

2018 IL App (1st) 151507-U

No. 1-15-1507

Order filed June 22, 2018

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 09 CR 09935
)	
CLEVELAND LYONS,)	Honorable
)	William J. Kunkle
Defendant-Appellant.)	Joan M. O'Brien,
)	Judges, presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction and sentence affirmed when, following remand, the trial court conducted an adequate preliminary inquiry into his *pro se* posttrial claims of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and the trial court did not consider an improper factor in aggravation when imposing sentence. Defendant cannot establish that he was denied the effective assistance of counsel at sentencing because he cannot show he was prejudiced by counsel's failure to file a motion for a new trial. Defendant's mittimus must be corrected to reflect 22 additional days of presentence custody credit.

¶ 2 Following a bench trial, defendant Cleveland Lyons was found guilty of aggravated vehicular hijacking. Defendant then filed a *pro se* posttrial motion alleging ineffective assistance of trial counsel. The trial court denied defendant's motion and sentenced him to 30 years in prison. Defendant appealed contending, *inter alia*, that the cause should be remanded to the circuit court for a hearing on his *pro se* posttrial claim of ineffective assistance of counsel and that the trial court improperly considered in aggravation at sentencing the fact that a firearm was used during the commission of the offense. This court remanded the cause for an inquiry into defendant's claims of ineffective assistance of counsel and a new sentencing hearing.

¶ 3 On remand, the trial court inquired into defendant's *pro se* posttrial claims of ineffective assistance, and denied defendant relief. The trial court then held a sentencing hearing and defendant was again sentenced to 30 years in prison. Defendant appealed.

¶ 4 On appeal, defendant contends that the trial court's post-remand inquiry into his *pro se* posttrial allegations of ineffective assistance of counsel was inadequate because the court failed to inquire into the factual basis of several of his claims. Defendant further contends that this cause must be remanded for resentencing because the trial court erroneously considered a factor inherent in the offense in aggravation at sentencing. He also contends that sentencing counsel was ineffective when counsel failed to file a motion for a new trial based upon newly discovered evidence. Defendant finally contends that he is entitled to an additional 22 days of presentence custody credit. We affirm, and correct the mittimus.

¶ 5 At trial, Bruce Hamlin testified that he backed his vehicle into his garage around 1 or 1:15 a.m., on May 16, 2009, and then used a remote to close the door. When the door was halfway down, a person holding a revolver came under the door (the first man), and it went back

up. The first man told Hamlin not to move and came toward the driver's side of the automobile. A second man then walked up and stood at the right edge of the garage. Hamlin identified defendant in court as the second man. The first man then opened the vehicle's door, pulled Hamlin out, put him against the wall of the garage with the firearm in his side and emptied Hamlin's pockets. Defendant remained in the same spot holding something chrome. Hamlin identified that object as a handgun. After the first man took Hamlin's items, he pushed Hamlin to the side, got in the automobile, and pulled into the alley. Defendant got into the vehicle and the men "took off." Hamlin then called the police.

¶ 6 The next morning, Hamlin called his cousin Calvin Taylor and said he wanted to ride around and look for his vehicle. At one point, he saw his automobile "ride past," so they followed it. Hamlin observed the vehicle pull into a "rim shop," and defendant exit the automobile. He contacted the police and defendant was taken into custody. When he inspected the vehicle, two amplifiers, a speaker box and a television were missing. He later identified the speaker and one of the "amps" at a police station.

¶ 7 During cross-examination, Hamlin testified that the first man put him face first against the wall. However, he could see defendant because his arms were up and he looked under them. Hamlin testified that defendant held a handgun in his right hand.

¶ 8 Calvin Taylor testified consistently with Hamlin that they followed the automobile to the tire shop. When a person exited the vehicle, Hamlin said "That's the mother*** right there that took my car." Taylor identified defendant in court as that person.

¶ 9 Officer Gorman testified that he was flagged down by a "frantic individual" who stated that the "guy who robbed him the night before" was at the corner rim shop with the car. Gorman

proceeded to detain defendant. At this point, Hamlin ran up pointing at defendant and screaming “ ‘That’s my car. That’s the guy who robbed me.’ ”

¶ 10 Detective Steven Ciecziel testified that while assigned to the case he spoke to defendant’s girlfriend. He then asked defendant about a set of keys to a truck because the girlfriend wanted the keys. After the keys were obtained, Ciecziel unsuccessfully tried to contact the girlfriend. Later, when he arrived at the location where the truck was parked, he spoke to the girlfriend and Demontae Magsby.¹ After the conversation, he and Magsby went, separately, to another location. There, Magsby produced a box speaker and an amplifier. Ciecziel then contacted Hamlin on the phone and asked him the make and model of the items that were missing from his car. Hamlin’s answer matched these items and he later identified them. Magsby indicated to Ciecziel that he was the legal owner of the truck, but did not use it on a day-to-day basis.

