2018 IL App (1st) 143578-U

THIRD DIVISION
February 21, 2018

No. 1-14-3578

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. 13 CR 13268 (02)
	)	
ANTONIO BRYANT,	)	The Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

HELD: The State proved defendant guilty beyond a reasonable doubt of both attempted first degree murder and aggravated assault of a peace officer under the accountability theory; defense counsel was not ineffective for failing to file a pretrial motion to suppress defendant's custodial statement; and the trial court did not err in failing to appoint new counsel following a *Krankel* hearing.

¶ 1 Following a bench trial, defendant Antonio Bryant (defendant) was convicted of attempted murder and aggravated assault and sentenced to 32 years in prison. He appeals,

contending that the State failed to prove him guilty beyond a reasonable doubt of either crime, that his trial counsel was ineffective for failing to file a motion to suppress his custodial statement, and that the trial court erroneously failed to appoint counsel at a *Krankel* hearing and used the wrong standard for evaluating his complaints. He asks that we reverse his attempted murder conviction, reduce his aggravated assault conviction to simple assault, remand the matter so he may move to suppress his custodial statement, and remand for the appointment of *Krankel* counsel. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Defendant was charged with a multitude of crimes arising from shooting incidents that took place in Chicago on the evening of April 28, 2013, the first on South Leavitt Street involving victim Nicklaus Dorsey and the second shortly after at a red light on Oakley Avenue and Van Buren Street involving victim officer Ronald Coleman.[1] Also involved in these incidents were codefendants Donzell Bonner, Deandre Fields, Dajuan Gates and Tyshawn Reese.[2] The charges alleged that defendant and Reese each personally discharged a firearm that caused great bodily harm to Dorsey. Defendant, Bonner, Fields and Reese were also charged

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[1]After several charges were *nolle prossed*, the State proceeded against defendant for attempted first degree murder and aggravated battery as against Dorsey, aggravated assault as against Coleman, and armed habitual criminal.

[2]We note for the record that Fields was found guilty of attempted first degree murder and aggravated assault on an accountability basis and was sentenced to 22 years' imprisonment; his convictions and sentence were recently affirmed by this Court. See *People v. Fields*, 2017 IL App (1st) 143575-U (unpublished order under Illinois Supreme Court Rule 23). Codefendant Gates was tried with defendant and acquitted. Reese filed a Notice of Appeal in our Court; his cause has been docketed and is currently pending. See *People v. Reese*, case no. 1-15-3631.

with placing Coleman in reasonable apprehension of a battery by pointing a firearm at him when they knew him to be a peace officer engaged in the performance of his duties. Defendant's trial was severed from all codefendants, though heard simultaneously with codefendant Gates' trial.

¶ 4 Francisco Samayoa, a security guard at the St. Stephens Terrace Apartments on Western Avenue near Jackson Street and Van Buren Street, testified at trial that he was on patrol at that complex on the night in question. He stated that, at approximately 8:15 p.m., he heard several gunshots coming from Jackson and then saw three men, whom he knew to be defendant, codefendant Gates and Reese, trying to get into the gates of the complex, which was put on lockdown after the shots were heard. He averred that he did not see anything in defendant's hands at the time. When they could not get in, they left, and he did not see them thereafter. Samayoa further testified that he again heard gunshots later that evening "around 10:00 or 10:30 p.m." while he was still on duty, this time coming from Oakley and Van Buren.

¶ 5 Dorsey testified that, at approximately 10:30 p.m. on the night in question, he walked out of his home at 315 South Leavitt to go to his car parked outside, across the street. As he crossed, he noticed a maroon car parked on the street to his right. He saw someone exit the driver's side of that car, but he did not pay much attention to him. Then, he heard several gunshots and ducked behind his parked car, but was shot while taking cover. He believed the shots were coming from the direction of the maroon car which was behind him, but he did not get a good look at the shooter before fleeing into his home. Once inside, he noticed his wound and told his father he had been shot. He was taken to the hospital; he sustained a bullet wound to the buttocks, requiring a colostomy, surgeries and a week's hospitalization. The bullet was not

removed and he still suffers pain from his injuries.

¶ 6 Officer Coleman testified that at approximately 10:00 p.m. that evening, he was off-duty, in plain clothes and in an unmarked police car at 307 South Leavitt, near Crane Technical High School; he was in possession of his badge and weapon, a .45-caliber semiautomatic loaded with 10 rounds. As he was about to move the car from the east to the west side of the street, he saw a maroon four-door Buick with four occupants turn onto Leavitt and abruptly stop directly across from his car, about five to six feet away. He next saw defendant exit the rear passenger door and begin firing a gun northwestbound onto Jackson from Leavitt. Then, as defendant re-entered the car, Reese exited from the rear driver side door and began firing a weapon southeastbound. After numerous gunshots, the maroon car drove away. Officer Coleman called 911, identifying himself as a police officer and reporting the incident. He then made a U-turn in his car to follow the maroon Buick and, as he did so, he saw a man laying on the ground and heard him say, " 'These motherf*ckers shot me.' "

¶ 7 Officer Coleman further testified that he caught up to the Buick as it came to a stop at a red light on Oakley and Van Buren. He noticed that there was a state trooper conducting a traffic stop at the corner, and he saw defendant and Reese slide down into the backseat of the maroon car. Officer Coleman stopped his car next to and behind the maroon Buick, exited and tried to get the trooper's attention by announcing his office. Officer Coleman approached the maroon car, held up his badge in his left hand and his service weapon in his right, and announced his office by yelling at the occupants, " 'Police. Police. Stop the car.' " He averred that he took a few steps closer to the maroon car and again announced his office, telling them to stop the car,

whereupon Reese turned around in the rear driver seat toward him and pointed a gun at him. Officer Coleman, who was now only 8 to 10 feet from the maroon car, discharged his weapon at Reese, shooting 10 rounds and hitting the Buick as it sped away. The state trooper asked officer Coleman if he was a police officer. Officer Coleman responded affirmatively and described what he had witnessed on Leavitt; the trooper pursued the maroon car. Officer Coleman averred that the next day, he viewed two photographic arrays from which he identified defendant as the shooter from the rear passenger side of the Buick on Leavitt and Reese as the shooter from the rear driver side of the Buick on Leavitt, as well as the one who had pointed the gun at him while that car was stopped at Oakley and Van Buren. Later, he viewed a physical lineup, from which he again identified Reese.

¶ 8 Additionally, since the state trooper had been conducting a traffic stop at Oakley and Van Buren, the video system in his patrol car had been recording. The video and audio were introduced at trial, and officer Coleman testified as to their content. As they played, he described for the court the positions of the cars involved, pointed out when he is first heard on the video announcing his office, noted when Reese pointed the gun at him, and showed the court when he announced his office again and informed the trooper what happened, with his badge displayed. Also, video of what had occurred on Leavitt had been obtained from cameras positioned at Crane High School; this was introduced at trial as well. Officer Coleman testified as to its content, which he described showed him in his car, the maroon car approaching Leavitt, defendant exiting the maroon car and shooting toward Jackson, Reese exiting the maroon car and shooting southbound, the maroon car driving away, and officer Coleman's car making a U-turn to follow

it. Though both of these videos were introduced and published at trial, neither was made part of the record on appeal.[3]

¶ 9 Illinois State Trooper Timothy Mayerbock testified that at approximately 10:00 p.m. on the night in question, he was on-duty, in uniform and in a marked squad car at a traffic light on Oakley and Van Buren conducting a traffic stop of a random vehicle. As he approached that vehicle on its passenger side, the traffic light was red and he saw two cars in the intersection, one of which was red and contained four occupants. Then, he noticed a man, whom he later identified as officer Coleman, approach from his left yelling, "Police;" officer Coleman, who was behind the red car at the intersection, fired approximately ten shots into that car. Trooper Mayerbock averred that he heard officer Coleman yell "Police" before he began to shoot, and he saw him display what he thought was a badge. As the red car fled the intersection, trooper Mayerbock "verified" that officer Coleman was a police officer and "was able to confirm that it was a badge and that he was, in fact, yelling, 'Police.' " After officer Coleman gave him a description of what had occurred, trooper Mayerbock reported the incident and pursued the red car. Although he was unable to apprehend it, he soon received a radio call that a red car had been found a few blocks away on Maplewood. When he went to that location, trooper Mayerbock saw the same red car from the intersection, with its rear window shot out, a revolver in plain view

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[3]These videos were also introduced and published at codefendant Fields' trial. See *Fields*, 2017 IL App (1st) 143575-U (unpublished order under Illinois Supreme Court Rule 23). Defendant filed a motion in our Court to supplement the record in his cause with the five-volume record in Fields' cause, which we granted. However, we note that, after reviewing that supplemental record on appeal, we found no such videos (or audio recordings, for that matter) contained therein, either.

within the car, and blood trails leading away from the car. Trooper Mayerbock ended his testimony by describing the contents of the video from his patrol car, which he stated accurately depicted the incident on Oakley and Van Buren.

