2015 IL App (2d) 131305-U
No. 2-13-1305
Order filed December 2, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LOUIS GULLEY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 12-CF-1758 Honorable Joseph G. McGraw, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

RULE 23 ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion to suppress because his statements did not constitute a plea discussion; defense counsel was not ineffective for failing to instruct the jury on identification testimony because defendant cannot establish that he was prejudiced; and the court conducted a proper *Krankel* hearing. Therefore, we affirm.

¶ 2 Following a jury trial, defendant, Louis Gulley, was convicted of two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2012)) and sentenced to a term of life imprisonment. On appeal, defendant argues that the trial court erred by denying his motion to suppress because his statements constituted a plea discussion; defense counsel was ineffective for failing to request a

jury instruction on identification; and the cause should be remanded for a proper *Krankel* hearing. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In July 2012, defendant was charged by indictment with four counts of armed robbery of a gas station and adjoining McDonald's. The four counts alleged that in April 2012, defendant, while armed with either a firearm or a dangerous weapon, took money from two people who were employees: Joshua Hayford and Sue Spors.

¶ 5 Defendant was arrested for the armed robbery and then questioned by two detectives, John Berg and Vince Lindberg. Defendant subsequently moved to suppress his statements to police, and the court conducted a hearing in April 2013.

¶ 6 Detective Berg testified first. After Berg confronted defendant with the evidence that the detectives had regarding the armed robbery, defendant responded, " 'Do you want me to confess to this? I just got done doing 13 years for an armed robbery.' " Berg told defendant he needed to cooperate with the investigation and "beg for mercy from the courts." Berg said that there must have been some valid reason for the armed robbery and then asked what it was. Defendant replied that if he confessed to the robbery, he would get life in prison. Defendant then asked for a cigarette, saying he would tell Berg everything he needed to know about the robbery if he got one. Berg gave defendant a cigarette, which he smoked.

¶ 7 After smoking the cigarette, defendant asked for a State's Attorney to be brought down to the interview room so that he could be "guaranteed a deal" if he told them everything they needed to know about the armed robbery. Detective Berg replied that "that was not going to happen. It was not an option at that point." Defendant's response was to again ask for a State's Attorney to be brought down so that he could be guaranteed a deal. Defendant noted that if he

confessed to this robbery, he would spend the rest of his life in prison. Detective Berg reiterated that "that [was] not going to happen at this point." Detective Berg then showed defendant a still photo from the surveillance video of the robbery and asked if he was involved. Defendant did not respond, and the interview ended.

¶ 8 Defendant testified next on his own behalf. He was 44 years old, had completed the 9th grade, and could read and write "a little bit." During the interview, Berg told defendant to help himself out and " 'get like a 28-year deal' " if he talked to the State's Attorney about any unsolved murders. Berg said that the State's Attorney was making deals with people who knew about unsolved murders. As a result, defendant asked to talk to a State's Attorney. Defendant never brought up the subject of the State's Attorney; Berg brought it up in conjunction with unsolved murders.

¶ 9 On cross-examination, defendant testified that Berg slapped the table, threatened to impound his girlfriend's car, and exhibited a threatening demeanor. After asking about unsolved murders, Berg told defendant that a judge might have mercy on him and give him about 28 years. Defendant denied telling Berg that he wanted to work out a deal because this was his third strike, meaning he would go to prison for the rest of his life. Defendant, however, could not remember specifics of the interview. Defendant testified that he had consumed alcohol that morning and was "drunk" during the interview.

¶ 10 The State called Berg as a rebuttal witness. Although defendant claimed to have been drinking prior to the interview, he did not say that he was intoxicated and could not talk. If defendant did consume alcohol, it was three hours prior to the 1 p.m. interview. Also, defendant did not have bloodshot or glassy eyes, slurred speech, unsteady balance, or an odor of alcohol. Based on Berg's experience, defendant was not intoxicated. Berg denied telling defendant that

the State's Attorney was making deals with people who had information about unsolved murders.

¶ 11 Detective Lindberg testified consistently with Berg, although he did not recall defendant using the word "guarantee." Rather, defendant asked, before receiving a cigarette, "What can you do for me?" Then, after defendant had time to think, he asked for a State's Attorney to be brought down to work a deal so that he did not, as a three-time offender, have to spend the rest of his life in prison.

¶ 12 During arguments, defense counsel maintained that defendant's potentially inculpatory statements were not an admission but an unsophisticated effort to negotiate, thus rendering them inadmissible at trial. The State responded that defendant's statements were not even the beginning of a plea negotiation. According to the State, defendant asked for a State's Attorney in order to be given a deal; he was told that that was not an option; and then he made the request again.

¶ 13 B. Trial Court's Decision

¶ 14 The trial court noted that the question of whether defendant's statements were plea negotiations was a factual one, and there were two inquiries. One inquiry was defendant's subjective expectation, and defendant never testified that he thought that if he told the detectives certain things, he would receive something in return. Any suggestions came from the detective, such as the court showing mercy and giving defendant a sentence of 27 or 28 years, which was "not a concession or response made by the State, nor was it a specific request by defendant in return for cooperation or confession." Defendant then asked for a cigarette, saying he would tell the detectives everything they needed to know. The court found this to be an "independent admission" that preceded any discussion about a request for a State's Attorney.

¶ 15 The court then analyzed whether what followed constituted a plea discussion. The court reasoned that even if defendant subjectively thought he was inquiring about a State's Attorney to make a deal, he knew that he could not enter into plea negotiations with the police and that he "would have to do it with the State's Attorney." Berg's immediate response to both of defendant's requests for a State's Attorney was "that that wasn't going to happen," however. Thus, when viewing the objective circumstances (the second inquiry), defendant's statements were not reasonably construed to be plea negotiations. After learning that the State's Attorney was not available, "anything" that defendant said afterwards was an admission to the extent that it was inculpatory.

