2019 IL App (4th) 170158-U

NO. 4-17-0158

FILED
February 20, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
JOHN L. CUNNINGHAM,	)	No. 12CF450
Defendant-Appellant.	)	
	)	Honorable
	)	Teresa Kessler Righter,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Steigmann and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's appeal presents no meritorious issues for review. OSAD's motion to withdraw as appellate counsel is granted and the trial court's judgment is affirmed.

¶ 2 Defendant, John L. Cunningham, was convicted of two counts of unlawful possession of stolen or converted motor vehicles (625 ILCS 5/4-103(a)(1) (West 2012)) and one count of robbery of a person over the age of 60 (720 ILCS 5/18-1(a) (2012)). The trial court sentenced him to prison terms of 7 years, 9 years, and 20 years for the convictions, respectively, with the sentences to be served concurrently. Defendant then appealed, and the Office of the State Appellate Defender (OSAD) was appointed to represent him. On appeal, OSAD filed a motion to withdraw as appellate counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967), asserting the appeal presents no meritorious issues for review. We grant OSAD's motion and

affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 Defendant was convicted of various charges stemming from a three-day crime spree that began when defendant allegedly shot his wife's cousin in Johnson County, Illinois. Defendant and his wife fled and their flight took them through Coles County, Illinois, Indiana, and Kentucky. Officers eventually apprehended the couple in Kentucky.

¶ 5 In December 2012, the State charged defendant in this case with aggravated robbery (720 ILCS 5/18-5(a) (West 2010)) (count I) in that defendant stole a truck from James Salyers while armed with a dangerous weapon and struck Salyers in the back of the head. In March 2014, the State charged defendant with additional counts of unlawful possession of the stolen or converted motor vehicle of Teresa Gibbs (625 ILCS 5/4-103(a)(1) (West 2012)) (count II), unlawful possession of the stolen or converted motor vehicle of Salyers (625 ILCS 5/4-103(a)(1) (West 2012)) (count III), and robbery of Salyers, who was over the age of 60 (720 ILCS 5/18-1(a) (2012)) (count IV). Count I was later dismissed.

¶ 6 Also, in December 2012, the State filed additional charges against defendant in Johnson County, which involved, *inter alia*, defendant's shooting of his wife's cousin, Jacob Witherall. Defendant's wife, Janet Cunningham, was also criminally charged in Coles County and Johnson County. However, we address the issues only as they relate to defendant and the charged offenses in Coles County.

¶ 7 At a preliminary hearing in April 2014, the State presented the following factual basis. Detective Christina Stephen testified to a report, prepared by another officer, regarding the interview of Teresa Gibbs and her stolen vehicle. Detective Stephen testified that, according to

the report, Gibbs was approached by a man and a woman as Gibbs was leaving her home in Johnson County to walk her dog on December 3, 2012. The man, later identified as defendant, was aiming a gun at Gibbs. Defendant said he "wanted her keys to [her] vehicle." Gibbs provided the keys to defendant, who subsequently had difficulty starting the vehicle before driving away. Detective Stephen testified that she later found Gibbs's abandoned vehicle in Coles County.

¶ 8 Detective Stephen further testified that, according to a report prepared by another officer, defendant and Janet walked to James Salyers's residence. They knocked on Salyers's door, asking for a ride into town because their vehicle had run out of gas. Salyers offered to give them a ride. Detective Stephen stated that defendant struck Salyers in the back of the head with "an object." Salyers fell to the ground. According to Stephen, Salyers reported that he was "dazed and confused." Defendant and Janet then drove off in Salyers's vehicle.

¶ 9 Detective Stephen testified that Janet, who was interviewed by another officer, stated that she drove with defendant from Johnson County to Coles County in Gibbs's vehicle. After running out of gas in Coles County, they abandoned Gibbs's vehicle and walked to a nearby residence. They took Salyers's vehicle, drove through Indiana, and were subsequently arrested at a truck stop in Kentucky. Detective Stephen testified that the remaining portion of Janet's recorded interview was consistent with the description provided by Salyers and Gibbs. Based on Detective Stephen's testimony, the court found probable cause to support the charges against defendant.

¶ 10 In September 2014, as part of an open plea agreement, defendant pleaded guilty to counts II, III, and IV. Defendant acknowledged that he understood the nature of the charges and

the possible sentencing range for each. The court admonished defendant as to the rights he was giving up if he pleaded guilty. Defendant indicated he understood. When asked whether "anybody made any threats or promises to get [him] to [plead guilty]," defendant responded, "No, sir." Defendant further stated that he was "just [on] blood pressure medicine" at the time of the hearing, but he stated that it did not affect his ability to understand the nature of the proceedings. That same day, defendant executed a "plea of guilty and waiver of jury and bench trial."

