2018 IL App (1st) 152602-U

No. 1-15-2602

Order filed December 11, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 8279
	)	
JOSE ARROYO,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: State established *corpus delicti* for two counts of criminal sexual assault and aggravated criminal sexual abuse because although they were not testified to by the victim, they involved contact with the same body part and occurred during the same assaults that were corroborated by the victim's testimony independent of defendant's confession. We affirm all of defendant's convictions over his contentions that the trial court (i) abused its discretion by denying his motion to appoint private counsel; and (ii) failed to make a proper preliminary inquiry, pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), into the factual basis of his *pro se* posttrial claims of ineffective assistance of trial counsel.

¶ 2 Following a jury trial, defendant Jose Arroyo was convicted of three counts of criminal sexual assault and two counts of aggravated criminal sexual abuse of the victim, his daughter. He was sentenced to a total of 28 years' imprisonment: three consecutive sentences of nine, eight, and seven years' imprisonment for criminal sexual assault (counts 10-12, respectively), to be served consecutively with two concurrent terms of four years' imprisonment for aggravated criminal sexual abuse (counts 13 and 15).

¶ 3 On appeal, Arroyo argues: (1) there was insufficient evidence to prove him guilty beyond a reasonable doubt of two of his convictions—one count of criminal sexual assault alleging mouth-to-vagina penetration and one count of aggravated sexual abuse alleging mouth-to-breast contact—because his postarrest statements to police were the only evidence of the *corpus delicti* for those two offenses; (2) the trial court abused its discretion by denying his motion to appoint private counsel in lieu of appointed counsel from the Public Defender's Office; and (3) the court failed to make a preliminary inquiry into his *pro se* posttrial claims of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). We affirm.

¶ 4 Arroyo was charged by indictment with a total of 48 counts of criminal sexual conduct committed against his 15-year-old daughter, D.H., during the month of April 2011. Before trial, the State *nol-prossed* all but six of those counts leaving four counts of criminal sexual assault and two counts of aggravated criminal sexual abuse. The first criminal sexual assault count (count 1) alleged that Arroyo knowingly committed an act of sexual penetration upon D.H. (penis-to-vagina contact) by the use of force or threat of force (720 ILCS 5/12-13(a)(1) (West 2010)). The remaining three criminal sexual assault counts alleged that Arroyo knowingly committed an act of sexual penetration upon D.H., *i.e.*, penis-to-vagina, mouth-to-vagina, and

finger-to-vagina contact (counts 10-12, respectively) (720 ILCS 5/12-13(a)(3) (West 2010)), D.H. was under 18 years of age, and Arroyo was her family member. Arroyo was also charged with two counts of aggravated criminal sexual abuse based on hand-to-breast and mouth-to-breast contact (counts 13 and 15, respectively) (723 ILCS 5/12-16(b) (West 2010)).

¶ 5 In April 2011, D.H. was 15 years old and resided in an apartment in Chicago with her father (Arroyo), her mother (Adela), and two younger sisters. The apartment included a bathroom, a bedroom, and a room in between the bedroom and bathroom. Arroyo and Adela were not getting along and slept in separate rooms. Arroyo slept in the bedroom and everyone else—Adela, D.H., and D.H.'s two siblings—slept in the room located between Arroyo's room and the bathroom.

¶ 6 Throughout April 2011, there were five or six occasions on which Arroyo assaulted his daughter. The first assault was in early April and the last assault was on April 28, 2011. The first incident "most likely" occurred during the first week of April. D.H. did not recall dates of the second, third, and fourth incidents or how much time elapsed between them. D.H. did not tell anyone about the assaults before the final incident on April 28, 2011, because Arroyo had threatened Adela's life and also threatened to assault D.H.'s younger sisters. Every incident occurred in Arroyo's bedroom, either in the morning or after school, when D.H. and Arroyo were home alone. On each occasion, Arroyo would place his penis in D.H.'s vagina without a condom. D.H. tried to get Arroyo to stop. On one occasion, she ran away before he pulled her back to his room by her hair and arms. Another time, D.H. ran to the kitchen and grabbed a knife, but Arroyo threatened to sexually assault her sisters and took the knife from her.

