2017 IL App (1st) 150749-U

SIXTH DIVISION
Order filed: December 1, 2017

No. 1-15-0749

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 11 CR 19625
	)	
BYRON EDWARDS,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's convictions and sentence are affirmed where: (1) he was not denied his right to a fair and impartial trial; (2) there was sufficient evidence to find him guilty of aggravated kidnaping; (3) the circuit court conducted an adequate preliminary inquiry into his claims of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984); and (4) his sentence does not violate the eighth amendment of the United States Constitution or the proportionate penalties clause of the Illinois Constitution.

¶ 2 Following a jury trial, the defendant, Byron Edwards, was convicted of aggravated criminal sexual assault, armed robbery, aggravated kidnaping, and aggravated criminal sexual

abuse. He was sentenced to an aggregate term of 85 years' imprisonment. On appeal, the defendant argues that: (1) he was denied a fair and impartial trial based upon the circuit court's biased conduct; (2) his conviction for aggravated kidnaping should be vacated where the asportation of the victim was incidental to his conviction for aggravated criminal sexual assault; (3) the circuit court did not conduct an adequate preliminary inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984); and (4) his sentence is unconstitutional. For the following reasons, we affirm.

¶ 3 Based upon an incident involving the victim, S.C., which occurred on November 19, 2008, the defendant was charged in a multi-count indictment with, *inter alia*, aggravated criminal sexual assault (720 ILCS 5/12-14(a)(4), (a)(8) (West 2008)), armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)), aggravated kidnaping (720 ILCS 5/10-2(a)(6) (West 2008)), and aggravated criminal sexual abuse (720 ILCS 5/12-16(a)(6) (West 2008)).

¶ 4 At trial, S.C. testified that, at approximately 5:30 a.m. on November 19, 2008, she was walking towards her vehicle, which was parked outside of her house, near the 8000 block of South Indiana Avenue in Chicago. She had almost reached her car when a man, later identified as the defendant, pointed an object at the back of her head and ordered her to enter the passenger seat. S.C. complied, and the defendant sat in the driver's seat and drove her to an alley behind her house while holding a black and brown revolver in his left hand. He parked the vehicle and demanded money. After S.C. gave him $20 or $40, the defendant then asked for anal and vaginal sex, but S.C. refused. When asked what happened next, S.C. testified that the defendant gave her a condom and told her to put it on him and perform oral sex. S.C. stated that she complied with his demands because "he had a gun" and she "was scared." She performed fellatio on the defendant for what "[c]ould have been minutes[,]" but he was unable to get an erection. The defendant then pushed S.C. towards the passenger door, lifted her shirt, and began to suck on her nipples. Once the

defendant's penis became erect, he again forced S.C. to perform oral sex on him. Shortly thereafter, the defendant told S.C. to stop and sit up because her neighbor's garage door had opened. The defendant then drove them to 78th Street and Prairie Avenue. He parked and exited the vehicle, telling S.C. that "God [wa]s going to bless [her] for what [she] did." The defendant thereafter fled on foot.

¶ 5 S.C. testified that she drove to a nearby McDonald's parking lot and called her fiancé, Van Strickland. When Strickland arrived at the McDonald's, he used her cell phone to call the police. After the police arrived, S.C. was taken to a hospital where a nurse took "swabs" of her breasts. S.C. further stated that, on November 16, 2011, she went to the police station to view a physical lineup and positively identified the defendant.

¶ 6 Strickland testified that, around 6 a.m. on November 19, 2008, he was awakened by S.C. "screaming hysterically over the answering machine." When he answered the phone, S.C. stated that she had been "robbed" and was in the McDonald's parking lot, which was less than five minutes from their house. Strickland drove to the McDonald's and, upon arrival, he observed S.C. sitting in the passenger seat with her shirt "raised up *** [o]ver her breast area." When he asked what happened, S.C. told Strickland that she was "raped." S.C. also informed Strickland that she had not contacted the police yet, so he "grabbed" her phone and called 9-1-1. The police arrived and drove S.C. to the locations of the incidents. Strickland remained in the McDonald's parking lot with the detectives and then met S.C. at a hospital.

¶ 7 The evidence further established that S.C. was examined at the hospital, which included the collection of "breast swabs[.]" The swabs were sent to the Illinois State Police forensic crime laboratory for analysis and, on September 10, 2010, the database matched the defendant's DNA to the DNA profile found on the swabs. The defendant was arrested on November 16, 2011, and a

buccal sample was collected from him on February 22, 2012. The DNA profile from that buccal swab matched the DNA profile taken from the victim's breast swabs.

¶ 8 After the State rested its case-in-chief, the defense filed a motion for a directed verdict, which the circuit court denied.

