NO. 4-19-0599

FILED
August 11, 2021
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARK A. WINGER, Defendant-Appellant.	)	Appeal from the Circuit Court of Sangamon County No. 01CF798 Honorable Jack D. Davis II, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice DeArmond concurred in the judgment.

SUMMARY ORDER

In June 2019, the Sangamon County circuit court denied the June 2018 motion for leave to file a successive postconviction petition filed *pro se* by defendant, Mark A. Winger. Defendant appealed the circuit court's denial, and the Office of the State Appellate Defender (OSAD) was appointed to represent defendant. On appeal, OSAD moves to withdraw its representation of defendant, contending "an appeal in this case would be without arguable merit." This court granted defendant leave to file a response to OSAD's motion on or before April 1, 2021. Defendant filed a response, and the State filed a brief agreeing with OSAD's assessment of defendant's motion for leave to file a successive postconviction petition. We have reviewed the record and agree with OSAD and the State defendant's appeal does not present a potentially meritorious claim.

In *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987), the United States Supreme Court addressed the withdrawal of counsel in collateral postconviction proceedings and held the

United States Constitution does not require the full protection of *Anders v. California*, 386 U.S. 738 (1967), with such motions. The Court noted the respondent did not present a due-process violation when her counsel withdrew because her state right to counsel had been satisfied. *Finley*, 481 U.S. at 558. Thus, state law dictates counsel's performance in a postconviction proceeding. The Illinois Supreme Court has held that, in a postconviction proceeding, the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq.* (West 2018)) entitles a defendant to reasonable representation. *People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995).

In *People v. McKenney*, 255 Ill. App. 3d 644, 646, 627 N.E.2d 715, 717 (1994), the Second District granted appellate counsel's motion to withdraw as counsel on an appeal from a postconviction petition, finding counsel's representation was reasonable. There, the motion stated counsel had reviewed the record and found no issue that would merit relief. The motion also provided the procedural history of the case and the issues raised in the defendant's petition. *McKenney*, 255 Ill. App. 3d at 645, 627 N.E.2d at 716. Here, OSAD's motion complies with the state law requirements for withdrawing as counsel in postconviction proceedings.

When the circuit court has not held an evidentiary hearing, this court reviews *de novo* the denial of a defendant's motion for leave to file a successive postconviction petition. See *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010). Our supreme court "has identified two bases upon which the bar against successive petitions will be relaxed." *People v. Sanders*, 2016 IL 118123, ¶ 24, 47 N.E.3d 237. The first basis is contained in section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2018)), which provides the following:

"[O]nly one petition may be filed by a petitioner under this Article

> without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process."

Thus, for a defendant to obtain leave to file a successive postconviction petition, both prongs of the cause-and-prejudice test must be satisfied. *People v. Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909. With a motion for leave to file a successive postconviction petition, the court is just conducting "a preliminary screening to determine whether defendant's *pro se* motion for leave to file a successive postconviction petition adequately alleges facts demonstrating cause and prejudice." *People v. Bailey*, 2017 IL 121450, ¶ 24, 102 N.E.3d 114. The court is only to ascertain "whether defendant has made a *prima facie* showing of cause and prejudice." *Bailey*, 2017 IL 121450, ¶ 24. If the defendant did so, the court grants the defendant leave to file the successive postconviction petition. *Bailey*, 2017 IL 121450, ¶ 24.

The second basis is the fundamental miscarriage of justice exception, which requires the petitioner to demonstrate actual innocence. *Sanders*, 2016 IL 118123, ¶ 24. The evidence of actual innocence must be the following: "(1) newly discovered, (2) not discoverable earlier through the exercise of due diligence, (3) material and not merely cumulative, and (4) of

such conclusive character that it would probably change the result on retrial." *Sanders*, 2016 IL 118123, ¶ 24. Our supreme court has held a successive postconviction petition alleging actual innocence "should be denied only where it is clear from a review of the petition and attached documentation that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *Sanders*, 2016 IL 118123, ¶ 24. Stated differently, leave of court should be granted where the defendant's supporting documentation raises the probability it is more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence. *Sanders*, 2016 IL 118123, ¶ 24.

Defendant's *pro se* motion for leave to file a successive postconviction petition included his proposed petition. In the petition, defendant asserted the following claims: (1) his due process rights were violated when the State engaged in deception to obtain a more favorable "immunity jury instruction" as opposed to an accomplice witness instruction; (2) the State failed to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963); (3) the prosecutors in his case engaged in prosecutorial misconduct; (4) he was denied effective assistance of trial counsel; (5) he was denied effective assistance of appellate counsel. In both his motion and petition, defendant contended he was asserting an actual innocence claim.

As to defendant's claims related to the "immunity jury instruction," defendant cannot make a *prima facie* showing the evidence supporting the claim was newly discovered and not discoverable earlier through the exercise of due diligence. The instruction at issue was based on the State's grant of immunity to DeAnn Shultz, defendant's mistress. The December 2008 affidavit by Victoria Eiger indicates defendant was aware the State suspected Shultz was an accomplice in June 2005. This claim is similar to the one raised in defendant's 2009 petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401

(West 2008)). There, he argued the State's concealment of its belief Schultz was an accomplice prevented him from requesting the applicable jury instruction for accomplice testimony. Moreover, defendant's claim he did not receive the transcript of the jury instruction conference until 2017 is immaterial. Defendant clearly had enough information to raise a similar issue in 2009 and has had numerous appeals during which he could have asked counsel for the transcript. Thus, we find this claim was not based on newly discovered evidence and does not make a *prima facie* showing of actual innocence.

In his *Brady* violation claim, defendant asserted the State failed to disclose the following: (1) Detective Doug Williamson's September 1999 affidavit; (2) telephone logs by Tabatha Marcacci, a forensic scientist; and (3) the internal affairs documents regarding the investigation of Detectives Graham and Carpenter. A *Brady* claim requires a showing of the following: "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either wilfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill. 2d 56, 73-74, 890 N.E.2d 500, 510 (2008). Evidence is material if it creates a reasonable probability the result of the proceeding would have been different had the evidence been disclosed. *Beaman*, 229 Ill. 2d at 74, 890 N.E.2d at 510.

