

No. 1-12-0319

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	
)	No. 10 CR 2279
EDWIN ESTELA,)	
)	
Defendant-Appellant.)	Honorable
)	James M. Obbish
)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.

Justice Pierce concurred in the judgment.

Justice Liu concurred in part and dissented in part.

ORDER

¶ 1 *Held:* The State presented sufficient evidence at trial to prove that defendant was driving a vehicle while he had a drug, substance, or compound in his urine as a result of the unlawful use or consumption of cannabis because the State presented evidence showing that there were cannabinoids in defendant's urine and that defendant admitted to using marijuana, and defendant did not present any evidence showing that the cannabinoids were in his urine as a result of some other cause. Defense counsel was ineffective for failing to object to the testimony of a state witness regarding a urine toxicology report because the test results contained therein were inadmissible and the State could not have proved defendant guilty of driving while having a drug, substance, or compound in his urine as a result of the unlawful use or consumption of cannabis absent the admission of that evidence. Defense counsel was ineffective for failing to assert a speedy trial

violation and seek dismissal of the charge of reckless homicide because defendant was not arraigned on that charge within 120 days of the date on which he was arrested and taken into custody.

¶ 2 Following a jury trial, defendant Edwin Estela was found guilty of reckless homicide and aggravated driving while under the influence of cannabis and sentenced to concurrent terms of 18 and 5 years' imprisonment and a three-year term of mandatory supervised release (MSR). On appeal, defendant contends that the State did not prove him guilty beyond a reasonable doubt of aggravated driving while under the influence of cannabis, defense counsel was ineffective for failing to object to the testimony of a state witness regarding a urine toxicology report or assert a speedy trial violation with regard to the reckless homicide charge and move to dismiss that charge on that basis. Defendant also contends that his conviction and sentence for reckless homicide must be vacated under the one-act, one-crime doctrine and that his three-year MSR term must be vacated. For the reasons that follow, we reverse and remand.

¶ 3 BACKGROUND

¶ 4 While driving on July 12, 2009, defendant was involved in an automobile accident that resulted in the death of Adelaida Otero. Defendant was charged with one count of aggravated driving while under the influence of cannabis to a degree that rendered him incapable of safely driving a vehicle and one count of aggravated driving while having any amount of a drug, substance, or compound in his urine as a result of the unlawful use or consumption of cannabis. Defendant was also charged with reckless homicide for allegedly engaging in reckless conduct that resulted in Otero's death.

¶ 5 The evidence presented at trial showed that between 10:30 and 11 p.m. on July 12, 2009, defendant was driving an automobile with his friend, Rafael Perez, seated in the front passenger seat. Defendant accelerated to between 40 and 70 miles per hour, lost control of his vehicle, and

struck an oncoming automobile in which the victim was riding. Perez testified that defendant entered the barber shop at which he worked prior to the accident and that he believed defendant was high from smoking marijuana because defendant looked tired and woozy and his eyes were small and red. Perez and defendant had been friends for a couple of years and, during that time, Perez had seen defendant high on a daily basis. Perez and defendant then left the barber shop and entered defendant's vehicle, which had a scent of marijuana. Perez testified that he visited defendant two or three weeks before trial and that defendant told him that he should not have said that defendant was high on the night of the accident.

¶ 6 Fletcher Prestidge, a paramedic with the Chicago Fire Department, testified that he and his partner arrived at the scene of the accident shortly after it had occurred and that they helped another paramedic remove defendant from his vehicle. Prestidge also testified that defendant was agitated and combative and that, based on defendant's behavior, he believed defendant was under the influence of drugs and/or alcohol.

¶ 7 George Miran, a trauma unit nurse, testified that he spoke with defendant on the night of the accident while performing an assessment of him. Miran asked defendant about any drug use, and defendant said that he used marijuana. Miran also asked defendant how much marijuana he used and when was the last time he had used it, but defendant did not answer those questions.

¶ 8 Dr. Masood Zaman, an emergency room physician, testified that he treated defendant on the night of the accident and that defendant appeared to be intoxicated, combative, and agitated. Dr. Zaman asked defendant about drug use, and defendant responded that he used marijuana, but Dr. Zaman did not recall if he asked defendant about when he had most recently used marijuana.

