

No. 1-10-2736

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County, Illinois
Plaintiff-Appellee,)	
)	
v.)	No. 03 CR 6016
)	
SHAUN HENDERSON,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

ORDER

¶ 1 *Held*: First, the trial court did not abuse its discretion during cross-examination when it required defendant to provide adequate expert testimony to introduce evidence about the perception and memory effects of marijuana. Second, a trial court's decision during a preliminary hearing on a motion for new trial alleging ineffective assistance of counsel is proper if the trial court has made the required inquiry into the factual basis of defendant's *pro se* claim. Given that the trial court properly inquired into defendant's claim and spoke to defendant, defendant's counsel, and State's counsel during his preliminary hearing, the trial court properly found defendant's claim meritless.

¶ 2 Defendant Shaun Henderson appeals from the circuit court of Cook County judgment that convicted him of attempted first degree murder. Defendant contends that the trial court improperly limited his right to conduct a reasonable cross-examination when it prohibited cross-examination regarding a key State witness's marijuana use on the day of the crime. The State responds that the court allowed defendant to attack the witness and properly limited defendant's right to cross-examine him. Further, the State contends that any possible error arising out of the court's restrictions during cross-examination is harmless error that does not prejudice defendant's conviction beyond a reasonable doubt.

¶ 3 Second, defendant contends that the trial court erred in denying his posttrial motion for new trial alleging ineffective assistance of counsel. Defendant further alleges that the trial court erred in conducting an unfair preliminary hearing. He states that it was reversible error for the trial court to deny his *pro se* motion for failure to investigate his alibi. The State responds that the trial court properly inquired into defendant's allegations and correctly dismissed them without prejudice. For the reasons that follow, we affirm the judgment of the trial court.

¶ 4 BACKGROUND

¶ 5 Defendant, Shaun Henderson, was charged with the attempted murder of Courtney Page who was shot in the stomach during a physical fight between him and three other men, including defendant, on January 7, 2003. Count one of the indictment alleged attempted first degree murder, and count two alleged aggravated battery with a firearm. After defendant pled not guilty, trial by jury took place on January 26, 2010. The jury found defendant guilty on both counts.

¶ 6 Since defendant did not challenge his presence at the crime scene, the issue during trial became one of identification; who, among the three men that attacked Page, held and shot the

gun against him. During trial the State called two main witnesses, Page and his ex-girlfriend, Mahogany Henry. The State also called Chicago Police Department Officer Gary Boldman, Detectives Randy Troche and Robert Brannigan, and Chicago Police Evidence Technician Watson to testify.

¶ 7 According to Page's testimony, on January 7, 2003, three men, defendant among them, attacked him as he was about to enter a single-entrance apartment building at 8020 S. Escabana Avenue in Chicago where he resided. He recognized one of the three men as "Shaun Moe." One of Shaun Moe's friends resided on the building's first floor.

¶ 8 Page testified that he had gotten into fights with Shaun Moe's friends before, but never with Shaun Moe himself. After exchanging words, Shaun Moe punched Page in the face after he declined to hold the building's door open. A fight ensued between the three men and Page. Shortly afterwards, one of the three men drew a gun, shot Page, and ran. Afterwards, Page's ex-girlfriend, Mahogany Henry, came downstairs. Later, Page identified the shooter as the defendant in a February 2003 photo array. However, at trial, Page was unable to do an in-court identification.

¶ 9 During cross-examination, in an attempt to discredit Page's testimony, defense counsel unsuccessfully tried to inquire about his marijuana use. While the defense had hospital records evidencing Page's marijuana use, the State objected and argued in a sidebar. After defense counsel presented an offer of proof – hospital records evidencing Page's marijuana use – the court sustained the State's objections and indicated that defense counsel lacked a proper foundation with testimony regarding perception and recollection effects of marijuana.

