FOURTH DIVISION
March 2, 2017

No. 1-14-1775

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 09 CR 19767
	)	
BARTHOLOMEW BISHOP,	)	Honorable
	)	Anna Helen Demacopoulos
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court's violation of Rule 431(b) was not plain error where evidence was not closely balanced. Trial court properly admitted other-crimes evidence. Trial court's decision not to appoint new counsel for full *Krankel* hearing on defendant's *pro se* claim of ineffective assistance of counsel was not manifestly erroneous. Mittimus shall be corrected to reflect presentence credit and proper statutory citation.

¶ 2 Following a jury trial, defendant Bartholomew Bishop was convicted of first-degree murder for the death of Marilyn Horton and attempted murder for shooting Leasha Crockett. The jury also found that defendant personally discharged a firearm that proximately caused Horton's death and caused great bodily harm to Crockett. The trial court sentenced defendant to 65 years'

imprisonment for the murder and 35 years' imprisonment for the attempted murder, to be served consecutively. He now appeals.

¶ 3 Defendant raises four issues on appeal. First, he argues that the trial court violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), and that this error warrants a new trial. Next, defendant argues that we should reverse his conviction and remand for a new trial or resentencing because the trial court improperly admitted other-crimes evidence. Defendant's third argument is that the trial court erred in failing to appoint new counsel for a full *Krankel* hearing after the preliminary inquiry resulted in contradictory accounts from trial counsel and defendant. The fourth issue concerns the mittimus. Both parties agree that the mittimus should be corrected to reflect presentence credit and the proper statutory citation for the attempted murder offense.

¶ 4 I. BACKGROUND

¶ 5 A. State's Pretrial Motion

¶ 6 The State filed a motion *in limine* to introduce other-crimes evidence. The first incident occurred in May 2009 and involved defendant stealing Crockett's car, threatening her with bodily harm, and harassing her by telephone. The next incident occurred during the week before the charged offenses, when defendant refused to let Crockett out of her bedroom, forced her to perform oral sex, and choked her. The third incident took place on September 24, 2009, when Crockett called the police after defendant refused to leave her house.

¶ 7 After a hearing, the trial court granted the State's motion.

¶ 8 B. Trial

¶ 9 1. State's Case-in-Chief

¶ 10 Leasha Crockett testified for the State regarding her relationship with defendant, the events leading up to the shootings, and the events of September 28, 2009. She first testified regarding the events related to the other-crimes evidence.

¶ 11 In May 2009, Crockett was living in Chicago Heights with her son, who is developmentally delayed. Defendant helped Crockett with child care and watched her son. Crockett stated that defendant had been her boyfriend "off and on" for nine years. At the time, her relationship with defendant was "rocky" as a result of the birth of defendant's child with another woman, Tara Wheeler. Crockett was bothered by the fact that defendant was bringing the child to Crockett's house.

¶ 12 Pursuant to the State's motion *in limine* to introduce other-crimes evidence, Crockett testified regarding an incident involving her car in May 2009. At that time, Crockett owned a car, but it was in defendant's possession. He had told Crockett that the car had stopped running and was in his uncle's driveway in Champaign. On May 27, 2009, however, Crockett received parking tickets in the mail because the car was in a no-parking zone. When Crockett realized that her car was not where defendant had claimed it was, she asked defendant to return her car. When defendant refused, she told him she would report it stolen. Defendant threatened to do bodily harm and kill her if she reported the car stolen. Specifically, he told her that he knew what time she worked, what time she got off, and that he was going to be waiting outside her house for her. Crockett called the police. When the police responded, defendant was still calling her, and she let the police officer listen to what defendant was saying.

¶ 13 On that same topic, Officer Nick Guidotti later testified that, on May 27, 2009, he was dispatched to Crockett's apartment to investigate her complaints of telephone threats, harassment and a stolen vehicle. While he was speaking with Crockett over a period of 20 to 30 minutes, she

received 14 telephone calls from a restricted number. Officer Guidotti answered one of the calls and identified himself, but the person on the other end of the phone did not speak.

¶ 14 Crockett testified that, by September 2009, Crockett and defendant's relationship had ended. Crockett had broken up with defendant after learning that Wheeler was again pregnant with defendant's child. Crocket allowed defendant to stay in the apartment on the condition that he find someplace else to stay by September 24, 2009. Crockett explained that, after having this relationship with defendant for nine years, she gave him this ultimatum in September because she "just had enough." She realized that defendant was never going to change. She wanted better for herself and did not want to be in that type of relationship any longer.

¶ 15 Testifying again pursuant to the State's motion *in limine* as to other-crimes evidence, Crockett testified to events the week before the crimes in question, in September 2009. She testified to one occasion where, though she had no desire to be intimate with defendant, defendant demanded oral sex from her and threatened to beat her when she refused. She complied with his demand.

¶ 16 She also testified that the events of September 23, 2009. When she returned home from work that night, defendant was doing the same thing that he had been doing when Crockett had left for work—listening to music. Defendant was very antisocial and quiet, saying that nobody loved him or wanted him. As Crockett tried to sleep in her bedroom that night, defendant kept coming into the room to try to talk to her. Crockett went into her son's room, hoping defendant would leave her alone, but defendant followed her and asked her to come into the living room to talk. She went into the living room and defendant again asked her if she was sure that she wanted him to leave the next day. When she responded, "Yes," defendant started choking her. Her son came into the room and asked defendant to stop. When defendant finally let her go, she went into

her son's room, where he was crying and upset. Crockett did not call the police because she was afraid.

¶ 17 As the final episode introduced pursuant to the State's motion *in limine* to introduce other-crimes evidence, Crockett testified that, the next day, September 24, 2009, defendant did not leave the apartment and told Crockett she would have to make him leave, so she called the police. By the time officers arrived, defendant had left the apartment. On that same topic, Officer Kevin Malone later testified that he responded to that call in Chicago Heights regarding a person refusing to leave. When he arrived, he spoke to Crockett, who told him that defendant had not wanted to leave but that defendant was gone by the time Officer Malone arrived.

¶ 18 Between September 24 and September 27, 2009, defendant called Crockett to make arrangements to get his belongings. She told him he had to either send somebody to get them or bring someone with him if he came to get them. Crockett was planning to move out of that apartment and into another apartment in the building where her friend, Marilyn Horton, lived.

¶ 19 On the evening of September 28, 2009, Horton had visited Crockett at her apartment to celebrate, because Crockett's application to move into Horton's apartment building had been accepted. Horton had paid the application fee for Crockett. The two women were in Crockett's bedroom, smoking marijuana and drinking. Crockett's son was in his room. There was a knock on the door. Horton went to the door and returned to tell Crockett that defendant was at the door. Defendant had not called first. Crockett was not expecting defendant because he had not agreed to her conditions that he was to send somebody to get his belongings or to bring someone with him if he came personally. Defendant's belongings were in a closet near the front door.

¶ 20 Crockett told Horton that she was going to answer the door and told Horton to call the police if she heard arguing. Crockett went to the door and opened it, and then opened the closet

door and pointed at his belongings. Defendant said nothing and Crockett went back into the room with Horton.

