FIRST DIVISION
September 25, 2017
Modified Upon Denial of Rehearing October 16, 2017

No. 1-14-2352

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	11 CR 1313
	)	
MARCUS LACEY,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* The State proved beyond a reasonable doubt that defendant did not act in self-defense. Defendant did not establish by the preponderance of the evidence that he believed his actions were unreasonably justified. The jury instructions given were not given in error. Defendant is not entitled to a new *Krankel* hearing and his sentence is not an impermissible *de facto* life sentence, nor is it excessive.

¶ 2 Defendant, Marcus Lacey, was convicted of first degree murder following a jury trial. He was sentenced to 40 years' imprisonment for the murder with a 25-year enhancement for personally discharging a firearm during the commission of the murder for a total sentence of 65 years in prison. Defendant now appeals and argues: (1) his first degree murder conviction should be vacated because the State failed to disprove beyond a reasonable doubt that defendant shot the decedent in self-defense or, alternatively, that his conviction should be reduced to second degree

murder because he established by a preponderance of the evidence that he believed his actions were justified, even if that belief was unreasonable; (2) he was denied a fair trial because the jury instructions were confusing and misleading, lacked critical definitional language, and the trial court denied giving certain instructions outright; (3) he is entitled to a new *Krankel* hearing because his first *Krankel* hearing was impermissibly adversarial and, in addition, the trial court failed to adequately inquire into all of defendant's claims of ineffective assistance; and (4) his 65-year sentence imposed by the trial court was an abuse of its discretion. For the reasons that follow, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 On March 29, 2010, at about 4:00 p.m., defendant shot Erick Harris, who died from a single gunshot wound to the abdomen. Nine months later, on January 2, 2011, defendant was apprehended and charged with murder. Defendant was convicted and sentenced to 65 years in prison. The following evidence was adduced at trial.

¶ 5 On March 27, 2010, Harris' girlfriend, Kori Jamison, borrowed defendant's car. In the early afternoon on March 29, 2010, Kori, Charles Jackson, and Kevin Terry were at a carwash when Charles received a call from defendant. Kori testified that she heard part of the conversation over speaker phone. Defendant was upset about his rims. Kori testified that when she borrowed defendant's car, she damaged his rims. Defendant arrived at the carwash shortly thereafter. Kori testified that upon arriving, defendant immediately walked up to her in a threatening way talking about his rims. Kori left the car wash after defendant told her "this is all your fault, all this that's going on."

¶ 6 The surveillance video of the carwash parking lot shows that when defendant arrived, he approached a group standing on the corner. Within a few seconds, Charles pushed defendant.

Defendant was removed from the altercation by another man. Defendant then approached Charles and they started talking. Charles again pushed defendant and followed defendant into the street. Another altercation followed. Defendant eventually left. The video also shows that Kori walked into the carwash while defendant and Charles were fighting, and that defendant never approached Kori at any point while at the carwash, despite her contentions otherwise. Eventually, all parties dispersed.

¶ 7 Kori testified that after she left the car wash with Charles, she saw defendant driving in the opposite direction. Charles stopped his car and fired several shots at defendant. Charles denied leaving the carwash with Kori, and denied shooting at defendant. Kori testified that Harris was not anywhere near Charles when Charles got out of the car and shot at defendant.

¶ 8 Defendant testified that he was driving in the opposite direction of Charles's van, but stated that Harris was driving Charles's van, and Charles and Patrick Jones were passengers. When Harris attempted to cut defendant off, Charles exited the van and shot at him multiple times. Defendant then drove away and went to get his gun. He returned to Ridgeway and Huron.

¶ 9 Kori testified that after Charles shot at defendant, Charles dropped her off at Ferdinand and Hamlin where she spoke with John Jackson[1]. John testified that while on break from work, he saw Kori, who asked him to give her and Harris a ride to Hamlin. John received a call from Charles and then drove himself, Kori, and Harris to Ridgeway and Huron. Both Kori and John testified that when they arrived, Charles and defendant were pointing guns at one another. Charles denied being in the area and that anything happened there.

¶ 10 Defendant testified that while standing near his vehicle at Ridgeway and Huron, Charles and Harris got out of John's work van and pointed guns at him. Defendant specifically recalled

[1] John Jackson is the uncle of Charles Jackson.

