2016 IL App (4th) 150649-U

NO. 4-15-0649

FILED
May 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.	)	Champaign County
DAVID K. ANDERSON,	)	No. 10CF1192
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Holder White and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: After performing an adequate preliminary investigation of defendant's *pro se* allegations of ineffective assistance of trial counsel, the trial court found no potential merit in the allegations, declined to appoint new counsel, and denied defendant's *pro se* motion for a new trial; this decision by the trial court is not manifestly erroneous, and therefore it is affirmed.

¶ 2 A jury found defendant, David K. Anderson, guilty of four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)). The trial court sentenced him to 30 years' imprisonment for each count, ordering that the four prison terms run consecutively.

¶ 3 Defendant filed a *pro se* motion for a new trial, alleging ineffective assistance of trial counsel. The trial court held several hearings, in which it inquired into defendant's claims of ineffective assistance. In the third and most recent of these hearings, the court made the same

decision it had made in the previous hearings. Finding defendant's allegations of ineffective assistance to be devoid of potential merit, the court declined to appoint substitute counsel and denied the *pro se* motion for a new trial. Defendant appeals.

¶ 4 We find no manifest error, and we are unconvinced that a fourth *Krankel* inquiry (*People v. Krankel*, 102 Ill. 2d 181 (1984)) is necessary. Therefore, we affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 A. The Section 115-10 Hearing

¶ 7 On November 16, 2010, pursuant to section 115-10(d) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10(d) (West 2010)), the prosecution served on the defense a notice of intent to present hearsay evidence in the upcoming trial. According to the notice, the hearsay evidence would be "out-of-court statements of the minor [P.C.] to Heather Forrest and Joseph Ferry on July 14, 2010[,] and to her mother[,] Kassandra Logue, as provided in discovery."

¶ 8 On November 29, 2010, the trial court held a hearing to determine whether "the time, content, and circumstances of the[se] statement[s] provide[d] sufficient safeguards of reliability." 725 ILCS 5/115-10(b)(1) (West 2010). At the beginning of the hearing, the court stated it had "been provided a dis[c] of the child advocacy interview" and that it had reviewed the interview. The court then heard evidence.

¶ 9 The prosecutor, Duke Harris, called Heather Forrest as a witness. Forrest testified she had worked for the Illinois Department of Children and Family Services (DCFS) since 1998 and that she currently was a child protection investigator. In 2001 or 2002, she obtained

certification as a forensic trainer. Since then, she had received ongoing training. On July 14, 2010, around 9 a.m., in the Child Advocacy Center (Center), she interviewed a five-year-old girl, P.C. In the interview, P.C. told Forrest that a landlord named Dave had touched her, and P.C. described the touching. Forrest had watched the compact digital disc on which the interview was recorded, and the recording was accurate.

¶ 10 Defense counsel, Scott Schmidt, cross-examined Forrest. He asked her how the matter was first brought to her attention. She answered that the sheriff's department telephoned her, telling her "they had received an allegation that something had happened to this child" and asking her "to go and talk to her." The purpose of the interview was neither to perform an "investigation" nor to formulate a treatment plan, but simply to "gather information, if any," "[f]or the police."

¶ 11 Forrest was the only witness to testify in the section 115-10 hearing. After her testimony, Harris argued it was evident, in the recorded interview, that Forrest took "significant and sufficient precautions to make sure that this was done in a nonleading [manner], with an eye towards having the victim essentially narrate what had happened to her." He argued "there [were] sufficient safeguards of reliability."

¶ 12 Schmidt disagreed that "the requirements of [section 115-10 had] been met, particularly the [S]tate's requirement to show significant indicia of reliability."

¶ 13 Harris and Schmidt agreed, however, that under *Crawford v. Washington*, 541 U.S. 36 (2004), P.C. would have to testify in the trial and be subject to cross-examination.

¶ 14 The trial court ruled:

> "The court has reviewed the dis[c] of the interview that Ms.

> Forrest conducted. The interview, the questions were open-ended questions. They weren't leading. The child appeared to be bright and somewhat articulate for her age. Given all that was available on the dis[c], the training that Ms. Forrest has had, the court finds that the time, content[,] and circumstances of the statement provide sufficient safeguards of reliability. Should the child testify, then this exhibit, this tape will be made available to the jury."

¶ 15 Harris made no argument, and thus the trial court made no ruling, regarding the other hearsay statements listed in the State's notice, namely, the "out-of-court statements of the minor [P.C.] to *** Joseph Ferry on July 14, 2010[,] and to her mother[,] Kassandra Logue."