¶ 9 The defense called Stephan Jakes. Jakes testified that, in fall of 2008, S.C. introduced him to the defendant so he could purchase some "weed." The three of them met near 76th Street and Eberhart Avenue and entered the defendant's vehicle. According to Jakes, he and the defendant then got into an argument because the defendant had a revolver and Jakes grabbed it from him. Jakes and S.C. got out of the car and the defendant drove away. Jakes stated that he did not encounter the defendant again until "recently while [he] was incarcerated."

¶ 10 The defendant then rested without testifying on his own behalf.

¶ 11 Following closing arguments, the jury deliberated and found the defendant guilty of two counts of aggravated criminal sexual assault, one count of armed robbery, one count of aggravated kidnaping, and one count of aggravated criminal sexual abuse.

¶ 12 In February 2015, a sentencing hearing was held. The circuit court heard the evidence in aggravation and mitigation, and reviewed the presentence investigation (PSI) report. The court noted that the defendant had a traumatic childhood, graduated from high school, and had an employment history of "a couple of jobs." The court also found, however, that the defendant had a prior conviction for aggravated vehicular hijacking and that the nature of the instant offense was serious. The court then stated that it had considered the "horror" and "terror" that S.C. endured. The court further explained as follows:

> "But what I find very aggravating and I guess kind of says a lot about you *** it says that you fathered three children, but you can't recall their names. I think that's

> an example of how you're so antisocial and don't have any normal sort of receptors in your brain which allows you to act appropriately. You fathered three children. Big deal. I guess you could have fathered another one if you didn't take your—or if you didn't use a condom when you went after this complaining witness. But fathering three children is nothing. They've got sperm banks where they can go get sperm to produce children. That's not being a father. That's being, you know, some sort of farm animal that would, you know, just deposit biological substances so that a child could be produced like you were out for stud or something. Being a father means a lot more. That means protecting, caring for, nurturing, you know, a human being so that they turn out the best that they can be, but you don't even know their names."

The court ultimately sentenced the defendant to consecutive terms of 30 years' imprisonment on each count of aggravated criminal sexual assault and 25 years' imprisonment on the armed-robbery count, for an aggregate sentence of 85 years. (Each of these sentences included mandatory 15-year firearm enhancements.) The court also sentenced the defendant to 21 years' imprisonment for aggravated kidnaping and 7 years' imprisonment for aggravated criminal sexual abuse, to be served concurrently.[1] The defendant filed a motion to reconsider his sentence, which the court denied. This appeal followed.

¶ 13 The defendant's first assignment of error on appeal is that he was deprived of a fair and impartial trial. In support of his argument, he cites to various comments made by the trial judge throughout the proceedings, which he maintains demonstrates bias against him.

[1] The aggravated-kidnaping count was also enhanced 15 years due to the defendant's use of a firearm.

¶ 14 The defendant initially challenges comments made by the trial judge during a December 2, 2014, hearing on the State's motion *in limine* to bar Jakes from testifying about whether he had a prior sexual affair with S.C. and from describing a tattoo on her breast. In holding that defense counsel was only permitted to ask S.C. whether she had a tattoo (not what the tattoo depicted), the court stated, in pertinent part, as follows:

> "And I can't help but just be somewhat repulsed by the testimony of this four time convicted felon who comes forward one week ago with this *** preposterous fabrication to try to discredit a woman who has already been *** brutally subjected to unimaginable of activities [*sic*].
>
> And I just don't think, you know, to allow Mr. Jakes to *** com[e] forward so late to brutalize [S.C.] again is something that can be allowed. ***.
>
> ***
>
> But *** the testimony [of] Mr. Jakes is so inherently suspicious that I think that any fact finder would sort of see through it. And find it way more aggravating towards the proponent of that testimony than it being in anyway somehow *** viable as a defense.
>
> It reminds me of, you know, back in the dark ages of sexual assault cases where defendants would collect a bunch of guys in the neighborhood to come [into court and] say we all had sex with that lady and that it was admissible. That's what it strikes me as. Especially since [the defendant] himself only revealed this witness to the defense a week ago."

The defendant argues that these comments "demonstrated prejudgment of the case, particularly where the court expressed concern that Jakes' testimony would 'brutalize' [S.C.] 'again.' " We are not persuaded.

¶ 15 All criminal defendants are entitled to fair trials decided by "an unbiased, open-minded trier of fact." *People v. Jones*, 2017 IL App (1st) 143403, ¶ 32. Our supreme court has explained:

> "A judge is presumed to be impartial even after extreme provocation. [Citation.] It is assumed that judges, regardless of their personal backgrounds and experiences in life, will be able to set aside any biases or predispositions they might have and consider each case in light of the evidence presented." *People v. Jackson*, 205 Ill. 2d 247, 276 (2001).

