2016 IL App (4th) 140575-U

NO. 4-14-0575

FILED
September 13, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
DENNIS E. DAVIS,	)	No. 11CF1330
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The State's evidence was sufficient for the jury to find beyond a reasonable doubt defendant was one of the shooters in a September 2011 shooting spree; defendant is entitled to remand for an inquiry into his *pro se* ineffective-assistance-of-counsel claims; and the record has not been developed enough to address defendant's claims on appeal of ineffective assistance of counsel.

¶ 2 In September 2011, the State charged defendant, Dennis E. Davis, by information with four counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2010)) and three counts of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)). After a March 2014 jury trial, the jury found (1) defendant guilty of first degree murder and three counts of attempt (first degree murder) and (2) that, in committing the aforementioned offenses, defendant personally discharged a firearm. In April 2014, defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial. At a joint hearing in May 2014, the Macon County circuit court denied defendant's posttrial motion and sentenced him to 50 years'

imprisonment for first degree murder, to run consecutively to three concurrent 30-year prison terms for attempt (first degree murder) (the court's oral pronouncement of sentence included a 20-year sentence enhancement but the written judgment did not). Thereafter, defendant filed a *pro se* motion for a new trial and an appeal, which the court essentially struck in June 2014.

¶ 3 On appeal, defendant asserts (1) the State's evidence was insufficient to prove him guilty beyond a reasonable doubt; (2) the circuit court erred by failing to inquire into his *pro se* posttrial claims of ineffective assistance of trial counsel as required by *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984); and (3) he was denied effective assistance of counsel. We affirm and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 The seven charges in this case relate to a September 3, 2011, shooting spree at 1502 Church Street in Decatur, Illinois, which resulted in the death of Mishyra Wheeler and injuries to ShaKeia Stewart, John Taylor, and Gregory Lewis. Wheeler received nine gunshot wounds during the shooting spree and died from her injuries. At defendant's March 2014 jury trial, the State presented the testimony of (1) Christine Hyde, Wheeler's grandmother; (2) Stewart; (3) Taylor; (4) Colten Green, an adopted relative of defendant; (5) Demariel Cunningham, a guest at 1502 Church Street at the time of the shooting spree; (6) Adam Jahraus, a Decatur police officer; (7) Scott Cline, a Decatur police crime scene investigator; (8) Troy Kretsinger, a Decatur police crime scene investigator; (9) Bryan Kaylor, a Decatur police officer; (10) Joe Patton, a Decatur police detective; (11) Gary Havey, a forensic scientist specializing in latent fingerprints; (12) Carolyn Kersting, a forensic scientist specializing in firearm and toolmark identification; and (13) Dr. John Scott Denton, a forensic pathologist. The State also presented numerous stipulations from other witnesses and many exhibits. Defendant presented

the testimony of (1) Vickie Reader, a roommate of defendant in September 2011; (2) Jessie Owens, a Macon County deputy sheriff; and (3) Green. Defendant also presented several exhibits. The trial evidence relevant to the issues on appeal is set forth below.

¶ 6 Stewart testified she was 18 years old and Wheeler's cousin and best friend. The day of the shooting spree was Wheeler's birthday, and they spent the entire day together. During the day, they ran into Joel Shoulder, who told them to come over to his house on North Church Street so he could give Wheeler some money for her birthday. Stewart and Wheeler went over to Shoulder's residence at around 9:30 p.m. on September 3, 2011. When they arrived, Shoulder, Taylor, Lewis, and Freedom Cunningham were at Shoulder's home. After Shoulder got into the shower, everyone went out onto Shoulder's front porch. Stewart sat down on the couch in front of the picture window, and Taylor sat on a fold-up chair next to Stewart. Wheeler sat on the porch's stairs, and Lewis stood next to the stairs. After awhile, one of Freedom's relatives came and picked him up in a Jeep. Stewart did not know the relative and never heard anyone mention Demariel Cunningham's name that evening.

¶ 7 Shortly after Freedom left, two or three men came from the back of Shoulder's house on both sides and started shooting at them. Stewart testified she saw three guns but was unsure whether it was two or three men who were shooting. At first, everyone just stood there until someone mentioned getting shot in the head, and then everyone started running into the house. Lewis was the first one in the home, and Taylor followed him. Stewart was after Taylor, and Wheeler only made it partially into the home. Stewart tried to get Wheeler into the home, but Shoulder picked Stewart up and moved her to his bedroom. Stewart was shot in the arm and leg.

¶ 8 Stewart testified the men shooting at them were wearing all black but were not

wearing face masks. When the prosecutor first asked Stewart about what the shooters were wearing, Stewart gave the following response: "I don't want to talk at this moment. I want to go." Stewart testified she did not recognize any of the shooters. On September 4, 2013, Stewart gave a statement to Decatur police officer Joshua Kessinger, in which she said the men started shooting about 30 seconds after Freedom left. She also stated the shooters were three black men, two of whom were more than six feet tall, thin, and dark complected. The third shooter was around 5 feet 9 inches tall, heavier built, and medium complected.

