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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE)	Appeal from the Circuit Court
STATE OF ILLINOIS,)	of De Kalb County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-132
)	
ZACHARY R. ISAACMAN,)	Honorable
)	Robbin J. Stuckert,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* Trial counsels' performance fell below an objective standard of reasonableness where they failed to communicate with defendant and where they failed to investigate three known witnesses who would have corroborated their theory of the case. Counsels' deficiencies prejudiced defendant in that the lack of corroborating evidence allowed for a debilitating attack on defendant's credibility. Reversed and remanded for a new trial.

¶ 2 A jury convicted defendant, Zachary R. Isaacman, of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010) (Class X felony) (defendant knowingly or intentionally by means of discharging a firearm causes injury to another person) (repealed by P.A. 96-1551 (eff. July 1,

2011)) and aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1) (West 2010) (defendant carries on or about his person an uncased, loaded, and immediately accessible firearm while not on his own land, abode, fixed place of business, or as an invitee) (Class 4 felony)).

¶ 3 Posttrial, defendant filed two *pro se* motions for a new trial, each alleging ineffective assistance of counsel. Defendant had been represented by two attorneys: John Paul Carroll and an assistant.¹ Following a line of cases beginning with *People v. Krankel*, 102 Ill. 2d 181 (1984), the trial court determined that the factual allegations showed possible neglect of the case and appointed a public defender to represent defendant on the motion. At the *Krankel* hearing, defendant essentially argued that counsel did not adequately prepare for trial, ignoring correspondence from defendant and failing to investigate the case. The court agreed that counsel’s preparation was “imprudent,” but found that conduct was outweighed by a strong courtroom performance. Additionally, the court stated that better preparation would not have changed the outcome. Accordingly, the court denied the motion and sentenced defendant to 10 years’ imprisonment for aggravated battery with a firearm and 2 years’ imprisonment for aggravated unlawful use of a weapon, to be served concurrently. Defendant now appeals, arguing that the court erred in its *Krankel* ruling. For the reasons that follow, we agree. Reversed and remanded for a new trial.

¶ 4 I. BACKGROUND

¶ 5 A. Overview of the Crime and Theory of the Case

¶ 6 The instant case involves an altercation between two students at Northern Illinois University (NIU), occurring outside one of the university’s dormitories and ending in a single gunshot wound

¹ We name Carroll because he handled opening statements, the questioning of witnesses, and closing argument.

to the leg of the victim. Defendant was 22 and approximately 5 feet, 6 inches and 150 pounds. The victim, Brian Mulder, was 24 and approximately 6 feet and 200 pounds.²

¶ 7 In opening statements, defense counsel told the jury defendant would concede that he shot Mulder in the leg (and all but admitted to the offense of aggravated unlawful use of a weapon). The question for the jury would be whether defendant committed the offense of aggravated battery with a firearm or whether he acted in self-defense. The defense argued the evidence would show that defendant acted in self-defense, stating: “[A]s [Mulder] approaches [defendant], *[Mulder] takes out a knife and makes a sweeping, a sweeping movement with the knife.*” (Emphasis added.) The defense made no mention that the evidence would show the gun went off in a struggle, supporting the defense of accident.

¶ 8 B. Witness Testimony

¶ 9 The only street-level witnesses were defendant and Mulder. However, many witnesses saw the crime, or parts thereof, unfold from the vantage point of their dorm rooms several stories up. Unfortunately, many of the witnesses of this late-night crime could not see very well or, by their own admission, were intoxicated. Therefore, accounts differ slightly. Though not the order at trial, we begin with the accounts of defendant and Mulder, which align on one critical point: Mulder’s hand was on defendant’s arm area and/or the gun when the gun went off.

¶ 10 Defendant testified in direct examination that, at around 2 a.m. on February 18, 2010, he left his fraternity house to visit his friend, Patricia Lee, also a student at NIU. Defendant carried a loaded handgun in the inner pocket of his jacket. He claimed he did this for protection; it was late at night,

² Defendant’s size is noted in the charging instrument. Mulder’s size is referenced in argument, a description not challenged in court nor inconsistent with photos of Mulder in the record.

he was alone, and he had been “jumped” in the past.³ Defendant cut across an area known as Eco Park. He came out of the park area and crossed onto a median in the road, facing the Stevenson Towers, an NIU dormitory. At this point, he attempted to send Lee a text message, letting her know he was on his way, but his phone battery died. He swore loudly in frustration: “F***ing piece of s***.” Mulder, who was standing outside the dorm, heard him and responded: “Who the f*** do you think you’re talking to, faggot?” The two began to yell at each other. Mulder crossed the street and “stormed up” to defendant in a “very aggressive demeanor.” Defendant noticed that Mulder seemed “very drunk.” Defendant himself had one drink that night. Mulder said, “You’re going to look awfully funny with this knife sticking out of your ass.” In contrast to his attorney’s opening statement, defendant did *not* see a knife, but he believed that Mulder had one. In response to Mulder’s comment about the knife, defendant said, “I have a gun, and if you attack me, I have to defend myself.” Defendant then pulled out his gun and showed it to Mulder. Mulder grabbed the barrel of the gun and started pulling it down. With his free hand, Mulder reached into his pocket. He said, “You’re dead,” and he told defendant that he would “cut the s*** out of [him].” At that time, the gun discharged. When the gun discharged, both defendant and Mulder were pulling on the gun. When asked whether he “ever intended to shoot [Mulder] when he grabbed that gun,” defendant answered, “No, sir.” Upon seeing that Mulder was shot in the leg, defendant turned and ran back through Eco Park.