When a defendant claims that a judge is biased, those allegations "must be viewed in context and should be evaluated in terms of the trial judge's specific reaction to the events taking place." *Id.* at 277. Even if a trial judge makes improper comments, they may nonetheless be harmless error. *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 57. "For the comments or questioning by a trial judge to constitute reversible error, the defendant must demonstrate that they were a material factor in the conviction or that prejudice appears to have been the probable result." *People v. Brown*, 200 Ill. App. 3d 566, 577 (1990).

¶ 16 While the trial judge's comments here reveal that he found Jakes' proposed testimony to be "inherently suspicious" and was concerned about Jakes victimizing S.C. by suggesting she was sexually promiscuous, the defendant cannot establish prejudice. The defendant had a jury trial, not a bench trial, and the judge's comments were not made in the presence of the jury. See *Lopez*, 2012 IL App (1st) 101395, ¶¶ 69-70 (holding that the defendant failed to show prejudice where, *inter alia*, the circuit court's criticism of defense counsel was not made in the presence of the jury).

Rather, the statements were made prior to trial, before the *voir dire* examination of prospective jurors had even occurred. Accordingly, the defendant cannot show that the trial judge's comments influenced the jury or were a "material factor" in his conviction.

¶ 17 We similarly reject the defendant's argument that he was deprived of a fair and impartial trial based upon the trial judge's conduct during a hearing on his post-trial motion for a new trial. The transcript from that hearing discloses that the defendant requested a new attorney based upon his trial attorney's ineffective assistance. In response, the trial judge stated, in pertinent part, as follows:

> "I sympathize with what your attorneys have had to endure trying to do their job in representing you because this has been just an ongoing nightmare for them trying to do their best to put forth their best effort to represent you effectively in a case where as the jury pretty quickly concluded the evidence against you was overwhelming[.]"

The defendant argues that he was prejudiced when the circuit court "antagonistically" stated that it sympathized with what his attorney had to endure in representing him. As just discussed, the defendant cannot show that the judge's comments constituted a material factor in his conviction because they were made outside the presence of the jury, after the defendant had already been found guilty. Thus, the defendant cannot establish prejudice.

¶ 18 In further support of his argument that the trial judge was biased against him, the defendant cites to the judge's decision to overrule defense counsel's objection to the State's opening statement, in which it referred him as "Mr. Nightmare." By overruling the objection, the defendant maintains that the court gave credibility to the State's improper remarks, which influenced the jury. Again, we disagree.

¶ 19 In opening statements, the State is permitted to comment on what it anticipates the evidence will be and the reasonable inferences to be drawn therefrom. *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993). Absent deliberate misconduct, incidental or uncalculated remarks in opening statements cannot form the basis of reversal. *Id*. Reversal is warranted only where the complained-of remarks engender substantial prejudice such that the result of the trial would have been different had the comments not been made. *Id*.

¶ 20 In this case, the record conveys that the State informed the jury that S.C. would be testifying about "the most horrific event of her life, an absolute nightmare." The State then introduced the defendant by stating as follows: "Ladies and gentlemen, this is [the defendant]. Meet him. Mr. Nightmare." Contrary to the defendant's argument on appeal, these comments are nothing more than an idiomatic expression, which is commonplace enough that a jury would not misconstrue it. See *People v. Shaw*, 186 Ill. 2d 301, 333-34 (1999); *People v. Moore*, 358 Ill. App. 3d 683, 692 (the State's comments that the bullet to the victim's head was an "early Christmas gift" from the defendant was an idiomatic expression and not improper). Moreover, even if the trial judge erred in overruling the defendant's objection, the jury was instructed that opening statements and closing arguments are not evidence. We find that this instruction was sufficient to cure any prejudice arising from any improper remarks made by the State. See *Moore*, 358 Ill. App. 3d at 693.

¶ 21 The defendant also asserts that the trial judge exhibited bias and antagonism toward him when it interrupted defense counsel's cross-examination of S.C. and threw a pen down. He argues that the judge assumed the role of a prosecutor and strengthened the State's case by contradicting the anticipated testimony of the defendant's witness, Jakes.

¶ 22 It is improper for a judge to step from his judicial role into a prosecutorial role. *People v. Taylor*, 357 Ill. App. 3d 642, 648 (2005). The judge must be fair and impartial and conduct himself in a manner "as not to give the jury the impression of his feelings ***, and not make any comments or insinuations indicative of an opinion on the credibility of a witness." *Brown*, 200 Ill. App. 3d at 576. Because a trial judge has great influence over a jury, "[the] slightest show of deference to the State could prejudice a defendant." *People v. Foules*, 258 Ill. App. 3d 645, 655 (1993). Where a judge interjects in the presence a jury, we must evaluate the effect of the comments in light of the evidence and the circumstances surrounding the trial. *People v. Williams*, 209 Ill. App. 3d 709, 719 (1991).

