

FIRST DIVISION
MARCH 11, 2013

Nos. 1-11-0735 & 1-11-0736, Consolidated

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal form the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	Nos. 04 CR 5284, 04 CR 5285
)	
ROBERT MAURY,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The plain error doctrine does not apply to reach the forfeited issues that the trial court improperly denied the defendant's request for self-representation and that prosecutorial comments made during closing arguments improperly bolstered the victims' testimony. The trial court properly declined to appoint new counsel after conducting a *Krankel* inquiry.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Robert Maury was convicted of two counts of predatory criminal sexual assault and sentenced to mandatory life imprisonment. On direct appeal, the defendant argues that: (1) the trial court improperly denied his request to proceed *pro se*; (2) the State committed prosecutorial error during closing argument by

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improperly presenting to the jury its own expert opinion to improperly bolster the victims' testimony; and (3) the trial court erred in declining to appoint substitute counsel after conducting a *Krankel* inquiry. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 Prior to 2003, Tashnia M. (Tashnia) placed her six¹ minor children, including daughter T.M. and son A.M., in the custody of the children's grandmother, Tashnia's mother, Catherine M. (Catherine),² who lived at 56th and Carpenter Streets in Chicago, Illinois. Sometime in 2003, the defendant moved into Catherine's home. During the summer of 2003, the defendant sexually assaulted T.M. and A.M. on separate occasions. At that time, T.M. was 11 years old and A.M. was 10 years old. Thereafter, the defendant was arrested.

¶ 5 On February 26, 2004, the defendant was charged with multiple counts of predatory criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse and criminal sexual abuse, with regard to his conduct towards T.M. under case No. 04 CR 5284, which was presided over by Judge Mary Brosnahan (Judge Brosnahan). The defendant was also charged with multiple counts of predatory criminal sexual assault, aggravated criminal sexual assault and criminal sexual assault, with regard to the defendant's conduct towards A.M. under case No. 04 CR 5285, which was initially presided over by Judge Matthew Coghlan (Judge Coghlan).

¹The record suggests that Tashnia's seventh child may have been born in 2003 or 2004 and thus, it is unclear whether that child also lived with Catherine in the summer of 2003.

²Catherine M.'s name varies in the record as Katherine or Catherine.

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¶ 6 On November 1, 2006, in a jury trial for T.M.'s case (case No. 04 CR 5284), the defendant was convicted of one count of predatory criminal sexual assault and sentenced to a term of natural life imprisonment.

¶ 7 On January 8, 2008, while T.M.'s case (case No. 04 CR 5284) was pending on appeal, a hearing on the State's motion to allow other-crimes evidence (725 ILCS 5/115-7.3 (West 2006)) was held before Judge Coghlan in A.M.'s case (case No. 04 CR 5285), during which the trial court denied the defendant's request to proceed *pro se* and granted the State's motion to allow other-crimes evidence.

¶ 8 On March 31, 2009, this court reversed and remanded the defendant's conviction and sentence in the case involving T.M. (case No. 04 CR 5284). We ordered a new trial, holding that the prejudicial effect of the cumulative other-crimes evidence presented by the State during case No. 04 CR 5284 outweighed its probative value. *People v. Maury*, No. 1-07-0142 (2009) (unpublished order under Supreme Court Rule 23).

¶ 9 On remand, on August 26, 2009, the State filed a motion for joinder of the two cases (case Nos. 04 CR 5284 and 04 CR 5285), which the trial court granted. Thereafter, the State elected only to proceed against the defendant on one count of predatory criminal sexual assault upon T.M., and one count of predatory criminal sexual assault upon A.M.

¶ 10 On December 6, 2010, during a status hearing before Judge Brosnahan, the defendant requested to proceed *pro se*. The trial court reminded the defendant of the seriousness of the charges against him, the potential sentence that would be imposed if convicted, and admonished him that,

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if he were to proceed *pro se*, he would be treated like an attorney by the court and would not receive standby counsel or extra help from the court during the proceedings. The trial court then ordered defense counsel and his supervisor at the public defender's office to meet with the defendant in order to explain the seriousness of the charged offenses. The court continued the matter to allow the defendant time to reconsider his request to proceed *pro se*. At the next status hearing date, which was December 22, 2010, the defendant agreed to continue to be represented by defense counsel.

¶ 11 On January 25, 2011, a jury trial³ commenced before Judge Brosnahan. The State presented the testimony of T.M., who testified that she was 18 years old and that in the summer of 2003, she and her siblings were temporarily living with their grandmother, Catherine, at 56th and Carpenter Streets in Chicago. In the summer of 2003, T.M. was 11 years old when the defendant, Catherine's then boyfriend, moved into Catherine's home. The defendant and Catherine shared a bedroom on the first floor of the home, while T.M.'s older brother, Tremaine, occupied a second bedroom on the same floor. T.M. and her younger siblings shared a bedroom on the second floor. The home's only full bathroom was located across the hallway from Catherine's bedroom. Early one morning in July 2003, T.M. was awakened by the then 46-year old defendant, who ordered T.M. to go to the bathroom shower and get undressed. The defendant also removed his clothes and stepped into the shower, where he started kissing and touching T.M. After kissing T.M., the defendant ordered her to get down on her knees and "suck his dick," to which she complied until "sperm" came into her

³As discussed above, the January 25, 2011 jury trial jointly encompassed the retrial of the defendant in T.M.'s case (case No. 04 CR 5284) and the trial of the defendant in A.M.'s case (case No. 04 CR 5285).

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mouth and the defendant commanded her to "swallow it." T.M. did not tell her grandmother, Catherine, about the incident because she feared that Catherine would not believe her nor take any appropriate action. This fear was based on an earlier incident (the first incident), about a month prior to the July 2003 incident at issue, when Catherine refused to believe T.M. that the defendant had asked T.M. to perform oral sex on him. During the first incident, she had refused to comply with the defendant's request and had run away to a neighbor's home. T.M. then testified that the defendant threatened to kill T.M. if she told anyone about the incident, and that she was afraid of him. On the next day following the July 2003 incident, T.M. reported it to her mother, Tashnia. At trial, T.M. described the defendant's penis as hard, hairy and circumcised. On cross-examination, T.M. could not recall the exact date or day of the week of the sexual assault. T.M. also testified that, during the first incident, she was home alone but that everyone was playing outside. On redirect examination, T.M. testified that the defendant had physically beat her in the past, and that he gave her money and candy to keep quiet about his conduct.

