

Nos. 1-12-1914 & 1-12-2843 (cons.)

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 06 CR 27445
)	
DANIEL VARGAS,)	Honorable
)	Ellen Beth Mandeltort,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in declining to appoint new counsel to represent defendant with respect to his post-trial claims of ineffective assistance of counsel. The circuit court did not err in denying defendant leave to raise additional claims where the circuit court complied with this court's remand order.

¶ 2 A jury found defendant Daniel Vargas guilty of first-degree murder, attempted murder, and aggravated discharge of a firearm in relation to a shooting that occurred on November 5, 2006 in Streamwood, Illinois. This court previously remanded defendant's case because the trial court had not conducted an inquiry into defendant's post-trial claims of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). *People v. Vargas*, 409 Ill. App. 3d 790, 801-03 (2011). Defendant now appeals from the circuit court's denial of his motion for new counsel to represent him with respect to his allegations of ineffective assistance of trial counsel,

Nos. 1-12-1914 & 1-12-2843 (cons.)

claiming: (1) that he showed possible neglect of trial counsel, justifying the appointment of new counsel; and (2) that the circuit court erred in denying him leave to make additional claims of ineffective assistance of counsel on remand. We find that the circuit court did not err in denying defendant's motion for new counsel because defendant's claims do not show possible neglect by trial counsel. We also find that the circuit court did not err in denying defendant leave to raise additional claims because the court reasonably interpreted this court's mandate on remand, which was drafted by defendant. We affirm the circuit court's denial of defendant's motion for new counsel.

¶ 3

I. BACKGROUND

¶ 4 As we described the evidence presented at defendant's trial in our previous decision (*Vargas*, 409 Ill. App. 3d at 791-93), we will only discuss those facts necessary to our resolution of the instant appeal.

¶ 5

A. Trial Proceedings

¶ 6 Defendant and codefendant David Luna—who is not a party to this appeal—sought to purchase one-half pound of marijuana from Joseph Benitez. Luna and defendant gave Joseph money but Joseph did not deliver the marijuana. Defendant's convictions arose from a confrontation over the failed drug transaction at Joseph's house on November 5, 2006, when defendant shot and killed Joseph's friend Anthony (Tony) Brown. The evidence of this confrontation came from three live witnesses—Joseph, his brother Michael Benitez, and Michael's girlfriend Stephanie King—as well as defendant's videotaped statement to the police.

¶ 7 Luna and defendant arrived at the Benitez home about 9 p.m. on November 5, 2006. Michael Benitez answered the door and Luna and defendant asked to speak to Joseph. Joseph was in the backyard with Tony at that time. Tony was not involved in Joseph's drug deal with

Nos. 1-12-1914 & 1-12-2843 (cons.)

Luna and defendant, but he was aware that Joseph had Luna and defendant's money. Michael went to the backyard and told Joseph that someone was there to see him. Michael testified that Joseph explained the situation to him. Michael went back into the house.

¶ 8 Joseph testified that he and Tony went to the front of the house, where Luna and defendant were standing near the garage. Joseph testified that defendant pointed a gun—which was inside a sock—at him and demanded his money. Joseph told defendant to calm down and defendant put the gun in his jacket. Michael exited the house and Tony stood on a foot-high stoop to the door to the house.

¶ 9 Michael said he was going inside to get defendant what he wanted and defendant said, "No one is going inside." Joseph testified that defendant ran in the garage door and Tony grabbed defendant to pull him outside. Joseph testified that Tony did not hit defendant in the face.

¶ 10 Joseph testified that defendant said, "I will kill your whole family," pulled out the gun, and shot it three times in rapid succession. Joseph testified that the first shot struck Tony on the upper left side of his chest and the second shot hit Tony in the back. Defendant ran away. Joseph testified that he heard two more shots outside the garage. Before the grand jury, Joseph testified that he did not hear any more shots after defendant ran away.

¶ 11 Michael testified that, after defendant said that no one was going inside, he "got in [defendant's] face." Defendant "stepped up" and Tony hit defendant on the side of his face by his left temple. Michael testified that Tony was about six feet, five inches tall—a foot taller than defendant—and was standing on the foot-high stoop when he hit defendant. After Tony hit him, defendant pulled out the gun and shot Tony in the shoulder. Tony grabbed defendant by the shoulder and pulled defendant, when Michael heard three more shots. Defendant ran out the

Nos. 1-12-1914 & 1-12-2843 (cons.)

doorway of the garage and past Michael. Michael testified that defendant said, "[Y]ou're going to die, too," and shot at him. Michael testified that he felt the bullet pass by his face. Defendant got in the passenger's side of the car he arrived in and Luna drove away. Before the grand jury, Michael did not testify that defendant said, "[Y]ou're going to die, too," before he shot at him. Michael did not think that he told the police that defendant said that. Michael also told the grand jury that he punched defendant as defendant ran out of the garage.