¶ 16 B. The Jury Trial (December 2010)

¶ 17 1. *Opening Statements*

¶ 18 In his opening statement, Harris told the jury that, from January through May 2010, P.C. and her family lived in a trailer in Bondville, Illinois, and that defendant was their landlord. P.C. and her family became close acquaintances of defendant, and P.C. and her sister S.P. spent a lot of time at his residence. "And during the course of those times when [P.C.] and [S.P.] were at [defendant's] residence[,] the relationship turned dark." Harris said the jury would hear from P.C. "about what [defendant] did to her." His wrongdoing came to the attention of P.C.'s mother, Kassandra Logue, who called the sheriff's department, which in turn called DCFS. An investigator with DCFS, Heather Forrest, interviewed P.C. on July 14, 2010, and P.C. described to Forrest in some detail "how and where [defendant] had touched her." The jury would hear from Forrest. The jury also would hear from Joseph Ferry, the investigator with the

Champaign County sheriff's department who interviewed defendant.

¶ 19 Schmidt then made his opening statement. He told the jury the evidence would suggest that P.C. had been coached, but he cautioned that, ultimately, it might be impossible to identify who had coached her or to figure out why they had done so. He said:

> "So, of course the only conclusion that we can draw is that somebody told [P.C.] to say this, that her statements are coached. The evidence may not show specifically who did it. It will probably be even more difficult to get to the bottom of why someone would do that. But at the end of the evidence I'm certain that you're going to be convinced that somebody told [P.C.] to say this and her statements are coached and my client's not guilty of any of the charges brought against him in this case."

¶ 20 2. *The Testimony of P.C.*

¶ 21 The State called P.C. as its first witness, and she testified as follows. She was five years old and in kindergarten. Sometimes she and her eight-year-old sister, S.P., would go over to defendant's house, walking or biking there from their nearby trailer. (She identified defendant in court; in her testimony, she referred to him as Dave.) They stayed overnight at his house every once in a while.

¶ 22 According to P.C.'s testimony, defendant touched her on the "pee-pee" and on the "booty." She could not specify, however, when and where this happened.

¶ 23 When staying overnight at defendant's house, P.C. slept in his bed or on his couch. When she slept in his bed, he and S.P. would be in the bed, too.

¶ 24 Sometimes only P.C. and defendant slept in his bed. When the two of them alone were in his bed, he would lie on the edge, and she would lie on the opposite edge. Harris asked her:

"Q. Okay. And were you laying on the edge or were you laying on top of David?

A. On the edge.

Q. Okay. Did David ever ask you to marry him?

A. Yes."

Harris asked her:

"Q. Okay. What happens when people get married? Do you remember what you told the lady at the place with the play room?

A. No."

¶ 25 P.C. had taken a bath in defendant's bathroom. He was in the bathroom when she did so. Harris asked her:

"Q. Did he touch you while you were in the bathtub?

A. No.

Q. Okay. Did he, did he touch you in a way that didn't make you comfortable?

A. No.

* * *

Q. When you first—who was the first person that you told

about what David had done to you?

A. Mama.

Q. You told your mama first?

A. Yes.

Q. Did anyone tell you what to say to your mother?

A. No.

Q. And what you told your mother, was it the truth?

A. Yes.

Q. Okay. And when you went and talked with the lady in the building with the big play room, what you told her, was it the truth?

A. Yes.

Q. Did anyone tell you what to say when you talked to her?

A. No."

¶ 26 On cross-examination, Schmidt asked P.C.:

"Q. Okay. Did you think it was weird when Dave asked you to marry him when he already lived with Ella?

A. Yes.

Q. You told Mr. Harris about places that Dave touched you. Did you go to the doctor because Dave touched you in those places?

A. No."

¶ 27 *3. The Testimony of S.P.*

¶ 28 The State next called S.P. She testified that when she first met defendant, she lived with her family in a trailer in Bondville and defendant lived close by. She and P.C. were at defendant's house a lot, and sometimes they spent the night there, playing games and watching TV.

¶ 29 During these overnight stays, S.P. slept on the couch or on defendant's bed. Defendant and P.C. slept on the bed at the same time as S.P. There were times when only defendant and P.C. slept on the bed. Sometimes P.C. slept on the couch. Ella Breeden always slept in her own bedroom.

¶ 30 S.P. and P.C. had taken a bath or shower in defendant's bathroom. S.P. would be alone in the bathroom when taking a bath, and the door would be closed. Defendant would be in the bathroom when P.C. was taking a bath, and the door would be open. He was the only one who checked on P.C. when she was taking a bath.

¶ 31 Defendant and Breeden had no rules related to doors except that S.P. and P.C. were not to lock doors.

