2016 IL App (2d) 140877-U
No. 2-14-0877
Order filed August 31, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TUAN C. FIELDS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 07-CF-1241 Honorable Susan Clancy Boles, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not manifestly err in denying defendant's *pro se* claims of ineffective assistance of counsel without appointment of new counsel. Further, the court conducted an adequate hearing into defendant's claims. Affirmed.

¶ 2 In 2008, a jury found defendant, Tuan C. Fields, accountable for the acts of his co-defendant, Darvin Henderson, and convicted him of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a) (West 2006)). The trial court sentenced defendant to consecutive terms of 25 years' and 8 years' imprisonment, respectively. Defendant appealed, and we rejected his argument, as to his attempted first-degree

murder conviction only, that the evidence was insufficient to sustain his conviction, as well as his argument that trial counsel provided ineffective assistance where he did not object to the State's introduction of gang-affiliation evidence. *People v. Fields*, 2013 IL App (2d) 120945, ¶¶ 29, 31, 35. We agreed, however, that defendant's *pro se* posttrial motion alleging ineffective assistance of counsel required remand because the State's participation at the preliminary inquiry into his claims rendered the hearing adversarial. *Id.*, ¶¶ 41-42.

¶ 3 The hearing on remand was conducted, and defendant now appeals the court's August 21, 2014, order, again denying his *pro se* posttrial motion alleging ineffective assistance of trial counsel. Defendant argues that: (1) the record reflects that trial counsel possibly neglected his case and, therefore, the trial court should have appointed new counsel to evaluate his ineffective-assistance claims; or (2) a new preliminary inquiry into his *pro se* claims must be held because the hearing was inadequate and the court applied the wrong standard, requiring him to show actual neglect or ineffective assistance, as opposed to possible neglect. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 The facts underlying defendant's conviction, as relevant to the issues raised in his initial appeal, may be found in our prior opinion. *Id.* at ¶¶ 3-24. Therefore, we repeat only those facts here that remain relevant and provide context to the instant appeal.

¶ 6 A. Trial

¶ 7 On April 30, 2007, Henderson fired a weapon, allegedly given to him by defendant, in the stairwell of an apartment building in Aurora. Rashod Waldrop died as a result of gunshot wounds and Jonathan Phillips sustained a head wound.

¶ 8 At trial, Robert Moore testified that he knew and was "like brothers" with defendant, who was known by the street name "Don Juan." Moore agreed that, on April 29, 2007, Phillips, Waldrop, defendant, Moore, and Michael Towns[1] were at a barbecue in Aurora when Henderson arrived; a fight ensued between Henderson, Waldrop, and Phillips. The fight became physical and Phillips snatched a gold chain off of Henderson's neck. Defendant was not involved in the fight. The fight broke up when Towns fired a shot from a silver, .357-caliber revolver into the air. Later, according to Moore, Henderson demanded that his chain be returned; Waldrop responded, "Get it in blood," and Phillips ripped the chain into pieces.

¶ 9 That evening, there was a party held in different apartments at 430 River Street in Aurora. The apartment building has a secured elevator lobby, and a door off of the lobby that leads to a stairwell. At the party, as defendant and Henderson exited a room, defendant said to Moore, "watch what me and Bling about to do." Moore saw Towns give defendant the gun that he had fired in the park. Defendant put the gun in his waistband and left.

¶ 10 The evidence further reflected that defendant and Henderson were seen outside the building, with Henderson putting on white gloves and wearing a hooded sweatshirt. Defendant told a witness, "We on some bullshit." Later, inside at the party, defendant said "follow me," and led multiple people, including Phillips and Waldrop, out of the apartment, down a hallway, and into a stairwell. While descending the stairs, Phillips and Waldrop passed by defendant and then Henderson fired gunshots. Everybody ran. Henderson was seen running out of the building

[1] In our prior decision, as well as various places in the record, Michael's last name is spelled "Townes". However, in his affidavit, he spelled his last name "Towns." Accordingly, in this order, we spell it "Towns."

with gloves on and a gun in his right hand. Waldrop sustained three gunshot wounds and blunt force trauma to the back of his head; he died in surgery.

¶ 11 Defendant's friend, Earl James, testified in exchange for a deal with the State. James had known defendant for several years and he spent time with defendant in the same jail cell. While there, defendant told James that he gave Henderson the gun while outside the apartment building and that he then returned to the apartment party while Henderson went into the stairwell.

