FOURTH DIVISION
March 13, 2014

No. 1-11-3443

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. 97 CR 11235 (02)
	)	
LARRY HOWELL,	)	Honorable
	)	Frank Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

ORDER

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

HELD: Defendant's sentence for home invasion is affirmed because the evidence was sufficient to permit a reasonable trier of fact to conclude that defendant personally discharged a firearm during the commission of the offense. The trial court did not commit error in not inquiring into defendant's alleged posttrial allegations of ineffective assistance of trial counsel. The 20-year enhancement to defendant's sentence for aggravated kidnaping based on personal discharge of a firearm is vacated because it violates the

Proportionate Penalties Clause of the Illinois Constitution, and the cause is remanded for resentencing.

¶ 1 The State charged defendant, Larry Howell, with multiple offenses arising from an incident in which defendant and Darnell Grigsby, in the middle of the day, held five people at gunpoint in a residence, while Grigsby demanded money from the homeowner and used a TASER on three of the victims and one of the criminals fired gunshots as the victims attempted to escape by jumping from the second-story balcony of the bedroom in which they were held. Following a bench trial, the circuit court of Cook County found defendant guilty of, among other crimes, aggravated kidnaping, home invasion, and armed habitual criminal. The court sentenced defendant to concurrent terms of 60 years' imprisonment for aggravated kidnaping and home invasion, both of which included a mandatory 20-year sentencing enhancement based on the court's finding that defendant personally discharged a firearm during the commission of the offenses, and 30 years' imprisonment for armed habitual criminal.

¶ 2 Defendant appeals the trial court's finding he personally discharged a firearm based on insufficient evidence, his enhanced sentence for aggravated kidnaping and home invasion based on the Proportionate Penalties Clause, and the trial court's failure to adequately inquire into defendant's alleged *pro se* posttrial allegations of ineffective assistance of counsel based on *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant also asks this court to correct his mittimus to reflect the proper count for which he was convicted for armed habitual criminal.

¶ 3 For the following reasons, we affirm in part, reverse in part, remand for resentencing, and direct the clerk of the court to correct defendant's mittimus.

¶ 4 BACKGROUND

¶ 5 Defendant and Grigsby agreed to be tried jointly without a jury. At trial, Howard Norris testified he was at his home in his second-floor bedroom when he heard a knock at his bedroom door and Lakia Roach stating that she had to come in. Roach would later testify at trial that she had been in the kitchen of the residence when she heard her son screaming. When she went to investigate, a man she did not know approached her with a gun and ordered her upstairs to Norris's bedroom. Norris opened the door to see Grigsby holding Roach in a choke hold armed with a handgun. Grigsby ordered Roach and Norris to the floor and to cover their faces with their clothing. Norris testified that defendant, wearing a mask that only covered the bottom half of his face, entered the room with Marlo Davis and two young boys--Davis and Roach's five-year-old son, and Norris' 14-year-old nephew. Roach testified Grigsby left the room briefly and returned with Davis and the children, along with defendant. Davis testified defendant brought him and the children to Norris's room.

¶ 6 Grigsby began to demand money from Norris. Norris denied having any money, and Grigsby used a TASER on him repeatedly. Roach testified Grigsby also used the TASER on her back once. Grigsby held the gun, occasionally pressing it against the back of Norris' neck and once to his head when Grigsby threatened to kill everyone if he did not get the money. Roach testified that defendant said nothing the entire time. Roach testified she never saw defendant with a gun.

¶ 7 Norris testified that Davis said something and Norris heard a roll of duct tape being pulled. Roach testified Davis told Grigsby that Norris had money in the basement of the residence. Norris testified Grigsby ordered him up from the floor, at which point Davis rushed

Grigsby. Norris attempted to escape via the second-floor balcony. Norris heard a gunshot. Roach testified that after Norris ran off the balcony, she and the two children ran toward the balcony and also jumped to the ground. Roach testified she heard two or three gunshots. She did not see who fired the gun. Norris and Roach both testified they fled to a neighbor's home. Norris identified Grigsby and defendant in a physical lineup and at trial. Roach identified Grigsby at the scene where the intruders crashed their car while attempting to escape.

¶ 8 Following additional testimony by non-victim witnesses, and before trial resumed, Grigsby plead guilty. Defendant persisted in the trial, and Marlo Davis testified. Davis testified he was in front of the residence when Grigsby approached and began talking to him. Grigsby eventually brandished a revolver to Davis. Davis testified Grigsby led him and the two children into the house and demanded to know who was inside. Davis yelled no one was inside and Grigsby struck Davis on the back of the neck with the gun, knocking Davis to the floor. Grigsby covered Davis's head with his shirt. Defendant pulled Davis to his feet and led Davis and the children to Norris's bedroom, where they were ordered to the floor. Davis identified defendant as the intruder who was wearing a mask. Other witnesses identified defendant as the intruder who was wearing the mask (and defendant does not dispute his identification as that intruder on appeal).