A urine test was administered as a part of defendant's treatment, and the toxicology report from that test revealed the presence of cannabinoids, but did not disclose the amount of cannabinoids in defendant's urine. Dr. Zaman testified that a cannabinoid was equivalent with cannabis, which was generally known as marijuana, and opined within a reasonable degree of medical certainty that cannabis was present in defendant's urine at the time he was tested. Dr. Zaman testified that, although some of defendant's behavior could have been explained by the bleeding which was occurring in defendant's brain, he believed defendant was intoxicated. On cross-examination, Dr. Zaman stated that the toxicology report did not show that there was marijuana in defendant's urine but, rather, disclosed the presence of cannabinoids. Dr. Zaman also stated that there are different types of cannabinoids, but he was not familiar with the different types of cannabinoids and any knowledge regarding that topic was beyond his expertise.

¶ 9 Dr. Ronald Henson, an independent consultant in drug and alcohol testing analysis, testified for the defense that defendant's toxicology report revealed the presence of cannabinoids in his urine. Dr. Henson testified that one cannabinoid, Delta-9 tetrahydrocannabinol (THC), has psychoactive effects on the body and that other cannabinoids, such as Delta-9 carboxy, Delta-8, and Delta-11 are inert and do not impair a person's mental functions. Dr. Henson also testified that the toxicology report did not reveal whether there was any THC in defendant's urine and that the cannabinoids could have entered defendant's urine through contact exposure to cannabis, also known as second-hand smoke, or contact with various lotions and food products which contain hemp seed and hemp seed oils. Dr. Henson further testified that he believed the cannabinoids in defendant's urine were carboxy because THC is not found in urine and that, while THC use could

sometimes be extrapolated from the existence of high levels of cannabinoids in a person's urine, the toxicology report did not reveal the amount of cannabinoids in defendant's urine. Dr. Henson opined within a reasonable degree of scientific certainty that it could not be determined from the evidence in this case if defendant was under the influence of cannabis and that the cannabinoids detected in defendant's urine were not THC. On cross-examination, Dr. Henson stated that, if a person uses marijuana on a daily basis, then a urine test of that person will most likely detect the presence of cannabinoids.

¶ 10 Based on this evidence, the jury found defendant not guilty on the count of aggravated driving while under the influence of cannabis which alleged that he drove a vehicle while under the influence of cannabis to a degree which rendered him incapable of safely driving the vehicle. The jury, however, found defendant guilty on the count of aggravated driving while under the influence of cannabis which alleged that he drove a vehicle while there was any amount of a drug, substance, or compound in his urine resulting from the unlawful use or consumption of cannabis. The jury also found defendant guilty of reckless homicide. At the sentencing hearing, the State presented evidence of defendant's prior convictions, and the court sentenced defendant as a class X offender to concurrent terms of 18 and 5 years' imprisonment and 3 years of MSR.

¶ 11 ANALYSIS

¶ 12 I. Sufficiency of the Evidence

¶ 13 Defendant contends that the State failed to prove him guilty of aggravated driving while under the influence of cannabis because the State failed to prove that he had a substance in his urine as a result of the unlawful use or consumption of cannabis. A defendant's challenge of the

sufficiency of the evidence to sustain his conviction is reviewed to determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Jordan*, 218 Ill. 2d 255, 269-70 (2006). This standard recognizes the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences therefrom.

People v. Siguenza-Brito, 235 Ill. 2d 213, 224 (2009). This court will only reverse a conviction when the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

¶ 14 A person is guilty of aggravated driving while under the influence of cannabis if, in committing the crime of driving while under the influence of cannabis, he was involved in an accident that resulted in the death of another person and his criminal activity was the proximate cause of that person's death. 625 ILCS 5/11-501(d)(1)(F) (West 2008). A person is guilty of driving while under the influence of cannabis if he drives a vehicle while under the influence of cannabis to a degree that renders him incapable of safely driving the vehicle (625 ILCS 5/11-501(a)(4) (West 2008)), or if he drives a vehicle while there is any amount of a drug, substance, or compound in his breath, blood, or urine resulting from the unlawful use or consumption of cannabis (625 ILCS 5/11-501(a)(6) (West 2008)). In this case, the jury found defendant not guilty of driving while under the influence of cannabis to a degree that rendered him incapable of safely driving a vehicle, but found defendant guilty of driving a vehicle while having a drug, substance, or compound in his urine as a result of the unlawful use or consumption of cannabis.