¶ 11 On November 6, 2014, the trial court held a sentencing hearing. At sentencing, defense counsel raised concerns that defendant's testimony at the sentencing hearing could be used against him at his trial in Johnson County. The State indicated that it was offering defendant use immunity for his sentencing hearing testimony and that it would not be used against him in the subsequent prosecution in Johnson County. The trial court found that the State's offer of use immunity resolved the issue.

¶ 12 The State presented the testimony of Deputy Joseph Price. Deputy Price testified that, on December 4, 2012, he was dispatched to an abandoned vehicle in the middle of a road in Coles County. It was later determined that the vehicle belonged to Gibbs, and it was reportedly stolen by defendant and Janet, who were allegedly involved in an attempted murder in Johnson County.

¶ 13 Deputy Price testified that he was subsequently dispatched after Salyers's vehicle was reported as stolen. When Deputy Price arrived at Salyers residence, Salyers was holding a rag in his hand that was "covered in blood." Deputy Price observed the wound, which was 1 to 1.5 inches long. Salyers told Deputy Price that a man and a woman approached him asking for a

ride into town. The man struck Salyers with "some hard object" that "dazed him" and the couple drove away in Salyers's truck.

¶ 14 Special Agent Mark Stram of the Illinois State Police testified next. He stated that he was dispatched to investigate an alleged shooting in Johnson County. He explained that the victim of the shooting, Witherall, was a cousin of defendant's wife, Janet. As Witherall was speaking with officers, defendant, the alleged shooter, drove past Witherall's residence. Officers pursued defendant. Defendant crashed his vehicle and then fled on foot.

¶ 15 Special Agent Stram testified that Witherall was later interviewed in the hospital. Witherall reported he was shot by defendant following a dispute regarding a stolen Crock-Pot. Special Agent Stram testified that defendant also pistol-whipped Witherall. On cross-examination, when asked what position Witherall was in when he was shot, Special Agent Stram testified that Witherall was "laying on the couch" with his "knees *** on the ground and his upper part of his body *** laying on the couch in somewhat of a *** crouching position."

¶ 16 Special Agent Stram further testified that the report regarding the Witherall shooting was primarily based upon "the interview with [Janet] Cunningham." Special Agent Stram stated that he personally spoke to Witherall on only two occasions at the Johnson County courthouse to obtain deoxyribonucleic acid (DNA) samples and hair follicles.

¶ 17 Special Agent Stram testified that he and Sergeant Chad Brown interviewed Janet after Janet and defendant were apprehended in Kentucky. Defense counsel objected to Special Agent Stram's testimony regarding Janet's statements made during the interview on the basis of marital privilege. The court sustained the objection, stating, in pertinent part, as follows:

"The objection will be sustained, and for clarification purposes, the privilege ***

> applies to communications or admissions, so the [c]ourt will not consider anything that [Janet] reports as to items that [defendant] related [to her], any communications or admissions, but she can testify and I will consider her *** statements as to what she observed, and that could also include *** any communications [defendant] may have made in [Janet's] presence to others, but communications or admissions that he made to her would be excluded."

¶ 18 Defense counsel further objected to the publication of Janet's interview. The trial court overruled the objection, stating that it "will allow that over objection, and [the court] will *** disregard any statements that [Janet] has made that are *** contrary to the marital spouse privilege."

¶ 19 According to the recorded interview, Janet stated that she was watching TV while defendant was "ranting and raving" about coffee Witherall had taken. Defendant told Janet to get in the car because he "had things to do." As they left, Janet could hear sirens.

¶ 20 Janet stated that, after speeding away, they crashed their vehicle and then ran to a nearby home. Janet explained that a woman was standing on the porch of that home. Defendant asked the woman for the keys to her vehicle and "away [they] went." Janet explained that the events that followed were "patchy" because she had some chest pain and she had taken a "hydro." When their vehicle ran out of gas, they walked to a residence and asked "an old man" for a ride into town. When he offered them a ride, Janet got into the truck. She stated that, when they drove away, she "didn't know where the guy [went]."

¶ 21 Janet stated that defendant started driving south. She told defendant that she wanted to go home but defendant told her, " [']You're with me, you're an accessory, you can't

go home.[’] ” She explained that they drove through Indiana and they were eventually arrested at a truck stop in Kentucky.

¶ 22 During the interview, an officer stated, “I think you’re being less than truthful with us because you’re scared of *** ratting [defendant] out so to speak.” The officer then informed Janet that defendant shot her cousin, Witherall, in the back of the head. Janet stated that she did not know defendant shot her cousin. She explained that she had waited outside in their vehicle listening to music while defendant spoke to Witherall. Janet stated that, following the conversation with Witherall, they went back to “their camper” to “load[] up some clothes.” She stated that defendant later told her that he pistol-whipped Witherall but he did not mention shooting him.

