2016 IL App (1st) 131970-U

FIRST DIVISION
MARCH 14, 2016

No. 1-13-1970

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.	)	No. 11 C66 0262
	)	
GLEN BROWN,	)	Honorable
	)	John D. Turner and
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judges Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justice Harris concurred in the judgment.
Justice Connors dissented.

ORDER

¶ 1 *Held*: Evidence was sufficient to convict defendant of the offense of felony disorderly conduct; trial court did not abuse its discretion in finding defendant fit to stand trial with medications; plain error doctrine does not apply to reach the forfeited issue of whether defendant's conviction violated the First Amendment of the United States Constitution; the trial court erred in failing to conduct an inquiry into defendant's *pro se* ineffective assistance of counsel claim; cause remanded to the trial court for the limited purpose of allowing the trial court to conduct the required preliminary inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1994).

¶ 2 This order is entered pursuant to the Illinois Supreme Court's supervisory order directing this court to vacate the judgment of the June 8, 2015 order in this case for the purpose of addressing defendant's other claims of error before remanding the cause for a *Krankel* inquiry (*People v. Krankel*, 102 Ill. 2d 181 (1994)).

¶ 3 Following a jury trial in the circuit court of Cook County, defendant Glen Brown was convicted of the felony offense of disorderly conduct (720 ILCS 5/26-1(a)(3) (West 2010)), and sentenced to 50 months of imprisonment. On direct appeal, the defendant argues that: (1) the evidence was insufficient to convict him of felony disorderly conduct; (2) his due process rights were violated where he was convicted and sentenced despite being unfit to stand trial or to be sentenced; (3) the trial court erred in failing to make a factual inquiry into his *pro se* claim of ineffective assistance of counsel under *People v. Krankel* (102 Ill. 2d 181 (1994)) and its progeny; and (4) his conviction for felony disorderly conduct violated the First Amendment of the United States Constitution. For the following reasons, we remand the cause to the circuit court of Cook County for a hearing pursuant to *Krankel*, but affirm the circuit court's judgment in all other respects.

¶ 4 BACKGROUND

¶ 5 On April 5, 2011, the defendant was charged with two counts of felony disorderly conduct for making a false bomb threat (count 1) during a March 3, 2011 incident at a post office, and for making a false report of a crime (count 2). The State elected to proceed against the defendant at trial on count 1.

¶ 6 On April 14, 2011, during an arraignment hearing, defense counsel[1] requested the court to order a behavioral clinical examination (BCX) on the defendant's sanity and fitness to stand trial, which the court granted. In a letter to the court dated April 27, 2011, the Director of Forensic Clinical Services, Dr. Matthew Markos (Dr. Markos), reported that the BCX could not be completed because the defendant refused to cooperate. On July 6, 2011, defense counsel asked the court for a second BCX for fitness and sanity, which the court granted. In a written report to the court dated July 29, 2011, psychiatrist Nishad Nadkarni (Dr. Nadkarni) opined that the defendant was unfit to stand trial; that the defendant was "actively manic and highly psychotic, disorganized in his thinking and expressing a variety of paranoid and grandiose delusions"; that he was unable to verbalize a meaningful understanding of the nature of his charges, courtroom proceedings, or the roles of courtroom personnel; and that his psychosis precluded him from "rationally assisting counsel in his defense and maintaining appropriate courtroom demeanor." Dr. Nadkarni further opined that the defendant should receive inpatient treatment and that "there [was] a substantial probability that [he] [would] be restored to fitness within the statutory period of one year." However, due to the defendant's psychosis, Dr. Nadkarni was unable to render an opinion regarding his sanity at the time of the alleged offense.

¶ 7 On August 2, 2011, defense counsel asked the court for a reevaluation of the defendant (a third BCX), by a different doctor for a "second opinion." Defense counsel noted that when he reviewed with the defendant some of the same questions that were asked by Dr. Nadkarni in the second BCX, the defendant gave "much different" answers to defense counsel. The trial court granted defense counsel's request and ordered a third BCX for fitness and sanity by a doctor

[1] The defendant was represented by both male and female assistant Public Defenders; thus, pronouns "he" and "she" are used to describe defense counsel throughout different stages of the case.

other than Dr. Nadkarni. In a letter to the court dated September 23, 2011, Forensic Clinical Services psychologist, Dr. Susan Messina (Dr. Messina), opined that the defendant was unfit to stand trial. Dr. Messina stated that although the defendant correctly identified the roles of court personnel during the BCX, he failed to demonstrate a rational understanding of the charge against him. However, due to the defendant's mental state, Dr. Messina was unable to offer an opinion as to the issue of sanity.

¶ 8 On October 4, 2011, a fitness hearing was held during which Dr. Messina testified to her September 23, 2011 evaluation of the defendant. Dr. Messina testified that during the evaluation, the defendant was "alert and oriented" and understood the purpose of the evaluation. Dr. Messina stated that the defendant was responsive to her questions, but that his responses were not always logical and were consistent with someone who was exhibiting psychotic symptoms and "illogical thought process[es] and loose associations." Dr. Messina testified that while the defendant demonstrated an ability to have factual knowledge of the roles of court personnel, he failed to have a rational understanding or meaningful appreciation for the charge against him. Dr. Messina opined that the defendant would be unable to assist his lawyer in his own defense because of his psychotic symptoms, and that he could not focus on the "factual information" regarding the incident. She opined that the defendant was unfit to stand trial, but there was "substantial likelihood" that the defendant could be restored to fitness within the statutory period.

¶ 9 The defendant also testified at the fitness hearing. When asked his name, he stated that he was "Dr. Brown, Skyway Canine. Brown is a common color, B-r-o-w-n." He testified that he was a veterinarian, and answered questions regarding the roles of court personnel.

¶ 10 The trial court found the defendant unfit to stand trial, noting that there was no evidence presented to rebut Dr. Messina's testimony, and found that there was a probability that the defendant would become fit to stand trial within one year. The trial court then remanded the defendant to the Department of Human Services (DHS) for inpatient treatment.