¶ 15 Defendant asserts that the State failed to prove that there was a substance in his urine as a

result of the unlawful use or consumption of cannabis because the only evidence presented at trial regarding that issue was Dr. Zaman's testimony about the results of the urine test and those results were unreliable. The results of a urine test performed to determine the presence of drugs that is conducted while the person is receiving medical treatment in a hospital emergency room are admissible as a business record exception to the hearsay rule if the test was ordered in the regular course of providing emergency medical treatment and was performed by the laboratory routinely used by the hospital. 625 ILCS 5/11-501.4(a) (West 2010). Although defendant maintains that the urine test results were unreliable because the State did not establish that the test was performed by the laboratory routinely used by Dr. Zaman's hospital, section 11-501.4(a) only governs the admissibility of the urine test results. Even if the test results were inadmissible, this court must consider all the evidence presented at trial in determining the sufficiency of the evidence, including evidence that was erroneously admitted at trial. *People v. Lopez*, 229 Ill. 2d 322, 367 (2008). As such, the alleged inadmissibility of the urine test results does not affect our determination as to whether the evidence presented at trial was sufficient to prove defendant guilty beyond a reasonable doubt.

¶ 16 Defendant next asserts that the State did not present sufficient evidence to prove that he had a substance in his urine as a result of the unlawful use or consumption of cannabis because the test results only revealed that an unspecified type and quantity of cannabinoids were detected in his urine. In *People v. Martin*, 2011 IL 109102, ¶¶ 17-18, our supreme court held that the evidence was sufficient to prove the defendant guilty of driving while having methamphetamine in his urine because a urine test revealed the presence of methamphetamine and the defendant

admitted to having ingested methamphetamine at some unspecified time prior to the night he was driving. In doing so, the court stated that "[t]he fact that other substances may give a positive test result for the presence of methamphetamine is irrelevant without some evidence that the defendant had used such a substance." *Id.* at ¶ 19.

¶ 17 In this case, Dr. Zaman and Dr. Henson testified that cannabinoids were detected in defendant's urine, Miran and Dr. Zaman testified that defendant admitted to using marijuana, Perez testified that defendant smoked marijuana on a daily basis, and Dr. Henson testified that a person who smokes marijuana on a daily basis will most likely have cannabinoids in his system. While Dr. Henson testified that cannabinoids could enter a person's urine through second-hand smoke or contact with certain lotions or food products, defendant did not present any evidence showing that the cannabinoids were present in his urine as a result of those other possible causes. Thus, we conclude that the State presented sufficient evidence at trial to support the inference that there were cannabinoids in defendant's urine as a result of the unlawful use or consumption of cannabis. In doing so, we have considered *People v. McPeak*, 399 Ill. App. 3d 799, 802 (2010), and *People v. Allen*, 375 Ill. App. 3d 810, 816 (2007), cited by defendant, and find those cases distinguishable because there the evidence only showed that the defendants admitted to smoking cannabis and that their breath smelled like burnt cannabis whereas here defendant's admission that he smoked marijuana was coupled with the additional evidence showing that he had cannabinoids in his urine.

¶ 18 II. Ineffective Assistance of Counsel

¶ 19 Defendant contends that defense counsel was constitutionally ineffective for failing to

object to Dr. Zaman's testimony regarding defendant's urine test results and failing to assert a speedy trial objection as to the reckless homicide charge. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A failure to make the requisite showing of either deficient performance or sufficient prejudice defeats a claim of ineffective assistance. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). To establish deficient performance, the defendant must overcome the strong presumption that the challenged action may have been the product of sound trial strategy (*People v. Simms*, 192 Ill. 2d 349, 361 (2000)) and show that counsel's performance fell below an objective standard of reasonableness (*People v. Manning*, 241 Ill. 2d 319, 326 (2011)). To establish prejudice, a defendant must prove that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Simms*, 192 Ill. 2d at 362.