¶ 23 After further questioning, Janet admitted that defendant had been holding a gun in his hands when he asked for the first vehicle that they took. Janet also admitted that when they took the second vehicle from the “old man,” defendant struck him in the back of the head. She stated that the “old man” got back up and went into his home.

¶ 24 The trial court stated that the following portions of Janet’s interview were covered by the marital privilege:

> “*** [I]n conjunction with my earlier ruling[,] I’ll point out three topics that I believe are covered by the marital privilege. One would be *** comments related by Ms. Cunningham during her statement *** where she indicated that the [d]efendant said to her that *** they are wanted. I believe that that’s covered by the privilege. [In] another [statement][,] she indicates that [defendant] said to her, [‘][Y]ou’re with me. You’re an accessory. We can’t go home.’ I believe that

> comment is protected by the privilege[.] [A]nd then finally when *** she said that [defendant] related to her that [defendant] pistol[-]whipped the first victim, I believe that was meant to be confidential, and that is covered by the marital privileges."

¶ 25 The recorded interview of Gibbs was also presented to the court by the State during the sentencing hearing. In the interview, Gibbs explained that she was taking her dog for a walk when a man and a woman approached and said, "[']Give me the keys to the car or I'm [going to] shoot ya.[']" Gibbs reached for her car keys while the man pointed a double-barrel shotgun at her. The two individuals then drove off in her vehicle.

¶ 26 Defense counsel presented the testimony of Karen Harris, defendant's maternal aunt, as evidence in mitigation. She testified that she had known defendant his entire life, and he stayed with her frequently. She testified that defendant's father passed away when he was a child and his stepfather passed away from cancer. Defendant's two brothers were also deceased. Harris testified that defendant was devastated by these deaths and suffered from depression. Defendant later joined the army and earned a degree in business administration. Following his graduation, defendant became a truck driver, but he was forced to stop working after he injured his back in an accident.

¶ 27 Defendant made a statement in allocution, stating, in part, that he "would give about anything to be able to pay [Salyers] back in full."

¶ 28 The State recommended the maximum sentence for all three counts—14 years for count II, 14 years for count III, and 30 years for count IV. Defense counsel recommended eight years' imprisonment for count IV and "less or equal" sentences for the remaining counts. In

support of this recommendation, defense counsel noted factors in mitigation, defendant's remorse, and his desire to pay restitution to Salyers. With respect to the alleged shooting of Witherall in Johnson County, defense counsel emphasized that "[t]here is no evidence that Mr. Witherall was even shot other than [the] self-serving testimony through an officer." Defense counsel requested that the court consider the testimony regarding Witherall "for the weight it's worth."

¶ 29 The trial court sentenced defendant to 7 years in prison for count II, 9 years for count III, and 20 years for count IV, with the sentences to be served concurrently. The court stated, in pertinent part, as follows:

> "***One has to be careful *** to recognize that the sentence is for the offenses to which [defendant] pled guilty in Coles County, not to the charged but uncompleted *** case in Johnson County, although the facts *** [from the] Johnson County [case] can be considered by [this] [c]ourt *** as part of the factors in aggravation.
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> * * *
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> [T]he [c]ourt can also consider the criminal activity that has been brought about or that has been brought forth in the evidence today as to the Johnson County matters[.] [B]ut I do have to keep in mind when I consider the activities in Johnson County, that these are charged crimes. Guilt has not been proven yet in a trial. There have been no admissions or pleas of guilty, and it is up to the *** officials in Johnson County to prove his guilt[.] *** I have heard evidence as to what happened in the RV, the pistol[-]whipping, the gunfire where there is

evidence of a gun having been fired, [and] aiming the shotgun at Ms. Gibbs and taking her car[.] [S]o I am noting that criminal activity ***[.]"

¶ 30 In November 2014, defendant filed motions to reconsider and reduce his sentence, which the trial court denied. Defendant appealed the denial of his motions. In April 2016, this court remanded the matter (docketed in this court as case No. 4-15-0191) for the filing of a corrected Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016) certificate and the opportunity to file a new postplea motion as well as a new notice of appeal.

¶ 31 Defendant subsequently filed a *pro se* "[m]otion to withdraw guilty plea and vacate sentence." In that motion, defendant argued trial counsel was ineffective, the guilty plea was the result of coercion, and he was not mentally fit to enter a plea. A new Rule 604(d) certificate was filed in October 2016.

¶ 32 On October 31, 2016, a different trial judge conducted a hearing on defendant's motion to withdraw his guilty plea and vacate his sentence. Defendant testified that he did not have regular contact with his trial counsel, Bryan Robbins. However, he acknowledged that Robbins communicated the State's plea offers to him. Defendant stated that one offer was that "if [he] would plead to the charges, they would give Janet immunity."

¶ 33 Defendant further testified that Robbins indicated he was going to contact Salyers to discuss defendant's intention to "bring his truck back and give him money ***." He also asked Robbins to contact a jail administrator for "a character thing." According to defendant, apart from his aunt, Robbins failed to contact any witnesses.