¶ 11 On November 2, 2011, DHS filed a treatment plan for the defendant, which included psychotropic medications and counseling, and estimated a goal for his treatment to be completed by February 1, 2012. In a letter dated January 5, 2012, Dr. Nadkarni informed the court that, based on his evaluation of the defendant (the fourth BCX), it was his opinion to a reasonable degree of medical and psychiatric certainty that the defendant was "restored to fitness to stand trial, with medications."

¶ 12 On January 24, 2012, the trial court conducted a restoration hearing during which Dr. Nadkarni testified to his evaluations of the defendant. Dr. Nadkarni testified that, in July 2011, he had found the defendant unfit to stand trial due to his "active psychotic symptoms of schizoaffective disorder" and his need of inpatient treatment. Dr. Nadkarni testified that the defendant then received treatment at the DHS Elgin Mental Health Center. Dr. Nadkarni stated that the defendant initially refused medication, but eventually complied with taking antipsychotic and mood-stabilizing medication, which "led to a substantial remission of his psychotic symptoms" and "much clearer thinking." Dr. Nadkarni testified to a reasonable degree of medical and psychiatric certainty that, based on his January 5, 2012 evaluation of the defendant, he was restored to fitness to stand trial with medications. Dr. Nadkarni stated that the defendant was not actively psychotic and his illness was in remission, that he needed medications to maintain that status, but that he did not know whether the defendant was in compliance with taking his medication while at the Cook County jail. Following Dr. Nadkarni's testimony,

defense counsel did not present the testimony of any witnesses and elected not to make any arguments. The trial court then found the defendant fit to stand trial with medications, and remanded the defendant to the custody of the Cook County sheriff.

¶ 13 On May 3, 2012, during a status hearing when defense counsel filed an answer to discovery, the defendant stated, "[w]ell, we have a motion on the table, too, your Honor, before you retire, too, your Honor." In response, the trial court asked defense counsel what the defendant was referring to, to which defense counsel said she did not know. The trial court then stated, "if I hear outbreaks like that, I am going to have to order another BCX to find out what his current status is." The trial court then ordered a fifth BCX for fitness to stand trial, but not for the issue of sanity, and noted, "[w]hen people act like that in front of me after they have been found unfit where restored, it only indicates to me that he is not fit again."

¶ 14 In a letter dated June 26, 2012, Dr. Nadkarni reported to the court that, after conducting a June 15, 2012 BCX of the defendant, it was his opinion to a reasonable degree of medical and psychiatric certainty that the defendant was fit to stand trial with medications. The letter stated that the defendant "demonstrates an understanding of the charge against him, comprehends the nature of courtroom proceedings, correctly identifies the roles of various courtroom personnel, displays the capacity to assist counsel in his defense." Dr. Nadkarni also opined in the letter that the defendant "continue compliance with psychotropic treatment in order to maintain his fitness status."

¶ 15 On October 29, 2012, a day the case was set for bench trial, the defendant informed the court that he intended to ask his attorney to "withdraw herself from this case because *** she is always trying to pick the trial that I'm going to have and that's not the defense's job; that's my job to say if it's going to be by jury or bench." When questioned by the trial court, the defendant

expressed the desire to have a jury trial and the court granted his request. The defendant then mentioned "a motion or something pending," at which point the court interrupted him and allowed defense counsel to explain the following: "On the last court date, [the defendant] was asked would he like a jury or a bench. I advised him that I could get a bench on a shorter date than I could get a jury and he said give me the bench if I could have it quicker. And so that's why this matter is set for bench today." Defense counsel also stated that the motion that the defendant wished to file was a speedy trial motion, but that the motion was inappropriate and defense counsel was not asking that the motion be heard because "there have been BCXs done here." The trial court then passed the case to allow defense counsel time to speak with the defendant. When the case was recalled, the defendant asked the court for a "sidebar," which the trial court denied on the basis that it would be inappropriate ex-parte communications. When questioned, the defendant told the court that he was ready for the jury trial. The case was then passed and later recalled again for the purpose of commencing a jury trial. Once the case was recalled, however, defense counsel asked for a continuance on the bases that there had never been a finding "on the issue of his sanity at the time of the offense" and that, although the defendant asserts that "he's constantly on his medicine," defense counsel "would also like to follow up on whether or not that's in fact true based on some observations I have made of him today." During defense counsel's request for a continuance, the defendant interrupted by raising several objections. The trial court instructed the defendant that he could not object to his own attorney and overruled those objections. The State concurred that the issue of sanity at the time of the offense had not been addressed in any of the reports filed with the court by evaluating doctors at Forensic Clinical Services. The trial court then found that "the issues [*sic*] of sanity at the time of the offense was never evaluated though requested from the date of arraignment, so

[defense counsel's] request is well-taken here," and the court ordered a sixth BCX of the defendant for the issues of fitness and sanity.

¶ 16 In a written report dated November 20, 2012, Dr. Nadkarni informed the court that, based on his evaluation of the defendant, the defendant is fit to stand trial with medications. Dr. Nadkarni further opined to a reasonable degree of medical and psychiatric certainty that the defendant "would have been legally sane at the time of the alleged offense" and that the defendant "was not suffering from any mental disease or defect that would have substantially impaired his capacity to appreciate the criminality of the alleged act."

