2018 IL App (2d) 151153-U
No. 2-15-1153
Order filed July 27, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHAEL ROMANO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 14-CF-22 Honorable Sharon L. Prather, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Even if the trial court erred in admitting hearsay evidence, the error was harmless because the hearsay evidence was cumulative and duplicated other evidence; the prosecutor's statements during closing argument did not undermine the presumption of innocence or shift the burden of proof to the defense; and defendant was not entitled to a *Krankel* inquiry. Therefore, we affirmed.

¶ 2 Following a jury trial, defendant, Michael Romano, was found guilty of two counts of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) in the deaths of his father, Nicholas Romano (Nick Sr.) and his step-mother, Gloria Romano.[1] In this direct appeal, defendant argues

[1] We refer to Nick Sr. and Gloria as defendant's "parents."

that: (1) the trial court erred in admitting hearsay evidence; (2) the prosecution's closing argument contained an erroneous statement of law that was highly prejudicial; and (3) remand for an inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984), is necessary because, in posttrial proceedings, he raised an allegation of ineffective assistance of counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by indictment on January 8, 2014, with four counts of first-degree murder. Count I alleged that he shot Gloria with the intent to kill her, and count II alleged that he shot her knowing that the act would cause her death. Counts III and IV alleged the same as to Nick Sr. The State later nol-prossed counts I and III.

¶ 5 We summarize the evidence presented at defendant's trial, which began on September 21, 2015. Shortly before 3 a.m. on November 20, 2006, defendant called 911 and said that he had gone to check on his parents at their Crystal Lake home and found them dead. Defendant said that the lights and T.V. were on and that he used a key to enter the front door.

¶ 6 Defendant called Sharon Romano, his sister-in-law, at about 3 a.m., wanting to speak to his brother, Nicholas Romano (Nick Jr.). Nick Jr. was at the gym, where he often was as that hour because he began work at 5 a.m. Defendant told Sharon of the deaths. Sharon was eventually able to get ahold of Nick Jr., and they went to the house.

¶ 7 The deputy sheriff dispatched to the house found defendant in the driveway. Defendant's demeanor was "normal"; he was not crying or emotional. Defendant said that he had come over at around 2 a.m. to check on his parents, and that he had unlocked the front door. He said that he found Gloria in the kitchen and Nick Sr. on the basement steps.

¶ 8 The deputy sheriff went inside and found the tv blaring and the victims where defendant had described them to be. The deputy sheriff did not notice a cigarette butt anywhere in the area.

A paramedic who entered the kitchen also did not notice a cigarette butt. The deputy sheriff did not see any signs of a break in or a struggle, nor did he immediately observe any blood or gunshot wounds. He initially thought defendant's parents may have been killed by carbon monoxide. Nick Jr. arrived and was very emotional. When told that defendant had called the police, he asked what that "f*cker" was doing there. In contrast, defendant said that he and Nick Jr. got along and that they were a very close knit and loving family. Defendant told the deputy sheriff that he went to check on his parents because he had made arrangements with Gloria to go gambling on November 20 but was not able to reach either of his parents on Sunday, November 19. Defendant also explained that Gloria turned up the volume when she watched tv because she was extremely hard of hearing.

¶ 9 The police discovered that Gloria, who was almost 66 years old, had one gunshot wound to the back of her head. A .22 caliber shell casing was found under the kitchen table, consistent with someone having shot Gloria from behind. Nick Sr., who was 70 years old, had been shot twice in the back of the head. Two .22 caliber shell casings were found near Nick Sr.; he also had a toothpick in his mouth. The gunshot wounds were visible only after the bodies had been moved, at which time defendant was not present.

¶ 10 On the kitchen counter, there was a logbook where Gloria would record her blood pressure and weight twice a day, in the late morning/early afternoon and at night. The date November 19, 2006, was written, but no information was entered. A signed birthday card from defendant and his dog was found on the kitchen table. The tv was on channel 32, which had been broadcasting the Chicago Bears game on November 19, 2006, at noon. There was a paper nearby where Gloria had been writing the Bears' scores and win-loss record, but there was no entry for the game on November 19, which had ended around 3:15 p.m. Nick Sr. had met Nick

Jr. that morning from 6 to 7 a.m. for breakfast, and Nick Sr. was excited about his upcoming trip to Mexico. Nick Sr. spoke to a friend later that morning, around 9 to 9:15 a.m. Nick Sr.'s computer had been logged onto at 10:41 a.m. He typically ate an early dinner around 3 p.m., but there was no indication that he did so that day. The pathologist opined that Nick Sr. and Gloria died between 10:41 a.m. and 2 or 3 p.m. on November 19, 2006. Nick Sr. and Gloria had been married for about 40 years at the time of their deaths.

¶ 11 A detective found a cigarette butt on the tile floor, about eight feet from Gloria's body. Only the "E-L" on top of the cigarette was initially visible, but it was later revealed to be a Camel cigarette. There was no ash or burn residue near it, so it appeared to the detective that "it was introduced at the crime scene." The cigarette butt did not contain any DNA belonging to defendant, Nick Jr., Nick Sr., or Gloria. It also did not match any profiles in an FBI database. A cigarette butt of an unknown brand was found to the side of the front door, and it contained defendant's DNA. Nick Sr. smoked Benson & Hedges cigarettes, Gloria smoked Virginia Slims, and defendant smoked Newport.

¶ 12 Gloria was wearing gold necklaces, and Nick Sr. was wearing numerous items of gold jewelry. He had a safety deposit key in his pocket as well as thousands of dollars. A total of over $200,000 was found in various locations throughout the house.[2] Also found in various locations were numerous firearms, some of which were loaded, and boxes of ammunition, including up to 1,000 rounds of .22 caliber ammunition. A pellet gun was near the patio. Nick Sr. had a valid firearm owner's identification card. There was no credible information that Nick Sr. was engaged in any illegal activities.

[2] About one year later, on October 31, 2007, a safe was found in the basement floor containing an additional $100,000, and that cash was subsequently released to Nick Jr.

¶ 13 A promissory note found in a house safe listed defendant as borrowing $26,500 at 5% interest on November 18, 2003. Another promissory note signed by Nick Jr. and Sharon was dated April 1, 2001, and was for $30,000 at 7% interest. A third promissory note signed by Nick Jr. and Sharon was dated November 4, 2003, and was for $32,000. The safe also contained Nick Sr.'s will and an amendment dated April 11, 1997, to his irrevocable trust. In the office, there was a handwritten note stating: "To my son, Michael Romano, I leave $20,000 upon my death. I hope he understands my feelings on how he has affected my life." Disability paperwork for defendant was found in the office as well.