Defendant contends Detective Williamson's 1999 affidavit demonstrates the detective was lying during his trial testimony when he denied the murder investigation was reopened when Schultz came forward and stated she had an affair with defendant. While the affidavit mentions Schultz coming forward, it also mentions testing on clothing worn by the victims and defendant. The affidavit does not expressly state the case was reopened based on Schultz's coming forward. Detective Williamson acknowledged in his trial testimony Schultz

came forward around the time he had been authorized by his new sergeant to have the clothing tested. Even if the affidavit expressly said the case was reopened based on Schultz's coming forward, the reasoning for the reopening of the murder case is insignificant to defendant's guilt. The circuit court reached a similar conclusion on defendant's claim in his initial postconviction petition of prosecutorial misconduct based on the allegation the State knowingly permitted Detective Williamson to give false testimony concerning the time when the criminal investigation was reopened. We note Detective Williamson was thoroughly cross-examined about the timing and circumstances surrounding the reopening of the murder case and was even impeached on the date Schultz came forward. As such, the evidence is not material.

OSAD asserts Marcacci's logs do not support defendant's claim the logs show Assistant State's Attorney Steven Weinhoeft and Detective James Graham steered Marcacci away from exculpatory testing. Defendant does not refute that contention in his reply briefs. We have reviewed the logs and agree with OSAD they do not contain evidence suggesting Assistant State's Attorney Weinhoeft and Detective Graham prevented exculpatory testing. Thus, Marcacci's logs are not material.

OSAD further asserts defendant's claim the State failed to disclose an ongoing investigation of Detectives Paul Carpenter and Graham and other members of the Springfield Police Department was not based on newly discovered evidence. It notes the 2006 internal affairs documents defendant filed in support of his claim were attached to his December 2008 motion to permit release of evidence for " 'Touch DNA' " testing. A review of the record shows defendant did attach the same internal affairs documents to his December 2008 motion. Thus, OSAD is correct the evidence was not newly discovered.

Since defendant's three pieces of undisclosed evidence do not meet the

requirements for a *Brady* violation, defendant did not make a *prima facie* showing of actual innocence with his *Brady* claims.

Defendant's prosecutorial misconduct claim asserted the following: (1) the State failed to inform defense counsel Detectives Graham and Carpenter were under investigation for misconduct, (2) Assistant State's Attorney Weinhoeft made false statements during the initial postconviction proceedings regarding the State's reliance on Detective Williamson's perjured testimony, (3) the State identified Schultz as an occurrence witness at the jury instruction conference when the State believed Schultz was an accomplice, and (4) Assistant State's Attorney Weinhoeft steered Marcacci away from performing exculpatory tests and manipulated Marcacci's testimony to take advantage of that manipulation. These allegations are very similar to the allegations he raised with his *Brady* claims, which we have found did not make a *prima facie* showing of actual innocence. Thus, defendant also failed to plead a *prima facie* case of actual innocence based on prosecutorial misconduct.

In his proposed first successive postconviction petition, defendant further asserted his trial counsel was ineffective for failing to (1) refile defendant's motion *in limine* to suppress statements defendant made at the crime scene, (2) impeach Detective Williamson's testimony with his 1999 affidavit, (3) cross-examine and impeach Marcacci's testimony, (4) show Detectives Graham and Williamson conspired to destroy potentially exculpatory evidence, and (5) obtain and use the internal affairs investigation file. However, defendant claims he did not receive the following evidence until 2017: (1) the evidence recovery form that supported his first claim of ineffective assistance of counsel, (2) Detective Williamson's affidavit supporting his second ineffective assistance claim, and (3) Marcacci's log supporting his third and fourth ineffective assistance claims. He presents no evidence trial counsel possessed that information at

the time of defendant's trial, and thus trial counsel could not be ineffective for failing to use the information it lacked at defendant's trial. See *People v. Smith*, 182 Ill. App. 3d 1062, 1068, 538 N.E.2d 1268, 1272 (1989) (noting courts evaluate counsel's performance from counsel's perspective at the time of trial). As to his fifth ineffective assistance claim, defendant alleges counsel was unaware of the investigation of Detectives Graham and Carpenter but should have obtained and used that information at defendant's trial. Defendant does not explain how defense counsel should have learned about the investigation. Regardless, defendant was aware of the internal affairs documents in 2008, and thus that claim is not based on newly discovered evidence. Accordingly, defendant has also failed to make a *prima facie* showing of actual innocence based on ineffective assistance of counsel. Since defendant's claims of ineffective assistance of trial counsel were insufficient, defendant's claim of ineffective assistance of appellate counsel for failing to raise the ineffective assistance of trial counsel was also insufficient.

To the extent defendant also sought to raise his claims under the cause-and-prejudice test, defendant failed to identify an objective factor that impeded his ability to raise the claims in his initial postconviction proceedings and failed to plead a valid claim that so infected his trial that his conviction violates due process. Additionally, defendant asserts he has a conflict of interest with the attorney that filed the motion to withdraw. He alleges counsel's representation lacked effort to understand the issues in his case and counsel failed to thoroughly review the record. The State and this court agree with counsel's conclusion defendant's contentions are meritless. Thus, we do not find a conflict of interest.

Therefore, in accordance with Illinois Supreme Court Rule 23(c)(2) and (c)(4) (eff. Jan. 1, 2021), we grant OSAD's motion to withdraw as counsel and affirm the Sangamon

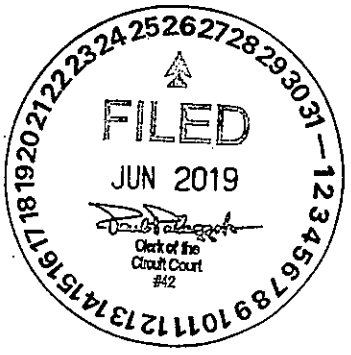
County circuit court's judgment.

Affirmed.

COPY

STATE OF ILLINOIS
IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	01 CF 798
v.	)	
MARK A. WINGER Defendant.	)	



Order

Cause coming before the court on defendant, Mark A. Winger's (hereinafter "defendant") Motion for Leave to File his First Successive Post-Conviction Petition Pursuant to 725 ILCS 5/122-1 *et. seq.* Having reviewed the Motion and all relevant evidence and facts of record and being fully advised in the premises, the court hereby Orders:

On June 5, 2002, a Sangamon County jury convicted defendant of first-degree murder for the killings of his wife and Roger Harrington. The court sentenced him on August 1, 2002 to natural life in prison. Defendant appealed his conviction and the Fourth District affirmed. On March 30, 2005, defendant filed his Petition for Post-Conviction Relief Pursuant to ILCS [sic] 5/122, *et. seq.* Defendant's Petition alleged substantial denials of his constitutional rights[1] and that he was actually innocent of the 1995 murders.

