2017 IL App (1st) 141138-U

FOURTH DIVISION
June 15, 2017

No. 1-14-1138

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. 08 CR 4948-01
	)	
NICHOLAS AKERELE,	)	Honorable
	)	Michele M. Pitman,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt; (2) the trial court did not err in denying defendant's motion to quash arrest and suppress evidence; (3) the trial court did not err in denying defendant's motion to suppress identification; (4) defendant's confrontation rights were not violated by admitting testimony that police spoke with Cordel Allen; (5) the State did not err in cross-examination of Harlan, and closing arguments were proper; (6) there was no cumulative error; and (7) the trial court properly conducted a preliminary inquiry of defendant's ineffective assistance of trial counsel claims under *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 2 Defendant, Nicholas Akerele, was charged with multiple counts of attempt first degree murder, aggravated battery with a firearm, armed violence, aggravated battery, and possession of

a controlled substance arising from the December 2007 shooting of Michael Lofton in Calumet City, Illinois. Following a May 2013 jury trial, the jury found defendant guilty of one count of attempt first degree murder, with an additional finding that defendant personally discharged the firearm that caused great bodily harm to Lofton, and aggravated battery with a firearm. Subsequently, the trial court sentenced defendant to a term of 45 years in prison.

¶ 3 Defendant appeals, arguing that: (1) the State failed to prove defendant guilty beyond a reasonable doubt; (2) the trial court erred in denying defendant's motion to quash arrest and suppress evidence and his trial counsel was ineffective for failing to call an occurrence witness at the hearing on the motion; (3) the trial court erred in denying defendant's motion to suppress Lofton's identification nearly a year after the shooting, and his trial counsel was ineffective for using defendant's booking photograph during cross examination leading to an in-court identification; (4) defendant's right to confront witnesses was violated through the admission of testimony that Cordel Allen was interviewed and released, and defendant was subsequently charged; (5) defendant's right to a fair trial was violated by the State's improper cross-examination of a defense witness and subsequent improper closing arguments; (6) the cumulative effect of the multiple errors warrants a new trial; and (7) the trial court erred in failing to appoint counsel to represent defendant on his *pro se Krankel* petition.

¶ 4 In June 2012, defendant filed a motion to quash arrest and suppress evidence, arguing that the police lacked probable cause to place him under arrest on December 6, 2007, in Calumet City, Illinois. The trial court subsequently conducted a hearing on the motion.

¶ 5 Defendant testified that on December 6, 2007, he was at Pete's Sports Bar in Calumet City around 9 to 10 p.m. with three friends. While there, he was approached by "more than ten" police officers as he was playing pool. Defendant stated that he was not engaged in any type of

criminal attack, was not violating any laws, and did not have an active warrant for his arrest. Defendant said that subsequent to his arrest he made a "manufactured" statement to the police on December 7, 2007.

¶ 6 On cross-examination, defendant admitted that he owned a 1997 gray Chevrolet van with front-end damage. He said that he parked the van at Pete's Sports Bar. He stated that he arrived at Pete's with Gregory Kimbrough, Cordel Allen, and Vincent Harlan around 9 p.m. At around 10 p.m., he loaned his van to Kimbrough, who left with Allen and Harlan to go to Nick's Liquor Store in Hammond, Indiana. Defendant told them to buy him a $25 bottle of Hennessey to take to a club later that night. His friends returned about 30 minutes later. Defendant testified that the police "bombarded in there" about five minutes later.

¶ 7 Defendant denied owning a gun, and denied that the gun found in the driver seat of the van belonged to him. Defendant also denied parking the van at 221 155th Street. On redirect, defendant stated that the police initially told him he was being arrested for a hit and run, but when he got to the police station, he was told he was under investigation for a murder. Defendant admitted that he had previous convictions for aggravated discharge of a firearm, possession of a controlled substance, and delivery of a controlled substance. On recross, defendant admitted that he never told the police that his friends had been driving his van.

¶ 8 After defendant rested, the State called Officer Christopher Bello.

¶ 9 Officer Bello testified that he was employed with the Calumet City police department. At around 10 p.m. on December 6, 2007, Officer Bello was working with a partner, Officer Kwiatkowski, in an unmarked vehicle. The officers were in plain clothes. At around 10:10 p.m., Officer Bello received a radio dispatch that someone had been shot near State Line Road and 155th Street. The dispatch indicated that the offender was driving a gray minivan with front-end

damage, driving southbound on State Line Road. After receiving that dispatch, Officer Bello and his partner began searching the area for the vehicle. They located the vehicle at 221 155th Street. Officer Bello testified that the location of the van was approximately two and a half blocks west from the location of the shooting. The van was located at around 10:25 p.m.

¶ 10 Officer Bello observed that the van had front-end damage and the front passenger side tire was flat. The officers then ran the license plate for registration and the registered owner came up as defendant. The officers approached the vehicle to see if anyone was inside the van. They did not observe anyone in the van. Officer Bello's partner went to the driver's side to look in the window and immediately notice a handgun protruding from underneath the driver's seat. Officer Bello went to the driver's side and saw the handgun as well. Officer Bello observed the brown butt of gun sticking out, as well as, a clear plastic baggie with an off-white, rock-like substance, which he suspected was crack cocaine.

¶ 11 While at the scene, other officers arrived with a witness from the shooting, Michael Hill. He testified that Hill identified the van as being involved in the shooting. Officer Bello and another officer observed footprints from the van in fresh snow, and they followed the footprints to Pete's Sports Bar. He stated that there were two sets of footprints. He said Pete's was approximately a block and a half from where the van was parked. At that point he and other officers went inside the sports bar. Officer Bello testified that he was familiar with defendant and identified him in court. He observed defendant in the bar playing pool. Officer Bello contacted the detective working on the case and advised him that defendant had been located. The detective advised Officer Bello to place defendant into custody, which he did at approximately 10:50 p.m.

¶ 12 On cross-examination, Officer Bello admitted that the description of the van did not include make, model, or year. He said that he believed he was advised that the van also had rear-

end damage. He recognized the van from previous occasions. Officer Bello stated that defendant was in the company of Kimbrough, Allen, and Harlan at Pete's. Officer Bello admitted that he did not have a physical description of the driver.

¶ 13 Following arguments, the trial court denied defendant's motion to quash arrest and suppress evidence. The court found that, "Based upon the nature of the call, the proximity, the time of the arrest, the time of – of the witness coming immediately to the – to the location, of the vehicle, the Court finds there was probable cause to arrest the Defendant."

¶ 14 In March 2011, defendant filed an amended motion to suppress identification testimony, arguing that the photo array identification made by Lofton on November 3, 2008, was improperly suggestive, and Lofton's limited observation as well as his emotional and physical condition impaired his ability to make a fair, rational, and reasoned identification. Initially, the prosecutor assigned stated that she would not be using Lofton's identification of defendant from the photo array because it was not a proper identification. Defendant's attorney then withdrew the motion. Later, another prosecutor informed defense counsel that she wanted to elicit this testimony from Lofton at trial. Defense counsel then reinstated his motion to suppress identification.

¶ 15 At the October 2012 hearing, Detective Casey Erickson testified that he was employed by the Calumet City police department and he was assigned to investigate the December 6, 2007, shooting. He stated that he arrived at the scene the night of the shooting, but Lofton had already been transported to the hospital. He remained assigned to the investigation.

¶ 16 Detective Erickson first spoke with Lofton on November 3, 2008. Detective Erickson testified that Lofton changed locations because of his injuries, including hospitalization and rehabilitation. As a result of the shooting, Lofton was rendered a quadriplegic. He admitted that

he had the ability to speak with Lofton earlier, but did not do so. At around 10:25 a.m. on November 3, he went to Lofton's residence with Assistant State's Attorney (ASA) Cordelia Coppleson. ASA Coppleson was present for the interview with Lofton. Detective Erickson testified that Lofton initially described the suspect as a male black with braids. Detective Erickson presented Lofton with the lineup photo spread advisory form, but due to his condition, Lofton was unable to sign. Lofton's grandmother signed the form with Lofton's consent.

¶ 17 Detective Erickson then showed Lofton the photo array. He watched Lofton examine the photo array. Lofton told him that "the person – number six looked like the person who had shot him, but he couldn't be sure." Defendant's photograph was in the number six position. Lofton said to the detective that he could not be sure unless he viewed a photograph taken of the offender on the day of shooting. Detective Erickson testified that he told Lofton that the photographs in the photo array may not be photographs taken of those individuals on the day of the shooting, that the photographs may be older.

