2019 IL App (1st) 170244-U

THIRD DIVISION
June 19, 2019

No. 1-17-0244

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 15 CR 12169
	)	
RONALD JARVIS,	)	The Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's trial counsel did not operate under conflict of interest based on his law firm's representation of a codefendant; defendant was not deprived of effective assistance of counsel due to his trial counsel's failure to move to sever his trial from that of his codefendant; case is remanded to trial court for consideration of defendant's contentions of error in the order assessing fines, fees, and costs.

¶ 2 Defendant Ronald Jarvis was convicted in a bench trial of one count of being an armed habitual criminal and two counts of unlawful use or possession of a weapon by a felon. On appeal, defendant contends that: (1) he was deprived of effective assistance of counsel because his trial counsel represented him while operating under a conflict of interest; (2) his trial counsel

was ineffective for failing to move to sever his trial from that of his codefendant; and (3) certain fines, fees, and costs were improperly assessed against him upon his conviction. For the reasons that follow, we affirm the judgment of the trial court. However, we remand the case to the trial court so that defendant's contentions of error in the order assessing fines, fees, and costs can be addressed as provided under Illinois Supreme Court Rule 472 (eff. May 17, 2019).

¶ 3 I. BACKGROUND

¶ 4 The charges against defendant arise from events that occurred on July 4, 2015, when officers from the Chicago Police Department recovered two handguns while executing a search warrant at a second-floor apartment in a three-flat building in the 1100 block of South Whipple Street. The search warrant had been obtained based on information from a confidential informant that Nikkolas Casillo, a convicted felon who resided at the apartment, had been seen there on June 29, 2015, "holding two chrome semi-automatic .40 caliber handguns with black handles." When the officers executed the search warrant, defendant was present at the apartment. Casillo, Jonathan Duttine, and Zoe Mella were also present at the apartment that day.

¶ 5 The execution of the search warrant led to the filing of a nine-count indictment against defendant, Casillo, and Duttine. Three of the counts of the indictment were against defendant. In the first, he was charged with the offense of being an armed habitual criminal, in that he "knowingly or intentionally possessed a firearm" after having been convicted of the offenses of manufacture or delivery of a controlled substance and residential burglary. The second and third counts both charged him with the offense of unlawful use or possession of a weapon by a felon. The second count alleged that he "knowingly possessed on or about his person any firearm" after having been convicted of the felony offense of manufacture or delivery of a controlled substance. The third count alleged that he "knowingly possessed on or about his person any firearm

ammunition" after conviction for that same felony offense. Five charges of the indictment were against Casillo. Of those, one was for armed violence and one was for possession of cannabis with intent to deliver. The remaining three charges were for unlawful use or possession of a weapon by a felon, one alleging that he "knowingly possessed on or about his person any firearm" and two alleging that he "knowingly possessed on or about his person any firearm ammunition," after having been convicted of a felony. The remaining two counts of the indictment were against Duttine, both charging him with possession of a controlled substance.

¶ 6 Prior to trial, Duttine pled guilty to one of the two counts, and the State moved to *nolle pros* the second count against him. Upon questioning by the prosecutor pursuant to his guilty plea, Duttine stated that neither of the two firearms recovered at the apartment were his.

¶ 7 Both defendant and Casillo were represented in this matter by privately-retained counsel from the law firm of Gottreich & Grace. The defense of defendant was handled by attorney Marc E. Gottreich, and the defense of Casillo was handled by attorney Timothy Grace. At a pretrial hearing, Gottreich informed the trial court of this fact. He stated that "there may be a conflict," but he and Grace needed to look at the police reports to determine if one existed and talk to their clients about it. At a later status hearing, Grace stated to the trial court that they had looked into the issue and neither the attorneys nor the clients perceived a conflict. The matter proceeded to a bench trial. Prior to its commencement, both attorneys confirmed to the trial court that they had not filed motions to sever the cases.

¶ 8 At the bench trial, the prosecutor stated in her opening statement that the testimony from the police officers would be that when they were executing the search warrant, they saw Casillo

armed with a pink and silver item that turned out to be a handgun.[1] As for defendant, the prosecutor stated that the officers would testify that as they were pursuing Casillo into the apartment, they saw defendant run into a bedroom where he took a different handgun and threw it out the window. In Grace's opening statement on behalf of Casillo, he asserted that the evidence would not prove Casillo's guilt beyond a reasonable doubt, specifically as to his "possession" of a firearm. He stated that the evidence would show that when the officers found Casillo, he did not have a weapon on his person. Rather, it was not until the officers searched the house that they found a pink and silver handgun in the bedroom, and Mella had a firearm owner's identification (FOID) card and receipt showing that she had purchased a pink handgun. In Gottreich's opening statement on behalf of defendant, he stated that the evidence would show that the layout of the apartment would make it impossible for officers pursuing Casillo to have seen defendant run into a bedroom and throw a gun out the window. He stated that Duttine, Mella, and Casillo were all present and could have thrown a gun out of a window.

