

trial counsel rendered ineffective assistance because counsel operated under an actual conflict of interest. We affirm.

¶ 3

BACKGROUND

¶ 4 The factual background underlying defendant's convictions was recounted in our previous decision on direct appeal. *People v. Franklin*, 2013 IL App (1st) 103013-U. In relevant part, the following evidence was presented at defendant's trial. On June 2, 2009, several officers executed a search warrant at 520 West 104th Street in Chicago. The complaint for the search warrant and the search warrant itself were issued on June 2, 2009, and listed Michael Franklin and the premises of 520 West 104th Street as the person and place to be searched. Michael Franklin is defendant's brother.

¶ 5 Officer Foertsch, present when the search warrant was executed, testified that when the police entered, several people scattered. Eventually, everyone was gathered and placed in the dining room to secure the premises. The officers then conducted a search of the premises. Foertsch went upstairs and observed defendant lying on the floor being handcuffed. Foertsch testified there were three or four bedrooms on the second floor and, after entering one, he observed a plate of food and narcotics in plain view.

¶ 6 A K-9 team then searched all the bedrooms and Foertsch did a systematic search of the bedroom he had entered. He found two loaded 9-millimeter handguns under blankets and 9-millimeter ammunition under the bed. Further search of the bedroom revealed several documents addressed to defendant at 520 West 104th Street in Chicago.

¶ 7 Officer Kasper testified he was also part of the team that executed the search warrant. Kasper was informed that two handguns were recovered in one of the bedrooms on the second floor as well as documents containing defendant's name and the address of the residence. Kasper

testified he found defendant in the dining room with the other individuals. He asked to speak to defendant in the kitchen along with Officer Mohammad. Kasper then advised defendant of his *Miranda* rights and asked defendant about the guns. Defendant admitted the guns were his; at which time he was taken into custody. The State tendered a certified copy of a prior conviction for defendant, which was entered into evidence.

¶ 8 After the State rested, defendant called Ida Johnson. Johnson testified she was a resident of 520 West 104th Street in June of 2009, and lived there with her five children. She also testified that, for at least five days prior to defendant's arrest, he did not stay at the residence because he was staying at his sister's house. She stated defendant arrived about 15 to 20 minutes prior to the execution of the search warrant, that defendant never left the dining room, and she never heard him receive his *Miranda* rights or make a comment about the guns. On cross-examination, Johnson admitted that defendant resided at 520 West 104th Street and received mail there. Johnson also testified that no one except for Barbara Franklin, the owner of the house, had their own bedroom and that she herself slept on the couch.

¶ 9 Sakita Burks, a family friend, testified she was in an upstairs bedroom at the time of the execution of the search warrant. As police escorted her to the dining room she did not see defendant on the second floor but found him sitting in a chair in the dining room. She did not see officers take defendant into the kitchen.

¶ 10 Anita Franklin, defendant's sister, testified that defendant stayed at her house every night from May 29 until he was arrested. She admitted she could not account for his whereabouts between 6:30 a.m. and 8:30 p.m.

¶ 11 Barbara Franklin, defendant's mother, testified that she owned the residence at 520 West 104th Street, that defendant lived at the residence and received mail there. She stated that for the

five days prior to defendant's arrest he was staying at his sister's house. She testified that when she was brought to the dining room and told to lie on the floor, defendant was in the dining room and she never saw him leave the dining room. She testified she did not hear officers give defendant his *Miranda* rights or hear defendant say the guns were his.

¶ 12 Defendant, testifying on his own behalf, stated that on June 2, 2009, he was at 520 West 104th Street, having arrived about 30 minutes before the police arrived. He said he had been staying at his sister's house for the five-day period before his arrest, that he never went upstairs, never was taken to the kitchen, never was read his *Miranda* rights, and never told the police the guns were his. On cross-examination, defendant testified he had given 520 West 104th Street to his parole officer as his place of residence. He also stated he lived at his mother's and his sister's homes.

¶ 13 Michael Franklin was called as a witness and was not questioned once he asserted his Fifth Amendment right to remain silent. Defense then rested.

¶ 14 The trial court found defendant guilty of all charges. The court specifically determined that defendant's principal place of abode was 520 West 104th Street. The court found defendant possessed the weapons within the meaning of the statute and was a convicted felon.