¶ 10 Officer Maureen O'Hearn-Boyle testified that she and her partner were on patrol that night at approximately 10:00 p.m. in uniform and in a marked squad car. They responded to a call of a person shot in the 300 block of Maplewood; upon their arrival, they were directed by witnesses to an alley where they found defendant, who was bleeding from several gunshot wounds to his head and neck. When an ambulance arrived, codefendant Gates approached the officers and asked who was in the ambulance. After other officers arrived, officer Boyle and her partner followed a trail of blood from the alley to a gangway and found a maroon Buick in the middle of the street; the back windshield had been shot out and inside she saw a revolver in plain view in the backseat, as well as blood, broken glass and bullet holes.

¶ 11 Detective James DeCicco testified that he and his partner were assigned to investigate the Leavitt shooting and on April 30, 2013, two days after that incident, they went to the hospital to interview defendant. Detective DeCicco stated that defendant "had IVs in him," but that he was in stable condition, responded to his questions "right away" and agreed to speak to him. Defendant described that earlier on the day of the shooting, he was walking with codefendant Gates on Jackson and Western when they saw 10 people come from an alley; one of them pointed a gun and started shooting. Defendant and codefendant Gates ran into a nearby restaurant and waited until it was safe; defendant then went to the front of the St. Stephens apartment complex and called his girlfriend to pick him up. When she did not arrive, defendant

started to walk to a nearby store when he saw Fields driving by. He asked Fields for a ride to his aunt's house. Detective DeCicco recounted that defendant noted Fields was in the driver seat, a man he did not know was in the front passenger seat, and Reese was in the rear driver seat. Defendant got into the car and, when they approached Leavitt, he asked Fields to turn left, but Fields turned right. Detective DeCicco further described that, right after they made that turn, defendant saw someone standing on the corner of Leavitt and Jackson and Reese, whom he did not know was armed, exited the car and started shooting. Defendant next saw several people coming down an alley on his side of the car, so he picked up a revolver that was in the car, got out and shot twice into the air. Then, he and Reese got back into the car, which drove away, and all he could remember after that was hearing more gunshots and feeling pain in the back of his head.

¶ 12 On cross-examination, defense counsel attacked the circumstances of Detective DeCicco's interview with defendant, confirming with him that it took place only two days after the incident during which defendant had been shot multiple times in the head, that it occurred at 1:00 in the morning, that he had already talked to several other people about the incident and had the pertinent details, and that he knew defendant had just exited surgery and had been under anesthesia. Defense counsel also questioned Detective DeCicco about what type of room in the hospital defendant was in at the time of the interview, with Detective DeCicco finally admitting it was a room off of the emergency room. Defense counsel further elicited that Detective DeCicco did not record or memorialize this interview with defendant in any way.

¶ 13 Detective Robert Garza testified that, upon his investigation of the shooting on Leavitt, he

was directed to Maplewood and discovered the maroon car, as well as a blood trail from it to the alley. There, he was approached by codefendant Gates, who told him that defendant, his cousin, had been shot while he (codefendant Gates) was on the phone with his girlfriend and he came to see what had happened. Codefendant Gates was transported to the station and Detective Garza interviewed him. Detective Garza stated that codefendant Gates recounted he had been shot at earlier that day on Jackson and Western. He later saw Fields and his friend in a Buick and asked them if they would give him a ride because he wanted to look for the people who shot at him in order to retaliate. When Fields agreed, codefendant Gates retrieved defendant and the two went to meet Fields; codefendant Gates asked the group to wait while he got cigarettes, but by the time he returned, the Buick was gone, as were Fields, his friend and defendant. Angry that they left him, codefendant Gates spoke to defendant via cell phone, who told him to go home; codefendant Gates later saw the Buick drive by, eventually followed by police personnel. As he was standing outside, Fields and Bonner ran up and told him defendant had been shot by a police officer that had pulled up next to them. Codefendant Gates clarified for Detective Garza that Fields was driving the Buick, Bonner was in the front passenger seat, and defendant got into the backseat of the car. Detective Garza discovered that Bonner was receiving treatment at the hospital, so he interviewed him and then began looking for Reese and Fields, who were eventually arrested.

¶ 14 Forensic investigator Paul Presnell testified that he examined and photographed the scene on Van Buren, finding ten .45-caliber cartridge casings and a turn signal from a car. He examined and photographed the scene on Leavitt, finding nine .45-caliber cartridge casings and a

spent bullet. And, he examined and photographed the scene at Maplewood, particularly the maroon Buick, finding a .45-caliber revolver on its rear floor, a hat next to it, and two cell phones on the back seat. He testified that the car was missing a turn signal that "probably" matched the one he recovered at the Van Buren scene. He swabbed the revolver, which contained five spent shell casings, and the cell phones, and he took officer Coleman's gun for comparison purposes.

¶ 15 The parties stipulated that two .45-caliber bullets and a bullet fragment were found in the maroon Buick; these were not fired from the revolver found in the car, but officer Coleman's gun could not be ruled out as the source. The parties further stipulated that the five cartridge casings found in the revolver were fired from it, the ten cartridge casings found at the Van Buren scene had been fired from officer Coleman's gun, and the nine cartridge casings from the Leavitt scene had been fired from one gun that was neither the revolver from the Buick nor officer Coleman's gun. Additionally, the parties stipulated that no usable fingerprints were found on the revolver, the five cartridges in it or the nine cartridges from the Leavitt scene; that defendant's fingerprint was found on the rear passenger door of the Buick; and that Fields' fingerprint was found on the driver's vanity mirror. Finally, the parties stipulated that defendant's DNA was found on both cell phones and in blood recovered from the backseat of the Buick.

¶ 16 The State rested its case-in-chief. Defendant moved for a directed finding, which the trial court denied, and he rested his cause. Following closing argument, wherein defense counsel argued at length the lack of sufficient evidence against defendant and attacked the testimonies of officer Coleman and Detective DeCicco, as well as the forensic investigation, the trial court found defendant guilty. It cited the forensic evidence which placed defendant in the maroon

Buick. It also highlighted officer Coleman's testimony and noted defendant's statement to Detective DeCicco. The court concluded that, from all the evidence, the State had met its burden of proof "beyond a reasonable doubt" of the charges against defendant.

¶ 17 During a posttrial motion hearing wherein defense counsel presented the court with a motion for a new trial, defendant, *pro se*, asked the court if he could submit a motion to dismiss defense counsel as his attorney. The court allowed him to present the reasons for his motion in open court; defendant described that he had not met with defense counsel save for one time since his incarceration, that they have "no meaningful communication," and that they have not discussed or reviewed any matters pertinent to his case. The court then questioned defense counsel about defendant's allegations, to which he replied that he had spoken "at length" with him about his case, that he had been to the jail at least once to speak to defendant, that he spoke to him several other times when they were together in courtrooms for pretrial matters, and that they had watched the video evidence in the cause together. Defense counsel further explained to the court that he and defendant had "discussed trial strategy," his rights and the type of trial he should request, and reviewed his presentence investigation report together. After allowing defendant and counsel to speak, the trial court denied defendant's motion, concluding that his "reasoning isn't adequate to dismiss" his counsel. Defendant asked for a continuance, telling the court he and his family had contacted another attorney who promised to appear on his behalf once her retainer was paid. The court granted defendant a continuance and withheld its decision until further hearing.

¶ 18 At a subsequent hearing, defendant and defense counsel appeared, but defendant did not

have new counsel. He told the court that the prison had been on lockdown for the last 15 days and he could not communicate with his family to secure his new counsel. However, the court verified with a prison superintendent that the prison had not been on lockdown at all. Upon this information, the trial court denied defendant's motion to dismiss his counsel. Defendant then asked the trial court, *pro se*, if he could represent himself in filing a motion for ineffective assistance of counsel. The trial court denied this, but allowed defendant to read his *pro se* motion in open court. Defendant did so, asserting that he had not be "represented zealously" by defense counsel and that counsel's performance fell below the standard of competency due to a lack of "meaningful communication," visits, and pretrial motions. He also mentioned plea-bargaining, investigations, and his overall concern that "his rights of effective assistance of counsel will continue to be violated."

