2017 IL App (2d) 160671-U
No. 2-16-0671
Order filed December 12, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PAUL GILMORE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 01-CF-1755 Honorable James C. Hallock, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Although the trial court used an erroneous legal standard in assessing defendant's ineffective-assistance claims in a preliminary *Krankel* inquiry, the error was harmless because defendant's claims pertained to matters of trial strategy. Affirmed.

¶ 2 In 2003, following a jury trial, defendant, Paul Gilmore, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2000)) and acquitted of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2000)). The trial court, with Judge Timothy Q. Sheldon presiding, sentenced defendant to 32 years' imprisonment. Defendant filed a *pro se* posttrial motion, alleging ineffective assistance of counsel, and the trial court summarily denied the

motion without conducting a preliminary (*i.e.*, first-stage) examination of the claims, consistent with the procedure in *People v. Krankel*, 102 Ill. 2d 181, 189 (1984). On appeal, this court reversed the dismissal of defendant's posttrial motion and we remanded the cause for a preliminary hearing. *People v. Gilmore*, 356 Ill. App. 3d 1023, 1037 (2005).

¶ 3 On remand, the trial court, with Judge Sheldon again presiding, appointed counsel to represent defendant. On October 24, 2007, after conducting an evidentiary hearing, the court denied defendant's motion. Defendant appealed, and this court concluded that, because the proceedings on remand improperly limited defendant's claims of ineffective assistance, our mandate was not executed; thus, we reversed and remanded for a preliminary inquiry into defendant's claims. *People v. Gilmore*, No. 2-07-1055 (2009) (unpublished order under Supreme Court Rule 23).

¶ 4 On the second remand, with Judge Sheldon again presiding, the court denied defendant's posttrial motion, finding no "possible neglect" by trial counsel. Defendant appealed, and, in 2015, this court, in appeal No. 2-14-0852, summarily reversed and remanded after the State confessed that it was improperly allowed to actively participate in the preliminary *Krankel* hearing.

¶ 5 On the third remand, the case was assigned to Judge James C. Hallock. In 2016, after a hearing, the court denied defendant's posttrial motion. Defendant appeals.

¶ 6 In this fourth appeal, defendant argues that the trial court applied the wrong legal standard to analyze his claims. Specifically, he asserts that, rather than analyzing each claim to determine whether there was "possible neglect" by trial counsel, which is the standard applied in preliminary *Krankel* hearings, the trial court assessed whether defendant had shown ineffective assistance under the two-part *Strickland v. Washington*, 466 U.S. 668, 694 (1984), test, a more

stringent standard applied in second-stage, adversarial *Krankel* hearings where a defendant is represented by counsel. The State responds that any error was harmless because defendant's claims concerned matters of trial strategy, which are immune from ineffective-assistance claims. We conclude that the trial court applied the wrong legal standard, but the error was harmless because defendant's claims pertained to matters of trial strategy. Accordingly, we affirm.

¶ 7 I. BACKGROUND

¶ 8 In 2001, defendant was indicted and assistant public defender Regina Harris was appointed to represent him. Prior to trial (in January 2003), she informed the trial court that neither she nor the State had succeeded in serving with a subpoena a potential witness, Patricia Holley (who subsequently became the focus of defendant's posttrial ineffective-assistance claims and this appeal). A stipulation in lieu of Holley's testimony had been prepared, but it was not offered during the trial.[1]

¶ 9 At trial, the State established that, on March 30, 2001, several people, including Dionna Ross, A.C. Span (Ross's boyfriend), Donald Harvey (the murder victim and Span's roommate), and Holley, were staying at April Heard's (Harvey's girlfriend's) apartment at the Foxview complex in Carpentersville. (Heard was incarcerated.) Ross claimed that, defendant, who lived in the same complex at 20 Oxford (another apartment across the parking lot), forced her to perform oral sex on him. She returned to Heard's apartment at about 1 a.m. Thereafter, Span, Harvey, and defendant fought in the parking lot. The fight ended, and Span, Harvey, and Ross returned to Heard's apartment.

[1] The stipulation is not contained in the record on appeal. We rely on the parties' representations as to its contents.

¶ 10 Span testified that, at about 4 or 5 a.m. the next morning, a gunshot awoke him and he heard the outer door to his building slam. Span "ran to" his bedroom window, which was "right by the window" and overlooked the parking lot, and saw defendant running and holding something in his right hand. Defendant entered 20 Oxford. Span heard someone outside ask, "Did you get him?" While looking out the window, Span heard Holley coming up the stairs and screaming. (The apartment unit consisted of two levels.) Ross was in the room at this time; she was also awake and out of bed. Holley came into the bedroom, screaming that Harvey was shot. Span tried to calm her down while he went downstairs. He told both Holley and Ross "to stay low, get down and be quiet, as I turned off the lights downstairs and the TV." Once downstairs, Span saw Harvey lying on the floor just inside the doorway to the apartment. Span related that Harvey said, "that the guy that we got in the fight with shot him."

¶ 11 Prior to trial, Span was convicted of felony and misdemeanor thefts. At the time of trial, he faced charges of residential burglary, unlawful possession of a stolen motor vehicle, misdemeanor theft, and aggravated theft on a public way.

¶ 12 Addressing the shooting, Ross testified that the sound of a gunshot awoke her. It sounded like it was outside the window. When she awoke, she thought it was just a dream, so, she did not do anything. After the gunshot, Holley knocked on the bedroom door, calling for Span. Ross opened the door and let her in. When Ross asked what had happened, Holley said that Harvey had been shot. Ross responded, " 'Are you serious?' " Ross was very nervous. Ross and Span went downstairs. ("[Span] went downstairs as soon as [Holley] came upstairs.") They saw Harvey lying on the floor. Span walked over to Harvey, and Harvey said, "The [bald-headed] dude who we got into it with just came and shot me." Ross described defendant as

having no hair on his head and unkempt facial hair. Span asked some people outside, including a man called PeeWee, to call the police.

¶ 13 Larry Nichols lived in the apartment complex where the shooting took place. Afterwards, while in custody on controlled-substance charges, Nichols spoke to detectives about the shooting. Initially, he denied knowing anything about it, but, after they pressured him, Nichols told them that he saw defendant after the fight while walking to the apartment. Defendant asked Nichols if he had a gun and said that he was going to shoot the person he had been fighting. Nichols testified that he told the police these things because he was scared and, "[t]hey told me they was going to work me out a deal. I told them anything to get myself out of trouble, but it didn't happen."

¶ 14 Two witnesses, Jeanette Wesley and Fanny Moore, testified that, in the early morning hours of March 31, 2001, defendant was with them at Wesley's home in the Foxview Apartments. He related to them that he was contemplating revenge and would either fight the two men again or shoot out their windows. However, defendant did not say that he would go to their door and shoot them. Defendant removed a gun from a grocery bag that he had with him. Wesley went to bed at around 3 or 3:30 a.m. She slept on her living-room floor, and defendant was there, too. Wesley decided to go to sleep because she felt that she had successfully talked defendant out of doing anything foolish. The women saw defendant again at 6 or 7 a.m., sitting in their kitchen, but they did not see the gun. They drove defendant to Chicago to his mother's home.

¶ 15 Two detectives testified that, at the hospital, they asked Harvey if he could name the shooter. Harvey told them that he did not know the person's name, but that he had fought with the person earlier that evening. He described the shooter as an African-American male who was

taller than Harvey, who was about 5 feet, 4 inches tall. Harvey stated that Span was also involved in the fight and might know the shooter's name.

