2017 IL App (1st) 143424-U

No. 1-14-3424

Order filed July 20, 2017

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 917
	)	
JOHN ORTEGA,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Where there was sufficient evidence to convict defendant and the trial court did not fail to accurately recall evidence at trial crucial to his defense, his conviction for first-degree murder is affirmed. However, the trial court did not inquire into defendant's postsentencing complaint concerning the representation of his trial counsel, warranting a remand for the limited purpose of such an inquiry. Defendant is not entitled to resentencing under the new sentencing provisions contained in Public Act 99-69 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105), as they do not apply retroactively to his case.

¶ 2 Following a bench trial, defendant John Ortega was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) and sentenced to 38 years' imprisonment. On appeal, defendant contends that: (1) the State failed to prove his guilt beyond a reasonable doubt in light of the incredible and unreliable testimony of its sole eyewitness; (2) the trial court failed to accurately recall significant evidence from trial; (3) the trial court failed to inquire into his postsentencing complaint concerning the representation of his trial counsel; and (4) his case should be remanded for resentencing under new statutory sentencing provisions applicable to defendants under the age of 18 years old at the time they committed their crimes, which took effect during the pendency of his appeal. We affirm defendant's conviction, but remand the matter to the trial court for the limited purpose of inquiring into his postsentencing complaint concerning the representation of his trial counsel.

¶ 3 The State charged defendant with two counts of first-degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2010)), one count of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), two counts of leaving the scene of a motor vehicle accident involving death (625 ILCS 5/11-401(a), (b) (West 2010)), and possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2010)), all stemming from an incident where he allegedly drove a vehicle into Rene Torres and at Vicente Martinez, which resulted in Torres' death. Defendant, who was 16 years old at the time of the alleged offenses, was automatically transferred to adult court pursuant to section 5-130 of the Juvenile Court Act of 1987 (705 ILCS 405/5-130 (West 2010)).

¶ 4 At trial, the evidence showed that, at 7 p.m. on January 27, 2011, Ramon Rodriguez Lopez started his blue Nissan Maxima, which his girlfriend, Cynthia Perez Espinoza, also used.

Lopez went inside his residence, leaving the vehicle unlocked and running outside. When Lopez came back outside a short time later, he did not see his vehicle and called 911 to report it as stolen.

¶ 5 Vicente Martinez testified that, between 8 and 8:30 p.m. on the same night, Rene Torres came over to his house. Both Martinez and Torres had been members of the Two-Six street gang, and Martinez acknowledged being convicted of unlawful vehicular invasion in 2006. After drinking a beer, they decided to walk to a nearby liquor store to get more. While they were walking through a bank parking lot near 25th and Karlov, Martinez observed a dark blue vehicle "angled" in an unusual way. The passenger of the vehicle was leaning out of the window with his arm extended over the vehicle's roof holding a "shiny gun." Martinez and Torres ran behind a "Do Not Enter" sign in the parking lot and ducked to avoid being shot, but the vehicle drove toward them with the engine revving as if the driver had "stepped on the gas pedal." Martinez continued to duck and closed his eyes.

¶ 6 When Martinez opened his eyes, he observed that the vehicle was on top of Torres. Although Martinez "felt an impact," he was unsure if it was because he had been hit by the vehicle or simply fell to the ground. The vehicle began "rocking back and forth," as if the driver was "hitting the [gas] pedal." Martinez started to run away toward a fence that separated the parking lot from an alley, but the vehicle's passenger door opened causing him to stop and look at the vehicle. Martinez observed the passenger "stumble[]" out of the vehicle, fall, look at him for "three" or "four seconds," and start to run away. Martinez ran a few more steps away from the vehicle toward the fence, when, from about "ten feet" away, he witnessed the driver exit the vehicle through the window. The driver, identified in court as defendant, "push[ed] his body" out

of the vehicle head first, touching the "area above the driver's window," and turned his head in Martinez's direction for "one" or "two seconds." Martinez stated that he also saw defendant touch the "area of the rear window." Martinez was able to see the front of defendant's face, as there were two lit street lights as well as the vehicle's headlights.

¶ 7 Martinez later testified that, when the vehicle finally came to a stop, he was by the fence adjacent to the alley, but came back toward the vehicle slightly which is where he saw the passenger exit the vehicle. He then ran back toward the fence and observed defendant exit the vehicle. Martinez also stated that, when the vehicle began rocking back and forth, he was "by the gate" behind the vehicle on the passenger's side. From there, he saw the passenger exit the vehicle. He then moved toward the driver side of the vehicle, staying behind it, where he saw defendant exit.

¶ 8 Defendant and the passenger ran away toward 25th and Pulaski, leaving the passenger's door open and the driver's door closed, though Martinez acknowledged that, in the State's photographic exhibits, the driver's door was open while the passenger's door was closed. Martinez subsequently called 911. Because Torres was still pinned underneath the vehicle, Martinez yelled for help and tried to lift the vehicle up himself.

