

2011 IL App (2d) 090813-U  
No. 2-09-0813  
Order filed October 26, 2011

**NOTICE:** This order was filed under Supreme Court Rule 23(c)(2) and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08-CF-5371
	)	
ROYAL M. COOPER,	)	Honorable
	)	Christopher R. Stride,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE McLAREN delivered the judgment of the court.  
Justice Bowman concurred in the judgment.  
Justice Burke specially concurred in the judgment.

*Held:* Where defendant cited no authorities and included only a citation to one page of the record, the issue of error in the denial of his motions for directed verdict at the close of the State's case and at the close of evidence was forfeited.

No error occurred when the trial court refused to instruct the jury on a self-defense theory.

Defendant forfeited the issue of whether error occurred in the admission of a weapon; forfeiture notwithstanding, the trial did not abuse its discretion and any prejudicial effect did not outweigh the relevance of the gun and its location in the dresser drawer in the bedroom.

The trial court properly allowed the jury to hear evidence regarding a prior incident of domestic violence that occurred 13 months prior to this case and involved defendant and the victim.

Defendant's immediate objection, which was sustained, to a comment in closing argument, and the trial court's prompt admonishment to the jury that the comment was stricken, cured any error that might have occurred; therefore, defendant was not prejudiced.

Defendant's various claims of ineffectiveness of his trial counsel were unsupported by the record; the trial court properly ruled that the issues raised in his *pro se* motion for a new trial were matters of trial strategy.

¶ 1 Defendant, Royal M. Cooper, appeals from his convictions of aggravated criminal sexual assault. (720 ILCS 5/12-13(a)(1) (West 2006)). He contends that numerous prejudicial errors occurred during his trial, necessitating reversal of his convictions and remand for a new trial. We affirm.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged by indictment with six counts of aggravated criminal sexual assault. (720 ILCS 5/12-13(a)(1) (West 2006)); two counts of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)); one count of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2006)); and one count of unlawful restraint (720 ILCS 5/10-3(a) (West 2006)).<sup>1</sup> On May 21, 2009, defendant was convicted by a jury of two counts of aggravated criminal sexual assault and one count of unlawful restraint.

¶ 4 Prior to trial, the State sought admission of three prior acts of domestic violence committed by defendant toward Michelle McIver. After argument, the trial court excluded any evidence of two

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<sup>1</sup>Defendant was also indicted on two counts of unlawful possession of a weapon by a felon, (gun and ammunition) in violation of section 5/24-1.1 (a) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.1(a)(West 2006)), which counts were severed and are not subject to this appeal. Additionally, two counts of unlawful restraint were dismissed.

separate incidents from 2005. The trial court then granted the State's motion as to an incident that occurred on November 23, 2007, after finding that:

“the State has shown sufficient similarity in terms of the facts, the argument, the hitting, using something, a plastic alleged [*sic*] toilet plunger, which the victim was hit with; that she was injured; that there was drinking; that it was close in time \*\*\*.”

The trial court specifically stated that, in allowing the evidence of the 2007 incident, it “look[ed] at those facts and balanc[ed] the probative and prejudicial nature of it” pursuant to section 115-7.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.4 (West 2006)).

¶ 5 During *voir dire*, four prospective jurors stated that they or members of their families had experiences with criminal events, and one prospective juror stated that she was an emergency room nurse and had dealt with victims of sexual assault. These venire persons were all seated as jurors.

At trial, Gurnee police officer Ben Munji testified that on December 19, 2008, Michelle McIver came to the police station to file a complaint against defendant for an incident that occurred the night before. As a result, defendant was arrested and brought to the police station.

¶ 6 McIver testified that she lived with defendant for five years. On December 18, 2008, she and defendant had an argument about his use of her cell phone. Defendant gave her the phone and she went downstairs to the basement bedroom they shared. Defendant followed her and became angry and hit her in the face “seven or eight times.” He then duct-taped her wrists and ankles and tried to carry her outside but was unsuccessful. He took a knife and ran it over her body and between her toes. He grabbed her by her hair and told her to perform oral sex on him, but she was unable to do so while she was still taped. Then he calmed down, cut the duct tape off, and she performed oral sex on him and they had vaginal intercourse. She stated she wanted him to stop hurting her. Afterward, he became angry again, spit in her face and told her to “get out of his \*\*\* face before he

blows my brains out.” He went towards a dresser where she knew that he kept a gun. McIver then went into the adjacent laundry room and sat on the floor. Defendant came into the laundry room without a gun and after talking for a short time they had sex again and he went to sleep. McIver testified that while he was asleep he kept his arm and leg over her, so she was afraid to get up and leave the house. She stated that she would have left if she felt she could have done so safely.

