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SIXTH DIVISION
October 20, 2017

No. 1-12-2012
2017 IL App (1st) 122012-UB

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 11 CR 2913
	)	
ALLEN FIELDS,	)	Honorable
	)	Matthew Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort specially concurred.

ORDER

Held: Prior conviction for AUUW could serve as predicate felony for UUWF conviction; evidence was sufficient to prove defendant's guilt; counsel was ineffective for not filing a motion to suppress under *Miranda v. Arizona*; State's rebuttal argument was not plain error; defendant was not prejudiced by replacement of juror; trial court did not coerce the verdict; and remand for new post-trial counsel or a *Krankel* hearing was not necessary; affirmed in part and reversed and remanded in part.

¶ 1 Following a jury trial, defendant Allen Fields was convicted of unlawful use or possession of a weapon by a felon (UUWF) and sentenced to four years in prison. In a previous

order, we reversed defendant's conviction because we found that his prior conviction for aggravated unlawful use of a weapon (AUUW) was void under *People v. Aguilar*, 2013 IL 112116, and therefore could not serve as the predicate felony for UUWF. *People v. Fields*, 2014 IL App (1st) 122012-U.

¶ 2 On September 28, 2016, our supreme court entered a supervisory order that directed us to vacate our judgment and reconsider the matter in light of *People v. McFadden*, 2016 IL 117424, to determine if a different result is warranted. We now vacate our prior judgment and find that defendant's prior conviction for AUUW could serve as the predicate felony for his UUWF conviction. We also address the other issues that defendant raised in his initial appeal: (1) his conviction should be reversed because the State's case rested on one officer's uncorroborated and incredible claims; (2) defense counsel was ineffective for failing to file a motion to suppress where certain statements were admitted in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); (3) defendant was denied a fair trial due to the prosecutor's improper rebuttal argument; (4) defendant was prejudiced by the trial court's decision to replace a juror during deliberations; (5) the trial court coerced the verdict; and (6) the matter should be remanded to appoint new posttrial counsel or for a *Krankel* inquiry. We reverse on the *Miranda* issue and remand for a new trial.

¶ 3 I. BACKGROUND

¶ 4 The record reveals that after an incident on February 8, 2011, in which police found a gun in a vehicle, defendant was charged with multiple weapons-related offenses. Before trial, the State nol-prossed all of the charges except for one count of unlawful use or possession of a weapon by a felon, which stated that defendant had possessed a handgun "after having been previously convicted of the felony offense of aggravated unlawful use of a weapon under case number 08CR17581***."

¶ 5 Also before trial, defense counsel filed a motion to quash arrest and suppress evidence that stated as follows. Defendant's arrest was a seizure under the fourth amendment of the United States Constitution. However, defendant's conduct before the arrest could not reasonably be interpreted as probable cause that defendant had committed or was about to commit a crime. The arrest was made without a valid search or arrest warrant, and so any physical evidence, statements, reports of gestures, and responses should be suppressed.

¶ 6 At a proceeding related to the motion to quash, on November 22, 2011, defense counsel and the State discussed the whereabouts of one of the officers at the scene—Officer Sierra—who was "essential" to the motion to quash, but had been reassigned to a position in which he was not allowed to come to court. At a proceeding on March 27, 2012, defense counsel stated that it was in her client's best interest to withdraw the motion and enter a written jury demand.

¶ 7 Another pretrial matter was the State's motion *in limine*, which in part sought to prohibit the defense from eliciting or presenting any evidence or testimony or making any argument or reference to the current assignment of Officer Sierra or any internal or external proceedings involving Officer Sierra that did not relate to the matters pending before the court. In addressing the State's motion, defense counsel stated that she tried to get information for a long time about Officer Sierra's whereabouts and why he was not allowed to testify, which was "what ultimately got us to enter the demand." Defense counsel maintained that the defense had "an absolute right to argue where is Officer Sierra" and that the defense had the right to assert that the State did not bring the officer who could have corroborated the story of the other officer at the scene, Officer DiCarlo. It was acceptable if the State did not attempt to go into anything about what Officer Sierra saw or what he said to Officer DiCarlo. The State agreed that the defense could argue that

the jury did not hear from Officer Sierra. The State further asserted that any testimony from Officer DiCarlo about what Officer Sierra told him was hearsay and would not come in.

¶ 8 Ultimately, the court granted the State's motion *in limine*. The court also allowed the defense to comment on Officer Sierra's absence and question why he was not there. The court instructed the State to prepare its witness, "if there is any information, conversations you are not to go into specifics of a conversation with Sierra. Did you have a conversation with Sierra, yes, what did you [do] next."

¶ 9 At trial, Officer DiCarlo testified as follows. On February 8, 2011, he was in the vicinity of 7010 South Eggleston in Chicago at approximately 11:36 p.m. After speaking with a victim of an aggravated battery, Officer DiCarlo and his partner, Officer Sierra, toured the area looking for three armed men. The officers had a photo identification for one of the men, Jovan Webb, and descriptions of the other two men. The officers were also looking for three weapons: an AK-47, a .45 semiautomatic handgun, and a snub-nose revolver. Officer DiCarlo observed a van that was running and double-parked. Inside the van were two people, one in the front passenger seat and one in the back seat. The person in the front seat was Jovan Webb, who was placed in custody in the back of a squad car. The backseat passenger matched the description of one of the other two people that the officers were looking for, and the officers put him in custody in a police vehicle as well.

¶ 10 While the officers were clearing the van and looking for weapons, defendant approached, stated that the van was his, and asked what Officer DiCarlo was doing. Defendant was handcuffed and "placed *** in custody" inside of a police vehicle. The officers did a protective pat-down for weapons and continued clearing the van and looking for weapons. After not finding any, Officer DiCarlo asked defendant if there was a gun in the van, and stated that if there was,

defendant needed to tell him. Defendant replied that there was a gun in the van. Officer DiCarlo asked where the gun was and defendant stated he could show Officer DiCarlo. Officer DiCarlo and defendant returned to the van, where defendant stated that the gun was behind the seatbelt assembly and that a plastic piece had to be moved out of the way. Defendant was handcuffed at the time, so he motioned to the officers and explained how to retrieve the gun. The officers followed defendant's directions and recovered a snub-nose revolver that was fully loaded with six live rounds. Defendant returned to the police vehicle, where Officer DiCarlo advised defendant of his *Miranda* rights using a preprinted card from a Fraternal Order of Police book. Having indicated that he understood his rights and agreeing to speak, defendant stated that the gun was his and that he needed it for protection because he had been robbed several times.

¶ 11 At that point, the officers transported defendant to the police station for further processing. Around 12:30 a.m., with Officer DiCarlo and Officer Sierra present, defendant was again advised of his *Miranda* rights and stated that the gun was his and he needed it for protection because he had been robbed several times. Another officer, Sergeant Sebastian, heard defendant's statement at the police station. During his testimony, Officer DiCarlo identified a picture of the interior of a vehicle that was similar to defendant's. Officer DiCarlo was also shown a revolver at trial that he stated was the same one that he recovered.

¶ 12 Officer DiCarlo acknowledged on cross-examination that the revolver was very well hidden and that he would not have found the revolver without defendant's statement. Officer DiCarlo admitted that he did not ask defendant to write down his statement at the police station. Officer DiCarlo further stated that the police did not get a chance to tow the van because someone interfered with it being towed. Officer DiCarlo did not know what happened to the van. Officer DiCarlo also recalled that several officers responded to the call to look for the armed

men. An evidence technician arrived at some point, but did not take pictures of the van, process the gun for fingerprints, or check if defendant's DNA was on the gun.

¶ 13 After Officer DiCarlo's testimony, defense counsel renewed the motion to quash and suppress the arrest. Defense counsel stated that there was nothing in the descriptions of the armed men that fit defendant's description or the van, and yet Officer DiCarlo took defendant into custody as soon as he approached the van. Defense counsel added that defendant was handcuffed and questioned before he was given *Miranda* warnings. Defense counsel asserted that there was no probable cause to arrest defendant and all of defendant's statements should be suppressed. The State responded that the motion was not proper and it would have elicited different testimony if a motion had been at issue. The court denied the motion, finding that it was untimely.

¶ 14 The parties stipulated that defendant had been previously convicted of a qualifying felony offense. Both sides then rested.

¶ 15 In its closing argument, the State in part recalled the testimony that defendant told a police officer that he possessed a firearm and it was not until defendant told the officer where the gun was that the officer was able to find it. Defense counsel asserted in closing that Officer DiCarlo's version of the events was not credible and there was no evidence to corroborate the officer's testimony that defendant stated the van was his. Noting that Officer DiCarlo stated that he was with Officer Sierra, defense counsel asked, "Where is Sierra today? Sierra didn't testify." Defense counsel also asserted that the sergeant who witnessed defendant's confession was not in court either. Defense counsel stated that the evidence consisted of just one witness and there were no fingerprints, DNA, pictures, or impoundment of the van.

¶ 16 In rebuttal, the State maintained that defendant's statement was not all the evidence, and asserted that defendant's car had two people that matched the description of two people involved in an aggravated battery. The State continued:

> "The defense raises the fact that Officer Sierra wasn't here to testify. You only heard from Officer DiCarlo. I heard Officer DiCarlo tell you that he and Officer Sierra were on the scene. That's who was there with him the whole time. You didn't hear another officer come in and tell you the same thing over again. No, you didn't. You didn't. He was there for everything Officer DiCarlo was there for. So no, you didn't hear from another witness who was there for the same things that Officer DiCarlo testified to come in and tell you the same thing over again."

¶ 17 After closing arguments, the court instructed the jury. The court also told the first alternate juror not to discuss the case with anyone and stated that she could be called back if she was still needed. The jury began its deliberations at approximately 4:54 p.m.

