2014 IL App (2d) 120805-U
No. 2-12-0805
Order filed April 16, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. NATHAN BELL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 2011-CF-2458 Honorable Joseph G. McGraw, Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: In prosecution of three counts of aggravated criminal sexual assault, the evidence supported verdict that defendant caused bodily harm during the vaginal penetration; the trial court did not abuse its discretion in admitting the other crimes evidence involving four other victims and defense counsel was not ineffective for not objecting to it; however, a remand is necessary for a proper inquiry into defendant's *pro se* posttrial allegation of ineffective assistance.

¶ 2 A jury found defendant, Nathan Bell, guilty of three counts of aggravated criminal sexual assault (see 720 ILCS 5/11-1.30(a)(2) (West 2012)) against the complainant, R.D., and the trial court imposed three consecutive 30-year prison terms. The three counts alleged oral, vaginal, and anal penetration, with the aggravating factor of causing bodily harm.

¶ 3 The State also charged defendant with sexually assaulting four other victims but elected to proceed with R.D.'s case first. Before trial, the State filed a motion *in limine* to introduce evidence of the other sexual assaults. Rather than challenging the other crimes evidence, defense counsel moved for permissive joinder of all the cases in a single prosecution. The trial court denied joinder as statutorily unwarranted and prejudicial, but ruled the other crimes admissible in R.D.'s case for the limited purpose of showing defendant's intent, motive, lack of mistake, and propensity.

¶ 4 Defendant appeals, arguing that (1) his conviction of aggravated criminal sexual assault based on vaginal penetration must be reduced to criminal sexual assault because the State failed to prove he caused bodily harm during that penetration; (2) the trial court committed plain error in admitting the other crimes evidence; (3) defense counsel was ineffective for moving for joinder of all the offenses rather than objecting to the other crimes evidence; and (4) a remand is necessary for a proper inquiry into his posttrial allegation of ineffective assistance. We affirm the convictions but remand the cause for a preliminary inquiry into defendant's posttrial claim of ineffective assistance.

¶ 5 I. BACKGROUND

¶ 6 A. R.D. (August 21, 2011)

¶ 7 At trial, R.D. testified that, at the time of the incident, she was a drug addict and worked as a prostitute to get money for drugs. At the time of trial, she was 39 years old, she faced an outstanding charge of possession of a controlled substance, she was serving her last day of parole for one prostitution conviction, and she had three other felony convictions for prostitution.

¶ 8 On the morning of August 21, 2011, R.D. was walking down Eighth Street in Rockford when defendant pulled up in a green truck and asked if she would "get freaky" with him. R.D.'s

idea of "freaky" did not match the disgusting events that followed. R.D. and defendant did not discuss any potential sex acts. R.D. got in defendant's truck, he gave her $20, and they rode to buy crack cocaine. R.D. smoked the cocaine in defendant's truck, and he drove to his house. On the way, defendant stopped at a gas station to play the lottery. Before meeting defendant, R.D. had smoked crack five times within the previous 12 hours.

¶ 9 R.D. and defendant went to his bedroom and got undressed, and defendant got on top of R.D. R.D. stopped defendant to discuss money for specific sex acts. Defendant remained silent, punched her left eye, and choked her. For the next five hours, R.D. followed defendant's orders because she "didn't want to die."

¶ 10 Defendant forced R.D. to open her mouth three times so he could spit in it. A couple of other times, defendant forced her to lick the inside of his nose. Defendant told her that she better "do it right" because he accidentally killed "the last girl" who did not. Defendant said that it did not matter because he would never see R.D. again. When R.D. asked why, defendant responded "Because nobody is."

¶ 11 1. Oral Penetration

¶ 12 R.D. testified that defendant stood, posing in the mirror. Defendant told her to get on her knees and "suck his penis like it was a baby bottle." Defendant held a stick while staring in the mirror and asked R.D. if she would mind if he "busted her head." R.D. begged him not to. Defendant made R.D. wash up in the bathroom and then he forced her to perform oral sex on him again. R.D. performed oral sex because she feared defendant would kill her if she did not.

¶ 13 Defendant next told R.D. that he wanted her to eat his "poop" and would kill her if she did not eat it all. Defendant got on his knees on the bed, forced her to get on her knees on the floor, and defecated in her mouth. R.D. could not eat it and threw it under the bed and over the

side of a couch. Afterwards, defendant made her "lick his butthole clean" and then wash up. In the bathroom, R.D. threw feces in the clothes basket and sink. When R.D. returned, she still had a ring around her face. Defendant told her she was not "doing it right," so he grabbed her by the hair and told her to "eat his shit" again.

¶ 14 2. Anal Penetration

¶ 15 Defendant forced R.D. on her knees on the bed and had anal sex with her. When defendant inserted his penis into her anus, R.D. jerked in reaction. Defendant punched her really hard in the back. Defendant continued the anal penetration for about 30 minutes, and R.D. experienced a lot of pain.

¶ 16 R.D. admitted that she had engaged in anal sex twice before but did not like it. When interviewed by Rockford detective John Eissens, R.D. was embarrassed and falsely told him that she had never engaged in anal sex before.

¶ 17 3. Vaginal Penetration

¶ 18 The prosecutor asked R.D., "While you were there, did he ever place his penis in your vagina?" R.D. responded that defendant did when she was on her knees at the end of the bed and defendant was standing. R.D. said that she did not consent to defendant placing his penis in her vagina, anus, or mouth and that she did those things only because she feared he would kill her.

¶ 19 Near the end of the ordeal, defendant told R.D. that he would let her go if she would drink all of his "piss" and "not waste a drop." Defendant had R.D.'s clothes, and she wanted to go home. Defendant forced R.D. to her knees and urinated in her mouth, and R.D. drank all of it.

¶ 20 R.D. said that, after five hours in defendant's house, he said he needed to leave to pick up his grandchildren. Defendant returned R.D.'s clothing. As she rode in his truck, R.D. talked to

defendant politely because she feared he would not let her go. Defendant told her that she was just talking so he would not kill her.

¶ 21 4. Investigation

¶ 22 Defendant dropped off R.D. in her neighborhood, where she walked past a couple of houses before collapsing from exhaustion and soreness. A neighbor took R.D. to the hospital, where she met Rockford police officer Apostolos Sarantopoulos. The officer testified that R.D. walked gingerly, appeared tired, and said she was in pain. The officer observed a bruise near R.D's left eye, bruises on her back and left shoulder blade, and scratches across her spine. The officer also observed what looked and smelled like feces on her nose and in her nostrils. R.D.'s feet were dirty, and she did not have shoes. R.D. provided a detailed description of defendant.