¶ 9 The evidence at trial began with the testimony of Officer Roberto Baltazar of the Chicago Police Department. He testified that he was with Officers James Fernandez and Bryan Town that day. When they arrived at the building to execute the search warrant, he saw an individual, whom he identified in court as Casillo, on the second floor of the building's rear deck. When the officers identified themselves, Casillo ran inside the apartment. Officer Baltazar then saw Casillo reach near the waistband area of his pants, at which point he noticed a silver and pink object in Casillo's hand. The officers pursued Casillo into the apartment. It had three bedrooms, and Officer Baltazar testified he saw Casillo standing in the rear bedroom with his hands up. Nothing was in his hands. He conducted a pat-down of Casillo, and no weapon was recovered from him.

[1] In this decision, we set forth only that evidence and argument pertaining to the charges against Casillo that are pertinent to the issues raised by defendant on appeal.

¶ 10 Officer Paul Heyden testified that he was part of the team of officers that executed the search warrant from the front of the building. When no one answered the door of the second-floor apartment, the officers forced their way in. After doing so, Officer Heyden heard Officer Fernandez, who had already entered from the rear of the apartment, giving orders for an individual to stop. Officer Heyden went into the room where Officer Fernandez was, which was the front bedroom. There Officer Heyden saw an individual, whom he identified in court as defendant, standing near a window. He saw nothing in defendant's hands at that time. Officer Heyden detained defendant and brought him to the living room, where Officer Apacible and the other three occupants of the apartment were present. Officer Heyden testified that after he read *Miranda* warnings to defendant, defendant said to him that he had gotten scared when he saw the police and had run to the window to get rid of the gun. On cross-examination, Officer Heyden agreed that when defendant was taken to the police station, he had refused to sign a written *Miranda* waiver and did not talk further about the gun.

¶ 11 Officer Albert Wyroba testified that he was part of the team of officers executing the search warrant through the front door. He testified that after breaching the front door, he immediately ran back outside because he learned through radio communication that a weapon had been discarded through a window. He ran to the side of the building and saw a handgun on the adjacent gangway. After it was photographed for evidence, Officer Wyroba rendered the hand-gun safe and ascertained that it contained seven live rounds of ammunition. During his testimony, he identified both the actual gun that was recovered and a photograph showing it in the place where he found it in the gangway. Both of these exhibits were admitted into evidence.

¶ 12 Officer Wyroba testified that defendant, Casillo, and Duttine were placed into custody and taken to the police station. He testified that Casillo then agreed to speak to him and was given his

Miranda warnings. He testified that Casillo had told him that he had recently had a conflict with gang members from the area. He had found these gang members selling narcotics in front of his building and had become upset. He made efforts to get them to stop selling narcotics on his porch and forced them away from his residence. He told Officer Wyroba that "the pink and chrome Taurus on his person was for protection from gang members in the area." On cross-examination, Officer Wyroba said, concerning the preceding sentence, that Casillo was speaking "in general that he carries the pink and silver gun for his protection." He also testified on cross-examination that no fingerprint or DNA evidence was ever done on this case to his knowledge. He testified there was no proof of residency found in the apartment concerning defendant, and defendant had nothing on his person indicating he lived in that apartment.

¶ 13 Officer Roberto Delcid testified that he served as the evidence officer during the execution of the search warrant. He testified that upon the officers' advising Casillo of the search warrant, Casillo directed them to a pile of clothes in the rear bedroom. There Officer Delcid found a pink and silver Taurus handgun loaded with six live rounds of ammunition. Officer Delcid identified in his testimony both the actual handgun that was recovered and a photograph showing it in the place where he found it in the bedroom, and both of these exhibits were admitted into evidence. He further testified that he found proof-of-residency documents for Casillo in the apartment, but he did not find any proof-of-residency documents with defendant's name on it. He testified that he recovered a .40 caliber handgun and inventoried it also. He did not recall whether Officer Heyden had a conversation with defendant while he was in the living room.

