No. 124112

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	Appeal from the Appellate Court of Illinois, Fifth District
Plaintiff-Appellee,	No. 5-15-0274
v.	There on Appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois
	No. 10-CF-425
AARON JACKSON,	The Honorable John Baricevic,
Defendant-Appellant.	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Defendant appeals his murder conviction, entered upon a jury verdict. No issue is raised on the pleadings.

ISSUES PRESENTED

1. Whether a rational juror could find defendant guilty of murder where multiple eyewitnesses, DNA evidence, fingerprint evidence, gunshot residue, and defendant's statement tie him to the murder of John Thornton.

2. Whether two isolated comments made during the prosecutor's closing argument did not amount to plain error.

3. Whether, following a preliminary *Krankel* inquiry, the trial court properly declined to appoint new counsel for defendant's ineffective assistance claims.

4. Assuming that they were error, whether the prosecutor's brief comments at the end of the preliminary *Krankel* inquiry were harmless.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612. This Court allowed defendant's petition for leave to appeal on January 31, 2019.

STATEMENT OF FACTS

On April 1, 2010, Washington Park, Illinois Mayor John Thornton was shot to death. C1.[1] Multiple eyewitnesses identified defendant as the shooter, and he was charged with first degree murder. C10.

A. Defendant's First Trial

At defendant's first trial, the People presented eyewitness testimony and other evidence inculpating defendant in Mayor Thornton's murder. One eyewitness, Laqueshia Jackson, testified that she heard gunshots, saw Thornton's car crash into a tree, and then saw defendant get out of the car and limp away to another vehicle. R351-55. During a recess in the proceedings, the judge expressed concern about threats Jackson had received for testifying against defendant and instructed the police "to see that she is protected." R871-72. Later, while undergoing cross-examination, Jackson suffered a seizure and was rushed to the hospital, and the court declared a mistrial. R879, 916. Although Jackson did not testify at the second trial, her testimony at the first trial is relevant to claims defendant raises here.

B. Defendant's Second Trial

At defendant's second trial, a forensic pathologist testified that Mayor Thornton died as a result of three close-range gunshots to the chest. R1280-

[1] The common law record and report of proceedings are cited as "C_" and "R__," respectively; defendant's briefs here and in the appellate court are cited as "Def. Br. _," "Def. App. Br. _," and "Def. App. Reply _," respectively.

83, 1288. Due to the nature of the injuries, most of Thornton's bleeding was internal. R1286-87.

Gilda Lott testified that she was standing outside around 5:00 a.m. on April 1, 2010, when she saw Mayor Thornton's car crash into a tree. R1312-13. Defendant then got out of the car, limped over to another vehicle, which he entered with another man's help, and drove away. R1315-20. Lott recognized defendant because they are acquaintances. R1317. On cross-examination, Lott denied that she had told defense counsel — when he and an investigator came to her home to question her about the case — that she did not see anyone get out of the car. R1327-28. Rather, Lott insisted that she saw defendant. R1341.

Nortisha Ball testified that she saw Mayor Thornton's car right after it crashed. R1348-50. She then testified that she saw a man get out of the car, but she did not see his face; the claim that she could not see the man's face was a recantation of Ball's previous statements to police, and prosecutors believed she was recanting due to her fear of defendant. R1350-51.

As a result, out of the presence of the jury, Ball watched a videotaped statement she had given to police a few hours after the murder. R1360-61. When the jury returned, Ball testified that a few hours after the murder she had told Special Agent Joseph Bates that she saw defendant get out of Mayor Thornton's car, limp to another car, and drive away with another person. R1361-63. Ball knew defendant because he had dated her sister. R1363.

Ball also testified that investigators later showed her a photo array, and she identified a photo of defendant as the man who got out of the mayor's car. R1369-70. Ball testified that she approached the police on her own initiative on the morning of the murder because she had information about the crash. R1383-84. Although Ball was now claiming that she was "not sure who" got out of the car, she admitted that she had previously testified and told police on multiple occasions that defendant got out of the car. R1377-79, 1384-85.

On cross-examination, Ball claimed that after the shooting, Detective Kim McAfee took her to the police station and said that "if [she] was there and knew what happened, [she would] be arrested if [she] wouldn't tell them"; she also claimed that McAfee told her to implicate defendant. R1394-95, 1400. Yet Ball still testified that she had not been threatened or pressured by the police or others. R1401-02. She was "scared," however, because her cousin said that Ball's name was in the newspaper. *Id.*

On redirect, Ball admitted that she had sent a letter to the trial judge stating that defendant "killed the mayor" and that she was "scared" of being involved in the case because she was "being threatened." R1407-09; *see also* Peo. Exh. 76 (Ball's letter regarding threats made "by [defendant's] family").

Cynthia Hooker — defendant's girlfriend and the mother of two of his children — testified that defendant borrowed her car the night of March 31, 2010, *i.e.*, several hours before the murder. R1413-15. He did not return

until the next morning. R1416. Police came to her apartment building a few hours later, and defendant told her "they gotta be here for me." R1422.

Special Agent Bates, the lead investigator, testified that he interviewed defendant a few hours after the murder; a video of the interview was then played for the jury. R1439-40. In the video, defendant said that he was walking down the street near the site where Mayor Thornton's car crashed, he heard gunshots, his leg started to hurt, and then he went to his girlfriend's apartment. Peo. Exh. 57 at 4:25-6:10. Although the interview took place within hours of these events, defendant did not remember how he got to his girlfriend's apartment. *Id*. at 4:40-55. In the video, defendant walked with a severe limp (which the prosecution contended was caused by the car crash) and struggled to get into a chair. *Id*. at 0:15-0:50. When Bates asked about the limp, defendant said, "Guess I got shot." *Id*. at 3:50-4:02. Bates then lifted defendant's pants leg and confirmed that there was no gunshot wound. *Id*. at 4:00-15; R1442.

Bates also interviewed Ball a few hours after the murder, and a videotape of that interview was played for the jury. R1443-44. In the video, Ball stated that she heard gunshots followed by a screeching sound; the mayor's car ran into a tree; and then defendant got out of the car, "limped" to another vehicle, and drove away. Peo. Exh. 74 at 2:15-6:30.

Bates further testified that he was present a week after the murder when Ball picked defendant out of a photo lineup, and that video was played

for the jury. R1447-48. In the video, Bates emphasized to Ball that she should only identify the person she saw getting out of the car; he told her it was "fine" if she did not see that person in the photo array and thus could not circle anyone, because it is "just as important to free an innocent person as it is to charge a guilty one." Peo. Exh. 62 at 3:00-3:30. Ball then selected defendant's photo and confirmed that no one had threatened her or promised her anything for doing so. *Id*. at 3:30-5:00.

Forensic scientists testified that that they found (1) gunshot residue on defendant's t-shirt, jeans, and left hand and (2) defendant's fingerprint near the exterior door handle of the front passenger door of Mayor Thornton's car. R1611-13, 1683-86, 1708.

A DNA analyst testified that he obtained a partial DNA profile from a small bloodstain on defendant's jeans that was "consistent with having originated" from Mayor Thornton. R1574-75. That partial DNA profile is found in only 1 in 46,000 African-Americans (Mayor Thornton was black), 1 in 73,000 Caucasians, and 1 in 17,000 Hispanics. R1576. The analyst could not use the term "DNA match" because the stain was too small to generate the complete DNA profile needed to confirm a "DNA match." R1588-91. However, he could say to a reasonable degree of scientific certainty that the blood on defendant's jeans "likely" came from Mayor Thornton. R1578.

Defendant did not testify. Mike Boyne, a defense investigator, testified that before trial, he and defense counsel spoke with Lott, who said that she

did not see anyone get out of Mayor Thornton's car. R1741-43. However, Boyne admitted that Lott did not sign a statement to that effect even though the defense asked her to do so. R1744.

The jury found defendant guilty of first degree murder. C290. Noting defendant's criminal history, including a prior armed robbery conviction, the trial court sentenced him to thirty-five years in prison. C344-45.

C. Remand and Preliminary *Krankel* Inquiry

After sentencing, defendant sent the trial court a letter arguing that the evidence was insufficient to prove his guilt and that his counsel erred by failing to call Laqueshia Jackson (the eyewitness who had a seizure at the first trial) to testify at the second trial. C374. The trial court did not address the letter. The appellate court dismissed defendant's subsequent appeal and remanded for a preliminary *Krankel* inquiry. C446.

At the preliminary inquiry on remand, the court asked defendant to elaborate on his claims and asked defense counsel to respond. As relevant here, defendant alleged that counsel should have called Jackson to testify at the second trial; counsel responded that he and defendant had jointly decided not to call Jackson because she had "indicated an eagerness and a willingness to testify on behalf of the State." C459-60.

Defendant next alleged that counsel should have called Jackson's sister, Angela Dodd, to testify that the police tried to bribe Jackson. C461. Counsel responded that this was the first he had heard that defendant

wanted Dodd to testify and noted that Dodd was not even mentioned in defendant's *Krankel* motion. C462-63. The court asked defendant whether he had any correspondence with Dodd that reflected her potential testimony, or any documents showing that he had told counsel of his desire to call Dodd, but defendant did not. C463-65.