¶ 9 Officer Jahraus received the dispatch call about the shooting spree at 11:34 p.m. When he arrived at the scene shortly thereafter, Officer Jahraus searched the home and found only the four victims.

¶ 10 Taylor testified that, on September 3, 2011, he went to Shoulder's home on North Church Street with Lewis. There, he suffered a gunshot wound to his leg. Taylor stated he had been standing on Shoulder's front porch for about 15 minutes and was looking at his cellular telephone before being shot. He had not entered Shoulder's home before standing on the porch. Taylor looked and saw someone wearing all black and holding a big gun. He heard a lot of gunshots. Taylor did not realize he had been shot until he was on the ground and unable to get up. After the shooting stopped, he crawled into Shoulder's home and was later taken to the hospital by ambulance. Taylor never saw Demariel at Shoulder's home on September 3, 2011. Taylor believed Freedom may have set up the shooting because he was only gone two minutes before the gunfire started.

¶ 11 Taylor further testified that, at the hospital on September 3, 2011, he gave a statement to police, in which he described the shooter as 6 feet 3 inches tall, 165 pounds, and medium complected with no facial hair. On September 4, 2011, Taylor gave a second statement

to police and described the shooter as 6 feet 2 inches tall, 160 pounds, and slender with no facial hair. He also noted the shooter was wearing dark clothing. Additionally, Taylor testified he gave another statement to police on September 4, 2011, in which he said the shooter was 6 feet 3 inches tall, 160 pounds, and dark complected with no facial hair. Taylor again mentioned the shooter's dark clothing. During one of his statements, Taylor described the shooter as being in his late 20's to mid-30's. Taylor was eventually arrested at the hospital on unrelated charges and taken to jail.

¶ 12 Moreover, Taylor testified that, on September 8, 2011, the police had him look at a photograph lineup (State's exhibit No. 23). Taylor stated he looked at the lineup before signing the Decatur police department "photo spread advise form" and the officer showed him a picture of the suspect they had in custody before showing him the photograph lineup. Taylor testified he identified defendant and placed a "J" under defendant's photograph because that was the person the police had in custody. Defendant had facial hair in the photograph he selected. Taylor testified he had never seen the man in the photograph and did not see the shooter's face because it was dark. Taylor stated he only made the identification in the photograph lineup "out of anger and spite and because they said that they had him." Taylor further testified that, on the same day, he was shown another photograph lineup and did not identify anyone in the second lineup. Taylor further testified that, on September 9, 2011, Officer Patton showed him a third photograph lineup (State's exhibit No. 24). He again identified defendant's photograph as the shooter and gave a written statement, in which Taylor stated he was positive the suspect he identified was the person who shot him. Last, Taylor testified he had convictions for possession of cannabis and possession of weapons by a felon and was currently serving a prison term for aggravated unlawful use of a weapon.

¶ 13 Officer Kaylor testified he conducted the photograph lineup with Taylor at the Macon County jail on September 8, 2011, which was State's exhibit No. 23. The lineup was composed of six photographs of individuals in the same age range with similar characteristics. Officer Kaylor first read to Taylor the "advise form," and they both signed the form. The first lineup that Officer Kaylor showed Taylor contained defendant's photograph. Officer Kaylor did not give Taylor the names of the people in the photographs. At first, Taylor asked questions about the individuals in the photographs, such as the person's weight or where they were from. Officer Kaylor told Taylor he did not have the information Taylor was requesting and that Taylor had to look at the lineup and make his determination based on the lineup. Taylor pointed to defendant's photograph and stated that person was the shooter in the incident at North Church Street during which he was shot. Officer Kaylor asked Taylor if he was certain of his identification, and Taylor responded he was certain. Officer Kaylor asked Taylor to circle the photograph and initial the box underneath the photograph, and Taylor circled the box under the photograph and initialed the box. Officer Kaylor testified he did not indicate to Taylor which photograph he should select and did not tell Taylor any of the individuals in the photographs were suspects in the shooting or were in custody for it.

¶ 14 Since the incident involved more than one shooter, Officer Kaylor presented Taylor with a second photograph lineup about an hour after the first one. The name list included in State's exhibit No. 23 for the second lineup does not include defendant's name. Officer Kaylor asked Taylor if he remembered the statements in the "advise form," and Taylor responded he remembered the statements. Taylor looked at the second lineup closely and asked how many people he could identify. Officer Kaylor told Taylor he did not have to identify anyone and could identify multiple people. Officer Kaylor explained the purpose for showing him the

lineups was for the police to determine who the suspects were in the case. Taylor identified two people in the lineup who looked similar to the shooter. Taylor stated he was only able to get a look at one of the shooters. Taylor explained he was not a 100% certain with any of the identifications but was going off what he observed of the suspect before he was shot, such as hairline, body build, ears, facial hair, and other physical characteristics.