¶ 17 On February 26, 2013, prior to jury selection,[2] the parties engaged in discussion with the court regarding pretrial matters. The defendant interjected on at least three occasions by attempting to make requests to the court, by objecting to the State's comments, and by telling the court about a "motion for daily transcripts." Defense counsel responded by saying "I'm going to ask that my client not be asking anything right now. He is represented by counsel. I will be asking." The trial court agreed and informed the defendant that "[y]ou are represented by counsel, Sir. So therefore you should let them decide as to what should be discussed or not discussed at this time. If you have any concerns, you can always in [*sic*] conference with your attorney, speak on your behalf." Defense counsel also noted for the record that the Public Defender's Officer at which she worked had been in contact with "the jail this morning" and that she was given a verbal confirmation that medication had been dispensed to the defendant. When the defendant attempted to raise a "motion for daily transcripts," defense counsel stated, "I have no motions other than the ones that I've spoken about that I had filed. Mr. Brown has filed *pro*

[2] Most of the pretrial proceedings were presided over by J. Zelezinki, J. Murphy, J. Groebel, and J. Porter (10/4/11 fitness hearing and 1/24/12 restoration hearing), while J. Turner presided over jury selection, the trial, and sentencing.

se motions. I do not adopt those motions and so we are ready to proceed." The trial court then asked the attorneys whether there were other pending matters that needed to be addressed, at which point the defendant stated, "[t]he compulsory services need certain dates to pull documents up of dates and times that the Harvey Police has did [*sic*] certain things." Defense counsel then told the court there was "[n]othing further." The trial court then asked counsel for both parties to approach the bench, at which time the court stated that the defendant "is going to prejudice himself substantially if he keeps making these outbursts." Defense counsel agreed, stating that "[t]hat's what I'm talking about. That's why I'm saying I can't say what he is going to say if he testifies," and that "[t]hey say he is fit. I just can't let him keep on talking--." The trial court then questioned the attorneys whether they had tried to resolve this case in lieu of trial, to which counsel for both parties said "yes" and defense counsel informed the court that the defendant wanted to have a trial. Thereafter, the trial court conducted *voir dire*.

¶ 18 On February 27, 2013, a jury trial commenced and the State presented the testimony of several witnesses. Candida Brewer (Brewer) testified that she was a supervisor at a post office in Harvey, Illinois. On March 3, 2011, at about noon, Brewer was working at the post office when the customer service doorbell rang and she answered the "dutch door" to see the defendant standing on the other side of it. The defendant was wearing blue camouflage pants and a dark-colored jacket. Brewer had spoken with the defendant on several prior occasions when he had asked that his mail be delivered to a boarded-up vacant home, and Brewer had explained to him that the mail carrier was not able to do so due to "postal policy" and had provided the defendant with other alternative options for receiving his mail. On March 3, 2011, the defendant again asked if his mail was being returned, to which Brewer said "yes." In response, the defendant used profanity and "began to get louder and was screaming and pacing back and forth up and

down the hall." As the defendant walked down the hallway and then walked back towards Brewer, he screamed "I am going to blow this building up if you don't give me my mail" and "kill everyone in here if you don't give me my mail." As he screamed, Brewer saw the defendant grab "some bulges on his jacket." At that point, Brewer stepped back away from the door and asked "anyone in the building" to call 9-1-1. The defendant again threatened to blow up the building and kill the occupants. Brewer followed defendant out of the post office to see which way he went. Brewer stated that there were ten other employees and several customers in the post office at the time of the incident. When the police arrived, Brewer gave them a description of the defendant. About 5 to 10 minutes later, the police returned and asked Brewer to go outside, where she saw the defendant in the back of the police car and identified him as the perpetrator. On cross-examination, Brewer stated that the defendant never stated that he had a gun, a bomb, or any sort of explosive device. The defendant never told Brewer that he had hidden anything, nor did she see him hide anything. She testified that the entire incident lasted about 3 to 4 minutes and that she never evacuated the post office.

¶ 19 Christy Thomas (Thomas) testified for the State that she was an employee of the post office who witnessed the encounter between defendant and Brewer. Thomas' testimony was substantially similar to Brewer's.

¶ 20 Officer Kelley testified that on March 3, 2011, he was dispatched to investigate a threat at the post office at 155th Street and Center Avenue in Harvey, Illinois. En route, Officer Kelley was advised by Officer Banks of the suspect's description—a black male wearing a black jacket and blue camouflage pants. Officer Kelley later observed an individual, whom he identified in court as the defendant, matching that description walking west of 154th Street and Center Avenue near the post office. Officers Kelley and Banks then placed the defendant in custody

and performed a pat-down search. The police recovered a flashlight from the breast area of the defendant's coat. The defendant was hostile and "almost incoherent."

¶ 21 Following Officer Kelley's testimony, the State rested its case and the trial court denied defense counsel's motion for a directed finding.

¶ 22 The defendant elected to testify in his own defense. When asked to introduce himself at the start of his testimony, the defendant answered, "[y]ou have reached Dr. Brown & Rawls & Associates, Skyway Canine Dog Training Academy," and "[m]y friends and family call me Glen Brown. Brown is a common color spelled B-r-o-w-n." He denied being at the post office in Harvey on March 3, 2011. He stated at some point he was "picked up by the Harvey Police Department." On cross-examination, defense counsel asked him to reintroduce himself for the record, and the defendant repeated that "[y]ou have reached Dr. Brown & Rawls & Associates, Skyway Canine Dog Training Academy." He testified that he was both a veterinarian and a trainer, "which is security and crime prevention." He testified that on March 3, 2011, he was at the Fifth Third Bank "trying to locate a banker who is going to do business accounts for me because I had to do taxes also." He denied going to the post office. He admitted that he wore a black "canine uniform" and blue camouflage pants, and that he carried a flashlight on the date in question. He admitted that he had met Brewer before March 3, 2011, but denied that he spoke to her on that day. He testified that he never had any issues with the post office in Harvey because "they would hand me my mail through the door."

¶ 23 On February 28, 2013, the jury found the defendant guilty of the offense of disorderly conduct.

¶ 24 On April 2, 2013, defense counsel requested a seventh BCX to determine the defendant's fitness for sentencing. During defense counsel's request, the defendant remarked, "I object to

that, your Honor, and I would ask for another counsel to take on where [current counsel] has fallen short in her duties." In response, the trial court stated, "[s]o noted." Over the defendant's continuing objection, the trial court granted a seventh BCX to determine his fitness for sentencing. On April 3, 2013, the Cook County clerk's office received the defendant's written *pro se* "motion for appointment of counselor other than Public Defender" (motion for new counsel), alleging ineffective assistance of counsel. The *pro se* motion for new counsel bears a "received" stamp by the clerk's office dated April 3, 2013, but was stamped as "filed" on April 15, 2013, along with a "notes" section to his motion for new counsel that was also filed on the same day.