¶ 16 The court went on to say that there was no bright-line rule. Instead, it was necessary to look at the statements that were made and the context in which they were made. This case was distinguishable from *People v. Friedman*, 79 Ill. 2d 341 (1980), in that defendant did not initiate contact with a detective in an attempt to offer something in return for some benefit. It was not until the middle or latter third of the interrogation, after he had been confronted with the detectives' evidence against him, that defendant asked for the State's Attorney and was told that that would not happen. Defendant's requests to talk to a State's Attorney were part of a sequence of events during the interview, and extracting one or two sentences in which defendant asked to see a State's Attorney did not somehow convert everything that followed into a plea negotiation. According to the court, simply invoking the State's Attorney did not convert the interrogation into a plea negotiation.

¶ 17 Finally, the trial court found the detectives' testimony to be credible and reasonable. On the other hand, the court found that defendant understood his rights and was not intoxicated, and there were no threats or inducements for defendant to speak. Rather, defendant was told to tell

the detectives what he knew about the armed robbery and throw himself at the mercy of the court. There was not even an insinuation that cooperation would benefit him in some specific way or guarantee him something. For all of these reasons, the court denied defendant's motion to suppress.

¶ 18 C. Trial Testimony

¶ 19 Defendant's jury trial occurred in November 2013, at which the following evidence was adduced.

¶ 20 Shell station employee Hayford testified that on April 27, 2012, around 3:50 a.m., he was making coffee when a black male wearing a tan sweat suit entered. The man put a candy bar on the counter, and Hayford left the coffee area to walk behind the register. The man threw a dollar on the counter, and Hayford made change. Then, the man pulled a gun from his lower left pocket and said, " 'Give me the f**king money.' " Hayford thought it was a revolver but was not sure. Hayford pulled out the money, and as he put it in a plastic bag, Jon Frisk, who worked at the McDonald's next door, entered the Shell station to use the bathroom. At first, Frisk did not know what was happening and walked past the man as though he were a normal customer. The man then told Frisk to walk towards them, and Frisk resisted at first but eventually complied. The man instructed Hayford to jump the counter and walk with Frisk to McDonald's. As they walked to McDonald's, the man continued to hold the gun in his left hand.

¶ 21 At McDonald's, Frisk walked behind the counter, where another McDonald's employee, Spors, was standing. Spors kept moving her hand, and the man told Spors not to hit the panic button or she would be the first one to get shot. Spors opened the register and gave the man money. The man then instructed Hayford to jump the counter, and the man followed Hayford and demanded money out of the drive-thru register. After that, he ordered the three into the

cooler and blocked the door. From the cooler, Hayford used Frisk's cell phone to call 911. Hayford estimated that the incident lasted three to five minutes.

¶ 22 That day (April 27, 2012), detectives showed Hayford a photo line-up that did not include defendant, and Hayford made no identification. On June 4, 2012, Hayford was shown another line-up that did include defendant, but he was unable to identify anyone. During the incident, Hayford was not looking at the man's face. Hayford explained that he was more focused on what the man was telling him to do and not making him mad. Hayford thought that the man was close to six feet tall and weighed 240 to 250 pounds. Hayford did not think the man had facial hair, and he was not wearing glasses. The man was wearing a white hat and a hoodie over his head; he did not disguise his face.

¶ 23 Frisk's testimony was consistent with Hayford's. At trial, Frisk described the man who committed the robbery as a black male, 5' 9" to 5' 11" tall, who weighed 200 or 220 pounds. The man was wearing a tan sweat suit and had no facial hair. The man tried to conceal his face by looking down and away. Frisk did not know whether he was wearing glasses or a hat. Frisk admitted that he was more concerned about his safety than getting a good look at the man; he did not try to take a close look at his face.

¶ 24 Hayford used Frisk's cell phone to call the police from the cooler because Frisk was too nervous to talk. Later that day, Frisk was shown a photo line-up that did not include defendant, and he made no identification. On June 11, 2012, Frisk was shown another line-up that did include defendant, and he identified defendant as the offender.

¶ 25 Spors testified consistently with Hayford and Frisk. A black male came into McDonald's with Frisk and Hayford. The man was wearing a sweat suit, and she could not really see what he looked like because his hoodie covered part of his face. Spors did not try to make eye contact;

she did not want to know what he looked like because she was scared. She thought the man was 5' 7" or 5' 8" and weighed 165 or 170 pounds. When the man demanded money, she tried to reach under the counter to push the panic button, but he said that if she did, she would be the first person to get shot. Spors was nervous and scared; she estimated that the robbery lasted 10 minutes. She was not able to identify the offender later.

¶ 26 Officer James Sanders responded to the scene at 3:55 a.m. Without specifying which eyewitness provided the description, Sanders testified that the man was described as weighing 210 to 220 pounds and wearing a khaki-colored sweat suit, a white hat, and black shoes. Though there was video surveillance of the robbery at the gas station and McDonald's, Sanders testified that it was "very poor" and "very blurry." It showed only "general characteristics" of a person.

¶ 27 Detective Lindberg testified as follows. The first photo line-up that was created at the beginning of the investigation contained a photo of an individual named Dandre Harris. Based on their investigation, Harris was then eliminated as a suspect. In working with other law enforcement agencies, Lindberg was given the name of "Crazy Cuz" as a suspect. Lindberg subpoenaed records to obtain a telephone number and address associated with that name and traced it to defendant. After learning that information, Lindberg compiled a photo line-up including defendant. Frisk was shown this line-up on June 11, 2012, and he identified defendant. When Hayford was shown this photo line-up on June 4, 2012, he did not identify defendant. Jessica Hardin,[1] an individual who had walked into McDonald's during the armed robbery, was also shown this line-up, and she did not identify anyone.