¶ 32 4. *The Testimony of Heather Forrest*

¶ 33 The State next called Heather Forrest, who testified she was employed as an investigator for DCFS. Her job was to "go out and investigate any suspected reports of abuse or neglect." She had been doing forensic interviews of children for seven or eight years. She had been through "ongoing forensic interview training throughout the years." Her approach was to "try to use non-leading questions, open-ended questions" and to "rarely use yes/no questions." She tried to "frame questions for children so that they would be able to tell [her] in their own

words, elaborate in their own words, rather than saying yes or no."

¶ 34 On July 14, 2010, during the morning hours, Forrest interviewed P.C. in the Center. It was the first time she ever met P.C. Forrest identified a digital video disc (disc) as a recording of the interview. She had signed her initials on the disc after watching it the morning of the trial. With the trial court's permission, Harris played the disc for the jury.

¶ 35 The disc is in the record. In the interview, Forrest asked nonleading questions for the most part. Her questions were nonleading in the crucial parts of the interview. Usually, when she asked a leading question, it was merely to repeat and confirm what P.C. already had said in response to a nonleading question.

¶ 36 When Forrest asked P.C. whether her mother had told her what they would be talking about today, she answered no. After establishing a rapport with her, Forrest took out a drawing of a naked girl and asked her if she could identify the body parts, from head to toe. One side of the drawing showed the front of a naked girl. P.C. identified, among other body parts, the "pee pee," used for going potty. The other side of the drawing showed the naked girl from the rear. P.C. identified the "booty," used for sitting on the potty. Forrest asked her whether there were any body parts others should not touch. She answered, "Your pee pee." Forrest asked her if anyone had touched her on her "pee pee." She replied, "Dave has. My landlord." On the drawing, Forrest requested her to draw an X where Dave had touched her. Using a crayon, P.C. drew an X over the vagina.

¶ 37 P.C. said this happened in a house that Dave was working on. He had taken her, only her, to that house. Both of them had their clothes on, and he touched her on her "pee pee," over her clothes. He said not to tell anybody about this. Forrest asked her, "Did it happen only

one time or more than one time?" "A lot," she answered.

¶ 38 Forrest asked her if Dave had touched her anywhere else. P.C. turned over the diagram and pointed at the buttocks, saying, "There, too." It "happened at the same house [she] was talking about," the house Dave was working on. It happened after he took her there.

¶ 39 Forrest asked her if Dave had touched her on the inside of her body or on the outside. On the inside of her body, she answered. "How did that make you feel?" Forrest asked her. "Not nice," she said.

¶ 40 Immediately thereafter, P.C. remarked: "He wanted me to marry him." "What happens when you marry someone?" Forrest asked. "You have sex," she answered. "How do you know that?" Forrest asked. "Because my mom showed me on TV. I see it all on TV." She could not describe, however, what sex was; she just knew that people had sex when they got married.

¶ 41 When staying overnight at Dave's house, P.C. sometimes would sleep on the couch and sometimes would sleep on his bed, a "huge bed." Forrest asked her where she was when she was asleep. "I sleeped on top of him," she replied. Both of them had their pants pulled up when she slept on top of him.

¶ 42 Forrest asked P.C. whether Dave had ever asked her to touch any part of his body. "Yeah," she said. "What part?" Forrest asked. "His pee pee," she replied. He had asked her to touch his "pee pee" with her hand. "And I didn't do it," she added. She had never seen his "pee pee." "Did anything like that happen with anybody else?" Forrest asked. "No," she answered.

¶ 43 At first, P.C. told Forrest that Dave had forbidden her to take a bath at his house. Then she told Forrest she had taken a bath at his house. While she took a bath, he showed her

how to "get stuff inside your pee pee and your booty," using something like a rag. Forrest asked her, "Did he put it inside your pee pee and inside your booty?" "Yes," she answered. Forrest asked her what he had used. "That thing you were talking about and I was talking about," she said. "That scrubby thing?" Forrest asked. "Yes," she replied. Dave had not put anything else in there.

¶ 44 5. *The Testimony of Joseph Ferry*

¶ 45 Joseph Ferry testified he was an investigator with the Champaign County sheriff's department and that, from a remote video observation room, he witnessed Forrest's interview of P.C. on July 14, 2010, at the Center. At 3 p.m., shortly after the interview, Ferry went to 106 East Chestnut Street in Bondville, Illinois, and took defendant into custody. He transported defendant to the jail and interviewed him in the video arraignment room.

¶ 46 In the interview, defendant said the girls had stayed overnight at his house six or seven times, sleeping either in his bed or on the couch in the living room. He also said they had taken baths or showers at his house and that he was present in the bathroom when P.C. took a bath. He said he merely had washed her back.

¶ 47 Harris asked Ferry:

> "Q. During this conversation—you had been at the CAC interview when [P.C.] had talked about some sort of scrubby type of thing?
>
> A. Yes, that's correct.
>
> Q. And during the course of your conversation with him you had a discussion about a loofah sponge or a fishnet thing; is

that correct?