¶ 9 During Martinez's direct examination, the State played surveillance video from the night in question. In the first clip, time stamped at 9:13:06 p.m., Martinez and Torres can be seen leaving the sidewalk and beginning to cut through the parking lot. A vehicle on the street comes from behind them and drives out of view. Martinez and Torres appear to pause, look in the direction the vehicle went and walk toward a sign, eventually crouching behind it. Suddenly, a vehicle enters the screen and collides with Torres. The vehicle appears to either narrowly miss

Martinez or nick him. Torres disappears and Martinez falls to the ground. Martinez, who is behind the vehicle, immediately gets up and runs in the direction of the driver's side toward the fence by the alley. As Martinez runs away, the vehicle slows down and begins to rock back and forth. As the vehicle stops, Martinez can be seen by the fence several feet away from the vehicle. The clip ends at 9:13:36 p.m. The next clip, which begins at 9:13:42 p.m., shows two individuals running from the vehicle in the opposite direction of Martinez and eventually out of the camera's sight. The individual on the driver's side appears slightly ahead of the individual on the passenger's side. After they disappear from view, Martinez's legs can be seen near the fence by the alley as the clip ends at 9:13:48 p.m.

¶ 10 Martinez continued to testify that, after the incident, he thought the individuals responsible might have been members of the Latin Kings street gang because "they had a momo [*sic*]" and displayed a firearm. Over the course of the next several months, he became more convinced that the individuals responsible were members of the Latin Kings. On November 29, 2011, Martinez went to the police station, viewed a photo array and identified defendant as the driver of the vehicle that ran over Torres. The police did not tell him that they had identified a suspect based on fingerprints recovered from the vehicle. A week later, Martinez went back to the police station, viewed a lineup and again identified defendant as the driver. He acknowledged that defendant was the only individual who appeared in both the photo array and lineup, but Martinez did not recognize him as a member of the Latin Kings.

¶ 11 Chicago police detective Garcia testified that he responded to the scene of the crime. There, he discussed the incident with Martinez, who told him that he was a member of the Two-Six street gang. Garcia stated that, at the time of the crime, he was aware of violence between the

Two-Six and the Latin Kings street gangs. Martinez described the offenders as 17- to 23-year-old male Hispanics between 5-feet-4- and 5-feet-6-inches tall, but did not provide any details about their facial hair, hairstyle or any scars, marks or tattoos on their faces. Although Martinez did not tell Garcia that the offenders paused and stared at him, he did tell Garcia that "he got a good look at [the offenders]." Garcia acknowledged this fact was not contained in his supplemental report, but explained the report was "a summary, not a verbatim statement." Martinez further told Garcia that the driver exited the vehicle through a window and the passenger exited using the passenger's side door. Garcia acknowledged that these facts were not contained within his reports, but rather from his memory of his interview with Martinez.

¶ 12 In late May 2011, Garcia learned that a fingerprint had been recovered from a Coca-Cola bottle inside the vehicle, and on June 2, 2011, he learned that a fingerprint had been recovered on the window frame of the vehicle, both which matched defendant. As a result, he helped create a photo array using defendant's photograph and the photographs of four additional individuals based on similar demographic information, such as height, weight and age. On November 29, 2011, Martinez reviewed the photo array and identified defendant as the driver. Garcia acknowledged that the other individuals whose photographs had been used in the photo array were not from the same neighborhood as defendant. But he stated that he did not look at where the individuals lived or where they had been arrested prior to selecting their photographs to be used in the photo array. Based on Martinez's identification, Garcia located and arrested defendant, who, at the time, was 17 years old, Hispanic and 5-feet-3 inches tall. Defendant was placed in a lineup, and Martinez again identified defendant as the driver. At no point before

either the photo array or lineup did Garcia, or anyone else to his knowledge, tell Martinez that the police had identified a suspect based on fingerprints.

¶ 13 Additional evidence at trial showed that Torres was pronounced dead at the scene. An autopsy revealed that his cause of death was "compressional asphyxia due to an automobile striking a pedestrian" and his manner of death was a "homicide."

¶ 14 Forensic investigators located several items of interest at the scene, including a black do-rag on the parking lot pavement and a blue Nissan Maxima. Inside the vehicle, investigators found a Coca-Cola bottle in the rear center console cup holder, and a black knit cap and screwdriver on the floor of the front passenger's side of the vehicle. After investigators dusted the vehicle for fingerprints, four impressions were discovered: one on the "front driver's side door window frame," two from the "exterior rear driver's side door window frame" and one from the "front passenger's side quarter panel." An impression was also found on the Coca-Cola bottle, but no other impressions suitable for comparison were found inside the vehicle.

¶ 15 A forensic scientist, whom the parties stipulated was an expert in fingerprint analysis and identification, compared the impression on the bottle to the fingerprints of Lopez and Espinoza, but they did not match. She then entered the impression into a computer database and obtained a list of ten "fingerprint cards" which the "system thought closely resembled" the impression from the bottle. From that list, the expert found one fingerprint card that she determined was "worth" comparing to the impression from the bottle. That fingerprint card belonged to defendant. After comparing his fingerprints to the impression from the bottle, the expert concluded the impression matched defendant's right middle finger. She also reviewed the fingerprint impressions found on the vehicle and determined that two of them were suitable for comparison. One of the

impressions matched Lopez. The other impression, which was taken from the exterior rear driver's side door window frame, matched defendant's right index finger. No fingerprint impressions suitable for comparison were found on the screwdriver.