[1] Defendant's March 30, 2005 Petition alleged seven grounds supporting his collateral attack of the jury's verdict: (1) Ineffective assistance of counsel (2) violations of his constitutional due process rights relating to blood spatter evidence (3) failure of his counsel to effectively cross-examine a witness (4) "overreaching" by the prosecutors (5) miscellaneous claims of ineffective legal representation (6) ineffective representation by appellate counsel and (7) prosecutorial misconduct related to a police officer's allegedly false testimony.

The State moved to dismiss the Petition. The matter was fully briefed and argued by the parties. In a written order dated November 13, 2007, the court dismissed defendant's Petition for Post-Conviction Relief.

Defendant filed this Motion on June 1, 2018. He seeks leave of court to file his first successive post-conviction petition. Defendant brings his Motion pursuant to 725 ILCS 5/122-1, *et. seq.* He bases his Motion on claims of due process/ constitutional violations and actual innocence related to what he claims is newly discovered evidence.

When a defendant claims actual innocence as a basis for seeking leave to file a successive post-conviction petition, the question before the court is whether the motion and supporting documentation set forth a colorable claim raising a probability that it is more likely than not that no reasonable juror would have convicted him in light of the alleged new evidence. A defendant claiming actual innocence is not required to satisfy the cause and prejudice test. In order to prevail on an actual innocence claim, defendant must present new, material, noncumulative evidence of such conclusive character as would probably change the result at trial.

The court has examined defendant's proposed Petition and the volume of attachments/ exhibits tendered in support thereof. Defendant's claims of actual innocence set forth in his Motion, Petition and in his affidavit rest in large part (while not exclusively) on the contents of telephone communication logs between a forensic investigator, police and the prosecutor's office (Exhibits 5/6) he received pursuant to FOIA requests in 2017. In conducting its review of this matter, in addition to all other relevant and material information, the court examined defendant's Exhibits 5 and 6.

The court disagrees with defendant's position and does not find the contents of the proposed Petition and supporting exhibits to be new, material, noncumulative evidence of such

conclusive character as would probably change the result at trial. The proposed Petition and attachments thereto do not set forth a colorable claim of actual innocence such that more likely than not, no reasonable juror would have convicted him in light of the claimed new evidence.

With regard to defendant's claims of cause and prejudice, the court does not find defendant has identified an objective factor that impeded his ability to raise a specific claim in or during his initial post-conviction proceedings. Defendant has not demonstrated that any claims he failed to previously raise so infected the trial that his conviction violated due process.[2] As such, the court finds the defendant's Motion, proposed Petition and attached exhibits fail to meet the cause and prejudice test.

Defendant has failed to establish a *prima facie* case.

For these reasons, the court denies defendant's Motion for Leave to File his First Successive Post-Conviction Petition Pursuant to 725 ILCS 5/122-1 *et. seq.*

*** *** ***

Entered this 26 day of June, 2019

Judge of the Circuit Court of Sangamon County

[2] Many of defendant's arguments were made on appeal or in his first post-conviction petition, which were rejected by the court in its 2005 Order. The doctrine of *res judicata* bars the presentation of these claims.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
201 W. MONROE STREET
SPRINGFIELD, IL 62704

CLERK OF THE COURT
(217) 782-2586

RESEARCH DIRECTOR
(217) 782-3528

September 2, 2021

RE: People v. Winger, Mark A.
General No.: 4-19-0599
Sangamon County
Case No.: 01CF798

The Court today denied the petition for rehearing filed in the above entitled cause. The mandate of this Court will issue 35 days from today unless a petition for leave to appeal is filed in the Illinois Supreme Court.

If the decision is an opinion, it is hereby released today for publication.

Carla Bender
Clerk of the Appellate Court

c: Mark A. Winger
State's Attorney's Appellate Prosecutor, Fourth District

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

Mark A. Winger
Reg. No. K97120
Western Illinois Correctional Center
2500 Rt. 99 South
Mt. Sterling IL 62353

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

January 26, 2022

In re: People State of Illinois, respondent, v. Mark A. Winger, petitioner.
Leave to appeal, Appellate Court, Fourth District.
127833

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 03/02/2022.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

CAROLYN TAFT GROSBOLL
Clerk of the Court

(217) 782-2035
TDD: (217) 524-8132

November 01, 2021

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
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TDD: (312) 793-6185

Mark A. Winger
Reg. No. K97120
Western Illinois Correctional Center
2500 Rt. 99 South
Mt. Sterling, IL 62353

In re: People v. Winger
127833

Dear Mark A. Winger:

This office has timely filed your Petition for Leave to Appeal, styled as set forth above. You are being permitted to proceed as a poor person.

Your petition will be presented to the Court for its consideration, and you will be advised of the Court's action thereon.

In accordance with your request, we are returning to you with this letter a file-stamped copy of your motion.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: Attorney General of Illinois - Criminal Division
State's Attorney Sangamon County
State's Attorney's Appellate Prosecutor, Fourth District

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

CAROLYN TAFT GROSBOLL
Clerk of the Court

(217) 782-2035
TDD: (217) 524-8132

September 22, 2021

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, Illinois 60601-3103
(312) 793-1332
TDD: (312) 793-6185

Mark Winger
Reg. No. K-97120
Western Illinois Correctional Center
2500 Route 99 South
Mt. Sterling, IL 62353

Re: People State of Illinois, appellee, v. Mark A. Winger, appellant
Appellate Court Fourth District No. 4-19-0599.

Dear Mr. Winger:

This will acknowledge receipt of your motion for an extension of time to file a petition for leave to appeal, which is being returned to you with this letter, unfiled.

Please note that you have **until November 12, 2021,** to file a timely petition for leave to appeal to this Court, and that no extension of time beyond that date will be given. It is suggested that you prepare a petition that contains a detailed statement of the facts concerning your case, such as indictment number, crime, date and length of sentence, and a detailed argument stating the reasons why you feel you are entitled to review by the Supreme Court. A copy of the Appellate Court decision (filed August 11, 2021) should be attached as an appendix to your material, all of which should then be forwarded to this office as soon as possible for filing. Please try to limit your petition to 20 pages or less, excluding the appendix and cover page.

For your assistance, we are enclosing a pro se template to guide you while preparing your petition for leave to appeal. This template contains detailed samples for preparing a pro se petition to this Court, along with a copy of Supreme Court Rule 315, which governs the filing of petitions in the Supreme Court. **Please note that the template is to be used as a sample only.**

In the event your petition is not timely submitted, you should include with your petition a "motion for leave to file a late petition for leave to appeal," generally setting out the reasons why you were unable to timely file.

