FOURTH DIVISION
April 26, 2018

No. 1-15-1246

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 17590 (03)
	)	
CHARLES STARNES,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for delivery of a controlled substance affirmed. Error in admitting officer's testimony that defendant engaged in prior "narcotics transactions," without proof that narcotics were sold, was harmless, and numerous other claims of evidentiary error lacked merit. Error in giving IPI 4.16, where possession was not an element of the charged offense, was harmless. Trial court's *voir dire* procedure, allowing prospective jurors to reply to questions as a group rather than individually, complied with Supreme Court Rule 431(b). Defense counsel's participation in preliminary *Krankel* inquiry did not render proceeding improperly adversarial.

¶ 2 Defendant Charles Starnes was jointly indicted with Carl Powell and Barron Shannon on one count of delivery of a controlled substance. See 720 ILCS 570/401(d)(i) (West 2012). The State alleged that the codefendants jointly executed a hand-to-hand sale of less than one gram of

heroin to an undercover police officer on August 24, 2012. Defendant was tried separately and convicted by a jury.

¶ 3 Defendant contends, in summary, that the trial court made several erroneous evidentiary rulings; failed to conform to Supreme Court Rule 431(b) in conducting *voir dire* of the potential jurors; erroneously instructed the jury by defining a term, "possession," that was not an element of the charged offense; and conducted an improperly adversarial *Krankel* inquiry by allowing defense counsel to question one of defendant's witnesses and argue at length against defendant's *pro se* motion. For the reasons that follow, we affirm defendant's conviction.

¶ 4 I. BACKGROUND

¶ 5 Officer Miller, the undercover buy officer, testified to his purchase of heroin from the codefendants. Officer Miller was directed to the 400 block of West Tremont Street in Chicago by Officer DiFranco, a surveillance officer. There, he approached codefendant Powell and asked about purchasing heroin. He either asked Powell, "Who has the blows?" or said, "I need D." Either way, Officer Miller testified that "blows" and "D" are both street terms for heroin.

¶ 6 Powell led Officer Miller to defendant, who was seated on a porch a few houses down the block. Powell asked defendant, "Who has it?" Defendant said, "The guy has it. Where is he?" When Powell told him, "The guy's not out here," defendant responded, "He's in the house. Go get him." On cross-examination, Officer Miller acknowledged that this dialogue was not included in his report, and that the only phrase he recorded anyone saying was defendant's instruction to Powell to "[g]o get him."

¶ 7 Defendant instructed Officer Miller to wait on a bench across the street. Powell went to another house, on the other side of a vacant lot. When Powell came back out of the house, with codefendant Shannon, they walked back to defendant, who motioned for Officer Miller to come

over to the porch. Officer Miller walked over and gave a prerecorded $20 bill to Shannon, who in turn gave him what he believed to be $20 worth of heroin. Officer Miller returned to his vehicle and radioed a description of the three codefendants to the enforcement officers. After the codefendants were detained, Officer Miller drove back to the block to identify them, and then returned to the station.

¶ 8 The item that Officer Miller received from Shannon was either one plastic ziploc bag, a pair of two smaller ziploc bags, or two smaller bags contained in one larger bag. The baggies moved into evidence as People's Exhibit 3 matched the last of these descriptions—two small baggies within one larger one. And the small baggies had green dollar signs on them. In his report, Officer Miller wrote that the baggies he received from Shannon had blue "money signs" on them. Officer Miller admitted on cross-examination that he made a mistake in his report, which he attributed to his being "a little color blind." When defense counsel asked why he did not have another officer verify the color for him, Officer Miller simply said that it was his report, not theirs.

¶ 9 Officer Miller testified that the expected weight of $20 worth of heroin in a street buy is .4 to .6 grams. In his report, he estimated a street value of $60 for the drugs he received, despite having paid only $20 for them. Defense counsel questioned him about this apparent discrepancy. Over the State's objection, Officer Miller testified that the "street value" and what a person pays for drugs on the street are not the same thing. Defense counsel then continued to ask Officer Miller about the discrepancy, but the judge sustained the State's objection and repeated to the jury that the street value and the actual price paid are two different things.

¶ 10 When Officer Miller returned to the station, he gave the plastic baggies to the inventory officer, Officer Hughes, who completed the inventory report. Although Officer Hughes's name

did not appear on the report, Officer Miller explained that the inventory officer normally enters the star numbers of the lead officers—which included Officer Miller, as the buy officer—and their names appear in a box on the report labeled "electronic approval." And though Officer Miller did not sign the report, he testified that nobody does. Lastly, he knew that Officer Hughes completed the report based on the PC number that was listed. Defense counsel asked, on recross, if he knew Officer Hughes's PC number offhand, but the judge sustained the State's objection.

¶ 11 When defense counsel asked on cross-examination, Officer Miller testified that he never saw defendant in possession of any drugs.

¶ 12 Officer DiFranco, the surveillance officer, testified that he directed Officer Miller to the block where he had been observing defendant, Powell, and Shannon. He was too far away to hear what anyone said, but he gave an account of his visual observations, which were consistent in all essentials with Officer Miller's description of the transaction. Officer DiFranco initially testified that People's Exhibit 4, a photograph of the house where defendant was seated on the porch, fairly and accurately depicted its appearance. In the photograph, the house was boarded up. After a defense objection and a sidebar, Officer DiFranco testified that he did not recall whether the house was boarded up at the time, but that the photograph otherwise fairly and accurately represented the house's appearance.

¶ 13 At the station, Officer Hughes received two plastic bags containing a white powder from Officer Miller. Officer Hughes testified that the bags had green dollar signs on them, but they were not contained within one larger bag, as People's Exhibit 3 was. Officer Hughes inventoried the bags and generated an inventory report. In generating the report, he entered the star numbers of the two lead officers—including Officer Miller—and the computer automatically generated e-signatures for them. Officer Hughes did not sign the report himself. During a custodial search of

Shannon at the station, Officer Hughes recovered the prerecorded $20 bill that Officer Miller used during the transaction.