Harris pointing a black gun at him. Defendant then drew his gun and pointed it at Charles and Harris. John testified, however, that Harris stayed in the van during the incident and was not holding a gun. Kori testified that Harris was not anywhere near Charles and defendant when they were pointing guns at each other. It is undisputed that John got in the middle of the standoff, and when asked by defendant to come over, he complied. Defendant believed that Charles and Harris would not shoot him if John was in the way. John and defendant then left together in defendant's car. Defendant dropped John off in the general vicinity of John's home. According to John, he wanted defendant to drop him off near his home because he knew Charles would be there, and he "wanted to talk to [Charles] to calm the situation all the way down."

¶ 11 Within approximately five minutes of dropping John off, defendant received a call from John on his chirp phone, telling him to come over to John's house to talk. Defendant drove down Ferdinand to John's house. As he neared the stoplight on Ferdinand, he looked down the street and saw Charles with a group of people outside of John's house. Defendant testified that he decided not to proceed any further towards John's house. He started to pull off of Ferdinand but heard someone call him by his nickname, "Sweet Pea," so he pulled over. Defendant saw Harris walking at a fast pace towards his car and observed a black gun hanging out of Harris's hoodie pocket. Harris reached for his gun. Defendant, who testified he was "scared for [his] life," drew his gun, pointed it out towards the front passenger window, and shot Harris. Defendant testified he immediately left the area out of fear of retaliation by Charles.

¶ 12 All of the State's witnesses testified that at some point following the standoff, John, Charles, Kori, Harris, and Jones were on the front porch of John's house. Harris left John's house, which was four houses south of the convenience store where Harris was heading. Kori testified that Harris was at the store for less than a minute when she heard shots fired. Kori

ducked when she heard gunshots, but claimed she saw defendant shoot Harris. Specifically, she testified she saw defendant driving his car and Harris crossing the street. Defendant pointed a gun towards the open front passenger window, and fired several shots at Harris. Harris stumbled into the convenience store, and defendant drove away. Kori testified she never saw Harris reach for a weapon or heard him call defendant by his nickname. She further testified that when she went to the convenience store to help Harris, she did not remove a gun from Harris's body. She did not speak to police until June 10, 2010. Kori identified defendant as the shooter in a lineup on January 2, 2011.

¶ 13 Charles testified that as Harris was walking to the convenience store, he heard multiple gunshots and then saw Harris holding his side. Charles testified he then saw defendant drive away down Ferdinand. Charles never saw a gun on Harris's body, and did not remove a gun from him in the convenience store. John similarly testified that he did not see Harris with a gun, nor was he aware of Harris possessing a gun just prior to the shooting. John testified he saw Harris stumbling outside of the convenience store, and defendant drive away in his car.

¶ 14 Jarmel Brown gave a statement to police that was published at trial, indicating he saw Harris outside of the store prior to the shooting. In the statement, Brown stated he saw defendant driving alone down Ferdinand, stop his car near Harris, lean over the passenger seat, raise his hand, and point something towards Harris. Brown stated he heard multiple gunshots and saw a flash coming from defendant's hand. He did not talk to the police at the scene because he was afraid. At trial, Brown stated that he only recalled seeing Harris on the ground in the store, claiming his mind was "gone" from drugs.

¶ 15 In addition to defendant's testimony, defendant's cousin, Jonathan Smith, testified for the defense. Smith testified that at the time of the shooting, he was driving his car north on Hamlin

when he saw numerous people outside of John's house. He testified that as Harris crossed the street, he saw Harris holding the right side of his jogging pants, as if he was holding something. While stopped at the stoplight, Smith heard gunshots and drove off.

¶ 16 Other evidence introduced at trial included the convenience store surveillance video from the time of the shooting. The video shows a girl in a white coat[2] enter the store. As Harris lifted the upper part of his body, a dark, black object appeared under his right side, near his waist. The girl in the white coat later passes a black object out of the door.

¶ 17 On January 2, 2011, nine months after the shooting, defendant was arrested. When he was arrested, he stated, "I know I'm wanted for that murder. I'll split the reward money with you guys. Just take me to jail." After his arrest, Kori and Brown identified defendant in a line up.

¶ 18 After hearing the evidence, the jury found defendant guilty of first degree murder. Thereafter, defendant alleged defense counsel provided ineffective assistance, and a two-part *Krankel* hearing was held. At the hearing, the trial court addressed defendant's allegation that counsel was ineffective for, *inter alia*, failing to call Patrick Jones as a witness in support of his defense at trial, and for failing to introduce footage from a POD camera that could have been used to impeach John Jackson. The judge denied defendant's motion. Defendant was sentenced to 65 years' imprisonment. This appeal followed.