Defendant also criticized counsel for failing to object to portions of the People's closing argument, to which counsel responded that he had objected when he believed it was appropriate to do so. C468-70.

After confirming with defendant that he had nothing further to add, the judge asked the prosecutor whether he had anything to say. C476. The prosecutor noted in part that defense counsel had explained that his decisions were strategic and stated his belief that the record would show that defense counsel was a "tenacious opponent." R476-77.

The court denied defendant's ineffective assistance claims in a detailed written order:

> Most of the defendant's complaints were weight of evidence or were related to credibility of witnesses. Mr. Keefe, the defense attorney, addressed them all during the trial. They were pointed out in opening statement and argued at closing. Witnesses were aggressively cross-examined on all issues brought by defendant. The defense attorney's performance at trial not only lacked ineffectiveness, it was a good primer for young attorneys who might want to observe cross examination. Issues that were important to the theory of defense and weakness of each witness were raised in cross succinctly and with force.

C480. The court also noted that defense counsel "aggressively" argued to the jury that the People's witnesses were not credible and that there were

problems with the other evidence. C481. Defendant "received not only a competent performance from his attorney but a very good one that indicates he was well-prepared, thorough and aggressive." *Id.* The court concluded by observing that, during the *Krankel* inquiry, one of defendant's responses

> captures the defendant's real complaint. After his attorney responded to an issue, the defendant was asked if he believes Mr. Keefe [his trial counsel] was lying. Paraphrasing the defendant, he responded no, that he liked Mr. Keefe and, in fact, thought he performed very well at the first trial. The defendant simply complains about results. When a mistrial was declared, he thought his attorney was competent, when a guilty verdict is returned, he is unhappy, when, in fact, a review of both cases indicates a similar competent display of the talents of a good lawyer.

Id.

D. Defendant's Second Appeal

On appeal, defendant argued, as relevant here, that (1) the evidence was insufficient to convict; (2) he was prejudiced by purported misstatements the prosecutor made in closing argument; (3) the trial court erred by allowing the prosecutor to comment at the end of the preliminary *Krankel* inquiry; and (4) the court erred by not appointing new counsel to represent defendant following the *Krankel* inquiry. *People v. Jackson*, 2018 IL App (5th) 150274, ¶ 1. The appellate court rejected defendant's claims and affirmed his conviction. *Id.*

ARGUMENT

I. The Evidence Was Sufficient to Convict Defendant of Murder.

Defendant's sufficiency challenge is meritless. Def. Br. 21-24. When reviewing the sufficiency of the evidence, the relevant question is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *People v. Collins*, 214 Ill. 2d 206, 217 (2005) (same). It is the province of the jury to "asses the credibility of the witnesses, to determine the appropriate weight of the testimony, and to resolve conflicts or inconsistencies in the evidence." *People v. Evans*, 209 Ill. 2d 194, 211 (2004). By contrast, "it is not the function of the [reviewing] court to retry the defendant, nor will we substitute our judgment for that of the trier of fact." *Collins*, 214 Ill. 2d at 217.

Here, the evidence was sufficient to find defendant guilty beyond a reasonable doubt. Lott testified that after the shooting, she saw defendant exit Mayor Thornton's car and limp away to another vehicle, and Ball attested to the same facts in her prior testimony and statements to police, which were admitted as substantive evidence. R1315-18, 1341, 1361-63, 1378-79, 1384-85; Peo. Exhs. 62, 74. Further, defendant had a severe limp shortly after the accident (as captured in his videotaped statement) and his explanation — "Guess I got shot" — was plainly false; he did not have a gunshot wound. Peo. Exh. 57. In addition, the physical evidence also

strongly tied defendant to Mayor Thornton's murder: (1) defendant's fingerprint was found near the passenger door handle of Thornton's car; (2) gunshot residue was found on defendant's hand and clothing; and (3) an expert witness testified that the blood on defendant's jeans "likely" was Thornton's because that partial DNA profile is found in only 1 in 46,000 African-Americans, 1 in 73,000 Caucasians, and 1 in 17,000 Hispanics. R1576-78, 1611-13, 1683-86, 1708. Accordingly, it cannot be said that no rational juror could have found defendant guilty.

Defendant's primary argument — that Ball and Lott are not credible — fails as a matter of law. This Court has consistently held that "a conviction will not be reversed 'simply because the defendant tells us that a witness was not credible.'" *E.g., People v. Tenney*, 205 Ill. 2d 411, 428 (2002); *see also People v Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009); *Evans*, 209 Ill. 2d at 211-12. That is because "it is the function of the jury" — and *not* the reviewing court — to "assess the credibility of the witnesses [and] the weight to be given their testimony." *E.g., Tenney*, 205 Ill. 2d at 428; *see also Siguenza-Brito*, 235 Ill. 2d at 228; *Evans*, 209 Ill. 2d at 211-12.

For example, in *Evans*, the jury was presented with conflicting evidence, including impeached testimony from a "jailhouse informant" who hoped to receive leniency in his own case in return for testifying against the defendant; this Court rejected the defendant's sufficiency challenge, noting that "on the issue of [the jailhouse informant's] credibility, we will not

substitute our judgment for that of the jury." *Evans*, 209 Ill. 2d at 213-14. Likewise, in *Tenney,* the defendant argued that the prosecution's witnesses were unbelievable, inconsistent, and impeached in various ways; this Court rejected his sufficiency claim, noting that his "arguments against [the witnesses] address functions of the jury and not of this court" because it is for the jury "to assess the credibility of the witnesses" and "resolve conflicts or inconsistencies." *Tenney*, 205 Ill. 2d at 428. Similarly, defendant's arguments regarding Lott's and Bell's credibility were for the jury to resolve, not reviewing courts.

Moreover, it was reasonable — indeed, the jury was correct — to credit Lott's and Bell's accounts that defendant was the shooter. It is undisputed that both Lott and Bell knew defendant before the murder (and thus could easily recognize him), and their accounts were consistent on the key points (that defendant got out of the car and limped away) and corroborated by defendant's videotaped statement showing his limp, the fingerprint evidence, the DNA evidence, and the gunshot residue.

In light of that corroboration, the minor inconsistencies defendant points to — such as who was standing where, how defendant exited the car, and who called police — are insufficient to undermine the jury's verdict. Def. Br. 21-22; *see, e.g., People v. Brooks*, 187 Ill. 2d 91, 133-34 (1999) (eyewitness inconsistencies are "to be expected," and, thus, eyewitnesses' testimony was sufficient to convict defendant of murder despite various contradictions,

including whether defendant was sitting in the front or back of the car when the shooting occurred).

In addition, although defendant notes that at the second trial, Ball recanted her prior testimony and statements to police and claimed that McAfee told her to identify defendant, based on Ball's letter to the trial court, it is reasonable to conclude that she recanted due to threats from defendant or his family. *See* R1407-09; Peo. Exh. 76 (letter); *see, e.g., Brooks*, 187 Ill. at 132-33 (evidence sufficient to convict, despite two eyewitnesses recanting, because it is "well-settled" that recantations are "unreliable"). And while defendant questions Lott's memory and motives, and points to her supposed recantation to a defense investigator, the jury observed each witness, heard the evidence, and was entitled to credit Lott's testimony that she saw defendant emerge from the car and limp away. R1317-18, 1341; *see, e.g., People v. Gray*, 2017 IL 120958, ¶¶ 37-48 (jury could credit witness despite her intoxication, memory lapses, and inconsistencies).

Defendant's remaining arguments — in which he re-analyzes the evidence and, contrary to the governing *Jackson* standard, asks this Court to draw inferences arguably favorable to him — fare no better. Def. Br. 23-24. Defendant contends that no gun was recovered, there was no evidence that defendant "came into contact with an airbag," no hair or fiber evidence connected defendant to the car, and police supposedly failed to investigate "possible enemies of Mayor Thornton" or Thornton's cell phone. *Id.* Yet the

People addressed several of these same points at trial (including by calling experts to explain how it could be that no airbag dust or singe pattern was found on defendant and no hair evidence was recovered, *see* R1641-42, 1657, 1661-62, 1686), and defendant's remaining arguments rely on pure speculation (such as his suggestion that Mayor Thornton might have had "enemies" or that the cell phone could yield exculpatory evidence).

More importantly, "it is not necessary that the trier of fact find beyond a reasonable doubt as to each link on the chain of circumstances" and the "jury is not obligated to 'accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt.'" *Evans*, 209 Ill. 2d at 209, 212; *see also Tenney*, 205 Ill. 2d at 429; *Siguenza-Brito*, 235 Ill. 2d at 229.