¶ 16 DNA evidence revealed that a male DNA profile was found on the do-rag, but it did not match Lopez, defendant or Torres. On the black knit cap, a mixture of DNA profiles was identified, which was consistent with originating from two people: a major male profile and a minor profile. The male profile did not match Lopez, defendant or Torres, and all three, as well as Espinoza, were excluded as matches for the minor profile. On the screwdriver, a low-level DNA profile was identified, but Lopez, defendant, Torres and Espinoza were excluded from contributing to the profile.

¶ 17 DNA evidence was also found in the vehicle as a result of investigators scrubbing the four quadrants of the vehicle. In the front driver's side quadrant, a low-level DNA profile was identified that was consistent with originating from at least one person. Lopez, defendant, Torres and Espinoza could not be excluded from contributing to the profile. Approximately 45% of Black, 68% of White and 72% of Hispanic unrelated individuals could not be excluded from contributing to the profile. No DNA profile was identified from the front passenger's side quadrant. In the rear driver's side quadrant, a mixture of DNA profiles was identified, which was consistent with originating from at least three people. Espinoza could not be excluded from contributing to the mixture, but Lopez, defendant and Torres were excluded. In the rear passenger's side quadrant, a mixture of DNA profiles was identified, which was consistent with originating from two people: a major male profile and a low-level profile. The male profile did not match Lopez, defendant or Torres, but all three, as well as Espinoza, could not be excluded

as matches for the low-level profile. Approximately 50% of Black, 25% of White and 50% of Hispanic unrelated individuals could not be excluded from contributing to the profile.

¶ 18 Detective Garcia further testified that, approximately three years after defendant's arrest, he learned a DNA profile found as a result of testing the black knit cap matched the profile of a man named Raoul Molina. Martinez subsequently viewed a photo array and identified Molina as the passenger of the vehicle.

¶ 19 In the defense's case, it presented a full copy of the surveillance video, which was subsequently played in court. In the video, after the offenders flee the scene, Martinez can be seen walking back toward the vehicle from the fence on the driver's side, and eventually stopping and standing behind the vehicle for approximately two minutes. Martinez then walks up to the rear bumper of vehicle and appears to try and lift it. Martinez stays next to the vehicle for approximately 30 seconds before walking back to behind the vehicle. He continues to stand behind the vehicle for another five minutes until first responders arrive.

¶ 20 The trial court found defendant guilty of one count of first-degree murder, but not guilty of the remaining five counts. The court observed that Martinez identified defendant, who "looked right at" him, as the driver of the vehicle in a photo array, in a lineup and at trial. It noted that the physical evidence corroborated Martinez's identifications, specifically that defendant's fingerprints were found on the Coca-Cola bottle inside the vehicle and "on the outside of [the] vehicle," which was consistent with Martinez's testimony on how defendant exited the vehicle. The court also observed that "the passenger was identified, and his identity was corroborated by DNA left on the D[o]-Rag." Lastly, it dismissed any notion that Martinez

was simply trying to pin a crime on a rival gang member and concluded that the evidence was "simply overwhelming" that defendant was the driver of the vehicle.

¶ 21 The trial court denied defendant's motion for a new trial and sentenced him to 38 years' imprisonment. Defendant subsequently filed an unsuccessful motion to reconsider the sentence. On September 24, 2014, 26 days after sentencing, the court received a *pro se* document from defendant titled "Motion for Reduction of Sentence," wherein he argued that he was innocent of the crime, did not deserve the sentence he received or to be in prison. The motion also alleged that his trial counsel had treated him unfairly, "created a bias for [him] to the judge" and made "false accusations." The court denied the motion, finding it "not timely" and "frivolous." This timely appealed followed.

¶ 22 Defendant first contests the sufficiency of the evidence to establish that he was the driver of the vehicle that ran over and killed Torres, arguing that Vicente Martinez's testimony was too incredible and his identifications were too unreliable to support his guilt. Defendant asserts that various evidence at trial "undermined" Martinez's version of events and, when coupled with his "dishonest demeanor" and repeated inability "to give straight answers to simple questions," warrant the reversal of his conviction for first-degree murder.

¶ 23 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. While we must carefully examine the evidence before us,

credibility issues, resolution of conflicting or inconsistent evidence, weighing the evidence and making reasonable inferences from the evidence are all reserved for the trier of fact. *Brown*, 2013 IL 114196, ¶ 48. We will not overturn a conviction unless the evidence is "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Id.*

¶ 24 Where identification is the main issue, the State must prove beyond a reasonable doubt the identity of the individual who committed the charged offense. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). In assessing identification testimony, Illinois courts utilize a five-factor test established in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). See *People v. Slim*, 127 Ill. 2d 302, 307 (1989). The factors are: "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Id.* at 307-08.

