

No. 1-10-1607

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County |
| |) | |
| v. |) | No. 08 CR 7137 |
| |) | |
| SPENCER RILEY, |) | Honorable |
| |) | Stanley J. Sacks, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The State was not collaterally estopped from prosecuting defendant for violating the armed habitual criminal (AHC) statute because the issue of whether he possessed a weapon was not decided by the jury in his prior murder trial. The State's witnesses' testimony established that defendant was present at the murder scene and possessed a weapon, which was sufficient to prove defendant guilty of the AHC charge beyond a reasonable doubt. Defendant's counsel was not ineffective for failing to elicit the motives underlying the State's witnesses' testimony during the AHC trial because that testimony was irrelevant to the issue of whether defendant possessed a weapon and cross-examination of a witness is a matter of trial strategy. Defendant's alleged *pro se* claim of ineffective assistance of counsel made during his sentencing hearing lacked specificity and was insufficient to warrant a *Krankel* hearing.

¶ 2 The State charged defendant Spencer Riley with six counts of first-degree murder and one count of armed habitual criminal (AHC), and the murder charge was severed from the AHC charge. Following a jury trial, defendant was acquitted of all the murder charges. Following a bench trial, defendant was convicted of the AHC charge and sentenced to 15 years in prison. On appeal, defendant contends that his AHC conviction should be reversed because the State was collaterally estopped from prosecuting him for that charge since the jury in the murder trial previously decided the issue of whether he discharged a weapon. Defendant also claims that the evidence was insufficient to prove beyond a reasonable doubt that he possessed a weapon. Defendant further claims that counsel provided ineffective assistance because he failed to elicit motive testimony on cross-examination of witnesses. Defendant finally claims that the trial court erred in not inquiring into his *pro se* claims of ineffective assistance of counsel that he raised during sentencing hearing alleging that counsel failed to call witnesses who would have aided in his defense. For the reasons that follow, we affirm the judgment of the trial court.¹

¶ 3 BACKGROUND

¶ 4 The jury in defendant's murder trial found defendant not guilty of all six counts of first degree murder and also found that the State failed to prove that during the commission of first degree murder, defendant personally discharged a firearm that proximately caused the death of Cedric Hudson.

¹ Defendant in his opening brief claimed that he was entitled to 38 days of additional sentencing credit, but withdrew that claim in his reply brief. As such, that issue has not been addressed in this disposition.

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¶ 5 Demetrius Allen testified that on October 30, 2007 at approximately 10:40 p.m., he was at a vacant lot located at 5902 South Union with his cousin Brown and Hudson. Defendant was also at the lot, but Allen could not recall whether Sheeba was there, too. Allen did not see Hudson get shot, he did not see defendant leave the lot and walk toward his house, he did not see defendant carrying a handgun, and he also did not see Sheeba arguing with Hudson. Allen did not recall the content of any conversation that he had with Detective Dan Gorman or Assistant State's Attorney Mike Jojta.

¶ 6 The parties stipulated that on March 10, 2008, Allen met with an assistant state's attorney and Detective Gorman and provided a handwritten statement. Allen, however, either did not recall making the statements that were in the handwritten statement or denied making the statements.

¶ 7 Allen's testimony during the AHC trial is reflective of the testimony he gave during defendant's murder trial with the exception that during the murder trial, he testified that he went to the police station to discuss the shooting after he was pulled over by the police. Allen stated that the police asked him what he knew about the shooting and that if he would not tell them what he knew, he would go to jail. Allen also stated that he signed the statement that he provided to the police because he was told that if he did not sign the statement, he would go to jail and there would be a warrant for his arrest for being a witness to a murder. On redirect examination, Allen stated that he told the police what was necessary to get out of jail.