¶ 16 The defense did not present any evidence. On January 29, 2003, the jury found defendant guilty of murder, but acquitted him of aggravated criminal sexual assault. Defense counsel Harris filed a posttrial motion, asserting that the court erred in admitting Harvey's statements to Span and one of the detectives and challenging the sufficiency of the evidence. The trial court denied the motion, proceeded to the sentencing hearing, and sentenced defendant to 32 years' imprisonment.

¶ 17 On May 7, 2003, defendant filed a *pro se* posttrial motion for a new trial, alleging ineffective assistance of counsel. Specifically, defendant alleged that Harris was ineffective because she: (1) had not adequately impeached Span; (2) did not locate, attempt to speak with, or subpoena Holley, who would have been a key witness; and (3) did not play Holley's taped statement for the jury, despite representing to defendant that the tape would be played when Holley did not appear. In addition, defendant alleged that African-American and Hispanic jurors were improperly excluded from the jury. The trial court denied defendant's motion without a hearing.[2] Apparently, the court believed that defendant's motion was identical to Harris's and the court did not notice that defendant's motion included an ineffective-assistance claim.

¶ 18 Defendant appealed, arguing that the trial court: (1) erroneously admitted Harvey's dying declarations; and (2) erred in summarily denying his *pro se* motion. On April 29, 2005, this court upheld the admission of the dying-declaration evidence, but remanded for further proceedings on defendant's *pro se* motion. *Gilmore*, 356 Ill. App. 3d at 1037. Specifically, we

[2] Also by this time, the trial court had denied defendants' *pro se* motion to reduce sentence and Harris's motion to reconsider the sentence.

concluded that the court erred by ruling upon the *pro se* motion without first conducting a preliminary investigation into defendant's ineffective-assistance claims:

> "We note that the trial court was not in a position to evaluate all of the ineffective assistance claims simply by relying on facts within its knowledge. [Citation.] For example, the claim that defense counsel failed to call Holley would require at least a brief inquiry into the potential substance of Holley's testimony and why counsel was unable to secure her presence or obtain a stipulation. Because the trial court did not conduct a preliminary investigation, we must remand the cause for that purpose." *Id.*

Accordingly, we remanded for a hearing on "defendant's *pro se* posttrial motion challenging trial counsel's performance." *Id.*

¶ 19 On remand, Rachel Hess was appointed to represent defendant, and, on March 5, 2007, Hess filed an amended posttrial motion on his behalf with various supporting documents. That motion contained a recitation of the procedural history of the case and included the following two paragraphs:

> "13. The matter was remanded back for further proceedings on Defendant's *pro-se* supplemental posttrial motion limited to the claims of ineffective assistance of counsel.
>
> 14. Thus, the issue to be addressed on remand is limited to an inquiry into the potential substance of Patricia Holley's testimony and why counsel was unable to secure her presence or obtain a stipulation was required [*sic*]."

¶ 20 In the motion, Hess alleged that Harris was ineffective for not investigating, interviewing, and calling Holley as a witness. Hess argued that Holley's testimony would have supported the defense's claim that someone other than defendant killed Harvey and, thereby, would have affected the outcome of the trial.

¶ 21 Hess attached a 2007 affidavit from Holley, wherein Holley stated that she was very afraid and would rather not testify. In addition, she stated that, to her knowledge, the murder was not committed in retaliation for the altercation between Span and defendant. Rather, Holley asserted that she, not Harvey, was the intended target of the shooting because of a drug deal that went bad because of a scam by a drug dealer to rob Holley of a $100 bill. She claimed that Harvey, who was at Heard's apartment, answered the apartment door to purchase crack cocaine for Holley and was shot because the dealer intended to rob Holley. Holley averred that the two key witnesses at trial, Span and Ross, did not know what actually happened because they were upstairs fighting at the time of the shooting.

¶ 22 Hess also attached an affidavit from defendant, wherein he averred that, although Holley was unavailable at trial, her statement to police reflected that she was only a few feet away from Harvey when he was shot and that she went upstairs after the shooting and knocked on the door of the bedroom occupied by Span and Ross. Ross answered the door, and Span got out of bed *after* Holley told Ross that Harvey had been shot. Accordingly, defendant claimed that Holley's statement *contradicted* Span's claim that *he* heard the gunshot and immediately looked out of the window and saw defendant running from the scene. Defendant also averred that Holley's statement would corroborate Ross's trial testimony that she and Span were asleep and Holley woke them up, after which Span went downstairs.

¶ 23 (In the transcript of Holley's April 2, 2001, interview with the police, which was attached to a later filing, Holley stated that she arrived at the apartment at about 12:15 a.m. Ross and Span were upstairs fighting. Ross was upset and had been crying; she was bruised, and her face looked swollen. Span "was fist fighting with her." Holley observed Span push Ross back into the bedroom and call her a bitch. Addressing the shooting, Holley stated that she did not see the

shooter. When Officer Johnson asked Holley what transpired after the shooting, when she ran upstairs to get Span, she replied, "I banged on the door *** and when he [*sic*] came to the door *** [Ross] came to the door I told him [Harvey] had been shot *** and he jumped up and he was putting on *** no he jumped up and he ran down the stairs.")

¶ 24 Hess alleged that the failure to locate and present Holley to testify could not be considered sound trial strategy because, if her testimony had been presented at trial, the outcome would have been different. Hess also argued that the testimony suggested that someone other than defendant shot Harvey and that it would have directly contradicted Span, one of the State's main witnesses; instead, Span's testimony went uncontradicted.

¶ 25 A. 2007 Hearing

¶ 26 In 2007, before proceeding to a hearing on defendant's motion, Hess sought a continuance to produce Holley because Holley had not appeared despite having been subpoenaed; Holley had contacted the State's Attorney's office to say that she had no transportation. The court decided to hear testimony from defendant and Harris, who were present, and to give the defense one more chance to bring Holley into court.

¶ 27 1. Defendant

¶ 28 Defendant testified that he learned of Holley's police statement more than one year before his trial, when Harris showed him the police reports. He did not know what, if anything, Holley could say beyond the reports. According to defendant, Holley's police statement reflected that she was standing a few feet from Harvey when the murder occurred, that she knew who committed the murder,[3] and that the shooting occurred because of a drug deal gone bad. Defendant felt that Holley's testimony was important, and he discussed potential trial witnesses,

[3] She actually denied seeing the shooter, but also stated that defendant was not present.

including Holley, with Harris prior to trial. At one point, he telephoned Holley from jail; someone answered the phone, handed it to Holley, and she hung up. Defendant told Harris that Holley could be located at that telephone number.

¶ 29 Harris reported that she had called the number, but had not reached Holley. Prior to trial, defendant and Harris discussed the fact that Holley had not been found and would not testify. According to defendant, Harris did not specify what she had done to try to find Holley. Defendant testified that the possibility of a stipulation to Holley's testimony was raised before trial, but no stipulation was ever presented. He did not ask Harris why the stipulation was not presented, but he did ask Harris, prior to trial, whether Holley's taped statement could be played if Holley did not appear. Defendant did not recall receiving an answer.

¶ 30 2. Harris

¶ 31 Harris testified that she was currently the De Kalb County Public Defender. In 2003, when she represented defendant, Harris was the first assistant public defender in Kane County. Harris had practiced law for over 18 years and had handled over 2000 felonies, 50 to 60 of which were murder cases. Harris first became familiar with Holley around 1990, during her tenure with the Public Defender's office. Harris knew that Holley suffered from numerous problems, including post-traumatic stress disorder.