¶ 20

A. Urine test results

¶ 21 Defendant asserts that the urine test results contained in the toxicology report were inadmissible because the State failed to lay a proper foundation for that evidence. Section 11-501.4(a) of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/11-501.4(a) (West 2010)) provides that the results of a urine test performed for the purpose of determining the presence of drugs in a person's urine that is conducted while that person is receiving medical treatment in a hospital emergency room are admissible as a business record exception to the hearsay rule if the test was ordered in the regular course of providing emergency medical treatment and the test was

performed by the laboratory routinely used by the hospital. In this case, the State did not present any evidence showing that defendant's urine test was performed by the laboratory routinely used by Dr. Zaman's hospital, as Dr. Zaman only testified that the test was administered in the regular course of emergency medical treatment and did not provide testimony regarding the laboratory which performed the test. Although the State maintains that the trial court could have reasonably inferred that the test was performed by the laboratory at Dr. Zaman's hospital because Dr. Zaman ordered the tests to assist in treating defendant and he only treated defendant for a few hours, the trial court was never asked to make that inference because defense counsel did not object to the admissibility of the urine test results. Moreover, as section 11-501.4(a) requires proof that the test was ordered during the course of emergency medical treatment *and* was performed by the laboratory routinely used by the hospital to be admissible, a court may not infer that a urine test was performed by the laboratory routinely used by the hospital on the sole basis of evidence showing that the test was ordered during emergency treatment because doing so would sidestep the requirement that the State establish both facts and would render the requirement that the State establish that the test was performed by the laboratory routinely used by the hospital superfluous. Thus, we determine that the urine test results were inadmissible because the State failed to lay a proper foundation pursuant to section 11-501.4(a) of the Vehicle Code.

¶ 22 In reaching that determination, we have considered *People v. Olsen*, 388 Ill. App. 3d 704 (2009), cited by the State, and find it distinguishable from this case. In *Olsen*, this court held that the trial court did not abuse its discretion by finding that the State had satisfied the requirements in section 11-501.4(a) because the person in charge of the hospital's clerical section testified that,

"in the normal course of business, the hospital's lab tested all blood, that defendant's blood test results looked like they came from the hospital's lab, and that the results were entered into his chart about one hour after he arrived at the hospital." *Id.* at 710-11. In this case, however, Dr. Zaman did not provide any testimony regarding the laboratory that performed defendant's urine test.

¶ 23 Defendant next asserts that defense counsel was ineffective for failing to object to the introduction of the inadmissible urine test results through the testimony of Dr. Zaman because such an objection would have been sustained and the State would not have been able to prove defendant guilty absent that evidence. In *People v. Solis*, 275 Ill. App. 3d 346, 352 (1995), this court held that an expert witness may not disclose the results of a test which does not meet the requirements of section 11-501.4(a) of the Vehicle Code during his testimony at trial because permitting an witness to do so would allow substantively inadmissible evidence in through the 'back door." Thus, if counsel had objected to Dr. Zaman's testimony regarding the results of the urine test, the trial court would have been required to sustain that objection.

¶ 24 The State responds that defense counsel exercised sound trial strategy by deciding not to object to Dr. Zaman's testimony because counsel could then use the contents of the toxicology report to attempt to show that the urine test results were not sufficiently reliable or specific to establish that the cannabinoids detected in defendant's urine were the result of cannabis use or consumption. However, if counsel had successfully objected to Dr. Zaman's testimony regarding the urine test results, then counsel would not have needed to show that the test results were not sufficiently specific or reliable to establish that the cannabinoids in defendant's urine were the

result of cannabis use or consumption because there would have been no proof that there were cannabinoids in defendant's urine in the first place. Thus, defense counsel's failure to object to Dr. Zaman's testimony regarding the urine test results could not be the product of sound trial strategy.

¶ 25 In addition, it is reasonably probable that the result of the trial would have been different had defense counsel objected to Dr. Zaman's testimony because the State could not have proved that defendant had a substance in his urine as a result of the use or consumption of cannabis if the State could not have presented evidence showing that there were cannabinoids in his urine. While the State maintains that it could have easily presented other witnesses who were involved in the preparation of the toxicology report, that claim is pure speculation and is not consistent with the State's failure to call any such witnesses at trial to satisfy the requirements of section 11-501.4(a).