¶ 8 Detective Dan Gorman testified that he worked as a violent crimes detective on October 30, 2007. During the course of the murder investigation, he learned that Allen and Brown were

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possible witnesses. Detective Gorman was unable to locate either of the possible witnesses and issued an investigative alert for Allen, who was subsequently taken to the police station. After speaking with Allen, Detective Gorman looked for defendant and other witnesses. Defendant was arrested on March 9, 2008. Detective Gorman transported defendant from the police station to the court for a hearing on March 11, 2008. When he was transporting defendant back to the police station, defendant attempted to talk to him about the case. Defendant wanted to know who were the witnesses against him, but Detective Gorman responded that he could not talk about the case and advised him that he had been charged with murder. Defendant told him that he thought Sheeba identified him as the shooter. Defendant also stated that "he wasn't worried about the case against him and that dead man can't come to court and testify." Defendant continued by stating that "my witnesses are going to be his witnesses come trial time." Detective Gorman testified that defendant explained that "the State's witnesses will be his witnesses at trial; and that those witnesses will come to court and say that the police forced them to identify [him] as the shooter." During cross-examination, Detective Gorman stated that he did not recover a gun from defendant and he did not go to defendant's house to look for a weapon either when he was arrested or thereafter. Detective Gorman acknowledged that defendant did not admit that he committed the murder.

¶ 9 The parties stipulated to Allen's handwritten statement taken on March 10, 2008. The handwritten statement indicates that Allen saw Sheeba and defendant at the lot on the night of the murder. Defendant left the lot to walk toward his house and returned approximately three to four minutes later wearing a white hoody with his hands in his front pocket. Defendant stated to

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Hudson "You ain't going to talk to my boss like that." Defendant removed a black semi-automatic weapon from his hoody pocket and hit a man with the weapon who fell over on a car. Defendant then pointed the weapon and discharged it at Hudson. Allen saw Hudson fall down and he knew defendant had just killed Hudson.

¶ 10 The parties also stipulated to Allen's grand jury testimony. If Assistant State's Attorney Mary Innes were called to testify, the parties stipulated that her testimony would reveal that she presented Allen to the Grand Jury on April 3, 2008, and that he answered questions that she asked him. In his responses, Allen stated that he saw defendant walk toward his house, which was approximately across the street from the lot where he was at, and he came right back. Allen also stated that Hudson and Sheeba were passing a couple of words. Defendant then told Hudson "You can't talk to him like that" and he pulled out a weapon. Kenny Head, who was also present at the scene, told defendant to put the gun away, but defendant did not comply and responded "Fuck that. You can't talk to him like that." Defendant punched Head.

¶ 11 The parties further stipulated that defendant had two prior convictions, one for delivery of a controlled substance and one for armed robbery and aggravated unlawful restraint.

¶ 12 During closing arguments in the AHC trial, the State argued that Brown testified "quite credibly" and Allen's prior handwritten statement and grand jury testimony corroborated Brown's testimony. The defense argued that the State's two witnesses did not provide their statement to the police immediately, were inconsistent regarding the color of hoody that defendant wore, could not identify the weapon that defendant allegedly possessed, but, yet, identified defendant as the shooter. The defense also noted that no weapon was recovered during the investigation.

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¶ 13 During closing arguments in the murder trial, the State argued that this was not an identification case and that defendant was the individual who pulled the trigger of a weapon discharging a bullet causing Hudson's death. The defense argued that defendant's statements to Detective Gorman were not admissions of guilt, but "questions about what in the world am I doing here, why am I being charged, who are the witnesses, why are they doing this to me. We have evidence in this case that suggests that there was more than one gun out there."

¶ 14 When the trial court rendered its finding in the AHC trial, it stated that the failure to recover the gun was not significant because in many cases, no gun is recovered. The trial court summarized the evidence as being that two witnesses testified that defendant was at the scene located across the street from his home, defendant stated, in essence, to Hudson that "you can't talk to my boss like that," defendant pulled out a weapon and shot Hudson. The trial court also found defendant's statements to Detective Gorman incriminating, even though he did not admit that he shot and killed Hudson. The trial court found defendant guilty of being an AHC, and sentenced him to 15 years in the Illinois Department of Corrections. Defendant filed a motion for a new trial and arrest of judgment, which the trial court denied. The trial court also denied defendant's motion to reconsider the sentence. Defendant timely filed this appeal.

¶ 15 ANALYSIS

¶ 16 *A. Collateral Estoppel*

¶ 17 Defendant first contends on appeal that the doctrine of collateral estoppel barred the State from prosecuting him on the AHC charge because the material factual issue of identifying who shot Hudson was resolved during defendant's murder trial. Defendant claims that because the

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jury found that defendant did not discharge the weapon that proximately caused Hudson's death, the jury necessarily considered the issue of whether defendant possessed a weapon. Defendant maintains that the State's evidence regarding his possession of a weapon was the same evidence it presented during the murder trial, which the jury found insufficient to establish beyond a reasonable doubt that defendant discharged the weapon that killed Hudson. Thus, defendant contends that the State erred in prosecuting him on the weapon possession charge because the possession issue was previously decided by the jury in the murder trial.