¶ 12 A.M. testified that he was 17 years old and that, during the summer of 2003, he was 10 years old and living with his siblings in Catherine's home. During that time, the defendant had moved into Catherine's home and shared a bedroom with Catherine. One Wednesday evening in the summer of 2003, A.M. stayed home while the rest of the family attended Bible study. Catherine had told him to stay home because he had forgotten his coat. The defendant, who was also in the home, summoned A.M. into Catherine's bedroom, slapped him across his eye, "whopped" him with a belt and asked A.M. to "suck [his] dick." The defendant told A.M. that he had a knife on the side of the

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bed. The defendant then forced A.M. onto his knees, pulled down the defendant's shorts, put one hand on the wall and put his penis into A.M.'s mouth, where he ejaculated. A.M. described the defendant's penis as circumcised and "long, hard and [hairy]," and the defendant's semen as "liquidy" "white sperm." The defendant then threatened A.M. that he would stab A.M. and throw him out a window if he told anyone about the defendant's conduct. A.M. testified that he never informed Catherine of the incident because he was afraid that she would not believe him, and that A.M. was afraid of the defendant. He further stated that the defendant had hit him and his siblings multiple times in the past. A.M. later reported the incident to his mother, an aunt and the police. A.M. testified that the incident occurred around 5 p.m., but that Bible Study began at 7 p.m.

¶ 13 Tashnia testified that in the spring and summer of 2003, she lacked steady employment and income, and was unable to care for her children in her own residence. As a result, she placed her children in the custody of Catherine, by signing a statement reflecting the guardianship agreement. The statement was notarized and signed by Tashnia, Catherine and a social worker. Catherine provided financial support to the children with the aid of government welfare assistance. In the summer of 2003, the defendant moved into Catherine's home, where the children resided. Tashnia described her relationship with the defendant as "[r]ocky." Tashnia testified that it was her intention to regain custody of her children when she became financially secure. In July 2003, Tashnia's father brought the children to see her, at which point she had conversations with the children, including T.M. and A.M. After speaking with her children, Tashnia went to Catherine's home to confront her about the allegations of the defendant's improper conduct. However, Catherine did not believe the

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allegations against the defendant and defended him. Thereafter, Tashnia called the police. On cross-examination, Tashnia initially stated that she had no knowledge of the defendant's conduct prior to the date her father brought her children to visit her, but later acknowledged that she had testified in a prior proceeding that T.M. contacted her three weeks earlier to discuss the defendant's conduct during the first incident. On redirect examination, Tashnia clarified that T.M. telephoned her in early July 2003 about the first incident, during which the defendant had tried to engage in oral sex with T.M. and that T.M. had fled from him. Tashnia testified that her children thereafter received counseling through the Department of Children and Family Services (DCFS) with the help of a school counselor and a woman named Catherine Byrne (Byrne).

¶ 14 Detective Michael Nolan (Detective Nolan) testified that on July 28, 2003, he was assigned to investigate a report of criminal sexual assault allegedly committed by the defendant. As part of his investigations, he spoke with T.M. and A.M. at 5635 South Carpenter Street in Chicago. He ensured that a safety plan was in place for the children and scheduled a victim-sensitive interview between the victims and a forensic interviewer at the Chicago Child Advocacy Center. On August 11, 2003, a victim-sensitive interview took place during which T.M. and A.M. spoke with the forensic interviewer separately, while Detective Nolan observed through a two-way mirror in an adjoining room. In February 2004, the defendant was taken into police custody.

¶ 15 Antoinette Murray (Antoinette) testified that, in 1986, she was 14 or 15 years old and lived with her siblings, mother Ivory, and the defendant in public housing. The defendant was Ivory's boyfriend at the time. She testified that, starting when she was about five years old, the defendant

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would wake her up in the middle of the night and take her to the bathroom, where he would force her to perform oral sex on him. When the defendant ejaculated into her mouth and she gagged, he instructed her to "swallow it," to which she complied. The defendant also threatened that he would throw Antoinette out of the window and kill her mother if she told anyone about his conduct. Antoinette stated that she was scared and did not tell anyone about the defendant's sexual conduct toward her, but that her sister eventually informed the police.

¶ 16 The State then rested and the trial court denied the defendant's motion for a directed finding. The trial court then asked defense counsel whether the court should, at that point, inquire of the defendant with respect to his right to testify. Defense counsel then indicated that the defendant was not expected to testify, and asked the court to admonish the defendant. The trial court then admonished the defendant as to his right to testify, and the defendant indicated that he did not wish to testify.

¶ 17 The defense presented the testimony of two witnesses. Byrne testified that she was a child protection investigator at DCFS. In July 31, 2003, she visited Tashnia's children in Kane County after they had been removed from Catherine's home. She ensured that the children stayed at the new residence pending the outcome of the investigation of the allegations against defendant. Byrne did not offer or provide any services to the children, but noted that services such as counseling were available through DCFS.

¶ 18 John Crivellone (Crivellone) testified for the defense that he was a defense investigator who was assigned to take photographs of the defendant on January 26, 2011, the day before he was

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scheduled to testify in defendant's trial. Crivellone stated that he took a total of four photographs of defendant, including two photographs of the defendant's genitalia. On cross-examination, Crivellone stated that the defendant did not appear to be in a state of sexual arousal at the time the photographs were taken.

¶ 19 Following Crivellone's testimony, defense rested. After closing arguments, the jury found the defendant guilty on both counts of predatory criminal sexual assault.

¶ 20 On January 31, 2011, defense counsel filed a motion for a new trial on behalf of the defendant. On February 14, 2011, the defendant filed, *pro se*, a handwritten supplemental motion for a new trial, alleging that defense counsel provided ineffective assistance to him. Specifically, the defendant alleged that defense counsel had failed to investigate the complainants' motive to lie; that defense counsel failed to thoroughly interview Catherine and thereby overlooked her as a crucial witness to rebut the victims' testimony; that defense counsel did not properly listen to the defendant; and that defense counsel forced the defendant to prematurely decide whether to testify at trial before presenting the testimony of the defense witnesses. On February 24, 2011, a *Krankel* inquiry was conducted during which the defendant presented his arguments of ineffective assistance of counsel. At the *Krankel* inquiry, defense counsel was also given an opportunity to respond to the defendant's allegations. The trial court then found that the defendant's *pro se* claims of ineffective assistance of counsel lacked merit and only pertained to matters of trial strategy. The trial court then declined to appoint new counsel to the defendant, and denied the defendant's *pro se* supplemental motion for a new trial. The trial court also denied the January 31, 2011 motion for a new trial, which was filed

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by defense counsel on behalf of the defendant. Subsequently, the defendant was sentenced to mandatory natural life in prison. On that same day, February 24, 2011, the defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 21 On February 24, 2011, the defendant filed two separate notices of appeal for each of the two cases that were tried jointly (case Nos. 04 CR 5284 and 04 CR 5285). On December 22, 2011, this court granted the defendant's motion to consolidate the two cases on appeal.

