

**NOTICE**

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2019 IL App (4th) 180381-U

NO. 4-18-0381

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

June 27, 2019

Carla Bender

4<sup>th</sup> District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
TIMOTHY W. DAVIS,	)	No. 13CF185
Defendant-Appellant.	)	
	)	Honorable
	)	Mark S. Goodwin,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Knecht and Turner concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed where the trial court’s decision not to appoint new counsel after a *Krankel* inquiry was not manifestly erroneous.

¶ 2 After a May 2014 trial, a jury found defendant, Timothy W. Davis, guilty of two counts of aggravated sexual abuse (720 ILCS 5/11-1.60(b) (West 2012)) and one count of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)). In June 2014, the trial court sentenced defendant to an aggregate term of 17 years in prison. On direct appeal, this court remanded for the trial court to conduct a preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). *People v. Davis*, 2016 IL App (4th) 140603-U, ¶ 98. In February 2017, the trial court denied defendant’s claims of ineffective assistance of counsel.

¶ 3 On appeal, defendant argued the trial court failed to address his claims concerning defense counsel's failure to (1) object to improper other-crimes evidence and (2) obtain witness testimony showing the victims had a motive to fabricate their statements. This court remanded with directions to address those claims. *People v. Davis*, 2018 IL App (4th) 170151-U, ¶ 36.

¶ 4 On remand, the trial court found defendant's claims of ineffective assistance of counsel were meritless and did not warrant the appointment of new counsel. On appeal, defendant argues the trial court's decision not to appoint new counsel was manifestly erroneous because defendant's claims of ineffective assistance showed possible neglect. For the following reasons, we affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 A. Defendant's Initial Appeal

¶ 7 Because the parties are familiar with the facts of the underlying case, we set forth only those facts necessary to address the issues in this appeal.

¶ 8 In April 2013, the State charged defendant by information with aggravated sexual abuse of his two stepdaughters, S.T. (born February 13, 2002) (count I) and D.B. (born January 28, 1998) (count II), who were under 18 at the time (720 ILCS 5/11-1.60(b) (West 2012)). Later that month, the State filed an amended information adding count III, alleging defendant committed predatory criminal sexual assault of a child by committing an act of sexual penetration with S.T., who was under the age of 13 at the time (720 ILCS 5/11-1.40(a)(1) (West 2012)).

¶ 9 In March 2014, defendant filed a motion *in limine* seeking to prohibit the State from using his prior conviction for domestic battery (Vermilion County case No. 13-CM-26) to impeach his credibility. The State did not object, and the court granted the motion. However,

defense counsel did not specifically object to the admission of the underlying incident as other-crimes evidence. This particular domestic battery conviction stemmed from an incident during which defendant shot S.T. with a BB gun, causing authorities to remove the children from the family home.

¶ 10 In May 2014, defendant's jury trial commenced. Following the presentation of evidence, the jury returned guilty verdicts on all counts. In June 2014, the trial court sentenced defendant to an aggregate term of 17 years in prison. Later that month, defendant sent two letters to the trial court alleging ineffective assistance of counsel. The trial court took no action with respect to defendant's allegations.

¶ 11 On direct appeal, defendant argued, *inter alia*, (1) his defense counsel was ineffective for failing to object to other-crimes evidence and (2) the court failed to provide defendant with a preliminary inquiry into his ineffective-assistance-of-counsel claims. *Davis*, 2016 IL App (4th) 140603-U, ¶ 4.