¶ 19 At this point, the trial court declared that it was "going to have a *Krankel* [h]earing on this." The court asked defense counsel how many times he had visited defendant, to which counsel responded "in the jail at least one time; many times here in lock-up." In an effort to be more specific, the court asked if he had other visitations with defendant and how many times he discussed his case with him, to which counsel responded, "at least 10 to 15 times." With respect to defendant's allegations regarding a lack of pretrial motions, the court acknowledged counsel's motions for discovery, but asked why, for example, he had not filed a motion to quash defendant's arrest and suppress his statement to Detective DeCicco. Defense counsel explained that he and defendant had reviewed the facts of his case and such a motion did not "fit in with the theory of our case." Defense counsel elaborated that there was videotape evidence that would be,

and was, introduced at trial, and that officer Coleman and trooper Mayerbock corroborated that evidence; he also noted that there was physical evidence directly linking defendant to the maroon Buick–all of which "certainly was damaging to" defendant. Accordingly, defense counsel believed their best trial strategy was to attack how defendant's statement was obtained by Detective DeCicco, upon his cross-examination, in an effort to show its unreliability. Counsel further informed the court that, with respect to any plea-bargaining, "after getting permission from [defendant] to approach the State," he did so and an offer was made, which he relayed to defendant and which defendant declined. And, with respect to defendant's "rights," he "advise[d]" him that he "believed that his best chan[c]e" was a jury trial, but defendant insisted on proceeding to a bench trial; defense counsel followed his wishes and actually withdrew his initial motion for a jury trial. Defense counsel reiterated to the court that he had discussed with defendant many "possible options" with respect to his representation throughout the litigation of defendant's cause.

¶ 20 After considering defendant and counsel's argument, the trial court held that "there is no ineffective assistance of counsel." It found that, while some of defendant's statements concerning the law were correct, some of them were "conclusionary" and, ultimately,"the facts don't support his conclusions that he had ineffective assistance of counsel." Defendant then fired defense counsel and the trial court gave him time to obtain new counsel.

¶ 21 Subsequently, at sentencing, and following argument by the State and defendant's new counsel, the trial court merged defendant's aggravated battery conviction into his attempted first degree murder conviction and sentenced him to 32 years in prison (12 years for the attempted

murder conviction plus a mandatory 20 years for a firearm enhancement). It further sentenced him to 6 years in prison for his aggravated assault conviction, to run concurrently. No sentence was entered on defendant's conviction for armed habitual criminal.

¶ 22 ANALYSIS

¶ 23 Defendant presents several issues on review. His first allegations concern the sufficiency of the evidence; he then asserts an allegation of ineffective assistance of counsel and a final allegation of error upon the trial court regarding the *Krankel* hearing.

¶ 24 I. Sufficiency of the Evidence

¶ 25 Defendant's first contention on appeal is that the State failed to prove him guilty beyond a reasonable doubt of the attempted first degree murder of Dorsey and of the aggravated assault of a peace officer of officer Coleman. With respect to the former, he claims that, because the State could not prove that Reese shot at Dorsey due to several differences in time, manner and result as evidenced by the testimony presented at trial, then he could not be guilty of Dorsey's attempted first degree murder under the accountability theory, as charged. With respect to the latter, he claims that, because the State could not prove that Reese knew officer Coleman was a police officer due, again, to discrepancies in the testimony presented, then he could not be guilty of officer Coleman's aggravated assault. We disagree.

¶ 26 When a criminal defendant challenges the sufficiency of the evidence used to convict him, the standard of review is whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *People v. Hunley*, 313 Ill.

App. 3d 16, 20 (2000). Courts of appeal will not retry the defendant. See *People v. Digirolamo*, 179 Ill. 2d 24, 43 (1997). Instead, the trial court, as the trier of fact in a bench trial, hears and sees the witnesses and, thus, has the responsibility to adjudge their credibility, resolve any inconsistencies, determine the weight to afford their testimony and draw reasonable inferences from all the evidence presented. See *People v. Steidl*, 142 Ill. 2d 204, 226 (1991); *Hunley*, 313 Ill. App. 3d at 21.

¶ 27 Briefly, a person commits attempted first degree murder when he, with the intent to kill another, performs any act constituting a substantial step toward killing another. See 720 ILCS 5/8-4(a), 9-1(a)(1) (West 2014). A person commits aggravated assault when he "knowingly engages in conduct which places another in reasonable apprehension of receiving a battery" and knows that the person assaulted is a peace officer performing his official duties. 720 ILCS 5/12-1(a); 12-2(b)(4) (West 2014). And, a person may be held liable for the conduct of another under the accountability theory when, "either before or during the commission of the offense, and with the intent to promote or facilitate such commission, he or she solicits, aids, abets, agrees, or attempts to aid" the other person in planning or committing the offense. 720 ILCS 5/5-2(c) (West 2014).

¶ 28 Critical to the instant cause, we further note that conflicts and inconsistencies in the testimony of witnesses do not create reasonable doubt, especially if those inconsistencies are minor. See *People v. Adams*, 109 Ill. 2d 102, 115 (1985) ("[m]inor inconsistencies in the testimonies do not, of themselves, create a reasonable doubt"); *People v. Bennet*, 329 Ill. App. 3d 502, 513 (2002) ("[i]nconsistency between certain eyewitnesses' testimony does not necessarily

establish reasonable doubt"). Such discrepancies go only to the weight that is to be afforded to their testimony (see *People v. Hruza*, 312 Ill. App. 3d 319, 326 (2000)), which is for the trial court here as the trier of fact to determine, not the reviewing court (see *People v. Vasquez*, 313 Ill. App. 3d 82, 103 (2000)). See *People v. Robinson*, 30 Ill. 2d 437, 440 (1964) ("minor variations *** pointed to by defendant at most affect the credibility of the witnesses, a matter for the trial court's determination" in a bench trial); *People v. McPherson*, 306 Ill. App. 3d 758, 766 (1999) (judgment will not be reversed on appeal where testimony is merely conflicting); see also *People v. Deleon*, 227 Ill. 2d 322, 332 (2008) and *People v. Simon*, 2011 IL App (1st) 091197, ¶ 94 (it is in trial court's direct purview to adjudge credibility and resolve these inconsistencies, and a reviewing court may not substitute its judgement in this regard). Moreover, absent any affirmative indication in the record to the contrary, it is presumed that the trial court considered only competent evidence in reaching its verdict. See *People v. Gilbert*, 68 Ill. 2d 252, 258-59 (1977) (this is rebutted only with affirmative evidence in record); accord *Simon*, 2011 IL App (1st) 091197, ¶ 91. Ultimately, a conviction will not be overturned unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of guilt. See *People v. Brown*, 185 Ill. 2d 229, 247 (1998).

¶ 29 Based on the record before us, we find that the State proved defendant guilty of the attempted first degree murder of Dorsey and the aggravated assault of officer Coleman beyond a reasonable doubt.

¶ 30 Security guard Samayoa heard gunshots around 8:15 p.m. and saw defendant, codefendant Gates and Reese soon thereafter, trying to get into the gate of their apartment

complex. When they could not get in, they left, and Samayoa heard another series of gunshots later that evening from Oakley and Van Buren "around 10:00 or 10:30 p.m."

¶ 31 At that time, victim Dorsey was crossing Leavitt to his parked car when he saw a maroon car parked on his right; he saw someone get out of that car, but did not pay attention to him. He heard shots coming from that car, which was behind him, and he ran around his car and ducked to hide, and then fled to his home; he had been shot.

¶ 32 Officer Coleman, who was off-duty, in plain clothes and in an unmarked police car was also on Leavitt at that time. While in his car, he saw the same maroon Buick turn onto Leavitt and stop directly across from him, only five feet away. There were four people inside. He saw defendant, whom he identified at the time of the crimes as well as in court at trial, exit the rear passenger side and begin firing a gun northwestbound. As he re-entered the car, officer Coleman saw Reese exit the rear driver side and begin firing a weapon southeastbound. The maroon car then drove away. Officer Coleman immediately pursued the Buick and followed it to a red light on Oakley and Van Buren. With a state trooper in the right lane, and the Buick in the left turn lane, he stopped his car in the center lane to the right of and behind the Buick and announced his office; he yelled it a second time and held up his badge as he was making his way to the Buick, and announced it again a third time as he got even closer. At this point, Reese turned around in the rear driver seat and pointed a gun at officer Coleman, who was only about eight feet from that car. Officer Coleman, upon seeing this, discharged his weapon.