¶ 22 ANALYSIS

¶ 23 We determine the following issues on appeal: (1) whether the trial court improperly denied the defendant's request to proceed *pro se*; (2) whether comments made by the State during closing argument constituted prosecutorial error and improperly bolstered the victims' testimony; and (3) whether the trial court erred in declining to appoint substitute defense counsel after conducting a *Krankel* inquiry.

¶ 24 We first determine whether the trial court improperly denied the defendant's request to proceed in the proceedings *pro se*, which we review under an abuse of discretion standard. See *People v. Span*, 2011 IL App (1st) 083037, ¶ 55.

¶ 25 The defendant, in referencing the January 8, 2008 pretrial proceeding for A.M.'s case (case No. 04 CR 5285), which was presided over by Judge Coghlan, argues that the trial court improperly denied his constitutional right to self-representation. Specifically, the defendant contends that he made "an articulate, unmistakable demand to represent himself," and that the trial court erroneously denied his request on the impermissible basis that it was an unwise decision.

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¶ 26 The State counters that the defendant has forfeited this claim because he failed to raise the issue in his posttrial motion. The State maintains that no error occurred under plain error analysis because the defendant's request to proceed *pro se* was vague and equivocal, and he ultimately abandoned any request for self-representation when he agreed with the trial court that representing himself would be unwise.

¶ 27 We find that the defendant has forfeited this issue for review on appeal because it was not raised in his posttrial motion for a new trial. *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 472-73 (2005) (a defendant who fails to make a timely trial objection and include the issue in a posttrial motion forfeits the review of the issue). However, the plain error doctrine allows a reviewing court to consider unpreserved issues when either: (1) the evidence is closely balanced, regardless of the seriousness of the error; or (2) the error is so serious, regardless of the closeness of the evidence, as to affect the fairness of the defendant's trial and challenge the integrity of the judicial process. *Id.* at 178-79, 830 N.E.2d at 475; *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). The Illinois Supreme Court has "equated the second prong of plain-error review with structural error." *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010). Structural error is a "systematic error which serves 'to erode the integrity of the judicial process and undermine the fairness of the defendant's trial' " and which requires automatic reversal. *Id.* at 613-14, 939 N.E.2d at 413 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98, 917 N.E.2d 401, 416 (2009)). An error is recognized as "structural" in a very limited class of cases, including the denial of self-representation at trial. *Thompson*, 238 Ill. 2d at 609, 939 N.E.2d at 411. In order

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to obtain reversal and a new trial, the defendant bears the burden of persuasion. See *People v. Hayes*, 409 Ill. App. 3d 612, 628, 949 N.E.2d 182, 195 (2011). The first step in a plain error analysis is to determine whether an error occurred at all. *People v. McLaurin*, 235 Ill. 2d 478, 489, 922 N.E.2d 344, 351-52 (2009); *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964, 971 (2008).

¶ 28 A defendant has a constitutional right to self-representation. *Span*, 2011 IL App (1st) 083037, ¶ 59. However, the constitutional right to self-representation is not absolute and may be forfeited if the defendant "cannot make a knowing and intelligent waiver of counsel or if the defendant's request to represent himself is untimely." (Internal citations omitted.) *People v. Gorga*, 391 Ill. App. 3d 406, 410, 920 N.E.2d 535, 540 (2009). "A defendant wishing to represent himself must relinquish his right to counsel knowingly and intelligently, and his waiver of counsel must be clear and unequivocal, not ambiguous." *Span*, 2011 IL App (1st) 083037, ¶ 59; see also *People v. Baez*, 241 Ill. 2d 44, 155-16, 946 N.E.2d 359, 401 (2011). "A defendant waives his right to self-representation unless he 'articulately and unmistakably demands to proceed *pro se*.'" (Internal quotation marks omitted.) *Baez*, 241 Ill. 2d at 116, 946 N.E.2d at 401. "In determining whether a defendant's statement is clear and unequivocal, a court must determine whether the defendant truly desires to represent himself and has definitively invoked his right of self-representation." *Id.* "Courts must 'indulge in every reasonable presumption against waiver' of the right to counsel." *Id.* (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232 (1977)). "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances of that case, including the background, experience, and

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conduct of the accused." *Baez*, 241 Ill. 2d at 116, 946 N.E.2d at 401. While a court may consider a defendant's decision to represent himself as unwise, the defendant's decision must be accepted if it is made freely, knowingly and intelligently. *Id.* at 116-17, 946 N.E.2d at 402. However, even if a defendant gives some indication that he wants to proceed *pro se*, he may later acquiesce in representation by counsel "by vacillating or abandoning an earlier request to proceed *pro se*." *Span*, 2011 IL App (1st) 083037, ¶ 61.

¶ 29 In the case at bar, on January 8, 2008, while T.M.'s case (case No. 04 CR 5284) was pending on appeal, a hearing on the State's motion to allow other-crimes evidence was held before Judge Coghlan in the case involving A.M. (case No. 04 CR 5285). During the hearing, defense counsel informed the court that the defendant wished to represent himself. The trial court then asked the defendant, "[is] this true," to which the defendant replied, "[y]es, sir." The trial court then engaged in a dialogue with the defendant, during which the trial court remarked that it was not a wise decision and asked the defendant if there was something he wanted to tell the court. The defendant stated that "[t]here's important information that have not come out." The trial court then questioned the defendant about his background, including whether he was a lawyer or had attended law school, to which the defendant answered in the negative. The trial court then reminded the defendant that defense counsel was an experienced attorney who had been "filing motions on [his] behalf, strenuously arguing those motions, *** citing the right points of law." The defendant remarked that he had "answers and stuff like that" which he wanted to "come out," and that "[defense counsel] and he just don't agree on the simple truth." The trial court then reminded the defendant of the

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seriousness of the charged offenses, including his eligibility for natural life in prison if convicted. The trial court then asked, "so you want to risk sentence of up to natural life on your representation when you have *** an experienced attorney who has been arguing on your behalf?" The defendant then reiterated that there was "information" that he possessed which defense counsel must have in order to "fight the case productively." In response, the trial court stated that "[he] [could] give [defense counsel] that information but certainly [defense counsel was] more experienced to make determinations and trial decisions as to whether or not he [thought] those factors would be accepted by a trier of fact." The defendant then agreed with the trial court that defense counsel was more qualified to make determinations about the defendant's case, and stated, "I guess what I am trying to ask you do I have my input too." The trial court replied that defense counsel was expected to consult with defendant and take the defendant's input into account, but that it is expected that the defendant would disagree with defense counsel on some matters. The trial court then made the following remarks:

"THE COURT: You are in jeopardy of being sentenced, if found guilty of these offenses, up to natural life in prison without parole mandatory so I think it would be very unwise for you at this juncture to seek to go *pro se* *** Do you understand that?"

