2017 IL App (5th) 140450-U

NO. 5-14-0450



IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | St. Clair County. |
| | ) | |
| v. | ) | No. 12-CF-357 |
| | ) | |
| CORTEZ GILLUM, | ) | Honorable |
| | ) | Randall W. Kelley, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE OVERSTREET delivered the judgment of the court.
Presiding Justice Moore and Justice Welch concurred in the judgment.

**ORDER**

¶ 1 *Held*: The defendant is unable to establish that he should be granted a new trial, that his cause should be remanded for further inquiry into his posttrial ineffective-assistance-of-counsel claims, or that the sentence imposed on his conviction for attempted first-degree murder was improperly influenced by the trial court's consideration of a factor inherent in the offense's enhancement or the victim's status as a uniformed police officer.

¶ 2 BACKGROUND

¶ 3 On March 25, 2014, a St. Clair County jury found the defendant, Cortez Gillum, guilty of two counts of attempted first-degree murder (counts I and II) (720 ILCS 5/8-4(a), (c)(1)(A), (c)(1)(D) (West 2012); 720 ILCS 5/9-1(a)(1) (West 2012)), one count of aggravated battery with a firearm (count III) (720 ILCS 5/12-3.05(e)(2) (West 2012)),

and one count of unlawful possession of a weapon by a felon (count IV) (720 ILCS 5/24-1.1(a) (West 2012)). Viewed in the light most favorable to the prosecution (*People v. Ehlert*, 211 Ill. 2d 192, 202 (2004)), the evidence that the State presented at trial established the following.

¶ 4 In September 2002, in the United States District Court for the Central District of Illinois, the defendant pled guilty to one count of felon in possession of a firearm (18 U.S.C. § 922(g)(1) (2000)) and was committed to the custody of the United States Bureau of Prisons for a term of 10 years. After serving most of his sentence incarcerated at the federal correctional institution in Pekin, Illinois, the defendant was transferred to a halfway house in Farmington, Missouri, to serve his remaining nine months.

¶ 5 In January 2012, after being at the halfway house in Farmington for approximately a month, the defendant received his first furlough, left, and never returned. As a result, the United States Marshals Service circulated a "wanted poster" for his arrest. See 28 C.F.R. 570.38(a) (2011) ("An inmate who violates the conditions of a furlough may be considered an escapee *** and may be subject to criminal prosecution and institution disciplinary action.").

¶ 6 On the afternoon of March 4, 2012, after being advised that the defendant had recently been seen at the Orr-Weathers housing complex in East St. Louis, uniformed Officers Rudy McIntosh and Michael Baxton of the East St. Louis police department commenced patrolling the area in separate marked squad cars. At around 3 p.m., Baxton observed the defendant, who he did not otherwise know, walking through a parking lot "attempting to conceal his identity with a hood." After the defendant changed his

direction of travel upon seeing Baxton drive by, Baxton turned around, intercepted the defendant, and parked several feet in front of him. When Baxton exited his squad car, he immediately "saw that [the defendant] was the subject that was on the wanted poster." Intending to arrest the defendant, Baxton repeatedly asked him to "put his hands on the vehicle." When the defendant refused and began backing away, Baxton drew his service pistol, pointed it at the defendant, and ordered him to get down on the ground. When the defendant failed to comply, Baxton "went hands-on" and attempted to force the defendant onto the hood of the car. When the defendant physically resisted, Baxton "disengaged," holstered his pistol, and grabbed his pepper spray, which was on his duty belt behind his gun. Baxton advised the defendant that he was going to "mace him if he didn't comply." Baxton did not otherwise threaten the defendant "in any way." As Baxton approached the defendant with the pepper spray, the defendant pulled out a 9-millimeter (9mm) pistol and shot Baxton once in the face at close range. As Baxton fell to the ground, the defendant leaped backwards firing two additional shots, both of which missed. The defendant then fled the scene, ditching his black hooded sweatshirt along a nearby street. Baxton radioed for assistance, and McIntosh quickly arrived and administered first-aid.

¶ 7 The bullet that entered Baxton's face had travelled through his left cheek and exited out his left ear. Baxton was transported by ambulance from the scene of the shooting to St. Louis University Hospital, where he remained for several days. Unbeknownst to the defendant, his entire encounter with Baxton had been captured by one of the housing complex's surveillance cameras.

¶ 8 Within hours of the shooting, the police were informed that the defendant was at a high-rise apartment building on Wavery Avenue in East St. Louis. A tactical response team was called to the building, and the area around apartment number 706 was secured. After the residents of the apartment exited without incident, the tactical team entered and found the defendant hiding under a bed, still in possession of the 9mm handgun that he had used to shoot Baxton. At that point, the defendant was arrested and taken into custody. At trial, one of the tactical team officers explained that after entering the apartment, they "had to actually get on the floor [and] look under the bed" to see the defendant.

¶ 9 On the evening of March 5, 2012, after the defendant indicated that he wanted to give a statement, investigators interviewed him at the St. Clair County jail. The interview was video-recorded, and a redacted version was later played at the defendant's trial. At the outset of the interview, the defendant confirmed that he had not sustained any lacerations, bruises, or abrasions other than handcuff scuffs and a rug burn that had resulted from his arrest. The defendant specifically denied having been "slapped upside the head or anything."

¶ 10 When initially discussing what had occurred at the Orr-Weathers housing complex, the defendant told an elaborate story in which he claimed to have witnessed Ryan Ivory shoot Baxton following an argument over money. The defendant stated that he did not know Baxton and had never seen him before. The defendant further stated that after the incident, Ivory had taken him to the apartment on Wavery and had given him $200 to "chill out" for a while. The defendant claimed that he had never touched the gun

that had been used to shoot Baxton and that Ivory had left it at the apartment. The defendant adamantly denied having shot Baxton and repeatedly stated that he was telling the truth.

¶ 11 When asked why he fled the halfway house in Farmington, the defendant explained that he had grown frustrated because the personnel there would not help him find work or transfer him to a halfway house in St. Louis. The defendant acknowledged that he was aware that the Marshals Service had been looking for him, that he was a "wanted fugitive," and that he had been "ducking" the police for weeks. The defendant referenced the federal prison in Pekin where he had previously been incarcerated and explained that his federal probation would not have "kicked in" until after his release from the halfway house.