A copy of each document should be served on the Attorney General of the State of Illinois (Hon. Kwame Raoul, Attorney General, Criminal Appeals Division, 100 West Randolph Street, 12th Floor, Chicago, Illinois 60601) and the State's Attorney of the county of conviction.

Very truly yours,

Carolyn Taft Grosboll
Clerk of the Supreme Court

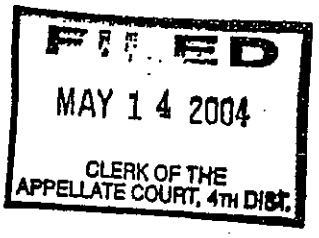
CTG/ak/Encl.

NO. 4-02-0631

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT



THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARK A. WINGER, Defendant-Appellant.	))))))))	Appeal from Circuit Court of Sangamon County No. 01CF798 Honorable Leo J. Zappa, Jr., Judge Presiding.

ORDER

In August 2001, a grand jury indicted defendant, Mark A. Winger, for the first degree murders of Donnah Winger and Roger Harrington. In June 2002, a jury found defendant guilty. In August 2002, the trial court sentenced defendant to a term of natural life in prison.

On appeal, defendant argues (1) the State failed to prove him guilty beyond a reasonable doubt and (2) the trial court violated his rights by conducting voir dire of prospective jurors without a court reporter present. We affirm.

I. BACKGROUND

In August 2001, a grand jury returned a six-count indictment against defendant for the first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2000)) of his wife, Donnah Winger, and Roger Harrington. Defendant pleaded not guilty.

In May 2002, defendant's jury trial commenced. Ray Duffy, president of Bart Transportation, testified he operates a shuttle service to Lambert Airport in St. Louis, Missouri. On August 25, 1995, Duffy received a phone call from defendant, seeking to lodge a complaint

concerning a ride his wife had taken several days earlier. Donnah had complained that the driver, known to her as Roger, drove at excessive speed and discussed that he heard voices that made him kill a person and plant a car bomb. Defendant told Duffy the experience made his wife feel uncomfortable. Defendant also stated his wife received a phone call at their house and the caller hung up. Defendant told Duffy he suspected the caller to be the van driver and mentioned that he was going to file a police report. On August 26, 1995, defendant told Duffy that he planned to speak with an attorney and wanted Roger's last name to file a police report. On August 28, 1995, defendant called Duffy and asked that he be able to talk to the driver about the situation and tell him his wife was not his friend. Duffy then called Harrington and told him he would not be given any driving assignments until the matter was resolved. Harrington agreed to talk with defendant to straighten out the matter.

Donnah memorialized the trip in a handwritten letter dated August 23. She felt nervous and uneasy at the speed Harrington was driving. During conversation, Harrington told her about Dahm, a spirit with a vampire origin, that "reveals himself in the form of a dragon." Along with setting car bombs and killing people, Harrington stated Dahm "takes him out of his body" and "makes him fly above the tree tops." Harrington also told Donnah about "nude parties" with older women. Donnah felt "very nervous" and "extremely uncomfortable" and believed her and her daughter's lives "were in the hands of a nut."

Susan Collins, Harrington's friend and former roommate, testified she used to smoke marijuana with him. Harrington spoke of a guardian angel named Dahm. Collins also mentioned a "Halloween mask" in Harrington's room that he referred to as Dahm. On August 23, 1995, Harrington told Collins of "the strangest fare" he had ever taken in the shuttle as the woman

spoke of her mother's spirit talking to her in her sleep and about using the Ouija board. Harrington stated he mentioned Dahm to his passenger. On August 29, Harrington received a phone call in the morning, and according to Collins, Harrington stated, "Mark Winger, 4:30 p.m." Collins then handed Harrington an "old bank deposit slip" and a pen, and he wrote down "Mark Winger, [2305 Westview Drive], Springfield, 4:30." After the phone call ended, Harrington told Collins he was to meet "that strange fare's husband" and take care of the matter. Harrington left the trailer at around 3:30 p.m. "to take care of this problem," and he hoped to start work again the next day.

By stipulation, defendant's April 1997 deposition in a related civil case was received into evidence. As to the shooting incident, defendant testified, in part, as follows:

> "I came up from the basement[,] and I heard my daughter still crying[,] and the cries were coming from our bedroom, which when you come up the basement[,] you look to your right[;] you can look through the master bathroom and then our bedroom, and I saw my daughter laying [sic] there crying. And so I ran in there because I came up running anyways[,] and, you know, I went to look at her. And then I heard--I heard some sounds comin' from the--from the other room and, you know, I just had this sick feelin', you know, just nothin' was normal. So I ran over to my nightstand and grabbed my weapon and went runnin' down the hallway and saw the driver--actually, I didn't even know who he was at that point, I didn't know if he was the driver or just anybody, I saw a

man standing over my wife[,] and he had a hammer in his hand[,] and he had just hit her and then he was drawing back with the hammer, and I chambered a round and he looked up and I shot him in the head and he fell back, and I--I didn't know whether I missed him or what the first time, you know, 'cause it just--I couldn't really understand what was going on, I just wanted separation between this person and my wife. And when he fell down it looked like he was getting back up, and so I stood over him and shot him in the forehead and then threw my gun on the table."

Dan Jones, a police officer with the Springfield police department, testified he was dispatched to a shooting at 2305 Westview in Springfield on August 29, 1995. Upon arriving at the scene and entering the house, Officer Jones observed Donnah lying face down on the floor and Harrington lying on his back with an apparent gunshot wound. Officer Jones moved an emotional defendant to a bedroom to question him. Defendant stated he had been exercising on a treadmill downstairs. After hearing a thump, he proceeded upstairs and heard his wife screaming. He entered his bedroom and saw his three-month-old baby crying on the bed. After hearing a loud noise, defendant indicated he removed his handgun from the nightstand, left the bedroom, and saw his wife on her knees as Harrington beat her in the head with a hammer. Defendant told Officer Jones he then shot Harrington.