¶ 9 Davis testified Grigsby was asking Norris about money while holding a TASER in one hand and a gun in the other. Davis told Grigsby there was money, and Grigsby responded by using the TASER on Davis. Davis eventually told Grigsby the money was in the sump pump, prompting Grigsby to order Norris to his feet. Davis heard the duct tape, and as Norris was

standing, Davis turned and pushed defendant. Defendant did not have a gun in his hands. Davis then ran toward the door and he and Grigsby began to wrestle. Before Davis and Grigsby began to wrestle, Grigsby still had the gun in his hand. Davis testified that after he began to wrestle with Grigsby, he saw that defendant had the gun in his hand. Davis did not see the gun pass between them. Davis told the other victims to run. Davis heard Grigsby order defendant to shoot Davis. Norris, Roach, and the two children jumped form the balcony before Davis. Davis broke free from Grigsby and followed them off the balcony. Davis heard approximately three gunshots. Davis was the last person out of the bedroom. Defendant was the last person Davis saw with the gun. Davis only saw the gun in defendant's hands for approximately five seconds.

¶ 10 The parties stipulated to evidence of bullet holes in Norris's bedroom wall near the balcony and in the bannister on the balcony. Police recovered a fired bullet from the residence and a handgun from the scene were the intruders' vehicle crashed. The gun police recovered was loaded with four live rounds of ammunition and two spent shell casings. The bullet recovered from the residence was fired from the gun recovered from the intruders' car.

¶ 11 Defendant presented no evidence. On April 21, 2011, the trial court found defendant guilty of home invasion, aggravated kidnaping, robbery, and armed habitual criminal. The court made a finding that defendant personally discharged a firearm during the commission of the home invasion and aggravated kidnaping. Before sentencing, defendant filed a *pro se* notice of appeal and posttrial motion. Defendant's *pro se* posttrial motion raised claims that his trial counsel rendered ineffective assistance. Defendant withdrew the notice of appeal, and the trial court ordered the public defender to speak to defendant regarding the posttrial motion.

¶ 12 The record does not demonstrate that a public defender interviewed defendant regarding his allegations in his first *pro se* posttrial motion. At defendant's trial counsel's request, the trial court placed defendant under oath to inquire as to defendant's *pro se* posttrial motion. Defendant responded that he withdrew his *pro se* posttrial motion freely and voluntarily. The matter proceeded with sentencing. At defendant's sentencing hearing, defendant's trial counsel noted that the trial court had ruled on a posttrial motion defendant's trial counsel filed, and the court agreed. The court sentenced defendant to terms of imprisonment of 60 years for home invasion and aggravated kidnaping. Defendant's 60-year sentences included a mandatory 20-year enhancement as the result of the court's finding that defendant personally discharged a firearm during the commission of those offenses.

¶ 13 In November 2011, defendant's trial counsel filed a motion to reconsider sentence. The trial court denied the motion. After the court denied the motion to reconsider sentence, the court noted that since counsel filed the motion to reconsider sentence, defendant had also filed additional *pro se* posttrial motions. The court informed defendant it considered those motions moot. Defendant protested he needed to preserve errors for appellate review, and complained about his trial counsel's communication with defendant. The court explained that defendant's November 2011 motion was untimely and that it had ruled on the posttrial motion defendant's trial counsel filed, and that counsel had preserved defendant's errors. The same day, trial counsel filed a notice of appeal. In December 2011, after counsel filed a notice of appeal, an additional *pro se* motion defendant submitted for a new trial making several allegations of ineffective assistance of counsel was filed. Defendant's letter to the court accompanying this motion is

dated November 10, 2011. The trial court ruled that it lacked jurisdiction over defendant's December 2011 motion in light of the notice of appeal and, further, it had already ruled on a motion for a new trial.

¶ 14 This appeal followed.

¶ 15 ANALYSIS

¶ 16 Defendant argues (1) the State failed to prove beyond a reasonable doubt that defendant personally discharged the firearm used in this case, (2) the 20-year sentencing enhancement to defendant's extended-term sentence for aggravated kidnaping violates the Proportionate Penalties Clause of the Illinois constitution, (3) the trial court committed reversible error by failing to make an adequate inquiry into defendant's November 2011 *pro se* allegations of ineffective assistance of counsel, and (4) the court should correct his mittimus to reflect the trial court convicted defendant of count 63 of the indictment for armed habitual criminal, rather than count 62.