¶ 14 Officer Fernandez testified that he was part of the team of officers that approached the building from the back. When he arrived, he saw an individual, whom he identified in court as Casillo, standing on the second-floor deck. Officer Fernandez exited his car and began to

approach Casillo. He testified that at that point, he did not see anything in Casillo's hands. When Casillo noticed the officers, he ran inside the apartment. The officers pursued him, and he ran into a bedroom. Officer Fernandez, however, did not go into that bedroom but continued down a hallway toward the front of the apartment. Doing so required him to make a right turn and then a left turn. When he made that left turn, he saw an individual, whom he identified in court as defendant, running toward him into the doorway of a different bedroom. He observed defendant carrying a black handgun in his right hand. Officer Fernandez followed defendant into that bedroom. There, he saw defendant at a window sliding the handgun over the windowsill and dropping it. Defendant then turned around, and Officer Fernandez secured him. Officer Fernandez then immediately looked out the window and saw a black gun on the sidewalk below, similar to the gun he had seen in defendant's hand. He directed Officer Wyroba to go to the sidewalk in the gangway where the gun was. On cross-examination, he agreed that he did not "simultaneously" see defendant running from the living room to the bedroom when he entered the rear door of the apartment, as Officer Mora had written in his report. After Officer Fernandez testified, the State presented certified copies of defendant's two felony convictions.

¶ 15 Following the denial of motions for directed finding by both Casillo and defendant, Mella was called as a witness for both Casillo and defendant. She testified that Casillo was the father of her children. On July 4, 2015, she resided with Casillo in the apartment at issue. She testified that on that date, she possessed a valid FOID card and owned a pink and silver Taurus handgun. She identified a receipt showing her purchase of that handgun. She testified that she also had ammunition for the Taurus handgun. She testified that defendant did not live at the apartment with Casillo and her. She testified that she was in the living room and heard police officers talking to defendant there, but she did not at any point hear defendant tell the police that he threw

a gun out a window. On cross-examination by the State, she testified that she and Casillo had moved together into the apartment on South Whipple Street in October 2014. However, she testified that her FOID card had an issue date of April 22, 2015, and listed a different address than the one on South Whipple Street.

¶ 16 Before defendant rested, a stipulation was presented that if Officer Mora were called to testify, he would testify that he wrote a report stating that "simultaneously" upon entering the second-floor apartment from the rear, Officer Fernandez had observed defendant run from the living room to his own bedroom, which was the front bedroom of the apartment, while holding a black handgun.

¶ 17 In the State's closing argument, with respect to Casillo, the prosecutor pointed to the fact that an officer saw him on the back porch holding a pink and silver object, which turned out to be a firearm. The prosecutor cited Casillo's own statement in which he said that he holds the pink and silver chrome handgun for protection. She argued that he ran inside and tried to hide it because he knew that as a felon he could not have it. She argued that Mella was not a credible witness, but even if she was the owner of the firearm, the offense only requires possession, and the evidence showed that Casillo was in possession of the handgun. The prosecutor argued that with regard to defendant, although a lot of commotion was happening as he was running into the apartment, Officer Fernandez saw defendant run into a bedroom with a gun in his hand. Officer Fernandez got into that bedroom right after defendant, he saw defendant pushing a black object over the windowsill, and a black handgun was seen and recovered from the ground below that window. The prosecutor did not mention Casillo's statement in the context of her argument concerning the charges against defendant.

¶ 18 Attorney Grace, in his closing argument on behalf of Casillo, argued that either Officer

Baltazar or Officer Fernandez was not telling the truth or was not paying attention to whether Casillo had a pink and silver object in his possession on the back porch. He pointed out that Officer Baltazar claimed he saw something pink and silver taken from his waist area, but Officer Fernandez said he did not see anything in Casillo's hands. He went on to state:

> "[MR. GRACE:] Let me tell you something. Fernandez kind of impressed me. He seemed like he knew exactly what he was talking about and the way things were going. He's been on the job a long time. He didn't see anything. If he would have seen something, he would have followed Casillo into that front bedroom. We all know that.
>
> * * *
>
> THE COURT: I take it you're arguing that he was credible as to testimony he gave related to your client?
>
> MR. GRACE: Well, I don't have any horse in the race with respect to what he says with respect to the other guy, Jarvis. That's none of my concern. I'm saying that I judge a person's credibility or judge a person and what he perceives by his actions. If he would have saw something, if Baltazar would have saw something, they would have gone guns out, ran after Casillo to follow him into that bedroom. They wouldn't even mess around with what was going on in the front of the building.
>
> So there is no way he had anything in his hand. ***"