¶ 18 Detective Erickson stated that ASA Coppleson contacted him and asked if they could interview Lofton. He said they told Lofton they needed to speak with him because they had not heard his side of the story of what happened the night of the shooting. He did not recall telling Lofton anything regarding the case, but Lofton's family members were aware that a suspect was in custody.

¶ 19 On cross-examination, Detective Erickson stated that after the shooting Lofton was hospitalized and went to rehabilitation. Following rehabilitation, he did not believe that Lofton returned to his former residence. The interview was conducted at his residence in Joliet, Illinois. He stated that Lofton was in a hospital bed. At the time of the interview, the bullet was still lodged in his Lofton's body. He asked Lofton a few questions, and asked if Lofton thought he

was able to identify the individual who shot him. Lofton responded that he thought he might be able to. After going over the lineup advisory form with Lofton, Detective Erickson held the photo array up for Lofton to view. He testified that he observed Lofton's eyes move as he looked at the pictures. After Lofton made a tentative identification of defendant, Detective Erickson asked if he knew the driver. Lofton responded that he did not know the person who shot him. For the photo array, Detective Erickson used a photograph of defendant from a December 2006 arrest. Detective Erickson testified that they did not have the capabilities to transfer Lofton to the police station to view a physical lineup. Detective Erickson denied telling Lofton who to identify in the photo array or make any actions to indicate which photograph to select. On redirect, Detective Erickson stated that Lofton told him that the shooter had a medium complexion after viewing the photo array.

¶ 20 The trial court denied defendant's motion, finding that the photo array identification was not suggestive. The court noted that delay in conducting the photo array was not suggestive, and Lofton's tentative identification went to the weight of the identification at trial.

¶ 21 In January 2013, defendant filed an amended motion to suppress Lofton's tentative identification because it was conducted in the absence of defendant or defense counsel after charges had been filed against defendant. The trial court denied the motion, noting that defendant does not have the right to have an attorney present for a photo array.

¶ 22 On May 6, 2013, immediately prior to the start of jury selection, defense counsel presented a statement from Michael Hill, dated that day. The statement was initially given to the prosecutor and disclosed to defense counsel. Counsel informed the court that in the statement, Hill said "he did not know if that was the van that was involved in the shooting." Defense counsel asked to revisit the ruling on defendant's motion to quash arrest and suppress evidence.

The prosecutor responded that at the hearing on the motion, police officer testified that Hill identified the van as the one involved in the shooting. The prosecutor informed the court that Hill was essentially recanting his prior identification to the police. The court held that its prior ruling would stand because "the issue in probable cause is what the officers' knowledge was." The court observed that a witness could "always come in and say they said something different. That's impeachment for trial."

¶ 23 The following evidence was presented at defendant's jury trial.

¶ 24 Officer Guerrero testified that on December 6, 2007, he was employed by the Calumet City police department, and was working with a partner in a marked patrol car. At approximately 10:09 p.m., he received a dispatch of a car accident at 155th Street and State Line Road. When he arrived on the scene, he observed a green Buick crashed into a pole. Hammond police were already present. The driver of the vehicle had already been taken to the hospital. Officer Guerrero observed a large amount of blood on the front passenger seat and center console inside the car.

¶ 25 Officer Guerrero spoke with Michael Hill at the scene. Following his conversation with Hill, he was looking for a gray minivan with front-end damage that had driven south on State Line Road. This information then was dispatched to officers. On cross-examination, Officer Guerrero admitted that the dispatch did not include any make, model, or registration information for the van.

¶ 26 Officer Christopher Bello testified substantially similar to his testimony at the hearing on defendant's motion to quash arrest as to his discovery of the van and subsequent actions leading to defendant's arrest. In addition, Officer Bello stated that the van was still warm and no snow was on the van when he found it at 221 155th Street. Officer Bello also testified that at Pete's,

defendant was with Kimbrough, Harlan, and Allen. He admitted that all four men were asked to step outside, but only defendant was taken into custody. None of defendant's friends came forward with any information. Officer Bello stated that he was familiar with Kimbrough and had dealt with him at least a dozen times in the year and a half prior to the shooting. He never knew Kimbrough to have long braids.

¶ 27 On cross-examination, Officer Bello admitted that Kimbrough had a similar complexion to defendant and also wore his hair in braids. He did not take Kimbrough into custody. Officer Bello stated that his involvement in the case ended after defendant was arrested at Pete's. On redirect, Officer Bello stated that defendant's braids were longer than Kimbrough's, and he did not believe the men looked alike.

¶ 28 Michael Lofton testified that on December 6, 2007, he was at his uncle's house in Riverdale, Illinois. He left around 9:30 or 9:40 p.m. to go to his girlfriend's house. He was driving alone in his car, a 1994 Buick Le Sabre. He was driving on Sibley Boulevard toward State Line Road, he then made a right onto State Line Road. As he was driving south on State Line near Pulaski, he noticed a minivan on his passenger side going the same speed as he was, 10 to 15 miles per hour. Lofton rolled down his passenger window because he thought it was someone he knew. When he rolled down the window, he saw the driver of the van, who had his window down as well. Lofton testified that he did not recognize the driver of the van and had never seen him before. He observed a passenger in the van, but could not describe the passenger.

¶ 29 Lofton described the driver as "brown skinned" black male with medium length braids. Lofton said there were words between himself and the driver, but he could not remember what was said. He looked toward the road, but then he turned back and saw the gun fire and heard a gunshot. Lofton testified that he saw the driver of the van with a gun. Lofton stated that he fell

over into the passenger seat of the car, and the car crashed into a pole. He described feeling numb and was unable to move. He said someone came up to him in the car and asked if he was all right. The person said he would call the police. Lofton was subsequently removed to an ambulance. He was taken to St. Margaret's Hospital, and then later to St. James Hospital. He said he spent two to three months in the hospital and rehabilitation.

¶ 30 Lofton testified that after the shooting, he could not feel anything from his chest down. At trial, he had "sensation in like certain parts of my arm and maybe in my side too somewhere." In September 2009, he woke up one morning and his grandmother was helping him get dressed. She noticed blood on the pillow and the bullet in the bed. Lofton said the bullet had been expelled from the back of his shoulder. The doctors had opted not to remove the bullet to avoid any possible ligament damage in his shoulder. The police were called and came to recover the bullet.

¶ 31 In November 2008, Detective Erickson and ASA Coppleson came to speak with him at his house. He had not spoken with any police officers since the shooting because he was in the hospital. His grandmother was also present during the interview. Lofton testified that he was shown a photo array, and the photo array shown to him was presented in court. Lofton said he identified number 6 in the photo array. He said he told Detective Erickson that he was "80 percent sure that was the guy who shot [him], but would [he] be able to see the photo when [the suspect] was put into the jail, that's how [he] can be 100 percent. But [he] was 80 percent sure that was the guy." Lofton also identified photographs of defendant's van as the van the shooter was driving and his own car. Over defense counsel's objection, Lofton identified defendant in court as the shooter.

¶ 32 On cross-examination, Lofton stated that he did not recall saying there was movement in the back seat of the van. He admitted that he was not able to get a height, weight, build or describe the clothing of the shooter. He said that he first described the shooter's braids as medium length in his testimony at trial. Lofton testified that prior to his testimony, he met with the prosecutors and they showed him a photograph of defendant taken the night of the shooting. Defense counsel showed defendant's booking photograph to Lofton on the stand. Lofton said he was now 100 percent convinced that defendant was the shooter. Lofton denied that he would have identified another person if told that was defendant. Lofton admitted that Kimbrough was not included in the photo array.

¶ 33 After cross-examination, the State sought to question Lofton about defendant's booking photograph, which had previously been barred as too suggestive. The trial court allowed the State to use the photograph since defense counsel had used it with no objection from defense counsel. On redirect, Lofton testified that Detective Erickson did not tell him who to pick and he did not know defendant by name. Lofton said that all of the subjects in the photo array had braids. The prosecutor showed Lofton defendant's booking photograph and Lofton testified that defendant was the shooter. The prosecutor also showed Lofton a photograph of Kimbrough. Lofton stated that he had never seen that individual before and he was not the shooter. On recross, Lofton admitted that he never described the shooter's face to the police.