[1] Hardin did not testify at trial.

¶ 28 Lindberg met with defendant on June 19, 2012, and defendant was bald and clean-shaven. Now, in court, defendant looked much different: he had a full head of hair, a full beard, and a moustache.

¶ 29 Detective Berg testified as follows. He arrested defendant on June 19, 2012, and took him to the station, where he was questioned around 12:50 p.m. Defendant indicated that he had drunk some brandy at 10 a.m. that morning, but he did not appear to be under the influence of alcohol.

¶ 30 Berg showed defendant a still photo of the robber from the video surveillance. Defendant did not really respond and asked to see more photos. Berg produced a second photo, and defendant became a bit nervous and edgy. Defendant asked to see more photos, but Berg questioned him about his involvement in the robbery. At this point, defendant began choosing his words carefully. Berg told him that one of the victims had positively identified him, and defendant asked how someone wearing a hoodie and glasses could be identified.

¶ 31 Defendant then asked, "What can you do for me?" Defendant took a moment and said, " 'If you get me a cigarette, I'll tell you everything you need to know.' " Defendant was given a cigarette, which he smoked. He then asked for a State's Attorney to be brought down so that he could be guaranteed a deal if he told Berg everything about the robbery. Berg explained that "that's not going to happen." Defendant again asked for a State's Attorney because he wanted to work out a deal, and Berg reiterated that that was not possible. The interview ended at that point.

¶ 32 Berg testified that no tan hoodie was found in the house where defendant was arrested, which was the house of his girlfriend or wife, Gloria Sockwell. At the jail, Berg listened to a phone call that defendant made to Sockwell, in which he told her to dispose of his cell phone.

Based on defendant's phone call, Berg went to Sockwell's house the next day and was unable to locate defendant's cell phone.

¶ 33 No physical evidence linked defendant to the scene.

¶ 34 Defendant moved for a directed verdict on the basis that not one of the three eyewitnesses made in-court identifications of defendant as the individual who committed the robbery. The court denied defendant's motion.

¶ 35 Sockwell testified first on behalf of the defense. Sockwell married defendant on April 6, 2012. At that time, she lived with her two children, ages 17 and 9, defendant, and defendant's niece Dannica, age 21. Sockwell worked at a nursing home from 4:30 to 8 p.m.

¶ 36 On April 26, 2012, she worked until 8 p.m., arrived home around 8:30 p.m., and started drinking tequila around 10 p.m. Sockwell was an occasional drinker, whereas defendant drank every day. Defendant's other niece Derrica came over around 10:30 or 11 p.m. but did not stay long. Defendant's sister Vernetta also came over around 12:30 p.m. or 1 a.m. The drinking lasted until 1 a.m., with Sockwell getting tipsy, and defendant getting "drunk." Defendant was slurring, wobbling, and belligerent. He was also angry because no one would let him drive; he was too drunk. Sockwell went to bed around 1:30 a.m., and Derrica had already left. Sockwell then got up around 6 a.m. the next morning because the kids had to go to school.

¶ 37 When defendant was arrested at the house on June 19, 2012, Sockwell did not tell police what had transpired on April 26, 2012. They did not ask. She also did not share this information with police when they returned on June 20, 2012. Sockwell admitted that during the last 15 months, she never went to police and told them that she knew where defendant was during the early morning hours of April 27, 2012. Sockwell was shaking and crying when police arrested

defendant and also later when they showed her still photos of the robbery from the surveillance video.

¶ 38 Dannica, defendant's niece, testified next. On April 26, 2012, Sockwell came home from work around 8:30 p.m. They all started drinking tequila around 9:30 p.m., and defendant drank heavily. Defendant drank every day. Dannica's sister Derrica came over around 11:30 p.m. that night, and she stayed until about 2 a.m. Dannica's mother Vernetta also came over but did not stay long. Defendant wanted to take Sockwell's car but no one would let him drive because he was too drunk. Defendant was "real loud and obnoxious," yelling that he wanted to leave, and he could not walk straight. This went on for about 30 minutes, and then Vernetta left and Sockwell went to bed. Defendant passed out, but Dannica could not remember what time. Dannica went to bed around 3 a.m. in Sockwell's daughter's room. Defendant woke up around 2 p.m. the next day, and so did Dannica. Defendant was hung over.

¶ 39 The State called Detective Lindberg as a rebuttal witness. When Lindberg spoke with Sockwell on June 19, 2012, she never said that defendant had been at her home the entire morning of April 27, 2012. When he spoke with Sockwell again on June 20, 2012, she was not upset. When she was shown still photos of the robbery from the video surveillance, however, Sockwell's demeanor changed, and she started to cry and shake.

¶ 40 D. Posttrial Matters

¶ 41 The jury found defendant guilty of all four counts of armed robbery. Defendant then moved for a new trial, and the trial court denied this motion.

¶ 42 At the sentencing hearing, defendant told the court that he would "like to put in for ineffective assistance of counsel." The court asked, "How so?" and defendant replied that one of his witnesses was not called to testify. Defendant continued that his niece Derrica was not called

to testify. The court asked what her testimony would have been, and defendant responded that Derrica "came and picked up her daughter there [at Sockwell's house] at a certain time, which would put me at the house." According to defendant, Derrica picked up her daughter at 4:30 a.m. and would testify that defendant stayed up and watched the baby. When the court clarified that it thought Sockwell testified that defendant had passed out from drinking during the day, defendant agreed, saying that she testified that she woke up at 6 a.m. with him next to her. When the court asked if defendant was watching the baby until 4:30 a.m. and then went to bed, defendant said "yes." The court asked defense counsel why Derrica was not called to testify. Defense counsel explained that he called those witnesses he believed "would be most effective and were most able to tell the story." Defense counsel had "certain difficulties with certain witnesses at different times." In the end, he chose the "simplest stories," the witnesses who lived with defendant, and the witnesses "who would cover the time frame."