¶ 21 After four or five minutes, defendant came into the room. Crockett was sitting on a futon and Horton was sitting in a chair by the door. Defendant said: "[Y]ou have no idea what I've been through in the last four days." Crockett testified that she had an "I-don't-care attitude at that point." She asked defendant what he had been through. Defendant said he was homeless and staying in abandoned buildings. He asked her for money for a Greyhound bus ticket to Champaign, but Crockett did not give him money. She bent down to "ash the blunt" and heard Horton crying. When she looked up, she saw defendant pointing a gun at them. He told them to get down on the floor.

¶ 22 Horton got down on the floor. She was crying and told defendant that she could go and get him some money at her house. Defendant told Horton he could not let her go because she would call the police. He also said that he had not come for her, but that he had come for "this bitch," referring to Crockett. Defendant told Horton that she was there "at the wrong place at the wrong time."

¶ 23 Crockett did not get on the floor but pleaded with defendant. She was trying to stop Horton from crying so that defendant would not get agitated. Crocket testified that defendant did not "act well with people crying." Crockett was trying to calm Horton down so that she could talk to defendant and rectify the situation. At that point, Crockett's 10-year-old son came into the room. Defendant put the gun to her son's head and told Crockett: "I told you to get down on the floor." Crockett complied and asked defendant not to hurt her son.

¶ 24 Defendant took her son to his room and closed the door. Defendant started turning down the lights in the apartment. A telephone began ringing and defendant said, "it better not be no

dude calling your phone." Horton responded that, if it was a Boost mobile phone, it was hers. Defendant found the phone and said: "You lucky it is a Boost mobile phone."

¶ 25 Crockett was thinking about what she could do to try to talk with defendant and change the situation. She sat up. Defendant walked towards her and tried to hit her with the gun but she put her hands up. The two began struggling, and she was able to get to her feet. When they broke apart, they were by the window. When she saw that the window was slightly cracked open, she tried to "lunge" for it so that she could "yell out for help."

¶ 26 When she lunged for the window, defendant shot her in the chest. She felt a burning sensation but was still standing. She lunged for the window again and this time was able to scream out the window, "Help, he's trying to kill me." Defendant shot her multiple additional times. She testified that, after the chest wound, she was struck nine times in her left arm and twice in her right arm. At this point, Horton was lying on the floor crying. Crockett dropped to the ground, closed her eyes, and pretended she was dead.

¶ 27 Defendant ran out of the bedroom for a few seconds and then returned. He asked Crockett for her phone and purse. She told him she did not know where they were. Crockett testified that she then saw defendant fire the gun at Marilyn Horton several more times. Defendant left the apartment.

¶ 28 Crockett stated that, when she heard the back door to her apartment slam, she told Horton she was going to get some help. Crockett had to pick her arm off the floor because it was very numb and heavy. She went to the next-door neighbor's apartment to get somebody to call the police, but the neighbor would not open the door. She went downstairs and saw two persons. When she asked them to call the police, they began arguing over who would call the police.

¶ 29 Crockett went outside, where she saw her neighbor, Pamela Bonadona, with a Comcast employee. Crockett told Bonadona that defendant had shot her. Bonadona pressed a piece of clothing against Crockett's chest to stop the bleeding. When the police arrived, Crockett told them to go upstairs and check on Horton because she had not come downstairs.

¶ 30 Crockett was taken to Christ Hospital by ambulance. As a result of defendant shooting her, she has a steel plate in her shoulder, a dark scar in the middle of her chest, nine scars on her left arm, and two scars on her right arm.

¶ 31 Gregory Pearson, an independent contractor for Comcast, testified that, on September 28, 2009, he was waiting to go inside an apartment to pick up Comcast equipment when he heard commotion and gunshots. An African American female, bleeding from the arms and chest, came out of the building and told him she had been shot. Pearson called 9-1-1.

¶ 32 Pamela Bonadona also testified for the State. On September 28, 2009, Bonadona lived in the apartment complex at 450 West 16th Street. She knew Crockett and defendant. On that evening, she was sitting in her apartment when she heard gunshots outside. She testified that she heard one gunshot, then a four-to-five-second pause, then six more shots, for a total of seven gunshots. At the same time, the Comcast man was knocking at the door of the apartment building. Bonadona went to the door to let him in. She went outside, walked down the walkway towards the street and looked around. She testified that when she looked to the right, towards the east, she saw a man running who was wearing blue jeans and a gold hoody.

¶ 33 Bonadona then heard Crockett saying, "Oh God, somebody help me." Crockett stumbled out the door and fell into Bonadona's arms. Bonadona testified that Crockett (who routinely called Bonadona "Ma") said, "Ma, he shot me." Bonadona asked Crockett who shot her, and Crockett said "Bart."

¶ 34 Bonadona, a retired registered nurse, applied pressure on the two wounds in Crockett's chest and put a towel on them. She then saw blood coming from Crockett's left arm. Bonadona felt it and said Crockett's bone was completely shattered.

¶ 35 Illinois State Police Investigator Patrick Phillips processed the crime scene. He spoke to the other officers and took photographs. He saw blood-like stains on the concrete step outside the front entrance door, inside the building on a hallway door, and on the outside of the door to apartment 1B.

¶ 36 He went inside apartment 1A. Horton's body had already been removed. He saw a spent shell casing on the bathroom floor. In the master bedroom, he noticed two fired bullets and one spent shell casing on the floor just inside the doorway. He also saw two spent shell casings on top of two plastic trash bags on the bedroom floor, and four spent casings on the floor on the other side of the trash bags. He later discovered that there was an additional spent shell casing inside one of the trash bags. He found a total of nine spent shell casings.

¶ 37 On redirect examination, Phillips stated that, once a bullet hits a surface, it can travel in any direction. He also stated that, after a bullet is fired, a casing and bullet are not always left behind. He explained that when bullets strike an object, they can mushroom at the tip, or they can be mangled, damaged, or dented. They can also break apart into smaller pieces.

¶ 38 Investigator Phillips also saw a pool-of-blood-like stain on the floor in the northwest corner, indicating someone had been there long enough to develop the stain. Other than liquid, that stain also contained some kind of body tissue such as brain matter or organ matter. He also saw a possible bullet hole that was "through-and-through" the window on the west side of the bedroom. He was unable to locate any bullet outside. Investigator Phillips photographed his observations and collected and inventoried the evidence.

¶ 39 Officer Christopher Mazzone testified that, on September 28, 2009, he was working with his partner, Officer Serrato. At approximately 8 p.m., they received a shooting-victim call and went to 450 West 16th Street in Chicago Heights. He spoke to Crockett and she told him, "My ex-boyfriend, Bartholomew Bishop, shot me." She was bleeding from her chest area and was being treated by the paramedics. Officer Mazzone went inside the apartment and into the northwest bedroom, where he saw an African American female lying on the ground and a pool of blood around her head.

¶ 40 Officer David Kline testified that, about two weeks later, on October 15, 2009, between 7:30 and 8 p.m., he responded to 1020 Stratford Drive in Bourbonnais to assist with a person who had overdosed. Officer Kline identified defendant in court as that person. When he arrived at the scene, Officer Kline was told by some individuals that the unresponsive person was "Bartholomew Sandifer." He also spoke to Kendra Morris, who was purported to be the unresponsive person's girlfriend, who also gave him the name of "Bartholomew Sandifer." A record search showed no results for an individual with that name.