¶ 7 At the time of the first incident in early April, D.H. arrived home from school and was alone in the apartment with Arroyo. He told her to go to his room because they needed to "talk." There, Arroyo grabbed D.H. by the arms and took her to his bed, where he undressed her. Arroyo removed D.H.'s pants and underwear, and then removed his own pants and underwear. He placed his penis into her vagina for a few minutes. D.H. tried to push and kick Arroyo off her, but he hit her and kept pinning her down by her arms. She told him to stop because it hurt, but he did not. Arroyo also touched D.H.'s breasts, "tried to squish them," and tried to insert a finger into her vagina.

¶ 8 On April 28, 2011, Adela and D.H.'s sisters were gone for the day. D.H. stayed home from school and was alone in the apartment with Arroyo. She wanted him to "get caught" so she left the apartment's front door unlocked. D.H was brushing her teeth in the bathroom when Arroyo pulled her by her arm. He tried to grab her hair and she fell. Arroyo picked D.H. up. She was kicking and fighting, but he succeeded in getting her to his bedroom and placing her on his bed, where she lay on her back with her legs "dangling" off of the bed. Arroyo removed D.H.'s pants and underwear, removed his own, and then stood between her legs and inserted his penis inside her vagina.

¶ 9 As Arroyo was assaulting D.H., Adela and D.H.'s sisters came home and Adela walked into the room. Arroyo was unclothed, D.H.'s blouse was up, her pants were down, and her legs were open. D.H. was crying. Adela yelled at Arroyo and left the apartment with D.H. and D.H.'s sisters.

¶ 10 A friend drove Adela and the girls to the emergency room at St. Mary's Hospital. There, D.H. told the doctors that she had been sexually assaulted. A doctor performed a sexual assault

kit on D.H., which included taking a blood sample and vaginal swabs. Those samples, and D.H.'s underwear, were placed in the sexual assault kit. Detective Jose Castaneda arrived at the hospital and spoke to Adela who told them what she had seen.

¶ 11 Castaneda, a detective in the Special Investigations Unit at the Children Advocacy Center (CAC) and his partner, Detective Mark DiMeo, were assigned to investigate the allegations against Arroyo. The detectives spoke to D.H. and Adela at the CAC on April 29. Adela also spoke with Assistant State's Attorney Lisa Morrison, with Castaneda present, and repeated what she had seen.

¶ 12 About 8 p.m., the detectives interviewed Arroyo who admitted to assaults on D.H. that occurred during April 2011. According to Arroyo, who spoke to the detectives in English, the first incident occurred when he wanted to make D.H. feel better because she was having issues at school and had broken up with her boyfriend**.** They began touching each other's bodies, took each other's clothes off, and began to kiss**.** Arroyo kissed D.H.'s breasts and touched her buttocks and vagina**.** He performed oral sex on her, placing his mouth on her vagina, and then they had vaginal sex. Arroyo wore a condom. The first incident ended because he had to go meet someone. He did not ejaculate during sexual contact with D.H., but, "at times after" he would masturbate.

¶ 13 Arroyo also told detectives about the April 28th incident. While he and D.H. were home alone, they kissed and fondled each other. He touched her buttocks, vagina, and breasts and then they had vaginal sex. They stopped when Adela walked into the apartment. Arroyo realized what he was doing was wrong and he felt bad.

¶ 14 ASA Morrison arrived at 10 p.m. and interviewed Arroyo. Castaneda and DiMeo were present for the interview. Arroyo's statements to Morrison were similar to what he had told the detectives. He admitted to three incidents involving D.H. that occurred when he and his daughter were alone at home. Arroyo touched D.H.'s chest, buttocks, and vagina. He also put his hands in her vagina. He was sexually aroused when he kissed and touched D.H. Arroyo told Morrison about a third incident, which occurred a week after the first incident, where he and D.H. were in a "69" position. He performed oral sex on her, placing his mouth on her vagina, while she placed her hand on his penis.

¶ 15 Arroyo agreed to provide a written statement. While Castaneda was out of the room, Morrison ascertained from Arroyo that he had been treated well. Castaneda was present when Morrison memorialized Arroyo's statement. Morrison asked Arroyo questions in English, he responded in English, and Morrison typed his statement on a computer. Castaneda observed Arroyo sign the statement. Castaneda and Morrison also signed the statement. Arroyo identified a photograph of D.H. and a photograph of himself. Arroyo, Castaneda, and Morrison signed both photographs.