¶ 12 Officer Kevin Jenkins interviewed defendant, who initially denied any involvement in the shootings. In part, defendant later admitted that he obtained Towns' gun inside the building that night. He conceded that Henderson was the shooter and that he admitted Henderson into the elevator lobby through a secured door.

¶ 13 B. Posttrial Hearings on *Pro Se* Ineffective-Assistance Claims

¶ 14 On October 19, 2010, defendant filed an amended *pro se* posttrial motion asserting approximately 15 claims of ineffective assistance, including counsel's alleged failure to present and interview witnesses who could have testified on defendant's behalf. Defendant subsequently amended the motion and attached to his various amended motions affidavits from those witnesses claiming that, although they were willing to testify, they were not contacted by defense counsel. Specifically at issue on appeal are defendant's claims that trial counsel was ineffective for failing to interview and present JaQuay Fields, Richard Scales, Martin Craig, Michael Towns, and Jonathan Phillips.

¶ 15 1. First *Krankel* Hearing

¶ 16 On February 16, 2011, judge Karen Simpson (who did not preside over defendant's trial) held a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). Defense counsel Frank Valenti testified that, with co-counsel, he tried defendant's case. Valenti testified that, in

general, he considered everything that defendant and defendant's family provided, such as lists of witnesses and their anticipated testimonies. "In each and every case[,] we either spoke to those witnesses, and if we didn't call them, it was because what they were telling me either didn't match up to the facts that I knew to be true facts in the case, or in fact, the times didn't match up with what I –what I knew to be the true times of the case, I didn't think what they were going to say would in any way rebut anything in the State's case, Judge ***."

¶ 17 Valenti was asked about each witness. First, according to her affidavit dated April 16, 2010, JaQuay Fields, defendant's sister, would have testified that "Jr.", *i.e.*, Moore, told her that the only reason he testified against defendant is because the police told him that, if he did so, he would receive a "get out of jail free card," and that she obtained a letter (or possibly an affidavit) from Moore admitting to that fact. JaQuay claimed that she gave Moore's letter to defendant's trial counsel and was ready and willing to testify, but she was never called. Valenti was aware of JaQuay, but he had not seen her affidavit attached to defendant's motion. After reading it aloud, Valenti commented that Moore's promise of leniency from the State in exchange for his testimony was, in fact, addressed at trial through cross-examination of Moore. Indeed, at trial, counsel cross-examined Moore concerning his deal with the State and cross-examined Moore with the affidavit referenced by JaQuay. Moore disavowed it; he claimed that he did not write it and that it did not contain his signature. The State moved to bar JaQuay's potential testimony, arguing that it would not impeach Moore. The court denied the motion, but the defense had not yet decided whether it would call her. Obviously, counsel ultimately chose not to do so.

¶ 18 Second, an affidavit from Richard Scales dated October 27, 2009, stated that, contrary to Moore's trial testimony that his friend "Little Richard" was with him at the party and that he drove to the party with Scales, Scales was not present at the party on the evening of April 29,

2007. Scales wrote that he was willing to testify, but defendant's lawyers never contacted him about doing so. Defendant argued that, as Scales's testimony contradicted Moore, it was relevant to Moore's overall credibility as a witness. Valenti stated that, although he knew about Scales, he never spoke with him. Rather, when Valenti was advised about what Scales would say, he determined that "it didn't match up with what we knew to be the facts, so we never went down that road anymore." Valenti testified that he made the decision that Scales's testimony did not help defendant's case. "[I]n essence, he said he wasn't there. And that didn't help us in any way shape or form. I mean, I could have gotten 20 people to say I wasn't there."

¶ 19 Third, defendant submitted an affidavit from Martin Craig, Jr., that was dated April 6, 2010. The affidavit stated that Craig was willing to testify on defendant's behalf that:

> "Robert Moore (Don Juan Jr. or Junior) told me at Kane County Jail that he was going to make up [a] story about Don Juan's case just to get out of jail so his girlfriend wouldn't leave him. At that time I did not know who Don Juan was until my uncle (Wendell Thompson) told me that he knew who Don Juan was and Junior told him the same thing. Wendell said he was going to let Don Juan know when he seen him. I told him to let me know if Juan need me for court because that's bogus."