¶ 11 Defendant was apprehended on the other side of Eco Park, where he immediately surrendered to police. In addition to the gun that defendant had thrown down nearby in the snow, police found

³ It was elicited in cross-examination that defendant had been trained in the martial arts and that he was an “instructor.” Defendant’s presentence report documents that he was a yoga instructor.

that defendant had a folding knife in his pocket (in closed position). Police reports show that defendant's initial statements to police were: "I f***d up" and "I did what I had to do." None of the several apprehending officers to testify recounted any other statements by defendant pertaining to the facts of the case.

¶ 12 During cross examination, the State elicited a similar account from defendant, which we quote:

"Q. You said, quote, 'I have a gun and if you attack me, I have to defend myself'?"

A. Yes, ma'am.

Q. That's what you said?

A. Yes, ma'am.

Q. Did you say anything else?

A. No, ma'am.

Q. At this point is this when [Mulder] brought out a knife?

A. No, ma'am.

Q. Still no knife in sight?

A. No, ma'am.

Q. Now, [Mulder] didn't punch you, did he?

A. No, ma'am.

Q. He didn't push you, did he?

A. No ma'am.

Q. He didn't punch—or slap you, did he?

A. No, ma'am.

Q. He didn't kick you, did he?

A. No, ma'am.

Q. And in your opinion, [Mulder] was very intoxicated, very drunk?

A. Yes, ma'am.

Q. And so you pulled your gun out of your pocket; isn't that correct?

A. Yes, ma'am.

Q. Your loaded gun?

A. Yes, ma'am.

Q. The gun that you only needed to pull the trigger to shoot?

A. Yes, ma'am.

Q. And you pulled it out with your left hand?

A. Yes, ma'am.

Q. So, you're standing there with a gun, [Mulder] is standing there very drunk with no weapon in sight and *** says, 'You're dead?'

A. Yes, ma'am.

Q. At this point you've got the gun in your left hand, so [Mulder] grabs it with his right?

A. No, ma'am. Grabbed it with his left.

Q. And at the same time that he's grabbing your gun with his left hand and starts pushing it down?

A. Yes, ma'am.

Q. And as he's pushing it down with his left hand he's pulling—he's putting his hand into his pocket?

A. Yes, ma'am.

Q. To I assume you're going to say pull out this alleged knife?

A. Yes, ma'am.

Q. Did you ever see a knife?

A. No, ma'am.

Q. At the same time [Mulder] is doing this he says, quote, allegedly, 'I'm going to cut the shit out of you?'

A. Yes, ma'am.

Q. So [Mulder] falls to the ground when he's shot; is that correct?

A. Yes, ma'am."

The State did not impeach defendant based on prior statements to police as to his assertion that the gun went off in a struggle.

¶ 13 Mulder testified that, in the five or so hours preceding the shooting, he attended a house party at a fraternity. He had approximately 10 drinks, both beer and hard alcohol. Upon returning to his dorm, he smoked marijuana. Around 3 a.m., he and a friend, Kevin Anderson, went outside the Stevenson Towers to smoke a cigarette. Mulder did not have a weapon. Mulder noticed defendant "walking up the sidewalk" toward the dorm. He had never met defendant before. Defendant asked if he could go inside the dorm, and Mulder said no. Defendant became frustrated and "a little angered." At that point, Anderson went inside, and Mulder continued to talk with defendant. Mulder asked defendant where he was going, and defendant said Eco Park. Mulder told defendant how to get to Eco Park. After telling defendant how to get to Eco Park, defendant became "a little

more frustrated and angered and to the fact where he pulled out a gun and pointed it at [Mulder's] forehead." Mulder recalled what happened next:

"I didn't really know what to do but I asked him if he was going to shoot me and all I remember is him reacting with a twitch of his eye so I wasn't going to hesitate. I grabbed the gun, pulled it down to the side and then in the struggle of what was going on it got aimed at my leg and then it went off and shot me in the leg."

Once the gun went off, defendant fled in the direction of Eco Park. Mulder limped out to the median and declared that he had been shot. He was taken to the hospital.

