2016 IL App (2d) 140044-U
No. 2-14-0044
Order filed April 12, 2016

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
	)	No. 09-CF-725
v.	)	
	)	Honorable
PRECILLIANO GARCIA,	)	Timothy Q. Sheldon and
	)	James C. Hallock,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for murder and home invasion were supported by the evidence. The trial court properly denied defendant's motion under *People v. Krankel*, 102 Ill. 2d 181 (1984), for appointment of new counsel to pursue claims that his trial attorney provided ineffective assistance of counsel. The court also did not err in denying defendant's posttrial motions filed with counsel. Finally, the court did not rely on improper factors at sentencing.

¶ 2 Defendant, Precilliano Garcia, appeals his convictions and sentence for first degree murder (720 ILCS 5/9-1(a)(3) (West 2008)) and home invasion (720 ILCS 5/12-11(a)(3) (West 2008)). He contends that (1) the evidence did not support his convictions; (2) the trial court erred in denying his motion under *People v. Krankel*, 102 Ill. 2d 181 (1984), for appointment of

new counsel to pursue claims that his trial attorney provided ineffective assistance of counsel; (3) the court erred in denying his posttrial motions filed with counsel; and (4) the court relied on improper factors at sentencing. For the following reasons, we reject these contentions and affirm.

¶ 3 I. BACKGROUND

¶ 4 We will supplement the following background facts as we discuss each issue on appeal.

¶ 5 A. Trial

¶ 6 On November 4, 2008, two masked intruders entered a private residence at 208 North Chestnut Street in Aurora. The intruders demanded money and drugs from the occupants. The occupants fought back. In the struggle, two individuals were shot: Mario Vasquez, one of the occupants, who died from his wound, and Anthony Ortiz, one of the intruders, who survived and was arrested at the scene. The other intruder fled, and the occupants were unable to identify him because of the mask. In statements to the police, Ortiz claimed that defendant was the second intruder. Defendant was arrested and, in June 2009, was charged with first degree murder (720 ILCS 5/9-1(a)(3) (West 2008)), armed robbery (720 ILCS 5/18-2(a)(4) (West 2008)), and home invasion (720 ILCS 5/12-11(a)(5) (West 2008)). The Honorable Timothy Q. Sheldon presided over the matter until his retirement in December 2012 during posttrial proceedings. The Honorable James C. Hallock presided for the remainder of the proceedings.

¶ 7 Private attorney Christopher Wheaton filed his appearance for defendant in April 2011. Wheaton was defendant's third successive private attorney in the case; defendant was also represented by the public defender for a time. Wheaton would remain defendant's attorney throughout trial and some of the posttrial proceedings. On September 7, 2011, defendant waived his right to a jury trial. Also on that date, the defense disclosed as witnesses (1) himself, (2) his

father, Precilliano Cuellar, (3) his wife, Hazel Garcia, and (4) Priscilla Montero. Defendant noted, "Investigation continues," next to Montero's name on the disclosure.

¶ 8 On September 27, 2011, the parties informed the court that defendant intended to present an alibi defense at trial but had not yet informed the State of "certain aspects of it." The same day, the court permitted the State to present the testimony of its witness Justin Richard in advance of the trial date, as Richard had an impending military commitment.

¶ 9 On January 3, 2012, the date scheduled for trial, defendant filed a supplemental disclosure formally indicating an intent to present an alibi defense. The defense would be that defendant "was working with [Cuellar] at the home of [Montero] at 1726 North Talman Chicago, Illinois at the time of the incident." Defendant named Montero and Cuellar as potential witnesses. In court on January 3, defendant moved for a continuance because Montero was recovering from surgery. The court decided that, while the defense was waiting for Montero to become available, the parties could proceed with opening statements and the State with the remainder of its witnesses.

¶ 10 In its opening statement, the State asserted that Ortiz would testify that his cousin, Nathaniel Solis, planned the robbery at the Chestnut residence and that Solis drove Ortiz and defendant to the residence and waited in the car while Ortiz and defendant went into the home to commit the robbery. In its opening statement, the defense claimed that one of its witnesses would include a woman who would testify that defendant and his father were at her Chicago apartment at the time of the robbery on November 4. Defense counsel suggested that the second intruder may well have been Solis himself.

¶ 11 The State's witnesses included four men who were inside the Chestnut residence when the two intruders entered: brothers Robert and Guadalupe Magana, their cousin Enrique

Barraza, and Justin Richard. The following account of the November 4 incident represents the common points of the testimony given by these four victim-witnesses. We note only material variations.

¶ 12 On November 4, Robert was renting the Chestnut home from his parents. Casey Banas was Robert's roommate. In the early evening on that date, Robert was giving Richard a tattoo in the dining room. Guadalupe, Barraza, and Banas[1] were in one or more of the bedrooms off the dining room. Vasquez was either in the dining room or in a bedroom.

¶ 13 The front door was closed but unlocked. Robert heard it open. He turned and saw two men enter. Both wore masks. According to Richard, the men had plain black nylon material over their faces; one wore a light blue sweatshirt and the other a dark sweatshirt. Richard remembered telling the police that one intruder wore a red "hoodie" (hooded sweatshirt) and black pants and that the nylon over his face was like a "dew rag."

¶ 14 Barraza testified that one intruder wore a black mask with a white face, like the mask in the movie "Scream," and was dressed in a red hoodie. Barraza could not recall the mask worn by the other intruder and was not asked to describe his apparel.

¶ 15 Guadalupe claimed that his memory of the masks was weak, but believed one of them was red and remembered telling police that the other one was a "Scream" mask.

¶ 16 Robert stated that both intruders wore black hoodies and ski masks; one of the masks was red and black and the other was plain black. Robert did not recall telling the police that one of men wore a red hoodie and the other a yellow hoodie.

¶ 17 All four witnesses agreed that one of the intruders had a handgun. They had different degrees of certainty as to whether both had handguns.

[1] Banas, who did not testify, is barely mentioned in the witness accounts of the incident.

¶ 18 The intruders ordered everyone to get down on the floor. One of the intruders went into the bedroom while the other remained, at least initially, in the dining room. They repeatedly asked where the "shit" or "stuff" was. The intruder in the dining room threw Robert and Richard to the floor. He ordered them onto their stomachs and went through their pockets, taking their wallets. The man struck Robert and Richard in the head with a handgun and held the muzzle to their heads. The man also kicked Richard.

¶ 19 In the bedroom, the second intruder ordered Barraza, Guadalupe, and Vasquez to lie on their stomachs on the floor. The man used duct tape to secure their hands behind their backs. He removed Guadalupe's and Barraza's wallets. According to Barraza, this was the man in the "Scream" mask. The intruders began to ask where "Lupe" was. "Lupe" was Guadalupe's nickname. Guadalupe answered that he was Lupe, and one or both of the intruders responded by beating him on the head with a handgun. Guadalupe heard a "bang" like a gunshot during the beating and exclaimed that he was shot. He rose to his feet, ripped off his duct tape, and tried to grab the gun from the intruder with the "Scream" mask. When Robert heard the struggle in the bedroom, he also stood up; both intruders were now in the bedroom. Robert grabbed a vacuum cleaner and, running to the bedroom, struck one or both of the men with it. As Guadalupe struggled with the intruder over the gun, it discharged and Vasquez was shot in the face. Neither Robert nor Guadalupe knew whose finger was on the trigger when the shot was fired that struck Vasquez. Guadalupe wrested the gun away and shot one of the intruders in the chest. He did not recall if the intruder he shot was the one with whom he struggled over the gun, *i.e.*, the man in the "Scream" mask.

¶ 20 The intruder whom Guadalupe shot fell to the bedroom floor. The second intruder was gone. Guadalupe placed the gun he took from the intruder on top of the television set. He also

gave Vasquez a towel to stem the bleeding from his face. Both Barraza and Richard fled the home during the struggle and heard gunshots as they ran. Barraza drove away without notifying the police, while Richard called 911 from the house next door.

¶ 21 Guadalupe remembered telling police when they arrived that he shot a man and that the gun was on the television set. He did not remember telling the police that the man he shot was the man who had shot Vasquez. Guadalupe admitted that there was marijuana in the house at the time of the incident on November 4. He also admitted that, at the time of trial, he was serving a four-and-a-half year prison sentence for felony drug possession.

¶ 22 When the police arrived, Vasquez, Robert, and Guadalupe were exiting the house through the front door. Vasquez, who was bleeding, collapsed on the front porch. According to the officers, Guadalupe reported that he shot the person who shot his friend and that the offender was still inside the house. His specific words were: "I shot him, the gun is on the TV in there, he's probably dead, but fuck him, he shot my boy." Neither Guadalupe nor the other victims who testified were able to see the intruders' faces during the incident.

¶ 23 Moving inside the residence, the police recovered a handgun from the top of a television set in the dining room. Inside a bedroom, the police observed a man lying on the floor. He was identified as Ortiz. He had a gunshot wound to the chest and was gasping for air. Ortiz told officers that he did not reside at the house but had been dragged inside as he was walking past. Ortiz was wearing a red hoodie and blue jeans. Protruding from the hoodie was a wallet later identified as Barraza's. Ortiz was not wearing a mask at the time. Paramedics cut his clothes from his body and left them at the scene. An evidence technician later recovered from the bedroom floor the red hoodie as well as the dark gray T-shirt that Ortiz was wearing underneath. The garments had bullet holes. The technician found a pair of gloves within the hoodie. One of

the gloves was brown and the other was orange and emblazoned with the emblem of the Texas Longhorns. Near the hoodie and T-shirt were two masks. One was a black mask with a white face and the other was black and red. Also recovered from the floor were cartridges and spent shell casings. A spent bullet and a gray glove were recovered from the covers on the bed. Pieces of duct tape were collected from outside the residence and from Guadalupe's person.

¶ 24 Detective Giullermo Trujillo, the lead detective assigned to the case, testified that he interviewed Ortiz for about an hour on November 13, 2008. During the interview, Ortiz claimed that the person who accompanied him inside the Chestnut residence on November 4 was a man he knew only as "Rick," or by his street name, "Cobra Folks." Ortiz did not know the address where "Rick" lived, but was willing to take Trujillo there. Trujillo drove Ortiz and, based on his descriptions, narrowed the area down to the 500 block of East Benton. As they drove that block, Ortiz identified a residence at 534 East Benton as Rick's house. The parties stipulated at trial that defendant and his wife, Hazel Garcia, agreed to rent the Benton residence from Joshua Pence for a term from September 14, 2008, to September 14, 2009.

¶ 25 On cross-examination, Trujillo testified that he believed Ortiz was not being truthful in his November 13 statement because he did not mention Solis. Trujillo believed that Solis was involved in the crimes and that Ortiz was "keeping Solis out of it." Counsel continued:

"Q. In fact, you told Mr. Ortiz that you believed that Nathaniel Solis was involved in this?

A. We asked him if he was involved.

Q. Well, you also asked him that you had heard on the street that he was involved, correct?

MR. BELSHAN [Assistant State's Attorney]: Judge, I am going to object if that's being offered for the truth of the matter as to the hearsay, what he heard.

THE COURT: What he heard on the street, sustained."