¶ 17 1. The State proved defendant personally discharged the firearm.

¶ 18 Defendant argues the State failed to prove beyond a reasonable doubt he personally discharged the gun fired during the home invasion and kidnaping and, therefore, the 20-year sentence enhancements added to his convictions for home invasion and aggravated kidnaping must be vacated[1]. Defendant argues the State failed to prove he personally discharged the

[1] In light of the State's concession and this court's disposition regarding the constitutionality of the firearm enhancement on defendant's sentence for aggravated kidnaping (see part 2), defendant admits this argument concerns only the 20-year enhancement as applied to defendant's sentence for home invasion.

firearm because no one saw him fire the gun, no physical evidence linked him to the gun, the witnesses consistently testified that Grigsby had the gun during most of the incident, the only victim to identify him never saw him with the gun, only one witness testified to seeing defendant with the gun--but only briefly and without explanation as to how defendant came to possess it--and, the witnesses's testimony contradicted as to the timing of the gunshots, therefore there is a reasonable doubt as to who fired the gun.

¶ 19 Defendant's first argument presents a challenge to the sufficiency of the evidence to prove every element of the offense for which he was convicted and sentenced. "When confronted with a challenge to the sufficiency of the evidence, a reviewing court does not retry the defendant; rather, it determines whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.] *** To overturn a conviction, the evidence must be so improbable or unsatisfactory that reasonable doubt of the defendant's guilt remains." (Emphasis in original and internal quotation marks omitted.) *People v. Fountain*, 2011 IL App (1st) 083459-B, ¶ 13. We allow the jury to decide the inferences to be drawn from ambiguous testimony. *Id.*, ¶ 25. "The general rule regarding review of a guilty verdict reflects the deference accorded to the jury's assessment of the evidence: When reviewing a challenge to the sufficiency of the evidence, this court considers *** the evidence in the light most favorable to the State. [Citation.]" (Internal quotation marks omitted.) *Id.*, ¶ 26. This means that "[a] reviewing court must allow all reasonable inferences from the record in favor of the prosecution. [Citation.]" (Internal quotation marks omitted.) *Id.*, ¶ 28.

¶ 20 Defendant argues neither Howell or Roach ever saw him fire the gun. The State was not

required to adduce eyewitness testimony that defendant personally discharged the firearm. *People v. Dunmore*, 389 Ill. App. 3d 1095, 1103 (2009) ("Defendant essentially contends that a conviction cannot stand without eyewitness testimony or some other direct evidence of the fatal blow, itself. Defendant misinterprets the law. Circumstantial evidence is sufficient to sustain a criminal conviction, provided that such evidence satisfies proof beyond a reasonable doubt of the elements of the crime charged. [Citation.]") (Internal quotation marks omitted.). The State solicited sufficient circumstantial evidence for a reasonable trier of fact to find defendant personally discharged a firearm during the commission of the home invasion and aggravated kidnaping.

¶ 21 Davis testified he saw defendant with the gun. The length of time Davis saw defendant in possession of the gun is immaterial because Davis testified that shortly after seeing defendant with the gun--and hearing Grigsby's order to shoot Davis--he fled away from his would-be killer. "An inference is a factual conclusion that can rationally be drawn by considering other facts." (Internal quotation marks omitted.) *Id*. Considering the facts undisputed by defendant--that a gun was used during the commission of these offenses, Davis jumped Grigsby, the two started to wrestle, and Grigsby ordered defendant to shoot Davis--a trier of fact could rationally draw the conclusion that Grigsby either dropped the gun when he started to fight with Davis or Davis knocked the gun free and defendant retrieved it from the ground. This conclusion is consistent with the testimony that defendant did not possess the handgun before Davis and Grigsby began to fight and that Davis saw defendant in possession of the gun during the fight.

¶ 22 The State was not required to adduce direct evidence as to how defendant came to be in

possession of the gun. "It is not necessary *** that the jury be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. It is sufficient if all the evidence taken together satisfies the jury beyond a reasonable doubt of the accused's guilt. [Citations.] Further, in weighing evidence, the trier of fact is not required to disregard inferences which flow normally from evidence before it [citation] ***." (Internal quoation marks omitted.) *People v. Campbell*, 146 Ill. 2d 363, 380 (1992). As stated above, the evidence provides a reasonable basis to infer how defendant came to posses the gun.