¶ 34 Defendant testified that he "agreed to a certain amount of money" for legal representation during the case but Robbins "wanted more money in order to go to trial."

Defendant stated that he failed to mention this demand for money to the trial judge at the time he pleaded guilty because defendant thought there were "no aggravating factors." He also stated that he did not tell the trial judge that he was forced to plead guilty because he was "worried that they were going to come after [his] wife more." Defendant testified that Robbins advised him that the State could not use Janet's statements during the sentencing hearing.

¶ 35 Defendant also stated that, at the time he pleaded guilty, he was "drowsy and depressed" due to his medications. He stated that he was placed on a blood pressure medication that was not supposed to be mixed with his other medication. He was also placed on "a diuretic that was causing low potassium." He was taken off Valium and an antidepressant. He testified that he failed to tell the trial judge about his mental state because he "didn't know at the time [about] *** the two drugs that weren't supposed to be mixed."

¶ 36 Thomas Bucher, Assistant State's Attorney in Coles County, testified that there was no discussion of a "*quid pro quo* deal" where Janet would receive a reduced sentence if defendant pleaded guilty. On cross-examination, Bucher acknowledged that he had intended to "put [Janet] on the stand" but he was "well aware of the spousal privilege*** and the limitations on what she could testify to and about."

¶ 37 Todd Michael Reardon Sr., Janet's trial counsel, testified that defendant's mother paid the attorney fees. He stated that initially he was asked to represent both Janet and defendant but Reardon was concerned about a potential conflict of interest so he referred defendant to another attorney and agreed to represent only Janet. He stated that he "d[id]n't think [defendant's] [plea] deal was ever contingent on [Janet's]."

¶ 38 Robbins, defendant's trial counsel, testified that he advised defendant of the

possible options of "trying the case, pleading guilty which he did not advise defendant to do, or do an open plea." He informed defendant that "if you accept the plea, you know what you are getting. If you go to trial, then you don't." Robbins denied making any threats.

¶ 39 Robbins testified that defendant's mother signed a contract and provided a retainer. He stated that, through the sentencing hearing, additional fees were generated and paid by defendant's mother. Robbins testified, "I am sure I advised [defendant] that *** if we go to trial, *** [i]t will take more hours. And *** a trial retainer would be required." Robbins further stated that, after the appellate court remanded the matter to correct the Rule 604(d) certificate, he offered to correct the certificate at no charge. However, Robbins advised defendant that, "if [defendant] wanted to withdraw his guilty plea, and pursue a [m]otion to [v]acate and then continue the legal battle, *** that time would be billable *** and *** more money would be required." Robbins testified that he did not advise defendant that he could ensure Janet did not receive a longer sentence.

¶ 40 With respect to potential witnesses, Robbins testified that defendant only provided the names of two witnesses to contact. Robbins attempted to contact both. However, one witness did not corroborate what defendant said. Robbins was unable to locate the other witness on the Internet or with the phone number provided.

¶ 41 Robbins further testified that he informed defendant that Janet would "most likely *** be able to testify." He advised defendant that he would make "a good[-]faith argument" for the application of "spousal immunity" but "the law was against us."

¶ 42 Defense counsel noted that defendant was found not guilty of the charge relating to the shooting of Witherall in Johnson County and that, in addition to the other arguments made

in defendant's motions, this warranted a reduction of defendant's sentence in Coles County. In response, the State argued that even uncharged crimes can be considered at a sentencing hearing and defendant was still found guilty of other charges in Johnson County. The trial court denied defendant's motion to withdraw his guilty plea and his motion to reduce his sentence.

¶ 43 This appeal followed. OSAD was appointed to represent defendant on appeal and filed a motion to withdraw, alleging there are no meritorious issues for review. OSAD attached a brief to its motion, and the record shows service on defendant. Defendant filed a response on September 29, 2017.

¶ 44 II. ANALYSIS

¶ 45 On appeal, OSAD and defendant identify seven potential issues for review: whether (1) defendant was properly admonished when he entered his guilty plea; (2) the trial court abused its discretion in denying defendant's motion to withdraw his guilty plea; (3) the court abused its discretion in denying defendant's motion to reduce his sentence; (4) defendant was prejudiced by the court allowing the prosecutor to testify at the postplea hearing; (5) defense counsel filed a proper Rule 604(d) certificate; (6) the court considered evidence covered by the marital privilege; and (7) defense counsel's performance was ineffective. OSAD maintains all of these issues lack merit. We agree.

¶ 46 A. Admonishments

¶ 47 OSAD contends that defendant was properly admonished when he entered his guilty plea.

¶ 48 "For a guilty plea to be constitutionally valid, the record must reflect that a defendant's guilty plea was intelligently and voluntarily made." *People v. Blankley*, 319 Ill. App.

