2018 IL App (2d) 150426-U
No. 2-15-0426
Order filed January 29, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN CASSIMATIS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 13-CF-224 Honorable John F. McAdams, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's aggravated-stalking conviction does not violate due-process standards; (2) the evidence was sufficient to sustain that conviction; and (3) defendant's statement in allocution raised an implicit claim of ineffective assistance of trial counsel that was sufficient to trigger a preliminary *Krankel* inquiry. Affirmed and remanded.

¶ 2 After a jury trial, defendant, John Cassimatis, was convicted of aggravated stalking (720 ILCS 5/12-7.4(a)(3) (West 2016)) and violating an order of protection (720 ILCS 5/12-3.4 (West 2016)). The trial court sentenced him to four years' imprisonment on the aggravated-stalking conviction. Defendant appeals, arguing that: (1) subsection (a) of the general stalking statute

(720 ILCS 5/12-7.3(a)(2) (West 2016)) is unconstitutional; (2) alternatively, the evidence was insufficient to sustain his aggravated-stalking conviction; and (3) his comments during his statement in allocution were sufficient to put the trial court on notice that he was claiming ineffective assistance of counsel so as to require a preliminary (*i.e.*, first-stage) examination of his claims, consistent with the procedure in *People v. Krankel*, 102 Ill. 2d 181, 189 (1984). We affirm and remand for a preliminary *Krankel* inquiry.

¶ 3 I. BACKGROUND

¶ 4 On April 29, 2013, defendant, age 77, was charged by indictment with one count of aggravated stalking, one count of stalking (720 ILCS 5/12-7-3(a)(2) (West 2016)), and one count of unlawful violation of an order of protection. Prior to trial, the State *nol prossed* the stalking charge.

¶ 5 The charges arose from acts that occurred between July 2012 and April 2013. The aggravated-stalking count alleged that defendant knowingly engaged in a course of conduct directed at Sherry Carlson, knowing that his course of conduct would cause a reasonable person to suffer emotional distress, in that defendant placed Carlson under surveillance at 2300 Sycamore Road, a Walmart store, and directed a third party, Tyrell Mitchell, to enter a protected address at 8967 Baseline Road in Kingston (the farm) and take pictures, all in violation of an order of protection.

¶ 6 A. Sherry Carlson

¶ 7 Trial commenced on September 9, 2014. Carlson, the victim, testified that she knew defendant because she had rented a room from him at his residence at the farm, which is at the corner of Annie Glidden Road and Base Line Road. The property is in a rural area, spans five acres, and contains seven outbuildings. Carlson briefly dated defendant while she lived at his

residence. Also during this time, around September 2010, the farm was going into foreclosure and defendant was planning on moving to Florida. Carlson purchased the farm at a sheriff's auction. Sometime after her relationship with defendant had ended, Carlson married Jeffrey Maye.

¶ 8 In October 2011, Carlson obtained an order of protection against defendant, which required defendant to stay away from certain residences and places of employment. Between September 8, 2011, and September 19, 2011, defendant, on three occasions, appeared at Carlson's residence (a house on Neil Road in Sugar Grove, where defendant drove by and looked in the windows) or place of employment (in Aurora). On October 18, 2011, defendant waited outside Carlson's place of employment and, as she drove away, he followed her through downtown Aurora. Carlson called 911, defendant was arrested, and, ultimately, in 2012, he was convicted in Kane County of aggravated stalking and violation of an order of protection.

¶ 9 As part of his sentence, defendant was required to submit to GPS monitoring and was directed to stay at least 1,500 feet from Carlson and certain protected addresses. One of those addresses was the farm. The order of protection prohibited defendant from contacting Carlson directly, indirectly, or through third parties. It also prohibited him from putting Carlson under surveillance.

¶ 10 Between late 2012 and early 2013, Carlson lived at the farm. She occasionally saw defendant at the Walmart, Aldi, or Walgreen's stores or driving on Sycamore Road in De Kalb. The Walmart, Aldi, and Walgreen's are not protected addresses. She also saw him on Base Line Road in De Kalb. Carlson never observed him on the farm, nor did she ever see anyone, in person or on the surveillance video, suspicious or unfamiliar on the farm.

¶ 11 Carlson further testified that she received numerous calls from the GPS officer that indicated that defendant was bordering the perimeter of a protected address. On one occasion, in March 2013, at about midnight, Carlson, who was alone at the farm, received a call from the GPS officer, stating that defendant was bordering the perimeter of the property and that she needed to put into effect her emergency plan and leave the residence. Carlson carried out her emergency plan about four or five times in March 2013. Also during that month, Carlson and Maye were contacted by Mitchell. Afterwards, they contacted the police.

¶ 12 The interactions with defendant have impacted Carlson's life. She testified that she cannot go anywhere by herself and is afraid to make new friends. "I don't know where it is that I'm supposed to feel safe."

¶ 13 B. Tyrell Mitchell

¶ 14 Tyrell Mitchell testified that he spent six years in prison for possession of a controlled substance and has a DUI conviction. Further, he is on probation for two felony violations of an order of protection. Mitchell testified that he received no favors for testifying in this case.

¶ 15 Mitchell met defendant when they were both in custody in the Kane County jail in January 2012. After he was released, Mitchell stayed with defendant for one week because defendant was assisting Mitchell with legal matters.

¶ 16 Mitchell testified that, on July 1, 2012, defendant rented a vehicle and instructed Mitchell to drive himself to the farm. He gave Mitchell a box camera and asked him to take pictures of the property and to turn off the wind turbine if it was running. Defendant also asked Mitchell to take photos of the inside of the house, but Mitchell did not do so, explaining that there was a surveillance camera on the porch. Mitchell photographed the buildings on the property, a black Expedition truck, and the inside of the barns, all at defendant's request. He then returned the

camera to defendant. Mitchell testified that he was aware at this time of the orders of protection against defendant and that defendant was not supposed to be on the property.

