

Nos. 1-12-3143 and 1-13-1606 (consolidated)

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).

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. 11 CR 13241
)	
ERNEST NANCE,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Epstein concurred in the judgment.

O R D E R

¶ 1 **HELD:** Evidence sufficient to convict defendant of robbery. Court did not err in considering defendant's *pro se* post-trial ineffectiveness claims. Erroneous fees vacated and credit awarded. Mittimus corrected to properly reflect MSR. Mittimus not limited to statutory title of offense but may also include description of relevant circumstances of offense.

¶ 2 Following a jury trial, defendant Ernest Nance was found guilty of robbery and sentenced to six years' imprisonment with fines and fees. On appeal, defendant contends that the evidence was insufficient to convict him of robbery, in that the evidence showed that the victim's wallet

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was taken by stealth rather than force or threat of force. He also contends that the trial court erred in failing to properly investigate his *pro se* post-trial claims of ineffective assistance of counsel. He contends that certain fees were erroneously assessed and that he is entitled to presentencing detention credit against his fines, and he contends that his mittimus must be corrected to properly reflect his term of mandatory supervised release (MSR) and the title of his offense.

¶ 3 Defendant was charged with robbery, in that he allegedly took a wallet from the person or presence of Susan Soria, at least 60 years' old as of the offense on or about June 20, 2011, by force or threat of force. He was also charged with unlawful restraint for allegedly detaining Soria on the same date; the unlawful restraint charge was not pressed just before trial.

¶ 4 Before trial, the parties told the court that the State would tender supplemental discovery, followed at the next court session by defense counsel informing the court that discovery was apparently complete and that counsel would be interviewing a potential witness named Riley.

¶ 5 In December 2011, counsel sought to withdraw on the basis that defendant "has not complied with his professional obligations," which he told the court referred to "not taking care in terms of witnesses, corroboration, of that sort;" the case was continued for two weeks to allow defendant to comply. At the next session on December 20, counsel asked to continue his motion as the court had "questioned [defendant] about whether or not he was going to be able to comply by today." Defendant chose to keep existing counsel (so that the court denied counsel's motion to withdraw) but asked for trial "as early as possible." When the court noted that counsel must be ready for trial, counsel explained that he "could be filing a motion with witnesses that we have. We have been trying, we made six different appointments since August to try to get the persons and get all of those. I haven't had any contact since August, before August." Counsel agreed that an attorney's "client gives you information that you need to go forward." Defendant told the court

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"I'm prepared to go forward *** without the witnesses," but the court admonished him that he should make that decision in consultation with counsel and that the court is unaware of the underlying facts. At counsel's behest, the case was continued to January 2012.

¶ 6 There were further continuances, including a session where counsel told the court that "I gave them in the Answer to Discovery another witness he had to interview" (from the answer, a Randell Rhodes) so that further continuance was needed, and a session on April 30 where the parties referred to the State tendering further discovery documents. At the July 17 session where the trial date was set, defendant expressed a desire to "pick[] a jury today" but the court explained that, for scheduling reasons, a different judge would have to preside. The court gave defendant an opportunity to meet with counsel, followed by the court asking defendant if he reached an agreement with counsel regarding substitution; defendant replied "not honestly." The case was continued for trial to July 30, 2012.

¶ 7 At trial, Susan Soria testified that she was 76 years old on the day at issue. She went that afternoon to a particular grocery store and was leaving the store for her parked car with a grocery bag in one hand and her purse in the other when a tall man – defendant – and a woman passed her. The woman "pinned me at my back;" that is, was touching Soria "all along my back" and "pushed me so that I could not move in the back." Simultaneously, defendant "got right against my knees and bent down as if he were going to buy" one of the flowers or plants for sale in front of the store, as the woman asked him if he was buying a plant. He touched Soria's knees with his arm, as her purse was down at her side in her right hand. In sum, Soria was "blocked" by defendant in front of her and the woman behind her. When they suddenly left, Soria realized that her purse felt lighter and discovered that her wallet was gone. She saw the woman crossing the parking lot and yelled "did you take my wallet." A man (not defendant) returned her wallet, and

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she left without reporting the incident as no money, credit cards, or other items were missing from the wallet. She had not seen defendant or the woman take her wallet, nor had they threatened her. However, about a half-hour later, she returned to the store; the police were already there, and she reported the incident. Two days after the incident, Soria viewed an array of five photographs, from which she identified defendant as one of the thieves. About six weeks later, Soria viewed a lineup from which she identified defendant as one of the thieves.