¶ 15 Detective Patton testified he met with Taylor at the jail on September 9, 2011, to clear up why Taylor made a positive identification but then later indicated he was not sure. Taylor told Detective Patton that, when he was shown the first photograph lineup, he was positive of the identification he made. When Officer Kaylor presented him with a second photograph lineup, Taylor thought he had made a bad identification and started to doubt himself. Detective Patton presented Taylor with a photograph lineup (State's exhibit No. 24), which included defendant's photograph and five other photographs of the other men with similar physical characteristics. Taylor pulled the photograph lineup closer to him and looked at it more closely. Taylor focused in on the photograph of defendant and described how the person's characteristics, including facial hair, were consistent with what he had witnessed. Taylor identified defendant as the person he saw the night of the shooting. Taylor initialed the box under defendant's photograph. Detective Patton asked Taylor to make a handwritten statement in his own words of what had taken place. Taylor did so, and both he and Detective Patton signed the statement. In the statement, Taylor stated he was positive the photograph he selected was of the person he saw shooting. Detective Patton denied making any suggestion or indication as to whom Taylor should identify and did not give Taylor any direction or suggestion as to what to include in his written statement. On September 9, 2011, the police did not have anyone in custody for Wheeler's murder.

¶ 16 Detective Patton further testified the police had obtained defendant's photograph from his booking at the Macon County jail when he was arrested for a traffic violation shortly after the shooting. Defendant's exhibit No. 2 was defendant's booking photograph, in which he had facial hair, and Detective Patton testified the booking photograph appeared to be the same photograph used in the photograph lineup he showed Taylor. The police took the photograph on September 3, 2011, or the early hours of September 4, 2011. At the time of the lineup, Detective Patton was unaware of Taylor's statements about the shooter being clean-shaven and thus did not ask Taylor any questions about his previous statements.

¶ 17 Demariel testified that, on September 3, 2011, he had been hiding out from the police at Shoulder's residence for a week because he was wanted for the murder of Marvin Dickerson. He had been avoiding contact with others by staying in a bedroom. Only his brother, Demarta Cunningham, and Shoulder knew he was there. That evening, he heard male and female voices on the porch, but he did not recognize them. His cousin, Freedom, had come into the house that evening, but the others had not. Demariel was in the living room when Freedom left. Two or three minutes after Freedom left, Demariel, who was sitting in the living room and looking out the front window, saw Roderick Dickerson come around the front of the house from the right and defendant come around the house from the left. He had almost a full view of the front yard. Both Roderick and defendant were shooting guns. Demariel saw the guns in both shooters' hands fire and Roderick had two guns. Demariel knew Roderick but not defendant. Once the shooting started and a bullet came close to his head, Demariel got down on the floor and started crawling for the kitchen. As he was crawling away, Shoulder entered the home from the front porch. Demariel heard “a lot” of shots. A minute after the shooting stopped, Demariel left the house out the back door and went to his brother's apartment. Demariel testified the

shooters were in all black and were not wearing masks. Demariel did not tell the police he was present at the shooting spree until November 2012, when he was in custody. On November 12, 2012, Demariel identified defendant in a photograph lineup (State's exhibit No. 25). Demariel also testified he had prior felony convictions for obstructing justice and possession of a controlled substance with the intent to deliver. He also had a pending probation violation and three pending criminal cases in Macon County.

¶ 18 Officer Kretsinger, one of the crime scene investigators, testified that, when he arrived at the crime scene on September 4, 2011, black curtains were on the living room window. The curtains were hanging straight down, not pulled to the side.

¶ 19 Green testified he was adopted by defendant's grandmother, who was also Roderick's grandmother and the mother of Randy Hubbert. He saw defendant "quite a few times when he was not in jail." Green had a "very good relationship" with the deceased, Wheeler. Green had felony convictions for violating an order of protection with a prior domestic battery and aggravated battery. At the time of trial, Green had a pending armed robbery charge. He did not expect an offer of leniency for his testimony in this case.