¶ 16 According to Arroyo's statement, before the date of the first incident, D.H. was being picked on by classmates and having a hard time in high school. After she and Arroyo spoke about her problems, he comforted her, hugged her, and kissed her on the face. They started touching each other's bodies and taking each other's clothing off. Arroyo touched D.H.'s breasts and buttocks with his hands and kissed her breasts with his mouth. Arroyo also rubbed D.H.'s vagina with his hands and put a finger inside it. D.H. did not touch Arroyo's penis because she

was shy. After Arroyo and D.H. touched each other's bodies, they had sex. Arroyo put his penis inside D.H.'s vagina for about 20 minutes.

¶ 17 About a week later, D.H. came home from school and was upset because classmates had teased her about her body. Arroyo and D.H. talked in Arroyo's bedroom and started to kiss. They touched each other and removed each other's clothing. Arroyo and D.H. were naked in bed in a "69" position. Arroyo put his mouth on D.H.'s vagina and his tongue inside her vagina. D.H. did not want to perform oral sex on Arroyo, but rubbed his penis with her hand. Arroyo then had sex with D.H. by placing his penis in her vagina for about 30 minutes.

¶ 18 Finally, on April 28, 2011, Arroyo recounted that D.H. did not go to school and was home alone with Arroyo. They began kissing in the bathroom. Arroyo and D.H. then went to Arroyo's bedroom, where he pulled his pants down and she pulled down her pants. She was on the bed and he leaned over her and placed his penis in her vagina for about a minute. All of a sudden, D.H.'s eyes opened wide and she looked surprised. Arroyo looked and saw Adela at the door. Adela told Arroyo she was leaving him and taking the girls with her. Adela made a phone call and left the apartment with the girls. Arroyo stated he felt really bad for what he did and for putting his daughter through this.

¶ 19 When the statement was completed, Arroyo made several corrections, which were initialed by himself, Morrison, and Castaneda, and he also read the statement out loud in English to Morrison and Castaneda.

¶ 20 After he was charged, Arroyo filed a motion to suppress his statements on the ground that he was not provided *Miranda* warnings, he did not speak English and thus did not understand either the *Miranda* warnings or what police were saying to him, police continued to question him

after he invoked his right to counsel, and his written statement was the product of coercion and material misrepresentations. Castaneda and Morrison testified during the hearing that Arroyo spoke to both of them in English and never requested to speak in Spanish. Castaneda, who is fluent in Spanish, told Arroyo he could speak to him in Spanish, but Arroyo declined. Arroyo testified, through an interpreter, that he spoke little English and did not understand what the detectives or the ASA were saying, except when they spoke "very slowly." For example, Arroyo understood when the detectives told him in English that if he did not admit to assaulting his daughter, they would arrest Adela and D.H. to find out who was lying. He admitted signing certain pages of the statement and the photographs of himself and D.H., but denied signing the portion of the written statement describing his sexual contact with D.H. The motion was denied. Arroyo persisted in his assertion that he did not speak English and had the assistance of an interpreter throughout the proceedings in the trial court.[1]

¶ 21 The matter proceeded to trial before a jury. In addition to testimony regarding the assaults on D.H. and the ensuing police investigation, the State presented testimony from three forensic scientists with the Illinois State Police Crime Forensic Science Center who participated in the DNA analysis of the buccal swab obtained from Arroyo and D.H.'s sexual assault kit.

¶ 22 Casey Karaffa received the sexual assault kit performed on D.H., which included D.H.'s blood standard, vaginal swabs, and underwear. Karaffa analyzed the swabs and underwear for the presence of semen and sperm. Two preliminary tests indicated the presence of semen on the vaginal swabs and underwear. The third confirmatory test, which required the complete

[1] We discuss below the facts as they relate to Arroyo's claims that the trial court erred in failing (i) to appoint a private attorney to represent him and (ii) to conduct an adequate inquiry into his posttrial claim of ineffective assistance of counsel.

consumption of the samples, was negative for sperm. The third test was based on sperm heads and could, in certain cases, produce a negative result despite the presence of semen in cases where a contributor has a low sperm count or has undergone a vasectomy. Karaffa admitted that it was possible for another bodily fluid besides semen to trigger positive preliminary test results.

