FIRST DIVISION
August 10, 2015

No. 1-13-0392
2015 IL App (1st) 130392-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	11 CR 4655
LAMAR COLLINS-THOMPSON,	)	
	)	
	)	Honorable Frank Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* A rational trier of fact could have found identification testimony was sufficient to prove defendant was the shooter when one witness was six feet away when defendant first pulled the trigger, saw defendant aim at him and the second witness, and the second witness "felt pain" after the second of two sequential shots. Other testimony that the shooter aimed in one direction and that all six shots came from the same place is sufficient for a rational trier of fact to conclude that defendant was the only shooter. Testimony that defendant held a gun to the window of a car, and thereafter gun shots were heard, is sufficient for a rational trier of fact to conclude that defendant was the shooter. Trial court must inquire about the factual underpinnings of defendant's allegation of ineffective assistance of counsel to satisfy *Krankel*.

¶ 2 After a bench trial, defendant was found guilty of the attempted murder of Michael Jones, four counts of aggravated battery with a firearm (Vincent Davis, Michael Kelley, Michael Jones, and Christopher Mitchell), and personally discharging the firearm which proximately caused great bodily harm to Michael Jones. Defendant was sentenced to 33 years in the Illinois Department of Corrections for the attempted first degree murder conviction and severe bodily harm to Michael Jones. He was sentenced to three separate, consecutive sentences of nine years each on the three aggravated battery with a firearm convictions.[1] Defendant now appeals two aggravated battery convictions of victims Davis and Mitchell as well as the attempted murder conviction of Jones. He also requests that we remand the case for a *Krankel* hearing. We affirm defendant's convictions but remand for the case for a *Krankel* hearing.

¶ 3 BACKGROUND

¶ 4 The State called eight witnesses at trial: Officer Andrew Derewonko, Detective Gilberto Miramontes, Vincent Davis, Michael Kelley, Christopher Mitchell, Camille Donald, Michael Jones, and Myron Hogue. The defense called Jessie Waller to testify.

¶ 5 First, Officer Andrew Derewonko testified that on the night of February 26, 2011, he was dispatched to a teen nightclub, Kingdom Café, because shots reportedly had been fired. Upon arriving at the scene, the officer testified that he saw over 100 people running in the area and that he secured a perimeter and spoke to four individuals who gave information about an altercation at the nightclub.

¶ 6 Detective Miramontes testified that he showed Jones, Kelley, and Hogue a photo array on February 27, 2011 and that Jones and Kelley identified defendant as the shooter in the altercation

[1] The fourth charge of aggravated battery with a firearm of Michael Jones merged into the attempted murder charge of Michael Jones.

at Kingdom Café. The officer then testified that Jones and Mitchell viewed a physical lineup on February 28, 2011 and that both of them identified the defendant in that lineup.

¶ 7 Vincent Davis testified that he was at Kingdom Café on February 26, 2011, when a fight broke out. He further testified that he first heard a "clank, like somebody tried to pull the trigger [of a gun]." Davis explained he then heard six shots come from the same place inside the club—two shots, a pause of "a couple of minutes," then four more shots—and that he was shot on the left hip. He further explained that "by the time [he and his cousin, Kelley,] were shot, [both of them] were behind the DJ booth" of the café and that more than 15 people were also behind the DJ booth. On cross-examination, Davis testified that he did not see who shot him. He also explained that he was not sure which of the six shots hit him but he believed the second shot hit him because he "didn't feel pain until after the second shot." Davis testified that he was assisted out of the nightclub to an ambulance and was treated at the hospital for his injuries.

¶ 8 Michael Kelley testified that he saw defendant at Kingdom Café on February 26, 2011 and that defendant was drunk and said "ya'll got guns, ya'll got guns." Kelley testified that he was about six feet from defendant when defendant tried to pull the trigger of a gun but the gun did not go off but only made a "click" noise. After that, Kelley explained, defendant aimed the gun at Kelley's crowd of friends and Kelley got shot by the first bullet in his left hand and also got shot in his right thigh. Kelley further testified that he did not give police a description of the shooter but "remember[ed] his face" and picked defendant's photo from a photo array the day after the incident. Kelley was treated at the hospital for his injures.