¶ 20 According to defendant, the affidavit again relates to Moore's credibility and motive to fabricate testimony. Valenti first stated that he "never heard of Mr. Craig." Then, he later commented in the same hearing that the problem "we had with the affidavit, he's Don Juan, and he was referring to somebody else saying stuff who's Don Juan. We evaluated that and said it is not a reliable witness, Judge, he can't get the names right as to who Mr. Fields is." (Specifically, the confusion stemmed from the fact that *defendant's* nickname is Don Juan. Notably, as

defendant argues on appeal, the affidavit is dated almost two years after defendant's trial, so counsel's suggestion that he reviewed it before trial is questionable).

¶ 21 Fourth, an affidavit from Towns dated August 20, 2010, stated that he was willing to testify that he never gave defendant a gun prior to the April 29, 2007, shooting. Towns stated that he left voicemails for defendant's trial counsel, explaining that he was willing to testify and providing his contact information, but he never received a return call. Valenti testified, "Judge, we evaluated Mr. Towns. I didn't find him to be credible. I started matching up the times [with] what he was saying, the times didn't match up. Things didn't match up. We chose not to call him, Judge." The judge asked counsel to "expand" on what he meant when he said he "evaluated" Towns. The following ensued:

> "COUNSEL: We did what they did. Their trial, Judge, is we had extensive videos, and with the video we were able to put times together on things. And when I spoke to this witness regarding times, times weren't matching up with what I know to be the true facts.
>
> Plus, I did have with the video, Judge, is the times were pretty good, pretty easy to see the times, and nothing he said matching up, and I didn't want to put him on because I didn't think he was going to help us and I believe we discussed this the day of the trial.
>
> DEFENDANT: No. What it is, how, I don't understand what time has to do with him saying that he didn't provide, him going to testify he didn't, he didn't provide me with a gun, when Robert Moore, what does it have to [do] with time?
>
> You didn't see, no, you didn't see Michael Towns not once on that video. This was in the apartment, Robert Moore testified that he seen me getting a gun from this person. Where does time come in at?

COURT: Mr. Valenti, can you help me out?

COUNSEL: I just know now, we went through this stuff, we chose not to call him."

¶ 22 The State then commented that it recalled that Towns had an extensive criminal history, which it would have used for impeachment, suggesting that fact might have impacted defense counsel's decision (we, of course, held in our prior decision that the State's input of this sort was improper). Counsel then agreed, "That's part of it. We didn't believe he would be credible." Defendant then interjected:

"It wasn't up to either one of those, it's up to the trier of fact to decide whether he was credible or not. Just like everybody that came on the stand had an extensive background, cases pending, so what does it matter ***. Why would he not call this person as testimony and let the trier of fact decide who and who not to be credible. He, they, they are going to people that got cases pending and getting deals from the State. What's the difference with Mr. Towns?"

¶ 23 As noted, on appeal after the first *Krankel* hearing, we remanded for a new preliminary inquiry, without adversarial State participation, into defendant's *pro se* claims. *Fields*, 2013 IL App (2d) 120945, ¶¶ 41-42.

¶ 24 2. Second *Krankel* Hearing

¶ 25 On August 20, 2014, Judge Susan Clancy Boles held a second *Krankel* hearing. At the outset, the judge acknowledged that the parties were appearing for a preliminary hearing on defendant's *pro se* motion alleging ineffective assistance. Further, the judge stated: "And for purposes of the record and so everyone knows here, I have had the opportunity to read the entire trial transcript. It's quite voluminous, but I read all the transcript[s.]"

¶ 26 By the hearing date, defendant had added to his amended motion an affidavit dated August 18, 2011, from victim Phillips, attesting that he was "confident" that defendant had "nothing to do" with the April 29, 2007, shooting. "I don't wish to indulge any further about the shooting, but know that [defendant] *did not* take *any* part in what transpired ***." (Emphasis in original.). Phillips attested that he "cannot allow, as long as I can help it, for [defendant] to be imprisoned for a crime [he] has nothing to do with."

¶ 27 At the second *Krankel* hearing, the judge asked Valenti for his position with respect to defendant's claims about witnesses who were not called. Valenti explained generally that, when he began representing defendant, he made a timeline of the events, based on reports and witness statements. Then, when he received statements from the witnesses whom defendant had identified, "it became apparent that what they were saying just wasn't credible. It was not possible for what they were saying to have occurred given facts I knew that were in fact definite facts."