A. Yeah. He, Mr. Anderson, said he would put body wash soap on a—what I believe was a loofah sponge. He described it as a fishnet, kind of a fishnet, sponge-type thing that you wash yourself with. And he said he would give it to her and he had concerns about how she washed herself with that.

Q. During the course of your conversation with him was there any discussion about [P.C.] washing her privates?

A. Yes.

Q. What, if anything, did he say about that?

A. I asked him if he assisted her in washing her privates, and he said he did not. However, he was concerned that due to the texture of the loofah sponge that he felt that she was—might push too hard on her private area when she was washing herself with the loofah sponge."

¶ 48 Defendant told Ferry he "had previous conversations with both girls in the past about their private areas and whether anybody should touch it and who should and should not touch their private areas." Harris asked:

"Q. Was there any discussion about [P.C.] asking Mr. Anderson about his privates?

A. Yes, there was.

Q. What did Mr. Anderson tell you about that?

A. He said at one point when he was drying her off—drying [P.C.] off—she had mentioned or asked him if his private looked like her daddy's private and that she had seen her daddy rub her private—his private—on her mom's private.

Q. And, again, at that point did Mr. Anderson indicate to you that he was still at a loss as to what had happened to whom?

A. Yes.

Q. During the course of this conversation that you had with Mr. Anderson was there any conversation between yourself and Mr. Anderson about him ever talking to [P.C.] about getting married?

A. Yes, there was.

Q. What, if anything, did Mr. Anderson say about that?

A. When I asked him the question, if he had ever had a discussion with [P.C.] about getting married, he kind of set [*sic*] back and laughed out loud openly and said yes, he had. He said that she had a little dress that she would often wear, she would get dressed up—and he described it as kind of like a little wedding dress—and he said it was kind of a running joke, a standing joke for a while, that he was gonna marry her in that dress.

Q. Did you finally tell Mr. Anderson that the allegation was that he had touched [P.C.] in her private areas?

A. I did.

Q. What was his response?

A. He denied touching her at all."

¶ 49 On cross-examination by Schmidt, Ferry admitted that although he photographed the inside of defendant's house, he never went inside unit No. 4, the vacant trailer, which also was allegedly a crime scene.

¶ 50 Ferry also admitted it was "fairly standard practice to seek an examination of an alleged victim of sexual assault by what's called a sexual assault nurse examiner," and yet, to his knowledge, "no sexual assault kit was ever done." He did not know why.

¶ 51 On redirect examination by Harris, Ferry testified that a deputy sheriff named Ferriman "took the initial report" and that, according to Ferriman's report, "these events *** occurred some number of months prior to July 14th." By then, there would have been no "fresh evidence to be collected."

¶ 52 On re-cross-examination, however, Schmidt asked Ferry:

"Q. Okay. But a sexual assault examination is not merely to find trace evidence like DNA, but it's also to examine physically for any sign of sexual abuse or trauma; isn't that right?

A. I would think so, yes.

Q. Including digital penetration of a five-year-old; is that right?

A. I would think so, yes.

Q. So there's really not a reason not to have a sexual assault

examination done just because there's no allegation of penetration with a penis and ejaculation?

A. It certainly wouldn't have hurt probably to have one done.

Q. And you stand by your answer that you don't know why that was not completed?

A. That's correct."

¶ 53 6. *The Testimony of Ella Breeden*

¶ 54 After unsuccessfully moving for a directed verdict, Schmidt called Ella Breeden as the first witness for the defense. Breeden testified that, for the past 8 or 10 years, she and defendant had shared a house adjacent to a trailer park of four trailers. They had separate bedrooms. He had been taking care of her because she had "a lot of crippling and stuff."

¶ 55 P.C. and S.P. frequently came over, and sometimes they would spend the night. Sometimes their two younger sisters, "the two babies," would come over, too.

¶ 56 S.P. would come in and take her own bath, but P.C. had to be lifted in and out of the big, claw-footed tub. Breeden testified:

"A. But she couldn't climb out very good so he'd pick her up by the waist and stand around and let her dry.

Q. Uh-huh.

A. And then she'd wrap the towel around her before she got dry, wantin' to play, and she'd just get up and wrap her feet around him."

There was romping and there was wrestling when the kids were over.

¶ 57 Schmidt asked Breeden:

> "Q. All right. You didn't have any problem with those girls staying at your house?
>
> A. Well, we like kids and they wanted to stay and their mom and dad said okay. Even when [P.C.] come there and said she wanted a bath, David went over and asked her mother what he should do. She said[,] ['W]ell, go ahead and give her a bath if you feel comfortable with it.[']"

P.C. and her family lived in unit No. 2. A man with four boys lived in unit No. 1. Two of the boys stayed overnight at defendant's house a lot. Defendant babysat them as well.