¶ 23 Moreover, the circumstantial evidence is sufficient to permit a reasonable trier of fact to infer that defendant fired the two gunshots established by the other, uncontested, evidence. Davis testified defendant was the last person he saw with the gun before someone fired. From that fact alone the trier of fact could reasonably infer defendant was the person who fired the gun. Additionally, Davis heard Grigsby order defendant to shoot Davis. The trier of fact could reasonably infer defendant complied with that order based on evidence that Grigsby appeared to be in control of the situation throughout the commission of the crime. The trier of fact could also infer defendant fired the shots from the testimony as to the timing of the shots. Davis testified he and Grigsby fought, Grigsby gave the command to shoot, Davis broke free and fled, and the shots were fired, all in rapid succession. Davis testified he heard the gunshots before he reached the patio, and that he was at the patio door "seconds" after breaking free from Grigsby, after Grigsby ordered defendant to shoot Davis.

¶ 24 The trier of fact was not required to infer that after Davis broke free, defendant returned the gun to Grigsby, who then shot at Davis. *Campbell*, 146 Ill. 2d at 380 ("the trier of fact is not

required to *** search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt [citation].") Accepting, as we must, Davis's testimony that he saw defendant in possession of the handgun while he and Grigsby struggled, and given the sequence and nature of events, we doubt such an inference would be reasonable. See *Westlake v. C. House Corp.*, 2011 IL App (1st) 100653, ¶ 18. ("When circumstantial evidence is relied upon, that evidence must support an inference which is reasonable and probable, not merely possible.") Regardless, this was not the inference the jury was required to make nor the one we may employ. On appeal, we must allow all reasonable inference from the evidence consistent with the jury's verdict. *Fountain*, 2011 IL App (1st) 083459-B, ¶ 28. Defendant argues that each victim testified to hearing gunshots as he or she leapt to safety and that, since they each left at a different time and Grigsby possessed the gun throughout the bulk of the crime, the ambiguity as to the timing of the gunshots raises a reasonable doubt as to the identity of the shooter.

¶ 25 Contrary to defendant's argument on appeal, the victims' testimony as to the timing of the gunshots does not raise a reasonable doubt as to the identity of the shooter and in fact supports the reasonable inference defendant fired the shots. Norris testified he ran to the patio of his second-floor bedroom. He initially ran into the glass door but was eventually able to open the door. Then, after he "was able to open it *** I just jumped over, through the screen and over the patio." The Assistant State's Attorney asked Norris what happened "once [he] jumped over" the patio. Norris replied "[t]hat is when I heard the *** gun that went off." On cross-examination, Norris testified that "[a]s I am approaching the bannister, I hear a pop." Roach testified Norris jumped before she and the children did because she hesitated when Davis told them to run. She

stated "like a couple minutes after [Norris] jumped, that is when I finally got enough courage to get up and jump."

¶ 26 On cross-examination, Roach testified she saw Norris jump over the bannister while she was still lying on the bedroom floor. She again testified that she heard two to three gunshots as she was jumping off the patio and that no other shots had been fired prior to those two to three shots being fired as she was jumping off the patio. Grigsby's defense counsel asked Roach if she was "absolutely certain of that." Roach testified she was not, but did not think she heard any gunshots until she jumped off the patio.

¶ 27 Finally, Davis testified that "[b]efore [he] jumped over the balcony, [he] heard shots." Davis testified that while he was struggling with Grigsby, he heard Grigsby tell the man in the mask "to come shoot me." Then, once he ran, he heard approximately three gunshots. On cross-examination, Davis clarified he heard the gunshots before he reached the patio and that he saw defendant with the gun during his struggle with Grigsby.

¶ 28 Defendant argues the victims' testimony, in context, suggests the victims escaped the bedroom sequentially, each heard gunshots as they were making their escape, and, therefore, the victims could not have all heard the same gunshots--raising a reasonable doubt as to the identity of the shooter. We disagree. "It is for the trier of fact to resolve any inconsistencies in the testimony, and the trier of fact is free to accept or reject as much or as little as it pleases of a witness's testimony. [Citation.]" (Internal quotation marks omitted.) *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 29. Based on the totality of the victims' testimony, it is not difficult or unreasonable to envision Norris on or falling toward the ground, Roach and the children

surmounting the bannister, and Davis running toward the balcony, all at the same moment someone is pulling the trigger. It is highly unreasonable to assert that Roach waited a literal two minutes before she and the children also escaped the intruders. On redirect examination, Roach clarified she estimated the time, "but it was not that long and it wasn't that quick."

¶ 29 The trier of fact could reasonably infer defendant fired the shots the victims heard. "The inference to be drawn need not be the only conclusion logically to be drawn; it suffices that the suggested inference may reasonably be drawn." (Internal quotation marks omitted.) *People v. Martin*, 401 Ill. App. 3d 315, 323 (2010). The inference that defendant fired the gun flows logically from the facts presented at trial. Therefore, the evidence is sufficient to sustain the trial court's finding defendant personally discharged a firearm during the commission of the offenses, and properly applied the sentencing enhancement to defendant's sentence for home invasion.