Indeed, the sole case defendant relies upon for his sufficiency claim is fatal to his argument. *See People v. Wheeler*, 226 Ill. 2d 92 (2007) (cited in Def. Br. 22-24). In *Wheeler*, the defendant argued that the evidence was insufficient to convict him of murder because (1) there were no eyewitnesses, (2) no gunshot residue was found on him; (3) no fingerprints tied him to the murder; (4) although there was "a good deal of blood" in the victim's car, and he was shot at close range, the defendant "had no blood on him"; (5) although broken glass from the car "was strewn about the street," none was found on the defendant's soft-soled shoes; and (6) human hairs found in the mask and stocking hat recovered by police did not belong to the defendant. *Id.* at 115-

16. This Court rejected the defendant's sufficiency argument, holding that reviewing courts need not engage in

> a point-by-point discussion of every piece of evidence as well as every possible inference that could be drawn therefrom. To engage in such an activity would effectively amount to a retrial on appeal, an improper task expressly inconsistent with past precedent. . . . Accordingly, this Court is not required to search out all possible explanations consistent with innocence or be satisfied beyond a reasonable doubt as to each link in the chain of circumstances.

Id. at 117. Thus, in *Wheeler*, despite the lack of evidence directly tying the defendant to the murder, this Court held that circumstantial evidence (including that the defendant had motive to kill the victim and access to a gun) was sufficient to support the guilty verdict. *Id*. at 118-21.

The evidence here is far stronger even than in *Wheeler*. Even defendant concedes that the bloodstain on his jeans is "evidence that [defendant] had been inside [Mayor Thornton's] vehicle." Def. Br. 24. And the obvious conclusion to be drawn from that fact is that defendant is the person who shot and killed Mayor Thornton, especially given that multiple eyewitnesses, fingerprint evidence, gunshot residue, and defendant's videotaped statement implicate him as well.

II. Defendant's Closing Argument Claim Is Forfeited and Meritless.

Defendant argues that he is entitled to a new trial due to two isolated comments the prosecutor made during a lengthy, thirty-one-page closing argument and rebuttal:

1. "the Prosecutor's statement that [defendant's] fingerprint on Mayor Thornton's car was 'a fresh print,'" and

2. the prosecutor's use of the word "matched" one time when discussing the blood evidence.

Def. Br. 13.

Defendant correctly notes that because he failed to object at trial, his argument is forfeited and may be reviewed only under the plain error doctrine, which requires him to show that (1) a "clear and obvious error" occurred; and (2) the evidence was so "closely balanced" that the error alone threatened to tip the scales against him or the error is so serious that it undermined "the integrity of the judicial process." *People v. Adams*, 2012 IL 111168, ¶ 21. Defendant cannot carry this burden.

A. None of the challenged comments was clear and obvious error, and defendant has forfeited any contrary argument.

To begin, defendant has forfeited any argument that the prosecutor's comments are "clear and obvious error" because his brief simply identifies the challenged comments and provides no argument or authority for his claim that the statements were error, let alone "clear and obvious error." Def. Br. 13. Defendant's failure results in forfeiture of his claim, because to obtain relief under the plain-error rule, "a defendant must first show that a clear or obvious error occurred." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (finding plain error argument forfeited); *see also People v. Ward*, 215 Ill. 2d 317, 331-32 (2005) (defendant forfeited claim by presenting conclusory argument

without citation); Ill. S. Ct. R. 341(h)(7) (arguments not raised in appellant's opening brief are forfeited).

Forfeiture aside, the prosecutor's comments were not error, let alone "clear and obvious" error. Prosecutors have "wide latitude" in closing argument, and reviewing courts must consider the closing argument as a whole, rather than focusing on selected phrases. *E.g., People v. Perry*, 224 Ill. 2d 312, 347 (2007); *Evans*, 209 Ill. 2d at 225. Moreover, prosecutors may argue reasonable inferences from the evidence, "even if the suggested inference reflects negatively on the defendant." *Perry*, 224 Ill. 2d at 347.

Comment 1 — "the Prosecutor's statement that [defendant's] fingerprint on Mayor Thornton's car was a 'fresh print'" — was just such a permissible inference from the trial evidence. Although one cannot conclude from a fingerprint itself precisely how old it is — *i.e.*, you cannot look at a print under a microscope and determine its age, R1604 — expert testimony at trial established that the length of time a fingerprint remains on a surface depends on "environment factors" and that there are "a lot of ways" that fingerprints can be removed. R1604-05. As the expert explained, heat and humidity cause a fingerprint to evaporate, rain "will wash it away," and someone or something can wipe it away. *Id.* Given that defendant's fingerprint was found on the outside of Mayor Thornton's car near the passenger door handle after his murder, it is reasonable to infer that defendant's fingerprint was "fresh" because it otherwise would have been

washed away by rain or snow, destroyed by heat or humidity, wiped away by someone cleaning or opening the car door, or otherwise removed. That inference is further bolstered by eyewitness testimony and DNA evidence placing defendant in the car at the time of the murder. The prosecutor thus was entitled to argue that the fingerprint was fresh; at the very least, his doing so cannot be called "clear and obvious" error. *See, e.g., Perry*, 224 Ill. 2d at 347 (prosecutors may make inferences "even if the suggested inference reflects negatively on the defendant"); *People v. Nicholas*, 218 Ill. 2d 104, 121 (2006) (prosecutor "may comment on the evidence and any fair, reasonable inferences it yields").[2]

Comment 2 — the prosecutor's single use of the word "matched" when discussing the blood evidence — was not clear and obvious error either. Although defendant does not explain his claim, he apparently believes that by this single use of the word "matched," the prosecutor was arguing that it had been scientifically proven that the blood on defendant's jeans could only

[2] The appellate court held that it was a reasonable to infer that the fingerprint was fresh, but error to say that the expert expressly testified that the print was fresh. *Jackson*, 2018 IL App (5th) 150274, ¶ 78. Defendant's brief notes that the prosecutor said the print was fresh, and he does not argue that the prosecutor expressly stated that the expert testified it was fresh; thus, defendant has forfeited any such argument. Def. Br. 13, 17, 19. In any event, although the prosecutor referred to the expert in closing argument, that brief reference was, at most, an awkward transition to a discussion of issues regarding the fingerprint evidence and was not a "clear and obvious" assertion that the expert expressly testified that the print was "fresh." R1807.

have come from Mayor Thornton to the exclusion of everyone else on earth. *See* Def. Br. 13. But that is not what the prosecutor said at all.

Closing argument "must be viewed in its entirety, and the challenged remarks must be viewed in their context." *E.g., Nicholas*, 218 Ill. 2d at 122; *see also Perry*, 224 Ill. 2d at 347. Read in context, the prosecutor's comment was consistent with the evidence presented at trial. Just prior to the challenged use of the word "matched," the prosecutor said:

> You heard [the expert witness] say it's likely the victim's blood, and he said the profile only occurs in one in 46,000 blacks, one in 73,000 whites, and one in 17,000 Hispanics.
>
> Now think about that. The defense asks the expert, "Can you say that's his? Can you say that's his blood?" Well, I can't say it's perfect — definitively. I can say it's not the Defendant's, and that profile — you know, those words sometimes can be confusing, how likely — it occurs one in 46,000 black people.

R1772-73. The prosecutor then noted the stipulation that the village's total population was approximately 4,000 people, and said

> So think about it. Take ten villages of Washington Park and put them side by side, and that profile that matched John Thornton is going to come up one time.

R1773.

Accordingly, it is plain that when he used the word "matched," the prosecutor was not saying that scientific proof established that the DNA profile could only belong to Mayor Thornton. Rather, the prosecutor noted that, while the expert said the blood "likely" came from Mayor Thornton, he could not say so "definitively." *Id.* The prosecutor's point was that, given how rare it is to find that particular partial DNA profile and the small size of

the village, it was reasonable to conclude that the blood belonged to Mayor Thornton.

Lastly, the People note that elsewhere in his brief, defendant faults his attorney for failing to object when the prosecutor referred to "the mayor's blood on [defendant's] pants" in closing argument. Def. Br. 19 (citing R1807). Defendant does not mention this comment in the context of his prosecutorial error claim, and thus it is forfeited as a basis for establishing a clear and obvious error. Moreover, such a claim would be meritless for the reasons provided above.

B. Defendant cannot show that the alleged errors affected the outcome or integrity of his trial.

Even if defendant could show that the prosecutor's comments were "clear and obvious error," his forfeiture must be enforced because he cannot show that the comments affected his trial.

To begin, improper comments in closing argument can be cured when the court instructs the jury prior to deliberations that closing statements are not evidence and that the jury should disregard any statement that is not supported by the evidence. *See, e.g., Perry*, 224 Ill. 2d at 348-350 (collecting cases). Here the trial court gave that instruction, R1819, curing any potential prejudice.

But even if the trial court had not cured the alleged errors, defendant's forfeiture must be enforced because he cannot prove either prong of plain error — that (1) the evidence was so closely balanced that the error tipped the scales

of justice against him; or (2) the error was so serious that it "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Adams*, 2012 IL 111168, ¶ 21.

