

NOTICE

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2018 IL App (4th) 170151-U

NO. 4-17-0151

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 16, 2018

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermillion County
TIMOTHY W. DAVIS,)	No. 13CF185
Defendant-Appellant.)	
)	Honorable
)	Mark S. Goodwin,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court remanded for further proceedings, finding defendant is entitled to a new preliminary *Krankel* hearing.

¶ 2 In May 2014, a jury found defendant, Timothy W. Davis, guilty of two counts of aggravated sexual abuse (720 ILCS 5/11-1.60(b) (West 2012)) and one count of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)). In June 2014, the trial court sentenced defendant to an aggregate term of 17 years' imprisonment. On direct appeal, this court remanded the cause for the trial court to conduct a preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). In February 2017, the trial court denied defendant's claims of ineffective assistance of counsel.

¶ 3 On appeal, defendant argues the trial court failed to address his claims concerning defense counsel's failure to (1) object to other-crimes evidence and (2) obtain witness testimony showing the victims had a motive to fabricate their statements. We remand with directions.

¶ 4 I. BACKGROUND

¶ 5 A. Matters Regarding Defendant's Initial Appeal

¶ 6 Because the parties are familiar with the facts of the underlying case, we will set forth only those facts necessary to address the issues in this appeal.

¶ 7 In April 2013, the State charged defendant by information with aggravated sexual abuse of his two stepdaughters, S.T. (born February 13, 2002) (count I) and D.B. (born January 28, 1998) (count II), who were under 18 at the time (720 ILCS 5/11-1.60(b) (West 2012)). Later that month, the State filed an amended information adding count III, alleging defendant committed predatory criminal sexual assault of a child by committing an act of sexual penetration with S.T., who was under the age of 13 at the time (720 ILCS 5/11-1.40(a)(1) (West 2012)).

¶ 8 In March 2014, defendant filed a motion *in limine*, seeking to prohibit the State from using his misdemeanor domestic-battery conviction (Vermilion County case No. 13-CM-26) to impeach his credibility. The State did not object, and the court granted the motion. However, defense counsel did not specifically object to the admission of the underlying incident as other-crimes evidence. This particular domestic- battery conviction stemmed from an incident during which defendant shot S.T. with a BB gun, causing authorities to remove the children from the family home.

¶ 9 In May 2014, defendant's jury trial commenced. S.T. testified defendant began inappropriately touching her after the family moved into their Georgetown, Illinois, home

(approximately April 2012). She testified to multiple incidents of sexual contact with defendant. In a recorded interview played for the jury, S.T. stated defendant shot her with a BB gun as punishment, which left a scar on her leg. As a result, the sisters were removed from the home. D.B. testified she had her first sexual encounter with defendant in 2011 or 2012. She also testified to multiple incidents of sexual contact with defendant.

¶ 10 Following the presentation of evidence, the jury returned guilty verdicts on all counts. In June 2014, the trial court sentenced defendant to an aggregate term of 17 years' imprisonment. Later that month, defendant sent a letter to the trial court, stating he was no longer represented by his attorney, and he was unhappy with the representation he received. A few days later, defendant sent a second letter, again complaining about defense counsel's representation. Defendant asserted defense counsel failed to (1) explain the proceedings, (2) prepare for trial, (3) communicate, and (4) present certain evidence. The trial court took no action with respect to defendant's allegations.

¶ 11 On direct appeal, defendant argued, "(1) defense counsel was ineffective for failing to object to other-crimes evidence with respect to the charges related to S.T., (2) the trial court improperly allowed other-crimes evidence regarding the charge related to D.B. and then failed to provide a limiting jury instruction, (3) the State improperly elicited expert testimony that bolstered the credibility of the alleged victims, (4) the cumulative errors required reversal, (5) the court denied defendant his right to counsel for purposes of a motion to reconsider his sentence and also failed to provide defendant with a preliminary inquiry into his

ineffective-assistance-of-counsel claims, and (6) the court improperly imposed a four-year period of mandatory supervised release (MSR) on count II." *People v. Davis*, 2016 IL App (4th) 140603-U, ¶ 4.