3d 996, 1007, 747 N.E.2d 16, 25 (2001). To ensure that a defendant enters a knowing and voluntary guilty plea, Illinois Supreme Court Rule 402(a) (eff. July 1, 2012) requires the trial court to first admonish defendant of his rights. "Substantial compliance" with Rule 402(a) is sufficient. (Internal quotation marks omitted.) *People v. Dennis*, 354 Ill. App. 3d 491, 495, 820 N.E.2d 1190, 1193 (2004). Whether a trial court substantially complied with the admonishment requirement presents a legal question, which we review *de novo. People v. Bowens*, 407 Ill. App. 3d 1094, 1104, 943 N.E.2d 1249, 1261 (2011).

¶ 49 In pertinent part, Rule 402(a) states as follows:

> "The court shall not accept a plea of guilty *** to convict without first, by addressing the defendant personally in open court, informing him or her of and determining that he or she understands the following:
>
> (1) the nature of the charge;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;
>
> (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and
>
> (4) that if he or she pleads guilty there will not be a trial of any kind, so that by pleading guilty he or she waives the right to a trial by jury and the right to be confronted with the witnesses against him or her ***." Ill. S. Ct. R. 402(a) (eff. July 1, 2012).

¶ 50 In this case, defendant was properly admonished pursuant to Rule 402(a). *Id.* The

transcript of the hearing reflects that the trial court informed defendant of the offenses with which he was charged and the possible sentencing ranges. Defendant acknowledged he understood. The court stated defendant had a right to plead guilty or not guilty. The court informed defendant that, by pleading guilty, there would not be a trial or an opportunity to confront witnesses against him. Again, defendant acknowledged that he understood. When asked whether he had been promised anything or forced to enter his guilty plea, defendant responded, "No, sir." The court asked defendant if he was under the influence of any medications, and defendant responded that he was "[j]ust on blood pressure medicine." When asked if his medications affected his ability to understand the proceedings, defendant responded, "No[,] sir." Defendant also signed a "Plea of Guilty and Waiver of Jury and Bench Trial" form. At the conclusion of the hearing, the trial court found defendant understood his rights and he knowingly and voluntarily waived those rights. Thus, we agree with OSAD that no colorable argument can be made that defendant was not properly admonished when he pleaded guilty to the charged offenses.

¶ 51 B. Defendant's Motion to Withdraw His Guilty Plea

¶ 52 OSAD next considers whether the trial court abused its discretion in denying defendant's motion to withdraw his guilty plea.

¶ 53 A defendant does not have an absolute right to withdraw a guilty plea. *People v. Feldman*, 409 Ill. App. 3d 1124, 1127, 948 N.E.2d 1094, 1098 (2011). A defendant may withdraw a guilty plea "only to correct a manifest injustice under the facts involved ***." *Id.* Leave to withdraw will be granted if the defendant can show "(1) the plea was entered on a misapprehension of the facts or the law, (2) there is doubt as to the guilt of the accused, (3) the

accused has a meritorious defense, or (4) the ends of justice will be better served by submitting the case to a jury." *People v. Dougherty*, 394 Ill. App. 3d 134, 140, 915 N.E.2d 442, 447 (2009). We review the trial court's denial of a motion to withdraw guilty plea for an abuse of discretion. *Id.* An abuse of discretion occurs where the court's decision is arbitrary, fanciful, or altogether unreasonable. *People v. Becker*, 239 Ill. 2d 215, 234, 940 N.E.2d 1131, 1142 (2010).

¶ 54 Here, at the hearing on defendant's motion to withdraw his guilty plea, defendant testified that he pleaded guilty based on his understanding that his wife, Janet, would receive a less severe sentence. However, at the plea hearing, when the trial court asked defendant whether he had been promised anything or forced to enter his guilty plea, defendant responded, "No, sir." Further, Bucher, the Assistant State's Attorney, testified that there was no discussion of a "*quid pro quo* deal" where Janet would receive a reduced sentence if defendant pleaded guilty. Defendant's trial counsel, Robbins, testified that he did not advise defendant of any plea offer where he could ensure Janet did not receive a longer sentence.

¶ 55 In addition, at the hearing on defendant's motion, defendant claimed that his guilty plea was not voluntary to the extent that his attorney "wanted more money in order to go to trial." However, defendant failed to raise this issue during the plea hearing and, as stated, the record reveals defendant specifically acknowledged during the plea hearing that he was not forced to enter his guilty plea.

¶ 56 Further, defendant in this case failed to sufficiently allege a misapprehension of the facts or the law. He also failed to allege that he was innocent of, or possessed a meritorious defense to, the crimes here. To the contrary, the record shows he voluntarily and knowingly entered his guilty plea. Based on the above, we agree with OSAD that the trial court did not

abuse its discretion in denying defendant's motion to withdraw his guilty plea.