¶ 41 Officer Kline continued his investigation. He checked to see if the fire department paramedics who had transported the individual to the hospital had obtained a name. Officer Kline learned that the individual had told them his name was "Merlin Moss." The dispatcher ran the name thorough the system and told Officer Kline that the name had a Champaign County warrant attached to it, as well as several aliases.

¶ 42 Officer Kline went to Riverside Hospital, where defendant was being treated. Officer Kline asked defendant his name. Defendant held up his I.D. bracelet that had the name "Merlin Moss" on it. Defendant then told Officer Kline several times that his name was Merlin Moss.

Officer Kline told defendant that his friends at the apartment had provided a completely different name for him.

¶ 43 Officer Kline then told defendant that there was a warrant attached to the name Merlin Moss. At that point, defendant said he was not Merlin Moss and, instead, claimed he was "Anthony Bishop." Defendant also explained that the reason he had given a different name was that he was on parole and was worried that he would get a parole violation since he was out of his parole district.

¶ 44 Officer Kline then ran a check on the name "Anthony Bishop" and found an individual with that name through the Illinois Department of Corrections. After seeing the photograph of Anthony Bishop, Officer Kline was not convinced of defendant's identity because the photograph did not look like him.

¶ 45 Because the police were getting several different names for defendant, the dispatcher decided to run checks on the aliases that had been attached to the original warrant for "Merlin Moss." One of the names was "Bartholomew Bishop." The dispatcher told Officer Kline that this name had a Chicago Heights murder warrant attached to it.

¶ 46 Officer Kline confronted defendant. He asked him if there would be any reason why the Chicago Heights police would be looking for him. Defendant started crying and appeared visibly upset. He told Officer Kline that he knew why the Chicago Heights police department was looking for him and eventually told him that his name was Bartholomew Bishop. The Bourbonnais police department notified the Chicago Heights police department. Officer Kline stayed with defendant until they arrived.

¶ 47 Detective Mikal El-Amin, of the Chicago Heights police department, testified that he investigated this crime and spoke to Crockett, who told him that defendant was her assailant.

Detective El-Amin issued a wanted bulletin for defendant and began looking for him. Eventually, an arrest warrant was obtained.

¶ 48 On October 15, 2009, Detective El-Amin was contacted by the Bourbonnais police department and went to Riverside Hospital. Defendant, who had just been discharged from the hospital, was taken into custody.

¶ 49 2. Defendant's *Lynch* Witness

¶ 50 In the middle of the State's case, defense counsel had informed the court that he intended to call Tara Wheeler as a *Lynch* witness to introduce evidence that Crockett had held a knife and threatened to physically harm defendant and Wheeler. The State, which had learned of defense counsel's intent to introduce *Lynch* evidence only one hour earlier, objected because defendant had not raised it in a pretrial motion, and the State was unprepared. Defense counsel explained that he had been unable to speak to Wheeler until the previous evening, and he did not intend to call her that day. The trial court reserved its ruling but allowed defense counsel to give notice to the State so it would have the opportunity to interview Wheeler.[1]

¶ 51 After the State rested its case, the trial court re-visited the *Lynch* issue. Defense counsel told the court that, after speaking with defendant and Wheeler, it was their decision not to call her as a witness. Defense counsel also told the court that defendant agreed with the decision. The trial court addressed defendant, who confirmed that he did not want Wheeler to testify. The court also stated that, to corroborate his state of mind at the time of the shooting, defendant would be

[1] In *People v. Lynch*, 104 Ill. 2d 194 (1984), our supreme court held that when a defendant raises the theory of self-defense, evidence showing the victim's aggressive and violent character may be introduced to: (1) show that the defendant's knowledge of the victim's violent tendencies affected his perceptions of and reactions to the victim's behavior; or (2) support the defendant's version of the facts, when there are conflicting versions of events. *Id*. at 200.

allowed to testify to that same prior incident involving Crockett, to which Wheeler would have testified.

¶ 52 3. Motion for Directed Verdict

¶ 53 Defendant moved for a directed verdict. The trial court denied the motion.

¶ 54 4. Defendant's Case-in-Chief

¶ 55 Defendant testified on his own behalf. He stated that he and Crockett had dated "off and on" for approximately nine and a half years. During that time, Crockett had a son, and defendant stated that he "basically raised him since he was six months old." He watched Crockett's son when he was a baby, when Crockett went to college. They called each other "Stinky."

¶ 56 Defendant testified that he had cheated on Crockett with a woman named Tara Wheeler, with whom he had children. According to defendant, Crockett became aware of his relationship with Wheeler in 2006 or 2007. He testified that Crockett, Wheeler and he all lived together but Crockett moved out when Wheeler got pregnant. Defendant's first child with Wheeler was born in 2008.

¶ 57 Defendant testified that Wheeler and Crockett would fight, and that Crockett did not like Wheeler. He said Crockett realized Wheeler was not going anywhere, and that Wheeler wanted defendant and was determined to get him.

¶ 58 He testified regarding a 2008 incident during which Crockett, after learning that defendant and Wheeler were having a sexual relationship, "grabbed a knife and said she was going to hurt" Wheeler and him. Defendant said that Crockett went upstairs to find Wheeler. He told Wheeler to come downstairs and she did. Defendant testified that he called the police and told them what had happened. The police went upstairs to talk to Crockett and look for the knife, which they did not find.

¶ 59 Defendant testified that Crockett then moved out to live with her mother, but he moved back in with Crockett in March or April 2008, while still dating Wheeler.

¶ 60 Defendant also testified regarding the shooting in question. He stated that he went to Crockett's apartment to get some personal items. He heard Horton saying that he was at the door. Crocket opened the door and he asked her where his things were. Crockett opened the closet door and returned to the back bedroom where Horton was. Defendant testified that he did not get his things out of the closet because Crockett's son came out of his bedroom and called defendant's name. Defendant stated that he hugged and kissed Crockett's son.

¶ 61 Defendant testified that he next went to the doorway where Crockett was and "asked her—because I been calling to get my stuff for like a whole week, and she would tell me that she's at work or she's here or she's there." Crockett responded: "F__ you, Bart. I hate you. I don't care about your stuff." Defendant testified that he felt like she was trying to impress Horton. Defendant testified that he then said: "Well, did Marilyn say that me and her was messing around?" Defendant said that Horton told Crockett that she was sorry and had not wanted her to know. He testified that Crockett came at him, started swinging, told him she hated him, and to get out. As Crockett was swinging, defendant was blocking her attacks and laughing at her because he knew he had "hit a nerve and hurt her feelings."

¶ 62 Defendant said that he and Crockett struggled for a few seconds until her son came to the door and told them to stop. Defendant testified that he bent down to tell her to tell her son it was okay. As he bent down, Crockett saw his gun in his back waistband and took the gun from him and "it was snatched out real quick" and that was when he "heard a shot, pow." Defendant believed Crockett was shooting at him, so he pushed her son out of the way. He then heard three

to four more shots. When defendant turned around, Crockett had the gun pointed in his face. She said: "I hate you" and "I'm tired of you hurting me."