¶ 10 Henry, who testified next, witnessed the altercation through a door. She was inside the building when Page rang the building's doorbell, and came downstairs when she heard loud collisions. According to her testimony, she saw Page fighting two men on the building's porch. One of them drew a gun, shot, and fled. The shooter ran with one man, and another went inside the building. On January 10, 2003, she spoke to the police while at the hospital with Page. Based on her memory, she identified defendant as the shooter in a 2003 photo array and a February 2003 lineup. Later, Henry was able to identify defendant in court, stating that he "looked different" in 2003 as defendant wore braided hair.

¶ 11 The State called Officer Boldman, Detectives Troche and Brannigan, and Chicago Police Evidence Technician Watson. Officer Boldman testified that on January 7, 2003, he attempted to locate defendant at his house located at 8213 S. Manistee. There, he spoke to defendant's brother Demitrius. Demitrius notified defendant's father that the police were searching for defendant. Detective Troche was part of the fugitive apprehension unit that conducted defendant's arrest on February 4, 2003. Detective Brannigan testified that he investigated the shooting that took place on 8020 S. Escabana Avenue on January 7, 2003, and set up an investigative alert. However, he did not investigate the crime scene on the date of the crime. On or around that date, Detective Brannigan was unable to speak to Page because he was undergoing surgery. Further, shortly after the shooting, Detective Brannigan conducted a photo array during which both Page and Henry picked out defendant's picture and identified him as the shooter. On February 4, 2003, after defendant's arrest, Detective Brannigan conducted a lineup during which Henry was able to pick out defendant as the shooter. At trial, Detective Brannigan explained that the revolver used had a cylinder containing all bullet casings that does not eject shell casings like other weapons. Chicago Police Evidence Technician Watson

photographed and processed the crime scene. He testified about it and stated that he did not recover any ballistics evidence.

¶ 12 Once the State's witnesses testified, the defense moved for a directed verdict and rested. The jury returned a verdict of guilty on both counts. On September 7, 2010, the court sentenced defendant to 30 years in prison.

¶ 13 On March 3, 2010, after the verdict, the defendant presented a posttrial motion for new trial. Defendant argued that the trial court erred in excluding evidence of Page's marijuana use on the day of the shooting. This motion was denied the same day.

¶ 14 On March 18, 2010, defendant presented an oral *pro se* motion for new trial alleging ineffective assistance of counsel for failure to investigate. The court instructed defendant to write his *pro se* claim and name the witnesses that the defense counsel had failed to investigate. On April 12, 2010, defendant filed additional allegations and stated that defense counsel had failed to investigate his alibi witnesses, Joseph and Georgia Henderson. On May 26, 2010, the State filed a written response to defendant's *pro se* allegations and argued that defendant failed to state the relevance of the witnesses' testimony and whether their testimony would have been occurrence, alibi, or character testimony.

¶ 15 On May 27, 2010, the court held a preliminary inquiry into defendant's *pro se* motion. The trial court asked defense counsel to explain defendant's claim of failure to investigate. Counsel stated that because he had not decided to present an alibi defense, he did not interview the defendant's witnesses. Counsel also stated that he had spoken to one of the witnesses, that they were defendant's parents, and that they had no "direct knowledge" involving the case. Counsel stated that the witnesses were of no sound relevance to the case. The State stated that defendant's representation was sound. After listening to defendant, defendant's counsel, State's

counsel, and reviewing each paragraph of defendant's claim, the court found that defendant was adequately represented. Accordingly, the court denied defendant's *pro se* motion for new trial.

¶ 16 ANALYSIS

¶ 17 On appeal from that judgment, defendant now contends that the trial court erred by: (1) improperly limiting his right to conduct a reasonable cross-examination, and (2) incorrectly denying his post-trial motion for new trial alleging ineffective assistance of counsel.