¶ 12 Stephanie King testified that she was inside the Benitez home during the incident. King heard yelling and looked out the window. She testified that she saw two people "hugging" on the stoop leading to the garage door. She could not tell who the two people were. King looked away and heard "a loud bang." King looked back out the window and saw the shooter's profile. She ran into Joseph's mother's bedroom and heard two or three more shots. In court, King identified someone other than defendant as the shooter.

¶ 13 After the shooting, the police recovered defendant's blood from the interior passenger's side door handle of the car he and Luna fled in. The gun was recovered from the floorboard of the car.

¶ 14 After his arrest, defendant gave a videotaped statement to the police. Defendant said that, when he and Luna arrived at the Benitez house, he was carrying a gun in his pocket to scare Joseph. Defendant asked Joseph for the money and Joseph said he would get it. Defendant said that Tony then began to curse at him. Tony grabbed defendant and pulled defendant toward him. Tony punched defendant in the head several times. Defendant pulled out the gun and fired three or four shots. Defendant ran out of the garage and another person hit him in the face. Defendant fired a shot at this person, then jumped into the car with Luna and fled. During police questioning, defendant denied having any injuries.

Nos. 1-12-1914 & 1-12-2843 (cons.)

¶ 15 An autopsy performed on Tony's body showed that he had died from three gunshot wounds: one to the left upper chest, one to the left armpit, and one to the lower left back. The wounds to Tony's chest and armpit showed evidence of close range firing but the wound to his back did not. Tony's body tested positive for the presence of cocaine.

¶ 16 At trial, defense counsel's theory was that defendant committed the lesser-mitigated offense of second-degree murder. In his opening statement, defense counsel stated that "[t]he first blow was struck by [Tony] right in the face of [defendant]." Defense counsel asserted that Michael's testimony and defendant's videotaped statement would prove that Tony struck defendant first. Defense counsel told the jury, "[Y]ou will know that while having acted unreasonably in his own self-defense, [defendant] is absolutely not guilty of first degree murder."

¶ 17 In his closing argument, defense counsel averred that defendant acted "out of fear." Defense counsel told the jury that the instruction "more important than any other that you will hear is the option of you finding [defendant] guilty of second degree murder." Defense counsel argued that the fact that Tony was the initial aggressor showed that defendant had an unreasonable belief that he was acting in self defense, justifying a second-degree murder verdict. Defense counsel said that defendant was "guilty of, if anything, *** second degree murder."

¶ 18 The jury was instructed on first-degree murder, second-degree murder, and self-defense with respect to Tony's death. The jury found him guilty of first-degree murder, attempted murder, and aggravated discharge of a firearm.

¶ 19 At his sentencing hearing, defendant stated that his trial attorney was ineffective. Defendant asserted that his attorney failed "to get and obtain records and information that I advised him was [*sic*] very helpful for my defense strategy." The trial court did not inquire into the basis of defendant's allegation before sentencing him.

Nos. 1-12-1914 & 1-12-2843 (cons.)

¶ 20

B. First Appeal

¶ 21 Defendant appealed his conviction, asserting, *inter alia*, that the trial court failed to question the venire in accordance with Illinois Supreme Court Rule 431(b) and that the trial court failed to inquire into his post-trial claims of ineffective assistance of counsel. On November 29, 2009, this court rejected defendant's Rule 431(b) claim, but remanded for an inquiry into his claims of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). *People v. Vargas*, 396 Ill. App. 3d 465 (2009). Defendant sought leave to appeal that decision to the Illinois Supreme Court.

¶ 22 On January 26, 2011, the Illinois Supreme Court denied defendant leave to appeal and issued a supervisory order directing this court to vacate its initial opinion and reconsider defendant's Rule 431(b) claim in light of its decision in *People v. Thompson*, 238 Ill. 2d 598 (2010). *People v. Vargas*, 239 Ill. 2d 584 (2011) (table). On May 6, 2011, pursuant to the supreme court's supervisory order, this court vacated its previous opinion and issued a new opinion again remanding defendant's case for an inquiry into his claims of ineffective assistance of counsel. *People v. Vargas*, 409 Ill. App. 3d 790 (2011).

¶ 23

C. First *Krankel* Hearing

¶ 24 On January 6, 2010, before this court's mandate had issued from its November 29, 2009 opinion, the trial court conducted a hearing on defendant's ineffective assistance of counsel claims. At that hearing, defendant asserted that his trial attorney failed to introduce medical records that would corroborate his claim that Tony had hit him. Defendant also argued that this attorney was ineffective for failing to request a second-degree murder instruction based upon provocation.

Nos. 1-12-1914 & 1-12-2843 (cons.)