¶ 25 Applying the factors, we find they sufficiently support Martinez's identification of defendant as the driver. Regarding the first factor, Martinez testified that he observed the face of the driver for one to two seconds from about ten feet away in an environment in which there was ample artificial lighting. Detective Garcia testified that Martinez told him he "got a good look" at the driver. The surveillance video confirmed that there were two nearby streetlights on as well as the vehicle's headlights. The video also showed that, as the driver ran away from the vehicle, Martinez was behind the vehicle on the driver's side several feet away. There was no video presented, however, showing the moment the offenders exited the vehicle. Based on this evidence, Martinez had a sufficient opportunity to view the driver's face. See *People v. Rodriguez*, 134 Ill. App. 3d 582, 586, 589-90 (1985) (finding a witness' identification of a

defendant reliable despite the witness only observing him for "a couple of seconds" from a second-floor apartment window).

¶ 26 Regarding the second factor, while Martinez never testified about his degree of attention during or after the incident, it can reasonably be inferred that he was paying attention based on the circumstances. After all, Martinez first observed the passenger of the vehicle point a firearm in his direction and then observed the aftermath of the vehicle colliding with Torres. Although he ran away from the scene, Martinez testified that he looked in the direction of both offenders upon them exiting from the vehicle. It is reasonable to assume that he would be attentive in order to get a good look at the individuals responsible. Furthermore, contrary to defendant's assertion, Martinez's acknowledgment of drinking one beer earlier in the night does not suggest his degree of attention was low.

¶ 27 Regarding the third factor, Martinez's initial description of the driver closely matched the description of defendant upon his arrest. Martinez described the driver as a 17- to 23-year old male Hispanic between 5-feet 4- and 5-feet-6-inches tall. Upon being arrested, Detective Garcia described defendant as a 17-year-old male Hispanic and 5-feet-3 inches tall.

¶ 28 Regarding the final two factors, Martinez identified defendant in a photo array and lineup approximately 10 months after the crime. Although these identifications were not made immediately after the crime occurred, the lapse of time only affects the weight to be afforded to Martinez's testimony, thus making it a question for the trier of fact. See *People v. Holmes*, 141 Ill. 2d 204, 241-42 (1990). Regardless, our courts have found identifications reliable despite delays even longer than occurred in the present case. See *id.* at 242 (18-month delay); *People v. Rodgers*, 53 Ill. 2d 207, 213-14 (1972) (24-month delay). Furthermore, nothing in the record

indicates that Martinez's identifications of defendant were anything but certain. As we view the evidence in the light most favorable to the State, we must find these identifications were confidently made. We note that defendant was the only person who appeared in both the photo array and lineup. However, the role this evidence played in casting doubt upon Martinez's lineup identification was for the trier of fact to determine. See *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 88.

¶ 29 In sum, after weighing the *Biggers* factors and viewing Martinez's testimony in the light most favorable to the State, a rational trier of fact could have found his identification of defendant as the driver of the vehicle was reliable. As the trial court implicitly found Martinez to be a credible witness given that it relied predominantly on his identifications of defendant in finding defendant guilty, we could affirm defendant's conviction based on Martinez's testimony alone. See *People v. Smith*, 185 Ill. 2d 532, 541 (1999).

¶ 30 However, the State did not rely solely on Martinez's identifications of defendant. Instead, the State supported his identifications of defendant with additional evidence. The State buttressed Martinez's credibility by introducing evidence that, some three years after defendant's arrest, Martinez positively identified Raoul Molina in a photo array as the passenger of the vehicle, an identification which was consistent with Molina's DNA being found on the black knit cap located on the floor of the vehicle's front passenger side. But, perhaps most importantly, the State presented physical evidence of defendant's guilt: the fingerprint impressions found on the Coca-Cola bottle in the rear center console cup holder and on the exterior rear driver's side door window frame, both which matched his fingerprints. Consequently, physical evidence connected defendant to the vehicle used to kill Torres, a vehicle that had been reported stolen only two

hours prior. Defendant's guilt for first-degree murder was sufficiently proven beyond a reasonable doubt.

¶ 31 Defendant, however, argues that the State's evidence was insufficient for several reasons. First, he asserts the surveillance video and photographic exhibits contradict Martinez's testimony concerning his version of events, namely in regard to his movements immediately after the collision and the subsequent fleeing of the offenders. For example, defendant points to Martinez's testimony that, at one point, while being located behind the vehicle on the passenger's side, he watched the passenger exit the vehicle. Yet, defendant argues the video surveillance never showed Martinez return to the passenger's side after he immediately ran toward the fence on the driver's side and Martinez could "not possibly" have returned there during the six-second gap in the video. Defendant further asserts that, although Martinez testified that the passenger exited the vehicle and ran before the driver, the video shows the driver was actually ahead of the passenger while they were fleeing the scene. Defendant also highlights Martinez's testimony that the driver's door was closed and the passenger's door open yet the photographic exhibits show the opposite, suggesting to defendant that Martinez could not have seen the driver climb through his window. Defendant similarly posits that Martinez's own testimony contradicted itself in various places, again specifically concerning the immediate aftermath of the collision and his movements.