¶ 18 In a criminal trial, the Sixth Amendment Confrontation Clause grants defendant the fundamental right to confront the witness. This includes the right to cross-examine. See, *e.g.*, *People v. Klinier*, 185 Ill. 2d 81, 130 (1998), and U.S. Const. amend. VI. Any matter that goes to disproving the witness's credibility may be developed during cross-examination. *Klinier*, 185 Ill. 2d at 130. When the issue is one of identifying the accused, the defense counsel possesses wide deference during cross-examination. *People v. Struck*, 29 Ill. 2d 310, 312 (1963). Further, defense counsel has the power to test the witness's memory, identification, and means of observation. *Id.* However, even vague identification may prove guilt beyond a reasonable doubt. *People v. Barnes*, 364 Ill. App. 3d 888, 894 (2006).

¶ 19 While the defense can rightfully discredit the witness during cross-examination, the trial court retains wide latitude during cross-examination. *Klinier*, 185 Ill. 2d at 130. However, the Confrontation Clause does not guarantee cross-examination that is effective to an unlimited extent. *Id.* at 134. Since the right to confront the witness is not absolute, it affords great discretion to the trial court. *People v. Whalum*, 2012 IL App (1st) 110959 at ¶22. Therefore, the Confrontation Clause does not preclude the trial court from imposing limits to the defense's cross-examination to preserve trial integrity, witness safety, and prevent witness harassment amongst other concerns. *Klinier*, 185 Ill. 2d at 134. On review, the appellate court

should not interfere with the trial court's wide discretion during cross-examination. *Id.* at 130. Absent abuse of discretion, the appellate court will not reverse a trial court's decision to limit cross-examination. *Whalum, supra* at ¶23. In restricting the limits during cross-examination, it is error when the court does not allow any possible means of impeachment. *People v. Morris*, 30 Ill. 2d 406, 409 (1964).

¶ 20 In reviewing whether the trial court improperly limited defendant's right to cross-examine the witness, the court is to review the entire record and ask whether defendant's inability to introduce the inquiry created substantial danger of prejudice resulting in defendant's inability to test the witness's truthfulness. *Whalum, supra* at ¶23. The court must look at whether the defense had alternative means of impeachment. *Id.* However, no constitutional question arises when the trial court prohibited defendant's inquiries into outside matters. *Id.* If defendant's theory is uncertain or remote, the trial court may properly limit cross-examination. *Id.*

¶ 21 Defendant contends that while the court allowed him to cross-examine Page, it improperly limited his ability to impeach and attack his credibility. According to defendant, the court should not have granted the State's objection and should have allowed him to ask Page about his marijuana use on the day of the crime. With this line of questioning the defense intended to advance the theory that given Page's marijuana use on the day of the crime, he would be scientifically unable to recollect which of the three men held the gun. Further, given Page's hostile relationship with defendant's friends and his marijuana use on the day of the crime, the defense intended to prove that Page's identification was biased against defendant regardless of whether he was holding the gun. The defense further intended to prove that Page, through his biased misidentification, influenced Henry to make the same misidentification.

Therefore, through the question about Page's marijuana use, the defense intended to discredit both Page's and Henry's identification testimonies. However, the State responds that the court did allow defendant to attack the witness's credibility, and that if it erred in limiting defendant's cross-examination, it is harmless error that does not discredit defendant's guilt beyond a reasonable doubt.

¶ 22 In evaluating the witness, evidence of substance abuse or habitual drug use is a substantial factor not only to show the witness's dishonest character, but to prove the witness's lack of ability to perceive or recall facts accurately. *People v. Di Maso*, 100 Ill. App. 3d 338, 342 (1981). Self-intoxication on or around the time of the crime is admissible evidence to attack the witness's memory and perception. *In re C.L.*, 180 Ill. App. 3d 173, 180 (1989). Further, a witness's intoxication at the time of the crime he testifies about is admissible evidence that goes to affect the weight of the evidence. *People v. McGuire*, 18 Ill. 2d 257, 259 (1960). However, the fact-finder is to assess the witness's credibility. *People v. Brown*, 2012 IL App (2nd) 110640 at ¶17. The fact-finder can make all reasonable conclusions based on the evidence's weight. *Id.* at ¶20. Its judgment will not be disturbed unless the evidence is uncertain or unclear about defendant's guilt beyond a reasonable doubt. *People v. Bazemore*, 25 Ill. 2d 74, 77 (1962). Absent unusual circumstances, the appellate court will not interfere with the jury's decision about the weight of the evidence. *McGuire*, 18 Ill. 2d at 259.