¶ 9 The State next called Christopher Mitchell. He testified that he heard that "somebody tried to pull the trigger" of a gun on the night of February 26, 2011 at Kingdom Café but that the gun clicked. Mitchell testified that when he was on the dance floor near the DJ booth he heard

two shots, saw Kelley holding his leg behind the DJ booth, and after a "minute or so" heard four more shots. Mitchell testified that, at that point, he thought somebody knocked him out but in fact, he soon realized he was shot in his right shoulder and saw his t-shirt was full of blood. Mitchell saw that Davis had been shot too.

¶ 10 During his testimony, Mitchell explained that he did not see the shooter but only knew who the shooter was by what the shooter was wearing. The exact exchange on direct examination was as follows:

> "Q: Now, two days later on February 28th, 2011 they took you to the police station to view a lineup; is that correct?
>
> A: Yes, sir.
>
> Q: All right. And you picked someone out of that lineup; is that right?
>
> A: Yes, sir.
>
> Q: And is that the person that you saw with the gun the night of February 26th?
>
> A: I didn't see – I didn't see anyone. I couldn't tell who was the shooter when I was – I didn't know. I didn't know who it was. I was just going by what I seen that the shooter had on. That is all I knew."

On cross-examination, defense counsel asked “so you don’t know who shot you, do you, sir?” He responded: “Now I know who shot me. I found out who shot me.”

¶ 11 Mitchell testified that everyone in Kingdom Café was running and, when he ran out the front door of the nightclub, he saw a girl get hit by a car. Once outside, Mitchell testified that he then heard more gunshots, saw the car window had been shattered and also saw his friend, Kelley, get out of a car and "hit the ground." He also testified that he told a police officer that he saw that the shooter had on a red and black shirt. Mitchell testified that on February 28, 2011, he

was taken to the police station where he picked defendant out of a physical lineup. Mitchell took medication for a month and a half, then had surgery to remove the bullet from his right shoulder.

¶ 12 The next State witness, Camille Donald, testified that she too was at Kingdom Café on February 26, 2011 when a fight turned into a shooting. She testified that she ran out the back door of the nightclub, toward her car, then turned back to find her friend with whom she had come. At that point, Donald explained that she was hit by a gold van. On cross-examination, Donald testified that she described the shooter as having a red and white button-up shirt to a police officer.

¶ 13 The State also called Michael Jones. Jones testified that he recognized defendant from a previous encounter between defendant and Jones' best friend, as well as from school. He described his arrival at the parking lot area of Kingdom Café on February 26, 2011 stating that "everything looked normal" until he got out of the car and saw Donald, whom he also knew, get hit by a vehicle. Jones testified that he and his friends, including Hogue, got out of their car and started walking toward Donald to help her. Jones explained that before they got to Donald, she had hopped up and starting running from the spot. Jones testified that a group of people got out of the vehicle that hit Donald, and the group started arguing with Jones' group. Jones testified that a person from the other vehicle pulled a gun out. Jones further testified that the person he saw with the gun was not in the courtroom during his trial testimony and that he did not see defendant with a gun that night. Jones testified that he then told his friends "let's leave because they have a gun" and, while he and his friends were getting back into their car, he saw defendant talking to the person who had the gun and pointing at his group, particularly Hogue. Hogue got into the front passenger seat of the car and Jones got in the back seat of the passenger side. Jones testified that, while he was in the car, he thought someone threw something to shatter the car

window. When he got out of the car "fixing to fight," Jones realized he had been shot near his right shoulder blade. Jones testified that he had not heard a gun shot nor had he seen the shooter's face. Jones went to the hospital for his injury. He also explained that on February 27, 2011 he identified defendant in a photo array and on February 28, 2011, he identified defendant in a physical lineup.

¶ 14 Myron Hogue was the next person to testify on behalf of the State. He described arriving at the parking lot of Kingdom Café on February 26, 2011 in the front passenger seat of a car with Jones behind him in the back seat of the passenger side. Hogue further described that his group tried to help Donald but that before they reached her, defendant and others hopped out of the vehicle that struck Donald and started running towards Hogue's group "fixing to fight." Hogue testified that he recognized defendant in the other group from his brother's school. He explained that the other group's vehicle was 35 feet away when the occupants, including defendant, started running toward him. When the other group was between 10 and 12 feet away, Hogue testified that he saw that defendant had a gun in his sleeve. Upon seeing that, Hogue testified that one or more of the other vehicle's occupants said "get in the car before we start shooting."[2] Hogue testified that he then pushed Jones in the back seat of the passenger side of the car and he got into the front seat passenger side. Hogue went on to explain that he saw defendant with a gun in his hand at the back seat passenger-side window of the car, when Hogue put his head down and heard the car window break and the sound of four gunshots. Hogue explained that he did not look around from the front seat to see the shooter. Hogue testified that he and Jones got out of the car and he saw that Jones had been shot in the back. In his testimony and the statement he made on March 1, 2011, Hogue explained that defendant was the only person he