¶ 23 Kisha Redd, the treating nurse, testified that R.D. had a contusion under her left eye, several bruises on her back, and feces in her nose. R.D. identified bruises under her left eye and on her back where defendant had punched her. R.D. said she was in pain and had difficulty lying on her back. Redd prepared a sexual assault kit and obtained vaginal and rectal swabs. R.D. told Redd that she experienced bleeding after the anal penetration. Redd observed three rectal tears but did not see blood.

¶ 24 Dr. Matthew Valente, the treating physician, described R.D. as having multiple bruises over her eyebrows and bruises on both sides of her back and on her upper arm. Dr. Valente observed three anal tears that were one-centimeter long and appeared to be recent. R.D. was in significant emotional distress, and Dr. Valente smelled and observed brown stool in and around R.D.'s nose and mouth.

¶ 25 The next day, Detective Eissens was assigned to the investigation. Detective Eissens reviewed surveillance video from the gas station. In the video, Detective Eissens observed the

driver park in the lot, exit the vehicle, walk to the service counter, and return to the vehicle. The driver appeared to be defendant, and a passenger sat in the truck while it was parked. On August 31, 2011, R.D. identified defendant in a photographic lineup.

¶ 26 Keia Brown, a forensic biologist, and Laurie Lee, a forensic scientist, testified to the testing of the sexual assault kit. Brown identified semen on the vaginal, oral, and rectal swabs. Lee analyzed the vaginal swab and found the DNA matched the profiles of R.D. and defendant.

¶ 27 B. Other Crimes Evidence

¶ 28 1. K.T. (January 29, 2011)

¶ 29 The trial court also admitted evidence of assaults against four other victims. K.T. testified that she previously had been convicted of possession of a controlled substance, a felony prostitution charge, and aggravated fleeing. Her speech and memory had been affected by a brain injury that she suffered in a car accident. Over defense counsel's objection, Detective Eissens testified that he was the officer who responded to K.T's car accident in 2000. Detective Eissens testified that, when he arrived at the scene, K.T. had been ejected from her car, was unconscious, and her skull cap "had opened up."

¶ 30 K.T. testified that, on the evening of January 29, 2011, she was addicted to crack cocaine but was not under the influence of drugs or working as a prostitute. K.T. was walking to a store at Seventh Street and Tenth Avenue when defendant pulled up to her in a teal truck. Defendant opened the door and pulled her inside. Defendant drove to his house, pulled her inside, and they went to his bedroom. K.T. was undressed and defendant told her that she had to put his penis in her mouth and that he would not pay her. K.T. could not do it, and defendant was "tearing [her] mouth apart." K.T. testified that it happened "a lot of times" and she "couldn't count how

many." K.T. said defendant also wanted to put his penis in her rectum but could not, so he punched her in the back.

¶ 31 Defendant told K.T. he wanted her to "poop" on his fingers and lick them. Defendant also wanted her to eat his feces, but he could not "poop." More than once, defendant tried to urinate in K.T.'s mouth. When she could not swallow it, defendant hit her in the head and face. Defendant asked if she believed in Jesus Christ, and she responded "Yes." Defendant said "First mistake," and hit her as hard as he could five times in the head. Defendant told K.T. that she "wasn't going out alive" because she was a "whore and a prostitute" and "was going to die like the rest." K.T. tried to explain that she was no longer a prostitute, but defendant said she needed to die and that God did not care.

¶ 32 K.T. testified that defendant had vaginal sex with her in the bedroom and on a couch in his basement. In the basement, K.T. saw "body bags," and defendant said she would be leaving in one. Defendant tried to put his penis in her mouth again, and she started choking. K.T. had a difficult time walking up the basement stairs because defendant had been punching her sides and back and kicking her ribs and the back of her head.

¶ 33 K.T. testified that she agreed to the sexual acts because she was scared and felt that she had no choice. When she told defendant "No," he beat her. At the end of the evening, K.T. could not get up because defendant had beaten her so severely. Defendant told her that he would let her go. Defendant put on K.T.'s coat, returned her shoes, dropped her off somewhere, and threw the rest of her clothes at her. K.T. said an "oriental" man saw her and helped her put on her shoes and pants.

¶ 34 Two days later, K.T. went to a hospital, where she met Officer Michele Krebs. Officer Krebs testified that K.T. was in a wheelchair and had bruises on her left hip, her left triceps, the

left side of her neck, and near her left eye. K.T. also had red marks and bruising on her back. At trial, K.T. and Officer Krebs identified photographs showing her injuries at the hospital.

¶ 35 2. H.J. (January 2011)

¶ 36 H.J. testified that, at the time of trial, she was in jail because she previously had failed to appear as a witness for defendant's trial. H.J. also had two prior convictions for retail theft. H.J. testified that in January 2011 she was addicted to heroin and crack cocaine and was working as a prostitute. One day, defendant pulled up and asked if she wanted a ride. H.J. believed defendant wanted a "date," which was sex for money. Defendant told H.J. that he would give her money for a hotel room for the next week.

¶ 37 Defendant took H.J. to his home, they went to his bedroom, and H.J. began taking off her clothes. H.J. asked for money, and defendant started choking her. Defendant told H.J. that he had rules and that if she "messed up," he would hit her five times, starting with an open hand and "graduating" to a closed fist. "Messing up" meant upsetting defendant or not acting like she was enjoying herself. Defendant told H.J. that she was his "white bitch" for the night and that if she did not act right, he would kill her.

¶ 38 H.J. was at defendant's home for six hours. During that time, there was "oral sex, regular sex, [and] anal sex." Defendant forced H.J. to perform oral sex on him multiple times on the bed and on the floor. Defendant also made H.J. drink his urine, saying that if she wasted one drop, he would hit her. Defendant gave her a razor and told her to shave her pubic hair. Defendant grabbed a section of her pubic hair and cut it.

¶ 39 Defendant told H.J. to eat his "poop." He forced her to lie on the ground, he squatted over her mouth, and he forced her to put her mouth to his butt and eat it. When H.J. could not do

it, defendant struck her five times in the head and told her that he would kill her in the basement. H.J. started vomiting, and defendant got mad and kicked her sides and took her to the basement.