¶ 32 Having reviewed the surveillance video and Martinez' testimony, they do not match perfectly in all respects and at times, appear to be inconsistent. However, it is well established that the resolution of conflicting and inconsistent evidence is reserved for the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We, as the reviewing court, may not substitute our

judgment for that of the court on these matters. *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 21. The surveillance video was played during trial, allowing the court the opportunity to compare it to Martinez's testimony. Additionally, in defendant's motion for a new trial and during the hearing on the motion, he argued extensively about the alleged inconsistencies in defendant's own testimony and as compared to the video. Given that the court observed the trial firsthand, it was in the superior position to resolve any issues concerning inconsistent evidence. *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24.

¶ 33 Defendant next argues that the fingerprint evidence failed to corroborate Martinez's identifications. Defendant asserts that the evidence only shows that he had touched the vehicle and an item inside the vehicle "at some point." Thus he posits that, while the fingerprints might circumstantially place him in the rear compartment of the vehicle, they do not show he drove the vehicle. Defendant again asks this court to invade the province of the trier of fact. It was the trial court's responsibility to place as much weight as it wanted on the fingerprint evidence and make reasonable inferences from that evidence. *Brown*, 2013 IL 114196, ¶ 48. We will not reweigh the evidence from defendant's trial. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

¶ 34 Defendant further argues that the photo array used by the police to obtain an identification of him "was suggestive" because he was the only teenager whose photograph was used, he was the only individual in the array who lived near Martinez, the array only had four "filler" photographs and of the five total photographs used, only defendant's and one other had light backgrounds. Defendant did not challenge the suggestiveness of the photo array in the trial court with a pretrial motion to suppress. Consequently, any deficiency in the procedures or the related testimony goes to the weight of the evidence, which is in the province of the trier of fact.

See *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977); *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 35 Defendant lastly attacks the credibility of Martinez generally and the investigation as a whole. He notes that Martinez has a prior conviction for vehicular invasion, had been involved in the Two-Six street gang, presented a "dishonest demeanor" during trial and frequently could not "give a straight answer." Furthermore, defendant posits that Detective Garcia might have provided Martinez information in order to have Martinez identify him as the driver of the vehicle, suggesting that "[t]here would be nothing miraculous about Martinez's identification if police officers fed him information." Defendant's blanket allegation impugning the integrity of Garcia is unsubstantiated by anything in the record. Regardless, as previously mentioned, issues surrounding the credibility of witnesses are matters reserved for resolution by the trier of fact. See *Brown*, 2013 IL 114196, ¶ 48.

¶ 36 Having reviewed defendant's arguments about the alleged weaknesses of the State's case and the evidence at trial, we do not find the evidence against him was "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt" of his guilt. *Id.*

¶ 37 Defendant next contends that his right to due process was violated when the trial court failed to accurately recall significant evidence from his trial.

¶ 38 The trial court's failure to accurately recall and consider evidence that is crucial to a criminal defendant's defense is a denial of his right to due process. *People v. Mitchell*, 152 Ill. 2d 274, 323 (1992). In contrast to a defendant's claim that there was insufficient evidence of his guilt in his bench trial, in which we presume the court accurately recalled the evidence and thus heavily defer to its findings, a claim that the court did not accurately recall the evidence is

reviewed under a *de novo* standard. *People v. Schuit*, 2016 IL App (1st) 150312, ¶ 105 (quoting *People v. Williams*, 2013 IL App (1st) 111116, ¶¶ 102-104). This is so because, if "the record contains affirmative evidence that the trial court made a mistake in its decision-making process," the presumption that serves as the very foundation for the deferential standard of review in an insufficiency-of-the-evidence claim is undercut. *Williams*, 2013 IL App (1st) 111116, ¶ 103. However, minor misstatements by the court, which have "no effect on the basis of the trial court's ruling" and do not "result in a mistake in the decision-making process," will not result in a denial of the defendant's right to due process. *Schuit*, 2016 IL App (1st) 150312, ¶ 107.

¶ 39 The parties disagree on whether defendant has preserved this claim of error for review. Regardless, because for the reasons set forth below, we have determined that the trial court did not fail to accurately recall evidence that was crucial to defendant's defense, we need not decide whether he has preserved his claim of error for review. See *People v. Jackson*, 2016 IL App (1st) 133823, ¶ 35.

¶ 40 The first alleged instance of the trial court failing to accurately recall the evidence occurred when it explained how defendant's fingerprint found on the exterior of the vehicle corroborated Martinez's testimony on how defendant exited the vehicle. The court stated:

> "The fingerprint of the defendant was on the outside of that car, as the eyewitness indicated. *He saw the defendant with his hands outstretched in a fashion* that would support and corroborate the location of a fingerprint on the exterior of that car on the driver's side."

¶ 41 At trial, Martinez testified that he observed defendant "come out the window, hanging onto the roof and the window and pushing his body like coming out the car." On cross-examination, defense counsel attempted to clarify Martinez's testimony as follows:

"Q. While he stopped to look at you, his hands—could you show me what he was doing with his hands?

A. It is like he came out of the vehicle and pull himself out. Say the car is like this. Like somehow he went like this, grabbed on to it and put his body out. When he put his body out, that's when he went like this and he started to run that way.

Q. Just so the record is clear, when you held your hands up, you were holding your hands up about shoulder width apart and straight ahead even with your face, correct?