Shortly later, the court sustained the State's objection to another question as to why Trujillo believed Solis was involved. Later, however, defense counsel elicited the following from Trujillo without State objection:

"Q. *** You believe Nate Solis was a suspect that was in that house?

A. Yes, that was my gut feeling, if you want to say, or based on what I was advised by others."

¶ 26 Trujillo testified that, after he mentioned Solis, Ortiz continued to assert that defendant was the second intruder. In addition to taking Ortiz's statement and identifying defendant's house, Trujillo showed Ortiz a photograph lineup containing Solis. Defendant was not included because, at the time, Trujillo did not know who "Rick" was. In the lineup, Ortiz identified Solis as his cousin.

¶ 27 The police having in the interim identified "Rick" as defendant, Trujillo decided on November 14 to test Ortiz's identification of defendant. Since defendant was known to Ortiz, Trujillo did not utilize a photo array, but rather showed Ortiz a single black and white photograph of defendant. Ortiz thought the individual looked like "Rick," but was not sure. He asked if Trujillo had other photos. Trujillo then showed Ortiz a color photograph of defendant, and Ortiz identified him as "Rick." Ortiz wrote on the photograph, "This is the guy that went with me to 208 Chestnut with the gun in his hand and started pistol whipping Lupe." Ortiz initialed and signed the photograph.

¶ 28 Trujillo testified that, though he "kept trying to get [Ortiz] to tell him" that Solis was the second intruder, Ortiz continued to claim that defendant was the one.

¶ 29 The State also called Ortiz, who stated that he was testifying in accordance with a proffer letter that he received from the State and signed on November 12, 2008. In exchange for his cooperation in defendant's case, the State would drop the home invasion and armed robbery charges against Ortiz and he would plead guilty to the murder charge, receiving a prison term of 20 years. The agreement also specified that Ortiz would be incarcerated in a nearby facility. Without the concessions in the agreement, Ortiz was facing a sentence from 45 years to life in prison.

¶ 30 Ortiz described how he came to know defendant and became involved in the November 4 invasion of the Chestnut residence. The defense questioned Ortiz extensively about apparent inconsistencies between his testimony and his statements to police. These inconsistencies are difficult to identify, however, because Ortiz's trial testimony had its own apparent contradictions. For instance, at one point in his testimony Ortiz claimed that he and Solis went to defendant's home on Benton three times before the November 4 incident. On the first occasion, Ortiz did not go inside the house and did not meet or see defendant. On the second occasion, which was about three or four weeks before the incident, Ortiz and Solis attended a party at defendant's home. At the party, Solis introduced defendant to Ortiz as "Cobra Folks." The third trip to defendant's home was a week or two before the incident. Solis and Ortiz went inside the house, and then Solis and defendant went into a rear room while Ortiz remained in the living room.

¶ 31 At other points in his testimony, however, Ortiz flatly denied that he met defendant at a party and acknowledged that he lied to police officers in giving that account of how he met

defendant. We are unable to reconcile this apparent inconsistency, and can only speculate that Ortiz might have been referring to two different parties.

¶ 32 Ortiz testified that, before his arrest in November 2008, he was living with Solis on Edgelawn Avenue in Aurora. Twice when they were speaking alone at the Edgelawn house, Solis referenced an upcoming robbery. First, several days before the November 4 incident, Solis mentioned to Ortiz that there was an opportunity for making money. Solis said there was a house that would be "an easy score," and that Ortiz would "be in and out and get the weed and the money." Solis provided no other details. At the time, Ortiz believed that Solis would be his accomplice. This was Solis' job and he was "calling the shots on it." Solis' second mention of the robbery was November 4, the day of the incident, when Solis told Ortiz to get dressed. Solis said, "[T]oday is the day." Solis said they were going to steal weed and money. He wanted Ortiz to "go grab the stuff." Soils mentioned "drug dealers" and said someone named "Lupe" lived at the house they would rob. After these remarks, Solis left the house and returned with defendant.

¶ 33 Ortiz testified that Solis then provided Ortiz and defendant with gloves and masks. One was a black mask with a white face, like the mask from "Scream." Ortiz described the other mask as black and silver. The masks had been in the basement in the Edgelawn house. Ortiz did not know where Solis got the masks. The gloves Ortiz wore were mismatched: one bore the Texas Longhorns emblem and the other was a brownish orange gardening glove. Ortiz wore a black T-shirt and a red hoodie. Defendant wore a black hoodie and a black jacket. One of defendant's gloves was gray and the other was black.

¶ 34 Ortiz stated that he, defendant, and Solis left the Edgelawn residence in a white Impala owned by Solis' mother. Solis drove, defendant was in the front passenger seat, and Ortiz was in

the backseat. Ortiz knew they were on their way to commit a home invasion because defendant and Solis were talking about it. Ortiz saw a roll of duct tape in the car.

¶ 35 Solis drove by a house and pointed it out to defendant and Ortiz. He parked in the adjacent alley and said, "[T]hat's the house you're going to go in and get the weed at." He told defendant and Ortiz to "go in and get out." Solis said he would not be going in because the people living there knew him. He said he would wait at the end of the alley for defendant and Ortiz. Though Solis said, "You know what to do," Ortiz testified that there was no plan and that he was not sure what to do.

¶ 36 Ortiz testified that he took the roll of duct tape as he and defendant exited the Impala. Both men wore the gloves they were given at the Edgelawn residence. Ortiz did not see defendant holding anything when they exited the car. As they reached the front porch, both men put on the masks they were given at the Edgelawn residence. Ortiz wore his black and white "Scream" mask. Ortiz now saw defendant holding and cocking a Glock handgun.

¶ 37 Ortiz entered the house first. He held the roll of duct tape under his hoodie like it was a gun. He and defendant walked into the dining room where there were three or four people, one of whom was getting a tattoo. Ortiz continued on to the bedroom. He heard defendant tell the people in the dining room to "[g]et the fuck down." Ortiz also told the people in the bedroom to lie down. They cooperated, and Ortiz tied their hands behind their backs with the duct tape. He asked where the "weed" was and one of them said it was in the closet. Ortiz took from the closet a white garbage bag filled with marijuana. Ortiz could hear defendant ask the people in the dining room if they had anything in their pockets. At the same time, Ortiz went through the pockets of the people in the bedroom. He took one man's wallet, which contained a large amount of money. Ortiz heard "commotion" in the dining room; the sound was of someone

being beaten. Ortiz was ready to leave and told defendant to go with him. Defendant then asked the occupants who Lupe was. One of the people in the bedroom identified himself as Lupe. Defendant approached the man and struck him in the head with the gun. The man then rose from the floor and started struggling with defendant over the gun. Ortiz claimed he "stood in shock" and dropped the bag of marijuana as he observed the struggle. The men from the dining room rushed into the bedroom and one of them struck Ortiz with a vacuum cleaner. Ortiz began struggling with this man and then with a second man who had come from the dining room. At the same time, defendant was struggling with the man who identified himself as Lupe. During Ortiz's struggle with the two men, both Ortiz's mask and the eyeglasses he wore underneath came off. Ortiz heard a gunshot but did not know who fired it. While Ortiz was struggling with the two men, another man approached and shot Ortiz in the chest. Ortiz hit the floor, rolled over, and played dead until the police arrived. Ortiz did not know where defendant was at this time.

¶ 38 Ortiz was shown at trial the photographs of various articles found by the police in the bedroom at the Chestnut residence. The items depicted were a black and white mask, a red and black mask, a gray glove, and a red hoodie. Ortiz identified the black and white mask and the red hoodie as the articles he wore to the robbery. He identified the red and black mask and the gray glove as the articles that defendant wore to the robbery. Some of the victims were shown the same articles. Guadalupe identified the red and black mask as one of the masks worn by the intruders (he did not recognize the black and white mask). Barraza identified the red hoodie as having been worn by one of the intruders.

¶ 39 Ortiz acknowledged providing many false statements to the police. He lied on the night of the incident when he told police that he was passing by the Chestnut residence when two men came out, dragged him inside, and shot him.

¶ 40 Ortiz acknowledged that he gave subsequent statements to the police on November 13 and 17, 2008, and on October 11, 2011. Ortiz signed the State's proffer letter on November 12, 2008, and spoke to Detectives Trujillo and Trent Byrne the next day. At that time, he told the detectives that defendant was the "mastermind" of the home invasion. Ortiz admitted at trial that this was a lie, as the mastermind was in truth Solis. He lied because Solis was involved in the robbery and Ortiz wanted to protect him. He also lied when he claimed to have overheard defendant and Solis conversing at a party about "making easy money." He lied, too, about the events preceding the November 4 robbery. He told the detectives that defendant picked him up at Edgelawn, drove to Benton to pick up masks, duct tape, and a gun, and then drove to Chestnut.

¶ 41 Ortiz testified that, by November 17, the State had agreed to a maximum sentence of 20 years in exchange for his cooperation. Ortiz decided that he had better admit to the lies he told in his November 13 statement. In a departure from his November 13 statement, Ortiz told detectives that he first met defendant on November 4. This was itself a lie, as Ortiz admitted at trial. Ortiz also changed his account of the events preceding the robbery. He told detectives that, on November 4, Solis picked up defendant from Benton while Ortiz waited at Edgelawn. Ortiz saw the gun when Solis and defendant returned from Benton. Solis then drove Ortiz and defendant to Chestnut and dropped them off.

¶ 42 Ortiz testified that his most recent statement to police was the August 26, 2011, statement. This statement was given one month before the State presented its first witness, Richard. In the August 26 statement, Ortiz continued to claim that he first met defendant on November 4. Ortiz again changed his account of the events preceding the robbery. He said that when Solis drove Ortiz and defendant to Chestnut, the masks "were already in the car." Solis

said he would wait in the alley for them, but in fact he drove off. Ortiz now claimed that he first saw the gun in defendant's possession just before they entered the Chestnut house.

¶ 43 Ortiz testified that the reason his November 13 statement did not mention Solis' involvement is that Ortiz was afraid of Solis. He "looked up to" to Solis and "would do anything to protect him." Initially, Ortiz "took the weight" for Solis, but Ortiz then "cut his own deal to minimize his involvement."

¶ 44 Dr. Mark Peters performed the autopsy on Vasquez. Peters concluded that the cause of death was a gunshot wound. The bullet entered Vasquez's right check and continued on a downward trajectory through the left chest cavity and lodged in the skin on the posterior wall of the cavity. Peters noted that the lack of soot and stippling at the site of the bullet's entry indicated that the shot was from a distance of more than 24 inches. Peters recovered a spent bullet from Vasquez's body and gave it to an evidence technician.

¶ 45 The handgun recovered from the dining room of the Chestnut residence was a .40 caliber semiautomatic handgun. Ballistics testing was done on the spent shell casings and spent bullet recovered from the bedroom at Chestnut and also on the spent bullet recovered from Vasquez's body. The testing matched these items to the handgun.

¶ 46 Forensic scientist Lyle Boicken described the DNA testing that was done on some of the items found at the Chestnut residence. Samples were recovered from the gray glove, the two masks (specifically, the mouth areas), and the trigger of the handgun. For comparison, buccal swabs were taken from Barraza, Robert, Guadalupe, Ortiz, and defendant. Though no swab was taken from Solis, he was in the DNA database against which Boicken compared the samples.

