

No. 1-13-0016

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. 10 CR 5302
)	
DWAYNE BAKER,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

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

O R D E R

- ¶ 1 *Held:* Defendant was not denied a fair trial by the State's closing argument when the challenged remarks were based upon testimony at trial or inferences based upon that testimony. When defendant expressed no dissatisfaction with counsel's representation on the record, the trial court was not required to inquire further.
- ¶ 2 Following a jury trial, defendant Dwayne Baker was found guilty of attempted first degree murder and sentenced to 40 years in prison. On appeal, defendant contends that he was denied a fair trial when, during closing argument, the State argued facts that it knew to be false. He further contends that this cause must be remanded for an additional inquiry into his posttrial

claim of ineffective assistance of counsel when the trial court failed to adequately inquire into a stipulation that was not entered into evidence. He finally contends that his mittimus must be corrected to reflect 993 days of presentence custody credit. We affirm and correct the mittimus.

¶ 3 Defendant's arrest and prosecution arose out of a February 18, 2010 incident during which the victim, Robert Richardson, was shot twice. At a pretrial hearing, the State informed the court that although the victim was not present at a previous date, which caused a warrant to be issued, the victim had been absent because he was staying at a different place and did not have his subpoena and court papers. The State requested an "I-bond" because the victim had previously come to court and was currently present. The matter then proceeded to a jury trial.

¶ 4 The victim testified that he had known defendant for almost 20 years. He acknowledged that he was a drug user and that in 2010 he used cocaine twice weekly and heroin on a daily basis. On the night before the shooting, defendant called the victim asking for help because he had locked his keys in his car. The victim went to defendant's location with a clothes hanger and a flashlight. He held the flashlight while defendant gained access to the car. Defendant then reached under the dashboard. The next morning, the victim went to his garage where he worked on his son Marco's truck. He did not use any drugs that morning. Defendant later called to say that he would be coming by. When defendant arrived, Marco was present. Defendant asked where his "shit [was] at," then pulled out a gun and shot the victim in the pelvis. After he fell to the floor, defendant shot him in the chest and left. Although the victim was conscious when police and paramedics arrived he was in too much pain to answer any questions. He denied speaking to hospital personnel prior to surgery. He first spoke to police two days later and identified defendant as the shooter.

¶ 5 The victim admitted that he was present in court pursuant to a subpoena and had previously not come to court. He also acknowledged that in 2012, two years after the shooting, he told two assistant State's Attorneys that the person who shot him was wearing a mask. He explained that he lied because he was afraid for his life and did not know where he would get "protection" from.

¶ 6 The victim's son Marco, who was serving a four-year sentence for possession of a controlled substance at the time of trial and had numerous prior felony convictions, testified that on the day of the shooting, he saw defendant, who asked if he had seen the victim. When Marco answered no, defendant stated that the victim had stolen his car radio and money, and that if the victim did not have those things, he was going to kill the victim. Marco then went to the victim's garage. Marco was sitting in his truck when defendant arrived and asked the victim about the radio. Defendant then shot the victim. Marco saw defendant, who was not wearing a mask, shoot the victim a second time in the chest. After defendant left, Marco called 911. When officers arrived, Marco told them that the shooter was masked. He did this because he planned to handle the situation himself, *i.e.*, take revenge. However, when he spoke with officers an hour later at the hospital, he told them that defendant shot the victim. He changed his mind because he had been "doing so good" since his release from prison.

¶ 7 Detective Roger Lara testified that defendant was taken into custody based upon identifications by the victim and Marco. During a subsequent conversation, defendant stated that he sold the victim drugs in the past and the victim helped him when he locked his keys in his car. Once the car was unlocked, the victim watched as defendant put some drugs under the dashboard and locked the car. When defendant returned several hours later, the drugs and the car radio were

missing. Defendant believed that the victim took these items. However, when he confronted the victim, the victim denied it and told him to get away.