¶ 23 In the present case, during cross-examination, the trial court sustained the State's objection to the defense's marijuana question, making it inadmissible evidence without the proper foundation and expert testimony. The court stated that defense could ask the question if it first laid a proper foundation with expert testimony on the effects of marijuana use. Therefore, the court gave the defense a proper means for impeachment. Instead, defense counsel chose not

to introduce an expert in that respect and effectively lost the opportunity to render such evidence admissible.

¶ 24 The court permits expert testimony for complex matters outside the average person's understanding. *People v. Albanese*, 104 Ill. 2d 504, 518 (1984). The court can also permit expert testimony in issues that are common knowledge, but difficult to comprehend. *Id.* However, statements based on legitimate inferences from the evidence are not improper arguments. *Id.*

¶ 25 In the instant case, the defendant argues that it was improper for the court to require expert testimony on the matter that marijuana use affects the witness's perception and memory. Further, defendant argues that marijuana use is as common as alcohol use such that expert testimony is unnecessary. However, defendant does not provide any case law that states that the trial court does not need expert testimony to introduce evidence about the effects of marijuana use. Instead, defense cites *People v. Strother*, 53 Ill. 2d 95 (1972), in which our supreme court stated that it was reversible error for the court to require a medical doctor to examine a witness's scars - needle marks - instead of showing the jury directly and permitting them to weight the evidence. See *Strother*, 53 Ill. 2d at 99. However, needle marks are a visual factor, while the perception and memory effects of marijuana cannot be reasonably inferred from paperwork indicating that on the day he was shot, the witness tested positive for marijuana. See, e.g., *id.* Thus, the trial court did not abuse its discretion in requiring expert testimony on this matter.

¶ 26 Moreover, even if we were to find that the trial court improperly limited defendant's right to cross-examine the witness, it would be harmless error. See *Kliner*, 185 Ill. 2d at 130. In inquiring whether an error is harmless beyond a reasonable doubt, the reviewing court must address six main factors:

“These factors include the importance of the witness' testimony in the prosecution's

case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *People v. Davis*, 185 Ill. 2d 317, 338 (1998), quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

When inquiring into whether an error is harmless beyond a reasonable doubt, the court should ask whether the harm complained of contributed to defendant's conviction. *Chapman v. California*, 386 U.S. 18, 23 (1967). Error is harmful when it affects a defendant's substantial rights. *Id.*

¶ 27 A single credible identification can be grounds for conviction. *Barnes*, 364 Ill. App. 3d at 894. In this case, while Page's testimony was of great importance during trial, as he is the victim of the crime, his testimony was cumulative. Even though he was unable to identify defendant in court, his lack of identification during court could be due to the fact that defendant had a different hairstyle during the commission of the crime.

¶ 28 Further, Henry corroborated Page's testimony by identifying defendant in a line-up, photo array, and in court. Additionally, it was Henry who indicated that defendant had a different hairstyle during the commission of the crime. Even if for some reason Page's testimony is not strong enough to prove defendant's guilt beyond a reasonable doubt, the record shows that Henry's testimony was sufficient to prove defendant's guilt beyond a reasonable doubt. Given Henry's repeated and consistent identification of the defendant, any possible error arising out of Page's cross-examination is harmless beyond a reasonable doubt.

¶ 29 Absent an abuse of discretion of the trial court, the appellate court will not disturb the lower court's discretion during cross-examination. *Whalum, supra* at ¶23. This case does not

show a clear abuse of discretion from the trial court. Thus this court affirms the trial court's decision to require expert testimony as a foundation for questioning Page on his marijuana use.