¶ 20 On September 3, 2011, he saw defendant around 8 or 9 p.m. He, defendant, Roderick, and Hubbert sat in a Pontiac minivan on the driveway of Jacoby Jarrett's girlfriend's home for about 10 to 15 minutes. Green wanted to go into the home and "chill" with Jarrett. He did not want to go with the others because he "knew it was going to be something." He later testified the three were going "most likely to harm somebody." Green explained his cousin, Marvin, was murdered on August 23, 2011. In his discussions with defendant, Roderick, and Hubbert after Marvin's death, Green learned the other three men believed Demariel was responsible for Marvin's death. Defendant, Roderick, and Hubbert wanted revenge on Demariel,

and if they could not find him, “any Cunningham would do.” During the conversation on the night of the shooting, the discussion centered around Marvin's death and how they were “going to take care of business.” While in the minivan, Green observed a black nine-millimeter handgun with a brown handle and a silver .40-caliber handgun with a black handle. Prior to that day, Green had seen the nine-millimeter handgun in Hubbert's possession and the .40-caliber handgun in Roderick's possession. When Green got out of the minivan and went into the home, the other three drove away. Green testified it had to be after 9 p.m. when they drove away.

¶ 21 Green further testified he saw defendant again around 5 p.m. on September 4, 2011, at Hubbert's girlfriend's home. Hubbert and Roderick were also present. Defendant, Hubbert, and Roderick were looking at news footage about Wheeler's death on the computer. Green was with them for about 30 to 45 minutes and left with Roderick. While Green was there, it was discussed Roderick needed to get rid of his weapon and people needed to get out of town.

¶ 22 Green first spoke to the police on September 25, 2011. Green testified he believed he told an officer the Pampers box in the minivan contained guns and defendant was in the van the night of the shooting spree. Green also believed he told Detective Patton on December 10, 2013, that defendant was present on September 4, 2011, at Hubbert's home. Green also spoke to Detective Patton about the sale of a nine-millimeter pistol to Lorenzo Davis, which occurred after Wheeler's death. In November 2011, Green wrote a letter stating the statements he made against Roderick and defendant were not true. Green testified he wrote the letter because Hubbert was pressuring him to write it. Hubbert took Green to the currency exchange and had him write the letter in the car. Green went into the currency exchange and had the letter notarized. He then gave the letter to Hubbert, and then Hubbert “dropped [him] back off.” Green testified the contents of the letter were not true. He had received a great deal of

pressure over the past couple of years for his statements and tried to go into hiding. In late November or December 2013, Green told Ed Culp with the Decatur police department about being pressured into writing the letter.

¶ 23 Kersting testified she received 38 shell casings that the police recovered from the crime scene. The recovered shell casings included 14 nine-millimeter Winchester casings, 9 .40-caliber casings, and 15 nine-millimeter Blazer casings. Her testing was inconclusive as to whether two or three guns were used during the shooting spree. However, Kersting did testify "there was enough difference in each of the arced patterns and the fire pin impressions to suggest" there could have been two different nine-millimeter guns.

¶ 24 In defendant's case, Reader testified that, on September 3, 2011, she resided with her two children and defendant in Macomb, Illinois. Between 8 and 9 p.m. that night, defendant left with his aunt to go to Decatur, which was around a 1 1/2-hour to 2-hour drive. Defendant did not return home until between 6 and 7 a.m. the next day. Reader also testified that, except for when defendant went to church at around 10:30 a.m., he was at home the rest of the day on September 4, 2011.

¶ 25 Deputy Owens testified that, around 11:47 p.m. on September 3, 2011, he put on his lights to pull over a 1997 Jeep on westbound Eldorado Street for not having its headlights on. He made the stop at 11:50 p.m. Defendant was the driver, and he did not have a valid driver's license. According to Deputy Owens, defendant did not appear nervous or upset during the stop. Deputy Owens arrested defendant for driving with a revoked license and took him to jail after the vehicle was towed at 12:20 a.m. on September 4, 2011. He did not find any weapons or black clothing in defendant's vehicle. Defendant's booking photograph accurately represented what defendant looked like that night. Deputy Owens testified that, at that time of night, it would take

less than five minutes to get from Church Street to Eldorado Street. A video of Deputy Owens's stop of defendant's Jeep was played for the jury. In the video, defendant was wearing jeans and an orange plaid shirt.

¶ 26 At the conclusion of the trial on March 28, 2014, the jury found defendant guilty of the first degree murder of Wheeler and the attempt (first degree murder) of Stewart, Taylor, and Lewis. The jury also found "the allegation that the Defendant personally discharged a firearm in committing First Degree Murder and Attempt First Degree Murder was proven." On April 25, 2014, defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial. At a May 20, 2014, joint hearing, the circuit court denied defendant's posttrial motion and held the sentencing hearing, at which the State presented the testimony of Nathan Binkley, chief investigator for the Macon County State's Attorney's office, who investigated defendant's pending charges in McDonough County, and a victim impact statement. Defendant spoke in allocution. After hearing the parties' arguments, the court sentenced defendant as follows:

> "For Count I, Defendant is sentenced to 50 years in the Illinois Department of Corrections plus a 3 year parole term; for Counts V, VI, and VII, the defendant is sentenced to 30 years in the Illinois Department of Corrections; plus an additional 20 years for personally discharging a firearm. *** This is an 85 percent sentence. *** The sentences for Counts V, VI, and VII shall be served concurrently among those counts. There shall be a 3 year parole term for Counts V, VI, and VII. The sentences for Counts V, VI, and VII shall be served consecutively with the sentence for Count I."

