2020 IL App (1st) 170237-U

No. 1-17-0237

Order filed November 4, 2020

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 55
	)	
RANDALL RUSH,	)	Honorable
	)	Brian Flaherty,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed in part; reversed in part; remanded with instructions. Trial court erred in failing to question juror about Rule 431(b) principles, but evidence was not closely balanced. Record was not sufficient to resolve claim of ineffective assistance on direct review. Trial court erred in failing to conduct *Krankel* inquiry. Defendant may challenge fees and credits on remand.

¶ 2 A jury convicted defendant Randall Rush of the first-degree murder of Sybil Parker. On appeal, defendant argues (1) that the trial court's failure to comply with Illinois Supreme Court Rule 431(b) was plain error; (2) that trial counsel was ineffective for failing to present scientific

evidence to support his theory that the gunshot residue found on his jeans was not probative evidence of his guilt; (3) that the trial court erred in failing to conduct an inquiry into his *pro se* claim of ineffective assistance of counsel; and (4) that the trial court erred in its application of certain fees and credits.

¶ 3 We affirm defendant's conviction but remand to the circuit court for a *Krankel* inquiry. On remand, defendant may also raise his challenges to the fines, fees, and costs order pursuant to Illinois Supreme Court Rule 472(e).

¶ 4 BACKGROUND

¶ 5 I. *Voir dire*

¶ 6 During jury selection, the trial court asked the venire as a whole whether any potential juror "disagreed" with any of the principles set forth in Illinois Supreme Court Rule 431(b). No potential juror indicated disagreement. While questioning the potential jurors individually, the trial court asked each potential juror, with the exception of Evelyn Madrona-Pena, whether he or she understood and accepted those same four principles. They all did. Neither the State nor the defense informed the trial court that it had failed to ask Madrona-Pena. The court confirmed, however, that Madrona-Pena would follow any instructions given by the court. The parties selected Madrona-Pena as a juror. Before the first witness testified, the trial court read the jury a preliminary instruction, which, among other things, reiterated the four principles about which the jurors had been questioned during *voir dire*.

¶ 7 II. Trial

¶ 8 On October 31, 2010, Sybil Parker was found dead on the floor of her bedroom, in her two-story house on the 2200 block of West 170th Street in Hazel Crest. Parker lived with her

son, Chasmand White; her niece, Shameka Ambrose; and Chasmand's dog, a pit bull named Black. Parker's daughter, Myesha White, lived with her fiancé in Thornton, but she stayed at Parker's house on occasion.

¶ 9 Parker and defendant dated for four or five years. Defendant moved into Parker's house in February 2010. He moved out after their relationship ended sometime in October 2010, but he still kept some personal belongings there, including an entertainment center, in an upstairs bedroom that he used as an office.

¶ 10 Parker's house had three entry doors: one in the front and two in the rear. The rear doors led, respectively, into the kitchen and the basement. The front and back doors required different keys. Only Parker used the front door or had a key to that door. Myesha, Chasmand, Parker, and defendant all had keys to the rear door leading into the kitchen. Other than Parker, everyone used that door to enter the house.

¶ 11 About a week before Parker's death, Myesha overheard a phone call between Parker and defendant. They were on speakerphone. According to Myesha, defendant told Parker "that if he found out [Parker] was giving her pu--y to another man that he would kill her and him."

¶ 12 On the evening of October 30, 2016, Chasmand, Myesha, Myesha's daughter, and Parker ate pizza in Parker's bedroom, on the second floor of the house. When Myesha and her daughter left, around 8 or 8:30 p.m., Parker was still in her bedroom with Black. Chasmand went to his bedroom in the basement and closed the door.

¶ 13 Around 9 or 9:30 p.m., Chasmand started watching an action movie with "a lot of shooting [and] explosions." He played it at a "nice volume" on his "pretty elaborate sound system," which had "[q]uite a few speakers and surround sound." When Chasmand was in his

bedroom, he could not hear anything on the second floor of the house. And when asked whether someone walking from the back door to the stairs leading up to the second floor would pass over his bedroom, Chasmand said no.

¶ 14 Chasmand fell asleep shortly after starting the movie. At some point—he was not sure when—he woke up to Black scratching at his bedroom door. This was unusual, because Black normally slept upstairs with Parker. He yelled at Black to stop and went back to sleep. He woke up in the morning at 11:00 a.m. and went upstairs. He noticed some chewed up tissue on the floor and went up to the second floor to look for Black.

¶ 15 Chasmand found Black sitting at the foot of Parker's bed. He ran over and saw Parker; her body was cold and stiff, and she had a hole in her sweater. Chasmand tried CPR, called 911, and later met the police at the back door. Eventually, he went to the police station and cooperated while "tests" were performed on his hands.

¶ 16 Chasmand testified that he never left the door to the house open or unlocked, and that while Black would bark at strangers, he did not bark at defendant or show any aggression toward defendant. But Black would not follow defendant or stay in the same room as him.

¶ 17 By the time of trial, the deputy examiner who performed Parker's autopsy no longer worked for the Cook County Medical Examiner's Office. The chief medical examiner, Dr. Ponni Arunkumar, reviewed the records from the autopsy in anticipation of defendant's trial.

¶ 18 Dr. Arunkumar testified that the external examination revealed numerous injuries to Parker's face, chest, back, and upper and lower extremities. Most saliently, she had two gunshot wounds to her chest. Judging from the nature of the gunshot wounds, Arunkumar believed that one shot was fired while the gun was in direct contact with Parker's skin, that the other was fired

at close range, and that both occurred while Parker was laying on the floor. The gunshots wounds were the cause of death.

¶ 19 Parker's body also had three stab wounds, one on each side of her chest and one on the right side of her back, and 21 incised or sharp-force injuries, mostly on her hands, wrists, and forearms. The incised wounds were superficial and appeared to be defensive. Parker's body also had abrasions on her face and upper and lower extremities.

¶ 20 The autopsy report listed the date of death as October 31, 2010, but it did not list a time of death. Arunkumar would expect someone with injuries like Parker's to "bleed out" within minutes.

¶ 21 In October and November 2010, Jamie Moreno was a terminal manager for Enterprise Transportation (Enterprise), a trucking company in Channahon, Illinois, where defendant was employed as a driver. Moreno testified that the Enterprise truck defendant drove was equipped with a global positioning system (GPS) tracking device, and tracking data from that device was stored in a computer system.

¶ 22 The GPS tracking system generally recorded the truck's location once per hour, but if a message was sent between the truck and dispatch, the truck's location would be recorded at that time. The location of the truck was not recorded by latitude and longitude on computer readouts; rather, the location was recorded relative to a given point. The safety director for Enterprise, Nolan Everitt, could generate reports with the coordinates of the recorded locations.

¶ 23 Moreno had no knowledge of the GPS tracking system malfunctioning on October 30 or 31, 2010. The records showed that on October 30, 2010, defendant's truck was at the Enterprise terminal, 3.8 miles northeast of Channahon, at 9:21 p.m. At 9:56 p.m., and again at 10:32 p.m., it

was 1.1 miles west northwest of East Hazel Crest. At 11:36 p.m., the truck was 3.4 miles northeast of Channahon, which was near the terminal.