¶ 33 Trooper Mayerbock noticed the Buick, with its four occupants, while he was conducting his traffic stop and saw officer Coleman approaching it. He heard officer Coleman yell "Police,"

and saw him display a badge before he shot at the car. Trooper Mayerbock immediately gave chase to the Buick and later received a radio call that it had been found on Maplewood. When trooper Mayerbock arrived there, he saw the same maroon car, with its rear windshield shot out, a revolver in plain view in the backseat and a blood trail leading away from it. Officer Boyle was also there, having found defendant only a few feet away from the car with gunshot wounds to his head and neck.

¶ 34 Detective DeCicco spoke with defendant two days later, who told him that he and codefendant Gates had been shot at earlier that evening near Jackson and Western. Later, he saw his friend Fields driving by and asked for a ride; inside the car with him was Reese and a man he did not know. When they turned onto Leavitt near Jackson, Reese got out of the car and started shooting. Defendant then grabbed the revolver that was in the backseat and shot at people coming toward his side of the car from the alley, and they all drove away. The only other thing defendant could remember was more gunshots and pain in his head.

¶ 35 Detective Garza also saw the maroon Buick on Maplewood and, as defendant was being transported to the hospital, codefendant Gates approached him. Codefendant Gates recounted that he had been shot at earlier that night and, after he contracted Fields to drive him around for retaliatory purposes, he retrieved defendant and brought him to the Buick where Fields and Bonner were waiting. Codefendant Gates left to get cigarettes and when he returned, the Buick, Fields, Bonner and defendant were gone. Angry that they left him, he called defendant, who told him to go home. Codefendant Gates later saw the Buick drive by his home, followed by police and an ambulance. Forensic evidence clearly placed defendant in the backseat of the maroon

Buick that night.

¶ 36 From all this, when viewed in the light most favorable to the prosecution, we conclude that any rational trier of fact could have found defendant guilty of the attempted first degree murder of Dorsey and the aggravated assault of officer Coleman, a peace officer, under the accountability theory beyond a reasonable doubt.

¶ 37 With respect to his attempted first degree murder conviction, defendant asserts that it must be reversed in light of several discrepancies he points out regarding the time line, the victims' stories, and the direction of the shooting, which he claims are so "mismatche[d]" that they prove there must have been two separate shootings (*i.e.*, that Reese did not shoot Dorsey) and that officer Coleman, contrary to his testimony, did not see the Dorsey shooting at all. However, none of defendant's alleged discrepancies in any way, singularly or even taken together, merit the reversal of his conviction for attempted first degree murder, in light of the evidence presented.

¶ 38 For example, defendant spends much time pointing to the "timeline" of events, insisting that while Dorsey testified he was shot at about 10:30 p.m., officer Coleman testified the shooting he saw on Leavitt took place at 10:00 p.m., with trooper Mayerbock testifying that he saw defendant on Oakley and Van Buren at 10:00 p.m. and officer Boyle testifying that she found defendant on Maplewood at 10:00 p.m. Defendant claims that, pursuant to this time line, he was wounded, and Reese must have fired his gun on Leavitt, long before Dorsey was shot at that location. Defendant's claim makes much of these "precise" times. But, the record is clear that none of the occurrence witnesses–Dorsey, officer Coleman, trooper Mayerbock or officer

Boyle–ever specifically testified as to an exact time of the shooting or of their involvement.

¶ 39 The time frames given–which defendant now repeatedly calls mismatched discrepancies–were all mentioned by the attorneys who questioned these witnesses at trial. In other words, they were introduced by the attorneys simply as a means to initiate their testimony. Indeed, the time of the crimes was never an issue at trial. In fact, the only witness who ever spoke directly as to the time of the crimes, in his own words, was security guard Samayoa. He, as the first witness who testified at defendant's trial, was the one who set the time line. He testified that there was a prior shooting earlier that evening at 8:15 p.m., which he heard coming from Jackson and Van Buren and after which he saw defendant, codefendant Gates and Reese trying to get into the now locked apartment complex. He further testified that he heard another shooting later that evening, "around 10:00 or 10:30 p.m." while he was still on duty, this time coming from Oakley and Van Buren. This is directly in line with defendant's custodial statement to Detective DeCicco that he was shot at earlier that night while he was with codefendant Gates, hid in a restaurant, walked back to his apartment, waited for his girlfriend, walked to a store, and then saw Fields, whereupon they drove around, went to Leavitt and the subsequent shootings happened, first on Leavitt and then on Oakley and Van Buren. It is also in line with codefendant Gates' custodial statement to Detective Garza that he was shot at earlier that night and later asked Fields to drive him around to retaliate, whereupon he recruited defendant who left in the maroon Buick; codefendant Gates later saw that car, followed by police and an ambulance, and was told by Field and Bonner that defendant had been shot by an officer on Oakley and Van Buren. Contrary to defendant's insistence, the specific time of the events is irrelevant here.

¶ 40 Essentially, the evidence in this cause established that there was an initial shooting earlier in the evening for which defendant, codefendant and their friends sought retaliation, which resulted in Dorsey being shot on Leavitt and officer Coleman being assaulted at Oakley and Van Buren.

¶ 41 Defendant also criticizes that officer "Coleman's story failed to match Dorsey's" in that officer Coleman testified he saw Dorsey lying on the ground after making a U-turn to follow the maroon Buick on Leavitt and heard him say he had been shot, while Dorsey testified that he ran home upon hearing the shots and only realized he was shot once he was inside his house; in that officer Coleman testified Reese shot in a southeasterly direction but that logistically, Dorsey could only have been shot from a southerly or perhaps southwesterly direction; and in that Dorsey testified he saw one person exit the maroon Buick and cross the street, while officer Coleman testified he saw defendant exit the rear passenger side, shoot, and then as he re-entered, Reese exited the rear driver side and shoot before driving away.

¶ 42 Just as with his argument with respect to the time line, defendant's assertions here present nothing more than minor inconsistencies in testimony. For example, Dorsey was never directly questioned at trial if he was on the ground after being shot, if he saw officer Coleman, or if he said anything. He was only asked, and properly so as the victim, if he realized he had been shot. Whether he said anything or exchanged any words with officer Coleman about being shot was irrelevant, in light of his testimony that he was, indeed, shot at that time on Leavitt as the Buick drove away and that he thought the shots came from that car, and in light of officer Coleman's testimony that when he heard the shots and saw the Buick begin to drive away, he immediately

made a U-turn and pursued the car, so as not to lose sight of it.

¶ 43 Nor was the direction of the shooting otherwise relevant. Defendant devotes much time to speculating the potential direction in which the shooter fired and the direction Dorsey must have been facing at what particular times, concluding that Reese could not have hit Dorsey because the shooter must have been shooting in a southerly or southwesterly direction, while officer Coleman testified he saw defendant fire northwestbound from Leavitt onto Jackson and Reese fire southeastbound on Leavitt. Though this might not be perfectly in line with defendant's theory, short of any forensic evidence regarding bullet trajectory, it is nothing more than speculation.

¶ 44 So, too, is his assertion that officer Coleman and Dorsey's accounts of the events do not match as to what they saw. Dorsey testified that he saw only one person exit the maroon car from the driver side and cross the street, while officer Coleman identified both defendant and Reese who exited the car, shot and got back inside. However, Dorsey made clear in his testimony that as he crossed the street, the maroon Buick was down the street a bit and behind him and he was not paying attention to it or its occupants until he heard the first shots, whereupon he ran behind his car, ducked and hid until he could run inside his house. Officer Coleman, meanwhile, was sitting in his car and actually saw the Buick first pull onto Leavitt, watched as its four occupants parked right across from him only about five feet away, and witnessed defendant and Reese, whom he both identified at the time and at trial, fire several shots on Leavitt north and south in opposite directions. That the testimony of officer Coleman, who was in a direct position to see the shooting and was focused on the scene from the beginning, was

slightly different–in that it was more detailed–than that of Dorsey, who admitted he was not paying attention and was shot, is hardly surprising.