¶ 8 Michael Bolton testified that he and his wife went to the grocery store on the afternoon in question; she stayed in the car while he went inside to shop. On his return, they had a conversation that drew his attention to two people walking "hastefully" towards a nearby parked van: a man wearing a hat and a woman with a long wig. Bolton had first seen this couple as they walked towards the store moments earlier. The couple entered the van and it left the store parking lot with another man as driver. Bolton followed the van in his car and phoned 911 to report the van's license plate number. When the van made a U-turn, Bolton saw the driver. He testified that the driver may have been defendant, though he was not "a hundred percent because the guy that I saw was a heavier guy." Bolton saw a police car less than a block ahead, so he reported "what had happened" including the van's plate number.

¶ 9 Police detective William Donnelly testified that he investigated Soria's report. The license plate number was for a rental van that at the time of the incident was leased to defendant. He then showed the photographic array to Soria, who identified defendant. Soria described the incident to him, including that defendant blocked her path while the woman "shoved her." He also arrested defendant about six weeks later and conducted the lineup from which Soria identified defendant. Defendant admitted that he rented, and was the sole driver of, the van at the time of the incident and admitted to having been at the grocery store about six weeks earlier.

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¶ 10 Defendant made a motion for a directed verdict, with counsel arguing that intent to deprive Soria of her wallet was unproven, as shown by the return of her wallet shortly after she realized it was gone from her purse. The court denied the motion, noting that robbery does not require that the defendant "intended to keep the property forever."

¶ 11 The defense rested, and the court admonished defendant of his rights to testify and to refrain from testifying; he chose to refrain. During the jury instruction and exhibits conference, counsel objected unsuccessfully to an accountability instruction but successfully objected to the State's plan to recite the accountability instruction and project it on a screen.

¶ 12 During closing arguments, counsel argued that the State had failed to show any intent to deprive Soria of her wallet and that there was no evidence that defendant consorted or colluded with the woman to take the wallet. He noted that the wallet had been returned and that nobody saw it being taken, so that Soria could have misplaced the wallet earlier and then "rushed to judgment" when defendant knelt in front of her. He also noted defendant's admission to being the sole driver of the rented van and Bolton's testimony that he was the driver of the van when the couple entered it.

¶ 13 Following instructions and deliberation, the jury found defendant guilty of robbery of a person 60 years old or older.

¶ 14 Counsel filed a post-trial motion arguing insufficiency of the evidence and that the court erred by not striking a particular juror and by denying his motion for a directed verdict. At the motion hearing, counsel stood on his motion. The court denied the motion, noting that defendant had not used all his peremptory challenges so that no error could arise from failing to strike a juror for cause.

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¶ 15 At the sentencing hearing on September 19, 2012, the presentencing investigation report and arguments noted defendant's various prior felony convictions. Defendant apologized for "what happened to" Soria while denying involvement beyond driving the van without knowledge of any crime, and expressed confusion as to whether he was convicted as a principal or on accountability. The court sentenced defendant on the Class 1 felony of robbery of a victim at least 60 years old to six years' imprisonment with two years' MSR and fines and fees. The mittimus describes defendant's offense as "ROBBERY/VIC HANDICAP OR 60+ YR" and shows three years' MSR. The order assessing fines and fees shows presentencing detention time but no monetary credit. Counsel filed notice of appeal on October 9, 2012.