¶ 12 When the defendant was informed that his encounter with Baxton had been captured by a security camera, the defendant initially indicated that he had shot Baxton to protect his family. The defendant then claimed that he had shot Baxton in self-defense. The defendant maintained, among other things, that after almost running him over with his squad car, Baxton had jumped out of the car with a gun in his hand, acting like a "crazy fucking lunatic." The defendant stated that Baxton had cornered him where no one else was around, had repeatedly hit him in the head with the gun, and had pointed the gun at his face. The defendant believed that Baxton was going to kill him. The defendant indicated that after pushing Baxton away during an ensuing struggle, he had pulled out his 9mm pistol and tried to shoot Baxton in the leg. The defendant further indicated that the first two shots he had fired were warning shots intended to scare Baxton. The

defendant claimed that he had "just pointed and shot" and did not know how Baxton ended up getting shot in the face. The defendant further claimed that Baxton had his gun out the entire time and that Baxton's gun was pointed at him when he fired.

¶ 13 When describing what had occurred, the defendant never referenced mace, pepper spray, Baxton encouraging him to run, or Baxton putting him in a chokehold. The defendant maintained that he had been compliant. The defendant indicated that he had ditched the hooded sweatshirt that he had been wearing because it had been obstructing his vision as he ran. The defendant stated that he had purchased his 9mm pistol "off the street" for $25.

¶ 14 When the defendant was confronted with the fact that there were no physical indications that he had been hit in the head with a gun, the defendant suggested that he had deflected the pistol blows with his arms and that his handcuff scuffs were the resulting injuries. When asked why Baxton had not shot him when Baxton saw that he had a gun, the defendant stated that he did not know. When the interviewing investigators suggested that the defendant had "panicked" and had shot Baxton to avoid being sent back to prison, the defendant insisted that he had not escaped from the halfway house in Farmington because his failure to return from furlough was technically an "unauthorized movement." He further insisted that his unauthorized movement would likely not have resulted in any additional prison time.

¶ 15 The defendant acknowledged that prior to his 2002 arrest, he had told his mother that he would shoot the police if they tried to take him to jail. He further indicated that the authorities who had apprehended him in 2002 had been "scared" of him.

¶ 16 The defendant eventually maintained that the police had been extorting him since he fled the halfway house, that he did in fact know Baxton, and that he also knew Baxton's father, who used to be a police officer. The defendant claimed that Baxton's father had beaten him up and tried to extort him in the early 1990s, when the defendant was a teenager.

¶ 17 The defendant maintained that the surveillance video would corroborate his version of events. The defendant also maintained that because he never intended to kill Baxton, his conduct constituted aggravated discharge of a firearm as opposed to attempted first-degree murder. The defendant stated that he did not know why he had attempted to convince the investigators that Ryan Ivory had shot Baxton.

¶ 18 At trial, as the sole witness for the defense, the defendant testified that he had left the halfway house in Farmington because he was being threatened by members of the Aryan Brotherhood. The defendant acknowledged that he knew that a warrant had subsequently been issued for his arrest. With respect to the incident at the Orr-Weathers housing complex, the defendant testified that after cutting off his path with the squad car, Baxton had jumped out "agitated and aggressive." The defendant testified that Baxton had ordered him to the hood of the car and had pointed a gun in his face. Baxton then attacked him by hitting him in the head with the gun, banging his head on the hood and side of the car, and putting him in a chokehold. The defendant testified that he had been compliant and had not resisted or attempted to flee. The defendant claimed that when he repeatedly asked Baxton to just arrest him and take him to jail, Baxton had stated, "No, fuck that. Run, run," and, "No, you ain't going to jail. You're going to die back here

today. I'm tired of individuals like you." The defendant further claimed that Baxton "kept beating [him] and telling him, 'Run so I can shoot you.' " The defendant testified that when he cried out for help to some people across the street, Baxton had looked over at them and told them to mind their own business or he would "put a case on [them]."

¶ 19 The defendant testified that after he "kind of backed up a little bit," Baxton reached behind his back, and the defendant thought that Baxton was going to shoot him. The defendant testified that Baxton's "exact words" were, "I'm going to blow your mother-fucking brains out. I'm going to mace the fuck out of you, and I'm going to blow your fucking brains out." At that point, the defendant pulled out his 9mm pistol, fired three shots "toward the ground, and ran." The defendant testified that he had not shot Baxton to avoid arrest and had not tried to kill him.

¶ 20 The defendant testified that his head had felt tender and sore after the incident, but there had been no bleeding. The defendant claimed that he would have turned himself in to a local police department, but he was afraid that something might happen to him if he did. He eventually went to the seventh-floor apartment on Wavery, hoping that he would not be found there. The defendant explained that the apartment's residents were friends of his family and that the apartment was not a place that he frequented. The defendant testified that he "honestly feared" that he was in danger.

¶ 21 The defendant maintained that when the tactical response team came to the apartment to arrest him, he decided that it was better to have them "try to find [him]" rather than allow them to "just *** do something to [him]." The defendant indicated that he had not been attempting to hide or avoid apprehension, he just "didn't want to get

hurt." The defendant explained that he had crawled under the bed thinking that the mattress would afford him "some type of padding" for "protection in case they tried to shoot [him with their] fully-automatic weapons." The defendant also claimed that he had extended his left arm out from under the bed, "where they could see it," and had tried to do the same with his right arm.

¶ 22 The defendant indicated that he had initially been untruthful with the interviewing investigators because he knew that Baxton's father had numerous police connections. The defendant believed that had he admitted what he had done, he would have been harmed out of "retaliation and revenge." The defendant testified that after he had been informed that his encounter with Baxton had been caught on video, he had decided to tell the truth because he knew that there was proof that he had done nothing wrong. He further indicated that he knew that if something happened to him, his family would be able to watch the video and "know the reasons why it happened." The defendant testified that he had been involved in incidents with East St. Louis police officers on prior occasions and that they had beaten him, shot his brother in the leg, and killed one of his friends.

¶ 23 During closing arguments, the State maintained, among other things, that there was "no doubt" that the defendant had intentionally shot Baxton in the face intending to kill him and had done so to avoid being arrested and sent back to prison. The State argued that the defendant had "zero" credibility and that his claims that he had been the victim defied logic, common sense, and the surveillance video.

¶ 24 In response, defense counsel referenced the infamous "Rodney King case" and argued that the defendant had truthfully described exactly what had occurred. Counsel

further argued that because the security video had no audio, it failed to convey "the entire context" of the encounter. Counsel suggested, among other things, that if the incident had been audio-recorded, the jurors would have been able to hear Baxton profanely threaten to kill the defendant while encouraging him to run.

