2016 IL App (1st) 142881-U
No. 1-14-2881
July 26, 2016

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiff-Appellee,	)	
	)	No. 12 CR 22533
v.	)	
	)	
MARTELL WALKER,	)	The Honorable
	)	Tommy Brewer,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: When the defendant, the judge and the attorneys do not expressly raise the issue of ineffective assistance of counsel, the judge does not have a duty to hold a *Krankel* hearing *sua sponte*. The State cannot properly create separate crimes of attempted murder from several gunshots on appeal, when the State made no apportionment of the charges between the shots in the charging instrument or at trial.

¶ 2 Following a bench trial, the trial court found Martell Walker guilty of aggravated battery, attempted armed robbery, and three counts of attempted murder. In this appeal, Walker argues: (1) the evidence did not prove him guilty beyond a reasonable doubt; (2) the trial

court should have ordered a hearing on the effectiveness of Walker's attorney, even though Walker never claimed that he received ineffective assistance of counsel; and (3) under the one-act, one-crime rule, this court should vacate four of the five convictions. We hold that the eyewitness testimony sufficiently supports the convictions; on this record, the trial court had no duty to raise the issue of ineffective assistance of counsel *sua sponte*; and, applying the one-act, one-crime rule, we vacate two of the convictions for attempted murder and the conviction for aggravated battery. In all other respects, we affirm the trial court's judgment.

¶ 3 BACKGROUND

¶ 4 Around 7 p.m. on October 9, 2012, Jesus Hogue left a store on 144th Street in Riverdale, Illinois. A man came up from behind Hogue and tried to rob Hogue. Hogue hit the man in the face repeatedly. The robber landed a blow, then stepped back and pulled out a gun. He fired two bullets into Hogue's leg and four into Hogue's abdomen, then ran off.

¶ 5 Lejuan Sipp, who lived on 144th Street, heard the fight start. She went to her door and saw part of the fight and the shooting through a window in her door. She called 911. An ambulance took Hogue to a hospital, where emergency surgery saved Hogue's life. Hogue remained in the hospital for a week.

¶ 6 On October 19, 2012, police went to Hogue's home and showed him an array of photographs. Hogue picked a photograph of Walker as a picture of the man who shot him. That same day police showed a photo array to Sipp and her nephew, Brandon Green. They did not make a positive identification from the photo array. Sipp saw a lineup at the police station on October 22, 2012. She pointed to Walker as the man she saw shooting Hogue. Green also saw a lineup that included Walker, but he did not identify anyone as the shooter.

Hogue saw a lineup at the police station on October 24, 2012, and he again identified Walker as the man who shot him.

¶ 7 A grand jury returned an indictment of Walker on five counts, including one count of attempted armed robbery, one count of aggravated battery, and three counts of attempted murder. The aggravated battery and the three attempted murder counts all charged that Walker shot Hogue. One attempted murder count added that the shooting caused great bodily harm; a second count added that the shooting caused a permanent disability; the third attempted murder count added that the shooting caused permanent disfigurement.

¶ 8 At the bench trial, the prosecutor presented no evidence concerning the investigation or why police included Walker's picture in the photo arrays they showed to Hogue, Sipp and Green. Hogue testified that when Walker came up from behind Hogue on October 9, 2012, Walker told Hogue to "Run them pockets." Hogue explained that Walker meant that he intended to take from Hogue anything Hogue carried in his pockets. At the time, Hogue had a phone and some cash. Hogue testified that "[i]t was getting dark," but with the streetlights on, "it was perfect lighting." Hogue said the assailant's face had a goatee but no scars or tattoos. Hogue estimated that he fought with Walker for three minutes before Walker pulled out the gun.

¶ 9 Sipp testified that when she heard the fighting, she went to her front door and looked out through the crescent-shaped window in her front door. Green also came to that front door and looked out through the window. Because the front door was very close to the sidewalk, Sipp stood, behind her door, about four feet away from the fighters. Streetlights gave her a

clear view of the shooter, especially when, in the course of the fight, the hood of his hoodie fell back off his head. Sipp identified Walker in court as the shooter.

¶ 10 Sipp testified that when she saw the photo array, she was "90 percent sure" she saw a photo of the shooter, but she "wanted to see the body build" because she "wanted to be sure before *** pick[ing] out somebody that *** could ruin their lives." When she saw the lineup in person she had no doubt about her identification of the shooter. On cross-examination, she guessed she saw the fighting and shooting for "about 7 seconds." She did not notice any scars or tattoos on the shooter's face, nor did she see "anything unusual" about the shooter's face. Sipp did not mention a goatee. Photographs of the lineup at the police station showed that Walker had a goatee and no facial scars or tattoos.