¶ 23 In this case, during S.C.'s cross-examination, the following exchange occurred:

"Q. Do you know an individual by the name of Steven Jakes or Stephone Jakes; correct?

A. Come again. You said I know someone.

Q. You know an individual by the name of Stephone Jakes?

A. No.

Q. You knew him in late November 2007, 2008?

A. No.

Q. A man named Stephone Jakes has been in your red Ford Taurus?

MS. RAJK [(Assistant State's Attorney)]: Objection.

Beyond the scope.

THE COURT: Overruled.

A. I am sorry 2007. I wasn't here. I was living in Iowa.

BY MS. WEBER [(defense counsel)]:

Q. 2008.

THE COURT: You were living in Iowa in 2007. And you asked her whether or not she knew this man in 2007. He was in car or somehow [*sic*]."

¶ 24 Based upon the judge's comment, the defendant filed a motion for a new trial asserting that the trial judge threw his pen "down on [his] desk" and "sat back in [his] chair," which was "obvious *** to most people in the courtroom." In denying the defendant's motion for a new trial, the judge explained that he was bothered by defense counsel's line of questioning, which was based upon the likely "fabricated" testimony of Jakes. Nonetheless, the court assured the defendant that he would receive a fair jury trial, stating: "I will not comment on the evidence in front of the jury unless I feel the need to based on some outrageous statements or conduct being made by any witness." It further stated that:

> "it is my goal here *** to try to make sure that justice is done in the appropriate way, not by prejudging the case but not by being a fool either ***.
>
> The fact that I would deny that [*sic*] I threw my pen in front of the jury during any particular time. I take notes up here and I don't take notes. I do things when I want to do them. None of them are designed to influence this particular jury."

¶ 25 Here, we cannot say that the circuit court's remark during S.C.'s cross-examination deprived the defendant of a fair trial. Before the court interjected, defense counsel successively asked S.C., in one form or another, whether she knew Jakes three times. After the first time, S.C. asked defense counsel to repeat the question. After the second and third time, however, S.C. responded that she did not know Jakes. Nevertheless, defense counsel persisted in her line of questioning and proceeded to ask S.C. whether Jakes had ever been in her car. It was at that time

that the court interjected. Rather than strengthening the State's case, it appears that the court was prohibiting repetitious and improper questions. See *People v. Faria*, 402 Ill. App. 3d 475, 479 (2010) ("the court may interject to avoid repetitive or unduly harassing interrogation"). Additionally, contrary to defense counsel's contention, the trial judge denied throwing down his pen when making this comment and, even if he did, a "display of displeasure or irritation" with defense counsel "is not necessarily evidence of judicial bias against the defendant or his counsel." *Id*. at 482; see also *Jackson*, 205 Ill. 2d at 277. Therefore, the defendant has failed to show that the trial judge's conduct in the presence of the jury evinced bias against him.

¶ 26 The defendant finally claims that "the most egregious example of bias" against him occurred at sentencing, when the trial judge likened him to a sperm donor or a farm animal for not knowing the names of his three children. According to the defendant, the judge's statements evince a "categorical bias" against defendants with shortcomings as parents. We disagree.

¶ 27 We find that the defendant mischaracterizes the nature of the comment. A review of the record conveys that, rather than arising from bias, the comment—albeit gratuitous—was made by the court while considering the defendant's moral character as an aggravating factor, which is not improper. See *People v. Fort*, 229 Ill. App. 3d 336, 341 (1992) ("a defendant's moral character, including the tendency to be irresponsible, is very much a legitimate factor for the court to consider" in sentencing). The court was troubled by the fact that the defendant did not know his children's names because it indicated that he was "antisocial" and unable to "act appropriately." The record further establishes that the court considered several other aggravating and mitigating factors in imposing the defendant's sentence. See *People v. Primm*, 319 Ill. App. 3d 411, 425-26 (2000) (although the court called the defendant "a lunatic, a raving animal[,]" resentencing was not required because the record showed that the court otherwise considered proper sentencing

factors). Specifically, in aggravation, the court considered "the horror" and "terror" that S.C. had endured as well as the defendant's prior conviction for aggravated vehicular hijacking. In mitigation, the court noted that the defendant had a traumatic childhood, graduated from high school, and held "a couple of jobs." Because we find that the court considered proper sentencing factors, its commentary did not deprive the defendant of a fair sentencing hearing and he cannot establish prejudice.

¶ 28 For all of these reasons, we conclude that the defendant was not deprived of his right to a fair and impartial trial.