¶ 14 An analysis of Nick Sr.'s computer revealed a document that was saved in October 2005 and stated:

> "Michael, Like I told you before, I do not like to have to ask for money. When we agreed to borrow you [*sic*] the money, you agreed to pay $250.00 a month. I know you do not make a lot, but you manage to pay your credit cards monthly before. You keep calling saying we will get together Sunday[,] and I never hear from you. I expect you to try and pay something on a monthly basis. It will be two years in December[,] and you have only paid $1,860.00. Please try and do better so I don't have to hear about it. I know things have been tough on you, but it has not been any better for me. Please try and understand my position. Dad." [3]

¶ 15 The police interviewed Nick Jr. from about 6:35 a.m. to 7:10 a.m. on November 20, 2006. He was upset and crying. Nick Jr. was very cooperative and agreed to submit to a gunshot residue analysis and to a search of his car. He told the police that after Nick Sr. lost his job due to defendant's actions, he took defendant out of his will.

[3] The original document was written in all capital letters.

¶ 16 The police interviewed defendant at about 7:50 a.m. on November 20, 2006, and he remained at the police station until 7 p.m. at night. Defendant stated the following to police. He went to his parents' house on Friday, November 17, 2006, at about 1 or 2 p.m., to go over paperwork relating to his disability claim and give Gloria a birthday card. Nick Sr. was "busting his balls" because he liked belittling defendant. Defendant stayed for about 40 minutes. The following day, which was November 18, he went to White Hen and McDonald's just after 10:30 a.m. and was home the rest of the day. On Sunday, November 19, at about 12:30 p.m., he called Nick Sr.'s cell phone. Nick Sr. did not answer, even though he "always anwer[ed] the phone." Defendant watched the Bear's game and called his parents' house phone at 7:18 p.m. No one answered, and defendant left a message. He was going to ask Gloria if she wanted to stay with him during Nick Sr.'s upcoming trip to Mexico; he described his relationship with Gloria as "tight." Defendant dozed off, and after waking up a little after 2 a.m., he saw that his calls were not returned. He thought it was unusual because his parents "always called" when he left a message. He went to White Hen and got coffee and then proceeded to their house. All of the lights were on, which seemed strange to defendant. He unlocked the door and saw Gloria in the kitchen and Nick Sr. on the stairs. Defendant then went outside and called the police.

¶ 17 When asked about his finances, defendant said that he had worked at the Wyndham Club in Palatine as a property manager from 2004 to April 2006. He left due to an injury for which he received an $18,000 workers' compensation settlement. The Wyndham Club wanted defendant to come back in January, but he had to see how he was feeling. He had sold his house to an investor, who was renting it back to him. Defendant had also applied for Social Security disability. He admitted borrowing about $20,000 from Nick Sr. about two to three years prior,

and said that he had paid some of it back. Defendant felt that Nick Sr. owed him the money because of what had happened when they and Nick Jr. all worked at Pepper Construction.

¶ 18 Defendant explained that he worked at Pepper Construction from 1980 to 1989 overseeing purchasing. Nick Sr. would "tell [him] to do certain stuff on invoices" for supplies, and then Nick Sr. would sign off on the invoices and get kickbacks. Management confronted defendant and said that if he admitted to wrongdoing, his father and brother could keep their jobs. Defendant agreed even though he did not do anything wrong. Still, Nick Sr. was fired as well. Nick Sr. was also "hooked up *** big time" with "other ventures," and defendant thought that someone was trying to get at his father through him. He described, years ago, finding his dog tied up in the basement after coming home and finding a rat on his car dashboard.

¶ 19 Defendant denied owning any guns. He said that he had not fired a gun and consented to a search of his vehicle but stated, "If somebody plants something in my car because I loved my dad and Gloria [*sic*]. I would never do anything to hurt anybody, okay." He also said that his uncle on his biological mother's side had a gun collection. The uncle died six years before, and defendant's mom inherited the guns. They sold them at gun shows, and Nick Sr. also took some. Defendant later recalled shooting a rifle the week before at his parents' house, when Nick Sr. was shooting at a raccoon in the yard. Nick Sr. asked defendant if he wanted to try, and defendant shot a couple of rounds at a tree. Another time, in March 2006, he gave a drug dealer a ride from the back of the Wyndham Club property to the front, and that man shot a gun out of the car's window. Defendant then recalled that the previous week, he had picked up a hitchhiker. She pulled out a gun and stole the $750 he had in cash before having him stop the car, at which point she ran away.

¶ 20 Defendant said that he would like to leave the interview to sleep, but the police said that he was going to be detained until officers obtained a search warrant to perform a gunshot residue test. The police did not tell defendant during the interview how many times his parents had been shot.

¶ 21 Defendant's second interview took place on November 25, 2006. Defendant again described his activities on November 19 and 20. However, this time he described going to White Hen for cigarettes and McDonald's for breakfast on Sunday, November 19. He further stated that after waking up around 2 a.m. on November 20, he "had a taste for a cup of coffee" and decided to go to White Hen. When he was leaving White Hen, he decided to check on his parents because it was unusual that they had not called back; they were about a 15-minute drive away. He heard the tv blasting and rang the doorbell about 50 times. Defendant let himself in with his key and found them. He also saw a shell casing near Gloria, a little blood, and a Camel cigarette butt. Defendant estimated that he was inside for only 30 seconds.

¶ 22 When discussing his finances, defendant admitted borrowing a couple of thousand dollars from his girlfriend, Lenore Henning, who was married with three daughters. The police stated that they had talked to Henning about her loans to defendant, and he then agreed that she had loaned him tens of thousands of dollars.

¶ 23 Defendant stated that he had brought 25 to 30 guns from his uncle's collection from Colorado to Illinois. He sold them at guns shows, and Nick Sr. took four or five. Defendant also sold several guns to his neighbor, "Jim" (James Jacobs), who bought and sold guns. Defendant denied keeping records of gun sales and said that he had last seen Jacobs a couple of weeks ago. The police asked if defendant had seen Jacobs the day before, and defendant agreed, saying that Jacobs had expressed condolences. The police also stated that Henning had mentioned seeing

guns at defendant's house. He said that he had some but had gotten rid of them. When confronted, defendant agreed that the prior week, he had erased computer records pertaining to his gun sales.

¶ 24 The police then stated that Jacobs had told them that he had talked to defendant the previous week. They said that phone records showed that defendant had called Jacobs at 4:20 p.m. When questioned if he went to Jacob's house to ask for anything, defendant twice stated that he could not think of anything. He then stated that Jacobs gave him about 20 .22 caliber shells,[4] and defendant gave them to Nick Sr. when he went to his house on November 17. One of the detectives told defendant that Nick Sr. had amended his trust to disinherit defendant. Defendant said that he did not know about the amendment, and he denied having anything to do with the murders.