¶ 34 Dr. Gary Merlotti testified that in December 2007, he was the chief of trauma surgery at St. James Hospital and he treated Lofton when he arrived at the hospital. He stated that the bullet transected Lofton's spinal cord at the 5th and 6th vertebrae. The bullet was at the top of his left shoulder blade. As a result of the injury, Lofton was a quadriplegic. After consultations, the doctor decided to leave the bullet alone and allow it to erode or fall out on its own.

¶ 35 Detective Casey Erickson[1] testified consistently with his testimony from the hearing on defendant's motion to suppress identification regarding Lofton's identification from the photo array. Detective Erickson viewed defendant's booking photograph and stated that he did not include this photo of defendant in the photo array for Lofton because "the hair in there would have been very hard to match to have five other similar hairstyles in there, and [he] didn't want to make the photo array too suggestive." He felt that defendant's booking photo would have stood out too much due to his hair. He further stated that he did not come back with another photo array using this photograph because it would have been suggestive to show Lofton two photo arrays with one picture of the same person in each one.

¶ 36 On cross-examination, Detective Erickson stated that Lofton told him that he observed a driver and a passenger in the van, and that he saw movement in the back. He admitted that Kimbrough was not included in the photo array shown to Lofton. On redirect, he stated that he would not have included Kimbrough in the photo array because his face was "pudgier," and he had "significantly more facial hair than any of the other individuals in the photo array."

¶ 37 ASA Coppleson testified that in November 2008, she was assigned to the felony trial division at the Markham courthouse. She stated that she contacted Detective Erickson to interview Lofton. They went to Lofton's residence in Joliet. They had a 15-minute conversation about what Lofton could remember of the event, and then Detective Erickson showed Lofton the photo array. She said Lofton viewed the photo array for about a minute, and then indicated that he believed number 6 was the shooter. Lofton added that he could not be sure unless he saw a photo from when the shooter was arrested. She denied that she or Detective Erickson suggested or indicated to Lofton which individual to pick. On cross-examination, ASA Coppleson stated

[1] Detective Casey Erickson testified at trial that he was currently a lieutenant, but previously held the rank of detective and was assigned as detective to this case. For consistency, we will continue to refer to Lieutenant Erickson as Detective Erickson in this decision.

that Lofton knew someone was in custody and he did not indicate what percent sure he was of his identification.

¶ 38 The parties then entered a stipulation that Investigator Mitch Grow administered a gunshot residue test on defendant's hands on December 6, 2007, and then sealed the test. Robert Berk testified that was employed as a trace evidence analyst. He received the sealed gunshot residue test performed on defendant. After testing, the results were negative, which meant that defendant "may not have discharged a firearm with either hand."

¶ 39 Investigator Marco Glumac testified that he searched defendant's van on December 7, 2007. He recovered a loaded Smith & Wesson revolver, a Remy Martin liquor bottle, an empty Hennessey box, and a paper listing the vehicle's ownership. The revolver contained five live rounds and one spent round. The firearm and the bullets were inventoried and sealed for testing. He testified that the ignition column in the van had been "peeled."

¶ 40 Wilburn Wilkins testified that he was a forensic scientist specializing in latent prints with the Illinois state police crime lab. He received the firearm and bullets recovered from defendant's van for testing. After he conducted several tests, no recoverable fingerprints were found on the firearm or the bullets. He stated that it was not uncommon to find no prints suitable for comparison.

¶ 41 Sergeant Kevin Rapacz testified that he was currently a sergeant in the Calumet City police department, but in December 2007, he was an investigator and he assisted in this case. Pursuant to the investigation, he met with Cordel Allen. On December 7, 2007, he interviewed and released Allen, who passed away in July 2010. Defendant was charged later that day.

¶ 42 Detective Allen Pieczul testified that he was a detective with the Calumet City police department and in December 2007, he was assigned to investigate this case. At approximately

12:55 a.m., he met with defendant along with Sergeant Rapacz for an interview. He stated that the interview lasted 5 to 10 minutes. He informed defendant of his *Miranda* rights, and defendant stated that he understood his rights, but he declined to sign the *Miranda* waiver. Defendant agreed to speak with them. Detective Pieczul stated that defendant denied any knowledge of the shooting and said he did not know why he was in custody. Defendant was then returned to his cell.

¶ 43 Around 10 a.m. that morning, Detective Pieczul spoke with defendant a second time with Detective Grow present. He informed defendant of his *Miranda* rights again, defendant again stated that he understood, but continued to refuse to sign the form. Defendant again agreed to speak with them.

¶ 44 Defendant told them that on December 6, he was driving his van east on Sibley Boulevard when he saw a black car with chrome rims exit the gas station at Sibley Boulevard and Oglesby. Defendant said the vehicle kept passing him and slowing down. Defendant told him the vehicle passed him using the oncoming lane of traffic near Sibley Boulevard and Lincoln Avenue. Both vehicles then turned right to go south on State Line Road. As they approached Pulaski, both vehicles stopped at a stop sign. Defendant looked over at the black vehicle and saw someone he knew as Michael Lofton. He said both vehicles continued south, but then the black vehicle struck the right rear corner of the van, which caused defendant to lose control. He hit the curb and blew out his right front tire. The black vehicle pulled up next to him, and the driver yelled, “Do we have a problem?” Defendant told the detective that he saw Lofton move as if he was grabbing something from the seat, at that time defendant grabbed his gun and pointed at the passenger front door of the vehicle and fired once. Defendant said he did not know if he hit

anyone and fled the scene. Detective Pieczul stated that the interview concluded. He testified that the statement was not reduced to writing.

¶ 45 On cross-examination, Detective Pieczul admitted that Lofton's vehicle was green. He also admitted that he did not prepare a report from his first interview until September 2009. He did not ask defendant about the gun or who he was with at the time of the shooting.

¶ 46 Linda Yborra testified that she was forensic scientist specializing in firearm and tool mark identification. She stated that she received the revolver, the fired shell casing, and the live bullets as well as the fired bullet. Based on her analysis, she found that the fired bullet was fired from the revolver recovered from defendant's van.

¶ 47 The State then rested. Defendant moved for a directed finding, which the trial court denied.

¶ 48 Vincent Harlan testified for the defense that on December 6, 2007, he went with defendant, Kimbrough, and Allen in defendant's van to Pete's Sports Bar. He said that he, Kimbrough, and Allen walked from an apartment complex in Indiana to defendant's house. He was unsure of the time, he said they got there after 3 p.m., but no later than 6:30 to 7 p.m. He sat at the bar having drinks while defendant and Kimbrough played pool. He said he drank a double shot of Hennessey.

¶ 49 Harlan said he left Pete's after 30 to 40 minutes with Kimbrough and Allen. He was "riding towards a friend's sister of mine's house" with Kimbrough, whom he had known for "a couple of months." When asked where they were going, Harlan answered that "it was basically a drug deal." He said they got into a gray van. He sat in the back seat, Kimbrough was driving, and Allen was in the passenger seat. He said Kimbrough had the keys to the van, which he saw defendant give them to Kimbrough in Pete's. He said Kimbrough started the van with the keys.

First they went to Kimbrough's sister's house, and then they went to a liquor store. The liquor store was on Burnham Avenue. Harlan stated that he remained in the van while the other two went inside. He said they returned with a bottle of Hennessey, which they started to drink as they drove. Harlan testified that Kimbrough was making drug deals as he drove around.

¶ 50 As they were driving on south on State Line Road, he said that "somebody got on our bumper," and "it was like a road rage going on." Harlan testified, "then they drove on the side of each other and started arguing. And then it was a bang." He said he "really didn't see nothing." He saw "a spark and a bang." He said it came from the driver's side window, which was where Kimbrough was seated. Harlan stated that after the victim was shot, they drove toward Calumet City, parked the car somewhere, and he ran two blocks because he was scared of Kimbrough. He ran back to the bar, and Kimbrough and Allen arrived three minutes later. He said the police arrived five minutes later and arrested defendant, but let Harlan go. The police did not talk to him. Harlan has not seen Kimbrough since that night. He said the police never questioned him about his knowledge.

¶ 51 On cross-examination, Harlan admitted that he was homeless and unemployed. He said he did side jobs, such as, clean yards, take out garbage. He stated that he stays at the homes of his family members. He denied having spoken with defendant or his friends or family since the shooting. Harlan stated that in December 2007, Kimbrough's hair was "dreaded," and down a little past his shoulders.