¶ 25 After deliberating for approximately 90 minutes, the jury returned a verdict finding the defendant guilty on all counts. The jury also returned a special interrogatory finding that the defendant had personally discharged a firearm that proximately caused great bodily harm to another. The defendant's sentence on count I was thus subject to a mandatory add-on sentence of 25 years to life. See 725 ILCS 5/111-3(c-5) (West 2012); 720 ILCS 5/8-4(c)(1)(D) (West 2012) (added by Pub. Act 91-404, § 5 (eff. Jan. 1, 2000))).

¶ 26 In May 2014, after merging counts II and III into count I, the trial court imposed an aggregate 70-year sentence on count I and a concurrent 14-year sentence on count IV. In September 2014, following the trial court's denial of his motions for a new trial and his motion to reduce sentence, the defendant filed a timely notice of appeal.

¶ 27 DISCUSSION

¶ 28 On appeal, the defendant raises numerous issues and alternatively asks that we remand his cause for a new trial, a new sentencing hearing, or a preliminary *Krankel* hearing (*People v. Krankel*, 102 Ill. 2d 181 (1984)). For the reasons that follow, we deny each of his requests and affirm his convictions and sentences.

¶ 29 Ineffective Assistance of Counsel and Plain Error

¶ 30 Most of the issues that the defendant raises on appeal are presented as claims of ineffective assistance of counsel, plain error, or both. At the outset, we will therefore recite the general principles attendant to such claims.

¶ 31 A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). Counsel is presumed to know the law (*People v. Perkins*, 229 Ill. 2d 34, 51 (2007)), and a reviewing court "must indulge in a strong presumption that counsel's conduct fell into a wide range of reasonable representation" (*People v. Cloutier*, 191 Ill. 2d 392, 402 (2000)). "Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have proceeded differently is sufficient to establish ineffective assistance of counsel." *People v. Dobbs*, 353 Ill. App. 3d 817, 827 (2004). "In fact, counsel's strategic choices are virtually unchallengeable." *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

¶ 32 To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). "Further, in order for a defendant to establish that he suffered prejudice, he must show a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different." *People v. Burt*, 205 Ill. 2d 28, 39 (2001). "Because a defendant must establish both a deficiency in

counsel's performance and prejudice resulting from the alleged deficiency, failure to establish either proposition will be fatal to the claim." *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996).

¶ 33 "The plain-error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Wilmington*, 2013 IL 112938, ¶ 31. "Under both prongs of the plain-error doctrine, the burden of persuasion remains with [the] defendant." *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 34 When reviewing a claim under the first prong of the plain-error doctrine, "a reviewing court must undertake a commonsense analysis of all the evidence in context." *People v. Belknap*, 2014 IL 117094, ¶ 50. That analysis must be a "qualitative, as opposed to a strictly quantitative," one and must take into account "the totality of the circumstances." *Id.* ¶¶ 53, 62. Additionally, "[p]lain-error review under the closely-balanced-evidence prong of plain error is similar to an analysis for ineffective assistance of counsel based on evidentiary error insofar as a defendant in either case must show he was prejudiced." *People v. White*, 2011 IL 109689, ¶ 133. "Accordingly, where a defendant fails to show prejudice, a defendant's allegations of ineffective assistance of counsel and plain error under the closely-balanced-evidence prong both fail." *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 47. Under either prong, "[a]bsent reversible error,

there can be no plain error," and the initial step in conducting a plain-error analysis is to determine whether error occurred at all. *People v. McDonald*, 2016 IL 118882, ¶ 48.

¶ 35 Evidence of the Defendant's Guilt

¶ 36 On appeal, the defendant does not challenge the sufficiency of the evidence supporting his convictions. Suggesting that the jury's verdict rested solely on whether it believed his trial testimony or Baxton's, however, the defendant argues that the evidence of his guilt was closely balanced for purposes of first-prong plain-error review and prejudice under *Strickland*. We disagree.

¶ 37 As previously indicated, the relevant "commonsense assessment" requires a "qualitative, as opposed to a strictly quantitative," review of the evidence. *Belknap*, 2014 IL 117094, ¶ 53. Here, the defendant's encounter with Baxton was captured on video by a surveillance camera. Although the video has no audio, is low resolution, and has a slow frame rate, it is nevertheless corroborative of Baxton's testimony regarding the incident in question and does not support the defendant's varying accounts. We note that Baxton used the video while testifying and identified several specific points of the incident; the video was played for the jury a second time during the State's closing argument; the State encouraged the jurors to watch the video during their deliberations; and the trial court later observed that the "defendant had the misfortune of having the [the incident on video] for the jury to view and therefore to consider his credibility and his testimony in conjunction with that video." Moreover, even in the absence of the video, we would still conclude that the evidence of the defendant's guilt was overwhelming.

¶ 38 By his own admissions, the defendant knew he was a wanted fugitive and had been "ducking" the police for weeks. The defendant therefore had a motive to kill Baxton. See *People v. Witherspoon*, 27 Ill. 2d 483, 487 (1963). By his own admissions, the defendant was also armed with a 9mm handgun and had previously indicated that he would shoot the police to avoid going to jail. When Baxton holstered his gun and drew his pepper spray, the defendant took advantage of the opportunity to pull his own pistol and shoot Baxton in the face at close range. The defendant exhibited a consciousness of guilt by subsequently fleeing, ditching his hooded sweatshirt, hiding, and initially claiming that Ryan Ivory had shot Baxton. See *People v. Reeves*, 385 Ill. App. 3d 716, 727 (2008); *People v. Milka*, 336 Ill. App. 3d 206, 227-28 (2003); *People v. Clark*, 335 Ill. App. 3d 758, 767 (2002); *People v. Jones*, 162 Ill. App. 3d 487, 492 (1987). In significant respects, what the defendant told the interviewing investigators was inconsistent with his trial testimony, and much of what he claimed was nonsensical. When the investigators confronted the defendant with the fact that there were no physical indications that he had been struck in the head with a gun, for instance, he maintained that his handcuff scuffs were the resulting injuries. The defendant claimed that he had ditched his hooded sweatshirt because it had been obstructing his vision. The defendant claimed that he had tried to shoot Baxton in the leg but at trial, maintained that he had shot at the ground. At trial, the defendant also suggested that he had not been hiding under the bed in apartment 706 but at the same time indicated that his intent had been to make the police "try to find [him]."