¶ 14 During cross-examination, Mulder admitted that he told a different story to police. He explained that any inconsistencies between his testimony and his initial statement to police were due to the pain medication he received at the hospital. The defense read into evidence Mulder's initial written statement to police. Mulder told police that he first saw defendant with a woman near the side entrance of the dorm. They were arguing. Mulder approached defendant and told him to relax. The woman, who Mulder did not know and could describe only as "thin" (and whom police apparently never located), went inside the dorm. Defendant "looked like he wanted to take action" but said nothing and retreated to the bus stop median across the street from the dorm. Mulder approached defendant and told him to "go home and let it go." Defendant was "reluctant to leave" and approached the dorm. Mulder put his arms out to deny defendant passage. Defendant then pulled out a gun. Mulder said, "you don't have to do this," and asked "what are you doing?" Defendant responded by shooting Mulder's upper leg. Then, defendant fled. Anderson then went inside the dorm to notify security.

¶ 15 Aside from defendant and Mulder, the police took statements from approximately 15 crime-scene witnesses. However, only four testified. These were students Christopher Nakis, Abhishek Tiwari, and Taylor Scroggins, as well as NIU employee Davonna Manuel. For reasons unknown to this court, Anderson did not testify.

¶ 16 Nakis, age 20, testified that, on the night of the shooting, he was in his dorm room on the fourth floor of the Stevenson Towers. He had not taken any drugs or consumed any alcohol that night. He was working on a paper, and he had cracked open his window for fresh air. He heard voices, and he looked out the window. He saw defendant, who he did not know, walk out from under the smoking benches in front of the dorm toward the median in the street. Defendant was yelling at a person or people near the smoking benches. Nakis recalled:

“[Defendant] said, ‘Come out here,’ like he was calling them out saying that he wants to fight them, and he—and he was like saying, ‘Oh yeah, I can take you and your crew. Come on, why don’t you fight,’ and there was no response from anybody on the bench.”

A minute later, Nakis saw Mulder, who he recognized as his neighbor’s friend, walk into the street. As Mulder walked closer to defendant, defendant said, “I have a *knife*. If you get any closer, I have the right to use it.” (Emphasis added.) Mulder responded, “Yeah, right, like you’re going to stab me?” Nakis could not hear everything that Mulder said because Mulder was speaking more quietly than defendant. Mulder continued walking closer and said, “go home.” Mulder never got closer than five feet from defendant when defendant pulled out a gun and shot him. Defendant fled toward Eco Park.

¶ 17 At one point, Nakis asked to take a break in his testimony because he was nervous. Then, during cross-examination, Nakis clarified that he heard Mulder say both that defendant had a knife

and a gun. Mulder said, “You have a *gun*. Are you serious?” (Emphasis added.) Then, defendant said, “I have the right to use it if you attack me.”

¶ 18 Tiwari, a sophomore at NIU, testified that, during the five hours before the shooting, he and his friends had been drinking “jungle juice,” a fruit punch and vodka mix. At around 3 a.m., Tiwari took a break from his friends and went outside the Stevenson Towers to smoke a cigarette. Tiwari sat on the smoking benches and noticed Mulder and Anderson. Mulder was a “social friend;” Tiwari and Mulder visited three or four times per week, spoke on the phone, and occasionally went places together. Tiwari saw that Mulder was talking to defendant. He could not recall anything specific that they said. He characterized Mulder as “relaxed” and defendant as “aggressive and agitated.” Tiwari finished his cigarette and went inside. As he walked between the glass doors of the dorm, he heard a gunshot. Tiwari heard Mulder yell out and knew it was Mulder who had been shot. However, he continued up to his dorm room. He did not want to be a witness because he did not want the police to see that he had been drinking.

¶ 19 During cross-examination, Tiwari conceded it would be fair to say that he was “intoxicated” and “drunk” the night of the shooting. He spoke to police the next day, and, in contrast to his testimony at trial, he said that he remembered hearing defendant say, “F*** you. I’ll kick you’re a***” and Mulder respond, “clam your f***ing mouth.” Also in contrast to his testimony, he told police that he saw defendant shoot Mulder.

¶ 20 Scroggins, age 22, also attended the fraternity party on the night of the shooting. He saw Mulder there. Scroggins had seven or eight beers. He returned to the Stevenson Towers at around 1 a.m. At around 3:30 a.m., he was in bed watching television. Scroggin’s window was open a crack. He heard loud voices, so he got up to close the window. He saw Mulder and a couple other people

smoking. He saw defendant walk from the lagoon (Eco Park) area toward Stevenson Towers and up to the median. He saw Mulder walk from the dorm toward defendant near the median and say something to the effect of: “What are you doing here. You don’t live here.” Defendant asked for directions. He saw defendant reach toward his jacket pocket and heard Mulder ask, “What, do you have a knife?” Mulder continued to walk toward defendant. When Mulder was five or six feet away, defendant’s hand went up toward him. Scroggins could not see what was in defendant’s hand, but he saw a flash and heard a gunshot. Defendant then fled toward Eco Park.

¶ 21 During cross-examination, Scroggins conceded that he was friends with Mulder. He and Mulder talked about the shooting before Scroggins made a statement to police several days later.

