No. 1-09-3187

FIFTH DIVISION
June 17, 2011

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. 04 CR 21935-7
	)	
PAUL GRAY,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

ORDER

HELD: Because the evidence presented by the State did not support a reasonable inference that defendant specifically intended to kill the victim he struck while driving a hijacked automobile, we find it necessary to reduce defendant's conviction for attempt murder to the lesser offense of aggravated battery.

Following a bench trial, defendant Paul Gray was convicted

of one count of attempt murder, two counts of aggravated battery and one count of aggravated vehicular hijacking. The trial court acquitted him on a second count of attempt murder. Defendant was sentenced to an 18-year prison term for attempt murder, concurrent 12-year terms for the hijacking and aggravated battery counts, and a consecutive 8-year prison term on the remaining aggravated battery count. On appeal, defendant contends: (1) the State failed to prove beyond a reasonable doubt that defendant had the specific intent to kill required to support an attempt murder charge; (2) the trial court failed to require the State to prove specific intent with regards to the attempt murder charge; and (3) the trial court failed to properly evaluate defendant's *pro se* post-trial claims of ineffective assistance of counsel, as required under *People v. Krankel*, 102 Ill. 2d 181 (1984).

For the reasons that follow, we reduce defendant's attempt murder conviction to an aggravated battery conviction and remand the cause for resentencing on the lesser charge. We also find defendant's *Krankel* issue is without merit.

BACKGROUND

Defendant was indicted under three separate case numbers. All of the charges stemmed from allegations that on August 22, 2004, defendant struck two bicyclists and one motorcyclist while fleeing from police in a car he had hijacked. Under case number

04 CR 21936--which related to the bicyclists defendant struck--defendant was charged with two counts of attempt first degree murder and five counts of aggravated battery. Under case number 04 CR 21935, defendant was charged with two counts of aggravated vehicular hijacking, one count of aggravated battery and one count of vehicular invasion. Under case number 04 CR 21937--which related to the motorcyclist defendant struck--defendant was charged with one count of attempt first degree murder, three counts of aggravated battery and one count of possession of a controlled substance.

At trial, James Ishaw testified that on August 22, 2004, he and a friend were traveling southbound on Pulaski Road when he saw a vehicle drive onto the curb near the intersection of Pulaski and Peterson. Ishaw said the vehicle then proceeded through a red light while traveling at around 50 miles per hour. Brian Finley also testified he was driving south on Pulaski when he saw a truck drive up onto the sidewalk to avoid traffic. He called 911 and reported seeing the truck being driven erratically.

Several blocks further south, two bicyclists, Cheryl Lawrence and Sarah Walz, were riding their bikes southbound on Pulaski. Lawrence testified she heard a nosie, turned her head, and saw a huge silver truck approaching them at around 55 to 60

miles per hour. Lawrence said the side mirror of the truck struck her left shoulder, knocking her to the ground. Lawrence had only mild injuries. Lawrence said the truck "pegged [Walz] into the curb." Walz testified she had no recollection of being struck by the truck and could only recall waking up in the hospital. Walz suffered more serious injuries, including a skull fracture and a hematoma.

Ishaw and Finley both testified that as they continued heading south on Pulaski, they noticed Walz and Lawrence lying in the street. Both Finley and Ishaw stopped to help the women. Finley testified that after he told the police who responded to the scene what he saw, he went back to his car and continued driving south on Pulaski. About four or five blocks from where the bicyclists had been struck, Finley saw the grey truck he had seen driving erratically stopped in the middle of the street surrounded by broken glass.

Nora Llanos testified she was driving her silver Nissan Stanza eastbound on Foster Avenue when she was cut off by a man driving a grey truck with a broken window on the right side. The driver, who Llanos identified as defendant, then got out of his truck and approached her car. According to Llanos, defendant opened her door, grabbed her legs, and pulled her from the car. All of the passengers in Llanos' car were able to get out before

defendant drove away.