¶ 47 Boicken explained that his testing in this case involved comparing "questioned" DNA samples, extracted from the items of evidence, with both the DNA standards in the buccal swabs

provided by the individuals and the profiles in the DNA database. Boicken noted that his standard procedure is to compare DNA profiles at 14 loci. Only a match at all 14 loci is considered a true "match." A sample that yields a profile of less than 14 loci cannot generate a true match, but can be the basis for exclusion of individuals by probability.

¶ 48 Boicken testified that the DNA profile recovered from the gun trigger was a match for Guadalupe. The profile would be expected to occur in approximately: one in 6.3 quadrillion Blacks, one in 3.8 quadrillion Hispanics, or one in 870 trillion White unrelated individuals.

¶ 49 Also, the DNA profile recovered from the black mask with the white face was a match for Ortiz. That profile would be expected to occur in approximately: one in 380 quintillion Blacks, one in 22 quintillion Hispanics, or one in 11 quintillion White unrelated individuals.

¶ 50 The DNA profile recovered from the gray glove was a four-loci profile representing a mixture of profiles from at least three people. Vasquez, Barraza, and Robert could be excluded, while Ortiz, Guadalupe, and defendant could not be excluded. Approximately one in four Blacks, one in four Hispanics, or one in six White unrelated individuals could not be excluded as contributors to the profile.

¶ 51 The DNA from the red and black mask was likewise a mixture of profiles from at least three contributors. Boicken identified a "major" profile, an 11-loci "middle-minor" profile, and at least one additional profile. The major profile was not consistent with any of the DNA standards in the swabs or the DNA database. Ortiz, Barraza, Guadalupe, Robert, and Vasquez could be excluded as contributors to the profiles. However, defendant could not be excluded from 4 loci in the 11-loci middle-minor profile. Approximately one in 9.6 trillion Blacks, one in 650 billion Hispanics, or one in 5 trillion White unrelated individuals could not be excluded from having contributed to the middle-minor profile at those four loci. Boicken noted, for perspective,

that the current world's population was 7 billion. Boicken testified that the "[a]dditional minor profiles" identified in the sample were "not suitable for entry into the DNA database."

¶ 52 Boicken clarified what information can be derived from running a sample against the DNA database alone. A database can generate a "hit," *i.e.*, a "possible association," but not a match. A match would be determined by acquiring a standard from the individual. When Boicken ran the DNA samples collected in this case through the database, he did not yet have a standard from defendant. Once there was a hit for defendant in the database, Boicken obtained a standard from defendant and compared it with the samples. There was no hit for Solis in respect to any of the samples.

¶ 53 At the close of the State's case on January 5, 2012, the defense moved for a directed finding, which the trial court denied. The case was continued to February 21 and then to April 3 because the defense's alibi witness, Montero, was still unavailable.

¶ 54 On April 3, the defense presented only one witness, forensic scientist Scott Rochowicz, who testified that he conducted gunshot residue (GSR) tests on Ortiz, Richard, Robert, Guadalupe, and Vasquez (apparently, Barraza was not tested). The tests were conducted by swabbing the backs of both hands. GSR was found on both of Vasquez's hands, Guadalupe's right hand, and Robert's left hand. GSR was also found on Ortiz, but Rochowicz did not specify which hand. No GSR was found on Richard. The presence of the GSR on an individual meant that he either discharged a firearm, came into contact with a firearm, or was in the vicinity of a firearm when it was discharged. The caliber of the gun can impact the spread of GSR, but there is no established correlation.

¶ 55 The defense presented no alibi witnesses and defendant himself did not testify. In closing argument, defense counsel contended that Ortiz was not a credible witness because his

agreement with the State gave him an incentive to lie and because he admitted lying to the police. Counsel contended that the GSR testing suggested that, contrary to Ortiz's testimony, he himself fired the gun. According to counsel, the second intruder may have been Solis, "the bragger, the guy that Ortiz was afraid of, the guy who he admitted he was protecting."

¶ 56 In a lengthy written decision issued on April 26, 2012, the court found defendant guilty of all charges on an accountability basis. The court found Ortiz's account of the home invasion sufficiently corroborated by, first, the accounts of the surviving victims as to how the incident proceeded, and, second, by the DNA evidence. The court found, consistent with Ortiz's testimony, that defendant carried a handgun into the house but Ortiz only pretended to have one. The court found that defendant's gun "went off" during the physical struggle with the occupants of the house, but the court did not identify who fired the gun.

¶ 57 B. Defendant's First Posttrial Motion Filed with Counsel

¶ 58 On May 9, 2012, the court gave defendant 30 days to file posttrial motions. On June 11, defendant filed a motion for a new trial. Hearing on the motion was continued to September 2012. Meanwhile, on August 29, defendant, still represented by Wheaton, filed an amended motion for a new trial. He attached affidavits from two individuals who claimed that they were part of, or overheard, conversations with Ortiz or Solis in which Solis was identified as the individual who accompanied Ortiz inside the Chestnut residence on November 4. The affidavit of Michael James was signed and notarized on June 8, 2012, and the affidavit of Arthur Braaksma was signed and notarized on July 25, 2012.

¶ 59 In his affidavit, Michael James claimed that, in the beginning of 2011, he and Ortiz were fellow inmates at the Kane County Jail when Ortiz confided in James about "what happened during the home invasion/murder that [Ortiz] had been fighting for a little over two years." Ortiz

said that he and another man "went to a crib on the west side to hit a lick and once they got in everything went wrong." The man who entered the house with Ortiz "started fighting with the dudes in the house that they came to rob," and "[b]efore [Ortiz] knew it one of the dudes they came to rob got shot in the face right before [Ortiz] was shot." James asked Ortiz how he got caught and Ortiz said that " 'somebody in the crib told the police that they shot [the] dude that killed his cousin.' " Also, Ortiz had GSR on his hand and arm. When James asked Ortiz how he got GSR on his hand and arm, Ortiz acted like he did not hear the question. Ortiz also would not tell James who went into the house with Ortiz, but "he did admit that the other person was not his co-defendant Cobra Folks." Ortiz did not want to implicate his true accomplice for fear of retaliation. Ortiz said that his attorney had obtained a "20 year cop out" for him in the case "and all he had to do to get it was testify that Cobra Folks did it and [the] dude in the crib was lieing [*sic*] to APD when he said he (Tony) killed his cousin." James asked Ortiz why he would lie about Cobra Folks. Ortiz responded that "he didn't know Cobra Folks, Cobra Folks ain't from the town (Aurora), somebody gotta go down and it ain't going to be him[.]" Ortiz said that he "hope[d] the judge or jury believes him because he already changed his story a couple of times and made a few different statements." James stated he and Ortiz did not speak after this conversation because Ortiz was moved to segregation.

¶ 60 In his affidavit, Braaksma averred that, two and a half years ago, he was working at Deadman's Customs and Motorcycles on the east side of Aurora when "two guys [he] knew from the neighborhood," Mike Ovalley (spelled "Ovalle" at the hearing on defendant's motion) and someone Braaksma knew as only "Nate or Blue," brought Ovalley's truck in for repairs. As Braaksma was ordering a part for the repair, he overheard

> "Nate telling Mike how he and his cousin Tony went to do a robbery at some guy Lupe's house for money, drugs, and guns. How he had everyone tide [*sic*] up as Tony searched the back room. Putting everything in a white plastic bag. But while they were ready to go Tony started fighting with Lupe over the gun. That's when Nate said, 'Tony shot some guy in the face. That's when he run [*sic*] out of there leaving everything.' "

¶ 61 Braaksma further averred that, in mid-June 2012 when he was in the A-Pod at the Kane County Jail, he overheard "some guys talking about details of Rick's case and how he got found guilty for something he did not do." Afterwards, in the beginning of July 2012, Braaksma approached Rick in the day room of the jail and told him everything he knew. Rick asked if Braaksma could help him by also telling the State what he knew. Braaksma agreed "because everyone in Aurora knews [*sic*] who realy [*sic*] did it and it is not right."

¶ 62 The court held an evidentiary hearing on defendant's motion on October 24 and November 20, 2012. Testifying for defendant were James and Braaksma. The State called Ortiz, Richard Beavers, Detective Trujillo, and Nina Jones.

¶ 63 James testified that he was currently in the Kane County Jail on felony charges of domestic battery and possession with intent to deliver a controlled substance. He had prior felony weapons and drug convictions.

¶ 64 He stated that, in late 2010 and early 2011, he and Ortiz, whom he knew as "Tony," were housed in the E-Pod of the jail. James braided Ortiz's hair on several occasions, during which they conversed. They learned that they were graduates of the same high school in Oswego. In October or November 2010, Ortiz told James that he was incarcerated for home invasion and murder. Ortiz said nothing further about the matter at the time. In January 2011,

Ortiz asked if James could be trusted with "serious stuff," and James said yes. Ortiz told James about the home invasion as James related in his affidavit.

¶ 65 James testified that, in June 2011, he was transferred to the A-Pod of the jail and met defendant there. After the April 2012 guilty verdict, James decided to approach defendant about the conversations with Ortiz. James did not approach defendant earlier because James was following the "unwritten code" in prison that one does not get involved in another's case. He was hoping that the truth would prevail at trial so that he would not have to come forward. After the verdict, James decided to approach defendant because James had lingering guilt over not coming forward in another fellow inmate's case (the inmate was eventually exonerated anyway). James only came to defendant and never contacted the police or prosecution. James told defendant that he had contact with Ortiz in E-Pod and that Ortiz "told [James] what happened." James offered to write an affidavit based on what Ortiz told him. Defendant accepted the offer but told James he did not want to know what Ortiz said. James never did tell defendant what he learned from Ortiz. James wrote the affidavit the same day that defendant accepted the offer. The affidavit was notarized no more than a week later, on June 8, 2012.

¶ 66 James testified that he was receiving no benefit for submitting the affidavit and testifying on defendant's behalf. James noted that, since he was a Vice Lord and defendant was in a rival gang, Cobra Folks, James was potentially putting himself at risk by helping defendant.

¶ 67 James acknowledged that, when Detective Trujillo came to ask him about his affidavit, James declined to speak with him because he did not have an attorney present.

¶ 68 Braaksma testified that he was currently serving a two-and-half year prison term for "possession and theft." He had prior felony convictions for theft and burglary.

¶ 69 Braaksma—who had averred that the conversation he overheard at Deadman's occurred two and a half years prior to July 2012—testified that he was not sure what month the conversation occurred. He believed it was the fall of 2009 "because it was getting cold." He was "pretty sure" that Richard Beavers, the owner of Deadman's, was on the premises when the conversation occurred. At the time, Braaksma was not employed by Deadman's but was using its facility for his own jobs. Braaksma acknowledged that, on September 12, 2012, a detective interviewed him about the affidavit. Braaksma denied that he told the detective that Solis did not mention "Tony" by name. Solis had indeed mentioned "Tony" by name.

¶ 70 Braaksma testified that he was placed in the Kane County Jail on his present charges in February 2012. In June 2012, he overheard the conversation in A-Pod that he referenced in his affidavit. The conversation took place in the day room. The conversation was between James and one other man. After hearing it, "everything seemed to fit together" for Braaksma. About two weeks later, in the beginning of July 2012, he approached defendant, who was also in A-Pod, and told him about the conversation he overheard at Deadman's. Defendant asked if Braaksma would be willing to put the information in writing and also testify on his behalf. Braaksma said he would. Braaksma wrote the affidavit on July 24, 2012, the day before it was signed and notarized. Braaksma never went to the police or prosecution with his information.