¶ 22 NIU employee Davonna Manuel testified that, on the night of the shooting, she was checking the ID’s of students entering the dorm. She heard arguing outside the dormitory. She did not report hearing any exact words or phrases. After about five minutes, she got up to see what was going on. Before she got to the window, she heard a gunshot. She ran to the phone and called the police. She was not able to give the police a description of the perpetrator, because she had not actually seen anything. She only heard general arguing.

¶ 23 Next, numerous officers testified to their investigation. Particularly, as to defendant’s apprehension, police officer Michelle Anderson said that she arrived at Eco Park after defendant was in custody. As she walked past him, she heard him say to another officer, “I just got jumped by three guys.” During cross-examination, Anderson conceded that she had not been paying much attention to the conversation. She could not say whether the statement was part of a larger conversation as to why defendant had been carrying a gun with him in the first place. As to forensics, the bloody jeans Mulder had been wearing were recovered at the hospital. There was no knife in the pocket.

¶ 24

C. Closing Argument and Deliberation

¶ 25 In closing argument, the State reminded the jury that defendant essentially admitted to the crime of aggravated unlawful use of a weapon. In summing up defendant's decision to walk around a college campus with a gun, the State called defendant "a one-man militia." The defense did not object.

¶ 26 The State then moved to the crime of aggravated battery with a firearm and defendant's claim of self-defense. The State recapped:

“[Defense counsel] said the evidence is going to show you folks that *the victim had a knife and that he made this big sweeping motion at the defendant.* Then he told you that before the victim pulls out the knife but after he tells the defendant he has this knife that the defendant said to the victim, ‘Hey, wait a minute. I’ve got a gun.’

Well, guess what. That isn't the evidence at all. In fact, defendant got up there and sat in that chair and told you that he never saw a knife. You heard the police never recovered a knife [from Mulder]. *** The defendant himself sat up there and he didn't tell you that the victim made this big sweeping motion with this knife that he had.” (Emphasis added.)

The State noted that defendant's account seemed unlikely: defendant, a relatively sober man trained in the martial arts, could not maintain control of the gun *vis-a-vis* Mulder, a drunk man who somehow had the coordination to reach for a knife during the struggle. The State concluded: “[t]his knife [did] not exist anywhere other than in [defendant's] *** make-believe world.”

¶ 27 As to witness credibility, the State discounted defendant, for the reasons set forth above. It discounted Mulder, who, according to the State, was too severely intoxicated to provide accurate, consistent testimony. It promoted the three students, claiming only “minor variances” amongst their

testimony. According to the State: “[T]he three of them told you the same and that’s that [Mulder] was attempting to calm the defendant down[.] *** He was attempting to diffuse the situation of this *mad gunman* who’s on the campus of [NIU].” (Emphasis added.) The defense objected to the phrase “mad gunman.” The court sustained the objection and told the jury to disregard the phrase.

¶ 28 As to the necessary *mens rea* for aggravated battery with a firearm, the State commented: “the defendant must have knowingly caused injury to another person. *Well, we know that happened.* He shot him. *** The *only issue* for you to determine is whether or not the defendant shooting the victim was justified.” (Emphases added.) The State proceeded to inform the jury what the instruction for self-defense would require.

¶ 29 Then, the State recapped defendant’s post-crime behavior and asked the jury to consider whether that was the way a person who was justified in shooting another would behave. For example, would a person who acted in self-defense flee, or would he go to the dormitory for help? As to the way defendant behaved when apprehended, the State commented:

“And then when he is apprehended by the police you didn’t hear any police come in and testify that the defendant *** [said], ‘Oh, my gosh, the man that I had to shoot to protect myself, is he okay? He’s not dead, is he? I didn’t want to shoot him. He made me do what I did. I had to shoot him.’”

The defense objected, presumably to any implication that defendant had a burden to prove his innocence. The court sustained the objection, telling the jurors to disregard the remarks. The State continued, “ask yourself if the defendant behaved as a reasonable person standing in his shoes.”

¶ 30 In its closing response, defense counsel again conceded that defendant had a gun and that he shot Mulder. He then stated: “The issue is self-defense.” The defense focused on the three student

crime-scene witnesses. The defense rhetorically asked the jury to consider why, out of all the many students that lived in the dorm, the State chose to call these three witnesses. The defense suggested that Tiwari's testimony should be discounted; he admitted to being intoxicated, he did not remember anything, and he claimed to have walked inside before the shooting took place. The remaining two witnesses, Nakis and Scroggins, were Mulder's friends.

¶ 31 The defense then recapped evidence supporting Mulder as the aggressor. The defense noted that Scroggins, Mulder's own friend, testified that Mulder closed the distance between defendant and himself. The defense further suggested that, while Scroggins is sure he heard Mulder say the word "knife" he cannot have been sure from a distance of five stories up and a cracked window, whom was threatening whom. The defense noted that defendant, who was relatively small in stature, was likely intimidated by Mulder, who was large in stature, and who quickly approached him, very intoxicated, shouting profanities, calling him a "faggot," and threatening to use a knife. The defense suggested that this was an adequate prompt for defendant to reveal his gun.