¶ 28 Valenti said that, "Mr. Craig, and I think I said last time, I never heard of Mr. Craig, Judge, at all. That name was never tendered to me[.]" Valenti explained that when defendant or his mother presented him with possible witnesses, he would invite them to come to the courthouse, where he met with most potential witnesses:

> "They would come to court, and I would talk to them in the hallway, and I would go through this, and after about [10], 15 minutes, you realize that they really were just trying to say whatever they could to help him, but it didn't fit, and I said, you're not really going to help, you get on the witness stand, and next thing we know, your whole statement is just destroyed, it's not credible, we can't do that, and then everybody just kind of backed off, Judge."

¶ 29 The judge then confirmed that, with the exception of Craig and Phillips, Valenti either discussed or reviewed statements by the other witnesses and, after comparing those statements with the facts that he already knew, decided not to call them. As for Phillips, Valenti did not recall defendant informing him that Phillips wanted to talk or was willing to testify on defendant's behalf. Later in the hearing, Valenti reiterated that, prior to trial, he and co-counsel reviewed each potential witness and what he or she might say, "and I am of the position, Judge, that if you are going to put a witness on, the witness really has to be consistent regarding what they said, and we didn't have any consistent or credible witnesses to present."

¶ 30 At the conclusion of the hearing, the judge informed the parties that she wished to review the record again, having heard defendant's arguments and Valenti's response. "[I]t's huge, but *** I want to be able to go back into the transcript at certain points and be able to look for myself as it relates to some of the issues. Some of them I could rule on right now. Others, I want to go back and take a look at some of the things that you have raised." Accordingly, the judge announced that her ruling would be in writing, after she had an opportunity to review the transcripts.

¶ 31 Moreover, the judge informed defendant about his rights to an appeal. "If I grant your motion, if I find that *there was neglect*, then *** I would appoint an attorney to represent you." (Emphasis added.) However, if "I deny your motion, if I find that each of your allegations *either lack merit or they were matters pertaining to trial strategy* and I deny your motion, then you have the right to appeal that." (Emphasis added.)

¶ 32 C. Ruling

¶ 33 The next day, on August 21, 2014, the judge issued a written ruling, rejecting the arguments in defendant's *pro se* motion. With respect to defendant's allegations about trial witnesses, the court ruled:

> "This paragraph [of defendant's motion] references matters of trial strategy with defense counsel indicating all potential witnesses given to them they either spoke to or reviewed the potential statements finding them not to be credible. No ineffective assistance is found."

¶ 34 Defendant appeals.

¶ 35 II. ANALYSIS

¶ 36 A. Notice of Appeal

¶ 37 We address first the notice of appeal. The State draws our attention to the fact that, although the notice lists the date of the judgment appealed as August 21, 2014 (the date the trial court denied defendant's *pro se* motion), it identifies the nature of the order as "post conviction denial." As this case is not in a postconviction stage of proceedings, the State notes that the notice is flawed. However, it concedes that it does "not assert prejudice from this flaw."

¶ 38 The purpose of the notice of appeal is to inform the prevailing party that the other party seeks review of the trial court's decision and, if the appeal is not from a conviction, it must identify the nature of the order appealed. *People v. Lewis*, 234 Ill. 2d 32, 37 (2009). A notice of appeal confers jurisdiction on an appellate court to consider only the judgments or parts of judgments specified in the notice, and, if there is no properly-filed notice of appeal, the reviewing court lacks jurisdiction and must dismiss the appeal. *Id.* However, if the notice, considered as a whole and construed liberally, fairly and adequately identifies the complained-of

judgment, it is sufficient to confer jurisdiction. *Id.* The failure to comply strictly with the form of the notice is not fatal if the deficiency is nonsubstantive and the appellee is not prejudiced. *Id.*

¶ 39 Here, on August 21, 2015, the same day it entered its order denying defendant's motion, the court ordered the clerk of the court to prepare and file a notice of appeal. One week later, the clerk prepared and filed a form notice of appeal that mirrors the format provided by Illinois Supreme Court Rule 606(d). 210 Ill. 2d R. 606(d) (eff. Dec. 11, 2014). Although it refers to the nature of order being appealed as a "post conviction denial," it does not reference the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)), nor has defendant filed a petition pursuant to that Act. Moreover, the notice accurately describes the case number and date of judgment being appealed. As such, we conclude that, considered as a whole and liberally, defendant's notice of appeal substantially conforms to the one provided by Rule 606(d), adequately identifies the complained-of judgment, and informs the State of the nature of the appeal. Further, the State concedes that it has not been prejudiced by the error. Accordingly, the notice was sufficient to confer jurisdiction on this court to consider defendant's appeal.