¶ 58 Schmidt asked Breeden:

> "Q. Were there explicitly stated rules in the household when children were visiting?
>
> A. Yes. We had a rule of not goin' in and shuttin' the door or havin' the door shut when they're in there."

¶ 59 Breeden insisted that she and defendant were "not boyfriend and girlfriend." They merely "share[d] in rent." She did the cooking and never "touch[ed] his bedroom."

¶ 60 7. *The Testimony of Defendant*

¶ 61 Defendant testified he was a general contractor and that he was 54 years old. He had been living with Breeden in a small white frame house in a trailer park, which he was buying on a contract for deed. The trailers dated from the 1960s, and their owner had tried without

success to give them away on condition that they be hauled off the premises. Defendant was renovating them as best he could. Breeden was merely his friend, and she was afflicted with arthritis. She needed a single-level residence. That was part of the reason why they moved, initially, into unit No. 1 and, later, into the house as caretakers of the trailer park.

¶ 62 P.C. and her family moved into unit No. 2 in the last week of January 2010. Tenants in the trailer park were more than tenants; they soon became friends of defendant and Breeden. He liked to help out young families because he knew what it was like to be, economically, on the bottom.

¶ 63 P.C. and S.P. got into the habit of visiting him quite frequently. This was not unusual for kids in the trailer park. The eight-year-old and six-year-old boys from unit No. 1, often came over and spent the night.

¶ 64 In response to the question of why P.C. and S.P. took baths at his house even though their trailer was right across the driveway, defendant testified that the first time they took a bath at his house was on their second visit, when the girls' parents wanted a date night, a chance to be alone together for the evening. Defendant had all four girls at his house, and he needed a baby bottle for one of the younger girls. As he was leaving his house to head over to unit No. 2 to get a baby bottle, he called out for the girls to use the bathroom and get ready for bed. P.C. said she wanted to take a bath because Thursday was her bath night. Defendant went over to unit No. 2 and asked their mother what to do about P.C.'s request for a bath. Their mother said to go ahead and give the girls a bath because she trusted him and, besides, if he did anything wrong, P.C. and S.P. would come over and tell her. It was necessary for defendant to help P.C. in and out of the big tub; Breeden could not do so. He denied, however, touching her

privates with a sponge or scrubber. She washed herself.

¶ 65 He denied that P.C. ever slept on top of him.

¶ 66 He denied taking her into unit No. 4 and touching her privates. The only time P.C. was in unit No. 4 was when her parents were thinking of renting it, considering that unit No. 2 had only two bedrooms, whereas unit No. 4 had three bedrooms. Unit No. 4 was crammed with construction supplies, but defendant denied working on unit No. 4 itself during the period when P.C. resided in the trailer park. He used it strictly for storage.

¶ 67 He denied touching her privates at any time. In fact, he had talked with her about good touches and bad touches after hearing she had gone missing for a while.

¶ 68 The jury found defendant guilty of four counts of predatory criminal sexual assault of a child.

¶ 69 The trial court sentenced him to four consecutive terms of 30 years' imprisonment.

¶ 70 C. The *Krankel* Proceedings

¶ 71 Defendant appealed on a single ground: that the trial court had violated *Krankel* and its progeny by failing to make an adequate preliminary inquiry into his allegations of ineffective assistance, allegations he made in a *pro se* motion for a new trial. Because we found paragraphs 14(I) and (K) of his motion to be vague and enigmatic, we were unable to say that the trial court had made an adequate inquiry into those paragraphs (maybe, instead of "we," it would be more accurate to say "the majority," since Justice Pope dissented in that appeal). *People v. Anderson*, 2012 IL App (4th) 110275-U, ¶ 12. It seemed to us that an adequate inquiry into defendant's claims would entail asking him what he meant in paragraphs 14(I) and (K) if it was

unclear what he meant. *Id.* We wrote:

> "In paragraph 14(I) of his *pro se* motion for a new trial, defendant asserted that his trial counsel had rendered ineffective assistance by 'flatly refus[ing] to take steps necessary to defend this case when [the] State changed its intended course of prosecuting the case, depriving defendant [of] the right to confront witnesses against him[] and to present his defense to the jury.' How did the State 'change its intended course of prosecuting the case'? And what 'necessary steps to defend this case' should trial counsel have taken in view of this change of course? ***
>
> Also, in paragraph 14(K) of his *pro se* motion for a new trial, defendant said that '[c]ounsel failed to sufficiently prepare the called witnesses for testifying at trial.' How, specifically, in defendant's view, could the witnesses have been better prepared? What does defendant believe these witnesses would have said in their testimony if they had been better prepared?" *Id.* ¶¶ 13-14.