Myra Stanley testified she was coming out of her house to walk a family member to their car when she "heard a weird sound like a muffler being dragged." Stanley said the sound was "like metal" and "really, really loud, and echoing." Stanley looked towards Foster Avenue and saw a little grey car facing east. When she walked towards the car, she saw a person was lodged underneath. Stanley then walked in front of the car, looked at the driver, and said hysterically "you know you got a person underneath your car." According to Stanley, defendant got out of the car with the engine still running. Defendant then attempted to force himself into another nearby vehicle. Stanley said that during this time, there was a lot of traffic in both directions and cars were at a "dead stop." After several failed attempts to force his way into a car, defendant began running eastbound down Foster Avenue. When Stanley yelled for someone to stop defendant, a few people standing on the sidewalk tackled defendant and held him down until the police arrived. Stanley testified that when she looked back down the street, she saw there were a "bunch of guys trying to pick up the car to try to get the man underneath the car out." Stanley said they were able to lift the car up and pull the guy out.

Richard Richko testified that at around 4:45 p.m. on August

22, 2004, he was stopped on his motorcycle at a red light waiting to make a right turn at the intersection of Foster and Lincoln. The next thing he remembered was waking up by the ambulance in "excruciating pain." When he arrived at the emergency room, Richko noticed a piece of flesh was missing from his elbow and he could see the bone. He was hospitalized for over a month and a half. Richko sustained a broken collar bone, broken shoulder, and multiple fractures in his chest, tail bone, left pelvis and right pelvis. When Richko was asked if he had a chance to see the clothes he was wearing that day prior to trial, Richko said the clothes had a foul odor and there was some dried blood on his motorcycle helmet.

Chicago Police Officer Kontil testified he responded to the intersection of Foster and Lincoln after receiving a report that a man with a gun was attempting to hijack a vehicle in the area. Officer Kontil said he saw several crashed vehicles near the intersection. Officer Kontil testified he saw a silver Nissan Stanza at the scene that "had damages to the front."

The trial court found defendant not guilty with regards to the two attempt murder charges related to Walz and Lawrence, finding it had some difficultly "as to the intent that concerns that particular act." The trial court instead found defendant guilty of aggravated battery in those matters.

As to the attempt murder charge related to Richko, the court held:

> "I am going to give him the benefit of a doubt since it wasn't proved beyond a reasonable doubt as concerns with Ms. Walz and the other young lady. But Mr. Risco [sic] was in his way. Mr. Risco didn't matter. What happened to Mr. Risco, Mr. Gray wanted to get away. Running the individual over with a motorcycle that's attempted murder. Finding of guilt as to that count. So as to everything but the two bicyclists attempt murder matter, finding of guilty."

The trial court sentenced defendant to an 18-year prison term for the attempt murder conviction. Defendant was sentenced to consecutive 12-year prison terms for the hijacking conviction and one of the aggravated battery convictions respectively. Defendant was also sentenced to a six-year prison term for the remaining aggravated battery conviction, which the trial court held would run consecutively to the attempt murder sentence. Defendant appeals.

ANALYSIS

I. Burden of Proof

Defendant contends the trial court applied an incorrect burden of proof with regards to the attempt murder charge when reaching its findings. Specifically, defendant contends that if Richko really "didn't matter" to defendant, as the trial court specifically noted, the court could not have logically determined defendant acted with specific intent to kill Richko, as required to support an attempt murder conviction. Defendant contends the trial court essentially found defendant guilty of something the law does not recognize, "an attempt to achieve an unintended result." See *People v. Terrell*, 99 Ill. 2d 427, 431 (1984).

Initially, the State counters defendant forfeited any issue with regards to the burden of proof applied in this case by failing to either object at trial or raise the issue in a post-trial motion to reconsider. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Waiver aside, we find nothing in the record suggests the trial court actually applied an incorrect burden of proof in this case.