¶ 18 Collateral estoppel is an equitable doctrine that bars retrial of an issue previously decided in another case. *People v. Hopkins*, 235 Ill. 2d 453, 468 (2009). The equitable doctrine is invoked "when a party participates in two separate and consecutive cases arising on *different* causes of action and some controlling fact or question material to the determination of both causes has been adjudicated against that party in the former case by a court of competent jurisdiction." (emphasis in original) *Id.* Collateral estoppel is invoked where "the issue decided in the prior adjudication is identical with the one presented in the current action, there was a final judgment on the merits in the prior adjudication, and the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior adjudication." *DuPage Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 77 (2001). A criminal defendant bears the burden of establishing that the prior action resolved the identical issue that he now seeks to preclude from the trial court's consideration. *People v. Zegiel*, 179 Ill. App. 3d 649, 651 (1989). We review a trial court's ruling regarding the application of the doctrine of collateral estoppel *de novo*. *In re A. W.*, 231 Ill. 2d 92, 99 (2008).

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¶ 19 Before turning to address the merits of defendant's collateral estoppel argument, we note that defendant claims that even though this issue was not preserved for review, it may nonetheless be reviewed under a plain error analysis. As support for his position, defendant claims that the evidence was closely balanced and that because collateral estoppel is embedded in the Fifth Amendment guarantee against double jeopardy, the issue must be reviewed to ensure that a substantial injustice did not occur during his trial. The State acknowledges that double jeopardy issues, including collateral estoppel claims, may be reviewed under a plain error analysis. Because the parties agree that the unpreserved claim may be reviewed under a plain error analysis, defendant's collateral estoppel issue is not waived for purposes of our review and we address that issue below.

¶ 20 Collateral estoppel did not preclude the State's prosecution of defendant on the AHC charge because the issue decided by the jury in the murder trial was not identical to the issue the trial court was charged with deciding in the AHC trial. In the murder trial, the issue that the jury decided was whether defendant discharged a weapon that proximately caused Hudson's death. Thus, the relevant issue was whether defendant killed Hudson by use of a weapon and not whether he merely possessed a weapon, which was the relevant issue during the AHC trial. The elements of a murder charge differ from the elements of an AHC charge. To prove that a defendant committed first degree murder, the State must provide evidence that a defendant "kills an individual, intending or knowing that he is likely to cause death or great bodily harm, or when he commits the killing in the attempt or commission of a felony other than second degree murder." *People v. Swift*, 202 Ill. 2d 378, 388 (2002). To prove that a defendant is an AHC, the

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State must present evidence that the defendant possessed a firearm and has two prior convictions. 720 ILCS 5/24-1.7 (West 2010). Thus, it is readily apparent that the State must satisfy different elements to prove a defendant guilty of the two crimes. More specifically, to obtain a conviction for violating the AHC statute, the State need not prove that defendant discharged a weapon or killed another individual when he discharged a weapon.

¶ 21 Reviewing the record, we note that during closing arguments in the murder case, the defense stated that the evidence "suggests that there was more than one gun out there." The defense further argued that "[t]here were two separate calibers of ammunition. Does that not prove to you that maybe one or two or three of those witnesses were lying about that?" Based on these statements, one theory of the case presented by the defense during the murder trial was that multiple weapons were present at the scene when Hudson was shot. The defense used this theory to create reasonable doubt that defendant was not in fact the individual who discharged the weapon that killed Hudson. The defense also indicated that the State's witnesses were convicted felons, which created an inference that the witnesses were not credible. Thus, a rational jury could have based its acquittal of defendant's murder charges on an issue and a conclusion apart from whether defendant possessed a gun. To determine whether defendant possessed a weapon to sustain a conviction for being an AHC, the trier of fact would not need to determine whether defendant discharged a weapon or if he killed Hudson. Defendant frames the issue in both the murder and AHC cases as one of identity, and more specifically, whether defendant was the individual who shot Hudson. During the murder trial, the State offered Brown's and Head's testimony to establish that defendant was the shooter, and the defense argued that Head was the

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shooter. During the AHC trial, however, whether defendant was the individual who shot Hudson was not at issue because merely possessing a weapon is sufficient to be convicted for violating the AHC statute.