¶ 45 The fact remains that Dorsey testified that he heard shots coming from the maroon Buick parked on Leavitt and that he was shot during that time, and that officer Coleman testified he saw defendant and Reese, whom he clearly identified, exiting that same car on Leavitt, shooting guns at that same time. The discrepancies defendant cites are just that–discrepancies which, at best, amount to minor inconsistencies that go only to the weight of the evidence for the trial court to determine and which, at worst, are wholly irrelevant. Dorsey and officer Coleman's testimony and identification, combined with the corroborating testimony of the other witnesses presented, the forensic evidence and the video evidence presented at trial, was more than sufficient to prove that Reese shot Dorsey and, thus, that defendant was guilty of his attempted first degree murder under the accountability theory beyond a reasonable doubt.

¶ 46 Similarly, defendant attacks his conviction of aggravated assault of a peace officer by asserting that the State failed to prove Reese knew officer Coleman was a police officer. He claims that, by the mere fact that trooper Mayerbock asked officer Coleman immediately after the shooting if he was a "cop," it would have also been unclear to Reese, who more than likely would have been looking at officer Coleman's gun rather than listening to his words or seeing his badge. Again, defendant's argument presents nothing more than speculation.

¶ 47 Initially, we note that defendant repeatedly refers to "audio evidence" suggesting Reese never heard officer Coleman announce his office and that officer Coleman's announcement(s) were "garbled" and "unintelligible." This audio evidence was from trooper Mayerbock's squad

car, which was activated during his traffic stop at the red light on Oakley and Van Buren. However, this audio evidence, as well as the video evidence from trooper Mayerbock's squad car and the video evidence of the Leavitt scene from the cameras at Crane Technical High School, were never submitted to this Court on appeal as part of the record, by either party. Thus, we cannot entertain any argument regarding them. These potentially would have been helpful to us in reviewing defendant's claims. Yet, we recognize that the trial court viewed them, and we have the testimony of those witnesses (officer Coleman and trooper Mayerbock) who described them at trial as they played. There is nothing more we can say about them, other than we must presume the trial court considered them appropriately. See *Simon*, 2011 IL App (1st) 091197, ¶ 91 (it is presumed that the trial court considered only competent evidence in bench trial); *People v. Smith*, 406 Ill. App. 3d 879, 886 (2010) (defendant has burden to present complete record on appeal and any doubt arising from incomplete record is to be construed against him).

¶ 48 Without the audio and video evidence, all we have is the testimony of officer Coleman and trooper Mayerbock regarding what occurred on Oakley and Van Buren. Officer Coleman testified, unrebutted, that he announced his office three times before he saw Reese turn in his seat in the back of the maroon Buick and point a weapon at him. He stated he first exited his car and tried to get trooper Mayerbock's attention by announcing his office; he then started to step toward the Buick and yelled "Police. Police. Stop the car" again, while holding up his badge in his left hand and his service weapon in his right; and, he yelled it a third time when he was only about eight feet away from the Buick. Officer Coleman pointed all this out as video of the scene was published for the trial court.

¶ 49 Trooper Mayerbock directly corroborated officer Coleman's testimony, also describing the contents of the video, as it was played again for the court. Trooper Mayerbock averred that he heard officer Coleman yell "Police" and saw him display his badge before he began to shoot at the Buick. That Reese "likely did not hear" officer Coleman's announcement or "likely did not notice" his badge because he may have been fixated on his gun, as defendant claims, is pure speculation. Officer Coleman's testimony was corroborated by trooper Mayerbock and remained unrebutted, as Reese never testified at defendant's trial. Also, that trooper Mayerbock asked officer Coleman if he was a "cop" does not support defendant's claim that this was "strong circumstantial evidence" that Reese did not know he was. Trooper Mayerbock never testified that he was unsure that officer Coleman was a police officer when the shooting began. To the contrary, he testified he heard him repeatedly yell "Police" and show a badge before it did. He stated simply that, after the shooting, he "verified" officer Coleman was a police officer before he left him at Oakley and Van Buren to chase after the Buick. Officer Coleman and trooper Mayerbock's testimony, combined with the forensic evidence and the video evidence presented at trial, was more than sufficient to prove that Reese knew officer Coleman was a police officer when he aimed his gun at him and, thus, that defendant was guilty of his aggravated assault under the accountability theory beyond a reasonable doubt.

¶ 50 Accordingly, we find no basis to reverse defendant's convictions on these grounds.

¶ 51 II. Ineffective Assistance of Counsel

¶ 52 Defendant's second contention is that defense counsel was ineffective for failing to file a motion to suppress his custodial statement, which he gave to Detective DeCicco while he was in

the hospital. Detective DeCicco admitted he did not memorialize defendant's statement, but testified that, while in a room off of the emergency room, defendant described he and codefendant Gates had been shot at earlier in the evening, he met up with Fields and the others and got into a car with them, when they turned down Leavitt Reese exited the car and started shooting, he (defendant) then also shot twice with a revolver he found in the car as others approached from a nearby alley, they all drove away, and he remembered only more gunshots and pain in his head thereafter. Defendant claims that such a motion "would have fit like a glove into counsel's strategy, which was to get the trial court to disregard the statement." He further claims that the motion clearly would have succeeded and that he, therefore, would have been acquitted of, at least, attempted first degree murder. Based on the record before us, we disagree.

¶ 53 The law regarding claims of ineffective assistance of counsel is well established. These are examined under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); the defendant must demonstrate both that his trial counsel's performance was deficient and that this deficient performance substantially prejudiced him. See *People v. Enis*, 194 Ill. 2d 361, 376 (2000). To demonstrate performance deficiency, the defendant must establish that trial counsel's performance fell below an objective standard of reasonableness. See *People v. Enoch*, 122 Ill. 2d 176, 202 (1988). Meanwhile, to demonstrate sufficient prejudice, the defendant must show that there is a reasonable probability that, but for his trial counsel's unprofessional errors, the result of the proceedings would have been different. See *Enoch*, 122 Ill. 2d at 202; accord *Enis*, 194 Ill. 2d at 376 (but for counsel's alleged error, the defendant suffered such serious prejudice that the result of the trial would have been different had the error not occurred). A

reasonable probability is one sufficient to undermine the confidence in the outcome. See *Enis*, 194 Ill. 2d at 376 (trial counsel's deficient performance must have rendered the result of the trial unreliable or fundamentally unfair–more than a simple showing that counsel's alleged error has some conceivable effect on the proceedings). The right to effective trial counsel guarantees competent representation, not a perfect performance. See *People v. West*, 187 Ill. 2d 418, 432 (1999).

¶ 54 In addition, " 'there is a strong presumption that the challenged action of counsel was the product of sound trial strategy and not of incompetence' " (*People v. Steidl*, 142 Ill. 2d 204, 240 (1991), quoting *People v. Barrow*, 133 Ill. 2d 226, 247 (1989)), and falls "within the 'wide range of reasonable professional assistance' " (*Steidl*, 142 Ill. 2d at 248, quoting *People v. Franklin*, 135 Ill. 2d 78, 116-17 (1990)). Significantly, we note that simple errors of judgment or mistakes in trial strategy do not make defense counsel's representation ineffective. See *West*, 187 Ill. 2d at 432. In fact, trial tactics encompass matters of professional judgment and we will not order a new trial for ineffective assistance based on these claims. See *People v. Reid*, 179 Ill. 2d 297, 310 (1997).

¶ 55 Specifically, counsel's decision whether to file a motion to suppress is generally a matter of trial strategy that is entitled to great deference. See *People v. White*, 221 Ill. 2d 1, 21 (2006); accord See, *e.g.*, *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 78 (trial counsel's decision not to file a motion to suppress matter of trial strategy); *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000) (the failure to file a pretrial motion to quash or suppress does not represent *per se* incompetence on the part of defense counsel). While under certain circumstances ineffective

assistance may result if defense counsel neglects to present a pretrial motion that was patently meritorious or would have been his client's best defense, the law is well-settled that defense counsel's decision to file or not to file such a motion is a matter of professional judgment beyond the scope of appellate review. See *People v. Rucker*, 346 Ill. App. 3d 873, 885 (2003); accord *People v. McPhee*, 256 Ill. App. 3d 102, 106-07 (1993); *Rodriguez*, 312 Ill. App. 3d at 925 (strong presumption lies with counsel that failure to challenge or seek exclusion of evidence was proper). And, counsel will not be deemed ineffective for failing to file a futile motion. See *Rucker*, 346 Ill. App. 3d at 886.