¶ 40 In the basement, H.J. saw plastic leaf bags laid down on the floor. Defendant mentioned "killing a white girl before" and talked about how "it was wintertime and how fast her body was going to decompose." Earlier, in an attempt to leave, H.J. lied and said she had to pick up her daughter from a bus stop. Defendant said that she "should give him her mom and dad's address so he could send some money to her daughter." H.J. told defendant that she would try to do better and that defendant was not a bad person. Defendant let her walk back upstairs. They had more sex, and defendant again forced her to eat his feces. H.J. took some from her mouth and placed it between the wall and the bed. Defendant also let her spit some in the toilet.

¶ 41 H.J. testified that the acts were repeated "over and over" until 9 or 10 p.m. when defendant told her to get dressed. Defendant said, "I have a confession to make. I'm really not going to kill you. I just had to tell you those things so that way, you would, you know, do them because I knew you wouldn't do them unless I, you know, told you I was going to kill you."

¶ 42 While H.J. got dressed, defendant took her boyfriend's necklace and told her that he was not going to pay her and that she had to pay him. Defendant also asked, "You didn't think that anything like this would happen to you, getting into random cars with random people?"

¶ 43 H.J. went to her parents' home. Her ribs, face, and body were badly bruised and she was very sore and could not eat for a few days. H.J. did not go to the hospital or the police station because she had an outstanding arrest warrant and did not wish to "detox" in jail.

¶ 44 3. C.J. (January 2009)

¶ 45 C.J. testified that she did not want to appear at the trial because she wanted to "let it go" and so much time already had passed since defendant assaulted her. C.J. admitted that she could "only remember certain things because [she had] been trying to get it out of [her] head."

¶ 46 C.J. testified that in 2006 and 2009, she lived with defendant's sister, Rebecca Buntyn. In January 2009, defendant visited Buntyn's home, and C.J. asked to borrow $20. Defendant said they should go to his house to get it. C.J. had been to defendant's home and borrowed money from him before.

¶ 47 When defendant and C.J. entered his house, he locked the door behind them. C.J. followed defendant to his bedroom, and he closed the door and said she was in his house now and was not going anywhere until she did something for the money. Defendant told C.J. to take off her clothes and get on the bed. C.J. testified that she followed defendant's orders because she was scared and he had "an evil look up in his face." Defendant choked C.J. and put his penis in her mouth and vagina. Defendant made her perform oral sex. Defendant also made her lick earwax from his ear and suck snot from his nose. C.J. felt like she could not say "no" or stop what was happening.

¶ 48 After 3½ hours, defendant told C.J. to get dressed. Defendant gave her money and dropped her off near her sister's house. Defendant told C.J. not to saying anything or he would kill her. On cross-examination, C.J. denied telling Buntyn that the incident never occurred.

¶ 49 4. J.H. (June 22, 2007)

¶ 50 J.H. testified that, at the time of trial, she was on probation and monitored through drug court for three felony prostitution convictions. J.H. had another prostitution conviction, a domestic battery conviction, and a pending obstruction of justice charge. J.H. further admitted that, on June 22, 2007, she was addicted to heroin and crack cocaine and supported her drug

habit by working as a prostitute. Defendant pulled up in his truck and asked if she needed a ride. J.H. believed that, by offering a "ride," defendant wanted a "date," which meant money for sex. J.H. entered defendant's truck.

¶ 51 Defendant drove to his house, and they entered through the back door and went to the kitchen. J.H. sat and ate some candy. Defendant and J.H. went to the basement, where defendant told her to undress. J.H. told him she wanted to go home because defendant was scaring her and they had not discussed how much he would pay for sex acts. On cross-examination, J.H. admitted that, in fact, defendant had offered her $200 for sex when he picked her up.

¶ 52 Defendant told J.H. that she could not go home. He warned her "White girl, you'd better make me feel good." Defendant started hitting J.H. in the ribs, head, and face. Defendant kicked her and said she better do what he said or he would kill her. Defendant found a syringe that J.H. used for heroin and told her that he would shoot up her veins with air so her family would think she overdosed.

¶ 53 Defendant forced J.H. to drink his urine and told her that if she did not drink it, her family would find her in the woods. J.H. drank it and tried to run away. Defendant caught her and beat her. J.H. heard a crack and told defendant that she could not breathe. J.H. started vomiting, and defendant provided a garbage can. Defendant also forced J.H. to perform oral sex and lick the snot from his nose. Defendant said he wanted to lick her snot.

¶ 54 After 2½ hours, defendant told J.H. that he would let her live because she had fought for her life. Defendant took her identification and $40 from her. Defendant warned that, if she told anyone what happened, he would come after her family. He dropped her off at her friend's house.

¶ 55 J.H. was having difficulty breathing, so her friend took her to the hospital. J.H. saw Officer Christopher Jones, who testified that J.H. was scared and crying hysterically and appeared to have been beaten very badly. Officer Jones observed bruises and abrasions on J.H.'s forehead, chin, and throat. J.H. had bruises and swelling on her back and wrists. J.H. and Officer Jones identified several photographs showing her injuries at the hospital.

¶ 56 C. The Defense

¶ 57 1. Charged Conduct

¶ 58 Defendant testified that he solicited prostitutes because his girlfriend did not enjoy sex. On the date of the incident, defendant was driving down Eighth Street when he heard someone "holler" and saw R.D. running beside his truck. R.D. grabbed the handle of the door, asked if she could get in, and then got in the truck. R.D. asked defendant if he was the police, and when he said he was not, she asked if she could feel his "dick," and he let her. R.D. told defendant she was a "girl trying to make some money" and asked if he had a place. Defendant told her the address, and she asked if they could "pick up a bag," which defendant understood to be a bag of crack cocaine. R.D. directed him where to go and asked for money. Defendant said he only had $20, and R.D. replied that she only needed $10. Defendant asked R.D. if she would "let [him] get his freak on" and told her to let him spit into her mouth. R.D. opened her mouth, and defendant spit into it.

¶ 59 R.D. bought the crack cocaine and asked to smoke it in the truck, but defendant told her not to. On the ride to his house, defendant asked R.D. if she shaved, and she laid down the seat, pulled down her pants, and told defendant "touch it, you paid for it."