¶ 19 Attorney Gottreich, in his closing argument on behalf of defendant, argued there were various inconsistencies and unbelievable aspects to the testimony by the officers. Concerning Officer Fernandez, he stated that he would "differ with co-counsel that I don't think he's very credible." He pointed out that Officer Fernandez's trial testimony that the living room could not be seen from the back door was inconsistent with Officer Mora's report stating that

"simultaneously" upon entering the apartment, Officer Fernandez saw someone running. He argued that it was a long hallway with several turns, and one would think that Casillo had alerted the other occupants of the police presence when he ran into the house, such that defendant would not have waited several seconds before running toward the bedroom. He argued that "the story that Fernandez tells makes absolutely no sense at all." He pointed out that there were three other people in the apartment, including Casillo, who could have thrown the black gun out a window, as all the bedrooms had windows facing the area where the gun was found. He argued that Officer Heyden was fabricating the fact that defendant gave a statement admitting he threw the gun out the window, as Officer Delcid testified he was in the same room and did not hear any part it. Defendant's counsel did not make any reference to in his closing argument to any statements by Casillo.

¶ 20 In the State's rebuttal closing, the prosecutor again focused on the evidence against defendant and Casillo respectively. With respect to defendant, she argued that the officers were in fact credible as to the point in time when Officer Fernandez saw defendant and in the fact that defendant stated that he got scared and threw the gun out the window. The prosecutor did not mention any statement by Casillo in the rebuttal closing.

¶ 21 The trial court found defendant guilty of all three charges against him. In ruling, the trial court stated that the credible evidence was that Officer Fernandez, as he was running into the apartment, saw defendant running from the front of the apartment with a black item in his hand, go into a room, go to the window, and drop an object. He then looked out the window and saw a gun outside the window on the concrete. There was ammunition in the firearm. Thus defendant possessed that firearm and had been previously convicted of the offenses of manufacture and delivery of a controlled substance and residential burglary. The trial court merged the two

convictions for unlawful use or possession of a weapon by a felon into the conviction for being an armed habitual criminal and sentenced defendant to eight years in the Illinois Department of Corrections. The trial court further entered an order assessing fines, fees, and costs in the amount of $534. The defendant then filed a timely notice of appeal.

¶ 22 II. ANALYSIS

¶ 23 A. Trial counsel's conflict of interest

¶ 24 Defendant's first argument on appeal is that he was deprived of his constitutional right to the effective assistance of counsel because his trial counsel represented him while operating under a conflict of interest. As discussed below, he contends that his trial counsel had both a *per se* conflict of interest and an actual conflict of interest, arising from the fact his trial counsel was a member of the same law firm that also represented Casillo at the trial.

¶ 25 A criminal defendant's right to effective assistance of counsel includes the right to conflict-free representation. *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). For purposes of conflict of interest analysis, the law considers the representation of codefendants by attorneys from the same law firm as if the codefendants were represented by one attorney. *People v. Nelson*, 2017 IL 120198, ¶ 29. Two categories of conflicts of interest exist: *per se* and actual. *People v. Peterson*, 2017 IL 120331, ¶ 102.

¶ 26 A *per se* conflict of interest will be found to exist where certain facts about a defense attorney's status engender, by themselves, a disabling conflict. *Id.* ¶ 103. However, the mere fact of joint representation of codefendants by one attorney or law firm does not create a *per se* violation of the right to effective assistance of counsel. *Nelson*, 2017 IL 120198, ¶ 29. Rather, the supreme court has recognized that a *per se* conflict of interest exists in the following three situations: (1) where defense counsel has a prior or contemporaneous association with the victim,

the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved with the prosecution of defendant. *Peterson*, 2017 IL 120331, ¶ 103. The justification for treating these as *per se* conflicts is that, in each situation, the defense attorney's association or tie to the victim, the prosecution, or a prosecution witness may have subtle or subliminal effects on his or her performance that are hard to detect or demonstrate. *Id.* If a *per se* conflict exists, there is no need to show prejudice or that that the conflict affected the attorney's actual performance. *Hernandez*, 231 Ill. 2d at 143. Unless the defendant waives the *per se* conflict, its existence alone is grounds for automatic reversal. *Id.* This court reviews *de novo* the issue of whether the undisputed facts of record present a *per se* conflict. *People v. Morales*, 209 Ill. 2d 340, 345 (2004). In doing so, the court makes a realistic appraisal of defense counsel's professional relationship to someone other than the defendant under the circumstances of the case. *People v. Austin M.*, 2012 IL 111194, ¶ 83.