¶ 56 Ultimately, in evaluating counsel's effectiveness, we look at the totality of counsel's representation. See *People v. Eddmonds*, 101 Ill. 2d 44, 69 (1984). Again, the defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to succeed on his claim of ineffective assistance of trial counsel which, in the context of a motion to suppress a custodial statement, requires the defendant to show that the unargued motion would have succeeded and that it was reasonably probable the outcome of the trial would have been different had the statement been suppressed. See *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 18; accord *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996) (failure to prove either prong renders ineffective assistance claim untenable); *People v. Albanese*, 104 Ill. 2d 504, 525-27 (1984). If it is determined that he did not suffer prejudice, whether trial counsel's performance was constitutionally deficient need not be decided. See *People v. Brooks*, 187 Ill. 2d 91, 137 (1999); accord *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011) (where the defendant has not suffered prejudice, examination of performance prong is not even warranted); see also *People v. Graham*,

206 Ill. 2d 465, 476 (2003) (reviewing court may reject ineffective assistance claim without reaching performance prong if it is determined the defendant has not satisfied the prejudice requirement).

¶ 57 Defendant insists that filing a pretrial motion to suppress his custodial statement to Detective DeCicco was integral to his trial strategy, which was to get the trial court to ignore the statement. He further claims that such a motion undoubtedly would have been successful and would have acquitted him, since it is clear that the trial court relied on his statement to convict him. However, based upon our thorough review of the record before us, we find that defense counsel's decision not to file a motion to suppress did not amount to ineffective counsel resulting in prejudice. Moreover, the record affirmatively demonstrates that defense counsel in no way performed deficiently during defendant's trial.

¶ 58 First, we fail to find any substantive merit in defendant's claims of the sure victory a motion to suppress his statement would have had, let alone his insistence that he would have undeniably been acquitted of attempted first degree murder had his statement been suppressed. The strategy presented on his behalf at trial was not, as he now insists, necessarily "to get the trial court to disregard the statement." Rather, and in light of the evidence against him, the strategy was to tackle the statement head-on and dispel any notion of its veracity and, in direct relation, Detective DeCicco's credibility. As defense counsel explained in the ensuing *Krankel* hearing, he did not file a motion to suppress defendant's statement because he did not think it would have prevailed. Instead, after discussing all the evidence he knew would be presented at trial, he recounted to the court that "the strategy with regard to anything that might have been said by

[defendant] was to have the court as the trier of fact realize that that detective had all this information before, led the questions and here's [defendant] in a hospital room. With or without that statement the evidence *** certainly was damaging to us."

¶ 59 In his brief on appeal, defendant begins his discussion of this issue by citing *Mincey v. Arizona*, 437 U.S. 385 (1978) (Rehnquist, J., dissenting in part), a case where the Supreme Court scrutinized a custodial statement, admitted by the trial court and affirmed by the appellate court, taken of a "seriously wounded" defendant who had been shot several times; at the time of his questioning by police, he was intubated, could not speak and was essentially in a coma in " 'unbearable' " pain, in the intensive care unit, and somewhat incoherent, "lying on his back in a hospital bed, encumbered by tubes, needles, and breathing apparatus." *Mincey*, 437 U.S. at 398. Additionally, the record there showed that the defendant repeatedly asked that the interrogation stop and requested an attorney, but police continued to question him for four hours. The Court reversed his resulting conviction, noting that, due to his condition at the time of questioning, he had been " 'at the complete mercy' " of the interrogating detectives and, accordingly, that his will, and the voluntariness of his statement, were "simply overborne." *Mincey*, 437 U.S. at 398 (Rehnquist, J., dissenting in part, concluding that the statement was admissible as voluntary).

¶ 60 After citing this case, however, defendant admits in his brief that his "condition may not have been as bad as the defendant in *Mincey*," but insists that the resulting statement was likewise inadmissible and a motion to suppress it would have certainly succeeded. This is not borne out by the record. What evidence is present in this record is the testimony of Detective DeCicco, which was for the trial court to believe or disregard–again, as defense counsel astutely

realized, and without defendant testifying on his own behalf, this was the only thing upon which a strategy could be built. Detective DeCicco testified on direct examination that while defendant had some tubes connected to him, these were only IVs; he was otherwise in stable condition, coherent, responsive, agreed to speak to him and answered his questions right away. It had also been 48 hours since he was admitted to the hospital, his surgery was complete and he was not in the emergency room. Detective DeCicco stated that defendant provided him with a cohesive account of the crimes, which was in line with the facts Detective DeCicco had already obtained before the interview. Detective DeCicco noted that there was no indication that defendant was unresponsive or incoherent, or that his condition at the time of questioning was emergent. Thus, although defendant here, like the defendant in *Mincey*, suffered the pain of gunshot wounds at the time he made his custodial statement, if the trial court believed Detective DeCicco's account, then the remaining facts would not support the same result. See, *e.g.*, *People v. Williams*, 181 Ill. 2d 297, 310-11 (1998) (distinguishing *Mincey* where the circumstances surrounding the making of the custodial statement demonstrated that they did not rise to the same level of coercion in that case). With admittedly far less compelling facts, it can hardly be said, as defendant otherwise insists, that a motion to suppress would have surely been granted.

¶ 61 Even if, by some tenuous link to *Mincey*, it could somehow be concluded that a motion to suppress defendant's custodial statement to Detective DeCicco would have been remotely successful, there is certainly no indication, and definitely no reasonable probability, that the outcome of the trial would have been different with the suppression of his statement and that he would have been acquitted of attempted first degree murder. This is because, as we have already

discussed in detail, the evidence against defendant was overwhelming. Contrary to defendant's characterization, the trial court here did not convict him solely based on his custodial statement. Indeed, it noted in its decision that defendant had made a statement to Detective DeCicco, but this mention was brief and the court did not go into detail. Rather, the court focused more extensively on the forensic evidence which placed defendant in the maroon Buick, and officer Coleman's eyewitness testimony which it clearly found credible. Add to this the videotape evidence placing defendant in the Buick and the fact that police found him wounded and only a feet away from that car shortly after the officer Coleman shot out the window of the backseat where defendant was sitting therein, it is clear to us, much as it was to defense counsel, that the case against defendant was damning–even without his custodial statement. Defendant simply cannot show prejudice here.

¶ 62 Consequently, having determined, for all these reasons, that defense counsel's representation did not prejudice defendant in any way, we need not examine the performance prong of the test for ineffective assistance. See *Graham*, 206 Ill. 2d at 476; *Brooks*, 187 Ill. 2d at 137. However, even if defendant could somehow show sufficient prejudice here (which he cannot), he still could not demonstrate this other required prong of *Strickland*, since, based on our thorough review of the record, there is nothing therein to even remotely indicate that his counsel performed deficiently.

¶ 63 Defense counsel clearly advocated unrelentingly on defendant's behalf. He participated vigorously in pretrial matters, filing multiple motions and arguing extensively for them, including a motion in *limine* regarding some five prior felony convictions which he sought to exclude on

defendant's behalf and upon which he partially prevailed. During trial, he presented a cohesive opening argument, arguing the existence of serious contradictions in witness testimony, noting that there was no concrete evidence that defendant pointed a gun at either victim, and raising a clear defense theory of Detective DeCicco's lack of credibility which he reiterated throughout the proceedings. He thoroughly cross-examined the State's witnesses, poking holes in and eliciting contradictory testimony. For example, he established through security guard Samayoa that defendant was not seen holding anything in his hands shortly before the crimes; he prodded officer Coleman's ability to view defendant on Leavitt and his identification of him, as well as contradictory statements he gave to police after the crimes regarding the guns he said he saw; he intensely questioned forensic investigators who testified about the physical evidence presented; and he attacked Detective DeCicco repeatedly, arguing with him directly about the circumstances of his interview with defendant at the hospital and his failure to memorialize his alleged statement in any way. Defense counsel raised numerous objections when appropriate, focused the trial court's attention on the contradictions in testimony and the lack of evidence linking defendant to the shootings, moved for directed verdict and presented a convincing closing argument in line with his theory on the case, repeatedly noting that the evidence against defendant amounted to nothing more than a short and distracted viewing of the crimes and a statement taken from defendant in the ICU after he was shot in the head and face.

¶ 64 Ultimately, and in addition to our review of the totality of defense counsel's representation of defendant (see *Eddmonds*, 101 Ill. 2d at 69), which we find to have been both thorough and zealous, we hold that defendant received effective representation, and any claim to

the contrary, particularly regarding defense counsel's strategic decision not to file a pretrial motion to suppress his custodial statement, is without merit in light of the record in this cause.