¶ 11 The parties stipulated that the surgeon who treated Hogue would testify about Hogue's injuries, including the loss of his spleen and half of his pancreas. The parties also stipulated that Green would testify that he looked at the fight, and he could not identify anyone in the photo array or the lineup as the shooter.

¶ 12 The trial court found Walker guilty on all five counts. Immediately after the trial court announced its finding, a woman in the courtroom spoke up. The transcript reads as follows:

"THE COURT: Who are you, ma'am.

UNIDENTIFIED SPEAKER: I am his girlfriend.

***

Can I please say something?

> I know that you all made your decision, but he was with me on the night -- the whole day, okay. The whole day.
>
> The next morning when the police came to get him, they told us they were coming to get him for questioning. ***
>
> * * *
>
> I know that he didn't do it because he was with me the whole day on the 9th. This is a big mistake of identity."

¶ 13 Neither defense counsel nor Walker asked for leave to present the unidentified speaker as a witness. The court ordered a presentence investigation report and set a date for sentencing.

¶ 14 Walker's trial counsel filed a motion for a new trial. He said:

> "Sipp testified that she *** and her nephew all tried to look out the same window at the altercation in front of her house. She described the window as a crescent shaped window. She did not state that the window was partitioned. A picture of the window [attached to the motion] shows the window was partitioned into five small sections. ***
>
> *** Defendant's attorney told the Assistant State's Attorney that he had sent a subpoena to Green at [the street address of the fight on 144th Street]. The Assistant State's Attorney agreed that this was the correct address. It was not. Green, who lived with Sipp, now had a different address. Defendant's attorney did not learn this until after the case was over.

> *** Defendant had subpoenaed Green and wanted Green to testify as to what he could see. Since Green lived with Sipp, the Assistant State's Attorney should have known that defendant had the wrong address a few days prior to trial. Defendant was deprived of his right to call Green as a witness, and this was extremely important given Sipp's testimony."

¶ 15 The trial court denied the motion for a new trial, noting that defense counsel answered ready for trial. The presentence investigation report indicated that Walker had one prior felony conviction for possession of a stolen motor vehicle in 2008 and two misdemeanor convictions for possession of marijuana. The court sentenced Walker to 35 years in prison for each of the attempted murder convictions and the aggravated battery conviction, with all four sentences to run concurrently, and to 10 years for armed robbery, to run consecutively to the other sentences. Walker now appeals.

¶ 16 ANALYSIS

¶ 17 Walker argues on appeal: (1) the State did not present sufficient evidence to prove him guilty beyond a reasonable doubt of any of the charges; (2) the trial court had a duty to raise the issue of ineffective assistance of counsel *sua sponte*; and (3) the one-act, one-crime rule requires this court to vacate four of the convictions. Different standards apply to our review of the differing issues.

¶ 18 Sufficiency of the Evidence

¶ 19 We will not reverse a conviction due to insufficient evidence if any rational trier of fact could find that the State proved all the elements of the crime charged beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). The prosecution's case here

rested on the eyewitness identifications of Walker as the shooter. Eyewitness identification of the offender sufficiently supports a conviction, as long as the witnesses had an adequate opportunity to see the offender. *People v. Nightengale*, 168 Ill. App. 3d 968, 973 (1988). When courts review identification testimony, they should consider "(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." *People v. Slim*, 127 Ill. 2d 302, 308 (1989).

¶ 20 Both Hogue and Sipp had an opportunity to see the face of the offender during the fight and during the shooting. Hogue estimated that he fought with the assailant for several minutes, and he had ample opportunity to see the assailant's face when he hit the assailant's face repeatedly. Sipp saw the assailant's face from only a few feet away, and with adequate lighting, but she estimated that she saw the assailant for only a few seconds. Both Sipp and Hogue paid attention to the assailant, especially during the fist fight, before the assailant drew his gun. Neither party presented any evidence concerning the descriptions of the offender given to police by Hogue and Sipp. Both Hogue and Sipp expressed complete certainty that they correctly identified the assailant in the lineup at the police station and in court. The crime occurred about 13 days before Sipp saw the lineup and 15 days before Hogue saw the lineup.

¶ 21 Of the five *Slim* factors, the lack of evidence about the descriptions favors the defense, and the passage of time slightly favors the defense. The opportunity to see the assailant, the degree of attention, and the certainty the witnesses expressed all favor the prosecution.

¶ 22 Walker argues that the weapon drew the witnesses' attention away from the assailant. See *People v. Allen*, 376 Ill. App. 3d 511, 525 (2007). The argument ignores the significant opportunity both witnesses had to view the assailant before he pulled out the gun.

¶ 23 Walker also argues that the court should not rely on the lineup identifications, because the police improperly suggested that the witnesses should identify a person in the lineup as the shooter. Police told both Hogue and Sipp, before they viewed the lineup, "The suspect in this case may not be in the line-up." Walker contends that the police thereby informed the witnesses that police had a suspect, and therefore the witnesses should make an identification. Walker argues that the police should have said, "the person who committed the crime may not be in the lineup." We do not find the language the police used impermissibly suggestive. Weighing all the *Sims* factors, we find the eyewitness testimony sufficient to support the convictions.