¶ 25 The police searched defendant's house in Algonquin on the same day as his second interview. There was a letter from the Social Security Administration dated September 8, 2006, on the dining room table. On the fireplace mantel, there was a safety deposit box envelope containing a key, some bank cards, and a handwritten note. The note stated: "Now that you know, you will realize why I did what I did. Enjoy this with the girls, this will change your life. I wish you and Ben happiness. Maybe tell them how much I wanted to know them. Take care." There was a lot of ash in the fireplace and what appeared to be paper. A bank bag in a hall closet contained silver certificate dollar bills. In the master bedroom, there was a document stating

[4] At trial, an officer testified that he spoke to Jacobs and learned that defendant had borrowed some .22 caliber long rifle ammunition from him on November 16, 2006. Jacobs gave the police the remainder of the box. Jacobs died in 2013, and his wife confirmed at trial that defendant had visited their home for about 15 minutes that day.

"Nicholas M. Romano Revocable Trust," and there were two envelopes inside. One was a living will and power of attorney for Nick Sr., and the other was a living will and power of attorney for Gloria.

¶ 26 An individual who worked at White Hen testified that defendant came in between 2 and 3 a.m. on November 20, 2006, and bought a pack of cigarettes and a cup of coffee. He paid with a $5 silver certificate and said that it came from an inheritance, and that the worker should keep it because of its value.

¶ 27 Defendant's former wife attended the funeral of Nick Sr. and Gloria. Afterwards, defendant told her that he had found a cigarette butt on the kitchen floor.

¶ 28 Defendant had a romantic relationship with Henning from 1990 until 2006. They talked on the phone, and Henning would see him every couple of months at his house. During the course of their relationship, Henning knew defendant to have possessed firearms and to have gambled. She also knew that he kept the key to his safety deposit box on the mantel. Henning had loaned defendant about $30,000 over the years. Defendant paid the bill when they went out to dinner, but he had repaid only $5,000 of the loans. Defendant had told her that Nick Sr. had millions of dollars and a trust in which defendant and Nick Jr. were the beneficiaries. He said that if Nick Sr. died, the money would go to Gloria, then to him and Nick. Defendant had told her about his efforts to obtain Social Security disability in 2006. In the summer of 2006, she went to defendants' parents' house with him, and they talked about Social Security. Nick Sr. was discounting and unsupportive. A few days later, Henning asked defendant if he could borrow money from Nick Sr. to pay her back. Defendant said, "I have no father."

¶ 29 Defendant texted Henning when he was being interviewed by the police on November 20, 2006, to ask if she could take care of his dog. When Henning arrived, she noticed that

defendant's house was cleaner than usual, and the washer and dryer had clothes in them, whereas the clothes were usually in a heap on the laundry room floor. Henning later picked defendant up from the police station, and he was not crying or emotional. Inside his home, he started pacing around and looking at lights, the telephone, and his laptop computer. He randomly said that he had erased a list of guns that he had on the computer. He then went upstairs, saying that he was going to take a shower, but he returned about 15 minutes later with the same clothes and dry hair. Defendant sat next to Henning on the couch, turned the volume on the T.V. up to an "obnoxious level," and whispered that he had seen a Camel cigarette butt about four feet from Gloria's body. Defendant and Henning then had sex and went out to eat.

¶ 30 A neighbor and friend of defendant testified that defendant called him on November 21, 2006, and said that he had found his parents dead. He said that they had been shot in the back of the head, execution style, and that he observed that Nick Sr. had been shot twice. According to the police, the fact that there were multiple gunshots was not disclosed to the public until after 2010.

¶ 31 A representative of Pepper Construction testified that in December 1999, the company received a phone call from a woman alleging that her husband and defendant were involved in a kickback scheme. An investigation revealed that defendant was submitting false and inflated invoices. Nick Sr. had approved 18 of the 19 invoices at issue. Defendant admitted his involvement in writing and agreed to resign as a result. Nick Sr. was forced to retire. Defendant agreed to pay Pepper Construction $100,000 in restitution. Defendant paid $20,000 in March 2000 and later sent a letter saying that he was unable to pay more.

¶ 32 Between 2003 and 2008, defendant went to the Grand Victoria Casino in Elgin 27 to 57 times per year. In 2006, he was there 38 times, but he did not visit after October 8, 2006, until

February 21, 2007. He gambled $206,502 in 2006 and had a net loss of $22,222. Defendant further had net losses of $45,415 in 2005 and $18,112 in 2004.

¶ 33 In 2006, defendant received $18,367.33 from the sale of his house and $19,648 from a worker's compensation settlement. By December 2, 2006, he was down to about half that total in his only known bank account. On about November 19, 2006, he owed approximately $65,224.16 on seven debt accounts, which included credit cards. Defendant had paid no money on five of those accounts between August and November 2006. He owed about $6,532 on another six accounts, and he had a $31,111.33 federal tax lien. A forensic accountant opined that defendant was "having a substantial amount of financial difficulty" on November 20, 2006, because his revolving debt was about 334% of his average wages for the years 2002 through 2006. Defendant's Social Security disability claim was denied on November 22, 2006, after the murders.

¶ 34 A board member from the Wyndham Club testified that in 2006, defendant worked at the property for the maintenance company the board had hired. The board asked that he be removed in early 2006 because he was making a lot of requests of the board. The board was never interested in having defendant come back.

¶ 35 Defendant was a frequent patron of a restaurant called the Italian Gourmet, and he had a tab there. After the murders, defendant said that once he received his inheritance, he would pay the tab. According to a police officer, a server said that defendant told people he was dining with that he was going to receive a $4 million trust from a family member who had died.

¶ 36 A neighbor of Nick Sr. testified that during the morning of November 13, 2006, she saw defendant walking quickly from Nick Sr.'s yard towards her yard. He was wearing baggy pants and a hooded sweatshirt. Defendant went through her yard and into a wooded area. There were

paths in that area that led to a beach access, where a parked car would not be visible from the street.

¶ 37 Telephone records showed that defendant called Nick Sr.'s home or cell phone number 24 times between July 27, 2006, and November 30, 2006. Most of the calls were one or two minutes. Nick Sr.'s cell phone called defendant two times during the same period, and defendant received one phone call from the landline. Defendant called Nick Sr. once on November 19, 2006, at 12:43 p.m., and the call went to voicemail. The call lasted about two minutes. Defendant called his parents' home phone at 7:18 p.m., and the call lasted one minute.