¶ 27 On May 28, 2014, defendant filed a *pro se* motion and a letter to the court. In the two documents, defendant raised numerous complaints about his trial counsel and argued the State's evidence was insufficient to convict him. At a June 25, 2014, hearing, the circuit court, prosecutor, and defendant's trial counsel discussed defendant's motion. The court noted defense counsel was still of record and defendant could not file a motion on his own. Without addressing the contents of defendant's motion, they agreed a notice of appeal should be filed on defendant's behalf. Thus, the court essentially struck defendant's timely filed *pro se* motion on that date. On June 27, 2014, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Feb. 6, 2013). Thus, this court has jurisdiction of this cause under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 28 II. ANALYSIS

¶ 29 A. Sufficiency of the Evidence

¶ 30 Defendant argues the State's evidence was insufficient to prove beyond a reasonable doubt he was one of the shooters during the September 3, 2011, shooting spree at Shoulder's residence on North Church Street. Specifically, he asserts the following: (1) the eyewitness identifications were unreliable; (2) the testimony of Green, the State's key witness, was unreliable; and (3) defendant's case supports the more likely scenario that he was not involved in the shootings. The State disagrees with all three of defendant's contentions.

¶ 31 When presented with a challenge to the sufficiency of the evidence, a reviewing court considers " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Davison*, 233 Ill. 2d 30, 43, 906 N.E.2d 545, 553 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). " 'Under this

standard, the reviewing court does not retry the defendant, and the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence.' " *People v. Washington*, 2012 IL 107993, ¶ 33, 969 N.E.2d 349 (quoting *People v. Ross*, 229 Ill. 2d 255, 272, 891 N.E.2d 865, 876 (2008)). Further, we note a reviewing court will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010).

¶ 32 Defendant first challenges the identification testimony of eyewitnesses, Taylor and Demariel. The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed the charged offense. *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 36, 986 N.E.2d 158. While a single witness's identification that is vague and doubtful is insufficient to sustain a conviction, a single witness's identification will be "sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *People v. Lewis*, 165 Ill. 2d 305, 356, 651 N.E.2d 72, 96 (1995) (*Lewis I*). In assessing the reliability of identification testimony, Illinois courts have relied upon the factors set forth by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199 (1972). *Lewis I*, 165 Ill. 2d at 356, 651 N.E.2d at 96; *People v. Piatkowski*, 225 Ill. 2d 551, 567, 870 N.E.2d 403, 412 (2007). Those factors, which are contained in Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000), include "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification

confrontation." *Lewis I*, 165 Ill. 2d at 356, 651 N.E.2d at 96; *Piatkowski*, 225 Ill. 2d at 567, 870 N.E.2d at 412.

¶ 33 At defendant's trial, eyewitness Taylor recanted his pretrial identification of defendant as the shooter he saw during the September 3, 2011, shooting spree. "The State's evidence may be sufficient even where it consists entirely of the prior, recanted statements of eyewitnesses." *People v. Ivy*, 2015 IL App (1st) 130045, ¶ 56, 37 N.E.3d 945. This court may not second-guess the trier of fact's reliance on an eyewitness's prior statement. *Ivy*, 2015 IL App (1st) 130045, ¶ 57, 37 N.E.3d 945. Moreover, as the State notes, defendant did not move to suppress Taylor's identification of him in the photograph lineups, and thus he has forfeited his right to argue the identification was the result of suggestive procedures. *People v. Brooks*, 187 Ill. 2d 91, 125-26, 718 N.E.2d 88, 108 (1999). Accordingly, we will address the reliability of Taylor's identification of defendant as one of the shooters.

¶ 34 As to the first and second factors, "[t]he conditions need not be perfect and the observation need not be prolonged." *People v. Benson*, 266 Ill. App. 3d 994, 1005, 641 N.E.2d 617, 626 (1994). In this case, Stewart's testimony set the scene of the shooting spree for the jury. She testified the group on the porch did not immediately react to the gunfire. They stayed where they were until someone stated being shot. She also testified the shooters were not wearing masks. Despite the time of night, Stewart was able to observe the shooters' heights, builds, and complexions. While Stewart observed multiple shooters, Taylor's focus was on just one shooter. In the hours after the shooting, Taylor provided the police with a fairly consistent description of the one shooter, which included the shooter's height, weight, build, and complexion, as well as the lack of facial hair. Based on the aforementioned facts, Taylor had an opportunity to view

defendant at the time of the crime and he had a degree of attention in observing defendant as he only focused on one of the shooters.