¶ 23 Ruben Ramos performed DNA testing on the vaginal swabs and underwear and found male DNA in both. Ramos was not able to generate a profile given the large amount of female DNA present. Ramos recommended that an analysis of the short tandem repeats (STRs) on the Y chromosome (Y-STR testing) be performed. Ramos acknowledged that Y-STR testing is extremely sensitive, can be contaminated, and is used in cases involving small DNA samples.

¶ 24 Lisa Fallara performed Y-STR analysis on the samples from the vaginal swabs and underwear. The male DNA in the vaginal swabs and underwear matched Arroyo's profile from the buccal swab. According to Fallara, this Y-STR DNA profile would be expected to occur in approximately 1 in 1,500 unrelated African American males, 1 in 1,000 unrelated Caucasian males, or 1 in 1,000 unrelated Hispanic males. While Arroyo's DNA profile matched the major male profile from the samples, there was a minor male DNA profile that did not match Arroyo. Fallara was aware of studies that have shown that sperm cells can transfer between items of clothing in the laundry.

¶ 25 The State rested, and defense counsel moved for a directed finding, which was denied.

¶ 26 Arroyo elected to testify on his own behalf. At the time of trial, he was 39 years old. Arroyo denied having any sexual contact with D.H. On April 28, 2011, D.H. and Arroyo were home alone and Arroyo undressed to his underwear for a haircut. D.H. was being playful and she stumbled on top of him. At that moment, Adela entered the room, was upset about something,

and "thought ill of what she saw." Arroyo denied making inculpating statements to detectives and Morrison about sexual contact with his daughter.

¶ 27 The jury found Arroyo guilty on all counts except the criminal sexual assault count, which alleged that Arroyo knowingly committed an act of sexual penetration upon D.H. (penis-to-vagina contact) by the use of force or threat of force.

¶ 28 On May 28, 2015, Arroyo filed a motion for new trial and on July 30, 2015, he filed an amended motion, arguing, *inter alia*, that there was insufficient evidence to support counts 11, 13, and 15, because the only evidence that the acts occurred were his own statements. The same day, Assistant Public Defender David Roleck informed the court that Arroyo had also filed a *pro se* motion entitled "Motion for Judgment of Acquittal or a New Trial." In his 31-page *pro se* motion, Arroyo raised a number of claims. As relevant here, Arroyo claimed that his trial counsel failed to (i) object to the State's motion to consume DNA evidence during testing, (ii) request a hearing on the State's motion to collect a buccal swab, and (iii) subpoena documents relating to "Cordero," who was referred to in Arroyo's written statement,[2] and which would have shown both Morrison and Castaneda committed perjury.

¶ 29 After argument on the amended motion for new trial, the trial court denied it. The court then stated that it had reviewed Arroyo's *pro se* motion. The court asked Arroyo, "in addition to the written words contained in this document, do you have any additional matters which you choose to present to this court?" Arroyo responded, "I have friends at the legal library and they helped me to search and write what I have to write. I've just copied what [they] gave me. That's all." The court denied Arroyo's motion.

[2] In an obvious typographical error, the last page of Arroyo's statement reads "Cordero [sic] states that he was given two sandwiches and something to drink."

¶ 30 The court sentenced Arroyo to a total of 28 years' imprisonment: three consecutive sentences of nine, eight, and seven years' imprisonment for criminal sexual assault (counts 10-12, respectively), to be served consecutively with two concurrent terms of four years' imprisonment for aggravated criminal sexual abuse (counts 13 and 15).

¶ 31 We first address Arroyo's claim that the State failed to prove him guilty beyond a reasonable doubt of criminal sexual assault in count 11 (mouth-to-vagina penetration) and aggravated criminal sexual abuse in count 15 (mouth-to-breast contact) because it did not prove the *corpus delicti* of those offenses. Arroyo maintains that the only evidence that he committed the alleged sexual acts came from his own postarrest statements.

¶ 32 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we consider whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). A defendant's conviction will not be overturned unless the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt as to defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48.

¶ 33 "Under the law of Illinois, proof of an offense requires proof of two distinct propositions or facts beyond a reasonable doubt: (1) that a crime occurred, *i.e.*, the *corpus delicti*; and (2) that the crime was committed by the person charged." *People v. Sargent*, 239 Ill. 2d 166, 183 (2010). A defendant's out-of-court admission alone cannot prove the *corpus delicti*. *People v. Lara*, 2012 IL 112370, ¶ 17; *Sargent*, 239 Ill. 2d at 183. Rather, a defendant's extrajudicial admissions must also be accompanied by "independent corroborating evidence." *Lara*, 2012 IL112370, ¶ 17.