1. The evidence was not closely balanced.

To establish the "closely balanced" prong of plain error, defendant must prove "that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Id.* In *Adams*, this Court held that the evidence was not closely balanced, even though no physical evidence inculpated the defendant and the trial amounted to a credibility contest, because "[the defendant's] explanation of events, though not logically impossible, was highly improbable." *Id*. at ¶ 22.

Defendant's contention that someone else shot Mayor Thornton is equally improbable and completely uncorroborated. To conclude that defendant is innocent a jury would have to believe that

1. Lott lied when she testified that she saw defendant emerge from Mayor Thornton's car and limp away;
2. Ball lied when she confirmed those same facts in multiple videotaped statements to the police, in a letter to the trial court, and in her prior testimony;
3. there is an innocent explanation for the evidence linking Mayor's Thornton's DNA to the blood on defendant's jeans;
4. there is an innocent explanation for the gunpowder residue on defendant's hand and clothing;
5. there is an innocent explanation for the presence of defendant's fingerprint on Mayor Thornton's exterior car door; and

6. defendant did not injure his leg in the crash, but, instead, at the same time that Mayor Thornton was murdered, defendant was coincidentally shot in the leg (for unexplained reasons, and by an unidentified person), even though it is undisputed that he had no gunshot wound, he went to his girlfriend's home rather than seek medical attention, and did not call police or tell his girlfriend that he had been shot.

It is not only improbable, it is essentially impossible that all of these things could be true. Moreover, this is not a case where defendant presented exculpatory evidence that must be weighed against the prosecution's case. Defendant has no alibi — rather, his statement to police and his girlfriend's testimony demonstrate that he had both the time and opportunity to murder Mayor Thornton. And while defendant's brief suggests that it is possible that Thornton could have had "enemies," he points to no record evidence suggesting that an actual "enemy" had a motive to kill Thornton, let alone evidence that such an individual killed Thornton and successfully framed defendant with all the foregoing evidence within hours of the murder.

Nor do defendant's critiques of Ball's and Lott's credibility render the evidence closely balanced. *See, e.g., People v. White*, 2011 IL 109689. In *White*, the victim's girlfriend recanted her identification of the defendant as the shooter, and the testimony of other prosecution witnesses was inconsistent and impeached; in addition, the defendant presented multiple eyewitnesses who testified that he was not the shooter, two alibi witnesses, and evidence that he was physically incapable of performing some of the acts alleged. *Id.* ¶¶ 17-123. This Court nevertheless concluded that the evidence was not closely balanced, noting in part that it "would truly be an incredible

sequence of coincidences" for multiple people to misidentify the defendant as the shooter and that the recantations "appear[ed]" to be driven by "fear." *Id.* at ¶¶ 136-37. Just so here. Ball's recantation plainly was driven by fear, and it would be an "incredible sequence of coincidences" for all of the foregoing evidence to implicate defendant if he were innocent, especially given that (unlike the defendant in *White*) he presented no exculpatory evidence.

Defendant's critiques of the physical evidence fare no better. To begin, this Court has found that evidence is not closely balanced even if *no* physical evidence inculpates the defendant. *See, e.g., People v. Belknap*, 2014 IL 117094; *Adams*, 2012 IL 111168, ¶ 22. In *Belknap*, (1) no physical evidence linked the defendant to the death of his girlfriend's daughter; (2) there were no eyewitnesses; (3) other adults had access to the child; (4) the girl's mother testified that the defendant was innocent and had always been good to the girl; (5) the prosecution's case rested largely on two jailhouse informants, one of whom had been repeatedly convicted of "crimes of dishonesty" and the other of whom received a sentencing reduction in another case after testifying against the defendant; and (6) the jailhouse informants' testimony was impeached and inconsistent. 2014 IL 117094, ¶¶ 8-9, 15-18, 20-27, 30, 54. This Court nevertheless concluded that the evidence was not closely balanced because the jailhouse informants' testimony was consistent on certain key points and, after the girl was taken to the hospital, the defendant wondered if he would be contacted by the police. *Id.* ¶¶ 56-62. Here, the evidence was

stronger: not only did defendant's conduct betray consciousness of guilt (such as by telling his girlfriend that he assumed that the police had come to arrest him and lying to police about his limp), but eyewitness testimony and physical evidence linked him to the murder.

Defendant's arguments about the physical evidence, Def. Br. 16, contravene the record and defy common sense. While defendant notes that his fingerprint matched "only" one of the fifty-seven prints lifted from the car, he omits that the expert explained that most of those prints were not suitable for comparison and, thus, they too could belong to defendant. R1608-13. And it is unsurprising that there is no evidence that defendant "came into contact with an airbag," for experts testified that airbags can deploy without leaving particles on a person, the particles are easily removed, and it is rare to find airbag singe marks. R1641-42, 1657, 1686. Similarly, the People presented expert testimony explaining that a person who remains in one place only a short time (as defendant did) will not necessarily leave hair evidence, R1661-62, and common sense suggests that the same is true of fiber evidence. And although defendant argues that it is theoretically possible that the gunshot residue on his hand and clothes came from another source (though no evidence suggests it did) or that the blood on his jeans came from someone besides Mayor Thornton (though no evidence suggests that it did and, statistically, the chance of that is almost zero), such unlikely possibilities do not render the evidence closely balanced. *See, e.g., Adams*, 2012 IL 111168,

¶ 22 (evidence not closely balanced where "defendant's explanation of events, though not logically impossible, was highly improbable").

Lastly, defendant's cases are inapposite. Def. Br. 14-16 (citing *Sebby*, *Naylor, Piatkowski*). In contrast to the present case, in *Sebby*, there was no physical evidence, and the defendant presented multiple eyewitnesses who corroborated his testimony that he was innocent. *People v. Sebby*, 2017 IL 119445, ¶¶ 60-63. In *Naylor*, the defendant provided a "credible" account of his innocence, and "no extrinsic evidence was presented to corroborate" the prosecution's witnesses "or contradict" the defendant's testimony. *People v. Naylor*, 229 Ill. 2d 584, 607-08 (2008). And, in *Piatkowski*, the prosecution "presented no physical evidence to connect the defendant to the shooting," and there were "discrepancies" in the eyewitnesses' description of the shooter's appearance, age, and race. *People v. Piatkowski*, 225 Ill. 2d 551, 567-70 (2007).

In sum, defendant cannot establish that the evidence was so closely balanced that the prosecutor's alleged misstatements "threatened to tip the scales of justice against" him.

2. The alleged errors did not undermine the integrity of the judicial process.

Nor may defendant's forfeiture be excused as second-prong plain error, which requires him to prove that the alleged errors are "of such a magnitude" that they resulted in "a total breakdown in the integrity of the judicial process." *Evans*, 209 Ill. 2d at 224.

First, this Court has consistently held that improper comments in closing argument — absent serious prosecutorial misconduct in other parts of the trial — do not constitute second-prong plain error. *See, e.g., id.* at 224-26; *Adams*, 2012 IL 111168, ¶ 24; *Nicholas*, 218 Ill. 2d at 123. Here, defendant merely challenges two isolated comments in a thirty-one-page closing argument and rebuttal, and makes no other claim of prosecutorial error.

Second, and independently, second-prong plain error applies only if the alleged misconduct is so egregious "that the trial court could not cure the error by sustaining an objection or instructing the jury to disregard the error." *E.g., Brooks*, 187 Ill. 2d at 136 (collecting cases). To the extent that either of the challenged comments was error, it could have been cured by sustaining an objection, a point defendant presumably does not contest, given that he claims his counsel erred by failing to object to the alleged misstatements. *See* Def. Br. 19 (arguing that had counsel objected, "there is a reasonable probability" defendant would have been found not guilty).

Lastly, defendant's cases are inapposite because they are not plain error cases and/or they involve a pervasive course of egregious misconduct. Def. Br. 17 (citing *Marshall, Johnson*, *Blue, Abadia*). In *Marshall*, the People confessed error because the prosecutor's "naked prejudice" and "extremely racially prejudicial" comments were "a consistent theme in the presentation of the State's theory of the case." *People v. Marshall*, 2013 IL App (5th) 110430, ¶¶ 1, 14-16. In *Johnson*, the prosecutor engaged in a course of

misconduct, displaying the victim's "bloodied and brain-splattered" police uniform on a mannequin throughout trial, eliciting inflammatory testimony, suggesting that defense counsel was deceptive, and misstating the law and evidence. *People v. Johnson*, 208 Ill. 2d 53, 72-85 (2003). The companion case, *Blue*, is also a cumulative error case that involved widespread errors by both the trial court and the prosecution, including the improper admission of evidence, the display (once again) of the victim's "bloodied and brain-splattered" police uniform, and prosecutors who harassed witnesses, cursed defense counsel, and made improper objections "to introduce contrary evidence through themselves." *People v. Blue*, 189 Ill. 2d 99, 120-41 (2000). Finally, *Abadia* is inapposite because it concerns reversible error, not plain error. *People v. Abadia*, 328 Ill. App. 3d 669, 678, 681-85 (1st Dist. 2001).