¶ 25 With respect to the medical records, trial counsel stated that defendant had brought those records to his attention and to the attention of the attorney assigned to the case before trial counsel. Trial counsel indicated that defendant told him and his first attorney that the records "bolstered his claims that he had been beaten up or assaulted." Trial counsel continued:

"[T]o my recollection, *** there were intimations made by [defendant] that those injuries also could have occurred while he was in custody subsequent to his arrest. In any event, both [defendant's first attorney] and I independently reviewed that evidence, those records, and they simply did not bear out in any way what [defendant] was contending."

Trial counsel also noted that none of the police reports or defendant's videotaped statement showed that defendant had any injuries.

¶ 26 With respect to the second-degree murder instruction based on provocation, trial counsel stated that it "was a matter of trial strategy" that he and defendant "spoke about at length as to whether or not we wanted that instruction ***." The trial court denied defendant's request for new counsel to represent him on his ineffective assistance of trial counsel claims.

¶ 27 On February 4, 2010, defendant filed a motion in the circuit court, seeking to vacate the January 6, 2010 judgment as void. Defendant averred that the trial court lacked jurisdiction to dismiss defendant's claims because this court had not issued its mandate from his first appeal. The trial court denied that motion and defendant appealed that order.

¶ 28 On June 17, 2011, after this court had issued its May 6, 2011 opinion remanding defendant's case for a *Krankel* inquiry, defendant filed a *pro se* motion in the circuit court requesting a new *Krankel* hearing. Defendant asserted the trial court's January 6, 2010 judgment was void because it did not have jurisdiction to rule on his claims while his petition for leave to

Nos. 1-12-1914 & 1-12-2843 (cons.)

appeal to the Illinois Supreme Court was pending. Defendant raised the same claims of ineffective assistance of counsel that he did at the January 6, 2010 hearing.

¶ 29 Defendant attached numerous medical records to his June 17, 2011 motion showing that, in early 2007, he sought treatment in Cook County jail for pain in his left ear. The records showed that defendant was eventually diagnosed with a ruptured eardrum that required surgery. Defendant also included two affidavits in which he attested to his communications with trial counsel.

¶ 30 The trial court denied the June 17, 2011 motion because it had already conducted a *Krankel* inquiry. Defendant appealed.

¶ 31 D. Second Appeal

¶ 32 In a consolidated appeal from the denial of defendant's February 4, 2010 and June 17, 2011 motions, the parties filed an agreed motion for summary remand, asking this court to vacate the trial court's order and remand defendant's case for a new hearing on defendant's claims of ineffective assistance of counsel. The parties agreed that, because the trial court conducted the hearing prior to this court's mandate issuing from defendant's first appeal, the trial court lacked jurisdiction to rule on defendant's claims. On February 6, 2012, this court granted the parties' motion and entered an order with the following directions, which were drafted by defendant's counsel: "[T]he matter is remanded for a new '*Krankel* inquiry' into the allegations of ineffective assistance of counsel set forth in the *pro se* motion filed on June 17, 2011."

¶ 33 E. Second *Krankel* Hearing

¶ 34 On remand, defendant's case was brought before Judge Ellen Beth Mandeltort, who did not preside over defendant's trial. Judge Mandeltort reviewed the transcripts of defendant's trial and first *Krankel* inquiry.

Nos. 1-12-1914 & 1-12-2843 (cons.)

¶ 35 Defendant sought leave to file an amended motion for new counsel, as well as a *pro se* post-conviction petition. The amended motion for new counsel reiterated the claims defendant had made at his first *Krankel* hearing, but also raised additional claims of ineffective assistance of trial counsel. The circuit court docketed defendant's post-conviction petition and appointed counsel to represent defendant solely on the post-conviction petition.¹

¶ 36 With regard to the amended motion for appointment of counsel, the court found that its jurisdiction was restricted by this court's February 6, 2012 remand order:

"When the appellate court issues a mandate, they are giving this Court jurisdiction to take action based on that mandate and that mandate alone.

This mandate clearly states that this Court is to conduct a *Krankel* [*sic*] inquiry into the allegations that you set forth in the *pro se* [*sic*] motion that you set on June 17th of 2011. For that reason, sir, *** you will not be granted leave to file your amended motion."

The circuit court offered defendant "an opportunity to make additional statements to this Court and supplement the record in that way," but denied him "permission to file additional filings with the court." The court later clarified that it would allow defendant to "expand" on the allegations in his June 17, 2011 motion, but would "not allow [him] to allege something completely different." Defendant filed an appeal from this ruling (appeal No. 1-12-1914).

¶ 37 At the hearing on defendant's motion, the circuit court again noted that it had "been empowered with jurisdiction by the appellate court only to address the issues *** that you raised

¹ The allegations in defendant's post-conviction petition are not before this court. According to defendant, his post-conviction petition was still pending before the circuit court at the time of this appeal.

Nos. 1-12-1914 & 1-12-2843 (cons.)

in the motion that you filed on June 17th." The court said it would "allow [defendant] to expand on the arguments" in that motion but limited defendant "to those allegations."