¶ 22 Defendant relies on *People v. Gordon*, which he acknowledges is only persuasive authority because it was decided by the California Appellate Court, to support his claim that identification issues decided in a prior trial are collaterally estopped from being retried in a subsequent trial. 177 Cal. App. 4th 1550 (2009). In *Gordon*, a third, unidentified individual entered a house with two other men and committed murder, attempted robbery, and kidnapping. *Id.* at 1560. The defendant in *Gordon* was charged with those crimes, as well as being a felon in possession of a weapon. *Id.* at 1554. The jury acquitted the defendant of the murder, attempted robbery and kidnapping charges, but in the subsequent bench trial, the trial court convicted the defendant of the possession of a firearm charge. *Id.* at 1555, 1560. In concluding that the defendant may not be prosecuted for the possession of a firearm charge, the *Gordon* court reasoned that the jury in the prior proceeding necessarily had a reasonable doubt that the defendant was the individual with the weapon at the crime scene. *Id.* at 1560. Apart from not being binding on this court, *Gordon* is distinguishable. The witness in *Gordon* did not previously know the defendant and identified him from a photograph, but indicated that the person in the photograph “kind of look like him.” *Id.* at 1553. During trial, the witness did not think that the defendant looked like the person in the photograph. *Id.* In the case *sub judice*, the witnesses knew defendant and no evidence was presented that defendant was not present at the crime scene. Thus, the considerations regarding the identity of an unknown individual who

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committed the crimes in *Gordon* are not relevant here.

¶ 23 We agree with the State that *People v. Jones*, 207 Ill. 2d 122 (2003) is instructive. In that case, after the defendant was acquitted of an aggravated battery charge, he claimed that collateral estoppel barred the prosecution of a robbery charge brought against him. *Id.* at 138. The supreme court disagreed reasoning that a retrial for robbery required a jury to consider whether a defendant took property from a victim by use of force or threatening the imminent use of force, which is a consideration separate from determining whether defendant actually pushed or struck the victim. *Id.* at 140. As in *Jones*, the trial court in the AHC trial was required to determine whether defendant possessed a weapon, which is a consideration separate from the issue that the jury was charged with determining in the murder trial of whether defendant discharged a weapon that resulted in Hudson's death.

¶ 24 Defendant also claims that the issue in both trials was whether defendant was the individual identified as discharging a weapon. Defendant claims that there was only one gun at the scene as evidenced by only one recovered shell casing, which necessarily means that there was only one shooter. Since defendant was acquitted of the murder charge where identification of the shooter was at issue, he claims that the State is precluded from litigating the issue of whether he possessed a weapon. We disagree.

¶ 25 Recovery of shell casings attributable to one gun does not preclude a finding that defendant possessed a weapon, but did not discharge it. The critical fact that must be determined in an AHC trial is not whether defendant actually used the weapon, but whether he possessed the weapon. The jury's finding that defendant was not guilty of murder merely shows that it was not

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proven beyond a reasonable doubt that defendant discharged a weapon resulting in Hudson's death. We note that during opening statements in the murder trial where defendant revealed his theory of the case, it was argued that Head, and not defendant, was the shooter. Defendant, however, did not argue during the murder trial that he was not present at the scene or that he did not possess a weapon. A conviction for being an AHC requires a determination of whether defendant possessed a weapon, which was distinct from the issue defendant faced in the murder trial. Because a rational jury in the prior proceeding could have reached its verdict based on an issue other than whether defendant possessed a weapon, collateral estoppel does not bar the litigation of the AHC charge against defendant. Since we conclude that collateral estoppel does not bar litigation of the AHC charge, we need not address defendant's claim that counsel was ineffective by failing to raise collateral estoppel during his trial.

¶ 26

B. Reasonable Doubt

¶ 27 Next, defendant claims that the State failed to prove him guilty of being an AHC beyond a reasonable doubt. Defendant contends that the testimony of each of the State's two identification witnesses was incredible and the trial court erred in relying on that testimony to find defendant guilty of the AHC charge. Defendant maintains that the jury in the murder trial rejected the same witnesses' testimony that defendant was the individual who used a weapon. Because the witnesses' testimony was incredible, defendant asserts that his AHC conviction should be reversed.