¶ 12 Relevant to this appeal, defendant claimed "defense counsel provided ineffective assistance of counsel by failing to challenge, as improper other-crimes evidence, the admission of S.T.'s statement that defendant shot her in the leg with a BB gun." *Id.* ¶ 53. Defendant conceded "defense counsel challenged the admission of the BB gun incident as improper impeachment based on a misdemeanor conviction not involving dishonesty. However, defendant asserted counsel's failure to recognize and raise the other-crimes-evidence issue before the trial court constituted ineffective assistance." *Id.* ¶ 54. This court found the record on appeal contained "no explanation from defense counsel as to why he chose to frame his objection as improper impeachment evidence rather than improper other-crimes evidence." *Id.* ¶ 57. Thus, we deemed the issue more appropriately addressed through a collateral proceeding. *Id.* In the

alternative, however, this court stated “because we are remanding this case for a *Krankel* hearing [citation] to allow the trial court to address defendant’s claims of defense counsel’s neglect, defendant may be able to develop a sufficient record for our review during that proceeding.” *Id.*

¶ 13 Defendant also claimed on direct appeal that the trial court failed to provide him with a *Krankel* hearing despite his *pro se* allegations of ineffective assistance of counsel as contained in the two letters defendant mailed to the trial court following his sentencing hearing. *Id.* ¶ 96. We accepted the State’s concession that defendant was entitled to an inquiry into his claims and remanded for the trial court to conduct a preliminary inquiry into defendant’s allegations of ineffective assistance of counsel. *Id.* ¶¶ 96, 98.

¶ 14 B. First Remand

¶ 15 On remand, the trial court conducted a preliminary *Krankel* inquiry. Defendant made multiple claims of ineffective assistance of counsel, including defense counsel’s failure to ask defendant’s mother “questions that [he] thought she should be asked.” Defendant “felt the reason that all this was happening was because [he] had put a stop to [his] mother-in-law \* \* \* claiming one of the girls on her taxes.” Defendant believed “the reason that [his step-daughters] were told to lie about [the sexual abuse] was to financially benefit their grandparents.” Defendant stated defense counsel never asked his mother about his mother-in-law “claiming one of the girls on her taxes.” Defendant’s mother had prepared his and his wife’s taxes, and defense counsel “never asked [his] mom about that.”

¶ 16 Defendant also brought to the trial court’s attention “the thing that the State—that my appellate attorney has mentioned where [defense counsel] objected to the use of evidence.” The following colloquy ensued:

“THE COURT: Let me interrupt you. I mean, the Appellate Court has dealt with that. You know, they—if you read your opinion, the Appellate Court dealt with all the other issues. So I’m not going to get into that today.

DEFENDANT: With the BB gun thing?

THE COURT: Yes.

DEFENDANT: Okay. Well, I guess that’s it then.”

¶ 17 The trial court asked defense counsel to respond to defendant’s allegations. Defense counsel did not discuss his questioning of defendant’s mother at trial or address why he chose to frame his objection to S.T.’s statement that defendant shot her in the leg with a BB gun as improper impeachment evidence rather than improper other-crimes evidence. Characterizing “witness presentation” as “under the realm of trial strategy,” the trial court found no merit to defendant’s claims of ineffective assistance of counsel.

¶ 18 C. Second Appeal

¶ 19 On appeal, this court concluded the trial court did not conduct an adequate *Krankel* inquiry because it (1) “refused to consider defendant’s claim” that defense counsel was ineffective for failing to challenge, as improper other-crimes evidence, the admission of S.T.’s statement that defendant shot her in the leg with a BB gun and (2) “conducted no inquiry into defendant’s allegation of ineffective assistance of counsel regarding defense counsel’s examination of defendant’s mother.” *Davis*, 2018 IL App (4th) 170151-U, ¶¶ 26, 33. We remanded for the trial court to conduct a preliminary *Krankel* hearing concerning these two issues. *Id.* ¶¶ 35, 36.

¶ 20 D. Second Remand

¶ 21 On remand, the trial court conducted a preliminary *Krankel* inquiry. The court began by providing defendant an opportunity to explain his concerns regarding defense counsel's objection to the BB gun statement. Defendant stated he didn't "know anything" but his appellate counsel "said that it was objected on the wrong grounds and so [he had] to go with what the experts say." The court then inquired of defense counsel "about facts that [he] could offer maybe concerning this issue," and the following colloquy ensued:

“[DEFENSE COUNSEL]: As near as I remember, I believe I did not want to make too big of an issue out of the objections to the BB gun attack so I wouldn't highlight that attack to the jury, which would prejudice the jury against my client. The attack with a BB gun, these crimes, I think they were something I wanted to stay away from, so I phrased them that way as to try to minimize the effect on the jury.