¶ 38 Regarding Nick Sr.'s and Gloria's wills, their joint financial accounts were equally split between their estates, and Nick Sr.'s individual accounts went to his estate. Nick Sr.'s net worth at the time of his death was over $1,721,000, plus the value of the home. Nick Sr.'s long-time accountant testified that he never saw any suspicious sources of income. It did not seem unusual to him that about $200,000 cash was found in the house, because some people were afraid of the stock market, and cash was "king." The attorney who prepared Nick Sr.'s original will and trust in 1997 testified that it was set up so that upon his death, $130,000 would be distributed to Nick Jr. and defendant, and $40,000 to grandchildren. The balance was to go to Gloria, and then to Nick Jr. and defendant upon her death. In 2001, Nick Sr. told the attorney that he wanted to disinherit defendant, and the attorney prepared an amendment to the trust. The amendment removed defendant from receiving any of Nick Sr.'s assets. The attorney did not notify defendant of the change.

¶ 39 Robert Paddock, a close friend and former coworker of Nick Sr., testified that Nick Sr. and Nick Jr. had a very close relationship. In contrast, Nick Sr. was very upset with what happened with defendant at Pepper Construction. He was "embarrassed," "disgusted," and said

that defendant had "destroyed" his professional life, which had been very important to him, by getting Nick Sr. fired. Nick Sr. said that he did not want to talk to or see defendant. Paddock would have known if Nick Sr. had a problem with the union or any members, but Nick Sr. never mentioned anyone. Nick Sr. was "highly respected" in the organization and was well-liked. Paddock did not believe that Nick Sr. was using his position to further any illegal activity, because he "was by the book."

¶ 40 In 2006, Nick Jr. was working for Pepper Construction and had a $140,000 annual salary; Sharon earned $25,000 a year from her job. They did not have any outstanding credit card, medical, or tax debts. Nick Sr. loaned them $32,000 in November 2003, and they signed a promissory note, but it was their understanding that they did not have to pay the money back unless they got divorced. Sharon testified that they also signed a promissory note for $30,000 in April 2001 but that they paid that money back. Nick Jr. retired in 2012 and was receiving a $78,000 per year pension from Pepper Construction.

¶ 41 Nick Jr. owned two firearms that he used for hunting, neither of which was .22 caliber. Nick Jr. did not know of Nick Sr. being involved in any illegal activities, nor did he know of any enemies of his father. He testified that his parents were private people who locked their doors out of habit. In addition to Nick Sr. and Gloria, Nick Jr. and defendant had keys to the house. Gloria's sister may also have had a key.

¶ 42 Nick Jr. testified that he was very close to Nick Sr. and talked to him every day. They would meet for breakfast on weekends and would also go out to eat on Wednesdays. Nick Jr.'s license plate read "Dad BFF." Nick Jr. testified that after defendant was forced to leave Pepper Construction, Nick Sr. did not want to see or talk to defendant. Nick Jr. and defendant had never been close. Sharon testified to similar relationship dynamics in the family. Nick Jr. testified that

defendant was close to Gloria before 1999, but not afterwards. He did not know of defendant ever taking her to Elgin to gamble, nor did he know defendant to ever go to their parents' house at night to check on them. Nick Jr. learned about the changes Nick Sr. had made to his will in 2001 to disinherit defendant, but Nick Jr. did not tell defendant.

¶ 43 Nick Jr. testified that on November 19, 2006, after meeting his father for breakfast, he spent the day hanging Christmas lights. He went to bed at 6 p.m. in order to wake up at 2:45 a.m. and go to the gym. On November 20, 2006, after talking to the police, Nick Jr. went to three safe deposit boxes on which he and Nick Sr. were signatories, and he retrieved their contents. Nick Jr. testified that Nick Sr. had told him that if anything ever happened to him, the first thing Nick Jr. should do was go to the boxes and get the papers. There was also about $64,000 cash in the boxes. He deposited the money and took the papers to the police after being asked for them. On March 28, 2007, Nick Jr. offered a $25,000 reward for information about the deaths, but defendant did not wish to participate in the reward offer. Nick Jr. increased the reward amount to $50,000 in July 2007 and $100,000 in November 2007. Nick Jr. was the sole benefactor of Nick Sr.'s estate, and he received about $1.5 million in 2008. After everything was finalized in 2012, he had received a total of under $2 million.

¶ 44 Nick Jr. agreed to participate in eight recorded conversations with defendant. Three of them took place on November 25, 2006, November 28, 2006, and March 19, 2007. In the first conversation, defendant said that the police told him that Nick Sr. had taken him out of his will, which defendant had not known. In the second conversation, defendant complained about his treatment by police. He discussed calling his parents on November 19, 2006, falling asleep and then waking up and going to White Hen, and driving over to the house and finding them. Defendant also discussed obtaining and selling firearms after their uncle's death. Nick Jr. said

that defendant had been "hounding" Nick Sr. for money a few weeks before, which defendant denied. In the March 2007 conversation, defendant again complained about the police interviews. He talked about his financial situation, saying that he was "out of money" and had only "a couple grand left in the bank." He wanted the estate distributed. Nick Jr. suggested having the police offer the cash that was found in the house as a reward. Defendant said that Nick Jr. could do what he wanted with his half of the inheritance. Defendant said that they should take out an ad in the paper themselves, without police involvement.

¶ 45 Laura Nuccio, Nick Sr.'s niece, testified that in October 2006, she was at Nick Sr.'s and Gloria's house. Defendant called, and Nick Sr. let the call go to voicemail. He said that he did not want to take the call because he felt that the only time defendant would call was when he wanted money.[5] Nuccio talked to defendant on February 13, 2007. He mentioned that Nick Sr.'s trust would be split between him and Nick Jr. He also said that he was having a very hard time coping with his parents' deaths and that finding them was the most horrible thing he had ever experienced.

¶ 46 Defendant's half brother, Don Leshinski, testified that in the spring of 2002, he helped defendant and their mother take possession of their uncle's guns, which numbered about 40 to 50. Leshinski had made a spreadsheet of the guns on which he noted that defendant planned to keep two of the guns, a Walther TPH handgun and a Ruger Mark 1 target pistol. Both were semi-automatic guns that used .22 caliber bullets.

¶ 47 Defendant's car was tested for gunshot residue, and the test was negative, as were residue tests from the hands of defendant and Nick Jr. An expert testified that within six hours of firing a gun, an individual's normal activities would remove all residue. The police put a

[5] Defendant objected to this testimony, but the trial court overruled the objection.

tracking device on defendant's car on November 20, 2006, without his knowledge, but they did not obtain any relevant evidence.

¶ 48 The bullets removed from Nick Sr. and Gloria had six lands and grooves. One bullet had a right twist, and the other two were too damaged to be able to tell if they had a left or right twist. All three casings were fired from the same weapon. The bullets, along with the shell casings, were .22 long rifle caliber. The casings had "REM" on them, which was how Remington marked its ammunition. They were likely Remington Golden Bullet ammunition, which was the type of ammunition obtained from Jacobs. None of the ammunition found at Nick Sr.'s house matched the ammunition from Jacobs. Remington produced over 549 million rounds of that type of ammunition in 2006 alone. Walther TPHs were capable of firing such ammunition, as were hundreds of other firearms, including rifles, revolvers, and pistols. Testing showed that none of the guns found in Nick Sr.'s home fired the recovered bullets.