C. Defendant's related ineffective assistance claim is meritless.

Defendant's derivative claim that his counsel erred by failing to object to the prosecutor's comments is also meritless. Def. Br. 18-20. To prevail, defendant must prove that (1) counsel's performance was "deficient"; and (2) there is a "reasonable probability" that, had counsel objected, defendant would have been found not guilty. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). As explained, the prosecutor's comments were proper and the evidence is not closely balanced. Thus, defendant cannot show that counsel erred by failing to object or that there is a reasonable probability defendant would have been found not guilty had counsel objected.

III. The Trial Court Properly Denied Defendant's *Krankel* Motion.

A. Defendant has forfeited his new argument that the lower courts erred by considering the merits of his claim.

Defendant's opening brief in this Court argues that "a trial court commits reversible error when it conducts a preliminary *Krankel* inquiry and concludes — on the merits — that there was no ineffective assistance." Def. Br. 30; *see also id*. at 28. But defendant never argued below that a court may not consider the merits of a claim during the preliminary *Krankel* inquiry. To the contrary, defendant's appellate brief argued that a claim may be denied at the preliminary inquiry if it "lacks merit," and cited and discussed *Strickland v. Washington*, 466 U.S. 668 (1984). Def. App. Br. 48-49.

Thus, defendant has forfeited his new argument that the trial court erred by considering the merits of his ineffective assistance allegations. *See, e.g., People v. Cherry*, 2016 IL 118728, ¶ 30 ("it is well settled that arguments raised for the first time in this Court are forfeited"); *McMath v. Katholi,* 191 Ill. 2d 251, 255 (2000) (party may not "complain of an error where to do so is inconsistent with the party's position taken in an earlier court proceeding").

Although forfeiture is a limitation on the parties, and not this Court, defendant's forfeiture should be enforced here because (1) defendant not only failed to raise this "no merits" theory earlier, he expressly told the appellate court it was *proper* to consider the merits; and (2) his "no merits" theory is directly contrary to at least twenty cases from this Court, *infra* pp. 30-32. Further, the same "no merits" argument is pending before this Court in

People v. Roddis, No. 124352, and declining to address it here will not inhibit development of the law.

B. It is settled law that trial courts should consider the merits of a claim at the preliminary inquiry stage.

Forfeiture aside, this Court should reject defendant's new argument because it is contrary to more than twenty opinions of this Court.

The *Krankel* rule requires a court to conduct an inquiry into a criminal defendant's pro se post-trial allegation that counsel provided ineffective assistance. *See People v. Krankel*, 102 Ill. 2d 181, 189 (1984). But this Court has repeatedly cautioned that "the trial court is not required to automatically appoint new counsel when a defendant raises such a claim." *E.g., People v. Ayres*, 2017 IL 120071, ¶ 11 (collecting cases). Instead, the trial court first must "conduct some type of inquiry" into the defendant's pro se claims. *Id.* (collecting cases). During this preliminary *Krankel* inquiry, it is "usually necessary" for the trial court to confer with defense counsel about the basis for the pro se claims to determine whether new counsel should be appointed. *Id.* ¶ 12. The trial court also "is permitted to discuss the allegations with defendant" and "to make its determination [of whether to appoint new counsel] based on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations." *Id.* (collecting cases).

As this process suggests, the decision the trial court must reach at the preliminary inquiry stage — whether to appoint new counsel — turns on the merits of the defendant's claims. In particular, a defendant is entitled to

Krankel counsel only if, at the end of the preliminary inquiry, the defendant has shown "possible neglect of the case" by trial counsel. *Id.* ¶ 11. Plainly, the trial court cannot make that determination unless it considers the merits of the defendant's claims.

Indeed, in more than twenty cases spanning three decades, this Court has held that trial courts should decline to appoint new counsel if the preliminary *Krankel* inquiry reveals that the defendant's claim is meritless. *See, e.g.*, *id.* ¶ 11 (collecting cases); *People v. Jocko*, 239 Ill. 2d 87, 92 (2010) (no new counsel if defendant's claim "lacks merit"); *People v. Simms*, 168 Ill. 2d 176, 199 (1995) (no new counsel if defendant's claim "is meritless"); *People v. Byron*, 164 Ill. 2d 279, 305 (1995) (no new counsel if defendant's claim is "without merit"); *People v. Sims*, 167 Ill. 2d 483, 518 (1995) (no new counsel if "there is no validity to the defendant's claim").[3]

This Court's decision in *People v. Chapman*, 194 Ill. 2d 186 (2000), is instructive. There the defendant faulted his trial counsel for failing to investigate and introduce certain documents that could have provided an alibi, and the trial court declined to appoint new counsel because it "found

[3] *See also, e.g.*, *People v. Jolly,* 2014 IL 117142, ¶ 29; *People v. Taylor*, 237 Ill. 2d 68, 75 (2010); *People v. Banks*, 237 Ill. 2d 154, 214 (2010); *People v. Moore*, 207 Ill. 2d 68, 78 (2003); *People v. Bull*, 185 Ill. 2d 179, 210 (1998); *People v. Towns*, 174 Ill. 2d 453, 466 (1996); *People v. Munson*, 171 Ill. 2d 158, 199 (1996); *People v. Kidd*, 175 Ill. 2d 1, 44-45 (1996); *People v. Johnson*, 159 Ill. 2d 97, 124 (1994); *People v. Coleman*, 158 Ill. 2d 319, 350-51 (1994); *People v. Robinson*, 157 Ill. 2d 68, 86 (1993); *People v. Strickland*, 154 Ill. 2d 489, 527 (1992); *People v. Ramey*, 152 Ill. 2d 41, 52 (1992); *People v. Williams*, 147 Ill. 2d 173, 251-53 (1991); *People v. Crane*, 145 Ill. 2d 520, 533 (1991).

that defendant received the effective assistance of counsel," and the omitted evidence would not have changed the jury's verdict. *Id.* at 229. As in this case, in *Chapman* the defendant argued on appeal that the trial court had erred by evaluating the merits of his ineffective assistance claim under *Strickland v. Washington*, 466 U.S. 668 (1984), "rather than first determining whether new counsel should be appointed to argue [his] assertions regarding the ineffectiveness of trial counsel." *Id.* This Court rejected the defendant's argument and affirmed the trial court's judgment, noting that new counsel should not be appointed if the defendant's claim "lacks merit." *Id.* at 230-31. The Court held that the trial court correctly declined to appoint new counsel because it "reviewed counsel's performance and concluded that counsel provided effective representation." *Id.* at 231. The defendant's arguments on appeal did "not affect the fact" that his complaints about trial counsel "lack merit[.]" *Id.* As this Court explained, "the record shows that [the evidence counsel omitted] would not have had any bearing on the case. This claim simply has no merit." *Id.*

Thus, it is well-established that courts should consider the merits of a defendant's claims at the preliminary inquiry stage, deny claims that are "meritless," and appoint new counsel if it appears that the claims may potentially be viable if an attorney is appointed to pursue them. *Id.*; *see also, e.g., Crane*, 145 Ill. 2d at 533 (trial counsel's failure to investigate motion to suppress did not entitle defendant to new counsel because motion would have

had no legal merit); *Coleman*, 158 Ill. 2d at 350-51 (no new counsel where motions defendant faulted trial counsel for not filing were meritless); *Towns*, 174 Ill. 2d at 466-68 (no new counsel because defendant's allegations "do not constitute strong and convincing proof of incompetency when considered against the totality of counsel's conduct during trial").

Departure from this established precedent "must be specifically justified" by showing that the prior decisions are "unworkable or badly reasoned" and "likely to result in serious detriment prejudicial to public interests." *People v. Williams*, 235 Ill. 2d 286, 294 (2009). No such justification exists here because this Court's rule that courts should consider the merits of a defendant's claim during the preliminary *Krankel* inquiry is not only longstanding and repeatedly re-affirmed, but it is also straightforward, sensible, and efficient. Certain claims can — and should — be disposed of at the preliminary inquiry stage, rather than wasting the time and resources that would be expended by automatically appointing new counsel every time a defendant expresses dissatisfaction with his trial counsel. And there can be no dispute that this rule has proved to be simple, understandable, and easily applied. In short, this Court's longstanding rule works, and there is no reason to change it.

Citing three appellate court decisions, defendant nevertheless suggests that this Court should now hold that is "reversible error" to consider the merits of an ineffective assistance claim at the preliminary *Krankel* hearing.

Def. Br. 30-31 (citing *Fields*, *Cabrales*, *Roddis*). But *Fields* and *Cabrales* expressly state that trial courts should decline to appoint new counsel if the defendant's claim "lacks merit" or is otherwise not "valid." *People v. Fields*, 2013 IL App (2d) 120945, ¶ 38; *People v. Cabrales*, 325 Ill. App. 3d 1, 5-6 (2d Dist. 2001). And while *Roddis* attempts to place some limits on a trial court's ability to reach the merits, that decision is currently on appeal before this Court. *People v. Roddis*, No. 124352. Moreover, even *Roddis* identifies situations in which a court *may* deny a claim on the merits at the preliminary inquiry stage, including (as relevant here) where the defendant faults his counsel for failing to call a witness and the trial court concludes that the omitted witness's testimony would be "not helpful to the defendant." *People v. Roddis*, 2018 IL App (4th) 170605, ¶¶ 71, 73. Thus, even under defendant's cases, his argument fails.