¶ 15 On December 29, 2009, defendant's retained trial counsel filed a motion for new trial. On January 22, 2010, defendant filed a *pro se* motion to vacate the judgment and a *pro se* motion for a new trial. Defendant alleged he was not proven guilty beyond a reasonable doubt and trial counsel was ineffective for not moving to quash the arrest or suppress evidence.

¶ 16 On January 28, 2010, at a hearing at which trial counsel waived defendant's appearance, the trial court informed counsel of the *pro se* motions filed by defendant. Trial counsel indicated he had never received a copy and the motions were withdrawn at trial counsel's request.

¶ 17 On February 14, 2010, trial counsel filed an amended motion for a new trial. On February 17, 2010, at a hearing on the motion, trial counsel argued that the trial court erred in rulings on the admission of evidence and that the State failed to prove defendant guilty beyond a reasonable doubt. Furthermore, trial counsel informed the court that defendant did not want trial counsel to represent him. Defendant then chose to be represented by a public defender. The trial court then appointed a public defender, as standby counsel for the motion on a new trial and then as counsel for sentencing. Trial counsel then argued his motion for a new trial, the State argued in response and the trial court denied the motion for a new trial. Trial counsel then withdrew. The trial court indicated defendant's previously withdrawn *pro se* motion was untimely and the court continued the matter for sentencing.

¶ 18 On May 27, 2010, the case came before the trial court for sentencing. The court noted that defendant had five felony convictions which were greater than Class 2. Based on this background, the trial court found defendant was a Class X felon and sentenced him to 10 years in the Illinois Department of Corrections. Defendant asked to present witnesses in mitigation. The trial court noted that she had already sentenced defendant, and she would re-open sentencing to allow defendant time to gather witnesses and any evidence that he wished to present.

¶ 19 On September 17, 2010, the case was before another judge for sentencing. Defendant presented three witnesses in mitigation and also spoke on his own behalf. After hearing arguments in aggravation and mitigation, the court sentenced defendant to 10 years imprisonment.

¶ 20 Defendant filed a direct appeal, arguing among other claims, that the trial court denied his Sixth Amendment right to counsel of his choice by permitting his retained trial counsel to argue posttrial motions when defendant had previously indicated that he no longer wished to be

represented by that attorney. *People v. Franklin*, 2013 IL App (1st) 103013-U, ¶ 23. We remanded the case back to the trial court for a hearing on the motion for a new trial giving defendant leave to amend his motion to include the allegation of ineffective assistance of counsel. *Id.* ¶ 41.

¶ 21 On remand, defendant's new court-appointed attorney filed an amended motion for a new trial, alleging trial counsel's ineffectiveness. The motion claimed that trial counsel was ineffective for: (1) failing to file a pre-trial motion to quash the warrant and suppress the evidence; (2) calling Michael Franklin as a defense witness, then advising him to assert his Fifth Amendment privilege; and (3) failing to properly argue that the State failed to prove defendant guilty beyond a reasonable doubt.

¶ 22 Michael Franklin testified at the hearing that James Stamos, defendant's trial counsel, came to his house a week before defendant's trial. Michael told trial counsel about the events that occurred on the night of June 2, 2009, the day the warrant was executed. Trial counsel then subpoenaed Michael to appear and testify at defendant's trial. Michael testified that, about an hour before he was set to testify, trial counsel, without explanation, advised Michael to assert his Fifth Amendment privilege against self-incrimination.

¶ 23 The trial court denied the amended motion for a new trial. The court noted that trial counsel's decision to advise defendant's brother to invoke the Fifth was a matter a trial strategy and was not "objectively unreasonable." Defendant's attorney asked the trial court to impound an affidavit from trial counsel and an order was entered to that effect. In the affidavit, dated September 3, 2014, trial counsel stated that he had "no independent recollection whatsoever of [defendant's] trial" and that if he were called to testify he would be unable to answer any questions about the trial or his representation of defendant. This appeal follows.