¶ 17 In August 2012, Mitchell again stayed with defendant, at Parkside Apartments on Sycamore Road in De Kalb. While there, defendant spoke about Carlson and Maye, stating that he wanted to have their legs broken, referring to it as teaching them how to play baseball. Defendant asked Mitchell if he could refer him to anyone who could do that for him. Mitchell did not refer defendant to anyone.

¶ 18 In late September/early October 2012, defendant asked Mitchell to accompany him to Walmart in De Kalb. As they pulled into the parking lot, defendant pointed out Carlson and Maye's black Mercedes. Carlson and Maye were sitting in the vehicle. Mitchell did not know why defendant pointed out the couple or the car.

¶ 19 In January 2013, defendant again asked Mitchell for help in obtaining drugs and finding someone to plant them in Maye's truck. Defendant and Mitchell were staying at Hope Haven, and Mitchell learned that word was getting out that Mitchell was defendant's hit man. Mitchell, who was still on parole, did not want to return to prison. He feared that, if something happened to Carlson or Maye, his affiliation with defendant would get him into trouble. Also, he had a baby on the way. Shortly after this, Mitchell contacted Carlson and Maye to alert them. He also cooperated with the police and agreed to wear a wire while meeting with defendant for lunch. (Detectives obtained an overhear order on April 1, 2013.)

¶ 20 On April 4, 2013, Mitchell had lunch with defendant at China House restaurant in De Kalb as part of the overhear. The recording was played for the jury. At one point during the conversation, Mitchell states, "I looked out for you. You know, I'm going, doing reconnaissance missions and shit for your ass and all that shit, man." Defendant responded, "yep." Mitchell

stated, "So we know – you know, we – we helping each other out, you know what I mean? You know, I go out there. You know, I took the pictures of farm and shit for you, you know what I mean? Just take – taking the chance, you know what I mean? Getting tied up in this mess, man." Defendant responded, " I don't want you tied up in what happens. It came back to [De Kalb sheriff's detective] Brad Carls that I was associated with you and that you were a hit man."

¶ 21 Later in the conversation, Mitchell stated, "I said remember back up in September, October, when you came and picked me up and we went up to Walmart and you pointed Sherry and Jeff out to me? You showed me the – the black Mercedes, right? What – what other car does she drive?" Defendant responded, "They drive a Ford Explorer, the one that you saw in the driveway." Mitchell stated, "Yes." Defendant then stated, "And they drive a – another Mercedes, a – a CLK 320." Defendant then discussed his attempts to raise money to get the farm back.

¶ 22 Mitchell told defendant that he had been laid off again and needed money. He attempted to persuade defendant to give him money. Defendant replied that he would have funds if he got back the farm. Defendant offered to connect Mitchell to a friend so he could make money selling "weed." Defendant responded in the affirmative when Mitchell stated he would teach Maye to play baseball, defendant's way of saying break someone's legs, for $500. Later, defendant stated that Maye "deserves a kneecap opened." Mitchell mentioned the windmill at the farm, and defendant responded that he knew it was still there because he "passed by there last night" and again "this morning." Later, defendant asked Mitchell if it was "worth a kneecap, so [Maye] never walks again?" He also stated that, if both Maye and Carlson were done, it would tie defendant together. Mitchell asked, "So what, one at a time?" Defendant replied, "Yeah."

Mitchell then confirmed that they would "go for [Maye] and [Carlson's] shit." Defendant replied in the affirmative.

¶ 23 After the overhear was played for the jury, defense counsel cross-examined Mitchell. Mitchell admitted to his recent guilty pleas in two felony violation-of-order-of-protection cases, for which he was sentenced to two years' imprisonment, but which was stayed pending compliance with the probation orders, and denied that the plea agreements had anything to do with his testimony against defendant.

¶ 24 Addressing the Walmart incident, Mitchell testified that he and defendant were there for about three or four minutes. They drove into the parking lot, saw Carlson and Maye enter their car, drove around the parking lot, and left. They did not make contact with Carlson or Maye or follow them.

¶ 25 C. Matthew Peterson

¶ 26 Matthew Peterson, a supervisor at Kane County Court Services, testified that, during the relevant period, he supervised the county's electronic monitoring program. Beginning in 2012, Peterson tracked defendant's movements through a GPS device, which tracks defendant's movements within a 30-foot radius. He identified printouts, which were admitted into evidence, depicting defendant's GPS movements in March and April 2013 and late September/early October 2012.

¶ 27 The March and April 2013 exhibits show defendant's GPS monitor traveling on Glidden Road, passing the farm. The exhibits from September and October 2012 show him driving on Sycamore Road in De Kalb. During the monitoring period, defendant lived on Sycamore Road in De Kalb, south of the farm.

¶ 28 During the two-year period the defendant was on the GPS monitoring, he never crossed into the 1,500-foot exclusion zones surrounding Carlson's protected addresses. If the exclusion zone had been violated, Carlson would have been contacted. Given that defendant never violated the exclusion zone, Carlson would not have been contacted. Peterson did not know whether Carlson was ever present when defendant drove near the exclusion zones.

¶ 29 D. Brad Carls

¶ 30 Brad Carls, a detective with the De Kalb County sheriff's office, testified that he was familiar with defendant, Carlson, and the order of protection in this case. Walmart was not listed as a protected address in the order of protection. Carls knew that, in September and October 2012, defendant lived in an apartment within a "[r]easonable proximity" to the Walmart. He was supposed to be living in Aurora, but chose to live in De Kalb County. (Carlson lived in Kingston, at the farm, at this time.) During that same period, Carls never received any reports from Carlson that defendant followed or made any contact with her at Walmart.