¶ 71 Braaksma testified that he received no benefit from his affidavit or testimony. While he did not consider defendant his friend, he did allow defendant to use his PIN number for making calls from the jail. According to Braaksma, it was "general practice" for inmates to borrow PIN numbers from each other, and Braaksma let several people beside defendant use his number. He was not sure if or how much defendant used the number. Braaksma noted that he did not incur

charges for calls made with his loaned PIN number, as he would have if he loaned his phone card.

¶ 72 Ortiz testified for the State that he became acquainted with James when they were both in E-Pod during the pendency of Ortiz's case. James braided Ortiz's hair several times but they did not become friends. During the first braiding session, James asked "what [Ortiz] was locked up for." Ortiz "mentioned the death on the west side," and James immediately knew what Ortiz was talking about. James asked how Ortiz was involved, and he replied, "Wrong place, wrong time." James also asked Ortiz how he got caught, and Ortiz said he was caught at the scene. Ortiz rebuffed James' further questions about the case. Ortiz did not say, for instance, that GSR was found on him or admit that the person who went inside Chestnut with him was not Cobra Folks. Ortiz did not, and would not, have told James about the deal he received from the State. The reason was that James was a Vice Lord, as were the victims, Robert and Guadalupe.

¶ 73 Richard Beavers testified that his fiancé owns Deadman's. Beavers remembered the vehicle that Mike Ovalle brought into Deadman's for repairs. Beavers believed that Ovalle brought the vehicle to Deadman's in the spring of 2008. Beavers was "at a store or at the doctor's that day." Beavers received a call from Braaksma asking Beavers to order a drive shaft for Ovalle. When Beavers returned, Ovalle's car was gone. Deadman's would have had no record of the work because Braaksma was not employed by Deadman's at the time, but rather was using its facility for his own jobs.

¶ 74 Trujillo testified that he and a fellow detective went to the Kane County Jail on September 12, 2012, to interview James and Braaksma about their affidavits. James refused to speak with them because his attorney was not present. Braaksma, however, answered their questions. Trujillo asked him about what he heard Nate and Ovalle say at Deadman's.

Braaksma admitted that, though he wrote in his affidavit that the subject of Nate's and Ovalle's conversation was "Tony," they did not in fact mention that name. Rather, Braaksma surmised who they were talking about because Nate has a cousin named Tony.

¶ 75 Nina Jones testified that she is employed by the Kane County Jail in the area of disciplinary, housing, and phone investigations. She testified to the dates that James, Braaksma, Ortiz, and defendant were in the jail and to what pods they were assigned. The timelines to which James, Braaksma, and Ortiz testified were consistent with the information she provided.

¶ 76 Jones also testified that inmate phone calls are recorded and stored in a searchable database. Jones noted that the State had asked her to cross-reference Braaksma's PIN Number with two phone numbers, (630) 333-2849 and (773) 263-9627. Jones found that, from May 7 through August 29, 2012, 45 calls were made to those numbers using Braaksma's PIN number. Over defendant's objection, the State placed into evidence a CD recording of calls in May 2012 to those phone numbers. The calls are to defendant's wife, Hazel Garcia, and an unidentified female apparently named "Marisol." Also over defendant's objection, the State introduced transcripts of five of the calls in the CD recording. The CD recording was played for the court.

¶ 77 Immediately following the close of evidence on November 20, 2012, the court issued its oral ruling denying defendant's posttrial motion. The court found James and Braaksma lacking credibility. Both had criminal records and James was a gang member. Also, neither one contacted the police or prosecution about what he learned. In James' case, there was a span of 15 months between Ortiz's alleged statement (in January 2011) and the guilty verdict (in April 2012), during which James did not act on the information. The court found Braaksma's assertions suspicious because he and defendant evidently were "very friendly in the jail," as defendant was using Braaksma's PIN number. Moreover, the court found that the jail recordings

between defendant and the two women, including his wife, suggested a conspiracy to arrange false affidavits. The court noted that defendant apparently had copies of his discovery in the jail and was using it "for the wrong purpose."

¶ 78 Finally, apart from the court's suspicions over the affidavits, the court noted that the DNA testing on the red and black mask undercut the theory that Solis or someone else other than defendant went inside the Chestnut residence with Ortiz. The court also found that, since James' and Braaksma's affidavits only impeached Ortiz's credibility, they did not meet the high threshold for reversal based on newly discovered evidence. See *People v. Hallom*, 265 Ill. App. 3d 896, 906 (1994) ("[N]ewly discovered evidence which has only the effect of impeaching, discrediting, or contradicting a witness is insufficient to justify a new trial").

¶ 79 After the court announced its decision, the State raised an issue for consideration prior to sentencing. The State noted that, in its written decision following trial, the court found that "defendant was accountable in count 3[,] home invasion." As the State pointed out, however, count III charged home invasion under subsection (a)(5) of section 11 of the Criminal Code of 1961 (Code) (720 ILCS 5/12-11(a)(5) (West 2008)), which states the element of *personal* discharge of a firearm. The court recognized the inconsistency, and said that its decision should be revised to find that, though the State proved that defendant was armed when he entered the Chestnut residence, he did not personally discharge the firearm. The State suggested that the court vacate the conviction entered under subsection (a)(5) and find defendant guilty under the lesser included offense, in subsection (a)(3), of home invasion while armed and using force or threatening the imminent use of force (720 ILCS 5/12-11(a)(3) (West 2008)). The court did so.

¶ 80 C. Defendant's *Krankel* Allegations of Ineffectiveness

¶ 81 After the court entered the home invasion conviction, Wheaton represented to the court that defendant wished to discharge him and have the public defender appointed for sentencing. Upon questioning by the court, defendant complained that Wheaton failed to investigate the case adequately and present issues. The court, after deliberating with the parties on how to proceed, allowed Wheaton to withdraw and appointed the public defender. After some inquiries by the public defender as to the scope of the appointment, the court clarified that the public defender would not be assisting defendant in developing his contentions for the first stage of the process under *People v. Krankel*, 102 Ill. 2d 181 (1984). The matter was then continued for several months for defendant to prepare his *pro se* contentions. During this time, the Honorable James C. Hallock took over the case from Judge Sheldon. Also during this time, the court vacated the appointment of the public defender and also denied defendant's motions for additional discovery and extended law-library access.

¶ 82 The *Krankel* hearing was initially set for March 15, 2013. On March 4, the State moved for a continuance because Wheaton, a "material witness," would be unavailable on March 15. The court continued the hearing to April 3, 2013. On that date, defendant was in the midst of presenting his *Krankel* contentions when he brought the court's attention to a motion to substitute judge that he had filed. The court immediately adjourned the *Krankel* hearing so that the motion to substitute could be addressed. That same day, the motion was heard and denied by the Honorable Judith M Brawka. Judge Hallock then postponed the *Krankel* hearing to May.

¶ 83 Meanwhile, on April 30, defendant filed his "Supplemental Motion Claiming Ineffective Assistance of Counsel" (this was defendant's first written motion claiming ineffectiveness; what it "supplemented" were his oral contentions presented at the April 3 hearing). The motion

presented multiple contentions, all of which the trial court ultimately denied. We set forth here only the three contentions that are the subject of defendant's claims of error on appeal.

¶ 84 The first contention was that Wheaton failed to complete his investigation of the alibi defense. Wheaton had referenced the defense in his opening statement but later abandoned it. The alibi as disclosed to the State and described in the opening statement was that defendant was not in Aurora when the crime occurred but was with Cuellar, his father, doing work at Montero's apartment in Chicago. To support his claim of ineffectiveness, defendant submitted affidavits. One affidavit was from Montero, who stated:

> "I spoke to Chris Wheaton on two different occasions, the first time was when Chris Wheaton called and asked if Precilliano Garcia did any work in my apartment. I said yes he was fixing a clogged pipe in my bathroom.
>
> The second conversation I had with Chris Wheaton was a couple weeks later when he called me the day before trail [*sic*] and told me not to come to court. I was not needed; he didn't explain why[,] just that I should not go. I was not able to tell an investigator that Precilliano Garcia was at my house doing work for me, because Chris never sent an investigator to speak with me.
>
> Chris Wheaton asked if I had the receipt of the work that Precilliano Garcia did at my house. I told him I did and it was dated November 04, 2008. This is the day when Precilliano Garcia was at my house with his father Precilliano Cuellar, doing some work in my bathroom."

¶ 85 Another affidavit was from Hazel Garcia, defendant's wife. She stated that defendant and Cuellar were at Montero's home in the "afternoon [or] early evening" of November 4, 2008. Montero was the mother of Hazel's friend. Hazel told Wheaton that Montero and Cuellar had

receipts for the work done on November 4. After some initial contact with Montero, Wheaton made no further effort in regard to the alibi defense.

¶ 86 Defendant also submitted his own affidavit. According to defendant, Wheaton said he would send an investigator to speak with Montero and her son about the alibi defense, but Wheaton ultimately made only two or three phone calls to Montero. Defendant "ask[e]d Wheaton many times about [Solis], never getting a clear answer."

¶ 87 The second contention of ineffectiveness was that Wheaton failed to investigate for himself a potential lead that Trujillo indicated in his report dated November 10, 2008, which defendant attached to his motion. Trujillo wrote that he was contacted that day by Angela Lynn Daniels, who reported that, several days earlier, she was at home in Galena with her boyfriend Jay Randolph when they received a call from a man mentioned only by the nickname of "Little Blue." The conversation took place on speaker phone. Little Blue told Randolph that the police were after him because of what he did in Aurora. Randolph asked what happened, and Little Blue said that he and "Tony" "went into the house in Aurora to get some stuff." A person in the house pulled a gun on Little Blue. The two wrestled for the gun, and "Little Blue ended up with the gun and shot Anthony with it." Little Blue "just ran from the house and left Tony there." Little Blue said that the shooting was in self-defense and asked if he could stay with Randolph in Galena in order to hide from the police. Daniels did not want Little Blue at the house, and she and Randolph had arguments over the issue. When she came home several days later to find Little Blue there, she decided to call the police. Daniels told Trujillo that she would cooperate only if there was a reward. Trujillo replied that the police would need to verify her information before deciding about a reward. Daniels said she "understood" and agreed to meet with Trujillo in Galena later that day.

¶ 88 Trujillo wrote that he met Daniels at a Galena gas station later that day. Trujillo told Daniels that he "needed her cooperation in the investigation and, after all, she had already told us what she knew and who had done it." Daniels "confirmed that it was correct, but now she was recanting her story in fear of retaliation." Trujillo persuaded Daniels to attempt a photo identification. He showed her a photo of Solis. Daniels only "glanced" at the photo and said that it was not Little Blue. Daniels then "stormed out of the gas station yelling that we will not find her for court purposes if needed and that the Aurora Police did not care about her well-being, but just in making a case." Trujillo wrote: "It should be noted that during all conversations with [Daniels] she would go off on temper tantrums," and "would ** be calm one moment and then be very argumentative and vocal the next moment without being provoked." Trujillo commented that he would have to "continue the investigation to try and identify Little Blue via other means."