¶ 52 Harlan testified that during the incident on State Line Road, the other vehicle did not make contact with the van. He said there was arguing, but he could not see the person in the car. He could not see because "it was a blizzard." Harlan said he was not "afraid" of Kimbrough, he was "just afraid, period." Harlan admitted that he told an investigator shortly before trial that he

was afraid of Kimbrough. He denied telling the police anything, and said they did not ask him any questions. He admitted that he saw the police arrest defendant, rather than Kimbrough, but he did not say anything because he was "thinking that [Kimbrough] is going to kill me." Harlan admitted that he never told the police that Kimbrough was the shooter. He stated that he was testifying because he had received a subpoena and he "just don't want nothing to deal with the case."

¶ 53 Harlan admitted he was a convicted felon. He admitted to a 2003 conviction for burglary. He denied that he pled guilty in 2004 for robbery of a victim 60 years of age or older. The defense then rested.

¶ 54 In rebuttal, the State called Officer Mike Serrano, who testified that he was a Calumet City police officer. He stated that he had contact with Kimbrough on December 21, 2006, and February 26, 2007. On both dates, Kimbrough's hair was short and braided. On cross-examination, he admitted that his last contact with Kimbrough was several months before December 6, 2007. He stated that he saw Kimbrough on a daily basis about six months before the shooting.

¶ 55 Investigator William Dodaro testified that he was employed with the Cook County State's Attorney's bureau of investigations. He stated that on May 6, 2013, he interviewed Harlan outside the courtroom. Harlan told him that on the night of the shooting, the police came into the bar and questioned them. Harlan said he told the police that he did not see anything and did not know anything about the shooting.

¶ 56 The State presented a certified copy of Harlan's conviction in 2004 for robbery of a victim handicapped 60 years of age or older. The State then rested in rebuttal.

¶ 57 Following arguments, the jury found defendant guilty of attempt first degree murder with the additional finding that defendant personally discharged a firearm that caused great bodily harm to Lofton, and aggravated battery with a firearm.

¶ 58 Defendant obtained new counsel after trial. His new attorney filed a motion for a new trial, as well as an amended version. Defendant filed a *pro se* petition for a *Krankel* hearing, alleging ineffective assistance of his trial counsel, including failure to investigate an alibi defense, failing to present evidence of Detective Erickson's prior allegations of misconduct, failure to communicate a plea offer of 15 years, and failure to present Hill at the hearing on the motion to quash. Defendant's new attorney declined to adopt defendant's *Krankel* petition. Defendant appeared *pro se* at the hearing on his motion. At the hearing, defendant's trial counsel appeared and refuted defendant's claims. The trial court found that defendant's petition lacked merit and declined to appoint counsel. The court subsequently denied defendant's motion for a new trial.

¶ 59 Following the sentencing hearing, the trial court sentenced defendant to a term of 20 years for the attempt first degree and a 25-year enhancement for personally discharging the firearm that caused great bodily harm, for a total of 45 years.

¶ 60 This appeal followed.

¶ 61 Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt. Specifically, defendant asserts that the evidence linking him to the shooting was a questionable identification by Lofton and the involvement of defendant's van was insufficient in light of Harlan's identification of Kimbrough as the shooter.

¶ 62 When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-

30 (2000). Rather, our inquiry is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Cox*, 195 Ill. 2d 378, 387 (2001). It is the responsibility of the trier of fact to "fairly *** resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.*

¶ 63 The reviewing court must carefully examine the record evidence while bearing in mind that it was the fact finder who saw and heard the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Id*. However, the fact a judge or jury did accept testimony does not guarantee it was reasonable to do so. Reasonable people may on occasion act unreasonably. Therefore, the fact finder's decision to accept testimony is entitled to great deference but is not conclusive and does not bind the reviewing court. *Id*. Only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330.

¶ 64 Defendant bases his sufficiency of the evidence claim on three things: Lofton's identification, defendant's statement to Detective Pieczul, and Harlan's testimony. First, defendant contends that Lofton's identification was insufficient to establish defendant's guilt beyond a reasonable doubt. "The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed the charged offense." *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Illinois courts consider

identification testimony under the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). *Id.* Those factors include: "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Id.*

¶ 65 We find that the *Biggers* factors were satisfied in this case. Lofton testified at trial that he first noticed defendant's van going 10 to 15 miles per hour next to his vehicle. He rolled down his passenger window to see if it was someone he knew. Lofton stated that he looked at the driver and it was someone he did not recognize. After conversation Lofton could not recall, he looked to the road and then back at the driver. At that time, he saw the driver had a gun which he fired into Lofton's car, striking Lofton and paralyzing him. Lofton testified that streetlights were lit while this confrontation occurred. He looked at defendant for several seconds. He described the driver as a medium complected, black male with braids.

¶ 66 Lofton identified defendant in a photo array as the person who shot him. Even though the photo array was done eleven months after the shooting, Lofton was able to make an identification. At trial, Lofton described his certainty as 80% sure that defendant was the shooter. While Lofton expressed a little uncertainty in his identification, his identification at trial in viewing defendant's booking photo was certain. The police did not use defendant's booking photo in the photo array because defendant's hair was unique and the photo would be too suggestive. Lofton also identified defendant in court. Further, Lofton was shown a photograph of Kimbrough and unequivocally stated that Kimbrough was not the shooter.

¶ 67 We disagree with defendant's characterization of Lofton's identification as "absolute uncertainty." The testimony from Lofton, Detective Erickson, and ASA Coppleson is consistent that Lofton identified defendant in the photo array, but stated that he could not be certain unless shown defendant's booking photo from the night of the shooting. The jury heard the circumstances of Lofton's identification, as well as the circumstances and the time since the shooting occurred. It was for the jury as trier of fact to weight this evidence. Moreover, defendant's guilt was not based solely on Lofton's identification, and we find no error in its admission.

¶ 68 Defendant also argues for the first time that his statement to Detective Pieczul was unreliable. Specifically, defendant asserts that the circumstances surrounding his statement demonstrate that it was unreliable because it lacked details, it conflicted with Lofton's description of the shooting, and was not preserved. At no point does defendant directly contend that his statement was false or coerced, nor did he make any such contention in the trial court. Defendant did litigate a motion to suppress statements as involuntarily given, which the trial court denied, but defendant has not raised that claim on appeal. The circumstances surrounding defendant's statement were presented to the jury. Significantly, the jury knew that defendant declined to sign a form waiving his *Miranda* rights, and that the statement was not memorialized in either written or video form. The jury also knew that defendant initially declined to give a statement, but later gave a statement after spending the night in custody. It is not for this court to reweigh defendant's statement, that was a question for the jury. The jury was presented this statement along with all the evidence from both sides to weigh in reaching its verdict.

¶ 69 Defendant further asserts that Harlan gave "unimpeached eyewitness testimony" identifying Kimbrough as the shooter in contrast to Lofton's unreliable identification. Again, the

credibility of Harlan's testimony was a question for the jury. The jury heard all the evidence, including Harlan's testimony naming Kimbrough as the shooter and rejected it. Moreover, Harlan's testimony was not unimpeached. First, Harlan denied one of his prior convictions, which was proved with a certificate of conviction. Second, Lofton was shown Kimbrough's photograph, and denied that he was the shooter. Additionally, Detective Erickson stated that he did not include Kimbrough's photograph for the photo array because his appearance was different from defendant, namely Kimbrough had a fuller face, suggesting a heavier build than defendant. The jury was able to hear and consider all of these factors.

¶ 70 When viewing the evidence in the light most favorable to the State, we find that any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. None of these reasons are sufficient to undermine the jury's finding. For these reasons, we find that the State sufficiently proved defendant guilty beyond a reasonable doubt.

¶ 71 Next, defendant contends that the trial court erred in denying his motion to quash arrest and suppress evidence. Specifically, defendant argues that the State lacked probable cause to arrest him after the shooting on December 6, 2007. Defendant asserts that at the time of his arrest, he was inside Pete's Sports Bar playing pool, and the testimony at the hearing on the motion failed to show that he had recently been outside or was visibly nervous or agitated. Further, defendant claims that his arrest was premised solely on a nontestifying witness, Hill, identifying defendant's van to police as the van used in the shooting.