¶ 60 Upon arriving at defendant's house, they went to his bedroom and R.D. grabbed the crack pipe. Defendant told her she could not smoke crack there and that he had to pick up his

grandchildren at 9:30. R.D. undressed and defendant told her to wash up and use mouthwash while defendant went to the kitchen to cook beans.

¶ 61 When defendant returned to the bedroom, R.D. was sitting naked on the bed. R.D. performed oral sex on defendant. Defendant explained that he was "a freak" and watched in the mirror as R.D. performed oral sex on him. Defendant testified that he never struck, threatened, or physically forced R.D. to engage in any sex acts with him.

¶ 62 Defendant testified that he next had vaginal sex with R.D. Defendant told R.D. that he wanted to have anal sex, and she asked whether she could smoke crack afterwards. When defendant said she could, R.D. grabbed his penis and put it up to her anus, but it hurt defendant and he backed out. Defendant had vaginal sex with R.D. again. R.D. asked if she could take a hit of crack, and defendant said she could. R.D. smoked crack behind the fan of the air conditioner to direct the smoke outside.

¶ 63 Defendant checked on his beans and took a hit of "weed." Defendant returned to the bedroom, laid down, and stroked himself until R.D. finished smoking crack. R.D. told defendant that was "her job" and performed oral sex on him again.

¶ 64 Defendant asked R.D. what "freaky" things she had done before, and she described how some guys liked for her to "pee" on their chest or in their mouth. R.D. said one guy had her "poop" on his foot. Defendant and R.D. discussed defecation and putting feces in her mouth. R.D. said she would do anything defendant wanted if he paid her. R.D. said "Give me some, give me some, baby," which he understood to mean to defecate in her mouth, and he did so. Defendant told her to spit it out and wash out her mouth. Defendant returned to the kitchen.

¶ 65 When defendant returned to the bedroom, R.D. was preparing to smoke crack again. She asked defendant if he liked "that." Defendant did not respond and instead picked up his cell

phone, called his house phone, answered it, and pretended to speak with his girlfriend. Defendant told R.D. that he needed to pick up his girlfriend, and she responded that she wanted more money. Defendant told her that he did not have any, but he could give her more if she met him at a store the next day. Defendant dropped off R.D. where he had picked her up.

¶ 66 On cross-examination, defendant testified that he told the detectives "the whole story" and did not leave anything out. He denied telling them that he was too scared to put his penis in R.D.'s vagina and only "dipped" it in and took it out. Defendant admitted that he called R.D. a "bitch" and a "ho." On redirect examination, defendant explained that he was angry because R.D. was accusing him of rape even though everything they had done was consensual.

¶ 67 2. Other Crimes Evidence

¶ 68 Defendant also testified regarding the other crimes evidence. Defendant admitted having sex with the four women but denied that he forced, threatened, or injured them in any way. Defendant also denied having body bags in his house. Defendant testified that, when he picked up K.T., H.J., and J.H., they were working as prostitutes. Defendant bought them crack cocaine in exchange for sex. Defendant testified that he had sex with C.J. in exchange for $20.

¶ 69 On cross-examination, defendant said that he remembered talking to the detectives about R.D. only, but he later recalled telling them that he and C.J. had "a little thing." Defendant denied telling the police that the women were "whores" or that he had been with "close to 25 prostitutes." Defendant acknowledged that he talked to Buntyn on October 1, 2011, and asked her to tell C.J. to sign an affidavit indicating that she made up her story.

¶ 70 Buntyn testified that, in early 2009, C.J. told her that she had made up a story about defendant sexually assaulting her. On cross-examination, Buntyn said she did not remember a

conversation with defendant on October 1, 2011, in which he told her to have C.J. sign an affidavit admitting that she had lied.

¶ 71 D. The State's Rebuttal

¶ 72 1. Charged Conduct

¶ 73 In the State's rebuttal, Detective Eissens testified that, during a post-arrest interview, defendant did not say that, when R.D. first entered the truck, he spit in R.D.'s mouth or she had leaned over and touched his penis. Defendant said that he had "dipped" his penis into R.D. one time and stopped because he feared getting a disease. Defendant repeatedly denied defecating on R.D. and said that feces should be "flushed down the toilet." Defendant denied having anal sex with R.D. because she said that was "taboo." In a subsequent interview, defendant said that he started to have anal sex with R.D. but stopped because she said it hurt. When asked why R.D. would have anal tears, defendant responded "Because she's a ho."

¶ 74 2. Other Crimes Evidence

¶ 75 Detective Eissens further testified that, when he interviewed defendant, he acknowledged that he knew C.J. was not a prostitute. According to Detective Eissens, defendant told him that he had sex with "close to" 25 prostitutes. When Detective Eissens asked if he respected them, defendant responded "Hell no."

¶ 76 E. Jury Instruction

¶ 77 At defense counsel's request, the trial court used Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.14), the jury instruction on other crimes. The court advised the jury that the testimony was to be considered for the limited purpose of showing defendant's "intent, motive, lack of mistake, and propensity."

¶ 78 Defense counsel submitted a non-IPI instruction defining "propensity," arguing that it was necessary because "the jury almost has to have a mini-trial for each [witness]" for them to determine that the State proved "by a preponderance of the evidence" that defendant committed the other crimes. The court rejected the non-IPI instruction.

¶ 79 F. Verdict and Sentencing

¶ 80 On April 26, 2012, the jury found defendant guilty of the three charges of aggravated criminal sexual assault, and sentencing was scheduled for June 29, 2012. On May 4, 2012, defendant filed a *pro se* motion for a new trial. The motion alleged that defense counsel failed to investigate the case and refused to have witnesses subpoenaed on his behalf.

¶ 81 On June 28, 2012, defense counsel moved to continue the sentencing hearing because he had "requested but not received information from [defendant] that he believe[d] was necessary to prepare for the sentencing hearing." The court asked defendant if he had given his attorney the medical documents and the biographical information that counsel had requested. Defendant said he had some documents from an insurance claim arising from a car accident but that he did not give counsel those documents because he "didn't feel that [counsel] haven't [*sic*] been doing what he should have been doing for me so I took the time out to do it myself." The court responded, "So he made the request and you just didn't give it to him?" Defendant replied, "Right." The court denied counsel's motion to continue the sentencing hearing. The court also denied the motion for a new trial.