¶ 14 Gail Gutierrez, a forensic chemist with the Illinois State Police, testified that she received two Ziploc baggies, stapled together, for forensic testing. Both bags contained a white powder that tested positive for heroin and weighed a total of .9 grams.

¶ 15 Defendant testified and denied any participation in the drug transaction. He specifically denied telling Officer Miller to wait on the bench, summoning Officer Miller to the porch to complete the transaction, or pointing down the street toward the house where Powell went to meet Shannon. He also denied knowing what "D" is or seeing anyone exchange money or drugs.

¶ 16 At the time of the transaction, defendant was sitting on the porch at his friend Tameka Sanders's house, on West Tremont Street in Englewood, waiting to accompany her to a doctor's appointment. The house was not boarded up as depicted in People's Exhibit 4. Two strangers approached him on the porch. Defendant later learned that the strangers were Powell and Officer Miller. Powell asked defendant, "who got the D?" Defendant answered that he did not live in the area (in fact, defendant lived in Oak Park) and did not know anything about "D." Defendant then told Powell to "get the 'F' away from him." Powell and Officer Miller kept walking. Officer Miller sat down on a bench across the street. Powell talked to a man defendant later learned was Shannon; eventually, Powell and Shannon summoned Officer Miller to them. After a brief conversation, Officer Miller walked away; Shannon and Powell remained in the area.

¶ 17 A "detective car" soon pulled up. Four officers got out and talked to Shannon and Powell. One of the officers brandished his sidearm and motioned to defendant to come over. Defendant complied. The officer asked defendant what he was doing there, and he answered that he was visiting a friend. At the officer's request, defendant produced his state identification card. The

officer confirmed with defendant that he lived in Oak Park. The officers then spoke amongst themselves, and defendant heard one of them say, "Take them all in." Defendant, Powell, and Shannon were handcuffed and taken to the station.

¶ 18 At the station, the codefendants were split up. The arresting officer told defendant that he could "make this case disappear" if defendant could give him information about shootings or murders in the area. Defendant said he did not live in the area and did not know the others who were arrested with him. Defendant was then booked for a drug charge.

¶ 19 The State recalled Officer DiFranco in rebuttal. He testified that he surveyed the block for ten to fifteen minutes before Officer Miller arrived. He saw the codefendants engaged in the same pattern of activity, three or four times, that he later observed during Officer Miller's undercover buy. Each time, Powell would bring a prospective buyer to defendant, who would "direct" the buyer to wait on the bench across the street while Powell went to get Shannon. On cross-examination, Officer DiFranco clarified that defendant "directed" the prospective buyers by pointing to the bench. Powell and Shannon would then walk back to the porch where defendant was sitting, and Shannon would complete a hand-to-hand transaction. Although Officer DiFranco could not see what Shannon tendered and could not hear what anyone said, he testified that they all "engage[d] in narcotics transactions."

¶ 20 The jury received pattern instructions on accountability and the offense of delivery of a controlled substance. At the State's request, the jury received IPI 4.16, which defines the term "possession." Defense counsel objected that the instruction was irrelevant and would confuse the jury, because possession was not an element of the charged offense. The trial court gave the instruction, reasoning that defense counsel had elicited testimony from Officer Miller that he

never saw defendant in possession of any narcotics, and because it would help the jury understand the issue of accountability.

¶ 21 After defendant was convicted, he filed a *pro se* motion for new trial, in which he alleged that counsel was ineffective for various reasons. As relevant here, defendant initially alleged that counsel failed to locate Tomise Hubbard, who could have testified as a witness on his behalf, but he later "concede[d]" in his motion that counsel made a "tactical decision" not to use Hubbard as a witness. The trial court conducted a preliminary *Krankel* inquiry. Defendant called two witnesses at that proceeding: his mother—who was not present at the scene and could not offer any relevant testimony—and Hubbard.

¶ 22 In response to questions from defendant and the court, Hubbard testified, in sum, that she met with counsel, discussed this case, and was told by counsel that she would not be called as a witness at trial. Hubbard, who lived in the neighborhood where defendant was arrested, testified that defendant came to her house on the morning in question. He was supposed to take her children to school. At some point, defendant went to buy her some "loose cigarettes" at the house on Tremont Street, where Tameka Sanders lived. Defendant told Hubbard that he was arrested while leaving Sanders's house. Hubbard had a criminal case pending at the same time as defendant, but it was *nolle prossed* shortly before defendant's trial.

¶ 23 The trial court also allowed defense counsel to question Hubbard. Most of the responses counsel elicited recapitulated, or briefly elaborated upon, the answers Hubbard had already given. But Hubbard also testified that sometime before defendant's trial, she told counsel and defendant that she did not want to testify or have "anything to do with" his case.

¶ 24 The trial court denied defendant's post-trial motion, found that he was subject to Class X sentencing because of his criminal history, and sentenced him to nine years in prison.

¶ 25 II. ANALYSIS

¶ 26 A. Evidentiary Rulings

¶ 27 Defendant first contends that several erroneous evidentiary rulings warrant a new trial. The trial court's alleged errors include (1) improperly restricting defense counsel's cross-examination of Officer Miller on various potential areas of impeachment; (2) admitting improper opinion testimony from Officer DiFranco; and (3) admitting a photograph of the house where defendant was sitting that was misleading and lacked a proper foundation. We address each alleged error in turn.