THE COURT: Okay. And so the Appellate Court essentially has said the focus is on whether or not the proper objection was made. And I have reread the record, which perhaps you haven't had the benefit of in these four years, but I have recently reread the record, and the video, which was People's Exhibit 1, was admitted without objection and published without objection, but there was a motion in limine that you had filed that raised the domestic battery charge that originated from the BB gun incident as the desired information that was sought to be precluded from presentation.

And the Appellate Court is saying, really the objection that should have been made in this instance was that if that part of the video was played for the jury, it would be the introduction of other crimes evidence that was offered to

perhaps encourage the jury to find him guilty of the charged offense because of that other crimes evidence.

What say you about that? Do you understand the discrimination of the—

[DEFENSE COUNSEL]: I understand the issue, Your Honor.

THE COURT: Okay.

[DEFENSE COUNSEL]: I'm still saying that because of the motion in limine it was improper impeachment of evidence to bring that out, or improper other crimes evidence.

THE COURT: Well, and I think that, you know, again, upon revisiting the exhibit and watching the interview again, we are talking about really, and I'm not even sure we can say minutes of inquiry by Officer Bolin with the stepchild, but he's—he's basically in that video trying to make sure the stepchild remembers who he was and he basically is identifying that she should remember him because she talked to him about the BB gun incident where [defendant] had—had shot her with a BB gun, had indicated it was an accident.

Officer Bolin in the video does indicate to the stepchild that the—that he didn't think, Officer Bolin didn't think that that was an accident, having been involved in the investigation of it. And then he moves off of that, into the inquiry concerning [defendant's] conduct for which he is charged in this case. There's no reference I could detect back at trial, as well as more recently, that he makes any reference to a charge of domestic battery having been made over the incident, a conviction having been sought or obtained.

And so I think that on this particular claim as to [defense counsel's] failure to challenge by objection that it was improper other crimes evidence, that in this particular instance, [defendant's] conclusion that that's ineffective assistance of counsel is really just that. I don't see any merit that exists in that given the vagueness of the objectionable material. And so the Court, I believe, lacks the ability on that issue alone to advance any *Krankel* review beyond this preliminary stage."

¶ 22 When asked why defense counsel chose not to inquire into the victims' motive to fabricate their allegations of abuse during defendant's mother's testimony at trial, the following colloquy occurred:

“[DEFENSE COUNSEL]: Well, Your Honor, thinking back on this trial four years ago when I was told about this possibility, it seemed speculative without confirmation. Based on my experience, I never want to put witnesses on and ask them questions not knowing what the answer will be in advance. I felt that if we went down this line, something could blow up in my face and open doors as to other evidence I would not want in, so I made a strategic decision not to do it.

THE COURT: Okay. Had you talked to Tina Farris about this subject matter?

[DEFENSE COUNSEL]: Tina Farris? I thought your mother was Tina Peach. I remember having talked to her. I don't know if I talked to her about this or not. But I don't think there was any actual proof of this.

THE COURT: Okay. And [defendant] had indicated to you that this was a line of inquiry that may have been worth looking into?

[DEFENSE COUNSEL]: Yes. Well, when I talked to them about it, I thought it was speculative. I thought it could blow up in my face and open doors as to things we didn't want in, so I made a strategic decision not to go into it."

¶ 23 The trial court concluded that there was "no merit" to this claim, stating, "Clearly, that area of inquiry was a matter that was left to [defense counsel] from a trial strategy standpoint based upon his investigation that he's described here. That testimony was just simply not there as [defendant] seems to suggest." Finding no merit to either of defendant's claims, the trial court declined to appoint new counsel.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues the trial court committed manifest error when it did not appoint *Krankel* counsel because his allegations of ineffective assistance of counsel showed possible neglect of his case. We disagree.