¶ 38 With regard to counsel's failure to introduce defendant's medical records, defendant asserted that he "made no intimations to counsel that the injuries or any injury *** could have been caused from a fight at the county jail or anywhere other than that from the altercation between the victim *** and [him]." Defendant averred that he had never been in a fight at the county jail. Defendant noted that his medical records showed that he had been diagnosed with a ruptured left eardrum caused by blunt force trauma. Defendant argued that these records would have bolstered counsel's trial strategy of pursuing a second-degree murder verdict.

¶ 39 With respect to counsel's failure to request a second-degree murder instruction based upon provocation, defendant argued that the evidence at trial showed mutual combat justifying the instruction. Defendant noted that Tony was much larger than him and under the influence of cocaine during the incident, and that his videotaped statement and Michael's testimony both showed that Tony grabbed defendant and punched him in the head. Defendant also noted that, in his statement to the police, Joseph also said that Tony pushed and punched defendant. Defendant argued that counsel's failure to request a second-degree murder instruction based on provocation prejudiced him because it precluded the jury from rendering a verdict on that lesser offense.

¶ 40 The circuit court offered defense counsel an opportunity to respond to defendant's arguments. Counsel elected to rest on explanations for his decisions that he made at the first *Krankel* hearing on January 6, 2010.

¶ 41 The circuit court denied defendant's motion. The court found that defendant's "allegations [we]re either unsupported by the record and therefore [without] merit, or the allegations that

Nos. 1-12-1914 & 1-12-2843 (cons.)

[we]re raised pertain[ed] only to matters of trial strategy." Defendant appealed that judgment (appeal No. 1-12-2843) and we consolidated that appeal with appeal No. 1-12-1914.

¶ 42

II. ANALYSIS

¶ 43 Defendant claims that he was entitled to the appointment of new counsel because he showed possible neglect of trial counsel. Defendant also asserts that the circuit court erred in denying him leave to supplement his June 17, 2011 motion with additional claims of ineffective assistance of trial counsel. We first look to defendant's claim that the circuit court erred in denying his motion to appoint new counsel.

¶ 44

A. Possible Neglect

¶ 45 Criminal defendants are entitled to the effective assistance of trial counsel. U.S. Const., amend. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

To establish a claim of ineffective assistance of trial counsel, defendant must show that his attorney's performance was deficient and that he suffered prejudice as a result, *i.e.*, there was a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694.

¶ 46 In *People v. Krankel*, 102 Ill. 2d 181, 189 (1984), the Illinois Supreme Court held that a defendant is entitled to the appointment of new counsel during a post-trial hearing on his trial attorney's ineffectiveness. New counsel is not automatically required, however, when a defendant raises a claim of ineffective assistance of trial counsel. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, when a defendant presents a *pro se* post-trial claim of ineffective assistance of counsel, the circuit court "first examine[s] the factual basis of the defendant's claim." *Id.* at 77-78. In conducting this initial inquiry, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is

Nos. 1-12-1914 & 1-12-2843 (cons.)

permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Id.*

¶ 47 "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.* at 78. "However, if the allegations show possible neglect of the case, new counsel should be appointed." *Id.* A trial court errs in declining to appoint new counsel "where a defendant's assertions, if true, strongly suggest possible neglect, and those assertions may be readily proved *** by consulting the record ***." *People v. Haynes*, 331 Ill. App. 3d 482, 485 (2002).

¶ 48 Defendant contends that he was entitled to appointed counsel because he showed that his trial attorney possibly neglected his case in two respects: (1) by failing to introduce medical records to show that defendant suffered an injury at the time of the incident; and (2) by failing to request an instruction on second-degree murder based on provocation caused by mutual combat. The State contends that trial counsel exercised reasonable trial strategy in declining to introduce the medical evidence or request the instruction. Before addressing the merits of defendant's claims, we must determine the proper standard of review.

¶ 49 *1. Standard of Review*

¶ 50 Defendant contends that "review of a court's decision under the *Krankel* framework is *de novo*." The State contends that the proper standard is whether the circuit court committed "manifest error" because it resolved defendant's ineffective assistance of counsel claims on the merits. We agree with the State.

¶ 51 "On appeal [from a *Krankel* hearing], the standard of review changes, depending on whether the trial court did or did not determine the merits of defendant's *pro se* posttrial claims of ineffective assistance of counsel." *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. If a

Nos. 1-12-1914 & 1-12-2843 (cons.)

trial court made no determination on the merits of the defendant's claims, *de novo* review applies. *Id.* (citing *People v. Moore*, 207 Ill. 2d 68, 75 (2003)). "If a trial court has reached a determination on the merits of a defendant's ineffective assistance of counsel claim, we will reverse only if the trial court's action was manifestly erroneous." *Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 52 In this case, the circuit court reached a determination on the merits of defendant's claims. The court found that defendant's claims lacked merit because they were unsupported by the record or related to matters of trial strategy. We thus review the circuit court's decision to deny defendant new counsel for manifest error.