THE DEFENDANT: Yes, sir.

THE COURT: Do you agree?

THE DEFENDANT: Yes, sir.

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THE COURT: At this time I'm not going to allow you to go *pro se*. I expect you to work with your attorney, and I'm sure he will consult with you and give you his opinions as well. But you should seriously consider his opinions because he certainly has much more experience and knowledge in trial courts and evidence in the ways of jury. Okay?

THE DEFENDANT: Yes, sir."

¶ 30 Our review of the record shows that at a certain point in the case, the defendant made a request to proceed *pro se*. However, upon the trial court's questioning, defendant indicated that his true desire was to ensure that he had input into the defense strategy and that information which he possessed was included in the defense strategy. The defendant also expressed to the trial court that he and defense counsel disagreed "on the simple truth," but then defendant agreed with the trial court that defense counsel was more qualified than defendant to make determinations about trial strategy. The defendant asked the court if he was allowed to have "input." The trial court replied that defense counsel was expected to consult with the defendant but the defendant may disagree with defense counsel on certain matters. The defendant then explicitly *agreed* with the trial court that it would be "unwise" for him to proceed *pro se*. Based on our review of the entirety of the record, we find that the defendant's statement regarding self-representation was not clear and unequivocal, and does not lead us to conclude that he definitively invoked his right of self-representation. In fact, defendant's comments could be interpreted as expressing a desire to ascertain that his input and

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information which he possessed would be included in his defense strategy. Even assuming that he had clearly and unequivocally invoked his right to self-representation, we find that the defendant, by explicitly agreeing with the trial court that it was unwise to represent himself, acquiesced to representation by counsel and abandoned his earlier request to proceed *pro se*. See *Span*, 2011 IL App (1st) 083037, ¶ 61 (even if a defendant gives some indication that he wants to proceed *pro se*, he may later acquiesce in representation by counsel "by vacillating or abandoning an earlier request to proceed *pro se*"); see also *Baez*, 241 Ill. 2d at 116, 946 N.E.2d at 401 (courts must allow every reasonable presumption against waiver of the right of counsel). Therefore, the trial court did not err in denying his request to proceed *pro se*.

¶ 31 Moreover, the record reveals that, after the two cases were joined (case Nos. 04 CR 5284 and 04 CR 5285), the defendant made a similar request to proceed *pro se* and later acquiesced to representation by counsel. At the December 6, 2010 status hearing before Judge Brosnahan, the defendant made a request to proceed *pro se* before the court. However, the trial court reminded the defendant of the seriousness of the charges against him and the potential sentence that could be imposed upon conviction. The trial court then ordered defense counsel and his supervisor at the public defender's office to explain the seriousness of the charged offenses to the defendant, and continued the matter to allow the defendant time to reconsider his *pro se* representation request. Subsequently, at the following hearing date, on December 22, 2010, the defendant *agreed* to continue to be represented by defense counsel. Thus, we find that the defendant's subsequent conduct clearly established that he abandoned the request for self-representation. See *Span*, 2011

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IL App (1st) 083037, ¶ 61("[w]e may look to the defendant's subsequent conduct following his request to represent himself" to determine if he has abandoned an earlier request to proceed *pro se*).

¶ 32 Nonetheless, the defendant, citing *People v. Fisher*, 407 Ill. App. 3d 585, 944 N.E.2d 485 (2011), argues that the trial court abused its discretion in denying his request for self-representation. In *Fisher*, the defendant filed a written motion to discharge (motion to discharge) the public defender and proceed *pro se*. *Id.* at 586, 944 N.E.2d at 487. At the hearing on the motion to discharge, the trial court questioned the defendant about the substance of the motion and discovered that the defendant's dissatisfaction with defense counsel stemmed from the defendant's mistaken interpretation of the law. *Id.* at 586-89, 944 N.E.2d at 487-89. The trial court then denied the defendant's request to proceed *pro se*, on the basis that the defendant's ignorance of the law demonstrated his need to be represented by counsel, regardless of whether the defendant wanted one. *Id.* at 589, 944 N.E.2d at 489. On appeal, this court reversed and remanded for a new trial, finding that the defendant's ignorance of the law and need for an attorney were not proper bases upon which to deny the defendant's request for self-representation, where his desire to represent himself, as outlined in the written motion to discharge, was clear and unequivocal. *Id.* at 590, 944 N.E.2d at 490. The *Fisher* court further found that the defendant said nothing that could reasonably be interpreted as a withdrawal of his request to represent himself. *Id.*

¶ 33 We find *Fisher* to be distinguishable from the facts of the instant case, where, as discussed, even assuming that the defendant made a clear and unequivocal request to proceed *pro se* during the January 8, 2008 proceedings, he later made comments that could reasonably be interpreted as

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acquiescence to representation by counsel and a withdrawal of his prior request for self-representation. Thus, we find that the defendant has not established that any error occurred. Therefore, the plain error doctrine does not apply to reach the forfeited issue.

¶ 34 We next determine whether comments made by the State during closing argument constituted prosecutorial error and bolstered the victims' testimony.

¶ 35 The defendant argues that he was prejudiced when the State made comments during closing argument that bolstered the victims' testimony. Specifically, he argues that the prosecutor made his "own scientific, authoritative opinions to support [the] case," by telling the jury how the "mind works." Although the defendant concedes that this issue is forfeited for review on appeal, he argues that the plain error doctrine applies to reach the issue because the evidence was closely balanced.

¶ 36 The State counters that the defendant has forfeited review of this claim and that the plain error doctrine does not apply to reach the issue where the defendant could not establish that any error occurred. The State maintains that comments made by the prosecutor in rebuttal closing argument were reasonable inferences from the evidence presented, and were an invited response by defense counsel's assertion during closing argument that the victims were incredible.