¶ 31 Addressing the overhear, Carls testified that Carlson contacted him. As a result, on March 22, 2013, Mitchell met with Carls and the sheriff's office obtained an order authorizing an overhear of Mitchell's lunch with defendant. Carls denied that Mitchell was offered anything in exchange for his cooperation in this case. He did give Mitchell money for lunch at China House and $50 to give to defendant. The overhear was conducted on April 4, 2013, and, as a result, Carls subsequently, on April 17, 2013, obtained a warrant for defendant's arrest.

¶ 32 Carls also testified that, on April 23, 2013, he drove to the farm and took photographs at the corner of Base Line and Glidden Roads. He selected this location because GPS monitoring information reflected that defendant often travelled that route and his vehicle was coming to

almost a complete stop in that area. At this corner, one can see the west side of the property and if any vehicles are parked at the house. The photographs were admitted into evidence.

¶ 33 Addressing the Walmart, Carls testified that he is familiar with the plaza in which it is located and knows that they keep surveillance video of their parking lot for 90 days. If an incident occurred in 2012 and he was not aware of it until March 2013, there would no longer be available the surveillance video. Also, the video would not necessarily depict the occupants of a vehicle. The State rested.

¶ 34 E. Defendant

¶ 35 Defendant, age 77, testified that, in 2010, he lived at the farm and had owned it for 14 years. In January 2012, defendant met Mitchell in the Kane County jail. Both men had the same attorney, but were housed in different areas of the jail. After Mitchell got out of jail, defendant occasionally let Mitchell stay at his place when defendant was not there.

¶ 36 Defendant denied that he ever asked Mitchell to go to the farm, take photographs of the farm, make contact with or follow Carlson, turn off the windmill at the property, or provide Mitchell with money to perform illegal acts on his behalf. He also denied ever going to Walmart with Mitchell and denied ever providing him drugs to place in Carlson's or Maye's vehicles.

¶ 37 Addressing the overhear, defendant stated that he reviewed it "[e]xtensively." According to defendant, he counted three occasions when he told Mitchell that he did not want him involved in the situation. Defendant testified that, at various parts of the conversation, he could not understand what Mitchell was saying. As to the farm photos, defendant testified that he was referring to photos of his farm that he had printed off the internet.

¶ 38 Defendant was also asked the following question concerning the overhear:

> "And when [ ] Mitchell said that I remember back in September, October when you came and picked me up and we went to Walmart and you pointed [Carlson] and [Maye] out to me, you showed me the black Mercedes, right, what other car does she drive, you responded they drive a Ford Explorer, the one you saw in the driveway. Is that correct?"

Defendant responded, "That's correct. That was in the driveway at – that was in the driveway of – going into Jewel." This was "[a]cross the street from my apartment."

¶ 39 When defendant was asked if he identified Carlson and Maye's other vehicle, the black Mercedes convertible, he responded, "I don't know if I did or not. I might have." Defendant explained that he was familiar with the vehicles and their license plate numbers because he paid for their registrations and drove them (presumably during the time Carlson and defendant lived at the farm).

¶ 40 Defendant denied driving past the farm. When asked a second time whether he drove past the farm, he responded, "I have not driven past my farm in two years. I drove down Glidden Road, and that's my constitutional right, and I intend to exercise it." Defendant was asked, "So you drove down Glidden Road past the farm, correct?" He responded, "No, I did not drive down Glidden Road past my farm. You can't help passing on the side of the road. You can view it from Glidden Road." He testified that the farm is 3,700 feet from Glidden Road. Next, defendant was asked, "So when you indicated to [ ] Mitchell that somebody was staying at the farm, you could see if there were people on the property. Is that correct?" Defendant stated, "My lights might have – may have been on. There's a security light on – there's a security light there."

¶ 41 The jury convicted defendant of aggravated stalking and violation of an order of protection. At sentencing, on November 12, 2014, defendant gave a statement in allocution,

explaining how he had tried to help Carlson with her drug and alcohol problem, to get her life together, let her live with him when her house was unlivable, and spent $56,000 fixing up Carlson's house. He claimed that Carlson and Maye owe him a lot of money. Further, defendant maintained that Carls tampered with the overhear tapes because he allegedly had an affair with "her" (presumably Carlson) and that he had told his attorney that parts of the record were missing:

> "Every time I called the police to do help, help something in De[ ]Kalb County I've gotten nothing, and I've had nothing but problems with Brad Carls for three years because he's had an affair with her, okay, and he tampered with – he tampered with the tapes and I know they are tampered with because there's excerpts missing and I told my attorney exactly some of the excerpts that are missing."

Later, defendant returned to the tampering issue:

> "The last time I was convicted there's no evidence. There's no pictures. He had – that guy right there, do you see the smirk on his face? He's had this – he's had this vendetta against me and I know he tampered with the tapes and I can prove it to you and I'll get this matter straightened out and I'll get an audio expert and I'll show you exactly what transpired through this whole thing."

Defendant also claimed a disbarred attorney fabricated the overhear transcript:

> "Your Honor, through this all there's a gentleman who is an ex-barred attorney by the name of – by the name of Ed Varger who I have known for a long time. He's a disbarred attorney. He's a convicted federal felon. He's the one who wrote this script. That's all it is. It's a script. There's nothing factual in it."

Defendant then again addressed the alleged tampering:

> "I apologize to the Court for taking – taking this time, but I would like to emphatically state that Mr. Brad Carls and [detective] Sarah Frazier tampered with those tapes. Okay? There's a lot of excerpts missing in them, and I will prove to you through some way somehow that they were tampered with. There's many excerpts missing, and it just disturbs me that I spent 581 days in custody for something I haven't done."