¶ 11 Demontae Magsby testified that he knew defendant through his sister and that he was the legal owner of a certain vehicle that defendant drove. When he arrived at the vehicle on May 16, 2009, he put his hand through the “cracked” window and opened the door. He observed, *inter alia*, amplifiers and speakers in the backseat. Magsby put these items in his car and went home. Later, he had a detective follow him home and gave these items to the detective. The State rested. The defense indicated that defendant would not be testifying, and the trial court admonished him regarding that right.

¶ 12 In finding defendant guilty, the court found Hamlin credible and that Hamlin identified defendant as the person acting as a lookout at the scene of the carjacking. The court also found defendant was accountable for the conduct and actions of his co-offender.

¹ Magsby’s first name is spelled multiple ways in the record. When he testified, however, he spelled his name “Demontae.”

¶ 13 Defense counsel filed a motion for a new trial. Defendant also filed *pro se* motions for an “Arrest of Judgment” and for a new trial. The motion for an Arrest of Judgment alleged that the charging instrument was defective because it cited the wrong section of the statute, that is, it stated that defendant violated section 18-4(a)(3) of the Criminal Code (720 ILCS 5/18-4(a)(3) (West 2008)), rather than section 18-4(a)(4) (720 ILCS 5/18-4(a)(4) (West 2008)). Defendant’s *pro se* motion for a new trial alleged that although defendant told trial counsel about witnesses Terry Pritchett and Demontae Magsby, counsel did not call them at trial. The motion further alleged that counsel failed to file a pretrial motion to suppress identification or identification testimony based upon discrepancies between the “initial police reports” and the “sworn preliminary hearing witness statements,” to “properly confront” Hamlin, and to bring to the court’s attention that defendant was left-handed when Hamlin testified that defendant held a handgun in his right hand. The motion finally alleged that counsel did not visit defendant enough, denied him the right to testify, and discussed his case in front of other people in the “bull pen.”

¶ 14 The court stated that it did not have to look at defendant’s motions, but would rule on them separately. The court also told defendant “[d]on’t file anything else.” The court next asked whether defendant had any other motions that he wanted to file and defendant said no. The trial court denied all the motions, and sentenced defendant to 30 years in prison.

¶ 15 On appeal, this court rejected defendant’s contention that the aggravated vehicular hijacking statute as defined in section 18-4(a)(4) of the Criminal Code (720 ILCS 5/18-4(a)(4) (West 2008)), violated the proportional penalties clause of the state constitution. See *People v. Lyons*, 2013 IL App (1st) 112086-U, ¶¶ 15-18. This court next determined that the trial court’s

inquiry into the facts and circumstances of defendant's *pro se* posttrial allegations that trial counsel provided ineffective assistance of counsel were insufficient and remanded the cause for such an inquiry. *Id.* ¶¶ 20-24. This court finally determined that it could not say whether the trial court placed "no significant weight" on the presence of a firearm as a justification for the sentence, and vacated defendant's sentence. *Id.* ¶ 26-28.

¶ 16 On remand, the trial court informed defendant that the cause was before the court pursuant to a remand from the appellate court for an inquiry into defendant's claims of ineffective assistance of counsel. The court further stated that if it found that there was no merit to defendant's claims that would "be the end of it." However, if the court found "even potential merit" in the claims, defendant would be appointed counsel who would "work" with defendant to prepare new posttrial motions.

¶ 17 Defendant replied that he had a "few different reasons" that made him feel that trial counsel was ineffective. He tried to "recall" because he did not have his paperwork. Defendant stated that he asked counsel to interview witness Terry Pritchett, but counsel never did. He stated that Pritchett "would be able to testify to the person telling him where [defendant] was at the time" and that Pritchett talked to Hamlin. Defendant did not know Pritchett's name "at first" and could not tell counsel where Pritchett was located because defendant was "locked up." He later obtained Pritchett's name and gave it to counsel "[m]aybe a year or two" into his case. Defendant further stated that he spoke to Pritchett on the phone the morning of the offense and told Pritchett where he was going to be that night. The court replied that Pritchett did not know where defendant was at the time of the offense; rather, all he knew was what defendant told him and that was neither "evidence of value" nor admissible.