¶ 65 III. *Krankel* Hearing

¶ 66 Defendant's final contention asserts error upon the trial court following its verdict. He alleges that the court failed to appoint *Krankel* counsel and used an incorrect standard for deciding whether to appoint counsel when he, posttrial, complained about defense counsel's neglect of his cause. He insists that, after informing the trial court that his counsel failed to discuss pretrial motions with him, particularly a potential motion to suppress his custodial statement, the court should have appointed new counsel to him. He also insists that, at the very least, the court should have used a "possible ineffectiveness standard"–which he claims is a lower threshold–in determining whether new counsel was warranted, rather than determining ineffectiveness in fact. For the final time, we disagree.

¶ 67 *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny govern those situations where a represented criminal defendant raises *pro se* claims of ineffective assistance of counsel. That is, a trial court generally cannot consider *pro se* motions raised by a represented defendant; however, an exception exists when the defendant is citing the ineffectiveness of his counsel. See *People v. Milton*, 354 Ill. App. 3d 283, 292 (2004). Such was the case in *Krankel*, where our supreme court, based on the particular circumstances of that case, remanded the defendant's cause for a new hearing upon his *pro se* motion challenging his attorney's competence at trial. See *Krankel*, 102 Ill. 2d at 187-89; see also *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶¶ 35, 36, quoting *People v. Patrick*, 2011 IL 111666, ¶ 39, and *People v. Ayres*, 2017 IL 120071, ¶

13 (*Krankel* hearing " 'serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance claims' " in order to " 'facilitate the trial court's full consideration of a defendant's *pro se* claim and thereby potentially limit issues on appeal' ").

¶ 68 However, for such consideration to take place, the defendant must raise sufficient allegations of ineffective assistance, which are to include "supporting facts and specific claims." *Milton*, 354 Ill. App. 3d at 292; see *People v. King*, 2017 IL App (1st) 142297, ¶ 15, quoting *People v. Washington*, 2015 IL App (1st) 131023, ¶ 11 (although pleading requirements for this are " 'somewhat relaxed,' " the defendant must still satisfy minimum requirements, which includes more than just " 'mere awareness' " of complaints made by him to trial court). The trial court is then to examine the underlying circumstances presented and the factual basis of the defendant's claim. *Milton*, 354 Ill. App. 3d at 292. New counsel is not automatically required in every case where a defendant raises a *pro se* claim of ineffective assistance. See *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If the trial court determines that the claim either lacks merit or pertains only to matters of trial strategy, then the court does not need to appoint new counsel and may deny defendant's *pro se* motion on its own accord. See *Moore*, 207 Ill. 2d at 78; accord *Milton*, 354 Ill. App. 3d at 292. It is only when the defendant's allegations show "possible neglect" of the case on the part of counsel that the court should appoint new counsel and conduct a separate hearing on ineffectiveness. *Moore*, 207 Ill. 2d at 78; accord *Bridgeforth*, 2017 IL App (1st) 143637, ¶ 37.

¶ 69 The key concern for us as a reviewing court is to determine whether the trial court

conducted an "adequate inquiry" into the defendant's *pro se* allegations of ineffective assistance. *Moore*, 207 Ill. 2d at 78, citing *People v. Johnson*, 159 Ill. 2d 97, 125 (1994). During the trial court's evaluation, some sort of interchange between it and the defense 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." *Moore*, 207 Ill. 2d at 78. As directed by our state supreme court, the trial court can conduct this interchange in one of three ways: the court may ask counsel about the facts and circumstances related to the defendant's allegations; the court may have a brief discussion with the defendant himself; or the court may rely on its own knowledge of counsel's performance at trial and "the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 78-79; see *Milton*, 354 Ill. App. 3d at 292; accord *Bridgeforth*, 2017 IL App (1st) 143637, ¶ 38. Because, under such circumstances, a reviewing court is called upon to examine the adequacy of the trial court's inquiry into the defendant's claims of counsel's ineffectiveness, a question of law is inherently involved and our review is *de novo*. See *Bridgeforth*, 2017 IL App (1st) 143637, ¶ 39, 36.

¶ 70 In the instant cause, the record clearly indicates that, contrary to defendant's contention, the trial court conducted a more than adequate inquiry into the facts and circumstances presented before it pursuant to *Krankel*.

¶ 71 As noted earlier, when defense counsel was presenting a posttrial motion for new trial on defendant's behalf, defendant asked the court, of his own accord, if he could present a motion to dismiss his counsel. The court allowed him to do so, and defendant asserted ineffectiveness by

claiming counsel had only met with him once, they had "no meaningful communication," and they had not discussed any matters relevant to the cause against him. The court then questioned counsel about defendant's allegations, to which he replied that he had spoken with him "at length," he had been to the jail at least once and met with him several other times while in courtrooms after court calls, and that they, together, watched the videos that had been referenced as evidence against him; he also explained that they had "discussed trial strategy," defendant's rights and the type of trial he should request, and reviewed his presentence investigation report together. After hearing both sides, the court denied defendant's *pro se* motion, finding that his "reasoning" was not "adequate to dismiss" his counsel. However, upon defendant's insistence, the trial court withheld the entry of its decision and afforded him a continuance and a further hearing on counsel's ineffectiveness.

¶ 72 At this next hearing, defendant was not prepared with new counsel, as he had told the court he would be, and averred it was because the prison had been on lockdown. After verifying that this was not true, the court denied his motion to dismiss his counsel. However, defendant asked the court if he could file a *pro se* motion for ineffective assistance of defense counsel. Although it initially denied this as well, the court allowed defendant to read his motion into the record in open court, which defendant did. In his oral motion for ineffectiveness, similar to his motion to dismiss counsel, defendant asserted that he had not be "represented zealously" and that counsel's performance fell below the standard of competency due to a lack of "meaningful communication," visits, and pretrial motions. He then also made some general mention of plea-bargaining, investigations, and his overall concern that "his rights of effective assistance of

counsel will continue to be violated."

¶ 73 It was at this point that the trial court declared that it would be affording defendant "a *Krankel* [h]earing on this." After discussing with defendant his concerns, the court turned to address defense counsel, upon which a lengthy exchange ensued. First, it asked counsel how many times he had visited defendant, to which counsel responded "in the jail at least one time; many times here in lock-up." Then, desiring more specificity, the court further inquired whether he had other visitations with defendant and how many times he discussed his case with him, to which counsel responded, "at least 10 to 15 times." With respect to defendant's allegations regarding a lack of pretrial motions, the court acknowledged that counsel had filed motions for discovery, but asked why, for example, he had not filed a motion to suppress defendant's custodial statement to Detective DeCicco.

¶ 74 Defense counsel explained that he and defendant had reviewed the facts of his case and such a motion did not "fit in with the theory of our case." Defense counsel elaborated that there was videotape evidence that would be (and was) introduced at trial, and that officer Coleman and trooper Mayerbock would be (and did) corroborating that evidence; he also noted that there were several pieces of physical evidence directly linking defendant to the maroon Buick–all of which "certainly was damaging to" defendant.

¶ 75 Accordingly, defense counsel believed their best trial strategy was to attack how defendant's statement was obtained by Detective DeCicco, upon his cross-examination, in an effort to show its unreliability. Counsel further informed the court that, with respect to any plea-bargaining, "after getting permission from [defendant] to approach the State," he did so and an

offer was made, which he relayed to defendant and which defendant declined. And, with respect to defendant's "rights," he "advise[d]" defendant that he "believed that his best chan[c]e" was a jury trial, but defendant insisted on proceeding to a bench trial; defense counsel followed his wishes and actually withdrew his initial motion for a jury trial. Defense counsel reiterated to the court that he had discussed with defendant many "possible options" with respect to his representation throughout the litigation of defendant's cause.

¶ 76 After considering defendant and counsel's argument, the trial court held that "there is no ineffective assistance of counsel." The court did point out that some of defendant's statements concerning the law were correct, but it also noted that some of them were "conclusionary." Ultimately, the court found that "the facts don't support [defendant's] conclusions that he had ineffective assistance of counsel."