¶ 53 The cases relied upon by defendant in support of *de novo* review, *People v. Jolly*, 2013 IL App (4th) 120981, and *People v. Fields*, 2013 IL App (2d) 120945, are distinguishable. In both *Jolly* and *Fields*, the defendants averred that the trial courts erred in permitting the State to participate in the preliminary inquiry into defendant's post-trial ineffective assistance of counsel claims. *Jolly*, 2013 IL App (4th) 120981, ¶¶ 43, 54; *Fields*, 2013 IL App (2d) 120945, ¶¶ 37-43. The *Jolly* and *Fields* courts thus applied *de novo* review because they reviewed the legal question of whether the trial courts erred in the *manner* in which they conducted the *Krankel* inquiries. See *Jolly*, 2013 IL App (4th) 120981, ¶ 44 ("The proper scope of a preliminary investigatory hearing to determine whether to appoint defendant new counsel is a question of law we review *de novo*."); *Fields*, 2013 IL App (2d) 120945, ¶ 39 ("We review *de novo* the manner in which the trial court conducted its *Krankel* hearing."). In this case, defendant does not challenge the manner in which the circuit court conducted its inquiry. Rather, defendant challenges the court's conclusion that his claims lacked merit. *De novo* review is not the correct standard of review for defendant's claim.

Nos. 1-12-1914 & 1-12-2843 (cons.)

¶ 54 Defendant also contends that, because we applied *de novo* review in our previous decision (*People v. Vargas*, 409 Ill. App. 3d 790, 801 (2011)), that standard of review "is now law of the case." We disagree. The law of the case doctrine generally bars relitigation of an issue previously decided in the same case. *People v. Hopkins*, 235 Ill. 2d 453, 469 (2009). In defendant's first appeal, we decided whether the trial court erred in failing to conduct any inquiry into defendant's post-trial claims of ineffective assistance of counsel. *Vargas*, 409 Ill. App. 3d at 799-801. With respect to the standard of review, we stated, "As the question of the adequacy of the [trial court's] inquiry is one of law, our review is *de novo*." *Id.* at 801. In the instant appeal, the issue presented is not the adequacy of the circuit court's inquiry. The issue is whether the circuit court erred in concluding that defendant failed to show possible neglect by trial counsel at that inquiry. As we are presented with a different issue in this appeal, the standard of review applicable to this issue is a different question than the standard of review applicable to the issue in defendant's first appeal. The law of the case doctrine does not dictate our standard of review in this case.

¶ 55 We find that the appropriate standard of review is whether the circuit court's denial of defendant's motion for new counsel was manifestly erroneous. *Tolefree*, 2011 IL App (1st) 100689, ¶ 25. "A ruling is manifestly erroneous only if it contains error that is clearly evident, plain, and indisputable." (Internal quotation marks omitted.) *People v. Slover*, 2011 IL App (1st) 100276, ¶ 17.

¶ 56 We now turn to defendant's two contentions of ineffective assistance of trial counsel, beginning with counsel's failure to introduce medical records.

Nos. 1-12-1914 & 1-12-2843 (cons.)

¶ 57

2. Medical Records

¶ 58 According to defendant, the medical records attached to his *pro se* motion, showing that he had a ruptured eardrum in his left ear shortly after he was taken into custody, would have bolstered his trial strategy that he shot Tony due to an unreasonable belief that he was defending himself. Defendant contends that his trial attorney's failure to introduce these records at trial was thus unreasonable. We conclude that trial counsel was reasonable in declining to present this evidence where it conflicted with defendant's statement to the police, and that defendant cannot show that counsel's decision not to present the medical records prejudiced him.

¶ 59 Decisions regarding "which witnesses to call and what evidence to present" generally constitute matters of trial strategy that cannot form the basis of an ineffective assistance of counsel claim. *People v. Leeper*, 317 Ill. App. 3d 475, 482 (2000). However, "defense counsel's failure to present available evidence to support a defense constitutes ineffective assistance of counsel." *People v. York*, 312 Ill. App. 3d 434, 437 (2000).

¶ 60 Defendant contends that the medical records attached to his *pro se* motion would have bolstered his second-degree murder defense because they showed that Tony injured defendant when he punched him. These records show that, in early 2007, defendant said he began to experience pain, bleeding, and hearing loss in his left ear after he was punched on "11/06." Defendant was diagnosed with having a ruptured eardrum caused by "blunt trauma" that required surgery.