¶ 18 Defendant next stated that Pritchett talked to Hamlin and that Hamlin told Pritchett that he knew that “the guy that did it” was not defendant but “somebody got to pay *** and he wanted money.” Defendant then stated that Magsby, whose name counsel had “all the time,” was scared and was pressured by the State to “say stuff that didn’t happen.” Although defendant told his attorney to speak to Magsby, Magsby told defendant that she never spoke to him.

¶ 19 The trial court replied that Magsby was present in court subject to cross-examination. Defendant replied that he knew Magsby was lying and Magsby knew Magsby was lying. The court then asked defendant whether it was his belief that if counsel had talked to Magsby, counsel would have changed his testimony when Magsby was already subject to the penalties of perjury and subject to cross-examination. Defendant reiterated that counsel did not talk to Magsby.

¶ 20 Defendant next stated that “there were some other things” in his *pro se* motion but that he could not remember because he had “no papers” in prison. He stated that he did know the maximum and minimum sentences that he faced, “[e]veryone said it was twenty-two, when, in fact, it was twenty-one.” The court then asked whether that one year made a difference and defendant responded that he was not sure. Defendant further stated that there were things he asked counsel to do that she “never did” such as fingerprints from the crime scene and interviewing the victim.

¶ 21 Assistant Public Defender Renee Frisch was then sworn in, and the trial court asked her about Pritchett. Frisch testified that defendant told her about Pritchett on April 10, 2011 and gave her his name and phone number. When she spoke with Pritchett, she learned that Hamlin told Pritchett that he was not sure that he was going ahead with the case because he was awaiting

restitution from defendant's family. Frisch further testified that "just before" this case was set to go to trial, defendant asked her to obtain a continuance so that defendant could speak to his family regarding restitution. She then went to speak with her Chief regarding what action to take and they decided that Pritchett "was certainly not a witness for impeachment or any other basis, so he was not called."

¶ 22 With regard to Magsby, Frisch explained that Magsby gave a "very specific handwritten statement" to police in response to the fact that defendant told police that Magsby was "sort of an alibi witness." In this statement, Magsby indicated that defendant made a statement to him that defendant planned to commit a crime. Frisch tried to find Magsby when she learned that he was going to recant that statement and attempted to contact Magsby through his then girlfriend Shante Williams, but neither Magsby nor Williams ever responded. At one point, Frisch spoke to Magsby when he was before the court on an unrelated matter and during that conversation, Magsby "pretty much confirmed" what was in his statement to the police. She further stated that during that conversation, Magsby did give her "good information" that helped the defense.

¶ 23 With regard to Hamlin, Frisch testified that she tried a "number of ways" to contact him, including sending an investigator to his home. The investigator was told "quite firmly" to leave Hamlin alone, that Hamlin did not want to speak to the defense, and "to never come to his home again." With regard to defendant's mandatory minimum, Frisch testified that at one court date, the prior judge on the case stated that defendant was facing between 6 and 30 years in prison. Although she had already told defendant that the minimum was 22, she "went back immediately and corrected him on that on the same day," and visited defendant in jail so that defendant knew that the judge was incorrect. Frisch further stated that she had given defendant a written

document with the sentencing range for the “main charge” noted as between 22 and 46 years in prison. She also discussed the minimum sentence in the context of a plea discussion. As to fingerprints, Frisch did not “believe that there was anything that they would be in” and did not know if “anything was ever dusted.”

¶ 24 The court then continued the cause so that defendant could bring “whatever papers he thinks he needs to bring.” At the next hearing, the trial court asked defendant what defendant would “like to add.”

¶ 25 Defendant reiterated that trial counsel “refused and failed” to investigate Pritchett and Magsby. He also argued that counsel failed to impeach Hamlin on several points where “he blatantly just lied about the discrepancy between the Preliminary Hearing testimony and his trial testimony” and failed to show that he was lying or “test him” on the fact that description of the offender in the police report did not match defendant. Defendant also argued that counsel did not impeach Hamlin on the fact that the “assailant” held the gun in his right hand but defendant is left-handed or regarding how Hamlin said that he saw defendant.

¶ 26 The court then asked Frisch to respond. She reiterated that after speaking to Magsby she “brought out a number of things” on cross-examination. She also stated that she made the exact same argument about how Hamlin could have seen defendant to the court at trial. With regard to impeachment, she stated that although it had “been years since this case went to trial, *** [her] assumption was that if there’s impeachment to be brought out, [she] did it.”