¶ 26 Although the dissenting justice, citing *People v. Rodriguez*, 313 Ill. App. 3d 877 (2000), and *People v. Diaz*, 377 Ill. App. 3d 339 (2007), concludes that it is not reasonably probable that the result of defendant's trial would have been different had counsel objected to Dr. Zaman's testimony regarding the urine test results, we respectfully disagree. In *Rodriguez*, 313 Ill. App. 3d at 888, the challenged evidence was admitted in the defendant's first trial and the court held that the defendant was not prejudiced by counsel's failure to make a foundational objection at the second trial because the court could identify specific means by which the defect could have been cured at trial. Here the State has not identified how it could have cured the defect regarding the urine test results except to claim that it could have called other unnamed witnesses. In *Diaz*, 377

Ill. App. 3d at 350, the court stated that the State could have likely cured the foundational defect by asking more questions of the witness who was testifying at the time. Here the State only claims that it could have called other unnamed witnesses; however, the court's statement was not necessary to its holding because it had already determined that counsel's decision not to object was sound trial strategy, was not accompanied by a citation to any authority, and was not the only reason given for why the defendant was not prejudiced by counsel's failure to object.

¶ 27 While we appreciate the dissent's concern that an ineffective assistance claim might be used to avoid the consequences of forfeiture, we note that the State had the initial opportunity to lay a sufficient foundation for the urine test results at trial but failed to do so. We are also concerned that, if the State could defeat an ineffective assistance claim on appeal by claiming that it could have called other unnamed witnesses to cure a foundational defect at trial, a defendant who is wrongly convicted as a result of the ineffective failure to raise a foundational objection to inadmissible evidence at trial could never find relief on appeal.

¶ 28 As such, we conclude that defense counsel was ineffective for failing to object to Dr. Zaman's testimony regarding the urine test results and, as we have already determined that the State presented sufficient evidence to prove defendant guilty of aggravated driving while under the influence of cannabis at trial, we may remand the matter for a new trial on that count without raising any double jeopardy concerns (*People v. Jackson*, 2012 IL App (1st) 102035, ¶ 21).

¶ 29 B. Speedy trial

¶ 30 Defendant asserts that defense counsel was ineffective for failing to assert a speedy trial objection as to his reckless homicide charge because his speedy trial rights were violated by the

State's failure to arraign him on that charge within 120 days of the date on which he was arrested and taken into custody. As counsel's failure to assert a speedy trial violation cannot satisfy either prong of the ineffective assistance of counsel standard if there is no lawful basis for raising such an objection, we must first determine whether defendant's right to a speedy trial was violated in this case. *People v. Phipps*, 238 Ill. 2d 54, 65 (2010).

¶ 31 Every person in custody for an alleged offense shall be tried within 120 days from the date on which he was taken into custody unless the delay is occasioned by the defendant. 725 ILCS 5/103-5 (West 2008). While the 120-day period automatically begins to run the day the defendant is taken into custody regardless of whether the defendant has made a formal demand for trial (*People v. Campa*, 217 Ill. 2d 243, 251 (2005)), any delays caused by a continuance to which the defendant has agreed are deemed attributable to the defendant (*People v. Kliner*, 185 Ill. 2d 81, 114 (1998)). If the State fails to try the defendant within the 120-day period, then the defendant is entitled to have the charges brought against him dismissed. *Campa*, 217 Ill. 2d at 251-52.

¶ 32 When a defendant is charged with several offenses that are all based on the same act and are known to the prosecutor at the time of commencing the prosecution, then the charges must be prosecuted in a single prosecution. 720 ILCS 5/3-3(b) (West 2008). If a defendant is charged at different times with two offenses that must be prosecuted in a single prosecution, any delays that were attributable to the defendant on the initial charge are not attributable to the defendant on the subsequent charge because it cannot be presumed that the defendant would have agreed to a continuance if he had been facing both charges. *People v. Williams*, 204 Ill. 2d 191, 207 (2003).

¶ 33 The record shows that defendant was arrested and taken into custody on October 7, 2009. Although the common law record does not include the original indictments charging defendant with various crimes, the supplemental report of proceedings contains the transcript of defendant's arraignment, which took place on December 10, 2009, where the court informed defendant that he had been charged with possession of a stolen motor vehicle and aggravated driving while under the influence. Defendant was reindicted on January 22, 2010, and charged with various crimes including reckless homicide. At the arraignment on the reindictment, which took place on February 16, 2010, the prosecutor informed the court that the only change from the original indictment was the addition of the reckless homicide charge.