¶ 82 The court sentenced defendant to three consecutive 30-year prison terms. The court admonished defendant of his appeal rights and asked if he was satisfied with his representation. Defendant said that he was not because "if [counsel] brought these issues up when [his] trial was beginning, [he] wouldn't be sittin [*sic*] here facing this garbage that is throwed [*sic*] up on me."

The court asked, "Anything else?" Defendant replied, "Yeah, I got a lot to say, but nobody want to hear what I got to say." This timely appeal followed.

¶ 83 II. ANALYSIS

¶ 84 A. Sufficiency of the Evidence

¶ 85 A person commits aggravated criminal sexual assault if that person commits criminal sexual assault—an act of sexual penetration using force or the threat of force—accompanied by a statutorily enumerated aggravating factor "during the commission of the offense." 720 ILCS 5/11-1.30(a), 11-1.20(a)(1) (West 2012). In this case, the three counts of aggravated criminal sexual assault alleged that defendant, by the use of force or threat of force, committed oral, vaginal, and anal penetration of R.D. Each count alleged the aggravating factor of causing bodily harm by punching R.D. in the head.[1] 720 ILCS 5/11-1.30(a)(2), 11-1.20(a)(1) (West 2012).

¶ 86 Criminal sexual assault is a Class 1 felony, normally punishable by a prison term of 4 to 15 years (720 ILCS 5/11-1.20(b)(1) (West 2012); 730 ILCS 5/5-4.5-30 (West 2012)), while aggravated criminal sexual assault is a Class X felony, normally punishable by a term of 6 to 30

[1] All three counts alleged bodily harm by "punching her in the head," but one could argue that the jury heard evidence that defendant punched R.D. in the head only once, during the oral penetration. Defendant tacitly concedes that the three counts did not require evidence of punches to the head to prove bodily harm. The phrase "punching her in the head" in each count is "immaterial" because the allegation is not essential to the crime and can be stricken from the charging instrument without rendering it insufficient. *People v. Braddock*, 348 Ill. App. 3d 115, 125 (2004). In any event, defendant has forfeited the issue, as he did not file a bill of particulars for more specificity, and on appeal, he does not claim a deficiency in the charging instrument.

years (720 ILCS 5/11-1.30(d)(1) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012)). Multiple convictions of criminal sexual assault or aggravated criminal sexual assault require mandatory consecutive sentences. 730 ILCS 5/5-8-4(d)(2) (West 2012). After defendant was convicted of three offenses of aggravated criminal sexual assault, the trial court imposed three consecutive 30-year prison terms.

¶ 87 Defendant challenges the sufficiency of the evidence on the aggravated criminal sexual assault conviction based on vaginal penetration. Specifically, he argues that the conviction must be reduced to criminal sexual assault because the State failed to prove the aggravating factor of causing bodily harm during the vaginal penetration.

¶ 88 When considering a challenge to a criminal conviction based up on the sufficiency of the evidence, a reviewing court does not retry the defendant. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). "When reviewing the sufficiency of the evidence, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Bishop*, 218 Ill. 2d 232, 249 (2006) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). "Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004).

¶ 89 Our duty is to carefully examine the evidence while giving due consideration to the fact that the court and jury saw and heard the witnesses. The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict. *Smith*, 185 Ill. 2d at 541. The credibility of a witness is within the province of the trier of fact, and the finding of the jury on

such matters is entitled to great weight, but the jury's determination is not conclusive. We will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Smith*, 185 Ill. 2d at 542.

¶ 90 Defendant does not contest the finding that he committed vaginal penetration using force or the threat of force, but he argues that the State failed to prove beyond a reasonable doubt that he caused bodily harm "during the commission of the offense." See 720 ILCS 5/11-1.30(a)(2) (West 2012). The conviction requires proof that such an aggravating factor occurred "contemporaneously" with the criminal sexual assault. *People v. Potts*, 224 Ill. App. 3d 938, 949 (1992) (to prove aggravated criminal sexual under the "bodily harm" element, the State must prove that the bodily harm was contemporaneous to the criminal sexual assault, not after). However, injuries inflicted immediately before or after the assault will support a conviction of aggravated criminal sexual assault if they are "part of an unbroken series of events *** both very near in time and closely linked to the forced sexual acts." *People v. Thomas*, 234 Ill. App. 3d 819, 825 (1992). Under one-act-one-crime principles, multiple counts of an aggravated offense cannot be based on the same aggravating circumstance. *People v. Bishop*, 218 Ill. 2d 232, 248-49 (2006) (vacating one of two convictions of aggravated criminal sexual assault where the victim's pregnancy was the aggravating factor for both).

¶ 91 In this case, the jury heard ample evidence of a distinct bodily harm accompanying each sexual penetration. R.D. testified that, when defendant initially led her to his bedroom and she asked for more money, defendant punched her left eye and choked her. Defendant then used threats to force R.D. to her knees and perform oral sex.

¶ 92 R.D. also testified that defendant forced her onto her hands and knees at the end of the bed. Defendant stood behind her and inserted his penis in her anus. R.D. jerked in reaction, and

defendant punched her in the back really hard. Defendant continued the anal penetration for about 30 minutes, and R.D. experienced a lot of pain. While R.D. still was on her knees, defendant inserted his penis in her vagina.

¶ 93 At the hospital, Officer Sarantopoulos observed a bruise near R.D's left eye, bruises on her back and left shoulder blade, and scratches across her spine. Dr. Valente and Nurse Redd observed multiple bruises under R.D.'s left eye, several bruises across her back, and bruises on her upper arm. R.D. showed Redd the bruises under her left eye and on her back where defendant had punched her. R.D. said she was in pain and had difficulty lying on her back. Dr. Valente and Redd observed three rectal tears that appeared to be recent.

¶ 94 The bodily harm of causing bruising on R.D.'s back had temporal proximity to the vaginal penetration and was independent of the bodily harm accompanying the anal penetration. R.D. testified to anal penetration when she was on her hands and knees at the end of the bed, and the jury heard evidence of rectal tears. R.D. also testified to vaginal penetration contemporaneous with defendant striking her, and the jury heard evidence of extensive bruising across her back and scratches across her spine. The jury could make a reasonable inference from the evidence that defendant struck R.D. in the back during this part of the assault.

