

2014 IL App (2d) 130122-U
No. 2-13-0122
Order filed August 4, 2014

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-4070
)	
KENDRICK L. MITCHELL,)	Honorable
)	Gary V. Pumilia,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Burke and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defense counsel was not ineffective, as counsel could not have used a police report for impeachment, a proposed witness's testimony would have been cumulative, and the record did not contain a medical report that counsel allegedly should have introduced; (2) the trial court erred in failing to address defendant's apparent revocation of his waiver of counsel for the sentencing hearing; (3) defendant's two convictions of home invasion (based on one entry, though with two victims) violated the one-act, one-crime rule; (4) defendant was entitled to 1,164 days of presentencing credit, not 1,163.

¶ 2 Following a bench trial, defendant, Kendrick L. Mitchell, was convicted of two counts of home invasion (720 ILCS 5/12-11(a)(2) (West 2008)). Evidence presented at trial conflicted as to whether the two victims were injured, and defense counsel mentioned at trial that one of the

victims was under the influence of heroin when that victim was taken to jail. After a sentencing hearing, where defendant appeared *pro se*, he was sentenced to concurrent terms of 12 years' imprisonment, and he was given credit against his sentence for 1,163 days he served in presentencing custody. On appeal, defendant contends that (1) his counsel was ineffective for failing to impeach the witnesses with (a) evidence that neither victim suffered any injury and (b) a report showing that one of the victims was under the influence of heroin when he was taken to jail; (2) the trial court erred when it failed to acknowledge and rule on defendant's request for the assistance of counsel at the sentencing hearing; (3) one of his convictions must be vacated under the one-act, one-crime rule; and (4) he is entitled to an additional day of sentencing credit. For the reasons that follow, we determine that counsel was not ineffective; the court erred in failing to inquire further into defendant's alleged attempt to revoke his waiver of counsel; one of defendant's convictions of home invasion must be vacated; and defendant is entitled to an additional day of sentencing credit.

¶ 3 The following facts are relevant to resolving the issues raised. On December 2, 2009, defendant was arrested for breaking into the home of Lisa Brockmann, defendant's former girlfriend, and injuring her and Aaron Fox, Brockmann's longtime friend. At trial, Brockmann, who had a prior conviction of attempted home invasion, testified that, on December 1, 2009, she was at home at approximately 1:30 p.m. when she heard a knock on her front door. Brockmann went to the door and asked who was there; defendant said that it was him. Brockmann told defendant, who never lived with her, that she did not want to speak to him, and defendant began pounding on the door, and Brockmann told defendant that she would call the police if he did not leave. Defendant refused to leave, and Brockmann went to the kitchen and was about to call 911 when she heard the front door burst open and saw defendant, who appeared upset, coming

around the corner and into the kitchen. Defendant grabbed the phone from Brockmann; he threw the phone to the ground; and the phone broke. Defendant then “grabbed” Brockmann by the hair and “slammed” her into the kitchen cabinets, into the refrigerator, and onto the floor, and then he “dragged” her by the hair into the dining room.

¶ 4 According to Brockmann, Fox soon came into the dining room and asked defendant “what was going on.” Defendant let go of Brockmann, turned to Fox, and punched Fox in the face. When Fox fell to the floor and Brockmann saw that defendant was going to hit Fox again, she ran to a neighbor’s house and called the police.

¶ 5 Brockmann testified that defendant injured her. Specifically, when asked to describe her injuries, Brockmann stated that “[her] head hurt because [her] hair had been pulled out, [her] neck, [her] back, from being slammed around.” Brockmann also asserted that her elbow “may have” been injured, as she was “slammed around into, you know, the kitchen counter and cabinets.” Brockmann denied being under the influence of drugs or alcohol that day.

¶ 6 Fox, who was arrested on a traffic warrant later that day and had a conditional discharge for a prior misdemeanor theft, testified consistently with Brockmann. However, Fox added that he was in the living room when he heard the door break open. Fox turned and saw defendant standing by the door. Defendant pushed Fox out of the way and went into the kitchen. Fox followed and saw defendant dragging Brockmann across the kitchen floor. When Fox asked defendant what he was doing, defendant “struck [Fox] in the head *** 4 or 5 times maybe.” Fox explained that defendant, using his fist, struck him a “couple of times in the back [of the head], couple of times on the side [of the head], [and] once in the front” and “on [the] side of [his] cheek[,]” between his right eye and cheek. When asked about the injuries he sustained that day, Fox said that he had “some swelling, a little bit of bruising.” Fox clarified that he “wasn’t hurt to

the point where [he] had to go to the hospital or anything like that,” but he was placed in the medical portion of the county jail when he was arrested that day. Like Brockmann, Fox denied being under the influence of drugs or alcohol when the incident happened.