¶ 43 At this point, defendant added, "And then, too, the condition" that he was in "at the time of the so-called interrogation." Defendant told the court that prior to the police picking him up, he had worked a night shift at Lowe's (6 p.m. - 4:30 a.m.). Defendant told the court that he drank that morning "until the time they picked [him] up." As a result, he was fatigued, intoxicated, and in no shape to be interrogated. Defendant asked whether the police "had been impeached on the stand before because they did a lot of speaking on their opinions" of what they felt at the time.

¶ 44 The court asked the State if it wished to "state anything about that, the comments of the law enforcement officers as they might relate to their observations of the defendant's sobriety or alertness during the interview." The State responded that "we did do a Motion to Suppress. This Defendant did testify. He had a chance to make those statements." The State continued that at

both the suppression hearing and at trial, the State called Detective Berg to testify that for purposes of the interview, defendant had said that he had had a drink. However, based on their years of experience as police officers having experience with people who were intoxicated, they opined that defendant exhibited no signs that he was intoxicated or too fatigued to talk to them. Defendant had no problem answering their questions.

¶ 45 The court then asked the State about Derrica, asking whether she was ever interviewed by police, to which the State responded no. The court also asked defense counsel whether his reason for not calling Derrica was a lack of cooperation or her inability to provide an alibi. Defense counsel responded that he had spent a lot of time interviewing defendant's two nieces (Dannica and Derrica), his sister (Vernetta), and his wife (Sockwell), and he chose the witnesses who would testify most effectively. When the court pressed whether defense counsel believed that Derrica was not credible, defense counsel answered that her testimony would have been duplicative; there were "certain aspects that did not correspond to others"; she did not stay overnight at Sockwell's house; "and for purposes of narrative" he believed that the witnesses he chose were best.

¶ 46 In ruling on defendant's *pro se* motion alleging ineffective assistance of counsel, the court began by stating that defense counsel had tried "many, many, many cases in front of this Court." Defense counsel was always prepared and effective, even having "remarkable victories" in terms of success for his clients. The court indicated that it knew from "firsthand experience [defense counsel's] level of experience." The court further noted that it had given defendant an opportunity to elaborate on "what he thought was ineffective"; defense counsel a chance to respond; "as well as the State's Attorney to supplement the record."

¶ 47 According to the court, the decision of which witnesses to call was a matter of trial strategy, especially in an alibi case, because "inconsistencies in impeachment" were "delicate." Whereas cumulative testimony was not necessarily helpful, testimony that was inconsistent "in some measure" could damage an alibi. When the court asked about the timing of the robbery, the State replied that it occurred just before 4 a.m. The court reasoned that even if Derrica went to Sockwell's house at 4:30 a.m. to retrieve her baby, it would not preclude defendant's involvement in the robbery. Accordingly, the court did not find defense counsel ineffective.

¶ 48 The parties agreed that for sentencing purposes, count II merged into count I, and count IV merged into count III. The trial court imposed a mandatory sentence of natural life imprisonment.

¶ 49 Defendant timely appealed.

¶ 50 II. ANALYSIS

¶ 51 A. Motion to Suppress

¶ 52 Defendant first argues that the court erred by denying his motion to suppress. According to defendant, his suppression motion should have been granted because his statements to the detectives constituted nascent plea discussions which were inadmissible under Illinois Supreme Court Rule 402(f) (eff. July 1, 2012).

¶ 53 When reviewing a trial court's ruling on a motion to suppress, we afford great deference to the court's factual findings and will not reverse those findings unless they are against the manifest weight of the evidence. *People v. Neese*, 2015 IL App (2d) 140368, ¶ 10. Still, the ultimate decision to grant or deny a motion to suppress is entitled to *de novo* review. *Id*.

¶ 54 Rule 402(f) provides that "[i]f a plea discussion does not result in a plea of guilty, or if a plea agreement is not accepted or is withdrawn, *** neither the plea discussion, nor any resulting

agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding." Ill. S. Ct. R. 402(f) (eff. July 1, 2012). The purpose of Rule 402(f) is to encourage the negotiated disposition of criminal cases by eliminating the risk that juries will hear statements or admissions made by defendants during plea negotiations. *People v. Hart*, 214 Ill. 2d 490, 502 (2005). Not all statements made by a defendant in the hope of obtaining concessions are plea discussions, however, and courts draw a distinction between a statement made in the course of a plea discussion and an otherwise independent admission, which is not excluded by Rule 402(f). *People v. Rivera*, 2013 IL 112467, ¶ 19.

¶ 55 To determine whether a particular statement is plea related, the supreme court adopted the two-part test utilized in *United States v. Robertson*, 582 F.2d 1356, 1366 (5th Cir. 1978). *Hart*, 214 Ill. 2d at 503. First, courts must consider whether the defendant exhibited a subjective expectation to negotiate a plea, and second, whether that expectation was reasonable under the totality of the objective circumstances. *Id*. The determination is not a bright-line rule, and we may consider the nature of the statements, to whom the defendant made the statements, and what the parties to the conversation said. *Rivera*, 2013 IL 112467, ¶ 19. " 'Before a discussion can be characterized as plea related, it must contain the rudiments of the negotiation process, *i.e.*, a willingness by defendant to enter a plea of guilty in return for concessions by the State.' " *Hart*, 214 Ill. 2d at 503 (quoting *Friedman*, 79 Ill. 2d at 353). Whether a statement is plea related, and therefore inadmissible under Rule 402(f), depends on the particular facts of each case. *People v. Victory*, 94 Ill. App. 3d 719, 722 (1981).