¶ 25 On May 31, 2013, at a hearing on posttrial motions and sentencing, defense counsel presented a May 29, 2013 written report by Dr. Nadkarni, which stated that the defendant had been reevaluated and was fit for sentencing with medication. Defense counsel then argued for a new trial by standing on the arguments made in a previously filed written motion for a new trial, while the State made oral arguments against it. During the State's arguments, the defendant raised an "objection," to which the court stated, "Mr. Brown, we can do this without you." Thereafter, the trial court denied defense counsel's motion for a new trial and proceeded to the sentencing phase. During the sentencing hearing, the defendant made another outburst and the court warned him to be silent or be removed from the courtroom. The trial court then sentenced him to 50 months of imprisonment, denied defense counsel's motion to reconsider the sentence, but did not address the defendant's *pro se* motion for new counsel alleging ineffective assistance of counsel.

¶ 26 On May 31, 2013, defense counsel filed a timely notice of appeal.

¶ 27 ANALYSIS

¶ 28 We determine the following issues on appeal: (1) whether the evidence was sufficient to convict the defendant of felony disorderly conduct; (2) whether the defendant was convicted and sentenced in violation of his due process rights without regard to his fitness to stand trial or to be sentenced; (3) whether the trial court failed to make a factual inquiry into the defendant's *pro se* ineffective assistance of counsel claim under *Krankel*; and (4) whether the defendant's conviction for felony disorderly conduct violated the First Amendment of the United States Constitution.

¶ 29 We choose to first determine whether the trial court failed to make a factual inquiry into the defendant's *pro se* ineffective assistance of counsel claim under *Krankel* (102 Ill. 2d 181 (1994)).

¶ 30 The defendant argues that the trial court failed to make a required factual inquiry into his posttrial *pro se* ineffective assistance of counsel claim, in violation of *Krankel* and its progeny. He requests this court to remand the case for the limited purpose of allowing the trial court to conduct the required preliminary inquiry into his allegations.

¶ 31 The State counters that the trial court was not required to conduct an inquiry into the factual basis of the defendant's purported claim of ineffective assistance of counsel, where the defendant's oral claim was simply "an outburst" made out of frustration with defense counsel's request for a seventh BCX, and that it is unclear whether the trial court even knew that his written motion for new counsel existed.

¶ 32 In the case at bar, following trial, the defendant made both an oral and a written claim of ineffective assistance of counsel. During posttrial proceedings, on April 2, 2013, defense counsel requested a seventh BCX to determine the defendant's fitness for sentencing. The defendant remarked, "I object to that, your Honor, and I would ask for another counsel to take on

where [current counsel] has fallen short in her duties." The trial court stated, "[s]o noted." On April 3, 2013, the clerk's office received the defendant's written *pro se* motion for new counsel, alleging ineffective assistance of counsel. The *pro se* motion for new counsel bears a "received" stamp by the clerk's office dated April 3, 2013, but was stamped as "filed" on April 15, 2013, along with a "notes" section to his motion for new counsel that was also filed on the same day. In the *pro se* motion for new counsel, the defendant specifically alleged that there had been no line of meaningful communication with his counsel; that there had been no "conferences or visits" with his counsel concerning his case despite his request for her to do so; that counsel "precluded" his efforts to file several pretrial motions; that counsel told him to take a plea bargain without trying to fight the case; and that counsel told him that representing him posed a "conflict of interest."

¶ 33 Our Illinois Supreme Court, through *Krankel* and its progeny, has provided trial courts with a clear blueprint for the handling of posttrial *pro se* claims of ineffective assistance of counsel. *Krankel*, 102 Ill. 2d 181; see *People v. Moore*, 207 Ill. 2d 68, 77-82 (2003) (discussing *Krankel* and its progeny). A trial court is not automatically required to appoint new counsel anytime a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel. *Moore*, 207 Ill. 2d at 77. Rather, the trial court *must first conduct an inquiry* to examine the factual basis underlying a defendant's claim. *Id.* at 77-78. The inquiry that the trial court conducts has evolved into what is now known as a "*Krankel* inquiry." *People v. Vargas*, 409 Ill. App. 3d 790, 801 (2011). If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. *Moore*, 207 Ill. 2d at 78. However, if the allegations show possible neglect of the case, new

counsel should be appointed. *Id.* Where the trial court has made no determination on the merits, our standard of review is *de novo*. *Id.* at 75.

¶ 34 In this case, it is quite clear from the record that the trial court conducted *no inquiry of any sort* into the defendant's allegations of ineffective assistance of counsel. The State characterizes the defendant's oral request for a new attorney on April 2, 3013 as nothing more than an "outburst" objecting to the seventh BCX that did not constitute a proper ineffective assistance of counsel claim. While the defendant's behavior throughout the proceedings lends some credence to the State's argument, the *Krankel* hearing requirement is not excused because of the defendant's behavior. The record reveals that the defendant specifically noted that his counsel had "fallen short in her duties," to which the trial court only said "[s]o noted" without any further inquiry into the matter. The record is clear that the trial court also did not consider the defendant's subsequent April 15, 2013 *written and filed pro se* motion for new counsel at all. The State argues that the trial court was excused from ruling on the written *pro se* motion for new counsel because the court may have been unaware of its existence, supposedly because it never appeared on the court's half sheet. The State further argues that the defendant had effectively "abandoned" his ineffective assistance of counsel claim by failing to bring it to the attention of the court at the following hearings in May 2013. While we acknowledge the familiar refrain quoted by the State that a litigant "has the responsibility to obtain a ruling from the court on his motion to avoid waiver on appeal" (*People v. Redd*, 173 Ill. 2d 1, 35 (1996)), we note the equally well-settled rule that a *pro se* defendant is not required to do any more than bring his claim to the trial court's attention, which the defendant did in this case both orally and in writing. See *Moore*, 207 Ill. 2d at 79. To require a defendant to bring his *pro se* ineffective assistance of counsel claim to the court's attention for a third time at a subsequent hearing, would impose an

extra burden on the accused who, in this case, has a history of mental illness and could not always be expected to understand every nuanced legal procedure. The history of this case was such that the defendant made such a nuisance of himself during the court proceedings that the court may have eventually become exasperated with the defendant's interruptions and, prior to sentencing, warned him to be silent or be removed from the courtroom. It is reasonable to infer that the trial court's warnings had a chilling effect on the defendant that prevented him from verbally reminding the court to rule on his written *pro se* ineffective assistance of counsel claim. Notwithstanding the seemingly endless outbursts and bizarre statements from defendant throughout his courtroom appearances, the law requires the trial court to conduct a preliminary inquiry into the factual basis underlying the defendant's *pro se* ineffective assistance of counsel claim. No such inquiry occurred in this case. Thus, we must remand the cause to the trial court for the limited purpose of allowing the trial court to conduct the required preliminary inquiry under *Krankel*.