¶ 39 "When a defendant elects to explain the circumstances of a crime, he is bound to tell a reasonable story or be judged by its improbabilities and inconsistencies." *People v. Nyberg*, 275 Ill. App. 3d 570, 579 (1995). Here, the defendant's contrasting, evolving, and impractical statements undoubtedly damaged his credibility. See *In re C.B.*, 386 Ill. App. 3d 735, 743 (2008). Under the circumstances, even in the absence of the surveillance video, the jury could have readily concluded that the defendant's claim of self-defense was "thoroughly incredible" (*People v. Harmon*, 2015 IL App (1st) 122345, ¶ 58), and we would still find that the evidence of his guilt was overwhelming (*cf. People v. Naylor*, 229 Ill. 2d 584, 608 (2008) (determining that the evidence of the defendant's guilt was closely balanced where "the trial court was faced with two different versions of events, both of which were credible")).

¶ 40 Trial Issues

¶ 41 *Defendant's 2002 Felony Conviction*

¶ 42 Over defense counsel's objections, the State was allowed to introduce a certified copy of the defendant's 2002 felon-in-possession-of-a-firearm conviction as impeachment evidence (see *People v. Montgomery*, 47 Ill. 2d 510 (1971); Ill. R. Evid. 609 (eff. Jan. 1, 2011)) and as proof of his motive, intent, and lack of mistake (see *People v. Priola*, 395 Ill. 296 (1946); Ill. R. Evid. 404(b) (eff. Jan. 1, 2011)). The defendant argues that the trial court's admission of this evidence was reversible error. We disagree.

¶ 43 "Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the court has abused that discretion." *People v. Reid*, 179 Ill. 2d 297, 313 (1997). "An abuse of discretion will be found only where the trial court's ruling is

arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 44 Here, the defendant's 2002 felon-in-possession-of-a-firearm conviction was the basis for his placement in the halfway house, and his flight therefrom was relevant to show his motive and intent. See *People v. Salazar*, 126 Ill. 2d 424, 455 (1988); *People v. Chambers*, 179 Ill. App. 3d 565, 583-84 (1989). The conviction was thus part of the relevant chain of circumstances underlying the defendant's criminal conduct in the present case, and its admission as evidence of his motive and intent was not error. *Id*.; see also *People v. McKibbins*, 96 Ill. 2d 176, 182 (1983) ("[T]his court has held that evidence of other offenses is admissible if it is relevant for any purpose other than to show the propensity to commit crime."); *People v. Rutledge*, 409 Ill. App. 3d 22, 25 (2011) (noting that "if the evidence of the other offenses and the evidence of the crime charged are inextricably intertwined, the rule relating to other crimes is not implicated and ordinary relevancy principles apply").

¶ 45 The conviction was further admissible as impeachment evidence, and the trial court specifically rejected the defendant's contention that the evidence's prejudicial effect substantially outweighed its probative value. We thus conclude that the trial court did not abuse its discretion in admitting the evidence of the defendant's 2002 conviction for impeachment purposes, either. See *People v. Flowers*, 306 Ill. App. 3d 259, 265 (1999) (finding no abuse of discretion where the record demonstrated that "the judge understood and applied the balancing test required by *Montgomery*"). We further agree with the State's observation that because the evidence advised the jury of the precise nature of the

conviction, the defendant's assertion that the conviction's admission "amounted to impermissible mere-fact impeachment" is without merit. See *People v. Williams*, 2015 IL App (1st) 130097, ¶ 51; *People v. Lillard*, 200 Ill. App. 3d 173, 180-81 (1990).

¶ 46 We note that in its opening statement to the jury, the State explained that the defendant "had been sent to a halfway house on a federal sentence, and he had escaped from that halfway house. He had walked away." The State did not otherwise discuss the 2002 conviction during the course of the trial, however, and the jury was properly instructed as to the evidence's limited use. See *People v. Sims*, 244 Ill. App. 3d 966, 998 (1993). Lastly, even assuming *arguendo* that the evidence of the conviction should not have been admitted, we would find that the error was undoubtedly harmless given the overwhelming evidence of the defendant's guilt. See *People v. Bramlett*, 276 Ill. App. 3d 201, 207 (1995).

¶ 47 *Defense Counsel's Opening Statement*

¶ 48 The defendant's trial counsel reserved making an opening statement until after the State had rested its case-in-chief, and his opening statement was brief. Counsel emphasized that the defendant had not tried to run from Baxton, that Baxton had pointed his gun at the defendant, and that a "tussle" had ensued. Counsel maintained that believing that Baxton was going to kill him, the defendant had fired a shot so that he could "get away and out of danger of being killed." Counsel further maintained that the defendant had not shot with an intent to kill. Counsel stated, "That's what the evidence is going to be. That's what the evidence is." On appeal, the defendant argues that trial

counsel was ineffective for reserving his opening statement and that his statement was "woefully inadequate."

¶ 49 Trial counsel's decision to reserve or ultimately forego the making of an opening statement is a matter of trial strategy. *People v. Humphries*, 257 Ill. App. 3d 1034, 1042 (1994). In the present case, the record indicates that trial counsel reserved making an opening statement because he was uncertain whether the defendant was going to testify. See *People v. Medina*, 221 Ill. 2d 394, 403 (2006) (reaffirming that whether to testify is one of the few decisions that "ultimately belong to the defendant in a criminal case"). At a recess taken towards the end of the State's case-in-chief, proposed jury instructions were discussed, and it was noted that "potential" and "alternative" instructions were being offered by the defense in the event that the defendant did not testify. Counsel's decision to reserve making an opening statement was therefore reasonable, as "it is improper for counsel to make opening statements about testimony to be introduced at trial and then fail to produce that evidence." *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). By reserving his opening statement until he was certain that the defendant was going to offer testimony, counsel also avoided the risk of losing credibility with the jury "by not fulfilling the promise, made in the opening statement, to present that evidence." *People v. King*, 109 Ill. 2d 514, 534 (1986). For similar reasons, the cursory nature of trial counsel's opening statement was also reasonable. As the State notes on appeal, the defendant's trial testimony "differed markedly" from his statements to the police. Counsel would have understandably "wanted to avoid any potential for conflict between his client's testimony and his opening statement." *People v. Penrod*, 316 Ill. App. 3d 713,

725 (2000); see also *People v. Flores*, 231 Ill. App. 3d 813, 826 (1992) (noting that the "[d]efendant was the key witness for the defense, and variances between an opening statement and defendant's testimony would have been noticed by the jury"). It was thus sound strategy for counsel to make a brief, general opening statement followed by a strong closing argument based on the defendant's actual testimony.

¶ 50 As previously noted, a reviewing court "must indulge in a strong presumption that counsel's conduct fell into a wide range of reasonable representation" (*Cloutier*, 191 Ill. 2d at 402), and here, the defendant is unable to demonstrate that counsel's strategic decisions with respect to his opening statement were objectively unreasonable. Moreover, even assuming that counsel had waived making an opening statement altogether, the defendant would be unable to establish prejudice under *Strickland*. See *People v. Foster*, 168 Ill. 2d 465, 483 (1995).