¶ 72 "When reviewing the trial court's ruling on a motion to quash arrest and suppress evidence, we apply a two-part standard of review." *People v. Almond*, 2015 IL 113817, ¶ 55. We afford great deference to the trial court's findings of fact and will reverse those factual

findings only if they are against the manifest weight of the evidence, but review the ultimate legal ruling as to whether the evidence should be suppressed *de novo*. *Id.*

¶ 73 "If a trial court finds that a warrantless arrest was based on probable cause, then the arrest is deemed lawful." *People v. Arnold*, 349 Ill. App. 3d 668, 671 (2004). "Probable cause does not require proof beyond a reasonable doubt but does require more than mere suspicion." *Id.* at 671-72. "Probable cause exists if the totality of the circumstances known to the police at the time of a suspect's arrest is sufficient to warrant a reasonably prudent person to believe the suspect has committed a crime." *Id.* at 672. "Probable cause for a warrantless arrest can be based on information provided by an informant." *Id.* "Third-party information, whether the source of the information is identified or unidentified, an ordinary citizen or a paid informant, a victim, an eyewitness or other witness, is reliable if it bears some indicia of reliability." *Id.* "An indicia of reliability exists when the facts learned through a police investigation independently verify a substantial part of the information learned from the informant." *Id.*

¶ 74 At the time of defendant's arrest, the evidence presented at the hearing established probable cause. Police received a report of a shooting at 155th and State Line in Calumet City, and the shooter was driving a gray van with front end damage. Officer Bello and his partner began to look in the area for the van. Within 15 minutes of the shooting, a gray van with front end damage was located at 221 155th Street, approximately two and a half blocks from the scene of the shooting. The officers looked inside the van and saw a handgun with wood grain handle visible under the driver's seat. The officers ran the license plates and learned that it was registered to defendant. A witness to the shooting, Hill, was brought to that location and he identified the van as the one involved in the shooting to the officers. The officers observed

footprints in the fresh snow, which they followed to Pete's Sports Bar, one and a half blocks away. Defendant was located in the bar.

¶ 75 According to defendant, "at the time of [defendant's] arrest, the police only knew that an individual had been brought to [defendant's] van, and claimed it was the van involved in the shooting." Defendant also asserts that he had not admitted his presence at the scene of the shooting and no ballistics testing linked the gun in his van to the shooting. Defendant minimizes the police officers' locating the van, registered to defendant, a brief time after the shooting and within blocks of the shooting, the handgun in plain sight inside the van, and the police tracking footprints from the van to defendant's location in Pete's Sports Bar, but instead focuses on Hill's identification of the van as the one involved in the shooting.

¶ 76 Defendant's argument fails to cite any authority explaining the evidence required to satisfy probable cause. Rather, he concludes that the evidence was insufficient based on purported analogous cases in which probable cause was not found. See *People v. Haymer*, 154 Ill. App. 3d 760 (1987), *People v. Hollins*, 169 Ill. App. 3d 304 (1988).

¶ 77 In *Haymer*, the defendant was arrested in connection a homicide. The State had appealed the trial court's granting of the defendant's motion to quash arrest and suppress evidence. In affirming the trial court, the reviewing court found that the defendant was arrested "for the purpose of conducting an expedition for evidence in hope of obtaining information upon which to predicate probable cause to justify an arrest." *Haymer*, 154 Ill. App. 3d at 768. At the time of the defendant's arrest, the extent of the evidence was that the witness to the shooting had written down a license plate, which matched the defendant's vehicle, and the defendant had failed a polygraph examination. The witness told police she had seen two or three black males commit the shooting and leave in the vehicle. The vehicle was not found until more than two months

later, after the victim died. When the defendant was initially present he claimed to be near the location of the shooting with his girlfriend and heard the shots, but did not want to get involved. Later, the defendant told police that he had gone to the location with two friends to drink and get high. He observed one of his friends approach an old man in a car and then shot him. The defendant then left with his friends. He was released the following day. *Id.* at 762-63.

¶ 78 Two days later, the police brought the defendant and the two named friends in for questioning. After waiving their *Miranda* rights, the defendant and one of the friends, separately, implicated the third man with them the night of the shooting. The third man denied being present with the other two men the night of the shooting, but told the police that he saw the second man a couple days later and he made an inculpatory statement. The defendant and the second man were then placed under arrest and the investigation continued. *Id*. at 763-65. Eventually, after being confronted with a failed polygraph examination, the second man implicated the defendant. The defendant later made an inculpatory statement after being confronted with the second man's statement. *Id.* at 764-65.

¶ 79 In *Hollins*, the defendant was arrested and charged with burglary of a grocery store. At the hearing on the motion to quash arrest, the only evidence of the defendant's involvement was that an unidentified person told an auxiliary policeman that the defendant and his brother were involved in the burglary, and the auxiliary policeman passed that information onto the police chief, who placed the defendant under arrest. *Hollins*, 169 Ill. App. 3d at 305-07. The only additional evidence was testimony that an anonymous person told the police that a vehicle belonging to the defendant's family was seen backed up to the grocery store. *Id.* at 307. The reviewing court held that the trial court erred in denying the defendant's motion to quash. The court found that the auxiliary officer's

> "information that 'someone' told him that the defendant had been involved in the burglary, was hardly information that would lead a reasonable person to conclude that the defendant had committed the offense in question. [The police chief's] other information, from [the store owner] and an unidentified man, in no way linked the defendant to the crime. We agree with the defendant that [the police chief] acted on a mere suspicion, and not on facts sufficient to establish probable cause to arrest. We therefore find that the defendant's arrest was invalid." *Id.* at 308.

¶ 80 The circumstances in *Haymer* and *Hollins* are readily distinguishable from the instant case. Here, a gray van was reported to have been involved in the shooting, and was subsequently recovered approximately 15 minutes later, within a few blocks of the shooting. A handgun was visible inside the van. The van was registered to defendant. Footprints from the van led to Pete's Sports Bar, less than two blocks away, where defendant was found. Additionally, Hill identified defendant's van to police as the van involved in the shooting. The evidence presented at the hearing in this case was sufficient to establish probable cause to place defendant under arrest, and the trial court did not err in denying defendant's motion.

¶ 81 Defendant next argues that the trial court erred in denying his motion to suppress identification because the photo array was unduly suggestive. According to defendant, the use of a six person photo array on a single sheet conducted by the lead detective and an ASA, both of whom knew defendant was the suspect, was unduly suggestive. Defendant contends that "a sequential array" is less suggestive based on scientific studies.

¶ 82 However, as the State points out, defendant did not raise this basis in his motion to suppress in the trial court. In his motion to suppress Lofton's identification, defendant argued that (1) Detective Erickson's conduct improperly suggested the identification of defendant, (2) Lofton's emotional and physical condition as well as limited observation of the occurrence impaired his ability to make an identification, and (3) defense counsel should have been present for the photo array identification. Defendant did not contend that a sequential array was more appropriate and less suggestive in the trial court.

¶ 83 " 'Failure to raise issues in the trial court denies that court the opportunity to grant a new trial, if warranted. This casts a needless burden of preparing and processing appeals upon appellate counsel for the defense, the prosecution, and upon the court of review.' " *People v. Hughes*, 2015 IL 117242, ¶ 38 (quoting *People v. Caballero*, 102 Ill. 2d 23, 31 (1984)). Without defendant raising this argument in the trial court, the State had no opportunity to present evidence to rebut it. See *id.*, (noting "how new factual theories on appeal deprive the formerly prevailing party of the opportunity to present evidence on that point"); see also *People v. McAdrian*, 52 Ill. 2d 250, 254, (1972) ("The failure to urge a particular theory before the trial court will often cause the opposing party to refrain from presenting available pertinent rebuttal evidence on such theory, which evidence could have a positive bearing on the disposition of the case in both the trial and reviewing courts.").

¶ 84 Defendant maintains in his reply brief that this argument is not subject to forfeiture because it "supplements" the issue of suggestiveness raised in the trial court. We are not persuaded. The basis for the suggestiveness argument in the trial court was that Detective Erickson's conduct was improperly suggestive. Nothing in the motion or hearing challenged the method of the photo array, *i.e.*, that a sequential photo array was preferable. Since defendant

failed to raise this new theory in his motion to suppress in the trial court, we find the argument forfeited on appeal.