¶ 89 In subsequent reports, also attached by defendant, Trujillo noted that he found Solis at Randolph's house and arrested him.

¶ 90 Defendant's third contention of ineffectiveness was that Wheaton failed to investigate the possibility of an alternate perpetrator wearing a yellow hoodie. Defendant attached the report of Officer Christoffel, who stated that Robert told him at the scene on November 4 that "one subject was wearing a red hoodie and one was wearing a yellow hoodie[.]" Defendant also attached the report of Officer Bosson, who wrote that, after the Chestnut residence was secured following the police response to the incident, he and Officer Camardo canvassed the area. A white Chevrolet Impala registered to Solis' mother was found parked in front of 444 Spruce Street, one block away from 208 Chestnut. Solis and another man, Nathan Delgado, were standing in the backyard of 444 Spruce. Solis was wearing a "yellow hooded sweatshirt, a black head beany and jeans." Delgado was wearing "a black short sleeve shirt and jeans."

¶ 91 On May 16, 2013, the court reconvened the *Krankel* hearing and Wheaton responded on the record to the allegations of ineffectiveness. He noted that he came on the case in April 2011, nearly two years after defendant was indicted. He had no involvement in the "initial investigation" done by defendant's prior attorneys. The reason he raised the alibi defense at the "11th hour" was that he was unable to communicate with defendant's father, Cuellar. Eventually, he did speak to Cuellar, and they "developed some witnesses which related to the alibi." Wheaton disclosed those witnesses—Cuellar and Montero—to the State. Wheaton asked Cuellar and Montero to provide him the documentation they claimed to possess relating to the alibi, but they never did. Wheaton never "received any corroboration on the alibi."

¶ 92 Wheaton also noted that his investigation revealed that the alibi witnesses were not "just random people" as he initially believed, but rather there was "some connection" between them and defendant. Specifically, defendant's sister had lived with the Monteros. Thus, Wheaton came to doubt the veracity of the alibi witnesses.

¶ 93 Wheaton further noted that, during the trial, the State disclosed recordings of phone calls between defendant and his wife while he was being held in the Kane County Jail. The recordings "directly related to the alibi," and would have been "damning" to defendant if Wheaton pursued the alibi. Wheaton then spoke to defendant and "[they] decided to proceed in a different direction" in the case.

¶ 94 As to Solis being the possible second intruder, Wheaton noted the efforts he undertook at trial to present that possibility to the court:

> "I cross-examined [Detective] Trujillo and other witnesses regarding Nate Solis. In fact, my recollection is Trujillo even admitted at one point that he thought Solis was another suspect in this case. We developed that through cross-examination. I argued it. In fact,

> our main strategy of the case was that Ortiz was a liar, that he was protecting Solis and that he was not to be believed because he cut a deal with the State for 20 years, and that was the main gist of our defense which I had discussed numerous times with the Defendant."

¶ 95 On June 25, 2013, defendant filed a *pro se* motion responding to Wheaton's "conscious decision to falsely respond to defendant's allegations." He attached affidavits from Cuellar, Toemy Garcia, defendant's sister, and Jose Montero, Priscilla Montero's son.

¶ 96 Cuellar stated that, on November 4, 2008, he and defendant arrived at Montero's apartment at 3:30 or 4 p.m. and left between 7 and 8 p.m. Cuellar claimed that he tried to contact Wheaton "more than four times within two weeks," but Wheaton did not respond.

¶ 97 Jose stated that, "in regard to Chris Wheaton saying I told him Toemy Garcia lived here, which was false, he never mentioned her when we talked [.]" Toemy averred: "I would like the court to know I, Toemy Garcia, have not lived with Jose Montero[.] Chris Wheaton never asked me about my living status, or my history with Jose Montero."

¶ 98 On June 26, 2013, the trial court issued its written order finding no merit in defendant's *Krankel* allegations of ineffectiveness. We relate only the portions of the decision regarding the specific *Krankel* issues raised on appeal. First, the court found no ineffectiveness with regard to the abandoned alibi defense:

> "Counsel presented details of the trial and his preparation leading up to trial concerning the alibi defense. Prior to trial he informed the [S]tate of his intention to proceed with an alibi defense. Counsel related at the hearing that he contacted a woman alibi witness [Montero] as well as [defendant's] father about an alibi defense. He found both people to be uncooperative. When he first reached Ms. Montero, counsel was

informed that her apartment 'had a clogged pipe' and that she couldn't talk. Considering [defendant] being held under a murder indictment[,] a 'clogged pipe' in her apartment seems rather insignificant. He also tried contacting her again the day before trial and had similar results. Complicating all of this is that through the living arrangements of the alibi witness and [defendant's] sister the potential witness would have met difficulty with the finder of fact.

Counsel also revealed at this hearing that there were recorded jail tapes of the defendant communicating with people on the outside. Counsel discussed those tapes with the petitioner during the course of the proceedings. ***. Setting forth an alibi defense would have surely meant the introduction of the tapes. Counsel's description of them at [the] hearing was to the effect that they were 'far more damning.' The court finds that counsel did make an effort towards [an] alibi defense but that it would have been pointless."

¶ 99 As for Wheaton's failure to pursue the possibility that the second intruder was Solis in a "yellow hoodie," the court said:

"Whether there was a red [hoodie] or a yellow one or a black one[,] or the differences in testimony from witnesses as to the colors they saw more than three years earlier when two perpetrators, at least one of them with a gun, came bursting into the house, has no hearing on the effectiveness or ineffectiveness of trial counsel. [Defendant] is clutching for straws."

¶ 100 The court ended with these general remarks about Wheaton's performance in the case:

"Overall[,] attorney Wheaton was very well prepared for this trial, he was focused on the strategy that would have the best chance for success. It was clear that [in] the time

> he had[,] he prepared well for trial, did more than a reasonable amount of investigation and tested the evidence presented by the [S]tate. [Defendant's] complaints about his attorney are so much about matters that are trial strategy. There may have been some approaches that could have been made but weren't but that does not equal ineffective assistance of counsel."

¶ 101 D. Defendant's Second and Third Amended Posttrial Motions Filed With Counsel

¶ 102 The same day as it denied the *Krankel* motion, June 26, the trial court appointed the public defender and set the matter for sentencing. On September 5, 2013, the date set for sentencing, defense counsel moved for a continuance to investigate new information that might form the basis for a further posttrial motion. The court denied the motion and set the case for sentencing on September 24.

¶ 103 In the meantime, on October 15, defendant filed his second amended motion for a new trial. Defendant attached the affidavits of Nicholas Seidel and Felipe Perez. The next day, defendant filed his third amended motion for a new trial, attaching yet another affidavit, from Gary Castle, Jr. Each affiant claimed to have encountered Ortiz while the two were fellow inmates in the Kane County Jail. Seidel's affidavit was dated June 28, 2013, Perez's October 11, 2013, and Castle's October 3, 2013. Defendant asserted that these affiants "assert with great detail how it is they met Anthony Ortiz and how it came that Mr. Ortiz admitted to both that he had lied at the Defendant's trial and that it was not the Defendant who committed the crimes with him but his cousin, Nathaniel Solis." Counsel represented that defense investigators were able to interview Seidel and Perez but not Castle, whose affidavit counsel just received.

¶ 104 In court on October 17, 2013, the State moved to strike the third amended motion as untimely. The State noted that the trial had concluded months before and that defendant was

pulling witnesses "out of the woodwork." Defendant responded that he could not be charged with delay in bringing the motion, as the information was "brand new." Defendant asked that the court postpone sentencing and set the motion for hearing "to hear testimony from [the affiants]." Defendant stated that "[a]ll three new witnesses are willing, able, and ready to appear and testify on the information they have that [defendant] has been wrongly convicted."

¶ 105 The trial court, agreeing with the State that "[t]here has to be some finality," found the motions untimely and declined to hear them. In its ruling, the court commented on the substance of the affidavits:

> "In reading these affidavits side by side, the affidavits all appear to dovetail nicely into each other and appear to be dovetailed by the same craftsman. This is the day that we put an end to the defendant's effort to continue to produce manufactured stories. This defendant appears to be the craftsman of these affidavits.
>
> The court finds that, in spite of the fact it has jurisdiction, that these are not timely. The defendant already had an opportunity for a post-trial motion, and it's easy to wave the flag of actual innocence but just waving the flag isn't making it so."

¶ 106 E. Sentencing

¶ 107 Immediately following the denial of the third amended posttrial motion, the case proceeded to sentencing. Defendant, who was born in 1980, had two juvenile adjudications: unlawful use of a weapon and possession of a controlled substance, both from 1995. As for his adult record, defendant received court supervision in October 2009 for possession of cannabis (offense date of September 2007). The supervision was terminated in July 2010. Defendant's only other adult offense was a criminal trespass to land committed in 2001.

¶ 108 The court made these comments prior to imposing sentence:

"The Court does note the defendant has juvenile history, and according to counsel, when he was 15 years old. He's now 33. These events having occurred when he was 27, approximately 5 years ago, leaves us a 12-year gap in criminal history.

The actual length of the history is therefore quite short, being the three cases: the possession of cannabis with the date of offense of 9/27/07, the juvenile possession of a controlled substance, and the juvenile aggravated discharge. [2]

Defendant's criminal history is very limited, although it does show his occupation or professional calling since an early age dealt with the underworld of the drug and—drug business.

The Court has considered the pre-sentence investigation, has considered the arguments of the attorneys, has considered the information produced here today, and has also reviewed the factors in mitigation and the factors in aggravation.

With regarding to the factors in mitigation, the Court notes *** that there's really not much here that applies to the defendant's situation other than *** the criminal history being slight, and I would have to agree that the criminal history is slight.

In considering the factors in aggravation ***, the Court finds that *** the defendant's conduct caused serious harm. The Court finds that he does *** have a history of prior delinquency. Although, as I said, his history of criminal activity is awfully slight.

*** [A] sentence here is necessary to detur [*sic*] others from committing the same crime."

[2] The court did not mention the 2001 criminal trespass conviction.

¶ 109 The court found that the armed robbery conviction merged into the murder conviction for purposes of sentencing. The court sentenced defendant to 40 years in prison on the murder conviction. Defendant was subject to a mandatory 15-year add-on because he committed the murder while armed with a firearm. See 730 ILCS 5/5-8-1(d)(i) (West 2008). The court sentenced defendant to 10 years in prison on the home invasion conviction. He was subject to the mandatory 15-year add-on for home invasion committed while armed with a firearm. See 720 ILCS 5/12-11(a)(3), (c) (West 2008). Defendant's total sentence, therefore, was 80 years in prison.

¶ 110 Defendant subsequently filed a motion to reduce sentence, which the trial court denied. He filed this timely appeal.

¶ 111 II. ANALYSIS

¶ 112 A. Sufficiency of the Evidence

¶ 113 Defendant's first contention is that the evidence was insufficient for the trial court to conclude that he was the individual who accompanied Ortiz into the Chestnut residence.