¶ 30 Defendant's sentence for personally discharging a firearm during the commission of a home invasion is affirmed.

¶ 31 2. The firearm sentencing enhancement for aggravated kidnaping is unconstitutional and remand is required for the trial court to resentence defendant.

¶ 32 Next, defendant argues his sentence for aggravated kidnaping, which included a 20-year mandatory sentence enhancement based on the trial court's finding that defendant personally discharged a firearm during the commission of the offense, violated the Proportionate Penalties Clause of the Illinois constitution. "A statute violates the proportionate penalties clause where two offenses have identical elements but one carries a greater sentencing range than the other." *People v. Harris*, 2012 IL App (1st) 092251, ¶ 13. "The constitutionality of a statute is purely a matter of law, and we review that question *de novo*." *Id.*, ¶ 12. The State concedes this point.

¶ 33 The trial court sentenced defendant for aggravated kidnaping in violation of section 5/10-2(a)(7) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/10-2(a)(7) (West 2006)). Under that section, "[a] kidnapper *** is guilty of the offense of aggravated kidnaping when he ***, [d]uring the commission of the offense of kidnaping, personally discharged a firearm." 720 ILCS 5/10-2(a)(7) (West 2006). "Aggravated kidnaping in violation of *** subsection (a)(7) is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/10-2(b) (West 2006). If extended term sentencing applies to the Class X felony, the court may sentence the defendant to a term of imprisonment of not less than 30 years and not more than 60 years. 730 ILCS 5/5-8-2 (West 2006). Thus, the extended term sentencing range for aggravated kidnaping is 50 to 80 years. The elements of aggravated kidnaping are (1) a kidnaping and (2) personal discharge of a firearm.

¶ 34 Kidnaping can also lead to a charge of armed violence. "A person commits armed violence when he or she personally discharges a firearm *** while committing any felony defined by Illinois law." 720 ILCS 5/33A-2(b) (West 2006). Kidnaping is a Class 2 felony. 720 ILCS 5/10-1(c) (West 2006). A violation of section 33A-2(b) "is a Class X felony for which the defendant shall be sentenced to a minimum term of imprisonment of 20 years." 720 ILCS 5/33A-3(b-5) (West 2006). Consequently, the extended term sentencing range for armed violence based on kidnaping is 30 to 60 years. 730 ILCS 5/5-8-2 (West 2006). The elements of armed violence based on kidnaping are (1) a kidnaping (a Class 2 felony) and (2) personal discharge of a firearm.

¶ 35 Because the elements which constitute aggravated kidnaping and armed violence based

on kidnaping are identical, then their penalties must be identical. See *People v. Christy*, 139 Ill. 2d 172, 181 (1990). In *Christy*, our supreme court held that because the commission of kidnaping while armed with a knife constituted both aggravated kidnaping and armed violence, and those two offenses had different sentencing ranges, the penalties for aggravated kidnaping and armed violence were unconstitutionally disproportionate. *Christy*, 139 Ill. 2d at 181. *Christy* was the first case to apply what would come to known as "the identical elements test" for proportionality. *People v. Clemons*, 2012 IL 107821, ¶ 12. This court has applied the identical elements test to aggravated kidnaping in violation of section 10-2(a)(6) of the Criminal Code (720 ILCS 5/10-2(a)(6) (West 2006) (aggravated kidnaping while armed with a firearm)) and armed violence based on kidnaping in violation of section 33A-1(c)(1) (720 ILCS 5/33A-1(c)(1) (West 2006) (armed violence based on kidnaping while armed with a firearm)). *Harris*, 2012 IL App (1st) 092251, ¶ 14. The *Harris* court found that those two offenses have identical elements, and since the penalties for aggravated kidnaping are harsher than the penalties for armed violence, the defendant's sentence for aggravated kidnaping violated the Proportionate Penalties Clause. *Harris*, 2012 IL App (1st) 092251, ¶ 15. See also *People v. Herron*, 2012 IL App (1st) 090663, ¶¶ 25, 26 (parties agreed 15-year enhancement on sentence for aggravated kidnaping violated the Proportionate Penalties Clause).

¶ 36 Here, as well, the parties agree defendant's sentence for aggravated kidnaping violates the Proportionate Penalties Clause. In this case, aggravated kidnaping in violation of section 10-2(a)(7) of the Criminal Code has the same elements as armed violence based on kidnaping in violation of section 33A-2(b) of the Criminal Code. Because of the 20-year enhancement to the

extended term sentence for aggravated kidnaping, those two identical offenses carry different sentencing ranges. Accordingly, the 20-year enhancement on defendant's sentence for aggravated kidnaping is unconstitutional. *Herron*, 2012 IL App (1st) 090663, ¶ 25. As in *Herron*, however, the parties are also "in dispute as to the appropriate remedy for the sentence." *Id*., ¶ 26.