Further, defendant's "no merits" theory is also inconsistent with the goal of a just, efficient legal system. For example, under defendant's theory, if a defendant alleged that his counsel erred by failing to raise arguments that are per se irrelevant — for example, that the victim in a statutory rape case was dressed proactively — the court would be required to appoint new counsel. Similarly, if a defendant alleged that his counsel erred by refusing to offer an alibi defense — while the record demonstrated counsel had called multiple alibi witnesses — the trial court would be required to appoint new

counsel even though the claim was objectively baseless. The law does not require such absurd results.

Defendant's reliance on the standard applicable at the first stage of postconviction proceedings — where the petitioner need only provide enough facts and supporting evidence to show that he has an "arguable" *Strickland* claim — fares no better.

To begin, defendant's suggestion that "it cannot be the case" that his burden at a preliminary *Krankel* inquiry would be "greater than his burden at the first stage of postconviction proceedings" misapprehends the burden postconviction petitioners must carry. Def. Br. 31-32. Contrary to defendant's no-merits theory, this Court has consistently held that courts at the first-stage of postconviction proceedings should summarily dismiss claims that are factually baseless or are based on a "meritless legal theory." *E.g., People v. Petrenko*, 237 Ill. 2d 490, 499-502 (2010) (affirming first-stage dismissal of postconviction claim alleging that trial counsel erred by failing to contest the validity of a search warrant because police had enough evidence "to establish probable cause" and the arguments the petitioner faulted counsel for not raising "would not have succeeded"). Defendant also fails to consider that, to demonstrate an "arguable" claim, a postconviction petitioner must attach supporting documentary evidence, such as witness affidavits. *See* 725 ILCS 5/122-2; *see also, e.g., People v. Delton*, 227 Ill. 2d 247, 254-58

(2008) (affirming first-stage dismissal where petitioner's documentary evidence was insufficient to support claim that counsel erred).

Moreover, even if defendants did face a lesser burden at the first stage of postconviction proceedings than at the preliminary *Krankel* inquiry, that difference would be unsurprising, given the significant differences between the two proceedings. A judge conducting a preliminary *Krankel* inquiry will typically be much more familiar with the proceedings (and counsel's performance) than a judge considering a postconviction petition at the first stage. That is so because a *Krankel* motion must be filed shortly after trial is complete, in the same proceeding, and (typically) before the same judge who presided over the defendant's trial. *See Ayres*, 2017 IL 120071, ¶ 22 ("*Krankel* is limited to posttrial motions"). It is thus understandable that this Court has long held that at the preliminary *Krankel* inquiry the trial court may deny a *Krankel* motion on the merits "based on its knowledge of defense counsel's performance at trial." *E.g., id.* ¶ 12 (collecting cases). By contrast, a postconviction judge will almost always have less knowledge (or memory) of a defendant's trial and claims because postconviction petitions are typically filed long after trial (usually after the direct appeal is complete), are sometimes filed before a judge who did not preside over the trial, and generally concern extra-record matters. Therefore, it would be unsurprising if postconviction judges have less discretion to dismiss a postconviction petition in the first instance, because they are less familiar with the

defendant's claims and may more often need to appoint counsel to efficiently and accurately resolve them.

Lastly, defendant's theoretical concern about "active resistance" from defense counsel during the preliminary *Krankel* inquiry is misplaced. Def. Br. 32. If a particular attorney were to put up "active resistance" during a preliminary inquiry, it would be a matter for the court to address in that particular case; it is not a basis for this Court to hold that courts may never consider the merits of a claim at a preliminary *Krankel* inquiry.

In sum, defendant's contention that trial courts should not be permitted to deny meritless claims during the preliminary inquiry is contrary to this Court's longstanding precedent and would lead to bad (and sometimes absurd) results. The better rule is the one this Court has re-affirmed for decades: lower courts can and should be trusted to determine at the preliminary inquiry stage whether claims are "meritless" or may potentially be viable such that new counsel should be appointed to pursue them.

C. The trial court properly denied defendant's *Krankel* motion.

Defendant contends in conclusory fashion that he was entitled to new counsel, and, thus, the trial court erred by denying his *Krankel* motion, because trial counsel provided ineffective assistance by (1) not objecting to the People's closing argument; (2) failing to present evidence that DNA testing is "misleading"; and (3) deciding not to call two particular witnesses to testify. Def. Br. 25, 29. Defendant's arguments are forfeited and meritless.

1. Defendant's new argument that de novo review applies is forfeited and meritless.

Defendant's contention that this Court should review the trial court's denial of his *Krankel* motion de novo is forfeited. Def. Br. 26-27. Contrary to his current argument, in the appellate court defendant (correctly) stated that a trial court's denial of a *Krankel* motion can be reversed only if it is "manifestly erroneous." Def. App. Br. 48, 54. Defendant cannot now reverse course and claim that the appellate court erred by applying the standard he urged it to apply. *Supra* p. 28 (collecting cases).

Defendant's new request for de novo review is also incorrect, because it rests on his incorrect theory that the lower courts erred by considering the merits of his claim. Def. Br. 27; *see supra* pp. 30-32. And, as defendant's own cases hold, because the court's ruling at the preliminary inquiry stage requires an "inquiry" into the "factual basis" for the claims, *e.g., Ayres*, 2017 IL 1250071, ¶ 11, it is necessarily fact-bound and may be reversed only if the trial court's decision is manifestly erroneous, *i.e.*, only if it is an error that is "clearly evident, plain, and indisputable," *People v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 40; *see also* Def. Br. 26-27 (collecting cases applying manifestly erroneous standard in *Krankel* cases). But defendant cannot demonstrate manifest error, nor could he prevail even under a de novo standard, because the trial court's ruling was not just reasonable, it was correct.

2. Defendant's allegation that his counsel erred by failing to object to the People's closing argument does not entitle him to new counsel.

Defendant's allegation that his counsel erred by failing to object to the prosecutor's isolated comments in closing argument about the DNA "match" and "fresh" fingerprint does not entitle him to appointment of new counsel for two independent reasons. *See* Def. Br. 25.

First, it is settled that new counsel should not be appointed when a defendant's *Krankel* claim "pertains" to "trial strategy." *Ayres*, 2017 IL 120071, ¶ 11 (collecting cases). Indeed, defendant concedes that a *Krankel* claim should be denied at the preliminary inquiry stage if it relates to "matters of trial strategy." Def. Br. 28. That concession is fatal to defendant's claim because this Court "has noted on several occasions that decisions regarding 'what matters to object to and when to object' are matters of trial strategy" because counsel may withhold an objection to an improper statement "to diffuse its importance, rather than object and draw further attention to the statement." *Perry*, 224 Ill. 2d at 344-45, 348 (collecting cases). Defense counsel explained at the preliminary inquiry that he objected when he believed it was appropriate to do so, C470, and the record shows that during closing argument, he emphasized that prosecutors could not (1) definitively say that the blood on defendant's pants belonged to Mayor Thornton or (2) prove when defendant left his fingerprint on the car, *e.g.,* R1799-1801. Defendant's challenge to counsel's legal strategy thus is not a colorable claim.

Second (and independently), as noted, it also settled that new counsel should not be appointed when a defendant's *Krankel* claim "lacks merit." *Ayres*, 2017 IL 120071, ¶ 11 (collecting cases). As explained above, defendant's ineffective assistance claim is plainly meritless because the prosecutor's comments in closing argument were permissible (thus, there was no basis to object) and the evidence against defendant is strong (thus, defendant cannot establish prejudice). *Supra* pp. 10-25.

3. Defendant's allegation that his counsel "failed to present evidence that a partial DNA profile is misleading" does not entitle him to new counsel.

Defendant's conclusory allegation that his counsel "failed to present evidence that a partial DNA profile is misleading" does not entitle him to new counsel for three independent reasons. *See* Def. Br. 29.

First, defendant has forfeited this claim because he fails to further develop this argument, provide citations, or identify what "evidence" counsel supposedly omitted. *See* Ill. S. Ct. R. 341(h)(7); *Ward*, 215 Ill. 2d at 331-32.

Second, as noted, defendant concedes that complaints about counsel's trial strategy cannot serve as the basis for a *Krankel* claim, Def. Br. 28, and it is settled that decisions regarding what evidence to present are "matters of trial strategy," *e.g.*, *People v. West*, 187 Ill. 2d 418, 432 (1999). Defense counsel explained that his strategy concerning the blood evidence was to suggest that defendant "could have picked it up from outside of the vehicle and that in no way proved that he was inside the vehicle." C467. And the record shows that counsel pursued that strategy by eliciting testimony that

some of Mayor Thornton's blood was found outside his car, R1234, and arguing in closing that the prosecution not only could not say how the blood got on defendant's jeans, but that the prosecution's theory that he got a small bloodstain near the front pocket of his jeans while sitting in car wearing a sweatshirt did not make sense, R1800-01.