¶ 49 The parties stipulated that a neighbor of Nick Sr.'s would testify that he had observed Nick Sr. shooting at raccoons with a small rifle in his yard. The parties also stipulated that an attorney received a call in 2006 "or thereabouts" from an individual purporting to be "Mr. Romano." The caller said that he was involved with the "Local 150 training center" and "afraid of his brothers there." He said that he wanted the attorney's assistance because "Chuck was going to get him." They set up an appointment, but the meeting never took place.

¶ 50 Surveillance footage introduced by the defense from November 19, 2006, at about 11 a.m., showed a man making a purchase at White Hen and a portion of a car near the drive-thru lane at McDonald's.

¶ 51 Nicole Romano, Nick Jr.'s daughter, testified for the defense as follows. Defendant was her uncle and had "practically raised" her. She visited Nick Sr. and Gloria about once per week

in 2006. Defendant had gone with her a couple of times that year to see Gloria; defendant and Gloria had a close relationship. Sometimes they would all go out for coffee, and then defendant would take Gloria to the riverboat casino.

¶ 52 Nicole drove with defendant to the wake and funeral. He was "devastated" and "couldn't function." Nicole testified that she had known defendant her whole life and that he would be emotional and crying if something was bothering him, and would not want to eat. Nicole agreed that, prior to trial, she did not want to talk to anyone who was not on defendant's "side." She testified that she spoke to the FBI after the murders but had never talked to a police officer.

¶ 53 John Bucci, an officer with the Major Investigations Assistance Team, testified in rebuttal that he spoke to Nicole on November 22, 2006. She told him that defendant and Nick Sr. had a falling out. To Bucci's knowledge, the FBI was not involved with the investigation.

¶ 54 During closing argument, the prosecutor told the jury not to "reward [defendant] for not being an incompetent murderer" and to "not reward him for planning what he thought was going to be the perfect murder because he failed." He argued that defendant had planned the murders by doing a dry run on November 13, 2006, when a neighbor saw him in her yard, and that the jury should "not reward him for being good at murder" "[j]ust because he planned this." After discussing additional evidence, the prosecutor stated: "You cannot reward him for being—for planning this murder. Do not reward him for not being competent at murder." Towards the end of closing argument, the prosecutor similarly stated, "Don't reward him for being good, for planning a murder." He concluded by saying, in part, to "[t]ell [defendant] you didn't commit the perfect murder. You're guilty." At the end of rebuttal closing argument, the prosecutor stated, "Do not reward him for being a well-planned killer. Find him guilty." Defendant did not object to the comments.

¶ 55 The jury found defendant guilty of both counts of first-degree murder. It further found that he had personally discharged a firearm proximately causing the deaths. On October 22, 2015, defendant filed a motion for a new trial in which he argued, among other things, that the trial court erred in allowing Nuccio to testify, over defendant's hearsay objection, to statements made by Nick Sr. in October 2006. The trial court denied the motion on October 28, 2015. On November 19, 2015, the trial court sentenced defendant to life imprisonment on each count, plus 25 years on each count for personally discharging a firearm. Defendant filed a notice of appeal the same day.

¶ 56 Subsequently, on December 17, 2015, the trial court held a hearing because it had learned that a provision in the relevant sentencing statute had been declared unconstitutional. The trial court concluded that the prior version of the statute still required a mandatory life sentence for anyone convicted of murdering more than one victim, so the sentence it imposed would stand. Defense counsel then stated that defendant wanted to address the court. Defendant stated. "I would like to go on record. I would like to know why my original attorneys did not even spend three hours in face-to-face contact visits." The trial court told defendant to "stop right now" and that it was not going to listen to defendant criticize his attorneys. It stated that it knew how hard his lawyers worked for him during the course of the trial and that they did everything that they possibly could have to represent him.

¶ 57 II. ANALYSIS

¶ 58 A. Hearsay

¶ 59 On appeal, defendant first argues that the trial court erred in allowing the State to admit into evidence Nuccio's testimony that when she was at Nick Sr.'s house in October 2006, he ignored a phone call that he said was from defendant. According to Nuccio, Nick Sr. said that he

did not want to talk to defendant because the only time defendant called him was when he wanted money. At trial, the State argued that it was introducing this testimony to rebut defendant's statement to police that Nick Sr. always answered his phone and that it was strange that his parents had not called him back. Defendant notes that he objected to Nuccio's testimony at trial and raised the issue in his posttrial motion.

¶ 60 Hearsay is an out-of-court statement offered to establish the truth of the matter asserted. *People v. Banks*, 237 Ill. 2d 154, 180 (2010). Unless it falls within an exception, hearsay is generally inadmissible because of its lack of reliability and the opposing party's inability to confront the declarant. *People v. Cook*, 2018 IL App (1st) 142134, ¶ 31. Where the question on appeal involves the legal interpretation of a hearsay exception, we review the trial court's ruling *de novo*. See *People v. Perkins*, 2018 IL App (1st) 133981, ¶ 53. Otherwise, we review the trial court's hearsay ruling for an abuse of discretion, which occurs where the trial court's ruling is arbitrary, fanciful or unreasonable, or where no reasonable person would take the trial court's view. *Id.*

¶ 61 At trial, the State argued that Nuccio's testimony was admissible under Illinois Rule of Evidence 806 (eff. Jan. 1, 2011), which states:

> "When a hearsay statement, *or a statement defined in Rule 801(d)(2)(C), (D), (E), or (F)*, has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls

> the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination." (Emphasis added.)

The State argued that Nuccio's statement, although hearsay, was admissible under the rule because it impeached defendant's statement to police. The trial court agreed and allowed the testimony.

¶ 62 Defendant points out that his statement falls under Illinois Rule of Evidence 801(d)(2)(A), which consists of "the party's own statement, in either an individual or a representative capacity" (Ill. R. Evid. 801(d)(2)(A) (eff. Jan. 1, 2011)), but that Rule 806 does not include statements under Rule 801(d)(2)(A). Instead, Rule 806 deals with statements under subparts (C), (D), (E), and (F), which all involve statements by someone other than the party himself. See Ill. R. Evid. 801(d)(2) (eff. Jan. 1, 2011); Ill. R. Evid. 806 (eff. Jan. 1, 2011). We agree with defendant, as does the State, that the admission of Nuccio's testimony under Rule 806 was error.

¶ 63 The State notes that we are not bound by the trial court's reasoning and may still affirm the trial court's ruling on any basis appearing in the record. See *People v. Hayes*, 2018 IL App (5th) 140223, ¶ 30. The State argues that the testimony falls within the state-of-mind hearsay exception, which applies to a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." Ill. R. Evid. 803(3) (eff. Jan. 1, 2011). The State maintains that Nick Sr. asserted his own state of mind about receiving and taking a phone call from defendant, which was relevant to show the deterioration of his relationship with defendant over money, which in turn was relevant to defendant's motive.