A. Yes.

Q. So this would have been him touching the area on the top of the driver's window, right?

A. Yes.

Q. Did you see him touching the area of the rear window?

A. The rear? Yes.

Q. You said you saw him touching the area above the driver's window, right?

A. Yes.

Q. And then he gets out of the car and he runs away, right?

A. Yes.

Q. Is that the only place you saw his hands?

A. Yes."

From these portions of Martinez's testimony, defendant asserts that, contrary to the trial court's finding, there was no evidence that Martinez saw defendant's hands "outstretched."

¶ 42 Based on defense counsel's questioning of Martinez, it is clear that Martinez pantomimed how defendant exited the vehicle. However, despite defense counsel's attempt to clarify Martinez's recreation for the record, we still cannot see exactly how Martinez motioned with his hands. Given that, during trial, the trial court observed firsthand how Martinez portrayed defendant exiting the vehicle, a luxury we are not afforded on appeal, we do not find the court unreasonably concluded that Martinez's hands were "outstretched" despite counsel's attempt to clarify. As we review trial testimony on a "cold" record as compared to the court's in-person observations, we see no basis to conclude the court inaccurately recalled or mischaracterized this evidence.

¶ 43 The second alleged instance of the trial court failing to accurately recall the evidence occurred when it discussed Martinez's identification in a photo array of Molina as the passenger of the vehicle. The court found this identification was corroborated because Molina's "DNA" had been "left on the D[o]-Rag." As defendant correctly notes, no evidence connected either Molina or defendant to the do-rag.

¶ 44 There was DNA evidence, however, that connected Molina to the black knit cap found in the front passenger side of the vehicle. While the trial court did misspeak, we do not find the court's misstatement affirmatively shows that it failed to accurately recall evidence that was crucial to defendant's defense. See *Mitchell*, 152 Ill. 2d at 323. The court's ultimate conclusion,

i.e., that Molina had been connected to the vehicle by DNA evidence and Martinez identified him in a photo array, was nevertheless correct. Accordingly, we find that defendant's right to due process has not been violated by the trial court's recall of the evidence.

¶ 45 Defendant next contends that the trial court should have conducted an inquiry into his postsentencing claim, which had been made in his *pro se* motion to reconsider the sentence, concerning the representation of his trial counsel. In that motion, defendant stated:

> "I am innocent in this crime. I am not a hazard to society. There are many law-abiding citizens and community leaders who can advocate for me that I am a good indivi[d]ual and an asset to society. I was treated misfairly [*sic*] by my representation and he created a bias for me to the judge and I feel the judge is going off his false accusations. I do not deserve this sentence or to be in the penitentiary."

At the end of the motion, defendant listed the names of three "advocates:" Arthur Guerrero-Bene, who worked for CeaseFire, Matt Paller, who worked for Urban Life Skills, and Hector Escalara.

¶ 46 After defendant filed his *pro se* motion, the court called his case. The State appeared, but neither defendant nor his trial counsel were present. The court noted that defendant had filed a *pro se* motion to reconsider the sentence, read the motion into the record and denied it, finding it "not timely" and "frivolous."

¶ 47 Under *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny, when a defendant makes a posttrial *pro se* claim of ineffective assistance of counsel, including claims related to sentencing proceedings, the trial court must " 'conduct some type of inquiry into the underlying

factual basis, if any,' " into the defendant's claim. *People v. Ayres*, 2017 IL 120071, ¶ 11 (quoting *People v. Moore*, 207 Ill. 2d 68, 79 (2003)); *People v. Patrick*, 2011 IL 111666, ¶ 38. A *pro se* defendant need not "do any more than bring his or her claim to the trial court's attention." *Moore*, 207 Ill. 2d at 79. However, the trial court need not appoint new counsel for the defendant merely because he raises a claim of ineffective assistance of counsel. *Ayres*, 2017 IL 120071, ¶ 11. Rather, the trial court's initial inquiry into the claim is the first step required under *Krankel*. *Id.*

¶ 48 In making this inquiry, the trial court may ask the defendant's counsel about the allegations, discuss the allegations directly with the defendant, or rely on its own knowledge of counsel's performance at trial and the insufficiency of the defendant's allegations on their face. *Id.* ¶ 12. If, after this inquiry, the court determines that the allegations are meritless or pertain to matters of trial strategy, it does not have to appoint the defendant new counsel. *Id.* ¶ 11. But, if the court determines that the allegations demonstrate " 'possible neglect of the case' " by counsel, it should appoint the defendant new counsel. *People v. Jolly*, 2014 IL 117142, ¶ 29 (quoting *Moore*, 207 Ill. 2d at 78).

¶ 49 However, in order for the defendant to trigger proceedings under *Krankel*, he needs to make a sufficient claim of ineffective assistance of counsel. *People v. Taylor*, 237 Ill. 2d 68, 75-76 (2010). While the pleading requirements are "somewhat relaxed," the defendant must still satisfy minimum requirements to trigger an initial inquiry by the trial court. *People v. Washington*, 2015 IL App (1st) 131023, ¶ 11. The defendant may do this through a written motion, orally or even in a letter to the court. *Ayres*, 2017 IL 120071, ¶ 11. All that is required from the defendant is to bring "a clear claim asserting ineffective assistance of counsel." *Id.* ¶ 18.