¶ 16 On October 18, defendant filed (by depositing in the mail) a *pro se* motion for reduction of sentence, arguing insufficiency of the evidence and that "defense failed to vigorously & conscientiously defend." Defendant also filed on an unspecified date (the document bears no visible filing stamp) a *pro se* motion for a new trial enumerating various claims of ineffective assistance of trial counsel: failure to file pretrial motions including a motion to suppress statement and "in court identification," lack of "meaningful" communication, two continuances without defendant's approval, unspecified "deception" regarding investigation photographs, refusal to subpoena security video and a 911 recording, failure to "share" supplemental discovery with defendant while asserting that "there was none," failure to present an alibi or argue discrepancies between the victim's identification and "actual I.D.," "less than reasonable" cross-examination and closing arguments, "allowing" the State to argue guilt by accountability or as a principal, and failing to "share strategy with defendant" so that he "did not in fact detect any strategy at all." The court denied the motion for reduction of sentence without further finding. Notice of appeal followed and was later consolidated with the first notice of appeal.

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¶ 17 On appeal, defendant first contends that the evidence was insufficient to convict him of robbery, in that the evidence showed that Soria's wallet was taken by stealth rather than force or threat of force.

¶ 18 In reviewing a challenge to the sufficiency of the evidence, we determine, after taking the evidence in the light most favorable to the prosecution, whether the fact finder could rationally find every element of the offense beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. We refrain from substituting our judgment for that of the fact finder on issues involving the weight of evidence or witness credibility because the fact finder resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences. *Id.* The fact finder need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, all the evidence taken together must satisfy the fact finder beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly, the fact finder need not disregard inferences that flow normally from the evidence or seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Brown*, 2013 IL 114196, ¶ 48.

¶ 19 Robbery is the knowing taking of property "from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (West 2012). While theft requires an intent to permanently deprive the owner of the use or benefit of her property, robbery does not require a similar intent but instead the essence of robbery is the use of force or the threat thereof in the taking of property. *People v. Gilliam*, 172 Ill. 2d 484, 507 (1996). The degree of force that constitutes robbery is that which overcomes the power of the owner to retain her property, either by actual violence physically applied or by putting her in fear

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that overpowers her will. *People v. Hay*, 362 Ill. App. 3d 459, 465-66 (2005). Property is taken by violence whenever even the least injury is inflicted on the owner or the act of taking is accompanied by any degree of force employed to overcome resistance to such taking. *Id.* "While the mere act of swiftly taking property from a victim's hands does not constitute robbery, when the slightest degree of force is used the act may constitute robbery." *Id.*

¶ 20 Here, the evidence supports a conclusion that defendant knelt in front of Soria and touched her knees as he took her wallet from her purse, on the subterfuge that he was picking up a flower or plant for sale. A woman who arrived and left with defendant attempted to support this subterfuge by asking him if he was buying a flower or plant. More importantly, that woman was pushing or pinning Soria's back, so that Soria felt herself blocked by defendant and the woman. On this evidence, taken in the light most favorable to the State as we must, a reasonable finder of fact could conclude that defendant and the woman jointly effected the taking of Soria's wallet by using force in excess of merely swiftly taking it from her purse in her hand. That Soria did not feel threatened by the brief blockage of her path does not change that the woman, defendant's accomplice, applied force to Soria's back in conjunction with defendant kneeling in front of her to effect the taking of her wallet.

¶ 21 Defendant also contends that the trial court erred in failing to properly investigate his *pro se* post-trial claims of ineffective assistance of counsel.

¶ 22 The State responds that the trial court lacked jurisdiction to consider defendant's motion because notice of appeal had already been filed. "[O]nce a notice of appeal has been filed, the trial court loses jurisdiction of the case and may not entertain a *Krankel* motion raising a *pro se* claim of ineffective assistance of counsel." *People v. Patrick*, 2011 IL 111666, ¶ 39. However, defendant invokes Supreme Court Rule 606(b) (eff. Feb. 6, 2013):

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"[T]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion. When a timely posttrial or postsentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court. *** This rule applies whether the timely postjudgment motion was filed before or after the date on which the notice of appeal was filed."