¶ 32 According to Harris, police reports reflected that Holley witnessed the shooting, although none stated that Holley had seen the shooter. The reports also reflected that Holley stated to police that she had asked Harvey to call Tommy Dickson,[4] also known as PeeWee, to bring some cocaine to her. PeeWee brought Holley $20 worth of cocaine. Later, Holley asked Harvey to

[4] The record also contains "Dixon" as an alternative spelling. For consistency, we use "Dickson."

call PeeWee again. When PeeWee arrived, Holley wanted only $10 worth of cocaine, but had a $50 bill. PeeWee wanted Holley to buy more cocaine. She declined, and PeeWee left; he was supposed to return with change and the drug. When someone knocked at the door, Holley told Harvey to answer it. Harvey opened the door, was shot, and fell to the ground. Holley believed that she, not Harvey, was the shooter's intended target. After the shooting, Holley was so upset that she was taken to the hospital.

¶ 33 According to Harris, the defense theory at trial resembled an alibi defense; two female witnesses (Wesley and Moore) placed defendant in their apartment when they went to sleep and when they awoke shortly after the shooting. In addition, although the witnesses testified that defendant had been very upset after his fight with Span and had talked of getting revenge or shooting Span's windows, defendant had calmed down by the time they went to sleep. Harris understood that Holley's police statement raised the inference that PeeWee, rather than defendant, was the shooter. Also, Holley had stated that she went upstairs to get Span after the shooting, which contradicted Span's account that he ran downstairs after hearing the shot. Holley had also reported that Span and Ross had argued, with Span pushing Ross, and repeatedly calling her names. In this regard, Holley's testimony might also have affected Span's credibility to the extent that he portrayed himself as Ross's knight in shining armor.

¶ 34 Harris never obtained any information from Holley beyond what the police reports showed. She testified that her office made many unsuccessful efforts to interview Holley. Her office's initial efforts to locate Holley occurred in June 2001, shortly after Harris was assigned to the case. Harris learned that Holley did not want to be found. As the trial date neared, a second effort was made. Tracy Newcomer, the chief investigator for the Public Defender's office, made several attempts to locate, interview, and subpoena Holley over a six- to eight-week period.

("[S]he was able to locate people who knew where [Holley] was but was not able to get actual access to Ms. Holley.") Harris believed that Newcomer contacted Holley's friends and relatives and was informed that Holley was in hiding because she feared for her life and would not surface until after trial. ("[W]e were told sort of in no uncertain terms that she's not going to surface until after this trial is over.") Thus, although Harris issued a subpoena for Holley, it was never served.

¶ 35 Harris and the prosecutor prepared a stipulation to Holley's testimony that was based upon the police reports. Harris believed that the defense had done all that could be done to locate and subpoena Holley. Moreover, Harris considered the stipulation to be preferable to Holley's appearance at trial. Harris found Holley to be "very unstable." Harris related that Holley was present in a motor vehicle when her sister's estranged husband shot her sister in the head. Holley was splattered by her sister's blood and brain matter. Since then, Holley has suffered post-traumatic stress disorder and has had other mental-health issues. "She's never really been quite right. And depending on the day, [Holley] can be just fine and [Holley] cannot be just fine. You just never know." Harris was concerned about how Holley would come across under the stress of testifying in a murder trial. She further described Holley as an emotionally-volatile person who cries often and is very nervous. Holley shakes when she has even a normal conversation. The stipulation would have avoided presenting Holley to the jury. In addition, the stipulation would have avoided impeaching Holley with her felony record and drug addiction.

¶ 36 Harris further testified that she had many discussions with defendant about the stipulation. At trial, the State rested its case without calling all of its available witnesses. Harris believed that the State strategically believed that it would call those witnesses to rebut defendant's and/or Holley's stipulated testimony. Harris was particularly concerned that the

State would call PeeWee and his brother, who could have been damaging to the defense. She believed that the trial had gone as well as could be expected for defendant, and she advised defendant not to present the stipulation; Harris thought defendant would be worse off if witnesses rebutted Holley's testimony than he would be if the defense presented no evidence. Harris and defendant had a vigorous debate; defendant very much wanted to present the stipulation. They discussed it quite a bit, but defendant, ultimately and not happily, accepted Harris's advice. According to Harris, the State was surprised when the defense rested without presenting evidence, thereby, preventing any rebuttal.

¶ 37 Regarding defendant's interest in Holley's taped statement to police, Harris recalled discussing the statement with defendant and explaining to him that, in her professional experience, the statement would be admissible only to impeach Holley if she testified contrary to it. She did not discuss with defendant the tape being played in substitution for Holley's live testimony; that was the purpose of the stipulation.

¶ 38 3. Holley

¶ 39 After Harris's testimony, the hearing was continued to October 4, 2007. Holley appeared and testified that, on March 31, 2001, she was in Harvey's apartment. As she began to describe the events of the evening, the State objected. The court instructed Hess to ask Holley why she had not come to court to testify at trial. Hess responded that whether Holley's testimony about the events at issue would have impacted the trial was a subject to be examined. The trial court reviewed this court's opinion and stated that the only issue to be considered was trial counsel's performance.

¶ 40 Hess then continued her examination, wherein Holley acknowledged that she was present when the shooting occurred; however, Holley did not see the shooter. Still, she testified that

defendant was not present at the time of the shooting. After the shooting, she ran upstairs and went to Span's room. (Defendant notes that, at this point, after another objection, Holley's depiction of the events was again truncated.) Holley testified that she told the police what she had observed. She did not provide the police with an address because she did not have one. Subsequently, Holley had no contact with the police or the offices of the State's Attorney or Public Defender. She testified that she did not call those offices to tell them where she was because she did not know that she had reason to. Holley went to Chicago shortly after the murder. Prior to that, she was hospitalized at St. Joseph Hospital in the psychiatric ward. As of January 2003, Holley was living "place to place." Holley testified that she was imprisoned at Lincoln Correctional Center in 2001 to 2002, or "possibly" 2002 to 2003. Later, she testified that she went into custody in April, May, or June 2003. (Defendant's trial occurred in January 2003.) She told her attorney at the time that she was scared and did not want to testify in defendant's case; he advised her to keep quiet. Holley testified that she did not need to tell anyone that she did not want to cooperate because she never contacted anyone and no one contacted her. She did *not* have any relatives and did *not* tell any friends that she did not want to be found for trial. Holley testified that she learned of defendant's conviction after her release from prison. She was contacted by Hess and drafted and signed an affidavit. Holley did not come forward sooner because she did not realize that she needed to.

¶ 41 Holley further testified that she had been hospitalized in psychiatric facilities about 10 times. She has dual diagnoses for post-traumatic stress disorder and drug addiction. The disorder developed after she witnessed a double murder; she was meant to be the third victim. She testified that she had used drugs the day of Harvey's shooting. Holley testified that she served time in the department of corrections on three occasions. Holley possessed a felony

conviction for "um, let me see—I think retail theft—no, it was for forgery, writing a check, bad check" in "I think it was in 2000 or '99 or '01, somewhere around there I had the case."