¶ 51 *Agreed Stipulation*

¶ 52 Immediately following the aforementioned recess during which the proposed jury instructions were discussed, the jury was read the following stipulation:

> "The People have proven beyond a reasonable doubt the following element of the charge of Unlawful Possession of a Weapon by a Felon: That the defendant had previously been convicted of a forcible felony."

On appeal, the defendant argues that trial counsel was ineffective for agreeing to this stipulation, because the term "felony" would have been sufficient, and the term "forcible felony" resulted in "immense prejudice to his case." We find this claim is speculative at best. Moreover, not only did trial counsel sign the complained-of stipulation, the

defendant personally signed it as well. The defendant is thus estopped from claiming any resulting prejudice. See *People v. Baynes*, 88 Ill. 2d 225, 239 (1981); *People v. Bennett*, 82 Ill. App. 3d 225, 232 (1980). The defendant's argument further ignores the overwhelming evidence of his guilt.

¶ 53 *Failure to Sever Count IV*

¶ 54 Prior to trial, defense counsel indicated that he was not seeking to sever count IV, that he and the defendant had discussed the matter, and that the defendant had agreed that the inclusion of count IV would not prejudice his defense. When the trial court inquired, the defendant indicated that he agreed and understood that the inclusion of count IV would not be prejudicial. The defendant now argues that trial counsel was ineffective for failing to file a motion to sever count IV from counts I, II, and III. The defendant's argument suggests that had counsel done so, the motion would have been granted, and the jury would not have learned that on March 4, 2012, he was a felon in possession of a firearm. We find that this argument is without merit.

¶ 55 A defense decision to seek a severance of charges is a matter of trial strategy. *People v. Poole*, 2012 IL App (4th) 101017, ¶ 10. "[I]mportant factors to consider in connection with a severance motion are the proximity in time and location of the offenses, the identity of evidence needed to demonstrate a link between the offenses, whether there was a common method in the offenses, and whether the same or similar evidence would establish the elements of the offenses." *People v. Gapski*, 283 Ill. App. 3d 937, 942 (1996). The decision to grant or deny a motion to sever charges lies within

the substantial discretion of the trial court and will not be disturbed absent an abuse of that discretion. *People v. Willer*, 281 Ill. App. 3d 939, 950 (1996).

¶ 56 As noted, the record indicates that trial counsel's decision to not seek a severance was a matter of trial strategy with which the defendant consented, and the defendant does not contend that counsel obtained his consent through trickery or deceit. "A defendant cannot agree to a procedure before the trial court and then complain about that same procedure on appeal." *People v. McKinney*, 260 Ill. App. 3d 539, 542 (1994). Moreover, trial counsel is not required to file futile motions to render effective assistance. *People v. Robinson*, 299 Ill. App. 3d 426, 435 (1998).

¶ 57 Here, regardless of whether count IV had been severed, the jury would have inevitably learned that the defendant was a felon in possession of a firearm on March 4, 2012. As previously indicated, when interviewed, the defendant referenced the federal prison in Pekin where he had been incarcerated prior to his transfer to Farmington, and by his own admissions, he knew that he was a "wanted fugitive" and had shot Baxton with a 9mm pistol that he had purchased "off the street" for $25. Additionally, as previously discussed, the defendant's 2002 felony conviction was properly admitted for impeachment purposes and as evidence of his motive and intent. Trial counsel could have also reasoned that by essentially conceding the defendant's guilt on count IV, he might gain credibility with the jury when arguing the defendant's claim of self-defense with respect to counts I, II, and III. See *People v. Guest*, 166 Ill. 2d 381, 395 (1995).

¶ 58 In any event, because all of the charged counts ultimately arose out of the same "comprehensive transaction" and involved the same evidence, there would have been no

basis upon which to grant a motion to sever count IV. *People v. Sockwell*, 55 Ill. App. 3d 174, 177 (1977); see also *Gapski*, 283 Ill. App. 3d at 942-43. The defendant's on-the-record agreement that the inclusion of count IV would not prejudice his defense aside, he is therefore unable to establish either prong of *Strickland* with respect to this claim.

¶ 59 *Allegedly Improper Remarks and Questions*

¶ 60 The defendant asserts that he was denied a fair trial due to improper remarks made by the State during its closing arguments and improper questions that he was asked on cross-examination. The defendant faults counsel for failing to object to the remarks and questions and further claims plain error. We find no impropriety or ineffectiveness.

¶ 61 "Prosecutors are afforded wide latitude in closing argument." *People v. Alvine*, 173 Ill. 2d 273, 292 (1996). "During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses." *People v. Moody*, 2016 IL App (1st) 130071, ¶ 60. A prosecutor's comments must also be considered in context, "rather than focusing on selected phrases or remarks." *People v. Runge*, 234 Ill. 2d 68, 142 (2009). "[A] prosecutor's comments in closing argument will result in reversible error only when they engender 'substantial prejudice' against the defendant to the extent that it is impossible to determine whether the verdict of the jury was caused by the comments or the evidence." *People v. Macri*, 185 Ill. 2d 1, 62 (1998).

¶ 62 The trial court has the discretion to allow the State wide latitude when cross-examining a defense witness. *People v. Shelton*, 401 Ill. App. 3d 564, 582 (2010). "The

proper scope of cross-examination extends to matters raised on direct examination, including all matters which explain, qualify, or destroy the testimony on direct examination." *Id*. "Only where the court has abused its discretion, resulting in manifest prejudice to the defendant, will a reviewing court interfere." *Id*.

¶ 63 "As a general rule, trial strategy encompasses decisions such as what matters to object to and when to object." *People v. Pecoraro*, 144 Ill. 2d 1, 13 (1991). Additionally, counsel cannot be deemed ineffective for failing to lodge objections that would have been overruled. *People v. Bean*, 137 Ill. 2d 65, 132 (1990).