[2] Hogue's written statement to police indicated that defendant said to Hogue and his friends, "you all better get in the car before I shoot you all."

saw with a gun in the parking lot. He also testified that on February 27, 2011 he identified defendant's picture in a photo array and on February 28, 2011, he went to the police station and, when he was asked to pick out the person that he saw with a gun in his hand at the Kingdom Café, he identified defendant.

¶ 15 The defense called Jessie Waller, the security guard at Kingdom Café, to testify. He stated that on the night of February 26, 2011, he heard people screaming and that he stepped through the doors of the nightclub and heard gun shots. He testified about the shooter: "whoever the guy was was shooting towards the DJ booth, bam, bam, and he just started shooting back and forth like towards the – I want to say like towards the makeshift dance floor and the DJ booth." Waller testified that he saw a silhouette of the shooter at the back door of the nightclub and only saw that the shooter had on "a red shirt or like a red hoodie."

¶ 16 After closing arguments, the trial court found defendant guilty of attempted murder of Michael Jones and three counts of aggravated battery with a firearm. Defendant was found not guilty of the attempted murder charges of Davis, Mitchell, and Kelley.

¶ 17 Defense counsel filed a motion for a new trial. At the hearing on the motion, defendant informed the court that he wanted to proceed *pro se*. Defense counsel spoke with defendant and the trial court subsequently denied counsel’s motion for a new trial. Defense counsel informed the court that defendant wanted to address the court concerning his own motion for a new trial and the court confirmed that defendant wanted to proceed *pro se*. Defendant informed the court that he "looked over [his] case, and [he saw] a lot of things that [] were not prepared for, a lot of things that w[ere] not done at trial that could have been done, a lot of things that wasn't physical evidence on [his] behalf that wasn't brought to your attention that never made it to the trial."

¶ 18 The court granted defendant's request to proceed *pro se* and as well as defendant's motion for a continuance so he could file a written motion for ineffective assistance of counsel. Defendant's defense counsel was given leave to withdraw. At the next court date, defendant informed the court that he was unable to prepare his claim and asked for appointment of counsel other than the public defender. The court denied that request stating: "I can't do that. It is not allowed by myself anymore. We don't do that because of budgetary reasons that came down. I would have to go through my presiding judge." The defendant then complained that he needed access to the law library. The court explained that access to the library had been abused in the past and that defendant's lack of access was a burden of representing himself. The court then suggested defendant could hire a new attorney or the court offered to reappoint the previous defense counsel saying "but nothing has been filed by yourself regarding her." Defendant stated: "I am indigent. We could proceed with the next step." Defendant then indicated he "wanted to make a claim for ineffective assistance of counsel." The court replied: "You could make your claim, but you have to have something filed." Defendant requested a copy of the trial transcripts in order to make his claim for ineffective assistance of counsel because without the transcripts to "visualize, see the argument, [he is] saying that's ineffective and everything else that [he] think[s] was ineffective [he] can't really state the fact." The court also denied that request saying "[g]ive me something in writing because the state will have to respond to it. It may have to call witnesses in response to it, sir." After a brief exchange over the ordering of trial transcripts, the court then said: "I will give you a date to see if you could fashion your motion, that's fine, but otherwise this case has to go to a disposition." Once again, defendant asked "You don't think you could appoint any other counsel" to which the court replied: "I cannot do it anymore." Defendant

then agreed to "proceed with the sentencing" and soon thereafter, agreed to the reappointment of the previous defense counsel.

¶ 19 ANALYSIS

¶ 20 Standard of Review

¶ 21 As described more fully below, defendant challenges the sufficiency of the evidence for both his aggravated battery with a firearm convictions as well as the attempted murder conviction. When reviewing challenges to the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Fields*, 2013 IL App (2d) 120945, ¶ 28. The findings and judgment will not be reversed unless the evidence is so improbable as to create reasonable doubt of the defendant's guilt. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). A reviewing court must consider all of the evidence submitted at the original trial to resolve the question of the sufficiency of the evidence. *People v. Olivera*, 164 Ill. 2d 382, 393–94 (1995).