¶ 64 The State argues that even if the trial court abused its discretion in allowing the contested testimony, any error was harmless. In deciding whether an error is harmless, the trial court may: (1) focus on the error to determine if it might have contributed to the conviction; (2) examine other properly admitted evidence to determine if it overwhelmingly supports the conviction; or (3) determine if the improperly admitted evidence is cumulative or duplicates properly admitted evidence. *People v. Barner*, 2015 IL 116949, ¶ 71. The State contends that Nuccio's testimony was cumulative and duplicated the properly-admitted cell phone records.

¶ 65 Defendant counters that the state of mind exception does not apply because Nick Sr. was not expressing his state of mind in his statements to Nuccio, as it did not describe his emotions. *Cf. People v. Wills*, 2017 IL App (2d) 150240, ¶ 57 (victim's statement that she was "very excited to spend the summer" with her mother was an assertion of her own state of mind and therefore an exception to the hearsay rule). Defendant argues that Nuccio's testimony was offered for the truth of the matter asserted—that he was calling Nick Sr.—and that it would not otherwise be relevant. Defendant additionally asserts that the error is not harmless because the cell phone records show only the frequency and length of calls, and not the deterioration of the relationship between defendant and Nick Sr. over money.

¶ 66 We agree with the State that even if it was error to allow the contested testimony into evidence, the error was harmless in that it was cumulative and duplicated other properly admitted evidence. The State argued at trial that it was introducing the testimony to rebut defendant's statements to the police that his parents always called him back, and that their failure to do so led him to go to their house in the early hours of November 20, 2006. However, the State's phone records also showed that defendant's parents frequently did not call him back. Specifically, the two calls defendant made on November 19, 2005, which his parents did not answer, lasted two

minutes and one minute, respectively. Records showed that between July 27, 2006, and November 30, 2006, defendant called Nick Sr.'s cell phone or the home phone 24 times. Most of those calls lasted one or two minutes, indicating that they also may not have been answered. However, Nick Sr.'s cell phone called defendant only two times during the same time frame, and defendant received one phone call from the home phone. Thus, the phone records also provided evidence that defendant's parents frequently did not call him back.

¶ 67 Regarding the testimony that Nick Sr. stated that defendant called only when he wanted money, defendant's financial difficulties were explored in depth in testimony relating to his financial and gambling records. Also, the document found on Nick Sr.'s computer from October 2005 showed that defendant had repaid Nick Sr. only a small amount of the money he had borrowed and that Nick Sr. wanted defendant to make regular payments. Additionally, the transcript of the second overhear was admitted into evidence, and in it Nick Jr. mentioned defendant "hounding" Nick Sr. for money a couple of weeks prior to the murder. To the extent that the testimony related to Nick Sr.'s and defendant's deteriorating relationship, that relationship was explored from many angles, including testimony from several individuals that defendant's actions at Pepper Construction led to Nick Sr. becoming disgusted with him and disinheriting him. Accordingly, Nuccio's contested testimony, even if improperly admitted, does not provide a basis for reversal.

¶ 68 We note that defendant makes a passing reference to the State invoking Rule 806 in the admission of testimony regarding why the Wyndham Club wanted defendant replaced. The State argues that defendant forfeited this argument by not raising it in his posttrial motion and not arguing plain error on review. In his reply brief, defendant addresses the subject testimony in more detail. However, as defendant did not elaborate on the issue in his initial brief, we do not

address it further. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) ("Points not argued [in the opening brief] are waived and shall not be raised in the reply brief"); see also *People v. Olsson*, 2014 IL App (2d) 131217, ¶ 16 (the failure to clearly define issues and support them with authority results in forfeiture of the argument).

¶ 69 B. Closing Argument

¶ 70 Defendant next argues that the prosecutor's statements in closing argument, urging the jury not to "reward" him for planning a murder, were erroneous statements of law and highly prejudicial.

¶ 71 A prosecutor has wide latitude in making a closing argument and may comment on the evidence and any fair, reasonable inferences arising from the evidence. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). We view the challenged remarks in the context of the entire closing argument. *Id*. Where a prosecutor makes numerous improper remarks, we may consider their cumulative impact. *People v. Clark*, 335 Ill. App. 3d 758, 764 (2002). Improper remarks constitute reversible error only if they result in substantial prejudice to the defendant, such that absent the remarks, the verdict would have been different. *People v. Branch*, 2018 IL App (1st) 150026, ¶ 32.

¶ 72 Defendant recognizes that defense counsel did not object to the alleged improper statements or mention them in the motion for a new trial, thus forfeiting them for review. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, defendant asks that we review the forfeited statements for plain error. The plain error doctrine allows a reviewing court to consider an unpreserved error where either (1) a clear error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) a clear error occurs that is so serious that it affected the trial's fairness and challenged the integrity of the

judicial process. *People v. Sebby*, 2017 IL 119445, ¶ 48. In applying the plain error test, the first step is to determine whether a clear and obvious error occurred. *Id.* ¶ 49.

¶ 73 Defendant argues that the prosecutor essentially conflated the presumption of innocence with a "reward," which was improper. Defendant maintains that acquitting a defendant due to a lack of evidence is the law, rather than a "reward." Defendant argues that equally fundamental are the principles that the prosecution bears the burden of proving every element of an offense beyond a reasonable doubt, and that the burden never shifts to the accused.

¶ 74 Defendant analogizes this case to *People v. Beasley*, 384 Ill. App. 3d 1039 (2008). There, in response to the defense argument that it was unconscionable for the State not to have done fingerprint testing on certain items, the State argued that it was then equally unconscionable for the defense not to have done so. *Id.* at 1048. The appellate court held that by stating that the defendant's failure to submit evidence was unconscionable, the State wrongly implied that the defendant had the burden of proof. *Id.* Defendant argues that the logic of *Beasley* applies even though "the State here shirked its burden instead of shifting it." According to defendant, the prosecution knew that the defense would argue that the State had not met its burden, so it preemptively argued that the jury would "reward" defendant if the jury held the prosecution to its burden of proof.

¶ 75 Defendant argues that both prongs of the plain error test apply. He argues that the evidence against him was closely balanced because it was entirely circumstantial and because a substantial portion of that evidence did not even relate to the murders, but rather was presented to discredit his statements to the police. Defendant points out that the murder weapon was never found, hundreds of millions of rounds of the type ammunition used was produced per year, and there was no physical evidence tying him to the crime. Defendant maintains that the police

focused on him as a suspect from the beginning, and that the State's theory of a financial motive was substantially flawed because it posited that he thought he would benefit from Nick Sr.'s death, whereas Nick Jr. knew that he alone would receive the entire inheritance.

