

NOTICE
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2016 IL App (5th) 140362-U

NO. 5-14-0362

IN THE

APPELLATE COURT OF ILLINOIS

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

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Saline County.
)	
v.)	No. 08-CF-274
)	
CARL D. RUSS,)	Honorable
)	Walden E. Morris,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Schwarm and Justice Moore concurred in the judgment.

ORDER

- ¶ 1 *Held:* The judgment of the circuit court denying the defendant's *pro se* posttrial motion for new trial based upon ineffective assistance of counsel is affirmed where the defendant's claims lacked merit and concerned matters of trial strategy.
- ¶ 2 The defendant, Carl D. Russ, appeals from the judgment of the circuit court of Saline County that denied his *pro se* posttrial motion for new trial, wherein he claimed ineffective assistance of trial counsel. The defendant contends that the trial court erred in denying his motion because he raised a nonspurious claim alleging that his trial counsel possibly neglected his case. The defendant requests that this court remand the case for an

evidentiary hearing, with the appointment of new posttrial counsel. For the reasons set forth below, we affirm the judgment of the circuit court.

¶ 3

FACTS

¶ 4 The facts necessary to the disposition of this appeal are as follows. In August of 2011, the defendant was convicted, following a jury trial, of 23 counts of aggravated criminal sexual abuse, and 3 counts of criminal sexual assault. The convictions resulted from events that occurred between June 2008 and September 9, 2008, when Phyllis Price, the defendant's mother-in-law, looked into the defendant's bedroom, and saw the defendant's 14-year-old stepson, B.B., performing oral sex on the defendant, while the defendant fondled B.B.'s penis.

¶ 5 During the defendant's trial, Price recounted the events she witnessed on September 9, 2008. Other evidence of the defendant's guilt included his videotaped confession to police, the testimony of B.B., the testimony of B.B.'s brother, and the testimony of James Reed, a friend of the defendant. In the defendant's confession, he admitted to performing oral sex on B.B., and that B.B. performed oral sex on the defendant. The defendant also confessed that he had penetrated B.B.'s anus with his penis on one occasion, and that B.B. had penetrated the defendant anally on one occasion. The anal sex occurred early on, two or three months prior to Price having witnessed the oral sex in September 2008. The defendant further admitted that the sexual encounters had occurred once per week.

¶ 6 B.B. testified that the defendant "sexually molested" him in June of 2008, and that he and the defendant continued to have sexual encounters on a weekly basis until

September 9, 2008. These sexual encounters included the defendant performing fellatio on B.B. and vice versa, mutual masturbation, and anal sex. B.B. did not tell anyone about the sexual activity because he feared that he and his family would be harmed by the defendant. B.B.'s brother also testified. He stated that he witnessed the defendant having sex with B.B. Finally, Reed testified that prior to the defendant's arrest, the defendant admitted he had committed the alleged offenses.

¶ 7 During the defendant's trial, his counsel chose to cross-examine each witness, except for Reed. The defendant's trial attorney did not present any evidence, nor did he call any witnesses. After deliberating, the jury found the defendant guilty of 23 counts of aggravated criminal sexual abuse, and 3 counts of criminal sexual assault.

¶ 8 On August 29, 2011, the defendant's attorney filed a posttrial motion for new trial. Subsequently, on September 21, 2011, the defendant filed a *pro se* motion for new trial alleging, *inter alia*, that he had been denied effective assistance of counsel. The defendant claimed that his attorney never discussed the discovery materials with him, and failed to investigate and present favorable evidence, including two medical reports from Dr. Furry and Dr. Partridge. The defendant alleged that both doctors had examined B.B. in September of 2008, by performing an anal exam, and a "whole body exam," and found everything was "normal." The defendant also claimed that his attorney did not call 16 witnesses at trial, which included some witnesses that had testified at trial, but on behalf of the State.

¶ 9 On November 1, 2011, while the defendant's posttrial motions were pending, a sentencing hearing was held. The circuit court sentenced the defendant to 3 consecutive

13-year terms of imprisonment on the 3 criminal sexual assault convictions, and 5 years' imprisonment on each of the aggravated criminal sexual abuse convictions. The court also ordered the defendant to pay a \$200 domestic violence fine.¹

¶ 10 On February 14, 2012, following a hearing, the circuit court denied the defendant's posttrial motion for new trial. The circuit court, however, did not inquire into, or rule on, the defendant's *pro se* claims of ineffective assistance of counsel.