¶ 114 Well-established principles of criminal law guide our review. "The due process clause of the fourteenth amendment to the United States Constitution safeguards an accused from conviction in state court except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged." *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 315–16 (1979)). "Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *Id.* "This standard of review 'gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony,

to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Id.* (quoting *Jackson*, 443 U.S. at 319). "Therefore, a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses." *Id.* "Although these determinations by the trier of fact are entitled to deference, they are not conclusive." *Id.* "Rather, a criminal conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Id.*

¶ 115 Defendant's challenge on this issue goes entirely to the issue of identification. "The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed the charged offense." *People v. Lewis*, 165 Ill. 2d 305, 356 (1995).

¶ 116 Defendant emphasizes that the only witness to identify him was Ortiz, who was caught at the scene. He asserts that the "amazing deal" Ortiz received from the State, and his admitted willingness to do anything to protect his cousin Solis, combined into a powerful inducement to falsely implicate a third party like defendant. He suggests that, based on the variety of contradictory accounts that Ortiz gave the police, the version he gave in court could not be trusted.

¶ 117 Defendant directs us to the principles regarding accomplice testimony. "[T]he testimony of an accomplice witness has inherent weaknesses as the testimony of a confessed criminal fraught with dangers of motives such as malice toward the accused, fear, threats, and promises or hopes of leniency or benefits from the prosecution." *People v. McLaurin*, 184 Ill. 2d 58, 79 (1998). "Because accomplice testimony is attended with serious infirmities, it should be accepted only with utmost caution and suspicion and have the absolute conviction of its truth." *Id.* Such testimony "must be cautiously scrutinized on appeal." *People v. Holmes*, 141 Ill. 2d

204, 242 (1990). This is not to say, however, that the State's burden of proof is higher when it relies on accomplice testimony. Rather, "[w]hile subject to careful scrutiny, the testimony of an accomplice, whether it is corroborated or uncorroborated, is sufficient to sustain a criminal conviction if it convinces the [finder of fact] of the defendant's guilt beyond a reasonable doubt." *McLaurin*, 184 Ill. 2d at 79. "[W]hether accomplice testimony *** is a satisfactory basis for conviction goes to the weight of the evidence and is, therefore, in the province of the jury or the court." *People v. Wilson*, 66 Ill. 2d 346, 349 (1977).

¶ 118 In its comprehensive written decision, the trial court duly acknowledged the infirmities in Ortiz's testimony yet found him credible. The court noted that Ortiz's "first lie," told at the scene, was that he was dragged into the Chestnut residence and shot. When Ortiz realized that this account was "unbelievable and uncorroborated by any of the other facts," he "modified his lie to a close version of the truth eliminating any involvement of his cousin, [Solis]." The court noted that, after the police confronted Ortiz with the other evidence in the case, Ortiz told them "the whole truth."

¶ 119 We would qualify the phrase, "the whole truth," for even Ortiz's last statement to the police, given August 26, 2011, was not entirely consistent with his trial testimony. For instance, Ortiz stated on August 26 that the masks were already in the car, but testified at trial that Solis provided the masks when they were at the Edgelawn house. Nonetheless, Ortiz's final account to the police was "the whole truth" in broad outlines, for there, as at trial, he asserted that Solis drove the car to the Chestnut residence and that it was Ortiz and defendant who entered the residence.

¶ 120 Notably, the "close version" of the truth that Ortiz gave after abandoning his very first account to the police was that defendant was the second intruder. Even while his story wavered

in other respects, Ortiz continued to claim that defendant accompanied him inside the house. He remained constant in this regard even while Trujillo, as he testified, "kept trying to get [Ortiz] to tell him" that Solis was the second intruder.

¶ 121 Of course, the trial court's confidence in Ortiz's credibility was significantly, perhaps indispensably, bolstered by the corroborative evidence. As the trial court noted, Ortiz's version of the tumult inside Chestnut was consistent with the account of the victims: upon entering the house, the intruders split up to secure the occupants in the dining room and the bedroom; after robbing the occupants, the intruders asked for "Lupe" and then beat Guadalupe; a struggle for the gun ensued, and Vasquez and Ortiz were both shot. Ortiz's account of the clothing and masks he and defendant wore was somewhat corroborated by the victim's varied accounts; at the very least, there were no damaging discrepancies.

¶ 122 Ortiz's testimony was corroborated also by the DNA results. Ortiz testified that the mask he wore was black with a white face, as in the movie "Scream," and then identified a mask with those features, recovered in the bedroom, as the one he wore. DNA recovered from the mouth of that mask was, according to Boicken, a "match" for Ortiz.

¶ 123 Directly corroborating Ortiz's implication of defendant was Boicken's findings with respect to the red and black mask, which Ortiz identified as the mask worn by defendant when he and Ortiz entered the Chestnut residence. Defendant raises some trifling points about the trial court's characterization of Boicken's findings and the fact that Boicken did not find a true match between defendant and the middle-minor profile derived from the mouth area of the mask. These points do not detract from the power of the statistics cited by Boicken, who found that defendant could not be excluded from the middle-minor profile. Boicken stated that approximately one in 9.6 trillion Blacks, one in 650 billion Hispanics, or one in 5 trillion White

unrelated individuals could not be excluded from that profile. Defendant does not dispute Boicken's calculations. While Boicken did not find a match, the odds he did provide are astronomical enough. Defendant might have tried at trial to sidestep their force by suggesting an innocent explanation for the presence of the DNA on the mouth area of the mask. He made no such attempt, however.

¶ 124 At oral argument before this court, defense counsel noted that Boicken found at least three contributors to the DNA taken from the red and black mask. Counsel maintained, therefore, that defendant cannot be singled out as the perpetrator to the exclusion of those other contributors. Counsel overstated the State's burden of proof at trial. The State did not need to disprove every reasonable hypothesis consistent with defendant's innocence. *People v. McCullough*, 2015 IL App (2d) 121364, ¶ 98. The State put forward an explanation at trial for why defendant could not be excluded as a contributor to the DNA on the mask: he wore the mask during the robbery, as Ortiz testified. The State did not have to explain the presence of other DNA contributors.

¶ 125 Pressing the possibility that Solis was the second intruder, defendant makes this comment:

> "Significantly, Nathaniel Solis was a name provided in the case [citation], and was in the DNA database [citation], but Boicken never had a buccal swab from which to obtain Solis' DNA sample for comparison and analysis." [3]

[3] In a reversal we cannot explain, defendant later claims, in his reply brief, that it is just "speculation" that Solis' DNA "was in the database at the time [Boicken] conducted the DNA testing and analysis in this case." He asserts that Boicken provided "no explanation as to why Solis was not tested *or[] if in fact there was a profile in the database, analyzed and compared*."

¶ 126 The undeveloped insinuation here—that the absence of Solis' DNA could not be determined from database comparison alone—has no support in Boicken's testimony. Boicken said that a database hit, or possible association, is not equivalent to a match; he did not say or suggest that the DNA database cannot adequately *exclude* an individual as a contributor by failing to generate a hit. Rather, the unmistakable inference from his testimony is that exclusion is possible based on the DNA database alone. See *supra* ¶ 51.

¶ 127 Defendant cites *People v. Ash*, 102 Ill. 2d 485 (1984), *People v. Wilson*, 66 Ill. 2d 346 (1977), and *People v. Gnat*, 166 Ill. App. 3d 107 (1988), but these are readily distinguishable because in each case there was, unlike here, no corroboration of the accomplice's identification testimony.

¶ 128 In *Wilson*, the defendant was on trial for armed robbery. The accomplice, Eugene Bonnell, testified against the defendant in exchange for immunity in the case. He stated that he initiated the plan to rob the victim. According to Bonnell, the defendant went to the victim's apartment, robbed her, and then ran to Bonnell's car where it was parked a distance away. The victim testified that when she responded to a knock at her door, she saw a man with a jacket pulled up to just below eye level. He threatened her with a gun, took her purse, and ran. The victim was shown a lineup that included the defendant and Bonnell. She identified neither, and in fact identified a third man. She also failed to identify the defendant at trial. The supreme court, noting that Bonnell's identification testimony was uncorroborated, held that the State failed to prove the defendant guilty beyond a reasonable doubt. *Wilson*, 66 Ill. 2d at 350.

(Emphasis added.) In fact, Boicken testified that Solis' profile was in the DNA database against which Boicken ran his comparisons. Consistent with the methodology he outlined, Boicken did not obtain a sample from Solis because the database did not generate a hit for him.

¶ 129 *Ash* had a similar fact pattern. Two men invaded a home, where they beat and robbed the occupants. Robert Phelps testified against the defendant pursuant to an agreement with the State. Phelps stated that he drove the defendant and another man to the victims' house. Neither of the two victims who testified made positive identifications of the defendant in or out of court. The supreme court reversed the defendant's convictions for armed robbery, home invasion, and unlawful restraint. The court observed that "testimony which supposedly corroborated Phelps' [testimony] described only certain events surrounding the crime but not who committed it." *Ash*, 102 Ill. 2d at 493-94.

¶ 130 In *Gnat*, the accomplice, Allan Loder, arranged for the sale of drugs to William Plahm, who, unbeknownst to Loder and the defendant, was a government agent. The delivery occurred and Loder and the defendant were charged. In exchange for leniency in the case, Loder offered to testify against the defendant. Loder testified that, after speaking to Plahm, he phoned the defendant and said he had a buyer for drugs. The defendant told Loder to meet him at a bowling alley later that day. Loder then told Plahm that the deal would occur in a bowling alley where "his guy, Paul" would be. Loder and Plahm went to the bowling alley. Loder testified that he saw the defendant at the back of the bowling alley and went to speak with him. The defendant said that the drugs were wrapped in a handkerchief in the glove compartment of an unlocked car near the west entrance of the bowling alley. Loder testified that he retrieved the drugs from the car, returned to the bowling alley, left with Plahm, and then handed him the drugs. *Gnat*, Ill. App. 3d at 108-109.

¶ 131 Plahm testified, as did another government agent who was in the bowling alley at the time. According to Plahm, while he and Loder were at the alley, Loder said he saw the defendant and then left. Plahm did not see where Loder went. Several minutes later, Loder

returned with the drugs. The other agent saw Loder speak with the defendant and then walk out of the alley. The agent did not follow Loder or see where he was going. The State did not establish at trial the existence of the car from which Loder allegedly retrieved the drugs. *Id.* at 109-110, 112. The appellate court reversed the defendant's conviction for delivery of drugs, finding "no corroboration for Loder's testimony that defendant supplied the drugs." *Id.* at 112.

¶ 132 In *Wilson*, *Ash*, and *Gnat*, there was corroboration of the accomplice's testimony that a crime occurred, but *no* corroboration that the defendant committed it. Here, by contrast, the DNA evidence corroborated Ortiz's testimony that defendant was the second intruder.

¶ 133 In sum, while Ortiz's testimony had deficiencies, the trial court was in a superior position to judge his demeanor, weigh his credibility, and resolve any conflicts in his testimony. See *People v. Richardson*, 234 Ill. 2d 233, 251 (2009). We are not prepared to upset the court's assessment of his credibility, particularly given the corroboration supplied by the DNA evidence. The State proved beyond a reasonable doubt that defendant was the second intruder.

¶ 134 B. Defendant's First Amended Motion for a New Trial

¶ 135 Defendant contends that the court erred in denying his motion for a new trial, which he supported with the affidavits of James and Braaksma. We disagree.