¶ 24 Ineffective Assistance of Counsel

¶ 25 In a line of cases starting with *People v. Krankel*, 102 Ill. 2d 181 (1984), our supreme court held that when a defendant, after a trial, alleges ineffective assistance of counsel, the court must examine the factual basis for the claim, and if the court finds possible neglect of the case, the court should appoint new counsel to assist the defendant with his claim for ineffective assistance of counsel. See *People v. Moore*, 207 Ill. 2d 68, 77-78; *People v. Taylor*, 237 Ill. 2d 68, 75-76 (2010). Usually, if the defendant has not clearly complained

about counsel's performance, the court has no duty to conduct a *Krankel* inquiry. See *Taylor*, 237 Ill. 2d at 75-76.

¶ 26 The appellate court in several cases has found that a court had a duty to conduct a *Krankel* inquiry, even though the defendant had not expressly argued that his counsel provided ineffective assistance. In *People v. Williams*, 224 Ill. App. 3d 517 (1992), defense counsel filed a posttrial motion in which he listed several alibi witnesses and characterized their potential testimony as newly discovered evidence, although counsel knew about the witnesses and some of the potential testimony prior to trial. The trial judge denied the posttrial motion, forcefully chastising counsel for mislabeling the evidence as newly discovered.

¶ 27 On appeal, Williams argued that the trial court had a duty to hold a *Krankel* hearing, even though Williams never requested one or specifically charged his counsel with ineffective assistance. The *Williams* court said:

> "At the post-trial motion, counsel revealed that he had additional witnesses who were not called at trial and who would have provided critical support to defendant's alibi defense. Counsel stated that the witnesses had been unavailable, but the record is silent as to what efforts counsel had made to present them. *** [T]he trial court correctly pointed out that the testimony was not and could not be considered as newly discovered.
>
> Defendant did not file a *pro se* petition or write to the judge claiming ineffective assistance of counsel. Nevertheless, the trial judge's strong comments to counsel at the hearing indicate that he was made aware of counsel's possible

> neglect. Where there is a clear basis for an allegation of ineffectiveness of counsel, a defendant's failure in explicitly making such an allegation does not result in a waiver of a *Krankel* problem. *** Fundamental fairness requires a further investigation of counsel's performance." *Williams*, 224 Ill. App. 3d at 524.

¶ 28 In *People v. Willis*, 2013 IL App (1st) 110233, defense counsel in a posttrial motion suggested that he committed an error that amounted to ineffective assistance of counsel. The trial judge pointed out that counsel faced a conflict of interest if he chose to pursue the claim of ineffective assistance. Counsel struck from the motion the paragraph concerning his error. The *Willis* court found that, because the attorney had raised a claim of his own error, the court had a duty to investigate the possibility of ineffective assistance, even though the defendant himself did not raise the issue. *Willis*, 2013 IL App (1st) 110233, ¶¶ 69-73.

¶ 29 Walker argues that after the trial, the trial court learned three facts that suggested ineffective assistance of counsel and imposed on the court a duty to conduct a *Krankel* inquiry *sua sponte*. First, in the motion for a new trial, defense counsel indicated that after the trial he discovered that the crescent shaped window in Sipp's front door had partitions. According to Walker, the court could infer that defense counsel had not investigated the scene of the offense. Second, defense counsel tried to subpoena Green, but he settled for a stipulation to Green's testimony when counsel discovered that he used an incorrect address on the subpoena. Walker argues that the failure to find Green's address shows inadequate preparation for trial. And third, a person in the courtroom told the court that she could have

provided alibi testimony for Walker. Nothing in the record explains why defense counsel chose not to call that person as a witness on Walker's behalf.

¶ 30 We find that the evidence of ineffective assistance of counsel here does not rise to a level that would impose on the court a duty to conduct a *Krankel* inquiry *sua sponte*. While defense counsel has a duty to investigate the circumstances of the offense, he may strategically conclude that viewing the crime scene would not likely help him prepare his client's defense. *People v. Domagala*, 2013 IL 113688, ¶ 38. The fact that the window had partitions adds very little to the understanding of the crime scene or Sipp's ability to view the assailant. Defense counsel admitted that he sought to produce Green at trial and explained why he believed he could rely on the information he received from the assistant State's Attorney concerning where to find Green. Defense counsel did not present any alibi testimony, although a person in court said she could have provided such testimony. The decision of whether to call a particular witness usually will not support a claim of ineffective assistance of counsel, because courts defer to counsel's strategic choice concerning which witnesses to present. See *People v. Patterson*, 217 Ill. 2d 407, 442 (2005).