The *Patrick* court found that a "*pro se* posttrial motion alleging ineffective assistance of counsel is not a new trial motion as outlined in section 116-1. Rather, it is part of a separate common law procedure developed in a line of cases beginning with *Krankel*." *Patrick*, 2011 IL 111666, ¶ 30, citing 725 ILCS 5/116-1(b) (West 2012). In essence, a *Krankel* motion is always timely filed or commenced so long as the trial court has jurisdiction. *Id.*, ¶¶28-30, 42. In the absence of a pending timely-filed post-trial or post-judgment motion, the trial court retains jurisdiction for 30 days following sentencing. Ill. S. Ct. R. 606(b); *People v. Bailey*, 2014 IL 115459, ¶ 8. We note that the *Patrick* court did not address Rule 606(b) in making the statement cited by the State, nor did it have to as the *Krankel* petition at issue was filed while a timely post-sentencing motion was pending. *Patrick*, 2011 IL 111666, ¶¶ 11-14. We are faced squarely with the issue of Rule 606(b) and conclude that the clear language of Rule 606(b) governs: while a *Krankel* motion is not a section 116-1(b) motion, it is a post-trial or post-sentencing motion filed by a defendant and directed against the judgment. Therefore, when defendant filed his *Krankel* motion within 30

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days of his sentencing, the trial court retained jurisdiction to rule on the motion regardless of the preceding notice of appeal.

¶ 23 A defendant who makes a *pro se* post-trial motion alleging ineffective assistance of counsel – a *Krankel* motion – is not automatically entitled to the appointment of counsel to assist with the motion. *People v. Fields*, 2013 IL App (2d) 120945, ¶ 38, citing *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). The court should examine the basis of the claims and, if it determines that the claims lack merit or pertain only to trial strategy, it may deny the motion without appointing counsel. *Id.* Conversely, if the court determines from its inquiry that the claims demonstrate possible neglect of the defendant's case by trial counsel, new counsel should be appointed for the hearing on the *pro se* motion, before which new counsel may independently evaluate the defendant's claims. *Id.* In conducting its inquiry into the defendant's claims, the trial court will likely need to discuss the allegations with the defendant or with trial counsel. *Id.*, ¶ 39. "Accordingly, to evaluate whether the claims indicate possible neglect, the trial court may consider any facial insufficiency of the defendant's allegations and may (1) ask the defendant's trial counsel questions; (2) briefly discuss the allegations with the defendant; or (3) *rely upon its own knowledge of counsel's performance.*" (Emphasis added.) *Id.*, citing *Moore*, 207 Ill. 2d at 78–79. Our review of how the trial court conducted this inquiry is *de novo*. *Id.*, citing *Moore*, 207 Ill. 2d at 75.

¶ 24 Here, the court ruled upon defendant's timely-filed *pro se* motion raising ineffectiveness claims, and we will not presume because it did not address the claims *seriatim* that it did not properly consider them. Moreover, the court could evaluate most of the claims wholly on its own knowledge of the case and of counsel's performance. For example, the court could decide for itself (without consulting defendant) whether counsel conducted "less than reasonable" cross-

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examination and closing arguments and whether it agreed with defendant when he "did not in fact detect any strategy at all" from counsel. The court could similarly assess the likelihood of success on a motion to quash – both whether the motion would likely succeed and its likely effect on the outcome of trial – where the rental van was linked to defendant and Soria had identified him in a photographic array well before his arrest and lineup, and where defendant did not give an inculpatory post-arrest statement but merely admitted that he drove the van he rented and had been to the grocery store around the time of the incident.

¶ 25 The court could determine from its knowledge of the law that seeking continuances without a defendant's approval does not constitute a conflict of interest. See *People v. Robinson*, 2012 IL App (4th) 101048, ¶ 33 (counsel makes decisions in criminal cases, except that defendant decides whether to: plead guilty, waive the right to a jury trial, testify, request jury instructions on lesser-included defenses, and appeal). The court could similarly determine that counsel could do nothing "allowing" or barring the State from arguing guilt by accountability and as a principal. *People v. Zirko*, 2012 IL App (1st) 092158, ¶ 35 (so long as slightest evidence supports both principal and accountability liability, jury may be instructed on both. Moreover, it could recall that counsel in fact objected unsuccessfully to a jury instruction on accountability.