The corroborating evidence need not be sufficient in itself to prove the offense beyond a reasonable doubt. *Id.* ¶ 45. Instead, under the *corpus delicti* rule, "the independent evidence need only *tend* to show" the crime occurred. (Emphasis in original.) *Id.* ¶ 18. "If a confession is not corroborated in this way, a conviction based on the confession cannot be sustained." *Sargent*, 239 Ill. 2d at 183. Whether there is sufficient independent corroboration of defendant's confession to satisfy the *corpus delicti* rule presents an issue of law, which we review *de novo*. *Lara*, 2012 IL 112370, ¶ 16.

¶ 34 Both *Sargent* and *Lara* address the independent corroboration rule. In *Sargent*, the defendant was charged with three counts of predatory criminal sexual assault of a child, for inserting his finger into M.G.'s anus, and two counts of aggravated criminal sexual assault for fondling M.G.'s penis. *Id.* at 170. The defendant confessed that he put his finger in M.G.'s anus numerous times and fondled M.G.'s penis. *Id.* at 176-77. At trial, the State presented evidence that the victim, M.G., had accused the defendant of putting his finger in M.G.'s anus, but did not present any evidence to corroborate the defendant's confession to fondling M.G.'s penis. *Id.* at 185. The defendant repudiated his confession and M.G. testified that he could not remember if the defendant had done anything to him that M.G. did not like. *Id.* The jury found the defendant guilty of all five counts. *Id.* at 181. Defendant's convictions were affirmed on direct appeal.

¶ 35 As relevant here, the *Sargent* court reversed two of defendant's convictions for aggravated criminal sexual assault. *Sargent*, 239 Ill. 2d at 187. In reversing the two aggravated criminal sexual assault convictions based on allegations of fondling, the court noted that aside from the defendant's confession there was no evidence of any kind to corroborate the defendant's confession that he fondled M.G's penis. The court explained:

> "The State contends the evidence of defendant's penetration of M.G.'s anus with his finger * * * provides sufficient corroboration that defendant also fondled M.G.'s penis. We note, however, that these were separate acts which gave rise to separate charges. Our precedent demonstrates that under the corroboration rule, the independent corroborating evidence must relate to the specific events on which the prosecution is predicated. Correspondingly, where a defendant confesses to multiple offenses, the corroboration rule requires that there be independent evidence tending to show that defendant committed each of the offenses for which he was convicted. [Citation.] *** There may be circumstances where criminal activity of one type is so closely related to criminal activity of another type that corroboration of one may suffice to corroborate the other, but such circumstances are not present here. See *People v. Richmond,* 341 Ill. App. 3d 39, 46 (2003) (corroboration rule applied to overturn conviction and sentence involving unlawful penis-to-vagina contact, notwithstanding defendant's confession, where corroborating evidence substantiated only penis-to-anus contact)." *Sargent,* 239 Ill 2d at 184-85.

¶ 36 The corroboration rule was further examined in *People v. Lara*, 2012 IL 112370 (2012), in which the defendant was charged with two counts of predatory criminal sexual assault of eight-year-old J.O. *Id.* ¶ 5. The defendant confessed to penetrating the victim's vagina on two separate occasions while she slept at his apartment. *Id.* ¶ 5. The evidence introduced at trial, however, showed only that J.O. had said in an interview, and repeated in her trial testimony, that

defendant touched her "private" twice while she was at his apartment, with no explicit reference to penetration. *Id.* ¶ 10.

¶ 37 This court held that the *corpus delicti* rule required the State to produce independent evidence of the element of penetration and that insufficient independent evidence was presented to support the defendant's convictions for predatory criminal sexual assault. *Id.* ¶ 2. Accordingly, this court reversed the defendant's convictions, reducing them to the lesser-included offense of aggravated criminal sexual abuse, and remanded for resentencing. *Id.* The State appealed.