¶ 63 While Crockett was talking, defendant "went for the gun." At that point, Marilyn was on the floor between the chair and the futon. Defendant testified that he used his left hand and pushed Crockett into the wall after he knocked the gun down. The gun did not fall out of Crockett's hand, but defendant thought "the gun went off like once or something like that." He "rushed" Crockett and pushed her into the door. The two continued struggling and fighting. Defendant stated that Crockett was trying to point the gun in his direction while he was trying to point it at the window, because his first thought was that Crockett's son was right behind him. He testified that Crockett's hand was on the gun and his hand was around her hands. The struggle took them "from the door, along the wall, into the TV and near the window."

¶ 64 When they got by the window, the gun went off again. He put his knee in her and "yanked" and that was when the gun went off. At that point, according to defendant, Crockett was focused on trying to shoot him. Defendant testified that Crockett "never yelled, 'Ow, I been shot' or anything like that."

¶ 65 Defendant further testified that when he tried to "yank the gun away," he believed it struck her in her shoulder because that was when she put one hand to her shoulder. Defendant stated that Crockett still had the other hand on the gun. At that point, defendant testified, he "yanked" at the gun again and put his "full force" into it. The gun went off again. Defendant said he thought that that was when it hit Crockett in her arm. At that point, Crockett let go of the gun. Crockett grabbed her arm and fell to the floor.

¶ 66 Defendant stated that, during the entire time they were struggling, until he got the gun away from her, there was no point that he felt he had control of the gun because Crockett's hands

were on the gun and he was trying to control where Crockett was trying to point the gun. He testified that he could not recall the exact amount of times he heard shots during the struggle, but he was "pretty sure" it was more than the two that he actually saw strike Crockett.

¶ 67 After he got the gun from Crockett and she fell to the ground, defendant said to her, "Man, what's wrong with you?" and she said she was sorry.

¶ 68 Defendant tried to figure out what to do next. His gun was not registered; he had bought it "off the street." He realized that he was a convicted felon in possession of a weapon. He left the apartment through the back door and went west down 16th Street. He put the gun in an alley and called his cousin. He walked back to Crockett's apartment but saw the police cars in front.

¶ 69 Defendant testified that when he was about four houses down from the apartment, he heard someone say that Horton was dead and that defendant was wanted for murder. Hearing this, defendant went to take a bus back to Hammond, where he was staying at the time.

¶ 70 On cross-examination, defendant testified that, in May 2009, Crockett let him use her car but the engine shut down. He denied threatening Crockett.

¶ 71 The jury found defendant guilty of first-degree murder and attempted first-degree murder.

¶ 72 5. Posttrial Motions

¶ 73 Defense counsel filed a motion for a new trial, which was later amended. The amended motion argued that the trial court erred in allowing the State to admit the other-crimes evidence because it was more prejudicial than probative.

¶ 74 Defendant filed a *pro se* motion for a new trial. Among other things, defendant argued that he was denied effective assistance of counsel when defense counsel lied and told him that his *Lynch* witness, Wheeler, was drunk and high and thus should not be called as a witness. Defendant argued that Wheeler was not drunk, nor high. Defendant also claimed that he chose

not to have Wheeler testify because his counsel misled him, and he had been unable to make a clear decision as a result of his counsel's lies. Defendant supported his claim that Wheeler was not intoxicated by attaching four affidavits to his motion for a new trial.

¶ 75 Defendant also filed *pro se* motions for the trial court to appoint an "American Bar Association" attorney to replace defense counsel, to relinquish defense counsel of his duties, and for a directed acquittal.

¶ 76 The trial court held a hearing on all of the posttrial motions. The court explained that it would first allow defense counsel to argue the motion for a new trial that he filed, and would then address the allegations that defendant made in his motion for a new trial. The court denied all of the motions.

¶ 77 The trial court sentenced defendant to 10 years of imprisonment for the attempted murder of Crockett, plus 25 years for the firearm enhancement, and 40 years for Horton's murder, plus 25 years for the firearm enhancement, with the sentences to be served consecutively.

¶ 78 II. ANALYSIS

¶ 79 A. Rule 431(b) Admonishments

¶ 80 Defendant first argues that his conviction should be reversed and this matter remanded for a new trial because the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). Rule 431(b) states:

> "(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on

> his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 81 Our supreme court has emphasized that the trial court must ensure that each juror *both understands and accepts* each of the four principles in the rule. *People v. Belknap*, 2014 IL 117094, ¶¶ 44-46; *People v. Wilmington*, 2013 IL 112938, ¶ 32; *Thompson*, 238 Ill. 2d at 607. Defendant argues that the trial court violated Rule 431(b) by asking the prospective jurors: (1) whether they disagreed with these principles, instead of asking whether they "accepted" them; and (2) failing to ask whether they understood them. Defendant further claims that when the trial court later questioned the already-selected panel of jurors, immediately prior to their swearing in, whether they both understood and accepted the principles, it was too late to use the questions to choose a fair and impartial jury.

¶ 82 The State concedes the Rule 431(b) error, because the trial court did not ask whether the potential jurors "understood" these principles. The State argues, however, that the issue was forfeited because defendant failed to properly preserve it. To preserve an issue for appeal, a defendant must raise an objection in the trial court and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defense counsel did not object to the trial court's purported noncompliance with Rule 431(b). Conceding he forfeited the issue, defendant claims that the trial court's error is reversible error under the plain-error doctrine.

¶ 83 We may review an unpreserved error under the plain-error doctrine found in Illinois Supreme Court Rule 615(a), which provides a limited and narrow exception to the general rule of procedural default. *People v. Lewis*, 234 Ill. 2d 32, 42 (2009). The plain-error doctrine allows a reviewing court to consider a forfeited issue if an error in fact occurred and: (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or; (2) the error is so substantial that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Thompson*, 238 Ill. 2d at 613; *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The defendant bears the burden of persuasion under both prongs of the plain-error test. *Lewis*, 234 Ill. 2d at 43.

¶ 84 Defendant relies only on the first prong, claiming the evidence was closely balanced. He argues that the case involved a credibility contest between Crockett and him, and that "each of them testified credibly that the other was the shooter." Citing *People v. Naylor*, 229 Ill. 2d 584 (2008), defendant claims that where the evidence comes down to a credibility contest, the evidence was closely balanced.

¶ 85 In *Naylor*, the trial court had committed error in admitting into evidence the defendant's prior conviction of aggravated battery to impeach his testimony (because more than 10 years had elapsed between the date of conviction and the date of trial). *Id*. at 598, 602. Our supreme court in *Naylor* concluded that this was plain error, because the evidence was closely balanced where the trial court had heard the credible testimony of two police officers that defendant sold drugs, and the credible testimony of defendant that he was swept up in a drug raid, and the case was a "contest of credibility." *Id*. at 606-07. As part of its analysis, the court found that defendant's testimony was credible because it was "consistent with much of the officers' testimony and the

circumstances of his arrest." *Id*. at 607. As the court further explained, at the close of the testimony in the bench trial, the trial court "was faced with two different versions of events, *both of which were credible*." (Emphasis added.) *Id*. at 608. Yet, "[m]oments after erroneously admitting incompetent evidence for the purpose of impeaching defendant's credibility, the [trial] court concluded that it believed the officers' version of events." *Id*. Based on that record, the court in *Naylor* opted to "err on the side of fairness" and reversed the defendant's convictions. (Internal quotation marks omitted.) *Id*. As the court explained:

> "The evidence boiled down to the testimony of the two police officers against that of defendant. Further, *no additional evidence* was introduced to contradict or corroborate either version of events. Thus, credibility was the *only* basis upon which defendant's innocence or guilt could be decided." (Emphasis added.) *Id*. at 608.