¶ 35 Regarding the third factor, the only discrepancy in Taylor's initial descriptions of the shooter and defendant's actual appearance asserted by defendant is defendant's facial hair. An eyewitness's "discrepancies and omissions as to facial and other physical characteristics are not fatal, but simply affect the weight to be given the identification testimony." *People v. Slim*, 127 Ill. 2d 302, 308, 537 N.E.2d 317, 319 (1989). Thus, the fact Taylor initially believed the shooter was clean-shaven does not render Taylor's subsequent identification of defendant with facial hair unreliable. This is especially true given Taylor's initial description of the shooter came while he was hospitalized with a gunshot wound to the leg and his consistency in describing the other characteristics of the shooter.

¶ 36 As to the fourth factor, Taylor identified defendant as the shooter in two separate photograph lineups and wrote a statement indicating he was positive the person in the lineup was the one who shot him. Defendant claims the lineups show Taylor's uncertainty with his identification of defendant. We disagree. Officer Kaylor testified that, with the first photograph lineup on September 8, 2011, he read Taylor the "advise form" before showing him the lineup, which informs the eyewitness that he or she does not have to make an identification because the suspect might not be in the lineup and tells the eyewitness not to assume the person administering the lineup knows who is the suspect in the case. Officer Kaylor did not provide Taylor with the names of the individuals in the photographs and did not indicate any of the individuals were suspects in the shooting spree. Officer Kaylor further testified he did not tell Taylor which photograph he should pick. When he first looked at the photograph lineup, Taylor asked questions about the individuals. Officer Kaylor declined to answer and told defendant he

had to make his determination based on just the photographs in the lineup. The lineup photographs only depicted the individuals from the shoulders up. Taylor pointed to defendant's photograph and identified him as the shooter. Officer Kaylor asked Taylor if he was certain, and Taylor replied in the affirmative.

¶ 37 Since more than one shooter was involved in the shooting spree, Officer Kaylor showed Taylor a second photograph lineup on September 8, 2011, which did not include defendant's photograph. Taylor did not identify anyone in that lineup but did say two people looked similar to the shooter. That fact supports Taylor's reliability, as he was not just picking someone at random. Moreover, Taylor's uncertainty of his earlier identification of defendant is understandable since the police showed him a second lineup despite his consistency in saying he only saw one of the shooters.

¶ 38 On September 9, 2011, Detective Patton showed Taylor a photograph lineup that included defendant's photograph. Detective Patton testified he informed Taylor he wanted to clear up why Taylor made a positive identification and then indicated he was not sure. Taylor told the detective he was positive of the identification that he made in the initial lineup but thought the second photograph lineup was an indication he made a bad identification and he began to doubt himself. As stated earlier, that is a reasonable explanation, and we do not find it renders Taylor's identification unreliable. With Detective Patton's lineup, Taylor pulled the sheet closer to him and began to focus on defendant's photograph and noted defendant's characteristics that were consistent with what he witnessed during the shooting spree. Taylor identified defendant as the person he saw the night of the shooting. Detective Patton asked Taylor to write down in his own words what had taken place with the three photograph lineups. Taylor did so and indicated he was positive of his identification of defendant. Detective Patton testified he did

not make any indication to Taylor about whom he should select and did not give him any directions about what to put in his written statement. Based on the aforementioned evidence, the jury could have found Taylor's identifications of defendant in the photograph lineups were made with certainty.

¶ 39 Regarding the last factor, Taylor identified defendant as a shooter twice within the same week of the shooting. Thus, the timing of the identifications supports the statements' reliability.

¶ 40 Accordingly, weighing all of the factors and viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found Taylor viewed defendant under circumstances permitting a reliable, positive identification despite the fact he did not identify defendant during trial.

¶ 41 As to Demariel, the evidence was also sufficient for the jury to find he viewed defendant under circumstances permitting a positive identification. Demariel testified he had almost a full view of the front yard when he saw the shooters approach in the same way described by Stewart. He witnessed the shooting long enough to observe the guns fire in both men's hands before getting on the floor and crawling away. Given that Demariel was wanted for Marvin's murder and he was crawling away from the living room during the shooting spree, the fact Taylor and Stewart did not see Demariel at Shoulder's house does not render his identification unreliable. Moreover, Demariel was able to observe what the shooters were wearing and the fact they did not have masks. Thus, the evidence was sufficient for the jury to have found Demariel had the opportunity to view defendant at the time of the crime and that his attention was on the shooters long enough to observe them. Since the trial evidence did not reveal Demariel gave a description of defendant before Demariel identified him, the third factor

does not apply. Regarding the fourth factor, Demariel identified defendant both at trial and in a photograph lineup. Demariel did wait 14 months before notifying the police he was present at the shooting spree and observed the shooters. He was also in police custody at that time. However, no evidence was presented as to when the murder charges were dropped against Demariel and when he was no longer hiding from the police. Thus, a reasonable inference is Demariel was hiding from the police during his 14-month delay in notifying the police of his presence at the shooting. Accordingly, after weighing all of the factors, the jury could have reasonably found Demariel made a reliable, positive identification of defendant as one of the shooters.