¶ 42 Finally, defendant also referenced a potential witness, Carlson's daughter, whom he had asked his attorney to contact:

> "I had asked my attorney to contact Taylor who would have come up and told basically what her mother was all about, but her mother's – her mother is the one that needs help. All I've done is tried to help her through this whole period. This is where I'm at."

¶ 43 The trial court thanked defendant and took a recess to consider the sentence. After the recess, the court sentenced defendant to four years' imprisonment, followed by four years' mandatory supervised release. The following day, the court merged the two counts, finding that the order of protection violation was a lesser-included offense of aggravated stalking. The trial court also denied defendant's motions for a new trial and to reconsider and reduce sentence. Defendant appeals.

¶ 44 II. ANALYSIS

¶ 45 A. Constitutionality of Stalking Statute - *Relerford*

¶ 46 First, defendant argues that his conviction must be vacated because the stalking statute (720 ILCS 5/7.3 (West 2016)) is unconstitutional. Specifically, relying on the First District's decision in *People v. Relerford*, 2016 IL App (1st) 132531, defendant argues that the stalking statute violates due-process standards because it lacks a *mens rea* requirement. *Id.* ¶ 27 (holding

that statute lacks *mens rea* requirement and, thus, is facially unconstitutional under due-process clause of fourteenth amendment). During briefing in this case, the supreme court granted leave to appeal as a matter of right in *Relerford*, and, on November 30, 2017, issued its decision, *People v. Relerford*, 2017 IL 121094, ¶¶ 78-79, affirming the appellate court's judgment. Accordingly, we address defendant's argument in light of the supreme court's decision and, for the following reasons, we reject it.

¶ 47 "A statute is presumed constitutional, and the party challenging the statute bears the burden of demonstrating its invalidity." *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). "Whether a statute is constitutional is a question of law that we review *de novo*." *Id.*

¶ 48 The fourteenth amendment to the United States Constitution and article I, section 2, of the Illinois Constitution protect individuals from the deprivation of life, liberty, or property without due process of law. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. The case law acknowledges two distinct strands of due process analysis: substantive due process and procedural due process. See *Doe v. City of Lafayette*, 377 F.3d 757, 767-68 (7th Cir. 2004); *In re J.R.*, 341 Ill. App. 3d 784, 791 (2003). Substantive due process, which is at issue here, bars the government from arbitrarily exercising its power without the reasonable justification of serving a legitimate interest. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

¶ 49 "Under the banner of its police power, the legislature has wide discretion to fashion penalties for criminal offenses, but this discretion is limited by the constitutional guarantee of substantive due process, which provides that a person may not be deprived of liberty without due process of law." *People v. Madrigal*, 241 Ill. 2d 463, 466 (2011) (when a fundamental right is not at issue, rational-basis test applies). A statute violates due process if it potentially subjects "wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond

mere knowledge." *Id.* at 467. In such a case, the statute "fails the rational basis test because it does not represent a reasonable method of preventing the targeted conduct." *Id.* at 467.

¶ 50 Defendant argues that the stalking statute violates the due process protections of the federal constitution by failing to contain a *mens rea* requirement. The stalking statute provides that "[a] person commits stalking when he or she *knowingly* engages in a course of conduct directed at a specific person, and he or she *knows or should know* that this course of conduct would cause a *reasonable* person to *** suffer other emotional distress." (Emphases added.) 720 ILCS 5/12-7.3(a)(2) (West 2016). The aggravated stalking statute states that "[a] person commits aggravated stalking when he or she commits stalking and *** violates *** an order of protection[.]" 720 ILCS 5/12-7.4(a)(3) (West 2016).

¶ 51 The term "course of conduct" is defined as follows:

> " 'course of conduct' means 2 or more acts, including but not limited to acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, *surveils*, threatens, *or communicates to or about*, a person, engages in other non-consensual contact, or interferes with or damages a person's property or pet. A course of conduct may include contact via electronic communications." (Emphases added.) 720 ILCS 5/12-7.3(c)(1) (West 2012).

¶ 52 Defendant relies on the First District's *People v. Relerford*, 2016 IL App (1st) 132531, decision, which held, as relevant here, that subsection (a) the stalking statute was facially unconstitutional because it contains no *mens rea* requirement, and, instead, includes a reasonable-person standard of criminality. *Id.* ¶ 26. The court relied on *Elonis v. United States*, 575 U.S. ___ , 135 S. Ct. 2001 (2015), where the Supreme Court held that a federal stalking statute that imposed criminal liability "using a 'reasonable person' standard was incompatible

with due process requirements[.]" *Relerford*, 2016 IL App (1st) 132531, ¶ 24; *Elonis*, 135 S. Ct at 2011. The First District, discussing subsection (a)(2) of the stalking statute, which is at issue here, concluded that, because the stalking statute criminalizes conduct only if the defendant "knows or should know" that it would cause a "reasonable person" to "suffer *** emotional distress," it violates due process. *Relerford*, 2016 IL App (1st) 132531, ¶¶ 26-27.