¶ 19 ANALYSIS

¶ 20 Defendant first argues that the State failed to prove beyond a reasonable doubt that he did not act in self-defense.

¶ 21 On appeal, when the defendant challenges the sufficiency of the evidence the reviewing

[2] The evidence at trial established that Kori was wearing a white coat on the day of the shooting.

court must determine, after viewing the evidence in the light most favorable to the State, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "A reviewing court affords great deference to the trier of facts and does not retry the defendant on appeal." *People v. Smith*, 318 Ill. App. 3d 64, 73 (2000). "A reviewing court must allow all reasonable inferences from the record in favor of the State." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). A criminal conviction will not be reversed "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *Id.*

¶ 22 "It is within the function of the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence." *Id.* It is not the duty of the trier of fact to accept any possible explanation that favors the defendant's innocence and "elevate it to the status of reasonable doubt." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009). "A reviewing court will not substitute its judgment for that of the trier of fact." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 23 In this case, defendant was charged with first degree murder. Section 9-1 of the Criminal Code defines the offense of first-degree murder, in pertinent part:

> "(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another[.]" 720 ILCS 5/9–1 (West 2010).

¶ 24 Defendant claimed that he killed Harris in self-defense. Self-defense is an affirmative

defense, and once a defendant raises it, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving the elements of the charged offense." *People v. Lee*, 213 Ill. 2d 218, 225 (2004). The elements of self-defense include: "(1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable." *Id.* "If the State negates any one of these elements, the defendant's claim of self-defense must fail." *Id.*

¶ 25 Here, the State not only proved beyond a reasonable doubt that defendant committed the offense of first degree murder, but also proved beyond a reasonable doubt that defendant did not act in self-defense. Defendant places much emphasis on the "three incidents involving Lacey and Charles Jackson that preceded the fatal shooting of Harris." Based on the record before us, the events that occurred prior to defendant killing Harris do not establish that defendant acted in self-defense when he shot and killed Harris. The evidence established that the prior incidents had ended and then the situation transformed into another encounter when defendant displayed a loaded gun and shot Harris through his passenger side window as Harris was walking to the store.

¶ 26 Defendant's use of a gun constituted deadly force, as it was intended or likely to cause great bodily harm. The use of deadly force is justified only if the defendant "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILCS 5/7–1(a) (West 2012). Defendant's testimony failed to establish that danger was imminent or that his use of force was necessary.

The evidence in this case reveals that defendant instigated the encounter between him and Harris that led to Harris' death. All of the witnesses testified that when defendant shot Harris, Harris was walking to the store. Defendant was driving in his car, pulled up and shot Harris through the passenger window. There was no evidence that at that time Harris threatened defendant in any way. We find that the State disproved that defendant acted in self-defense beyond a reasonable doubt.

¶ 27 We are aware that the issue of whether Harris had a gun was disputed. Neither Kori, John, Charles, or Jamel testified that Harris threatened any unlawful force at the time defendant shot him. Kori saw Harris walking to the store and saw defendant shoot repeatedly at Harris through his passenger side window. Kori did not see Harris reach for a weapon or see anyone remove a weapon from Harris' body. John did not see Harris with a gun prior to the shooting, did not see a gun near Harris' body and did not see anyone remove a gun from Harris' body after the shooting. Charles did not see a gun on Harris when Harris walked to the store. Charles told Detective McCarthy that he saw defendant drive up and fire shots at Harris. Jarmel testified at the grand jury that he saw defendant drive up, stop near the store, reach over the front passenger seat and shoot Harris through the open car window. Defendant testified that he believed that Harris had a gun because he saw it in Harris' hoodie. Smith attested that as he drove past Harris, it appeared he had an object in his pants that he was holding.

¶ 28 The issue of self-defense is always a question of fact determined by the trier of fact. *People v. Felella*, 131 Ill. 2d 525, 53 (1989). It was the jury's duty in this case to resolve any conflicting evidence regarding the gun. The jury heard all of the evidence and found that the State had disproved defendant's theory of self-defense. We will not disturb that finding.

¶ 29 Defendant next argues, in the alternative, that he established by a preponderance of the

evidence that he unreasonably believed his actions were justified, thereby meriting a reduction of his conviction to second degree murder. We disagree.