¶ 8 During closing argument, the State argued that the victim could not immediately tell anyone who shot him because he was in an incredible amount of pain, but two days later when he could speak, he identified defendant as the shooter. The State admitted that Marco originally stated that the shooter was wearing a mask, but that Marco came to his senses and decided to let police officers do their job. The defense argued that Marco was not believable because there are "certain principles" that people should follow, one of which is that if your father is shot, you should not make up the description of the person who shot him. The defense also argued that "you can assume" that the victim is a liar because he was a drug addict who had contact with "all sorts of unsavory characters." The defense highlighted that the victim only "showed up" for court because a warrant was issued. Turning to defendant, counsel argued that defendant cooperated with police like an "an innocent person" who "believes in the system."

¶ 9 In rebuttal, the State argued that the only evidence the jury had, or needed, was witness testimony, that is, if the jury believed the victim and Marco, then defendant was guilty. The State then explained that the victim was "practically dying" from a chest wound, was operated on twice, and was intubated, therefore, he was not able "to be interviewed or spoken to by anyone." However, once he could speak, he identified defendant as the shooter. At this point the defense objected. The trial court overruled the objection. The State continued that the victim told the police who shot him "the first chance he could" because the victim was unconscious "with a tube down his throat" for two days and could not communicate. The State acknowledged that the victim changed his "version of events" but argued that he was scared because he was threatened

on the street. The defense objected, and the trial court overruled the objection. The State reiterated that the victim said the shooter was wearing a mask because he was scared. However, the victim "finally" found the courage to come to court, although it took a subpoena, to tell the truth. The State concluded that the victim and Marco were telling the truth because their version of events was corroborated by defendant's statement.

¶ 10 After the jury retired to deliberate, defense counsel asked to note several things for the record. First, counsel objected to the State's argument that the victim said he was threatened. The court responded that the victim testified that he was afraid for his life and that the "logical inference" was that he was threatened, although "not necessarily" by defendant. Defense counsel then reiterated her objection to the State's statement that the victim could not speak for two days because the parties had previously "worked out" a stipulation indicating that the victim had spoken during that time, and, consequently, it was improper for the State to imply that the victim could not speak for "two days straight." The court asked whether the stipulation was part of the record. When defense counsel said no, the court advised counsel not to talk about a stipulation that was not part of the record. Defense counsel responded that the State was aware that the victim could speak, yet elicited testimony that he could not, which was possibly prosecutorial misconduct. The court replied that it could only rule on objections based upon the evidence that the court heard, not the evidence that defense counsel wished that the court had heard.

¶ 11 Ultimately, the jury found defendant guilty of attempted first degree murder and aggravated battery with a firearm. At a posttrial hearing, defense counsel informed the court that defendant wanted to file a motion alleging ineffective assistance of counsel. The court told

defendant to talk to counsel and that he could file the motion at a later date. The matter was then continued.

¶ 12 At the hearing on defendant's motion for a new trial, defense counsel argued, *inter alia*, that the State argued facts that it knew to be false when it argued that the victim could not communicate with anyone for two days. Counsel explained that the parties had entered into a stipulation that if the victim "failed to mention that he used heroin every day," the parties would stipulate that the victim told an anesthesiologist that he used heroin, which indicated that he could speak at the hospital. Counsel did not enter the stipulation into evidence because the victim admitted his drug use, but believed that "[i]n retrospect" she should have put it in. However, that was an issue defendant could later argue regarding her representation. The court responded that the fact that the victim was a heroin user and how that issue impacted his credibility was before the jury. The court also stated that it could only attempt to correct issues that occurred at trial, "not something that somebody thought about beforehand." Counsel responded that "obviously" she was not alleging her own ineffectiveness, but that she wanted "the next court" to be aware of the stipulation. The court responded there was no stipulation in the record.

¶ 13 Defense counsel also argued that it was improper for the State to argue that the victim was threatened. The court disagreed, concluding that such a statement was a reasonable inference based upon the victim's testimony that he was afraid for his life and did not know where he was going to get protection. The trial court denied the motion for a new trial, and sentenced defendant to 15 years in prison for attempted murder. Defendant was also sentenced to an additional 25-year prison term because the offense was committed with a firearm. He was credited with 992 days of presentence custody credit.