¶ 28 We begin with the allegedly improper restrictions placed on defense counsel's cross-examination of Officer Miller. The sixth-amendment right of confrontation includes the right to conduct a reasonable cross-examination. *People v. Davis*, 185 Ill. 2d 317, 337 (1998); *Olden v. Kentucky*, 488 U.S. 227, 231 (1988). That includes, among other things, the right to question the witness on any permissible matter that affects his credibility. *People v. Kliner*, 185 Ill. 2d 81, 130 (1998). But the sixth amendment affords trial courts "wide latitude" to impose "reasonable limits" on cross-examination, to prevent harassment, confusion of the issues, or questioning that is repetitive or of little relevance. *People v. Harris*, 123 Ill. 2d 113, 144 (1988); *Deleware v. Van Arsdall*, 475 U.S. 673, 678 (1986). The question for a reviewing court is whether a defendant's inability to make the desired inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness's direct testimony. *Harris*, 123 Ill. 2d at 145. In answering this question, we look to the record as a whole; if it shows that the jury was otherwise made sufficiently aware of the relevant areas of impeachment, no error arises from the specific limits placed on cross-examination. *Id.*

¶ 29 Here, defendant contends that the trial court improperly restricted counsel's impeachment of Officer Miller on cross-examination regarding his color blindness, his estimate of the street value of the drugs in his report, and his knowledge of the authorship of the inventory report. Taken together, defendant argues, these areas of impeachment, if fully perfected, could have cast significant doubt on the chain of custody of the drugs moved into evidence as People's Exhibit 3.

¶ 30 First, defense counsel impeached Officer Miller with the discrepancy between his report, which stated that the baggies he received had blue dollar signs, and People's Exhibit 3, which had green dollar signs. Officer Miller admitted that he made an error in his report and attributed the error to his being "a little color blind." Defense counsel then asked him, "If you were going to include information in your report that might not be accurate because of your being color blind, you could check with someone else, wouldn't you?" Officer Miller answered, "They don't write my report, I do." Defense counsel immediately asked Officer Miller again, "Wouldn't you check with them before you write a report to make sure the information is accurate if you were going to put blue in your report and you're color blind?" The trial court sustained the State's objection. Defendant argues that limiting cross-examination in this way was not reasonable.

¶ 31 We disagree. Counsel's question was repetitive. It had been asked and answered—not to counsel's satisfaction, perhaps, but answered nonetheless. The defense had made its point. The impeaching fact was the discrepancy between Officer Miller's report and the actual color of the dollar signs on the baggies. That fact was conveyed to the jury, and defense counsel used it during closing argument to challenge the chain of custody of the drugs moved into evidence. The fact that Officer Miller did not take steps to verify the accuracy of his report, given that he was prone to make mistakes about color, does not have impeachment value unless defendant could show that he normally checks with others when he describes a color in his report, but did not do

so on this occasion. Beyond that, it would not matter why Officer Miller failed to take such steps in completing his report. Indeed, counsel's questioning was more rhetorical than substantive. It emphasized for the jury that Officer Miller was arguably sloppy in writing his report, but it was unlikely to elicit any specific explanation that would bear on the chain of custody of People's Exhibit 3 or otherwise help the jury decide the case. The trial court reasonably permitted counsel to ask the question once, and the question was answered. The second time, the court may have reasonably concluded that counsel was badgering the witness.

¶ 32 Second, defense counsel confronted Officer Miller with an apparent discrepancy between the price he paid for the drugs and the street value he estimated in his report. Officer Miller testified that he asked to buy $20 worth of heroin, and that he gave Shannon a prerecorded $20 bill during the transaction. He further testified that $20 is the estimated street value of .4 to .6 grams of heroin. But in his report, Officer Miller estimated that the street value of the drugs he received was $60 for the same weight.

¶ 33 Officer Miller tried to reconcile the apparent discrepancy by testifying, over the State's objection, that the "street value" and "what you pay" for drugs on the street are two different things. For reasons the record does not disclose, the trial court spontaneously repeated his testimony and told the jury, "There's two different things, street value is one thing and what he paid is another thing." Officer Miller then asserted, without further explanation, that he paid $20 for drugs that had a street value of $60. Amid this confusion, defense counsel tried to remind Officer Miller of his previous testimony regarding "street value." Counsel asked, "But you just testified a few minutes ago that the street value of .4 grams was the $20, right?" The trial court sustained the State's objection to that question, and counsel moved on to a different area of cross-examination. Defendant argues that this ruling prevented counsel from perfecting a critical

impeachment of Officer Miller. However, defendant did not preserve his supposed impeachment through an offer of proof, so exactly how important this impeachment might have been is not something we can know with any precision.

¶ 34 Our understanding of the phrase "street value" of drugs is "the price typically paid by the ultimate purchaser, the user." *People v. Lusietto*, 131 Ill. 2d 51, 55-56 (1989). And the drug purchase here was certainly an end-user transaction, albeit as part of an undercover sting. The State argues that Officer Miller was trying to convey the difference between the *estimated* value of a narcotic sold illegally versus the actual price paid for it in a particular transaction.

¶ 35 Regardless, defendant makes far too much of the trial court's ruling. The court had at least two reasonable and straightforward grounds for sustaining the State's objection. First, counsel's question did not accurately represent Officer Miller's previous testimony that $20 is the estimated street value of .4 to .6 grams of heroin. Indeed, this was not the first time that defense counsel imprecisely rendered Miller's testimony on this point. In the previous instance, the trial court corrected counsel's error and allowed her to proceed with her question; but the court was not obliged to so a second time, especially in the face of a State objection. Second, to the extent that counsel was asking Officer Miller how much heroin one expects to receive for $20 in a street buy, the question had been asked and answered.

¶ 36 Thus, the trial court was within its discretion to sustain an objection to a redundant and poorly-framed question that misstated the witness's testimony. If this general line of inquiry had any further potential impeachment value, it was lost because counsel did not pursue it, not because the trial court sustained an objection to this particular question. Counsel was free to continue questioning Officer Miller about his understanding of the concept of "street value," how he thought it differed from the price that one typically pays in a street buy, or how he estimated

the street value of the particular drugs he received. For whatever reason, counsel did not do so. We cannot say that the trial court unreasonably limited counsel's cross-examination of Officer Miller.

¶ 37 Third, Officer Miller testified that, although he was not present when the inventory report was generated, he knew that Officer Hughes generated it, because it had Officer Hughes's PC number (or computer number) listed on it. On re-cross, defense counsel asked Officer Miller to recite Officer Hughes's PC number off the top of his head. The trial court sustained the State's objection. Defendant argues that the ruling was improper, because the jury was entitled to know whether Office Miller really knew who generated the report based on the PC number.