¶ 64 Here, we agree with the State's intimations that the comments and questions complained of on appeal did not exceed the bounds of permissible argument or cross-examination and that the defendant's contrary claims are based on words taken out of context and cases that are easily distinguishable. See, *e.g.*, *People v. Blue*, 189 Ill. 2d 99, 136 (2000) (holding that the State's " 'testifying' objections" violated the rule barring an attorney from "assuming a dual role as advocate and witness in the same proceedings"); *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶¶ 62-65 (holding that State's comments constituted "ridicule and derision" that were "disproportionately sarcastic and not based on the evidence"); *People v. Miller*, 302 Ill. App. 3d 487, 497 (1998) (holding that "the prosecution's argument violated the proscription against misstatements of law that in effect distort the burden of proof"); *cf. People v. Turner*, 128 Ill. 2d 540, 557-58 (1989) (finding that the prosecutor did not improperly humiliate or embarrass the defendant by attempting to "have him explain his story in light of the overwhelmingly conflicting evidence"); *People v. Zernel*, 259 Ill. App. 3d 949, 957 (1994) (finding no

error where the State referred to the defendant as a " 'violent menace' " and characterized his defense as " 'desperate' " and " 'ridiculous' "). We acknowledge that the record indicates that the State's cross-examination of the defendant became heated at times, but the defendant, who we view as legally sophisticated, was often evasive and repeatedly refused to provide direct answers to many of the State's yes-or-no questions. The defendant was also insistent that the surveillance video corroborated his testimony, and he and the prosecutor thus disputed what the video actually showed. The defendant complains that he was aggressively cross-examined, but "if a defendant takes the stand to testify on his own behalf, his credibility may be impeached and his testimony assailed like that of any other witness." *People v. Parchman*, 302 Ill. App. 3d 627, 635 (1998); see also *People v. DeHoyos*, 31 Ill. App. 3d 12, 18 (1975) ("A defendant who takes the stand and testifies puts his credibility in issue and is subject to the same tests as other witnesses.").

¶ 65 Lastly, even assuming *arguendo* that any of the prosecutor's comments and questions were improper, none rose to the level of reversible error. See *People v. Smith*, 152 Ill. 2d 229, 268 (1992). Nor can it be said that they affected the fairness of the defendant's trial and challenged the integrity of the judicial process. See *People v. Young*, 2013 IL App (2d) 120167, ¶ 42.

¶ 66 Sentencing Issues

¶ 67 *Factor Inherent in the Enhancement*

¶ 68 At the defendant's sentencing hearing, the State asked the trial court to impose sentences on counts I and IV but limited its argument to count I only. Notably, when

referencing the statutory factors in aggravation, the State did not argue that "the defendant's conduct caused or threatened serious harm." 730 ILCS 5/5-5-3.2(a)(1) (West 2012). When subsequently stating what it referred to as the "statutory factors in aggravation that apply in this proceeding," the trial court indicated that the fact that the defendant's conduct had caused serious harm was applicable. The defendant later filed a motion to reduce sentence, asserting, among other things, that the trial court had "improperly considered and used a factor that was implicit in the offense as an aggravating factor." Following a hearing, the motion was denied.

¶ 69 On appeal, the defendant argues that by noting that his conduct caused serious harm, the trial court impermissibly considered a factor inherent in the enhancement that subjected his sentence on count I to a mandatory add-on sentence of 25 years to life, *i.e.*, that he personally discharged a firearm that proximately caused great bodily harm to another. The defendant maintains that he was therefore subjected to an impermissible "double enhancement." We disagree.

¶ 70 It is well established that the trial court is presumed to know the law and apply it properly. *People v. Phillips*, 392 Ill. App. 3d 243, 265 (2009). There is thus "a strong presumption that the trial court based its sentencing determination on proper legal reasoning." *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009). We accordingly review the trial court's sentencing determination with great deference, and "[t]he burden is on the defendant to affirmatively establish that the sentence was based on improper considerations." *Id*. at 943. "In determining whether the trial court based the sentence on

proper aggravating and mitigating factors, a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court." *Id.*

¶ 71 We first note that the trial court's reference to "serious harm" might well have been made with respect to the defendant's conviction on count IV rather than count I. As previously indicated, the State focused its argument solely on count I and did not argue serious harm as a statutory aggravating factor; the trial court generally recited the statutory factors in aggravation that it deemed applicable "in this proceeding," and the court later rejected the defendant's claim that it had "improperly considered and used a factor that was implicit in the offense." Causation of serious harm is not inherent in the offense of unlawful possession of a weapon by a felon, as the offense is merely a "status offense." *People v. McFadden*, 2016 IL 117424, ¶ 29. The trial court could have therefore considered that the defendant's conduct caused serious harm when imposing sentence on count IV. Moreover, even assuming that the court's reference was made with respect to count I, the defendant would still be unable to establish that he is entitled to a reduction of his sentence or a new sentencing hearing.

¶ 72 When considering whether the application of a mandatory add-on sentence based on a defendant's use of a firearm ultimately results in an impermissible double enhancement, the appellate court has repeatedly held that the use of a firearm is the proper factor to analyze as opposed to the end result of the firearm's use. *People v. Dixon*, 359 Ill. App. 3d 938, 945-46 (2005); *People v. Jones*, 357 Ill. App. 3d 684, 691-92 (2005); *People v. Bloomingburg*, 346 Ill. App. 3d 308, 324-26 (2004); *People v. Sawczenko-Dub*, 345 Ill. App. 3d 522, 537-39 (2003); *People v. Moore*, 343 Ill. App. 3d

331, 347-48 (2003). Accordingly, because causation of serious harm is not an element of the offense of attempted first-degree murder (see, *e.g.*, *People v. Green*, 339 Ill. App. 3d 443, 451-52 (2003); *People v. Files*, 260 Ill. App. 3d 618, 630 (1994)), the trial court could properly consider that the defendant's conduct caused serious harm as an aggravating factor with respect to count I and impose the mandatory add-on based on the defendant's use of a firearm without implicating the general prohibition against double enhancement. See *id*. Such is the case because "it is the use of the firearm that triggers the enhancement," not the resulting harm. *Jones*, 357 Ill. App. 3d at 691. Furthermore, in *People v. Sharpe*, 216 Ill. 2d 481 (2005), when addressing the legislature's enactment of the mandatory-firearm-enhancement provisions set forth in Public Act 91-404, our supreme court stated,

> "[T]he general rule against double enhancement is merely a rule of construction established by this court, which arises from the presumption that the legislature considered the factors inherent in the offense in setting the initial penalty for that offense. [Citation.] But where the legislature has made clear an intention to enhance the penalty for a crime, even in a way which might constitute double-enhancement, this court will not overrule the legislature." *Id*. at 530.

¶ 73 "A reviewing court will extend all reasonable presumptions in favor of the judgment or order from which an appeal is taken, and will not presume that error occurred below." *People v. Besser*, 273 Ill. App. 3d 164, 169 (1995). Under the circumstances, we thus conclude that the defendant has failed to affirmatively demonstrate that the trial court's reference to serious harm was made with respect to

count I as opposed to count IV and that further assuming otherwise, the defendant is unable to demonstrate that the sentence imposed on count I was improper on double-enhancement grounds.