¶ 30 The elements of first degree and second degree murder are identical. *People v. Jefferies*, 164 Ill. 2d 104, 122 (1995). It is the presence of a statutory mitigating factor that reduces an unlawful homicide from first degree murder to second degree murder. *People v. Thompson*, 354 Ill. App. 3d 579, 587 (2004). The difference between a justified killing under self-defense and one not justified, amounting to second degree murder, is that in the former instance the belief that the use of force which is intended to cause death or great bodily harm is reasonable under the circumstances (720 ILCS 5/7-1 (West 2010)); *People v. Turcios*, 228 Ill. App. 3d 583, 594, (1992)), and in the latter the belief is unreasonable (720 ILCS 5/9-2(a)(2) (West 2010)).

¶ 31 Section 9-2 of the Criminal Code, which outlines second degree murder, states:

> (a) A person commits the offense of second degree murder when he or she commits the offense of first degree murder . . . and . . . the following mitigating factor[] [is] present:
>
> (2) at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles states in Article 7 of this Code, but his or her belief is unreasonable,
>
> (c) When evidence of . . . the mitigating factor[] defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove [the] mitigating factor by a preponderance of the evidence before the defendant can be found guilty of second degree murder. The burden of proof, however, remains on the State to prove beyond a reasonable doubt each of the elements of first degree murder and, when appropriately raised, the absence of

> circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of this Code. 720 ILCS 5/9–2(a), (c) (West 2010).

¶ 32 Where a defendant argues that he presented sufficient evidence to prove a mitigating factor in a first or second degree murder case, the reviewing court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present." *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996); see also *People v. Reid*, 179 Ill. 2d 297, 308 (1997). Viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found that the mitigating factor of the unreasonable belief in the need for self-defense was not present.

¶ 33 Defendant is the only witness to testify that Harris grabbed for a gun or in any way threatened its use against defendant. See *People v. Peterson*, 273 Ill. App. 3d 412, 424 (1995) ("when the only evidence of self-defense is the defendant's testimony, the trier of fact has discretion to accord that testimony less weight because of its self-serving character"). Kori, John, and Charles all testified that they saw Harris leaving John's house to go to the store. Defendant testified that he drove to the area and pulled over when he heard someone call his name and he saw Harris walking towards him at a fast pace and observed a gun hanging out of his hoodie pocket. Defendant testified that he shot Harris through the passenger side window of his car after he saw Harris reach for his gun. There was no other testimony that at that particular time, defendant, who was in his vehicle, would either reasonably or unreasonably need to defend himself from Harris, who was walking down the street.

¶ 34 The jury was instructed on self-defense and second degree murder. Nevertheless, the jury found the defendant guilty of first degree murder. In doing so, the jury plainly rejected the self-

defense and second degree murder options. It is the function of the jury to determine the credibility of the witnesses and assess the weight to be afforded evidence, and we may not lightly set aside such findings, nor substitute our own judgment for that of the jury. *People v. Gomez*, 215 Ill. App. 3d 208, 215 (1991). We therefore find that a rational trier of fact could have found that defendant did not have an actual and subjective, but unreasonable, belief in the need to use deadly force.

¶ 35 Defendant alleges numerous issues with the jury instructions tendered, as well as error by the trial court in refusing defense counsel's request to give an instruction stating a non-initial aggressor has no duty to retreat.

¶ 36 Defendant did not object to any of these issues at trial and he failed to include them in his motion for a new trial. We therefore review the alleged errors under plain error analysis outlined in *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005), but must first find that error actually occurred *People v. Piatkowski*, 225 Ill. 2d 551, 565–66 (2007))[3].

¶ 37 The purpose of jury instructions is to provide the jury with correct legal principles that

[3] Defendant has not requested that this court consider his jury instruction issues pursuant to Illinois Supreme Court Rule 451(c) (eff. April 8, 2013). We note however, that Illinois Supreme Court Rule 451(c) provides that "substantial defects" in jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require." Our supreme court has found that Illinois Supreme Court Rule 451(c) is "coextensive with the plain-error clause of Supreme Court Rule 615(a) (134 Ill.2d R. 615(a)), which provides: 'Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.' [Citation.] *People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