¶ 27 The trial court stated that it found Frisch to be credible as to the fact that she interviewed Pritchett and Magsby, such that the allegation that she failed to interview those men was incorrect. With respect to Hamlin, the court stated that it was “certainly not unusual” for a

complaining witness to refuse to talk to the defense. With respect the incorrect minimum sentence in the “original order” from the court, the court noted that this error was explained to defendant. The court concluded that there was “nothing” in defendant’s claims that would warrant the appointment of counsel and that defendant’s claims were not credible and did not have merit. The trial court denied defendant’s *pro se* motion for a new trial. The court then appointed counsel to represent defendant for the purposes of resentencing.

¶ 28 At the sentencing hearing, sentencing counsel indicated that the court instructed defendant in June 2011 not to file any more motions but defendant told counsel that he wanted to file more motions. The trial court asked defendant what other motions he wanted to file.

¶ 29 Defendant stated that he had “paperwork” for different things that happened in his case “like identification and certain things” that he wanted to file. However, when the court told him to stop filing motions, defendant “stopped working” on his case. The court then stated that if defendant had “any additional things” they had to be filed by the next court date. At the next court date, sentencing counsel told the court that defendant mailed him “a mitigation memorandum” that defendant wanted filed and counsel filed it. The court characterized the filing as a motion for a sentence reduction.

¶ 30 At sentencing, the State presented the testimony of Lloyd Williams and Bruce Hamlin. Williams testified regarding the facts which led to defendant’s conviction for aggravated unlawful restraint and nine-year prison sentence in case number 04 CR 15814. Williams testified that on the evening of May 22, 2004, he was about to get into his car when defendant approached him with a handgun, forced him into his vehicle and told him to drive to 57th Street and Green

Street. When they reached that location, defendant took the automobile. Williams contacted police and later identified defendant in a line-up.

¶ 31 Hamlin then testified that at approximately 1:30 a.m. on May 16, 2009, defendant “came up under” his garage door, and pointed a firearm at him. A second person then joined defendant. Defendant opened the driver’s side door, grabbed Hamlin and “put [him] up against the wall” and took “everything” out of Hamlin’s pockets. Defendant then got into the vehicle, pulled out, told the other man to get in, and drove away. The next day, Hamlin saw defendant driving the automobile, followed him to a “rim shop” and called the police. During cross-examination, Hamlin was asked whether at trial, he testified that defendant was the second person. Hamlin stated that he did not think so, and that he was mistaken at trial. Hamlin then testified that defendant was the person who took things out of his pockets, and who had the handgun. When sentencing counsel asked whether Hamlin was mistaken at trial or at the sentencing hearing, Hamlin answered “neither.”

¶ 32 The State then argued in aggravation that defendant was “not very long” discharged from parole when he committed “almost the exact same crime.” The State acknowledged that the defense “sought to impeach” Hamlin with his trial testimony, but argued that the trial was “nearly seven years ago” and that there was “no question” in Hamlin’s mind that defendant was involved and “worst case scenario” defendant was accountable for the other person’s actions. The court then asked how much time passed between defendant’s release from prison and the instant offense. The State indicated that defendant was discharged from parole on November 20, 2008, and arrested in this case on May 16, 2009.

¶ 33 The defense argued in mitigation that defendant completed his GED and took college classes while incarcerated, and had taken classes in electrical construction maintenance and worked when he was not in prison. Sentencing counsel also argued that there was “the issue of a victim now *** who is not sure exactly what role” defendant played in the offense.

¶ 34 In allocution, defendant stated that he was “not a bad person at all” rather he had “made some bad decisions.” He indicated that he was from a broken home where his mother was a drug addict and his father was killed when he was very young. However, he stated that he was using his past as a “motivational force” to push forward which is why he was in school and “a few credits” away from his degree, and had not gotten into trouble in prison. Defendant also stated that he was a “different person” and asked for the minimum sentence.

¶ 35 In sentencing defendant, the trial court noted that after considering the testimony in aggravation and the statutory factors in aggravation and mitigation, that “one of the things that is important in mitigation is the possibility of rehabilitation.” The court noted, in defendant’s favor, that defendant had not received any disciplinary tickets while in prison. However, counting against defendant was the fact that he committed the instant offense shortly after he was released from parole for a very similar crime. The court then stated that it believed that defendant was an intelligent man and that it was a shame that he would “waste the intelligence given to you and choose to take things from people with force.” The court further noted that “bad background notwithstanding, everybody knows from that time that you were a small child that you do not take things that are not yours and you did that with a firearm.” The court then stated that what it did not hear from defendant was “any remorse;” rather, after hearing the testimony of the

witnesses in aggravation, defendant talked about himself. The court did not “see that [defendant] made the connection between how [his] actions have affected someone else.”