¶ 7 Officer Michael Lange testified that he and two other officers, one of whom was Officer Mark Honzel, went to Brockmann’s home to investigate a home invasion. Lange, who talked to Brockmann at the scene, observed that Brockmann was “visibly shaken” and “very upset,” but he did not “observe any visible injuries to her person.” Lange testified that he “documented *** in [his] report” that “[he] did not see any visible injury on *** Brockmann.” Although Honzel did not testify at defendant’s trial, he testified at a suppression hearing that Brockmann “had no marks or bruises on her.”

¶ 8 Lange also spoke to Fox later that day. Fox, who appeared relaxed and calm, told Lange that his face hurt, but Lange testified that Fox “had no visible injuries.” Lange stated that, if he would have seen any visible sign of injury to Fox, he would have made sure to document it. Lange explained that he would have taken pictures of the injuries or noted in his report that Fox sustained injuries. When asked whether “the fact that there are no pictures, *** either of *** Fox or *** Brockmann, reflects that there were no visible injuries,” Lange responded, “Yes.”

¶ 9 Lange’s report, which is part of the record on appeal, lists “injury” for both Brockmann and Fox, and next to each entry is “N-None.” The report further provides that Brockmann told Lange that her only injury was that her left elbow was sore, while Fox told the officer that he did not have any injuries.

¶ 10 After the State presented their witnesses, defense counsel advised the court that he had just received from the State a medical report concerning Fox. Counsel found this report “highly interesting,” because “these are medical reports of *** Fox when he was taken to the Winnebago

County Jail suffering from heroin use.” This report is not part of the record on appeal, and neither party addressed the report further in any detail.

¶ 11 Defendant testified that he and Brockmann began dating in September 2009 and that they had plans to spend Thanksgiving together. However, those plans did not work out, and, because the couple had some miscommunication about how defendant was coming back to the area and kept missing each other’s phone calls, defendant went over to Brockmann’s house on December 1, 2009. When he got there, he knocked on the door and identified himself, but Brockmann told him that “ ‘[n]ow is not a good time.’ ” Defendant continued knocking, and the door, which had a lock that was broken before that day, opened. Defendant walked into the house and smelled “some crack or something.” He went into the kitchen and saw Brockmann, who was stunned to see him. Soon thereafter, Fox came into the kitchen, and defendant called them both “crackheads” and told them that “ ‘y’all meant for each other.’ ” Brockmann’s phone starting ringing, defendant went to get it from the counter, Brockmann went to snatch it out of his hand, and, in the process, the phone fell on the floor and broke. When asked about hurting either Brockmann or Fox that day, defendant denied arguing with Brockmann or physically harming either her or Fox in any way.

¶ 12 The trial court found defendant guilty. In doing so, the court determined that “[defendant’s] testimony was not credible,” and it made the following observation:

“There is no doubt, based on the testimony of Ms. Brockmann and Mr. Fox, that injuries were caused to each of them. The fact that there are no injuries—no photographs does not help the State, but some injuries are susceptible of looking good on photographs[,] and other injuries are not. That doesn’t mean there is not an injury. And we’re not talking necessarily great bodily harm because that’s not required as an element

of proof. We're talking injury. And both parties testified they were injured, and the Court finds that testimony to be credible.”

¶ 13 After defendant was found guilty, he claimed that his counsel provided ineffective assistance. At various hearings that followed, defendant expressed an interest in proceeding *pro se*, and the court cautioned him against doing so. Defendant alleged that various attorneys essentially “sold [defendant] out,” and the attorneys advised the court that they attempted to meet with defendant and discuss the issues he had, but defendant would always refuse to do so and would express in interest in proceeding *pro se*.

¶ 14 On June 12, 2012, after four different attorneys had represented defendant, and the State claimed that defendant was seeking new counsel as a way to further delay the proceedings, defendant advised the court that “[i]f [he was] not going to get a replacement,” he would proceed *pro se*. The trial court told defendant that his current counsel, who had “done the right thing so far,” would continue to represent defendant unless defendant wished to proceed *pro se*. Defendant opted to proceed *pro se*. When the court asked defendant if he was “sure about that,” defendant replied, “Yes, sir, absolutely, a hundred percent sure,” and he told the court that “[he was] not changing [his] mind.” The court admonished defendant pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984), and defendant persisted in his desire to represent himself.