¶ 18 What follows next is a summary of the notes that the jury sent while deliberating and the court's responses. At approximately 6:10 p.m., the jury asked for a copy of a police report and supplemental report. After a discussion with the parties, the judge denied the request and told the jury to continue deliberating. Just after 7 p.m., the jury asked: (1) for a transcript of Officer DiCarlo's testimony; (2) if there was a reason that Officer Sierra and Sergeant Sebastian did not appear as witnesses; and (3) whether Sergeant Sebastian gave a written statement as a witness to the conversation about "there was a gun, that it was [defendant's], and the location of the gun in the car"; and (4) if the jury could see the exhibit that depicted where the weapon was concealed. As for a transcript, the court reporter informed the court that it would take at least two hours to

prepare one. The judge stated that as a result, it would tell the jury that a transcript was currently unavailable. As for the questions about Officer Sierra and Sergeant Sebastian, the judge responded that the jury heard all the evidence and to continue to deliberate. As for the exhibit, the judge responded that it was not the actual van and the jury could see it with the understanding that the exhibit was used for demonstrative evidence.

¶ 19 Around 7:47 p.m., the jury asked, "What do we do if we don't come to a unanimous decision on this case?" The State requested that the jury be told to continue deliberating. Defense counsel asserted that given all the jury's questions in this one-witness case, the court should give a *Prim* instruction and ask if the jury was hopelessly deadlocked. The judge concluded that a *Prim* instruction was premature and told the jury, "Please continue to deliberate."

¶ 20 The judge convened the parties at around 8:35 p.m. and stated it would tell the jury to return the next morning. Defense counsel asked for a *Prim* instruction, which the judge declined to give. The jury asked for five more minutes, and ultimately, the judge told the jury to stop deliberating for the day at around 8:44 p.m. and return by 10 a.m. the next day.

¶ 21 Shortly before 11 a.m. the next day, a Friday, the court received a note from juror Majoo, asking to be dismissed due to a religious obligation. Defense counsel asserted that the juror's religious order should be respected. When the judge proposed that the jury continue to deliberate while the alternate was called, defense counsel objected and stated that if the juror was going to be excused, she should be excused right then. Juror Majoo was excused and the judge told the jury to stop deliberating. About an hour later, the alternate arrived and answered questions from the judge. The alternate stated that she had not formed any opinions, discussed the case with anyone, or expressed any opinions to anyone. The State and defense counsel declined to ask the alternate any questions. The judge instructed the jury to "begin your deliberations anew and

work towards reaching a verdict in this matter." The jury resumed deliberating at around 12:10 p.m.

¶ 22 At around 2 p.m., the jury sent a note that stated, "We cannot come to a unanimous verdict. This is a hung jury." At around 2:10 p.m., the jury asked, "May we send the gun back and see the bullets?" Defense counsel requested a *Prim* instruction, but the judge found that a *Prim* instruction would be premature. The judge stated that he could not take the notes out of context, and the second note indicated that the jurors were still discussing the case. The judge told the jury, "Please continue your deliberations," and sent back the gun and bullets to the jury.

¶ 23 Just before 3 p.m., the jury asked, "How many hours do we need to deliberate before it is considered a hung jury? The vote has not changed from nine to three guilty. Nothing has changed in over eight hours of deliberation." Defense counsel renewed her request for a *Prim* instruction and the State was not sure how fruitful further deliberations would be. The judge brought out the jury and instructed it as follows:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment.
>
> Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely

> because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> You are not partisans, you are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case."

The judge then told the jury to continue to deliberate. The jury returned to the jury room at 3:08 p.m. and requested chalk a short time later.

¶ 24 Around 3:35 p.m., the jury asked:

> "Your Honor, is this jury not entitled to be a hung jury? If our interpretations of what was said in any instance and seeing the recorded information from yesterday's court session will help reach a unanimous verdict, can we please read this information? Why does this decision have to be unanimous? Both sides are very set on belief from information we recall from witness account, information presented, evidence, et cetera."

The State contended that the jury seemed to be asking for a transcript and that efforts should be made to provide one, while defense counsel maintained that the jury was hung. The judge agreed with the State that the jury was asking for a transcript, but stated that a transcript was unavailable. The judge asserted that it was too early to declare the jury hung because only 30 minutes had passed since the *Prim* instruction. The judge told the jury, "Please continue your deliberations."

¶ 25 Around 4:30 p.m., the jury asked for an unofficial copy of the court transcript. The judge told the parties that per a call with the court reporter, a transcript could be prepared for Monday, but was currently unavailable. The judge responded to the jury that the transcript was unavailable and the court reporter was not available to prepare it.

¶ 26 At around 5:55 p.m., the jury sent a note stating, "We are almost there. She has signed her first name." Five minutes later, the jury returned a guilty verdict. The jury was polled, which led to the following exchange with juror Reddick:

> "THE CLERK: Marcella Reddick, was this then and is this now your verdict?
>
> JUROR: (No response.)
>
> (PAUSE.)
>
> THE COURT: Ms. Reddick?
>
> JUROR: (No response.)
>
> (PAUSE.)
>
> THE COURT: Ms. Reddick, are you all right?
>
> JUROR: (No response.)
>
> THE COURT: Are you all right, Ms. Reddick?
>
> JUROR: (No response.)
>
> (PAUSE.)
>
> JUROR: That is my verdict."

¶ 27 Defense counsel pointed out that juror Reddick was in tears and crying profusely. Defense counsel asked the court to inquire, which the court did as follows:

> "THE COURT: All right. Ms. Reddick, are you okay?"
>
> JUROR: Yes, sir.
>
> THE COURT: Is this your verdict?
>
> JUROR: Yes, sir."

¶ 28 Subsequently, defense counsel indicated that she would file a motion for a new trial and to set aside the verdict, given Reddick's condition and because the jury's final note indicated that

juror Reddick was intimidated and coerced. The judge responded that juror Reddick indicated that the verdict was hers and the court accepted her at her word.

¶ 29 On May 24, 2012, defense counsel filed a motion to set aside the verdict, vacate the finding of guilty, and grant a new trial. In part, the motion stated that the jury failed to give defendant the presumption of innocence that is required by law. The motion further stated that defendant received ineffective assistance of counsel because both of his attorneys were ill and not prepared for trial. The lead defense attorney had back problems that prevented her from completing the trial and she did not give the prepared closing argument. The second-chair attorney, who had never before given a closing argument for the defense, gave the closing argument without any preparation and had a stomach virus. Also, due to the attorneys' illnesses, they did not complete cross-examination, use peremptory challenges during jury selection, or call any witnesses or mount any defense. The attorneys' illnesses also caused the jury to misunderstand the defense's position. As another ground of ineffectiveness, the motion stated that defense counsel was ineffective for not objecting when a juror asked to be excused. The motion asserted that the already-angry jury was further exasperated when it was told to begin deliberating anew. The motion further contended that the verdict resulted from harassment and coercion, noting that one of the jurors was hysterical when the jury was polled. The motion posited that the court should have declared the jury hung, given that the case had one witnesses and was not complicated. By continuing to send back notes, the judge led the jury to believe that it might be held over the weekend, since it was not until a Friday evening when the last juror's will was overcome. Also, the transcript was never ordered even though the jury continued to ask for it. Attached to the motion were affidavits from two jurors, one of whom was the alternate juror.

¶ 30 In response, the State asserted that a jury verdict may not be impeached by the testimony of jurors. The response further stated that defense counsel's performance was reasonable and effective, noting that defense counsel conducted a lengthy and effective cross-examination of Officer DiCarlo, mounted a defense via opening statement, cross-examination, and closing argument, and used a peremptory challenge during jury selection. The response also maintained that the court did not abuse its discretion by having the jury continue to deliberate after the jury asked if it could be hung.

¶ 31 At the proceeding on defendant's posttrial motion, defense counsel rested on the motion and the State rested on its response. The court ultimately denied the motion. In an oral ruling, the court found that the record disproved that defense counsel was ineffective. The court stated that counsel's performance during jury selection was very effective and counsel used peremptory challenges. Defense counsel's cross-examination was vigorous and effective, and counsel "made the correct points." The court further noted that counsel showed no signs of being ill. The court acknowledged that one of the defense attorneys noted during closing argument that she had back issues the previous evening, but the other defense attorney was "experienced and capable" and her argument "hit all the right points." The court further noted that it had the discretion to allow jurors to continue deliberating, and the jurors quietly deliberated and reached a unanimous verdict.

¶ 32 Following a sentencing hearing, defendant was sentenced to four years in prison.

¶ 33 Defendant timely appealed and raised multiple issues, including that the State could not use defendant's prior AUUW conviction to prove an element of UUWF because under *Aguilar*, 2013 IL 112116, ¶¶ 12, 22, the Class 4 form of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)) was found to violate the second amendment of the United States

Constitution. Defendant contended that his 2008 AUUW conviction could not stand as proof of an element of UUWF, and so his conviction must be reversed.

¶ 34 On May 19, 2014, we issued an order in which we reversed defendant's UUWF conviction pursuant to *Aguilar*, and because we found that issue dispositive, we did not address defendant's other arguments. *Fields*, 2014 IL App (1st) 122012-U. On September 28, 2016, our supreme court entered a supervisory order that directed us to vacate the judgment and reconsider the matter in light of *McFadden*, 2016 IL 117424, to determine if a different result is warranted. We allowed the parties to file supplemental briefing with respect to the impact of *McFadden*.

¶ 35 II. ANALYSIS

¶ 36 A. Impact of *McFadden*

¶ 37 We first address whether, under *McFadden*, defendant's 2008 AUUW conviction could serve as the predicate felony for his 2011 UUWF conviction. As background, to sustain a conviction for UUWF, the State must prove that the defendant knowingly possessed a weapon or ammunition and that the defendant was previously convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2010).