¶ 37 We find that the defendant forfeited review of this issue on appeal because defense counsel failed to object to the comments at trial. See *Herron*, 215 Ill. 2d at 175, 830 N.E.2d at 472-73. As discussed, in determining whether the plain error doctrine applies to reach the forfeited issue, we must first determine whether an error occurred at all. *Hudson*, 228 Ill. 2d at 191, 886 N.E.2d at 971.

¶ 38 Prosecutors are afforded wide latitude in closing arguments. *People v. Anderson*, 407 Ill.

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App. 3d 662, 677, 944 N.E.2d 359, 373 (2011). "A prosecutor has the right to comment upon the evidence presented and upon reasonable inferences arising from that evidence, even if the inferences are unfavorable to the defendant, and may respond to comments made by defense counsel which clearly invite a response." *Id.* However, a prosecutor's closing remarks will lead to reversal only if they created substantial prejudice, which occurs when the improper remarks constituted a material factor in the defendant's conviction. *People v. Land*, 2011 IL App (1st) 101048, ¶ 153. In considering the defendant's claims for prosecutorial misconduct, a reviewing court "considers the closing argument in its entirety in order to place the complained of remarks in context." *Anderson*, 407 Ill. App. 3d at 676, 944 N.E.2d at 373. "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Id.*, citing *People v. Wheeler*, 226 Ill. 2d 92, 123, 871 N.E.2d 728, 745 (2007).

¶ 39 During rebuttal closing argument in the case before us, the prosecutor made the following remarks:

"Well, you notice that everytime [*sic*] when [the victims] talk about what he did to them, when they talk about that, there's no inconsistencies. *That's how the mind works.* They remember being victimized. They remember what he did to them. *They are not going to remember all of the collateral things that happened.*

Yeah, [A.M.] doesn't remember when the defendant moved in,

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but he sure knows what he did to him that night when the defendant had his hand against the wall and his other hand on his penis forcing it into [A.M.'s] mouth. Of course he remembers that. That's what victims remember." (Emphases added.)

¶40 The defendant challenges the highlighted portions of the prosecutor's comments, arguing that they improperly bolstered the victims' testimony as "pseudoscientific" and "unsworn psychological opinion." We disagree. Based on our review of the closing argument in its entirety, we find these remarks to be reasonable inferences based on the trial evidence. T.M. and A.M. were children at the time of the sexual assault—ages 11 and 10, respectively—and that their trial testimony occurred over 7 years after the defendant sexually assaulted them. It was reasonable to infer from the evidence that T.M. and A.M., as children, did not know or could not remember the collateral details of the crime, such as when the defendant moved into Catherine's home, but could distinctly remember the defendant's criminal conduct in forcing them to perform oral sex and threatening them into silence.

¶41 Further, we find that the prosecutor's comments were an invited response to defense counsel's assertions during defense's closing argument that the victims were incredible. See *Anderson*, 407 Ill. App. 3d at 677, 944 N.E.2d at 373 (a prosecutor may respond to comments made by defense counsel which clearly invite a response). During closing arguments, defense counsel attacked the victims' credibility by pointing to erroneous statements in the victims' testimony to suggest that their allegations against the defendant were untruthful. Specifically, defense counsel argued in closing that T.M. and A.M. incorrectly described the defendant's penis as circumcised, when photographic

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evidence showed that it was uncircumcised. Defense counsel then asserted, "[t]he inconsistencies are reflective upon this. Taking a look at the other evidence as a whole, memories failed with regard to the cross-examination, but they were consistent and told you why the defendant was not guilty. He's not circumcised. The proof is forward in the photographs." We find the statements complained of in the State's rebuttal closing argument to be an invited response to defense counsel's allegation that T.M. and A.M. fabricated their testimony against the defendant. In response to defense counsel's assertion that T.M. and A.M. were incredible, the prosecutor remarked that the victims consistently testified to the defendant's *conduct* against them, and argued that they would be more likely to recall the *act* of the defendant's penis being forced into their mouths than to recall collateral details of the crimes. We find this to be reasonable. Thus, based on our review of the entirety of the closing arguments, in context, we find no error in the prosecutor's remarks during rebuttal closing argument. Therefore, because the defendant cannot establish that an error occurred, the plain error doctrine is inapplicable to reach this forfeited issue.

¶42 Even assuming, *arguendo*, that the prosecutor committed error in making the complained-of statements, we find that such error did not rise to the level of plain error because the evidence at trial was not closely balanced. At trial, T.M. and A.M. testified in detail about the defendant's criminal conduct against them in 2003, while other-crimes evidence showed that the defendant committed similar criminal acts upon Antoinette for a period of years that ended in 1986. See *Herron*, 215 Ill. 2d at 178-79, 830 N.E.2d at 475 (plain error doctrine allows a reviewing court to consider unpreserved issues when either: (1) the evidence is closely balanced; or (2) the error is so serious

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as to affect the fairness of the trial). Regardless of whether the defendant's penis was circumcised or not, or whether T.M. and A.M. as children could have discerned a circumcised penis from an uncircumcized one, there was testimony which the jury believed that the defendant forced oral sex upon T.M. and A.M. The later admitted evidence also established that defendant had the propensity to commit these crimes—as evidenced by Antoinette's testimony that he had committed identical acts upon her, had also instructed her to "swallow it," and had threatened to throw her out the window if she told anyone of his conduct. Likewise, regardless of whether T.M. and A.M. could recall when the incidents occurred or whether there were minor inconsistencies in T.M.'s, A.M.'s and Tashnia's testimony, T.M. and A.M. consistently and positively testified that the defendant forced oral sex upon them on separate occasions. Thus, we find that the evidence was not closely balanced.

¶ 43 Nor do we find that any error if it occurred at all was so serious that it affected the fairness and the outcome of the trial. Based upon our review of the prosecutor's rebuttal closing argument, we cannot say that the jury could have reached a contrary verdict without the remarks in question, nor can we conclude that the remarks constituted a material factor in the defendant's conviction. Moreover, the jury was properly instructed that closing arguments were not considered evidence and that any statement that was not supported by the evidence should be disregarded. The jury, as fact finders, had the opportunity to observe the victims, assess their credibility and resolve any inconsistencies in their testimony. Thus, we find that any error attributed to the prosecutor's remarks was not so serious as to deprive the defendant of a fair trial. Therefore, the plain error doctrine is inapplicable to reach this forfeited issue.