¶ 53 On appeal, the supreme court affirmed, but rejected the First District's due-process analysis upon which defendant relies and struck the phrase "communicates to or about" as violative of the first amendment. *Relerford*, 2017 IL 121094, ¶¶ 19-22, 63-69, 78. As to due process, the supreme court held that: (1) *Elonis* is not a due process case; (2) the stalking statute *contains* a mental state; and (3) substantive due process does not categorically preclude negligence as a permissible mental state to impose criminal liability and *Elonis* does not hold otherwise. *Relerford*, 2017 IL 121094, ¶¶ 19-22. Specifically, the supreme court determined that the appellate court erred in vacating the defendant's convictions based on *Elonis*, explaining that *Elonis* was not a due process case and that the Supreme Court did not engage in any such analysis. *Id.* ¶¶ 19-21. Rather, *Elonis* was a statutory-interpretation case, holding that, where a criminal statute lacks a *mens rea* requirement, a mental state of intent or knowledge suffice. *Id.* ¶ 21; *Elonis*, 135 S. Ct. at 2012. Next, the supreme court held that the stalking statute is *not* silent as to a mental state. *Relerford*, 2016 IL App (1st) 132531, ¶ 21. The statute criminalizes knowingly engaging in a course of conduct, as evidenced by two or more acts—nonconsensual communications in *Relerford*—that negligently would cause a reasonable person to suffer emotional distress. *Id.* ¶ 34. Finally, the supreme court concluded that substantive due process does not categorically preclude negligence as a permissible mental state for imposition of criminal liability and that *Elonis* does not suggest otherwise. *Id.* ¶ 22. The Criminal Code of

2012, the court noted, includes both recklessness and negligence as permissible mental states and that strict liability is permitted in certain instances. *Id.* Thus, the supreme court's *Relerford* decision is fatal to defendant's due-process claim.

¶ 54 Turning to the supreme court's first-amendment analysis in *Relerford*, the court held that subsection (a) of the stalking statute violated the first amendment because it is overbroad in that it impermissibly infringes on the right to free speech.[1] *Id.* ¶¶ 63, 78. The court, thus, struck the phrase "communicates to or about" from the provision. *Id.* It also vacated the defendant's convictions because they could not be sustained based on other conduct prohibited by the statute (specifically, they did not constitute threats). *Id.* ¶¶ 65-69. Here, critically, defendant was charged with and convicted of *surveillance* of Carlson, whereas the *Relerford* defendant's acts, which, as relevant here, included calls and emails to the victim and standing outside of and entering her place of employment, constituted *communications*. *Relerford*, 2017 IL 121094, ¶ 3. The supreme court's striking of the phrase "communicates to or about" from the statute does not impact defendant's acts and, thus, its conclusion that that portion of the statute is unconstitutional has no impact on defendant's conviction, which was based on his surveillance of Carlson and not any communication to or about Carlson.

¶ 55 In summary, the supreme court's recent pronouncement in *Relerford* is fatal to defendant's due-process claim.

¶ 56 B. Sufficiency of the Evidence

¶ 57 Next, defendant argues in the alternative that, if the stalking statute is constitutional, this court should reverse his aggravated-stalking conviction because the evidence was insufficient to sustain the conviction. For the following reasons, we disagree.

[1] The court held similarly as to the cyberstalking statute, which is not at issue here. *Id.*

¶ 58 When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the required elements of the crime beyond a reasonable doubt. *People v. Bradford*, 2016 IL 118674, ¶ 12. It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *Id.* A reviewing court must draw all reasonable inferences in favor of the prosecution. *People v. Sumler*, 2015 IL App (1st) 123381, ¶ 54. A conviction will be reversed only if the evidence is so improbable, unsatisfactory, or inconclusive that it raises a reasonable doubt of the defendant's guilt. *Id.*

¶ 59 Again, the stalking statute provides that "[a] person commits stalking when he or she knowingly engages in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to *** suffer other emotional distress." 720 ILCS 5/12-7.3(a)(2) (West 2016). As relevant here, " '[c]ourse of conduct' means 2 or more acts, including *** acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means *** surveils *** a person[.]" 720 ILCS 5/12-7.3(c)(1) (West 2012). "Places a person under surveillance" means "remaining present outside the person's *** vehicle, other place occupied by the person, or residence[.]" 720 ILCS 5/7.3(c)(7)(1) (West 2016).

¶ 60 The State alleged that the stalking was based on two acts: (1) placing Carlson under surveillance; and (2) directing Mitchell to enter a protected address, *i.e.*, the farm, and take pictures. Defendant challenges the sufficiency of the evidence only as to the charges alleging that defendant placed Carlson under surveillance. Defendant maintains that the State's proof with respect to surveilling Carlson at Walmart consisted of: (1) Carlson's imprecise reference to

seeing defendant around town; and (2) Mitchell's testimony about defendant pointing out Carlson and Maye's vehicle. He argues that this evidence was insufficient to show a course of conduct.

¶ 61 As to Carlson, defendant points to her testimony that, in late 2012 and early 2013, she "occasionally" saw defendant "unexpectedly" at various stores, including Walmart on Sycamore Road. She did not say, he notes, that defendant remained present upon seeing her there or that he followed her. Defendant also points to Carls's testimony that Carlson never reported defendant following her at Walmart. Carls also testified that defendant lived within reasonable proximity to Walmart. Defendant argues that evidence that defendant was at a popular retail store within a reasonable proximity of his residence, where he was legally permitted to be, and was "occasionally" seen there by Carlson amounts to unfortunate coincidence, not surveillance.

¶ 62 As to Mitchell's testimony, defendant notes that Mitchell testified that he and defendant drove to the Walmart parking lot and saw Carlson and Maye sitting in their car. Defendant pointed them out to Mitchell, drove around the parking lot, and left. He did not follow Carlson and Maye. Mitchell, defendant notes, stated that the incident took only three to four minutes, and he had no idea why defendant pointed them out to him. Defendant urges that nothing in Mitchell's testimony establishes that defendant remained present outside Walmart knowing it was occupied by Carlson. At best, he argues, the testimony showed defendant pointing out the couple to Mitchell and then left. Thus, there was no evidence that defendant placed Carlson under surveillance at Walmart and the State failed to prove a course of conduct. Defendant asks that we reverse his aggravated stalking conviction.