¶ 38 We briefly summarize *McFadden*. In *McFadden*, 2016 IL 117424, ¶¶ 3, 32, the defendant was convicted of UUWF based on a 2002 conviction for the form of AUUW found unconstitutional in *Aguilar*. Initially, this court vacated the defendant's UUWF conviction, finding that defendant's Class 4 AUUW conviction was void and could not serve as a predicate offense. *People v. McFadden*, 2014 IL App (1st) 102939, ¶ 43. Subsequently, the supreme court reversed and reinstated the defendant's UUWF conviction. *McFadden*, 2016 IL 117424, ¶ 1. In its decision, the court reaffirmed the principle that "the void *ab initio* doctrine renders a facially unconstitutional statute unenforceable and renders a conviction under that facially

unconstitutional statute subject to vacatur." *Id.* ¶ 20. The court further noted that the defendant was not trying to apply the void *ab initio* doctrine to his 2002 AUUW conviction, but was instead trying to reverse his 2008 UUWF conviction. *Id.* ¶ 21. This raised the question of whether a prior conviction, which is asserted to be based on a statute that has been declared facially unconstitutional, may nevertheless serve as proof of the predicate felony conviction in prosecuting UUWF. *Id.* In finding that it could, the court relied on the United States Supreme Court's decision in *Lewis v. United States*, 445 U.S. 55 (1980), which held that "a constitutionally infirm prior felony conviction could be used by the government as the predicate felony" for a conviction under a federal felon-in-possession-of-a-firearm statute. *Id.* ¶ 22. The court also examined the UUWF statute and found that "[n]othing on the face of the statute suggests any intent to limit the language to only those persons whose prior felony convictions are not later subject to vacatur." *Id.* ¶ 27. The court also found that the state legislature intended that a defendant must clear his felon status before obtaining a firearm, and that the statute "represents a considered and deliberate decision to require that a prior felony conviction be vacated or expunged before a firearm is possessed." *Id.* ¶¶ 29, 30. The court concluded that although *Aguilar* may provide a basis for vacating the defendant's 2002 AUUW conviction, *Aguilar* did not automatically overturn that judgment of conviction. *Id.* ¶ 31. Thus, at the time that the defendant committed UUWF in 2008, he had a judgment of conviction that had not been vacated and made it unlawful for him to possess firearms. *Id.*

¶ 39 Applying *McFadden* here, defendant had a 2008 conviction for the Class 4 version of AUUW that was declared unconstitutional in *Aguilar*. Defendant did not have his conviction vacated before he committed UUWF in 2011. As a result, his 2008 AUUW conviction could serve as the predicate felony for UUWF.

¶ 40 Defendant contends that *Montgomery v. Louisiana*, 577 U.S. __, 136 S. Ct. 718 (2016), and *Ex Parte Siebold*, 100 U.S. 371 (1879), were not addressed in *McFadden* and require that we reverse his conviction. Defendant argues that these Supreme Court cases prevent states from ever punishing a citizen, whether directly or collaterally, based on a law that is facially unconstitutional. In part, defendant cites the statement from *Montgomery* that "as a general principle, *** a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Montgomery*, 577 U.S. at __, 136 S. Ct. at 731. Defendant further asserts that because the record in *McFadden* failed to show that the defendant's prior conviction was indeed for a facially unconstitutional offense, the *Montgomery/Siebold* issue was not even ripe for the court's review.

¶ 41 In *Montgomery*, 577 U.S. at __, 136 S. Ct. at 727, the Court considered whether *Miller v. Alabama*, 567 U.S. 460 (2012), which held that mandatory life without parole for juvenile homicide offenders was unconstitutional, applied retroactively on collateral review. The Court answered affirmatively, holding that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Id.* at 729. In *Siebold*, 100 U.S. at 374, the Court considered whether a party imprisoned due to a crime that was created by and indictable under an unconstitutional act of Congress may be discharged on *habeas corpus*. In part, the Court stated that an unconstitutional law is void and an "offen[s]e created by it is not a crime." *Id.* at 376.

¶ 42 Contrary to defendant's assertion, the record indicates that our supreme court indeed considered *Montgomery* and *Siebold.* As the State points out, the defendant's counsel was granted leave to cite *Montgomery* as additional authority in *McFadden*, and made the same

arguments as are presented here. See *People v. Mosley*, 2015 IL 115872, ¶ 16 n.6 (we may take judicial notice of briefs filed in another case). The defendant's counsel in *McFadden* also raised *Montgomery* in a petition for rehearing.

¶ 43 Further, *Montgomery* cautioned that states have no power to enforce a conviction or penalty barred by the constitution (*Montgomery*, 577 U.S. at ___, 136 S. Ct. at 729-30), and the State is not seeking to enforce defendant's invalid felony conviction. See *People v. Smith*, 2017 IL App (1st) 122370-B, ¶ 29. Nothing in *McFadden* prevents defendant from seeking to vacate his prior AUUW conviction. See *id*. Additionally, unlike in *Montgomery*, the issue in *McFadden* was whether a prior conviction based on a facially unconstitutional statute may serve as proof of the predicate felony conviction in prosecuting the offense of UUWF. *McFadden*, 2016 IL 117424, ¶ 21. Our supreme court answered affirmatively, and we are bound to follow *McFadden*. See *People v. Artis*, 232 Ill. 2d 156, 164 (2009) (appellate court lacks authority to overrule decisions of the supreme court).

¶ 44 In the alternative, defendant contends that pursuant to *Lewis*, 445 U.S. 55, his offense must be reduced from a Class 2 felony to a Class 3 felony. Defendant asserts that while *Lewis* permits use of a prior invalid conviction to prove a defendant's status as a felon, it forbids the use of that prior conviction to prove an element of an offense or enhance punishment. Defendant also relies on *United States v. Bryant*, 579 U.S. ___, 136 S. Ct. 1954 (2016), *United States v. Tucker*, 404 U.S. 443 (1972), and *Burgett v. Texas*, 389 U.S. 109 (1967) to maintain that constitutionally invalid convictions cannot be used to enhance punishment, sentence a defendant, or prove the prior-felony element of a recidivist statute. Defendant states that the State could use the fact of his prior conviction to prove his felon status when he possessed a weapon, which is

only a Class 3 felony. However, the State also used the prior conviction to make the offense a Class 2, which was expressly forbidden.

¶ 45 Section 24-1.1(e) of the Criminal Code (720 ILCS 5/24-1.1(e) West 2010)) provides that the offense of UUWF itself is a Class 3 felony. The statute also states that "[v]iolation of this Section by a person not confined in a penal institution who has been convicted of *** a felony violation of Article 24 of this Code *** is a Class 2 felony ***." 720 ILCS 5/24-1.1(e) (West 2010).

¶ 46 Defendant's reliance on *Tucker*, *Burgett*, and *Bryant* is misplaced. In *Tucker*, 404 U.S. 443, the Court held that a conviction that was invalid because the defendant had been denied his right to counsel could not be used by a court in sentencing the defendant after a subsequent conviction. In *Burgett*, 389 U.S. 109, the Court held that a conviction that was invalid because the defendant had been denied his right to counsel could not be used to support guilt or enhance punishment for another offense. *Bryant*, 579 U.S. at __, 136 S. Ct. at 1962, re-stated these principles. *Lewis* explained that the subsequent conviction or sentence was unconstitutional in *Tucker* and *Burgett* because it depended on the reliability of the past uncounseled conviction. *Lewis*, 445 U.S. at 67. *Lewis* continued that federal gun laws—one of which our supreme court found similar to the UUWF statute in *McFadden*, 2016 IL 117424, ¶ 28—focus "on the mere fact of conviction *** to keep firearms away from potentially dangerous persons." *Lewis*, 445 U.S. at 67. The Court found that "[e]nforcement of that essentially civil disability through a criminal sanction does not 'support guilt or enhance punishment,' " on the basis of an unreliable conviction. *Id.* Here, the State did not use the prior conviction to enhance punishment—rather, the State applied section 24-1.1(e) of the Criminal Code to prohibit defendant from possessing a firearm.

¶ 47 *People v. Easley*, 2014 IL 115581, reinforces our conclusion that the State did not use defendant's prior AUUW conviction to enhance punishment. In *Easley*, 2014 IL 115581, ¶¶ 21-22, the defendant was sentenced as a Class 2 offender for UUWF based on a prior UUWF conviction. The court found that under section 24-1.1(e) of the Criminal Code, a Class 2 sentence was the only statutory allowed sentence. *Id.* ¶ 22. The court further found that the prior UUWF conviction was only used once, as an element of the offense, and not also to enhance the offense. *Id.* ¶ 28. Just as in *Easley*, defendant's prior AUUW conviction was an element of his UUWF offense and section 24-1.1(e) of the Criminal Code dictated that defendant had to receive a Class 2 sentence. See *Smith*, 2017 IL App (1st) 122370-B, ¶ 32. The State did not impermissibly use defendant's prior conviction to enhance punishment.

¶ 48 Thus, defendant's prior AUUW conviction could serve as the predicate felony for his UUWF conviction and defendant properly received a Class 2 sentence. We note, however, that we incorporate the views expressed in the majority opinion and special concurrence in *People v. Spivey*, 2017 IL App (1st) 123563, about the need for a legislative solution to the effects of old convictions under the statute found unconstitutional and void *ab initio* in *Aguilar* being used in subsequent prosecutions.

¶ 49 Having determined that his prior AUUW conviction could serve as the predicate felony for his UUWF conviction, we turn to the other issues that defendant raises on appeal.

¶ 50 B. Sufficiency of the Evidence

¶ 51 Defendant contends that the evidence was insufficient to support his conviction. Defendant argues that Officer DiCarlo's testimony was contrary to human experience and not credible. According to defendant, it is impossible to believe that someone who had taken the trouble to hide a gun in a place where it could not be found would tell the police there was a gun

and lead them directly to it. Defendant further asserts that there was no corroborating evidence for any part of Officer DiCarlo's testimony.

¶ 52 As stated above, to sustain a conviction for UUWF, the State must prove that the defendant knowingly possessed a weapon or ammunition and that the defendant was previously convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2010). When reviewing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The reviewing court must not retry the defendant. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). "[A] reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of evidence or the credibility of witnesses." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). "A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *Id.* at 225.