¶ 86 The *Naylor* majority flatly rejected the dissent's suggestion that it was creating "a rule holding that if the evidence at trial involves a contest of credibility, and the defendant testifies contrary to the prosecution's witnesses, the evidence will always be closely balanced." *Id*. at 615-16 (Thomas, C.J., dissenting, joined by Garman and Karmeier, JJ.) As the court explained: "It is axiomatic that whether the evidence in a criminal trial is closely balanced depends solely on the evidence adduced in that particular case." *Id*. at 609. And more recently, our supreme court has stated that "a reviewing court must undertake a commonsense analysis of all the evidence in context when reviewing a claim under the first prong of the plain error doctrine." *People v. Belknap*, 2014 IL 117094, ¶ 50; see also *People v. Adams*, 2012 IL 111168, ¶ 22 (in deciding whether closely-balanced prong has been met, court's "commonsense assessment" of the evidence must be made "within the context of the circumstances of the individual case"); *People*

v. White, 2011 IL 109689, ¶ 139 ("A qualitative—as opposed to strictly quantitative—commonsense assessment of the evidence demonstrates that the evidence was not closely balanced."). Noting this additional supreme court precedent, we have found *Naylor* distinguishable in certain cases. See, *e.g.*, *People v. Sebby*, 2015 IL App (3d) 130214, ¶¶ 42-45, appeal allowed, 39 N.E.3d 1009 (Ill. 2015) ("[u]tilizing that contextual commonsense analysis" in case involving defendant's resisting peace officer, evidence was not closely balanced where it was "apparent that defendant's witnesses [were] less than credible" and "unlike *Naylor*, where neither party presented extrinsic evidence to corroborate or contradict either version, photographic evidence of deputy's injuries corroborated deputies' version of events). As we have also explained: "*Naylor* does not stand for the proposition that evidence is 'closely balanced' whenever the defense version of events differs from the State's version and the accounts are 'equally consistent with the physical evidence.' " *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 88.

¶ 87 We likewise find *Naylor* distinguishable. Here, in addition to Crockett's credible version of the shooting, the State presented testimony from police officers and other witnesses and photographic evidence of Horton's and Crockett's injuries. There was additional evidence corroborating Crockett's testimony, including testimony from Bonadona and Pearson, who saw Crockett immediately after the shooting. Bonadona testified that Crockett told her that defendant had shot her and Bonadona saw a man fleeing. More importantly, the State introduced evidence of other crimes, which the State correctly notes established defendant's repeated domestic abuse and harassing conduct toward Crockett.

¶ 88 And, as the State points out, instead of remaining at the scene, or returning to the apartment after he disposed of his gun in the alley, defendant escaped first to Indiana, and later to

Bourbonnais, when he knew he was wanted for the crimes, and tried to disguise himself using various aliases. "[A]s a general matter, both evidence of flight and the use of an assumed name may be admissible as proof of consciousness of guilt." *People v. Harris*, 225 Ill. 2d 1, 23 (2007).

¶ 89 Unlike the trial judge in *Naylor*, the jury in this case was not faced with two equally credible versions of the events. And unlike the defendant in *Naylor*, defendant's version of events here was not credible in light of the injuries suffered by Crockett. The State characterizes defendant's version as "absurd." As the State notes, according to defendant, Crockett had control of the weapon during the entire struggle, but somehow shot herself once in the chest, nine times in her left arm, and twice in her right arm. Yet defendant somehow suffered no injuries at all, despite the fact that, according to him, Crockett repeatedly fired his gun at him.

¶ 90 The evidence was not closely balanced. Defendant has failed to establish that the Rule 431(b) error constituted plain error.

¶ 91 B. Prior-Acts Evidence

¶ 92 Defendant next argues that the trial court improperly admitted other-crimes evidence.

¶ 93 Other-crimes evidence, or prior-acts evidence, encompasses criminal acts as well as other misconduct and bad acts that may not rise to the level of a criminal offense. *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 35. It is well-settled under the common law that prior-acts evidence is admissible if relevant for any purpose other than to show a defendant's propensity to commit crimes. *People v. Chapman*, 2012 IL 111896, ¶ 19. These purposes include motive, intent, identity, lack of mistake, and *modus operandi*. *Id*. But even if other-crimes evidence is offered for a permissible purpose, it "will not be admitted if its prejudicial impact substantially outweighs its probative value." *Id*.

¶ 94 The legislature abrogated the common-law propensity rule, in part, by enacting section 115-7.4 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.4 (West 2012). See *People v. Dabbs*, 239 Ill. 2d 277, 288 (2010). Section 115-7.4 of the Code, titled "Evidence in domestic violence cases," provides, in pertinent part:

> "In a criminal prosecution in which the defendant is accused of an offense of domestic violence as defined in paragraphs (1) and (3) of Section 103 of the Illinois Domestic Violence Act of 1986, or first degree murder or second degree murder when the commission of the offense involves domestic violence, evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.4(a) (West 2012).

¶ 95 Thus, provided the other requirements of the statute and other applicable rules of evidence are met, section 115-7.4 "permits the trial court to allow admission of evidence of other crimes of domestic violence to establish the propensity of a defendant to commit a crime of domestic violence." *Dabbs*, 239 Ill. 2d at 295.

¶ 96 Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011) incorporates both the common-law propensity rule described above and section 115-7.4, providing that:

> "Evidence other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided by sections 115–7.3, 115–7.4, and 115–20 of the Code of Criminal Procedure (725 ILCS 5/115–7.3, 725 ILCS 5/115–7.4, and 725 ILCS 5/115–20). Such evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

¶ 97 Prior to trial, the State filed a motion *in limine* to admit evidence of defendant's previous conviction for domestic violence against the same victim to show propensity pursuant to section 115-7.4 of the Code. The State also argued that the evidence was admissible under the common law to show defendant's intent, motive, and lack of mistake, so as to defeat any self-defense claims. After a hearing, the trial court granted the State's motion.

¶ 98 Defendant identifies three prior bad acts that he claims were improperly admitted at trial: (1) the telephone harassment in May 2009; (2) the forced sex act in September 2009; and (3) defendant's refusal to leave Crockett's house in September 2009 until Crockett called the police. Defendant does not claim that Crockett's testimony about defendant choking her, in September 2009, was erroneously admitted.

¶ 99 Before getting into the specifics of the three instances of prior-acts evidence defendant challenges, defendant first raises an argument applicable to *all* of the prior-acts evidence admitted—that the trial court failed to do the properly balancing of probative value versus unfair prejudice before admitting the other-crimes evidence. Whether the trial court applied the correct legal test is a question we review *de novo*. *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 26.