¶ 32 Then, the defense seemed to switch its recap of events from one of self-defense to one of accident:

"Here I am. I have a gun. The other guy grabs my gun. He pulls on it. Now, my trigger is inside. I'm not going to let go of the gun. I'm not going to let this guy have it. I want my gun. He pulls, I pull, the gun goes off.

I told you at the beginning that gun shot [Mulder]. I didn't tell you that [defendant] wanted to shoot [Mulder]. *** [W]hatever happend[,] *** he was pulling on the gun and [Mulder] was pulling on the gun and that's the unpredictability of drunks.

*** Two foolish men, but it wasn't intentional."

The defense then took issue with the State's assertion that the element of knowingly causing an injury was a forgone conclusion: "someone may argue that's an accepted thing. We don't accept that at all. He didn't knowingly do anything, cause an injury. He [caused an injury] by discharging the firearm. That firearm was discharged with two grown men who were grappling for it."

¶ 33 Finally, the defense addressed Michelle Anderson's testimony that she walked past defendant at Eco Park and heard him tell other officers that he had just been jumped by three men. The defense explained that the State was trying to show that defendant gave inconsistent accounts of the shooting. However, the defense asked the jury to remember that Anderson did not know the context. It was just as likely that defendant made the statement to explain why he carried a gun in the first place. That statement would have been consistent with his testimony at trial.

¶ 34 In rebuttal, the State attempted to bring out inconsistencies in the defense's theory of the case:

"[T]he first day of trial, we hear a story from the defense attorney. *** [Mulder] has a knife, [Mulder] is swiping at the defendant with the knife so the defendant shoots. Then yesterday we hear from the defendant, oh, no, wait. *** [Mulder] didn't have a knife. [Mulder] just threatened that he had a knife. *** Is it reasonable that a story that you hear for the very first time at the very end of the trial is the truth? Is that what an innocent person would do?"

¶ 35 The jury retired to deliberate. It was given instructions regarding the elements of the charged offenses and the elements of self-defense. Upon deliberation, the jury asked for a definition of "knowingly," and whether "knowing" had anything to do with intent. The court instructed the jury with both paragraphs of Illinois Pattern Jury Instruction, Criminal, No. 5.01B (4th ed. 2000), which

defined “knowingly” in part as “conscious[] aware[ness] that such result is practically certain to be caused by [one’s] conduct.” The jury found defendant guilty on both counts.

¶ 36 *D. Krankel Hearing*

¶ 37 After trial, defendant filed two *pro se* motions for a new trial, each alleging ineffective assistance of counsel. Following a line of cases beginning with *Krankel*, the trial court determined that the factual allegations showed possible neglect of the case and appointed a public defender to represent defendant on the motion.

¶ 38 At the *Krankel* hearing, defendant, through new counsel, argued that attorney Carroll and his assistant had been ineffective for failing to communicate with him and for failing to properly investigate the case. Defendant’s new counsel called defendant, Carroll, Carroll’s assistant, defendant’s mother Deborah Jean Galen, crime-scene witness Mercedes Lawson (who did not testify at trial), and investigator Crystal Harrolle.

¶ 39 Defendant testified that, in March 2010, while in jail, Carroll and his assistant solicited him. They were there to visit other clients. Defendant hired them. From March until May, defendant called them many times, but not a single call was answered or returned. He then decided that letters might be a better approach, and, between May and December, sent them over 20 letters. In the letters, he specifically asked them to interview three crime scene witnesses who indicated in their statements to police that Mulder, not he, was the aggressor: Mercedes Lawson, Mark Snyder, and Sarah Martin.⁴

⁴ Defendant also asked them to request a hospital inventory to see if doctors found a knife on Mulder when he was taken to the emergency room. We do not focus on this alleged error; the State sent a subpoena to the hospital. Therefore, we will never know whether defense counsel would have otherwise pursued the request.

Carroll and his assistant did not answer a single letter and defendant did not see Carroll again until the trial, which took place over several days in December.⁵

¶40 Carroll admitted that, aside from the initial solicitation, he did not see defendant until the trial and did not answer any of the calls or letters. Instead, he spoke with defendant's mother. Carroll never interviewed Lawson, Snyder, or Martin, as requested by defendant. Carroll could not remember the names of any witnesses with whom he spoke.

¶41 Carroll's assistant testified, and the jail logs support, that she visited defendant once more than Carroll, in June 2010. She did not provide details of that visit. She never spoke with defendant on the phone or responded to any of his letters. Instead, she spoke with defendant's mother. She never interviewed Lawson, Snyder, or Martin. She, too, could not remember the names of any of the witnesses with whom she spoke. She did, however, remember reviewing police reports in preparation for trial.