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¶ 44 We next determine whether the trial court erred in declining to appoint substitute counsel after conducting a *Krankel* inquiry.

¶ 45 The defendant argues that the trial court erred in failing to appoint him new counsel after conducting a *Krankel* inquiry, where he demonstrated the possibility that defense counsel was ineffective. Specifically, he contends that he showed that defense counsel failed to investigate T.M.'s, A.M.'s and Tashnia's motive to lie; that defense counsel failed to thoroughly interview Catherine and thereby overlooked her as a crucial witness to strengthen his defense; that defense counsel did not properly listen to the defendant's claim concerning Tashnia's motive to orchestrate false testimony by her children; and that defense counsel forced him to prematurely decide whether to testify at trial before presenting the testimony of the defense witnesses. The defendant further posits that the trial court did not examine his allegations at the *Krankel* inquiry in any "meaningful sense," where it rejected two of his allegations based on its mistaken recollections of certain facts in the case. Therefore, the defendant argues, this court should remand for appointment of new counsel or, in the alternative, remand for a new *Krankel* inquiry.

¶ 46 The State counters that the trial court did not err in declining to appoint substitute counsel after conducting a *Krankel* inquiry, where the trial court determined that the defendant's allegations of ineffective assistance of counsel lacked merit. Specifically, the State argues that the defendant's claims were baseless or involved clear matters of trial strategy. The State contends that, even if the trial court erred in failing to appoint new counsel, any such error was harmless.

¶ 47 In this case, on February 14, 2011, following defense counsel's filing of a motion for a new

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trial on the defendant's behalf, the defendant filed a *pro se* supplemental motion for a new trial alleging ineffective assistance of counsel. The defendant's filing of a *pro se* posttrial motion for ineffective assistance of counsel triggered the trial court's duty to conduct an inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), which was held on February 24, 2011. Our supreme court, through *Krankel* and its progeny, has provided guidance to trial courts on handling posttrial *pro se* claims of ineffective assistance of counsel. See *Krankel*, 102 Ill. 2d at 189, 464 N.E.2d at 1049; see also *People v. Moore*, 207 Ill. 2d 68, 77-82, 797 N.E.2d 631, 637-40 (2003) (discussing *Krankel* and its progeny); *People v. Chapman*, 194 Ill. 2d 186, 227-31, 743 N.E.2d 48, 73-75 (2000) (same); *People v. Johnson*, 159 Ill. 2d 97, 124, 636 N.E.2d 485, 497 (1994) (same); *People v. Nitz*, 143 Ill. 2d 82, 133-36, 572 N.E.2d 895, 918-20 (1991) (same). A trial court is not automatically required to appoint new counsel anytime a defendant claims ineffective assistance of counsel. *Moore*, 207 Ill. 2d at 77, 797 N.E.2d at 637. Rather, the trial court should first conduct an inquiry to examine the factual basis of the defendant's claim. *Id.* at 77-78, 797 N.E.2d at 637. This inquiry is now commonly known as a "*Krankel* inquiry." *People v. Vargas*, 409 Ill. App. 3d 790, 801, 949 N.E.2d 238, 248 (2011). If the trial court determines that the defendant's *pro se* claim lacks merit or concerns a matter of trial strategy, the court then need not appoint new counsel and the denial of the motion is appropriate. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637. "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." *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 40. However, if the allegations of the defendant's claim "show possible neglect of

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the case," new counsel should be appointed to represent the defendant on the hearing on the defendant's *pro se* posttrial motion. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637.

¶ 48 During a *Krankel* inquiry, "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." *Id.* at 78, 797 N.E.2d at 638. A trial court may base its evaluation of the defendant's *pro se* allegations of ineffective assistance of counsel on: (1) defense counsel's answers and explanations to facts and circumstances surrounding the defendant's allegations; (2) a brief discussion between the trial court and the defendant; and (3) "its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id.* at 78-79, 797 N.E.2d at 638.

¶ 49 The parties dispute the applicable standard of review. The defendant urges this court to engage in *de novo* review of the trial court's *Krankel* inquiry, on the basis that the trial court's findings were inaccurate, while the State argues that the court's judgment should only be reversed if it was "manifestly erroneous." Our supreme court has held that "if the trial court made no determination on the merits, then our standard of review is *de novo*." *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25 (citing *Moore*, 207 Ill. 2d at 75, 797 N.E.2d at 636). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578, 948 N.E.2d 132, 146 (2011). 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

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court's action was manifestly erroneous. *Tolefree*, 2011 IL App (1st) 100689, ¶ 25. A "manifest error" is one that is "clearly plain, evident, and indisputable." *Id.* Here, because the trial court has determined the defendant's claim on the merits, we review its judgment under the "manifestly erroneous" standard. However, we hold that, under either standard, the trial court did not err in declining to appoint new counsel after conducting a *Krankel* inquiry.

¶ 50 The defendant's first allegation of ineffective assistance of counsel pertained to defense counsel's alleged failure to investigate T.M.'s, A.M.'s and Tashnia's motive to lie. On appeal, he argues that defense counsel was at least possibly ineffective because he had failed to consider evidence of their motive to lie, which could have given the jury a reason to doubt the victims' testimony had defense counsel presented it at trial. In support of this allegation on appeal, the defendant attached to the appendix of his brief, a copy of a court order appointing Catherine as guardian of Tashnia's children and a copy of a court order discharging Catherine as guardian.

¶ 51 We find the copies of documents pertaining to Catherine's guardianship of the children, which were attached to the appendix of the defendant's brief, to be improperly before this court. See *People v. Williams*, 2012 IL App (1st) 100126, ¶ 27 (inclusion of evidence in the appendix of brief was improper supplementation of record with information *dehors* the record). Even if this court were to take judicial notice of the contents of the guardianship documents, as the defendant urges us to do, we find that the defendant failed to show that the trial court erred in rejecting this allegation of ineffective representation. See *People v. Alvarez-Garcia*, 395 Ill. App. 3d 719, 726-27, 936 N.E.2d 588, 595 (2009) ("while a reviewing court may not supplement the record with a document