¶ 22 Aggravated Battery With a Firearm as to Davis and Mitchell

¶ 23 Defendant argues that Mitchell's statement that he "now knew" who the shooter was amounted to inadmissible hearsay that had no probative value, or, if the statement did have probative value, then defense counsel was ineffective for failing to object to it. Moreover, defendant argues that Kelley's identification of defendant as the first shooter who fired two shots was insufficient circumstantial evidence to prove beyond a reasonable doubt that there was only one shooter who fired both the first and second sets of shots inside Kingdom Café. Defendant contends that the testimony of Waller and Donald was consistent with the theory of two shooters.

¶ 24 The State responds that the testimony of Kelley, Davis, and Mitchell proved beyond a reasonable doubt that defendant was the shooter because Kelley and Mitchell both identified defendant, Kelley testified that defendant aimed the gun at Kelley's group, and Davis testified that he was next to Kelley when he was shot. Moreover, the State argues, Mitchell testified that the shooter was wearing a red and black shirt even though he did not know the defendant before the shooting. While the State disputes that there was any evidence of a second shooter inside or outside, the State argues that defendant would be legally accountable for any second shooter because defendant stood next to and talked to the alleged shooter, and pointed directly at Hogue just before Jones was shot outside the club. We affirm defendant's convictions for aggravated battery with a firearm.

¶ 25 One commits aggravated battery with a firearm when: " (a) *** he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual" by means of discharging of a firearm. 720 ILCS 5/12-3; 5/12-4.2 (West 2010). The question in this case is whether a rational trier of fact could conclude that the identification of defendant as the shooter was proved beyond reasonable doubt.

¶ 26 Defendant argues that Kelley's identification of defendant as the shooter of the first two shots is insufficient to prove that there was only one shooter. However, uncorroborated testimony by a single witness is sufficient to convict if the testimony is positive and the witness credible. *People v. McVet*, 7 Ill. App. 3d 381, 385 (1972). We also note that the trial court is not required to accept any possible explanation compatible with the defendant's innocence and to elevate it to the status of reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009). In other words, a reviewing court, in viewing the evidence in the light most favorable to the

State, is not required to substitute a more plausible version of events put forward by the State in favor of a version advanced by defendant. See *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 27 In this case, Kelley was only six feet from defendant when he saw defendant pull the trigger. Kelley also saw defendant aim the gun at him and his group of friends that included Davis. Furthermore, the fact that Davis testified that he felt pain "after the second shot" was fired, which immediately followed the first shot, and that Davis and Kelley were next to each other when they were shot or soon thereafter, is sufficient for a rational trier of fact to conclude that defendant shot Davis.

¶ 28 As to the victim Mitchell, we also find that a rational trier of fact could have concluded that the State proved defendant was the shooter beyond a reasonable doubt. First, there was consistent testimony that all six shots came from the same place and were aimed at the same location. Waller, the security guard, testified that the shooter aimed all six shots at the DJ booth or the nearby dance floor. Davis testified that he heard all six shots coming from the same place in the club. Mitchell testified that he was "half behind the speakers behind the DJ booth" when he was shot in his right shoulder.

¶ 29 Furthermore, testimony about the shooter's clothing, the click sound of a gun, and the timing of the two set of shots, are all factors consistent with the State's theory that there was one shooter, rather than two shooters as defendant contends. Mitchell testified that the shooter was wearing a red and black shirt and Waller testified that the shooter was wearing a "red shirt or like a red hoodie." Both Mitchell and Kelley, who was only six feet away from defendant, heard the sound of the gun click before the shots began. The length of time of, at most, a few minutes, between the first and second sets of shots supports the theory that there was one shooter. Mitchell testified that there was a "minute or so" between shots, and Davis testified that he heard

two shots, a pause of "a couple of minutes" then four more shots. Therefore, as a reviewing court, in viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have concluded that defendant was the shooter. We need not rely on Mitchell's testimony that he "now knew" who the shooter was.

¶ 30 Attempted Murder of Michael Jones

¶ 31 Defendant again disputes the sufficiency of the evidence in identifying him as the person who shot Jones outside the Kingdom Café on February 26, 2011. Defendant argues that the trial court could not properly infer that defendant, rather than an unidentified person whom Jones saw with a gun, shot Jones. Moreover, defendant argues that Hogue's testimony that he saw defendant point his gun at the car in which Jones was sitting was not sufficient to prove beyond a reasonable doubt that defendant fired the shot.