¶ 38 There is no merit to this argument. Apart from the PC number, Officer Miller knew that Officer Hughes was assigned to be the inventory officer for this case, and he personally handed the drugs to Officer Hughes to begin the inventory process—a process that includes generating the inventory report. But even if we could say that the trial court erred in sustaining the State's objection, any error would have been harmless, as Officer Hughes, himself, testified that he generated the inventory report. See, *e.g.*, *Davis*, 185 Ill. 2d at 338 (limitation on cross-examination may be harmless beyond reasonable doubt if witness's testimony was cumulative or corroborated by other witnesses) (citing *Van Arsdall*, 475 U.S. at 684). Thus, further cross-examination would not have impeached Officer Miller's testimony about the authorship of the inventory report.

¶ 39 Next, defendant argues that the trial court erred in admitting People's Exhibit 4, a photograph of the house where he was sitting on the porch, because the State failed to lay a proper foundation for it. We review the trial court's evidentiary rulings for an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 40 During its direct examination, the State showed the photograph to Officer DiFranco. It was one of a series of photographs used for illustrative rather than substantive purposes, that is, to give the jury a basic visual sense of the area where the alleged offense was committed. Officer DiFranco authenticated the photograph, and defense counsel objected. During a sidebar, counsel argued that the photograph depicted the house as boarded up, but on the day in question—as defendant would later testify—it was not. Because Officer DiFranco did not acknowledge the (alleged) discrepancy, counsel argued that his testimony failed to lay a proper foundation for the photograph.

¶ 41 The State said it would address that discrepancy when it resumed its direct examination, and defense counsel agreed that "there would be no objection" if it did. After the sidebar, Officer DiFranco testified that he could not recall whether the house was boarded up at the time, but that the photograph otherwise fairly and accurately depicted the house as it appeared on the day in question. The trial court found that testimony sufficient to lay a proper foundation and admitted the photograph into evidence. During cross-examination, defense counsel asked Officer DiFranco whether the house was boarded up, and he testified, again, that he did not remember. Counsel renewed the initial objection to the photograph in a motion for new trial, and defendant now raises the same issue on appeal.

¶ 42 To lay a sufficient foundation for a photograph, a witness must testify, based on personal knowledge, that it is a fair and accurate representation of the object depicted, at a time relevant to the issues at trial. *People v. Donaldson*, 24 Ill. 2d 315, 318 (1962); Michael H. Graham, Cleary and Graham's Handbook of Illinois Evidence, § 401.8, at 160. A disparity between a photograph and the object as it appeared at the time in question does not render the photograph inadmissible if the authenticating witness acknowledges the disparity and the jury is not misled by it. *Warner*

v. City of Chicago, 72 Ill. 2d 100, 105 (1978); *Burke v. Toledo, Peoria & Western R.R. Co.*, 148 Ill. App. 3d 208, 213-14 (1986). We review the trial court's ruling on the admissibility of a photograph, including the question of whether a proper foundation was laid, for an abuse of discretion. *People v. Taylor*, 2011 IL 110067, ¶¶ 26-27.

¶ 43 Officer DiFranco testified that he could not recall whether the windows of the house were boarded up, as the photograph depicted. Defendant argues that his testimony thus failed to lay a proper foundation, because he could not establish that it was a fair and accurate representation of the house, in this one respect, at the time in question. The State responds that the exhibit did not mislead the jury because Officer DiFranco and defendant, in their respective testimony, "acknowledged" and "corrected" any potential inaccuracy.

¶ 44 In support of its argument, the State cites *Warner*, 72 Ill. 2d 100, and *Burke*, 148 Ill. App. 3d 208. Defendant says these cases are distinguishable because the juries in *Warner* and *Burke* were affirmatively told that, in certain respects, the disputed photographs did not accurately represent the condition of an accident scene at the relevant time. *Warner*, 72 Ill. 2d at 105; *Burke*, 148 Ill. App. 3d at 214. But because the disparities were specifically acknowledged and explained to the jury, the reviewing courts held that the photographs did not mislead the juries about any material issues. *Warner*, 72 Ill. 2d at 105 (in personal-injury case, photograph of sidewalk admissible to show nature of alleged defect even though it did not depict snow that was present when plaintiff fell); *Burke*, 148 Ill. App. 3d at 214 (belated photographs of accident scene admissible where intervening changes to scene were clearly described to jury). In contrast, Officer DiFranco did not affirmatively acknowledge the (alleged) disparity in the photograph because he was unable to recall the condition of the house; as a result, defendant says, the jury was left to "speculate" about an issue that was material to his theory of defense.

¶ 45 We recognize that this case differs from *Warner* and *Burke*, for the reasons defendant points out. But we do not find those differences significant enough to show that the trial court abused its discretion. In *Warner* and *Burke*, the juries were told to disregard certain aspects of the photographs that were inaccurate; here, the trial court, in effect, trusted the jury to suspend judgment—that is, to understand that the photograph *otherwise* accurately depicted the house on the day in question without this one collateral detail necessarily being accurate. The officer clearly testified that he had no memory of whether the house was boarded up on the day in question. The jury would not have been confused on that point.

¶ 46 Even if the trial court had erred, any error would have been harmless. Officer DiFranco testified that, before Officer Miller arrived, defendant had been involved in a pattern of recurring transactions with Powell and Shannon. Regardless of whether the house was boarded up, that testimony contradicted defendant's claim that he was merely waiting on the porch for his friend while two total strangers happened to sell heroin to Officer Miller. That testimony, together with Officer Miller's testimony implicating defendant in the undercover buy, made for a strong case against defendant. We are confident that excluding the photograph of the house would not have led the jury to assess Officer DiFranco's testimony any differently, and therefore would not have led to a different result.

¶ 47 The next group of evidentiary rulings concern Officer DiFranco's rebuttal testimony.

¶ 48 In rebuttal, Officer DiFranco testified that he had been observing defendant, Powell, and Shannon for ten or fifteen minutes before Officer Miller arrived in the area. During that time, Officer DiFranco observed the same pattern of activity, three or four times, that he later observed during Officer Miller's undercover buy. In describing that activity, Officer DiFranco testified that he observed defendant "directing" people to wait on the bench across the street, and that he

observed defendant and the others engage in "narcotics transactions." Defendant argues that this testimony was speculation and should have been excluded.