We review whether the defendant has made a valid claim, thus triggering an initial inquiry by the court, *de novo. Washington*, 2015 IL App (1st) 131023, ¶ 11.

¶ 50 Recently, in *People v. Ayres*, 2017 IL 120071, ¶¶ 3, 6, after a defendant pled guilty to aggravated battery, he mailed a *pro se* petition to withdraw his guilty plea and vacate his sentence, alleging simply " 'ineffective assistance of counsel.' " The trial court did not conduct any inquiry into his claim. *Id.* ¶ 6. On appeal, our supreme court found that such an allegation triggered an inquiry into the defendant's claim under *Krankel* despite the claim not including factual allegations, specific examples or any additional support. *Id.* ¶¶ 16-18. In so finding, the court explained that the primary purpose of a *Krankel* "inquiry is to give the defendant an opportunity to flesh out his claim of ineffective assistance so the court can determine whether appointment of new counsel is necessary." *Id.* ¶ 20.

¶ 51 With *Ayres* in mind, we first address whether the allegations in defendant's *pro se* motion sufficiently triggered the need for an inquiry by the trial court. In the motion, defendant informed the court that there were many people who could advocate on his behalf. The motion then made various claims concerning the representation of his trial counsel, such as that counsel treated him unfairly, "created a bias" and made "false accusations." Defendant concluded the motion arguing that he should not be in prison and did not deserve his sentence, and listed three "advocates."

¶ 52 It is undisputed that defendant's *pro se* motion never used the words "ineffective assistance of counsel," as occurred in *Ayres.* But implicit claims of ineffective assistance of counsel may suffice under certain circumstances. See *Taylor*, 237 Ill. 2d at 76. In defendant's motion, he expressly complained about his "representation" and gave specific examples of counsel's alleged deficiencies, including the alleged bias and false accusations. The motion also

listed three people who could advocate on defendant's behalf. By doing so, unlike in *Ayres*, defendant gave some supporting information to his complaints. While the motion does not clearly express why the advocates listed should have been called by trial counsel, defendant was not present when the court disposed of the motion. He therefore was not afforded the opportunity to flesh out his claim and clarify his complaints. See *Ayres*, 2017 IL 120071, ¶¶ 15, 20. Consequently, although defendant did not explicitly cloak his claim as one of "ineffective assistance of counsel," he complained about his counsel in a manner that required the court's inquiry into the matter.

¶ 53 As discussed, when the trial court disposed of defendant's *pro se* motion, neither defendant nor his trial counsel was present. However, interacting with them was not the only way the court could properly conduct an initial inquiry under *Krankel*. See *id.* ¶ 12. Although it is possible the court relied on its own knowledge of counsel's performance at trial and the insufficiency of defendant's allegations on their face (see *id.*), its isolated statement that the motion was "frivolous" does not demonstrate this conclusively. Accordingly, given that the purpose of an initial inquiry under *Krankel* is so a defendant has the opportunity to flesh out his claim concerning the representation of his counsel, we must remand the matter to the trial court so that defendant has that opportunity. See *id.* ¶¶ 20, 26.

¶ 54 Defendant lastly contends that his case must be remanded for resentencing under new statutory sentencing provisions, which took effect during the pendency of his appeal, applicable to defendants who committed their crimes before they were 18 years old.

¶ 55 In Public Act 99-69, which became effective on January 1, 2016, during the pendency of defendant's appeal, the Illinois legislature added section 5-4.5-105 to the Unified Code of Corrections (Code). Section 5-4.5-105(a) of the Code provides:

> "On or after the effective date of this amendatory Act of the 99th General Assembly, when a person commits an offense and the person is under 18 years of age at the time of the commission of the offense, the court, at the sentencing hearing conducted under Section 5-4-1, shall consider the following additional factors in mitigation in determining the appropriate sentence." 730 ILCS 5/5-4.5-105(a) (West 2016).

There are nine additional mitigating factors for the trial court to consider, including the defendant's "age, impetuosity, and level of maturity at the time of the offense," whether he "was subjected to outside pressure, including peer pressure, familial pressure, or negative influences," his "family, home environment, educational and social background, including any history of parental neglect, physical abuse, or other childhood trauma," and a catch-all provision of "any other information the court finds relevant and reliable." *Id.*

¶ 56 The parties dispute the effect of section 5-4.5-105(a). Defendant argues the section is retroactive because of the legislative intent and its procedural nature. He asserts that, because he was 16 years old at the time he committed first-degree murder, section 5-4.5-105(a) applies to his case and entitles him to a new sentencing hearing. The State argues that the plain language of the section demonstrates a legislative intent to apply it prospectively only, thus not entitling defendant to a new sentencing hearing.

