. App. 3d at 353. If an error is discovered, the defendant then bears the burden of persuasion to show that the error prejudiced him under either prong. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). Keeping these principles in mind, we review defendant's claim.

¶ 56 Generally, prosecutors are afforded wide-latitude during closing argument. *People v. Caffey*, 205 Ill. 2d 52, 131 (2001); *People v. Phillips*, 392 Ill. App. 3d 243, 275 (2009).

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Accordingly, a “ ‘defendant faces a substantial burden in attempting to achieve reversal [of his conviction] based upon improper remarks made during closing arguments.’ ” *People v. Gutierrez*, 402 Ill. App. 3d 866, 895 (2010) (quoting *People v. Williams*, 332 Ill. App. 3d 254, 266 (2002)). This wide-latitude afforded to prosecutor permits counsel to comment on the evidence as well as any reasonable inferences that the evidence may support, even if the inferences reflect negatively on the defendant. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). To be proper, however, the inferences must be reasonable and based on the facts and circumstances proven during the trial. *Gutierrez*, 402 Ill. App. 3d at 895; *People v. Hood*, 229 Ill. App. 3d 202, 218 (1992). It is also proper for a prosecutor to respond to comments advanced by defense counsel that clearly invite a response (*People v. Johnson*, 208 Ill. 2d 53, 113 (2003)), however, those responses should not contain improper or prejudicial commentary (*People v. Campbell*, 2012 IL App (1st) 101249, ¶ 40). In addition, a prosecutor may not comment on a defendant's failure to testify (*People v. Dixon*, 91 Ill. 2d 346, 350 (1982)) or offer personal opinions about the case (*People v. Emerson*, 122 Ill. 2d 411, 434 (1987)). In the event improper comments are made, a trial court can usually cure any prejudice arising from the comments by promptly sustaining an objection to the challenged comment and giving a proper jury instruction. *Campbell*, 2012 IL App (1st) 101249, ¶ 42.

¶ 57 To evaluate a defendant's allegation of prosecutorial misconduct during closing argument, a reviewing court will consider the closing argument as a whole and evaluate the challenged comments in the context in which they were delivered. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). Although a prosecutor's remarks may sometimes exceed permissible bounds of

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commentary, a verdict may not be disturbed unless it can be determined that the comments resulted in "substantial prejudice" against a defendant. *Wheeler*, 226 Ill. 2d at 123; *People v. Walton*, 376 Ill. App. 3d 149, 160 (2007). Substantial prejudice exists when it can be determined that the improper remarks constituted a material factor in the defendant's conviction (*Wheeler*, 226 Ill. 2d at 123; *Gutierrez*, 402 Ill. App. 3d at 895) and the "long-settled test for reversing a conviction based on a prosecutor's remarks is 'whether the jury would have reached a contrary verdict had the improper remarks not been made' " (*People v. Burton*, 338 Ill. App. 3d 406, 420 (2003), quoting *People v. Heard*, 187 Ill. 2d 36, 73 (1999)).

¶ 58 Defendant first objects to the following statements:

“You talk about what you remember and what you have heard. Let’s look at who’s telling the truth here. The defense got up here and made you all kinds of promises that they didn’t keep. They told you how the defendant was coming home from the store. Nobody told you where the defendant was coming from. Nor do I know if anybody knows where the defendant was coming from.

What else did they tell you? The defendant had recent abdominal surgery. You heard nothing of the sort. He has a scar on his abdomen. Lots of us have scars on our body. That doesn’t mean we are holding ourselves to protect ourselves. Remember, he just had surgery and he is out driving around at midnight without a shirt with a beer can on the driver’s side. Sounds like he just had surgery to me.

But those are things that the defense promised you. You didn’t hear anything of the sort and you have to remember while the defendant doesn’t have to testify, of course

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he doesn't and he has no burden of proof. They did get up here and tell you that. And you can't consider that."

¶ 59 Defendant asserts that the above remarks were "a direct comment on [his] failure to testify at trial and clearly improper." We disagree. While we acknowledge that a prosecutor is forbidden from commenting either directly or indirectly on a defendant's exercise of his constitutional right not to testify, a comment is only improper if it was intended or calculated to direct the attention of the jury to the defendant's decision not to testify. *Bannister*, 232 Ill. 2d at 88; *People v. Howard*, 147 Ill. 2d 103, 146-47 (1991). Here, we do not find that the comments were made to direct the attention of the jury to defendant's exercise of his constitutional right not to testify; rather the prosecutor was responding to the lack of evidence contained in the record to support defense counsel's account of the circumstances surrounding defendant's arrest. See, e.g., *Thomas*, 137 Ill. 2d at 529 (recognizing that where a prosecutor's statement is "designed to demonstrate a lack of evidentiary basis for a defense counsel argument, rather than to point to defendant's failure to testify, such an argument is permissible").

¶ 60 Defendant next contests the propriety of the following statement:

"You saw Officer Garcia testify. You saw Officer Etti testify. Did you really think they were trying to pull a fast one on you? Did you really think they were exaggerating? I think if anything they were subdued, truthful, they told it like it is."

¶ 61 He maintains the aforementioned statement improperly "conveyed the prosecutor's personal opinion about the veracity of Garcia and Etti's testimony, invaded the province of the jury and positioned the prosecutor as 'thirteenth juror.'" We disagree. Although the prosecutor

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used the word "I," when the argument is viewed in context, it is apparent that counsel was not vouching for the credibility of the witnesses or expressing her personal opinion; rather, she was responding to defense counsel and providing an argument based on the evidence that had been presented. See, e.g., *People v. Bailey*, 249 Ill. App. 3d 79, 82-84 (1993) (finding that counsel's repeated use of the first person during closing arguments was not improper because it was apparent that when the comments were viewed in their proper context, they were based on the evidence rather than personal opinion). Nonetheless, assuming *arguendo*, that these statements exceeded the scope of proper commentary, when the argument is viewed as a whole, we cannot conclude that they substantially prejudiced defendant. Accordingly, we reject defendant's contention that the State's rebuttal argument deprived him of his constitutional right to a fair and impartial trial.

¶ 62

III. CONCLUSION

¶ 63 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 64 Affirmed.