¶ 12 Relevant to this appeal, defendant claimed "defense counsel provided ineffective assistance of counsel by failing to challenge, as improper other-crimes evidence, the admission of S.T.'s statement that defendant shot her in the leg with a BB gun." *Davis*, 2016 IL App (4th) 140603-U, ¶ 53. Defendant conceded "defense counsel challenged the admission of the BB gun incident as improper impeachment based on a misdemeanor conviction not involving dishonesty. However, defendant asserted counsel's failure to recognize and raise the other-crimes-evidence issue before the trial court constituted ineffective assistance." See *Davis*, 2016 IL App (4th) 140603-U, ¶ 54.

¶ 13 This court found the record on appeal contained "no explanation from defense counsel as to why he chose to frame his objection as improper impeachment evidence rather than improper other-crimes evidence." *Davis*, 2016 IL App (4th) 140603-U, ¶ 57. Thus, we deemed the issue more appropriately addressed through a collateral proceeding. *Davis*, 2016 IL App (4th) 140603-U, ¶ 57. In the alternative, however, this court stated "because we are remanding this case for a *Krankel* hearing ([s]ee *People v. Krankel*, 102 Ill. 2d 189, 464 N.E.2d 1045 (1984)) to allow the trial court to address defendant's claims of defense counsel's neglect, defendant may be able to develop a sufficient record for our review during that proceeding." *Davis*, 2016 IL App (4th) 140603-U, ¶ 57.

¶ 14 Defendant also claimed on direct appeal that the trial court failed to provide him with a *Krankel* hearing despite his *pro se* allegations of ineffective assistance of counsel as

contained in the two letters defendant mailed to the trial court following his sentencing hearing. *Davis*, 2016 IL App (4th) 140603-U, ¶ 96. The State conceded defendant was entitled to an inquiry into his claims, and we accepted the State's concession, remanding for the trial court to conduct a preliminary hearing into defendant's allegations of ineffective assistance of counsel. *Davis*, 2016 IL App (4th) 140603-U, ¶ ¶ 96, 98.

¶ 15 With regard to defendant's remaining claims, this court affirmed the trial court's judgment, in part, and vacated the imposition of a four-year MSR period on count II, directing the trial court to amend the written sentencing judgment to reflect a two-year period of MSR. *Davis*, 2016 IL App (4th) 140603-U, ¶ ¶ 105-06.

¶ 16 B. Remand

¶ 17 On remand, the trial court conducted a preliminary *Krankel* hearing. Defendant made multiple claims of ineffective assistance of trial counsel, including defense counsel's failure to ask defendant's mother "questions that I thought she should be asked." Defendant "felt the reason that all this was happening was because I had put a stop to my mother-in-law *** claiming one of the girls on her taxes." Defendant believed "the reason that [his step-daughters] were told to lie about [the sexual abuse] was to financially benefit their grandparents." Defendant stated defense counsel never asked his mother about his mother-in-law "claiming one of the girls on her taxes." Defendant's mother had prepared "mine and my wife's taxes" and defense counsel "never asked my mom about that."

¶ 18 Defendant also brought to the trial court's attention, "the thing that the State – that my appellate attorney has mentioned where [defense counsel] objected to the use of evidence." The following colloquy ensued:

"[THE COURT]: Let me interrupt you. I mean, the Appellate Court has dealt with that. You know, they -- if you read your opinion, the Appellate Court dealt with all the other issues. So I'm not going to get into that today.

[DEFENDANT]: With the BB gun thing?

[THE COURT]: Yes.

[DEFENDANT]: Okay. Well, I guess that's it then."

¶ 19 The trial court asked defense counsel to respond to defendant's allegations. Defense counsel recalled speaking to defendant regarding a possible plea agreement and why defense counsel chose not to call two individuals as witnesses at trial. Defense counsel did not discuss his questioning of defendant's mother at trial, and did not address why he chose to frame his objection to S.T.'s statement that defendant shot her in the leg with a BB gun as improper impeachment evidence rather than improper other-crimes evidence. Characterizing "witness presentation" as "under the realm of trial strategy," the trial court denied defendant's claims of ineffective assistance of counsel.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 Defendant argues his cause should be remanded for a new *Krankel* hearing, claiming the trial court did not address his issues concerning defense counsel's failure to (1) object to as improper other-crimes evidence, the admission of S.T.'s statement that defendant shot her in the leg with a BB gun, and (2) obtain testimony from his mother showing his step-daughters had a motive to fabricate their statements. We agree, and the State concedes error.