¶ 74 *Baxton's Status as a Police Officer*

¶ 75 Citing *People v. Mauricio*, 2014 IL App (2d) 121340, the defendant argues that as a matter of plain error, the trial court improperly considered Baxton's status as a uniformed police officer as an aggravating factor at sentencing. The State counters that "when the court's words are considered in context," the defendant's argument fails. We agree with the State.

¶ 76 In *Mauricio*, when imposing sentence on the defendant's first-degree murder conviction, the trial court noted that the victim had been, among other things, a World War II veteran, " 'a very good man,' " and " 'a very, very fine man, who was a great value to his family and society.' " *Id.* ¶ 8. Based on these observations, which were apparently derived from victim-impact evidence that the State had presented, the trial court imposed a 60-year sentence on the defendant's conviction. *Id*. ¶¶ 8-9, 19-21. On appeal, the defendant argued that the trial court had abused its discretion by improperly relying on the victim's "personal traits" as an aggravating factor. *Id*. ¶ 13. The appellate court agreed, stating, "Consideration of a victim's personal traits is improper as long as those traits *as such* are what the trial court considers." (Emphasis in original.) *Id*. ¶ 17. The court further held, however, that "[t]o the extent that a victim's personal traits are necessary to understand the seriousness of the crime or other proper sentencing factors, consideration of such traits is not inherently error." *Id.*

¶ 77 Here, at the defendant's sentencing hearing, Baxton's status as a uniformed police officer was first discussed when the State recounted the facts of the case. The State noted, among other things, that Baxton had been shot while on duty, "doing what he was trained to do." The State further noted that the defendant had a "deplorable" criminal history that included juvenile adjudications for burglary, aggravated battery, and unlawful use of a weapon; a 1996 second-degree murder conviction; a 1997 attempted first-degree murder conviction; a 2001 unlawful-possession-of-a-weapon-by-a-felon conviction; and the aforementioned 2002 federal conviction for felon in possession of a firearm. The State argued that the defendant's "entire life" had "involved violent crimes, weapons, [and] people either dying or close to dying." Further arguing that the court should "look at the protection of the public," the State suggested that although "a police officer is no different than any other citizen," the defendant's willingness to shoot a police officer who was merely "performing his job" was telling. Describing the defendant as "a danger to everyone," the State argued that the defendant did not "care about the rules," "who he hurts," or "who he shoots." The State maintained that the defendant deserved to be sent to prison for the "rest of his life *** so someone else doesn't ever get hurt because of his propensity for violence and weapons." The State further maintained that a strong sentence was necessary to deter others from committing the same offense. See 730 ILCS 5/5-5-3.2(a)(7) (West 2012). The State asked the court "to send a message" so that the public would know that it would "be safe from someone like this." The State asked the court to impose an aggregate 65-year sentence on count I, to ensure that the defendant would not "injure or hurt anyone else for the rest of his life."

¶ 78 In response, defense counsel asked the court to impose the minimum aggregate sentence of 31 years on count I, noting that the defendant would be in his 60s upon his release from prison. Counsel acknowledged that what the defendant had done was "an atrocious crime" but maintained that the defendant had "never denied that he was the shooter."

¶ 79 In allocution, after acknowledging that he had spent a "major portion of [his] life in prison" and had made "some very bad choices that may have hurt people," the defendant suggested that he was dedicated to changing his ways. With respect to the present case, the defendant stated that he regretted what had happened but felt that he had acted in self-defense. The defendant indicated that he was accepting "full responsibility" for his actions and asked the court to not punish his children for what he had done.

¶ 80 When imposing sentence, the trial court found that none of the statutory factors in mitigation were applicable (see 730 ILCS 5/5-5-3.1(a) (West 2012)) and that the applicable statutory factors in aggravation included the defendant's history of prior delinquency and criminal activity and the need to deter others from committing the same crime (see 730 ILCS 5/5-5-3.2(a)(3), (7) (West 2012)). The court also stated that although it was not a statutory factor, the State's "argument that the victim was a uniformed officer acting in the line of duty" was a factor that the court would "certainly consider." The court then noted, among other things, that "as an adult," the defendant had "lived by the sword" since 1996 and that his "life's conduct" had amounted to "trying to kill other people and using handguns to effectuate [his] behavior." The court continued,

> "I am not going to ever let it happen again. You have committed your last weapon's offense outside of a penal institution. You can talk about accepting responsibility. I recall the testimony of your arrest when you weren't accepting responsibility, when you were cowering under a bed, hiding from whomever you could hide from, knowing full well that everything you had done had been as heinous of [an] act against our law enforcement officers as can be, as can happen. And I can't condone nor permit myself to be a participant in it ever[ ] happening again by yourself or hopefully anybody else who would give something of [a] thought before they would take such an action against a law enforcement officer who was just doing his job. You asked me not to punish your family. I am not punishing your family[,] sir. But you are going to be punished for your conduct."

After imposing a 30-year sentence on count I and a concurrent 14-year sentence on count IV, the court stated,

> "Finally, regarding the enhancement for the use of the weapon in the commission of [count I,] I am going to sentence you per that enhancement to a period of forty years. You don't use guns against police officers. And I hope the world understands this, that police officers need to know that they deserve and should be able to appreciate that they should be protected and if they are not they will have the support of the−of the courts. So that will be the sentence of this court."

¶ 81 Here, the defendant argues that the trial court "expressly relied on the victim's status when imposing sentence" and that the sentence imposed on count I was therefore

improper under *Mauricio*. Although the trial court expressly stated that it would "certainly consider" the State's "argument that the victim was a uniformed officer acting in the line of duty," we cannot conclude that the court impermissibly considered Baxton's status or personal traits under the circumstances.

¶ 82 As the *Mauricio* court noted, "[t]o the extent that a victim's personal traits are necessary to understand the seriousness of the crime or other proper sentencing factors, consideration of such traits is not inherently error." *Mauricio*, 2014 IL App (2d) 121340, ¶ 17. Here, to ignore that the defendant committed a "heinous" act against a uniformed law enforcement officer would be to ignore the facts of the case. As previously indicated, when Baxton holstered his gun and drew his pepper spray, the defendant took advantage of the opportunity to pull his own pistol and shoot Baxton in the face at close range. Furthermore, the State's argument that the trial court stated it would "certainly consider" focused on the defendant's dangerousness and willingness to shoot anyone, even a police officer merely "performing his job." The State specifically acknowledged that "a police officer is no different than any other citizen" and asked to court to "look at the protection of the public." The State also asked the court to impose a sentence that would ensure that the defendant would not "injure or hurt anyone else for the rest of his life."