Sergeant Charles Cox testified he worked as a detective for the Springfield police department in August 1995. At the scene, he interviewed defendant in the master bedroom. Defendant told him he called Harrington earlier that morning to tell him that his wife was not

Harrington's friend and he had filed a police report. When defendant returned home after work, he noticed a hammer and nails sitting on the dining room table as his wife wanted him to hang a hat rack. Defendant agreed to do so after he ran on the treadmill in the basement. While jogging, defendant heard a strange noise upstairs and shortly thereafter heard the baby cry. He went upstairs, saw his baby crying on the bed, and grabbed his pistol out of the nightstand. After hearing other noises, defendant entered a hallway leading to the dining room. At the end of the hallway, he saw a white male hitting his wife in the head with a hammer. Defendant told Sergeant Cox he ran down the hallway and, after the white male looked at him with the hammer raised in his hand, he shot him and the assailant "rolled off of his wife." The white male then raised his head and shoulders off the floor, and defendant shot him in the forehead. Defendant called 9-1-1, and then he hung up the phone when he heard his baby crying. At one point, defendant stated he tried to attend to his wife, and he became annoyed at Harrington's "moaning and groaning" so he struck him in the chest with the hammer several times "to shut him up."

During further questioning, defendant asked if the white male's name was Roger. When told his name was Roger Harrington, defendant stated, "'Oh, my God, this is the guy that's been harassing us all week.'" Defendant then told Sergeant Cox about his wife's return trip from St. Louis and the comments made by Harrington that upset her. Defendant further stated a male subject had called the residence, asked for his wife, and then hung up on two occasions earlier in the week. Defendant then agreed to show Sergeant Cox how the incident took place.

Dr. Joseph Bohlen, a psychiatrist, testified he was asked to render an opinion within a reasonable degree of medical certainty as to the psychiatric diagnosis of Harrington. Based on various reports and statements, Dr. Bohlen diagnosed him with schizotypal personality

disorder and chronic marijuana and alcohol abuse. Dr. Bohlen indicated people with this personality disorder "are odd and eccentric people." Although Harrington had been arrested for domestic violence and other crimes, Dr. Bohlen stated he was never committed to a mental-health facility or hospital for posing a danger to others. Further, although Harrington talked about violence and death, Dr. Bohlen found no evidence that he acted on those ideas.

Deann Schultz testified she became friends with Donnah when they worked together at Memorial Medical Center and they hung out together with their husbands. In June 1995, Schultz began having marital difficulties and related her problems to Donnah. In July 1995, Schultz received a phone call from defendant, who was in Chattanooga, Tennessee. He told her he was unhappy in his marriage as well and suggested they meet. Schultz thought about the offer and later met defendant at a hotel in Mt. Vernon on July 22, 1995, where they spent the night and engaged in sexual relations. During the next week, defendant and Schultz talked on the phone, and he stated he was unhappy in his marriage and did not love his wife. Between July 30 and August 12, 1995, Schultz and defendant met over the lunch hour as the relationship "was becoming more intense." On August 5, 1995, Schultz and defendant were talking in his driveway, and she testified defendant told her "it would be easier if Donnah just died." Defendant had thought about it for a while and told Schultz that "all you have to do is come in and find the body." Schultz found the idea "crazy" and did not agree to participate. Defendant and Schultz again had a conversation on August 9, 1995, wherein he told her he did not want his daughter Bailey "to grow up in hot, humid Florida" with Donnah's family and mentioned it would be easier if Donnah died. Schultz did not agree to participate and stated she was going to get a divorce and defendant would have to do the same. On August 19, 1995, Schultz and defendant met again at a

hotel in Mt. Vernon.

On August 24, 1995, Donnah called Schultz and described her trip back from St. Louis with Harrington. Schultz, a psychiatric nurse, thought Donnah's description of Harrington indicated he might have a mental illness. Later that evening, defendant called his wife, and she described the trip with Harrington. Schultz, present at the time, talked to defendant, and he told her to call the police. Later, Schultz answered the phone at the Winger residence, and the caller asked for Mrs. or Mr. Winger in a "slow[,] halting voice." The caller did not identify himself, did not make any threats, and said he would call back later. Schultz stayed with Donnah for the next two nights.

On August 26, 1995, Donnah and Schultz attended a baby shower while Schultz's daughter babysat Bailey. When they returned to the house, defendant had returned and wanted to talk to Schultz privately about the van driver. Later that evening, Schultz saw a note Donnah had written about the trip from St. Louis at the insistence of defendant.

On August 28, 1995, Schultz spoke with defendant, and he told her "he needed to get that guy in his house." Schultz testified "that guy" was the limousine driver. On August 29, 1995, the day of the murders, defendant asked Schultz "if [she] would love him no matter what." After the murders, Schultz spent the night with Mike and Jo Datz along with defendant. In the "early morning," defendant woke Schultz up and told her "to stay as far away from the police as possible" and not to say anything about their affair. Schultz believed defendant "seemed to be more concerned with the [police] investigation" and "thought that Detective Cox believed him."

Following Donnah's death, defendant and Schultz continued their relationship, and he talked about wanting to marry Schultz. Defendant gave Schultz a ring, and she purchased a

woman's wedding band. Unable to return home and explain the ring to her husband, defendant and Schultz exchanged rings, and she kept the one defendant gave her. In the weeks following the murder, Schultz became suspicious of defendant's involvement in Donnah's death. Defendant told Schultz that "dead men don't talk," referring to Harrington. Another time, defendant told Schultz the murder "didn't happen the way the paper said it did" and he did not want her "to know what happened at the house because ignorance is bliss." Defendant told her he was concerned the police found a note in Harrington's car with defendant's name and a time on it. He also thought his vehicle might have been "bugged" by the police. Defendant ended the relationship in March 1996.

Following Donnah's death, Schultz's psychological health "spiraled down." During later years, she attempted suicide on four occasions. Because of her depression, Schultz underwent counseling, took medication, and received electroconvulsive therapy (ECT) treatment. Schultz saw defendant for the first time since March 1996 at a hospital on October 23, 1998. She later called him at work to see if he would tell her "he killed Donnah and Roger." Defendant suggested they meet "up north," but Schultz did not meet with him. When she asked him how he lived with himself, defendant told her "he had found Jesus Christ and that he was forgiven." Schultz also disclosed details of the prior events with her psychiatrist after her fourth suicide attempt. Defendant indicated he was not happy as "the psychiatrist could go to the police." Defendant also told her if she told anybody their "gooses will be cooked." In March 1999, Schultz gave a formal statement to the police, and she received a grant of immunity for her testimony.

Andrew Skaar, defendant's coworker, testified he observed defendant kissing a

woman in his office after hours. Defendant told him the woman was having marital problems and he was counseling her. In the fall of 1995, defendant discussed what happened on the day of the murders. Defendant stated he was running on the treadmill, heard a thump, saw a man hitting his wife with a hammer, retrieved his gun, and shot the man. Skaar stated defendant "was concerned" about this story because he had told the police he had retrieved the gun before he saw the man beating his wife.