¶ 85 Defendant also argues that his trial counsel was ineffective for opening the door for the State to obtain an in-court identification of defendant by Lofton. Prior to trial, defense counsel successfully argued that the State's use of defendant's booking photo be barred from trial. Nevertheless, during Lofton's cross-examination, defense counsel used the photo, and the trial court subsequently allowed the State to present the photo to Lofton for identification on redirect. Lofton then testified that he was 100% sure defendant was the shooter. Defendant contends that no sound trial strategy could have existed for his attorney to use the barred photo "when the outcome would be to upgrade a tentative, at best, identification to one of complete certainty."

¶ 86 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that

course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶ 87 Even if we presume that trial counsel's performance was deficient, defendant cannot show prejudice such that there is a reasonable probability that the result of the trial would have been different. Defendant argues that the instant case is analogous to the decision in *People v. Dupree*, 2014 IL App (1st) 111872.

¶ 88 In *Dupree*, the defendant was on trial for first degree murder and attempted murder following a drive-by shooting. The evidence at trial established that gunshots were fired from a vehicle toward a group of people standing on the street. Several young men were in the vehicle and the victims could not identify the shooter. As part of the police investigation, the police interviewed two young men, both of whom initially denied involvement, but later admitted to being present in the vehicle and implicated the defendant as the shooter. *Id.* ¶¶ 3-4. At trial, the defense attorney questioned one of these men about his prior inconsistent statement in which he denied involvement for impeachment purposes. The witness stated that he initially lied to the police. *Id.* ¶ 14. After noting the discrepancies between his trial testimony and his initial statement, the defense attorney asked the witness "whether his 'enhanced memory' had just come to his mind in the last week." *Id.* On redirect, the witness explained that he was not telling the truth in his initial statement, but his statement the next day was the truth. The State made repeated references to the witness's second statement as the truth, with no objection. *Id.* ¶ 15.

¶ 89 On appeal, the defendant asserted that his trial counsel was suggesting that the witness's trial testimony was "of recent vintage," which allowed the State to present the witness's prior consistent statement to rebut the charge of recent fabrication. *Id.* ¶ 43. The reviewing court found that the trial counsel's action in raising the charge of recent fabrication, when counsel was aware

of the prior consistent statement, was deficient performance. Additionally, the court held that counsel erred by failing to object to the State's use of that consistent statement as substantive evidence and failed to request a limiting instruction. *Id.* ¶¶ 44-49.

¶ 90 The *Dupree* court concluded that the prior consistent statement was highly prejudicial because the evidence at trial was "far from compelling." *Id.* ¶ 54. The court noted that there was no physical evidence, including fingerprints, connecting the defendant to the shooting, the defendant had no prior altercation with the group on the street, and the two witnesses who identified the defendant as the shooter admitted to being present in the car and were not charged in connection with the shooting despite both having prior history with the victims' group. *Id.* The court also observed that the two witnesses provided conflicting accounts and the prior consistent statement of one witness may have impacted the jury's credibility determination, such that there was a reasonable probability that the result would have been different. *Id.* ¶¶ 55-56.

¶ 91 Here, while it is accurate that defense counsel opened the door to the admission of the booking photograph, the evidence against defendant was far more compelling than in *Dupree*. Defendant only argument as to prejudice is that, like *Dupree*, there was no physical evidence linking defendant to the shooting, and he presented a disinterested witness, Harlan, that exonerated defendant and implicated another. Defendant offers no argument on how but for the admission of his booking photograph, there was a reasonable probability that the result of the trial would have been different.

¶ 92 Defendant cannot establish this prejudice. Lofton had already testified that he was 80% sure of his identification of defendant as the shooter before being shown the booking photo. He also identified defendant in open court before any cross-examination. Further, Lofton was shown Kimbrough's photograph and he testified that Kimbrough was not the shooter. Additionally, the

evidence at trial showed that the van, registered to defendant, was found within a few blocks of the shooting, still warm within 15 minutes of the shooting. A handgun was visible inside the van, which matched the bullet subsequently recovered from Lofton. Footprints from the van led to Pete's Sports Bar, where defendant was located. Defendant also gave a statement to Detective Pieczul admitting to shooting at a vehicle because he thought the other driver appeared to be reaching for something. Based on the evidence presented at trial, we cannot say that absent the admission of defendant's booking photo, there is a reasonable probability that the result of the trial would have been different. Accordingly, defendant's claim of ineffective assistance fails.

¶ 93 Next, defendant contends that his right to confront witnesses was violated by the admission of the inference that Cordel Allen implicated defendant. Defendant bases this argument on two instances at trial. First, defendant contends that Detective Erickson testified that he spoke with Allen. However, our review of the record discloses that Detective Erickson did not give any testimony about interviewing Allen. The detective was asked if he spoke to witnesses before charging defendant, he answered "correct." The prosecutor then asked if one of those witnesses was Allen, but defense counsel objected before the detective answered and a sidebar occurred. Following the sidebar, no questions were posed to Detective Erickson about Allen. Thus, there was no testimony elicited from Detective Erickson regarding an interview with Allen and no basis for a claim of error. The remaining basis for defendant's claim is that Sergeant Rapacz testified that he spoke with Allen twice on December 7, 2007, and defendant was charged later that day. The substance of these interviews was not disclosed at trial.

¶ 94 "[A] law enforcement officer may testify about statements made by others, such as victims or witnesses, when such testimony is offered not to prove the truth of the matter asserted, but instead to show 'the investigative steps taken by the officer leading to the defendant's

arrest.' " *People v. Risper*, 2015 IL App (1st) 130993, ¶ 39 (quoting *People v. Pulliam*, 176 Ill. 2d 261, 274 (1997)). "This is not an exception to the hearsay rule; it is a relevant basis for admission of the testimony other than the truth of the matter asserted in those statements and, as such, is not hearsay in the first instance." *Id.* "The relevance of the testimony lies in explaining to the jury how a law enforcement investigation led to the defendant. Without such testimony, a jury might not understand how an officer got from point A to point C; it might appear to the jury that the officer had less than a valid basis for considering the defendant to be a suspect." *Id.* "Because it is not hearsay, testimony recounting the steps taken in a police investigation does not violate defendant's sixth amendment right to confront the witnesses against him." *Id.* ¶ 40. "This holds true even if, as a result of this testimony, a jury might be able to infer 'that the police began looking for a defendant as a result of what nontestifying witnesses told them.' " *Id.* (quoting *People v. Henderson*, 142 Ill. 2d 258, 304 (1990)).

¶ 95 Defendant concedes that the testimony was admissible under Illinois case law, but nevertheless asserts that the testimony should have been excluded because it served no purpose other than to imply that Allen implicated defendant. However, the State argues that defendant has forfeited this argument by failing to preserve it in the trial court. In his motion for a new trial, defendant claimed, "the Court erred in allowing testimony from Kevin Rapacz about interviewing Cordel Allen and that Cordel Allen was deceased."

¶ 96 To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). "The posttrial motion must specify the grounds for a new trial." *People v. Lewis*, 223 Ill. 2d 393, 400 (2006). "Raising a general rather than a specific error in a posttrial motion results in waiver of that issue on appeal." *People v. Howell*, 358 Ill. App. 3d 512, 521 (2005). Failure to do so operates as a forfeiture as to

that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). In his reply brief, defendant asserts that he sufficiently raised the issue in his motion for a new trial. We disagree, the motion for a new trial failed to raise a general claim of error, and not the specific basis now asserted on appeal, *i.e.*, a violation of defendant's confrontation rights. Defendant then belatedly seeks review under the plain error rule in his reply brief, but Supreme Court Rule 341(h)(7) provides that "[p]oints not argued are waived and shall not be raised in the reply brief." Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Since defendant failed to preserve this issue on appeal and failed to raise the plain error rule in his opening brief, we find this issue to be forfeited.

¶ 97 Defendant next argues that his right to a fair trial was violated by the State's improper cross-examination of Harlan and improper closing arguments. We will address defendant's claim of improper cross-examination first.

¶ 98 Specifically, defendant asserts that the State improperly asked Harlan about his financial well being, including whether he could support himself and whether he was homeless, and then followed with questions as to whether Harlan had been in contact with defendant or his family and friends. Defense counsel objected, and at a sidebar, asked the State to make an offer of proof that defendant or his family paid Harlan for his testimony. The trial court overruled the objection. However, this issue was not raised in defendant's motion for a new trial, and therefore, was forfeited on appeal. As we previously stated, defendant must object both at trial and in a written posttrial motion to preserve an issue for review (*Enoch*, 122 Ill. 2d at 186), and the failure to do so forfeits the issue on appeal (*Ward*, 154 Ill. 2d at 293). Defendant has not asked this court to review this issue under the plain error rule. Accordingly, this issue has been forfeited on appeal.