¶ 11 The defendant appealed his convictions, claiming the circuit court failed to conduct a preliminary inquiry into his *pro se* posttrial claims of ineffective assistance of counsel, as required by *People v. Krankel*, 102 Ill. 2d 181 (1984). The State conceded error, and we remanded the case back to the circuit court for the limited purpose of conducting a preliminary inquiry into the defendant's *pro se* claims of ineffective assistance of counsel. *People v. Russ*, 2014 IL App (5th) 120236-U.

¶ 12 On July 1, 2014, the trial court held a hearing for the limited purpose of conducting a preliminary inquiry into the defendant's allegations of ineffective assistance of counsel. The court began the hearing by stating the reasons why the defendant believed his counsel was ineffective. Testimony was taken, and throughout the course of the hearing, the court asked the defendant, on multiple occasions, if the defendant had

¹In this appeal, the defendant initially claimed that he was entitled to credit against his \$200 domestic violence fine for the time he was incarcerated before sentencing. He has since conceded this claim because this credit does not apply to a person incarcerated for sexual assault. See 725 ILCS 5/110-14(b) (West 2012).

any statements to make regarding the alleged inadequate performance of his counsel. The defendant explained that his counsel was wholly inadequate because the defendant had asked his attorney to investigate, and call at trial, the two doctors who had examined B.B. According to the defendant, he and his attorney never discussed the medical reports that were produced in discovery. The defendant stated that he had spoken with his attorney about calling the two doctors as witnesses, but that his counsel determined it would not be beneficial to the case. The defendant also claimed that he provided his attorney with the names of 16 witnesses, none of whom were ever contacted prior to trial.

¶ 13 Defendant's trial counsel also testified at this hearing. He responded that he had reviewed the discovery materials with the defendant, but did not recall any medical reports. Regarding the medical examinations of B.B., defense counsel further explained, "I don't believe that was an issue just due to the time frame between the incidents as alleged to have occurred versus when they were disclosed." With regard to the 16 potential witnesses, some of them testified on behalf of the State (B.B., B.B.'s brother, the defendant's ex-wife, and ex-mother-in-law) and were cross-examined by defense counsel at trial. When asked about the remaining potential witnesses, defense counsel stated that the sexual encounters were unwitnessed, and as a result, he decided not to interview those witnesses whose testimony was nonprobative of the alleged offenses. Shortly thereafter the court concluded the hearing and took the matter under advisement.

¶ 14 On July 3, 2014, the circuit court denied the defendant's *pro se* motion for new trial, finding that his claims of ineffective assistance of counsel lacked merit and pertained to matters of trial strategy. This appeal followed.

¶ 15

ANALYSIS

¶ 16 On appeal, the defendant's sole contention is that the trial court erred in denying his *pro se* posttrial motion for new trial because he raised a nonspurious claim alleging that his trial attorney possibly neglected his case. In particular, the defendant argues that his counsel failed to investigate and present evidence, including two medical reports, and failed to interview the two doctors who had examined B.B. shortly after the allegations of sexual abuse arose. Additionally, the defendant argues that his counsel failed to investigate, interview, and call 16 potential witnesses at trial. As a result, the defendant requests that this court remand the case for an evidentiary hearing with the appointment of new posttrial counsel. The State responds by arguing that the defendant's claims of ineffective assistance of counsel should be rejected because the trial court's determination on the merits was not manifestly erroneous.

¶ 17 When the trial court is presented with a *pro se* posttrial claim of ineffective assistance of counsel, it should first examine the factual basis of the defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If the trial court determines that the defendant's allegations lack merit or concern only matters of trial strategy, then the appointment of new counsel is not required, and the *pro se* motion may be denied. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010). Appointment of new counsel should occur, however, where the defendant's claims of ineffective assistance of counsel show possible neglect of the case. *People v. Moore*, 207 Ill. 2d at 78.

¶ 18 The main focus "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." *People v. Moore*, 207 Ill. 2d at 78. An adequate inquiry may be accomplished where the trial court: (1) asks trial counsel about the facts and circumstances related to the defendant's allegations; (2) asks the defendant for more specific information; and (3) considers the defendant's allegations and relies on its own knowledge of counsel's performance at trial. *People v. Moore*, 207 Ill. 2d at 78-79.