¶ 53 With these principles in mind, we find that the evidence was sufficient to prove defendant's guilt. The State's case rested on Officer DiCarlo's testimony. Officer DiCarlo testified that he had been looking for three armed men, one of whom was Jovan Webb. Officer DiCarlo came upon a van and one of the passengers was Webb. Defendant approached and stated that the van was his. After Officer DiCarlo could not find weapons in the van, he asked defendant if there was a gun in the car, to which defendant replied that there was and that he could show the officer where the gun was. Officer DiCarlo followed defendant's directions and recovered a loaded revolver from behind the seatbelt assembly. After being advised of his

Miranda rights, defendant stated that the gun was his and he needed it for protection because he had been robbed several times.

¶ 54 The trier of fact is best equipped to judge the credibility of witnesses (*People v. Wheeler*, 226 Ill. 2d 92, 114 (2007)), and the jury apparently found Officer DiCarlo credible. Testimony may be found insufficient "only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280. It is not so far-fetched to believe that defendant would cooperate, especially after he admitted the van was his. We conclude that the evidence was sufficient to find defendant guilty beyond a reasonable doubt.

¶ 55 C. Failure to Move to Suppress Statements under *Miranda*

¶ 56 Next, we consider defendant's contention that his counsel was ineffective for failing to file a motion to suppress certain statements that were admitted in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Defendant asserts that a motion to suppress would have been meritorious because defendant was interrogated while in custody without having been provided *Miranda* warnings. Defendant further argues that because his custodial statements comprised almost the entirety of the State's case, his counsel's failure to file a motion to suppress denied him the effective assistance of counsel. There are three statements at issue: (1) defendant's unwarned statement to Officer DiCarlo that there was a gun in the van and how to find it; (2) defendant's warned statement at the scene after officers recovered the gun that the gun was defendant's and he needed it for protection; and (3) defendant's warned statement at the police station that the gun was his and he needed it for protection.

¶ 57 To succeed on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant must overcome a strong presumption that his counsel's inaction was the result of sound trial strategy and not incompetence. *People v. Campbell*, 2014 IL App (1st) 112926, ¶ 38. Where an ineffective assistance of counsel claim is based on the failure to file a motion to suppress, to establish prejudice under *Strickland*, the defendant must show that the unargued motion is meritorious and that there is a reasonable probability that the trial outcome would have been different had the evidence been suppressed. *People v. Henderson*, 2013 IL 114040, ¶ 15.

¶ 58 We first consider whether a motion to suppress defendant's statements would have been successful. Under *Miranda*, 384 U.S. at 444, the prosecution may not use statements that stem from custodial interrogation unless it demonstrates the use of procedural safeguards that effectively secure the privilege against self-incrimination. The person must be warned that he has a right to remain silent, any statement he does make may be used as evidence against him, and he has the right to the presence of an attorney. *Id*. To determine if someone is in custody for *Miranda* purposes, a court must examine the circumstances surrounding the interrogation and ask if a reasonable person would have felt he could terminate the interrogation and leave. *People v. Braggs*, 209 Ill. 2d 492, 505-06 (2003). An interrogation occurs when a police officer uses words or actions that he should know are reasonably likely to elicit an incriminating response. *People v. Elliot*, 314 Ill. App. 3d 187, 190 (2000) (citing *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980)).

¶ 59 The first statement occurred when, per Officer DiCarlo's testimony, defendant was handcuffed and "placed *** in custody" inside of a police vehicle. After the officers unsuccessfully searched the van for weapons, Officer DiCarlo asked defendant if there was a gun in the van, and stated that if there was, defendant needed to tell him. Defendant replied that there

was a gun in the van, and after Officer DiCarlo asked where it was, defendant explained how to find it.

¶ 60 The State concedes that Officer DiCarlo's queries amounted to custodial interrogation, but asserts that this situation falls under the public safety exception set forth in *New York v. Quarles*, 467 U.S. 649 (1984). There, officers were on patrol when the victim of a crime informed them that the defendant had just entered a supermarket and was carrying a gun. *Id.* at 651-52. One officer caught up with the defendant in the store and learned that the defendant was wearing an empty shoulder holster. *Id.* at 652. The officer handcuffed the defendant and asked him where the gun was. *Id.* The defendant nodded in the direction of some empty cartons and stated, "the gun is over there," whereupon the officer retrieved a revolver from one of the cartons, arrested the defendant, and read him his *Miranda* rights. *Id.* The Supreme Court found there was a "public safety" exception to *Miranda*. *Id.* at 655-56. *Miranda* did not need to be applied "in all its rigor" when officers ask questions that are reasonably prompted by a concern for the public safety. *Id.* at 656. The Court noted that the police were confronted with the immediate necessity of locating a gun that "they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket." *Id.* at 657. The Court stated that the public safety exception was "a narrow exception to the *Miranda* rule" that "will be circumscribed by the exigency which justifies it." *Id.* at 658. The Illinois Supreme Court has stated that under *Quarles*, police faced with an immediate threat to public safety may ask questions necessary to secure the safety of the public or themselves before giving *Miranda* warnings. *People v. Williams*, 173 Ill. 2d 48, 77 (1996).

¶ 61 We find that the public safety exception does not apply here. There is no evidence that the officers faced an immediate threat to their or the public's safety. Although the officers were

looking for guns that were used in a recent crime, when defendant made his unwarned statement, they had already searched the van and could not find a gun. Defendant was handcuffed and in the back of a police vehicle and the two other passengers were also in custody in police vehicles. There were at least two officers on the scene and there is no evidence that anyone else was in the vicinity of the van. We find that the circumstances here are similar to those in *People v. Roundtree*, 135 Ill. App. 3d 1075, 1080 (1985) (public safety exception did not apply where the officer had secured control of the scene and all suspects were handcuffed and positioned away from the car and its contents); *United States v. Brathwaite*, 458 F.3d 376, 382 n.8 (5th Cir. 2006) (public safety exception did not apply where at the time of questioning about whether there were guns in a house, agents had already performed two sweeps of the house and both occupants of the house were in handcuffs, and moreover, the public did not have access to the house, which was under agents' full control at the time); and *United States v. Raborn*, 872 F.2d 589, 595 (5th Cir. 1989) (public safety exception would not apply where the subject truck had already been seized and only officers had access to it). Like in those cases, here, the van had been secured, all suspects were in custody, and the immediacy of the situation had dissipated.

¶ 62 We also note that we are not persuaded by the State's reliance on *United States v. Edwards*, 885 F.2d 377 (7th Cir. 1989), and *United States v. Brady*, 819 F.2d 884 (9th Cir. 1987). In *Edwards*, 885 F.2d at 380, officers removed the defendant from a car, handcuffed him, and searched him for weapons and contraband before an officer asked defendant if he had a gun. In finding that the public safety exception applied, the court stated that the defendant was a suspected drug dealer, suspected drug dealers are known to arm themselves, and the arrest took place in the parking lot of a restaurant. *Edwards*, 885 F. 2d at 384 n.4. Unlike here, in *Edwards*, the questioning took place where members of the public would be. In *Brady*, 819 F.2d at 885,

888, an officer's question about whether there was a gun in a car was subject to the public safety exception because a crowd was gathering on the public street where the car "stood with its door open and the keys in the ignition." Here, as stated above, defendant and the other two passengers were in custody and there is no evidence that members of the public were nearby. The State's cases are inapposite and the public safety exception does not apply here. Defendant's first, unwarned statement was admitted in violation of *Miranda* and would have been suppressed if defense counsel had filed the proper motion.

¶ 63 We next turn to the two statements that defendant made after he was given *Miranda* warnings. The first warned statement occurred after officers recovered the revolver. Officer DiCarlo advised defendant of his *Miranda* rights and defendant agreed to speak with Officer DiCarlo. Defendant then stated that the gun was his and that he needed it for protection because he had been robbed several times. The second warned statement occurred at the police station around 12:30 a.m., about an hour after the police arrived at the scene. There, with Officer DiCarlo, Officer Sierra, and Sergeant Sebastian present, defendant again stated that the gun was his and he needed it for protection because he had been robbed several times.

¶ 64 The question is whether, because the first statement was unwarned, the warned statements should also be suppressed. Defendant contends that the warned statements would also have been suppressed because Officer DiCarlo deliberately failed to warn defendant before his unwarned statement and sufficient curative measures were not taken.

¶ 65 *Missouri v. Seibert*, 542 U.S. 600 (2004), addressed the effects of unwarned statements on the admissibility of subsequent, warned statements. In applying *Seibert*, our supreme court found that Justice Kennedy's concurrence resolved the case on the narrowest grounds and was therefore controlling. *People v. Lopez*, 229 Ill. 2d 322, 360 (2008). Under that concurrence, we

must first determine whether the officers deliberately used a "question first, warn later" technique when interrogating the defendant. *Id.* A court should consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that a two-step interrogation procedure was used to undermine the *Miranda* warning. *Id.* at 361. Objective evidence includes the timing, setting, and completeness of the prewarning interrogation, the continuity of police personnel, and the overlapping content of the pre- and postwarning statements. *Id.* There are situations where an officer might mistakenly withhold *Miranda* warnings. For example, an officer may not realize that a suspect is in custody and warnings are required, or the officer may not plan to question the suspect or may be waiting for a more appropriate time. *Seibert*, 542 U.S. at 620 (Kennedy, J., concurring).

¶ 66 If there is evidence to support a finding of deliberateness, then we consider whether curative measures were taken. *Lopez*, 229 Ill. 2d at 360-61. Curative measures include a substantial break in time and circumstances between the statements, such that the defendant would be able " 'to distinguish the two contexts and appreciate that the interrogation has taken a new turn.' " *Id.* at 361 (quoting *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring)). A court should examine "the passage of time between the unwarned and warned statements, the location where those statements were taken, whether the same person questioned the suspect during the warned and unwarned statements, whether details obtained during the unwarned phase were used during the warned phase, and whether the suspect was advised that the unwarned statement could not be used against him." *Id.* at 364-65.