¶ 95 The various injuries corroborate multiple incidents of bodily harm that support convictions of all three counts, which complies with one-act-one-crime principles. Consistent with *Potts*, the injuries were inflicted during the same criminal episode and were proximately linked and temporally proximate to the three acts of sexual penetration. After viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt the essential elements of aggravated criminal sexual assault involving vaginal penetration. See *Bishop*, 218 Ill. 2d at 249.

¶ 96 B. Other Crimes Evidence

¶ 97 Defendant next argues that the trial court committed plain error in admitting the other crimes evidence. Defendant alternatively argues that defense counsel was ineffective for moving for permissive joinder of the five prosecutions rather than objecting to the other crimes evidence in R.D.'s case.

¶ 98 The trial court admitted the evidence pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963. 725 ILCS 5/115-7.3 (West 2012)). When a defendant is accused of aggravated criminal sexual assault, section 115-7.3 provides that evidence of the defendant's commission of certain sex offenses may be admissible for their bearing on any matter to which it is relevant, as long as the evidence is otherwise admissible under the rules of evidence. 725 ILCS 5/115-7.3(b) (West 2012)). In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider (1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; or (3) other relevant facts and circumstances. 725 ILCS 5/115-7.3(c) (West 2012)).

¶ 99 1. Plain Error

¶ 100 Defendant concedes that counsel did not object below to the trial court's admission of the other crimes evidence, and therefore, the issue is forfeited. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (both an objection at trial and raising the issue in a posttrial motion are necessary to preserve the issue for appellate review). However, defendant argues that the issue is reviewable under the plain-error doctrine, which permits a court of review to consider error that has been forfeited when either:

> "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the

> defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. [Citation.] Prejudice to the defendant is presumed because of the importance of the right involved, '*regardless* of the strength of the evidence.' (Emphasis in original.) [Citation.] In both instances, the burden of persuasion remains with the defendant." *Herron*, 215 Ill. 2d at 187.

¶ 101 In this case, defendant advocates reversal under the second prong of the plain error doctrine. Defendant contends that, despite the strong evidence of his guilt, he is entitled to a new trial because the error in admitting the other crimes evidence was so serious. "The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*." *People v. Johnson*, 238 Ill. 2d 478, 485 (2010). Where there is no error, there can be no plain error. See *People v. Johnson*, 218 Ill. 2d 125, 139 (2005).

¶ 102 We conclude that the trial court did not err in admitting the other crimes evidence. Section 115-7.3 expressly allows admission of certain prior sex offenses if their prejudicial effect does not substantially outweigh their probative value. *People v. Donoho*, 204 Ill. 2d 159, 176 (2003). The trial court's decision on the matter will not be reversed absent an abuse of discretion. *Donoho*, 204 Ill. 2d at 182. The trial court abuses its discretion where its decision is arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court. *Donoho*, 204 Ill. 2d at 182. However, our supreme court has urged trial courts

"to be cautious in considering the admissibility of other-crimes evidence to show propensity by engaging in a meaningful assessment of the probative value versus the prejudicial impact of the evidence." *Donoho*, 204 Ill. 2d at 186. When weighing the prejudicial effect of admission, a court should consider whether the other-crimes evidence will become the focus of the trial, or whether it might otherwise be misleading or confusing to the jury. See *People v. Boyd*, 366 Ill. App. 3d 84, 94 (2006) (other-crimes evidence must not become a focal point of the trial, and the detail and repetition admitted must be narrow so as to avoid the danger of a trial within a trial).

¶ 103 Here, the trial court found that the other assaults were proximate in time and factually similar to the charged offenses. Defendant allegedly beat all the victims and choked some of them. Defendant also allegedly committed the same types of sex acts with all the victims. He allegedly forced vaginal and oral sex with all the victims and anal sex with two victims. Defendant allegedly forced the victims to eat his feces, swallow his urine, suck "snot" from his nose, lick his nostrils, or allow him to spit in their mouths. Defendant allegedly threatened to kill all the victims. Defendant allegedly used the same vehicle to transport each victim to his home, where he assaulted each in his bedroom or basement. Each victim provided similar statements describing the location and manner of the assault. The court found that the other victims' statements were so specific in their similarity to the charged conduct that the probative value of the other crimes evidence outweighed its potential prejudicial effect.

¶ 104 Defendant does not dispute that the other crimes evidence was proximate in time or factually similar to the charged conduct. Rather, he argues that the prejudicial effect of the volume and specificity of the evidence outweighed its probative value. We disagree. The defense's theory of the case was that his conduct with R.D. was consensual. The trial court considered the other crimes evidence as it related to defendant picking up prostitutes for the

ostensible purpose of consensual sex for money and instead committing sexual assault. Accordingly, the trial court used a modified version of IPI Criminal 4th No. 3.14, advising the jury that the testimony was to be considered for the limited purpose of showing defendant's intent, motive, lack of mistake, and propensity. The other crimes evidence had great probative value on these issues because its volume and specificity so strongly corroborated R.D.'s testimony that the conduct was nonconsensual.

¶ 105 Defendant relies on *People v. Cardamone*, 381 Ill. App. 3d 462 (2008), in arguing that he was subjected to a mini-trial on the other crimes evidence, but his reliance on that case is misplaced. In *Cardamone*, this court recognized that there might be times when the sheer volume of other-crimes evidence renders it unduly prejudicial. *Cardamone*, 381 Ill. App. 3d at 496-97 (the State, in its prosecution of a gymnastics coach for sexual abuse, introduced several incidents of uncharged conduct against seven alleged victims). *Cardamone* did not purport to hold that other crimes are always more prejudicial than probative when they outnumber the charged incidents. Indeed, *Cardamone* recognized that section 115-7.3 permits other crimes evidence to be introduced for substantive purposes and that determining whether the nature and quantity of the evidence is excessive is left to the trial court's discretion. *Cardamone*, 381 Ill. App. 3d at 489, 497 ("some of the evidence was admissible and it is difficult to determine precisely where to draw the line"). *Cardamone* was an extreme case that bears no similarity to this case, where there is much less other crimes evidence.