¶ 40 B. Denial of New Counsel and Adequacy of Hearing

¶ 41 Defendant argues that the trial court should have appointed him new counsel to evaluate his *pro se* posttrial claims of ineffective assistance. He contends that his claims, and Valenti's responses thereto, showed possible neglect of his case by virtue of counsel's failure to call available "exculpatory witnesses." Specifically, defendant asserts that, although Moore claimed at trial that, shortly before the shooting, defendant obtained a gun and told a room full of people, "Watch what me and [Henderson] about to do," JaQuay, Towns, Scales, and Craig could have "countered" Moore's testimony, while victim Phillips stated that defendant was not involved in the shooting. Defendant asserts that, at the *Krankel* hearings, counsel's explanations for not

calling any of the aforementioned witnesses were contradictory, nonresponsive, nonsensical and/or otherwise inadequate. Defendant contends that the trial court manifestly erred where it found no possible neglect, and he argues that new counsel should be appointed to investigate his claims. We disagree.

¶ 42 When a defendant files a *pro se* posttrial motion alleging ineffective assistance of counsel, he or she is not automatically entitled to the appointment of counsel to assist with the motion. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, the trial court should first examine the bases of the defendant's claims; if the court determines that the claims lack merit or pertain only to trial strategy, the court may deny the *pro se* motion without appointing counsel. *Id*. at 77-78. A claim lacks merit if it is "conclusory, misleading, or legally immaterial" or where it does not set forth a "colorable claim" of ineffective assistance of counsel. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 22. If the court determines that the claims demonstrate that counsel *possibly* neglected the defendant's case, new counsel should be appointed to represent the defendant at the hearing on the *pro se* motion. *Moore*, 207 Ill. 2d at 78.

¶ 43 We review for manifest error the court's decision rejecting defendant's *pro se* claims of ineffective assistance and declining to appoint new counsel. *People v. Haynes*, 331 Ill. App. 3d 482, 484 (2002). Manifest error is plain, evident, and indisputable. *People v. Slover*, 2011 IL App (1st) 100276, ¶ 17.

¶ 44 Ineffective-assistance claims require showings that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) prejudice, *i.e.*, a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Generally, decisions regarding which witnesses to call constitute matters of trial strategy that are unassailable and cannot form the

basis of an ineffective-assistance-of-counsel claim. *People v. Pena*, 2014 IL App (1st) 120586, ¶ 33. Further:

> "A trial court is not required to appoint new counsel every time a defendant claims that his attorney failed to call all favorable witnesses. Many factors influence the decision to put a witness on the stand, and such decisions are generally matters of trial strategy that are beyond the scope of review. [Citation]. Nor do we suggest that new counsel is required every time the attorney's testimony conflicts with that of his client." *Haynes*, 331 Ill. App. 3d at 485.

¶ 45 Here, the crux of defendant's ineffective-assistance claims is that, if called, the witnesses would have "countered" or damaged Moore's testimony. Specifically: (1) JaQuay would have testified that Moore told police what they wanted to hear because he sought a deal with the State and wanted a "get out of jail free card"; (2) Towns would have testified that, contrary to Moore's report, he did not give defendant a gun before the shooting; (3) Scales would have testified that he was not with Moore the night of the shooting; and (4) Craig would have testified, like JaQuay, that Moore had admitted that he was going to fabricate a story about defendant's case to get out of jail. As for Phillips, his affidavit asserted that defendant had nothing to do with the shooting.

¶ 46 The court heard from counsel at the hearing that he either was not aware of the witnesses (Craig and Phillips) or chose not to call them for strategic reasons (JaQuay, Towns, Scales). Defendant points out that counsel's stated reasons for not calling these witnesses were contradictory or unconvincing. While he might be technically correct in some instances (*e.g.*, counsel's response that Scales could not have helped because he was not there the night of the party missed defendant's point that it was precisely Scales's *absence* that would have contradicted Moore, albeit on a collateral issue), he leaves no room for counsel's broader

explanation that, for various reasons, he determined that the witnesses were not credible and would not, overall, help defendant's case. Valenti explained that, upon meeting with witnesses, it became evident that they were only trying to help defendant and that other portions of their statements were inaccurate; thus, Valenti determined, if confronted on the witness stand, their statements would be "destroyed," which would not help defendant's case. These decisions reflect trial strategy. Further, through counsel's cross-examination of him, Moore's motive to fabricate testimony, *i.e.*, a potential deal with the State, *was* explored at trial, as was the document that he supposedly wrote referenced by JaQuay, admitting that he was falsifying his testimony. Moore disavowed that document in court, saying he did not write it, that the signature was not his, and that he never met with JaQuay. Counsel also cross-examined Moore regarding his initial failure to report to police that he saw Towns give defendant a gun. Counsel soundly strategized that further attempts to impeach Moore or to damage his credibility would have been redundant or possibly damaging, if the witnesses did not, themselves, present credibly.