¶ 42 Here, Taylor's and Demariel's identifications of defendant as one of the shooters during the shooting spree alone were sufficient for the jury to find beyond a reasonable doubt defendant was one of the shooters during the shooting spree. See *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999) ("The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict."). Additionally, we note a jury could have found Green's testimony reliable. His testimony about why he wrote a letter recanting his initial statement to the police was reasonable, considering he was Roderick and defendant's relative and Taylor also recanted his identification of defendant. Moreover, Stewart stated, at trial, she did not want to talk and wanted to go when asked to describe what the shooters were wearing. The evidence at trial showed pressure on the witnesses not to identify the shooters. As to defendant's other claims against Green's testimony, we note "[i]nconsistencies in the testimony of the witnesses, bias or interest affecting their credibility, and the weight to be given to the testimony of witnesses are for the trier of fact to determine." *People v. Hernandez*, 319 Ill. App. 3d 520, 533, 745 N.E.2d 673, 684-85 (2001). Thus, Green's testimony defendant was with Roderick and

Hubbert on the night of the shooting spree and they were discussing revenge for Marvin's murder is circumstantial evidence which further supports the jury's finding defendant was one of the shooters. Last, we find defendant's case does not create a reasonable doubt of defendant's guilt. As stated, it was the jury's responsibility to resolve the conflict between Reader's and Green's testimony about defendant's whereabouts at around 9 p.m. on September 3, 2011. Moreover, since Deputy Owens testified defendant was less than five minutes from the shooting spree when he was stopped, it was possible for defendant to leave the scene of the shooting, shed his dark clothing and weapon, and begin to drive somewhere else before the traffic stop on Eldorado Street.

¶ 43 Accordingly, we find the State's evidence was sufficient to prove defendant guilty beyond a reasonable doubt of being one of the shooters in the shooting spree that resulted in Wheeler's death.

¶ 44 B. *Krankel* Inquiry

¶ 45 Defendant also argues the circuit court failed to perform the necessary inquiry under *Krankel* and his case should be remanded for a proper inquiry. The State agrees.

¶ 46 A *Krankel* inquiry is triggered "when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel." *People v. Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127. Under *Krankel*, when a defendant raises such a claim, the circuit court employs the following procedure to determine whether new counsel should be appointed. First, the court examines the factual basis of the defendant's claim. *Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127. If the court determines the claim lacks merit or pertains only to matters of trial strategy, then the court does not need to appoint new counsel and may deny the *pro se* motion. *Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127. However, if the allegations show possible neglect of the case, the court should

appoint new counsel. *Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127. In examining the factual basis, the circuit court may (1) ask defense counsel to "answer questions and explain the facts and circumstances" relating to the claim, (2) briefly discuss the claim with the defendant, or (3) evaluate the claim based on "its knowledge of defense counsel's performance at trial" as well as "the insufficiency of the defendant's allegations on their face." *People v. Moore*, 207 Ill. 2d 68, 78-79, 797 N.E.2d 631, 638 (2003). Whether the circuit court properly conducted a preliminary *Krankel* inquiry presents a legal question, which we review *de novo*. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 72, 35 N.E.3d 1095.

¶ 47 On May 28, 2014, just eight days after sentencing, defendant filed a *pro se* motion for a new trial and an appeal, as well as a letter to the circuit court. In those documents, defendant claimed, *inter alia*, his trial counsel did not call the witnesses defendant asked him to call, such as Lewis and Shoulder. He also argued counsel failed to cross-examine Green about his original statements about the shooting spree. At a June 25, 2014, hearing, at which both the prosecutor and defense counsel were present, the circuit court was aware of defendant's documents, but there was confusion about what to do with them. The court and the attorneys' resolution was to have the circuit clerk file a notice of appeal on defendant's behalf. Thus, the court essentially struck defendant's *pro se* documents without conducting any inquiry into his *pro se* claims of ineffective assistance of counsel. Accordingly, we agree with the parties this case should be remanded to the circuit court for an inquiry into defendant's *pro se* ineffective-assistance-of-counsel claims that is consistent with *Krankel* and its progeny.

¶ 48 C. Effective Assistance of Counsel

¶ 49 Defendant also asserts he did not receive effective assistance of counsel because his trial counsel failed to (1) properly limit an improper remark made by Green, (2) object to

Green's numerous unresponsive answers, and (3) object to Green's testimony about inadmissible hearsay statements made by codefendant Roderick about wanting revenge against Demariel. The State asserts considering defendant's claims would be premature. We agree with the State and decline to address defendant's claims on direct appeal.