¶ 56 Initially, we note that defendant does not appear to challenge his statements to the detectives prior to requesting a cigarette, such as his statement that he would tell the detectives everything they needed to know about the robbery if they gave him a cigarette. Regardless, we

agree with the trial court that this statement was not plea related but rather an independent admission. See *Rivera*, 2013 IL 112467, ¶¶ 20, 22 (a finding to one statement does not necessarily reflect upon the admissibility of other statements, and the defendant's statement that he would confess if the detective brought him another glass of water negated any suggestion that the defendant might have been offering to plead guilty in exchange for concessions by the State).

¶ 57 Rather, defendant appears to challenge only the statements he made after smoking the cigarette. First, defendant asked for the State's Attorney to be brought down to the interview room so that he could be "guaranteed a deal" if he told them everything they needed to know about the armed robbery. Detective Berg replied that that was not going to happen; it was not an option at that point. Second, defendant again requested that the State's Attorney be brought in so that he could be guaranteed a deal. Defendant said that if he confessed to this robbery, he would spend the rest of his life in prison. Berg reiterated that involving the State's Attorney was "not going to happen at this point." According to defendant, "the substance" of his plea-related statements was his awareness that, due to his prior criminal record, he faced a mandatory natural life sentence. Defendant therefore "demanded the presence of the State's Attorney so as to be able to get some kind of deal or guarantee."

¶ 58 Beginning with defendant's subjective expectation to engage in plea discussions, the trial court specifically found that he had none. As the trial court noted, defendant never testified at the suppression hearing that he thought that if he told the detectives certain things, he would get something in return. In fact, at the suppression hearing, defendant *denied* telling Berg that he wanted to work out a deal because this was his third strike, meaning he would go to prison for the rest of his life. As we explain, defendant's statements about wanting to make a deal were not the same as offers to plead guilty in return for concessions by the State. See *Friedman*, 79 Ill. 2d

at 353 (before a discussion can be characterized as plea related, it must contain the rudiments of the negotiation process, *i.e.*, a willingness by the defendant to enter a plea of guilty in return for concessions by the State).

¶ 59 In this way, the case at bar differs from the two cases defendant relies on, *People v. Hill*, 78 Ill. 2d 465 (1980), and *Friedman*, where the defendants clearly expressed their subjective expectations to engage in plea discussions. See *Rivera*, 2013 IL 112467, ¶ 24 (distinguishing both *Hill* and *Friedman*, where the defendants clearly expressed their subjective expectations to engage in plea discussions).

¶ 60 For example, in *Friedman*, 79 Ill. 2d at 344, 349-50, the defendant, one month after being charged, called an investigator at the Attorney General's office and inquired about making a deal. The defendant then stated that if he were convicted, he would rather go to a Federal prison as opposed to a State prison. *Id*. at 350. The investigator replied that he had no control over such matters and that the defendant would need to speak to a Mr. Rosenberg. *Id*. The supreme court determined that the defendant's statement was improperly admitted at trial. *Id*. at 352. According to the court, the defendant's unsolicited statement was an offer to enter negotiation, stating generally the terms upon which the defendant would be willing to bargain, and the defendant's inquiry about making a deal prior to the statement was a clear indication of the defendant's intent to pursue plea negotiations. *Id*.

¶ 61 In *Hill*, 78 Ill. 2d at 469-70, the defendant confessed to one of two murders and then asked to see " 'the honcho, the head man.' " The assistant State's Attorney talking to the defendant indicated that he guessed that was him because he would be the one determining the charges against the defendant. *Id*. The defendant then said, "I want to talk a deal," and said that he would plead guilty to both murders and a give a statement of confession if got a signed

affidavit that he would be sentenced to a maximum of 14 years. *Id*. at 470. As in *Friedman*, the supreme court determined that the admission of this statement at trial was improper. *Id*. at 474.

¶ 62 Rather than *Friedman* and *Hill*, this case more closely resembles *Rivera* and *People v. Tennin*, 123 Ill. App. 3d 894 (1984). In *Rivera*, 2013 IL 112467, ¶ 28, the defendant met with a detective and an assistant State's Attorney and wanted to know that he had "guarantees that he was not going to jail if he spoke to" them. After the assistant State's Attorney indicated that he could not provide any guarantees, the defendant said he was torn; he wanted to do the right thing; he did not want to go to jail but wanted probation; and he would talk about what they were there to talk to him about if he had "those guarantees." *Id*. The supreme court determined that the defendant did not exhibit a subjective intention to enter into plea negotiations in that he did not offer to plead guilty or even to confess. *Id*. ¶ 29. The *Rivera* court stated that while Rule 402(f) was enacted to encourage the negotiation process, it was not enacted to discourage legitimate interrogation techniques. *Id*.

¶ 63 As an aside, we reject defendant's attempt to distinguish *Rivera* on the basis that it involved a plain error analysis. The legal principles that apply to plea negotiations and the admissibility of statements under Rule 402(f) remain the same regardless of the plain-error doctrine.

¶ 64 In *Tennin*, 123 Ill. App. 3d at 896-97, a second district case, the "troublesome question" was whether the defendant's nonspecific statement that he wanted "to make a deal," which the detective rejected, was plea related and therefore inadmissible under Rule 402(f). This court noted that in contrast to *Friedman*, where the terms upon which the defendant would be willing to bargain were generally stated, the statement by the defendant in *Tennin* did not indicate an explicit offer to plead guilty. *Id*. at 897. This court further noted that in cases where the court

found a statement inadmissible as plea related, such as in *Friedman* and *Hill*, each defendant clearly sought a concession in return for his guilty plea. *Id.* Conversely, in cases where the defendant had not made manifest his plea offer, the statement was not characterized as part of a plea discussion. *Id.* In sum, this court could not assume that "every statement by a defendant to the effect of 'making a deal' [was] plea related." *Id.* at 898.