¶ 63 The question whether a set of circumstances constitute surveillance under the stalking statute is a factual question for the trier of fact. *People v. Curtis*, 354 Ill. App. 3d 312, 318

(2004). "[T]here is no minimum amount of time a defendant must be present outside a victim's car or house in order for him to 'remain present' under the statutory definition of surveillance." *Id.* at 324 (2004). See also *People v. Daniel*, 283 Ill. App. 3d 1003, 1008 (1996) ("although 'remain' has a temporal connotation, there is no basis for concluding that a defendant must stop, stay, or wait for a set period of time before his behavior is deemed to be surveillance under the stalking statute").

¶ 64 We conclude that, construed in the light most favorable to the State, the evidence was sufficient to sustain defendant's aggravated-stalking conviction. Mitchell testified that the Walmart incident occurred in late September/early October 2012. Prior to this time, Mitchell, at defendant's request, had driven to the farm and taken pictures of the buildings. Mitchell was aware of the orders of protection against defendant and that defendant was not supposed to be on the farm property. In August 2012, defendant told Mitchell that he wanted to have Carlson's and Maye's legs broken (*i.e.*, teach them to play baseball) and he asked Mitchell if he could refer him to anyone who could do that for him. Thus, when defendant asked Mitchell to accompany him to Walmart in late September/early October 2012, Mitchell knew of defendant's animosity toward Carlson and Maye and his desire to inflict harm on them.

¶ 65 Mitchell testified that he and defendant pulled into the Walmart parking lot, defendant pointed out Carlson and Maye's black Mercedes (the couple was in the vehicle at the time), they saw the couple enter their vehicle, defendant and Mitchell drove around the parking lot, and then left. The incident lasted three to four minutes. In the overhear, Mitchell raised the Walmart incident, and defendant did not deny the trip occurred. Instead, he identified the couple's other vehicle, a Ford Explorer, "the one that [Mitchell] saw in the driveway" (a reference to the second

act in the course of conduct). Defendant testified, however, that he did not go to Walmart with Mitchell.

¶ 66 A reasonable inference as to the purpose of the Walmart trip was that it occurred so that Mitchell could identify Carlson and Maye. As the State notes, neither defendant nor Mitchell testified that they actually shopped at the Walmart during this incident or did anything other than locate and identify Carlson and Maye. Defendant wanted to inflict harm upon them, as was evidenced by the events prior to the Walmart incident mentioned above—taking photos at the farm and the discussion concerning breaking the couple's legs—and were subsequently confirmed during the overhear. In the overhear, defendant responded in the affirmative when Mitchell stated that he would teach Maye to play baseball. They also discussed inflicting harm on both Carlson and Maye, but defendant was concerned that it would tie him to the incident. Instead, when Mitchell asked if they should do so one at a time, defendant replied, "Yeah."

¶ 67 Furthermore, Carlson's testimony addressed her history with defendant, the order of protection, and the GPS monitor. She testified that she often saw defendant driving outside the protected area, which was confirmed in the overhear, where he stated that he passed the farm on both the night before and the morning of the overhear meeting. Carlson also testified about receiving four or five calls from the GPS officer in March 2013, stating that defendant was bordering the perimeter of her property and to carry out her emergency plan, which she did. She testified that she cannot go anywhere by herself, is afraid to make new friends, and does not know where she is "supposed to feel safe." This testimony supports an inference that a reasonable person in her situation would suffer emotional distress. See 720 ILCS 5/12-7.3(c)(3) (West 2016) (" 'Emotional distress' means significant mental suffering, anxiety or alarm").

¶ 68 We reject defendant's argument that the Walmart incident was merely an unfortunate coincidence and that, had it been for some other, *i.e.*, nefarious, purpose, Mitchell would not have testified that he had "no idea" why defendant pointed out Carlson and Maye. This is not the only reasonable inference from the evidence. In the absence of testimony that defendant and Mitchell shopped or engaged in other activity at the Walmart, the jury could instead have reasonably inferred that, by identifying Carlson and Maye to Mitchell, defendant went there to surveil Carlson.

¶ 69 Defendant also notes that Carlson did not testify that she saw him in the parking lot that day and, thus, she could not have been aware of his presence or suffered any emotional distress. We disagree that she was required to have observed defendant that day. The statute does not require that she be present when defendant "remain[s] present outside the person's *** vehicle, other place occupied by the person, or residence[.]" 720 ILCS 5/7.3(c)(7)(1) (West 2016). As the State notes, Carlson's testimony concerned the circumstances of defendant's surveillance, which supported a showing that a reasonable person in her situation would have been placed under emotional distress. See 720 ILCS 5/12-7.3(c)(8) (West 2016) (" 'Reasonable person' means a person in the victim's situation"). Carlson testified about defendant's prior aggravated stalking conviction, including that he had followed her to work, in Aurora, on one occasion and that he showed up at her Sugar Grove home several times. She also testified that, in March 2013, while living at the farm, she received four or five calls from the GPS officer, informing her that defendant was bordering on the perimeter of the protected address and to implement her safety plan. Defendant himself, on the overhear, stated that he had twice passed by the farm before meeting with Mitchell. Furthermore, the statute does not contain a temporal element requiring that the emotional distress be concurrent to the surveillance. Here, Carlson could have

suffered the distress when, for example, Mitchell came to tell her of defendant's activities. Overall, the testimony established that defendant knowingly placed Carlson under surveillance and that he knew or should have known that his conduct would have caused a reasonable person in Carlson's situation to suffer emotional distress.

¶ 70 In summary, construed in the light most favorable to the State, the evidence was sufficient to sustain defendant's aggravated-stalking conviction.