¶ 99 Forfeiture aside, the prosecutor's cross-examination of Harlan was proper.

> " 'Generally, cross-examination is limited in scope to the subject matter of direct examination of the witness and to matters affecting the credibility of the witness. [Citations.] However, this limitation is construed liberally to allow inquiry into whatever subject tends to explain, discredit, or destroy the witness' direct testimony. [Citation.]' " *People v. Brazziel*, 406 Ill. App. 3d 412, 429 (2010) (quoting *People v. Terrell*, 185 Ill. 2d 467, 498 (1998)).

¶ 100 It is within the trial court's discretion to determine the latitude to be given on cross-examination. *Id.* We will not interfere with the trial court's decision unless the court clearly abused its discretion such that there is manifest prejudice to the defendant. *Id.* Here, defense counsel objected and after a sidebar, the trial court overruled the objection. We find no abuse of discretion in the prosecutor asking Harlan about his potential bias or motive to testify at trial.

¶ 101 Defendant next contends that his right to a fair trial was violated by the State's improper closing argument. Defendant focuses on three comments during rebuttal closing argument that he asserts were objectionable. However, of the three comments, an objection was made as to one, and none of them were raised in defendant's posttrial motions. Again, defendant must object both at trial and in a written posttrial motion to preserve an issue for review (*Enoch*, 122 Ill. 2d at 186), and the failure to do so forfeits the issue on appeal (*Ward*, 154 Ill. 2d at 293). Defendant then belatedly seeks review under the plain error rule in his reply brief by referring to his previous claim for plain error review, but he makes no specific argument about why this claim of prosecutorial misconduct falls under either prong of the plain error rule. Further, as we already observed, Supreme Court Rule 341(h)(7) provides that "[p]oints not argued are waived and shall not be raised in the reply brief." Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Because defendant

failed to preserve this issue on appeal and failed to raise the plain error rule in his opening brief, we find this issue to be forfeited.

¶ 102 Forfeiture aside, we find no error. Generally, a prosecutor is given wide latitude in closing arguments, although his or her comments must be based on the facts in evidence or upon reasonable inferences drawn therefrom. *People v. Page*, 156 Ill. 2d 258, 276 (1993). "The prosecutor has the right to comment on the evidence and to draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant." *People v. Simms*, 192 Ill. 2d 348, 396 (2000). "Whether a prosecutor's comments or arguments constitute prejudicial error is evaluated according to the language used, its relation to the evidence, and the effect of the argument on the defendant's right to a fair and impartial trial." *Id*. "In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Stated another way, "[p]rosecutorial misconduct warrants reversal only if it 'caused substantial prejudice to the defendant, taking into account the content and context of the comment[s], its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial.' " *People v. Love*, 377 Ill. App. 3d 306, 313 (2007) (quoting *People v. Johnson*, 208 Ill. 2d 53, 115 (2004)). "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Wheeler*, 226 Ill. 2d at 123.

¶ 103 Defendant does not address an error individually, but rather, makes an argument that all of the objectionable comments deprived him of a fair trial. For the first two comments, defendant does not quote the transcript of the comments raised on appeal, but summarizes the gist of the

comments. We will quote the comments to show the comments in their entirety and in context. The first complained-of comment was as follows:

> "Harl[a]n came in here. Harl[a]n, who is homeless, nothing against homeless people, but he is homeless. He stays from place to place for five years, hasn't talked to anybody, defendant's family, defendant's friends, the defendant, but he sure pops up like a daisy; didn't he? He had no problem finding him. Five years of obscurity, hasn't told anybody his story, no one, zilch."

¶ 104 The second comment was:

> "This is a photo from 2007. Contradicted by the actual evidence. Vincent Harl[a]n was lying. Not even the defense wants to touch that one. He was up there lying. He was embellishing and exaggerating and lying. They needed Gregory Kimbrough to be the shooter. He gave it to them. He even gave them long braids.
>
> Would you -- where did he hear that, long braids? How did he find that out? And he's had no contact with the defendant or his friends or his family in five years? How did he find out what he needed to say, long shoulder length –
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Objection overruled. Attorneys can argue reasonable inference from the evidence.
>
> Ladies and gentlemen, I will instruct you again that what the attorney says is not evidence.

PROSECUTOR: After all, he doesn't care. He said he saw – he was in the bar, that dark bar, and he saw the keys transferred. Isn't that convenient? He just happened to look up at the exact moment the keys are transferred, and he could see across a crowded bar from the distance of the witness stand to the back of my table with nobody in between, seeing an item as small as keys being transferred, because they need the keys to be transferred. Defense needs to be transferred away from the defendant.

So here is Johnny on the spot. He's here to put it on Gregory Kimbrough. He's what they need, and he's going to transfer those keys for him, even though its [*sic*] ridiculous that you can see across a dark crowded bar something as small as keys being transferred."

¶ 105 The third complained-of comment was:

"[Lofton] came in to have justice, and counsel talks about what a horrendous wound it is. Let me say this: We are not asking you for sympathy for Michael Lofton. He gets sympathy from people every day. He doesn't need that from you, ladies and gentlemen, you twelve people. He needs justice, justice from you. That's what he asks. That's what the facts of this case demands. That's what the law demands, justice, because today is Michael Lofton's day for justice."

¶ 106 We find no errors in these comments. First, we note that defense counsel's argument attacked Lofton's identification as suggested by Detective Erickson, asserted that defendant was arrested solely because the van was registered to him and Kimbrough was the perpetrator, and that Harlan's testimony was credible. In response, the prosecutor properly argued that Harlan's testimony was not credible, pointing out that he did not come forward until trial and never told his version of events before trial. "The prosecutor may also respond to comments by defense counsel which clearly invite a response." *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). Moreover, "[i]t is proper for a prosecutor to reflect upon the credibility of witnesses and urge the fearless administration of the law if it is based on facts in the record or inferences fairly drawn from the facts elicited." *People v. French*, 2017 IL App (1st) 141815, ¶ 48 (citing *People v. Bryant*, 94 Ill. 2d 514, 523-24 (1983)). Additionally, "the State may denounce the activities of the defendant and urge that justice be administered." *People v. Goins*, 2013 IL App (1st) 113201, ¶ 93. Since the prosecutor's arguments were proper, defendant's claims of prosecutorial misconduct fail.

¶ 107 Defendant next argues that the cumulative effect of these errors deprived him of a fair trial. Since we have found that defendant's claims of error were either not error or forfeited, we decline to hold that the cumulative effect of these claims deprived defendant of a fair trial.

¶ 108 Finally, defendant contends that the trial court conducted an improper hearing on his *pro se* posttrial allegations of ineffective assistance of trial counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant obtained new counsel after the trial, but his new attorney declined to adopt defendant's *Krankel* petition, so defendant appeared *pro se* at the hearing. Defendant asserts that the trial court "exceeded the scope of an appropriate examination, and turned the inquiry into an adversarial proceeding, which [defendant] was forced to defend

without the assistance of counsel." The State maintains that defendant's argument is "unfounded."

¶ 109 In his petition, defendant argued that his trial counsel was ineffective for failure to investigate an alibi defense, failure to present evidence of Detective Erickson's prior allegations of misconduct, failure to communicate a plea offer of 15 years, and failure to present Hill at the hearing on defendant's motion to quash arrest.

¶ 110 The issue of whether the circuit court properly conducted a preliminary *Krankel* inquiry presents a legal question that we review de novo. *People v. Jolly*, 2014 IL 117142, ¶ 28. Under *Krankel*, when a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel, the trial court must conduct some type of inquiry into the underlying factual basis of the defendant's claims. *People v. Moore*, 207 Ill. 2d 68, 79 (2003). If the allegations "show possible neglect of the case," the court should appoint new counsel to represent the defendant at an evidentiary hearing on his *pro se* claims. *Id*. at 77-78. However, if after the preliminary inquiry, the trial court determines that the claims lack merit or pertain only to matters of trial strategy, the court may deny the *pro se* motion without appointing counsel. *Id*. at 78. "[T]he goal of any *Krankel* proceeding is to facilitate the trial court's full consideration of a defendant's *pro se* claims of ineffective assistance of trial counsel and thereby potentially limit issues on appeal." *Jolly*, 2014 IL 117142, ¶ 29.