Tom Bevel, president of TBI, a consulting company, testified as an expert in bloodstain-pattern analysis. Bevel relied on photographs of clothing and the premises in making his conclusions. He identified two different pools of blood that were not connected in the area where Harrington's body was found. Bevel found this to mean independent events created the smaller and larger stains and noted a two-foot distance between the center of the stains. He opined the stains and the distance between them were consistent with "Harrington being on his face with the left side of his head down toward the carpet and then at some juncture he is rolled from the smaller bloodstain" and "moved to a faceup direction in th[e] larger stain."

Bevel agreed Harrington's initial entry wound was in the top of his head and the second gunshot wound was to the forehead. He stated "the bullet path from the second bullet is traveling in a fairly close proximity to the first wound track that is filled with blood, and that will force the blood that is in the first wound track out." In addition, blood would be mixed with brain tissue "because the brain has been disrupted from the first bullet."

Bevel agreed that Donnah was found in a facedown position. Examining her shorts, Bevel did not find any high-velocity impact bloodstaining pattern consistent with someone being shot in the head while directly over her body. On a picture of the south wall of the

residence, Bevel found both blood "spatter," consistent from impact, and "cast off," that being blood flung off a bludgeoning-type object. Bevel opined that if the killer was wielding a hammer in an east-west fashion, the cast-off patterns would be found in an east-west direction. Bevel was not aware of any cast off consistent with the killer facing an east-west direction, but the evidence pointed to the killer facing the north-south direction. Bevel found that the spatter and the cast off were "consistent with the person facing the wall at the time that they're actually swinging the hammer" and inconsistent with the attacker facing down the hallway. Bevel identified a blood-spatter pattern and cast-off stain on defendant's T-shirt consistent with Donnah's blood type. He found no evidence of any cast-off patterns on the shoulder areas of Harrington's shirt.

Dr. Travis Hindman, a forensic pathologist, testified the cause of Harrington's death was "brain trauma due to the passage of bullets through the brain due to gunshot wounds to the left side of the head." He concluded Donnah's death was caused by "brain trauma due to multiple narrow[-]surface blunt[-]force injuries to the head, compatible with a hammer." Hindman also noted contusions on Harrington's chest caused by hammer strikes, and the toxicology test showed he had a cannabis metabolite in his urine.

Dr. James Cavanaugh, an expert in forensic psychiatry, testified for the defense as to his review of various records of Harrington. He diagnosed Harrington with schizotypal personality disorder, an antisocial personality disorder, a delusional disorder, and a substance-abuse psychotic disorder. He opined that Harrington was a potentially dangerous person because he was not receiving treatment, continued to abuse marijuana, made statements that he had homicidal or suicidal thoughts, was preoccupied with bizarre themes, and was fascinated with handguns and knives.

Terry Laber, a forensic scientist, testified as an expert in bloodstain-pattern analysis, deoxyribonucleic acid (DNA) analysis, and serology. He and his colleague, Bart Epstein, reviewed various reports, photographs, and physical evidence in this case. Based on his bloodstain-pattern analysis, Laber believed bloodstains on Harrington's clothing could not have resulted from his gunshot wounds and bloodstains on Donnah's jean shorts were believed to be "blood from probably two different individuals." Laber recommended these stains be DNA tested. As to the blood on the south wall, Laber opined the stains were caused by impact and not cast off. In looking at a line of stains in an east-west direction on the ceiling, Laber stated such a pattern of blood "would be consistent with a weapon being swung in an east-west direction." As to "a large piece of solid material consistent with tissue" on the south wall, Laber indicated it could have been cast off from a person swinging a hammer in an east-west direction. In his opinion, the assailant would have been "swinging the weapon in an east-west direction at the time he was striking Donnah Winger."

Laber testified "several possibilities" existed for the two pools of blood where Harrington was found, including him being rolled over, moving on his own, or being moved by medical personnel. A DNA test of a stain on the inside of Harrington's left sleeve revealed a mixture of DNA belonging to Harrington and Donnah. A stain on the back right shoulder of Harrington's T-shirt revealed Donnah's DNA. Laber opined that a hammer strike to Harrington's chest "could not deposit stains on his back" and would be "very difficult for a stain to get on the inside of the left sleeve." A "large tissue contact stain" on the front of Harrington's shorts "above the right pocket" matched Donnah's DNA. As to stains on Donnah's shorts, a DNA test matched one stain on the back left pocket with Harrington's blood. Laber opined the size of the stains on

the back of Donnah's shorts were "consistent with back spatter from a gunshot *** to Roger Harrington." Laber's examination of the blood and tissue deposited on Harrington and his blood on Donnah led him to conclude it was consistent with defendant's version of the events given to Detective Cox on August 29, 1995.

Defendant exercised his constitutional right not to testify. Following closing arguments, the jury found defendant guilty of the first degree murders of Donnah and Harrington. In July 2002, defendant filed a motion for a judgment of acquittal notwithstanding the verdict or in the alternative a motion for a new trial. In August 2002, the trial court denied defendant's motion. Thereafter, the court sentenced defendant to a term of natural life in prison. The court then denied defendant's motion to reconsider sentence. This appeal followed.

II. ANALYSIS

A. Sufficiency of the Evidence

Defendant argues the State's evidence failed to prove him guilty of first degree murder beyond a reasonable doubt. We disagree.

When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. People v. Pollock, 202 Ill. 2d 189, 217, 780 N.E.2d 669, 685 (2002). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. People v. Ortiz, 196 Ill. 2d 236, 259, 752 N.E.2d 410, 425 (2001). A court of review will not overturn the verdict of the fact finder "unless the proof is so improbable or unsatisfactory

that there exists a reasonable doubt of the defendant's guilt." People v. Maggette, 195 Ill. 2d 336, 353, 747 N.E.2d 339, 349 (2001).

1. Experts

In the case sub judice, the State postulated defendant killed his wife and attempted to frame Harrington by claiming he found him beating his wife in the head with a hammer. Defendant, on the other hand, claimed he saw Harrington beating his wife, shot him twice in the head, and hit him in the chest with a bloody hammer out of anger. With this in mind, the jury heard conflicting expert testimony as to the bloodstains found on the bodies and around the residence.