¶ 31 We hold that instead of imposing on the trial court a duty to conduct a *Krankel* inquiry *sua sponte* whenever the court has any grounds for doubting counsel's performance, when no one expressly raises the issue of ineffective assistance, the courts may properly defer the issue until the defendant presents it in a postconviction petition. We will not reverse the trial court's judgment here due to the court's failure to raise the issue of ineffective assistance *sua sponte*.

¶ 32 One-Act, One-Crime

¶ 33 Walker argues that this court should vacate two of the three convictions for attempted murder, the aggravated battery conviction, and the armed robbery conviction, because the State based all the charges on a single physical act. The State argues that Walker waived the issue by failing to raise it in the trial court. We agree with Walker that the failure to raise the issue at trial does not prevent review, because a "one-act, one-crime violation affects the integrity of the judicial process and, therefore, satisfies the plain error rule." *People v. Lee*, 213 Ill. 2d 218, 226 (2004).

¶ 34 Next, the State contends that the convictions do not violate the one-act, one-crime rule because Walker shot Hogue six times. The State does not discuss or distinguish *People v. Crespo*, 203 Ill. 2d 335 (2001), on which Walker relied in his brief. In *Crespo*, the State charged Crespo with armed violence and aggravated battery in that he stabbed the victim. At the trial, the State proved that in a single stabbing incident, Crespo stabbed the victim three times. The State argued that the multiple wounds permitted the convictions for both armed violence and aggravated battery to stand.

¶ 35 The *Crespo* court said:

> "[E]ach of [the victim's] stab wounds could support a separate offense; however, this is not the theory under which the State charged defendant, nor does it conform to the way the State presented and argued the case to the jury.
>
> A careful review of the indictment in this case reveals that the counts charging defendant with armed violence and aggravated battery do not differentiate between the separate stab wounds. Rather, these counts charge

> defendant with the same conduct under different theories of criminal culpability. *** Nowhere in these charges does the State attempt to apportion these offenses among the various stab wounds.
>
> We believe that to apportion the crimes among the various stab wounds for the first time on appeal would be profoundly unfair." *Crespo*, 203 Ill. 2d at 342-43.

¶ 36 Here, the State charged Walker with shooting Hogue, and nowhere in the charges did the State attempt to apportion the offenses among the various gunshot wounds. Following *Crespo*, we will not permit the State to apportion the crimes among the various gunshot wounds for the first time on appeal. In the three counts for attempted murder, the State charged that the single shooting incident caused (1) great bodily harm, (2) permanent disability, and (3) permanent disfigurement. Under *Crespo*, the court must vacate the two least serious of the three convictions for attempted murder. However, we find no distinction between the three charges for sentencing, and we see no basis for asserting that one of the three counts charges the most serious crime. The parties cite us no case to help us decide which convictions to vacate. We follow *In re Rodney S.*, 402 Ill. App. 3d 272, 285 (2010), in which an appellate court faced with a problem of which conviction to vacate remanded the case to the trial court for that court to determine which count charged the most serious crime. We remand the case to the trial court for that court to determine which two convictions for attempted murder it will vacate.

¶ 37 We also agree with Walker that the State based the aggravated battery charge on the same physical act of shooting Hogue, so we vacate the aggravated battery conviction. See *Crespo*, 203 Ill. 2d at 341-42.

¶ 38 Finally, Walker argues that we should vacate the attempted armed robbery conviction under the one-act, one-crime rule. The *Crespo* court said:

> " 'Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. *** We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered.' " *Crespo*, 203 Ill. 2d at 340-41, quoting *People v. King*, 66 Ill. 2d 551, 566 (1977).

¶ 39 The conviction for attempted armed robbery required proof that Walker took a substantial step toward robbing Hogue while armed, and with intent to rob Hogue. 720 ILCS 5/8-4(a), 5/18-2(a)(1) (West 2012). The State relied on Hogue's testimony that Walker said, "Run them pockets," meaning that Walker intended to rob Hogue of everything of value in his pockets. The separate act of demanding Hogue's possessions permits the conviction for attempted armed robbery to stand along with the conviction for attempted murder.

¶ 40 CONCLUSION

¶ 41 The eyewitness identifications of Walker as the person who fought with and shot Hogue sufficiently support the convictions for attempted murder and attempted armed robbery. Because neither Walker nor anyone else suggested to the court that defense counsel provided ineffective assistance, we find that the trial court had no duty to conduct a *Krankel* inquiry *sua sponte*. We vacate the conviction for aggravated battery and we remand the case to the trial court for it to determine which two convictions for attempted murder to vacate under the one-act, one-crime rule. In all other respects, we affirm the trial court's judgment.

¶ 42 Affirmed in part, vacated in part, and remanded with instructions.