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not considered by the trial court, this court may take judicial notice of matters that are readily verifiable from sources of indisputable accuracy"). At the February 24, 2011 *Krankel* inquiry, the defendant alleged that he had "some information" showing that "in order for Tashnia to reclaim her children, she would have to go through the courts, and she just couldn't come get them." He argued that defense counsel failed to investigate the witness' motive to falsely accuse him in order to reunite the children with Tashnia. Defense counsel responded generally that, during trial preparation, he had met with the defendant "numerous times throughout the course of his representation." At the conclusion of the defendant's arguments, the trial court found that, based on the court's own observations, defense counsel had "put in a lot of time" during the months of trial preparation and, in addition to examining the transcripts of the defendant's first trial, had adequately performed an investigation of the case. The trial court ultimately found that the defendant's claim of ineffective assistance lacked merit and only pertained to matters of trial strategy.⁴ Based on our review of the record, we cannot say that the trial court's ruling was manifestly erroneous. The defendant's argument about the witness' motive to lie was speculative and conclusory at best. We note that the defendant neither argued that Tashnia had attempted, but failed, to regain custody of her children at the time of the incidents so as to show a need to resort to underhanded measures to accomplish that goal, nor argued that T.M. and A.M. wanted to reunite with Tashnia. Thus, these speculative

⁴It appears from our review of the entire transcript of the *Krankel* inquiry that the trial court's ruling that the defendant's claim lacked merit pertained to his allegation of defense counsel's failure to investigate, while the court's ruling that the defendant's claim pertained to matters of trial strategy related to the defendant's allegations that defense counsel failed to call certain witnesses to testify at trial.

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musings by the defendant lacked merit. Therefore, the trial court properly declined to appoint new counsel on this basis.

¶ 52 The defendant's second allegation of ineffective assistance of counsel related to his assertion that defense counsel failed to thoroughly interview Catherine and thereby overlooked her as a crucial witness to strengthen his defense. In the defendant's *pro se* supplemental motion for a new trial, the defendant alleged that defense counsel⁵ had a "hasty conversation" with Catherine on the first day of trial, and that the hastiness of the conversation caused defense counsel to misunderstand the importance of Catherine's information and to overlook her as a crucial defense witness. Specifically, he argued that Catherine informed defense counsel that Tashnia could "come get her children at any time." He argued, however, that defense counsel misinterpreted this information to mean that Tashnia was able to regain custody of her children at any time, with or without court procedures, rather than mean that Tashnia had a right to visit the children at any time.

¶ 53 We find that the trial court's ruling in rejecting this allegation of ineffective representation was not manifestly erroneous. At the *Krankel* inquiry, the defendant acknowledged that defense counsel had the "final say" in deciding which witnesses to call to testify, but asserted that the defendant agreed not to allow Catherine to testify based on defense counsel's erroneous assessment that Catherine's testimony would be potentially harmful to the defense. He maintained that had Catherine testified, she could have impeached T.M. and A.M. by testifying that A.M.'s reason for

⁵At trial, the defendant was represented by two public defenders—Crystal Gray and Patrick White. For clarity, we address them collectively as "defense counsel" and by the generic pronoun "he."

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staying home from Bible study on the night of the sexual assault was a sham; that T.M. did not "run away" after the defendant's alleged first attempt to sexually assault her, but instead had "snuck out [*sic*] the house and [gone] to her girlfriend's house"; and that T.M. was not home at the time the sexual assault incident at issue allegedly took place. During the *Krankel* inquiry, the trial court questioned the defendant's arguments with remarks such as "[h]ow would that change the outcome of the case" and "how would that make a difference." In response to the defendant's allegation, defense counsel stated that the decision not to call Catherine as a witness, after consulting with the defendant, was trial strategy. The trial court then found defense counsel's decision not to call Catherine to testify at trial to be a matter of trial strategy, noting that defense counsel had the benefit of knowing what transpired at the first jury trial in T.M.'s case in 2006—during which Catherine had testified that she did not believe T.M.'s complaints about the defendant's conduct and that, despite his criminal background, she had no concerns about the defendant living with her grandchildren. The trial court found that, because the 2006 jury had found Catherine's testimony to be incredible, defense counsel "tried the case a little bit differently *** and chose not to call her" on retrial of the case. Based on our review of the record, we find that the trial court's ruling was not manifestly erroneous. See *People v. Clendenin*, 238 Ill. 2d 302, 319, 939 N.E.2d 310, 320 (2010) ("trial counsel has the right to make the ultimate decision with respect to matters of tactics and strategy after consulting with his client," including what witnesses to call). Therefore, the trial court properly declined to appoint new counsel on this basis.

¶ 54 Nonetheless, the defendant argues that the trial court's findings pertaining to this allegation

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of ineffectiveness failed to satisfy *Krankel*, because the trial court inaccurately recalled during the *Krankel* inquiry that Catherine had testified to certain facts at the previous 2006 jury trial when she in fact had not. Specifically, he contends that the trial court inaccurately stated, during an exchange with the defendant, that Catherine had provided testimony in the 2006 jury trial to impeach T.M. and A.M.—the same impeachment testimony that the defendant argued should have been introduced at the retrial had Catherine been allowed to testify. We reject this contention. Upon our examination of the transcript of *Krankel* inquiry, we find that, during the exchange at issue, the defendant corrected the trial court by stating "[Catherine] testified [at the first trial] but those facts didn't come out," to which the trial court stated "[o]kay." Further, our review of the record reveals that the inaccurate statements did not form a basis for the trial court's ruling in rejecting this allegation of ineffectiveness. Thus, we reject the defendant's argument as meritless.

¶ 55 Even assuming that the trial court erred in declining to appoint new counsel on this basis, we find such error to be harmless, where the evidence against the defendant was overwhelming and the defendant cannot show a reasonable possibility that the result of his trial would have been different had defense counsel made the tactical decision to call Catherine as a witness. See *Tolefree*, 2011 IL App (1st) 100689, ¶¶ 23-24 (where an appellate court finds that a trial court made a harmless error at a *Krankel* inquiry, the trial court's decision will not be reversed if enough of a record has been made to allow the reviewing court to evaluate the trial court's ruling). Therefore, we find that the defendant is not entitled to relief on this basis.

¶ 56 The defendant's third allegation of ineffective assistance of counsel pertained to his assertion

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that defense counsel did not properly listen to his claim that Tashnia had motive to orchestrate false testimony from her children. On appeal, the defendant argues that the trial court's decision to not appoint new counsel was erroneous because, while defense counsel had met with him on many occasions during trial preparations, defense counsel never actually "listened" to his concern that Tashnia convinced T.M. and A.M. to testify falsely against him because Tashnia had a troubled relationship with the defendant and Catherine.

¶ 57 A trial counsel has "the right to make the ultimate decision with respect to matters of tactics and strategy after consulting with his client," including what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions should be made, and the defense to be presented at trial. *Clendenin*, 238 Ill. 2d at 319, 939 N.E.2d at 320.