¶ 57 C. The Denial of Defendant's Motion to Reduce His Sentence

¶ 58 OSAD contends no colorable argument can be made that the trial court abused its discretion in denying defendant's motion to reduce his sentence where the court considered testimony regarding defendant's charged offenses in Johnson County.

¶ 59 "The ordinary rules of evidence governing a trial are relaxed at the sentencing hearing." *People v. Williams*, 2018 IL App (4th) 150759, ¶ 17, 99 N.E.3d 590. "Moreover, 'a sentencing judge is given broad discretionary power to consider various sources and types of information so that he can make a sentencing determination within the parameters outlined by the legislature.' " *Id.* (quoting *People v. Williams*, 149 Ill. 2d 467, 490, 599 N.E.2d 913, 924 (1992)). "[C]riminal conduct for which there has been no prosecution or conviction may be considered in sentencing. Such evidence, however, should be presented by witnesses who can be confronted and cross-examined, rather than by hearsay allegations in the presentence report, and the defendant should have an opportunity to rebut the testimony." (Internal quotation marks omitted.) *People v. Raney*, 2014 IL App (4th) 130551, ¶ 43, 8 N.E.3d 633 (citing *People v. Jackson*, 149 Ill. 2d 540, 548, 599 N.E.2d 926, 930 (1992)). Reversal is only required where the error is so serious or unfairly prejudicial that defendant's right to due process is violated. *People v. Harth*, 339 Ill. App. 3d 712, 715, 791 N.E.2d 702, 705 (2003) (citing *Payne v. Tennessee*, 501 U.S. 808, 825, (1991)). A new sentencing hearing is not warranted where defendant is later acquitted of charges that were considered at a sentencing hearing in a separate case, particularly where the trial court was aware that defendant had not yet been convicted of the offenses at the time of the sentencing hearing. *People v. Jackson*, 149 Ill. 2d 540, 551-53, 599 N.E.2d 926, 931-

32 (1992).

¶ 60 Here, at the sentencing hearing, the trial court noted the charges in Johnson County and emphasized that defendant had not been found guilty of those offenses at the time of the sentencing hearing in this case. In sentencing defendant, the court stated, in part, as follows:

> "***One has to be careful *** to recognize that the sentence is for the offenses to which [defendant] pled guilty in Coles County, not to the charged but uncompleted *** case in Johnson County, although the facts *** [from the] Johnson County [case] can be considered by [this] [c]ourt *** as part of the factors in aggravation.
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> [T]he [c]ourt can also consider the criminal activity that has been brought about or that has been brought forth in the evidence today as to the Johnson County matters, but I do have to keep in mind when I consider the activities in Johnson County, that these are charged crimes. Guilt has not been proven yet in a trial. There have been no admissions or pleas of guilty, and it is up to the *** officials in Johnson County to prove his guilt[.] [B]ut I have heard evidence as to what happened in the RV, the pistol whipping, the gunfire where there is evidence of a gun having been fired, [and] aiming the shotgun at Ms. Gibbs and taking her car[.] [S]o I am noting that criminal activity ***[.]"

¶ 61 We agree with OSAD that the trial court's consideration of the Johnson County charges for which defendant was later acquitted did not violate defendant's right to due process. See *Id.* at 553 (holding that the trial court's consideration of charges of which defendant was

later acquitted of did not violate due process.) At the sentencing hearing, the shooting in Johnson County was properly presented through the witness testimony of Special Agent Stram. *Raney*, 2014 IL App (4th) 130551, ¶ 44 (citing *People v. Jackson*, 149 Ill. 2d 540, 548, 599 N.E.2d 926, 930 (1992) (" '[C]riminal conduct for which there has been no prosecution or conviction may be considered in sentencing. Such evidence, however, should be presented by witnesses who can be confronted and cross-examined ***.' ")). Here, Special Agent Stram's testimony was subject to cross-examination by defense counsel. Further, in sentencing defendant, the trial court specifically emphasized that defendant had not been convicted of the charged offenses in Johnson County at the time of the sentencing hearing in this case. Accordingly, we agree with OSAD and find no violation of due process occurred during the original sentencing hearing and, therefore, the trial court did not abuse its discretion in denying defendant's motion to reduce his sentence.

¶ 62 D. The Prosecutor's Testimony

¶ 63 OSAD contends that no colorable argument can be made that defendant was prejudiced by the trial court allowing the assistant state's attorney to testify at the hearing on defendant's motions to withdraw his guilty plea and reduce his sentence.