¶ 32 The State responds that the trial court properly found that Hogue's testimony established that defendant shot Jones as he was in the back seat of the vehicle and properly dismissed defendant's argument that there was another shooter.

¶ 33 Section 5 of the Criminal Code of 1961 defines attempted murder as when one "either intends to kill or do great bodily harm *** or knows that such acts will cause death ***; or (2) knows that such acts create a strong probability of death or great bodily harm" and, "does any act that constitutes a substantial step toward the commission" of that act. 720 ILCS 5/9-1; 5/8-4 (West 2010). The burden is on prosecution to prove beyond reasonable doubt the identity of person who committed the offense. *People v. Goodloe*, 263 Ill. App. 3d 1060, 1069 (1994).

¶ 34 A conviction is not sustainable by evidence beyond reasonable doubt if identification of the accused was vague, doubtful, and uncertain. *People v. Cullotta*, 32 Ill. 2d 502, 504 (1965); *People v. Derengowski*, 67 Ill. App. 2d 66, 68-69 (1966). However, testimony that is

clear, convincing and unshaken on cross-examination, can be sufficient to justify a conviction. *People v. Miller*, 27 Ill. 2d 336, 338 (1963). *People v. Lacey*, 24 Ill. 2d 607, 610 (1962). The testimony of a single eyewitness is sufficient to support a conviction provided that the witness had the opportunity to view the accused under circumstances which would permit a positive identification. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). An identification is considered positive, and thus reliable, where the witness (1) had a sufficient opportunity to view the offender, (2) showed an adequate degree of attention to the characteristics of the assailant, (3) described the perpetrator with a reasonable degree of accuracy, (4) displayed a sufficient amount of certainty in identifying the offender, and (5) identified the accused within a reasonable period of time following the crime. *People v. Kidd*, 180 Ill. App. 3d 1065, 1070 (1989) (citing *People v. Dean*, 156 Ill. App. 3d 344, 351 (1987)).

¶ 35 We find that the trial court could have properly inferred from Hogue's testimony that defendant, rather than an unidentified person whom Jones saw with a gun, shot Jones. Even though Hogue did not watch defendant's movements as the gun went off, Hogue saw defendant aiming at the back passenger-side window right before he heard the sound of gun shots. It is the trial court's function to determine the credibility of witnesses and the weight that should be given their testimony. *People v. Manion*, 67 Ill. 2d 564, 577–78 (1977). The trial court found Hogue a credible witness and gave due weight to his testimony.[3]

¶ 36 Moreover, Hogue's testimony was not vague or uncertain nor did he equivocate on cross-examination. See *Lacey*, 24 Ill. 2d at 610. He testified that he watched as defendant approached him in the parking lot, advancing from 35 feet away to less than 12 feet away, at which point Hogue noticed that defendant had a gun and testified that defendant was the only

[3] The trial court mistakenly recalled Hogue's testimony that he actually saw defendant pull the trigger.

person with a gun. Hogue also testified that defendant said a threatening statement which prompted Hogue to push Jones into the car. Hogue testified that he saw defendant point a gun at the back passenger-side window before he put his head down, and then heard gunshots.

¶ 37 Furthermore, there is no requirement that a defendant be identified at a police lineup. See *People v. Coli*, 2 Ill. 2d 186 (1954); *People v. Schmidt*, 364 Ill. 313 (1936). Even so, Hogue testified that he identified defendant's picture in a photo array on February 27, 2011 and in a physical lineup on February 28, 2011 as the person he saw with a gun at Kingdom Café on February 26, 2011. The identifications made in this case were at most two days after the incident and, not being a considerable lapse of time, the identifications were owed considerable weight. *People v. Capon*, 23 Ill. 2d 254, 256-57 (1961) (citing *People v. Barad*, 362 Ill. 584 (1936) for the proposition that a considerable lapse of time from crime to identification of a defendant goes to the weight of the evidence). Moreover, the certainty of Hogue's identification is enhanced, because Hogue knew defendant from his brother's school. *People v. Milam*, 80 Ill. App. 3d 245, 251 (1980)(noting that testimony of an identification witness is strengthened to the extent of his prior acquaintance with the accused).

¶ 38 Construing the evidence in the light most favorable to the State, the unidentified man whom Jones saw with a gun was not the person who shot Jones and a rational trier of fact could have found Hogue’s identification of defendant sufficient.