¶ 136 "To warrant a new trial based on newly discovered evidence, the evidence: (1) must be of such conclusive character that it would likely change the result on retrial; (2) must be material to the issue but not merely cumulative; and (3) must have been discovered since the trial and be of such character that it could not have been discovered sooner through the exercise of due diligence." *People v. Smith*, 177 Ill. 2d 53, 82 (1997). A motion seeking a new trial based on newly discovered evidence "is addressed to the discretion of the trial judge and denial of such a motion shall not be disturbed upon review absence a showing of an abuse of discretion." *Id.*

¶ 137 Defendant's challenge in this court is directed at the trial court's finding that James and Braaksma lacked credibility. The trial court also found, however, that their statements were insufficient as a matter of law because they only impeached Ortiz's credibility. Defendant does not seriously challenge this ground or the additional grounds proposed by the State for affirming the court's decision.

¶ 138 The State, we note, identifies the most fundamental legal deficiency in James' and Braaksma's statements: they are hearsay. Inadmissible hearsay is not a proper ground for a new trial. *People v. Wallace*, 2015 IL App (3d) 130489, ¶ 25; *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003); *People v. Peters*, 144 Ill. App. 3d 310, 319 (1986). "Hearsay is "an out-of-court statement offered to establish the truth of the matter asserted therein, and resting for its value upon the credibility of the out-of-court asserter." *People v. Rogers*, 81 Ill. 2d 571, 577 (1980); see also Ill. R. Evid. 801(c) (eff. Jan. 1, 2011) (" 'Hearsay' is a statement, other than one made by the declarant while testifying at the 'trial or hearing, offered in evidence to prove the truth of the matter asserted."). James repeats what he was told by Ortiz, and Braaksma repeats what he heard Solis tell Ovalle and also what he heard James tell another inmate. Neither James nor Braaksma had personal knowledge of the matters addressed in the statements they reported. Defendant argues no hearsay exception or exclusion under which these statements would be admissible at a new trial on his charges.

¶ 139 On this point we distinguish *People v. Molstad*, 101 Ill. 2d 128 (1984), cited by defendant. The defendant in *Molstad* sought a new trial based on the affidavits of co-defendants, who were at the scene of the victims' beating and now claimed that the defendant was not present. Testimony from the co-defendants based on their personal observations at the crime scene would not have been hearsay.

¶ 140 The State points to a further legal bar to which James' statements specifically are subject. Defendant claims that Ortiz's alleged contradiction of his trial testimony bears upon his credibility. However, matters that merely impeach a witness do not meet the threshold for a new trial. *People v. Smith*, 177 Ill. 2d 53, 83-84 (1997). Defendant does not question that James' statements are subject to this well-established rule.

¶ 141 Also, "[t]he recantation of testimony is regarded as inherently unreliable," and so "courts will not grant a new trial on that basis except in extraordinary circumstances." *People v. Morgan*, 212 Ill. 2d 148, 154 (1997). Defendant makes no effort to show that the circumstances here are "extraordinary," and they are decidedly not so. Defendant was not convicted based on Ortiz's testimony alone, but by corroborating and compelling DNA evidence that defendant has never rebutted.

¶ 142 There are also general issues of credibility here. The court found the affidavits and testimony of James and Braaksma not credible because (1) James and Braaksma had prior criminal convictions; (2) James was a gang member; (3) the recordings of defendant's calls from jail suggested a scheme to arrange false affidavits; (4) neither Braaksma nor James told the police or prosecution what Ortiz allegedly told him, despite the gravity of the situation; and (5) Braaksma's extensive use of defendant's PIN number belied his denial that he was defendant's friend.

¶ 143 Defendant does not challenge all of these reasons. For instance he does not dispute that the criminal backgrounds of James and Braaksma were relevant to their credibility. See *People v. Mullins*, 242 Ill. 2d 1, 14-15 (2011); *People v. Montgomery*, 47 Ill. 2d 510, 516-18 (1971). He also does not question the trial court's finding as to the suspicious nature of defendant's phone calls to his wife Hazel and an unidentified woman. Despite the speakers' attempts at indirection

and code in these calls, they manifest a concerted effort to craft the right narrative for defendant's purposes. There are unmistakable references to a drafting process. At one point, Hazel says she has one of the documents "down pat." At other points, defendant stresses the need for "details" and says one of the documents needs to be changed. He makes a reference to someone "need[ing] to know it to a T." As the trial court noted, defendant's possession of his discovery enabled him to manufacture plausible accounts for willing affiants.

¶ 144 Importantly, the trial court had occasion to consider not only what James and Braaksma asserted, but how they asserted it. Both affiants testified, and "the trial court ha[d] the opportunity which the appellate courts lack, to observe the manner, demeanor and expression of the witness." *People ex rel. Emerson v. Pratt*, 23 Ill. App. 3d 340, 343 (1974). We uphold the court's express and well-supported finding that Braaksma and James lacked credibility.

¶ 145 For these reasons, we affirm the denial of defendant's first amended motion for a new trial.

¶ 146 C. Defendant's *Krankel* Motion

¶ 147 Defendant submits that the court erred in refusing to appoint new counsel to pursue his claims of ineffectiveness. We disagree.

¶ 148 "[W]hen a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim." *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). "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." *Id.* at 78. "However, if the allegations show possible neglect of the case, new counsel should be appointed." *Id.* The trial court's decision on the merits as to whether there was possible neglect will be upheld unless it was manifestly erroneous. *People v. McLaurin*,

2012 IL App (1st) 102943, ¶ 41. "Manifest error" is error that is plain, evident, and indisputable. *Id.*

¶ 149 The substantive law applied at the *Krankel* inquiry is the two-prong test for ineffectiveness of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). To prevail on a claim of ineffectiveness, a defendant must demonstrate: (1) that counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). Counsel's performance is assessed using an objective standard of competence under prevailing professional norms. *Id.* To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *Id.* As a result, counsel's strategic choices that are made after investigation of the law and the facts are virtually unassailable. *Id.*

¶ 150 Defendant raised multiple issues in his written *Krankel* motion and at the hearing on the motion. On appeal, however, he restricts his arguments to three main issues.

¶ 151 First, he claims that defense counsel Wheaton was ineffective for failing to pursue the alibi defense. "[F]ailure to adequately investigate and develop an available defense, or failure to present available witnesses who can corroborate a defense[,] may be ineffective assistance of counsel." *People v. Truly*, 230 Ill. App. 3d 948, 953 (1992). However, "[c]ounsel has only a duty to make reasonable investigations or to make a reasonable decision which makes particular investigations unnecessary, and the reasonableness of a decision to investigate is assessed applying a heavy measure of deference to counsel's judgment." *People v. Pecoraro*, 175 Ill. 2d

294, 324 (1997). "Where circumstances known to counsel at the time of his investigation do not reveal a sound basis for further inquiry in a particular area, it is not ineffective for the attorney to forgo additional investigation." *Id.*

¶ 152 Wheaton became defendant's attorney in April 2011 and formally disclosed in September 2011 his intent to present the defense that, at the time of the incident, defendant and his father, Cuellar, were doing work at Montero's home in Chicago. Wheaton announced at the start of trial on January 3, 2012, that Montero was unavailable for medical reasons. When the State rested its case on January 5, Wheaton sought and obtained a continuance because Montero was still unavailable. When trial reconvened on April 3, Wheaton did not call any alibi witnesses.

¶ 153 At the *Krankel* hearing, Wheaton gave three reasons for abandoning the alibi defense: (1) Cuellar and Montero never gave him the documentation they claimed would support the defense; (2) there was a connection between defendant and Montero, in that his sister stayed with Montero; and (3) if the defendant presented the defense, the State would introduce recordings of prison phone calls between defendant and his wife, which would be "damning" to the defense; (4) after further consultation with defendant, they "decided to proceed in a different direction" in the case. Wheaton also claimed that he was not able to raise the defense until the "11th hour" because he had difficulty communicating with Cuellar.

¶ 154 Defendant challenges some, but not all, of Wheaton's explanation. First, he does not challenge Wheaton's assessment of the phone recordings. At the hearing on defendant's first amended motion for a new trial, the State introduced the transcript of a May 14, 2012, phone conversation between defendant and Hazel. The portion below contains an apparent reference to a warning Hazel and defendant received from "the attorney" (presumably, Wheaton) about their discussing the alibi defense over the phone:

"Hazel: Ok. This is what I talked to the attorney and he said our conversations were, were, were the ones that were going to blow up in our face or something like that.

Garcia: About right now?

Hazel: No, about why you didn't use your, your excuse that, you know, that you were somewhere else. I mean what else could they possibly want. You weren't, you weren't even nowhere around.

Garcia: And, and they were going to use that how?

Hazel: He said that our conversations…they were going to use them as, as we were making it up or whatever the fuck, I don't know."

¶ 155 The "conversations" referenced here are presumably the conversations Wheaton was fearful would be revealed if he presented the alibi defense. Defendant does not dispute Wheaton's characterization of them as "damning," and indeed if defendant and Hazel were as indiscreet during those conversations as they were in the transcribed conversations that the State offered in posttrial proceedings (*supra* ¶ 143), they surely would have damaged the alibi defense. Second, while defendant's affidavits filed in response to Wheaton's remarks at the *Krankel* hearing contest Wheaton's claim that Cuellar was not cooperative and that defendant's sister had lived with Montero, the affidavits do not rebut Wheaton's assertion that Cuellar and Montero failed to provide him the documentation in their possession that they claimed would support the alibi. See *People v. Elder*, 73 Ill. App. 3d 192, 202 (1979) (consequences of a defendant's failure to cooperate with counsel cannot form basis for claim of ineffectiveness). Moreover, it is evident that, in the 22 months before Wheaton came on the case, defendant had never given the

alibi documentation to Wheaton's predecessors. This seriously calls into question defendant's own belief in his supposed defense.

¶ 156 Defendant comments that, while "Wheaton filed his appearance in this case in April of 2011, [he] certainly could have been investigating the affirmative defenses during the intervening nine months *** long before" the start of trial. This simply begs the question as to what Wheaton did or should have done during that time. Wheaton claimed at the *Krankel* hearing that he gave the alibi defense due consideration but abandoned it because of the "damning" phone recordings and inadequate documentation.

¶ 157 We acknowledge, as defendant notes, that the trial court misconstrued Montero's affidavit to mean that she was unable to speak with Wheaton about defendant's alibi because of a clogged pipe. In fact, what Montero stated was that the clogged pipe was the project on which defendant and his father were working in Chicago at the time of the incident. The State claims the error is harmless, but defendant asserts that it "demonstrates the inadequate consideration that [the trial court] gave to not only that claim but others." We review *de novo* whether the trial court properly conducted a preliminary *Krankel* inquiry. *People v. Jolly*, 2014 IL 117142, ¶ 28. What the trial court concluded from its (erroneous) finding is that Montero could not have been serious about defendant's alibi if she allowed a plumbing issue to prevent her from discussing the defense with Wheaton. The trial court, however, considered several additional factors bearing on the alibi defense, such as whether Montero failed to provide the necessary documentation and whether the alibi would have been undermined by the phone recordings. We conclude that, on balance, the court conducted a proper *Krankel* inquiry with respect to the alibi defense.