¶ 34 The State does not dispute defendant's claim that it was required to prosecute the charges of aggravated unlawful driving while under the influence of cannabis and reckless homicide in a single prosecution because both charges were based on the same act and were known to the prosecutor when defendant was initially charged. In fact, the State concedes in its brief that, for the purposes of the one-act, one-crime doctrine, defendant's convictions on those charges were based upon the same physical act. Thus, any delays attributable to defendant on the charges of aggravated driving while under the influence are not attributable to him on the reckless homicide charge. As defendant was taken into custody on October 7, 2009, but was not arraigned on the reckless homicide charge until February 16, 2010, more than 120 days later, defendant's right to a speedy trial was violated with regard to that charge and the court would have been obligated to dismiss that charge if defense counsel had asserted a speedy trial violation.

¶ 35 Although the State maintains that counsel's decision not to file a motion to dismiss the

reckless homicide charge was sound trial strategy because counsel could then argue to the jury that defendant should only be convicted of the lesser offense of reckless homicide, a review of the record reveals that counsel never made any such argument during closing and instead argued that the jury should find defendant not guilty of reckless homicide. As such, defense counsel was ineffective for failing to assert a speedy trial violation as to the charge of reckless homicide and seek dismissal of that charge. Having concluded that counsel was ineffective for failing to object to Dr. Zaman's testimony regarding the urine test results and failing to assert a speedy trial violation as to the reckless homicide charge, we need not consider defendant's other claims that his conviction and sentence for reckless homicide must be vacated under the one-act, one-crime doctrine and that his three-year term of MSR must be vacated.

¶ 36

CONCLUSION

¶ 37 Accordingly, we reverse defendant's convictions and remand the matter to the circuit court of Cook County.

¶ 38 Reversed and remanded.

¶ 39 Justice Liu, concurring in part and dissenting in part.

¶ 40 I agree with the majority that the evidence presented by the State was sufficient to prove defendant guilty of aggravated driving while under the influence of cannabis (aggravated DUI) beyond a reasonable doubt. I further concur with the majority's decision to reverse defendant's reckless homicide conviction based on our finding that defendant's counsel was ineffective for failing to raise a speedy trial violation. I write separately, however, because I disagree with the

majority's decision to reverse defendant's aggravated DUI conviction on the basis that his trial counsel was ineffective for failing to object to the lack of foundation for Dr. Zaman's testimony. Accordingly, I respectfully dissent.

¶ 41 Defendant contends that his trial counsel was ineffective for failing to object to the introduction of his urine test results through the testimony of Dr. Zaman. The crux of his argument is that his urine test results were inadmissible because the State failed to lay a proper foundation for their admission.

¶ 42 The majority begins its analysis by agreeing with defendant that his "urine test results were inadmissible because the State failed to lay a proper foundation pursuant to section 11-501.4(a) of the Vehicle Code." This Court should also acknowledge, however, that defendant has waived any issue regarding the admissibility of his urine test results, as he neither objected at trial nor raised the issue in a posttrial motion. *People v. Woods*, 214 Ill. 2d 455, 471 (2005) (noting that the failure to lay an adequate foundation for the admission of evidence concerns an evidentiary issue and, thus, is generally subject to waiver on review unless defendant objects at trial and raises the claim in a posttrial motion). Our supreme court has explained that the waiver rule "is particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundation proof at the trial level." *Id.* at 470. In recognizing defendant's waiver in this case, it becomes clear why he has raised his foundation challenge as a claim of ineffective assistance of counsel: to avoid his procedural default. Allowing defendant now to successfully challenge a

waived foundational issue by couching his claim as one of ineffective assistance of counsel essentially renders the rule of waiver a nullity. However, this concern notwithstanding, the record does not support the conclusion that defendant has satisfied his burden, under *Strickland*, of establishing that he received ineffective assistance of counsel.

¶ 43 To establish ineffective assistance of counsel, defendant must show that counsel's representation fell below an objective standard of reasonableness and that the deficient representation so prejudiced him as to deny him a fair trial. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). The prejudice component of *Strickland* is satisfied where defendant shows that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. The failure to show either deficient performance *or* sufficient prejudice will defeat an ineffectiveness claim. (Emphasis added.) *Palmer*, 162 Ill. 2d at 475 (citing *Strickland*, 466 U.S. at 687).

¶ 44 In the case at bar, the majority accepts defendant's argument that there is a reasonable probability that the outcome of his trial would have been different had counsel objected to the lack of foundation for Dr. Zaman's testimony concerning his urine test results. This court, however, has previously rejected nearly identical arguments.