¶ 65 In this case, defendant wanted to be guaranteed a deal based on telling the detectives everything they needed to know about the armed robbery and based on his impending sentence of life imprisonment if he confessed to the offense. However, defendant failed to state generally the terms upon which he would bargain; he did not ask for any specific concessions from the State; and he did not actually offer to plead guilty or to confess. As a result, defendant did not exhibit a subjective expectation to negotiate a plea, and the trial court's finding was not against the manifest weight of the evidence.

¶ 66 But even if we were to assume otherwise, meaning that defendant showed a clear subjective expectation to plea bargain, such an expectation was not reasonable under the totality of the circumstances. See *Rivera*, 2013 IL 112467, ¶ 27 (even assuming that a clear subjective expectation existed, it was not reasonable under the totality of the circumstances). As the trial court noted, defendant was told twice, in no uncertain terms, that no State's Attorney would be made available. The detectives' refusal to avail defendant of a State's Attorney destroyed any belief by him that the parties were engaged in plea negotiations. See *id.* ¶ 37 (the repeated disclaimers by the detective and the assistant State's Attorney that they could not offer the defendant any guarantees eroded the reasonableness of any belief by the defendant that the parties were engaged in plea-bargain discussions). Therefore, the trial court's finding that

defendant's statements could not be reasonably construed to be plea negotiations was also not against the manifest weight of the evidence.

¶ 67 Because the statements defendant challenges were not plea negotiations, they were admissible at trial. Accordingly, the trial court properly denied defendant's motion to suppress these statements.

¶ 68 B. Ineffective Assistance of Counsel

¶ 69 Defendant's second argument is that defense counsel was ineffective for failing to submit a jury instruction on identification. Defendant points out that Frisk was the only eyewitness to identify defendant out of a photo line-up, yet he did not identify defendant in open court. According to defendant, identification was the key issue in this case, and the evidence of identification was weak. Defendant thus concludes that defense counsel was ineffective for failing to proffer a standard instruction informing the jury of the factors to be used in weighing identification testimony.

¶ 70 Claims of ineffective assistance of counsel are reviewed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Houston*, 229 Ill. 2d 1, 11 (2008). "Under this test, a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense in that, absent counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *Id.* In order to establish ineffective assistance of counsel, a defendant must satisfy both the performance and prejudice prongs of *Strickland*. *Id.*

¶ 71 "Jury instructions are necessary to provide the jury with the legal principles applicable to the evidence presented so that it may reach a correct verdict." *People v. Falco*, 2014 IL App

(1st) 111797, ¶ 15. Illinois Supreme Court Rule 451(a) (eff. July 1, 2006) states that whenever the Illinois Pattern Jury Instructions (IPI) contains an applicable jury instruction and the court determines that the jury should be instructed on the subject, "the [IPI instruction] shall be used, unless the court determines that it does not accurately state the law." The failure to request a particular jury instruction may be grounds for finding ineffective assistance of counsel if the instruction was so critical to the defense that its omission denied the defendant his right to a fair trial. *Falco*, 2014 IL App (1st) 111797, ¶ 15.

¶ 72 Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 3.15), sets forth factors to be considered when weighing identification testimony. Those factors include: (1) the opportunity the witness had to view the offender at the time of the offense; (2) the witness's degree of attention at the time of the offense; (3) the witness's earlier description of the offender; (4) the level of certainty shown by the witness when confronting the defendant; and (5) the length of time between the offense and the identification confrontation. IPI Criminal 4th No. 3.15. The committee note instructs courts to "[g]ive this instruction when identification is an issue." IPI Criminal 4th No. 3.15, Committee Note.

¶ 73 The State concedes that the identification instruction should have been given, which means that defense counsel erred by failing to submit it. Nevertheless, the State argues that defendant fails to satisfy the prejudice prong of the *Strickland* test because he cannot show that, but for the lack of the instruction, there is a reasonable probability that the result of his trial would have been different. According to the State, defense counsel elicited evidence regarding the factors for weighing identification testimony and then argued this evidence to the jury. We agree with the State.

¶ 74 Beginning with opening argument, defense counsel pointed out that only one of the eyewitnesses, Frisk, was able to identify defendant in a photo line-up. The other eyewitnesses, Hayford, Spors, and a third individual named Hardin, were unable to identify defendant in a photo line-up.

¶ 75 Next, during the trial testimony, defense counsel cross-examined Frisk on the above factors to discredit his identification of defendant. Regarding the first two factors, the opportunity the witness had to view the offender and the witness' degree of attention at the time of the offense, defense counsel elicited the following testimony from Frisk. Frisk admitted that he did not notice the offender when he first came in and that the entire incident lasted only a short time. In addition, Frisk admitted that he was "very nervous" and that the offender made efforts to conceal his face or to disguise himself by looking "down and away." For example, Frisk could not recall whether there was anything concealing the offender's hair, such as a cap; he did not know whether the offender had a hoodie covering his head or whether he was bald; and he could not recall whether the offender wore glasses or sunglasses. Frisk further admitted that he was so startled and frightened that he could not use his phone to call 911 after the incident while in the cooler. When asked whether his fright during the incident prevented him from being a careful observer, Frisk admitted "[t]o some extent." Frisk agreed that he was more concerned about his safety than getting a good look at the offender, even admitting that he never tried to take a close look at the offender's face.

¶ 76 Turning to factors four and five,[2] the level of certainty shown by the witness when confronting the offender and the length of time between the observation and the identification,

[2] Defendant admits that the record contains little evidence of factor three, the witness' earlier description of the offender.

defense counsel elicited testimony that Frisk's identification of defendant in a photo line-up did not occur until six weeks after the robbery. When questioning Frisk about the identification, defense counsel confirmed that Frisk was "very nervous," "scared," and "never really got a close look" at the offender" at the time of the offense. He also confirmed, when questioning Frisk about the identification, that Frisk was not sure whether the offender had hair on his head or whether he was wearing a hat or sunglasses.