¶ 158 The second manner in which defendant claimed Wheaton neglected his case was by failing to cross-examination Trujillo at greater length as to why he believed Solis was possibly the second intruder in the house. Wheaton did not address this claim at the *Krankel* hearing, nor did the trial court address it in its decision. "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference[.]" *Pecoraro*, 175 Ill. 2d at 326. Defendant claims that Wheaton could have bolstered his examination of Trujillo by questioning him about his interaction with Daniels. Daniels initially reported to Trujillo that "Little Blue" told Randolph that he and "Tony" went into the house in Aurora. Later, Daniels told Trujillo that she was recanting her story out of fear. Daniels was also shown a photograph of Solis and said it was not "Little Blue." Eventually, Trujillo found Solis at Randolph's house.

¶ 159 Defendant asserts that, by examining Trujillo on his reports regarding Daniels, Wheaton would have shown that Trujillo's suspicion that Solis was the second intruder "was actually based on information from fellow police officers and his own investigation." Further, Wheaton "could have either impeached Trujillo with that information, or he could have recalled Trujillo to testify in the defense case-in-chief as to the information obtained from the Galena aspect of the investigation of the case."

¶ 160 These passing references to how Wheaton could have used the Galena investigation to defendant's benefit at trial do not survive scrutiny. The "impeachment" suggestion fails because defendant identifies no aspect of Trujillo's testimony that could have been attacked by reference to the Galena investigation; for instance, Trujillo never denied that he investigated Solis' involvement and never denied that he considered Solis a suspect; in fact, Trujillo said the opposite. Moreover, the suggestion that substantive use of the Galena reports would have

revealed that Trujillo's suspicious about Solis had an investigatory basis simply assumes that Trujillo indeed believed *from those reports* that Solis was the second intruder. In fact, Trujillo's reports are unclear as to whether he believed Daniels' account of Randolph's conversation with Little Blue. His impression of her did not appear to be favorable. He described her as erratic and volatile and noted that, when they met in Galena, she "recant[ed] her story in fear of retaliation." She was shown a photograph of Solis and failed to identify him as Little Blue. Since defendant can only speculate what Trujillo would have said about the Galena investigation if asked, defendant has failed to establish possible neglect by Wheaton.

¶ 161 The third manner in which defendant claims Wheaton neglected his case was by failing to perfect the impeachment of Robert as to how he described the intruders to the police. On direct examination, Robert testified that both intruders wore black hoodies. On cross-examination, he testified that he did not recall telling the police that one of the men wore a red hoodie and the other a yellow hoodie. Defendant asserts that Wheaton should have impeached Robert with Officer Christoffel's report that Robert did indeed mention hoodies of those colors. Wheaton did not address this contention in his remarks at the *Krankel* hearing. The trial court held that counsel was not possibly ineffective on this point, as the hoodies were described in various ways by the victims in the house, which was understandable given the span of time since the incident.

¶ 162 We agree with the trial court. "[T]he purpose of *** impeachment evidence is to destroy the credibility of the witness and *not* to establish the truth of the impeaching material." (Emphasis in original.) *People v. Cruz*, 162 Ill. 2d 314, 359 (1994); see also *People v. Douglas*, 2011 IL App (1st) 093188, ¶ 41 ("Impeachment is not evidence. [Citation.] It simply challenges the credibility of the witness."). In limited circumstances, impeachment evidence may also be considered as substantive evidence (see Ill. R. Evid. 801(d) (eff. Jan.1, 2011); 725 ILCS 5/115-

10.1 (West 2014)), but defendant does not argue those circumstances here. Thus, his point is simply that Wheaton lost an opportunity to challenge Robert's credibility as to the description of the hoodies.

¶ 163 Even if we assumed that it was objectively unreasonable for Wheaton to forgo this opportunity, we would not find a reasonable probability that, but for the omission, the result of the proceeding would have been different. The victims' descriptions of the hoodies were already varied; little would have been added by the fact that Robert also described them to the police as red and yellow. Defendant alludes at one point in his argument to the fact that, shortly after the incident, police spotted Solis in a nearby yard wearing a yellow hoodie. However, defendant does not specifically argue that Wheaton should have attempted to adduce evidence of this aspect of the investigation. Regardless, there was no reasonable possibility that this evidence would have changed the outcome at trial. Solis was not a hit, or possible association, for any of the DNA samples that Boicken tested, while staggering probabilities linked defendant to the DNA found on the red and black mask. Moreover, the presence of Solis with his mother's white Impala about a block from the Chestnut residence was consistent with Ortiz's testimony that Solis planned to wait for Ortiz and defendant nearby.

¶ 164 Defendant complains that "Wheaton could have done more to investigate Solis as an alternate suspect, including seeking a buccal swab for comparison and analysis." Boicken, however, testified that Solis' profile was in the DNA database against which he compared the DNA samples in this case, and that, since there was no hit for Solis, there was no need to obtain a sample from him. Defendant does not explain what more Wheaton could have learned from a forensic standpoint by obtaining a sample from Solis.

¶ 165 In all of this scrutiny of Wheaton's conduct, we cannot ignore that Solis was not an unknown at trial and that, though Wheaton's efforts, his precise role in the robbery was the subject of argument at trial. Ortiz testified to Solis' involvement as the concocter of the robbery scheme, the supplier of the masks and gloves, and the one who drove defendant and Ortiz to the Chestnut residence. Trujillo testified that he believed (at least during the investigation) that Solis was the second intruder. Wheaton and the State set before the court two theories as to the respective roles of Solis and defendant: Was Solis the driver and Ortiz and defendant the intruders, as the State argued, or were Solis and Ortiz the intruders, as Wheaton argued? The DNA evidence in favor of the State's theory was compelling. Even if Wheaton had done all of what defendant claims in retrospect he should have done, the theory that defendant was not the second intruder would still have an insuperable obstacle in the DNA evidence.

¶ 166 For the foregoing reasons, we find no error in the trial court's rejection of defendant's *Krankel* claims.

¶ 167 D. Defendant's Third Amended Posttrial Motion

¶ 168 Defendant contends that the trial court erred by refusing to continue the sentencing hearing so that he could present his third amended motion for a new trial. Defendant attached to the motion the affidavits of Seidel, Perez, and Castle, who claimed that Ortiz confessed to them in the Kane County Jail that Solis was the second intruder.

¶ 169 In his argument on this issue, defendant misunderstands what his counsel requested below and how the court ruled. He characterizes the issue on appeal as whether the trial court should have granted him a continuance in order to properly investigate the new affidavits and refine the motion. He claims that his counsel "simply needed a continuance to further investigate [the new] information and the witnesses." He asserts that, on October 17, 2013, when counsel

presented the motion to the court, she "expressed the legitimate concern that she needed time to investigate the information from three separate individuals who came forth with allegations that would exonerate the defendant."

¶ 170 The truth is that counsel did not seek a continuance for that purpose. Defendant's written motion requested a postponement of sentencing and the setting of a hearing on the posttrial motion. He stated that the affiants were ready and willing to testify. He did not claim that further investigation was needed. Likewise, in court on October 17, defense counsel did not seek additional time to investigate. Counsel said, "[W]e have done what we could to this date, and I think my investigator has done it in a very timely manner to get as much information to this Court for this court to make the determination whether or not to grant us this hearing on these three witnesses' testimony." At the conclusion of her argument, counsel asked the court "to continue the sentencing and *** set our motion for a hearing."

¶ 171 Even if we were willing to allow defendant to argue for the first time on appeal that his motion required further investigation, we would find the argument insufficiently developed. Defendant simply asserts that additional investigation was necessary. Such a conclusory statement does not meet the requirements of Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), and so is forfeited on appeal.

¶ 172 Defendant also overlooks that the court's decision not to set the motion for a hearing was based on a substantive consideration of the affidavits. The court found their contents "manufactured." Defendant does not assert that it was error for the court to consider the substance of the affidavits at that point in the proceeding. He also does not challenge the court's assessment of them. In fact, he provides no detail as to the affidavits' contents, but takes only

one sentence to describe their common theme. We are thankful to the State for taking pains to specify their contents.

¶ 173 For these reasons, we find no error in the trial court's refusal to hold a hearing on defendant's third amended motion for a new trial.

¶ 174 E. Sentencing

¶ 175 Defendant's final contention on appeal is that the trial court relied on two improper factors in sentencing him. "The defendant bears the burden of establishing that a sentence was based on improper considerations." *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9. Defendant has not carried that burden on either issue.

¶ 176 First, defendant claims that his criminal history did not support the court's finding that "his occupation or professional calling since an early age dealt with the underworld of the drug and—drug business." Defendant points out that his drug-related offenses consist only of a juvenile adjudication from 1995 (when he was 15 years old) and a 2007 charge of possession of cannabis, for which he received court supervision. He submits that this limited history did not warrant the court's assessment of him as a member of the drug underworld since his youth. While the context reveals that the court was speaking specifically about the defendant's *prior* history in making that characterization, the State submits that this court need not so restrict itself in reviewing the court's finding, but can take into account whether defendant's prior offenses *plus* the nature of the present offense (involving a robbery for drugs) warrant the trial court's description.

¶ 177 We need not decide whether the finding was fair on either of the opposing criteria suggested by the parties. Instead, we hold that, considered in context, the court placed insignificant weight on that finding. "In determining whether the trial court based the sentence

on proper aggravating and mitigating factors, a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court." *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). In the three transcribed pages comprising its sentencing findings, the court commented no fewer than four separate times on the sparseness of defendant's prior offense history: the history was "quite short," "very limited," "slight," and "awfully slight." We conclude from these comments that the weight the court placed on defendant's prior history was so minimal that it did not influence its sentencing decision. See *People v. Heidler*, 231 Ill. 2d 1, 21-22 (2008) (sentence based on an improper aggravating factor will be upheld if the weight placed on the factor "was so insignificant that it did not lead to a greater sentence").

¶ 178 Defendant also claims that the court erred when it considered in aggravation that "the defendant's conduct caused serious harm." See 730 ILCS 5/5-5-3.2(a)(1) (West 2012) (aggravating factor of whether "the defendant's conduct caused or threatened serious harm"). Defendant claims that, as death is an element of first-degree murder (720 ILCS 5/9-1(a)(3) (West 2008)), the court's consideration of the "serious harm" he inflicted contravened the rule that "a factor implicit in the offense for which defendant is convicted cannot be used as an aggravating factor at sentencing" (*People v. Rissley*, 165 Ill. 2d 364, 390 (1995)). We disagree. Defendant was convicted of Vasquez's death, but that is not the only harm that his and Ortiz's actions caused. Richard, Robert, and Guadalupe were struck with a gun. The State introduced photographic proof of the head lacerations that Robert and Guadalupe received from these blows. Defendant's actions also led to Ortiz being shot through the chest. Such harm was not implicit in the offense of home invasion under section 12-11(a)(3) of the Code (720 ILCS 5/12-11(a)(3) (West 2008)), of which defendant was also convicted. Section 12-11(a)(3) requires the use of

force *or* the threat of the imminent use of force. The trial court did not specify that the "serious harm" was the killing of Vasquez. We conclude that defendant has failed to carry his burden of proving that the court relied on a fact implicit in the offenses of which he was convicted.

¶ 179 III. CONCLUSION

¶ 180 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 181 Affirmed.