¶ 24 Detective Scott Lefko of the Cook County Sheriff's Police Department obtained the GPS records for defendant's truck from Moreno and Everitt. The records he received from Everitt contained latitude and longitude coordinates, which were plotted on a map. This revealed that when the truck was 1.1 miles west northwest of East Hazel Crest, it was parked at 170th Avenue and Dixie Highway—a "couple blocks" from Parker's house.

¶ 25 Special Agent Joseph Raschke of the Federal Bureau of Investigation (FBI) testified as an expert in historical cell site analysis, a method of determining the approximate location of a cell phone at any given time by using its call detail records. Raschke reviewed the call detail records for defendant's cell phone for the period between 8:30 p.m. on October 30, 2010, and 11:00 a.m. on October 31, 2010.

¶ 26 Between 8:38 p.m. and 9:28 p.m., on October 30, 2010, defendant's phone made 11 outgoing calls to Parker's phone, utilizing two different towers in the Joliet area. Between 9:33 p.m. and 9:49 p.m., defendant's phone made 4 outgoing calls to Parker's number. Raschke's analysis showed that as these calls were placed, defendant's phone moved progressively farther east from the Joliet area, until the last call was made in the Hazel Crest area. All 15 of these calls lasted only "a couple of seconds."

¶ 27 At 9:55 p.m., defendant's phone made an outgoing call to Parker's phone, lasting one second and using a tower near Hazel Crest, the sector boundaries of which were generally to the north and west of the tower and faced away from Parker's house. Defendant's phone next made an outgoing call to Parker's phone at 10:14 p.m., lasting two seconds and using a tower in the

same location, but the sector boundaries of that tower were generally to the east of the tower and faced Parker's house. Both the 9:55 p.m. and 10:14 p.m. phone calls utilized the tower site closest to Parker's house.

¶ 28 On October 31, 2010, at 1:48 a.m. and again at 9:16 a.m., defendant's phone made outgoing calls to Parker's phone, lasting four and five seconds, respectively, using a tower in the Joliet area.

¶ 29 Raschke concluded that his analysis was "consistent with the phone having been in the Joliet, Illinois, area in the evening of October 30, 2010, travelling to the Hazel Crest area utilizing the tower and sector nearest [Parker's house] in Hazel Crest[,] and then travelling back to Joliet."

¶ 30 Investigator Tarra Daniels-Davis was a crime scene investigator with the Cook County Sheriff's Police Department. On October 31, 2010, Daniels-Davis and her two partners went to Parker's home to process the scene. They entered through the back door. Daniels-Davis did not observe any damage to either the front or rear entryways into the home.

¶ 31 The officers recovered an empty Ruger gun box inside the entertainment center in the bedroom that defendant used as an office. No gun was recovered from the house, but a small pocketknife was recovered in the basement bedroom. A live round and two spent shell casings, all Luger 9-millimeter, were recovered from the floor in Parker's bedroom.

¶ 32 Later that day, Daniels-Davis went to the Hazel Crest police department and collected a gunshot residue (GSR) kit from Chasmand's hands. Daniels-Davis testified that Chasmand had a somber demeanor when she met with him, and that she had to repeat herself because Chasmand, while "very cooperative," appeared "somewhat out of it."

¶ 33 Daniels-Davis was present for Parker's autopsy on November 1, 2010. She learned that Parker's body "was not holding any of the [bullets]," so she returned to the house with her partners to pull up the carpeting and look for the bullets in the flooring. The officers found one bullet in the subfloor, and a second bullet in the insulation beneath the subfloor.

¶ 34 Around 5:00 p.m. on October 31, 2010, Officer Steven Moody of the Cook County Sheriff's Police Department went to the Enterprise terminal looking for defendant. He testified that the distance between Hazel Crest and Channahon was approximately 30 miles.

¶ 35 That same day, Investigator Lukasik of the Cook County Sheriff's Police Department went to the Enterprise terminal with his partner to process defendant's truck. Lukasik found a black gun holster in the sleeper compartment of the truck. A GSR kit was collected from the steering wheel, gearshift, and on a grab bar outside the truck, but not from the holster. The officers used an alternative light source capable of detecting blood or other bodily fluids. They did not find any blood on the inside or outside of the truck. The truck was towed to the Hazel Crest Police Department after it was processed at the terminal.

¶ 36 Lukasik performed a GSR kit on the backs of defendant's hands, and he took a buccal swab from defendant to obtain a sample of his DNA.

¶ 37 Investigator Maurice Cernick of the Cook County Sheriff's Police Department collected video surveillance footage from Pilot Travel Center (Pilot) in Channahon. The parties stipulated that the footage, which was played for the jury, captured images of defendant making a purchase inside Pilot between 5:22 p.m. and 5:29 p.m., on October 30, 2010. He was wearing blue jeans with a phone clip on the side, gym shoes, and a tan button-down, long-sleeve shirt.

¶ 38 Officer Derry Pierce of the Hazel Crest Police Department also viewed the surveillance

footage. After doing so, he went to defendant's truck to gather some items. Inside the truck, he saw some pants that the fit the description of the jeans defendant wore inside Pilot. Pierce got a bag from inside the station and put the pants into it. He wore gloves and did not handle the pants before that point. He searched the pockets and found a receipt from Pilot and a house key. Pierce gave the key to Detective Sergeant Anthony Gray and asked him to check if it fit into any locks at Parker's house.

¶ 39 A few days later, Pierce went back to the truck to look for the shirt defendant wore inside Pilot. He found it in a shopping bag. Wearing gloves, he put the shopping bag into an evidence bag. Pierce testified that neither the shirt nor the pants had direct contact with any surface inside the police station.

¶ 40 On cross-examination, Pierce testified he recovered five keys on November 3, 2010. One was inside a pocket, and that key, he initially said, was the only key that was separate from the others. But after Pierce's memory was refreshed with his report, this colloquy took place:

"Q. On November 8 – well, did you not, in fact, observe one single key loose in the bag?

A. Yes, it was.

Q. You also observed four keys loose in the bag; correct?

A. Yes.

Q. You observed five keys in this bag?

A. Yes.

Q. The report doesn't describe what bag it is, though, does it?

A. No, it doesn't.

Q. And with the clothing that you recovered, you placed the blue jeans inside of an evidence bag?

A. Yes.

Q. That would be in a Hazel Crest Police Department evidence bag?

A. Yes.

***

Q. Now, you testified on direct examination, and I just want to clarify how and when you actually placed the clothing *** when and where you placed them in an evidence bag. Did you actually place them in a bag in the public works area by the truck or in the police station?

A. In the truck.

Q. In the truck?

A. As I picked the bags up – as I picked the pants up, I went through the pockets, I placed the clothing in the bag, *** and, you know, I packaged everything – I packaged it there, but I labeled it when I got them to the station.