According to defendant, Harrington knelt behind and to the side of Donnah and faced east toward the hallway where defendant fired the first shot. However, Bevel, the State's expert, found no cast off down the hallway or on the ceiling that would be consistent with the killer facing an east-west direction. Instead, Bevel found the spatter and cast off were "consistent with the person facing the wall at the time that they're actually swinging the hammer." Laber, defendant's expert, opined the assailant would have been "swinging the weapon in an east-west direction at the time he was striking Donnah Winger."

Bevel also testified that if the attacker was kneeling behind Donnah while administering the hammer strikes, he would expect to find low-flying blood spatter in "a low area." Bevel was unable to find any low-flying blood spatter on the carpeted area where Donnah was located. Further, he did not find any evidence of bloodstaining on Harrington's shoes or any low-flying blood spatter on his socks.

Bevel did testify he found cast-off stains and impact spatter on several areas of

defendant's shirt. Such a finding would allow for the jury to conclude defendant was Donnah's assailant. However, Laber did not find any cast-off patterns on defendant's shirt. Further, Laber disputed Bevel's findings of tissue on Harrington's clothing as an "artifact" in the blown-up photograph as the original Polaroid did not contain that alleged tissue.

According to defendant, he shot Harrington while running down the hallway, Harrington rolled off his wife and onto his back, defendant's momentum continued over Harrington, and he shot him when he raised his head and shoulders off the floor. Bevel, however, found Harrington's head was bleeding for a fairly significant amount of time into the first smaller stain in the carpet as he was lying facedown. Then, with the independent larger bloodstain, Bevel concluded the two stains were consistent with Harrington being rolled over prior to the second gunshot to the forehead. Although Laber stated the two bloodstains could have been caused by Harrington moving on his own or being moved by medical personnel, he found it "certainly consistent that a person could have been laying [sic] in this position and then rolled over into this position."

Supporting the theory of a significant amount of time passing between shots, Bevel testified to a "fairly uncommon" phenomenon where blood tissue would be projected from the first wound when the second shot was fired. Bevel opined that blood and tissue could be projected in Donnah's direction as she was lying on the floor. Laber indicated Bevel's theory had not appeared in his previous reports. In looking at the distance between Donnah and Harrington Laber concluded the "air resistance is too great for a stain of that size, less than a millimeter, to travel that distance and be deposited on Donnah Winger's shorts." Although Laber stated the blood and tissue on Harrington and his blood on Donnah supported defendant's version of the

events, he agreed it was possible that had Harrington been shot first and been lying on the ground when Donnah was attacked, spatter and cast off could have fallen on him.

"The trier of fact is free to accept one expert's testimony over another's, and the jury decides what weight to accord the experts' respective testimony." People v. Cundiff, 322 Ill. App. 3d 426, 433, 749 N.E.2d 1090, 1097 (2001). "Moreover, a conflict between experts does not necessitate a finding that the evidence was insufficient to support a conviction; the trier of fact may either accept or reject an expert's conclusion." People v. Lind, 307 Ill. App. 3d 727, 736, 718 N.E.2d 316, 322 (1999).

The jury in this case had to consider a voluminous amount of expert testimony on blood-impact patterns, cast-off material, DNA analysis, and the projection of blood throughout the area where Donnah and Harrington were killed. The jury heard expert testimony that not only often conflicted with defendant's expert's conclusions but also with defendant's version of the events. However, the jury was free to accept Bevel's testimony over both Laber and defendant's account of what happened at the murder scene. While Bevel might have misconstrued a defect in a photograph, defense counsel and defendant's experts pointed out that discrepancy and any other they deemed appropriate. Thus, the jury had evidence before it that each side believed supported their case or disproved the other. In the end, the jury favored the State's expert testimony, and based on the evidence, it was entitled to make that determination.

2. Deann Schultz

Defendant argues Deann Schultz was an unreliable witness and the lack of credibility in her testimony cannot support defendant's first degree murder convictions. We disagree.

Deann testified she was having marital difficulties in June 1995 and eventually became romantically involved with defendant. In later conversations, defendant indicated he too was unhappy in his marriage and did not love his wife. As the relationship became "more intense," defendant told Deann he loved her. In August 1995, defendant made statements about Donnah dying, but Deann replied she would "cease to be a vital person" if someone was hurt.

Following the murders, defendant came to Deann and told her not to mention the affair to the police. After Donnah's death, defendant and Deann resumed their relationship and he told her he wanted to marry her. Defendant also made "suspicious" statements, including "dead men don't talk" and "ignorance is bliss" in reference to the murders.

Deann also testified to her psychological condition prior to and after the murders. As her health "spiraled down" after Donnah's death, Deann became "more and more depressed," started drinking more, and attempted suicide on multiple occasions. In seeking help, Deann was hospitalized, "tried a lot of different medications," and received ECT treatment. After her fourth suicide attempt, Deann told her psychiatrist what she knew and later went to the police.

On cross-examination, Deann testified to the affair and the statements defendant made to her prior to and after the murders. She also mentioned how she was "hurt" after the breakup because she loved defendant. Deann testified to the guilt she felt because she did not tell Donnah or the police about defendant's statements prior to the murders. Defense counsel also fully explored Deann's treatment, medication, and psychiatric visits following the murders.

Here, the jury heard Deann's testimony that established defendant's motive for murdering his wife, including his unhappiness in his own marriage and his affair with Deann. Her testimony established defendant had discussed Donnah's death prior to the murders. Also,

defendant's statements after the murders were indicative of his consciousness of guilt. Moreover, the jury could conclude Deann's mental health problems worsened after she had an affair with her best friend's husband, who she became suspicious of after the murders. Defendant's counsel attempted to portray Deann as a liar and possibly a "jilted lover" whose mental health spiraled down after the murders into her own "emotional cesspool." The jury was well aware of Deann's love affair with defendant, her troubled mental health, and her receipt of immunity for her testimony. The jury had the opportunity to observe Deann testify and determine the weight given to her testimony. In the end, the jury had evidence before it to find Deann a credible witness.

3. Other Evidence

The jury heard testimony that Harrington received a call from defendant to meet him at 4:30 p.m. to resolve the matter. The police found Harrington's note in his car parked outside the Wingers' home, indicative of an invitation to meet defendant. Although the defense set forth Harrington's mental health problems and two acts of violence, the jury could conclude from the testimony from friends and experts that he was not a threat or a danger to others. The jury also heard testimony regarding defendant's statements prior to and after the murders.