¶ 45 In *People v. Rodriguez*, 313 Ill. App. 3d 877, 879 (2000), the defendant was convicted of first degree murder and aggravated battery with a firearm. On appeal, he argued that the State failed to lay a proper foundation for the admission of an audiotape recording at his trial. *Id.* at 887. This court found the foundation issue waived; however, defendant attempted to avoid his

procedural default by claiming that his trial counsel was ineffective for failing to challenge the foundation for admission of the audiotape. *Id.* This court acknowledged that the recording was a "damaging piece of evidence" and that it could not find that "the jury's verdict would have been the same had it not heard defendant's admissions on that tape." *Id.* at 887-88. It noted, however, that "defendant must demonstrate not merely that the admission of the tape prejudiced him; he must demonstrate that, but for his attorney's alleged error, the tape would not have been admitted." *Id.* at 888. The court then noted that "if defendant had raised his challenge at trial, the State could have presented an alternative foundation for the tape." *Id.* The court ultimately concluded:

"[D]efendant has demonstrated, at best, that the State *did not* lay the proper foundation for the admission of the audiotape; he has not demonstrated that the State *could not* do so. Because defendant cannot affirmatively establish from the record that the State, if given the opportunity during trial, could not have established a foundation for the tape, we conclude that defendant has not established the prejudice component of the *Strickland* analysis and cannot establish ineffective assistance of counsel."

(Emphasis in original.) *Id.*

¶ 46 In *People v. Diaz*, 377 Ill. App. 3d 339 (2007), this court again rejected a claim of ineffective assistance of counsel based on trial counsel's failure to object to foundation. The defendant in *Diaz* was convicted of aggravated driving of a vehicle under the influence of

alcohol. *Id.* at 340. He argued on appeal that trial counsel was ineffective for failing to object to the State's lack of a proper foundation for the admission of the results of a horizontal gaze nystagmus (HGN) test. *Id.* at 349. Despite the State conceding that it failed to lay a proper foundation for the admission of the HGN test results, this court found that defendant could not satisfy the deficient performance prong of *Strickland* because "defense counsel's decision not to object to the admission of this evidence, so defendant could later attack the credibility of the officer during closing arguments, [was] sound trial strategy." *Id.* at 350. We further found:

"Even if defense counsel had made the objection to the foundation of the HGN evidence and that objection was sustained, counsel's failure to object would not have resulted in a different trial outcome, as mandated by the second prong of the *Strickland* test. [Citation.] This court cannot say that there is a reasonable probability of a different outcome because, even if defense counsel had opposed the admission of the HGN test, it is likely that the State would have immediately cured the foundation deficiency by asking more questions concerning [the administering officer's] knowledge and experience with the HGN test." *Id.*

¶ 47 The instant case is essentially indistinguishable from *Rodriguez* and *Diaz*. Here, as in those cases, defendant claims that his trial counsel was ineffective for failing to object to the admission of evidence for which the State failed to lay a proper foundation. However, he has not established prejudice by demonstrating that the State could not have cured the deficient

foundation had counsel objected. While the majority suggests that "the State has not identified how it could have cured the defect regarding the urine test results except to claim that it could have called other unnamed witnesses," the fact is, there is simply no evidence (or argument advanced in this appeal) to suggest that the State could *not* have cured the foundational deficiency at issue. By presuming prejudice first and then requiring the State to show that there was no prejudice, the majority's application of the *Strickland* test departs from settled precedent. Moreover, the majority's finding that "the State could not have presented evidence showing that there were cannabinoids in [defendant's] urine" is a supposition which is not supported by the record.

¶ 48 Allowing defendant to prevail on his ineffectiveness claim by merely showing that an objection would have been sustained is contrary to our reasoning in *Rodriguez* and *Diaz*. As a matter of law, defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Since there is no reason to believe that the jury would have acquitted defendant had his trial counsel raised a timely objection to the introduction of his urine test results through the testimony of Dr. Zaman, defendant has failed to establish the prejudice component of *Strickland*, and his ineffectiveness claim necessarily fails. *Palmer*, 162 Ill. 2d at 475.

¶ 49 For the foregoing reasons, I would affirm defendant's conviction of aggravated DUI and, therefore, respectfully dissent from the majority's decision to reverse the conviction.