¶ 30 Next, defendant contends that during his preliminary hearing for his *pro se* motion under *People v. Krankel*, the court erred in not giving him a new attorney and accepting defense counsel's "naked, uninformed choice not to investigate an alibi defense" as an accurate explanation for failing to interview defendant's alibi witnesses. See *People v. Krankel*, 102 Ill. 2d 181, 189 (1984). The State responds by stating that the trial court properly inquired into defendant's *pro se* motion of ineffective assistance of counsel and correctly denied the motion. Therefore, defendant's motion lacked merit and did not warrant appointment of new counsel under *Krankel*. See, e.g., *People v. Moore*, 207 Ill. 2d 68, 77 (2003). We agree.

¶ 31 In *Krankel*, our supreme court indicated that failure to appoint a new attorney for a *Krankel* hearing for ineffective assistance of counsel for failure to investigate an alibi defense amounted to reversible error. *Krankel*, 102 Ill. 2d at 189; *Moore*, 207 Ill. 2d at 68. However, our supreme court interpreted its ruling in *Krankel* in a later decision, *Moore*. In that case, our supreme court stated that appointment of new counsel for a *Krankel* hearing is necessary when defendant's allegations demonstrate counsel's possible neglect of the case. *Moore*, 207 Ill. 2d at 77. However, if defendant's claim is improper or concerns matters of trial strategy, the court may deny the motion without appointing new counsel. *Id.* at 77-78. On review, the appellate court will not disturb a trial court's decision not to appoint new counsel unless the decision is manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008).

¶ 32 On appeal, the issue becomes whether the trial court adequately inquired into defendant's *pro se* allegations. *Moore*, 207 Ill. 2d at 78. At least some inquiry into defendant's claim is necessary. *Barnes*, 364 Ill. App. 3d at 899. The appellate court reviews the question of

court inquiry adequacy *de novo*. *Vargas*, 409 Ill. App. 3d at 801.

¶ 33 In addressing defendant's claim, the court is to inquire into its factual basis. See, *e.g.*, *Barnes*, 364 Ill. App. 3d at 899, and *McCarter*, 385 Ill. App. 3d at 940. In conducting a preliminary investigation regarding alibi witnesses, under *Krankel*, the court is to inquire about the witness's identity, the substance of their testimony, and defense counsel's awareness of such witness. *McCarter*, 385 Ill. App. 3d at 942. Proper trial court inquiry varies from simple interchanges between the court and counsel, to a brief discussion between the court and defendant. *Moore*, 207 Ill. 2d at 78. Where the issue involves whether defense counsel should have called an alibi witness to testify, it involves issues of trial strategy reserved for counsel's discretion. *McCarter*, 385 Ill. App. 3d at 942.

¶ 34 The instant case involves a preliminary inquiry to a *Krankel* hearing that included conversations between the court and defendant, defense counsel, and the prosecution. Defendant indicated his perception of error, namely his defense counsel's failure to investigate his alibi witnesses. He named the witnesses as his parents, Georgia and Joseph Henderson. Thereafter, the court spoke to defense counsel. Defense counsel stated that he had spoken with one of the witnesses, but decided not to include them in matters of the trial case because they were not relevant to the case since they were not at the scene of the crime and had no involvement in it. Further, he stated that he did not call them to testify because they would only be useful for an alibi defense and counsel had decided not to present one at trial. For its part, the State indicated that defendant's representation during trial was proper. As a result, the court denied defendant's motion for new trial based on ineffective assistance of counsel without appointing new counsel.

¶ 35 We find that the trial court properly inquired into defendant's claim. It spoke to

defendant, defendant's counsel, and State's counsel. It properly found that defendant's contentions were meritless (see *McCarter*, 385 Ill. App. 3d at 942 (issues of trial strategy, such as whether to call an alibi witness, are reserved for counsel's discretion)), and properly denied defendant's motion. Given that defendant's contentions at his preliminary *Krankel* hearing were meritless, they did not warrant appointment of new counsel under *Moore*. See *Moore*, 207 Ill. 2d at 77.

¶ 36 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 37 Affirmed.