¶ 27 Defendant argues that this case involves the second type of situation in which a *per se* conflict has been recognized to exist. Specifically, he argues that Casillo "acted as a prosecution witness because the State admitted Casillo's statements implicating [defendant] as the possessor of the black gun at their joint trial." (Emphasis omitted). Based on this premise that Casillo was a prosecution witness, he argues that the fact that his trial counsel was a partner at the law firm that also represented Casillo caused his trial counsel to operate under a *per se* conflict of interest.

¶ 28 Casillo did not testify at the joint trial. Rather, the statements by Casillo that the defendant cites are the verbal statements that Casillo made to Officer Wyroba at the police station following his arrest. Officer Wyroba testified that Casillo had told him that he had recently had a conflict with gang members from the area after trying to get them to stop selling drugs in front of

his building. Casillo told him that "the pink and chrome Taurus on his person was for protection from gang members in the area." Officer Wyroba reiterated that Casillo was speaking "in general that he carries the pink and silver gun for his protection." Defendant contends that these statements implicate him. He reasons that the police recovered two handguns from the apartment, a pink and silver one and a black one. He points out that he did not reside at the apartment. Mella, who did reside there, testified only to owning the pink and silver handgun without claiming ownership of the black gun. Duttine, who was also present that day, stated in his plea before the same trial judge who presided over the bench trial that he was not the owner of either handgun. Thus, defendant contends, the statements by Casillo indicated that Casillo only possessed one of the guns, the pink and silver one, and therefore he effectively denied possessing the black gun. Defendant contends that this denial by Casillo provided evidence that made it more likely that defendant must have possessed the black gun.

¶ 29 Defendant cites no case in which a court has found a *per se* conflict to exist under similar facts. In *Morales*, 209 Ill. 2d at 346, the supreme court held that no *per se* conflict existed in a situation where a defendant's attorney also represented a potential prosecution witness in a different matter. Central to the court's reasoning was the fact that the potential prosecution witness did not actually testify at the defendant's trial, although at the defendant's sentencing phase, the State introduced certain out-of-court statements made by the potential witness in a letter concerning the defendant. *Id.* The supreme court found that the defendant's attorney "never assumed the status of attorney for a prosecution witness." *Id.*

¶ 30 Similarly, in this case, we do not find that defendant's trial counsel had the status of being an attorney for a prosecution witness by virtue of the fact that his law firm also represented Casillo in the joint trial. Casillo never testified as a witness at the trial, and we reject defendant's

arguments that the statements by Casillo about which he complains implicated defendant in any of the offenses with which he was charged. In his statement to Officer Wyroba, Casillo never mentioned defendant or the black handgun that was recovered at the scene. The fact that Casillo admitted to carrying the pink and silver handgun but did not also mention the black handgun had no relevance to whether defendant "possessed a firearm," as charged in the armed habitual criminal count of the indictment, or "possessed on or about his person any firearm" or "firearm ammunition," as charged by the two counts for unlawful use or possession of a weapon by a felon. See 720 ILCS 5/24-1.7(a) (West 2014) ("A person commits the offense of being an armed habitual criminal if he or she *** possesses *** any firearm after having been convicted a total of 2 or more times" of certain offenses); 720 ILCS 5/24-1.1(a) (West 2014) ("It is unlawful for a person to knowingly possess on or about his person *** any firearm or any firearm ammunition if the person has been convicted of a felony ***.").

¶ 31 It is evident that the State sought to prove the charges against defendant through proof that he was in actual possession of the black handgun, in that he was seen by Officer Fernandez carrying a black handgun in his hand and then attempting to hide or dispose of it by sliding it out of a bedroom window, directly above the place on the sidewalk where a black handgun was recovered. See *People v. Anderson*, 2018 IL App (4th) 160037, ¶ 31 (actual possession is proved by testimony showing that a defendant has exercised some dominion over contraband, which may be that the he had it on his body, that he tried to conceal it, or that he was seen throwing it away). In this circumstance, the possibility that Casillo (or Mella or Duttine) also had some sufficiently close relationship to the black handgun to constitute "possession" of it would not vindicate defendant, but rather it would present a situation of joint possession. *People v. Ingram*, 389 Ill. App. 3d 897, 901 (2009); *People v. Hill*, 226 Ill. App. 3d 670, 673 (1992). Therefore, the

fact that Casillo admitted to carrying the pink and silver handgun but did not also mention the black handgun was irrelevant to the charges against defendant that he possessed a firearm, and it does not amount to a statement implicating defendant.