¶ 27 When confronted with a defendant's posttrial allegations of ineffective assistance of counsel, our supreme court set out the procedural steps to follow in *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003) (noting the rule that had developed since *Krankel*):

"New counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel.

Rather, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or

pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed.”

¶ 28 The purpose of the preliminary inquiry is to determine the underlying factual basis of the defendant’s claim and to afford him an opportunity to explain and support his claim. *People v. Ayres*, 2017 IL 120071, ¶ 24, 88 N.E.3d 732. Thus, “the circuit court will have the necessary information to determine whether new counsel should be appointed \*\*\*.” *Id.*

¶ 29 A court can conduct an inquiry into allegations counsel was ineffective by doing one or more of the following: “(1) questioning the trial counsel, (2) questioning the defendant, and (3) relying on its own knowledge of the defense counsel’s performance in the trial.” *People v. Peacock*, 359 Ill. App. 3d 326, 339, 833 N.E.2d 396, 407 (2005). “Where a defendant’s claims are conclusory, misleading, or legally immaterial, or do not bring to the trial court’s attention a colorable claim of ineffective assistance of counsel, the trial court may be excused from further inquiry.” *People v. Bobo*, 375 Ill. App. 3d 966, 985, 874 N.E.2d 297, 315 (2007).

¶ 30 If the trial court makes a determination on the merits of defendant’s claims, that determination will not be overturned on appeal unless it is manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941, 897 N.E.2d 265, 285 (2008). “ ‘Manifest error’ is error that is clearly plain, evident, and indisputable.” *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25, 960 N.E.2d 27.

¶ 31 We are unconvinced the trial court here made an indisputably erroneous decision. The court presided over all phases of the jury trial and was familiar with the history of the case. The court engaged both defendant and counsel in dialogue and gave each side the opportunity to thoroughly explain his respective position. After hearing from defendant and counsel, the court

determined defendant's complaints were without merit or pertained to matters of trial strategy—not deficient representation. The supreme court has made clear that if the *pro se* allegations pertain to trial tactics, the defendant has no right to the appointment of new counsel. *People v. Nitz*, 143 Ill. 2d 82, 134, 572 N.E.2d 895, 919 (1991).

¶ 32 Defendant claimed that counsel should have inquired about the victims' motive to fabricate their allegations of abuse during defendant's mother's trial testimony. Defense counsel responded that he spoke with defendant's mother to investigate that theory. He recalled that he chose not to pursue it because it was "speculative" and because it could "open doors" to potentially unfavorable evidence for defendant. The court concluded that this claim lacked merit because counsel's decision whether to pursue a particular line of inquiry during the examination of a witness was a matter of trial strategy. Because the trial court is not required to appoint new counsel if it finds that a defendant's claim relates to a matter of trial strategy, the court's decision not to appoint new counsel based on this claim was not manifestly erroneous.

¶ 33 The trial court also addressed defendant's claim concerning the motion *in limine* where defense counsel failed to object, as improper other-crimes evidence, to the admission of S.T.'s statement that defendant shot her in the leg with a BB gun. Defendant could not provide a factual basis for his complaint, admitting his appellate counsel "said that it was objected on the wrong grounds and so [he had] to go with what the experts say." In concluding defendant's claim lacked merit, the court characterized the "objectionable material" as vague, noting the video made no reference to a "charge of domestic battery having been made over the incident, a conviction having been sought or obtained." Further, the court stated it had "watch[ed] the interview again" and found "not even \*\*\* minutes of inquiry" in the context of a lengthy and incriminating interview.

¶ 34 In sum, we find the trial court's hearing on defendant's *pro se* claims of ineffective assistance of counsel was adequate under *Krankel*. The court discussed the factual bases for the claims with defendant directly and also based its decision on its knowledge of counsel's performance at trial and of the evidence presented. Because defendant's allegations of ineffective assistance either lacked merit or pertained to trial strategy, we find no manifest error in the trial court's decision not to appoint new counsel.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 37 Affirmed.