¶ 36 The court finally stated that the transcripts from the trial and first sentencing hearing revealed that Hamlin had testified that defendant was the “second” person rather than the one who put the gun to his side. However, the court found that the State was correct that defendant was accountable for the actions of the person with whom he chose to commit a crime. Therefore, the court sentenced defendant to 30 years in prison.

¶ 37 On appeal, defendant first contends that the trial court failed to conduct an adequate preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), when the court failed to inquire into the factual basis of several of his claims.

¶ 38 Our supreme court, beginning with *Krankel*, has instructed that when a defendant presents a *pro se* posttrial claim of ineffectiveness of counsel, the trial court should conduct an inquiry to examine the factual basis of the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). No specific procedure is mandated, but an adequate inquiry will generally involve “some interchange” between the trial court and trial counsel. *Id.* at 78. “A brief discussion between the trial court and the defendant may be sufficient.” *Id.* If the “trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion.” *Id.* “A claim lacks merit if it is ‘conclusory, misleading, or legally immaterial’ or do[es] ‘not bring to the trial court's attention a colorable claim of ineffective assistance of counsel.’ ” *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 22 (quoting *People v. Burks*, 343 Ill. App. 3d 765, 774 (2003) quoting *People v. Johnson*, 159 Ill.

2d 97, 126 (1994)). We review the adequacy of the trial court's inquiry *de novo*. *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 80.

¶ 39 Here, defendant contends that the preliminary inquiry was deficient because the trial court failed to inquire into the factual basis of certain claims raised in his *pro se* posttrial motion alleging ineffective assistance of counsel. Specifically, defendant's claims that counsel failed to file a pre-trial suppression motion, elicited damaging evidence from Hamlin, failed to present evidence that defendant was left-handed, impinged upon defendant's right to testify, and misapprehended the law. Defendant contends that had the trial court inquired into the facts and circumstances underlying these allegations, "it might have discovered that they potentially had merit." In essence, defendant argues that the trial court's inquiry was inadequate because the trial court did not inquire as to each and every claim raised in his *pro se* motion, and, therefore, this cause must be remanded for an inquiry into those claims.

¶ 40 In the case at bar, the record shows that upon remand, defendant stated that he believed that he had received ineffective assistance of counsel for "a few different reasons," but that it was hard to "recall" because he did not have his paperwork. Defendant then stated that counsel failed to interview and present the testimony of witnesses Pritchett and Magsby, to adequately inform him of the minimum applicable sentence, to interview Hamlin, and to obtain fingerprints from the crime scene. The court then turned to trial counsel and asked her about the issues that defendant had raised. After counsel addressed each of defendant's issues, the court continued the case so that defendant could obtain his paperwork. At the next hearing, the court asked defendant directly if there was anything that defendant wanted "to add." Defendant again argued that counsel failed to investigate Pritchett and Magsby, failed to impeach Hamlin regarding certain

discrepancies between his testimony at the preliminary hearing and trial and the fact that the description of the offender in the police report did not match defendant, and did not impeach Hamlin on the fact that defendant was left-handed yet Hamlin testified that he held a gun in his right hand. The trial court again had trial counsel respond, and ultimately denied defendant relief.

¶ 41 Here, the trial court sufficiently inquired into defendant's claims of ineffective assistance when the court gave defendant two opportunities to raise his claims before the court, questioned trial counsel and then determined that defendant's claims of ineffective assistance of counsel lacked merit. See *Moore*, 207 Ill. 2d at 78-79. Although the defendant contends that the court should have questioned him regarding the additional claims in his written posttrial motion, he did not argue those claims before the court and the conclusory statements in his *pro se* filing did not necessitate further inquiry by the court. See *People v. Towns*, 174 Ill. 2d 453, 466-67 (1996); see also *Johnson*, 159 Ill. 2d at 125-28 (the trial court conducted an "adequate probe" where the "defendant did not bring to the trial court's attention a colorable claim of ineffective assistance of counsel" because "the allegations * * * were conclusory, misleading, or legally immaterial."). We note that although defendant argues that the trial court did not question him regarding his claim that counsel should have impeached Hamlin with evidence that defendant was left-handed when Hamlin testified that defendant held a gun in the right hand, defendant made this argument before the trial court.