¶ 32 As we have found that a *per se* conflict does not exist, reversal in this case would require the showing of an actual conflict. *Austin M.*, 2012 IL 111194, ¶ 81. In actual conflict situations, the defendant need not prove prejudice in that the conflict contributed to the conviction, but nevertheless it must be shown that an actual conflict of interest adversely affected the performance of the defendant's lawyer. *Id.* ¶ 82. The defendant must point to some specific defect in the lawyer's strategy, tactics, or decision-making attributable to the alleged conflict. *Id.* However, speculative allegations and conclusory statements are not sufficient to show that an actual conflict affected a lawyer's performance. *Hernandez*, 231 Ill. 2d at 144.

¶ 33 Defendant contends that it would have been detrimental to his trial counsel's law firm if Casillo, who was also the firm's client, were subjected to additional criminal liability based on his possession of the black gun in addition to the pink and silver one. He argues that the desire to prevent this by avoiding the presentation of evidence that Casillo (and not defendant) possessed the black gun caused his trial counsel to engage in certain actions amounting to defects in performance attributable to his law firm's representation of Casillo.

¶ 34 First, he argues that his attorney should have objected to the admission of Casillo's statements on the grounds that they were hearsay as to him and violated his constitutional right to confront witnesses against him. He similarly argues that his trial counsel should have asked to limit the use of Casillo's statements as being evidence only against Casillo, which defendant contends would have cured the hearsay and confrontation clause violations. We do not agree. As discussed above, the statements by Casillo that defendant cites are unrelated to the charges

against defendant, and the statements did not implicate defendant in the offenses with which he was charged. It is evident to us from the way the attorneys presented the evidence and argued their respective cases at trial that they all understood this fact. Moreover, the trial court's ruling indicates also that Casillo's statements were not evidence it considered against the defendant in finding him guilty. Therefore, there was no reason for defendant's trial counsel to have objected to this statement or sought to limit its use against defendant, and his failure to do so cannot be considered a defect in his strategy, tactics, or decision-making.

¶ 35 The final alleged defect that defendant identifies in the performance of his trial counsel is the fact that his counsel did not impeach Casillo's statement with what he contends was contradictory evidence. He points out that the complaint for search warrant indicates the police received information from a confidential informant that on June 29, 2015, she saw Casillo "holding two chrome semi-automatic .40 caliber handguns with black handles." Defendant suggests that defendant's counsel "could have used this evidence that *Casillo possessed* the .40 caliber *black gun* to impeach his statement that he only possessed the pink gun." (Emphasis in original.) Defendant similarly argues his counsel should have filed a motion to investigate the confidential informant's claim. We reject defendant's argument that this demonstrates a defect in the strategy, tactics, or decision-making of his trial counsel. As discussed above, the statements by Casillo that defendant cites were irrelevant and unrelated to the charges against defendant. All attorneys and the trial court recognized this fact, and thus defendant's trial counsel had no reason to present evidence impeaching Casillo's statements. Furthermore, even if evidence had been presented that Casillo had enough of a relationship to the black gun to also constitute his possession of it, this would not vindicate the defendant from the offenses with which he was charged. *Ingram*, 389 Ill. App. 3d at 901; *Hill*, 226 Ill. App. 3d at 673. The defendant has failed

to demonstrate an actual conflict of interest on the part of his trial counsel.

¶ 36 B. Ineffective assistance of trial counsel

¶ 37 Defendant next argues that his trial counsel was ineffective for failing to move to sever his trial from the trial of Casillo. He argues that the joint trial prejudiced him in two ways: (1) it allowed the State to admit Casillo's hearsay statement implicating defendant, while preventing defendant from confronting Casillo; and (2) it allowed Casillo to present an antagonistic defense that Officer Fernandez, the only witness who testified that he saw defendant in possession of a gun, was credible. Defendant contends that failing to move to sever the trials to prevent the admission of this evidence and the conflicting credibility arguments constituted deficient performance on the part of his trial counsel. He argues that he was prejudiced because, but for the presentation of this evidence and this defense, there is a reasonable probability that the outcome of his trial would have been different.

¶ 38 We review claims alleging ineffective assistance of counsel under the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). To establish such a claim, a defendant must demonstrate that (1) counsel's performance was objectively unreasonable compared to prevailing professional standards, and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81; *Strickland*, 466 U.S. at 688, 694. Both prongs must be satisfied before a defendant can prevail. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). Satisfying the first prong requires a defendant to overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *Id.*; *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010). Concerning the second prong, the "reasonable probability" required is "a showing sufficient to undermine confidence in the outcome, rendering

the result unreliable or fundamentally unfair." *Patterson*, 2014 IL 115102, ¶ 81.