¶ 100 Defendant relies on *People v. Boyd*, 366 Ill. App. 3d 84 (2006). In *Boyd*, we noted that the trial court had "carefully analyzed the probative value of the other-crime[s] evidence." *Id*. at 94. But as we further explained, "[a]lthough the defendant contended admissibility of the State's proposed other-crime[s] evidence would create unfair prejudice, the trial court did not refer to that argument when making its ruling. The trial court never mentioned the risk of unfair prejudice." *Id*. Thus, we concluded that the trial court had failed to conduct the balancing test, though we found that error harmless because, despite the court's failure to explicitly consider the

undue prejudice, we held that the unfair prejudice did *not* substantially outweigh the strong probative value of the evidence. *Id*. at 95.

¶ 101 Defendant is correct that, in determining the admissibility of prior-act evidence under section 115-7.4, the court is required to "weigh[] the probative value of the evidence against undue prejudice to the defendant." 725 ILCS 5/115-7.4(b) (West 2012). Indeed, the statute goes beyond that to elaborate on the trial court's balancing of these considerations: "In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider: (1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; or (3) other relevant facts and circumstances." *Id*.

¶ 102 In its ruling, the trial court directly tracked the statute's mandate regarding the balance of probative value versus prejudicial effect:

> "This Court must weigh the probative value versus the undue prejudice that the defendant may incur as a result of the admissibility of this evidence.
>
> The Court must consider the proximity in time to the charged predicate offense. In this particular case, we are only looking at five months which is close in time.
>
> Second, the degree of factual similarity to the charged or predicate offense. As I mentioned earlier, these are, in fact, similar in nature in that it's the same victim, the same place, and the same action of the defendant, that being control over the victim, and interfering with her personal liberties. And any other relevant facts or circumstances.
>
> I do believe that *** all three incidents do fall within the statute. And, therefore, they will be admitted." (Emphasis added.)

¶ 103 The court also discussed the ability to reduce the prejudicial impact of the testimony via curative jury instructions. The record thus shows that the trial court understood the need to consider the undue prejudice caused by this evidence and did so, both as section 115-7.4 prescribes and otherwise. Thus, *Boyd* does not assist defendant.

¶ 104 Defendant appears to base his first argument in part on the fact that the trial court told defendant that it could revisit the balancing of probative value versus prejudicial impact of the evidence, should defendant wish to do so as the evidence unfolded. The trial court's statement does not suggest to us that the court was abdicating its duty to *initially* consider the balance of the competing considerations, but rather that the trial court merely recognized that trials can sometimes take unexpected turns, and that the court would be willing to keep an open mind if the defendant wanted to raise the argument again at a later time. The trial court should be commended, not condemned, for that statement.

¶ 105 Beyond his initial argument about the trial court's failure to apply the proper legal test in admitting this prior-act evidence, defendant raises other arguments regarding the trial court's ruling. First, defendant argues that, even if the court did weigh the probative value of the evidence compared to its undue prejudicial impact, it did so erroneously. On *this* question, our review is not *de novo*; the decision to admit other-crimes evidence is within the sound discretion of the trial court. *Chapman*, 2012 IL 111896, ¶ 19. We will not reverse a trial court's decision to admit other-crimes evidence unless the court abused its discretion. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). Under this highly deferential standard of review, a trial court abuses its discretion when its decision is arbitrary, fanciful or so unreasonable that no rational person would adopt the view of the trial court. *Id.*; *People v. Lerma*, 2016 IL 118496, ¶ 32.

¶ 106 The trial court found that the three prior incidents that the State sought to introduce were close in time. The court also found that these incidents involved the same parties, the same location, and the same type of action by defendant—*i.e.*, the exertion of some type of control over Crockett. The court decided that these acts were admissible under the common law, which the court noted was now codified in Illinois Rule of Evidence 404(b). The court also found the incidents were properly admissible under the guidelines of section 115-7.4 to show propensity.

¶ 107 We will take these instances of prior-acts evidence in reverse order.

¶ 108 Crockett's testimony that, on September 24, 2009, defendant refused to move out of the apartment as Crockett demanded, was highly probative of defendant's state of mind, his hostility toward Crockett for kicking him out of the apartment, ending their relationship, or both. This testimony went part and parcel with Crockett's testimony about the previous day, September 23—testimony defendant does *not* challenge—that defendant choked Crockett when she told him she was still insisting he move out. The State's theory was that defendant's anger toward Crockett erupted into a murderous rage four days later. As defendant claimed self-defense at trial, this evidence helped prove that defendant did, in fact, intend to harm Crockett. See Ill. R. Evid. 404(b) (eff. Jan. 1, 2011) (prior-acts evidence admissible to prove defendant's intent); *People v. Young*, 381 Ill. App. 3d 595, 601 (2008) (evidence of prior acts of violence were properly admitted to show defendant's intent); *People v. Wilson*, 214 Ill. 2d 127, 140–41 (2005) (evidence of prior acts admissible to show defendant's intent). Arguably, this evidence was also admissible as a prior act of domestic violence under section 115-7.4, as a refusal to leave one's dwelling could be viewed as "harassment" or "interference with [the] personal liberty" of Crockett, both of which Illinois law recognizes as acts of domestic violence. See 750 ILCS

60/103(1), (3) (West 2012) (Illinois Domestic Violence Act). But as we have found the evidence admissible under Rule 404(b) and may affirm on that basis alone, we need not go further.

¶ 109 As to the evidence that defendant threatened to beat Crockett if she did not perform oral sex on him, the act occurred within a month of the shootings (even if the precise date in September 2009 was not locked down, as defendant complains), and it involved the same parties in the same dwelling. Defendant is correct that the ultimate crimes with which he was charged were not sex crimes, but sexual assault is still unquestionably an act of domestic violence, and it involves a use of violent force against Crockett, even if the precise method of violence perpetrated was different. The trial court did not abuse its discretion in finding that, under section 115-7.4, this evidence could be used to show defendant's propensity to commit forcible acts of domestic violence against Crockett. 725 ILCS 5/115-7.4(b) (West 2012).[2]

¶ 110 The final act alleged was the telephone harassment by defendant in May 2009, in which defendant called Crockett repeatedly and threatened to kill her if she reported her vehicle as stolen. Threats of physical harm constitute acts of domestic violence. See, *e.g.*, *People v. Torres*, 2015 IL App (1st) 120807, ¶¶ 41, 47 (defendant's previous threats to victim that she was "going to pay for this" and he could "hurt her badly," and that she was a "f__ing bitch, f__ing whore" were properly admitted as prior acts of domestic violence under section 115-7.4); 750 ILCS 60/103 (1), (3) (West 2012) (under Illinois Domestic Violence Act, "domestic violence" includes

[2] Arguably, the sexual-assault act might also be admissible to show defendant's intent to harm Crockett, even if the sex crime was different than the shooting, because, when offered to show intent, or any other exception to the propensity rule other than *modus operandi*, "less similarity between the facts of the crimes charged and the other offenses is required." *Wilson*, 214 Ill. 2d at 140. Given the close proximity in time between the sexual assault and the crimes in question, the identical location of the acts, and the factual similarity in that they both involved forcible acts committed against Crockett, the evidence might be admissible under Illinois Rule of Evidence 404(b) as well. But as we find it admissible pursuant to section 115-7.4 in any event, it was properly admitted, and we may affirm on that basis alone.