¶ 24

ANALYSIS

¶ 25 On appeal defendant argues that the trial court erred when it determined that trial counsel provided effective assistance of counsel. Defendant contends that trial counsel operated under an actual conflict of interest when he subpoenaed Michael Franklin, defendant's brother, called him to testify as a defense witness, and then informed him, shortly before defendant's trial, to invoke his Fifth Amendment right to refuse to answer any questions. Defendant maintains that by advising Michael not to testify, trial counsel placed Michael's Fifth Amendment interests ahead of defendant's Sixth Amendment right to assert an effective defense. According to defendant, he was deprived of his right to effective assistance of conflict-free counsel.

¶ 26 A criminal defendant's Sixth Amendment right to effective assistance of counsel includes the right to conflict-free representation. *People v. Morales*, 209 Ill. 2d 340, 345 (2004). The assistance of counsel means assistance which entitles an accused to the undivided loyalty of his counsel and which prohibits the attorney from representing conflicting interests or undertaking the discharge of inconsistent obligations. *People v. Washington*, 101 Ill. 2d 104, 110 (1984). Effective assistance means assistance by an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations. *Id.*

¶ 27 Illinois recognizes two classes of impermissible attorney conflicts of interest. *People v. Spreitzer*, 123 Ill. 2d 1, 13-14 (1988). The first category of conflict, termed “*per se* conflicts,” consist of those “certain facts ... [that] engender, *by themselves*, a disabling conflict” (emphasis in original), usually “the defense attorney's prior or contemporaneous association with either the prosecution or the victim.” *Id.* at 14.

¶ 28 The second category of conflict, argued by defendant here, often called a “potential,” “possible,” or “actual” conflict, describes something short of a *per se* conflict. See *Spreitzer*,

123 Ill. 2d at 17-18. In such cases, a defendant's convictions may be reversed if the trial court was informed of the problem and failed to take adequate protective steps, or where the court was not apprised and the defendant can show that “ ‘an actual conflict of interest adversely affected’ counsel's performance.” *Spreitzer*, 123 Ill. 2d at 18, quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). In cases where a defendant claims that an actual conflict adversely affected counsel's performance, a defendant must show “some specific defect in his counsel's strategy, tactics, or decision making attributable to [a] conflict.” *Spreitzer*, 123 Ill.2d at 18. Speculative allegations and conclusory statements are not sufficient to establish that an actual conflict of interest affected counsel's performance. *People v. Morales*, 209 Ill. 2d at 349.

¶ 29 Here, trial counsel's representation was not compromised. The record indicates that trial counsel's theory at trial was that defendant did not live at the residence, or at a minimum, had not been there for at least five days before the search warrant was executed, and, as such, defendant had no knowledge of the presence of weapons in the house. Defendant could not have been in possession of the recovered weapons, and thus, not guilty of the charges offense. Under this theory, the decision to call Michael Franklin, the intended target of the search warrant, and resident of the house, to invoke his Fifth Amendment right was a matter of trial strategy. Counsel wanted the trier of fact to infer that Michael was the owner of the weapons when invoking his Fifth Amendment right. Trial counsel's strategy was not contrary to defendant's interests, but was furthering his clearly-asserted theory at trial. Although the strategy did not work, we are not to evaluate counsel's performance in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions. *People v. Fuller*, 205 Ill. 2d 308, 331 (2002).

¶ 30 The facts in *People v. Miller*, 79 Ill. 2d 454, 458 (1980), are similar to the facts here. In *Miller* the Assistant Public Defender assigned to represent the defendant indicated that he would call Alfred Myles to the stand. *Id.* at 458-59. Myles had been charged with the same offense for which defendant was being tried and defense counsel stated that Myles, if called by the defendant, would admit his participation in the robbery. *Id.* at 459. The circuit court appointed another Assistant Public Defender to advise Myles of his rights. *Id.* After consulting with the assistant assigned to him, Myles refused to testify. *Id.* Defense counsel requested that Myles take the stand and the court ordered him to do so. *Id.* When interrogated concerning his knowledge of and participation in the offense, Myles invoked the privilege against self-incrimination. *Id.*

¶ 31 The court held that Myles would in all probability have been advised not to testify by anyone who served as his attorney, and that Myles' counsel's association with the Public Defender's Office was of no significance. *Id.* at 461. The court noted that defense counsel's performance was reasonable and that "[b]y forcing Myles to invoke the privilege against self-incrimination in court, the jury could infer that Myles, rather than defendant, committed the robbery. Such vigorous representation by defense counsel belies a claim of ineffective assistance." *Id.* at 461.