¶ 29 Next, the defendant contends that his conviction for aggravated kidnaping must be vacated because the movement and confinement of S.C. was incidental to his convictions for aggravated criminal sexual assault. According to the defendant, the detention of S.C. lasted only long enough for him to accomplish the commission of the sexual assaults.

¶ 30 The defendant asserts that this claim should be reviewed *de novo* because the facts are not in dispute. However, when a defendant challenges incriminating inferences that may have been drawn by the trier of fact from the evidence, the challenge constitutes a claim against the sufficiency of the evidence. *People v. Stewart*, 406 Ill. App. 3d 518, 525 (2010). Because the defendant's challenge is directed at the quantum of evidence presented against him, the correct standard of review is that which applies to a sufficiency-of-the-evidence challenge: whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt of aggravated kidnaping, taking the evidence in the light most favorable to the prosecution. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009) (reviewing whether an asportation was merely incidental to another offense or whether it rose to the level of an independent crime of kidnaping).

¶ 31 A defendant commits kidnaping when he "knowingly *** [b]y force or threat of imminent force carries another from one place to another with intent secretly to confine him against his will[.]" 720 ILCS 5/10-1(a)(2) (West 2008). The offense of kidnaping is elevated to aggravated kidnaping when a defendant commits the offense "while armed with a firearm." 720 ILCS 5/10-2(a)(6) (West 2008).

¶ 32 In general, an aggravated kidnaping conviction cannot stand "where the asportation or confinement of the victim was merely incidental to another crime, such as robbery, rape or murder." *People v. Eyler*, 133 Ill. 2d 173, 199 (1989). To determine whether the asportation of S.C. was incidental to the separate offense of aggravated criminal sexual assault, we consider the following four factors:

> "(1) the duration of the asportation or detention; (2) whether the asportation or detention occurred during the commission of a separate offense; (3) whether the asportation or detention is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense." *Siguenza-Brito*, 235 Ill. 2d at 225-26.

¶ 33 As to the first factor of time and distance, an asportation of $1^1/_2$ blocks has been held sufficient to support a separate kidnaping charge (*People v. Casiano*, 212 Ill. App. 3d 680, 687-88 (1991)), as has an asportation lasting a few minutes (*Siguenza-Brito*, 235 Ill. 2d at 226-27 (asportation lasted four to five minutes)). Here, the defendant, armed with a revolver, approached S.C. at 5:30 a.m. when he forced her into her vehicle and drove away. Strickland testified that he awoke to S.C. "screaming hysterically over the answering machine" around 6 a.m. Accordingly, the incident, *in toto*, lasted for approximately 30 minutes. The evidence also established that the defendant drove S.C. to an alley behind S.C.'s house and then drove to a different location—which

was approximately one-half mile away from her house. See *People v. Deleon*, 227 Ill. 2d 322, 326 (2008) (courts "may take judicial notice of the distances between two locations."). The duration and distance of the asportation in this case exceeded that in *Casiano* and *Siguenza-Brito*, so the first factor does not favor a claim that kidnaping was incidental to aggravated criminal sexual assault.

¶ 34 Regarding the second factor, a kidnaping charge will generally lie where the asportation occurs before or after the commission of the separate offense. *Siguenza-Brito*, 235 Ill. 2d at 226-27; *People v. Ware*, 323 Ill. App. 3d 47, 56 (2001) ("kidnaping constitutes a separate offense when the victim is transferred from one location to another before she is raped."); *People v. Sumler*, 2015 IL App (1st) 123381, ¶ 58 ("the asportation of the victim occurred after the commission of the separate offense of domestic battery"). The evidence here established that the defendant transported S.C. to the alley behind her house before sexually assaulting her. He also transported S.C. away from her house after the sexual assault occurred. Thus, the second factor does not weigh in favor of finding that the kidnaping was incidental to the aggravated criminal sexual assault.

¶ 35 The third factor has no application under the facts of this case as no credible claim can be made that asportation is "inherent" in the crime of aggravated criminal sexual assault. See *People v. Johnson*, 2015 IL App (1st) 123249, ¶ 27 (citing cases) ("[a]sportation of a victim is not an element of aggravated criminal sexual assault.").

¶ 36 Finally, the fourth factor provides no support to the defendant's claim because the asportation of S.C. heightened the danger to her. *People v. Smith*, 91 Ill. App. 3d 523, 529 (1980). We reject out-of-hand the defendant's argument that the asportation did not create a significant danger to S.C. because the "real danger" was the sexual assault perpetrated against her. See

People v. Jackson, 281 Ill. App. 3d 759, 769 (1996) (finding dangers independent of those posed by murder by the taking of the victim from a public place to an abandoned bridge); *People v. Cole*, 172 Ill. 2d 85, 104-05 (1996) (aggravated kidnaping charge proper where the defendant drove the victim to an isolated area before shooting and killing him). When the defendant moved S.C. from the street in front of her house to the alley behind her house, it made it more difficult for S.C. to signal for help because the likelihood of being seen was decreased. See *People v. Thomas*, 163 Ill. App. 3d 670, 679 (1987). Additionally, in being confined to a moving vehicle, S.C. was faced with the prospect of a car accident or that she might injure herself in attempting to escape. See *Sumler*, 2015 IL App (1st) 123381, ¶ 60. We, thus, find that the asportation of S.C. created a significant danger that was independent of that posed by the aggravated criminal sexual assault.