"harassment"). These threats occurred less than five months before the crimes in question and involved the same parties, defendant and Crockett. While we would consider the balance between probative value and undue prejudicial impact to be closest with regard to this episode of prior-act evidence, we cannot say that the trial court's ruling in this regard was so arbitrary or unreasonable that no reasonable person would adopt the trial court's view. We therefore affirm this ruling as well.

¶ 111 Defendant next claims that the court allowed the State to conduct "mini-trials" on the other uncharged offenses, which improperly bolstered Crockett's testimony. "Even when relevant and probative, other-crimes evidence must not become a focal point of the trial." (Internal quotation marks omitted.) *People v. Arze*, 2016 IL App (1st) 131959, ¶ 98. "In admitting evidence of other crimes to show propensity, a trial court should not permit a mini-trial of the other, uncharged offense[s], but should allow only that which is necessary to illuminate the issue for which the other crime was introduced." (Internal quotation marks omitted.) *Id*.; accord *People v. Chromik*, 408 Ill. App. 3d 1028, 1041 (2011) ("Courts have warned about the dangers of putting on a trial within a trial with detail and repetition greatly exceeding what is necessary to establish the particular purpose for the evidence.").

¶ 112 The State argues that the prior-acts evidence was limited to Crockett "briefly testifying to the prior bad acts, and the corroborating, succinct testimony by police officers for two instances." The record confirms as much, and we agree with the State that there were no "mini-trials" in this case.

¶ 113 Finally, defendant argues that these mini-trials involved the admission of hearsay evidence from police officers. Defendant claims that hearsay was wrongly admitted when Officer Malone was permitted to testify that, on September 24, 2009, "[Crockett] stated that

there was a subject who was—at first didn't want to leave, and by the time we got there he was gone" and that she identified the individual as defendant. We agree with the State that the issue has been forfeited, because defendant failed to object at trial and did not raise the issue in a posttrial motion. See *Enoch*, 122 Ill. 2d at 186. Nor has defendant asked for plain-error review of this alleged error, either in his opening brief or in his reply brief before this court. As our supreme court has explained, the defendant bears the burden of establishing plain error, and a "defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Thus, as to the hearsay issue, because defendant has failed to present a plain-error argument, we will honor the procedural default and consider it no further. *Id*.In sum, defendant has failed to show that the trial court abused its discretion in admitting the prior-acts evidence.

¶ 114 C. Preliminary *Krankel* Inquiry

¶ 115 We now address the issue regarding the trial court's preliminary *Krankel* inquiry. As noted earlier, defense counsel had informed the court that he intended to *ca*ll Tara Wh*eeler as a witnes*s to introduce evidence that Crockett had previously held a knife and threatened to physically harm defendant and Wheeler. Later, defense counsel informed the court that, after speaking with defendant and Wheeler, defense counsel and defendant agreed not to call Wheeler to introduce *Lynch* evidence at trial.

¶ 116 When defense counsel informed the trial court that the defense would not call Wheeler as a witness, the trial court addressed defendant. The following colloquy took place:

> "THE COURT: Mr. Bishop, Mr. Evans has indicated to me that—earlier this morning we talked about the possibility of Miss Wheeler testifying to some prior bad acts that may or may not have been performed by Miss Crocket. He is

now indicating to me that you have had a conversation with him and that it is your decision along with the consultation with your attorneys that you not call Miss Wheeler. Is that correct?

DEFENDANT: Yes, your Honor.

THE COURT: And is it your desire to not have her testify?

DEFENDANT: Yes, your Honor."

¶ 117 Posttrial, in his *pro se* motions for a new trial and to "relinquish counsel of his duties," defendant alleged ineffective assistance of counsel. Defendant claimed his counsel misrepresented to him, and misled him into believing, that Wheeler was "drunk and high" at the time she was going to testify on his behalf when she, in fact, was not. Defendant argued that he was therefore unable to make a clear decision as to whether Wheeler should testify. Defendant further claimed that he had later discovered that counsel had lied and that he had "recieved [*sic*] affidavits from them stating what took place."

¶ 118 In addition to his own statements contained in his written motion as detailed above, defendant submitted four affidavits to the court: an affidavit from Wheeler and affidavits from Marvella Williams, Anthony Bishop, and Darren Sandifer, which we summarize below:

- Wheeler did not deny, nor even address, her purported intoxication on the day in question. She stated only that defense counsel "asked [her] about Champaign and then told [her] to hold on, came back to [her] and said he wasn't going to use [her]."

- Williams swore that she met defense counsel in the hallway on February 21 and asked why he did not put Wheeler on the stand. Williams stated that defense counsel "replied that [Wheeler] was messed up." Williams also stated that when she asked defense counsel to explain, he told her that Wheeler was "hi" (*sic*). Williams further

stated that she has known Wheeler for "some years" and had never seen her high or intoxicated.

- Anthony Bishop stated that he met Wheeler at the courthouse and "did not witness her under the influence of any illegal drug or substance." He further stated that Wheeler "was alert and sober" and "not intoxicated in any way in [his] opinion."

- Sandifer stated, in his affidavit, that he picked Wheeler up from the train station on "the 20th of February, 2014 at 12:00 pm" and she needed to be at the courthouse at 1 p.m. Sandifer further stated: "During this time with her I saw no indentation [*sic*] of intoxiction [*sic*]."

¶ 119 After allowing defendant to argue his point, as detailed above, the court asked defendant's trial counsel to tell the court what testimony would have been provided by Wheeler, had she been called to testify. Defense counsel explained as follows:

> "Judge, the testimony that Mr. Bishop told us about Miss Wheeler was that at times in the past, Miss Crockett had been aggressive towards Mr. Bishop and herself. Upon speaking with her the day of trial when she was here to testify, I still stand by our original position, and that is that she was under the influence—severely under the influence of some type of drug or alcohol. Furthermore, Judge, upon speaking with her, [it] appeared that the testimony that she was going to offer in court was something that was not of her own recollection. And it was *based upon her condition, primarily*, that we went back and spoke with Mr. Bishop about her testifying, and it was at that time that I told Mr. Bishop that it was up to him, and he made the decision that she would not testify." (Emphasis added.)

¶ 120 The court then asked defendant if he had this conversation with defense counsel. Defendant stated:

> "After [defense counsel] told me that she was drunk and high, I chose for her—no, I chose for her not to testify because he said the condition she was in, until I found out otherwise that she was not in that condition."

¶ 121 The court then addressed defense counsel regarding his indication that "at best, even if she was in a condition to testify, that she would testify to matters that were not of her own knowledge." Defense counsel told the court that that was his impression, and added that Wheeler's testimony "was stuff that Mr. Bishop testified to at trial himself anyways." Defense counsel also agreed with the trial court that the evidence would have been cumulative at best.