¶ 37 Our supreme court has "ruled that 'when an amended sentencing statute has been found to violate the proportionate penalties clause, the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment.' [Citation.]" *Id*., ¶ 26 (quoting *People v. Hauschild*, 226 Ill. 2d 63, 88-89 (2007)). Defendant in this case argues that resentencing is not necessary because the trial court already imposed a sentence in accordance with the statute as it existed prior to the amendment. Defendant asserts the trial court "stated he was imposing a sentence of 40 years *** before adding another 20 years pursuant to the unconstitutional enhancement." Defendant relies on the following statement by the court:

> "By the fact that you discharged a firearm as a matter of law, an additional 20 years must be placed on any sentence I give you.
>
> * * *
>
> Therefore, I will sentence you on the home invasion counts, which are the counts that involve personally discharging a firearm, to a sentence which does include an extended term sentence and which does include the enhancement of 20 years to a total on counts 50 through 54 to 60 years in the Illinois Department of

Corrections.

As to the counts of aggravated kidnaping, which again involve personally discharging a firearm, I will sentence you on counts 31 to 35 to serve 60 years in the Illinois Department of Corrections."

¶ 38 Defendant asks us to strike the unconstitutional 20-year enhancement, and leave the "valid 40-year sentence" intact. Defendant argues *Hauschild* is not inapposite to proceeding in this manner, because, in that case, the reason for remand was the court's alleged concern, in light of its holding, with ordering the trial court to impose an increased sentence for one offense, without also giving the trial court an opportunity to consider the effect of that increase on a separate offense. Defendant argues those concerns are not present in his case.

¶ 39 This court addressed the identical argument in *Herron*, 2012 IL App (1st) 090663, ¶ 27 (the defendant pointed out that the trial court distinguished this portion of the sentence from the 15-year enhancement and argued that because his 9-year sentence for aggravated kidnaping is proper, and the sentences for his other offenses are proper as well, this court should simply vacate the void 15-year enhancement of his aggravated kidnaping sentence instead of remanding it for resentencing). This court elected to follow the earlier decision in *People v. Gibson*, 403 Ill. App. 3d 942 (2010), which also addressed the same argument. See *Herron*, 2012 IL App (1st), 090663, ¶ 29 (citing *Gibson*, 403 Ill. App. 3d at 953 ("The court in *Gibson* discussed the exact issue that is presented in the instant case.")). The *Gibson* court rejected the defendant's argument, holding that there is "a distinction between sentencing a defendant to a term of years

without a comment regarding the possible invalidity of an enhancement and doing so with a comment regarding whether the invalidity of the enhancement would affect the unenhanced portion of the sentence." *Gibson*, 403 Ill. App. 3d at 955. The court held as follows:

> "The underlying purpose of *Hauschild*'s rule is to allow the trial court to properly sentence the defendant under the proper statute. Because the trial court sentenced defendant within the parameters of a void statute without comment on the effect of the enhancement's invalidity on the unenhanced sentence, it must be given the opportunity to reevaluate defendant's sentence in light of his cumulative sentences in accordance with the statute as it existed prior to the amendment." *Id*.

¶ 40 Defendant has given no compelling reason to depart from this precedent. Defendant argues that in this case, the trial court's remarks "show that the court expressly distinguished the number of years imposed for the actual offense (40 years) and for the enhancement (20 years)." We do not find the passage defendant quoted to be a comment on the effect of the enhancement's invalidity on the unenhanced sentence. Accordingly, the trial court must given the opportunity to reevaluate defendant's sentence. *Gibson*, 403 Ill. App. 3d at 955. Therefore, we vacate defendant's sentence for aggravated kidnaping and remand to the trial court for resentencing in light of defendant's other sentences, without the unconstitutional 20-year enhancement to aggravated kidnaping. *Herron*, 2012 IL App (1st) 090663, ¶ 29 (vacating sentence for aggravated kidnaping and remanding to the trial court for resentencing on the conviction for

aggravated kidnaping).

¶ 41 3. The trial court did not err in failing to conduct a *Krankel* inquiry into defendant's November 2011 *pro se* motion.

¶ 42 Defendant argues the trial court failed to conduct an adequate inquiry into his second *pro se* motion for a new trial raising allegations of ineffective assistance of counsel.

> "[W]hen a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, 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." *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003) (citing *People v. Krankel*, 102 Ill. 2d 181, 187-89 (1984)).