¶ 49 Officer DiFranco was not speculating when he testified that defendant "directed" various individuals to the bench. Officer DiFranco observed a repeated pattern of activity: Powell would bring an individual to defendant on the porch; defendant would point to a bench across the street; that individual—whether Officer Miller or someone else—would walk to the bench and sit down; the codefendants would eventually reconvene on the porch; the individual would leave the bench, approach the codefendants, and execute a transaction. Given this pattern of activity, we do not agree that Officer DiFranco "had no idea what [defendant] was trying to communicate by pointing" to the bench. He may have been "out of earshot," as defendant says, but defendant's gesture, understood in context, was not at all ambiguous.

¶ 50 Thus, Officer DiFranco's testimony that defendant was "directing" those individuals to the bench was rationally based on his perceptions. And his inference was obvious, given his perceptions. We have no doubt that the jury would have drawn the same inference, anyway, even if he had omitted the word "directed" from his testimony and simply described defendant as having "pointed" to the bench in question.

¶ 51 As for defendant's complaint that Officer DiFranco described the codefendants' prior interactions as engaging in "narcotics transactions," we hold that any error that may have occurred would have been harmless, in any event. Immediately after Officer DiFranco testified that the prior exchanges he observed were "narcotics transactions," the State had him walk back this characterization by clarifying that he could not see what items were exchanged between Shannon and the other unknown individuals. And more importantly, this claimed improper characterization was not the crux of Officer DiFranco's rebuttal testimony. The critical point was

that defendant had been involved in *some* kind of recurring transactional activity with Powell and Shannon before Officer Miller arrived on the scene. This fact, alone, impeached defendant's testimony that he was sitting on his friend's porch, waiting to take her to the doctor, when two total strangers just happened to sell heroin to Officer Miller. Thus, if the jury found Officer DiFranco credible on this point—if it believed that he saw defendant participate in some recurring pattern of activity with Powell and Shannon—it would have rejected defendant's version of events, even without Officer DiFranco's testimony that these were "narcotics transactions." Thus, even if the officer's testimony here were impermissible—an issue we need not decide—any error would not have contributed to the jury's guilty verdict and was harmless.

¶ 52 Lastly, we reject defendant's cumulative-error argument. As we have explained above, any arguable errors that may have occurred were clearly harmless, individually and cumulatively.

¶ 53 B. Instructional Error

¶ 54 Next, defendant argues that the trial court erred in giving the jury IPI 4.16, which defines the term "possession." This instruction was irrelevant, defendant argues, because possession is not an element of the charged offense. And it was prejudicial, he says, because it allowed the jury to convict him based on an alternative, and uncharged, theory of guilt.

¶ 55 Jury instructions must fairly and fully explain the relevant legal principles to the jury. *People v. Parker*, 223 Ill. 2d 494, 501 (2006). They should not be misleading or confusing, and their correctness depends on whether "ordinary persons acting as jurors would fail to understand them." *People v. Herron*, 215 Ill. 2d 167, 187-88 (2005). A defendant is denied his right to a fair trial if an instructional error creates a serious risk that the jury incorrectly convicted him based

on a misunderstanding of the law. *People v. Durr*, 215 Ill. 2d 283, 299 (2005); *People v. McDonald*, 401 Ill. App. 3d 54, 64 (2010).

¶ 56 Whether a jury instruction accurately conveys the law is reviewed *de novo*. *Parker*, 223 Ill. 2d at 501. But whether a requested jury instruction is warranted, in light of the evidence, is a matter left to the trial court's sound discretion, and we will not reverse its decision absent an abuse of that discretion. *People v. McDonald*, 2016 IL 118882, ¶ 42.

¶ 57 IPI 4.16 defines the term "possession." In the first paragraph, the instruction divides the concept into actual and constructive possession. IPI Crim. 4.16 (4th ed.). Actual possession requires "immediate and exclusive control over a thing." *Id.* A person who lacks actual possession nonetheless has constructive possession if "he has both the power and the intention to exercise control over a thing either directly or through another person." *Id.* In the second paragraph, the instruction defines joint possession, which requires that two or more persons "share the immediate and exclusive control or share the intention or power to exercise control over a thing." *Id.* The committee note advises that the first paragraph should be given "only when there is an issue as to whether the defendant was in constructive possession," and that the second paragraph should be given "only when there is an issue as to joint possession." *Id.* (committee note).

¶ 58 Here, there was no issue as to constructive or joint possession. As both the trial court and the State recognized, the State was not required to prove possession beyond a reasonable doubt; possession is not an element of the offense of delivery of a controlled substance. 720 ILCS 570/401 (West 2012) ("it is unlawful for any person knowingly to *** deliver *** a controlled substance ***."). Nor did the State claim that defendant ever possessed or controlled the drugs; the State claimed that defendant was legally accountable for the delivery of the drugs. That is

why the issues instruction given to the jury, IPI 17.18, did not include the term "possession." Rather, it instructed the jury that to sustain this charge, the State had to prove that "defendant, or one for whose conduct he is legally responsible, knowingly delivered a substance containing heroin, a controlled substance." IPI Crim. 17.18 (4th ed.).

¶ 59 For these reasons, the defense objected that IPI 4.16 was irrelevant and could only confuse the jury. While the trial court recognized that possession was not an element of the charged offense, the trial court agreed with the State that the instruction was appropriate, because defense counsel elicited testimony from Officer Miller that he never saw defendant in possession of any narcotics. The trial court also thought that the instruction would "illuminate some issues in the case," because defendant was charged on a theory of accountability: If defendant was accountable, the trial court reasoned, "then he would be accountable for the possession that was either Shannon or Powell [*sic*] prior to either one of them making any delivery *** to the undercover officer."