¶ 23 When confronted with a defendant's posttrial allegations of ineffective assistance of counsel, our supreme court set out the procedural steps to follow in *People v. Moore*, 207 Ill. 2d 68, 797 N.E.2d 631 (2003) (noting the rule that had developed since *Krankel*):

"New counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. Rather, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. 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. However, if the allegations show possible neglect of the case, new counsel should be appointed." *Moore*, 207 Ill. 2d at 77-78.

¶ 24 On appeal, our "review of a defendant's claim of error necessarily turns on the *adequacy* of the trial court's inquiry." (Emphasis in original.) *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 40, 982 N.E.2d 832. "If a trial court conducts an inadequate *Krankel* inquiry, then the inquiry does not meet the purpose of the rule." *McLaurin*, 2012 IL App (1st) 102943, ¶ 44.

¶ 25 A. Adequacy of Inquiry

¶ 26 Defendant argues the trial court erred by denying him the opportunity to "develop a sufficient record for our review" his claim that defense counsel provided ineffective assistance of counsel by failing to challenge, as improper other-crimes evidence, the admission of S.T.'s statement that defendant shot her in the leg with a BB gun. The trial court refused to consider

defendant's claim, finding defendant's claim had been "dealt with" by this court. Thus, the trial court did not consider defendant's claim at the preliminary *Krankel* hearing.

¶ 27 Our previous order found the record on appeal contained "no explanation from defense counsel as to why he chose to frame his objection as improper impeachment evidence rather than improper other-crimes evidence." Thus, we determined "[s]uch an issue would be more appropriately addressed through a collateral proceeding." However, we expressly stated, "[i]n the alternative, because we are remanding this case for a *Krankel* hearing *** to allow the trial court to address defendant's claims of defense counsel's neglect, defendant may be able to develop a sufficient record for our review *during that proceeding*." (Emphasis added.) Our previous order did not, in any way, limit the trial court's review of defense counsel's framing of his objection to the BB gun statement in the preliminary *Krankel* hearing. Moreover, with the development of a sufficient record, we may be able to consider defendant's ineffective assistance of counsel claim on review. See *People v. Veach*, 2017 IL 120649, ¶ 46 ("Ineffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is incomplete or inadequate for resolving the claim.")

¶ 28 Although defendant asserts the instant record is "sufficient to show possible neglect" without a preliminary *Krankel* inquiry, and, therefore, requests this court appoint new defense counsel, we reiterate our previous finding that the record on appeal contains "no explanation from defense counsel as to why he chose to frame his objection as improper impeachment evidence rather than improper other-crimes evidence." Accordingly, this claim must be remanded for the trial court to conduct a preliminary *Krankel* hearing concerning defense counsel's objection to the statement concerning the BB gun as improper impeachment evidence rather than improper other-crimes evidence.

¶ 29

B. Defense Counsel's Examination of a Witness

¶ 30

Defendant next argues the trial court erred by failing to question defense counsel as to his examination of defendant's mother. According to defendant, defense counsel failed to ask defendant's mother "questions that I thought she should be asked." Defendant "felt the reason that all this was happening was because I had put a stop to my mother-in-law *** claiming one of the girls on her taxes." Defendant believed "the reason that [his step-daughters] were told to lie about [the sexual abuse] was to financially benefit their grandparents." Defendant stated defense counsel never asked his mother about his mother-in-law "claiming one of the girls on her taxes." Defendant's mother had prepared "mine and my wife's taxes" and defense counsel "never asked my mom about that."

¶ 31

The trial court asked defense counsel about two individuals he investigated but chose not to call as witnesses at trial. Defense counsel stated he spoke to defendant "about all of that" but did not respond to defendant's claims regarding defense counsel's examination of defendant's mother at trial.

¶ 32

As the supreme court explained in *Moore*, 207 Ill. 2d at 78:

"The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel. [Citation.] During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations."

¶ 33 In this case, the trial court conducted no inquiry into defendant's allegation of ineffective assistance of counsel regarding defense counsel's examination of defendant's mother. Thus, we conclude the trial court erred in failing to conduct the necessary preliminary inquiry into defendant's claim against defense counsel. Accordingly, this claim must be remanded for the trial court to conduct a preliminary *Krankel* hearing concerning defense counsel's examination of defendant's mother.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we remand the cause with directions to conduct a preliminary *Krankel* inquiry on defendant's claims of ineffective assistance of counsel.

¶ 36 Cause remanded with directions.