¶ 37 In sum, the evidence here was more than sufficient to find that the asportation of S.C. was not incidental to the aggravated criminal sexual assault committed by the defendant. We conclude, therefore, that the defendant was properly found guilty of aggravated kidnaping.

¶ 38 The defendant next contends that we should remand this case for a proper *Krankel* hearing because the circuit court failed to adequately examine the factual basis of two of his *pro se* claims of ineffective assistance of counsel: that defense counsel failed to investigate "witnesses" and obtain surveillance video from the scene of the crime. He asserts that, rather than asking him questions about these claims or having him elaborate on them, the court changed course by stating that it "sympathize[d]" with what his attorneys had to endure in representing him. He also claims that the court failed to "insist on questioning defense counsel[.]" We disagree.

¶ 39 Under *Krankel*, new counsel is not automatically appointed for a defendant who raises a *pro se* post-trial motion claiming ineffective assistance of counsel. *People v. Jolly*, 2014 IL 117142, ¶ 29. After the circuit court considers the factual basis of the defendant's claim and

decides that it " 'lacks merit or pertains only to matters of trial strategy,' " the court may decline to appoint new counsel and deny the *pro se* motion. *Id.* (quoting *People v. Moore*, 207 Ill. 2d 68, 78 (2003)). The court, however, should appoint new counsel if the defendant's claim establishes possible neglect of the case by defense counsel. *Id*.

¶ 40 In determining whether the defendant's claim has merit, the circuit court " 'must conduct an adequate inquiry ***, that is, inquiry sufficient to determine the factual basis of the claim.' " *People v. Ayres*, 2017 IL 120071, ¶ 11 (quoting *People v. Banks*, 237 Ill. 2d 154, 213 (2010)). "[T]he primary purpose of the preliminary inquiry is to give the defendant an opportunity to flesh out his claim of ineffective assistance so the court can determine whether appointment of new counsel is necessary." *Id*. ¶ 20. This "method of inquiry *** is somewhat flexible." *People v. Flemming*, 2015 IL App (1st) 111925-B, ¶ 85. The court "may consider any facial insufficiency of the defendant's allegations and may (1) ask the defendant's trial counsel questions; (2) briefly discuss the allegations with the defendant; or (3) rely upon its own knowledge of counsel's performance." *People v. Fields*, 2013 IL App (2d) 120945, ¶ 39. Depending upon the circumstances of the case, the court need not question defense counsel at all, directly or indirectly. *Flemming*, 2015 IL App (1st) 111925-B, ¶ 85. We review *de novo* whether a circuit court erred in the manner in which it conducted a preliminary inquiry under *Krankel*. *Jolly*, 2014 IL 117142, ¶ 28.

¶ 41 In this case, the record shows that the defendant first brought his ineffective-assistance-of-counsel claims to the circuit court's attention when he complained that defense counsel failed to investigate witnesses and obtain video surveillance. In response, the court made the comment about "sympathiz[ing] with what [his] attorneys have had to endure" in

representing him. The court, however, allowed the defendant another opportunity to specify his complaints:

"THE COURT: Be specific. I'll give you another chance to speak. Be specific. What are your complaints?

THE DEFENDANT: We had a motion against my—

THE COURT: Only against your attorney.

THE DEFENDANT: She didn't raise the fact that you said that we would have a voice recognition lineup here in court, and yet there was a visual lineup.

THE COURT: That's a lie.

THE DEFENDANT: I just went over it in parts of the transcript.

THE COURT: What are your other complaints against your attorney?"

The defendant responded by arguing that counsel did not point out alleged discrepancies in the evidence about the color of the gun and the type of condom used. He also complained that defense counsel's theory of the case "was a lie" insofar as it rested on the proposition that the DNA on the breast swabs was not his; according to the defendant, he did not want to proceed with that theory at trial. The court then asked defense counsel if she wished to address the defendant's complaints and she stated: "at this point I don't think it would be appropriate to respond. I still represent him on this case." Thereafter, the court denied the defendant's request that it appoint a new attorney to represent him.