¶ 76 With respect to the second prong of the plain error test, defendant argues that the prosecutor's repeated misstatements of law challenged the trial's integrity. Defendant recognizes that we have previously found that similar arguments did not technically shift the burden of proof (see *People v. Ealy*, 2015 IL App (2d) 131106, ¶ 78), but he argues that the prosecution polluted the justice system by equating the presumption of innocence with a reward. He additionally argues that the prosecutor's repeated use of the comments had the cumulative effect of creating a pervasive pattern of unfair prejudice to his case, making it impossible to say that his trial was fundamentally fair.

¶ 77 The State notes that it may prove a defendant's guilt of murder by circumstantial evidence. See *People v. Hall*, 194 Ill. 2d 305, 330 (2000). The State argues that because physical evidence was not necessary to meet its burden of proof, it neither misstated the law nor "shirked" its burden of proof. The State argues that the use of "reward" within the context of the entire argument was to ensure that the jury consider all relevant evidence introduced at trial. The State highlights that the defense discussed in opening argument the lack of physical evidence, and the State argues that the prosecutor's closing argument addressed defendant's competence in leaving no physical evidence. See *People v. Burman*, 2013 IL App (2d) 110807, ¶ 25 (during closing argument, the prosecutor may respond to comments made by defense counsel that invite response). The State argues that although the contested statements may have "perhaps [been] inartfully stated," when taken in full context, the prosecution did not unfairly characterize the law or the evidence. The State additionally argues that the trial court properly instructed the jury

on the fact that closing arguments are not evidence, on the presumption of innocence, on the State's burden of proof, and on the elements of the offense. Finally, the State argues that even if the comments amount to prosecutorial error, defendant failed to meet his burden in establishing plain error.

¶ 78 We agree with the State that the challenged remarks do not constitute error. Unlike *Beasley*, the prosecutor did not shift the burden of proof, nor did he undermine the presumption of innocence. The comments at issue are analogous to those in *Ealy*, where the State argued:

> " 'That's right, it's reward time, or at least it's reward time if you listen to the defense.
>
> The reason it's reward time, according to them, is because if a defendant is either smart enough or lucky enough not to leave his fingerprints at a crime scene, then according to them the defendant gets found not guilty.
>
> * * *
>
> Not once is Judge Shanes going to tell you that if the defendant's DNA is not at the crime scene that you have to find the defendant not guilty[,] *** because that is not the law, and the reason that is not the law is because the law does not reward criminals for doing their jobs too well. The law does not reward criminals for doing their jobs too well.' " *Ealy*, 2015 IL App (2d) 131106, ¶ 23.

As in this case, the defendant argued that the comments turned the presumption of innocence of its head by characterizing it as a reward, and shifted the burden of proof away from the prosecution. *Id.* ¶ 74.

¶ 79 The appellate court stated as follows. The remarks could be understood to mean that physical evidence was not necessary to prove a defendant guilty, and that the absence of such

evidence did not require an acquittal. *Id.* ¶ 77. The prosecution was not technically urging the jury to disregard the presumption of innocence or shifting the burden of proving his innocence to the defendant. *Id.* ¶ 78. The State subsequently explained to the jury that it had the burden of proving each element of the offense beyond a reasonable doubt. *Id.* Viewing the entirety of the argument and looking at the remarks in context, the comments did not rise to the level of prosecutorial misconduct. *Id.* The court concluded by saying that "the argument could have been made much more artfully, and we caution prosecutors to refrain from such unnecessary rhetoric that risks a diminution or confusion of the presumption of innocence or the burden of proof." *Id.*

¶ 80 Similarly, in *People v. Hommerson*, 399 Ill. App. 3d 405, 418 (2010), the prosecutor argued in closing that:

> "the defense regarded the trial as 'reward time,' because, if there is no eyewitness or physical evidence to prove defendant guilty, '[defendant] gets a reward, and the reward he gets according to them is an acquittal, a finding of not guilty because he did his job too well.' "

The defendant argued that the comment suggested that the jurors should not hold the State to its burden of proof because doing so would reward a criminal's competency. *Id.* The appellate court disagreed, stating that the State's reference to "reward time" was a comment on the circumstantial nature of the evidence at trial. *Id.* The appellate court held that "the State was attempting to convey to the jury merely that the absence of direct evidence of guilt did not mean that defendant was innocent." *Id.*

¶ 81 Here, as in *Ealy* and *Hommerson*, the prosecutor was commenting on the lack of physical evidence connecting defendant to the murders, which was a point the defense had raised.

Specifically, the prosecutor argued that there were no eyewitnesses or other physical evidence because of defendant's planning, and that defendant should not be "rewarded" for planning the murders. The prosecutor discussed the circumstantial evidence in great detail, arguing that no other person could have committed the crime. Like *Ealy* and *Hommerson*, the comments did not result in shifting the burden of proof or undermining the presumption of innocence. We echo *Ealy*'s sentiment that there are more "artful" ways to convey the same argument that do not rely on the word "reward," but we also agree with the *Ealy* and *Hommerson* courts that the use of the word did not rise to the level of error. We likewise find no error in the repeated use of the word. As we have found no error in the challenged statements, there can be no plain error (see *People v. Alexander*, 2017 IL App (1st) 142170, ¶ 46), and therefore no basis for reversal.

¶ 82 C. *Krankel* Inquiry

¶ 83 Last, defendant argues that a remand is necessary because the trial court failed to conduct a *Krankel* inquiry when he raised an allegation of ineffective assistance of counsel at the post-sentencing hearing on December 17, 2015. Whether the trial court was obligated to a preliminary *Krankel* inquiry as to a defendant's posttrial claim of ineffective assistance of counsel is a question of law that we review *de novo*. *People v. Branch*, 2017 IL App (5th) 130220, p. 26.

¶ *84* *Krankel* and its progeny govern the procedure for *pro se* posttrial claims of ineffective assistance of counsel. *People v. Ayres*, 2017 IL 120071, ¶ 1. Once a *pro se* defendant brings such a claim to the trial court's attention, either orally or in writing, the trial court must inquire into the factual basis of the defendant's claim. *Id.* ¶ 11. If the trial court finds that the claim lacks merit or pertains to trial strategy, the trial court may deny the motion. *Id.* Conversely, if

the trial court finds that the allegations show possible neglect of the case, the trial court should appoint new counsel. *Id.*

¶ 85 Defendant argues that the trial court was obligated to inquire into the factual basis of his *pro se* ineffective assistance claim when he raised the issue at the postsentencing hearing, but the trial court instead preempted any inquiry by cutting him off from elaborating on the basis of his claims. Defendant argues that because the trial court failed to conduct a proper preliminary *Krankel* inquiry, we must remand the case for that limited purpose. See *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 44.