¶ 38 Our supreme court reversed. The court first clarified the *corpus delicti* rule discussed in *Sargent*, noting that its statement in *Sargent* that corroboration must "relate to the specific events on which the prosecution is predicated" was addressed not to just any two separate criminal charges, but particularly to criminal charges alleging distinctly different types of acts. *Id.* ¶ 24. The court in *Lara* pointed out that *Sargent* "did not countenance the use of evidence establishing the defendant's digital penetration of [the victim] to prove the fondling allegation as well precisely because the latter constituted an entirely different type of assault affecting a different part of the victim's body." *Id.* ¶ 24, citing *Sargent*, 239 Ill. 2d at 185 (requiring separate corroboration where the two criminal counts alleged contact with different parts of the victim's body). In *Lara*, unlike *Sargent*, exactly the same type and point of contact was alleged in both predatory criminal sexual assault counts filed against the defendant *i.e.* that he inserted his finger into the victim's vagina. *Id.* ¶ 25. The *Lara* court also noted that "*Sargent* recognized that in some instances one type of criminal activity could be 'so closely related' to another type that 'corroboration of one may suffice to corroborate the other.' " *Id.* ¶ 26 (quoting *Sargent*, 239 Ill. 2d at 185). Thus, the fact that the victim' statement described two occasions on which defendant

touched her "private parts" sufficiently corroborated defendant's confession to digitally penetrating the victim's vagina. "Corroboration of only some of the circumstances related in a defendant's confession is sufficient." *Id.*¶ 45.

¶ 39 Turning to the record here, we disagree that the State failed to prove the *corpus deliciti* of the mouth-to-vagina and mouth-to breast counts. In addition to Arroyo's confession, independent evidence consisting of D.H.'s testimony regarding the first incident established that Arroyo penetrated her vagina with his penis and his finger. These assaults are closely related to the claimed oral penetration of D.H.'s vagina by Arroyo and, according to Arroyo's statement to the detectives, the oral penetration occurred during the first incident. The same can be said of the mouth-to-breast contact. D.H. testified that Arroyo fondled her breasts during the first incident and so the alleged mouth-to-breast contact with the same body part is closely related and, again, Arroyo admitted that the mouth-to-breast contact occurred during the first assault. We therefore reject Arroyo's request that two of his convictions be reversed.

¶ 40 Arroyo next contends that the trial court abused its discretion in denying his motion to appoint a private attorney, despite a showing of prejudice caused by the Public Defender's office's failure to consult with an independent DNA expert in his case. To provide context, we recount the history of Arroyo's representation by counsel and self-representation.

¶ 41 On June 9, 2011, the trial court appointed the Public Defender's office to represent Arroyo and Assistant Public Defender Wendy Steiner appeared on Arroyo's behalf. Over Steiner's objection, the court granted the State's motions to compel Arroyo to submit to collection of a buccal swab and to authorize the consumption of the samples during testing because the samples were small.

¶ 42 From September 24, 2012, through January 30, 2013, Steiner requested, and the trial court granted continuances while she had ongoing discussions with an attorney from the Public Defender's forensics unit about the need to hire a DNA expert. Steiner ultimately did not request leave to retain an expert witness before completing discovery.

¶ 43 On April 22, 2013, Arroyo filed a motion to represent himself, alleging that Steiner had a conflict of interest because she believed he was guilty, had not acted in his best interests, and had ignored his wishes. From April 22 through September 20, 2013, the court continued the matter several times to accommodate Arroyo's attempts to retain outside counsel. On September 20, after Arroyo was unable to procure private counsel, the court reappointed Steiner. Arroyo then insisted upon representing himself and the court granted Steiner's motion to withdraw. Before withdrawing, Steiner tendered discovery she had received from the State to Arroyo.

¶ 44 Arroyo represented himself for the next several months. On January 16, 2014, the court referred Arroyo for a behavioral clinical examination (BCX) to determine to determine both his fitness to stand trial and his ability to represent himself.

¶ 45 Although the case was continued for status to February 19, 2014, an order dated January 22, 2014, appears in the record that reads, "This cause coming on call to be heard for status, the court having jurisdiction over the parties and subject matter, does hereby order that: 1. Daniel Coyne and Chicago-Kent College of Law are hereby appointed to represent the Defendant…." No transcript of a January 22, 2014 status hearing is in the record, nor is it reflected in the half sheet containing the trial judge's notes for the case.

¶ 46 At the next status scheduled for February 19, 2014, Coyne appeared for Arroyo. Arroyo informed the court that he did not accept the appointment and wanted to represent himself. The

court stated it would not remove Coyne until Arroyo underwent a BCX, which the court re-ordered, nor would it consider Arroyo's *pro se* motion to dismiss the charges against him until he was deemed fit to represent himself.