A trial court is presumed to know the law and apply it properly; however, "when the record contains strong affirmative evidence to the contrary, that presumption is rebutted." *People v. Howery*, 178 Ill. 2d 1, 32 (1997); *People v. Virella*, 256 Ill. App. 3d 635, 638 (1993). When the record contains strong affirmative evidence that the circuit court applied the wrong

burden of proof, a defendant's conviction must be reversed and the cause remanded for a new trial. *People v. Kluxdal*, 225 Ill. App. 3d 217, 223-24 (1991).

In this case, contrary to defendant's contention, the record does not contain strong affirmative evidence that the circuit court failed to apply the proper standard in finding defendant guilty of attempt murder. Although the court noted the victim was in "[defendant's] way" and "didn't matter" to defendant, such comments do not clearly indicate the court did not find defendant specifically intended to kill the victim. Courts have recognized specific intent "may be inferred when it has been demonstrated that the defendant voluntarily and willingly committed an act, the natural tendency of which is to destroy another's life." *People v. Winters*, 151 Ill. App. 3d 402, 405 (1986); *People v. Medrano*, 271 Ill. App. 3d 97, 105-06 (1995). The trial court's comments that Richko "didn't matter" to defendant during his attempt to flee from the police are not inconsistent with the court inferring specific intent under such a standard. Accordingly, we find defendant's contention is without merit.

II. Reasonable Doubt

Defendant contends the State failed to prove him guilty of attempt murder beyond a reasonable doubt. Specifically, defendant contends the State failed to establish defendant acted

with the requisite specific intent to kill the victim necessary to support an attempt murder conviction. Defendant contends the circumstantial evidence presented by the State suggested defendant lacked specific intent to kill; rather, it suggested defendant was driving recklessly to evade the police. Accordingly, defendant asks this court to reduce his attempt murder conviction to the lesser-included offense of aggravated battery.

The State counters that intent to kill has been established by the fact that defendant used the hijacked car as a deadly weapon in such a way as to have a direct and natural tendency to destroy Richko's life when he ran the motorcyclist over. The State also suggests the manner of the assault, the severity of Richko's injuries, and the fact that defendant made no attempt to assist Richko after striking him supported the trial court's finding of specific intent to kill.

On review, the relevant question is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found defendant guilty beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004); *People v. Ornelas*, 295 Ill. App. 3d 1037, 1049 (1998). It is the responsibility of the trier of fact to determine the credibility of witnesses and the weight to be given their

testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). A criminal conviction will not be reversed unless the evidence is so improbable or unsatisfactory that a reasonable doubt of defendant's guilt is justified. *People v. Moore*, 171 Ill. 2d 74, 94 (1996).

The Criminal Code of 1961 provides: "A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2008). This court has previously recognized " 'a discrepancy exists between the culpable state for attempt, which requires an intent to commit the offense, and the alternative mental states for murder, which include not only intent to kill another, but also intent to do great bodily harm [citation], or knowledge that one's acts create a strong probability of death or great bodily harm [citation].' " *People v. Nuno*, 206 Ill. App. 3d 160, 164-65 (1990), quoting *People v. Kraft*, 133 Ill. App. 3d 294, 299 (1985).

Therefore, in order to sustain a conviction for attempt murder, the State must show beyond a reasonable doubt that the defendant performed an act constituting a substantial step toward the commission of murder, and that the defendant possessed the

criminal intent to kill the victim. *People v. Parker*, 311 Ill. App. 3d 80, 89 (1999), citing *People v. Jones*, 184 Ill. App. 3d 412, 429 (1989). "Intent to cause great bodily harm" would support a murder conviction if the victim died of his injuries, but intent to inflict great bodily harm is not sufficient to support a conviction for attempt murder. *Parker*, 311 Ill. App. 3d at 89. Because intent is a state of mind that is difficult to establish through direct evidence, "specific intent to kill may be, and normally is, inferred from the surrounding circumstances, such as character of the attack, the use of a deadly weapon, and the nature and extent of the victim's injuries." *Id,* citing *People v. Williams*, 165 Ill. 2d 51, 64 (1995). "Such intent may be inferred when it has been demonstrated that the defendant voluntarily and willingly committed an act, the natural tendency of which is to destroy another's life." *People v. Winters*, 151 Ill. App. 3d 402, 405 (1986); *People v. Medrano*, 271 Ill. App. 3d 97, 105-06 (1995).