apply to the evidence, thereby allowing it to reach the proper conclusion based on the applicable law and the evidence as presented. *People v. Bannister*, 232 Ill. 2d 52, 81 (2008). The State and defendant are both entitled to have a jury instructed on their theories of the case and, generally, an instruction is warranted if there is even slight evidence to support it. *People v. Barnard*, 208 Ill. App. 3d 342, 349-50 (1991). However, it is error to submit an instruction to the jury where there is no evidence to support it. *People v. Mohr*, 228 Ill. 2d 53, 65–66 (2008) (record must contain some evidence to justify an instruction, and instructions not supported by evidence or law should not be given). Usually, we review issues concerning jury instructions for an abuse of discretion. *Mohr*, 228 Ill. 2d at 65 (which issues are raised by evidence and whether instruction should be given are for the trial court to determine). We review *de novo* whether jury instructions accurately conveyed the applicable law, which, ultimately, directs us to examine whether the instructions given, when taken as a whole, fairly, fully and comprehensively apprised the jury of the relevant law. See *People v. Parker*, 223 Ill. 2d 494, 501 (2006).

¶ 38 Defendant's first allegation is that the judge omitted the phrase "without lawful justification" from the definitional instruction for first degree murder as required by the committee notes for that instruction. Defendant maintains that because the main issue was whether defendant was justified in shooting Harris, omitting the phrase made the instruction confusing.

¶ 39 The IPI Criminal 3d No. 7.01A given in this case read:

> "A person commits the offense of first degree murder when he kills an individual if, in performing the acts which cause the death,
>
> he intends to kill or do great bodily harm to that individual or another; or
>
> he knows that such acts will cause death to that individual or another; or

> he knows that such acts create a strong probability of death or great bodily harm to that individual."

The IPI committee note for this instruction instructs the court that if the jury is given a self-defense instruction, as it was in this case, the court should insert the words "without lawful justification" so that the instruction reads: "A person commits the offense of first degree murder when he, or one for whose conduct he is legally responsible, kills an individual without lawful justification if." See IPI Criminal 3d No. 7.01A, Committee Note.

¶ 40 This court has held that omission of justification language from a definitional instruction is not plain error if it is included in the issues instruction. *People v. O'Neal*, 2016 IL App (1st) 132284, ¶86. Similarly, this court has held that a trial court's deviation from the drafting committee's directives is not erroneous. *People v. Anderson*, 2012 IL App (1st) 103288, ¶45 ("Although the instructions were not read to the jury in the precise order directed by the drafting committee, the trial court clearly conveyed the applicable law and the proper instructions to the jury.").

¶ 41 Here, although the definitional instruction for first degree murder did not include the phrase "without legal justification," the first degree murder issues instruction did. The jury was instructed that in order to find defendant guilty of first degree murder, it had to find that defendant was not justified in using the force he used. Defendant admits that the written issues instruction accurately stated that the State was required to prove beyond a reasonable doubt that defendant was not justified in shooting Harris. See *People v. Rios*, 318 Ill. App. 3d 354, 362 (2000) (no error occurred when the "without lawful justification" language was erroneously omitted from the definition instruction when issues instruction properly instructed the jury on the elements of the offense.) Accordingly, we find no error.

¶ 42 Defendant's next argument is that the trial court erred in instructing the jury that "[t]he State also alleged that, during the commission of the offense of first degree murder, the defendant personally discharged a firearm that proximately caused death to another person. The defendant denied that allegation."

¶ 43 Defendant takes issue with this instruction because, by asserting self-defense, defendant admitted that he personally discharged a firearm that proximately caused death. He did not deny that allegation. We find the inclusion of the statement "the defendant denied that allegation" to be harmless error, as the jury could easily discern that defendant indeed did not deny that allegation based on his testimony in open court. The jury heard all of the evidence, including defendant's testimony that he shot Harris in self-defense.

¶ 44 Next, defendant claims that the trial court's refusal to tender IPI. 24–25.09x was prejudicial. I.P.I 24–25.09x provides that "[a] person who has not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor." Illinois Pattern Jury Instruction, Criminal, 24–25.09x (4th ed. 2000).

¶ 45 At trial, defendant argued that he was justified in killing Harris because he was acting in self-defense. Defendant alternatively argued that, even if he was not justified in his use of force, the evidence presented established the presence of a mitigating factor to reduce the offense to second degree murder - that he unreasonably believed that he was justified in the use of deadly force. The jury was instructed on the justifiable use of force and second degree murder based on the mitigating factor of unreasonable belief.