¶ 122 The court next considered the four sworn affidavits. Regarding Wheeler's affidavit, the court noted that "[it] says nothing about whether or not she herself was under the influence of alcohol or intoxicated in any way" and therefore found it to be "of no weight." As to Williams's affidavit, the court found that "[i]t relates to nothing about the court date in which she was present in court and whether or not [Wheeler] was observed." As to Anthony Bishops's affidavit, the court noted that his opinion that Wheeler was not high was contrary to defense counsel's opinion, and that it was also contrary to Wheeler's own affidavit, which did not deny that she had been high or intoxicated. Finally, the court considered Sandifer's affidavit that "she [*sic*] saw no indication of intoxication" and noted this affidavit was also inconsistent with defense counsel's memory.

¶ 123 The court also commented on Wheeler's testimony and noted that she would not have testified to things of her own personal knowledge, but only to things defendant had told her, and to which defendant had testified himself. The court concluded that it was defendant's decision

not to call Wheeler, and that the sworn affidavits did not contradict what defense counsel told the court regarding whose choice it was to not call Wheeler. The court did not appoint new counsel.

¶ 124 In *People v. Krankel*, 102 Ill. 2d 181 (1984), the Illinois Supreme Court held that a defendant may be entitled to the appointment of new counsel during a posttrial hearing on his trial attorney's ineffectiveness. But new counsel is not *automatically* required; instead, the circuit court should first examine the factual basis of the defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). In *Moore*, the court described three methods by which the trial court may evaluate a defendant's *pro se* claims of ineffectiveness of counsel: (1) by asking trial counsel to "explain the facts and circumstances surrounding the defendant's allegations"; (2) by briefly discussing the allegations with the defendant; or (3) by using its own "knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id*. at 78-79; accord *People v. Jolly*, 2014 IL 117142, ¶ 30. If the court determines that the defendant's claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. *Moore*, 207 Ill. 2d at 78. But if the defendant's allegations show possible neglect of the case, new counsel should be appointed. *Id*. at 78-79.

¶ 125 We review *de novo* whether the trial court properly conducted the preliminary *Krankel* inquiry. *Jolly*, 2014 IL 117142, ¶ 28. But if the trial court has properly conducted the *Krankel* inquiry and reached a determination on the merits, we will reverse that determination only if the trial court's action was manifestly erroneous. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 72 . “Manifest error is error that is clearly plain, evident, and indisputable.” (Internal quotation marks omitted.) *Id*. (quoting *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25).

¶ 126 First, the trial court here conducted a preliminary *Krankel* inquiry. The court heard defendant's position and reviewed his written submissions, asked trial counsel to give his view of the events, returned to defendant for a response to trial counsel's explanation, and then relied in part on the court's own memory of the record and the proceedings and on its own judgment as to the sufficiency of defendant's allegations of ineffectiveness.

¶ 127 Nor do we find the trial court's decision not to appoint independent counsel to be manifestly erroneous. First and foremost, the decision whether to call a witness is inherently a matter of trial strategy, generally reserved to the discretion of trial counsel and insufficient to support a *Strickland* claim. *People v. Chapman*, 194 Ill. 2d 186, 231 (2000); *People v. Kidd*, 175 Ill. 2d 1, 45 (1996); see also *People v. Richardson*, 189 Ill. 2d 401, 414 (2000) ("Counsel's decision whether to present a particular witness is generally a strategic choice which cannot support a claim of ineffective assistance of counsel.").

¶ 128 Here, during the initial inquiry, defense counsel, in fact, confirmed that the decision not to call Wheeler involved trial strategy. He offered two reasons for doing so—that Ms. Wheeler was intoxicated, and that her testimony would not be based on personal knowledge, anyway. The fact that his client now disagrees with those bases is not, alone, enough to establish an ineffective-assistance claim. If it were, then every decision on trial strategy could be a possible *Strickland* violation, because by definition a defendant mounting an ineffective-assistance claim will say he or she disagreed with that trial strategy in hindsight.

¶ 129 Defendant argues that the information that defendant provided—through affidavits, defendant's own statements, and trial counsel's initial statements to the court during trial—contradicted the subsequent statements made by trial counsel during the preliminary *Krankel* inquiry, and provided enough support for defendant's claim that Wheeler was not intoxicated and

did have personal knowledge of important, corroborating *Lynch* evidence. Thus, defendant claims that this showed possible neglect of his case and he should have been appointed new counsel for a *Krankel* hearing.

¶ 130 We disagree. Wheeler's affidavit merely recounted that defense counsel decided not to call her, without speaking in any way to her sobriety or lack thereof at that moment. Williams's affidavit simply stated in general terms that he was well-acquainted with Wheeler and had never seen her intoxicated, without mentioning anything about whether he even saw her on the relevant day.

¶ 131 Bishop and Sandifer did swear in their affidavits that they did not believe Wheeler was intoxicated that day. So did defendant, in the statement he made in the written motion and orally before the court at the *Krankel* hearing. The fact that trial counsel believed her to be unfit because of her intoxication, however, was a matter of trial strategy even if defendant believes that the underlying premise for that strategy—or one of them—was wrong. Trial strategy is generally immune from a *Strickland* claim, not because trial counsel is always correct in his or her strategy, but because attorneys must be entitled to a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" to eliminate "the distorting effects of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Here, defense counsel made the decision that this witness appeared to be intoxicated and calculated that her testimony would not benefit defendant for that reason. Whether counsel was right or wrong in that assessment is simply not the controlling question.

¶ 132 And that is to say nothing of trial counsel's *other* justification for opting not to call Wheeler—that her testimony would not be based on her personal knowledge. Defendant offered nothing at the *Krankel* inquiry to suggest that trial counsel was mistaken in this regard. Wheeler

herself, who supplied an affidavit, did not speak to the issue. The mere fact that counsel had initially disclosed Wheeler to the court and the State as a potential witness does not convince us that she must have had personal knowledge, as defendant posits; trial counsel determined, after conferring with Wheeler later that day, that she did not have such personal knowledge.

¶ 133 The trial court properly conducted a preliminary inquiry on defendant's posttrial claim of ineffective assistance of counsel and found defendant's claim meritless. The trial court's decision that new counsel did not need to be appointed for a full *Krankel* hearing was not manifestly erroneous.

¶ 134 D. Mittimus Correction

¶ 135 Finally, as noted earlier, the parties agree that the mittimus must be corrected. This court has the authority, under Illinois Supreme Court Rule 615(b)(1), to order the circuit court clerk to make necessary corrections. *People v. Decatur*, 2015 IL App (1st) 130231, ¶ 19. Accordingly, we instruct the clerk of the circuit court to correct the mittimus to reflect presentence credit and the proper statutory citation for the attempted murder offense, *i.e.* 720 ILCS 5/8-4(a), a Class X offense.

¶ 136 III. CONCLUSION

¶ 137 In accordance with the foregoing, the circuit court's noncompliance with Rule 431(b) was not plain error warranting a new trial. The trial court properly admitted prior-acts evidence. The trial court's decision not to appoint new counsel for a full *Krankel* hearing on defendant's *pro se* claim of ineffective assistance of counsel was not manifestly erroneous. The mittimus shall be corrected.

¶ 138 Affirmed; clerk of the circuit court directed to correct the mittimus.