¶ 35 Despite having determined that the cause must be remanded for the sole purpose of conducting a *Krankel* inquiry, pursuant to our supreme court's supervisory directive, we will also consider the defendant's remaining arguments on appeal.

¶ 36 We next determine whether the evidence was sufficient to convict the defendant of felony disorderly conduct.

¶ 37 The defendant argues that the evidence was insufficient to convict him of the charged offense, where the State presented no evidence that he "ever said anything to the effect that he had a bomb, and never claimed that a bomb was concealed anywhere on the premises of the post office." Specifically, he contends that he never made a "transmission" that there was a bomb or explosive device as required by statute; that his threat at the post office was "purely conditional"

upon his not receiving his mail; that his "hyperbolic demand" at the post office fell short of a false alarm that suggests that a bomb was on the premises; and that no reasonable inference could be drawn that there was any danger of a bomb or explosive device. He further argues that his act of grabbing the bulge in his jacket tended to make the alleged bomb more, not less, visible and thus, did not constitute "concealment" under the statute. The defendant argues in the alternative that his conviction should be reduced to a lesser misdemeanor conviction for "breach of peace."

¶ 38 The State counters that the evidence was sufficient to convict the defendant of felony disorderly conduct. The State argues that a reasonable jury could find that the defendant, by his words and gesture, transmitted to Brewer that there was an explosive device concealed in his jacket. The State further urges this court to reject the defendant's various arguments, arguing that they were based upon his misreading of the elements of the offense.

¶ 39 When the sufficiency of the evidence is challenged on appeal, 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 beyond a reasonable doubt.' " (Emphasis in original.) *People v. Graham*, 392 Ill. App. 3d 1001, 1008-09 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A reviewing court affords great deference to the trier of fact and does not retry the defendant on appeal. *People v. Smith*, 318 Ill. App. 3d 64, 73 (2000). It is within the province of the trier of fact "to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence." *Graham*, 392 Ill. App. 3d at 1009. The trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009). A reviewing court will

not substitute its judgment for that of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court must allow all reasonable inferences from the record in favor of the State. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). A criminal conviction will not be reversed "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *Graham*, 392 Ill. App. 3d at 1009.

¶ 40 A person commits felony disorderly conduct when he knowingly "transmits or causes to be transmitted in any manner to another a false alarm to the effect that a bomb or other explosive of any nature *** is concealed in such place that its explosion or release would endanger human life, knowing at the time of such transmission that there is no reasonable ground for believing that such bomb [or] explosive *** is concealed in such place." 720 ILCS 5/26-1(a)(3) (West 2010).

¶ 41 Viewing the evidence in the light most favorable to the State, we find that the evidence was sufficient to prove beyond a reasonable doubt that the defendant committed the offense of felony disorderly conduct. At trial, the State presented the testimony of Brewer, which was substantially corroborated by Thomas' testimony, that on March 3, 2011, the defendant walked into the post office and asked Brewer about his mail. The jury heard testimony that the defendant began using profanity and screamed, "I am going to blow this building up []" and "kill everyone in here if you don't give me my mail." The jury also heard testimony that as the defendant screamed, he grabbed at "some bulges on his jacket." Evidence was also presented at trial that the defendant again yelled profanity and threatened to "blow this building up and kill everyone in here" as he walked out of the post office. The State also presented evidence that Officers Kelley and Bank recovered a flashlight from the breast area of the defendant's jacket after the incident. Based on this evidence, we find that any rational jury could have found

beyond a reasonable doubt that the defendant knowingly transmitted a false bomb threat to Brewer in such a manner as to convey that a bomb or explosive device was concealed in his jacket. While the defendant argues that the evidence was insufficient to convict him by pointing out that he "[n]ever said anything to the effect that he had a bomb, and never claimed that a bomb was concealed anywhere on the premises," we find that the jury could reasonably have found that the defendant's words combined with his physical gesture transmitted to Brewer that he had a bomb on his person, where the relevant statute allows the transmission to be conveyed "in any manner"—thus, including both words and physical gestures.

¶ 42 The defendant further challenges the sufficiency of the evidence by arguing that his "threat" at the post office was "purely conditional" upon his not receiving his mail and that this "hyperbolic demand" fell short of a false alarm that suggests a bomb was on the premises. We reject this argument. A plain reading of the felony disorderly conduct statute shows that it only requires that a bomb or other explosive of any nature "is concealed in such place that its explosion or release *would* endanger human life." (Emphasis added.) 720 ILCS 5/26-1(a)(3) (West 2010). There is nothing in the relevant statute requiring the bomb's explosion to be imminent or the threat to be unconditional, but only that the explosion *would* endanger human life. See *People v. Barron*, 348 Ill. App. 3d 109, 115 (2004) (affirming conviction for felony disorderly conduct without consideration as to whether the explosion was imminent or whether the threat could or could not be conditional upon anything). The defendant also argues that the evidence was insufficient where Brewer never took his statements seriously because she did not evacuate the building. This court in *Barron* has already considered and rejected this same, exact argument, holding that an accused may be found guilty of felony disorderly conduct upon

transmission of a false alarm, regardless of the effect the words have upon the listener. *Id.* at 113.