¶ 19 The standard of review depends on whether the trial court determined the merits of the defendant's *pro se* posttrial claims of ineffective assistance of counsel. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. If the trial court reached a determination on the merits of the defendant's ineffective assistance of counsel claims, then we will reverse only if the trial court's decision was manifestly erroneous. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. Where the court made no determination on the merits, the standard of review is *de novo*. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. In this case, the trial court made a determination on the merits of the defendant's ineffective assistance of counsel claims. Thus, the manifestly erroneous standard of review applies. This means we will not disturb the trial court's ruling unless the error is clearly evident, plain, and indisputable. *People v. Ortiz*, 385 Ill. App. 3d 1, 6 (2008).

¶ 20 In the instant case, it is clear that the trial court conducted a thorough inquiry into the defendant's *pro se* posttrial motion for ineffective assistance of counsel. The court posed questions to trial counsel and asked for more specific information from the defendant on several occasions regarding his claims. During this process, the defendant revealed that prior to trial, he had discussed the issue of calling the two doctors who had examined B.B. as witnesses. More importantly, the defendant stated that he did have a

conversation with his trial counsel about calling the doctors as witnesses, and that his attorney made the decision not to call the doctors as witnesses in this case. Although the defendant's trial attorney did not recall the medical reports at the time of this hearing, he did recall that they would not have been at issue in this case "due to the time frame between the incidents as alleged to have occurred versus when they were disclosed." The testimony of the defendant and of trial counsel at this hearing makes clear that the matter about which the defendant complains was actually considered before trial, and the decision not to call the doctors as witnesses was based upon trial strategy. The trial court's decision to deny the defendant's *pro se* posttrial claim of ineffective assistance of counsel on this issue was not manifestly erroneous.

¶ 21 Additionally, the defendant's allegations regarding the two doctors and the significance of their medical examinations ignore the fact that the defendant was caught perpetrating the horrific acts of which he was convicted when Price looked into a room and witnessed the defendant fondling B.B., who was performing oral sex on the defendant. Neither of these acts would have revealed any injury on a medical exam, as no injury was reported to have occurred to B.B. Furthermore, the defendant ignores the fact that he also confessed to using his penis to penetrate B.B.'s anus. Thus, calling a physician to testify concerning a negative medical exam would have been a hollow attempt at presenting exculpatory evidence. The evidence at trial belies the accusations made regarding ineffective assistance of counsel as it relates to the trial counsel's failure to call the two medical doctors as witnesses. Simply put, the defendant's claim of ineffective assistance of counsel on this issue lacks merit, it involved a matter of trial

strategy, and is not supported by the evidence. Accordingly, the trial court's determination to deny the defendant's *pro se* posttrial claim of ineffective assistance of counsel on this issue was not error.

¶ 22 The defendant also claimed that his trial attorney was ineffective in that he failed to call 16 witnesses on the defendant's behalf. During the hearing, the defendant was given ample opportunity by the trial court to explain these grievances against his attorney. However, when given this opportunity, the defendant did not provide any explanation as to what testimony these witnesses could offer to aid in the defense of his case. Calling witnesses who cannot help establish a defense is an exercise in futility. See *People v. Reed*, 361 Ill. App. 3d 995, 1003 (2005) (remand denied for a preliminary inquiry into defendant's *pro se* posttrial claim of ineffective assistance of counsel where defendant did not specify what the witnesses would have said on the stand or how they would have helped his case); see also *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 58 (noting that the defendant cannot rely on speculation or conjecture to justify his claim of incompetent representation). The record shows that some of the people the defendant listed as potential witnesses (B.B., B.B.'s brother, his ex-wife, and ex-mother-in-law) did testify at trial and were cross-examined by the defendant's counsel. When the defendant's trial attorney was asked about these remaining potential witnesses, he explained that the decision not to subpoena them was a matter of trial strategy. In particular, the defendant's trial counsel testified that this was a crime that was committed behind closed doors and that none of these witnesses could testify to matters that were probative of the alleged offenses. Based upon the defendant's testimony, as well as trial counsel's testimony at the

hearing, the trial court could have reasonably inferred that none of these witnesses had any information relevant to the question of the defendant's guilt. Therefore, we cannot say that the trial court's determination to deny the defendant's *pro se* posttrial claim of ineffective assistance of counsel on this issue was manifestly erroneous.

¶ 23

CONCLUSION

¶ 24 In conclusion, the trial court performed a thorough inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel by questioning the defendant's trial attorney and having him explain the facts and circumstances surrounding the defendant's claims. The trial court also provided the defendant with numerous opportunities for him to explain his grievances. After taking the matter under advisement, the trial court properly determined that the defendant's claims lacked merit and were related to matters of trial strategy. Accordingly, the judgment of the circuit court is affirmed.

¶ 25 Affirmed.