¶ 106 Furthermore, the danger of unfair prejudice from admitting other crimes evidence under section 115-7.3, as opposed to admitting the evidence pursuant to common law, is greatly diminished by the way section 115-7.3 upended the long-standing rule that other crimes evidence establishing propensity is *per se* unfairly prejudicial—instead, introduction for propensity is

expressly permitted. *People v. Walston*, 386 Ill. App. 3d 598, 619-20 (2008). While undue prejudice can arise when too much evidence is admitted under section 115-7.3, "the actual limits on the trial court's decisions on the quantity of propensity evidence to be admitted under section 115-7.3 are relatively modest, especially when combined with the highly deferential abuse-of-discretion standard that governs review of such trial court decisions." *Walston*, 386 Ill. App. 3d at 621. Under this deferential standard, we conclude that the trial court did not abuse its discretion, and therefore, no plain error occurred.

¶ 107 2. Ineffective Assistance

¶ 108 Defendant alternatively argues that defense counsel rendered ineffective assistance by failing to object to the admission of the other crimes evidence and, instead, moving for permissive joinder of R.D.'s case with the prosecutions for the four other assaults.

¶ 109 Both the United States and Illinois Constitutions guarantee a defendant the right to effective assistance of counsel. See U.S. Const., amend. VI; Ill. Const. 1970, art. I, §8. The purpose of this guarantee is to ensure that the defendant receives a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 52. The ultimate focus of the inquiry is on the fundamental fairness of the challenged proceedings. *Strickland*, 466 U.S. at 696. However, there is a strong presumption of outcome reliability, so to prevail, a defendant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Anderson*, 2013 IL App (2d) 111183, ¶ 52.

¶ 110 Claims of ineffective assistance of counsel are generally evaluated under the two-part test set forth in *Strickland*, 466 U.S. at 687, and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). *People v. Harris*, 225 Ill. 2d 1, 20 (2007). Under *Strickland*,

defense counsel is ineffective only if (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's error prejudiced the defendant. The failure to establish either prong is fatal to the claim. *Strickland*, 466 U.S. at 687.

¶ 111 We assess counsel's performance using an objective standard of competence under prevailing professional norms. *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *Ramsey*, 239 Ill. 2d at 433. Counsel's strategic choices that are made after investigation of the law and the facts are virtually unassailable. *Ramsey*, 239 Ill. 2d at 433. The prejudice prong of the *Strickland* test can be satisfied if the defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 112 Defense counsel's decision to not challenge the admission of the other crimes evidence under section 115-7.3 was not objectively unreasonable because a motion to bar such evidence would have lacked merit. As discussed, the trial court did not abuse its discretion in admitting the other crimes evidence for the limited purpose of showing defendant's intent, motive, lack of mistake, and propensity. The other crimes evidence had great probative value on these issues because its volume and specificity so strongly corroborated R.D.'s testimony that she did not consent to defendant's conduct.

¶ 113 At oral argument, appellate counsel conceded that admitting the testimony of one other victim would not have been unduly prejudicial. The outcome of the trial would not have been different regardless of whether the court admitted the testimony of just one other victim or all

four, and therefore, defendant has not established that he was prejudiced from the admission of testimony of the other victims.

¶ 114 Furthermore, defendant was not prejudiced by counsel's decision to move for joinder of the five prosecutions. The trial court denied the motion, and defendant can identify no resulting prejudice. However, defendant suggests that the trial court's decision to admit the other crimes evidence to show defendant's intent, motive, lack of mistake, and propensity cannot be reconciled with its decision to deny counsel's motion for joinder. According to defendant, if the evidence was too prejudicial to allow joinder, it also must be too prejudicial for admission under section 115-7.3. We disagree.

¶ 115 The trial court denied joinder not only for the other crimes' prejudicial effect, but also because "it's not supported by a statutory basis." A court may order two or more charges to be tried together "if the offenses *** could have been joined in a single charge." 725 ILCS 5/114-7 (West 2012). "Two or more offenses may be charged in the same [charging instrument] in a separate count for each offense if the offenses charged *** are based on the same act or on 2 or more acts which are part of the same comprehensive transaction" (725 ILCS 5/111-4(a) (West 2012)), unless it appears that the defendant will be prejudiced by joinder of the separate charges (725 ILCS 5/114-8 (West 2012)). *Anderson*, 2013 IL App (2d) 111183, ¶ 68 (citing *Walston*, 386 Ill. App. 3d at 601).

¶ 116 The factors affecting whether two or more crimes are part of the "same comprehensive transaction" so as to be susceptible to joinder are described as (1) the proximity in time and location of the offenses; (2) the identity of evidence needed to demonstrate a link between the offenses; (3) whether there was a common method in the offenses; and (4) whether the same or

similar evidence would establish the elements of the offenses. *Anderson*, 2013 IL App (2d) 111183, ¶ 69 (citing *Walston*, 386 Ill. App. 3d at 601).

¶ 117 First, "the proximity in time and location of the offenses," the most helpful factor by far, asks whether the offenses to be joined were close in time and location. As events become separated by time and distance, the likelihood decreases that they may be considered part of the same comprehensive transaction as is required by the statute. *Anderson*, 2013 IL App (2d) 111183, ¶ 70. No matter how similar two incidents are, incidents not occurring within a very close time and space to one another will most likely be separate incidents. In this case, the factor of proximity in time and location weighs slightly in favor of joinder. The State introduced evidence that the five victims were assaulted on August, 21, 2011, January 29, 2011, January 2011, January 2009, and June 22, 2007, which are relatively close in time. The State also presented evidence that defendant committed all the sex crimes in the bedroom and the basement of his home.

¶ 118 "Second, 'the identity of evidence needed to demonstrate a link between the offenses' is a factor that asks 'not whether evidence of the two crimes is similar or identical but rather whether the court can identify evidence linking the crimes.' " (Emphasis omitted.) *Anderson*, 2013 IL App (2d) 111183, ¶ 71 (quoting *Walston*, 386 Ill. App. 3d at 605). For example, in *People v. Quiroz*, 257 Ill. App. 3d 576 (1993), the appellate court noted that there was evidence linking two shootings to the defendant's alleged armed robbery during his escape: during the time between the two sets of crimes, as he fled the scene of the shootings, the defendant had attempted to gain entrance into the home of a fellow gang member. *Quiroz*, 257 Ill. App. 3d at 586. The defendant's intervening attempt to hide in the house linked his crimes of shooting two people and stealing a car to escape. *Quiroz*, 257 Ill. App. 3d at 586. In this case, the sex

offenses committed against the five victims are very similar, but there is no evidence linking the crimes. Each sexual assault was separate and committed independently from the others.