¶ 14 On appeal, defendant first contends that he was denied a fair trial when the State asserted facts that it knew to be false during its closing argument. Specifically, he argues that the State knew it was false that the victim was not able to communicate with anyone for the first two days of his hospital stay and that the victim did not want to come to court because he was threatened. Defendant relies on defense counsel's arguments regarding the alleged stipulation, and the State's assertion to the court at a pretrial hearing that the victim missed court because he did not have his legal papers.

¶ 15 Prosecutors are given wide latitude when making closing arguments. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Reversal based on closing argument is warranted only if a prosecutor made improper remarks that engendered "substantial prejudice," that is, if the remarks constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. In closing, the State may comment on the evidence presented and draw reasonable inferences from that evidence. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). The prosecution may attack a defendant's theory of defense (*People v. Doyle*, 328 Ill. App. 3d 1, 12 (2002)) and, during rebuttal the State may respond to comments made in defendant's closing argument which invite a response (*People v. Kliner*, 185 Ill. 2d 81, 154 (1998)). On review, this court considers the complained of remarks in the context of the entire record as a whole, in particular the closing arguments of both sides. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000).

¶ 16 The appropriate standard of review for closing arguments is currently unclear. In *Wheeler*, our supreme court applied a *de novo* standard of review to the issue (see *Wheeler*, 226 Ill. 2d at 121), but also cited favorably its prior decision in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), which applied an abuse of discretion standard. In the instant case, however, we need not

resolve this issue, as our holding would be the same under either standard. *See People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 76-77 (acknowledging the conflict regarding the standard of review for this issue).

¶ 17 Defendant first contends that the State improperly attempted to explain the victim's delay in identifying defendant by arguing that he was intubated and could not speak when the State knew that the victim spoke to hospital personnel on the night of the shooting. Defendant relies on the alleged stipulation agreed to by the parties, but not entered into the record at trial, as evidence that the State knew this argument was false.

¶ 18 Initially, we note that this stipulation was not presented to the trial court and is not part of the record on appeal. We further note that defendant admits in his reply brief that the State's argument was "consistent with the evidence presented at trial." Because this alleged stipulation is not included in the record on appeal, we decline defendant's invitation to speculate as to its contents. A review of the State's closing argument reveals that the State argued that the victim did not tell anyone what happened to him immediately because he was in too much pain, but that two days later when he could speak, he identified defendant as the shooter to police officers. This argument is based upon the victim's testimony that although he was conscious when police and paramedics arrived at the garage he was in too much pain to speak to them and that he first spoke to police two days later at which point he identified defendant as the person who shot him. The victim also denied speaking to hospital personnel prior to surgery. The State acknowledged the victim's delay two-day in identifying defendant, but explained that the victim could not immediately tell anyone who shot him because he was in pain and "practically dying," but argued that once the victim could speak, that is, "the first chance he could," he identified

defendant to the police. To the extent that the stipulation indicated that the victim could speak during that two-day period, it merely indicated that the victim was able to speak to hospital personnel in order to facilitate his treatment, it did not indicate that he spoke to police but was unable to identify defendant as the shooter and does not contradict the State's argument that the victim identified defendant to the police as soon could, *i.e.*, when he was no longer intubated and could speak. Accordingly, this argument does not fall outside the wide latitude given to the State during closing argument. See *Wheeler*, 226 Ill. 2d at 123. Moreover, we find this argument would have been proper even if the parties had entered into the stipulation as defense counsel argued.

¶ 19 Defendant further contends that the State improperly argued that the victim failed to come to court because he was threatened when the State previously explained to the trial court that the victim missed court because he did not have his legal papers. Although defendant concedes that the State's argument that the victim was threatened was based upon the victim's testimony that he lied about the shooter being masked because he was afraid for his life, that is, "consistent with the facts heard from the witness stand but nevertheless false," defendant contends that such argument was improper. We disagree.