¶ 39 *Krankel* Hearing

¶ 40 Defendant argues that when he informed the court that he wanted to proceed *pro se* and complained about defense counsel's failure to present physical evidence, the trial court was required to conduct a *Krankel* hearing.

¶ 41 The State argues that defendant was not entitled to a *Krankel* hearing because defendant did not file a motion alleging ineffective assistance of counsel or provide the court with any details of the ineffective assistance of counsel claim.

¶ 42 The evolution of the *Krankel* inquiry has yielded a rule "that counsel need not be appointed in every case where a defendant presents a *pro se* claim of ineffective assistance of counsel." *People v. Vargas*, 409 Ill. App. 3d 790, 801 (2011). Instead, it is incumbent upon the trial court to examine the claim and its factual underpinnings. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). Where a *pro se* claim is determined to be without merit or concerns a matter of trial strategy, there is no need to appoint counsel and denial of the motion is appropriate. *Moore*, 207 Ill. 2d at 78. Alternatively, if the allegations demonstrate the possibility of neglect, then counsel must be appointed. *People v. Chapman*, 194 Ill. 2d 186, 230 (2000). On review, our concern " 'is whether the trial court conducted an adequate inquiry into the *pro se* defendant's allegations of ineffective assistance of counsel.' " *People v. Bull*, 185 Ill. 2d at 210, 235 (1998), quoting *People v. Johnson*, 159 Ill. 2d 97, 125 (1994). Our review of the adequacy of the inquiry is *de novo*. *Vargas*, 409 Ill. App. 3d at 801.

¶ 43 Our supreme court in *Moore* offered the following as a comprehensive statement of the basics of the inquiry:

> During this evaluation, some 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 on a defendant's claim. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations. [Citations.] A brief discussion between the trial court and the defendant may be

> sufficient. [Citations.] Also, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. [Citations.]

Moore, 207 Ill. 2d at 78-79.

¶ 44 We find that defendant made a sufficient description of his ineffective assistance of counsel claim and that the trial court failed to conduct a proper examination of defendant's *pro se* claim.

¶ 45 The threshold question is whether defendant's comment triggered the court's duty to inquire. *People v. Ward*, 371 Ill. App. 3d 382, 432 (2007). Here, defendant complained that defense counsel did not bring "physical evidence" on his behalf to the trial court's attention. There is no bright line rule as to the sufficiency of allegations a defendant must proffer in order to trigger *Krankel*. Compare *People v. Bolton*, 382 Ill. App. 3d 714, 721 (2012) (finding a bare claim of ineffectiveness warrants some degree of inquiry under *Moore*) with *Ward*, 371 Ill. App. 3d at 432 (noting that "'[a] bald allegation that [defense] counsel rendered inadequate representation is insufficient for the trial court to consider [as an acceptable invocation of *Krankel*].'"). We need not demarcate a bright line because our holding is limited to the specific facts of this case. We find defendant's statement that defense counsel failed to present "physical evidence" sufficient to trigger further inquiry in this case where there was an absence of physical evidence at trial.

¶ 46 In this case, the State's case relied on eyewitness testimony. Testimony revealed that there were between 7 and 11 shots fired at Kingdom Café on February 26, 2011. No ballistic evidence was introduced at trial. Defendant's assertion that defense counsel failed to present

"physical evidence" is at least an insinuation of the "possibility of neglect" of the case. *Chapman*, 194 Ill. 2d at 230. Defendant's statement was sufficiently clear that he was complaining about his attorney's performance. *People v. Taylor*, 237 Ill. 2d 68, 76-77 (2010).

¶ 47 Having determined that defendant's statement, in the context of the case as whole, triggered a *Krankel* inquiry, we now turn to the adequacy of the trial court's inquiry of defendant's allegations of ineffective assistance of counsel.

¶ 48 On October 5, 2012 the trial court held a hearing on defense counsel's motion for a new trial. The court denied the motion. It then heard from defendant who wanted to proceed *pro se* and file his own motion for a new trial. The defendant then explained that he saw "a lot of things that [] were not prepared for, a lot of things that w[ere] not done at trial that could have been done, a lot of things that wasn't [*sic*] physical evidence on [his] behalf that wasn't brought to [the court's] attention that never made it to the trial." The court gave defendant an opportunity to file a written motion. At the next court date on November 20, 2012, defendant stated that he was unable to prepare his claim.