We remanded the case with directions to perform a preliminary inquiry into these paragraphs of defendant's *pro se* motion for a new trial, such as by asking defendant what he meant. *Id.* ¶ 17.

¶ 72 On October 10, 2012, upon remand, the trial court held another *Krankel* hearing, in which the court sought clarification from defendant regarding paragraphs 14(I) and (K). The court also allowed defendant to question Schmidt after Harris finished questioning him. At the conclusion of the hearing, the court found no potential merit in defendant's allegations of

ineffective assistance. Therefore, the court declined to appoint new counsel, and the court denied the *pro se* motion for a new trial.

¶ 73 Defendant appealed again. Initially, on June 2, 2014, we held that the second preliminary inquiry was sufficient, and we affirmed the trial court's decision not to appoint new counsel. *People v. Anderson*, 2014 IL App (4th) 120960-U, ¶ 1.

¶ 74 Then defendant petitioned for rehearing, pointing out that we had overlooked an issue regarding void fines that he had raised. On August 8, 2014, we granted the petition for rehearing, and in a subsequent brief, defendant called our attention to the adversarial nature of the second preliminary hearing, which, according to *People v. Jolly*, 2013 IL App (4th) 120981, ¶ 48, and *People v. Fields*, 2013 IL App (2d) 120945, ¶ 41, should be neither adversarial nor evidentiary. Soon afterward, on December 4, 2014, the supreme court issued an opinion holding that if a trial court permitted the State's adversarial participation in a preliminary inquiry pursuant to *Krankel*, the error could not be regarded as harmless (*People v. Jolly*, 2014 IL 117142, ¶ 40) but, rather, the error was reversible (*id.* ¶ 41). Because the prosecutor, Harris, had questioned the defense counsel, Schmidt, in the second preliminary inquiry, the inquiry had been adversarial—a reversible error under *Jolly*. Consequently, it was necessary to remand the case for a third preliminary inquiry, this one to be nonadversarial. *People v. Anderson*, No. 4-12-0960, slip order at 2 (Dec. 19, 2014) (summary order under Supreme Court Rule 23(c)(2)).

¶ 75 On August 10, 2015, the trial court held its third preliminary inquiry into the claims in paragraphs 14(I) and (K) of defendant's *pro se* motion for a new trial. The court began by asking defendant what was the "change" to which he referred in paragraph 14(I) of his motion, the paragraph alleging that defense counsel had "flatly refused to take steps necessary to

defend the case when [the] State changed its intended course of prosecuting the case." Defendant replied: "[T]he State failed to call Cassandra [*sic*] Logue to testify under [*sic*] Section 115-10 hearing, fail[ed] to meets its burden of proof[,] and fail[ed] to even address whether the statutorily mandated factors of time, content[,] and circumstances of hearsay statements provided sufficient safeguards of reliability." See 725 ILCS 5/115-10(b)(1) (West 2010) (hearsay statements of the child victim are admissible only if "the time, content, and circumstances of the statement[s] provide sufficient safeguards of reliability").

¶ 76 The trial court said it did not understand how any of those things fit the description of a "change of course" by the prosecution. Nevertheless, the court focused on the alleged failure of the State to carry its burden of proof, asking defendant how, in his view, the case against him was unproven. Again defendant returned to the section 115-10 hearing. He complained that the State called only one witness in that hearing, the DCFS investigator, Heather Forrest, and that the State did not call Kassandra Logue, "the initial outcry witness," who, according to a police report, had told a detective that "this was a one-time incident, supposedly": in other words, that "the molestation happened only once." That discrepancy made the victim's hearsay statement to Forrest unreliable, defendant argued, and therefore inadmissible in the trial.

¶ 77 The trial court then suggested that they "get past the 115-10" and take up paragraph 14(K) of the *pro se* motion, the paragraph alleging that defense counsel had "failed to sufficiently prepare the called witnesses for testifying at trial." The court questioned Schmidt, who testified he had talked with Breeden and "discussed her testimony" on "a number of occasions" "[p]rior to her testifying."

¶ 78 The trial court asked defendant what other witnesses Schmidt had failed to

prepare for testifying, in his opinion. Defendant answered: "The only other witness could have been covered by that would be myself." He said he had gone to trial having no idea what the defense strategy was and no idea what questions Schmidt would ask him on the stand. He claimed he "had information that the [Logues and he had] mutually shared that would have [shed] light on this case" but that he "wasn't even allowed to present [this] when he got into court."