¶ 43 The defendant further argues that his conviction should be overturned because the State failed to prove beyond a reasonable doubt the essential element that the bomb was "concealed" as required by the statute, where the act of grabbing at the bulge in his jacket made the alleged bomb more, not less, visible. See 720 ILCS 5/26-1(a)(3) (West 2010). The crux of the defendant's arguments seems to suggest that in order to be convicted of the charged offense, his transmission of the false alarm needed to make the alleged bomb *more* concealed or hidden than it already was. Rather, the plain reading of the relevant portion of the statute requires only that the defendant transmit a false alarm to the effect that a bomb "*is* concealed" in a place where its explosion would endanger human life. (Emphasis added.) See 720 ILCS 5/26-1(a)(3) (West 2010). Viewing the evidence in a light most favorable to the State, the defendant, by words and physical gestures, transmitted to Brewer that there was a bomb concealed somewhere in his jacket at that time—the explosion of which would have endangered human life and "kill[ed] everyone in here." See *People v. Billups*, 384 Ill. App. 3d 844 (2008) (rejecting defendant's argument that the State failed to establish the concealment element of the offense; even though defendant's statements to 9-1-1 dispatcher threatening to blow up City Hall with natural gas from Lake Michigan did not include statements that he had concealed natural gas in City Hall, defendant's statements over the telephone were sufficient to imply that an explosive was concealed on the premises). The defendant cites *In re M.F.* (315 Ill. App. 3d 641 (2000)). However, *In re M.F.* does not support his argument. It involved the interpretation of the obstruction of justice statute, not the felony disorderly conduct statute as in the case at bar. Accordingly, we find *In re M.F.* to be inapposite to the instant case and thus, the defendant's

claim for relief on this basis must fail. We further note that the defendant does not challenge the sufficiency of the evidence to satisfy the element that he made the false bomb threat while "knowing at the time of such transmission that there is no reasonable ground for believing that such bomb [or] explosive *** is concealed in such place." 720 ILCS 5/26-1(a)(3) (West 2010). Since the police recovered a flashlight from the defendant's person and the defendant had no reasonable ground to believe that he was in possession of an explosive device, the State proved beyond a reasonable doubt every essential element of the charged offense. Accordingly, we hold that the evidence was sufficient to convict the defendant of felony disorderly conduct. In light of our holding, we need not address the defendant's argument in the alternative that his conviction should be reduced to a lesser misdemeanor conviction for breach of peace (720 ILCS 5/26-1(a)(1) (West 2010)).

¶ 44 We next determine whether the defendant was convicted and sentenced in violation of his due process rights without regard to his fitness to stand trial or to be sentenced.

¶ 45 The defendant makes dual contentions regarding his fitness to stand trial. First, he argues that a new trial is warranted because his January 24, 2012 restoration hearing, as well as the subsequent June 2012 fitness findings after a fifth BCX was conducted, were procedurally insufficient as a matter of law, where the trial court failed to conduct a proper inquiry into his fitness by "merely adopt[ing] the doctor’s conclusion." He claims that this left the issue of his fitness unresolved. Second, he raises a factual argument that because the trial court failed to conduct a proper inquiry into his fitness, "there remained a *bona fide* doubt as to his mental fitness as evidenced by his ongoing behavior before, during, and after trial."

¶ 46 The State responds that the restoration hearing was legally sufficient, and that the record does not show that there was bona fide doubt as to the defendant's fitness immediately before or during trial.

¶ 47 Initially, we note that defense counsel failed to object or include this issue in a posttrial motion; thus, it is generally forfeited for review on appeal. See *People v. Enoch*, 122 Ill. 2d 176 (1988). However, an issue may be reviewed as plain error where it concerns a substantial right. *People v. Contorno*, 322 Ill. App. 3d 177 (2001). Because the determination of a defendant's fitness to stand trial concerns a substantial right, we review this issue under the plain error rule. *Id.*; *People v. Sandham*, 174 Ill. 2d 379, 382 (1996). The issue of whether the trial court completely failed to exercise its discretion by failing to make a proper inquiry into the defendant's fitness is reviewed *de novo*. See *People v. Newborn*, 379 Ill. App. 3d 240, 248 (2008) (when a court is required by law to exercise discretion but fails to do so, it precludes deferential review). However, a trial court's determination that a defendant is fit to stand trial, and whether a *bona fide* doubt as to a defendant's fitness has arisen, are reviewed under an abuse of discretion standard. See *Sandham*, 174 Ill. 2d at 382; *People v. Taylor*, 409 Ill. App. 3d 881, 896 (2011).

¶ 48 Due process bars prosecuting or sentencing a defendant who is not competent to stand trial. *Sandham*, 174 Ill. 2d at 382. "Fitness to stand trial requires that a defendant understand the nature and purpose of the proceedings against him and be able to assist in his defense." *Id.* "Fitness speaks only to a person's ability to function within the context of trial; it does not refer to sanity or competence in other areas." (Internal quotation marks omitted.) *Taylor*, 409 Ill. App. 3d at 896 (quoting *People v. Coleman*, 168 Ill. 2d 509, 524 (1995)). A person may be fit for trial although his mind may be otherwise unsound. *Coleman*, 168 Ill. 2d at 524. Although a

defendant's fitness is presumed by statute, the trial court has a duty to order a fitness hearing, *sua sponte*, at any time a *bona fide* doubt arises regarding a defendant's ability to understand the nature and purpose of the proceedings or assist in his defense. *Sandham*, 174 Ill. 2d at 382.