¶ 26 Defendant's claim that counsel failed to present an alibi witness is a classic matter of trial strategy and thus a valid basis for denying *Krankel* relief. Cf. *People v. McCarter*, 385 Ill. App. 3d 919, 942 (2008) (while "a court conducting a preliminary investigation under *Krankel* ought to inquire into matters such as the identities of the witnesses, the substance of their proposed testimony, and the extent to which defendant's counsel knew and acted upon the existence of such witnesses," (emphasis added) "the trial court found that the testimony that defendant sought to elicit would not likely be sufficient to reverse the outcome of the case, and therefore there was

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no need to ask defense counsel whether it had sought to procure such testimony. We cannot say that this is a patently unreasonable decision, in light of the State's evidence linking defendant to the crime scene itself and placing him in the vicinity shortly afterward.") The court could recall that, before trial, counsel described unsuccessful efforts to interview potential witnesses and defendant expressed his willingness to proceed to trial without them to expedite the case. The court could similarly recall that counsel disclosed a witness (Randell Rhodes) other than defendant and persons named in the police reports, which tends to show that counsel's consultation with defendant and investigation made him aware of at least one potential witness that counsel then chose not to call at trial. While it would have been preferable to ask defendant about his alibi witness, we conclude that the court had sufficient information to evaluate this claim, especially in light of the general tenor of defendant's claims.

¶ 27 In sum, we see no reason to find that the trial court failed to conduct a proper inquiry into defendant's *pro se* ineffectiveness claims.

¶ 28 Defendant contends, and the State correctly agrees, that various corrections to his order assessing fines and fees are needed. He was assessed a \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2012)) though he has prior felony convictions subject to the fee; the fee may not be reassessed. *People v. Marshall*, 242 Ill. 2d 285 (2011). His \$50 quasi-criminal complaint conviction (clerk) fee (705 ILCS 105/27.2a(w)(2)(B) (West 2012)) is duplicative of his proper \$190 felony complaint filed (clerk) fee. *People v. Martino*, 2012 IL App (2d) 101244, ¶¶ 34-35 (one complaint or charging instrument incurs one fee under this statutory provision). His \$5 electronic citation fee (705 ILCS 105/27.3e (West 2012)) does not apply to felonies, his \$5 court system fee (55 ILCS 5/1101(a) (West 2012)) applies only to vehicular offenses, and his \$25 quasi-criminal complaint conviction (local prosecutor) fee (55 ILCS 5/4-2002.1(b) (West 2012))

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applies only to municipal prosecutions for vehicular offenses. Lastly, he should receive presentencing detention credit against his \$50 in fines: the \$30 children's advocacy center assessment, \$10 mental health court assessment, \$5 youth diversion/peer court assessment, and \$5 drug court assessment. 55 ILCS 5/1101(d-5) - (f-5); 725 ILCS 5/110-14(a) (West 2012); *People v. Graves*, 235 Ill. 2d 244 (2009); *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 13.

¶ 29 Defendant finally contends that his mittimus must be corrected to reflect his MSR and the name of his offense. The State correctly concedes the former: defendant's conviction for the Class 1 felony of robbery receives two years' MSR (as the court stated at sentencing) rather than three years as on the mittimus. 720 ILCS 5/18-1(c); 730 ILCS 5/5-4.5-30(1) (West 2012). The State correctly does not concede the latter. While the statutory *title* of defendant's offense is robbery, the clerk of the circuit court routinely includes statutorily-relevant circumstances of an offense in its *description* in the mittimus. Defendant cites no case standing for the proposition that these descriptions are improper – that is, limiting the clerk to using the statutory title of the offense on a mittimus – and we see no impropriety in such descriptions so long as they correctly reflect the verdict or judgment of the finder of fact. Here the statutorily-relevant circumstance was that "the victim is 60 years of age or over *or* is a physically handicapped person" (emphasis added) (720 ILCS 5/18-1(c) (West 2012)), and that circumstance was charged, instructed, and expressly found by the jury.

¶ 30 Accordingly, we vacate the \$200 DNA analysis fee, \$50 quasi-criminal complaint conviction (clerk) fee, \$25 quasi-criminal complaint conviction (local prosecutor) fee, \$5 electronic citation fee, and \$5 court system fee. Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct the (1) mittimus to reflect two

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years' MSR and (2) order assessing fines and fees to reflect said vacatur and \$50 presentencing detention credit. The judgment of the circuit court is otherwise affirmed.

¶ 31 Affirmed in part, vacated in part, mittimus and order corrected.