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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
v.)	No. 11-CF-1467
)	
CHRISTOPHER JENSEN,)	Honorable
)	Gary V. Pumilia,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* Because the trial court failed to conduct a proper preliminary *Krankel* inquiry concerning the defendant's *pro se* posttrial claims of ineffective assistance of counsel, the case is remanded for appropriate *Krankel* proceedings.

¶ 2 On October 31, 2013, following a jury trial, the defendant was convicted of attempted first degree murder (720 ILCS 5/8-4(a) (West 2008), 720 ILCS 5/9-1(a)(1) (West 2008)), home invasion (720 ILCS 5/12-11(a)(3), (a)(4), (a)(5) (West 2008)), and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)). On appeal, the defendant argues that his convictions should be reversed because the jury did not receive all the necessary written jury instructions. Alternatively, the defendant argues that the case should be remanded for new posttrial proceedings and for resentencing because the trial court failed to conduct a proper

hearing, pursuant to *People v. Krankel*, 102 Ill. 2d 181, 187-89 (1984), on his *pro se* posttrial claims of ineffective assistance of counsel. We reverse and remand with directions.

¶ 3

BACKGROUND

¶ 4 On February 20, 2013, the defendant was charged by superseding indictment with four counts of attempted first degree murder (720 ILCS 5/8-4(a) (West 2008), 720 ILCS 5/9-1(a)(1) (West 2008)), three counts of home invasion (720 ILCS 5/12-11(a)(3), (a)(4), (a)(5) (West 2008)), six counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)), and one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)).

¶ 5 Counts I through IV charged the defendant with attempted first degree murder. Count I included the allegation that the defendant personally discharged a firearm that proximately caused great bodily harm. Count II included that the defendant personally discharged a firearm. Count III included that the defendant was armed with a firearm during the commission of the offense. Counts V through VII charged the defendant with home invasion but count V included the allegation that the defendant personally discharged a firearm that caused great bodily harm and count VI specified that the defendant discharged a firearm. Counts VIII through XIII charged the defendant with aggravated battery with a firearm in various ways: victim shot in head (count VIII); victim shot in left tricep (count IX); victim shot in left forearm (count X); victim shot in lower left abdomen (count XI); victim shot in lower left abdomen area (count XII); and the victim was shot below the left nipple (count XIII). Count XIV charged the defendant with unlawful possession of a weapon. Prior to trial, on motion of the State, counts IV and XIV were *nolle prossed*.

¶ 6 A jury trial commenced on October 29, 2013. The victim testified that the defendant and another man entered his house and shot him for no reason. The defendant testified that he had

regularly purchased marijuana from the victim. The victim had been repeatedly calling the defendant because the defendant owed the victim money. On the day in question, the defendant went to the victim's house with a friend. The victim let them into the house. The defendant and the victim argued about the money. The victim pulled a gun on the defendant and demanded the money. A scuffle ensued which resulted in the gun shots at issue. The defendant and his friend then ran away from the victim's house. After the State rested its case, the trial court granted directed verdicts as to counts I and V, finding that the State had not provided evidence that the defendant personally discharged a firearm that proximately caused great bodily harm.

¶ 7 On October 31, 2013, following deliberations, the jury found the defendant guilty on all the remaining counts. On December 10, 2013, the parties appeared in court for a sentencing hearing. An associate appeared on behalf of lead defense counsel, who was not present due to illness, and requested a continuance. At that hearing, the defendant indicated that he wished to proceed *pro se* and that he had prepared a *pro se* posttrial motion. The trial court cautioned the defendant that the sentencing phase was very complex and that he was making a mistake. The defendant informed the trial court that defense counsel had not contacted him since trial and he had not seen the presentence investigation report. The trial court granted a continuance until the defendant's counsel could be present.