¶ 64 "[T]he 'advocate-witness rule' *** bars attorneys from assuming a dual role as advocate and witness in the same proceedings." *People v. Blue*, 189 Ill. 2d 99, 136, 724 N.E.2d 920, 940 (2000). "The rule, however, is not absolute," and "[a] prosecuting attorney may testify in a criminal case in which he is engaged if, in the discretion of the trial court, such testimony is necessary." *People v. Gully*, 243 Ill. App. 3d 853, 859, 611 N.E.2d 1374, 1378 (1993); see also *People v. Langdon*, 91 Ill. App. 3d 1050, 1056, 415 N.E.2d 578, 583 (1980). A trial court abuses

its discretion where its decision is arbitrary, fanciful, or unreasonable or "where no reasonable person would agree with the position adopted by the trial court." *Becker*, 239 Ill. 2d at 234.

¶ 65 Here, at the hearing on defendant's motion to withdraw his guilty plea and reduce his sentence, Bucher, the Assistant State's Attorney, testified that, contrary to defendant's assertions, there was no discussion of a "*quid pro quo* deal" where defendant's wife would receive a reduced sentence if defendant pleaded guilty. Defense counsel was afforded the opportunity to cross-examine Bucher. Defendant's trial counsel, Robbins, and Janet's trial counsel, Reardon, subsequently corroborated Bucher's testimony regarding the plea offer extended to defendant. Robbins and Reardon confirmed that defendant was not promised that, in exchange for his guilty plea, his wife would receive a reduced sentence. Although the practice of allowing the prosecuting attorney to testify is generally disfavored, we agree with OSAD that defendant was not prejudiced here and we cannot say the trial court abused its discretion in allowing Bucher to testify.

¶ 66 E. Rule 604(d) Certificate

¶ 67 OSAD maintains that, after this court remanded the matter for the filing of a corrected Rule 604(d) certificate (docketed in this court as case No. 4-15-0191), defense counsel subsequently filed a Rule 604(d) certificate that complied with the requirements of the Rule.

¶ 68 Illinois Supreme Court Rule 604(d) (eff. Dec. 11, 2014) states, in pertinent part, as follows:

> "The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by phone, mail, electronic means or in person to ascertain defendant's contentions of error in the

sentence and the entry of the plea of guilty, has examined the trial court file and both the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings."

¶ 69 After this court remanded the matter for a corrected Rule 604(d) certificate (case No. 4-15-0191), defendant's newly appointed public defender subsequently filed a Rule 604(d) certificate, stating as follows:

"I, Anthony Ortega, attorney for [d]efendant, certify pursuant to Supreme Court Rule 604(d) that:

1. I have consulted with the [d]efendant in person, by mail, by phone or by electronic means to ascertain the defendant's contentions of error in the entry of the plea of guilty and in the sentence;

2. I have examined the trial court file and report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing; and

3. I have made any amendments to the motion necessary for the adequate presentation of any defects in those proceedings."

¶ 70 Here, the language in the corrected Rule 604(d) certificate properly tracks the language in the Rule. We thus find no colorable argument can be made that defense counsel failed to comply with the requirements of Rule 604(d).

¶ 71 F. Marital Privilege

¶ 72 In his brief on appeal, defendant claims that the trial court improperly considered Special Agent Stram's testimony because it was based upon statements covered by the marital

privilege. Specifically, according to defendant, Special Agent Stram testified that defendant shot Witherall "on his knees *** execution style in the back of the head." Defendant claimed that "[t]he only way [Special Agent] Stram could of got that info was by Janet. And the only way Janet could of had the info to tell [Special Agent] Stram is if [defendant] told Janet what happened." Defendant claimed that Special Agent Stram's testimony was therefore covered by the marital privilege.

¶ 73 The marital privilege provides that neither husband nor wife "may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage ***." 725 ILCS 5/115-16 (West 2012). Our supreme court has stated that the marital privilege does not apply "to 'any' conversation or communication and, instead, *** applies only to communications which are intended to be confidential." *People v. Trzeciak*, 2013 IL 114491, ¶ 42, 5 N.E.3d 141. "The mere description by one spouse of general, noncommunicative conduct is not protected by the marital privilege." *Id.* ¶ 43. "Thus, two elements must be met before a communication between spouses falls within the privilege." *Id.* ¶ 44. First, the statement "must be an utterance or other expression intended to convey a message." *Id.* ¶ 44. Second, the message must be intended to be confidential. *Id.*

¶ 74 Here, the record reveals that at the sentencing hearing, Special Agent Stram testified that Witherall and defendant "got into a disagreement over a stolen [C]rock-[P]ot, *** a fight ensued, and eventually [defendant] shot him." Special Agent Stram stated that Witherall sustained injuries to the back and front of his head. On cross-examination, Special Agent Stram testified that, during the shooting, Witherall was "laying on the couch" with his "knees *** on the ground and his upper part of his body *** laying on the couch in somewhat of a ***

crouching position."