¶ 28 When resolving a sufficiency of the evidence claim on appeal, the pertinent inquiry is whether "any rational trier of fact could have found the essential elements of the crime beyond a

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reasonable doubt, viewing the evidence in the light most favorable to the prosecution." *People v. Hopkins*, 201 Ill. 2d 26, 40 (2002). The trier of fact is charged with the responsibility of determining a witness's credibility, as well as the weight to afford witness testimony, to resolve conflicts in evidence and to draw inferences from the facts presented. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). This court will not reverse a conviction based on insufficient evidence "unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt." *People v. Collins*, 241 Ill. 2d 206, 217 (2005). When reviewing the evidence presented, this court's function is not to retry the defendant or substitute our judgment for that of the trier of fact. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶ 29 A defendant is guilty of being an AHC if:

"He or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:

(1) a forcible felony as defined in Section 2-8 of this Code;

(2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child as described in Section 12-4.3 or subdivision (b)(1) of Section 12-3.05; intimidation; aggravated intimidation; gunrunning; home invasion; or aggravated battery with a firearm as described in Section 12-4.2 or subdivision (3)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05; or

(3) any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 4 felony or higher." 720 ILCS 5/24-1.7 (West 2010).

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¶ 30 The parties stipulated that defendant had two prior convictions, and, thus, that element is not at issue here. At issue, instead, is whether the State proved beyond reasonable doubt that defendant possessed a firearm, which defendant claims was not established by the testimony of the State's two unreliable identification witnesses. Defendant claims that Allen's testimony at the AHC trial that he did not see defendant carrying a weapon precludes the State from establishing that defendant possessed a gun. Defendant also claims that Brown's testimony lacked credibility because he identified defendant as the shooter approximately five months after the incident, and did so only after being "dragged" to the police station. Defendant further claims that his verbal post-arrest statements to Detective Gorman were ambiguous and failed to establish that he possessed a gun. Defendant maintains that this evidence, in addition to the fact that no physical evidence linked him to the possession of a weapon, failed to prove beyond a reasonable doubt that he, in fact, possessed a weapon.

¶ 31 Here, when viewed in the light most favorable to the prosecution, there was evidence supporting the trier of fact's finding that defendant possessed a weapon and was, therefore, guilty of being an AHC. Through Brown's testimony, the State established that he knew defendant and where defendant lived. Based upon Brown's testimony, the State also established that defendant approached Hudson and Sheeba and stated "Don't talk to my boss like that." Brown further testified that defendant "hit some dude with the gun and then he shot [Hudson]." Brown identified defendant's weapon as a black semi-automatic gun, and he saw defendant point and shoot the weapon at Hudson.

¶ 32 Because Allen, the State's other witness, did not remember details of the incident or his

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prior statements to police officers during the AHC trial, the State relied upon his prior handwritten statement taken on March 10, 2008, and grand jury testimony, both of which were admitted at trial by stipulation. Through that evidence, the State established that Allen knew defendant and that defendant "took out a black automatic pistol out of his hoody pocket." Allen also stated that defendant "pulled the gun up and pointed it at [Hudson] as [Hudson] was turning around." Allen further stated that defendant "fired the gun." It was stipulated that during the grand jury testimony, Allen stated that defendant "pulled the gun out." Allen also stated that another man told defendant to put the weapon away, but defendant did not and he instead punched the man. After doing so, defendant fired a shot.

¶ 33 The witnesses' collective testimony is not only relevant to establish that defendant possessed a handgun, but the testimony regarding defendant's possession of a weapon is consistent among the witnesses. In reaching its finding that defendant violated the AHC statute, the trial court stated that these two witnesses, in his opinion, "are not smart enough to make up a story." The trial court also remarked that the witnesses' statements were consistent in that both individuals stated that defendant "upped with the gun after making the comment 'You can't talk to my boss like that' " and that defendant possessed a weapon and discharged that weapon. When analyzing a sufficiency of the evidence claim, we are not at liberty to independently assess the credibility of witnesses because the trial court was charged with that responsibility, nor may we substitute our judgment for that of the trial court. Based upon the record, the trial court concluded that the State's witnesses' statements were credible and we see no reason to depart from that finding.