¶ 58 At the *Krankel* inquiry, the defendant argued that because he interfered with Tashnia's relationship with Catherine, Tashnia became the defendant's "fast enemy." He argued that Tashnia had lied on the witness stand and had also convinced T.M. and A.M. to falsely testify against him at trial. The trial court noted that the defendant was "blaming all this on Tashnia," and that "it was clear that [the defendant] didn't have a good relationship with her." The trial court found that, based on the court's observations, defense counsel not only "read all of the transcripts from the prior trial" but had properly investigated the case. The trial court further found that defense counsel did his "best to capably cross-examine [the] witnesses and go along with the theory that [Tashnia] may have had something against [the defendant]," but that it was ultimately the jury's decision that the State's witnesses were credible." The trial court also noted that it was defendant who was "clearly unhappy"

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with the outcome of the case, but that his claims of ineffective assistance of counsel lacked merit and pertained to matters of trial strategy.

¶ 59 Based on our review of the record, we find that the trial court's ruling was not manifestly erroneous. The record shows that defense counsel had read the transcripts of the previous 2006 jury trial, particularly Tashnia's 2006 trial testimony, as evidenced by the fact that defense counsel used Tashnia's prior testimony to impeach her during cross-examination in the trial at issue. Because the record reveals that Tashnia had testified about her dislike for the defendant at the 2006 jury trial, it could reasonably be assumed that defense counsel, who had read the transcripts of the 2006 jury trial, knew about Tashnia's dislike of the defendant but chose not to pursue this line of questioning during the trial at issue as a matter of trial strategy. See *id.* Further, just because defense counsel did not cross-examine Tashnia on a particular point did not necessarily mean that defense counsel failed to "listen" to the defendant's concern about Tashnia's motive to orchestrate false testimony from her children. Moreover, the record shows that information suggesting Tashnia's dislike for the defendant had already been presented to the jury during direct examination of Tashnia in the instant case, when the State elicited testimony that Tashnia's relationship with the defendant was "[r]ocky." Thus, as the trial court correctly found, it was "ultimately the jury's decision that the State's witnesses were credible." Therefore, we find that the trial court's ruling was not manifestly erroneous and the trial court properly declined to appoint new counsel on this basis.

¶ 60 The defendant's fourth allegation of ineffective assistance of counsel related to his assertion that defense counsel forced him to prematurely decide whether to testify at trial before presenting

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the testimony of the defense witnesses. On appeal, the defendant argues that the trial court erred in refusing to appoint new counsel because he waived his right to testify before he was aware of the evidence that would be elicited from the defense witnesses, and thus, the defendant did not intelligently waive his right to testify.

¶ 61 It is well-settled that the decision whether to testify in one's own behalf ultimately belongs to the defendant, but should be made with the advice of counsel. *People v. Enis*, 194 Ill. 2d 361, 399, 743 N.E.2d 1, 23 (2000); *People v. Smith*, 2012 IL App (1st) 102354, ¶ 92. A counsel's advice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless evidence suggests that counsel refused to allow the defendant to testify. *People v. Youngblood*, 389 Ill. App. 3d 209, 217, 906 N.E.2d 720, 727 (2009). However, a defendant cannot be required to choose whether to testify at his trial until after all of the defense evidence has been presented. See *People v. Collier*, 329 Ill. App. 3d 744, 751, 768 N.E.2d 267, 273 (2002) (citing *People v. Phillips*, 186 Ill. App. 3d 668, 675, 542 N.E.2d 814, 819 (1989) (citing *Brooks v. Tennessee*, 406 U.S. 605, 92 S. Ct. 358 (1972))).

¶ 62 At the *Krankel* inquiry, the defendant argued that had he known that defense counsel was not going to present the testimony of a certain witness named Brenda Forhan, he would have testified in his own defense at trial. He further argued that defense counsel "tricked" him into not testifying at trial. In response, defense counsel explained that the defendant was "fully advised as to where and when the evidence would terminate, *** and he knew that he was the last witness that would be called." The trial court then found that the defendant had "made a very knowing and capable

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decision not to testify," noting that he was admonished of his right to testify *after* the defense witnesses testified.

¶ 63 Based on our review of the record, we find that the trial court erred in finding that the defendant was admonished of his right to testify after defense witnesses had testified on the defendant's behalf. To the contrary, the record shows that the defendant was required to choose whether to testify *before* defense counsel had presented the testimony of the two defense witnesses. Specifically, at the conclusion of the State's case-in-chief, the trial court asked defense counsel whether the court should, at that point, inquire of the defendant with respect to his right to testify. Defense counsel then indicated that the defendant was not expected to testify, and asked the court to admonish the defendant. The trial court then admonished the defendant as to his right to testify, and the defendant stated that he did not wish to testify. However, we find such error to be harmless, where the evidence against the defendant was overwhelming and the defendant cannot show a reasonable possibility that the result of his trial would have been different had he not been required to choose whether to testify before defense evidence had been presented. See *Tolefree*, 2011 IL App (1st) 100689, ¶¶ 23-24 (where an appellate court finds that a trial court made a harmless error at a *Krankel* inquiry, the trial court's decision will not be reversed if enough of a record has been made to allow the reviewing court to evaluate the trial court's ruling). Had the defendant chosen to testify after the testimony of the two defense witnesses had been presented, we cannot say that there was a reasonable probability that the outcome of his trial would have been different. Indeed, the defendant had testified in his own defense at his first trial in 2006, in which he was extensively

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cross-examined and the jury ultimately convicted him. Therefore, we find that the defendant is not entitled to relief on this basis. Accordingly, we hold that the trial court's judgment in rejecting the defendant's claim of ineffective assistance of counsel was not manifestly erroneous, and the trial court properly declined to appoint new counsel and appropriately denied the defendant's *pro se* supplemental motion for a new trial.

¶ 64 The defendant argues that, in the alternative, this court should remand the case for the purpose of conducting a new *Krankel* inquiry, on the basis that the trial court inaccurately recalled the two facts discussed—(1) the timing as to defendant's waiver of his right to testify; and (2) the specific facts of Catherine's testimony at the previous 2006 jury trial. The defendant contends that, as a result of these inaccuracies, the trial court failed to examine his allegations at the *Krankel* inquiry in any "meaningful sense." We reject this contention. As discussed, these inaccuracies either did not form the basis of the trial court's ruling or constituted harmless error. Therefore, we find no reason to grant the relief sought by the defendant.

¶ 65 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 66 Affirmed.