Third, defendant's conclusory assertion is affirmatively rebutted by the record. Defense counsel elicited from the DNA expert that (1) he could not be certain that the blood on defendant's pants belonged to Mayor Thornton; (2) the bloodstain was not large enough to build a complete DNA profile; and (3) thus it was not a "match" to the mayor and it was possible the blood belonged to someone else. R1581-82, 1592. Defense counsel then emphasized those points in closing argument, telling the jury "they can't tell you that the blood is John Thornton's." R1801. Defendant's claim is thus rebutted by the record.

4. Defendant's allegations concerning Jackson and Dodd do not entitle him to new counsel.

Defendant's conclusory allegation that his counsel "failed to call Lequashia Jackson and Angela Dodd to testify" at the second trial does not entitle him to new counsel for three independent reasons. *See* Def. Br. 25.

First, defendant has forfeited this claim in multiple ways. Apart from a conclusory sentence in his brief, defendant never develops an argument, cites the record, or cites any authority for his contention that counsel erred by not calling Jackson or Dodd to testify. *See id.*; *see also* Ill. S. Ct. R. 341(h)(7);

Ward, 215 Ill. 2d at 331-32. In addition, defendant's failure to raise this allegation in his appellate briefs or his PLA results in a second layer of forfeiture. *See, e.g., People v. Carter*, 208 Ill. 2d 309, 318 (2003).

Second, this Court has consistently held that whether to call a witness to testify at trial is a strategic decision and, thus, the claim is not colorable under *Krankel*. *See, e.g., Banks*, 237 Ill. 2d at 216 (complaint about failure to call certain witness "fell under the parameters of trial strategy and therefore the trial court did not err in choosing not to appoint counsel"); *Chapman*, 194 Ill. 2d at 231 (defendant's allegation "did not require the trial court to appoint new counsel" because "whether to call certain witnesses is a matter of trial strategy"). Thus, as a matter of law, this claim does not entitle defendant to new counsel.

Third, defendant's claim is meritless. In the first trial, Jackson testified that she heard shots, Mayor Thornton's car crashed into a tree, and then she saw defendant (whom she had known since childhood) get out of the car and limp away. R351-55. Two days after she testified, the trial court recalled Jackson outside the presence of the jury and told her that there had been an anonymous report that she "may have received an offer of money from a police officer concerning [her] testimony." R864-65. Jackson denied that allegation but said that she did not wish to further participate at trial because she and her family had been receiving many threats, which she detailed. R865, 868-71.

The judge, who had previously discussed with counsel the police department's ongoing investigation into the threats against Jackson, thanked Jackson for her "courage," said that he wanted Jackson "to have a protective escort home," and instructed police to "make every reasonable" effort "to see that she is protected." R871-72. Defense counsel then recalled Jackson to testify; after only a few questions, Jackson suffered a seizure and had to be rushed to the hospital. R879. Out of the presence of the jury, a court clerk stated that shortly before suffering the seizure, Jackson said that she had just seen one of the persons who had threatened her. R882. The next day, the clerk and a bailiff stated that they had received calls from Dodd saying that (1) Jackson was in the hospital, with blood pressure so high she was in danger of having a stroke and dying; (2) Detective McAfee had told Jackson "that if she kept her mouth shut, he would pay her off"; and (3) another family member had received a call from a man who said Jackson "should not testify" because defendant "could beat this case if she did not testify." R891-92, 900-01. During a recess, the prosecutor spoke on the phone with Jackson, who said that McAfee told her that "he would give her money or something in exchange if she would just keep his name out of it and say that he was not in the area at that time." R908-09. However, Jackson also told the prosecutor that she stood by her testimony that she saw defendant get out of the car following the crash because it was "totally accurate." R909. The court then declared a mistrial at defendant's request. R916.

In a subsequent interview with police, McAfee denied that he had bribed anyone to say that he was not at the scene. R1474. Moreover, there was no point in even offering such a bribe because other officers testified that McAfee was at the crime scene and assisted in small ways with the investigation on the morning of the murder. *See, e.g.*, R1159, 1472.

Years later, during the preliminary *Krankel* inquiry, defendant faulted defense counsel for not calling Jackson and Dodd to testify at the second trial. Defense counsel responded that he and defendant made a joint decision not to call Jackson because she had "indicated an eagerness and a willingness to testify on behalf of the State." C460. When the court asked defendant whether those conversations occurred, defendant said "I'm not calling [defense counsel] a liar." C461. As to Dodd, defense counsel said that this was the first he had heard that defendant wanted Dodd to testify, and he noted that Dodd was not mentioned in defendant's *Krankel* motion. C462-63. The court asked defendant whether he had any correspondence with Dodd that reflected her potential testimony, or any documents that showing he had told counsel to call Dodd, and defendant did not. C463-65.

Under *Strickland*, counsel's decision whether to call a witness to testify is "generally immune from claims of ineffective assistance of counsel." *E.g.*, *West*, 187 Ill. 2d at 432; *People v. Reid*, 179 Ill. 2d 297, 310 (1997). The "only exception" to this rule is when counsel "'entirely fails to conduct any meaningful adversarial testing.'" *West*, 187 Ill. 2d at 432-33; *see also Reid*,

179 Ill. 2d at 310. Defendant's claim is meritless because he does not even attempt to argue that his counsel "entirely failed" to test the People's case, nor could he credibly do so.

Indeed, as defendant's own recitation of the facts shows, defense counsel (1) aggressively cross-examined Ball and Lott in an attempt to expose their purported inconsistencies and credibility problems; (2) aggressively cross-examined Special Agent Bates about purported mistakes or omissions in the investigation; (3) aggressively cross-examined the expert witnesses to emphasize certain limitations in the physical evidence; (4) called two witnesses to attempt to impeach Lott's testimony; and (5) forcefully argued in closing argument that the prosecution had failed to prove that defendant was guilty because, among other reasons, the prosecution's witnesses were not credible and no physical evidence definitively tied defendant to the murder. Def. Br. 4-9; *see also* R1326-41, 1386-1401, 1459-1519, 1581-88, 1614-21, 1687-98, 1711-14, 1734-36, 1738-44, 1782-1804. Indeed, the very arguments defendant now raises to support his sufficiency claim are based on theories that defense counsel developed and argued at trial. *Compare id.* with Def. Br. 21-25. Because defendant cannot dispute that defense counsel tested the People's case, his claim is meritless and does not entitle him to new counsel for this additional, independent reason.

Lastly, although defendant may not challenge the correctness of defense counsel's strategic decisions, counsel's decision not to call Jackson

and Dodd was the right one. Based on the first trial, Jackson and Dodd would say — at most — that McAfee said he would pay Jackson to "keep quiet" about his presence at the murder scene, which is not the same as telling Jackson to falsely accuse defendant of murder. And even after Jackson said she was offered a bribe to keep quiet about McAfee's presence, she still emphasized the truth of her statement that she saw defendant emerge from Mayor Thornton's car. At the second trial, Jackson would have either maintained that account (as she said she intended to do) or, if she recanted, she would have been impeached with her prior testimony regarding defendant's involvement in the murder and the threats she had received from defendant's associates. Either way, her testimony would have hurt defendant's case. Thus, it was correct not to call her. And, once Jackson has been eliminated as a witness, there was no reason to call Dodd to testify because her involvement in the case relates solely to allegations that Jackson inculpated defendant only because she was bribed by McAfee.

In sum, the trial court properly denied defendant's *Krankel* motion and declined to appoint new counsel.

IV. The Prosecutor's Limited Participation in the Preliminary *Krankel* Inquiry Provides No Basis to Remand.

At the preliminary *Krankel* inquiry, the judge asked defendant to elaborate on each of his claims of attorney error and for defense counsel to respond, a process that spanned over seventeen transcript pages. C459-76. During the court's lengthy discussion with defendant and defense counsel,

the prosecutor did not speak at all. *Id.* After confirming that defendant had nothing more to say, the court then asked the prosecutor whether he wished to "comment," and the prosecutor offered brief remarks spanning fewer than two pages. C476-77. After the hearing, defendant wrote a letter to the judge to thank him because "you gave me every opportunity to address my issues." C486. The court then issued a written opinion denying defendant's *Krankel* motion and declining to appoint counsel, a decision the court expressly made based on its review of the trial record and defendant's and defense counsel's statements at the hearing. C480-81.

This Court has held that the prosecution may participate in some fashion during the preliminary *Krankel* inquiry, but the prosecution's role should be "de minimis" and not "adversarial." *People v. Jolly*, 2014 IL 117142, ¶¶ 30, 38. Defendant's argument that this case should be remanded for further *Krankel* proceedings because the prosecutor's brief comments were per se error, and that such error can never be harmless, is barred and meritless.