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¶ 34 The State also offered defendant's statement to Detective Gorman wherein he asked "Who were the witnesses?" and then continued by stating that "Sheeba must have said I shot the guy." Defendant also stated that "I am not worried. Dead men can't come to court and testify." The trial court held that these statements demonstrated defendant's consciousness of guilt. The trial court also held that defendant's statement referring to Sheeba amounted to circumstantial evidence of guilt because defendant knew that Sheeba was at the vacant lot, which then establishes that defendant was there as well. The trial court also considered defendant's statement that "Your witnesses will be my witnesses by the time the case comes to trial. They will come to court and say the police forced them to identify me as the shooter." The trial court again considered defendant's statements to be "very incriminating." Defendant, however, claims that his statements are susceptible to more than one interpretation. Specifically, defendant claims that his statement that "dead men can't come to court and testify" may be interpreted to mean that he thought Sheeba was dead, so he would be unavailable to testify. Regardless of the interpretation denoted to those statements, defendant's statement that "I am not worried" is incriminating when read in context because it expresses his belief that witnesses would not testify against him.

¶ 35 Defendant notes an inconsistency in the testimony of the two witnesses where Brown testified that defendant wore a black hoody and Allen testified that he wore a white hoody. This inconsistency regarding the color of the hoody that defendant wore, however, is irrelevant to establishing defendant's identity because both witnesses testified that they knew defendant, and knew where he lived. Moreover, we are not persuaded by defendant's contention that because a

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different fact finder concluded that defendant did not commit a different crime beyond a reasonable doubt based upon evidence similar to that presented here, that we must accordingly conclude that defendant did not violate the AHC statute beyond a reasonable doubt. The State's evidence offered through witness testimony that defendant possessed a weapon and defendant's own statements were not so unsatisfactory or inconclusive to create a reasonable doubt regarding the trial court's finding that defendant was an AHC. Considering the evidence in its entirety and in the light most favorable to the State, we conclude that the evidence reasonably supports the trial court's finding that defendant was an AHC.

¶ 36 *C. Ineffective Assistance of Counsel*

¶ 37 Defendant further contends on appeal that his trial counsel was ineffective because counsel failed to present evidence during the AHC trial that the State's witnesses had motives to implicate him in Hudson's murder. Defendant claims that counsel presented this evidence during the murder trial and the jury acquitted defendant, but this same evidence was not presented during the AHC trial, which he claims resulted in his conviction on that charge. Defendant maintains that had counsel presented this evidence, a reasonable probability existed that he would have been acquitted of the AHC charge because the trial court would have questioned the credibility of the State's witnesses. Defendant also claims that counsel was ineffective because alternative interpretations of his statements to Detective Gorman were not presented during the bench trial.

¶ 38 A defendant's claim of ineffectiveness of counsel is analyzed according to the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674

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(1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Pursuant to *Strickland*, to prevail in an ineffective assistance of counsel claim, a "defendant must prove both (1) his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness; and (2) absent these errors, there was a reasonable probability that his trial would have resulted in a different outcome." *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011). A defendant must meet both *Strickland* prongs to successfully prevail on an ineffective assistance of counsel claim. *Id.* at 457. To satisfy the first prong, a defendant must establish that counsel's performance fell below an objective standard based upon "prevailing professional norms." *Id.* at 456. To satisfy the second prong, a defendant must establish that " 'but for' counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *Id.* at 457. In basic terms, "a reasonable probability" is understood to mean "that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Id.* Stating the proposition in even more basic terms, it means that "defendant was prejudiced by his attorney's performance." *Id.* Reviewing claims of ineffective assistance of counsel entails a bifurcated standard of review requiring deference to the trial court's factual findings unless they are against the manifest weight of the evidence, and *de novo* review of the legal issue of whether counsel's performance was ineffective. *People v. Stanley*, 397 Ill. App. 3d 598, 612 (2009).

¶ 39 A defendant may not raise a claim of ineffective assistance of counsel based on issues surrounding the cross-examination or impeachment of a witness because such matters encompass trial strategy. *People v. Smith*, 177 Ill. 2d 53, 92 (1997); *People v. Pecoraro*, 175 Ill. 2d 294, 327 (1997). The method used to cross-examine a witness entails the exercise of professional

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judgment and we must give substantial deference to counsel's exercise of his judgment.