¶ 15 Defendant filed a lengthy motion for a new trial, and the trial court, after reading the motion and hearing defendant’s argument, denied the motion on January 30, 2013. The court then advised defendant that he could appeal that ruling. After the court determined that defendant was indigent, the court asked defendant, “Do you want me to appoint counsel to represent you?” Defendant replied, “Yes, but—for the sentencing stage, yes.” The court did not inquire further about defendant’s desire to have counsel at the sentencing hearing.

¶ 16 On February 8, 2013, defendant asked the trial court about filing a motion to reconsider the denial of his motion for a new trial. At the end of that discussion, the court proceeded with a sentencing hearing. At no time on February 8, 2013, did defendant reiterate or did the court inquire further about whether he wanted counsel to represent him at the sentencing hearing. After hearing arguments from defendant and the State, the court sentenced defendant. Defendant never claimed that the court should have inquired into his request for counsel, that his two convictions of home invasion violated the one-act, one-crime rule, or that he was entitled to an additional day of sentencing credit. This timely appeal followed.

¶ 17 On appeal, defendant contends that (1) his counsel was ineffective; (2) the trial court should have acknowledged and ruled on his request to be represented by counsel at the sentencing hearing; (3) one of his home-invasion convictions must be vacated, as two convictions violate the one-act, one-crime rule; and (4) he is entitled to an additional day of sentencing credit. We consider each argument in turn.

¶ 18 First, we consider whether trial counsel was ineffective. A claim of ineffective assistance of counsel requires a defendant to establish that (1) the attorney's performance fell below an objective standard of reasonableness *and* (2) there is a reasonable probability that, but for the attorney's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). To succeed on a claim of ineffective assistance, a defendant must overcome a strong presumption that counsel's conduct was the result of strategic choices rather than incompetence. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Decisions concerning what evidence to present on a defendant's behalf have long been viewed as matters of trial strategy that ultimately rest with counsel and are generally immune from claims of ineffective assistance. *People v. West*, 187 Ill. 2d 418, 432 (1999). Likewise, "the decision

whether or not to *** impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel.” *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). The fact that a trial strategy was ultimately unsuccessful is not a sufficient reason to deem counsel’s representation ineffective. *People v. Skillom*, 361 Ill. App. 3d 901, 913-14 (2005). “This general rule is predicated upon our recognition that the right to effective assistance of counsel refers to ‘competent, not perfect representation.’ ” *West*, 187 Ill. 2d at 432 (quoting *People v. Stewart*, 104 Ill. 2d 463, 492 (1984)). Thus, mistakes in trial strategy, tactics, or judgment do not of themselves render the representation incompetent. *Id.* “The only exception to this rule is when counsel’s chosen trial strategy is so unsound that ‘counsel entirely fails to conduct any meaningful adversarial testing.’ ” *Id.* at 432-33 (quoting *People v. Guest*, 166 Ill. 2d 381, 394 (1995)).

¶ 19 Defendant advances three ways in which his counsel rendered ineffective assistance. That is, he argues that his attorney should have (1) used Lange’s police report as impeachment to support the absence of injuries to Brockmann and Fox; (2) called Honzel at trial, as Honzel had testified at the suppression hearing that Brockmann was not bruised and did not have any marks on her; and (3) introduced the report he received from the State indicating that Fox was under the influence of heroin when he was taken to jail, as that report would have discredited Brockmann’s and Fox’s testimony about being sober that day and supported defendant’s version of events.

¶ 20 We first consider whether counsel was ineffective for failing to introduce Lange’s police report. The problem with defendant’s argument is that Lange’s testimony at trial was consistent with his police report. That is, in both the report and at trial, Lange stated that neither Brockmann nor Fox sustained any injuries. Thus, his report could not have been used to impeach his testimony. See *People v. Johnson*, 385 Ill. App. 3d 585, 608 (2008). Any claim that

the report could have been used to impeach Brockmann and Fox at trial is likewise unfounded, as the report could be used only to impeach Lange, the author of the report. See *People v. Lucas*, 132 Ill. 2d 399, 430 (1989) (“Defendant’s attempt to impeach [a witness] with a written statement of [another witness] was improper.”). The cases defendant cites in support of his argument are clearly distinguishable, as the officers in those cases, unlike Lange here, were never called to testify. See, e.g., *People v. Williams*, 329 Ill. App. 3d 846, 855-56 (2002). To the extent defendant is arguing that counsel was ineffective for not impeaching the victims with their prior statements to the police, any alleged deficiency was not prejudicial.