¶ 83 As noted, there is "a strong presumption that the trial court based its sentencing determination on proper legal reasoning." *Dowding*, 388 Ill. App. 3d at 942-43. Here, the trial court's statements about "the world," "anybody else," the use of guns against police officers, and "the support" of the courts were consistent with its finding that there was a need to deter others from committing the same offense. Furthermore, the trial court's

intent to impose a *de facto* life sentence that would put an end to the defendant's "life's conduct" was apparent and fairly based on the defendant's prior criminal history. See *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 23 ("A defendant's unwillingness to learn from his mistakes or to respect laws enacted for the protection of the public's safety is a proper factor for the trial court to consider in sentencing."); *People v. Bailey*, 259 Ill. App. 3d 180, 186 (1994) ("A reasoned judgment as to a proper sentence depends upon such factors as the gravity of the offense and the circumstances of its commission as well as the defendant's credibility, demeanor, general moral character, social environment, habits, age and criminal history.").

¶ 84 We lastly note that in *Mauricio*, the reviewing court found that the trial court had "unmistakably focused on [the victim's] personal traits as such" and that the error could not be deemed harmless under the circumstances. *Mauricio*, 2014 IL App (2d) 121340, ¶¶ 20-21. Additionally, *Mauricio* addressed the improper consideration of victim-impact evidence. *Id.* ¶¶ 9, 11, 19-20. Here, the State presented no victim-impact evidence, and to the extent that the trial court considered Baxton's status as a police officer, the court's observations were relevant with respect to its findings regarding the seriousness of the offense and the need to deter others from using firearms against law enforcement officers. Accordingly, we cannot conclude that the trial court improperly focused on Baxton's status or personal traits as a reason to punish the defendant more severely than it otherwise would have, especially in light of the defendant's criminal history and the State's concession that "a police officer is no different than any other citizen." The defendant is therefore unable to establish plain error.

¶ 85 Posttrial Ineffective-Assistance-of-Counsel Claims

¶ 86 In April 2014, the defendant filed several *pro se* motions, including a *pro se* motion for a new trial that raised multiple ineffective-assistance-of-counsel claims. The defendant's *pro se* motion for a new trial alleged that trial counsel's "low[-]caliber" representation "reduce[d] the trial to a farce." The defendant's motion specifically asserted, among other things, that trial counsel had been ineffective for failing to object to the State's use of his 2002 felony conviction. The motion further asserted that trial counsel had represented him while acting under a *per se* conflict of interest with respect to "another criminal client[,] 'Davichion Washington.' " The motion claimed that the defendant had been a "confidential informant" against Washington and had every intention to testify "against him at trial if called as a witness to do so." The defendant's motion also argued that the trial court had denied him a fair trial through erroneous evidentiary rulings, including prohibiting the defense from impeaching Baxton with evidence of prior bad acts. At the defendant's sentencing hearing, the trial court denied the defendant's *pro se* motion for a new trial with little discussion. With respect to the defendant's ineffective-assistance-of-counsel claims, however, the court opined that trial counsel's representation had "exceeded" the level of assistance required by law.

¶ 87 The defendant's final argument on appeal is that his cause should be remanded for a preliminary *Krankel* hearing (*People v. Krankel*, 102 Ill. 2d 181 (1984)) because the trial court failed to adequately inquire into his *pro se* ineffective-assistance-of-counsel claims. The State counters that further inquiry is unnecessary because the defendant's

claims either lack merit or pertain to matters of trial strategy. We agree and conclude that further inquiry is not warranted.

¶ 88 Under *Krankel*, the trial court is obligated to inquire into a defendant's *pro se* posttrial claims that he was denied the effective assistance of counsel. *People v. Ayres*, 2017 IL 120071, ¶ 11; *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). This inquiry, which is often referred to as a "preliminary *Krankel* hearing" (*People v. Jolly*, 2014 IL 117142, ¶ 26), is "intended to promote consideration of *pro se* ineffective assistance claims in the trial court and to limit issues on appeal" (*People v. Patrick*, 2011 IL 111666, ¶ 41). "During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim[s]." *Moore*, 207 Ill. 2d at 78. If the claims show that trial counsel may have neglected the defendant's case, the trial court should appoint new counsel and set the matter for a hearing. *Id*. If the court ultimately determines that the claims lack merit or pertain only to matters of trial strategy, however, then no further action is required. *Id*. "Also, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id*. at 79.

¶ 89 "The question of whether a court has given proper attention to a defendant's *pro se* motion claiming ineffective assistance of counsel is a legal question." *People v. Washington*, 2012 IL App (2d) 101287, ¶ 17. After assessing the underlying claims, however, "[t]he trial court's decision to decline to appoint new counsel for a defendant

based on a judgment that the ineffective assistance claim is spurious shall not be overturned on appeal unless the decision is manifestly erroneous." *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008). "A decision is manifestly erroneous if it contains an error that is clearly evident, plain, and indisputable." *People v. Hatchett*, 2015 IL App (1st) 130127, ¶ 26.

¶ 90 Here, all of the defendant's *pro se* ineffective-assistance-of-counsel claims either lack merit or pertain to matters of trial strategy. Additionally, none of the claims suggest that counsel neglected the defendant's case, and some are simply belied by the record. Despite the defendant's contrary assertion, for example, counsel specifically objected to the State's use of the defendant's 2002 felony conviction for impeachment purposes and as evidence of his motive and intent. Moreover, as noted, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance, and the record in the present case supports the trial court's conclusion that counsel's representation "exceeded" the level of assistance required by law.

¶ 91 On appeal, the defendant argues that further inquiry is needed to properly evaluate his claim that trial counsel labored under a *per se* conflict of interest due to counsel's representation of Davichion Washington. As the State observes, however, because counsel's representation of a defendant who is merely a "potential witness" against another contemporaneously represented defendant does not create a *per se* conflict of interest (*People v. Morales*, 209 Ill. 2d 340, 346 (2004)), "[e]ven if every word of [the] defendant's claim was true, he simply did not allege facts from which the court could find

the existence of the claimed *per se* conflict." We accordingly reject the defendant's argument that the trial court failed to adequately inquire into his *pro se* ineffective-assistance-of-counsel claims.

¶ 92 CONCLUSION

¶ 93 For the foregoing reasons, the defendant's convictions and sentences are hereby affirmed.

¶ 94 Affirmed.