¶ 42 To the extent that defendant contends that the inquiry was inadequate because the trial court did not question him regarding the basis of each claim raised in his *pro se* motion, we disagree. In order to create a record and potentially limit issues on appeal, the trial court's goal in a preliminary *Krankel* inquiry is to "ascertain the underlying factual basis for the ineffective

assistance claim and to afford a defendant an opportunity to explain and support his claim.” *People v. Ayres*, 2017 IL 120071, ¶¶ 13, 24. The method by which the trial court conducts the initial inquiry is “somewhat flexible” (*People v. Fields*, 2013 IL App (2d) 120945, ¶ 40), and it may include a discussion with the defendant as well as some interchange with trial counsel (*Moore*, 207 Ill. 2d at 78). Thus, there is no requirement that the court orally review a defendant’s *pro se* filing line-by-line; rather, the court must “afford” the defendant an opportunity to explain and support his claims of ineffective assistance of counsel. *Ayres*, 2017 IL 120071, ¶¶ 13, 24.

¶ 43 Here, the record reveals that the court gave defendant two opportunities to articulate his claims before the court and that defendant raised, and argued, multiple claims. Although defendant had the opportunity to further articulate the claims he raises on appeal before the trial court, he did not expand upon those claims; rather, he focused on 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)) (if a defendant has the opportunity to articulate his theory but fails to do so, “ ‘he cannot reasonably expect the trial court, unaided, to divine his intent’ ”). The fact that the court did not specifically question defendant regarding the claims that he chose not to argue orally was not fatal to the inquiry when defendant was afforded the opportunity to explain and support his claims of ineffective assistance of counsel. *Ayres*, 2017 IL 120071, ¶¶ 13, 24.

¶ 44 Defendant next contends that this cause must be remanded for resentencing because the trial court erroneously considered a factor inherent in the offense, the use of a firearm, in aggravation at sentencing. Defendant acknowledges that he failed to preserve this issue for

review by failing to file a postsentencing motion; however, he asks this court to review his contention pursuant to the plain error doctrine.

¶ 45 Plain error preserves otherwise forfeited errors for review. In the sentencing context, the doctrine requires a defendant to show that a clear and obvious error occurred and that the evidence at the sentencing hearing was closely balanced or the error was egregious so as to deny the defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Under both prongs of the plain error doctrine, the defendant bears the burden of persuasion. *Id.* See also *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010) (the defendant has the burden under plain error review to demonstrate the applicability of the two prongs to his sentencing hearing). “In applying the plain error doctrine, it is first appropriate to determine whether error occurred, because absent reversible error, there can be no plain error.” *People v. Smith*, 2016 IL 119659, ¶ 39.

¶ 46 A trial court has broad discretionary power in imposing sentence and its sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). This court presumes that the trial court employed proper reasoning when fashioning a sentence. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. When determining the propriety of a sentence, the reviewing court must consider the record as a whole and should not focus on a few words or statements made by the trial court. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30 (citing *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986)). The court’s statements at sentencing may not be considered in isolation. *People v. Csaszar*, 375 Ill. App. 3d 929, 952 (2007).

¶ 47 Here, defendant contends that the trial court improperly relied on a factor inherent in the offense of aggravated vehicular hijacking with a firearm, that is, the use of a firearm, in

aggravation at sentencing. To support his claim, defendant relies on the trial court's statement, "bad background notwithstanding, everybody knows from the time that you were a small child that you do not take things that are not yours, and you did that while armed with a firearm."

¶ 48 A trial court generally may not consider a factor implicit in the offense itself as an aggravating factor during sentencing for that offense. *People v. Ferguson*, 132 Ill. 2d 86, 97 (1989). However, "[e]ven if the sentencing judge considered an improper factor, remand for resentencing is necessary only if the consideration resulted in a greater sentence." *Walker*, 2012 IL App (1st) 083655, ¶ 30. A defendant has the burden to establish that his sentence was based upon improper factors. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9. We review whether the trial court considered an improper factor at sentencing *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 49 Here, when read in context (see *Csaszar*, 375 Ill. App. 3d at 952), the record reveals that the trial court did not rely on a factor implicit in the offense when sentencing defendant. Rather, the court's comment was a reference to the circumstances of the offense, and was in response to defendant's statements that he was from a broken home and "not a bad person at all." See *People v. Robinson*, 391 Ill. App. 3d 822, 842 (2009) (the court may consider the nature of the offense when imposing a sentence, including "the nature and circumstances of each element" as committed). The court's passing reference to the fact that a gun was used in the commission of the offense, does not, without more, support defendant's claim that the court both found him guilty of aggravated vehicular hijacking with a firearm and then relied upon the fact that a firearm was used to impose a sentence that was harsher than might otherwise have been imposed. See *People v. Kibayasi*, 2013 IL App (1st) 112291, ¶ 56 ("unrealistic to suggest" that the trial