¶ 21 Further, calling Honzel to testify at trial would not have provided the court with any information of which it was not already aware. Specifically, because Lange already testified that neither Brockmann nor Fox was injured, Honzel’s testimony would have been cumulative. Counsel cannot be deemed ineffective for failing to introduce cumulative evidence. See *People v. Hayes*, 2011 IL App (1st) 100127, ¶ 42.

¶ 22 Defendant also claims that counsel was ineffective for failing to introduce the medical report that allegedly indicated that Fox was under the influence of heroin on some date when he was taken to jail. Even assuming that the report concerned Fox’s condition when he was taken to jail on the day the incident occurred, we cannot conclude that counsel was ineffective for failing to present this evidence, as we decline to speculate with respect to the substantive contents of the report. As a result, “[b]ecause this claim of ineffective assistance of counsel requires consideration of matters not contained in the record, we decline to address this argument on direct appeal.” *People v. Phillips*, 383 Ill. App. 3d 521, 545 (2008) (court refused to consider whether counsel was ineffective for failing to submit fire marshall’s report, because, without

knowing what was in the report, as the report was not contained in the record on appeal, court could not speculate that, as the defendant contended, the fire was started in a different location).

¶ 23 Given the above, we determine that counsel's performance did not fall below an objective standard of reasonableness. Accordingly, we conclude that counsel was not ineffective. See *People v. Harris*, 206 Ill. 2d 293, 304 (2002) (noting that both prongs must be satisfied to state a claim of ineffective assistance of counsel).

¶ 24 Defendant's second contention is whether the trial court should have acknowledged and ruled on defendant's request to be represented by counsel at the sentencing hearing. Defendant forfeited review of this issue by failing to raise this issue in the trial court. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, he argues that the issue may be considered under the plain-error rule. "Plain error review is appropriate where either an alleged error concerns the deprivation of a fundamental right or the evidence in the case is closely balanced." *People v. Ogurek*, 356 Ill. App. 3d 429, 433 (2005). The right to counsel is a fundamental right, and the alleged deprivation thereof is properly reviewable for plain error. *Id.* Accordingly, we consider whether the trial court committed plain error in failing to inquire into defendant's attempted request to revoke his previous waiver of counsel.

¶ 25 Under the Sixth Amendment to the United States Constitution (U.S. Const., amend. VI), a criminal defendant facing incarceration has the right to counsel at all "critical stages" of the criminal process. *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004). The Sixth Amendment also provides for the right of self-representation in criminal cases if the defendant knowingly and intelligently waives the right to counsel. *People v. Burton*, 184 Ill. 2d 1, 21 (1998). To ensure that a defendant's waiver of counsel is knowingly and intelligently made, the trial court must admonish the defendant pursuant to Rule 401(a). *Ogurek*, 356 Ill. App. 3d at 436. Here, the

court admonished defendant pursuant to Rule 401(a), and the parties agree that defendant's initial waiver of counsel under this rule was proper.

¶ 26 “A defendant's waiver of the right to counsel carries through to all subsequent proceedings unless (1) the defendant later requests counsel, or (2) other circumstances suggest that the waiver is limited to a particular stage of the proceedings.” *People v. Griffin*, 305 Ill. App. 3d 326, 329 (1999). Although questions concerning the waiver of counsel and the revocation of that waiver are generally reviewed for an abuse of discretion (*id.*), we believe that a *de novo* standard applies here, as the trial court did not consider, let alone decide, whether defendant was requesting counsel at the sentencing hearing (see *People v. Abernathy*, 399 Ill. App. 3d 420, 426 (2010) (“Where *** there are no disputes of fact, whether a defendant's right to counsel has been violated is an issue of law that we review *de novo*.”)).