¶42 Galen, defendant's mother and a physician, testified that she placed over 40 unreturned phone calls to Carroll and his assistant (several dozen from her cell phone and 10 from her work). She only received two or three calls from Carroll and three or four from his assistant. None of these calls concerned the facts of the case. In one conversation, Carroll told her to remind defendant that he knew the law and he would see him in court. In another conversation, the assistant told her that she

⁵ The record reflects that defendant appeared at status hearings via video transmission from the jail, and the record does not reflect any communication between them. Moreover, at an April 2010 status hearing, Carroll did not appear, and the State reported to the court that defendant's mother had been complaining that he never returned her calls. At a September 2010 status hearing, neither Carroll nor his assistant appeared, so the State requested a continuance.

thought they would win because “the truth is such a subjective thing” and Carroll is an “expert.” Galen sent a text message to the attorneys asking if they planned to interview witnesses, and they responded “yes.”

¶ 43 Lawson, one of the crime-scene witnesses, testified that she was in her dorm room on the 10th floor when the shooting occurred. She heard people in the street below yelling and arguing. She heard the phrases, “is that a knife,” and “I have the right,” but she did not know who said either phrase. Although she was not wearing her glasses at the time, she could see figures. She did not recall any physical altercation.

¶ 44 The other two crime-scene witnesses did not testify. One had been served but did not appear, and there was some difficulty in serving the other. However, Harrolle, the investigator for the public defender’s office was able to speak with them.

¶ 45 Harrolle testified that, in her capacity as an investigator for the public defender’s office, she attempted to contact the crime scene witnesses listed on various police reports. Of 15 witnesses, she was able to contact 10. Each reported that neither Carroll nor his assistant had ever tried to contact them. Snyder and Martin, the other two crime-scene witnesses who indicated in their statements to police that Mulder, not defendant, was the aggressor, told Harrolle what their testimony would have been. Harrolle stated as to Snyder:

“A. [Snyder] indicated that he heard the exchange, referring to, ‘Do you want to fight?’ He saw the defendant retreating back towards the middle island. Said the victim appeared to be the aggressor. He stated that the victim just continued to walk towards the defendant as the defendant was stepping backwards and at that time he did see the defendant pull a gun and heard the shot.

Q. He indicated that he thought that the victim was the aggressor?

A. Yes, and it's written in the police report. I only confirmed what the police report statements were. I didn't go beyond the scope of that."

Harrolle stated as to Martin:

**** [Martin] stated that she was a visitor to the dorm room of Mercedes Lawson. The two of them heard arguing, looked out the window. She stated that she did see defendant retreating. The victim appeared to be aggressing forward. She did hear them say—heard the defendant say, 'I have a right to shoot if you attack me.' She stated her eyes weren't so good so she couldn't see a gun or a knife or whatever object clearly."

¶ 46 The trial court denied the motion. As to performance, the court acknowledged that the attorneys' limited communication with defendant was "more than likely" not "prudent." However, the court found that, given the attorneys' "aggressive" and "thorough" representation at trial, it could not find their performance deficient. As to prejudice, the court held that, even if the alleged deficiencies caused the attorneys' performance to fall below an objective standard of reasonableness, it did not affect the outcome of defendant's case. The court explained, with specific reference to Lawson, that the witnesses that the attorneys failed to interview "added nothing to the case" and defendant's claim of self-defense. The court stated: "It is not as if [defendant] did not receive a trial regarding the affirmative defense of self-defense or allegations of self-defense." This appeal followed.

¶ 47

II. ANALYSIS

¶ 48 Defendant raises two claims on appeal: (1) the trial court erred in rejecting his claim of ineffective assistance at the *Krankel* hearing; and (2) improper argument warrants a new trial. We

find merit to the ineffective-assistance claim. The improper-argument claim is forfeited for failure to raise it in a posttrial motion, and the allegedly improper remarks do not rise to the level of plain error. We address the State's closing argument only to the extent that it magnified defense counsels' failure to guard against claims of fabrication and thereby worsened the prejudice suffered due to counsels' lack of preparation.

¶ 49 Defendant argues that the trial court erred in rejecting his claim of ineffective assistance at the *Krankel* hearing. To succeed on a claim of ineffective assistance of counsel, a defendant must establish that: (1) counsel's performance was deficient; and (2) the deficient performance resulted in a substantial prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). Counsel's performance was deficient if it fell below an objective standard of reasonableness. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 30. The deficient performance results in substantial prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* A trial court may base its decision in a *Krankel* inquiry on: (1) the trial counsel's actions and explanations; (2) statements by the defendant; and/or (3) its own knowledge of defense counsel's performance at trial. *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 40. Generally, we reverse a trial court's determination of ineffective assistance only if it is against the manifest weight of the evidence. *Id.* at ¶ 41.

¶ 50 To begin with, we affirm the trial court's implicit finding that counsel's preparation (communication and investigation) was inadequate, or, to use the court's words, "imprudent." As to communication, Rule 1.4 of the Illinois Rules of Professional Conduct sets forth that a lawyer shall:

- “(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.” Illinois Rules of Professional Conduct 1.4 (eff. Jan. 1, 2010).