¶ 39 " 'Generally, defendants who are jointly indicted are to be jointly tried unless a separate trial is necessary to avoid prejudice to one of the defendants.' " *People v. Mercado*, 397 Ill. App. 3d 622, 628 (2009) (quoting *People v. Mahaffey*, 165 Ill. 2d 445, 469 (1995)). A defendant has no automatic right to be tried separately from his or her codefendants, and a pretrial request for severance must demonstrate specifically the prejudice complained of. *People v. Byron*, 116 Ill. 2d 81, 92 (1987). Generally, two forms of prejudice are readily identified and require severance. *People v. Gabriel*, 398 Ill. App. 3d 332, 346 (2010). The first form occurs when a codefendant has made a hearsay statement that implicates the defendant. *People v. Daugherty*, 102 Ill. 2d 533, 541 (1984). If a codefendant's hearsay statement is admitted against the defendant, and the defendant is unable to examine the codefendant because the latter did not testify, then the defendant may be denied his constitutional right of confrontation. *Id.* A second form of prejudice occurs when the defenses of the various codefendants are so antagonistic that severance is imperative to assure a fair trial. *Id.* at 542; *Byron*, 116 Ill. 2d at 92.

¶ 40 Defendant contends that both forms of prejudice were present in this case, such that his trial counsel was ineffective for failing to move to sever his trial from that of Casillo. For his contention that the first form of prejudice existed here, he again relies on the statements by Casillo that we addressed above. He contends these statements by Casillo were hearsay statements that implicated him. Again, in our discussion above, we rejected the argument that Casillo's statements implicated defendant in the offenses with which he was charged. Moreover, we found Casillo's statements were so unrelated to defendant that we saw no reason why his trial counsel should have objected to them as hearsay or as violating defendant's right to confrontation. For the same reasons, we find that defendant's trial counsel's performance was

not objectively unreasonable compared to prevailing professional standards by failing to move to sever the trial on the basis of Casillo's statements.

¶ 41 For his contention that the second form of prejudice existed, he argues that his defense was antagonistic to Casillo's defense because both advanced opposite assessments of the credibility of Officer Fernandez. Defendant asserts that Officer Fernandez's credibility was key to the State's case against him, because Officer Fernandez was the only witness who testified that defendant possessed a gun. Thus, defendant presented a defense that involved attacking the credibility of Officer Fernandez. This included arguing that Officer Mora's statement in his report that Officer Fernandez "simultaneously" entered the back door of the apartment and saw defendant run from the living room into the bedroom contradicted Officer Fernandez's testimony at trial that the layout of the hallway made such a simultaneous observation impossible. By contrast, defendant contends that Casillo presented an argument that bolstered the credibility of Officer Fernandez, as to the fact that he testified he did not see Casillo holding a gun. Thus, defendant argues, in deciding whether to find each defendant guilty, the trial court had to choose whether to believe Casillo's defense that Officer Fernandez was credible or defendant's defense that Officer Fernandez was not credible.

¶ 42 For defenses to be so antagonistic to each other that either one of the defendants cannot receive a fair trial jointly with the other, actual hostility between the two defenses must be shown. *People v. Bean*, 109 Ill. 2d 80, 93 (1985). Actual hostility has been found where the trial becomes more of a contest between the codefendants than the State and the defendants, or where one defendant proclaims his innocence while pointing to his codefendant as the true perpetrator. *Id.* at 94-95; *Byron*, 116 Ill. 2d at 92-93. Here, the defenses of Casillo and defendant did not meet the standard of being antagonistic. Although Casillo and defendant were charged with similar

weapon-possession offenses occurring at the same place and time, they were defending against charges of separate offenses for possessing different handguns. Casillo was defending against the State's attempt to prove that he possessed a pink and silver handgun, and he did so by attempting to raise a reasonable doubt about the evidence against him. Defendant was defending against the State's attempt to prove that he possessed a black handgun, and he also did this by attempting to raise a reasonable doubt about the evidence against him. Nothing about Casillo's defense to the charges that he was in possession of a pink and silver handgun was antagonistic or actually hostile to defendant's defense against the State's efforts to prove that he was in possession of a black handgun. This was not a situation where Casillo was proclaiming his innocence while pointing to defendant as the true perpetrator of the offense with which Casillo was charged, or vice-versa. Likewise, it cannot be said that the trial became a contest between Casillo and defendant. The fact that Casillo attempted to bolster Officer Fernandez's credibility to emphasize testimony favorable to him while defendant attacked the credibility of Officer Fernandez does not make their defenses antagonistic or actually hostile for purposes of mandating severance.