¶ 49 Relying on *Contorno*, the defendant argues that the trial court failed to make an affirmative exercise of discretion at the restoration hearing or anytime thereafter by merely adopting Dr. Nadkarni's conclusion without any independent inquiry that the defendant was fit to stand trial with medications. In *Contorno*, the parties stipulated to a psychiatrist's report finding the defendant fit to stand trial. *Contorno*, 322 Ill. App. 3d at 178. The trial court entered a written order, relying on the psychiatrist's finding that the defendant was fit to stand trial. *Id.* The appellate court concluded that the record reflected that the trial court "merely accepted" the psychiatrist's conclusion and did not indicate "the court conducted any analysis of the doctor's opinion or exercised its discretion in finding defendant fit." *Id.* at 179. We find *Contorno* highly distinguishable from the facts before us. Unlike *Contorno* in which the trial court merely accepted the report's *conclusion* that the defendant was fit, here, the trial court found the defendant fit to stand trial with medications after having the opportunity to hear Dr. Nadkarni testify as to his *basis* for his conclusion and having read Dr. Nadkarni's written reports regarding the *basis* for his conclusion from which the court could make an independent evaluation. See *Taylor*, 409 Ill. App. 3d at 898-99 (finding restoration hearing adequate where the parties did not merely stipulate to Dr. Kulik's *conclusion* that defendant was restored to fitness with medication, but that they stipulated to Dr. Kulik's *basis* for his conclusions). At the January 24, 2012 restoration hearing, Dr. Nadkarni testified to his multiple evaluations of the defendant, the defendant's psychiatric issues, and his inpatient psychiatric treatment at DHS Elgin Mental Health Center which resulted in a "substantial remission of his psychotic symptoms." Dr.

Nadkarni testified that the defendant was not then actively psychotic, that his illness was in remission with medications, and that he understood the nature of the proceedings and was able to assist counsel in his defense. Based on his evaluation, Dr. Nadkarni testified to a reasonable degree of medical certainty that the defendant was restored to fitness to stand trial with medications. We find that the trial court, after hearing Dr. Nadkarni testify to his basis for his conclusion without any rebuttal evidence from the defense at the restoration hearing, made an affirmative exercise of discretion by finding the defendant fit to stand trial with medications. In making this finding, the trial court did not simply adopt Dr. Nadkarni's conclusion, but rather heard Dr. Nadkarni's testimony from which the court could make its analysis as to the defendant's fitness. Likewise, nothing in the record leads us to conclude that the trial court did not review the *basis* for Dr. Nadkarni's opinion of fitness after additional BCXs were conducted in June 2012 and November 2012. Therefore, we reject the defendant's contention that his restoration hearing and subsequent hearings were procedurally deficient, and we hold that the trial court did not abuse its discretion in finding the defendant fit to stand trial with medications.

¶ 50 With regard to the defendant's second contention, he argues that the trial court violated his due process rights because it should have halted proceedings rather than proceeded with the case when "there remained a *bona fide* doubt as to his mental fitness as evidenced by his ongoing behavior before, during, and after trial." He specifically points to three "outbursts" he made in court prior to jury selection on February 26, 2013, and his trial testimony on the next day, as evidence that there was a *bona fide* doubt as to his fitness to stand trial. We disagree. On February 26, 2013, prior to jury selection and before the venire was brought into the courtroom, the defendant interjected several times when the parties' attorneys were engaged in discussion with the court over pretrial matters. The defendant interjected by attempting to make requests to

the court, by objecting to the State's comments, and by attempting to raise a "motion for daily transcripts" which defense counsel refused to adopt. Based on our review of the record, we find no evidence that shows the remarks alerted the trial court that the defendant was unable to understand the proceedings or assist in his defense such that the trial court was required to halt the proceedings and *sua sponte* order yet another psychiatric BCX and hold a fitness hearing. In fact, a review of some of the "outbursts" showed that the defendant actually understood the nature and purpose of the proceedings against him and actively sought to assist in his own defense by disagreeing with certain strategic decisions of this counsel. See *Sandham*, 174 Ill. 2d at 382. The defendant also takes issue with his trial testimony as evidence of a *bona fide* doubt of fitness. However, upon further examination of the record, we find that the defendant was able to answer counsel's questions on both direct and cross-examination, and was able to testify to his own version of what occurred on the day of the incident. See *Coleman*, 168 Ill. 2d at 524 (a person may be fit for trial although his mind may be otherwise unsound); *Taylor*, 409 Ill. App. 3d at 896 (fitness speaks only to a person's ability to function within the context of trial; it does not refer to sanity or competence in other areas). We further note that, prior to sentencing, the defendant was found to be fit after a seventh BCX was conducted to determine his fitness for sentencing. Therefore, we reject the defendant's second contention that the trial court violated his due process rights in proceeding to trial, where there was no *bona fide* doubt as to his fitness to stand trial either immediately prior to or during trial, and any indication of unfitness had been fully resolved by the multiple BCXs and fitness hearings conducted by the trial court.

¶ 51 We next determine whether the defendant's conviction for felony disorderly conduct violated the First Amendment of the United States Constitution.

¶ 52 The defendant argues that his angry demand at the post office was not a "true threat," but merely crude and hyperbolic and, therefore, it constituted speech protected by the First Amendment to the United States Constitution. He specifically contends that his speech was a crude and hyperbolic demand that the post office serve its public function by delivering his mail, and that his conviction should be overturned because his words were not a "true threat" where there was "no serious expression of an intent to inflict bodily harm upon, or take the life of, another individual."

¶ 53 The State counters that the defendant forfeited this issue for review on appeal by failing to raise it at trial, and that the plain error doctrine does not circumvent forfeiture because no error occurred. The State argues that the defendant's demand at the post office was a "true threat" that was not protected speech under the First Amendment, where it created "enough of an apprehension to cause Brewer to step away from the customer service door, and later follow defendant" to make sure he did not return. Specifically, the State contends that a reasonable listener could find it objectively possible that the defendant, who was an agitated stranger threatening to blow up the building and kill everyone in it, made a serious expression of an intent to inflict bodily harm.