¶ 47 Defendant alternatively argues that the trial court failed to conduct an adequate inquiry into his claims, particularly where it did not resolve Valenti's inconsistencies concerning Craig, and, further, that it held him to a high standard of establishing actual neglect and ineffective assistance, when, for purposes of this hearing, he needed to establish only *possible* neglect and a *colorable* claim of ineffective assistance. Again, we disagree.

¶ 48 In conducting a *Krankel* hearing, the court should examine the factual basis of the claim to determine if it has any merit. *Moore*, 207 Ill. 2d at 77-78. The court may evaluate the *pro se* claims by discussing the allegations with defendant and asking for more details and/or questioning trial counsel regarding the facts and circumstances surrounding the defendant's

allegations. *Id.* On review, we must determine whether the court's inquiry into defendant's *pro se* claims was adequate. *Pena*, 2014 IL App (1st) 120586, ¶ 33.

¶ 49 Here, the court's inquiry was clearly adequate. The court stated for the record that it had reviewed defendant's motions, as well as all transcripts. After acknowledging that it was present for a preliminary, *i.e.*, *Krankel*, hearing on defendant's claims, the court systematically addressed the allegations in defendant's *pro se* petition, at times asking him questions and at times asking Valenti questions. Before ruling, the court explained its intention to review the record again. While the court did not expressly resolve the apparent inconsistency concerning Craig, its ruling implicitly concluded that counsel did not know about him and, if he had, he would not have called him for strategic reasons. In any event, the absence of a specific finding in that regard does not reflect an inadequate inquiry into defendant's *pro se* claims.

¶ 50 Defendant argues that the court's written ruling reflects that it held him to the higher standard of proving actual neglect and ineffective assistance. We disagree that the court held him to a higher standard. Again, the court acknowledged at the commencement of the hearing its understanding that it was conducting a preliminary inquiry. Before retiring, the judge informed defendant that she would deny his claims if she found that the allegations either lacked merit or pertained to trial strategy, the appropriate standard for the hearing. See *Moore*, 207 Ill. 2d at 77. In her written ruling, the judge found that the claims concerned trial strategy and, therefore, the ineffective-assistance claims lacked merit. We find no error here.

¶ 51 Moreover, the State argues that any error by the court was harmless. Indeed, even if the trial court made an error in failing to appoint new counsel to investigate defendant's *pro se* claims of ineffective assistance, we will not reverse if that error was harmless. *Tolefree*, 2011 IL App (1st) 100689, ¶ 23. While do not find that the court made an error here, we agree that any

such error would be harmless, and we disagree with defendant that the record is insufficient for us to evaluate the court's ruling for harmless error. Again, a claim lacks merit where it does not set forth a colorable claim of ineffective assistance, which necessarily requires a colorable claim of prejudice. See, *e.g.*, *Strickland*, 466 U.S. at 694. Here, even if counsel's explanations were unsatisfactory, the failure to call the witnesses did not prejudice defendant such that the outcome of the trial might have differed and, thus, the claims did not set forth a colorable claim of ineffective assistance. These witnesses may have diminished Moore's testimony or, in Phillips's case, might have asserted defendant was involved. It is true that Moore's testimony was damaging to defendant. However, even setting aside Moore's testimony, none of these witnesses, if presented, could change that the remaining trial evidence supporting defendant's accountability convictions included: (1) *defendant's own admission* to Officer Jenkins that he obtained Towns' gun inside the building that night; and (2) James's testimony that *defendant told him* that he gave the gun to Henderson. Moreover, and again, Moore's motive to fabricate testimony, *i.e.*, a potential deal with the State, *was* explored at trial.

¶ 52 As counsel's decisions not to call the witnesses were strategic, and where defendant was not prejudiced by the absence of their testimonies, the trial court's denial of defendant's petition without appointing new counsel was not manifestly erroneous. Further, the court conducted an adequate inquiry into defendant's *pro se* claims.

¶ 53 III. CONCLUSION

¶ 54 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 55 Affirmed.