¶ 43 Defendant relies on *People v. Rodriguez*, 289 Ill. App. 3d 223 (1997), in support of his argument that defenses can be antagonistic where codefendants present opposing arguments regarding the credibility of key witnesses. In *Rodriguez*, two codefendants were jointly tried before separate juries for a shooting that left one victim dead and another partly paralyzed. *Id.* at 225. At the trial, several occurrence witnesses implicated the defendant as the shooter and, in doing so, recanted earlier statements they had made identifying the codefendant and another person as the shooter. *Id.* at 236. Thus, the defendant argued that the witnesses were being untruthful at trial but were credible in their earlier statements, while the codefendant argued the opposite. *Id.* The court held that these defenses were antagonistic, and therefore the defendant

and codefendant should have been tried separately. *Id.* at 236-37. It found that the codefendant undercut the defendant's defense that the occurrence witnesses initially told the truth and reinforced the State's impeachment of those witnesses as to their recanted statements. *Id.*

¶ 44 We find *Rodriguez* to be distinguishable from this case. Here, defendant and Casillo were being tried for separate offenses arising from their possession of different weapons, whereas in *Rodriguez* both the defendant and codefendant were being tried for the same shooting. Thus, unlike in *Rodriguez*, Casillo's argument that Officer Fernandez was a credible witness was not effectively an argument that the trial court should believe defendant was guilty and Casillo was innocent. We conclude that defendant's trial counsel's performance was not objectively unreasonable compared to prevailing professional standards by failing to move to sever the trial on the basis that the defenses of Casillo and defendant were antagonistic. Defendant was not deprived of his right to effective assistance of counsel.

¶ 45 C. Fines, fees, and costs

¶ 46 Defendant's final argument on appeal challenges the trial court's order assessing fines, fees, and costs against him upon his conviction.[2] He asserts that he was improperly assessed a $5 electronic citation fee that does not apply in felony cases (705 ILCS 105/27.3e (West 2016)), a $5 court system fee for certain violations of the Illinois Vehicle Code (625 ILCS 5/1-100 *et seq.* (West 2016)) when he was not convicted of a violation under that code (55 ILCS 5/5-1101(a) (West 2016)), and a $60 fee for the State's Attorney for a probable cause hearing that did not occur (*id.* § 4-2002.1(a)). He also argues that the $15 state police operations fee should be classified as a fine to be offset by pre-sentence credit (705 ILCS 105/27.3a(1.5) (West 2016)).

[2] In his reply brief, defendant states that he is no longer pursuing an argument he raised in his opening brief regarding five assessments that were labeled "fees" but were actually "fines," due to the supreme court's resolution of this issue in *People v. Clark*, 2018 IL 122495.

¶ 47 Defendant concedes in his opening brief that he did not raise these issues in the trial court and is attempting to raise them for the first time in this court. He urges this court to review the issue under the plain-error exception to the forfeiture rule or as a claim for ineffective assistance of counsel. He also argues that this court may modify an order improperly assessing fines and fees under Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967). The State argues that defendant has forfeited all of his claimed errors by not including them in his post-sentencing motion or otherwise raising them in the trial court. It therefore argues this court should not consider the merits of the defendant's claims of error. Instead, the State argues that defendant should file an appropriate motion in the trial court raising these claims.

¶ 48 Our resolution of this issue is governed by Illinois Supreme Court Rule 472 (eff. May 17, 2019). That rule provides in pertinent part:

> "(a) In criminal cases, the circuit court retains jurisdiction to correct the following sentencing errors at any time following judgment and after notice to the parties, including during the pendency of appeal, on the court's own motion, or the motion of any party:
>
> (1) Errors in the imposition or calculation of fines, fees, assessments, or costs;
>
> (2) Errors in the application of *per diem* credit against fines;
>
> * * *
>
> (e) In all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." *Id.*

¶ 49 This is a case that was pending on appeal as of March 1, 2019, in which defendant has attempted to raise for the first time on appeal sentencing errors that are covered by Rule 472. Thus, pursuant to Rule 472(e), we remand this case to the trial court to allow defendant to file a motion pursuant to that rule.

¶ 50 III. CONCLUSION

¶ 51 We affirm the judgment of the trial court, but we remand this case to the trial court so that defendant's contentions of error in the order assessing fines, fees, and costs can be addressed according to the procedure set forth in Illinois Supreme Court Rule 472 (eff. Mar. 1, 2019).

¶ 52 Affirmed and remanded.