court must not mention that the defendant's actions caused the victim's death during sentencing for murder); *People v. Solano*, 221 Ill. App. 3d 272, 274 (1991) (the degree of harm to a victim may be considered as aggravating factor even in those cases where serious bodily harm is implicit in the offense). The trial court is not required to refrain from any mention of the factors which constitute elements of an offense, and a mere reference to the existence of such a factor is not reversible error. *People v. Jones*, 299 Ill. App. 3d 739, 746 (1998), *aff'd* 188 Ill. 2d 352 (1999).

¶ 50 The transcript of the sentencing hearing, taken as a whole (see *Walker*, 2012 IL App (1st) 083655, ¶ 30), reveals that in addition to noting defendant's conduct while in prison as mitigating evidence, the trial court focused on the facts that defendant committed the instant offense shortly after he was released from parole for a similar offense, and that rather than understanding how his actions affected the witnesses who testified at the sentencing hearing, defendant talked about himself. Although the trial court did mention the fact that a firearm was used, this passing reference was in a statement made by the court in reply to defendant's argument that his lack of a stable childhood home should be considered as a factor in mitigation. Defendant has therefore failed to establish that his sentence was based upon an improper factor (see *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9), and that a clear or obvious error occurred (*Ahlers*, 402 Ill. App. 3d at 734). Because there was no error, there can be no plain error to excuse defendant's forfeiture of this issue. See *Smith*, 2016 IL 119659, ¶ 39.

¶ 51 Furthermore, because there was no error, defendant also cannot demonstrate that his counsel was ineffective for failing to object at sentencing or raise this claim in a postsentencing

motion. See *People v. Patterson*, 217 Ill. 2d 407, 438 (2005) (counsel cannot be deemed ineffective based upon the failure to file a futile motion).

¶ 52 Defendant further contends that he was denied the effective assistance of counsel because sentencing counsel did not file a motion for a new trial based upon Hamlin's testimony at the resentencing hearing. Specifically, defendant contends that at trial Hamlin identified defendant as the second person whereas at resentencing, Hamlin contradicted that testimony when he testified that defendant entered the garage first, pointed a gun at him and went through his pockets. Defendant concludes that had sentencing counsel filed a motion for a new trial there is a reasonable probability that "success on the motion would have changed the outcome at retrial."

¶ 53 To prevail on a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and a reasonable probability that, but for defense counsel's unprofessional errors, a different result would have been achieved. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because a defendant's failure to establish either part of the *Strickland* test will defeat an ineffectiveness claim, a court considering a claim of ineffective assistance "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697.

¶ 54 To warrant a new trial based on newly discovered evidence, the evidence must: (1) have been discovered since the defendant's trial; (2) must be of such a character that it could not have been discovered prior to trial with the exercise of due diligence; (3) must be material to the issue and not merely cumulative; and (4) must be of such a conclusive character that it will likely

change the result on retrial. *People v. Anderson*, 2017 IL App (1st) 122640, ¶ 94. The trial court's denial of a motion for a new trial based on newly discovered evidence is reviewed for an abuse of discretion. *Id.*

¶ 55 Defendant contends that a motion for a new trial would have been successful because Hamlin testified at the resentencing hearing that defendant was the person who entered the garage, put a gun to his side and emptied his pockets, whereas at trial Hamlin testified that defendant was the person who merely stood holding a gun. We disagree.

¶ 56 Although Hamlin's testimony that defendant was the man who put the gun to his side and took his possessions from his pockets was certainly discovered since trial and could not have been discovered prior to trial with the exercise of due diligence, it was not of such a conclusive character that it would likely change the result on retrial. See *Id.* Hamlin did not recant his identification of defendant as being present at the garage holding a gun nor name someone else as the offender. Rather, he testified both that he was mistaken at trial when he identified defendant as the second person and then that he was mistaken at "neither" trial nor the resentencing hearing. Although Hamlin essentially contradicted himself as to whether defendant was the first or second offender, evidence that merely contradicts a witness is not of such a conclusive character that a new trial is warranted. See *People v. Smith*, 177 Ill. 2d 53, 83 (1997) (quoting *People v. Holtzman*, 1 Ill. 2d 562, 568 (1953) (" 'Newly discovered evidence, the effect of which is to discredit, contradict and impeach a witness, does not afford a basis for the granting of a new trial.' ")).