¶ 71 C. Ineffective Assistance of Trial Counsel - *Krankel*

¶ 72 Defendant's final argument is that the trial court erred in failing to make a preliminary inquiry under *Krankel*, where he had implicitly challenged trial counsel's effectiveness during his statement in allocution. For the following reasons, we agree and remand for such an inquiry.

¶ 73 The question whether the trial court conducted a proper preliminary *Krankel* inquiry is a legal question that we review *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28; see also *People v. Moore*, 207 Ill. 2d 68, 75 (2003).

¶ 74 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." (Emphasis added.) *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.

¶ 75 This case, again, involves whether the trial court should have conducted 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. "[T]he inquiry is not burdensome upon the circuit court, and the facts and circumstances surrounding the claim will be much clearer in the minds of all involved when the inquiry is made just subsequent to trial or plea, as opposed to years later on appeal." *Ayres*, 2017 IL 120071, ¶ 21. 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.

¶ 76 As the defendant need only raise a *colorable* claim of ineffective assistance at a preliminary *Krankel* inquiry, the correct inquiry, in determining whether there was "possible neglect," is to ask whether defense counsel's performance was arguably ineffective. See

McLaurin, 2012 IL App (1st) 102943, ¶ 40 (claim lacks merit if it "does not bring to the trial court's attention a *colorable claim* of ineffective assistance of counsel"). (Emphasis added.); see also *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984) (under *Strickland*, to show ineffective assistance of counsel, a defendant must prove both that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant).

¶ 77 Here, defendant contends that, during his statement in allocution, he implicitly challenged trial counsel's effectiveness, which triggered the trial court's duty to conduct a preliminary *Krankel* inquiry. During his statement, defendant alleged that Carls had tampered with the overhear tapes and that defendant had told trial counsel that parts of the record were missing. Defendant claimed that he could (and "someway" would) "prove it to" the court, get the "matter straightened out[,] [and] get an audio expert" to establish they were tampered with. He alleged that a disbarred attorney fabricated the overhear "script." Defendant also referenced a witness, Taylor, whom he identified as Carlson's daughter, that he had asked trial counsel to contact because she would have discredited Carlson's testimony.

¶ 78 A defendant is entitled to a *Krankel* inquiry when he or she makes an explicit or "clear" complaint, orally or in writing, of trial counsel's performance or ineffective assistance of counsel. *People v. Ayres*, 2017 IL 120071, ¶ 18. Further, even a bare assertion of " 'ineffective assistance of counsel' " is sufficient to trigger a *Krankel* inquiry. *Id.* ¶¶ 9, 18. The claim need not be supported by facts or specific examples because, "[i]f [the rule were otherwise, the supreme] court would not require the circuit court to conduct an inquiry into the underlying factual basis for the claim." *Id.* ¶ 19.

¶ 79 "In instances where the defendant's claim is implicit *and* could be subject to *differing interpretations*, a *Krankel* inquiry is not required." (Emphases added.) *People v. Thomas*, 2017

IL App (4th) 150815, ¶¶ 26-31 (holding that the defendant was not entitled to a *Krankel* inquiry, where he did not mention his attorney in his letter to the court or assert ineffective assistance; in context, the court was aware that parties had operated under misconception that charges were subject to sentencing at 85%; and the defendant was present when State and trial counsel learned of error; thus, the defendant's letter, wherein he stated that he would not have accepted the plea if he knew he could have received 50% if he went to trial, "could have easily appeared to be his hoping to somehow get another chance at a lesser sentence," not raising an ineffective-assistance claim).

¶ 80 In *Remsik-Miller*, which both parties address, this court held that the defendant's comment at the hearing on her *pro se* motion for reconsideration of her sentence that trial counsel did not represent her " 'to his fullest ability during [her] trial' " triggered a *Krankel* inquiry because it was an implicit claim of ineffective assistance. *Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 17 (the defendant had also stated, "I "want to make sure that [defense counsel] is no longer listed as my attorney") (Alteration in original.) In support, this court relied on *People v. Taylor*, 237 Ill. 2d 68, 75-77 (2010), where the supreme court held that the defendant's statement in allocution that he did not understand the consequences of his plea deal did *not* constitute an implicit *pro se* claim of ineffective assistance of counsel sufficient to trigger the trial court's duty to conduct a *Krankel* inquiry. The supreme court noted that the defendant did not specifically complain about trial counsel's performance or expressly state that he was claiming ineffective assistance of counsel; further, because his statement was "rambling," it was "amenable to more than one interpretation." *Id.* at 76-77 (noting, for example, that the defendant's statement merely reflected his regret at not accepting a more favorable plea deal

before trial, not that he had rejected the deal based on a misunderstanding of his potential sentence).

¶ 81 Here, defendant argues that his complaints concerning the tampering clearly show that he was complaining about trial counsel's performance (failing to have the tapes examined for tampering and failing to act on defendant's request concerning Taylor) and, thus, he implicitly alleged counsel's ineffectiveness. He asserts that he informed the court of some of the factual details about trial counsel's failure to investigate his case or prepare for sentencing, but he did not write or utter the words "ineffective assistance of counsel." Defendant distinguishes *Taylor*, asserting that, contrary to that case, here, he did mention his attorney during the statements at issue by specifically referencing two events. Further, responding to the State's assertion that defendant never stated that trial counsel failed to respond to his allegations, failed to thoroughly present his case, or express dissatisfaction with his attorney's performance, he contends that "it is difficult to imagine any scenario in which a defendant would complain that he told his attorney that evidence had been tampered with, if he did not mean, 'and my attorney did nothing about it.' " As to his statement that he had asked trial counsel to contact Carlson's daughter, who would have told "what her mother was all about," defendant contends that the fact that he did not state that counsel did not contact the daughter or what the relevance of her testimony would have been is not fatal to his argument and that these questions are unanswered because the trial court failed to conduct a preliminary *Krankel* inquiry. Defendant asserts that, where he alleged that he told his attorney that evidence was tampered with, it is not unreasonable to require the trial court to ask *some* follow-up questions.