¶ 42 We find that, before determining that the defendant's claims of ineffective assistance counsel lacked merit, the circuit court sufficiently inquired into them by relying upon its own knowledge of counsel's performance. *Moore*, 207 Ill. 2d at 79; *Fields*, 2013 IL App (2d) 120945, ¶ 39. Although the defendant contends that the court should have asked him questions about the

"witnesses" and the video surveillance, these conclusory statements did not necessitate further inquiry by the court. See *People v. Towns*, 174 Ill. 2d 453, 466-67 (1996); see also *People v. Johnson*, 159 Ill. 2d 97, 126-28 (1994) (where the "defendant did not bring to the [circuit] court's attention a colorable claim of ineffective assistance of counsel" because "the allegations *** were conclusory*** or legally immaterial."). Moreover, the court gave the defendant an opportunity to further articulate those claims, but he rested on his conclusory statements in order to raise other complaints about defense counsel. See *People v. Taylor*, 237 Ill. 2d 68, 77 (2010) (quoting *People v. Grant*, 71 Ill. 2d 551, 557-58 (1978)) (where a defendant has an opportunity to articulate his theory but fails to do so, the circuit court is not expected " 'to divine his intent' "); see also *People v. Bolton*, 382 Ill. App. 3d 714, 720 (2008) ("any gap in the [circuit] court's knowledge *** was because of [the] defendant's failure to call the court's attention to the matter despite having ample opportunity to do so."). We also reject the defendant's contention that the court should have "insist[ed] on questioning defense counsel" because such an exchange is not *always* necessary and certainly is not *required* under *Krankel* and its progeny. See *Fields*, 2013 IL App (2d) 120945, ¶ 39; *Flemming*, 2015 IL App (1st) 111925-B, ¶ 85. As a consequence, we find that the circuit court conducted an adequate preliminary inquiry into the defendant's claims of ineffective assistance of counsel.

¶ 43 Finally, the defendant maintains that his aggregate sentence of 85 years' imprisonment violates the eighth amendment's prohibition against cruel and unusual punishment (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). Specifically, he contends that the 15-year mandatory firearm enhancements coupled with the consecutive sentencing, as applied to him, are unconstitutional because they deprived the circuit court of the opportunity to make an individualized determination in sentencing him by

considering his age and culpability. Because the proportionate penalties clause provides greater protection than the eighth amendment (*People v. Clemons*, 2012 IL 107821, ¶ 40), we independently analyze the defendant's eighth amendment and proportionate penalties claims.

¶ 44 At the outset, we note that, in his brief, the defendant relies on relevant studies on brain development. We decline to consider this information, however, because it was not presented to the circuit court, which is the appropriate tribunal to weigh how that information applies to the facts and circumstances of this case. See *People v. Thompson*, 2015 IL 118151, ¶ 38.

¶ 45 On to the merits, the eighth amendment, applicable to the states through the fourteenth amendment, (*Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008)), provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The cruel and unusual punishment clause prohibits "inherently barbaric punishments" as well as punishments which are disproportionate to the offense. *Graham v. Florida*, 560 U.S. 48, 59 (2010).

¶ 46 In this case, as to his terms to be served consecutively, the defendant was convicted of three Class X felonies: two counts of aggravated criminal sexual assault and one count of armed robbery. See 720 ILCS 5/12-14(d)(1) (West 2008); 720 ILCS 5/18-2(b) (West 2008). Because the defendant was convicted of aggravated criminal sexual assault, the circuit court was required to impose consecutive sentences. See 730 ILCS 5/5-8-4(d)(2) (West 2008). Additionally, due to his use of a firearm during the commission of these offenses, these 3 convictions each carried mandatory enhancements of 15 years' imprisonment.[2] See 720 ILCS 5/12-14(d)(1) (West 2008); 720 ILCS 5/18-2(b) (West 2008). The sentencing range for the Class X felonies, including the

[2] The defendant's conviction for aggravated kidnaping was also mandatorily enhanced by 15 years due to his use of a firearm, but this term is being served concurrently—not consecutively.

mandatory 15-year firearm enhancement, was 21 to 45 years. See 730 ILCS 5/5-4.5-25(a) (West 2008) (Class X felony sentencing range is 6 to 30 years). Thus, the maximum aggregate sentence was 135 years' imprisonment. The court, however, did not impose the maximum sentence; instead, it sentenced the defendant to 30 years' imprisonment on each count of aggravated criminal sexual assault and 25 years' imprisonment on the armed-robbery count, which equated to an aggregate sentence of 85 years' imprisonment.