¶ 27 In resolving whether the court should have acknowledged defendant's request for counsel, we find *Griffin* instructive. There, the defendant received his 11-year prison sentence two months after he waived his right to counsel and entered his guilty plea. *Griffin*, 305 Ill. App. 3d at 329. After the court admonished the defendant about how to perfect his appeal, the defendant sought clarification of what type of posttrial motion he needed to file and asked the court whether he was entitled to the appointment of counsel. *Id.* More specifically, the defendant asked the court whether he had to file a motion to vacate the sentence to perfect an appeal. *Id.* The defendant also asked, “ ‘Can I be appointed an attorney to represent me in this appeal?’ ” *Id.* The court replied that the defendant was entitled to the appointment of counsel, but the court declined to advise the defendant further, noting that it would be acting as the defendant's attorney if it did so. *Id.*

¶ 28 Based on these facts, this reviewing court concluded that “[the] defendant sufficiently requested the assistance of counsel.” *Id.* at 330. We noted that “[e]ven if [the] defendant did not explicitly request counsel, he clearly sought legal advice from the trial judge and expressed an interest in the assistance of counsel for perfecting an appeal.” *Id.* Thus, “[b]ecause courts must ‘indulge in every reasonable presumption against waiver’ [citation],” we determined that “it follows that a reviewing court should make all reasonable presumptions in favor of a revocation of that waiver.” *Id.* Accordingly, we presumed that the defendant attempted to revoke his waiver when he sought both counsel and advice at the sentencing hearing. *Id.*

¶ 29 We believe that this case is even stronger than *Griffin*. Here, defendant waived his right to counsel more than seven months before he attempted to revoke that waiver. When defendant made that attempt, he, unlike the defendant in *Griffin*, explicitly said that he wanted counsel to represent him at his sentencing hearing. That is, when the trial court asked defendant if he wanted counsel, albeit counsel on appeal, defendant replied, “Yes, but—for the sentencing stage, yes.” If, as in *Griffin*, a court must presume that a defendant attempts to revoke his waiver of counsel by asking the court to appoint counsel on appeal, we must presume that defendant here attempted to revoke that waiver by explicitly asking for counsel to be appointed at the sentencing hearing.

¶ 30 In reaching this conclusion, we are mindful of the lengthy proceedings in the case concerning whether defendant would remain with his appointed counsel or go forward *pro se*. We are also mindful of how defendant persisted in his wish to handle his case himself, assuring the court at one point that he was “a hundred percent sure” that he wanted to proceed *pro se* and would “not [be] changing [his] mind.” Be that as it may, we determine that the trial court erred in failing to determine whether defendant wished to revoke his waiver of counsel on a later date.

Thus, we remand this cause for the trial court to consider defendant's request and, if granted, to conduct a new sentencing hearing. *Id.* at 332.

¶ 31 The next issue we address is whether one of defendant's convictions of home invasion must be vacated. We review this issue *de novo*. See *People v. Strawbridge*, 404 Ill. App. 3d 460, 462 (2010). The State, without addressing forfeiture, concedes error on this issue, noting that the two convictions run afoul of the one-act, one-crime rule. See *People v. King*, 66 Ill. 2d 551, 566 (1977). We agree.

¶ 32 Both home-invasion counts were predicated on the same act of entry into the home. The difference between the two counts was that one charged defendant with injuring Brockmann and the other charged defendant with injuring Fox. In *People v. Cole*, 172 Ill. 2d 85, 102 (1996), our supreme court held that "a single entry will support only a single conviction" of home invasion even though the defendant inflicted harm on two occupants in a dwelling. Thus, here, under *Cole*, multiple convictions of home invasion are improper. *Id.* Accordingly, we order the trial court to vacate one of the convictions on remand. See *People v. Artis*, 232 Ill. 2d 156, 172 (2009) (where there are multiple convictions of the same offense based upon the same physical act, none of the offenses is more serious than any other for purposes of the one-act, one-crime rule).

¶ 33 Last, we address defendant's claim that he is entitled to an additional day of sentencing credit. We review this issue *de novo*. *People v. McCreary*, 393 Ill. App. 3d 402, 408 (2009). The State, without addressing forfeiture, concedes error. We agree that defendant is entitled to an additional day of credit.

¶ 34 The record reflects that defendant was arrested on December 2, 2009, and remained in custody until he was sentenced on February 8, 2013. The trial court gave defendant credit for

1,163 days in custody, but the correct credit is 1,164 days. Given that this cause must be remanded, we order the trial court to correct defendant's mittimus on remand to reflect 1,164 days of credit.

¶ 35 In conclusion, we determine that counsel was not ineffective; the trial court erred in failing to inquire into defendant's apparent attempt to revoke the waiver of his right to counsel; one of defendant's convictions of home invasion must be vacated; and defendant is entitled to an additional day of sentencing credit. We remand this cause for the trial court to address the latter three issues.

¶ 36 For these reasons, we affirm in part and remand this cause with directions to the circuit court of Winnebago County.

¶ 37 Affirmed in part and remanded with directions.