¶ 60 In one sense, we can understand why the trial court so ruled. After all, any "delivery" of a controlled substance, by definition, involves a "transfer of possession." 720 ILCS 570/102(h) (West 2012); see IPI 17.05A ("The word 'deliver' means to transfer possession or to attempt to transfer possession."). The reasonable lay person understands as much, which is why the jury instruction defining "delivery," IPI 1705A, is typically unnecessary. See *People v. Monroe*, 32 Ill. App. 3d 482, 488 (1975); see also Committee Comment, IPI 17.05A (in typical case where "the evidence indicates that the delivery in question was an actual physical transfer of possession, no definition of the term need be given to the jury."). So it is understandable that, when defendant tried to distance himself from the drug sale by emphasizing that he was never seen touching, much less possessing, the drugs, the court might have believed that the State was

entitled to respond by arguing that defendant could be held liable even if he never physically possessed the drugs.

¶ 61 But the correct way to do that was not to instruct the jury on constructive possession. It was to instruct the jury on the law of accountability. The accountability instruction, properly given here by the trial court, accurately and completely embodied the State's proper response—that defendant was liable for the delivery of narcotics to the undercover officer, even if he had no role in the physical transfer of the drugs at any point in time, including the initial "possession" of the narcotics. Further instructing the jury on "possession" added nothing to its consideration of the elements of the charged offense.

¶ 62 It is true, as the State notes, that the committee note to IPI 17.17, the pattern instruction that defines the offense of delivery of a controlled substance, advises that "[i]t may be necessary to give other instructions defining terms used in this instruction," such as the term "possession." IPI Crim. 17.17 (4th ed.) (committee note). But the State ignores the fact that IPI 17.17, in its unmodified form, defines several distinct offenses, including the offenses of possession with intent to deliver and possession with intent to manufacture. *Id*. When the instruction, as given, applies to one of *those* offenses, it is appropriate to define the term "possession" for the jury. We do not take the committee note to suggest that the term should be defined for the jury even when the charged offense does not require the jury to apply it.

¶ 63 In sum, there was no reason why the jury needed the definition of the term "possession," when possession was not an element of the charged offense, and there was no legitimate use that the jury could have made of that instruction in applying the relevant law.

¶ 64 Though we find error here, it is not reversible error. Defendant says that the error was not harmless, because it "provided the jury with what looked like an alternate theory of guilt." In

particular, defendant says, the jury could have been misled by the instruction into believing that it should find defendant guilty "if it found that some kind of joint or constructive possession occurred." We disagree. The jury was given a definition of an irrelevant term, but it was never instructed that it could find defendant guilty by finding that he jointly or constructively possessed heroin.

¶ 65 Consider, in contrast, the misleading instruction in *People v. Anderson*, 2012 IL App (1st) 103288, one of defendant's cited cases. Anderson was charged with the murder of Hart and the attempted murder of Hazziez. *Id.* ¶ 56. The jury was instructed that it could find Anderson guilty of attempting to murder "an individual," and the trial court never clarified for the jury that the attempted-murder charge applied only to Hazziez. *Id.* ¶¶ 56, 59. As an ordinary person would understand that instruction, it allowed the jury to convict Anderson of attempting to murder Hart. *Id.* ¶¶ 61-64. Because that was not a charged offense, the instruction fully set forth an alternative, and improper, theory of guilt.

¶ 66 In *McDonald*, 401 Ill. App. 3d 54, which defendant also cites, the instructions allowed the jury to consider whether McDonald committed the uncharged offense of armed robbery in deciding whether he was guilty of murder. McDonald was charged with intentional and knowing (but not felony) murder, and he argued self-defense at trial. *Id.* at 55. After the close of evidence, the State argued, and the trial court agreed, that instructing the jury on armed robbery was necessary to respond to McDonald's claim of self-defense. *Id.* at 62. The trial court instructed the jury that McDonald could not legally claim self-defense if he committed the killing in the course of an armed robbery, and it further instructed the jury on the elements of armed robbery. *Id.* at 59. Because McDonald had not been charged with armed robbery, he had no opportunity at trial to present a defense to the assertion that he had committed an armed robbery in the course of the

shooting. *Id.* at 62. As a result, the jury was presented with an entirely new basis for rejecting his claim of self-defense, one that he had no opportunity to address at trial. *Id.* These instructions thus deprived McDonald of his due-process rights to a fair trial and a meaningful opportunity to respond to the charges against him. *Id.* at 62-63.

¶ 67 This case is unlike *Anderson* and *McDonald*. Here, the trial court did not instruct the jury on an uncharged offense. Even if the jury concluded, as defendant suggests, that "some kind of joint or constructive possession occurred," it was not instructed that it could use that finding as a basis for a guilty verdict. That finding, and the definitional instruction that gave rise to it, would have remained isolated. That may have puzzled the jury, but we see no way it could have led the jury to convict defendant. The instructional error was harmless.

¶ 68 C. *Voir Dire*

¶ 69 Next, defendant contends that the trial court committed first-prong plain error in failing to comply with Illinois Supreme Court Rule 431(b). Rule 431(b) provides that the trial court "shall ask each potential juror, individually or in a group, whether that juror understands and accepts" four fundamental principles of our criminal justice system. Ill. S. Cr. R. 431(b); see *People v. Zehr*, 103 Ill. 2d 472 (1984). The rule further provides that "[t]he court's method of inquiry shall provide each juror an opportunity to respond to the specific questions concerning the principles set out in this section." Ill. S. Cr. R. 431(b). Whether the trial court complied with Rule 431(b) is a question of law that we review *de novo*. *People v. Belknap*, 2014 IL 117094, ¶ 41.

¶ 70 During *voir dire*, the trial court addressed the entire panel of 34 prospective jurors and explained each of the four principles enumerated in Rule 431(b). With respect to each principle, the trial court first asked the prospective jurors, collectively, whether they understood it. In each instance, the transcript indicates that the prospective jurors responded with a "chorus of yes."

After each "chorus of yes," the trial court then asked the prospective jurors if anyone "could not or would not follow that principle of law," and instructed them, "if so, raise your hand." For each principle, the transcript indicates, "[n]o hands are up."