¶ 111 At the preliminary inquiry, " 'some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim.' " *Id.* ¶ 30 (quoting *Moore*, 207 Ill. 2d at 78). "Thus, the trial court may inquire with trial counsel about the facts and circumstances surrounding the defendant's

allegations." *Id.* "The court may also briefly discuss the allegations with defendant." *Id.* "Finally, the trial court is permitted to base its evaluation of the defendant's *pro se* allegations of ineffective assistance of counsel on its knowledge of defense counsel's performance at trial." *Id.* Because a defendant proceeds *pro se* during the court's preliminary investigation, the initial Krankel "inquiry should operate as a neutral and nonadversarial proceeding." *Id.* ¶ 38. If the State participates in the initial proceeding in a manner that is more than *de minimis*, then the potential exists that the inquiry becomes adversarial and circumvents the creation of an objective record for review. *Id*.

¶ 112 At the hearing, defendant argued his petition. He asserted that his trial counsel did not investigate his alibi that he was at Pete's Sports Bar, nor did his attorney investigate "dirty officers that was [*sic*] tampering with evidence." Trial counsel appeared at the hearing and denied all of defendant's claims. Counsel stated that he hired a private investigator to seek out "existing witnesses that [defendant] had indicated who supported his defense." Counsel said that one witness, Harlan, testified at trial, another witness, Allen, was deceased, and despite his efforts, the third witness, Kimbrough, was unable to be found. The court asked counsel if he was able to speak to other alibi witnesses, and counsel answered, "no." Counsel also discussed defendant's refusal to accept an offer of 18 years from the ASA, and the attorney's negotiations seeking 15 years. Counsel stated that defendant's allegation that counsel failed to investigate misconduct by Detective Erickson were false. Counsel explained that the allegations had no bearing on the case where Detective Erickson's involvement in the case was only identification, which was litigated.

¶ 113 In response, defendant argued that he was never told about an offer of 15 years, which he would have considered, but he was offered 18 years. The court asked the State if defendant was

offered 15 years, and the prosecutor responded that no offer of 15 years was made. Trial counsel clarified that he had attempted to negotiate a plea deal for 15 years, but it was never offered. The State indicated that a plea offer of 18 years was offered to a prior attorney for defendant and rejected. Defendant also disputed counsel's statement that counsel hired an investigator, defendant contended that his family hired the investigator.

¶ 114 The court passed the case before issuing its ruling. The trial court made extensive findings on the record detailing defendant's case since 2008. The court noted that it had observed defendant's conduct in the courtroom including the jury trial. The court specifically detailed defendant "consistently changing attorneys" over the pendency of the case. The court continued by discussing defendant's representation and interaction with four attorneys.

¶ 115 As for trial counsel, the court pointed out that trial counsel appeared for defendant in October 2010, and filed a motion to suppress identification, which was withdrawn. The court stated that trial counsel was "consistently speaking with his client and filing things at his client's request. That I know for a fact [defendant] because I have been the judge on this case, and I have watched you come out and watched the interaction with you and your attorneys." The court noted that trial counsel withdrew in August 2011, and defendant was then represented by the public defender. Trial counsel filed an appearance again in January 2012, and remained on the case. The court observed that the case was four years old at that point. The court detailed trial counsel's litigation of motions to quash arrest, and to suppress identification. The court stated that it

> "has been more than patient with [defendant] changing attorneys, changing his mind, negotiating, getting upset with offers, directing his attorneys to file things on his behalf.

The defense has been doing this for many years. This Court has engaged in numerous litigation – quite a bit of litigation with the defendant. I have observed the defense counsel who tried this case on this matter. He cross-examined the witnesses in this matter.

The defendant answered ready for trial with his attorney who was representing him for the second time. This case was quite old. It was five years old at the time it finally went to trial. Clearly the defendant indicated on the record he was ready for trial. His alibi was put forth in that there was a witness who testified at the trial at the direction of the defendant, that being Vincent Harl[a]n. He testified for the defendant. The defendant did not testify. This Court addressed the defendant prior to [trial counsel] resting his case, and the defendant chose not to testify. The State put in rebuttal evidence.

Clearly the defendant was going along with his trial – with the trial posture. He did not raise any concerns to this Court during the jury trial that he chose to proceed on.

Now defendant has been found guilty of the offense of attempt first degree murder, aggravated battery with a firearm and the extra enhancement, and the Court does not find that the defendant's allegation have any merit.

The Court listened to the defendant's allegations. I have listened to [trial counsel], and I have been the trial judge on this

> matter for six years. He goes back to 2007, seven years, because the defendant had two matters before he picked up this 2008 case, so [defendant] has been in front of me for numerous years, and clearly he's not ready to do something, as you can see in this *Krankel*, he certainly speaks up and says he is not ready to proceed. He indicated he was ready for trial. His witnesses were here. He proceeded to trial.
>
> I don't find that the defendant's allegations that defense counsel did not seek out his alibi witnesses, that defense counsel was ineffective – I do not find this has any merit based upon what I am hearing from the defendant and what I am hearing from [trial counsel]; therefore, the Court does not find that the defendant's rights were violated and that he – there was no ineffective assistance of counsel."

¶ 116 We find no merit to defendant's argument that the trial court improperly conducted the *Krankel* hearing. The hearing was not adversarial in nature. The court properly asked questions of trial counsel, and the State's participation was *de minimis*, limited to only answer questions over whether a plea offer of 15 years had been made. The court did not ignore defendant's claim of neglect in its finding, rather the court extensively detailed defendant's case and its own observations of defendant's actions during the pendency of the case. Trial counsel's response was not adversarial, but explained his actions in representing defendant.

¶ 117 While there was no discussion on the record by defendant, trial counsel, or the court regarding defendant's claim in his petition that his attorney was ineffective for failing to call Hill

at the hearing on the motion to quash, we decline to assume that the court did not consider defendant's written motion in finding no merit to his claims. Defendant bases this claim on Hill's handwritten note tendered to the State immediately prior to trial in which he denied identifying defendant's van to police. However, the fact that Hill recanted his identification of defendant's van prior to trial does not establish how Hill would have testified at the hearing on the motion to quash, had defense counsel called him. Whether to call Hill at that hearing was a matter of trial strategy, which does not support a finding that defendant's *Krankel* petition should have proceeded beyond the preliminary inquiry.

¶ 118 Further, we find the instant case distinguishable from the circumstances present in *People v. Jackson*, 2014 IL App (1st) 133741, which defendant cited for support. In *Jackson*, the defendant argued that the trial court erred in conducting his *Krankel* hearing as follows:

> "(1) The trial court did not first consider the claim for possible neglect and then decide whether to appoint independent counsel but, instead, proceeded directly to the merits and ruled that defendant failed to establish a *Strickland* claim; (2) The trial court relied on evidence beyond the record—that the purported witness *** had been incarcerated with defendant—in rejecting defendant's claims of inadequate investigation by trial counsel; (3) The trial court misinterpreted our mandate and concluded that defendant's claim of ineffective assistance related to the Rule 431(b) admonishments was not to be considered; and (4) The trial court did not inquire of trial counsel about defendant's complaints of ineffectiveness." *Id.* ¶ 75.

¶ 119 The State conceded the first three claimed errors and agreed that the defendant was entitled to a new *Krankel* hearing. *Id.* ¶ 76. This court agreed with the parties and remanded for a new *Krankel* hearing before a new judge. *Id*. ¶ 103. None of these significant errors occurred in this case.

¶ 120 Here, the trial court did not consider defendant's claims under the *Strickland* standard, but rather found that his claims lacked merit. Defendant appears to conflate the use of the word "merit" to mean that the court reached the *Strickland* standard. However, as we previously stated, if after the preliminary inquiry, the trial court determines that the claims lack merit or pertain only to matters of trial strategy, the court may deny the *pro se* motion without appointing counsel. *Moore*, 207 Ill. 2d at 78. The trial court's finding that defendant's claims lacked merit was appropriate and comported with relevant case law. Moreover, the court in this case did not consider matters outside of the record, nor misapply a prior mandate, as the court did in *Jackson*. We find *Jackson* distinguishable for these reasons. We find no error in the trial court's conducting of defendant's *Krankel* hearing, and affirm its holding that defendant's claims lacked merit to proceed beyond the preliminary inquiry.

¶ 121 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 122 Affirmed.