¶ 119 Third, the "common method" factor in the joinder analysis asks whether the offenses were part of a "common scheme," so that each of the offenses supplies a piece of a larger criminal endeavor of which the crime charged is only a portion. *Anderson*, 2013 IL App (2d) 111183, ¶ 72; *Quiroz*, 257 Ill. App. 3d at 586 (three crimes were part of a common scheme where the last crime was committed in an attempt to flee the scene of the first two)). In this case, the sex offenses committed against the five victims were not part of a common scheme supplying a piece of a larger criminal endeavor. The five victims were targeted independently of one another, and the crimes against them were factually similar but unrelated. Defendant was not engaged in a larger criminal endeavor.

¶ 120 Fourth, the question of whether the same or similar evidence would establish the elements of the offenses may be considered in the joinder analysis, but only if it is used to determine whether multiple offenses are part of a single comprehensive transaction. *Anderson*, 2013 IL App (2d) 111183, ¶ 73. In this case, the sex crimes committed against the five victims certainly would share similar elements, but the evidence would be different in each case. The crimes involve different victims, witnesses, and physical evidence. The evidence to prove the crimes committed against each victim shares no commonality for joinder purposes.

¶ 121 Although the "proximity in time and location" element weighs in favor of joinder, the other factors weigh heavily against it. The identity of evidence linking the offenses, the common method in the offenses, and the elements of the offenses establish that joinder of the charges was inappropriate in this case. The trial court did not abuse its discretion in denying counsel's motion for joinder, and defendant was not prejudiced by counsel's decision to file the motion.

As discussed, the court's decision to admit the other crimes evidence under section 115-7.3 was not an abuse of discretion. Thus, the two rulings are not inconsistent.

¶ 122 C. *Pro se* Posttrial Ineffective Assistance Claim

¶ 123 Finally, defendant argues that the cause must be remanded for an inquiry into his posttrial allegation of ineffective assistance of counsel. Before sentencing, defendant filed a *pro se* motion for a new trial, alleging ineffective assistance. At the sentencing hearing, defendant again expressed his dissatisfaction with counsel's performance. After sentencing, defendant sent a letter to counsel, again alleging his ineffectiveness and asking that counsel present the letter at the next hearing. At the hearing, defendant referred to the letter and asked that counsel read it aloud, but counsel did not. The trial court did not inquire into defendant's posttrial claims of ineffective assistance

¶ 124 When a defendant files a *pro se* posttrial motion alleging ineffective assistance of counsel, he or she is not automatically entitled to the appointment of counsel to assist with the motion. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, the trial court should first examine the bases of the defendant's claims; if the court determines that the claims lack merit or pertain only to trial strategy, the court may deny the *pro se* motion without appointing counsel. *Moore*, 207 Ill. 2d. at 77-78. If the court determines that the claims demonstrate that counsel possibly neglected the defendant's case, new counsel should be appointed to represent the defendant at the hearing on the *pro se* motion. *Moore*, 207 Ill. 2d. at 78. New counsel may also independently evaluate the defendant's claims. *Moore*, 207 Ill. 2d. at 78.

¶ 125 In conducting the inquiry into the defendant's claims, the trial court will likely need to discuss the allegations with the defendant or with the defendant's trial counsel. "[S]ome interchange between the trial court and trial counsel regarding the facts and circumstances

surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted ***." *Moore*, 207 Ill. 2d. at 78. Accordingly, to evaluate whether the claims indicate possible neglect, the trial court may consider any facial insufficiency of the defendant's allegations and may (1) ask the defendant's trial counsel questions; (2) briefly discuss the allegations with the defendant; or (3) rely upon its own knowledge of counsel's performance. *Moore*, 207 Ill. 2d. at 78-79. The defendant must raise a specific, discernible claim of ineffective assistance. *People v. Taylor*, 237 Ill. 2d 68, 76-77 (2010). A reviewing court reviews *de novo* whether the trial court made an adequate inquiry into the defendant's *pro se* claims. *Taylor*, 237 Ill. 2d at 75.

¶ 126 The State concedes that a remand is necessary because the trial court made no inquiry into any of defendant's claims of ineffective assistance. However, the State argues that the preliminary hearing should be limited to the allegations set forth in the *pro se* motion for a new trial. The State makes a specious argument that defendant's remaining claims were not properly before the trial court and should be disregarded on remand.

¶ 127 The State cites no authority for the proposition that defendant should be barred from presenting on remand any grounds for claiming ineffective assistance. In *Moore*, the trial court conducted a preliminary inquiry into the defendant's *pro se* posttrial ineffective assistance claim and directed appointed counsel to investigate only that claim. On appeal, the defendant argued that the trial court denied his right to effective counsel by limiting his claim. *People v. Moore*, 389 Ill. App. 3d 1031, 1039 (2009). The appellate court concluded that the trial court properly limited the scope of counsel's appointment after finding that the defendant's other allegations did not warrant further investigation. *Moore*, 389 Ill. App. 3d at 1044. However, the court stated "[w]e know of no rule that precludes appointed counsel from requesting that the trial court

consider other claims of possible neglect that he may discover in carrying out the precise duty of the appointment." *Moore*, 389 Ill. App. 3d at 1043. In *Moore*, appointed counsel did not raise any additional claims of ineffective assistance, but the appellate court suggested that he would not have been barred from doing so upon discovering them during his independent investigation. Likewise, we remand the cause for the court to inquire into the allegations of ineffective assistance raised in defendant's *pro se* posttrial motion as well as any other areas in which defendant alleges deficient performance of trial counsel. On remand, defendant is entitled to the same opportunity to present his claims as if the trial court had made a proper *Krankel* inquiry in the first place.

¶ 128 We hold the trial court erred by failing to conduct an appropriate preliminary inquiry under *Krankel* to evaluate the posttrial claims of ineffective assistance of trial counsel. We remand for the limited purpose of conducting a hearing on defendant's claims. We offer no opinion as to whether new counsel should be appointed to undertake an independent review of the claims. The trial court will conduct a preliminary inquiry into the factual basis of the claims to determine if they show possible neglect of the case warranting appointment of counsel.

¶ 129 III. CONCLUSION

¶ 130 For the reasons stated, defendant's three convictions of aggravated criminal sexual assault are affirmed. The cause is remanded for an inquiry into any claims of ineffective assistance of counsel that defendant wishes to present to the trial court.

¶ 131 Affirmed and remanded.