¶ 71 Defendant does not challenge the trial court's method of asking the prospective jurors whether they accepted, or were willing to follow, each of the Rule 431(b) principles. As to that question, the trial court asked for a show of hands, a method defendant applauds as "sensible" because it "insure[d] an intelligible response from each juror."

¶ 72 In contrast, when the trial court asked whether the prospective jurors *understood* each principle, it "invited the entire panel to answer verbally" and in unison. Defendant contends that this was error. But nothing in Rule 431(b) forbids this procedure. The rule does not require the *voir dire* process to take any specific form. It merely requires the trial court to ask the potential jurors whether they understand and accept the four principles, and to afford them an "opportunity to respond"—one way or another—to those questions. And the rule makes perfectly clear that the trial court may "ask each potential juror, individually *or in a group*, whether that juror understands and accepts" the four principles. Ill. S. Ct. R. 431(b) (emphases added). Here, the trial court asked the prospective jurors, *en masse*, whether they understood each of the four principles, and gave them a chance to respond; the prospective jurors responded, *en masse*, that they did. The trial court complied with Rule 431(b).

¶ 73 Defendant asserts that "[a] 'chorus of yes' from 34 different people speaking at once cannot possibly result in a decipherable response from each individual juror." Thus, the trial court could not be sure whether all of the prospective jurors responded, or whether one or two of them answered "no" but were drowned out by the others who answered "yes." If the trial court wanted to rely on verbal responses, says defendant, then it either had to ask each prospective

juror to state his or her answer individually or ask whether any prospective juror did *not* understand the principles, since "[o]ne or two voices speaking into the silence" would have been easy to hear. But as it stood, the trial court's method of inquiry failed to ensure that every prospective juror had an adequate opportunity to respond.

¶ 74 We reject this argument, for two reasons. First, we are in no position to say that the trial judge could not possibly have heard a dissenting voice or two among the prospective jurors. We are not persuaded by defendant's assertion that this is a matter of unassailable "common sense," and thus something that we can confidently state without knowing anything about the particular auditory conditions at issue, based on nothing but a cold record. Second, if there *was* a prospective juror who answered "no," but the judge did not hear and acknowledge the response, that prospective juror easily could have spoken up and said so. Thus, we are confident that any prospective juror who did not understand any of the four principles had a sufficient opportunity to bring that fact to the trial court's attention. The trial court complied with Rule 431(b).

¶ 75 Because there was no error in the trial court's *voir dire* procedure, we need not address defendant's plain-error arguments.

¶ 76 D. Preliminary *Krankel* Inquiry

¶ 77 Lastly, defendant argues that this case should be remanded for a new preliminary *Krankel* inquiry, because the proceeding conducted by the trial court was improperly adversarial.

¶ 78 Pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), the trial court must "conduct some type of inquiry into the underlying factual basis, if any, of a defendant's *pro se* posttrial claim of ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d, 68, 78 (2003). The trial court's method of inquiry at the initial stage is flexible, and no specific procedure is mandated. *Id.* The trial court may discuss the allegations with the defendant and ask defense counsel to explain the

facts and circumstances surrounding the allegations. *Id.* Indeed, "some interchange" between the trial court and defense counsel is not only permissible but also "usually necessary" to determine whether new counsel should be appointed to litigate the defendant's claims at an evidentiary hearing. *Id.* But any participation by the State must be *de minimis*; it is reversible error to permit the State to play an "adversarial role" at the initial stage. *People v. Jolly*, 2014 IL 117142, ¶¶ 38-41. We review the manner in which the trial court conducted its initial inquiry *de novo*. *People v. Flemming*, 2015 IL App (1st) 111925-B, ¶ 82.

¶ 79 Here, there is no dispute that the State did not play any adversarial role in the trial court's preliminary *Krankel* inquiry. In fact, the State stood silent throughout the proceeding. Defendant argues, however, that defense counsel's own participation rendered the proceeding improperly adversarial under *Jolly*, 2014 IL 117142. In *Jolly*, our supreme court held only that adversarial participation by *the State* at the initial stage is reversible error. *Id.* ¶¶ 38-41. But *Jolly*'s rationale, defendant argues, cannot logically be limited to its express holding; it applies with equal force when defense counsel, rather than the State, acts as a *pro se* defendant's "adversary."

¶ 80 As our supreme court has explained, the purpose of *Krankel* proceedings is to facilitate the trial court's "full consideration" of a defendant's *pro se* claims and thereby limit the potential issues on appeal. *Id.* ¶ 29. By initially evaluating the defendant's claims at a preliminary inquiry, the trial court will create the record necessary to resolve any claims that are raised on appeal. *Id.* ¶ 38. Because a defendant is not appointed new counsel at the initial stage, this purpose is "best served" when the preliminary inquiry "operate[s] as a neutral and nonadversarial proceeding." *Id.* The goal of "creating an objective record for review" is "circumvented" when the trial court permits the State to "take an adversarial role against a *pro se* defendant," since a record produced through "one-sided adversarial testing cannot reveal, in an objective and neutral fashion,"

whether the trial court properly declined to appoint new counsel. *Id.* ¶ 39. The State's adversarial participation, in short, will "bias the record" against a *pro se* defendant, and for that reason it is always reversible error. *Id.* ¶¶ 39, 41.

¶ 81 To protect the fairness and neutrality of the record produced, *Jolly* thus established a bright-line rule that confines the State to a *de minimis* and purely ministerial role in a preliminary *Krankel* inquiry. That bright-line rule cannot necessarily be extended to defense counsel. Unlike defense counsel, the State's input is usually unnecessary and unhelpful at a preliminary inquiry. If the defendant's allegations arise from matters of record, the trial court can simply rely on its own knowledge of defense counsel's performance. *Moore*, 207 Ill. 2d at 78-79. If the allegations arise from matters outside of the record—if, for instance, the defendant alleges that counsel failed to interview an alibi witness or otherwise conduct an adequate investigation of a viable defense—then the State usually will not be privy to the facts and circumstances surrounding the allegedly deficient representation.