¶ 67 Thus, we consider whether Officer DiCarlo deliberately withheld *Miranda* warnings from defendant. Defendant asserts that the failure to warn was not a mistake, given that Officer DiCarlo testified that defendant was placed in custody and that he read defendant *Miranda*

warnings immediately after he found the gun in the van. The State contends that there is no evidence that Officer DiCarlo used a "question first, warn later" technique, or used that technique deliberately, because his questioning was limited to finding the weapon. The State also asserts that the information from the unwarned statement—the location of the gun—was completely separate from the information from the post-*Miranda* formal interrogation—whose gun it was and the motives for having it.

¶ 68 While there is no subjective testimony that he did so, the objective factors suggest that Officer DiCarlo deliberately withheld *Miranda* warnings. Officer DiCarlo testified that after defendant stated that the van was his, defendant was handcuffed and "placed *** in custody" in a police vehicle. When Officer DiCarlo did not find the gun after an initial search, he returned to defendant and asked if there was a gun in the van. Immediately after finding the gun with defendant's help, Officer DiCarlo advised defendant of his *Miranda* rights in the police vehicle. Officer DiCarlo elicited the unwarned and first warned statement in the same location, while defendant was in custody in a police vehicle. Given that Officer DiCarlo knew defendant was in custody when he made the unwarned statement and the short span of time between the unwarned and first warned statement, the evidence suggests that Officer DiCarlo knew he had to give *Miranda* warnings, but declined to do so. Further, although the unwarned and both warned statements were about different aspects of the gun—the location versus ownership and reasons for having it—this is not a meaningful distinction. Defendant had already admitted the van was his. Once Officer DiCarlo found the gun in defendant's van using defendant's directions, it would not matter why defendant had it. See *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 23 (to establish constructive possession, State must prove that the defendant had knowledge of

the contraband and exercised immediate and exclusive control over the area where the contraband was found).

¶ 69 Further, there were insufficient curative measures taken that would make either the first or second warned statement admissible. As for the first warned statement, which occurred in the police vehicle with Officer DiCarlo present, it occurred in the same location as the unwarned statement, with the same officer asking the questions, and shortly after defendant made the unwarned statement. Although the second warned statement took place at the police station instead of in a police car, it occurred less than an hour after the unwarned statement and Officer DiCarlo was still present, although he testified that Officer Sierra and Sergeant Sebastian were also there. Nonetheless, defendant was in custody with Officer DiCarlo the entire time. Further, defendant was not advised that his unwarned statement would be inadmissible. See *Lopez*, 229 Ill. 2d at 366. Nothing had materially changed at the police station that would have allowed defendant "to distinguish the two contexts and appreciate that the interrogation ha[d] taken a new turn." See *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). Thus, both of defendant's warned statements were inadmissible and a motion to suppress under *Miranda* would have been successful.

¶ 70 Having determined that all three of defendant's statements were inadmissible, we next consider whether there is a reasonable probability that the trial outcome would have been different had the statements been suppressed. See *Henderson*, 2013 IL 114040, ¶ 15. Based on the record, we conclude that there is a reasonable probability that the trial outcome would have been different. Defendant's statements were the State's main evidence. Indeed, " 'a confession is the most powerful piece of evidence the State can offer, and its effect is incalculable.' " *People v. Miller*, 2013 IL App (1st) 110879, ¶ 82. The State's case was based on defendant's statement

that that there was a gun in the car, his explanation of how to find the gun, and his statements in the police vehicle and police station that the gun was his and he needed it for protection. Without the statements, the State had pictures of a different van and the recovered gun, which did not have any identifying information on it. The statements were the only direct evidence of defendant's guilt. Without the statements, there may not have been a trial at all. See *id.* ¶ 85 (statement to police was critical to finding of guilt because it was the only direct evidence of defendant's knowledge of an allegedly stolen vehicle's ownership). Further, "even if defense counsel vigorously tests the State's evidence at trial, prejudice can be found where a motion to suppress would have been defense counsel's strongest, and most likely wisest, course of action." (Internal quotation marks omitted.) *Id.* ¶ 84.

¶ 71 Defendant has overcome the presumption that a failure to file a motion to suppress under *Miranda* was sound trial strategy. See *People v. Tayborn*, 2016 IL App (3d) 130594, ¶ 21 ("We can see no reasonable trial strategy for trial counsel's failure to suppress defendant's statement to police *** where the statement was the State's strongest evidence against defendant"). We acknowledge that defense counsel filed and then withdrew a pretrial motion, but it was a motion to quash arrest and suppress evidence that was based on the fourth amendment and not *Miranda*. The record indicates that defense counsel withdrew the motion because she was unable to secure Officer Sierra's testimony, and then tried to pursue the same motion at trial based on Officer DiCarlo's testimony. As defendant points out, counsel wanted to attack the statements, but used the wrong vehicle to do so. We see no legitimate reason why counsel did not file a motion to suppress under *Miranda*, which would have been the strongest course of action. Because defense counsel was ineffective for not filing a motion to suppress under *Miranda*, we reverse and remand for a new trial.

¶ 72 In reversing and remanding for a new trial, we note that retrial is not barred by double jeopardy. The double jeopardy clause forbids a second trial for the purpose of giving the State another chance to present evidence it failed to present in the first proceeding. *People v. McCoy*, 2016 IL App (1st) 130988, ¶ 72. However, the clause does not preclude a second trial where a defendant's conviction has been set aside because of an error in the proceedings leading to his conviction. *Id*. "If the evidence presented at the first trial, including the improperly admitted evidence, would have been sufficient for any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt, retrial is the proper remedy." *People v. McKown*, 236 Ill. 2d 278, 311 (2010). As stated above, the evidence was sufficient to find defendant guilty beyond a reasonable doubt, though we make no finding as to defendant's guilt or innocence on retrial. *Miller*, 2013 IL App (1st) 110879, ¶ 87.

¶ 73 Though we are remanding this case for a new trial, we will address defendant's remaining arguments to the extent that those issues may recur.

¶ 74 D. State's Rebuttal Argument

¶ 75 Defendant next contends that the State's rebuttal argument was improper. Defendant asserts that in rebuttal, the State told jurors that Officer DiCarlo's version of events was corroborated by Officer Sierra, a witness who did not testify. Specifically, defendant points to the portion of the rebuttal where the State asserted the following:

> "The defense raises the fact that Officer Sierra wasn't here to testify. You only heard from Officer DiCarlo. I heard Officer DiCarlo tell you that he and Officer Sierra were on the scene. That's who was there with him the whole time. You didn't hear another officer come in and tell you the same thing over again. No, you didn't. You didn't. He was there for everything Officer DiCarlo was

> there for. So no, you didn't hear from another witness who was there for the same things that Officer DiCarlo testified to come in and tell you the same thing over again."

¶ 76 Recognizing that the issue would ordinarily be forfeited, defendant requests that we review for plain error, a doctrine that allows a reviewing court to consider unpreserved error when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) a clear or obvious error occurred and the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Here, defendant seeks review under the closely-balanced prong.

¶ 77 The first step in the plain error analysis is to determine whether an error occurred. *Id*. Defendant contends that the rebuttal argument was improper because the State asserted that Officer Sierra would have testified the same as Officer DiCarlo, but there was no evidence admitted at trial as to what Officer Sierra would say if called to testify, and moreover, Officer Sierra was not allowed to testify at all. Defendant also argues that the argument violated the trial court's ruling that excluded any statements from Officer Sierra. In response, the State contends that the rebuttal argument was a reply to defense counsel's argument that included the question, "Where is Sierra today? Sierra didn't testify." The State further asserts that the prosecutor would have directly violated the trial court's order only if she had mentioned specific conversations that Officer Sierra had with defendant or Officer DiCarlo, which she did not do.

¶ 78 We agree that the State's rebuttal argument was improper. It is true that a prosecutor has wide latitude in making a closing argument and may comment on the evidence and any fair, reasonable inferences it yields. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Further,

statements are not improper if they were provoked or invited by the defense counsel's argument. *Id*. However, the State may not argue assumptions or facts not based in the evidence or present to the jury what amounts to its own testimony. *People v. Smith*, 141 Ill. 2d 40, 60 (1990). The State did not technically violate the trial court's order, which prevented the State from eliciting information about specifics of conversations with Officer Sierra. However, the State went beyond merely responding to defense counsel's assertion that Officer Sierra did not testify and speculated about how Officer Sierra would have testified. The rebuttal strongly implied, if not explicitly stated, that Officer Sierra would have testified consistently with Officer DiCarlo. There was absolutely no evidence of how Officer Sierra would have testified, and indeed, he was not permitted to testify at all. Thus, the State's rebuttal argument was improper.

¶ 79 However, we will not review for plain error because the evidence was not so closely balanced that the error alone threatened to tip the scales of justice against defendant. See *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) (quoting *Piatkowski*, 225 Ill. 2d at 565). It is the defendant's burden to show that the quantum of evidence presented by the State against the defendant made the evidence closely balanced. *Piatkowski*, 225 Ill. 2d at 566. We make a "commonsense assessment of the evidence [citation] within the context of the circumstances of the individual case." (Internal quotation marks omitted.) *People v. Adams*, 2012 IL 111168, ¶ 22. Whether the evidence is closely balanced is a separate question from whether the evidence is sufficient to sustain a conviction on review. *Piatkowski*, 225 Ill. 2d at 566. Further, although a defendant has the burden to show that the evidence is closely balanced, he has no burden to present any evidence or testify himself at trial. *Id*. at 567. We also note that a jury's difficulty in reaching a verdict is just one factor in determining whether the evidence was closely balanced.

People v. Smith, 341 Ill. App. 3d 530, 543 (2003). We must view the evidence objectively because it is unknown why the jury may have had difficulty reaching agreement. *Id*. at 543.