¶ 75 As stated, defendant contends Special Agent Stram's knowledge of Witherall's position during the shooting was based upon the interview officers conducted with Janet and therefore Special Agent Stram's testimony recounting Janet's communications was improper under the marital privilege. Significantly, during Janet's recorded interview, she indicates that she was not even aware Witherall was shot by defendant. Thus, Janet could not have conveyed the information that defendant now complains was privileged. Consequently, Special Agent Stram also could not have recounted a privileged communication from Janet's interview regarding Witherall's position. In addition, the trial court specifically stated that it would consider only Janet's observations that she relayed during her interview and not confidential communications or admissions barred by the marital privilege. Therefore, we find no colorable argument can be made that the court improperly considered statements protected by the marital privilege during the sentencing hearing.

¶ 76 G. Ineffective Assistance of Counsel

¶ 77 Defendant argues that he received ineffective assistance of counsel when his trial counsel allegedly failed to (1) contact witnesses and (2) move to dismiss the charges in this case based on the speedy trial statute.

¶ 78 To determine whether a defendant received ineffective assistance of counsel, we apply the familiar two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Cherry*, 2016 IL 118728, ¶ 24, 63 N.E.3d 871. Under this test, a defendant must establish (1) his counsel's performance "was objectively unreasonable under prevailing professional norms" and (2) "there is a 'reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Cherry*, 2016 IL 118728, ¶ 24, 63 N.E.3d 871 (quoting *Strickland*, 466 U.S. at 694). "Because a defendant must satisfy both prongs of the *Strickland* test to prevail, the failure to establish either precludes a finding of ineffective assistance of counsel." *Id.*

¶ 79 Here, defendant complains that trial counsel failed to contact two witnesses, including a jail administrator who, according to defendant, would have described an instance in which two older inmates were to be placed in defendant's cell because the jail administrator "knew [defendant] wouldn't hurt or take advantage of them." Defendant also claimed that defense counsel failed to speak to Salyers, who "would [have] told Mr. Robbins what [defendant] said to [Salyers] on the day of the incident[,] [which] would [have] changed everything."

¶ 80 Contrary to defendant's assertions on appeal, defendant's trial counsel, Robbins, testified that defendant only provided the names of two witnesses to contact. Robbins attempted to contact both. However, one witness did not corroborate what defendant said. Robbins was unable to locate the other witness on the Internet or with the phone number provided. Based on this testimony, the record does not support defendant's claim that counsel failed to conduct an adequate investigation. Moreover, we disagree with defendant's assertion that contacting Salyers—the victim who defendant struck in the head—would have "changed everything" in this case where the evidence of defendant's guilt was overwhelming. Thus, we agree with OSAD that trial counsel's performance was not deficient and defendant was not prejudiced by an alleged failure to adequately investigate and contact witnesses.

¶ 81 Additionally, as stated, defendant argues trial counsel was ineffective by failing to

dismiss the charges in this case based on speedy trial grounds. We find defendant has forfeited this claim. "[I]ssues that could have been raised in the earlier proceedings, but were not, will ordinarily be deemed [forfeited]." *People v. Scott*, 194 Ill. 2d 268, 274, 742 N.E.2d 287, 292 (2000). Defendant here failed to raise the issue in his post-plea motions and his claim is therefore forfeited.

¶ 82 Defendant's forfeiture notwithstanding, his speedy trial claim fails on its merits. A criminal defendant "shall be tried by the court having jurisdiction within 120 days from the date he [or she] was taken into custody unless delay is occasioned by the defendant ***." 725 ILCS 5/103-5(a) (West 2012). Where a defendant is in custody in one county and there is a charge pending against him in another county, defendant is not considered "in custody" for the latter until "the proceedings against him in [the first county] *** [have] concluded." *People v. Davis*, 97 Ill. 2d 1, 14, 452 N.E.2d 525, 531 (1983); see also *People v. Welch*, 365 Ill. App. 3d 978, 983, 851 N.E.2d 584, 589 (2005). "Counsel's failure to assert a speedy-trial violation cannot establish either prong of an ineffective assistance claim if there is no lawful basis for raising a speedy-trial objection." *People v. Phipps*, 238 Ill. 2d 54, 65, 933 N.E.2d 1186, 1192 (2010).

¶ 83 Here, defendant was arrested in March 2014 on the Coles County charges. At the time, he was already in custody on the Johnson County charges. Defendant could not have been considered "in custody" for speedy trial purposes in Coles County until the Johnson County case concluded. See *Davis*, 97 Ill. 2d at 14. The record reflects that the Johnson County proceedings concluded *after* defendant was sentenced in Coles County. We therefore agree with OSAD that no argument can be made that defense counsel was ineffective for failing to object on speedy trial grounds because there was no speedy trial violation here.

¶ 84 III. CONCLUSION

¶ 85 For the reasons stated, we affirm the trial court's judgment and grant OSAD's motion to withdraw as appellate counsel.

¶ 86 Affirmed.