¶ 20 Here, the victim admitted that he had previously not come to court and was testifying pursuant to a subpoena. He also testified that he lied about the shooter wearing a mask because he was afraid and did not know from where he was going to receive protection. Thus, the State's argument that the victim did not come to court because he was threatened was a reasonable inference based upon the evidence presented at trial (see *Nicholas*, 218 Ill. 2d at 121). Although defendant is correct that the State told the court that the victim missed a court date

because he did not have his legal papers, we reject defendant's conclusion that State's argument was based upon facts that it knew to be false. In other words, the victim appears to have given two explanations for his reluctance to come to court. Therefore, this court cannot say that it was an error for the State to rely on the explanation given under oath for the victim's absence, rather than one given pretrial, during closing argument. See *Nicholas*, 218 Ill. 2d at 121 (the State may comment on the evidence presented at trial).

¶ 21 Ultimately, although defendant challenges the State's arguments regarding when the victim could speak after the shooting and the victim's reason for missing court, defendant's claim must fail when those arguments are based upon the victim's testimony and inferences from the evidence presented at trial, and are properly within the latitude afforded to the State during closing argument. See *Wheeler*, 226 Ill. 2d at 123.

¶ 22 Defendant next contends that this cause should be remanded for additional inquiry into his posttrial claim of ineffective assistance of counsel because the trial court did not adequately inquire into the stipulation that defense counsel failed to introduce at trial.

¶ 23 Pursuant to the principles articulated in *People v. Krankel*, 102 Ill. 2d 181 (1984), the trial court is required to inquire into the factual basis of a defendant's *pro se* posttrial ineffective assistance of counsel claims. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). No inquiry is required, however, when a defendant fails to identify relevant facts and only raises conclusory general allegations of ineffective assistance. *People v. Walker*, 2011 IL App (1st) 072889, ¶ 33. Although the pleading requirements for raising a *pro se* claim of ineffectiveness of counsel are somewhat relaxed, a defendant must still meet the minimum requirements necessary to trigger a *Krankel* inquiry. *People v. Bobo*, 375 Ill. App. 3d 966, 985 (2007). In other words, "[a] bald

allegation of ineffectiveness of counsel is insufficient; rather, the defendant should raise specific claims with supporting facts before the trial court is required to consider the allegations."

Walker, 2011 IL App (1st) 072889, ¶ 34.

¶ 24 Here, it is undisputed that defendant did not present a *pro se* posttrial motion asserting a claim of ineffective assistance of counsel or state that he was dissatisfied with counsel. See *People v. Taylor*, 237 Ill. 2d 68, 76-77 (2010) (rejecting defendant's claim that his statement at sentencing implied that his trial counsel was ineffective when there was nothing in the statement "specifically informing the court" that defendant was complaining about his attorney's performance). However, defendant contends that the fact that defense counsel indicated defendant wanted to allege a claim of ineffective assistance of counsel combined with defense counsel's arguments regarding the stipulation that was not entered at trial and her statement that in retrospect she should have moved to have the stipulation admitted at trial triggered the trial court's duty to conduct a preliminary *Krankel* hearing.

¶ 25 Here, defendant invites this court to expand the scope of *Krankel* to require the trial court to make a *sua sponte* inquiry anytime counsel indicates that she may have made a mistake. We decline such an invitation. Although the record reveals that defense counsel stated that in "retrospect," she should have moved to admit the alleged stipulation into evidence at trial, she never admitted that her failure to do so constituted deficient representation and defendant never claimed that this failure denied him the effective assistance of counsel. We decline defendant's invitation on appeal to conclude that defendant wanted to challenge counsel's effectiveness based upon this alleged stipulation as there is no indication in the record that he ever actually expressed any displeasure with counsel's actions during trial. See *Walker*, 2011 IL App (1st) 072889, ¶ 34

(a defendant should raise a specific claim with supporting facts before the trial court is required to consider the allegation).

¶ 26 Defendant finally contends that the mittimus must be corrected to reflect one additional day of presentence custody credit for a total of 993 days. The State agrees that defendant is entitled to 993 days of presentence custody credit when he was arrested in March 2, 2010, and sentenced on November 19, 2012. Therefore, pursuant to our power to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we direct the clerk of the circuit court to correct the mittimus to reflect 993 days of presentence custody credit.

¶ 27 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct the mittimus to reflect 993 of presentence custody credit. We affirm the circuit court in all other aspects.

¶ 28 Affirmed; mittimus corrected.