***

Q. After placing those items in the bags in the truck, did you ever take them out?

A. In the bag?

Q. Out of the bag.

A. Not the money.

Q. What about the clothes?

A. Not the clothing.

Q. Not the clothing?

A. No.

Q. They remained in the bag?

A. They remained in the bag. I pressed them down, I marked the bag, labeled it.

Q. Sealed it?

A. Sealed it.

Q. Never took photos of the clothing *** did you?

A. We took photos. I took photos in the truck and I took – let me – may I look at my report so I can refresh my memory?

Q. Do you remember where you took photos?

A. No.

Q. But you do remember sealing the bag in the truck?

A. No, I didn't seal it in the truck. I labeled it. I sealed everything at the station. I labeled it at the station. I placed it in a bag in the truck.

Q. Once you got back to the station, you took the items out of the bags; correct?

A. Let me refresh my memory."

¶ 41 Pierce's report did not refresh his memory as to whether he took the items out of the bag inside the station. Defense counsel then showed him photos in which the jeans he recovered from the truck were laid on a desk inside the Hazel Crest Police Department.

¶ 42 On redirect, Pierce acknowledged he was mistaken on direct examination, when he

testified that the pants had not come into contact with any surface inside the police department. But the photo of the pants on the desk showed only the backside of the pants in contact with the desk. Pierce testified that he did not discharge a gun near the pants, and he did not observe any other officer do so. Pierce also acknowledged that he was mistaken when he testified that he found a single key in defendant's pocket; rather, it was intermingled with defendant's possessions in the truck.

¶ 43 On November 3, 2010, Piece gave Gray a house key and asked him to check whether it opened the door at Parker's house. Gray testified that it unlocked the back door.

¶ 44 Forensic scientist Mary Wong, of the Illinois State Police, testified as an expert in primer GSR analysis. Wong explained that primer GSR analysis tests for a particle that is uniquely related to the discharge of a firearm. To warrant a conclusion that the tested subject discharged a firearm, or that the sample area was in the vicinity of a discharged firearm, at least three of these particles must be present. And even if the person had discharged a firearm, or the sample was in the vicinity of discharged firearm, the test can, in general, still yield negative results because the resulting GSR particles "were either removed by activity[,] not deposited[,] or not detected by the procedure." Wong analyzed various GSR kits and reached the following conclusions.

¶ 45 Defendant may or may not have discharged a firearm with either hand. In addition to the reasons why, in general, a test may be negative, Wong identified two specific reasons why GSR may not have been detected. First, the kit was collected from defendant's hands at 11:00 p.m. on October 31, 2010, and studies had shown that GSR cannot be identified on skin when six or more hours had elapsed since the discharge of a firearm. (But it can remain detectable on clothing for longer than that.) Second, defendant had washed his hands before the kit was

collected, and Wong would not expect to find GSR on someone who had done so.

¶ 46 The kit collected from Chasmand's hands, more than six hours after the shooting, yielded the same results as the kit collected from defendant's hands.

¶ 47 The three areas tested from defendant's truck—the steering wheel, gearshift handle, and grab bar—may or may not have been in the vicinity of a discharged firearm, and may or may not have come into contact with a "primer [GSR] related item." In Wong's opinion, the results of these kits were consistent with someone having GSR on his or her hands but wiping them either before or after touching these areas.

¶ 48 GSR kits were collected from each leg of the jeans found in defendant's truck. The right-leg kit did not reveal GSR, but the left-leg kit indicated that this area either was in the vicinity of, or came into contact with, "a primer [GSR] related item." The right and left cuffs of the tan shirt found in defendant's truck revealed one GSR particle each.

¶ 49 Wong testified that it is possible for GSR to be deposited through transfer from another item. Thus, it is possible that GSR particles were transferred to defendant's jeans when they were on a surface inside the Hazel Crest Police Department—if GSR particles were present on that surface. GSR particles can also be wiped off of a surface if it cleaned, dusted, or wiped down.

¶ 50 Forensic biologist William Anselme, of the Illinois State Police, analyzed various items for the presence of blood. A pair of shoes from defendant's truck, a dollar bill found in defendant's pants, and the knife recovered from Parker's house were all negative. The cuffs on the tan shirt found in defendant's truck tested positive for blood in four areas. The blue jeans tested "weak positive" in two areas. When Anselme received the jeans and tan shirt, they "were all folded up together" inside their respective bags.

¶ 51 Forensic biologist Christopher Webb, also of the Illinois State Police, performed DNA analysis on various items. A blood stain on a cuff of the tan shirt contained a mixture of Parker's DNA and defendant's DNA. Parker's DNA was the major profile. Based on the amount of DNA present in that sample, Webb believed that it came from bodily fluid, as opposed to "simple skin – cell-touch type DNA."

¶ 52 Webb testified that the blood stain on the jeans could not be analyzed in 2010 because the amount of DNA present was very small—too small to generate a profile using the technology available at that time. In 2012, when new technology made an analysis possible, he determined that defendant could not be excluded from the DNA profile found in the blood stain on the jeans. Webb also analyzed fingernail clippings from Parker and found that no male DNA was present.

¶ 53 The parties stipulated to the following: The live cartridge, two discharged cartridge cases, and the knife found in Parker's house were all tested for fingerprints, but no latent impressions suitable for comparison were found on any of these items. The two discharged cartridge cases were fired from the same gun, but without the gun for comparison, it could not be determined whether the discharged cartridge cases and the fired bullets were fired from the same gun.

¶ 54 On October 31 and November 1, 2010, officers searched several areas for a firearm or other evidence relating to Parker's death. These included (1) the area around 170th Avenue and Dixie Highway, and in particular, the parking lot of Bozo's, a hot dog stand on the east side of the Highway, and the exterior of a strip mall on the west side of the highway; (2) a creek on the east side of Parker's house; (3) the grounds of the Enterprise terminal, the buildings on site, and the perimeter of the terminal; and (4) both sides of Eames Street, where the Enterprise terminal was located, from Interstate 55 to Route 6. No items of significance were found in any of these

areas. None of the officers searched the area between Parker's house and Bozo's or retrieved any surveillance footage from Bozo's.

¶ 55 There was a large quarry on Eames Street, south of the Enterprise terminal. A sonar-equipped boat from the Plainfield Fire Department detected an item described as a "possible firearm" in the 15-foot-deep water. On November 3, 2010, police divers searched the bottom of the quarry, without a light source. They did not recover a firearm.

¶ 56 Defendant was interviewed at the Hazel Crest Police Department on October 30, 2010, by Sergeant William Dowding of the Frankfort Police Department and an officer from the Cook County's Sheriff's Police Department. Dowding testified that he did not observe any injuries to defendant's hands that day and that defendant was not bleeding. Defendant's interview lasted just over an hour and half and was recorded. The video was played for the jury.

¶ 57 In sum, defendant stated that on October 30, 2010, he returned from Michigan after hauling a load for Enterprise. He refueled his truck at the Pilot in Channahon and went back to the Enterprise terminal, where he remained throughout the evening. He had not been to Parker's house in the previous two weeks and did not leave the Enterprise terminal at any time between October 30 and 31. When defendant was confronted with the GPS records from his truck, which showed the truck was in Hazel Crest on October 30, he responded that the GPS tracking system was new, and that he did not believe it was functional at the time.

¶ 58 The defense presented one witness, Jamie Moreno from Enterprise. Moreno testified that in October 2010, defendant was a probationary employee. Company policy prohibited employees from taking the truck for personal use without permission. A probationary employee would have been terminated for such conduct.