¶ 42 4. Arguments and Ruling

¶ 43 In closing argument, Hess argued that defendant had been deprived of effective assistance of trial counsel because Harris did not locate Holley and then did not present the stipulation. Accordingly, defendant did not benefit from her testimony. Hess noted that Holley testified that she never purposefully evaded being found and argued that, despite her transient status, Holley could have been located. Hess stated that "on remand, we are to explore the issue of the potential substance—well, conduct a preliminary inquiry to determine the potential substance of Ms. Holley's testimony and why counsel was unable to secure her presence or to obtain a stipulation." She requested that the court appoint an attorney for further proceedings on the issue of ineffectiveness. Hess also asked that the court make a finding of "possible neglect" and to find that Holley's testimony had a potential bearing on the trial outcome.

¶ 44 The State argued that Harris's actions were strictly a matter of trial strategy and that her actions should be viewed by considering what she knew at the time.

¶ 45 The trial court agreed with the State. It noted that, although defendant need only be afforded a hearing *pro se* at the preliminary-inquiry stage, it *had* appointed counsel for that inquiry. The court reviewed the witnesses' testimony, finding Harris to be the most credible witness. It recognized Harris's legal experience and that "the Judges of the 16th Judicial Circuit have expressed their trust in her in unanimously appointing her the Public Defender of De[ ]Kalb County after 18 years of service in Kane County." The court found that there was no neglect on Harris's part. "What she did was proper trial strategy and this Court has to agree with her that the stipulation and perhaps the not calling [of any] witnesses or using the stipulation was sound

trial strategy." The court noted Holley's instability, mental-health problems, and criminal record. It further stated that Harris used an investigator, but that Holley appeared to do everything in her power to disappear or was incarcerated, and she did nothing to make herself available to police, the Public Defender's office, or the State's Attorney's office. Thus, the court determined that there was no neglect in Harris's representation of defendant and no ineffective assistance of counsel.

¶ 46 Defendant appealed, and this court reversed and remanded for a new preliminary hearing, holding that defendant did not receive a proper preliminary hearing that afforded him the opportunity to specify and support his complaints, because his claims were improperly dropped or narrowed where Hess had pursued only the claims concerning Holley's testimony. We also noted that the substance of Holley's testimony was truncated. *Gilmore*, No. 2-07-1055 (2009).

¶ 47 5. Second Remand and Third Appeal

¶ 48 On remand, Judge Sheldon instructed defendant to prepare a written pleading specifying his claims of ineffective assistance. On May 12, 2010, defendant filed his *pro se* motion, setting out his claims, with supporting documents, including Holley's 2007 affidavit, a March 2001 police report, and a transcript of the April 2001 police interview of Holley.

¶ 49 Defendant alleged in several claims that Harris was ineffective for failing to call Holley, an exculpatory and material witness who would have testified that someone other than defendant was the shooter. He also alleged that counsel failed to: (1) challenge false testimony from a police officer as to Harvey's dying declaration at the hospital; (2) seek a mistrial and adequately challenge perjurious testimony by Moore about whether, after the incident, she and another woman went to Chicago with defendant; (3) impeach Span with a prior false statement to a detective about seeing defendant and witness Dickson in the parking lot around the time of the

shooting and about his description of defendant; (4) challenge a suggestive lineup identification by Span, which was obtained in violation of the right to counsel; and (5) object to the State's preempting of an African-American prospective juror.

¶ 50 A hearing on defendant's motion began on August 19, 2010. Judge Sheldon directed that defendant's claims would be considered point by point, with defendant first articulating each claim, trial counsel Harris responding, the State responding next, and defendant getting the "last word." The State asked the court to take into account Harris's earlier testimony as well.

¶ 51 As to defendant's claim that Holley's testimony would have supported the defense theory that someone else was the shooter and would have refuted Span's testimony about jumping out of bed upon hearing a shot and looking out the window and seeing defendant flee the scene, Harris explained that she and defendant had discussed Holley being a witness. Defense investigator Newcomer had sought to locate Holley, but was unsuccessful. She had never learned that Holley was, at one point, imprisoned. Harris recalled that a family member in Elgin told Newcomer that Holley did not wish to be found or be a witness in this case. This "made it clear to me that she was doing everything that she could to avoid being found." Harris did not think that Holley's taped statement could be played in her absence. Thus, at this point, Harris prepared a stipulation with the prosecutor. However, Harris and defendant had a disagreement about whether to use the stipulation, with defendant advocating for it and Harris believing that they were courting trouble on rebuttal if it were offered. Harris testified that she decided as a matter of trial strategy not to use the stipulation. She believed that the State had reserved several rebuttal witnesses who could be very damaging to the defense. Specifically, she noted that Kendall Meeks would have testified consistent with a police report that, after the fight, he saw defendant, who asked him for assistance in getting a gun and stated that he was going to kill the

guys who beat him up. Harris also mentioned Gregory Griffin, who had made a statement that, in 2002, while they were both in a jail bullpen, defendant whispered to him that he had the case beat because no one saw him. Defendant also allegedly told Griffin that the whole thing started because of an incident between defendant and Span's girlfriend and that defendant wanted to kill both Span and Harvey in retaliation for beating him up. Defendant obtained a gun from "E," went to Span's apartment, knocked on the door, and shot Harvey when he answered. According to Harris, Griffin was potentially very damaging and he further corroborated Nichols's impeached testimony that, after the fight, defendant was looking for a gun.

¶ 52 Harris stated that, in her experience, the trial prosecutor, Joe Cullen, often held back witnesses for rebuttal. She had told defendant that the case had gone "as good as it gets" during the State's case and that she believed that it would be preferable if the State did not present rebuttal testimony, especially since she thought Cullen anticipated that defendant would take the stand. Harris stated that she made a strategic decision not to use Holley's stipulation and advised defendant not to testify and, thus, "force the State to have to live with the decision that they had made about what to put on and what to hold back." In the course of her conversations with defendant, Harris believed that defendant had come to understand her reasoning and "while he, you know, perhaps still had his own thoughts, if he had ultimately agreed to go with my judgment, I have [*sic*] may have not read that correctly." Ultimately, the decision whether or not to call a witness, Harris stated, was her decision to make.

¶ 53 Addressing Holley, Harris explained that she had known her since 1988. She suffered from mental-health problems that stemmed from witnessing her sister's shooting. She was in a vehicle when her sister was shot in the head and Holley was sprayed with blood, bone, and brain matter. She had post-traumatic stress disorder and depression issues. She has been very fragile

and unstable since that incident. Holley also has an extensive criminal record and a history of drug addiction. She could be very unpredictable if called as a witness. As to Holley's story that she twice asked PeeWee for cocaine and that the shooting occurred close in time to her second request, Harris stated that it "seemed highly suspect." Also, Harris noted that the State would have objected, as speculative, to any testimony by Holley that she believed she was the target of the shooter. Further, Holley did not see the shooter, thus, she would not have added much to the defense. She would have been limited to describing what she actually saw and heard.

¶ 54 The State argued that Holley was not in custody during the trial and had admitted hiding and that she could have been impeached on details such as whether she had a $50 or $100 bill on the night of the shooting. Also, she could have provided motive for the shooting, but could not have identified the shooter. Nor could she have directly contradicted Span about what happened when she knocked on his bedroom door. Harris, in the State's view, was a very experienced attorney who made strategic decisions and took into account what was actually admissible.

¶ 55 Defendant's position was that he would have preferred that all of the witnesses had testified and the jury be left to resolve the issues. In defendant's view, Holley would have contradicted Span's version of what happened after he awoke. As to Griffin, he had seen defendant's paperwork about the case in defendant's cell and fabricated what defendant allegedly said. (Harris responded that defendant had told her that Griffin had seen police reports in the cell, but she believed it would not be a good idea to have him testify just to be discredited by that information.) Meeks, according to defendant, was himself under arrest when he reported what he allegedly knew to the police.