Looking at this evidence in the light most favorable to the prosecution, along with the expert bloodstain analysis and testimony from Deann Schultz, we find the jury could have found defendant committed the first degree murders of Donnah and Harrington beyond a reasonable doubt. Although the defense put forth its own bloodstain expert, portrayed Deann as a depressed mistress hell-bent on payback, and likened Roger Harrington to a crazed and violent psychopath, the jury had evidence before it such that it could reasonably disagree with that defense.

B. Voir Dire

Defendant argues (1) the trial court violated his right to due process by conducting voir dire of prospective jurors without a court reporter present to transcribe the proceedings as required by Supreme Court Rule 608(a)(9) (177 Ill. 2d R. 608(a)(9)); (2) the failure to have a court reporter present to transcribe voir dire resulted in the denial of his right to the effective assistance of appellate counsel; (3) his trial counsel did not have the authority to waive the court reporter's presence at voir dire because that decision belonged to defendant alone; and (4) a bystander's report or agreed statement of facts could not be obtained in this case. We disagree.

In this case, the docket entry for May 13, 2002, indicates the "court reporter [was] waived for jury selection." Supreme Court Rule 608(a)(9) provides that in cases in which the death penalty is not imposed, "the court reporter shall take full stenographic notes of the proceedings regarding the selection of the jury, but the notes need not be transcribed unless a party designates that such proceedings be included in the record on appeal." 177 Ill. 2d R. 608(a)(9). We find defendant's contentions of error regarding Rule 608(a)(9) to be governed by this court's decision in People v. Culbreath, 343 Ill. App. 3d 998, 798 N.E.2d 1268 (2003).

In that case, the defendant claimed his right to due process was violated when the trial court conducted voir dire without a court reporter present as his trial counsel had no authority to waive the court reporter's presence. Culbreath, 343 Ill. App. 3d at 1005, 798 N.E.2d at 1273. This court found a "trial court's failure to provide a court reporter during voir dire does not deprive a defendant of due process." Culbreath, 343 Ill. App. 3d at 1005, 798 N.E.2d at 1273. Also, this court held "that in a criminal case, the decision whether to waive a court reporter's presence during voir dire remains with defense counsel, not the defendant." Culbreath,

343 Ill. App. 3d at 1007, 798 N.E.2d at 1275. The court noted that defense counsel's waiver of the court reporter's presence during voir dire did not create a conflict of interest because a defendant can still challenge counsel's actions by filing either a bystander's report or an agreed statement of facts. Culbreath, 343 Ill. App. 3d at 1008, 798 N.E.2d at 1275. Here, we find defendant's due-process rights were not violated as the decision to waive the court reporter's presence during voir dire remained with defendant's trial counsel.

In regard to a defendant's right to the effective assistance of appellate counsel and the absence of a transcription of jury selection, this court noted the defendant failed to file a bystander's report or an agreed statement of facts. Culbreath, 343 Ill. App. 3d at 1006, 798 N.E.2d at 1274. Although a lack of a transcript of voir dire might make appellate counsel's representation more difficult, the court found the creation of a bystander's report would not have been impossible. Culbreath, 343 Ill. App. 3d at 1006, 798 N.E.2d at 1274.

In this case, appellate counsel argues issues surrounding jury selection cannot be examined without a transcript of voir dire, and a bystander's report or an agreed statement of facts cannot be obtained in this case. Appellate counsel raises possible difficulties if defendant were to raise a claim about specific jurors, challenges for cause, peremptory strikes, or the trial court's improper limitation of voir dire. However, defendant has made no claim that he attempted to create a bystander's report but was unable to do so. Appellate counsel's hypotheticals of what defendant might be able to allege and the concern over the passage of time in the minds of the trial participants does not translate into an inability to create a bystander's report.

Defendant has not established any prejudice from trial counsel's waiver of recording of voir dire. Further, defendant makes no claim that jury selection was not fair and

impartial. Defendant's posttrial motion also made no mention of any error in the selection of the jury or how the lack of the transcription of voir dire hindered his cause. Moreover, at the hearing on the motion, defense counsel stated the following:

> "I respect this jury very, very much, and I think the [c]ourt took great care when you[, Judge Zappa,] were selecting the jury, and you did not hamper us in any way, shape[,] or form in asking questions. I thought you were very liberal when it came to cause, and quite frankly, Judge, I compliment you immensely on the jury selection, because while we all know that is sometimes the most painful part of the trial, you made it much less painful and even from time to time enjoyable."

Based on the foregoing, we find reversal of defendant's convictions on this issue is not warranted.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.

TURNER, J., with KNECHT, P.J., and MYERSCOUGH, J., concurring.

595-24536

AFFIDAVIT

99MR 0358

I, Daryle D. Williamson, being duly sworn state as follows:
I am a Detective with the Springfield Police Department and have been employed as a Detective for 8 years. I am currently assigned to the Major Case Unit which conducts homicide investigations in the City of Springfield, Sangamon County, State of Illinois. I have received specialized training in investigating homicides and other violent crimes. I am presently assigned to investigate the Murder of Donnah Winger on August 29th, 1995 in the City of Springfield.

1. On August 29th, 1995 Donnah Winger was murdered with a hammer while inside her residence. A second person was killed with a firearm by Donnah's husband Mark Winger.

2. We originally believed that Mark Winger killed the intruder after the intruder(Rodger Harrington) killed Donnah Winger with a hammer. A witness came forward on 3-8-99 and stated that she was having an affair with Mark Winger and that he planned to kill Donnah. Mark Winger asked the witness if she would be involved in the murder and she refused.

3. Donnah Winger had been brought back from St. Louis by Rodger Harrington while he was employed by B.A.R.T. transportation. During the ride Harrington showed signs of being delusional. Donnah reported this to Mark Winger. Mark then made statements to the witness that he had to get Harrington into his house.

4. Clothing worn by Harrington, Donnah and Mark were sent to Tom Bevel in Norman Oklahoma for a blood spatter analysis. Bevel reviewed the clothing and identified several blood stains that he wanted sent to the crime lab for ABO typing. The Connecticut State Police Crime Lab conducted this testing. The results of the Connecticut tests were sent to Tom Bevel. Bevel also requested the ABO types for Harrington as well as both of the Wingers. Donnah Winger and Rodger Harringtons ABO types were on file.

5. The affiant requests that a subpoena be issued for medical records kept by Memorial Hospital in the name of Mark Winger so the ABO typing can be confirmed.

Further Affiant Sayeth Not Det. D. Williamson #136

Subscribed and sworn before me
this 20 th day of September, 1999

Judge

Appendix - G