¶ 59 The jury began deliberating at 1:22 p.m. At 2:25 p.m., the trial court received a note from the jurors stating, "[w]e need to watch the DVD." Two DVDs—one with defendant's recorded statement to police and one with the Pilot surveillance footage—were in a "pack" of evidence that had been given to the jury at the beginning of their deliberations. By agreement of the parties, a television set with a DVD player was sent to the jury room. At 3:52 p.m., the jury returned its verdict, finding defendant guilty of first-degree murder.

¶ 60 III. Defendant's allocution

¶ 61 Defendant made a lengthy statement in allocution, which we will quote at length later on. In sum, he maintained his innocence, professed his love for Parker, and described his decorated military career and other life accomplishments that warranted leniency at sentencing.

¶ 62 Along the way, defendant alleged both that "[t]here's quite a bit of things that were not presented [at trial], that should have been presented," and that much of the evidence that was brought out at trial "isn't what it seems." Defendant initially asked for an "evidentiary hearing" to address these matters, but by the end of his allocution, asked for a "retrial" instead.

¶ 63 The trial court responded that it had already ruled on the motion for a new trial and that it found the evidence sufficient to prove defendant guilty beyond a reasonable doubt. The trial court imposed the minimum sentence of 45 years in prison (20 years, plus a 25-year firearm enhancement) and imposed various fines and fees.

¶ 64 ANALYSIS

¶ 65 I. *Voir dire*

¶ 66 The trial court failed to ask prospective juror Madrona-Pena whether she understood and accepted the four principles set forth in Illinois Supreme Court Rule 431(b). Defendant concedes

that he forfeited the error but argues that he is entitled to a new trial under the closely-balanced-evidence prong of the plain-error rule. We review the trial court's compliance with Rule 431(b) *de novo*. *People v. Belknap*, 2014 IL 117094, ¶ 41.

¶ 67 Rule 431(b) requires the trial court to "ask each potential juror, individually or in a group, whether that juror understands and accepts" four principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her. Ill. S. Ct. R. 431(b) (eff. July 1, 2012); see also *People v. Zehr*, 103 Ill. 2d 472, 477-78 (1984).

¶ 68 Rule 431(b) allows the court to question the prospective jurors either individually or in a group, provided the court affords "an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). Asking potential jurors whether they have a "problem with" or "disagree with" the principles, rather than whether they understand and accept them, is clear error. *People v. Sebby*, 2017 IL 119445, ¶ 49; *People v. Wilmington*, 2013 IL 112938, ¶ 32. And failing to ask even one juror whether he or she understands and accepts even one of the four principles is clear error. *People v. Montgomery*, 2018 IL App (2d) 160541, ¶ 26.

¶ 69 Here, the trial court asked the prospective jurors as a group whether they "disagreed" with the four principles. That alone was not sufficient to comply with the rule. *Sebby*, 2017 IL 119445, ¶ 49. And during the individual questioning, the trial court failed to ask juror Madrona-Pena whether she understood and accepted each of the principles. Thus, the trial court committed

clear error. *Id.*; *Montgomery*, 2018 IL App (2d) 160541, ¶ 26.

¶ 70 The State argues that the trial court's error was not "clear or obvious" because it was "inadvertent," as the court "made every effort to comply with the specific question and response process as mandated by the [supreme court]."

¶ 71 We cannot agree. True, the court did ask every other potential juror whether he or she understood and accepted the four principles, and so the court's failure to ask Madrona-Pena the same questions was quite likely an oversight. But while the trial court's error may have been "inadvertent," there is no rea son why an inadvertent error cannot also be clear and obvious. (The phrase "obvious oversight" is not an oxymoron.) Our supreme court has clearly instructed that strict compliance with Rule 431(b) is necessary. See, *e.g.*, *Belknap*, 2014 IL 117094, ¶ 46. The trial court did not live up to that mandate.

¶ 72 The State also points out that Madrona-Pena was present when the court asked the *other* potential jurors whether they understood and accepted the principles. Thus, the State contends, it is reasonable to infer that she would have informed the court *on her own initiative* if she did not understand or accept the principles that the other potential jurors were asked about—just as she informed the court, on her own initiative, that she had an upcoming doctor's visit. We do not find this inference reasonable; it seems unlikely that a prospective juror would interrupt the attorneys or the judge for this purpose. In any event, we have no authority to effectively shift the burden of compliance with Rule 431(b) from the trial court to the prospective jurors, as the State would have us do. Again, the trial court must strictly comply with the rule, and it did not do so here.

¶ 73 Lastly, the State argues that nothing in the record suggests Madrona-Pena was a biased juror. In short, the State says, she indicated her acceptance of the principles when she failed to

raise her hand during the group questioning of the venire, and she specifically agreed to follow the court's instructions. The supreme court has expressly rejected both of the State's arguments. *Wilmington*, 2013 IL 112938, ¶ 32; *Zehr*, 103 Ill. 2d at 476-77. We need not say any more.

¶ 74 Having concluded that the trial court committed a clear or obvious error, our next inquiry is whether the evidence was closely balanced, such that defendant is entitled to a new trial under the first prong of the plain-error rule.

¶ 75 A case is closely balanced when "it can hardly be said that reasonable jurors could only draw from [the evidence] a conclusion of guilt." *People v. Nelson*, 193 Ill. 2d 216, 223 (2000). When the evidence is close, in this sense, a Rule 431(b) error is "potentially dispositive" and therefore prejudicial. *Sebby*, 2017 IL 119445, ¶ 68. To determine whether a case was closely balanced, we undertake "a qualitative, commonsense assessment" of the evidence as a whole, including any evidence that bears on the credibility of the witnesses. *Id.* ¶ 53. Defendant bears the burden of persuasion. *People v. Fort*, 2017 IL 118966, ¶ 18 (quoting *People v. Herron*, 215 Ill. 2d 167, 187 (2005)). But he does not need to show how the error may have contributed to the verdict; his burden is simply to show that the evidence was close. *Sebby*, 2017 IL 119445, ¶ 51.

¶ 76 Defendant argues that the evidence was close because whatever physical evidence may have ostensibly tied him to Parker's murder was questionable and did not overwhelmingly establish his guilt. The physical evidence alone may not have been overwhelming, but it was not insignificant. And it was coupled with significant circumstantial evidence as well. Even purely circumstantial evidence can be overwhelming (see, *e.g.*, *People v. Ehlert*, 211 Ill. 2d 192, 231 (2004)), a point defendant refuses to acknowledge, although we agree that was not the case here. But even if neither the physical nor the circumstantial evidence alone was overwhelming, the

combination of them, and thus the evidence as a whole, was.

¶ 77 To begin, defendant had a motive to kill Parker. The two had just ended a four-and-a-half-year relationship. A week before Parker was murdered, Myesha overheard defendant on the phone with Parker, threatening to kill her if she had sex with another man. Defendant argues that it was a "close question" whether the call had any probative value, in part because it was not "recorded or memorialized in any way." But defendant points to no concrete reason to question Myesha's credibility on this point. And while it is trivially true, as defendant points out, that people sometimes say things they do not mean—for instance, they make hollow threats—we do not believe that a rational jury would give defendant's apparent threat such an innocent construction when that apparent threat is viewed in the context of the physical and circumstantial evidence of his guilt.