¶ 8 On December 16, 2013, the parties appeared for hearing. Defense counsel was present. The defendant reiterated his request to proceed *pro se*. The trial court cautioned the defendant that his counsel was more qualified to represent the defendant during sentencing. The defendant acknowledged that his counsel was more qualified but stated that his counsel had not seen him before trial or after trial and there were issues he wanted to be addressed that were never addressed. The trial court again continued the matter so that the defendant would have time to consult with defense counsel and decide if he wanted to proceed *pro se*. The trial court set the

matter for a sentencing hearing on December 23, 2013. The trial court informed the defendant that if he wished to proceed *pro se*, he should be ready by that date.

¶ 9 On December 23, 2013, the parties appeared for sentencing. The defendant again reiterated his request to proceed *pro se*. The defendant requested additional time to prepare a posttrial motion and he requested copies of certain discovery materials. The trial court continued the matter until December 27, 2013, discharged the defendant's attorney, and told the attorney to provide the defendant with all the discovery materials in the case. Defense counsel noted that there were allegations of ineffective assistance in the defendant's *pro se* posttrial motion and that he would return to court on the next date.

¶ 10 On December 27, 2013, the defendant, *pro se*, submitted his posttrial motion. In addition to arguing that he was not proved guilty beyond a reasonable doubt, the defendant argued that his counsel was sick during trial, that counsel never came to see him, during the trial they were never "on the same page," and that the defendant did not want to raise self-defense as a defense. The defendant further argued that his attorney did not argue the case "to the best of his ability" and that there were certain things not done, witnesses not called, and the defendant's requests ignored. The defendant noted that "Lisa Hohlfeld" was not called to testify. She had given a statement to the police that "it was a drug deal gone bad" and that the defendant only shot the victim because the victim shot at the defendant first. The defendant also noted that counsel did not cross-examine a witness, Lenetra Williams, about a prior conviction for assault of a handicapped person, which would have impeached her testimony. Additionally, defense counsel did not call the victim's ex-wife, who would have testified as to how long the victim had been selling cannabis, the volumes sold, and the victim's source. Further, defense counsel did not call an eyewitness of the events in question, whose testimony would have corroborated the defendant's version of events. The defendant also found it incomprehensible that defense

counsel did not object to anything at trial. The defendant also argued that due to defense counsel's illness, he did not receive a speedy trial.

¶ 11 Thereafter, the trial court asked the State how it wished to proceed. The State called defense counsel to testify. Defense counsel testified that he was a public defender and had represented the defendant in this case. Defense counsel stated that he had met with the defendant numerous times during the pendency of the case. He had reviewed the discovery and the evidence with the defendant prior to trial. He made a motion to continue trial because he needed surgery. However, he was able to get his surgery postponed and it did not affect his ability to represent the defendant at trial. He cross-examined witnesses at trial and followed up on things that the defendant had requested of him. Defense counsel testified that his decisions as to what witnesses to call or not call were part of his trial strategy. Defense counsel stated that the defendant raised the defense of self-defense. They were originally going to argue that the defendant was not present, but then the State provided a statement from the defendant's sister that placed the defendant at the scene. At that point, the defendant decided he wanted to argue self-defense. Defense counsel believed that self-defense was an appropriate trial strategy.

¶ 12 Defense counsel further testified that he did not call Hohlfeld to testify because certain portions of her testimony would have conflicted with the defendant's testimony and defense counsel therefore believed her testimony would have been more harmful than helpful. Additionally, he could not impeach Williams with her charge for attacking a handicapped person because she pled guilty to a misdemeanor and it was not an impeachable offense.

¶ 13 The defendant then cross-examined defense counsel. The defendant asked why defense counsel had not called the neighbor, who was an eyewitness, to testify. Defense counsel explained that the neighbor stated that she looked out her window and saw two men attacking the victim. Defense counsel believed that this testimony would have corroborated the victim's

version of events. As to not calling Hohlfeld, defense counsel explained that she would have testified that it was drug deal gone bad, which would have contradicted the defendant's testimony that he was there because he owed the victim money. Defense counsel did not request a speedy trial because he had other cases that were older than the defendant's case and he would not have been able to prepare for the defendant's case within 120 days. On re-direct examination by the State, defense counsel testified that as to the witnesses he did not call it was because he believed they would not provide any relevant testimony.