¶ 79 The trial court then turned to Schmidt and asked him:

> "THE COURT: *** Mr. Schmidt, were you able to spend time with Mr. Anderson in preparing him for his testimony at this trial?
>
> MR. SCHMIDT: Yes, [Y]our Honor.
>
> THE COURT: And you discussed with him whether or not he was going to testify and that it was his choice that he wanted to testify?
>
> MR. SCHMIDT: Yes.
>
> THE COURT: And once he made that choice, once he told you that he wanted to testify, did you go over with him his purported testimony, what it would be?
>
> MR. SCHMIDT: Yes.
>
> THE COURT: And did you suggest to him ideas or things he should or should not say?
>
> MR. SCHMIDT: Yes."

¶ 80 After hearing defendant's explanations and Schmidt's testimony, the trial court commented it still was unclear how the prosecution had changed its course, and, as for the preparation of defense witnesses, the court remarked that it found Schmidt to be more credible than defendant.

¶ 81 But defendant insisted that the prosecution had changed course, and as proof, he submitted to the trial court a police report that Champaign County Deputy Sheriff Ferriman wrote on July 9, 2010. The court accepted the report as evidence. Defendant said the report contained "six inconsistencies that show—that show that by the time everything happened five days later with the [Center] interview, this was conducted, then five days later at the [Center] interview everything had been exaggerated on." According to the police report, P.C. had told her mother, Kassandra Logue, there had been no penetration, but "[f]ive days later it suddenly turned into penetration." Also, according to the police report, P.C. had told Logue the contact had been with a washcloth, but "[f]ive days later, it had turned into a scrubber."

¶ 82 The trial court responded that the recorded statement did not have to match P.C.'s initial complaint to her mother. Defendant argued, though, that a statement lacking in spontaneity, such as the statement P.C. had made to Forrest, could be less reliable than a spontaneous statement.

¶ 83 This exchange followed:

> "THE COURT: —Mr. Anderson, the child supposedly told Ms. Logue it happened on one occasion. When interviewed, she gave a different or more extensive account. That doesn't affect its admissibility—

DEFENDANT ANDERSON: —it affects its reliability.

THE COURT: It doesn't affect its reliability either, sir."

¶ 84 The trial court then declined to appoint substitute counsel to represent defendant, and the court denied his *pro se* motion for a new trial. In so ruling, the court remarked: "I still don't understand the Defendant's contention about how the State changed their course of prosecution in this case."

¶ 85 The police report that defendant handed to the trial court is in the record. Names have been redacted from the report with a felt marker. We will quote from the report, and wherever such a redaction occurs, we will put empty brackets:

> "[ ] stated in the beginning of May, [ ] and [ ] went to stay at her mother's residence in [ ]. She stated [ ] and [ ] would come home on the weekends from her mother's residence and David would ask if the girls could stay the night during that time, the girls started refusing to go to David's residence. [ ] stated she then started to notice that [ ] was acting very odd around David.
>
> [ ] stated David has always made unpleasant statements but Wednesday (07-07-10) he made a statement to her, which made ever her to 'feel funny.' David made a comment to her something to the terms of 'It does not matter what is upstairs, as long as it has a fury [*sic*] taco downstairs.' [ ] stated this statement disgusted her and she started to wonder about David's intentions. She stated she had also just learned about David's past criminal history.

[ ] stated [ ] and [ ] returned from their grandmother's residence this morning (07-09-10), so she decided to talk to them individually. She stated she asked [ ] if she knew where her private areas were and if she had ever been touched by anyone in those areas. [ ] advised her she has never been touched by anyone in those areas.

[ ] then spoke to [ ] and asked her if she knew where her private areas were and if she had ever been touched there by anyone. She stated [ ] advised she did know where [ ] private areas were and pointed to them. She stated [ ] then advised her she had been touched in those areas by David.

[ ] stated she asked [ ] where this happened and [ ] advised her it happened in the bathtub. She stated [ ] at first stated David used his finger and then said it could have been with a wash cloth. [ ] could not remember exactly which one it was with. She stated she had [ ] demonstrate on a doll how David touched her. [ ] stated [ ] showed her and it was in a rubbing motion in her vaginal area. [ ] stated [ ] advised her there was never any penetration made by David at anytime [*sic*].

[ ] stated she asked [ ] if she had ever seen David's penis. She stated [ ] advised her, she had not seen David's penis but had touched his penis through clothing. [ ] had advised her, David told

[ ] to touch his penis and [ ] told him 'NO.' David then insisted that [ ] touch his penis through his pants.

[ ] stated she did not know the exact date when this occurred, but believes it had to be between the end of February and the beginning of May. She stated all this occurred at David's residence 106 E. Chestnut in Bondville, IL. [ ] stated none of the children have stayed at David's residence since the beginning of May."