¶ 78 The strongest piece of physical evidence was the blood stain on defendant's shirt, which contained a mixture of Parker's blood and defendant's blood. Defendant argues that the blood stain is not as incriminating as it might appear, at first blush, because it only contained a "very, very small" amount of Parker's DNA, thus suggesting that there could have been any number of innocent explanations of how it got there. But defendant misreads the record on this point.

¶ 79 The State's expert, Webb, did not testify that there was a "very, very small" amount of Parker's DNA in the mixed blood sample. That remark pertained to an entirely different blood sample, one taken from defendant's jeans. (More specifically, it was the sample that could not be analyzed in 2010 but was later determined to contain a DNA profile from which defendant "could not be excluded.") In fact, Webb testified that the blood sample lifted from the cuff of defendant's shirt contained significantly more DNA than any of the other samples tested, that

Parker's DNA was the major profile identified in this sample, and that the concentration of Parker's DNA was high enough for Webb to infer that it was deposited by bodily fluid, as opposed to cell-touch transfer. Thus, the kind of innocent explanation defendant suggests—that defendant and Parker both happened to bleed onto the same spot on defendant's shirt at different times in their relationship—seems highly unlikely, at best.

¶ 80 Defendant also had GSR on the jeans he was seen wearing inside the Pilot. Defendant argues that it would have been reasonable for the jury to conclude that the GSR was transferred to the jeans when they were placed on a table inside the office at the Hazel Crest police station. But there was no evidence that GSR was present on that table, and the photograph of the jeans on the table shows only the backside of the jeans in contact with the table surface, whereas the GSR was found on the front of the jeans, near the pockets.

¶ 81 Even more significantly, the GSR evidence must be viewed alongside the blood stain evidence. It would be a remarkable conspiracy of events if Parker's blood and GSR *both* just happened to be deposited, in some innocent way, on the clothes defendant was seen wearing on the day of the murder.

¶ 82 Defendant also argues that the lack of GSR found on defendant's shirt cuff and hands rendered the evidence closely balanced. We disagree. Wong testified that she would not have expected GSR to be found on defendant's hands, because more than six hours had elapsed, and because defendant had washed his hands before the GSR kit was collected. As for the shirt cuffs, Wong's testimony left open the possibilities that GSR was removed by activity, that it went undetected during analysis, or that it was simply not deposited, despite having been in the vicinity of a discharged firearm.

¶ 83 Defendant next argues that the GSR and DNA evidence collected from his clothing was rendered suspect by the fact the jeans and shirt were collected from his truck by Pierce, whose testimony was unworthy of belief because it had been impeached. According to defendant, Pierce established he could not be trusted when describing his collection and storage of the only physical evidence against defendant.

¶ 84 Evidence is not rendered closely balanced by the fact finder's need to assess the credibility of a witness where no rival witnesses or other competing evidence was presented. *People v. Jackson*, 2019 IL App (1st) 161745, ¶ 48. Pierce testified he placed the jeans inside an evidence bag inside the truck to carry it to the station, where he sealed the bag, and he testified he did not place the jeans on any surface inside the police station. On cross-examination, he did not recall having taken a photograph of the jeans at issue on a table inside the police department and, when confronted with the photograph, he admitted his mistake. This did not render his testimony incapable of belief. Pierce's credibility aside, defendant points to no evidence, *i.e.*, such as there being GSR on the table in the office in the Hazel Crest police station, from which a juror could conclude Pierce's alleged mishandling of the physical evidence somehow led to the discovery of the forensic evidence being present on the items he collected.

¶ 85 The State also presented circumstantial evidence placing defendant in Hazel Crest, near Parker's house, on the night of the murder. One source of this evidence was Agent Raschke's historical cell site analysis. Defendant made 17 outgoing calls to Parker's cell phone between 8:38 p.m. and 10:14 p.m., all of very short duration. Defendant made 11 of those calls in a 50-minute period between 8:38 p.m. and 9:28 p.m., all while he was near the Joliet area. Four of the calls were made in a 16-minute period between 9:33 p.m. and 9:49 p.m., and Raschke's analysis

of the call detail reports indicated the phone was traveling eastbound along Interstate 80 during that time period. The final two calls were made near Hazel Crest. The first of the final two calls was made at 9:55 p.m. using the tower closest to, but a sector which faced away from, Parker's house. The second of the final two calls was made at 10:14 p.m. and utilized the cell tower closest to and facing Parker's home.

¶ 86 The GPS records from defendant's truck were consistent with Agent Raschke's analysis. In particular, they confirmed that defendant's truck was (1) in Channahon at the Enterprise terminal at 9:21 p.m.; (2) in Hazel Crest, only blocks from Parker's home, at 9:56 p.m. and 10:32 p.m.; and (3) back near the Enterprise terminal at 11:36 p.m.

¶ 87 Thus, the evidence confirmed defendant was only blocks from Parker's house while Parker was alone in her bedroom, with a dog who would not bark at defendant, and while Chasmand was in his room in the basement, where he could not hear what was happening on the second floor. And it was a sixty-mile round trip between Hazel Crest and the Enterprise terminal in Channahon, which easily could have been made in the 2-hour-and-15-minute timeframe during which defendant was confirmed by the historical cell site analysis and GPS tracking system to have made the round trip.

¶ 88 Defendant points out that none of this evidence placed him inside Parker's house on the night of her murder. That may be true, but the fact there was no sign of forced entry strongly suggests that the murder was committed by someone who had access to the house. And there was no dispute that defendant still had a key and kept some of his belongings there. Nor was there any evidence that the door was left unlocked, or that Parker or Chasmand invited anyone else into the house that night.

¶ 89 Defendant also argues that a reasonable jury could have found alternative, innocent explanations for his presence in the area. In particular, he could have driven to his old neighborhood to eat at Bozo's or to park there, as he had done before, while he did something else in the area. Alternatively, a reasonable jury could infer that defendant simply waited in the parking lot at Bozo's, hoping Parker would answer his phone calls, and then drove back to the terminal. These arguments are speculative. There is no evidence in the record from which the jury could infer defendant drove to the location near Parker's house to do anything other than visit Parker's house. Defendant's whereabouts at the time of the murder are at the very least suspicious, and all the more so when one remembers that the clothing defendant wore that same day had Parker's blood and GSR on it.

¶ 90 And the combination of the time of day during which defendant was in Hazel Crest, the locations from which the calls were made, and the timeline of the calls rebuts defendant's theory that he simply sat in the parking lot at Bozo's, calling Parker, then drove back to the Enterprise terminal when she failed to answer. The evidence showed that defendant called Parker 17 times between 8:38 p.m. and 10:14 p.m. on October 30. However, only the last call was made while his truck was placed, by the GPS tracking system, at Bozo's. His truck was still at Bozo's 18 minutes later, at 10:32 p.m. The GPS tracking records did not place defendant's truck at the Enterprise terminal again until more than an hour later, at 11:36 p.m., despite the fact it was only a 30-mile drive.