¶ 50 This court evaluates ineffective-assistance-of-counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). To succeed on such a claim, a defendant must demonstrate (1) his counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's conduct, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 687. To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64.

¶ 51 In *People v. Kunze*, 193 Ill. App. 3d 708, 726, 550 N.E.2d 284, 296 (1990), this court held the adjudication of an ineffective-assistance-of-counsel claim is often better made in postconviction proceedings, where a complete record can be made. For example, we have found that, without an explanation from trial counsel, this court could not properly determine whether the trial counsel's actions involved the exercise of judgment, discretion, or trial tactics, which are

not reviewable matters; thus, we recommended a postconviction petition was a better forum for adjudication of the ineffective-assistance claim. *People v. Flores*, 231 Ill. App. 3d 813, 827-28, 596 N.E.2d 1204, 1213-14 (1992). Additionally, we have explained the resolution of a criminal defendant's ineffective-assistance claim is usually more appropriate for postconviction proceedings because the record on direct appeal in a criminal case rarely contains anything explaining the trial counsel's tactics. *In re Carmody*, 274 Ill. App. 3d 46, 56, 653 N.E.2d 977, 984 (1995). "Thus, if 'those trial tactics are to be the subject of scrutiny, then a record should be developed in which they can be scrutinized.' " *Carmody*, 274 Ill. App. 3d at 56, 653 N.E.2d at 984 (quoting *People v. Fields*, 202 Ill. App. 3d 910, 917, 560 N.E.2d 1220, 1224 (1990) (Steigmann, J., specially concurring)).

¶ 52 In this case, we have already found remand for a *Krankel* inquiry into defendant's *pro se* ineffective-assistance-of-counsel claims is appropriate. Moreover, the answers as to why counsel did not limit Green's remarks or make the objections defendant claims he should have made and whether those decisions were matters of trial tactics are currently outside of the appellate record. We disagree with defendant no justifiable explanation exists for trial counsel's actions. Accordingly, we decline to address defendant's ineffective-assistance-of-counsel claims at this juncture. Rather, defendant may pursue his claims under the Post-Conviction Hearing Act (725 ILCS 5/art. 122 (West 2014)).

¶ 53 D. Written Sentencing Judgment

¶ 54 In its brief, the State notes the circuit court's written sentencing order does not reflect the 20-year sentence enhancement for personally discharging a firearm, which the court imposed at the sentencing hearing on all four of defendant's convictions. It argues defendant's sentencing judgment should be amended to reflect the 20-year sentence enhancement on all four

convictions. Defendant contends the written sentencing judgment should not be amended because this court cannot increase a defendant's sentence on appeal. He also asserts the circuit court did not impose a 20-year sentencing enhancement on the murder conviction. The question of whether a defendant's sentencing judgment should be corrected presents a legal question, which is subject to *de novo* review. *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 86, 35 N.E.3d 649.

¶ 55 The State correctly notes that generally, when the circuit court's oral pronouncement of a sentence and the written sentencing order are in conflict, the oral pronouncement of the court controls. *People v. Lewis*, 379 Ill. App. 3d 829, 837, 884 N.E.2d 823, 829 (2008) (*Lewis II*). That is the result because a court's oral pronouncement is the judgment of the court, while the written order is merely evidence of that judgment. *Lewis II*, 379 Ill. App. 3d at 837, 884 N.E.2d at 829.

¶ 56 Here, the circuit court's oral pronouncement of defendant's sentence clearly included a 20-year *additional* sentence beyond the 30-year sentence for personally discharging a firearm on the attempt (first degree murder) convictions. Thus, the written sentencing order does not correctly reflect the court's sentencing judgment on the attempt (first degree murder) convictions and remand for an amended sentencing judgment is warranted. Accordingly, by having the circuit court amend its written sentencing order to conform to its oral pronouncement on remand, we are not increasing defendant's sentence on appeal.

¶ 57 As to the first-degree-murder conviction, the court's oral pronouncement does not suggest the court imposed the statutory enhancement on the first degree murder conviction. Our supreme court recently held a reviewing court cannot address a State's request to increase a criminal sentence which is illegally low, such as a court's failure to impose a mandatory sentence

enhancement. *People v. Castleberry*, 2015 IL 116916, ¶¶ 23, 26, 43 N.E.3d 932. Accordingly, we decline to address the State's request to impose the 20-year sentence enhancement on the first-degree-murder sentence.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm the Macon County circuit court's judgment but remand the cause to that court for a *Krankel* inquiry and an amended written sentencing order consistent with this order. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 60 Affirmed; cause remanded with directions.