¶ 49 At that point, the trial court engaged in a discussion with defendant in which defendant requested the appointment of new counsel, access to the law library, and the ordering of trial transcripts. The trial court explained that it could not grant any of defendant's requests. At least twice during this discussion, defendant reiterated that he wanted to make a claim for ineffective assistance of counsel: "I wanted to make my claim for ineffective assistance of counsel"; "without my trial transcripts to really visualize, see the argument, I'm saying that's ineffective and everything else that I think was ineffective". During this discussion, the trial court did not inquire about the underlying factual basis surrounding defendant's allegation that defense counsel failed to bring physical evidence to the court's attention. See *Moore*, 207 Ill. 2d

at 79; *Vargas*, 409 Ill. App. 3d at 802 (noting that the trial court commented on defendant's *pro se* motion, but that the commentary was not at all consistent with *Krankel*'s teaching). Therefore, the trial court erred in failing to engage in "some interchange" concerning the facts of the allegedly ineffective representation. *Moore*, 207 Ill. 2d at 78.

¶ 50 In the discussion between trial court and defendant about new counsel, the law library, and trial transcripts, the trial court indicated on three separate occasions that it required a written motion of defendant's complaints: "nothing has been filed by yourself regarding [defense counsel]"; "you have to have something filed"; "[g]ive me something in writing." But, in 2007, this court observed that oral motions were not necessarily insufficient to trigger *Krankel*:

> "one supreme court case that passed on such an oral motion without disparaging its manner of presentation (*People v. Crane*, 145 Ill. 2d 520, 532-33 (1991); one appellate court case holding that, under the circumstances, a defendant's oral complaints amount to a sufficient motion (*People v. Sanchez*, 329 Ill. App. 3d 59, 66 (2002); and, finally, one appellate court case which *** considered the merits of a defendant's oral complaints of ineffective assistance without charging any procedural impropriety (*People v. Spicer*, 163 Ill. App. 3d 81, 92-93 (1987)). *It thus appears unclear whether a defendant must present his* pro se *ineffective assistance claims in a written motion in order to invoke* Krankel."

(Emphasis added.) *Ward*, 371 Ill. App. 3d at 431.

¶ 51 In 2011, this court found that an oral motion "clearly offered sufficient information upon which further questioning could have resolved any lingering doubt or established the necessity of further inquiry consistent with *Krankel*." *Vargas*, 409 Ill. App. 3d at 802. See also, *Sanchez*, 329 Ill. App. 3d at 66 (characterizing the defendant's oral allegations of defense

counsel's ineffectiveness as a "motion.") Given these cases, we cannot conclude that defendant had to file a written motion in order for the trial court to satisfy its obligations under *Krankel*.

¶ 52 By failing to inquire about the factual underpinnings of defendant's allegation but instead requiring that the defendant's grievances be put into a written motion, the trial court did not carry out "some type of inquiry into the underlying factual basis, if any" of defendant's claim of ineffectiveness. *Moore*, 207 Ill. 2d at 79. The court should have asked defendant for the factual underpinnings of his allegations of ineffectiveness without requiring a written motion.

¶ 53 We acknowledge that the trial court did not dismiss defendant's claim (*People v. Gilmore*, 356 Ill. App. 3d 1023, 1037 (2005)) and that the trial court even offered defendant a second continuance to see if he could "fashion" his motion which defendant did not avail himself of. In this way, it can be said that the trial court afforded defendant the "opportunity to specify and support his complaints." *People v. Cummings*, 351 Ill. App. 3d 343, 351 (citing *People v. Robinson*, 157 Ill. 2d 68, 86 (1993)). See also *Ward*, 371 Ill. App. 3d at 433 (finding it significant that the trial court never took any action to preclude or dissuade defendant from specifying the necessary details about his claim). However, despite these efforts, the trial court was still unaware of the factual underpinnings of defendant's claim that defense counsel did not bring "physical evidence" to the trial court's attention when it proceeded to the sentencing phase.

¶ 54 CONCLUSION

¶ 55 We remand only for the limited purpose of allowing the trial court to conduct the required preliminary investigation. *Moore*, 207 Ill. 2d at 81. “If the court determines that the claim of ineffectiveness is spurious or pertains only to trial strategy, the court may then deny the motion and leave standing defendant's convictions and sentences. If the trial court denies the

motion, defendant may still appeal his assertion of ineffective assistance of counsel along with his other assignments of error." *Id.* at 81–82.

¶ 56 Affirmed in part; remanded in part with directions.