A. A prosecutor's participation in a preliminary *Krankel* inquiry is subject to harmless error review.

Defendant's opening brief in this Court contends that a prosecutor's participation in a preliminary *Krankel* inquiry may never be subject to harmless error review. Def. Br. 33, 36. But defendant took the opposite position in the appellate court, noting that "the [Illinois Supreme] Court in *Jolly* found that the State's adversarial input was subject to harmless error

review." Def. App. Reply Br. 20 (citing *Jolly*, 2014 IL 117142). Accordingly, defendant's new theory — that a prosecutor's participation may never be subject to harmless error review — is forfeited. *Supra* p. 28 (collecting cases).

Defendant's new theory is also meritless. As defendant correctly noted in his appellate court briefs, in *Jolly* this Court "found that the State's adversarial input was subject to harmless error review." Def. App. Reply 20; *see also Jolly*, 2014 IL 117142, ¶¶ 40-45 (holding that a prosecutor's participation is not structural error but that under facts of that case, the prosecutor's extensive involvement was not harmless); *People v. Skillom*, 2017 IL App (2d) 150681, ¶ 28 (*Jolly* permits harmless error review); *Jackson*, 2018 IL App (5th) 150274, ¶ 101 (same). Indeed, in addition to *Jolly*, this Court has consistently found in other cases that errors in *Krankel* proceedings are subject to harmless error review, provided the record is sufficiently developed to evaluate the defendant's claims. *See, e.g., Moore*, 207 Ill. 2d at 80 (collecting cases).

Defendant's new theory would also lead to absurd results. To return to an earlier hypothetical, assume that a defendant alleged during a preliminary *Krankel* inquiry that his counsel erred by failing to argue that the victim in a statutory rape case was dressed provocatively and, after the court confirmed that defendant had nothing to add, the prosecutor cited case law holding that such an argument would be improper. Or, assume that, after a defendant faulted his counsel for not calling his mother as an alibi

witness, and defense counsel said he concluded after reviewing discovery and speaking with the mother that she could not provide a truthful alibi, the prosecutor gave the court copies of police reports showing that the mother told detectives she had not seen the defendant on the day of the murder. Under defendant's new theory, in neither case would the prosecutor's involvement be subject to harmless error review, even though the record was sufficiently developed to examine the defendant's claims. Rather, both cases would require automatic reversal and remand for appointment of new counsel to pursue plainly meritless claims.

B. The prosecution's limited participation was, at most, harmless error.

In arguing that the appellate court erred by finding the prosecutor's comments harmless, defendant's brief does not identify any particular comments he believes were error, let alone explain why they were error. Def. Br. 33-38. Rather, defendant merely asserts in conclusory fashion that that the prosecutor's participation prevented the creation of an "objective" record, without explaining how. *Id*. at 36. Thus, he has forfeited his argument that the prosecutor's comments were not harmless error and even that they were error at all. Ill. S. Ct. R. 341(h)(7)*; Ward*, 215 Ill. 2d at 331-32.

If this Court were to nevertheless reach the merits, it should conclude that remand is unwarranted because, even assuming that the prosecutor's limited remarks were error, the error was harmless.

When determining whether a prosecutor's improper participation in a preliminary *Krankel* inquiry is harmless, the key question is whether the trial court "creat[ed] an objective record" that allows a reviewing court to determine "whether the circuit court properly decided that a defendant is not entitled to new counsel." *Jolly*, 2014 IL 117142, ¶ 39; *see also Moore*, 207 Ill. 2d at 80 (collecting cases that hold that error is harmless where record permits evaluation of claims). In *Jolly*, this Court determined that the prosecutor's participation was not harmless because during the preliminary *Krankel* inquiry, the trial court had "repeatedly stopped defendant from making any argument on his claims," and then allowed the prosecutor to "extensively" examine the defendant and his counsel (without allowing the defendant to ask any questions) and present evidence and personal opinions contradicting the defendant's claims. *Jolly*, 2014 IL 117142, ¶¶ 18-20, 31, 40. The prosecutor's extensive and aggressive participation "thwarted" the purpose of the inquiry — to create an objective record for review. *Id.* ¶ 46.

By contrast, here, the prosecutor's limited input came after the trial court had created of an objective record of defendant's claims. That is, the prosecutor did not participate until the very end of the hearing, only after the court had allowed defendant to explain and attempt to support his claims and confirmed with defendant that he had nothing else he wished to say. C476. Tellingly, defendant does not argue that he was unable to fully present his claims or that the prosecutor somehow hampered his ability to do so. *See*

Def. Br. 33-38. And the record would not support such an argument, especially given that defendant wrote to the judge after the hearing to thank him because "you gave me every opportunity to address my issues." C482.

Moreover, though defendant conspicuously avoids discussing what the prosecutor did or said at the preliminary hearing, it is notable that, unlike in *Jolly*, here the prosecutor did not introduce evidence, cross-examine defendant or his counsel, or otherwise create a record, let alone distort the record in any way. Rather, the prosecutor simply commented at the end of the hearing on the already existing objective record. He began by noting that many of defendant's claims went to the sufficiency of the evidence — an objectively true statement that repeated comments that defendant and the trial judge had made earlier in the hearing. C471-72, 476. He next said that defense counsel had represented that he "made a trial strategy decision" not to call Jackson at the second trial, C476 — which is an accurate reflection of defense counsel's own statement, C460. Then the prosecutor said that "I think if the court reviews the transcript" of both trials, "I think the court will find that [defense counsel] was a tenacious opponent," and "I think the record" of both trials will show that counsel provided "an excellent defense." C476-77. Those comments cannot be said to have prevented the creation of an objective record for a reviewing court because they are simply the prosecutor's opinion about what a review of the existing (objective) record shows. The prosecutor's last comment — that defense counsel's and

defendant's comments "indicate this was trial strategy" and that other allegations were unrelated to claims of attorney error, C477 — again simply echo comments made by others earlier in the hearing. Thus, the prosecutor's brief comments at the end of the hearing cannot be said to have distorted the record or made it impossible for a reviewing court to consider whether defendant was entitled to new counsel.

Thus, it cannot be disputed that the record is objective and sufficiently developed for this Court to review the three bases for defendant's claim that he was entitled to new counsel, *i.e.*, that trial counsel erred by (1) not objecting to the prosecution's closing argument; (2) supposedly failing to challenge the DNA evidence, and (3) not calling Jackson and Dodd to testify. As noted, because each allegation relates to legal strategy, it cannot serve as the basis for a *Krankel* claim; and, as to the merits, all three claims can be reviewed on the existing record, as they simply require a reviewing court to read the trial transcripts. *Supra* pp. 36-45. In sum, the prosecutor's participation was, at most, harmless error.

Lastly, defendant's brief raises an entirely new argument, alleging for the first time that defense counsel "advocate[d]" against defendant during the *Krankel* inquiry, and the hearing "devolved into a battle between [defendant] and his former counsel, with the court requiring [defendant] to offer proof" to refute his counsel's statements. Def. Br. 37-38. Defendant's new allegation

(which is forfeited due to defendant's failure to raise it earlier, *see Carter*, 208 Ill. 2d at 318) is meritless.

As noted, it has long been established that it is usually necessary for the trial court to confer with counsel about the basis for the defendant's claims, *Ayres*, 2017 IL 120071, ¶ 12 (collecting cases), and defendant's own authority holds that at trial court may deny a *Krankel* motion based on defense counsel's representations, including counsel's explanation for not calling certain witnesses, *Roddis*, 2018 IL App (4th) 170605, ¶ 71 (cited in Def. Br. 27, 30). The record demonstrates that both defense counsel and the judge acted appropriately in creating an objective record of the facts and circumstances relating to defendant's claims of attorney error. Notably, the only comment by defense counsel that defendant cites — defense's counsel's comment that "[defendant's] fingerprint was on the outside of the car," Def. Br. 38 — was an objectively true statement offered to explain why counsel made certain strategic decisions, C466-67.

Defendant's criticism of the trial judge is also meritless. Although defendant complains that "the trial court asked [defendant] if he was calling his counsel a liar," Def. Br. 37 (citing C460-61), the record shows the court was acting appropriately to create a record of defendant's claim. After counsel said that he and defendant agreed not to present Lequashia Jackson's testimony because it would be damaging, the judge turned to defendant and asked, "did [defense counsel] have those conversations with

you?" C460. When defendant's response was unclear, the court followed up by asking whether defendant was saying that counsel was "lying," and defendant said, "No, I'm not calling him a liar." C460-61. Thus, the court was simply seeking to clarify and understand defendant's position for the record. And the judge's comment that "it doesn't do you any good to argue with [defense counsel]" and "what will do you good is to convince me" — was simply the judge controlling his courtroom by redirecting defendant's attention to the factfinder rather than counsel. C467-68.

In sum, the trial judge and defense counsel acted appropriately during the preliminary *Krankel* inquiry, and the prosecutor's comments at the end of the inquiry were harmless error, assuming they were error at all.

CONCLUSION

For the foregoing reasons, this Court should affirm the appellate court's judgment.

November 5, 2019

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 13,716 words.

/s/ Michael L. Cebula
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 5, 2019, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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