Pecoraro, 175 Ill. 2d at 326-27. If counsel's method of cross-examination was objectively unreasonable, then defendant will prevail on an ineffective assistance of counsel claim. *Id.* at 327. Merely claiming that another counsel would have cross-examined a witness differently, however, is not sufficient to establish that counsel's approach failed to meet the wide range of reasonable professional assistance. *Id.*

¶ 40 Defendant failed to satisfy the established criteria to find that his counsel provided ineffective assistance. The foundation of defendant's ineffective assistance of counsel claim is that counsel failed to elicit testimony during the cross-examination of the State's witnesses supporting his defense that the witnesses had a motive to identify him as the shooter who killed Hudson. Essentially, defendant disagrees with his counsel's cross-examination of witnesses, but such matters encompass trial strategy, which may not be used to support a claim of ineffective assistance of counsel. Even if defendant's requested testimony was elicited, the witnesses' alleged motivation to identify him as the shooter who killed Hudson is inconsequential to the State's burden of establishing that defendant possessed a weapon because a defendant need not discharge the weapon to be convicted of being an AHC. The relevant inquiry at the AHC trial was not who shot and killed Hudson, but did defendant possess a weapon. Thus, the motivation underlying the witnesses' testimony identifying defendant as the shooter that was elicited during the murder trial was irrelevant at the AHC trial. Moreover, counsel did elicit testimony from the witnesses establishing that defendant was not immediately arrested for Hudson's murder after the witnesses spoke to the police, and defendant acknowledges that counsel argued during his AHC

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trial that Brown's and Allen's testimony was unreliable. Also, counsel elicited from Brown that he spoke to the police following an investigative alert. Because Allen failed to recall information relating to the murder during the defendant's AHC trial, it is unlikely that he would have been able to recall information if counsel would have asked additional questions, even ones directed at asking why he made the pre-trial statements. Apart from relying on trial strategy as support for his ineffective assistance of counsel claim, defendant failed to establish that a reasonable probability existed that had testimony regarding the witnesses motives to identify him as the shooter been elicited, the result of his trial would have been different.

¶ 41 In finding defendant guilty of being an AHC, the trial court heavily considered the statements that defendant made to Detective Gorman and considered those statements very incriminating. Defendant claims that counsel was ineffective because alternative explanations for the statements were not offered. For example, defendant claims that his statements could be interpreted to mean that he thought Sheeba was dead, which is why he stated that deadmen cannot testify. However, it may be inferred that defendant made these statements knowing that Hudson was the individual who was shot because he made the statements after he was arrested for Hudson's death. Moreover, defendant's statement that Sheeba must have been the witness who identified him assumes that he was present at the scene and any alternative explanation of defendant's statements would not have refuted that assumption. Although the trial court believed these statements to be incriminating, defendant's proposed alternative interpretation would not establish that the outcome of his case would have been different and he was prejudiced from counsel's performance. Here, defendant failed to prove that counsel's performance fell below an

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objective standard of reasonableness or that he suffered prejudice from his counsel's performance.

¶ 42 *D. Krankel Inquiry*

¶ 43 Defendant contends on appeal that the trial court erred in failing to conduct a *Krankel* inquiry following his oral statements during sentencing that he was innocent and that Sheeba was not called to testify even though his testimony would have assisted his defense. Defendant also contends that members of the community knew that he "did not do this." Because the trial court failed to inquire into defendant's *pro se* claims that exculpatory witnesses should have been called to testify, he claims that the case should be remanded with instructions for the trial court to conduct an inquiry into his *pro se* oral ineffective assistance claims.

¶ 44 Defendant claims that the following statements that he made during the sentencing hearing raised an ineffective assistance of counsel claim warranting a *Krankel* inquiry:

"DEFENDANT: And then involved with Rasheed, I know he would come to testify, sir. * * * And they offered to throw his DUI out which he was charged with to make a statement against me, and the State knows that Rasheed was in the back, back here, and they did not use him, they scratched him off the list because he told them that he would come out here and mess their case up because these officers right here, Officer Burge and them who's under a corruption scandal now, they knew me. * * * And, your Honor, the community where I'm from knows that I did not do this. The community, your Honor. *** If you can have Rasheed subpoenaed to court, this Sheeba guy, Rasheed Mackmore, to come here to say something pertaining to the case, which the State don't

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even want him to come, they don't want him here to say nothing, he'll come testify on my behalf.