¶ 91 In his videotaped police interview, defendant repeatedly maintained he did not leave the Enterprise terminal in the evening on October 30. When the detectives confronted defendant with the fact that the records from the GPS tracking device showed not only that he left the yard on

October 30, but that his truck was also in Hazel Crest, defendant's only explanation was that he did not believe the GPS system was working because it was new. Moreno rebutted this statement with her testimony that the GPS tracking system was operational, and that no known malfunctions occurred, on October 30 or 31. In short, defendant lied to the police, and his false exculpatory statement was evidence of his consciousness of guilt. *People v. Milka*, 211 Ill. 2d 150, 181 (2004).

¶ 92 With respect to his statements to the police, defendant argues that a reasonable jury could have concluded (1) that the GPS and cell tower records were unreliable; (2) that defendant did not want to discuss his whereabouts with the police; and (3) that defendant came to understand something had happened to Parker and did not want to say anything incriminating. We do not agree these are reasonable inferences to be drawn from the evidence.

¶ 93 As we noted, Moreno testified that the GPS system was operational and functioning properly during the relevant timeframe. A reasonable juror would not infer otherwise based on nothing more that defendant's (self-serving) custodial statement. Nor would a reasonable juror conclude that defendant did not want to share his whereabouts or speak with the police when defendant did most of the talking during his hour-and-a-half interview and repeatedly shared his (alleged) whereabouts, largely unprompted by any police questions.

¶ 94 An empty handgun box was found in defendant's entertainment center in the office he continued to keep at Parker's house, and an empty handgun holster was found in his truck. Even if we leave aside the "handgun like" object detected by sonar in the quarry near the Enterprise terminal, since that object was never recovered, much less linked to defendant, this additional circumstantial evidence, while weak on its own, does lend some small additional measure of

support to the inference that defendant shot Parker. And when all of the evidence is viewed as a whole, that inference is compelling, indeed.

¶ 95 Lastly, defendant argues that the evidence must have been closely balanced because the jury submitted a note during its deliberations stating, "We need to watch the DVD." Our supreme court rejected the same argument in *Wilmington*, 2013 IL 112938, ¶ 35. In that case, the jury requested to see evidence, but its requests did not state that the jurors had reached an impasse or that they considered the case a close one. *Id.* As the supreme court noted, jurors are expected to carefully consider the evidence in all cases, and there was no reason to suppose that the deliberations were extraordinary, or that the request was born of anything other than the jury's diligence. *Id.*

¶ 96 So too here. To begin, the record does not even disclose what specific evidence the jury wished to view—the surveillance footage from the Pilot Travel Center, the video recording of defendant's interview with the police, or both. In any event, the deliberations were relatively short—the jury was sent out to deliberate at 1:22 p.m. and returned with its verdict at 3:52 p.m.—especially given the quantity of evidence presented. The jury's note contains no indication that it had reached impasse. As in *Wilmington*, we have no basis to infer that the jury's request for the DVD was grounded in anything more than its diligent review of the evidence.

¶ 97 In sum, defendant has failed to show that the evidence was closely balanced. The trial court's failure to comply with Rule 431(b) was error, but not plain error.

¶ 98 II. Ineffective assistance of counsel

¶ 99 Part of the defense theory was that the GSR found on defendant's jeans was not probative evidence of his guilt. Defendant contends that trial counsel was ineffective for failing to utilize or

question the State's witnesses about certain empirical studies that support this theory.

¶ 100 As a general matter, claims of ineffective assistance should be reviewed on direct appeal, unless the record is incomplete or inadequate for resolving the claim. *People v. Veach*, 2017 IL 120649, ¶ 46. If the basis for the claim is apparent from the record, a defendant who failed to raise it on direct review would risk forfeiting the claim, under principles of *res judicata*, in collateral proceedings. *Id.* ¶¶ 46-47.

¶ 101 But as the supreme court explained in *Veach*, ineffective-assistance claims are sometimes better suited to collateral proceedings, and reviewing courts should consider each ineffective-assistance claim on a case-by-case basis, to determine whether it is suitable for direct review. *Id.* ¶¶ 46, 48. Notably, ineffective-assistance claims based on what counsel *should* have done, but failed to do, are often not suitable for direct review because they depend on matters of proof that are outside the record—precisely *because* of the allegedly deficient representation. *People v. Erickson*, 161 Ill. 2d 82, 88 (1994).

¶ 102 Here, part of defense counsel's strategy regarding the GSR evidence was to assert that it was unreliable because it was contaminated when it was placed on the table to be photographed by Detective Pierce. On appeal, defendant claims that trial counsel should have relied on two empirical studies when cross-examining the State's forensic experts, Wong and Anselme.

¶ 103 The first study, coauthored by the State's GSR expert, Wong, found that GSR was present on surfaces inside Chicago Police Department interview rooms but ultimately concluded "the potential for secondary transfer, although possible, is relatively low." The second study is the summary of an FBI symposium relating to the collection and use of GSR evidence, which reveals that contamination and transfer is possible, that GSR particles may remain on clothing

even after laundering, and that, prior to testing, larger garments should be folded with brown paper between the folds. These studies, defendant argues, supported his theory and therefore should have been a focus of cross-examination.

¶ 104 We agree with the State that this issue is best left for collateral review, where defendant can develop the factual record he needs to support his claim, and which the court needs to properly assess it. There are a number of reasons for this conclusion, but the most important one, which is indeed decisive on its own, is this: As it stands, the record does not disclose how the State's experts would have testified when confronted with these studies. Thus, we would be left to guess just how much support these studies lend to the defense theory when they are rigorously applied to the particular facts of this case. Without answers to these (and other) questions, we cannot determine whether counsel's failure to confront the experts with these studies was a reasonable strategic decision, or whether doing so might have changed the outcome of the case. Thus, the record does not permit us to competently evaluate either the deficiency or the prejudice prong of the *Strickland* analysis. See *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 105 Defendant would have us apply general scientific studies to the particular facts presented here without any expert guidance on the matter. That is beyond this court's competence, but it is a matter that can easily be addressed on collateral review. We therefore decline to address defendant's claim of ineffective assistance on direct appeal. He is free to raise his claim in a post-conviction petition, free of procedural default, if he so chooses.

¶ 106 III. *Krankel* inquiry

¶ 107 Defendant contends that the trial court erred by failing to conduct a preliminary *Krankel* inquiry into the *pro se* claim of ineffective assistance of counsel that he alleged during his

statement in allocution. See *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 108 When a defendant makes a *pro se* post-trial claim of ineffective assistance of counsel, the trial court must make a preliminary inquiry into the factual basis of the claim and determine whether the allegations reveal any possible neglect of the case by counsel. See, *e.g.*, *People v. Jolly*, 2014 IL 117142, ¶ 29; *People v. Moore*, 207 Ill. 2d 68, 78 (2003). To trigger the trial court's duty to inquire, the defendant does not need to do anything more than make the court aware that he is alleging some failure on counsel's part; no further context or factual detail is required, such that even a bare assertion of "ineffective assistance of counsel" will suffice. *People v. Ayres*, 2017 IL 120071, ¶¶ 16-23; *Moore*, 207 Ill. 2d at 78-79.