¶ 14 Following argument by the defendant and the State, the trial court denied the defendant's *pro se* posttrial motion. The trial court found that the verdict was in accord with the evidence and that the defendant was proved guilty beyond a reasonable doubt. The trial court further found that defense counsel was fully able and prepared to proceed at trial. As to the lack of speedy trial, the trial court believed it was a matter of trial strategy. The delay in time weakened the State's case and allowed the memories of the witnesses to fade. The trial court also found that this was a serious case and that defense counsel had to be properly prepared, which took time. As to the theory of defense, the trial court found that the defendant told defense counsel that it was self-defense and that defense counsel was thus bound to go with that theory. As to not calling certain witnesses, the trial court found that the defendant did not say how or why the witnesses would have helped. Further, defense counsel's explanations as to not calling other witnesses such as the neighbor or Hohlfeld were, based on the evidence, entirely proper.

¶ 15 Following the denial of the defendant's *pro se* posttrial motion, the trial court sentenced the defendant to 30 years' imprisonment on count II charging attempted first degree murder, with a 20-year add-on because the defendant personally discharged a firearm. The trial court also imposed a consecutive 20-year sentence on count VI, which charged the defendant with home invasion. The trial court found that count III and counts VIII through XIII merged with count II

and that count VII merged with count VI. On December 30, 2013 the defendant filed a *pro se* motion to reconsider his sentence. The motion was denied the same date and the defendant filed a timely *pro se* notice of appeal. A timely amended notice of appeal was filed by the State appellate defender on behalf of the defendant.

¶ 16

ANALYSIS

¶ 17 On appeal, the defendant argues that his convictions should be reversed because several of the jury instructions are missing from the written record. The defendant also argues that the trial court should have conducted a hearing, pursuant to *Krankel*, 102 Ill. 2d at 187-89, regarding his posttrial claims of ineffective assistance of counsel. He argues that the appropriate remedy is to remand for an appropriate inquiry into his *pro se* posttrial claims. We address only this second issue, as it is meritorious and disposes of the issues on appeal at this time.

¶ 18 The purpose of a *Krankel* proceeding “is to facilitate the trial court’s full consideration of a defendant’s *pro se* claims of ineffective assistance of counsel and thereby potentially limit issues on appeal.” *People v. Jolly*, 2014 IL 117142, ¶ 29. There are three ways in which the trial court may conduct a preliminary *Krankel* hearing: (1) the court may ask defense counsel about the defendant’s claim and allow counsel to “answer questions and explain the facts and circumstances surrounding” the claim; (2) the court may have a “brief discussion” with the defendant about his claim; or (3) the court may base its evaluation “on its knowledge of defense counsel’s performance at trial and the insufficiency of the defendant’s allegations on their face.” *People v. Buchanan*, 2013 IL App (2d) 120447, ¶ 19. “[T]he State should not be permitted to take an adversarial role against a *pro se* defendant at a preliminary *Krankel* inquiry.” *Jolly*, 2014 IL 117142, ¶ 38. Because a defendant is not appointed new counsel at the preliminary *Krankel* inquiry, the State’s participation, if any, should be *de minimis*. *Id.* If the trial court determines that the claims lack merit or pertain to trial strategy, the trial court may deny the *pro se* motion.

People v. Moore, 207 Ill. 2d 68, 77-78 (2003). However, if the allegations show possible neglect of the case, new counsel should be appointed to assist in the motion. *Id.* The manner in which the trial court conducted its *Krankel* inquiry is reviewed *de novo*. *People v. Fields*, 2013 IL App (2d) 120945, ¶ 39.