¶ 82 But defense counsel, obviously, *will* be privy to those facts. And that is why it is not only permissible, but often necessary, for the trial court to hear from counsel on these matters. See *id.* In this way, counsel's input is often necessary to generate a complete record for review of the defendant's claims. Sometimes, however, counsel's truthful explanations of the facts and circumstances surrounding the allegations will be adverse to the defendant's own position. Through no design of counsel, some element of antagonism is inevitable. The only way to avoid it entirely is to bar defense counsel from any meaningful participation in the inquiry, as *Jolly* did to the State. But that would undermine the preliminary inquiry's goal of producing the record needed to review the defendant's claims.

¶ 83 For these reasons, we cannot treat defense counsel and the State as interchangeable for purposes of applying the bright-line rule of *Jolly*. There are good reasons to limit that rule to the State.

¶ 84 Having said that, we do think there is some merit to defendant's claim that a defense attorney's role in the preliminary inquiry could, in theory, become unnecessarily or unfairly adversarial toward a *pro se* defendant. In contrast to *Jolly*'s bright-line rule, this will be a case-by-case inquiry, guided by the question whether counsel's participation deprived the defendant of a fair opportunity to make the objective and unbiased factual record necessary for a proper review of his allegations.

¶ 85 To this end, defendant makes two specific arguments. The first is that the trial court permitted defense counsel to cross-examine his main witness, Tomise Hubbard. It was unclear why defendant called Hubbard to testify. In his *pro se* motion, defendant had "concede[d]" that defense counsel made a "tactical decision," based on her knowledge of certain "circumstances" in Hubbard's life, not to use her as a witness at trial. For whatever reason, defendant still wanted to call her to the stand, and the trial court allowed him to present whatever evidence he thought might help his case. We do not question the trial court's decision to do so.

¶ 86 In response to questions from defendant and the court, Hubbard testified that she received a subpoena from defense counsel; that she went to court to meet with counsel; and that counsel ultimately told her that she would not be called as a witness at defendant's trial. Hubbard further testified—again, in response to questions from defendant and the court—that defendant came to her house on the morning in question, shortly before 8 a.m. Hubbard lived on West 56th Street, in the same neighborhood where defendant was arrested. Defendant was supposed to take her children to school, something Hubbard claimed she could not do because she was on a sheriff's

furlough program. Sometime between 8:00 and 8:30 a.m., defendant went to buy Hubbard some "loose cigarettes," which were sold at a house on Tremont Street, where (defendant's friend) Tameka Sanders lived. Defendant told Hubbard that he was arrested while leaving Sanders's house. Hubbard also testified that she had a criminal case pending at the same time as defendant, but it was *nolle prossed* shortly before defendant's trial.

¶ 87 To be sure, defense counsel was also permitted to question Hubbard. But most of the responses counsel elicited from Hubbard recapitulated, or briefly elaborated upon, the answers she had already given. There was one new substantive point: Hubbard testified that before defendant's trial, she told counsel and defendant that she "didn't want to have anything to do with Charles Starnes' case" and did not "want to be involved with the criminal court system period." Thus, although she would have (begrudgingly) testified if she had been called, she did not want to.

¶ 88 Questioning a witness that a defendant has called to the stand at a preliminary *Krankel* inquiry is a prime candidate for an unfair adversarial role on counsel's behalf. Cross-examination is the heart of adversarial procedure, and there is an obvious risk that a trained attorney could bias the record against a *pro se* defendant by questioning his witnesses. Thus, we acknowledge that in some cases, the result could be reversible error. But we do not think those concerns are present here.

¶ 89 Defendant was allowed to make an objective record of what Hubbard would have said at trial, through his own questioning and through questioning by the trial court. The problem for defendant is not that counsel then subjected Hubbard's answers to damaging cross-examination—she did not. The problem is that Hubbard, when questioned by defendant and the court, gave an account of events that contradicted defendant's own trial testimony. Defendant

testified that he travelled to Englewood that morning to take Sanders to the doctor; he went to Sanders's house and waited on her porch while she got ready. But according to Hubbard, defendant came to visit *her* and take her children to school; defendant was at *Hubbard's* house that morning and only went to Sanders's house to buy the cigarettes.

¶ 90 Hubbard also contradicted defendant's allegation, in his *pro se* motion, that Hubbard was with defendant on Sanders's porch when he was arrested; Hubbard said she was standing outside her own house, on a different street, when defendant went to buy the cigarettes. Hubbard's testimony showed that counsel was not ineffective for failing to contact Hubbard, because in fact counsel did; and that it was a reasonable strategic decision not to call her as a witness, because she would have undermined defendant's own testimony.

¶ 91 In short, defendant was allowed to make an unbiased record of counsel's interaction with Hubbard and the testimony Hubbard would have offered at trial. But the record he made defeated any claim that counsel was ineffective for failing to contact Hubbard or use her as a witness. And that result had little or nothing to do with counsel's participation in the preliminary inquiry.

¶ 92 Second, defendant complains that the trial court allowed defense counsel to argue against defendant's position. Our review of the record demonstrates that, for the most part, counsel limited her statements to objective and factual points. Defendant calls counsel's comments "clearly adversarial in nature," but we do not read them as such.

¶ 93 We would agree, however, that on balance, the trial court—which presided over this hearing without the benefit of the *Jolly* decision later handed down—would have been better served without giving the defense attorney *carte blanche* to make whatever statements counsel deemed pertinent to the inquiry. However unintentionally, it lent the appearance of an adversarial

hearing. Counsel's role should have been limited to answering factual questions and assisting the trial court with any necessary clarifications for the record, but nothing more.

¶ 94 We find no basis for reversal here only because the record does not show that the hearing was unduly adversarial. As stated above, defendant was given a full and fair opportunity to develop his record, and the witness he called ultimately demonstrated, through her testimony, that counsel made a more than reasonable decision in not calling her to the stand at defendant's trial. All of that occurred regardless of defense counsel's participation. As defendant cannot demonstrate prejudice from the hearing, we find no basis for reversal.

¶ 95 For the foregoing reasons, we affirm defendant's conviction and sentence.

¶ 96 Affirmed.