In *People v. Smith*, 402 Ill. App. 3d 538 (2010), the evidence adduced at trial established that police officers waited near the defendant's parked car in order to arrest him. Once the defendant returned to his car, an officer drove up next to the defendant's car and "boxed" the car into a parking spot. Officer Dwayne Johnson then got out of his unmarked car and approached

the defendant's car. Officer Johnson stood on the sidewalk about 20 feet in front of the defendant's car, held out his badge and identified himself as a police officer. The defendant then drove his car onto the sidewalk, hitting Officer Johnson's side as the officer dove out of the way. Officer Johnson testified that the defendant had looked down at the floor in his car, and then stared at the officer for about 15 seconds before gunning the engine and driving straight at Officer Johnson. Following a jury trial, the defendant was convicted of attempt murder.

On appeal, the defendant contended the evidence did not prove beyond a reasonable doubt that he had the specific intent to kill Officer Johnson necessary to support an attempt murder conviction. This court recognized our supreme court has held:

> " 'since every sane man is presumed to intend all the natural and probable consequences flowing from his own deliberate act, it follows that if one wilfully does an act, the direct and natural tendency of which is to destroy another's life, the natural and irresistible conclusion in the absence of qualifying facts, is that the destruction of such other persons life was intended.' "
> *Smith*, 402 Ill. App. 3d at 547, quoting

People v. Koshiol, 45 Ill. 2d 573, 578 (1970).

Viewing the evidence in the light most favorable to the prosecution, the court held the evidence sufficiently supported the jury's finding that the defendant attempted to murder Officer Johnson. *Smith*, 402 Ill. App. 3d at 547. In support of its conclusion, the court noted the defendant had looked at Officer Johnson for 15 seconds, then pressed the gas pedal and drove his car--which could be classified as a deadly weapon under the circumstances--in Officer Johnson's direction. *Smith*, 402 Ill. App. 3d at 547, citing *People v. Belk*, 203 Ill. 2d 187, 196 (2003) (recognizing a vehicle "can be used as a deadly weapon.") The court also noted that the defendant drove the car straight at Officer Johnson, and that the defendant did not slow down or swerve prior to hitting the officer. The court recognized "[t]he natural consequences of the defendant's act would be to cause Officer Johnson harm or to destroy Officer Johnson's life had he not dived out of the way." *Id.* Accordingly, the court held:

> "While jurors might have inferred from the evidence, if given the reckless conduct instruction, that defendant was only trying to flee or elude police and acted with reckless indifference for Officer Johnson's

> life, the jurors, instead, inferred from the evidence that defendant possessed the requisite intent to kill Officer Johnson." *Id.*

In this case, however, we are unable to say the evidence sufficiently supported defendant's conviction for attempt murder. Even viewing the evidence in the light most favorable to the prosecution, the evidence presented did not support the trial court's finding beyond a reasonable doubt that defendant acted with specific intent to murder Richko.

While we recognize the trial court clearly inferred from the evidence presented here that defendant intentionally struck the victim in order to flee from the police, we question whether such an inference was reasonable under the facts presented. The State did not present any evidence or witness testimony regarding the actual circumstances of the collision. Although Stanley testified she "heard a weird sound like a muffler being dragged" prior to looking over towards the intersection and seeing the victim pinned under defendant's car, and the State presented evidence suggesting Richko's injuries were quite severe as well as evidence establishing defendant immediately fled the scene rather than rendering assistance to the victim, absolutely no evidence or witness testimony was presented to establish

defendant "deliberately," "voluntarily" or "intentionally" hit Richko while fleeing from the police.