¶ 80 Here, the State's evidence largely consisted of Officer DiCarlo's testimony, which described the three times when defendant stated there was a gun in the van or admitted to owning the gun. Defense counsel thoroughly cross-examined Officer DiCarlo and highlighted that other pieces of evidence were missing, such as processing the gun for fingerprints or taking pictures of the van. However, it was the jury's function as the trier of fact to assess Officer DiCarlo's credibility and the weight to be given to his testimony. See *People v. Hogan*, 388 Ill. App. 3d 885, 895 (2009). Any alleged shortcomings in the evidence were before the jury, which weighed the evidence and took into account any discrepancies. See *People v. Jackson*, 2016 IL App (1st) 133741, ¶ 55. Officer DiCarlo testified consistently that defendant stated he owned the gun that was recovered and the lack of corroboration in this case did not make the evidence closely balanced. Further, the jurors were properly instructed that closing arguments were not evidence and only they were the judges of the believability of the witnesses. The improper comments were not of the sort likely to inflame the passions of the jury. Under these circumstances, defendant has not satisfied the closely-balanced prong of plain error review. See *Adams*, 2012 IL 111168, ¶ 23 (evidence not closely balanced where jury was properly instructed and comments were not likely to inflame the passions of the jury). Because plain error review does not apply, the matter is forfeited.

¶ 81 E. Juror Replacement

¶ 82 Defendant next contends that he was prejudiced by the trial court's decision to replace juror Majoo during deliberations. Defendant argues that the record shows that a substantial number of jurors did not begin deliberating anew when the alternate juror was seated and instead

adhered to their previously-formed opinions about the case. In support of this contention, defendant points to certain notes that the jury sent before and after the alternate juror was seated, and further states that the judge did not inquire of the 11 original jurors if they were capable of beginning anew with the alternate juror, given an earlier indication that they were deadlocked.

¶ 83 In Illinois, there is no general bar that prohibits the use of alternate jurors after the case has been submitted to the jury and deliberations have started. *People v. Carrilalez*, 2012 IL App (1st) 102687, ¶ 41 (citing *People v. Roberts*, 214 Ill. 2d 106, 119 (2005)). Matters relating to jury selection and management are generally within the trial court's discretion. *People v. Roberts*, 214 Ill. 2d 106, 121 (2005). The primary consideration is the potential prejudice to the defendant from replacing a juror after deliberations have started. *Id.* In determining whether a defendant was prejudiced, we consider the totality of the circumstances, including: "(1) whether the alternate juror and the remaining original jurors were exposed to outside prejudicial influences about the case; (2) whether the original jurors had formed opinions about the case in the absence of the alternate juror; (3) whether the reconstituted jury was instructed to begin deliberations anew; (4) whether there is any indication that the jury failed to follow the court's instructions; and (5) the length of deliberations both before and after the substitution." *Id.* at 124.

¶ 84 The State asserts that defendant forfeited his claim, and moreover, acquiesced and agreed to the juror replacement procedure. The State is correct that ordinarily, defendant could not pursue his claim because defense counsel advocated that juror Majoo be excused. Under the invited error doctrine, a defendant "may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319 (2003).

¶ 85 Defendant attempts to avoid the invited error doctrine by asserting that his counsel was ineffective for asserting that juror Majoo should be replaced. To succeed on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Prejudice requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result. *Id*.

¶ 86 We consider whether defendant was prejudiced by the replacement procedure. See *People v. McLaurin*, 235 Ill. 2d 478, 499 (2009) (noting that because certain occurrences did not prejudice the defendant, his counsel was not ineffective for failing to object to them). There is no evidence that the alternate juror and remaining original jurors were exposed to outside prejudicial influences about the case. The alternate juror stated that she had not discussed the case with anyone and had not formed any opinions or expressed any opinions to anyone. The jury was instructed to begin its deliberations anew when the alternate juror was seated. Further, the original jury deliberated for approximately five hours and the reconstituted jury, with the alternate, deliberated for approximately six hours. All of these circumstances indicate that defendant was not prejudiced by the replacement procedure.

¶ 87 In reaching this conclusion, we reject defendant's reliance on certain jury notes and an affidavit that was attached to the motion for a new trial. Defendant asserts that these items indicate that the jury did not in fact begin deliberating anew with the alternate juror.

¶ 88 We will not consider the affidavit. "[A] statement by a juror taken after the jury has rendered its verdict, has been polled in open court, and has been discharged will not be admitted to impeach the jury's verdict." *People v. Hobley*, 182 Ill. 2d 404, 457 (1998). A juror's affidavit may not be admitted to show the " 'motive, method or process by which the jury reached its

verdict.' " *Id*. By asserting that the affidavit shows that the jurors did not deliberate anew, defendant uses the affidavit to show the method or process by which the jury reached its verdict, which is impermissible. See *People v. Carrilalez*, 2012 IL App (1st) 102687, ¶¶ 45, 47 (juror interviews that allegedly indicated that jurors failed to engage in new deliberations could not be used where they went to the jury's deliberative process).

¶ 89 Turning to the notes, there are three that defendant relies on. The notes, however, do not overcome the presumption that the jury follows the instructions that the court gives it (*People v. Taylor*, 166 Ill. 2d 414, 438 (1995)), including that it should deliberate anew with the replacement juror. The first note was sent on the first day of deliberations and asked, "What do we do if we don't come to a unanimous decision on this case?" We do not agree with defendant that this note indicates that the jury was deadlocked and so unable to begin anew. The note only asked what to do if the jury could not come to a unanimous decision, which could be a general question. The other two notes were sent by the reconstituted jury. Less than two hours after the alternate was seated, the jury sent a note stating, "We cannot come to a unanimous verdict. This is a hung jury." About an hour later, the jury sent a note asking, "How many hours do we need to deliberate before it is considered a hung jury? The vote has not changed from nine to three guilty. Nothing has changed in over eight hours of deliberation." Defendant contends that these notes indicate that the jury was not capable of deliberating anew with the alternate juror and continued to adhere to opinions that were formed before the alternate was seated. We disagree. The reconstituted jury deliberated for almost two hours before sending the note that it could not come to a unanimous verdict. It is speculative to assert that the jurors did not deliberate anew on the basis of this note. See *People v. Carrilalez*, 2012 IL App (1st) 102687, ¶ 49 (it was speculative to assert that jury did not follow trial court's instruction to begin deliberations anew

where reconstituted jury reached a verdict after one-and-a-half hours of deliberating). The note stating that the vote had not changed from nine to three in eight hours of deliberations also does not change our conclusion. It is possible that the alternate juror cast her vote the same way that juror Majoo did, which is why the vote turned out the same, and that the new deliberations yielded the same result as the former deliberations. But see *Roberts*, 214 Ill. 2d at 125 (environment was inherently coercive where the record showed that the 11 original jurors voted twice before the case was submitted to the reconstituted jury). Further, the reconstituted jury had already deliberated for nearly three hours at that point. In light of the amount of time that had elapsed, it would be speculative to conclude that the note stating that the vote had not changed meant that the jury failed to deliberate anew. As a whole, the notes are insufficient to overcome the presumption that the jury followed the trial court's instructions and deliberated anew with the alternate.

¶ 90 Considering the totality of the circumstances, defendant was not prejudiced by the juror replacement procedure. As a result, he was not denied a fair trial due to his counsel's failure to object, and his ineffective assistance claim fails.

¶ 91 F. Verdict Coercion

¶ 92 Next, defendant contends that the trial court coerced the verdict. Defendant asserts that the judge's continued refusal to grant the jury's request to declare it hung, after hours of deliberations, was by itself coercive. Defendant further argues that the coercive effect was multiplied by the judge's repeated refusal to provide the jury with a transcript and the judge's failure to provide a correct answer when the jury asked what would happen if it did not reach a unanimous decision. Defendant also maintains that there was evidence of actual coercion in the jury room.

¶ 93 " 'The integrity of the jury's verdict must be protected from coercion, duress or influence.' " *People v. Gregory*, 184 Ill. App. 3d 676, 680 (1989). "A trial court's comments to the jury are improper where, under the totality of the circumstances, the language used actually interfered with the jury's deliberations and coerced a guilty verdict." *People v. Wilcox*, 407 Ill. App. 3d 151, 163 (2010). Because determining whether something was coercive or not requires knowing jurors' subjective thoughts, which we have no way of obtaining, "the test effectively turns on a consideration of whether the court's instruction imposed such confusion or pressure on the jury to reach a verdict that the accuracy and integrity of the verdict returned becomes uncertain." *Gregory*, 184 Ill. App. 3d at 681-82. Further, "[t]he possibility of a hung jury is an inevitable by-product of a unanimous-verdict requirement, and a jury cannot be compelled to reach a verdict in all instances." *Id.* at 681.

¶ 94 We do not find that the trial judge coerced the verdict in this case. We first consider the trial judge's alleged refusal to declare a hung jury. A trial judge has broad discretion when responding to a jury that claims to be deadlocked. *McLaurin*, 235 Ill. 2d at 491. Any response should be clear, simple, and not coercive. *Id.* Here, the trial judge acted properly within his broad discretion when he responded to the jury's notes about not being able to reach a unanimous decision. The first note on this topic was sent at approximately 7:47 p.m. on the first day of deliberations, when the jury asked, "What do we do if we don't come to a unanimous decision on this case?" The judge instructed the jury, "Please continue to deliberate." At around 2 p.m. the next day, the jury sent a note stating, "We cannot come to a unanimous verdict. This is a hung jury." About 10 minutes later, the jury asked for the gun and bullets. The judge responded, "Please continue your deliberations," and sent back the gun and bullets. Just before 3 p.m., the jury sent a note stating, "How many hours do we need to deliberate before it is considered a hung

jury? The vote has not changed from nine to three guilty. Nothing has changed in over eight hours of deliberation." The court provided an instruction pursuant to *People v. Prim*, 53 Ill. 2d 62 (1972), and told the jury to continue to deliberate. Around 3:35 p.m., the jury sent a note stating, "Your Honor, is this jury not entitled to be a hung jury? If our interpretations of what was said in any instance and seeing the recorded information from yesterday's court session will help reach a unanimous verdict, can we please read this information? Why does this decision have to be unanimous? Both sides are very set on belief from information we recall from witness account, information presented, evidence, et cetera." The judge agreed with the State that the jury was asking for a transcript and told the jury, "Please continue your deliberations."