Reasonable communication between the lawyer and client is necessary for the client to effectively participate in his defense. *Id.* (comment 1). “A lawyer’s regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer’s staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.” *Id.* (comment 4).

¶ 51 At a minimum, the Rules of Professional Conduct provide a frame of reference for objectively reasonable conduct. See *People v. Mena*, 337 Ill. App. 3d 868, 873 (2003). In *Mena*, the attorney violated Rule 1.4 when he failed to respond to reasonable requests for information, did not keep defendant informed of the status of his case, did not explain the steps needed for appeal, failed to impress upon the defendant that a separate retainer was needed for the appeal, and failed altogether

to file the appeal. *Id.* The court went so far as to state: “we hold that when an attorney violates the Rules of Professional Conduct, the attorney’s actions are objectively unreasonable.” *Id.*

¶ 52 Here, by attorney Carroll’s own admission, he did not talk to defendant once in the nine months between solicitation in the jail and the trial. The record reflects that neither attorney talked to defendant at status hearings (due to defendant’s video appearance) and, without notifying in advance defendant, the State, or the court, they failed altogether to appear at one status hearing. According to defendant, Carroll did not speak to him about the facts of the case before providing an opening statement. That opening statement contained a major inaccuracy (the “sweeping” knife). Although the attorneys corresponded with defendant’s mother, they never spoke about the facts of the case. More than three dozen calls went unreturned. This communication falls short of an objectively reasonable standard.

¶ 53 As to investigation, an attorney has a duty to conduct a reasonable investigation of the facts underlying the case. *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005). Counsel may draw a line when they have good reason to believe further investigation would be a waste. *Id.* at 383. However, an attorney who fails to make a full investigation is in no position to make strategic decisions about calling witnesses. *People v. Truly*, 230 Ill. App. 3d 948, 954 (1992). Under the *Strickland* performance prong, matters of trial strategy are presumed reasonable. *Mosely v. Atchison*, 689 F. 3d 838, 848 (7th Cir. 2012). However, the presumption applies only when the attorney actually exercised his or her judgment. *Id.* Therefore, a counsel’s failure to interview witnesses to see what their testimony would be cannot be considered trial strategy. *Id.*; *Tolliver v. Pollard*, 688 F.3d 853, 858 (7th Cir. 2012).

¶ 54 Admittedly, this case differs from *Mosley* and *Tolliver*, relied upon by defendant, because defendant's attorneys had the police reports to determine whether the testimony of Lawson, Snyder, and Martin would aid defendant's case. Still, the *failure* to talk to and probe the three witnesses who labeled Mulder as the aggressor cannot be a matter of strategy. Only by diligently interviewing Lawson, Snyder, and Martin could the defense determine whether they would in fact be strong witnesses for the defense. Defendant's attorneys could not remember a single crime-scene witness whom they had interviewed. Harrolle, the investigator for the public defender's office confirmed with at least 10 crime-scene witnesses that defense counsel never contacted them. Trial counsels' investigation was not thorough enough to justify a presumption of strategic deference.

¶ 55 Having established that counsels' preparation for the case fell well below an objective standard of reasonableness, we now review the trial court's *Krankel* findings that: (1) counsels' lack of preparation (communication and investigation) was outweighed by a strong courtroom performance, and, therefore, counsels' overall performance cannot be considered ineffective; and (2) lack of preparation would not change the outcome of the case.

¶ 56 As to the first point, we recognize that we must look to counsels' overall performance and that it is possible for a strong performance in one area of representation to overcome certain deficiencies. *People v. Jacobazzi*, 398 Ill. App. 3d 890, 927 (2009). Still, the right to effective assistance of counsel may be violated based on a single error where that error is sufficiently egregious. *Id.* In that circumstance, the adequate handling of other matters will not outweigh the error. *Id.*

¶ 57 Here, we cannot find that counsels' courtroom performance outweighed counsels' lack of preparation. To the contrary, counsels' lack of preparation created deficits in their understanding of the case that continued into trial. For example, Carroll did not speak with defendant before delivering

an opening statement that grossly misrepresented what defendant's testimony would be. Carroll stated that the evidence would show that Mulder made a sweeping gesture with a knife, prompting defendant to act in self defense. However, Defendant testified that he never saw a knife. Also, counsel posited a self-defense theory without even the most cursory investigation of the three known witnesses who would support that theory. We determine that the counsels' courtroom performance did not outweigh these deficiencies.

¶ 58 Moving to the prejudice prong, we must disagree with the court's finding that better preparation would not have added to the case. The court's finding in this regard was based on the viability of the self-defense theory: "It is not as if [defendant] did not receive a trial regarding the affirmative defense of self-defense or allegations of self-defense." However, defendant's case was not based solely on self-defense. Rather, what the defense labeled as "self-defense" was really an explanation of why defendant drew his gun in warning without intending to fire it. Defendant's testimony that the gun went off in a struggle invoked the defense of accident, or a lack of "knowing or intent."