¶ 54 Initially, despite the defendant's assertion to the contrary, we find this First Amendment issue to be forfeited for review on appeal because the defendant did not raise it at trial. See *People v. Cregan*, 2014 IL 113600, ¶ 16 (while most issues must be raised at trial and in a posttrial motion, constitutional challenges need only be raised at trial). The plain error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error 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. *People v. Herron*, 215 Ill. 2d 167, 187

(2005). Under both prongs, the burden of persuasion remains with the defendant. *Id.* at 187. The first step of plain-error review is to determine whether any error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 55 The felony disorderly conduct under which the defendant was convicted criminalizes a certain form of speech; thus, it must be interpreted within the confines of the First Amendment. The First Amendment prevents government from proscribing speech because of disapproval of the expressed ideas. *People v. Diomedes*, 2014 IL App (2d) 121080, ¶ 30. However, the First Amendment permits restrictions on some forms of speech, including "true threats," which "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 533 U.S. 343, 359 (2003). "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 359-60. There exists a split in federal courts of appeal as to whether the speaker's *subjective* intent must be shown to prove "true threat," or whether an *objective* reasonable-person standard test should be applied instead. *United States v. Parr*, 545 F.3d 491, 499-500 (7th Cir. 2008) (discussing federal split of authority on whether true threats encompass statements wherein the speaker *means* to communicate a serious threat to harm, or whether true threats are determined based on whether a reasonable speaker would understand that his statement would be interpreted as a threat). In *United States v. Fuller*, the Seventh Circuit noted that it applies an objective "true threat" test, which asks whether "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict

bodily harm." *United States v. Fuller*, 387 F.3d 643, 646 (2004). In *People v. Sucic* (401 Ill. App. 3d 492 (2010)), this court has noted that Illinois courts have found that the term "threat" implies generally that the expression has a "reasonable tendency to create apprehension that its originator will act according to its tenor." *Id.* at 503. "This definition suggests that an objective, not subjective, approach continues to apply." *Diomedes*, 2014 IL App (2d) 121080, ¶ 34; see also *People v. Peterson*, 306 Ill. App. 3d 1091, 1102-03 (1999) (considering threats under the intimidation statute by an objective standard).

¶ 56 Applying these principles, we find that a reasonable person would foresee that the defendant's statement about blowing up the building and killing everyone in it, while grabbing the bulge in his jacket, would be interpreted by those at the post office as a serious expression of an intention to inflict bodily harm. Stated another way, the defendant's statement had a reasonable tendency to create apprehension that he would carry out his threat. Thus, the defendant's statement was a "true threat" that was not protected speech under the First Amendment and his conviction cannot be vacated on this basis. Further, we reject as unpersuasive the defendant's extraneous arguments that the threat was purely conditional in nature, and that the post office is a significant public body with policies that are a matter of public concern. Accordingly, because the defendant cannot establish that an error occurred, the plain error doctrine does not apply to reach this forfeited issue.

¶ 57 For the foregoing reasons, we remand the matter to the circuit court of Cook County for the limited purpose of conducting a *Krankel* inquiry consistent with this order, but affirm the judgment of the circuit court in all other respects.

¶ 58 Affirmed and remanded with directions.

¶ 59 JUSTICE CONNORS, dissenting.

¶ 60 I respectfully dissent. Defendant was charged with two counts of felony disorderly conduct on April 4, 2011. Before the case was tried, the trial court, at various times, ordered six BCX evaluations for defendant. In response to the sixth BCX, Dr. Nadkarni opined that defendant was "fit to stand trial, with medications" and found defendant "legally sane at the time of the alleged offense." In late February 2013, the case proceeded to trial on one count only. Several witnesses testified at trial for the prosecution; defendant testified as well. On February 28, 2013, the jury verdict was guilty of the offense charged.

¶ 61 It is argued by defendant that he twice made claims of ineffective assistance of counsel that would trigger the court to inquire into the factual basis of these claims per *Krankel*. First, on April 2, 2013, upon conclusion of the trial, a seventh BCX was requested by counsel to determine defendant's fitness to participate in sentencing. Defendant offered his objection to this newly requested BCX in stating, "I object to that, your Honor and I would ask for another counsel to take on where [current] counsel has fallen short in her duties." The response of the trial court was "[S]o noted." The comment made by defendant was made in connection with his objection to a seventh BCX exam. The statements of defendant before and after his comments all relate to the BCX order. The defendant again objected to the seventh BCX exam and the court responded "[P]lease be quiet." In his brief, defendant fails to cite any case law that would suggest that this objection offered by him would satisfy the court's need to inquire under a *Krankel* analysis. Moreover, at oral argument, appellate counsel for the appellee appeared to agree that this "scenario" of April 2nd may not be sufficient to trigger a *Krankel* inquiry. Defendant did mention later in the April 2, 2013 court proceeding that he was "filing a motion" without providing any explanation or basis for the motion.

¶ 62 Defendant's second allegation is that the written ineffective assistance of counsel motion he filed triggered a *Krankel* inquiry. The motion does appear in the appellate record and is stamped as "Received" by the Clerk of the Circuit Court Criminal Division on April 3, 2013. The motion is also stamped "Filed" by the Clerk of the Circuit Court Sixth District on April 15, 2013. The record does not contain any evidence of a notice of filing or notice of motion. There is also no indication that this written motion was in the court file on either May 7, 2013 or May 31, 2013 which were the next two dates the case was on the court's docket. Clear, though from the record, is that defendant was in court on both May 7 and May 31 and no mention was made by the defendant of the written motion.

¶ 63 Citing *People v. Redd*, 173 Ill. 2d 1035 (1996) the Illinois Supreme Court reiterated that "a movant has the responsibility to obtain a ruling on his motion if he is to avoid forfeiture on appeal." *People* v. *Urdiales*, 225 Ill. 2d 354, 425 (2007). Further, a "motion is an application made to the court and the mere filing of it in the office of the clerk is not such an application. It must be brought to the attention of the court and the court asked to rule on it." *People v. Hornaday*, 400 Ill. 361, 364-65 (1948). This rule is no different if the motion is filed *pro se. People v. Newman*, 211 Ill. App. 3d 1087, 1098 (1991).

¶ 64 As a result, since defendant failed to even mention this motion or any reference to a claim of ineffective assistance of counsel on the trial court dates of May 7 and May 31, 2013, defendant abandoned his written motion by not bringing it to the attention of the Court despite opportunity to do so. There is nothing here to suggest that the trial court was aware of the motion. As a result, the case should not be remanded for the purpose of conducting a *Krankel* hearing.