¶ 19 In determining whether the trial court conducted a proper *Krankel* inquiry, we find *People v. Cabrales*, 325 Ill. App. 3d 1 (2001), instructive. In *Cabrales*, the trial court allowed the defendant to proceed without representation in a posttrial motion after the defendant requested to do so. *Id.* at 2. Among the allegations in the defendant's *pro se* posttrial motion were allegations of ineffective assistance of counsel. *Id.* The matter proceeded to the inquiry about the factual bases of the defendant's ineffective-assistance claims, and the State was allowed to cross-examine the defendant. *Id.* at 3-4. Additionally, trial counsel was also examined by the defendant and cross-examined by the State. *Id.* at 4. This court concluded that the trial court erred by skipping the preliminary inquiry and turning the proceedings into an adversarial hearing between the defendant and the State. *Id.* at 5-6. We noted that:

“We must conclude there was no preliminary investigation because the court proceeded to a full hearing on the merits of defendant's *pro se* motion without any discussion or resolution of the need for a preliminary investigation for appointment of conflict counsel. The only matter that appears of record is the detailed hearing on the merits of defendant's motion and not a simple fact-gathering investigation.” *Id.*

As such, this court reversed the trial court and remanded the matter to be picked up at the preliminary factual investigation phase of the *Krankel* hearing. *Id.* at 6.

¶ 20 In the present case, as in *Cabrales*, there was no preliminary investigation of the defendant's claims of ineffective assistance of counsel and no determination of the need for appointment of conflict counsel. The matter proceeded directly to a full hearing on the

defendant's claims of ineffective assistance of counsel where the State was able to call defense counsel as a witness and solicit testimony that rebutted the defendant's allegations. The State conducted both direct examination and a redirect examination of defense counsel in response to the defendant's contentions. The State was also allowed to give a closing statement. Because the State was allowed to examine defense counsel and offer argument in response to the defendant's claims, the hearing changed from one consistent with *Krankel* to an unpermitted adversarial hearing. *Jolly*, 2014 IL 117142, ¶ 38. As such, as in *Cabrales*, we remand for a preliminary inquiry, without adversarial State participation, into defendant's *pro se* claims. *Cabrales*, 325 Ill. App. 3d at 6.

¶ 21 In so ruling, we note that the State argues that its involvement at the hearing was *de minimus*. However, *de minimus* participation has been described as the "situation where the State may be asked to offer concrete and easily verifiable *facts* at the hearing." (Emphasis in original.) *Fields*, 2013 IL App (2d) 120945, ¶ 40. That is not what happened in the present case. Here, the State was allowed to conduct examination of defense counsel and offer argument in response to the defendant's *pro se* contentions. The State's participation went beyond merely offering easily verifiable facts. The State's contention is therefore without merit.

¶ 22 In light of this holding, we need not address the defendant's argument as to error in the written jury instructions. *Krankel*, 102 Ill. 2d at 189 (ruling that it was inappropriate to address the defendant's other appellate contentions before the trial court conducted a hearing to determine if the defendant had been denied the effective assistance of counsel). The appropriate remedy is to remand this matter for a new hearing on the defendant's posttrial motion. *Id.* If the trial court denies the motion, the defendant may still appeal his assertion of ineffective assistance of counsel along with his other assignments of error. *People v. Moore*, 207 Ill. 2d 68, 81-82 (2003).

¶ 23

CONCLUSION

¶ 24 For the foregoing reasons, we reverse the order of the circuit court of Winnebago County denying the defendant's posttrial motion, and we remand this cause for proceedings consistent with this order.¹

¶ 25 Reversed and remanded with directions.

¹ Although we would ordinarily remand for a preliminary *Krankel* inquiry before a different judge (see *Jolly*, 2014 IL 117142, ¶ 46; *Fields*, 2013 IL App (2d) 120945, ¶ 42), we find that unnecessary here since the trial court judge has since retired.