¶ 47 In support of his argument that the imposition of the mandatory 15-year firearm enhancements and consecutive sentencing violated his eighth amendment rights, the defendant cites *Miller v. Alabama*, 567 U.S. 460 (2012), *Graham*, 560 U.S. at 74-82, and *Roper v. Simmons*, 543 U.S. 551 (2005). In *Miller*, 567 U.S. at 479, the Supreme Court found that the eighth amendment prohibits a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders, including those convicted of homicide. In *Roper*, 543 U.S. at 574-75, the Supreme Court held that the death penalty was unconstitutional as applied to juvenile offenders. And, in *Graham*, 560 U.S. at 74, 82, the Court concluded that the eighth amendment prohibits life sentences for juvenile offenders convicted of non-homicide offenses.

¶ 48 As the defendant concedes, his case differs from *Miller*, *Roper*, and *Graham* in that he was an adult, not a juvenile, at the time he committed these crimes. Nevertheless, the defendant maintains that it is highly improbable, given the length of his sentence and his age, that he will outlive his term of incarceration, and he thus asserts that his aggregate sentence of 85 years' imprisonment represents a *de facto* life sentence.

¶ 49 Although the Illinois Supreme Court has not addressed the application of *Miller* to an adult defendant, it has stated that the rationale of *Miller*, *Roper*, and *Graham* applies "only in the context of the most severe of all criminal penalties." *People v. Patterson*, 2014 IL 115102, ¶ 110. In cases

involving an adult defendant, this court has rejected attempts to compare a lengthy prison term to a *de facto* life sentence without parole. See *People v. Thomas*, 2017 IL App (1st) 142557, ¶ 28 ("where an adult defendant receives a sentence that approaches the span of the defendant's lifetime, that term does not implicate the eighth amendment right barring cruel and unusual punishment"); *People v. Gay*, 2011 IL App (4th) 100009, ¶¶ 19-25 (97-year prison term composed of consecutive sentences for the defendant's 16 felony convictions did not amount to cruel and unusual punishment). Given the holdings in *Thomas* and *Gay*, the defendant's *de facto* life sentence does not implicate the eighth amendment proscription against cruel and unusual punishment. The holdings in *Miller*, *Roper*, and *Graham*, which involve capital punishment or life sentences without parole for *juveniles*, do not apply to adult offenders such as the defendant.

¶ 50 We next consider whether the defendant's sentence violates the proportionate penalties clause of the Illinois Constitution.

¶ 51 The proportionate penalties clause of the Illinois Constitution provides that penalties must be determined "both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A challenge under the proportionate penalties clause "contends that the penalty in question was not determined according to the seriousness of the offense." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). A violation may be shown where the penalty imposed is " 'cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community.' " *Id.* (quoting *People v. Moss*, 206 Ill. 2d 503, 522 (2003)). "To determine whether a penalty shocks the moral sense of the community, we must consider objective evidence as well as the community's changing standard of moral decency." *People v. Hernandez*, 382 Ill. App. 3d 726, 727 (2008).

¶ 52 In *Thomas*, 2017 IL App (1st) 142557, ¶ 31, the defendant's sentence included 2 mandatory firearm enhancements that totaled 50 years and comprised more than half of his 80-year sentence. On appeal, this court held that the "defendant's sentence did not violate the proportionate penalties clause because mandatory firearm enhancements are intended to account for the serious nature of weapons offenses as well as [a] defendant's rehabilitative potential." *Id.* ¶ 48; see also *Sharpe*, 216 Ill. 2d at 525. It also held that the defendant's sentence did not violate the eighth amendment or the proportionate penalties clause where "[t]he record *** establishe[d] that, in its discretion, the [circuit] court considered [the] defendant's age and background in imposing" his sentence. *Thomas*, 2017 IL App (1st) 142557, ¶ 48.

¶ 53 In this case, the sum of the defendant's 3 mandatory firearm enhancements on his consecutive terms—45 years—is less than the sum of the defendant's enhancements in *Thomas*. Similar to *Thomas*, the record here also establishes that the circuit court, in its discretion, considered the mitigating factors. Before imposing the defendant's sentence, the court heard defense counsel's arguments in mitigation and received a PSI report that contained information regarding the defendant's age, childhood history, education, drug and alcohol use, mental health treatment, and employment history. See *People v. Banks*, 2015 IL App (1st) 130985, ¶¶ 17, 19, 20 (the defendant's 45-year sentence, which included a 25-year mandatory firearm enhancement, did not violate the proportionate penalties clause where the circuit court retained discretion to impose a sentence within the statutory range and could consider the mitigating factors). "Although [the] defendant argues that, given his age, his rehabilitation potential should receive greater consideration, the potential for rehabilitation need not be given greater weight than the seriousness of the offense." *Thomas*, 2017 IL App (1st) 142557, ¶ 44, citing *Sharpe*, 216 Ill. 2d at 525. We,

therefore, conclude that the defendant's sentence does not violate the proportionate penalties clause of the Illinois Constitution.

¶ 54 Having rejected his claims of error, we affirm the defendant's convictions and sentence.

¶ 55 Affirmed.