¶ 77 In addition, defense counsel used the other witnesses' lack of identification to cast doubt on Frisk's identification. Defense counsel elicited testimony that Hayford did not look at the offender's face but instead focused on doing what he was told and not upsetting the offender. He also elicited testimony that Hayford was unable to identify defendant in a photo line-up five weeks after the incident. Likewise, trial counsel elicited testimony that: Spors never identified defendant in a photo line-up; she could not actually see what the offender looked like because his hoodie covered part of his face; and she did not try to make eye contact or see what the offender looked like because she was scared.

¶ 78 Then, during closing argument, defense counsel argued that due to the circumstances of the eyewitnesses being nervous and the offender's face being obscured, none of them was certain that defendant was the offender. Defense counsel pointed out that not one of them was able to make an in-court identification of defendant as the offender. Moreover, the only person able to identify defendant in a photo line-up, Frisk, did so six weeks later. Defense counsel questioned how certain Frisk's identification could be based on him being nervous and scared during the incident, based on him being unable to identify defendant in court, and based on him making an identification six weeks later. Defense counsel argued that "when the three eyewitnesses cannot give you a positive identification and say 'that is the fellow who did this,' how can it be said the

State has met its burden?" In addition, defense counsel argued that the witnesses' descriptions of a black male, 5'8" to 5'11", weighing 200 to 250 pounds, were so generic that they had little value. Finally, defense counsel argued that even the police pursued a suspect other than defendant based on the still photos of the video surveillance, thus creating further doubt as to Frisk's identification of defendant.

¶ 79 In sum, defense counsel explored the factors for weighing identification testimony at trial and argued them to the jury. Defendant concedes that the jury heard evidence and argument regarding the factors for weighing identification testimony, and he concedes that the evidence was sufficient to support his conviction. See *People v. Herron*, 2012 IL App (1st) 090663, ¶ 15 (a single witness's identification of the defendant is sufficient to support a conviction if the witness viewed the defendant under circumstances permitting a positive identification). Even so, defendant argues that receiving the identification instruction from the court, as opposed to defense counsel, would have caused the jury to treat the factors more seriously. While this argument contains some intuitive appeal, it is speculative. See *People v. Burchette*, 257 Ill. App. 3d 641, 662 (1993) (a defendant's claim that the jury "might" not have convicted him had a jury instruction been given is insufficient to show prejudice). More important, defendant cannot show prejudice because defense counsel presented the same argument to the jury that he would have had the instruction been given. See *People v. Gill*, 355 Ill. App. 3d 805, 812 (2005) (although the instruction should have been given, no prejudice where defense counsel presented the same argument to the jury that he would have had the instruction been given). Because the jury was sufficiently apprised of the types of factors to consider in weighing identification testimony, defendant cannot show that had the instruction been given, there is a reasonable

probability that the result of the proceeding would have been different. Thus, defendant's claim that defense counsel was ineffective fails.

¶ 80 C. *Krankel* Inquiry

¶ 81 Defendant's final argument is that the trial court erred in its handling of the *Krankel* hearing. Defendant argues that the court erred in three ways: first, it did not ask defense counsel about defendant's intoxication at the time of his interrogation by detectives; second, it allowed the State to argue that defendant's claim of intoxication was meritless; and third, it relied on matters outside the record as to defense counsel's past performance in other cases. As a result, defendant requests that this court remand the case for a new *Krankel* hearing.

¶ 82 In *Krankel*, after the defendant's trial counsel failed to contact an alibi witness or to present an alibi defense at trial, the defendant made a *pro se* allegation of ineffective assistance of counsel. *Id*. at 188. The defendant and the State agreed that the trial court should have appointed counsel different from his originally appointed counsel to represent him at the posttrial hearing regarding his claim of ineffective assistance of trial counsel. *Id*. at 189. Accordingly, the supreme court remanded the case to the trial court for a hearing on the defendant's motion with newly appointed counsel. *Id*.

¶ 83 Years later, the supreme court decided *People v. Moore*, 207 Ill. 2d 68 (2003), in which it discussed *Krankel* and its progeny. The rule that had developed in interpreting *Krankel* was that new counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. *Id*. at 77. Rather, the trial court should first examine the factual basis of the defendant's claim. *Id*. at 77-78. According to the court, "[t]he operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Id*.

at 77-78. There are three ways in which the trial court may conduct its evaluation: (1) the court may ask defense counsel about the defendant's claim and allow counsel to "answer questions and explain the facts and circumstances surrounding" the claim; (2) the court may have a "brief discussion" with the defendant about his claim; or (3) the court may base its evaluation "on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *People v. Buchanan*, 2013 IL App (2d) 120447, ¶ 19. The manner in which the trial court conducted its *Krankel* inquiry is reviewed *de novo*. *People v. Fields*, 2013 IL App (2d) 120945, ¶ 39.

¶ 84 In analyzing defendant's argument, we note that he does not challenge the trial court's handling of defense counsel's decision not to call Derrica as a witness. Rather, defendant focuses exclusively on his claim that he was intoxicated during the interrogation and that the detectives should have been impeached to that effect. As previously stated, defendant argues that the court erred by failing to question defense counsel regarding the intoxication issue, by allowing the State to argue that his claim was meritless; and by relying on defense counsel's experience in other trials.

¶ 85 Defendant relies on two cases, the first of which is *People v. Jolly*, 2014 IL 117142. In *Jolly*, the supreme court reviewed the adequacy of the trial court's preliminary *Krankel* hearing. *Id*. ¶ 30. There, the defendant appeared *pro se*, and the parties agreed that the court erred in permitting the State's adversarial participation in the hearing. *Id*. ¶ 31. The trial court permitted the State to question the defendant and his trial counsel extensively in a manner contrary to the defendant's *pro se* allegations of ineffective assistance of counsel and to solicit testimony from his trial counsel that rebutted the defendant's allegations. *Id*. ¶ 40. The trial court thus allowed

the State to confront and challenge the defendant's claims directly at a proceeding when the defendant was not represented by counsel. *Id*.