¶ 57 We are unpersuaded by defendant's reliance on *People v. Smith*, 2015 IL App (1st) 140494, for the proposition that Hamlin's testimony at sentencing would change the result upon

retrial. In that case, the defendant, who had been found guilty of murder and attempted murder and sentenced to 40 years in prison, argued in the appeal from the dismissal of his postconviction petition that he had made a substantial showing of his actual innocence based upon a witness's affidavit. Specifically, the witness averred that after testifying at the defendant's trial, he began to have doubts regarding his identification of defendant as the shooter. When the witness saw a person who "looked a bit like" defendant, it " 'came to' " him that this person was the "actual shooter." *Id.* ¶ 12.

¶ 58 On appeal, this court determined that the defendant had made a substantial showing of actual innocence based upon newly discovered evidence. Specifically, the court determined that the defendant could not have discovered the witness's recantation prior to trial because the witness himself believed that he had accurately identified the defendant as the shooter at the time of trial. *Id.* ¶ 19. The court further concluded that the witness's assertion that a person other than the defendant was the shooter was "certainly relevant" and supported the defendant's claim of innocence. *Id.* ¶ 20. The court finally concluded "given the absence of any evidence at trial pointing" to this other person, the witness's affidavit was "likewise not cumulative." *Id.*

¶ 59 The court then determined that because the witness was the only eyewitness to identify the defendant at trial and no physical evidence linked the defendant to the crime, the witness's recantation was of such a conclusive character that, if believed, it "would probably result in a different outcome." *Id.* ¶¶ 21-22. The court noted that the witness's recantation was not "mere impeachment," as the witness did not deny his earlier identification of the defendant but "exonerate[d] him altogether and name[d] a different perpetrator." *Id.* ¶ 23.

¶ 60 As we recognized in *Smith*, in order to proceed to an evidentiary hearing on a free-standing claim of actual innocence within a postconviction proceeding, the new evidence must vindicate or exonerate a defendant, it “must do more than merely call into question the sufficiency of the evidence adduced at trial.” *Id.* ¶ 18 (citing *People v. Coleman*, 2013 IL 113307, ¶ 97). Here, Hamlin’s testimony at the sentencing hearing does not exonerate defendant as Hamlin did not identify someone else or state that defendant was not present.

¶ 61 Moreover, even if Hamlin was impeached with his testimony at the resentencing hearing at a new trial, defendant cannot establish that a different result would occur. In addition to Hamlin’s identification testimony at trial, Taylor also testified that he observed defendant exit Hamlin’s car and that Hamlin identified defendant as the “mother***” who took the car, and Hamlin identified items recovered from a vehicle that defendant had access to as items removed from the car. Accordingly, as defendant has failed to establish that Hamlin’s testimony at the sentencing hearing qualified as “newly discovered evidence” which warranted a new trial (*Anderson*, 2017 IL App (1st) 122640, ¶ 94), he cannot establish that he was prejudiced by sentencing counsel’s failure to file a motion for a new trial and his claim of ineffective assistance of counsel must fail. See *Patterson*, 217 Ill. 2d at 438 (counsel cannot be deemed ineffective based upon the failure to file a futile motion).

¶ 62 Defendant finally contends, and the State agrees, that his mittimus should be corrected to reflect credit for the 2172 days he spent in presentence custody.

¶ 63 Whether a mittimus should be corrected is a question of law we review *de novo*. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 35. A defendant is entitled to credit for any part of a day he spends in presentence custody, excluding the day of sentencing. *People v. Williams*, 239

Ill. 2d 503, 509 (2011). Here, defendant was arrested on May 16, 2009, and remained in custody until he was re-sentenced on April 27, 2015. Counting the day of his arrest, and excluding his sentencing date, defendant spent 2172 days in presentence custody. We therefore order the clerk of the circuit court to correct defendant's mittimus to reflect 2172 days of presentence custody credit.

¶ 64 Accordingly, for the reasons listed above, we affirm defendant's conviction and sentence, and order that his mittimus be corrected to reflect 2172 days of presentence custody credit.

¶ 65 Affirmed; mittimus corrected.