¶ 43 The trial court acknowledged receipt of defendant's second *pro se* motion at a hearing on November 29, 2011. Defendant concedes he voluntarily withdrew his first motion and makes no claim of error with regard to that motion or the manner in which the trial court proceeded with regard to the first motion. Defendant's arguments are confined to his "November 2011" motion for a new trial. Defendant asserts the trial court "refused even to accept this motion, much less to make an inquiry into its allegations of ineffective assistance of trial counsel as is mandated by *People v. Krankel*, 102 Ill. 2d 181, 187-89 (1994)." Defendant argues this was reversible error, and asks this court to remand "for the limited purpose of permitting [defendant] to timely present

his claims of ineffective assistance to the trial court."

¶ 44 The State responds the record fails to support defendant's claim he made allegations of ineffective assistance of counsel in his November 2011 motion for a new trial because the motion is not contained in the record. The State argues defendant's statements to the trial court when the court refused to accept his motion merely state defendant's desire to have met with his attorney more frequently but do not allege that defendant's trial counsel was ineffective. Alternatively, the State argues the trial court acted appropriately under *Krankel* because defendant's concern, as stated to the trial court, when filing his second *pro se* motion for a new trial was the preservation of issues for appeal. The State argues the trial court adequately addressed those concerns and concluded that trial counsel's motion for a new trial preserved defendant's issues. Finally, the State argues any error in failing to conduct a *Krankel* hearing was harmless beyond a reasonable doubt because the record reflects trial counsel's "zealous representation" and because the trial court expressly recognized trial counsel's "capable representation" in earlier proceedings.

¶ 45 Defendant concedes the November 2011 motion is not in the record, but argues this is because the trial court erroneously refused to accept it, mistakenly finding the motion moot because defendant's trial counsel had already filed a motion for a new trial on defendant's behalf. Defendant argues not only did trial counsel not file a motion for a new trial, even if he did, that fact would not relieve the trial court from its obligations under *Krankel*. Instead of conducting the required *Krankel* inquiry, defendant argues the trial court erroneously advised defendant to address his concerns on appeal. See *Moore*, 207 Ill. 2d at 78 (holding trial court failed to comply with *Krankel* where it conducted no inquiry into the defendant's allegations of ineffective

assistance of counsel and erroneously concluded that defendant's claim could be resolved by the appointment of different counsel on appeal). Defendant argues that he "was given no platform whatsoever to air his grievances against trial counsel because the trial court categorically refused to accept the November 2011 *pro se* motion or address its merits." Defendant's arguments are refuted by the record.

¶ 46 At the hearing on November 29, 2011, after the trial court denied defendant's motion to reconsider sentence, the court noted that defendant had "filed further motions here for a new trial, *et cetera*." The court stated it considered those motions moot, but permitted defendant to address the court regarding that particular motion. Defendant stated he was advised, with regard to "the motion that I filed for a new trial, I was advised that my attorney had filed it already." The court informed defendant that the motion had indeed been filed. Defendant stated he did not know his trial counsel had filed a motion for a new trial on his behalf because he had never seen the motion. Defendant continued:

> "The only reason I filed that motion that you got was that I felt that a lot of issues that I felt should have been preserved, I was asking that they be preserved for me as far as on my appeal, and that is why I filed it because I have like, as far as [trial counsel], he don't come talk to me or nothing, he don't explain nothing to me.
>
> If I would have known what is going on, the things like that, I never would have took it upon myself to file this motion ***.

So that is why I am asking today that my motion be

accepted and the issued that I have be preserved and looked at."

¶ 47 The trial court informed defendant that, not only was his motion untimely, the court had already "dealt with the motions for new trial ***. [Trial counsel] preserved them extensively at that point ***." Defendant again asked the court whether "any issues that I have that were not filed promptly" would be preserved for appeal. The court correctly refused to give defendant legal advice but did state "I looked at your motion *** many of those issues can be dealt with thereafter, but I am not able to advise you." The trial court informed defendant he should work with his appellate counsel regarding the issues raised in the November 2011 motion.

¶ 48 Based on the record before us, we hold that the trial court did not commit reversible error in failing to conduct a *Krankel* hearing on the November 2011 motion. The record does not support finding the motion alleged ineffective assistance of trial counsel. We will not infer defendant raised claims of ineffective assistance of counsel in the November 2011 motion from his third *pro se* motion alleging ineffective assistance of counsel. "An appellant's arguments which depend on facts not contained in the record are not sustainable on appeal." *People v. Gilbert*, 2013 IL App (1st) 103055, ¶ 17. "[A]ny doubts arising from an incomplete record must be resolved against the appellant. *Id*.