I have - I didn't pass the bar, you know, but I was, like, in the law library and I was going over some case law pertaining to what I'm sentenced on, the sentencing guidelines pertaining to being an armed habitual criminal. And it says that you have to receive, possess, transfer, or sell. I wasn't selling guns. I wasn't receiving them, and I wasn't transferring them. So in possession, there is no gun at all, sir. And you said - - -"

The trial court responded stating, in part, the following:

"THE COURT: Mr. Riley, I'm letting you talk as long as you want to talk, but you have a very good lawyer. You talk about going to the law library and stuff like that. The State had to prove certain things on the charge of being an armed habitual criminal, which in my opinion they did. Going to the law library, which is your right to do, I have no problem with that whatsoever, doesn't change the fact that in my opinion you had the weapon, you are convicted of two qualifying offenses which makes you, therefore, an armed habitual criminal. So going to the law library, whatever you found there, doesn't change the evidence in this case, doesn't change the law either. Anything else you want to say?

And you have a very good lawyer, but the problem with that, Mr. Riley, is no matter how good the lawyer happens to be, and you've got a very good lawyer, lawyers

cannot change the facts. They can put a different spin on them. They can make them look more favorable to their client, but they can't change them."

¶ 45 A trial court is required to adequately inquire into a defendant's *pro se* posttrial claim of ineffective assistance of counsel, and, in limited circumstances, appoint counsel on defendant's behalf to argue the claim. *People v. Remsik-Miller*, 2012 IL App (2d) 100921 ¶ 9 (2012).

According to *Krankel* and its progeny, when a defendant notifies the trial court regarding a claim of ineffective assistance of counsel, the trial court must make a preliminary inquiry regarding the validity of defendant's claims. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). A defendant, however, must raise a claim of ineffective assistance with a fair degree of specificity, and a trial court is not required to inquire into unarticulated facts and issues. *People v. Bolton*, 382 Ill. App. 3d 714, 719 (2008). Similarly, a trial court need not conduct a *Krankel* inquiry into bald allegations of ineffective assistance of counsel. *People v. Radford*, 359 Ill. App. 3d 411, 418 (2005). We review *de novo* a defendant's claim that the trial court erred in failing to conduct a *Krankel* hearing. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010).

¶ 46 Defendant failed to sufficiently raise a claim of ineffective assistance of counsel during his sentencing hearing to warrant a *Krankel* inquiry because his statements were conclusory and lacked specificity. Defendant, in his oral statements, did not expressly state that his counsel was ineffective nor did he specifically complain about his counsel's performance. *Id.* at 76. In fact, defendant made no specific mention of counsel during his statement and, thus, any alleged claim of ineffectiveness was not explicitly made. *Id.* at 77. Defendant claims that the trial court understood that he was complaining of counsel's performance because the trial court stated that

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he had a very good attorney. The trial court, however, made this statement in response to defendant's remark that he was researching the charge he was facing in the law library and after his proclamation of innocence, but not in response to defendant's claim that Sheeba should have been called to testify.

¶ 47 Turning to the content of defendant's statements, we note that defendant claims that if Sheeba appeared in court, he would say something pertaining to the case and he would testify on his behalf. However, defendant fails to elaborate about what the "something" was that Sheeba would testify to and how it would help his defense or change the outcome of the case. *People v. Reed*, 361 Ill. App. 3d 995, 1003 (2005) ("Defendant does not specify what the witnesses would have said on the stand or how they would have helped his case. He calls them 'witnesses,' but it is unclear what they witnessed.") Similarly, defendant's statement indicating that other people in the community knew that "he did not do this" also lacks specificity. Defendant failed to identify specifically who the "other people" were and how they knew that "he did not do this." Here, defendant's statements were unsupported by specific facts and were inadequate to raise a claim of ineffective assistance of counsel to warrant a *Krankel* hearing. Regardless, counsel's decision regarding who to call as a witness is a matter of trial strategy and may not form the basis of a claim of ineffective assistance of counsel. *People v. Ward*, 371 Ill. App. 3d 382, 433 (2007). The trial court is not required to inquire into a defendant's claims of ineffective assistance of counsel that address matters of trial strategy. *Id.* Because defendant's claims of ineffective assistance of counsel lacked specificity, the trial court was not under an obligation to conduct a *Krankel* inquiry. *Bolton*, 382 Ill. App. 3d at 720. Thus, remand to allow a *Krankel* inquiry is not

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necessary.

¶ 48

CONCLUSION

¶ 49 For the reasons stated, we affirm the trial court's finding that defendant is guilty of violating the AHC statute.

¶ 50 Affirmed.