¶ 86 II. ANALYSIS

¶ 87 Defendant argues as follows. In its notice pursuant to section 115-10(d), the State said it intended to present the "out-of-court statement of the minor [P.C.] *** to her mother[,] Kassandra Logue." When the State "changed course" in the section 115-10 hearing by not calling Logue as a witness, Schmidt himself should have called Logue, defendant argues, because, judging by the police report, what P.C. told Logue was inconsistent with what P.C. told Forrest, and only through Logue could Schmidt have brought out these inconsistencies, thereby proving the unreliability of her statement to Forrest and its inadmissibility under section 115-10. Defendant sees three inconsistencies. As he understands the police report, P.C. told Logue there had been only one incident of molestation (whereas P.C. told Forrest there had been several), P.C. told Logue that defendant had molested her with a washcloth (whereas P.C. told Forrest he had molested her with a scrubber), and P.C. told Logue there had been no penetration (whereas P.C. told Forrest there had been penetration).

¶ 88 To evaluate the merits of this argument, we should be clear on the legal principles

governing a *Krankel* proceeding. Under *Krankel* and its progeny, a defendant is not automatically entitled to the appointment of new counsel whenever the defendant files a *pro se* motion for a new trial on the ground of ineffective assistance. *People v. Nitz*, 143 Ill. 2d 82, 134 (1991). Rather, the trial court must "conduct[] a preliminary investigation of the defendant's allegations." *Id.* If this preliminary investigation reveals that the allegations are "spurious" or that they "pertain[] only to trial tactics," the defendant has no right to the appointment of new counsel. *Id.* If, on the other hand, "the defendant's allegations of incompetence indicate that trial counsel neglected the defendant's case, the court should appoint new counsel to argue [the] defendant's claims of ineffective assistance of counsel." *Id.* at 134-35.

¶ 89 Because the trial court, on remand, determined the merits of defendant's allegations of ineffective assistance, we ask whether the court's decision is manifestly erroneous. See *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 41. " 'Manifest error' is error that *** is plain, evident, and indisputable." *Id.*

¶ 90 We are unconvinced the trial court made an indisputably erroneous decision. Our reasons are as follows. First, the supreme court has plainly stated that if the *pro se* allegations pertain to tactics, the defendant has no right to the appointment of substitute counsel. *Nitz*, 143 Ill. 2d at 134. Second, if defense counsel, knowing what a witness would say on the stand, decides not to call the witness, that decision is tactical. *People v. Whittaker*, 199 Ill. App. 3d 621, 629 (1990).

¶ 91 From the police report, Schmidt knew what Kassandra Logue would say on the stand. The report gives no reason to believe that Logue would have testified that P.C. specifically told her there had been only one instance of molestation. The report does not say

that Logue specifically asked P.C., "Were there any other times David did this?" and that P.C. said, "No." Rather, it appears that P.C. told Logue there had been at least two incidents of molestation: once when defendant touched her in the bathtub and another time when he had her touch him through his clothes. P.C. never really committed to the washcloth ("could have been with a wash cloth"). Lack of penetration is the only real inconsistency, and that inconsistency could be easily explained by the possibility that P.C., who was five years old, was unsure what penetration was. Thus, the benefit to the defense of having Logue testify in the section 115-10 hearing was marginal at best. The greater benefit, surely, was in the absence of Logue's testimony, because then Schmidt had the argument that the reliability of P.C.'s statement to Forrest was unproven, considering that such reliability depended in part on the degree of consistency between P.C.'s statement to Logue and P.C.'s statement to Forrest and that, without Logue's testimony, that degree of consistency was unknown. See *People v. Simpkins*, 297 Ill. App. 3d 668, 676 (1998).

¶ 92 Defendant also argues we should remand this case for a fourth *Krankel* hearing because "[a]t the latest hearing, [defendant] told the court that defense counsel had failed to react to four changes in strategy by the prosecution" and that defendant "was permitted to explain only one, concerning the section 115-10 hearing." A trial court, however, does not have to question the defendant about all aspects of his or her *pro se* claim of ineffective assistance. The defendant is only one potential source of information. "A brief discussion between the trial court and the defendant may be sufficient." *People v. Moore*, 207 Ill. 2d 68, 78 (2003). The court also can rely on the record and on its own knowledge of the proceedings. *Id.* at 79. Defendant was in no better position than the trial court to ascertain whether the prosecution had changed its strategy.

Both defendant and the trial court could perceive such a change from only one source: the record. As a matter of fact, because the prosecutorial strategy can be ascertained only from the record, appellate counsel is in just as good a position as defendant to identify these supposed changes of strategy, and because appellate counsel identifies no further such changes, they must not exist.

¶ 93 III. CONCLUSION

¶ 94 Because we find no manifest error in the trial court's decision to deny the *pro se* motion for a new trial without appointing substitute counsel, we affirm the trial court's judgment. We award the State $50 in appeal costs against defendant.

¶ 95 Affirmed.