¶ 46 The plain language of IPI 24-25.09x contemplates a situation that involves mutual combat, where a defendant is using force in response to the receipt of force. We cannot say that the trial court erred in finding that there was no evidence presented at trial of mutual combat to

entitle defendant to the requested instruction. Although there was some evidence of earlier altercations, defendant left the scene of the earlier altercation, went home, got his gun and drove to a different location. Even assuming Harris had a gun and reached for it, there is no evidence that Harris used the gun against defendant. Defendant shot Harris through the passenger window of his vehicle while Harris was walking down the street. There was no evidence of mutual combat involving defendant and Harris and the trial court did not err in denying defendant's request for IPI 24-25.09x.

¶ 47 Defendant next argues that the judge erred when it gave the jury IPI 3.05, instructing the jury on how to weigh the identification testimony. We agree with the parties that identification was not at issue here where defendant did not deny shooting Harris. We find that the instruction was simply unnecessary and not prejudicial where, at most, it merely informs the jury on how to evaluate identification testimony where identification was not at issue. No error occurred.

¶ 48 Finally, defendant takes issue with the order in which the jury instructions were given. We find that no error occurred with respect to the order in which the instructions were given. The precise order in which jury instructions are given is not error as long as the court clearly conveyed the applicable law and the proper instructions to the jury, as it did here. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 45. There was no error.

¶ 49 Because no error exists with respect to the jury instructions defendant complains of, we need not determine whether the issues defendant complains of rise to the level of plain error. Accordingly, we find defendant's claim that counsel was ineffective for failing to ensure that the jury was properly instructed is without merit. *People v. Mahaffey*, 194 Ill. 2d 154, 173 (2000), overruled on other grounds by *People v. Wrice*, 2012 IL 111860, ¶ 75, (noting ineffective assistance of counsel cannot be established where no error occurred).

¶ 50 Defendant next argues he is entitled to a new *Krankel* hearing because the State took an active role in the hearing, turning it into an adversarial proceeding. Defendant also argues the trial court inadequately inquired into his ineffective assistance of counsel claims, and should have appointed independent counsel because the record showed possible neglect by defense counsel. We disagree.

¶ 51 When a defendant files a *pro se* post-trial motion alleging trial counsel's ineffectiveness, the court must conduct a preliminary inquiry to examine the factual basis of the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). A preliminary *Krankel* hearing "should operate as a neutral and nonadversarial proceeding. *People v. Jolly*, 2014 IL 117142, ¶38. The trial court is not automatically required to appoint new counsel to assist the defendant; rather, the court should first examine the factual basis of the defendant's claim. *Moore*, 207 Ill. 2d at 77-79. The supreme court has listed three ways in which a trial court may conduct its examination: (1) the court may ask trial counsel about the facts and circumstances related to the defendant's allegations; (2) the court may ask the defendant for more specific information; and (3) the court may rely on its knowledge of counsel's performance at trial and "the insufficiency of the defendant's allegations on their face." *Id*.

¶ 52 If the defendant's allegations show possible neglect of the case, the court should appoint new counsel to argue the defendant's claim of ineffective assistance. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010). However, if the court concludes that the defendant's claim lacks merit or pertains only to matters of trial strategy, the court may deny the claim. *Id.* Once the court conducts an adequate inquiry, the decision to decline to appoint new counsel shall not be overturned on appeal unless the decision is manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008) (citing People v. Woodson, 220 Ill. App. 3d 865, 877 (1991)). If the court fails to

conduct the necessary preliminary examination as to the factual basis of the defendant's allegations, as occurred after defendant's trial, the case must be remanded for the limited purpose of allowing the court to do so. *Taylor*, 237 Ill. 2d at 75.

¶ 53 Defendant points to five instances of the State's participation that he alleges are more than *de minimis.* First, defendant argued that trial counsel was ineffective for failing to challenge the judge's ruling during the trial that prevented defendant from testifying that Charles told Kori to get a gun off of Springfield. The State commented that she "never heard [defendant] say anything like that." The court agreed. Second, defendant alleged that defense counsel was ineffective for failing to argue that Kori's statement to the police was coerced. In response to defense counsel's statement that he thought Kori refused to speak to the detectives at the hospital and did not cooperate until two months later and that Kori was not his witness and "maybe the State could correct me on this one," the State responded by stating this was testified to at trial. The evidence adduced at trial was that Kori went to the hospital with Harris, and refused to speak with detectives until two months later. Third, defendant asserts defense counsel failed to impeach John Jackson with his statement to police. Specifically, in the statement, John said that he picked up Harris from the "el" station. Defendant believed this could be used to impeach John because John did not in fact pick up Harris from the "el" station. However, John never testified to anything involving any rendezvous at an "el" station, and the State merely pointed that out. Similarly, in another of the five instances pointed out by defendant, defendant thought his counsel should have impeached Kori. Again, the State pointed out that the false testimony defendant alleged that Kori gave was in fact never given. Fourth, defendant alleged that his counsel was ineffective for not discrediting witnesses at trial. In response to the court's question about who defendant was referring to, defendant gave the example of Kori, and her ability to see