¶ 56 Defendant further argued that Harris failed to impeach Span with a prior statement to the police, describing the person with whom he fought on the night of the shooting and claiming to

have seen that person speaking with a man named Chris/Christopher Dickson in the parking lot at the time of the shooting. Harris responded that Dickson had denied any knowledge of the shooting and that Span could have explained away any impeaching detail. Harris believed that the prior statement would have hurt the defense more than it could have helped it because it would have firmed up Span's identification of defendant as the shooter.

¶ 57 Defendant also raised a claim that Harris had failed to move to suppress a lineup identification by Span, arguing that Span had misidentified him even though he did not fit the description Span had given and that he had been forced to stand in the lineup despite requesting to have counsel present. Harris responded that she could not recall if defendant ever asked her to challenge the lineup, but he had raised the absence of counsel. She determined that the lineup was not testimonial and, thus, there was no basis for a confrontation claim. Also, defendant had not complained that the lineup was suggestive. The State replied that the lineup occurred before defendant had been indicted and, thereby, acquired the right to counsel. Also, the police report did not reflect that defendant had asked about counsel.

¶ 58 Returning to the subject of the stipulation, Harris stated that it did not contain all of the information Holley related to the police. Specifically, it did not contain her *opinion* that the shooting resulted from a drug deal gone bad. It *did* include that she had not seen the shooter. The State added that Holley could only guess as to the shooter's identity, which would not have been admissible. Also, one of the State's rebuttal witnesses was Troy Dickson, who would have denied committing the shooting and had been ruled out as the perpetrator by the police. Defendant responded that Troy was not "PeeWee" and that Meeks could have been impeached by his own charges. (Troy testified at trial that his nickname is Little Cat and that his brother's,

Tommy's, nickname is PeeWee. A third Dickson brother, Christopher, is known as Boo Boo. In this and the 2106 hearing, Harris referred to Troy as PeeWee.)

¶ 59 Defendant also raised claims that the State had improperly preempted prospective African-American and Latino jurors, leaving him to be tried by an all-Caucasian jury. Harris noted that she did object when the State excused one prospective juror, but the court had the State provide a reason and found it sufficient. Finally, defendant also argued that Moore had lied and given testimony contrary to her statements to police and that Harris had not requested a mistrial. Harris responded that she had impeached Moore and argued that she was not credible, but that perjury had not been shown.

¶ 60 The trial court found no neglect on Harris's part. Defendant appealed, and, in 2015, this court, in appeal No. 2-14-0852, summarily reversed and remanded after the State confessed that it was improperly allowed to actively participate in the preliminary *Krankel* hearing.

¶ 61 5. Third Remand and 2016 Hearing

¶ 62 Upon the third remand, the case was assigned to Judge Hallock, who conducted the *Krankel* hearing on June 9, 2016. (On March 10, 2016, the court had granted a continuance, but also returned to the State a computer disk containing the trial record, stating that he would not look at it and thought it appropriate to consider the posttrial motion only on the record at the preliminary hearing.)

¶ 63 Defendant read his 2010 *pro se* motion, setting out all of his (nine) claims of ineffective assistance of trial counsel Harris. Harris responded to each claim, and she and defendant answered the court's questions. Harris's responses were consistent with, but somewhat less detailed, than those at the 2010 hearing. We briefly summarize the testimony relevant to this appeal.

¶ 64 Harris testified that she has known Holley for many years as a client. She summarized Holley's story about the cocaine deal. Holley did not see the shooting, but "the whole chain of events of her—um—asking for the cocaine on two separate occasions and the shooting occurring within close proximity to her second request for the drugs all seemed highly suspect." Holley told police that she believed she was the shooter's intended target. Harris explained that Holley had been traumatized years before by her sister's killing. Holley was never "quite right after that" and had many resulting mental-health hospitalizations. The shooting triggered a lot of things, and Holley believed that she was the intended victim. Harris was interested in speaking to Holley, but it became clear that Holley was deliberately avoiding Harris and her investigator. According to Harris, Holley's family members informed her that Holley would not surface until after the trial; she did not want to testify because she was afraid of becoming a target. Holley was in hiding.

¶ 65 Harris concluded that Holley's potential testimony was "a double-edged sword." On the one hand, Holley could support the defense theory that defendant was not the shooter and the incident was about something not having to do with him, but, on the other hand, there was Holley's history of mental-health problems, "her clear paranoia at the time of the case," and how she would present as a witness (she is "extremely anxious" and nervous and "will completely shut down when she's afraid or worried"). Harris testified that she had a lot of concerns about whether it would be helpful to have her testify. Also, there was a question about which PeeWee Holley had asked to obtain her cocaine: one of them is one of the Dickson brothers, and the other is Aletha or Orletha Walker.

¶ 66 According to Harris, she and the prosecutor agreed to a stipulation concerning Holley's statement to the police, "except for her belief that she was the intended target of the shooting."

However, there was the potential that the State would offer rebuttal testimony. The prosecutor had several individuals in the jail lock-up on the trial date who appeared to be there to rebut Holley's statement in the event that it came in. Harris believed that the case had gone as well as she could have hoped, and she told defendant the same. Harris did not want to use the stipulation. Defendant did not initially agree, but "ultimately we did agree that we would not put in that statement."

¶ 67 Addressing her office's search for Holley, Harris testified that Holley's family told Harris and Newcomer that Holley was hiding. Newcomer made many attempts to locate Holley, including through cousins, friends, and going to the apartment defendant had called from the jail. Harris suspected that Holley was intentionally hiding because she ordinarily was "everywhere all the time, you can always find her." After trying to locate her at the apartment, a friend or cousin told Harris/Newcomer that Holley would not come out of hiding until after the trial.

¶ 68 Addressing the inconsistencies between Span's and Holley's version of what happened when Holley came to his bedroom, Harris responded that she believed that she impeached him on all of his inconsistent statements, but could not specifically recall that aspect of the testimony.

¶ 69 At the conclusion of the hearing, Judge Hallock stated that he would have a transcript prepared, would analyze the claims, and prepare a written ruling. (An August 4, 2016, order in the common-law record reflects that the trial court returned to the clerk "Folder 2" of the court file and a thumb drive of the report of proceedings.)

¶ 70 Also on that date, the court issued its ruling, finding that there was no ineffective assistance of counsel and denying defendant's motion. The court set out the two-part *Strickland* test and then went through defendant's nine claims of ineffective assistance, five of which

involved Holley and which are the focus of this appeal. It did not set out the lower, "possible neglect" standard for preliminary *Krankel* hearings.

¶ 71 As to the claims involving Holley, the court determined that she was hiding out and avoiding being served with a subpoena. Harris, however, was able to work out a stipulation with the State to replace Holley's testimony, but then made a strategic decision not to present it so as to avoid rebuttal testimony. The court also found that any inconsistency between Holley's testimony and Span's was insignificant and that Harris had cross-examined Span about where he was at the time of the shooting and at the time Holley entered his room afterwards. Given Holley's avoidance of service, Harris, the court further found, was restricted in what she could do about her and, "[a]pplying the *Strickland v. Washington* standard," it found that defendant's allegations did not show ineffective assistance. In its concluding summary, the court repeated that there was no ineffective assistance under the *Strickland* standard. Defendant appeals.