¶ 86 The supreme court noted that because a defendant is not appointed new counsel at a preliminary *Krankel* inquiry, it is critical that the State's participation at the proceeding, if any, be *de minimis*. *Id*. ¶ 38. It stated that "[c]ertainly, the State should never be permitted to take an adversarial role against a *pro se* defendant at the preliminary *Krankel* inquiry. *Id*. Given the State's adversarial role against the defendant, the court rejected the State's contention that the error was harmless beyond a reasonable doubt. *Id.* And, because this error was reversible on its own, the court limited its holding to that error and did not address the court's further error of relying on matters outside the record. *Id*. ¶ 41.

¶ 87 The second case relied on by defendant is this court's decision in *Fields*, 2013 IL App (2d) 120945, which the *Jolly* court also cited with approval. *Jolly*, 2014 IL 117142, ¶ 38. In *Fields*, we stated that the trial court invited at least equal participation by the State into the preliminary inquiry of the defendant's *pro se* ineffective-assistance of counsel claims. *Id*. ¶ 41. As we stated, the court went through the defendant's allegations one by one, allowing the defendant to comment and then allowing the State to comment and provide counterarguments on the defendant's claims. *Id*. In response to the State's argument that its participation was focused primarily on noting the lack of specificity of particular claims and that other claims merely challenged trial strategy, we pointed out that the State was still advocating a position against the defendant. *Id*. Because the hearing changed from one consistent with *Krankel* and its progeny to an adversarial hearing where the defendant, without waiving his right to be represented, was forced, unrepresented, to argue the merits of his claims, we rejected the State's claim that the error was harmless. *Id*. ¶¶ 41, 42.

¶ 88 The State responds that the case at bar is distinguishable from *Jolly* and *Fields* because the State's participation was *de minimis*. To this end, the State points out that both *Jolly* and *Fields* permit such *de minimis* participation by the State. As previously mentioned, the supreme court in *Jolly*, for example, stated that because a defendant is not appointed new counsel at a preliminary *Krankel* inquiry, it is critical that the State's participation at the proceeding, if any, be *de minimis*. *Jolly*, 2014 IL 117142, ¶ 38. Likewise, in *Fields*, this court stated that a trial court's method of inquiry at a *Krankel* hearing is somewhat flexible, and "we can envision a situation where the State may be asked to offer concrete and easily verifiable *facts* at the hearing." (Emphasis in original.) *Fields*, 2013 IL App (2d) 120945, ¶ 40. This court cautioned that if the State's participation during the initial investigation into a defendant's *pro se* allegations is anything more than *de minimis*, there is a risk that the preliminary inquiry will be turned into an adversarial proceeding, with both the State and trial counsel opposing the defendant. *Id.*

¶ 89 Before addressing the merits of defendant's claim, we note that the trial court asked the State an open-ended question on the issue of intoxication. Specifically, the court asked the State whether it wished to "state anything about that, the comments of the law enforcement officers as they might relate to their observations of the defendant's sobriety or alertness during the interview." The State responded that defendant filed a motion to suppress, testified at the hearing, and made the same claims of intoxication. The State further pointed out that at both the trial and the suppression hearing, it called Detective Berg to testify that for purposes of the interrogation, defendant had said that he had had a drink but that the detectives, in their experience, did not observe signs of intoxication.

¶ 90 The trial court's open-ended inquiry to the State opened the door to a potentially adversarial response. Although this court has stated that the method of inquiry at a *Krankel* hearing is somewhat flexible (*Fields*, 2013 IL App (2d) 120945, ¶ 40), there are parameters in conducting the evaluation (see *Buchanan*, 2013 IL App (2d) 120447, ¶ 19 (there are *three* ways in which the trial court may conduct its evaluation: (1) the court may ask defense counsel about the defendant's claim and allow counsel to "answer questions and explain the facts and circumstances surrounding" the claim; (2) the court may have a "brief discussion" with the defendant about his claim; or (3) the court may base its evaluation "on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face.")). Although the State's response to the court's question was not adversarial, as we explain below, the better practice in a *Krankel* hearing is not to question the State at all. By questioning the State, the court risks turning the preliminary *Krankel* inquiry into an adversarial proceeding.

¶ 91 That said, because the State did nothing more than offer concrete and easily verifiable facts as to the sequence of events and the detectives' testimony in answering the court's questions, its role here was *de minimis*. This case falls under the scenario described in *Fields*, where we stated that the State may be asked to offer concrete and easily verifiable *facts* at the hearing. *Fields*, 2013 IL App (2d) 120945, ¶ 40. Unlike in *Jolly*, the State did not question defendant or defense counsel on the intoxication issue. And unlike in *Fields*, the State made no argument regarding defendant's claim but merely relayed the testimony elicited at the suppression hearing and trial.

¶ 92 Turning to defendant's remaining claims, it is true that the court did not question defense counsel regarding defendant's claim of intoxication during the interrogation. However, the court was not required to do so, given the three ways of conducting *Krankel* inquiries set forth above,

and the court properly questioned defendant as to this issue. Finally, although we agree with defendant that the court should have limited its observation of defense counsel's performance to the instant trial, rather than previous trials, the comments, though unnecessary, were irrelevant and harmless error at best. See *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 42 (on review, even if an appellate court finds that a trial court made an error, it will not reverse if it finds that the error was harmless).

¶ 93 III. CONCLUSION

¶ 94 For the aforementioned reasons, the judgment of the Winnebago County circuit court is affirmed.

¶ 95 Affirmed.