¶ 82 The State argues that *Taylor* is similar to the claims made here. Unlike in *Taylor*, defendant here, in the State's view, neither specifically complained about trial counsel's

performance, nor did he expressly state that he was claiming ineffective assistance of counsel. Instead, the implicit claims were made during his statement in allocution, which, the State asserts, could accurately be described as "rambling." See *Taylor*, 237 Ill. 2d at 77 ("because of the rambling nature of [the] defendant's statement, it is amenable to more than one interpretation"). The State also maintains that the facts here are far from those found sufficient in *Remsik-Miller,* where this court held that the defendant's statement that trial counsel did not represent her " 'to his fullest ability during [her] trial' " triggered a *Krankel* inquiry because it was an implicit claim of ineffective assistance. *Remsik-Miller,* 2012 IL App (2d) 100921, ¶ 17. We disagree. The issue in that case was whether the defendant's statement was " 'too vague and conclusory' " (*id.* ¶ 11) to trigger a preliminary *Krankel* inquiry, and this court determined that it was not. *Id.* ¶ 17. Indeed, in *Ayres*, the supreme court resolved a split in the appellate court over the issue and, agreeing with *Remsik-Miller* and similar cases, held that a bare allegation of "ineffective assistance of counsel" is sufficient to trigger an inquiry. *Ayres*, 2017 IL 120071, ¶ 18.

¶ 83 The State contends that the trial court here was not put on notice that defendant was raising potential ineffective-assistance claims. It cites to two cases that, it asserts, determined that there was a clear basis for the claims. See *People v. Barnes*, 364 Ill. App. 3d 888, 898-99 (2006) (the defendant alleged that trial counsel was ineffective where he requested, but did not receive, transcripts or interviews from alleged alibi witnesses; without inquiring into claims, the trial court responded that the defendant's complaints were a matter of trial strategy; reviewing court held that the trial court's brief, conclusory review was insufficient and it remanded the cause for a preliminary inquiry), and *People v. Williams*, 224 Ill. App. 3d 517, 523-24 (1992) (remanded for preliminary inquiry; although the defendant did not make explicit allegations of

ineffective assistance, defense counsel's admission in posttrial motion that he had failed to call certain critical witnesses was sufficient to trigger *sua sponte* examination of counsel's performance). We find *Barnes* somewhat helpful here because the *Barnes* defendant complained, as did defendant here, that he had asked trial counsel to obtain certain information. It is true that the *Barnes* defendant also added that his counsel had failed to comply with his requests for information, unlike defendant here. But the *Barnes* court did not explicitly hold that a defendant need do so. See also *People v. Pence*, 387 Ill. App. 3d 989, 995 (2009) (in allocution, the defendant stated that defense counsel did not thoroughly represent him, omitted factual issues and court was denied the full picture; reviewing court held that trial court erred in failing to inquire further into claims and remanded for preliminary inquiry). As to *Williams*, we find the case unhelpful to our analysis because its unique facts—defense counsel's admission, which the State uses here as an example of a clear basis for ineffective-assistance allegations—are not helpful in analyzing the facts in this case.

¶ 84 We conclude that defendant sufficiently raised a *pro se* claim of ineffective assistance of trial counsel and that the trial court erred in failing to conduct a preliminary *Krankel* inquiry. *Ayres* held that a bare assertion of ineffective assistance of counsel, without more, is sufficient to trigger a court's duty to conduct a preliminary inquiry. *Ayres*, 2017 IL 120071, ¶ 18. Here, defendant did not use the phrase "ineffective assistance of counsel," but, first, informed the court during his statement in allocution that he did not commit the crime, he believed the overhear tapes had been tampered with, "told [his] attorney exactly some of the excerpts that are missing," and "I will prove to you *** somehow," including with an "audio expert." He also raised allegations concerning a disbarred attorney, whom he believed fabricated the overhear "script." Second, defendant also stated that he had asked trial counsel to contact Carlson's daughter. We

agree with defendant that the implication of him raising the fact that he informed trial counsel of the fabrication and of a potential witness is that counsel had failed to follow up on these matters (and that defendant need not have expressly stated that counsel did not look into his complaints). We disagree with the State's suggestion that *Taylor* is sufficiently similar to the facts here. Unlike *Taylor*, the allocation statements here are not susceptible to another interpretation. In *Taylor*, the supreme court held the defendant's statement in allocution that he did not understand the consequences of his plea deal did not constitute an implicit *pro se* claim of ineffective assistance of counsel, where the defendant did not specifically complain about trial counsel's performance or expressly state that he was claiming ineffective assistance of counsel, and where his statement was "amenable to more than one interpretation." *Id.* at 76-77. The court could have merely held that a defendant must expressly state ineffective assistance and/or voice a complaint about counsel's performance, but it did not. It added that the statement was amenable to more than one interpretation, which is not the case here. That distinguishing element warrants a different result in this case. See *Ayres*, 2017 IL 120071, ¶ 24 ("A defendant need only bring his [or her] claim to the court's attention, posttrial, whether orally or in writing"). Defendant satisfied this requirement.

¶ 85 It is, of course, possible that defendant's claims are meritless, but without even a preliminary inquiry as to the factual bases of defendant's claims, the question remains unanswered. Accordingly, we remand the cause for the trial court to conduct a preliminary *Krankel* inquiry into defendant's claims.

¶ 86 III. CONCLUSION

¶ 87 For the reasons stated, the judgment of the circuit court of De Kalb County is affirmed and remanded.

¶ 88 Affirmed and remanded.