¶ 59 The evidence as to the "knowing or intent" element of aggravated battery with a firearm was close. Both defendant and Mulder, the only witnesses at street level and those closest to the crime, testified that the gun went off during a struggle. None of the State's four remaining crime-scene witnesses testified to a struggle. However, two of those witnesses did not see the crime take place (Tiwari and Manuel) and the other two, Mulder's friends, saw the crime from a further vantage point. In other words, the witness testimony at trial regarding a struggle was evenly split, and the jury would have reasons on both sides to find one or the other version more credible. Had the defense presented evidence supporting Mulder as the aggressor (as told to police by Lawson, Snyder, and Martin, none

of whom were friends of Mulder), it would have bolstered the credibility of defendant's explanation as to why he drew his gun in warning.

¶ 60 At oral argument, the State posited that defendant was not prejudiced by his attorneys' failure to procure witnesses corroborating his position that Mulder was the aggressor, because other evidence corroborated his position that Mulder was the aggressor. For example, Nakis testified that Mulder walked toward defendant and defendant said, "I have a [gun]. If you get any closer, I have the right to use it." Scroggins also testified that Mulder walked toward defendant.

¶ 61 However, while aspects of Nakis's and Scroggins' testimony imply that Mulder was the aggressor, neither *directly* confirmed Mulder as the aggressor. In fact, the overall thrust of Scroggins' testimony was the opposite. Scroggins testified that Mulder "walked" toward defendant—hardly aggressive behavior in and of itself. Then, according to Scroggins, defendant shot Mulder while he was still several feet away. Similarly, Tiwari described Mulder as "relaxed" and defendant as "aggressive and aggitated." Based on this testimony, the State referred to defendant in closing argument as a "mad gunman" who could not be dissuaded from firing a shot: "[T]he three of them told you the same and that's that [Mulder] was attempting to calm the defendant down[.] *** He was attempting to diffuse the situation of this mad gunman who's on the campus of [NIU]." ⁶

¶ 62 In contrast, Lawson, Snyder, and Martin, used stronger language when reporting the incident to police, describing Mulder as the "aggressor" and defendant as "retreating." This, combined with Nakis's recollection that defendant warned Mulder not to "attack" him, corroborated defendant's

⁶ The State characterizes the testimony of *all three* of its student witnesses as stating that Mulder tried to calm defendant, and, although the defense objected to the comment on the basis that it was inflammatory, it did not object on the basis of testimony not in evidence.

version of events that Mulder “stormed up” to him with a “very aggressive demeanor” and made more believable both defendant’s *and* Mulder’s testimony that the two had grappled over the gun. Without testimony that Mulder behaved in a truly aggressive manner—not just “walked” toward defendant or negotiated with him to leave the premises—the key element of the defense, accidental discharge during a struggle, loses plausibility.

¶ 63 The attorneys’ failure to call corroborating witnesses is especially prejudicial where the case is essentially a “swearing match” between two sides and defendant is the only witness for the defense. *Tolliver*, 688 F. 3d at 862. Here, the case is essentially a “swearing match,” but Mulder, one of the State’s witnesses, actually testified consistent with defendant. In closing, however, the State discredited Mulder as intoxicated and defendant as self-interested. The State also repeatedly drew attention to defense counsels’ misstatement concerning the sweeping knife, making it seem as though defendant himself testified inconsistently on this point or that defendant fabricated his account at the last minute. If three, sober, disinterested parties had corroborated defendant’s account that Mulder was behaving in a truly aggressive manner, and had counsel not grossly misstated what defendant’s testimony would be, the State would not have been able to so eviscerate the credibility of defendant. Additionally, while not dispositive, we find it worth noting that, on at least one occasion, the State improperly attacked defendant’s credibility based on his failure to assert his own defense: “[Y]ou did [not] hear the police come in and testify that defendant *** [said], ‘Oh, my gosh, the man that I had to shoot to protect myself, is he okay? *** I didn’t want to shoot him.’ ” Granted, the court sustained objection to that comment. Still, the comment illustrates the degree to which the State attacked defendant’s credibility, and how counsels’ failure to secure corroborating witnesses damaged defendant’s case.

¶ 64 Of course, there is no guarantee the jury would ever find credible defendant's version of events. Additionally, there is no guarantee that the jury would find defendant's version of events (a drunk aggressor's grabbing of a gun pulled in warning leading to an accidental discharge) inconsistent with a finding that the "knowing" element was met, *i.e.*, that defendant had a conscious awareness that such result was practically certain to be caused by his conduct. The point is that the defense's failure to competently prepare undermines our confidence in the outcome of this case.

¶ 65 For that reason, we reverse and remand for a new trial. There is no impediment to a new trial, because the evidence in this case was sufficient to convict. *People v. Wheeler*, 226 Ill. 2d 92, 134 (2007).

¶ 66

III. CONCLUSION

¶ 67 For the aforementioned reasons, we reverse the trial court's judgment and remand for a new trial.

¶ 68 Reversed and remanded for a new trial.