"each side of the gun" when he shot Harris from where she was standing. After discussion between the court, defendant and defense counsel, the State commented that "Kori never stated she saw both sides of the gun." Finally, defendant contends that defense counsel's motion for a new trial was defective because, although defendant liked the motion, he did not agree with it because defense counsel did not have the transcripts when he prepared it. Defense counsel responded that he did have the transcript when he prepared the motion and he included all of the relevant issues. The State responded that defense counsel had prepared a very long motion that included over 17 paragraphs of argument as to what was wrong in the trial.

¶ 54 Because the defendant is essentially acting *pro se* for purposes of the preliminary proceedings, "it is critical that the States' participation at that proceeding, if any, be *de minimis*." *People v. Jolly*, 2014 IL 117142, ¶ 38. "The State should never be permitted to take an adversarial role against a *pro se* defendant at the preliminary *Krankel* inquiry." *Id.*

¶ 55 Contrary to defendant's argument, the State never took an adversarial role in the hearing. The State merely stated objective facts regarding evidence and testimony that did or did not occur. There was no cross examination of the defendant or any questioning into defense counsel's competence. There was no attempt by the State to give alternative explanations or defend defense counsel's decisions, besides stating its own recollection of counsel's performance at trial in conducting the examination. See *People v. Boose*, 2014 IL App (2d) 130810, ¶27 ("The trial court may conduct a preliminary examination by: (1) questioning trial counsel about the facts and circumstances surrounding the defendant's allegations; (2) requesting more specific information from the defendant; or (3) relying on its own knowledge of counsel's performance at trial and the insufficiency of the defendant's allegations on their face.") We find the State's involvement here was *de minimis* and not grounds for remand.

¶ 56 The remaining two issues concerning the *Krankel* hearing involve whether the trial court adequately inquired into alleged failures by defense counsel, and whether the trial court should have appointed independent counsel to further investigate the claims.

¶ 57 Defendant faults counsel for failing to call Patrick Jones as a witness. According to defendant, Patrick Jones testified at the grand jury about a phone call earlier on the day of the shooting in which he was told that Charles was shooting at defendant, that he met defendant and was told "they're going to be shooting at me," and that defendant said he needed his gun for protection. Defendant also claimed that Patrick could corroborate that Harris possessed a gun during the standoff at Ridgeway and Huron.

¶ 58 The trial court inquired into why defense counsel did not offer Patrick's testimony at trial. Defense counsel stated that Patrick did not tell him that Harris and Charles were pointing guns at him at Ridgeway and Huron. He also stated that he spoke to Patrick numerous times at the jail, as well as to defendant, about whether to use Patrick as a witness or not. Counsel stated that while Patrick did have some good information that could help defendant's case, the bad outweighed the good, and ultimately counsel chose not to utilize him. While not explaining his "big league reason" for not calling Patrick as a witness, despite being asked by the trial court what the reason was, counsel nonetheless explained that Jones had an extensive criminal background, which was a major factor in his decision. Specifically, counsel explained that part of his argument against the State was that their witnesses all had extensive backgrounds. According to counsel, because Jones had an even more extensive criminal background than any of the State's witnesses, it undercut his argument.

¶ 59 We find this decision to be entirely within the province of counsel's discretion as part of his trial strategy. *See id.* at 79 ("The law requires the trial court to conduct some type of inquiry

into the underlying factual basis, if any, of a defendant's *pro se* posttrial claim of ineffective assistance of counsel.). We also note that after the trial court elicited a response from defendant regarding the reason why Patrick was not called, and defendant had an opportunity to discuss the issue with his trial counsel, defendant stated that he "agree[d] with his lawyer" regarding counsel's decision not to call Patrick as a witness. We therefore find that the trial court conducted an appropriate inquiry into defendant's claim, and did not err.