¶ 49 The trial court properly refused to consider defendant's November 2011 motion for a new trial. "[A] defendant must file a written motion for a new trial within 30 days of the entry of a finding or the return of a verdict. However, an exception to that rule is if a defendant is seeking a new trial based on claims of ineffective assistance of counsel and the claim is raised before a

notice of appeal is filed." *People v. Patrick*, 2011 IL 111666, ¶ 42. Defendant's own statements to the trial court belie his claim the November 2011 motion made allegations of ineffective assistance of counsel. In *Patrick*, the court addressed whether the defendant's *pro se* motions should be "characterized simply as motions for a new trial subject to the filing requirements of section 116-1(b)." *Id*., ¶ 37. The court found that "the character of a motion is determined by its content or substance." *Id*., ¶ 34. The substance of defendant's statements to the trial court concerned the preservation of issues on appeal, and not trial counsel's performance. Defendant's references to his attorney's level of communication with defendant were merely collateral to defendant's concern with preserving issues for appeal.

¶ 50 Defendant repeatedly expressed his concern with preserving issues for appeal during the November 29, 2011 hearing. Defendant stated the *only* reason he filed the motion was to preserve issues for appeal and, had he known trial counsel filed a motion for a new trial preserving those issues, defendant would not have filed his own motion. When defendant learned trial counsel did file a motion, defendant's concern was with whether trial counsel's motion preserved all of his issues. The record does not support finding the written motion raised concerns about counsel's performance.

¶ 51 Further, defendant's oral complaints at trial about his awareness of the filing or the contents of trial counsel's posttrial motion do not rise to the level of an oral allegation of ineffective assistance. The defendant must meet minimum requirements to trigger a preliminary inquiry by the trial court. *People v. Ward*, 371 Ill. App. 3d 382, 431 (2007). *Pro se* complaints of ineffective assistance that are ambiguous or unsupported by specific facts or both are

insufficient for the trial court to consider as an acceptable invocation of *Krankel*. *Id*., at 432. Defendant's oral pronouncements at the November 29, 2011 hearing are inadequate to sufficiently raise an issue ineffective assistance of counsel for the trial court to consider. This conclusion is especially appropriate in light of the fact that there is no indication of the court limiting defendant's articulation of his grievances when the court permitted defendant to speak at the hearing. *Id*., at 433.

¶ 52 We find that the trial court construed defendant's motion as nothing more than a motion for a new trial. A motion for a new trial must be filed within 30 days after entry of a guilty finding or verdict. *Patrick*, 2011 IL 111666, ¶ 33. As there is nothing in the record to suggest that the court misconstrued defendant's motion, we hold the trial court properly refused to accept defendant's November 2011 motion as untimely. *Id*. See also *Gilbert*, 2013 IL App (1st) 103055, ¶ 17.

¶ 53 Accordingly, the trial court's judgment is affirmed. If defendant is unremitting in his claim the November 2011 motion raised claims of ineffective assistance of counsel which, aware of those claims, the trial court failed to address under the procedures outlined in *Krankel*, his recourse lies in postconviction proceedings. *People v. Ligon*, 239 Ill. 2d 94, 105-06 (2010) (where the record is insufficient because it has not been precisely developed for the object of litigating a specific claim such a claim should be brought on collateral review rather than on direct appeal).[2]

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[2] Defendant did not supplement the record with the missing motion. "Generally, parties may supplement the record on appeal only with evidence actually presented to the trial court before judgment." *City of Chicago v. Yellen*, 325 Ill. App. 3d 311, 313 (2001). However, in

¶ 54 4. The mittimus must be corrected to reflect the proper count for defendant's conviction.

¶ 55 The parties agree the mittimus should be corrected. This court has the authority to order the clerk of the circuit court to correct the mittimus. *People v. Whalum*, 2012 IL App (1st), 110959, ¶ 29. Accordingly, we direct the clerk of the court to correct the mittimus to reflect that the trial court convicted defendant of armed habitual criminal under Count 63 rather than under Count 62. See *Id*.

¶ 56 CONCLUSION

¶ 57 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in part, reversed in part, and the cause is remanded for resentencing consistent with this order. The clerk of the circuit court of Cook County is order to correct the mittimus.

¶ 58 Affirmed in part, reversed in part, and remanded. Mittimus corrected.

Yellen, this court affirmed a trial court's decision to supplement the record with letters "never shown to the trial court, because the letters helped resolve the question" on appeal. *Id*., at 314. Illinois Supreme Court Rule 329 merely states that "[i]f the record is insufficient to present fully and fairly the questions involved, the requisite portions may be supplied at the cost of the appellant." Ill. Sup. Ct. R. 329 (eff. Jan. 1, 2006).