¶ 61 Even assuming that defendant's statements to the doctors in Cook County jail would have been admissible, trial counsel was not ineffective for not introducing that evidence because it conflicted with defendant's statements to the police. See *People v. Johnson*, 385 Ill. App. 3d 585, 602 (2008). ("Counsel cannot be expected to present testimony that contradicts a defendant's

Nos. 1-12-1914 & 1-12-2843 (cons.)

own statements."). At the first *Krankel* hearing, trial counsel explained that he did not use the medical records as evidence in part because defendant did not say that he had any injuries in his videotaped statement. In that statement, defendant told the police that he had no injuries:

"Q [police officer]. Do you have any injuries on you?

A [defendant]. No.

Q. No. You're not injured, hurt nothing?

A. No."

Had trial counsel introduced the evidence of defendant's complaints regarding his ear injury at trial, the State could have introduced evidence that defendant told the police he was not injured.

¶ 62 In his closing argument, trial counsel relied upon defendant's statement as evidence of second-degree murder:

"So let's just take a moment to discuss *** [defendant's] videotaped statement. You heard it. As I said, you will have the opportunity to listen and to watch that video again as you see fit.

Ladies and gentlemen of the jury, that video which you heard already in open court shows this is no killer. This is not a person who went to that house intending to kill. This was a person who, as he was sitting in that room at the *** police station, was still totally dazed and befuddled how did this happen. I don't know how this happened. I don't know how this unfolded. He couldn't even like grasp it.

That video shows what really happened and his intent. *** [Defendant] is not guilty of first degree murder. What he is guilty of, if anything, is second degree murder, and we ask that you judge him accordingly."

Nos. 1-12-1914 & 1-12-2843 (cons.)

The believability of defendant's statement was thus critical to trial counsel's strategy. That trial counsel's strategy was unsuccessful does not mean that his strategy was unreasonable. *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007). Trial counsel was reasonable in declining to present evidence that could have undermined the believability a key piece of evidence supporting the defense theory.

¶ 63 Along with contradicting defendant's statement, the failure to introduce evidence of defendant's ruptured eardrum did not prejudice defendant. At trial, Michael Benitez testified that Tony punched defendant in the side of his head. Defendant's videotaped statement related that Tony punched him in the head. Evidence that defendant sought medical treatment for an ear injury weeks after the incident would have offered minimal additional support for that evidence. See *People v. Vernon*, 276 Ill. App. 3d 386, 393 (1995) (where "it is clear that the testimony defendant claims should have been offered was cumulative to that evidence already in the record, defendant cannot make out a claim that his counsel was incompetent"). Importantly, defendant did not need to prove that he was injured in order to justify a second-degree murder verdict. 720 ILCS 5/9-2(a)(2) (West 2006). The presence of evidence of defendant's injury, therefore, would likely not have changed the result of defendant's trial. The circuit court did not manifestly err in denying defendant's motion for new counsel as defendant could not show prejudice resulting from counsel's decision.

¶ 64 Defense counsel offered a reasonable strategic explanation for declining to present evidence that defendant received medical treatment for a ruptured eardrum while in custody. Defendant also did not suffer prejudice from counsel's decision not to introduce that evidence. The circuit court did not manifestly err in denying defendant's motion for new counsel.

Nos. 1-12-1914 & 1-12-2843 (cons.)

¶ 65

3. *Second-Degree Murder Instruction*

¶ 66 Defendant also contends that he showed that his attorney possibly neglected his case by failing to request a second-degree murder instruction based on provocation caused by mutual combat. The State contends that counsel could not have been ineffective for failing to request such an instruction as the evidence at trial did not support it. We find that defendant has failed to show possible neglect by trial counsel because the evidence at trial did not support giving the instruction.

¶ 67 "[C]ounsel's choice of jury instructions, and the decision to rely on one theory of defense to the exclusion of others, is a matter of trial strategy." *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007). As such, "counsel's decision as to which jury instruction to tender can support a claim of ineffective assistance of counsel only if that choice is objectively unreasonable." *Id.* "Where defense counsel argues a theory of defense but then fails to offer an instruction on that theory of defense, the failure cannot be called trial strategy and is evidence of ineffective assistance of counsel." *People v. Serrano*, 286 Ill. App. 3d 485, 492 (1997). Where the evidence at trial does not support an instruction on a lesser offense, however, trial counsel cannot be ineffective for failing to request that instruction. *People v. Parker*, 288 Ill. App. 3d 417, 422 (1997). "Very slight evidence upon a given theory of a case will justify the giving of an instruction." *People v. Jones*, 175 Ill. 2d 126, 132 (1997).