¶ 109 At his sentencing hearing, defendant made a lengthy statement in allocution. Throughout, defendant maintained his innocence, professed his love for Parker, and detailed his military service and other life accomplishments. And he argues on appeal that he alleged, if implicitly, a claim of ineffective assistance. The question is whether his comments were sufficient to trigger the trial court's duty to inquire.

¶ 110 The following excepts from defendant's statement should illustrate what he was trying to convey:

> "I don't want to get into any kind of a litigation of the case, but everything isn't what it seems.
>
> The evidence presented – And being in my position, most people would say, 'You would say anything to lessen the burden on yourself.' And in this case, I can be brutally honest to say, '[t]he evidence isn't what it seems.'

What I would like – [i]nstead of you giving me a retrial, what I would like is an evidentiary hearing, if we can do that, if it's not improper, and look at some things. And I can point some things out to you that was in the evidence that really wasn't in the evidence.

The pants, for instance, the shirt, for instance, the wounds to the victim. There were statements made about 21 or so specific wounds to the hands, forearms, superficial, as they were stated to be. I know of one wound myself that really stood out to me. It was a deep slash to one of the victim's hands.

This was a crime that was committed in close proximity. I know Sybil Parker. I knew Sybil Parker. Her family knew Sybil Parker. I knew Sybil Parker as a little fighter, five feet-two inches tall, 115 pound fighter. Whoever attacked Sybil Parker wasn't wearing that tan shirt that they have in evidence because she would have definitely put hands on it, and it shows from the cut on that hand. A deep wound, which would have bled profusely; a matted texture, indicating she touched whoever attacked her. The shirt that we have in evidence was too clean, but yet at the same time way too dirty to have been at that scene.

The pants in question: I don't even know why we looked at the pants. We looked at the video of me refueling that rig when I came back from BASF Chemicals, in Warner, Michigan. I was wearing a tan shirt. I was wearing jeans. The jeans I was wearing, the jeans that you have in evidence are not the same. Those jeans you have in evidence are carpenter jeans, which nine pair of jeans in that truck were carpenter jeans. The jeans that

I had on when I refueled that truck were Gap wide-leg jeans. They did not have a hammer loop, nor did they have the rule pocket on the right leg.

Those are the clothes that I was wearing when I left that police station after being a person – held as a person of interest for 72 hours. Then Detective Pierce gave me back my overnight duffle bag from that truck with nine pair of jeans in that bag, less one shirt, the tan shirt. Those items that he kept, the multicolored tennis shoes, which were actually hiking boots, pants folded, shirts folded on top of the pants, shoes on top of the shirt, right there in the police station. And if I wanted to, I could have reached over and took them.

He was about to tell us when he was on the stand – but [defense counsel] interrupted him – I had asked him for some things. Those were the things I asked for. 'May I have that?' He said, '[n]o you can't have that.' Those things were right there in plain view where anyone could have disturbed them. He said, I couldn't have them. I said, '[v]ery well.'

***

I never made the statement about her, if she was giving her pu--y to another man I would kill her and him. I don't talk that way.

The statement that I made is in the record. It was announced during the bond hearing, and it's in the phone text messages that they have. The statement that I made was that, "If you cheat on me there will be hell to pay," which could mean anything. It definitely didn't mean I would kill her, and it definitely wasn't a threat on her life, and that is in the record.

***

I believe that there were several – several flaws in the trial that was put forth here in September of 2016. *** And I don't think that asking for you to give us an opportunity to show the information that didn't come out in the previous trial[.]

I'm asking you – and I believe, you are a fair and just man – to give me an opportunity with things that did not come out previously, and I will guarantee you – I can almost guarantee you that you will not think that I was found guilty beyond a reasonable doubt if you let us put forth the information that should have been put forth before you, as I stated, about the pants, about the wounds to the victim, things of that nature. There's quite a bit of things that were not presented, that should have been presented; things that were presented that if they were looked at closely, you would see exactly what I'm talking about."

***

THE COURT: I'm not trying to cut you off. But do you still have anything else you want to say?

DEFENDANT: No, other than asking you to, please, reconsider and offer me a retrial? There is nothing I can say. I can't say it, but I guarantee you, I can show you.

¶ 111 The State argues that these comments did not trigger the court's duty to inquire because they "constituted a plea for the court to retry the case, and not a clear claim of ineffective assistance of counsel."

¶ 112 Why couldn't it be both? The State's argument rests on a false dichotomy. There is no reason in principle why defendant could not be saying, in the same breath, that he wanted a new

trial, that he was dissatisfied with the defense he received, and indeed, that he wanted a new trial *because* he was dissatisfied with the defense he received.

¶ 113 Nor does it matter what *remedy* defendant happened to ask for. The trial court's duty to inquire into a defendant's allegations does not turn on whether the defendant asks for a retrial (as this defendant did at the end of his remarks), an evidentiary hearing (as he did at the beginning), or something else entirely. Nor do we expect a defendant, addressing the court *pro se*, to be well-versed in such questions of law. Rather, the pertinent question for the trial court, in the *Krankel* context, is this: *On what basis* is the defendant asking for relief in the first place? Or, what comes to the same: What kind of error(s) is he alleging? In particular, is he claiming that he is entitled to relief—of whatever sort he asks for—because of some failure(s) attributed to counsel?

¶ 114 In any event, even if the remedy invoked by the defendant in this context mattered—and neither the logic of *Krankel* nor our supreme court's case law reveals any reason why it should—a new trial is precisely the remedy that a meritorious claim of ineffective assistance would merit. So we find it particularly odd for the State to suggest that defendant's request for a retrial somehow shows that he was *not* alleging his attorney's ineffectiveness.

¶ 115 Granted, defendant did not make that allegation explicitly. As the State emphasizes, he never uttered the phrase "ineffective assistance" and did not otherwise explicitly "mention" his attorney. And in the State's view, an explicit claim of ineffective assistance, or at least some explicit reference to counsel, is necessary to trigger the trial court's duty to inquire.

¶ 116 Taken literally, that requirement would lead to absurd results. Suppose a *pro se* defendant alleges that "not one prosecution witness was cross-examined and no closing argument was made on my behalf." Such ill-considered uses of the passive voice are hardly unheard of, from

pro se defendants or others. See, *e.g.*, *People v. Brown*, 2017 IL App (3d) 140921, ¶ 12 ("one witness of mine was not evoked to the court"). And that grammatical device, by its very nature, whitewashes an allegation of any overt reference to counsel. But it would be absurd to argue that the allegation we just imagined did not alert the trial court to a complaint about counsel's performance. Who else, if not counsel, was supposed to cross-examine the witnesses and make a closing argument?

¶ 117 Unlike the State, we do not read *Ayres*, 2017 IL 120071, to hold that an express claim of ineffective assistance or an explicit mention of counsel is *necessary* to trigger the trial court's duty to inquire. In *Ayres*, the defendant baldly alleged "ineffective assistance of counsel," full stop, and the question for the supreme court was whether this "express" allegation, devoid as it was of any further explanation, context, or factual detail, was "sufficient" to trigger the duty to inquire. *Id.* ¶¶ 16-18. The supreme court held that it was: "[W]hen a defendant brings a clear claim asserting ineffective assistance of counsel, either orally or in writing, this is *sufficient* to trigger the trial court's duty to conduct a *Krankel* inquiry." (Emphasis added.) *Id.* ¶ 18.