¶ 47 On April 9, 2014, Arroyo informed the court he accepted Coyne's appointment. Coyne filed a motion to appoint as a defense expert Independent Forensics of Illinois, a private laboratory with a specialty in DNA analysis. The State requested leave to respond to the motion. On April 18, 2014, instead of responding to the motion to appoint an expert, the State filed a motion to vacate Coyne's appointment, arguing that the appointment of private counsel is limited to cases where the Public Defender's office is unavailable to represent a defendant or where a defendant establishes that the Public Defender's office's representation of him would result in prejudice. 725 ILCS 5/113-3(b) (West 2010). After reviewing the statute, the court agreed with the State, vacated Coyne's appointment, and informed Arroyo that he could either accept representation by the Public Defender's office or represent himself, but he did not have a right to private counsel. The court granted Arroyo's oral motion to proceed *pro se*.

¶ 48 On May 23, 2014, the court conducted a hearing on Arroyo's motion to dismiss the charges against him, which was denied.

¶ 49 On June 27, 2014, the court reappointed the Public Defender's office to represent Arroyo. Assistant Public Defender David Roleck appeared on Arroyo's behalf without objection from Arroyo. On August 11, 2014, Roleck received discovery and reviewed it with Arroyo. The court granted several continuances for Roleck to tender DNA evidence to the Public Defender's office's forensics unit and for its review of the evidence to be completed. At none of the status

hearings conducted between June 2014 and February 2015 did Arroyo voice any objection to Roleck's representation.

¶ 50 On February 20, 2015, Arroyo filed a *pro se* motion for the removal of Roleck. Like his motion directed to his former public defender, Arroyo claimed Roleck had a conflict of interest because Roleck believed Arroyo was guilty and that Roleck was not acting in Arroyo's best interests. The court asked Arroyo if he wished to proceed *pro se*. Arroyo responded that he did not wish to represent himself, but refused to be represented by the Public Defender's office. He asked the court to appoint a private attorney. The court denied Arroyo's motion, stating he could either represent himself or continue to be represented by the Public Defender's office. The court noted there was no evidence of Arroyo's allegations that the Public Defender's office refused his requests to subpoena witnesses and documents as a part of discovery, violated his right to have an independent DNA expert hired, or that Roleck was not acting to protect his rights. Arroyo proceeded to trial with Roleck representing him.

¶ 51 Based on the foregoing circumstances, Arroyo contends that the court abused its discretion in refusing to appoint a private attorney to represent him. If a court determines that the defendant is indigent and desires counsel, the public defender shall be appointed as counsel. 725 ILCS 5/113-3(b) (West 2010). If there is no public defender's office in the county or if "the court finds that the rights of the defendant will be prejudiced by the appointment of the Public Defender," the court may appoint a licensed attorney to represent a defendant. *Id.* "A showing of prejudice is necessary under [Section 113-3(b)] before the court can exercise its discretion and appoint another attorney." *People v. Adams,* 195 Ill. App. 3d 870, 872 (1990). Vague claims of dissatisfaction, or assertions that appointed counsel is working with the State's Attorney against

defendant, are insufficient to establish prejudice. See, *e.g.*, *People v. Hall*, 114 Ill. 2d 376, 403-04 (1986). A trial court's decision on a motion for substitution of counsel is reviewed for an abuse of discretion. *People v. Wanke*, 303 Ill. App. 3d 772, 782 (1999).

¶ 52 The trial court did not abuse its discretion in denying Arroyo's motion to appoint a private attorney where Arroyo failed to show that he was prejudiced by the appointment of the Public Defender's office. The record shows that the matter was continued on multiple occasions so that the Public Defender's office could consult with its forensics unit about the need to hire a DNA expert and matters related to the DNA evidence. Ultimately, the Public Defender's office elected not to present a DNA expert witness. Although Arroyo now argues that he was prejudiced by his trial counsel's failure to consult with an independent DNA expert, Arroyo offers no explanation as to why an outside expert was preferable to the Public Defender's office's own forensics unit. Without such explanation, Arroyo's argument is conclusory and insufficient to establish prejudice. *Adams*, 195 Ill. App. 3d at 873 ("vague charges" insufficient to show prejudice); *Hall*, 114 Ill. 2d at 403-04 (assertions that appointed counsel is working with the State's Attorney against defendant are insufficient to establish prejudice). Further, through cross-examination of the State's witnesses, counsel for Arroyo was able to establish that (i) the third confirmatory test initially performed did not reveal the presence of sperm; (ii) Y-STR testing is extraordinarily sensitive and prone to contamination, and (iii) it was possible for sperm to transfer to clothing in the laundry. Arroyo does not articulate what else an independent expert could have established given the consumption of the DNA sample and so has failed to demonstrate prejudice.