Unlike *Smith*, nothing in the record before us here concretely suggests defendant was aware he was going to strike the victim; but then deliberately or wilfully proceeded anyway without making any attempt to avoid the collision. Based on the limited evidence before us regarding the circumstances of the collision, we cannot rule out the possibility that defendant was either unaware he was about to strike Richko, or took steps to avoid the collision, before it occurred. Indeed, there was no evidence presented that defendant ever saw Richko before impact. Because we are unable to determine beyond a reasonable doubt whether defendant's actions in striking Richko were deliberate, we find it is not reasonable to infer specific intent in this case by saying defendant knew the natural consequences of his actions would be to cause the victim harm or to destroy the victim's life. *Cf. Smith*, 402 Ill. App. 3d at 547.

Accordingly, we agree with defendant that his conviction for attempt murder should be reduced to aggravated battery.

III. *Krankel* Issue

Defendant contends the trial court erred by failing to properly consider defendant's *pro se* post-trial allegations of ineffective assistance of trial counsel, as required under *People*

v. Krankel, 102 Ill. 2d 181 (1984).

During defendant's sentencing hearing, the following colloquy occurred:

> "THE COURT: Mr. Gray., is there anything you'd like to say before I impose sentence in this matter?
>
> THE DEFENDANT: Yes, there is, your Honor. I'd like to recall or refresh your memory back to 2006, June 19, when I come in and me and Ms. Koch [defendant's attorney], she had just really got on my case and represented me, and I felt as though we weren't seeing eye to eye. And I was asking for a motion to be put in, and she didn't want to put the motion, and I came in front of you, told you about the law library and I'm studying up on my case to understand.
>
> You out of your mouth you said 'I need both of you to breathe easy.' You gave me a little history about yourself that you used to represent -- that you was a lawyer or PD, I don't know, and you are not going to get rid of this. She's a very fine lawyer, and

you want us to work together, and that is what I did.

I was prepared before I talked to you to put a paper in to send it downtown to investigation of lawyers to get her off my case 'cause I felt this motion that I wanted to be put in was critical in my case. It never got put in. But, anyway, I did took your advice. Ms. Koch is a very fine lawyer, and I cooperated and work with them, and we worked together.

So I didn't really have much say about the way the trial or everything prepared for my case. But it's a lot of facts that wasn't brought forward in this case that I think would have made a big impact as far as me being found guilty. ***"

***

A lot of these is the fact of the case I think you want to know the story and all the facts, you have got to go back. I never had a chance to testify. I waived my right -- it was suggested to me not to take the stand.

I wanted to because I never had one witness, a thing on my behalf to shed some light. *** I didn't have no -- I was, like I said, I took her advice. I let the trial go on. I wanted to raise my hand bad, but I ain't want me and her to be in conflict with me taken the stand to tell you all the facts of what happened that day, you know.

I'm not no killer to go out. I didn't have no motive to hit nobody, to carjack nobody. I was out my mind. I was out my mind. And the motion I thought this was a good motion, and guys said, well, you really don't get no retrial with taking a bench trial because that mean the Judge have to say he made a mistake overlooked something.

We all make mistakes. Maybe why you didn't read, try, it wouldn't hurt nothing. We not trying to waste the State's money or the Court's time, but it was some facts in here when she showed me this, I was like this was a good motion. You denied it, so it's like maybe I got to come back on appeal.

***

But like I say, it's a lot of stuff that didn't come out. It's on record she said she wasn't putting the motion in that day. It was June 19.

THE COURT: It's on the record.

THE DEFENDANT: That motion I felt was appropriate because that day, and I say this because I didn't take the stand and, you know, this is it, so I'd like to take a little time so I can ***."