¶ 95 The trial court has discretion to have the jury keep deliberating even though the jury has reported that it is deadlocked and will be unable to reach a verdict. *People v. Cowan*, 105 Ill. 2d 324, 328 (1985). Further, the responses to the jury's notes were clear, simple, and not coercive. See *McLaurin*, 235 Ill. 2d at 492 ("keep on deliberating with an open mind" and "keep on deliberating" were proper responses to notes claiming that the jury was deadlocked). There were also reasons to encourage further deliberations. The note sent at 2 p.m. on the second day of deliberations that stated the jury was unable to come to a unanimous verdict was followed by a note requesting the gun and bullets. The judge believed that based on the second note, the jurors were still discussing the case. Similarly, the note sent at 3:35 p.m., which asked whether the jury was entitled to be a hung jury, included a request for a transcript, which suggested that the jury was seeking additional materials to further deliberate. The record indicates that the trial judge listened to arguments from both sides about how to respond to the notes and did not abuse his discretion when he told the jury to continue to deliberate. See *People v. Williams*, 173 Ill. 2d 48,

87-88 (1996) (no abuse of discretion where trial judge invited arguments and objections from both sides, listened to the arguments, and exercised his discretion).

¶ 96 Defendant also finds it problematic that the judge did not tell the jury that there would be a mistrial after receiving the note that asked, "What do we do if we don't come to a unanimous decision on this case?" We find that the judge's response, "Please continue to deliberate," was proper. The trial court has a duty to instruct the jury where it has posed an explicit question on a point of law arising from facts about which there is doubt or confusion. *People v. Love*, 377 Ill. App. 3d 306, 317 (2007). However, a trial court may exercise its discretion and properly decline to answer a jury's question "where the instructions are readily understandable and sufficiently explain the relevant law; where further instructions would serve no useful purpose or would potentially mislead the jury; when the jury's inquiry involves a question of fact; or if providing an answer would cause the court to express an opinion likely to direct a verdict." *Love*, 377 Ill. App. 3d at 317-18. Here, before it started to deliberate, the jury was instructed, "Your agreement on a verdict must be unanimous." That instruction sufficiently explained the relevant law and the judge's response to the note was proper. See *People v. Pulliam*, 176 Ill. 2d 261, 284-85 (1997) ("You have your instructions. Keep deliberating," was proper response to the question, "What happens if we cannot reach a unanimous decision on either verdict?" where jurors were previously instructed that they could not sign a verdict unless they unanimously voted for it); *Love*, 377 Ill. App. 3d at 316, 317-18 ("Keep deliberating" was proper response to question, "If all the people do not feel the same, what happen [*sic*]" where jurors were previously instructed, "Your agreement on a verdict must be unanimous").

¶ 97 We also find that the trial court acted properly when it did not provide the jury with requested transcripts. The jury asked for a transcript three times. The first request was around 7

p.m. on the first day of deliberations. Because it would take at least two hours to prepare one, the judge told the jury that a transcript was not currently available. We also note that upon hearing that a transcript would take two hours, defense counsel stated, "There is your answer. It's not a murder case. It's one witness." The second request was around 3:35 p.m. on the second day of deliberations. The judge stated to the parties that the transcript was not available and told the jury to continue deliberating. The third request was around an hour later, at approximately 4:30 p.m., when the jury asked for an unofficial copy of the transcript. The court conferred with the court reporter, who stated that a transcript could not be prepared that day. The judge told the jury that the transcript was unavailable and the court reporter was not available to prepare it.

¶ 98 The decision to grant or deny a jury's request for transcripts of testimony is within the trial court's sound discretion, and we will not disturb the trial court's decision unless it abused that discretion. *People v. Kliner*, 185 Ill. 2d 81, 163 (1998). An abuse of discretion occurs where the trial court's decision is "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. McDonald*, 2016 IL 118882, ¶ 32. Here, the trial judge denied the jury's requests for a transcript because the transcript was not available at that time. The judge had legitimate reasons for denying the jury's request, and did not act arbitrarily, fancifully, or unreasonably when it decided that deliberations should not be further prolonged so that a transcript could be obtained.

¶ 99 Finally, we disagree with defendant's contention that there was evidence of actual coercion in the jury room. Defendant states that the jury's final note, "We are almost there. She has signed her first name," was evidence of coercion. Defendant asserts that the only reason to send that note was to convey to the juror that she had crossed a threshold from which she would

not be allowed to turn back. Defendant presumes that the subject of the note was juror Reddick, who was crying when the jury was polled.

¶ 100 We find that defendant's argument is speculative. The record does not indicate why the note was sent or who the actual subject of the note was. Further, although juror Reddick initially hesitated when the jury was polled, we defer to the court's finding that she affirmed the verdict. The purpose of polling a jury is to determine whether any juror was coerced by his associate jurors into agreeing on a verdict. *People v. Cabrera*, 116 Ill. 2d 474, 490 (1987). Before the final verdict is recorded, a juror has the right to inform the court that a mistake has been made, ask that the jury be permitted to reconsider its verdict, or express disagreement with the verdict that was returned. *People v. Kellogg*, 77 Ill. 2d 524, 528 (1979). The trial judge determines whether a juror has freely assented to the verdict because it is the trial judge who hears the juror's response and can observe the juror's demeanor and tone of voice. *Id.* at 529. If a juror indicates some hesitancy or ambivalence, the trial judge must determine the juror's present intent by giving the juror a chance to make an unambiguous reply as to the juror's present state of mind. *People v. McDonald*, 168 Ill. 2d 420, 462-63 (1995), *abrogated on other grounds*, *People v. Clemons*, 2012 IL 107821. A trial court's determination of whether a juror voluntarily assented to the verdict will not be set aside unless the trial court's conclusion is clearly unreasonable. *Cabrera*, 116 Ill. 2d at 490.

¶ 101 Initially, juror Reddick did not respond to the question, "Was this then and is this now your verdict?" The court twice asked juror Reddick if she was all right, to which she also did not respond. After a pause, juror Reddick stated, "That is my verdict." Defense counsel pointed out that juror Reddick was crying profusely, and the court inquired if she was okay and asked, "Is this your verdict?" Juror Reddick answered "Yes, sir" to both questions. The court stated that

juror Reddick indicated that the verdict was hers and that the court accepted her at her word. We have no grounds for finding otherwise. We cannot discern the reason for juror Reddick's hesitation, and we are well aware that it was the trial judge who observed juror Reddick's demeanor and tone. The judge properly allowed juror Reddick a chance to make an unambiguous reply as to her state of mind and juror Reddick stated that the verdict was hers. The judge's decision to accept her at her word was not clearly unreasonable and juror Reddick's initial lack of response and emotional state do not indicate that she was coerced.

¶ 102 G. Remand for Post-Trial Counsel or a *Krankel* Inquiry

¶ 103 Lastly, defendant asserts that this court should remand to appoint new posttrial counsel or, alternatively, for a *Krankel* inquiry. Defendant argues that defense counsels' allegation in the motion for a new trial that they were ineffective for not calling witnesses created a *per se* conflict of interest that the trial court failed to investigate.

¶ 104 A defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation. *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). Counsel's representation and loyalty to the client cannot be diluted by conflicting interests or inconsistent obligations. (Internal quotation marks omitted.) *People v. Short*, 2014 IL App (1st) 121262, ¶ 109. Whether an attorney labored under a *per se* conflict of interest is an issue that we review *de novo*. *People v. Miller*, 199 Ill. 2d 541, 544 (2002).

¶ 105 Our supreme court has identified three situations where a *per se* conflict of interest exists: "(1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution [citations]; (2) when defense counsel contemporaneously represents a prosecution witness [citations]; and (3) when defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant

[citation].” *Hernandez*, 231 Ill. 2d at 143-44. This case does not involve any of those circumstances. However, defendant asserts that it has long been recognized that a *per se* conflict of interest develops when trial counsel is forced to argue his own ineffectiveness, relying on *People v. Lawton*, 212 Ill. 2d 285 (2004), *People v. White*, 322 Ill. App. 3d 982 (2001), *People v. Keener*, 275 Ill. App. 3d 1 (1995), *People v. Willis*, 134 Ill. App. 3d 123 (1985), and *Gray v. Pearson*, 526 Fed. Appx. 331 (4th Cir. 2013).

¶ 106 Each of defendant’s cited cases involve different circumstances than are present here. In *Lawton*, 212 Ill. 2d at 294-95, our supreme court found that a defendant could use a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2002)) to challenge the competence of the attorney who represented him in proceedings under the Sexually Dangerous Persons Act. The court found that section 2-1401 of the Code was the solution to the problem of defendants under the Sexually Dangerous Persons Act whose ineffective assistance claims “went unheard because the same lawyers who represented them at trial handled their direct appeals.” *Id*. at 296-97. In *People v. White*, 322 Ill. App. 3d 982, 988 (2001), a case under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 1998)), the court found that counsel other than trial counsel should have been appointed to represent the defendant on his *pro se* motion to withdraw a guilty plea that had included allegations of ineffective assistance. Defendant had filed a *pro se* motion to withdraw his guilty plea, whereupon the trial court reappointed trial counsel to represent the defendant on the motion. *Id.* at 986. The *pro se* motion was ignored by the trial court, “and the conflict of interest question was never addressed.” *Id*. at 986-87, 988. In *Keener*, 275 Ill. App. 3d at 5, also a case under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 1992)), the court stated that “a *per se* conflict arises when attorneys argue motions in which they allege their own ineffectiveness,” and went on to find that

"[i]n such situations defendants do not waive ineffective-assistance claims." In *Willis*, 134 Ill. App. 3d at 131, the defendant's amended motion to withdraw his guilty plea included a claim that his counsel was ineffective. At the hearing on the motion, counsel was "placed in the position of having to argue his own ineffectiveness" when he responded to a question posed to him by the defendant, and counsel's answer "was clearly not definitive, and counsel almost immediately changed his line of questioning." *Id*. In finding a conflict of interest, the court stated that the need to appoint other counsel "should have been glaringly apparent during the course of the hearing," and the "issue raised was one which required preparation and presentation of evidence" to develop certain facts. *Id*. at 133. In *Gray*, 526 Fed. Appx. at 334, the court found that there was a conflict of interest where the same counsel represented the defendant in state and federal postconviction proceedings.