¶ 118 But the court had no occasion to decide whether a similarly "clear" or "express" claim of ineffective assistance is *necessary*, such that an implied or implicit claim—for example, the allegation we imagined above—would *not* be sufficient. Thus, *Ayres* does not speak directly to the question presented here, and it certainly does not establish that the trial court had no duty to conduct a *Krankel* inquiry in response to defendant's allocution.

¶ 119 We do not accept the State's characterization of *Ayres* as a simple "recognition" of the supreme court's earlier holding, in *People v. Taylor*, 237 Ill. 2d 68 (2010), that an "implicit" claim of ineffective assistance never requires a *Krankel* inquiry. There is much to disagree with

in the State's argument, but what matters most, for our purposes here, is its mischaracterization of *Taylor*'s holding.

¶ 120 In *Taylor*, the defendant rejected a plea offer, was convicted at trial, and faced mandatory Class X sentencing because of his background. *Id.* at 70-71. During his "rambling" allocution, he said that he "had no idea" he could face a potential sentence of 6-30 years if he rejected the plea offer of 3 years on a lesser charge. *Id.* at 73-74. And, he continued, "[there's] no way on God's earth[ ] I would [have taken] that chance knowing the situation, knowing me, and the situation with my family." (Brackets in original.) *Id.*

¶ 121 The supreme court held that the defendant's statement did not trigger the trial court's duty to inquire. The court began by noting that the defendant did not "specifically inform[ ]" the trial court that he was complaining about his attorney's performance, or even "mention" counsel explicitly. *Id.* at 76-77. But that did not end the inquiry. The court considered the content of what the defendant *did* say and found that it was it too vague, too ambiguous, too amenable to varying interpretations, to bring a claim of ineffective assistance to the trial court's attention. *Id.* at 77. For all the supreme court could "divine" from the defendant's rambling, he could just as easily have been expressing his "regret" at rejecting the plea offer, as opposed to alleging that he rejected the offer based on a "material misunderstanding" of his possible sentence if convicted after a trial. *Id.* (quoting *People v. Grant*, 71 Ill. 2d 551, 557-58 (1978)).

¶ 122 Thus, *Taylor* did not hold, as a general principle, that an "implicit" claim of ineffective assistance is never sufficient to trigger a *Krankel* inquiry. Nothing in *Taylor* purported to rule out the possibility that a defendant's statement could offer a "clear basis" for a claim of counsel's ineffectiveness without alleging that claim, or even mentioning counsel, explicitly. See *id.* at 76-

77. Rather, the court's narrow holding in *Taylor* was that the defendant's particular statement failed to do so—again, not because the defendant *had* to expressly utter "ineffective assistance" or "counsel," but because it was unclear from his statement that he was doing anything more than venting his regret at his own decision.

¶ 123 This case is different. True, there are superficial similarities—the "rambling" statements in allocution, for example—on which the State is quick to seize. And some of defendant's remarks were *not clearly* complaints about counsel—such as his generic complaint that there were "flaws in the trial"—while other remarks were *clearly not* complaints about counsel. But whatever else defendant said, and however unclear some of it may have been, he did complain about the defense he received at trial.

¶ 124 By our count, defendant made two complaints about his defense. First, there was "quite a bit" of favorable evidence that "should have been presented" but was not. For example, there was evidence, in defendant's view, that would have established that he did not overtly threaten to kill Parker, as Myesha testified; and that he was not wearing the jeans on which the GSR was found on the day of Parker's murder, as the State contended.

¶ 125 Second, much of the evidence that the State introduced "isn't what it seems." To this end, defendant pointed out various ways in which, he believed, the correct inferences to be drawn from the evidence, such as Parker's wounds and the clothing found in his truck, were never argued to the jury.

¶ 126 While it may be true, as the State says, that defendant was expressing his "dissatisfaction with the evidence," this truncated description elides the key point. If defendant was dissatisfied, it was because favorable evidence was not introduced on his behalf, and because the State's

evidence was left to linger in a light that was misleadingly unfavorable to him. Or so he claimed. And lest one think that defendant was pointing the finger at the trial court, rather than at counsel, our review of the record has not revealed any ruling by the court that could conceivably be at issue. (For example, a ruling that excluded evidence that counsel sought to introduce.) The only way to make sense of defendant's allegations is to take them as complaints about *counsel*, given that they pertain to matters that were exclusively within counsel's control. If not counsel, who else was supposed to introduce evidence favorable to defendant, or walk the jury through the favorable inferences to be drawn from the State's own case?

¶ 127 Thus, while defendant did not explicitly allege his attorney's ineffectiveness, or mention his attorney directly, his remarks clearly implicate his attorney's performance. Indeed, they make no sense as *anything but* complaints about the defense his attorney mounted on his behalf at trial. Those complaints may or may not have any merit. They may or may not implicate matters of valid trial strategy. These questions are not for us to decide at this juncture. They are topics to be taken up at a preliminary *Krankel* inquiry. We remand for that purpose.

¶ 128 IV. Fees and credits

¶ 129 Finally, defendant contests the trial court's imposition of a probable cause hearing fee (55 ILCS 5/4-2002.1(a) (West 2010)) and the court's calculation of his pre-sentence custody credit. Defendant raised these claims for the first time in his brief to this court.

¶ 130 Illinois Supreme Court Rule 472, which originally took effect on March 1, 2019, provides that the circuit court retains jurisdiction to correct certain sentencing errors at any time following judgment, including during the pendency of an appeal. Ill. S. Ct. R. 472(a). Among them are

"[e]rrors in the imposition or calculation of fines, fees, assessments, or costs" and "[e]rrors in the application of *per diem* credit against fines." Ill. S. Ct. R. 472(a)(1), (2).

¶ 131 On May 17, 2019, Rule 472 was amended to provide that in all criminal cases pending on appeal as of March 1, 2019, in which a party has attempted to raise an error with respect to the imposition or calculation of fines, fees, assessments, or costs for the first time on appeal, the reviewing court must remand the matter to the circuit court to allow the party to file a motion pursuant to the rule. Ill. S. Ct. R. 472(e) (eff. May 17, 2019); see *People v. Sanders*, 2019 IL App (1st) 160718, ¶ 53. And here, defendant's appeal was pending on March 1, 2019.

¶ 132 In his reply brief, defendant cites *People v. Barr*, 2019 IL App (1st) 163035, ¶ 15, for the proposition that we should reach the merits of these claims because his opening brief was filed before March 1, 2019. But *Barr* was decided on April 9, 2019—before the amendment to Rule 472(e) took effect. The amendment, not *Barr*, controls.

¶ 133 On remand for the *Krankel* inquiry, defendant may file a motion raising his challenges to his fines, fees, and credits.

¶ 134 CONCLUSION

¶ 135 For the reasons stated, we remand this matter to the trial court for a preliminary *Krankel* inquiry. On remand, defendant may raise his challenges to the probable cause hearing fee and his presentence custody credit. We affirm the trial court's judgment in all other respects.

¶ 136 Affirmed in part; reversed in part; remanded with instructions.