¶ 72 I. ANALYSIS

¶ 73 Defendant argues that the trial court applied the wrong legal standard to evaluate his ineffective-assistance claims. Rather than analyzing each claim to determine whether defendant had shown "possible neglect" by trial counsel, the trial court determined whether defendant had shown ineffective assistance under the two-part *Strickland* test, a more stringent standard. See *Strickland*, 466 U.S. at 687-94 (under *Strickland*, a defendant must prove both that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant). Defendant requests that we vacate the trial court's order denying his motion and remand the cause for another preliminary *Krankel* inquiry. Alternatively, defendant contends that there *was* a showing of "possible neglect" and he requests a remand for, preferably, a *stage-two Krankel* hearing where he will have the assistance of new counsel to litigate his ineffective-assistance

claims. The State responds that the trial court's use of the *Strickland* standard was correct and that, on the merits, there was no "possible neglect" or ineffective assistance by trial counsel. Alternatively, the State argues that, even if there was error in using the *Strickland* standard, any error was harmless because the testimony and stipulation issues concerned matters of trial strategy. We agree with defendant that the court applied the wrong standard, but we conclude that the error was harmless because the issues relating to the presentation of Holley's version of the events concerned matters of trial strategy.

¶ 74 A. Standard of Review

¶ 75 The question whether the trial court conducted a proper preliminary *Krankel* inquiry presents a legal question, which we review *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28; see also *People v. Moore*, 207 Ill. 2d 68, 75 (2003) (applying *de-novo* review where the trial court "operated under [a] legal misapprehension").

¶ 76 B. *Krankel* Procedure

¶ 77 A common-law procedure has developed following our supreme court's *Krankel* decision, and it "is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel." *Id.* at ¶ 29. Under the common-law procedure, the trial court must first (in what is called the preliminary inquiry) examine the factual basis of the defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If the court determines that the claim *lacks merit or pertains only to matters of trial strategy*, it need not appoint new counsel and may deny the defendant's *pro se* motion. *Id.* at 78. "A claim lacks merit if it is conclusory, misleading, or legally immaterial or does not bring to the trial court's attention a colorable claim of ineffective assistance of counsel." *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 40. However, if the allegations show "possible neglect" of the case, then new counsel should be

appointed. *Id.* Following the appointment of counsel (*Krankel* counsel), the case proceeds to the second *Krankel* stage, which consists of an adversarial and evidentiary hearing on the defendant's claims and during which *Krankel* counsel represents the defendant. *People v. Downs*, 2017 IL App (2d) 121156-C, ¶ 43. At the second stage, *Krankel* counsel must review the defendant's *pro se* allegations and then must present any nonfrivolous claims (*i.e.*, those with an arguable basis in law or in fact) to the trial court. *Id.* ¶¶ 50, 54.

¶ 78 This case, again, involves a first-stage preliminary *Krankel* inquiry. The preliminary inquiry's purpose is to allow the trial court to ascertain the factual basis for the defendant's claims and to afford the defendant the opportunity to explain and support his or her claims. *People v. Ayres*, 2017 IL 120071, ¶ 24. In this way, the court can determine whether to appoint independent counsel to argue the defendant's claims. *People v. Patrick*, 2011 IL 111666, ¶ 39. "By initially evaluating the defendant's claims in a preliminary *Krankel* inquiry, the circuit court will create the necessary record for any claims raised on appeal." *Jolly*, 2014 IL 117142, ¶ 38.

¶ 79 The court must "conduct *some type of inquiry* into the underlying factual basis, if any, of a defendant's *pro se* posttrial claim[s.]" (Emphasis added.) *Ayres*, 2017 IL 120071, ¶ 11. It may question trial counsel concerning the facts and circumstances surrounding the claims and may discuss the allegations with the defendant. *Id.* ¶ 30; *Moore*, 207 Ill. 2d at 78-79. The court may also rely on its knowledge of trial counsel's performance at trial and the insufficiency of the defendant's allegations. *Jolly*, 2014 IL 117142, ¶ 30; *Moore*, 207 Ill. 2d at 79. The "preliminary *Krankel* inquiry should operate as a neutral and nonadversarial proceeding" and, because the defendant is not appointed counsel at this stage, the State's participation, if any, must be *de minimus*. *Jolly*, 2014 IL 117142, ¶ 38. Indeed, generally, the trial court commits reversible error when it permits the State to participate in an adversarial fashion in a preliminary *Krankel* inquiry.

Id. ¶¶ 41, 46 (declining to conclude that such error was harmless and remanding for a new preliminary inquiry before a different judge and without the State's adversarial participation).

¶ 80 C. Trial Court Applied An Erroneous Legal Standard

¶ 81 Defendant argues that the trial court applied the wrong standard to evaluate his claims. The *Strickland* standard, he urges, is too stringent a test. Defendant analogizes to first-stage review of a *pro se* postconviction petition, noting that, in the ineffective-assistance context, a court cannot apply the *Strickland* test to determine whether the petition is frivolous or patently without merit; rather, it must assess whether it is *arguable* that the attorney's performance fell below an objective standard of reasonableness and whether it is *arguable* that the petitioner sustained prejudice. See *People v. Hodges*, 234 Ill. 2d 1, 17 (2009); see also *People v. Tate*, 2012 IL 112214, ¶¶ 18-20 (first-stage proceedings are judged by lower pleading standard than second-stage proceedings). Here, defendant argues, the trial court should have evaluated whether defendant's claims showed "possible neglect" by trial counsel by inquiring if there was an *arguable* basis for the claims, not whether *Strickland* was *met*. The State responds that defendant's analogy to postconviction petitions is incorrect because the standards of review there are statutorily-prescribed and are not comparable to *Krankel* proceedings, which have common-law origins. It urges that the trial court *determined* that defendant's claim did not demonstrate "possible neglect" of the case *and* that trial counsel's representation was not ineffective under *Strickland*. We agree with defendant. Given that a defendant must only raise a colorable claim of ineffective assistance at a preliminary inquiry, we find appropriate defendant's analogy to first-stage review of a postconviction petition. In other words, in determining whether there was "possible neglect," the correct inquiry is to ask whether counsel's performance was *arguably* ineffective.

¶ 82 We acknowledge that the case law does not proscribe references to *Strickland*, because that test guides the trial court's preliminary inquiry. See, *e.g.*, *People v. Dickerson*, 393 Ill. App. 3d 531, 536 (2009) (passing reference to *Strickland* was not erroneous; the defendant had not argued that the trial court failed to make an adequate inquiry into his claim, but only that the court could not mention the *Strickland* standard without first appointing new counsel; reviewing court held that trial court's mention of prejudice prong and its ruling on the basis of the first prong that the defendant's allegations were meritless were not erroneous); see also *People v. Chapman*, 194 Ill. 2d 186, 231 (2000) (fact that trial court referenced *Strickland*'s prejudice prong during preliminary *Krankel* inquiry "does not affect the fact that the matters about which [the] defendant complains lack merit and involve a question of trial strategy"; held that the allegations did not show "possible neglect").