After defendant started to recount specific facts related to the offense that potentially implicated him in other crimes, defense counsel interjected and told the court everything defendant was saying "at this point is against my advice." The trial court then granted defense counsel's request for a moment to speak with defendant in private. After defense counsel spoke with defendant, she informed the court defendant was ready to proceed. Defendant then told the court that he was under the influence when he was arrested, and that he was sorry and apologized to any of the victims present in the courtroom. The court then proceeded to announce defendant's sentence.

The record indicates that during a pretrial status hearing

on June 19, 2006, defendant told the trial court that he had a "conflict of interest" with Ms. Koch, his appointed public defender. In support of his contention, defendant noted that defense counsel was "unprofessional" because she suggested he take a plea, and that he had "made a suggestion to her about a motion" defense counsel had refused to file. Following defendant's comments, defense counsel told the court:

> "Judge, I just want to make something clear for the record. I'm duty bound to convey any offers that the State makes, and I have explained that fact to Mr. Gray. And I would also like to indicate to the Court that this motion that Mr. Gray is talking about is something that I am just not going to do."

The court then informed defendant "[counsel] has some ethical requirements what [*sic*] motions she files and doesn't file, okay."

In interpreting *Krankel*, our supreme court has held new counsel is "not automatically required in every case in which a defendant presents a *pro se* post-trial motion alleging ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d 68, 79 (2003). Instead, when a defendant presents a *pro se* post-trial claim of ineffective assistance, the trial court should:

> "first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *Moore*, 207 Ill. 2d at 77.

The operative concern for us is "whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 77.

Initially, the State contends defendant waived this issue because he failed to file a *pro se* post-trial motion specifying his allegations of ineffective assistance of counsel.

Defendant notes, however, that our supreme court has held "[a] defendant is not required to do any more than bring his claim to the trial court's attention." See *Moore*, 207 Ill. 2d at 79. "Where there is a clear basis for an allegation of ineffectiveness of counsel, a defendant's failure in explicitly making such an allegation does not result in a waiver of a *Krankel* problem." *People v. Williams*, 224 Ill. App. 3d 517, 524

(1992).

Waiver aside, we find defendant's allegations were facially insufficient to raise a claim of ineffective assistance. See *People v. Ford*, 368 Ill. App. 3d 271, 276 (2006); *People v. Rucker*, 346 Ill. App. 3d 873, 883 (2004).

Although defendant's unsupported comments to the trial court during his sentencing hearing suggest he felt defense counsel should have filed a pretrial "motion" that would have been "critical" to his case, and that counsel should have brought other facts to light during the trial regarding his participation in the offense, defendant never specifically told the court that he felt counsel had provided ineffective assistance. In fact, defendant noted at one point that "Ms. Koch is a very fine lawyer, and I cooperated and work with them, and we worked together." Moreover, defendant never requested separate counsel be appointed to assist him with an ineffectiveness claim. Nor did he ever file a written motion regarding his alleged claims of ineffective assistance of trial counsel.

While we recognize courts have been careful not to suggest a *pro se* claim of ineffective trial counsel need take a specific form, we note we cannot expect the trial court in this type of instance "to devine such a claim where it is not even arguably raised." See *People v. Reed*, 197 Ill. App. 3d 610, 613 (1990);

People v. Burks, 343 Ill. App. 3d 765, 774-76 (2003); People *v. Hamilton*, 242 Ill. App. 3d 194, 198 (1992) ("The circuit court cannot be expected to formulate a specific ineffectiveness claim from such ambiguous language.")

Because defendant's allegations during the sentencing hearing were insufficient to raise a colorable claim of ineffective assistance of trial counsel, we decline to remand this case for a hearing regarding whether or not new counsel should be appointed to investigate claims of ineffective assistance of counsel. See *Burks*, 343 Ill. App. 3d at 776.

CONCLUSION

We reduce defendant's conviction for attempt murder to aggravated battery and remand the case for resentencing on the lesser charge. We affirm defendant's remaining convictions.

Affirmed in part, modified in part and remanded with directions.