¶ 68 Second-degree murder is a lesser-mitigated offense of first-degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 122 (1995). To establish second-degree murder, a defendant must prove one of two mitigating factors by a preponderance of the evidence: (1) that, at the time of the killing, the defendant acted "under a sudden and intense passion resulting from serious provocation by the individual killed *** "; or (2) that, at the time of the killing, the defendant

Nos. 1-12-1914 & 1-12-2843 (cons.)

believed that he was acting in self-defense, but that belief was objectively unreasonable. 720 ILCS 5/9-2 (West 2006); *Jeffries*, 164 Ill. 2d at 112-13. In this case, the jury was instructed as to second-degree murder based on defendant's unreasonable belief that he was acting in self-defense. Defendant contends that his attorney was ineffective for failing to request an additional instruction on second-degree murder based on serious provocation.

¶ 69 Serious provocation justifying a second-degree murder verdict may arise from "mutual quarrel or combat." *People v. Garcia*, 165 Ill. 2d 409, 429 (1995). "Mutual combat" is defined as combat "into which both parties enter willingly, or in which two persons, upon a sudden quarrel, and in hot blood, mutually fight upon equal terms." (Internal quotation marks omitted.) *People v. Delgado*, 282 Ill. App. 3d 851, 857 (1996). In order to constitute mutual combat, "[t]he defendant's retaliation must be proportionate to the provocation." *People v. Moore*, 343 Ill. App. 3d 331, 339 (2003). "There is no mutual combat where the manner in which the accused retaliates is out of all proportion to the provocation, particularly where the homicide is committed with a deadly weapon." *People v. Sutton*, 353 Ill. App. 3d 487, 496 (2004).

¶ 70 Defendant contends that counsel's failure to request a second-degree murder instruction based on provocation caused by mutual combat was objectively unreasonable because the evidence at trial showed that defendant and Tony engaged in mutual combat. Defendant cites evidence at trial that Tony was a foot taller than him, that Tony grabbed him by the shirt and punched him in the side of the head, and that he and Tony struggled with one another when defendant shot Tony.

¶ 71 We find that the evidence at trial did not support an instruction on second-degree murder based on provocation. Michael Benitez testified that, as defendant "stepped up" toward him, Tony punched defendant in the side of the head. In his videotaped statement, defendant stated

Nos. 1-12-1914 & 1-12-2843 (cons.)

that Tony cursed at him, grabbed his shirt, and punched him several times in the head. In response, defendant brandished a gun and shot Tony three times: once in the chest, once in the armpit, and once in the lower back. This evidence showed that the fight between defendant and Tony was not on equal terms; defendant acted out of all proportion to Tony's provocation. See *People v. Lauderdale*, 2012 IL App (1st) 100939, ¶¶ 28-29 (no mutual combat where the victim, who was larger than the defendant, punched the defendant in the jaw and the defendant retaliated by shooting the victim three times); *People v. Moore*, 343 Ill. App. 3d 331, 339-40 (2003) (no mutual combat where, during a fistfight, the defendant pulled out a gun and shot the victim three times in the chest). As the evidence at trial did not support a finding of mutual combat, defense counsel could not have been ineffective for failing to request a second-degree murder instruction on those grounds.

¶ 72 Defendant maintains that the fact that he brought a gun to the confrontation at the Benitez home did not preclude counsel from seeking a second-degree murder instruction, citing *People v. Leonard*, 83 Ill. 2d 411 (1980). In *Leonard*, the defendant brought a gun to a confrontation with a security guard at the building from which the defendant had been evicted. *Id.* at 414-15. Defendant and the security guard engaged in a struggle over the handgun defendant brought, during which both the defendant and the guard held the gun. *Id.* at 415-16. During the struggle, defendant shot the victim once. *Id.* at 415-16. After the struggle, defendant had a laceration on his lower lip that required stitches, scratches on his face, and bruises around his eyes. *Id.* at 416, 421. The security guard had a gun in his pocket capable of firing blanks or tear gas. *Id.* at 416.

¶ 73 The facts of this case differ from those of *Leonard*. Here, there was no mutual struggle over the handgun. Rather, Tony struck defendant with his fist and defendant responded by shooting Tony. Whereas the defendant in *Leonard* only shot the guard once during the struggle,

Nos. 1-12-1914 & 1-12-2843 (cons.)

defendant shot Tony three times after Tony punched him. Unlike *Leonard*, there was no evidence in this case that Tony was armed with any weapons during the incident. This evidence belies any assertion that Tony and defendant engaged in mutual combat on equal terms. We thus find that *Leonard* is inapposite.

¶ 74 As the evidence at trial did not support a second-degree murder instruction based on provocation, trial counsel was not ineffective for failing to tender such an instruction. The circuit court, therefore, was not manifestly erroneous in denying defendant's motion for new counsel.

¶ 75 B. Denial of Leave to Supplement *Pro Se* Petition

¶ 76 Defendant also contends that the circuit court erred in precluding him from raising additional claims of ineffective assistance of counsel during his second *Krankel* hearing. Defendant notes that his amended motion asserting ineffective assistance of trial counsel raised several new claims that the circuit court should have inquired into. The State argues that the circuit court reasonably interpreted this court's remand order from defendant's second appeal as limiting the *Krankel* hearing to the claims raised in defendant's June 17, 2011 *pro se* motion. We conclude that the circuit court did not err where its denial of defendant's request to raise additional claims resulted from language in an order drafted by defendant in an earlier appeal.