¶ 83 We conclude that the trial court erred in assessing defendant's claims *solely* within the *Strickland* framework. The court made more than a passing reference to the *Strickland* test, mentioning it multiple times in its findings and deciding the *ultimate* merits of the preliminary inquiry on this basis. For example, in stating its findings concerning Harris's failure to call Holley as a witness, the court found that that failure and the failure to introduce the stipulation "was not ineffective assistance" because they were trial-strategy matters. As another example, when the trial court addressed defendant's claim concerning the allegedly-suggestive police lineup, the trial court found that defendant needed to show that the failure to challenge the lineup was outside the wide range of professional assistance and determined that defendant failed to show that the results of the trial would have been different. The correct inquiry would have been to assess whether it was *arguable* that the failure to challenge the lineup constituted deficient performance and whether it was *arguable* that the results would have been different. The trial

court's findings state multiple times that there was no ineffective assistance of counsel; they nowhere clarify that there was no *arguable* ineffective assistance by counsel. It concludes by stating that, "applying the *Strickland v. Washington* standard[,] *** [there was] no ineffective assistance by trial counsel[.]"

¶ 84 Although the *Strickland* test informs the ineffective-assistance inquiry even during a preliminary inquiry, here, the court nowhere noted, let alone applied, the more lenient standard—arguable ineffectiveness—that dictates the resolution of the first *Krankel* stage. Given the record, the State's assertion otherwise is not well-taken. By all indications, the trial court utilized the *Strickland* standard, not the more lenient standard, to decide the *ultimate* merits of defendant's claims. This was error.

¶ 85 D. Any Error Was Harmless

¶ 86 The State argues that we should affirm the trial court's ruling because, even if the trial court erroneously used the *Strickland* standard in reaching its findings, any error was harmless. It maintains that the decision whether to call Holley, had she been secured, and whether to present the stipulation were trial-strategy decisions within trial counsel's purview. Defendant does not directly address harmless error, but suggests that, if we agree that the trial court applied the wrong legal standard, this court should reverse and remand for a second-stage *Krankel* hearing (with directions for the trial court to appoint *Krankel* counsel to independently evaluate defendant's claims), not solely for another preliminary *Krankel* inquiry. He maintains that the record contains sufficient indications of Harris's arguable ineffectiveness in failing to present Holley's version of events, at least by stipulation. For the following reasons, we conclude that the trial court's use of an erroneous legal standard was harmless error because defendant's claims pertained to matters of trial strategy.

¶ 87 We may apply harmless-error review in assessing a preliminary *Krankel* inquiry. In *Jolly*, the supreme court declined to find that the error in that case—the State's adversarial participation in a preliminary *Krankel* inquiry where defendant appeared *pro se*—was harmless, but also declined to find that it constituted structural error. *Jolly*, 2014 IL 117142, ¶¶ 38-40, 45. This court has noted that *Jolly*, thus, does not categorically preclude harmless-error review of a preliminary *Krankel* inquiry. *People v. Skillom*, 2017 IL App (2d) 150681, ¶¶ 28-30 (where an error is not structural, it is, by definition, subject to harmless-error review; *Skillom* involved a preliminary *Krankel* inquiry where the State had participated in an adversarial fashion; however, this court applied harmless-error review and held error was harmless because the defendant's claim concerning defense counsel's alleged incorrect advice was rebutted by the objective record, which reflected that the court's admonishments, and the defendant's understanding of them, cured any prejudice from incorrect advice as to whether the subject offense was probationable). Further, for harmless-error review to apply, there must be a record of the defendant's ineffective-assistance claims. *Moore*, 207 Ill. 2d at 81; *McLaurin*, 2012 IL App (1st) 102943, ¶ 42. Here, although the court's findings are based on its use of the wrong legal standard, we have a substantial record from multiple hearings from which to determine whether defendant's claims show possible neglect.

¶ 88 Defendant argues that the record contains a sufficient showing of arguable ineffectiveness by Harris. Specifically, he maintains that: (1) Holley's testimony would have strengthened the defense's case; (2) he showed arguable ineffective assistance by Harris in that she failed to locate Holley and determined, in any event, that she would not present as a good witness; and (3) he showed arguable ineffective assistance by Harris as to her decision not to use the stipulation. As to his first claim, defendant argues that the entire record, including Harris's

testimony and the submitted affidavits, shows that Holley's testimony was sufficient to show arguable ineffectiveness by Harris, where it would have provided significant support to the defense at trial. Holley reported to the police that she did not see the shooter. However, she testified at the 2007 hearing that defendant was not present at the time of the shooting. This testimony, defendant maintains, would have supported the defense theory that defendant was at another apartment in the complex at the critical time and was not the person who shot Harvey. The testimony also presented, according to defendant, an alternative motive for the shooting beyond the one advanced by the State, which was that defendant had shot Harvey in retaliation for the earlier beating. Holley told police that she was the intended target. Further, defendant argues, Holley's statement would have aided the defense by contradicting Span's testimony concerning the events in the bedroom and his statement that he saw defendant running from the scene. This view, defendant maintains, was consistent with the defense theory, even if Holley's testimony to that effect may not have been admissible because it was speculative. Acknowledging that there were ways that Holley could have been impeached, including with her criminal history, drug addiction (including that she had testified that she ingested drugs on the night of the crime), and history of mental-health problems, defendant argues that the substance of her testimony would have been very helpful to his case and the necessary showing for preliminary-inquiry purposes was made. As to his second claim, defendant acknowledges Harris's 2007 testimony that she attempted to locate Holley, but was unsuccessful. Afterwards, Harris determined that Holley did not want to be found. However, he notes that Holley testified that she was not as unavailable as Harris had portrayed and that Newcomer has not yet testified to explain what efforts she made to locate Holley. Given these contradictions, defendant urges that the entire record from the 2007 evidentiary hearing should be considered to suggest arguable

ineffective assistance by Harris and warrant further inquiry. As to his third point—the failure to use the stipulation—defendant asserts that his testimony calls into question the circumstances surrounding it and contradicted Harris's testimony that they vigorously argued about the stipulation and that defendant ultimately acquiesced in her approach. Also, defendant contends that the exact nature of the State's rebuttal evidence needs to be explored before Harris's claim that she feared the rebuttal evidence is credited and accepted.

¶ 89 The State relies primarily on the testimony from the trial and the 2016 hearing to support its arguments that defendant's claims lacked merit. Trial counsel could not, according to the State, have been ineffective for failing to serve a subpoena on a witness whom she had repeatedly tried to locate but was unable to do so. This was especially so because Harris knew Holley and her history. Nevertheless, Harris did prepare a stipulation of Holley's statements to police. The ultimate decision of whether to use the stipulation, the State asserts, was Harris's, regardless of defendant's opinion.

¶ 90 Trial-strategy matters are immune from ineffective-assistance claims, "unless counsel's strategy was so unsound that counsel completely failed to conduct any meaningful adversarial testing of the State's case." *People v. Patterson*, 217 Ill. 2d 407, 441 (2005). Also, the failure to subpoena a witness known to defense counsel who could contradict the State's theory of the case or provide exonerating testimony constitutes ineffective assistance. See *People v. Campbell*, 332 Ill. App. 3d 721, 731 (2002); see also *People v. Downs*, 2017 IL App (2d) 121156-C, ¶ 56 ("[w]hile the decision to call a witness or to present an alibi defense is a matter of strategy that is generally immune from review, counsel must first investigate the claim").