¶ 60 The second alleged failure is that the trial court failed to adequately inquire into defendant's claim that counsel was ineffective for failing to introduce into evidence video footage from a POD camera, which would have undermined John Jackson's version of events, specifically as to the timeline of when things occurred.

¶ 61 Similar to the previous allegation, the trial court inquired as to counsel's reason for not introducing the footage. Counsel explained that the video was not clear enough to determine whether the van was indeed John's. Furthermore, the video would have been useful had certain witnesses denied that the standoff ever occurred. However, all of the State's witnesses testified that it occurred, and according to counsel, the video was no longer relevant to any disputed issue. Again, we find that this is a matter of trial strategy. The court sufficiently inquired into defendant's claim and defense counsel's explanation. Therefore, no error occurred and defendant is not entitled to a new *Krankel* hearing.

¶ 62 Defendant received a 40-year sentence for first degree murder and a 25-year mandatory firearm enhancement. Defendant's final argument on appeal is that his 65-year sentence, a *de facto* life sentence, is excessive because the judge misapprehended the trial evidence and failed to adequately consider mitigating evidence. We disagree.

¶ 63 The Illinois Constitution requires that all penalties conform with two objectives: (1) "[a]ll

penalties shall be determined both according to the seriousness of the offense, and (2) "with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. On appeal, we adhere to a presumption that the sentencing court considered all relevant factors and any mitigation evidence presented. *People v. Burnette*, 325 Ill. App. 3d 792, 808 (2001). To rebut this presumption, a defendant must make an affirmative showing that the sentencing court did not consider the relevant factors. *People v. Canet*, 218 Ill. App. 3d 855, 864 (1991).

¶ 64 A trial court has broad discretionary powers in imposing a sentence. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). The sentencing court has the opportunity to weigh factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). We will not substitute our judgment for that of the trial court absent an abuse of discretion. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001).

¶ 65 Sentences within the statutory mandated guidelines are presumed proper and will not be overturned or reduced unless: (i) affirmatively shown to greatly depart from the spirit and purpose of the law, or (ii) are manifestly contrary to constitutional guidelines. *People v. Boclair*, 225 Ill. App. 3d 331, 335. A sentence promotes the spirit and purpose of the law when it reflects the seriousness of the offense and gives adequate consideration to defendant's rehabilitative potential. *Id*.

¶ 66 Defendant claims that his 65-year sentence amounts to a *de facto* life sentence and urges this court to reduce it. The sentencing range for defendant's first degree murder conviction was from 20 to 60 years' imprisonment. 730 ILCS 5/5-8-1(a)(1)(a) (West 2010). He received 40 years. Based on the jury's finding that defendant personally discharged a weapon causing death, he was subject to a mandatory 25-year to life enhancement. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010)). He received a 25-year enhancement, resulting in a total sentence of 65 years'

imprisonment. Defendant's sentence was well within the statutory range and therefore presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. In addition, this court has recognized that, so long as a defendant's lengthy prison sentence is not otherwise an abuse of discretion, it will not be found improper merely because it arguably amounts to a *de facto* life sentence. *People v. Martin*, 2012 IL App (1st) 093506, ¶ 50. We reject defendant's argument.

¶ 67 We also reject defendant's contention that the trial court failed to properly consider his relative youth, his rehabilitative potential and his remorse. " '[W]here mitigation evidence is before the court, it is presumed the court considered that evidence absent some contrary indication other than the sentence imposed.' " *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 18 (quoting *People v. Smith*, 214 Ill. App. 3d 327, 339, (1991)). In this case, all of the mitigating factors, including defendant's age (19 years at the time of the offense; 23 years at sentencing), his remorse and his rehabilitative potential were presented to the trial court at trial, in the presentence investigation report, or during defense counsel's arguments at the sentencing hearing. The trial court specifically stated that it had considered the facts of the trial, the presentence investigation report, and the arguments at sentencing, as well as the statutory factors in aggravation and mitigation in crafting defendant's sentence. In addition, the trial court specifically commented on defendant's rehabilitative potential, indicating that defendant did not have many prior convictions, and that he had previously shown the ability to comply with the conditions of probation. In the face of this record, defendant points to nothing other than the sentences imposed upon him as indicative that these mitigating factors were not considered by the trial court. This contention is belied by the record. Accordingly, we find defendant's 65-year sentence was a proper exercise of the trial court's discretion and will not disturb it.

¶ 68 CONCLUSION

¶ 69 For the reasons stated, the judgment of the trial court is affirmed.

¶ 70 Affirmed.