¶ 77 Assuming that defendant's claims were sufficient, and specific enough, to warrant an evaluation by the trial court pursuant to *Krankel* as to counsel's effectiveness, the record clearly supports the conclusion that the court properly conducted an adequate inquiry into the allegations in light of the circumstances before it. Again, the record reflects that there were multiple interchanges between the trial court and the defense regarding defendant's allegations, as required by *Krankel*. In fact, the trial court employed all three forms of evaluation declared appropriate by our state supreme court: speaking with defendant, speaking with defense counsel and relying on its own knowledge. First, the court entered into a lengthy inquiry with defendant about his claims, at both the hearing on his initial motion to dismiss his counsel and again at the subsequent hearing it had when, after affording defendant a continuance, it allowed him to orally

read his *pro se* motion regarding ineffectiveness into the record. It allowed him to describe his perceived views regarding lack of communication, lack of visits and lack of pretrial motions on counsel's part, and it permitted him to log his more general complaints about investigations, his "rights" and plea-bargaining–all the things he felt defense counsel did wrong in his case and how he believed this impacted his trial. Once the court heard from defendant, it declared that it was holding "a *Krankel* [h]earing" on his claims.

¶ 78 Next, the trial court turned directly to defense counsel to discern the facts and circumstances related to defendant's allegations. The court spoke to counsel, who had worked on defendant's case since he was first arrested. Counsel recounted all the tools he employed in preparing for and litigating defendant's cause. With respect to meetings and communication, counsel told the court that he certainly visited with defendant once when he was in jail, but also met with him in lockup as well as in courtrooms after their court calls to spend time with him discussing the case, totaling "at least 10 to 15 times;" they viewed the videotape evidence together and consulted his presentence investigation report together. Upon the court's questioning, and with respect to his motion practice and investigation, counsel spoke at length about why he had not filed a pretrial motion to quash defendant's arrest and suppress his custodial statement.

¶ 79 As counsel explained, such a motion did not "fit in" with the theory of the case he and defendant had developed, namely, that his statement was essentially made under duress and was inherently unreliable because it was taken in the middle of the night while defendant lay hooked up to tubes and machines in the emergency recovery room in the hospital just hours after having

had surgery on his head and neck for multiple gunshot wounds for which he had been placed under anesthesia–all of which Detective DeCicco knew, along with the facts of the case, before interviewing defendant without anyone else present and failing to memorialize his statement in any way. Counsel further pointed out to the trial court that they had developed this concept as their trial strategy in the face of the knowledge that videotape evidence existed, and most certainly would be used at trial, clearly showing defendant's presence at the scenes, as well as multiple pieces of physical and forensic evidence, including fingerprints and fresh blood, undeniably placing defendant in the backseat of the maroon Buick from where multiple witness were to testify shots were fired and a gun was pointed and from where a revolver used in the crimes was, in fact, discovered.

¶ 80 Lastly, with respect to defendant's remaining concerns about his "rights" and plea-bargaining, counsel recounted for the trial court, and as we have clearly found in the record, that he discussed various options with defendant. That is, the record shows that counsel initially requested a jury trial for defendant, but then later withdrew that request and asked the court for a bench trial after having conferred with his client–this, despite counsel's strong advice to defendant that a jury trial was a better option. Additionally, counsel reiterated to the court that he did, indeed, approach the State regarding a plea bargain as defendant desired; the State offered one and counsel brought it to defendant, but defendant refused to accept it.

¶ 81 Third, and in further accordance with *Krankel*, the record is clear that the trial court had its own knowledge of counsel's performance to consider in evaluating defendant's ineffective assistance claims. The court had presided over defendant's trial from the beginning, during

discovery, pretrial motion hearings and, obviously, throughout the trial itself. After considering defendant and counsel's argument, the court concluded that, although defendant made some pertinent legal points, his application of the instant facts to those points did not support them–there simply was nothing to substantiate his conclusions of ineffectiveness. Accordingly, the court denied defendant's motion.

¶ 82 From all this, it is clear that, contrary to defendant's contention, the trial court properly entertained his posttrial *pro se* motion regarding ineffectiveness. The court spoke directly to defendant and held a hearing, questioned defense counsel thoroughly, and relied on its own observations gathered from its lengthy participation in defendant's trial. The court addressed all of defendant's claims–lack of communication, lack of pretrial motions, concern of his "rights" and plea-bargaining–finding, after its long and detailed colloquy with both sides, that defense counsel's actions and explanations were warranted and that counsel had not been ineffective. Upon our review of the record, and having conducted a more than adequate inquiry into defendant's *pro se* allegations, we find no error on the part of the trial court here.

¶ 83 In addition to his claim that the trial court improperly failed to appoint *Krankel* counsel, which we have just found was a meritless one, defendant asserts that the court erred because in making its determination, it looked to "whether counsel was in fact ineffective instead of applying the lower *Krankel* possible-ineffectiveness standard." This claim, too, is meritless.

¶ 84 Defendant is correct that *Krankel* and its progeny call for a trial court to examine a defendant's allegations on the part of counsel for "possible neglect." *Moore*, 207 Ill. 2d at 78; accord *Bridgeforth*, 2017 IL App (1st) 143637, ¶ 37. Defendant is also correct that the trial court

here, in denying his *pro se* motion, stated that "the facts don't support his conclusions that he had ineffective assistance of counsel." From this, defendant adduces that the trial court "never addressed whether counsel was possibly ineffective; rather, [it] jumped to the next stage and found counsel in fact effective." We disagree, however, that the court held him to some higher standard, as he now claims.

¶ 85 First, there is nothing in the record to indicate that the court was not cognizant of the fact that it was conducting a preliminary inquiry. It had earlier allowed defendant to present a motion to dismiss counsel, continued the matter so he could appear with new counsel, and, after discovering that defendant lied about the reason he was not prepared at that subsequent hearing, still allowed him to orally present the reasons he believed rendered counsel ineffective. The court made clear it was holding a *Krankel* hearing, with all that entailed, questioning defendant and questioning counsel about the concerns presented. And, during this hearing, it consistently prodded counsel to explain how his actions, and inactions for that matter, coincided with trial strategy, the appropriate standard for a *Krankel* hearing.

¶ 86 Moreover, any error in this regard by the court, assuming that there was (which we do not), was harmless. That is, even if the trial court made an error, as defendant asserts, in failing to appoint new counsel to investigate his *pro se* claims of ineffective assistance, we will not reverse if that error was harmless. See *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 23, quoting *Moore*, 207 Ill. 2d at 80 ("[o]ur supreme court has held that '[a] trial court's failure to appoint new counsel to argue a defendant's *pro se* posttrial motion claiming ineffective assistance of counsel can be harmless beyond a reasonable doubt;' " therefore, "[o]n review, even

if an appellate court finds that a trial court made an error [in its *Krankel* determination], it will not reverse if it finds that the error was harmless"). 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 defense counsel's explanations were unsatisfactory for his inactions cited by defendant (*i.e.*, his lack of "meaningful" communication, his failure to file a pretrial motion to suppress, his lack of concern regarding his rights and his failure to plea-bargain), none of these cited inactions prejudiced defendant such that the outcome of his trial would have been different. We have already discussed this at length earlier in our decision here. Defendant's claims did not set forth a colorable claim of ineffective assistance, and the appointment of new counsel would not have changed this fact.

¶ 87 Ultimately, and again, new counsel is not automatically required in every case where a defendant raises a *pro se* claim of ineffective assistance. See *Moore*, 207 Ill. 2d at 77-78. Instead, if the trial court determines that the claim either lacks merit or pertains only to matters of trial strategy, then it does not need to appoint new counsel and may deny defendant's *pro se* motion of its own accord. See *Moore*, 207 Ill. 2d at 78; accord *Milton*, 354 Ill. App. 3d at 292. That is precisely what occurred here. Because counsel's decisions were comprehensive and strategic, and where defendant was not prejudiced by them, the trial court's denial of defendant's claims without appointing new counsel was not erroneous.

¶ 88 CONCLUSION

¶ 89 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

¶ 90 Affirmed.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
THIRD DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTONIO BRYANT, Defendant-Appellant.	)	No. 1-14-3578

O R D E R

IT IS HEREBY ORDERED that Defendant-Appellant's Petition For Rehearing is Denied.

Justice James Fitzgerald Smith

Justice Nathaniel Howse, Jr.

Justice Terrence Lavin

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September 26, 2018

In re: People State of Illinois, respondent, v. Antonio Bryant, petitioner.
Leave to appeal, Appellate Court, First District.
123520

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 10/31/2018.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

Additional material from this filing is available in the Clerk's Office.