¶ 91 Reviewing the entire record, we conclude that any error was harmless, because, regardless of whether Holley's testimony would have been helpful to defendant's case, Harris's

decision to forego presenting Holley's testimony in any form concerned a matter of trial strategy. Defendant initially focuses on the substance of Holley's testimony, arguing that her testimony would have supported the defense's theory that defendant was at another apartment at the time of the shooting and would have provided another motive for the shooting—that she was the intended victim due to a drug deal that had gone bad. In our view, this is the wrong focus. The proper question is whether Harris's failure to present Holley's testimony—more specifically, the failure to locate her and present her as a witness Holley and the failure to present the stipulation—was the result of arguable ineffective assistance. As to the issue concerning the substance Holley's testimony and whether it would contradict the State's case or constitute exonerating testimony, Harris *agreed* that Holley's testimony might be helpful to defendant's case; thus, she sought to locate Holley. Thus, we need not address whether or not Holley's testimony would have been helpful to the defense. Even assuming so, the specific issues are whether Harris's decision not to use the stipulation, after failing to locate her and determining, in any event, that she would not present as a good witness, showed arguable ineffective assistance of counsel.

¶ 92 As to Harris's efforts to locate Holley (and her determination that she would not present as a good witness), defendant argues that, in contrast to Harris's testimony, Holley's testimony reflected that she may have been transient, but was not as unavailable as Harris had portrayed. Holley denied ever telling anyone that she did not want to cooperate or did not want to be found for trial. Defendant concedes that there was a point where Holley herself was charged with crimes and told her attorney that she was scared, did not want to testify about the shooting, and he advised her to keep quiet. However, this advice, according to defendant, may not have come until the spring of 2003, *after* defendant's trial. In defendant's view, Holley's testimony

suggested that, although she did not attempt to contact anyone about the case, she was not beyond the reach of a diligent investigation before trial. Defendant himself was able to reach Holley once by phone from the jail, although she did hang up on him. Because she could have provided significant support to the defense, Harris, defendant argues, should have made a very diligent effort to find her "but *may* have failed to do so." (Emphasis added.)

¶ 93 The State argues that, if defendant had information that demonstrated Harris failed to make a diligent effort to locate Holley, he should have made that allegation in his motion or asked specific questions during the hearing. Neither was done. It contends that Harris did not neglect the case by failing to secure Holley. This is especially so, it reasons, because Harris secured a stipulation as to Holley's statements to the police.

¶ 94 We conclude that defendant failed to show arguable ineffective assistance as to Harris's efforts to locate Holley and her decision that Holley would not, in any event, be a good witness. Harris herself acknowledged that Holley's version of the events in Span's bedroom may have contradicted Span's version, but, ultimately, logistical and trial-strategy issues precluded her from presenting Holley's version in any form. As to her efforts to locate Holley, Harris testified at the 2007 hearing that her office made many unsuccessful efforts to locate Holley, with the initial effort in June 2001, shortly after she was assigned to defendant's case. As the trial date neared, her office made a second attempt. Harris determined that Holley did not want to be found. Newcomer, according to Harris, made several attempts over a six-to-eight-week period to locate Holley, including contacting her family and friends, but was informed that Holley was in hiding and would not surface until after trial. Thus, the subpoena was never served. Harris explained that Newcomer did speak to people who knew where Holley was, but she was unable to find Holley. Defendant himself related how Holley hung up on him when he was able to

reach her by telephone. Nevertheless, Newcomer *went* to the address defendant had called and was unable to locate Holley. Harris came to believe that Holley was in hiding and feared for her life. Indeed, Holley's 2007 affidavit averred that she was very afraid and would rather not testify. Her 2007 testimony that no one contacted her, that she did not tell any friends that she did not want to be found for trial, and that she did not have relatives are not necessarily contradictory to Harris's testimony. This is so because Holley also stated that she had no permanent address and was imprisoned or in custody near the time of trial or afterwards. Defendant, as the State notes, has not identified *how* Harris could have located Holley beyond the efforts she did undertake. Holley also testified about her mental-health issues and related hospitalizations and the fact that she used drugs on the day of the shooting. She was located by Hess for the 2007 proceedings and drafted and signed an affidavit, wherein, as noted, she averred that she remained afraid and preferred not to testify. In 2016, Harris added that she suspected that Holley was intentionally hiding near the time of trial because, ordinarily, Holley was "everywhere all the time, you can always find her." We cannot conclude that the record as a whole reflects that it is even arguable that Harris's efforts to locate Holley constituted ineffective assistance. However, we note that, even if Harris's efforts to locate Holley showed arguable ineffective assistance, we conclude that the trial-strategy determinations that Holley would not, in any event, present as a good witness and the decision to forego presenting the stipulation, are fatal to defendant's claims.

¶ 95 Turning to the stipulation, we note that, after failing to locate Holley, Harris did not cease her efforts to present Holley's version of the events. Indeed, Harris came to believe that a stipulation was preferable to having Holley testify because Holley was "very unstable" and would not present as a good witness and because it would have avoided impeaching Holley with

her felony record and drug addiction. In 2016, Harris referred to Holley's testimony as "a double-edged sword." Although Holley could support the defense's theory that defendant was not the shooter and the incident was about something not having to do with him, there was the issue of Holley's mental-health history, "her clear paranoia at the time of the case," and how she would present as a witness. There was also the question of PeeWee's identity. Thus, Harris decided to prepare a stipulation instead of presenting Holley's testimony.

¶ 96 Harris ultimately did not offer the stipulation due to strategic reasons, explaining that she believed the defense's case had gone as well as could be expected and that the State had held certain witnesses in reserve for rebuttal of defendant's potential testimony and the stipulation. She explained that she was familiar with the prosecutor's strategic use of rebuttal witnesses. Harris also knew the identity of the witnesses in the jail lockup, whose testimony, she determined, would damage defendant's case. The potential rebuttal witnesses included Tommy and Troy Dickson, whom she believed could have been damaging to the defense; one of the Dickson brothers (presumably PeeWee) would have denied being the shooter and testified that the police had ruled him out as such. Griffin, whom defendant asserted had fabricated defendant's jailhouse admission after he read defendant's file in jail, would still have been damaging to defendant's case, according to Harris, even if he was impeached by the fabrication evidence. As to Meeks, who would have testified that defendant was looking for a gun to kill the men involved in the fight, Harris testified that she believed his testimony would be damaging to the defense because it would corroborate Nichols's impeached testimony. Defendant's only response was that Meeks was under arrest when he reported what he allegedly knew to the police.

¶ 97 Harris testified in 2007 that she had a vigorous debate with defendant concerning the use of the stipulation and that defendant strongly believed that it should be used. However, Harris believed that the trial had gone as well as could be expected up to that point and defendant ultimately acquiesced to her strategy. She did not discuss with defendant the possibility of playing the taped statement of Holley's interview with the police instead of having Holley testify; that was the stipulation's purpose. Defendant points to his own testimony, which he claims calls into question the circumstances surrounding the proposed stipulation. He testified that Harris never explained why it was not presented, nor had he asked her about it. Thus, he claims, he contradicted her testimony that they vigorously argued about its use. But, as Harris noted, it was ultimately her decision, as counsel, whether to present the stipulation. See, *e.g.*, *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 79 (decision as to whether to stipulate to evidence is generally considered matter of trial strategy that will not sustain a claim of ineffective assistance). Again, on this record, we cannot conclude that defendant showed arguable ineffective assistance by Harris in not offering the stipulation.

¶ 98 III. CONCLUSION

¶ 99 In summary, we conclude that the trial court's use of the erroneous legal standard was harmless because trial counsel Harris's decision not to present Holley's version of the events in any form cannot be deemed to show arguable ineffective assistance, as it clearly pertained to matters of trial strategy. The trial court did not err in denying defendant's motion.

¶ 100 For the reasons stated, the judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed statutory State's Attorney fees as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 101 Affirmed.