¶ 77 Defendant contends that we should apply *de novo* review because that is the proper standard of review for evaluating the adequacy of a *Krankel* inquiry. *Vargas*, 409 Ill. App. 3d at 801. The State contends that the decision to deny leave to amend a pleading is reviewed for an abuse of discretion. *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004). We do not need to resolve this conflict as defendant's claim fails under either standard.

¶ 78 On appeal from the trial court's first, void *Krankel* hearing, we granted defendant's motion to remand for a second *Krankel* hearing. We entered an order, drafted by defendant's

Nos. 1-12-1914 & 1-12-2843 (cons.)

appellate counsel, stating, "[T]he matter is remanded for a new '*Krankel* inquiry' into *the allegations of ineffective assistance of counsel set forth in the pro se motion filed on June 17, 2011.*" (Emphasis added.) On remand, the circuit court cited the order as restricting its jurisdiction to those claims defendant raised in his June 17, 2011 motion. The circuit court thus denied defendant's request to present new claims but allowed him to offer further support for the claims in his June 17, 2011 motion.

¶ 79 "[A] party cannot complain of error which that party induced the court to make or to which that party consented." *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). "Action taken at defendant's request precludes defendant from raising such course of conduct as error on appeal." *People v. Carter*, 208 Ill. 2d 309, 319 (2003).

¶ 80 Any error in the circuit court's decision resulted from the language defendant drafted in the remand order. The court interpreted the remand order to mean that its jurisdiction was limited to the claims in defendant's June 17, 2011 motion. See *People v. Craig*, 313 Ill. App. 3d 104, 106 (2000) ("On remand, a trial court may only do those things directed by the reviewing court in the mandate; it has no authority to act beyond the dictates of the mandate."). Defendant may not seek remand for an error that he induced the circuit court to make by virtue of the language of the remand order he drafted.

¶ 81 Defendant maintains that the circuit court's interpretation of the remand order was unreasonable because, during a *Krankel* inquiry, the court should inquire into all of a defendant's *pro se* complaints of ineffective assistance of trial counsel. According to defendant, the circuit court's determination that the scope of its inquiry was limited to defendant's June 17, 2011 motion contradicted *Krankel*. We disagree. This court, in remanding cases for *Krankel* inquiries, has limited those inquiries to only one of defendant's claims of ineffective assistance of counsel.

Nos. 1-12-1914 & 1-12-2843 (cons.)

E.g., People v. McCarter, 385 Ill. App. 3d 919, 944 (2008); *People v. Parsons*, 222 Ill. App. 3d 823, 828-31 (1991). Even after a circuit court appoints counsel to represent a defendant on his post-trial claims of ineffective assistance of counsel, the court may limit counsel's representation to certain claims raised by the defendant. *People v. Moore*, 389 Ill. App. 3d 1031, 1040-44 (2009). In this case, the circuit court's interpretation of the remand order was not unreasonable or contradictory with the purpose of our remand: to inquire into the claims of ineffective assistance of counsel defendant raised after his trial. The circuit court did not ignore the language of the order or act beyond its scope. As we explained, any error in the language of the order itself stemmed from defendant's drafting, not from the circuit court.

¶ 82 We also note that the circuit court's decision did not deprive defendant of an opportunity to raise his new claims. Defendant filed a post-conviction petition simultaneously with his amended *pro se* motion for new counsel. The circuit court docketed defendant's post-conviction petition and appointed counsel to represent him with respect to the petition. According to defendant, this petition is still pending before the circuit court. In this appeal, defendant seeks the appointment of counsel to represent him with respect to his additional claims of ineffective assistance of trial counsel. Defendant's argument is not well taken where he is currently represented by appointed counsel, who can raise his additional claims of ineffective assistance of trial counsel in an amended post-conviction petition. Defendant will still have an opportunity to raise his additional claims under the Post-Conviction Hearing Act with the assistance of appointed counsel.

¶ 83 Defendant may not contest the circuit court's decision to limit his claims to those raised in his June 17, 2011 motion, where the language of the remand order he drafted limited the trial court's consideration to those claims. The court also did not err in limiting its review to the

Nos. 1-12-1914 & 1-12-2843 (cons.)

claims in defendant's June 17, 2011 motion, where it did not unreasonably construe this court's directions on remand. We affirm the circuit court's denial of leave to raise additional claims at the second *Krankel* inquiry.

¶ 84

III. CONCLUSION

¶ 85 For the reasons stated above, we affirm the circuit court's order denying defendant's request for appointed counsel to represent him on his claims of ineffective assistance of counsel.

¶ 86 Affirmed.