¶ 107 *People v. Perkins*, 408 Ill. App. 3d 752 (2011), provides helpful guidance in distinguishing the above situations from the case here. There, the defendant contended that he received ineffective assistance because trial counsel argued his own ineffectiveness in the posttrial proceedings. *Id.* at 761. Acknowledging *Lawton*, *Keener*, and *Willis*, the court stated that it was "far from clear that the recognition of a conflict of interest in the context of forfeiture or the context of an attorney representing a defendant on appeal or other postjudgment proceedings, means that it is a constitutional *per se* conflict of the sort warranting automatic reversal outside those situations." *Id.* at 762. The court further stated that where the defendant raised the ineffective assistance claim in the trial court, "this court has refused to hold a *per se* conflict of interest exists any time an attorney raises his own ineffectiveness or that appointment of new counsel is required, particularly when not requested by the defendant." *Id.* The court stated that "[a] *per se* conflict of interest does not exist merely because a defense attorney's

incompetence is questioned during posttrial proceedings; rather, the underlying allegations of incompetence determine whether an actual conflict of interest exists." *Id.* In finding that there was no *per se* conflict of interest, the court noted that the defendant's trial counsel "voluntarily and zealously asserted the claim on behalf of his client," and that the defendant was represented by new counsel on appeal "who was unencumbered by any conflict in arguing ineffective assistance by trial counsel and did so zealously." *Id*.

¶ 108 This case is more like *Perkins* than defendant's cases, which involve either the forfeiture scenarios addressed in *Perkins* or unique situations that are not present here. Although she rested on her motion at the hearing, defense counsel here voluntarily and zealously asserted her ineffective assistance claim. The motion included details about the defense attorneys' ill health and its effects on their performance at trial. The motion also detailed multiple, specific ways that defense counsel was allegedly ineffective. Further, counsels' conduct was a matter of record, and so it was unnecessary for them to argue the claim in greater detail than what was already in the motion. See *Short*, 2014 IL App (1st) 121262, ¶ 116.

¶ 109 Further, defendant was represented by new counsel on direct appeal who zealously argued trial counsel's ineffectiveness, as well as raised multiple other issues. Defendant asserts that because the motion for a new trial asserted that defense counsel failed to call unnamed witnesses, having new counsel on direct appeal would not help because this claim is based on evidence outside the record. Defendant misconstrues that part of the motion, which states that the attorneys' illnesses caused, among other things, the attorneys not to call any witnesses or mount a defense. This was not a claim that witnesses existed who should have been called. This was a broader claim that the attorneys were so ill that they performed poorly, which is a claim that is based on the record. Further, we note that of appellate counsel's two ineffective assistance

claims, we resolved one of them in defendant's favor. Under these circumstances, there was no *per se* conflict of interest.

¶ 110 Defendant further asserts that in the alternative, this court should remand for an inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant states that when trial counsel's own ineffectiveness was questioned, *Krankel* required the court to perform an inquiry to determine if it should appoint new counsel. Our review of the record indicates that the trial court performed the proper inquiry, and so a remand under *Krankel* is not needed.

¶ 111 In *Krankel*, 102 Ill. 2d at 187, the defendant filed a *pro se* motion for a new trial in which he alleged that his trial counsel was ineffective. The State and the defendant agreed that the defendant should have had new counsel appointed to represent him at the posttrial hearing on his ineffective assistance allegation. *Id.* at 189. The case was ultimately remanded for a new hearing on the defendant's motion for a new trial with newly appointed counsel. *Id.* at 189. However, our supreme court later stated that new counsel is not automatically required every time a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Instead, the trial court should first examine the factual basis of the defendant's claim. *Id*. at 77-78. If the trial court determines that the claim lacks merit or relates only to matters of trial strategy, then the court does not need to appoint new counsel and may deny the *pro se* petition. *Id*. at 78. If the allegations show possible neglect of the case, then the trial court should appoint new counsel. *Id*. The operative concern for this court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance. *Id*. The ultimate purpose of the inquiry is to determine whether new counsel should be appointed. *Short*, 2014 IL App (1st) 121262, ¶ 120. The inquiry can take one of a few forms, and the trial court can base its evaluation of the defendant's *pro se* allegations on its knowledge

of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. *Moore*, 207 Ill. 2d at 78-79.

¶ 112 *Krankel* and *Moore* both involve *pro se* claims of ineffective assistance, which were not at issue here. Even putting that aside, we find that the trial court conducted the appropriate inquiry. The record indicates that the trial court considered the ineffective assistance claim and found it lacked merit. The court recalled counsel's performance at various points in the trial, including during jury selection, cross-examination, and closing argument. The trial court did not need to expressly state that it was conducting a *Krankel* inquiry. See *Short*, 2014 IL App (1st) 121262, ¶ 121; *People v. Dean*, 2012 IL App (2d) 110505, ¶ 15. The trial court met its obligations under *Krankel* and *Moore*, and so we decline to remand for a *Krankel* inquiry.

¶ 113 III. CONCLUSION

¶ 114 For the foregoing reasons, we reverse defendant's conviction and remand for a new trial.

¶ 115 Reversed and remanded.

¶ 116 JUSTICE CUNNINGHAM, specially concurring.

¶ 117 I agree with the disposition of this case. However, I respectfully write separately to express my concern regarding the apparent distress and hesitation of juror Reddick, in relation to defendant's claim that her verdict may have been the product of coercion by her fellow jurors, rather than a true reflection of her evaluation of the evidence. My concern for the risk of coercion in this case is heightened by the jury's several notes indicating that it was deadlocked, including a note on the afternoon of the verdict which stated: "The vote has not changed from nine to three guilty." Most significantly, five minutes before the verdict was reached, the jury sent another note stating: "We are almost there. She has signed her first name." Moments later,

when the jury returned to the courtroom to announce their verdict, juror Reddick was crying uncontrollably and was so upset that she could not respond to the trial court's initial attempts to poll her regarding the verdict. Meanwhile, she continued to cry profusely. The trial court then asked her "are you okay?" and "Is this your verdict?" to which she finally answered in the affirmative.

¶ 118 The record does not identify which juror was the subject of the jury's final note. Nevertheless, it is highly unusual for a jury to send a note indicating that it is "almost" finished because a juror "has signed her first name" to the verdict. This clearly suggests great hesitation on the part of that juror who had just "signed her first name." This is such an aberration in procedural conduct of jury deliberations that it should have alerted the trial court to the possibility that a juror was being pressured into signing a verdict with which she did not truly agree.

¶ 119 That jury note, combined with juror Reddick's visible distress shortly thereafter, should have triggered the court's concern, such that it could and should have taken further steps to ensure that juror Reddick's verdict was voluntarily given. I acknowledge that juror Reddick, in open court, eventually admitted that she agreed with the guilty verdict. Further, we do not know if the jury's note referred to juror Reddick. However, given the unusual circumstances, I cannot help but wonder if she would have responded differently, had she been given a chance to discuss the reason for her obvious distress outside the presence of her fellow jurors. For example, the trial judge could have elected to question her in chambers, with the State and defense attorneys present, in the same manner that a prospective juror may be questioned during jury selection, when an answer to *voir dire* questioning may reveal sensitive information. In that manner, the trial court could and should have more specifically questioned juror Reddick about the reason for

her obvious distress and hesitation when asked to acknowledge her verdict. The court would then be in a better position to evaluate whether her verdict accurately reflected her evaluation of the case, rather than pressure from other jurors. While the State argues and the majority accepts that juror Reddick was given the opportunity to "make an unambiguous reply" to the question of whether she agreed with the verdict, I do not believe that satisfies the inquiry of whether the trial judge did enough to ensure accuracy, fairness and absence of coercion. Juror Reddick presumably was not knowledgeable about the procedural conduct of a trial and a courtroom. So, while the State may argue that she had her opportunity to renounce her verdict in open court, yet did not do so, that reasoning begs the question of her understanding of the procedural process in which she was enveloped. This juror was clearly in distress. The reason for her distress will remain unknown because of the manner in which the court handled the matter.

¶ 120 However, based on the record before us, I agree with the majority that we cannot say that the trial court was "clearly unreasonable" in finding that this juror's verdict was voluntary. Nonetheless, in order to protect against the risk of coercion, and to maintain the public trust in the integrity of our judicial system, I encourage trial judges to take further steps to ascertain that a juror's verdict is voluntary and freely taken, when, as in this case, the juror's demeanor and actions are so aberrant as to give reason for concern.

¶ 121 JUSTICE DELORT, specially concurring.

¶ 122 The defendant raises a host of issues in his appeal, and the majority's order addresses each in turn. I agree that defense counsel was ineffective for not filing a motion to suppress based on *Miranda*. I also agree that, despite resolving the *Miranda* issue in favor of the defendant, it is necessary for us to address whether: (1) the defendant's prior conviction for

AUUW could serve as a predicate felony for a valid UUWF conviction; (2) the evidence was sufficient to prove defendant's guilt; and (3) whether the State's rebuttal argument was plain error. I join Justice Connors' analysis regarding these three issues and the *Miranda* issue, and therefore concur in the judgment of reversal and remand.

¶ 123 I do not, however, believe it is necessary to address whether: (1) the defendant was prejudiced by the replacement of a juror; (2) the trial court coerced a guilty verdict from one particular juror when she was polled; and (3) a *Krankel* hearing was necessary. Sending the case back for a new trial renders these issues moot. None of these issues will recur, as the court will empanel an entirely new jury for the retrial. And since we have determined counsel was ineffective based on the trial record itself, there is no need to also consider whether the court erred by not conducting a proper *Krankel* inquiry. I therefore do not join in the analysis regarding those issues.