¶ 32 Similarly here, an examination of the record shows that trial counsel vigorously represented defendant and his decision to direct Michael Franklin to invoke his Fifth was a matter of trial strategy. Defense counsel called several witnesses who testified that defendant was not residing at the residence. Ida Johnson testified that, at least five days prior to defendant's arrest, he did not stay overnight in the house because he was staying at his sister's, Anita Franklin's house. Sakita Burks similarly testified that she did not see defendant during the time

she was at the house in the days prior to the execution of the search warrant. Anita Franklin testified that defendant stayed at her house every night for five days beginning on May 29th, which included the day he was arrested. Defendant's mother, Barbara, also testified that, in the five days prior to the police arriving at the house, defendant was staying at Anita's house. By directing Michael Franklin to invoke the privilege against self-incrimination, defense counsel was furthering his theory of the case and argument to the trier of fact that there was substantial doubt as to whether it was defendant who resided at the residence and possessed the weapons.

¶ 33 Moreover, defendant's argument that Michael Franklin would have testified as to the ownership of the weapons is speculative. Defendant merely assumes that Michael Franklin's testimony at trial would have been favorable for defendant. "A detailed and specific offer of proof is necessary when it is not clear what the witness' testimony will be or his basis for so testifying." *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 189. Here, there is no evidence in the record as to what exactly Franklin's testimony would have been or whether that testimony would have been favorable to defendant.

¶ 34 Defendant cites *People v. White*, 362 Ill. App. 3d 1056 (2005) in support of his argument. In *White*, three co-defendants in an armed robbery and unlawful restraint case were tried together. *Id.* at 1057. Defendants White and Tracy Chambers were represented by the same attorney. *Id.* The third defendant, Jerry Chambers was represented by an Assistant Public Defender. *Id.* A key witness in the trial was a store clerk who testified that all three defendants were in her store, but that she specifically saw defendant White who emptied the cash register. *Id.* at 1059. The defense counsel's law-partner cross-examined her on behalf of co-defendant Tracy Chambers, and proceeded to highlight that she was best able to identify defendant White as opposed to the other co-defendants. *Id.* Defense counsel adopted co-defendant Tracy' cross-

examination on behalf of defendant White, and attempted unsuccessfully to establish that the store clerk did not see defendant White's face. *Id.* The trial court found defendant White guilty based on the store clerk's testimony while granting directed findings in favor of the other co-defendants.

¶ 35 On appeal, defendant White argued that his trial attorney demonstrated loyalty to co-defendant Tracy Chamber by highlighting the strength of the witness' identification of defendant White compared with the weakness of the witness' identification of co-defendant Tracy Chambers. *Id.* at 1060. We found that defendant White's trial attorney labored under an actual conflict because, in his defense of co-defendant Tracy, he was forced to emphasize that the store clerk had best seen and interacted with defendant White, and could best identify him as the offender. *Id.* at 1061. In other words, counsel sacrificed defendant White for the sake of co-defendant Chambers, and this was clearly "a specific defect in counsel's tactics or strategy that resulted from the conflict." *Id.*

¶ 36 Here, unlike *White*, defendant's attorney was not jointly representing defendant and Michael Franklin. The record indicates that Michael Franklin was charged with possessing the weapons, but there was a finding of "no probable cause" in his case four months before defendant's trial. In addition, unlike *White*, defendant cannot point to a specific defect that resulted from the alleged conflict between defendant and Michael Franklin. While defendant argues that trial counsel declined to present "potential" exculpatory testimony, that argument ignores the fact that trial counsel did present several witnesses who attempted to establish that defendant was not responsible for the weapons, and that someone else must have been.

Counsel's decision to call Michael Franklin only to have him invoke his Fifth was a plausible

exercise of professional tactic in furthering a well-articulated theory of the case that implicitly suggested that Michael Franklin, and not defendant, had a tie to the recovered weapons.

¶ 37 In sum, we find that defendant cannot demonstrate that his trial counsel's representation was compromised by any relationship that counsel might have had with Michael Franklin.

Accordingly, defendant's claim of ineffective assistance of counsel fails.

¶ 38 CONCLUSION

¶ 39 Based on the foregoing, we affirm.

¶ 40 Affirmed.