¶ 86 The State responds that the trial court had no duty to make a *Krankel* inquiry because defendant filed a notice of appeal before the hearing. The State notes the following. When a timely notice of appeal is filed, it attaches the appellate court's jurisdiction and divests the trial court of jurisdiction. See *People v. Chapman*, 2018 IL App (1st) 163045, ¶ 4. A ruling made by the trial court in the absence of jurisdiction is void. *People v. Bailey*, 2014 IL 115459, ¶ 28. However, under Illinois Supreme Court Rule 606(b) (eff. July 1, 2017), when a timely posttrial or postsentencing motion directed against the judgment is filed, a pending notice of appeal becomes ineffective and is to be stricken by the trial court. Here, defendant was sentenced on November 19, 2015, filed his notice of appeal the same day, and did not subsequently file any motions.

¶ 87 The State argues that *People v. Darr*, 2018 IL App (3d) 150562, is instructive to determine the trial court's duty to inquire into an allegation of ineffective assistance of counsel after a notice of appeal has been filed. *Darr* in turn relied on *People v. Patrick*, 2011 IL 111666. In *Patrick*, the defendant filed *pro se* posttrial motions alleging ineffective assistance of counsel. *Id.* ¶ 30. The defendant filed his motions after sentencing but before the trial court had ruled on

his motion to reconsider his sentence. *Id.* ¶¶ 12-13. Our supreme court stated that the motions could not be characterized as motions for a new trial subject to the filing requirements of section 116-1(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-1(b) (West 2006)), which required that a motion for a new trial be filed within 30 days of the verdict (*id.* ¶¶ 33, 37), but rather were part of a common law procedure developed in *Krankel* and its progeny (*id.* ¶ 30). Still, the supreme court stated: "We note that once a notice of appeal has been filed, the trial court loses jurisdiction of the case and may not entertain a *Krankel* motion raising a *pro se* claim of ineffective assistance of counsel." *Id.* ¶ 39. The court further stated that an exception to section 116-1(b)'s requirement that a defendant must file a motion for a new trial within 30 days of the verdict was "if a defendant is seeking a new trial based on claims of ineffective assistance of counsel *and the claim is raised before a notice of appeal is filed*." (Emphasis added.) *Id.* ¶ 42.

¶ 88 In *Darr*, the defendant filed a *pro se* notice of appeal and raised allegations of ineffective assistance of counsel in the same document. *Darr*, 2018 IL App (3d) 150562, ¶ 41. The *Darr* court highlighted the *Patrick* court's statements that allegations must be raised before a notice of appeal is filed in order for the trial court to conduct a *Krankel* inquiry. *Id.* ¶ 92. It stated that because the defendant did not raise his ineffectiveness claims before filing a notice of appeal, the trial court could not conduct a *Krankel* inquiry, as the notice of appeal divested the trial court of jurisdiction, and any ruling it made thereafter would have been void. *Id.* ¶ 93. The *Darr* court concluded that Rule 606(b) also did not result in undermining the notice of appeal and returning jurisdiction to the trial court. *Id.* ¶¶ 95-96.

¶ 89 In arriving at its conclusion, the *Darr* court distinguished *People v. Ayres*, 2017 IL 120071. In *Ayres*, on September 26, 2013, the defendant mailed a *pro se* petition to withdraw his

guilty plea and vacate his sentence, alleging that his counsel was ineffective, and a notice of appeal on the same day his attorney filed a motion to reconsider his sentence. *Id.* ¶ 6; *People v. Ayres*, 2015 IL App (4th) 130996-U, ¶ 6 (reversed by *Ayres*, 2017 IL 120071). The defendant's *pro se* motion was file stamped September 30, 2013. *Id.* The trial court denied counsel's motion to reconsider and did not consider the defendant's petition. *People v. Ayres*, 2017 IL 120071, ¶ 6. The defendant subsequently appealed. *Id.* ¶ 7. The supreme court held that the trial court erred in failing to conduct any inquiry into the factual basis of the defendant's allegations. *Id.* ¶ 26.

¶ 90 The *Darr* court reasoned that *Ayres* was distinguishable because the defendant filed his motion and notice of appeal on September 30, 2013, after his counsel's earlier timely-filed postsentencing motion. *Darr*, 2018 IL App (3d) 150562, ¶ 98. The *Darr* court stated that counsel's motion clearly triggered Rule 606(b), such that the trial court still had jurisdiction to entertain the defendant's *Krankel* claim even after he filed his notice of appeal. *Id*. The *Darr* court stated that, in contrast, in the case before it the defendant filed his notice of appeal contemporaneous with his ineffectiveness claims, thereby perfecting his appeal and depriving the trial court of jurisdiction. *Id*. ¶ 99.

¶ 91 The State argues that as in *Darr*, defendant here filed a notice of appeal before he raised any claims of ineffective assistance of counsel, depriving the trial court of jurisdiction to consider his *Krankel* claims.

¶ 92 Defendant responds that *Ayres* suggests that a remand is appropriate and that *Darr* incorrectly analyzed *Ayres*. Defendant argues that the *Darr* court seemed to think that the motion to reconsider was filed four days before the notice of appeal, but the motion to reconsider was actually filed the same day that the notice of appeal was filed under the mailbox rule.

Defendant argues that the second problem with *Darr*'s analysis is that under its own logic, the *Ayres* defendant's *pro se* notice of appeal would have deprived the trial court of jurisdiction to rule on the motion to reconsider the sentence.

¶ 93 We disagree with defendant's criticisms of *Darr*. Under the mailbox rule, the time of mailing is deemed the time of filing *if the notice of appeal is received after the due date*. *People v. Maclin*, 2014 IL App (1st) 110342, ¶ 21; see also Ill. S. Ct. R. 373 (eff. Dec. 29, 2009). In *Ayres*, the trial court held a resentencing hearing in September 2013, and the defendant's notice of appeal was filed stamped September 30, 2013 (*Ayres*, 2015 IL App (4th) 130996-U, ¶ 5), so there was no need to apply the mailbox rule. Moreover, even if the notice of appeal was considered filed the same day as the postsentencing motion, the latter motion was a timely-filed motion directed against the judgment, rendering the notice of appeal ineffective under Rule 606(b). Here, defendant filed a notice of appeal on November 19, 2015, and he did not subsequently file a motion directed against the judgment that would have made the notice of appeal ineffective under Rule 606(b). As such, pursuant to *Darr* and *Patrick*, the trial court no longer had jurisdiction over the case and did not have the authority to conduct a *Krankel* inquiry.

¶ 94 III. CONCLUSION

¶ 95 For the reasons stated, we affirm the judgment of the McHenry County circuit court.

¶ 96 Affirmed.