¶ 57 As a matter of statutory construction, we review the question of whether a statutory amendment is prospective or retroactive *de novo*. *People v. Hunter*, 2016 IL App (1st) 141904, ¶ 35. In answering this question, we utilize the United States Supreme Court's approach set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 29. The first step under *Landgraf* is to determine whether the legislature "has clearly indicated the temporal reach of the amended statute," and if so, we must apply this legislative intent unless the constitution prohibits the amendment's temporal reach. *Id.* "The best indicator of such intent is the language of the statute, which is to be given its plain and ordinary meaning." *People v. Goossens*, 2015 IL 118347, ¶ 9. If there is no express provision from the legislature, the second step under *Landgraf* is "to determine whether applying the statute would have a retroactive impact, 'keeping in mind the general principle that prospectivity is the appropriate default rule.' " *J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 29 (quoting *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 330-31 (2006)). Going beyond the first step of the *Landgraf* approach, however, is rare. *Caveney v. Bower*, 207 Ill. 2d 82, 94 (2003).

¶ 58 In *People v. Hunter*, 2016 IL App (1st) 141904, ¶¶ 43-47, we used the *Landgraf* approach to determine whether section 5-4.5-105(a) applied retroactively or prospectively. We first examined the language of the section, which provides that it applies "only at sentencing hearings held '[o]n or after the effective date' of Public Act 99-69, *i.e.*, January 1, 2016." *Id.* ¶ 43. We found this language plainly demonstrated that a trial court must apply the section's requirements at a sentencing hearing on or after January 1, 2016, the legislation's effective date. *Id.* Therefore, we held the section's plain language showed a legislative intent to apply it prospectively. *Id.*

¶ 59 This court also found the legislature's use of the language " 'on or after' " buttressed the finding that the temporal reach of the section was prospective only, as similar language often had been used by our legislature to express prospective law. *Id.* ¶ 44 (citing cases). Given that our legislature indicated the temporal reach of section 5-4.5-105(a) by its plain language, we determined it was not necessary to move beyond the first step of the *Landgraf* approach. *Id.* ¶ 47.

¶ 60 We agree with the reasoning of *Hunter* and note that this court has reached the same conclusion regarding the prospective nature of section 5-4.5-105(a) in *People v. Wilson*, 2016 IL App (1st) 141500, ¶ 16 and *People v. Jackson*, 2016 IL App (1st) 141448, ¶¶ 29-31.[1] Given the dispositions of *Hunter*, *Wilson* and *Jackson*, we find that section 5-4.5-105(a) applies prospectively only, and defendant therefore is not entitled to a new sentencing hearing.

¶ 61 *People v. Reyes*, 2016 IL 119271, cited by defendant for support that he is entitled to a new sentencing hearing, does not compel a different conclusion than reached in *Hunter*, *Wilson* and *Jackson*. In *Reyes*, the defendant, who was 16 years old at the time he committed first-degree murder and two attempted murders, was sentenced to 97 years' imprisonment. *Id.* ¶¶ 1-2. The sentence was the minimum allowable based on a confluence of mandatory minimum sentences for each offense (20 years for first-degree murder and 6 years for attempted murder), mandatory firearm enhancements (25 additional years for first-degree murder and 20 additional years for attempted murder) and mandatory consecutive sentencing. *Id.* Furthermore, in light of the truth-in-sentencing-law, the defendant had to serve a minimum of 89 years of his 97-year sentence before being eligible for early release. *Id.* (citing 730 ILCS 5/3-6-3(b)(i)-(ii) (West 2008)).

[1] However, our supreme court has accepted petitions for leave to appeal in both *Hunter* and *Wilson*. See *Hunter*, 2016 IL App (1st) 141904, *appeal allowed*, No. 121306 (Nov. 23, 2016) (consolidated appeal with *Wilson*, 2016 IL App (1st) 141500, *appeal allowed*, No. 121345 (Nov. 23, 2016)).

¶ 62 On appeal, our supreme court held that the defendant's sentence was unconstitutional pursuant to the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. ___, ___ 132 S. Ct. 2455, 2469 (2012), which held that sentencing schemes mandating life sentences without parole for juvenile offenders violated the eighth amendment of the United States Constitution. *Reyes*, 2016 IL 119271, ¶¶ 3, 10. Our supreme court found that, although the trial court technically sentenced the defendant to a "term-of-years sentence," it was in essence "a mandatory, *de facto* life-without-parole sentence." *Id.* ¶ 10. Given that the defendant's 97-year sentence was unconstitutional, our supreme court was required to vacate it. *Id.* It further found, and the parties agreed, that the proper remedy based on the vacated sentence was for the defendant to be resentenced under section 5-4.5-105 of the Code. *Id.* ¶¶ 11-12 (citing 730 ILCS 5/5-4.5-105 (West Supp. 2015)). However, in *Reyes*, our supreme court did not address whether a defendant whose appeal was pending at the time of section 5-4.5-105's enactment was entitled to be resentenced, as is the issue in this case. Rather, *Reyes* addressed the proper remedy for a defendant whose sentence had been deemed unconstitutional. See *id. Reyes* accordingly does not compel a different result.

¶ 63 In sum, we affirm defendant's conviction for first-degree murder and find he is not entitled to have a new sentencing hearing. However, we remand the matter back to the trial court for an inquiry into defendant's postsentencing claim concerning the representation of his trial counsel consistent with *Krankel* and its progeny. See *Ayres*, 2017 IL 120071, ¶ 26.

¶ 64 Affirmed and remanded with directions.