¶ 53 Arroyo criticizes that State's conduct in requesting the opportunity to respond to Coyne's motion to retain an independent expert and instead filing a motion to vacate Coyne's appointment. But the fact is that Coyne's appointment, as acknowledged by the trial court, was unauthorized under the statute and although Roleck could certainly have pursued retention of an expert had he deemed it appropriate, he elected not to do so. Under these circumstances, we cannot say the trial court abused its discretion in denying Arroyo's motion to appoint an attorney other than the Public Defender's office.

¶ 54 Arroyo next contends that the trial court erred by failing to inquire into the factual basis of his *pro se* posttrial claims of ineffective assistance of counsel.

¶ 55 A *pro se* posttrial claim alleging ineffective assistance of counsel is governed by the procedure set forth in *People v. Krankel*, 102 Ill. 2d 181 (1984). *People v. Ayres*, 2017 IL 120071, ¶ 1. When a defendant makes a posttrial claim of ineffective assistance of counsel, either orally or in writing, new counsel is not automatically required to be appointed. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, the trial court must conduct a preliminary inquiry into the underlying factual basis, if any, of a defendant's *pro se* claim of ineffective assistance of counsel. *Ayres*, 2017 IL 120071, ¶ 11.

¶ 56 The court may conduct the preliminary inquiry by: (1) questioning trial counsel about the facts and circumstances of the defendant's allegations; (2) requesting more specific information from the defendant; or (3) relying on its own knowledge of counsel's performance at trial and any insufficiency of the defendant's allegations on their face. *Moore*, 207 Ill. 2d at 78-79. If the allegations show possible neglect of the case, new counsel should be appointed. *Ayres*, 2017 IL 120071, ¶ 11. However, if after the preliminary inquiry, the court determines that the claim lacks

merit or pertains only to matters of trial strategy, the court need not appoint new counsel and may deny the *pro se* motion. *Moore*, 207 Ill. 2d at 78. A claim lacks merit if it is conclusory, misleading, legally immaterial, or does not bring to the trial court's attention a colorable claim of ineffective assistance of counsel. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 22. Whether the court conducted a proper preliminary *Krankel* inquiry is a legal question that we review *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28.

¶ 57 Our review of the record shows that the trial court conducted an adequate inquiry into Arroyo's ineffective assistance claims based on its knowledge of counsel's performance at trial and the insufficiency of Arroyo's allegations. Arroyo's first claim alleged that counsel was ineffective for not requesting a hearing regarding the State's consumption of the swabs from D.H.'s rape kits and the State's motion to collect his buccal swab. But these procedures are standard in sexual assault cases and the record shows that counsel objected to both of the State's motions and the trial court granted the motions over counsel's objections. See *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 28 ("Counsel is not required to make futile motions in order to provide effective assistance.").

¶ 58 Arroyo's remaining ineffectiveness claims—based on Roleck's decision to not call an independent DNA expert and his cross-examination of Castaneda and Morrison—are insufficient on their face because those decisions concerned matters of trial strategy. See *People v. Patterson*, 217 Ill. 2d 407, 442 (2005) ("The decision whether to call particular witnesses is a matter of trial strategy and thus will not ordinarily support an ineffective-assistance-of-counsel claim."); see also *People v. Watson*, 2012 IL App (2d) 091328, ¶ 32 ("[G]enerally speaking, whether to call particular witnesses and the manner and extent of cross-examination are matters of trial strategy"

(citing *People v. Ramey*, 152 Ill.2d 41, 54 (1992)). Further, the court was familiar with Roleck's performance before and during trial and, as a result, additional examination of either Roleck or Arroyo was unnecessary. Accordingly, we find that, given the nature of Arroyo's *pro se* claims, the trial court's inquiry into the claims was sufficient.

¶ 59 Affirmed.