¶7 Later in the morning, McIver got out of bed and left the house with her two daughters, telling defendant that one of them had a doctor’s appointment. She went directly to the Gurnee police department to file a report. That afternoon, the police sent her to Lake Forest Hospital in order to “collect evidence.”

¶8 Dr. Murray Keene, emergency room doctor at Lake Forest Hospital, testified that McIver came to the emergency room on December 19, 2008, for treatment of injuries sustained during a sexual assault. She told the emergency room personnel that she had been struck with a fist about the head and the left side of her face and was kicked in left leg. She complained of pain in her left leg and her face. She also indicated that she was sexually assaulted in that she was forced to have vaginal and oral intercourse.

¶9 Pursuant to a pre-trial ruling on the State’s motion to allow evidence of prior acts of domestic violence, McIver furthered testified that on November 23, 2007, on the day after Thanksgiving, she was living in a house in Zion, Illinois, with defendant. They had an argument in the bedroom during which defendant hit her on the face with his open hand. He also hit her on her back and arms with a toilet plunger, breaking the handle. McIver stated that she smelled alcohol on defendant’s breath during the 2007 incident and the December 18, 2008, incident.

¶10 Immediately after McIver testified about the 2007 incident, the trial court gave the jury the following instruction:

“Ladies and gentlemen, the testimony that you just heard regarding the November of 2007 incident was offered for a limited purpose. The evidence that you heard about the conduct that the defendant was involved in was offered, as I indicated for a limited purpose, conduct other than what was charged in the indictment in this case. This evidence was offered on the limited issue of intent. It is for you to determine whether the defendant was involved in this conduct and, if so, what weight should be given to this conduct on the issue of intent.”

¶ 11 On cross-examination, McIver admitted that on December 19, 2008, she wrote out a statement that omitted some of the events to which she testified on direct-examination.

¶ 12 Defendant testified that on the evening of December 18, 2008, he and McIver had an argument about his using her cell phone. He stated that she “came towards” him and he pushed her away. She then “charged” at him so he slapped her face with an open hand. She started “swinging wildly and kicking,” then picked up a knife and said she was going to stab him with it. Defendant grabbed the knife from her and they eventually laid on the bed and talked for “about thirty to forty minutes.” They had sex and afterwards defendant began to “confess” that he was seeing other women. Defendant stated that McIver became angry, picked up the knife and started to threaten him. At that point, he grabbed her and pushed her back on the bed, and taped her wrists and ankles with duct tape from the nightstand next to the bed. He stated that he was “sick and tired of her grabbing that knife and threatening me with it.” McIver then started to cry so he took the knife and cut the duct tape. He threw the knife on the floor of the laundry room. They talked for another “fifteen, twenty, thirty minutes” and then they went to sleep. The next morning, December 19, they had sex again. Afterward, while doing her hair, McIver noticed her cell phone had three missed

calls from defendant's former girl friend. McIver became "really, really upset" and left the house with her two daughters.

¶ 13 Defendant admitted drinking about half a bottle of hard liquor on the night of the incident. He denied threatening McIver with a gun. He admitted drinking and hitting McIver during the incident in November 2007.

¶ 14 The trial court denied defendant's motion for a directed verdict at the close of the State's case, and denied defendant's motion for a directed verdict at the close of all the evidence. The jury found defendant guilty of two counts of aggravated criminal sexual assault and one count of unlawful restraint and not guilty of aggravated unlawful restraint.

¶ 15 On June 2, 2009, defendant filed *pro se* a motion for a new trial based partially on ineffective assistance of trial counsel. On June 5, 2009, defense counsel filed a seven-page motion for judgment notwithstanding the verdict, or, alternatively, for a new trial, adopting defendant's motion in part, without adopting the afore-mentioned claim of ineffective assistance. The trial court entered judgment on the verdicts and sentenced defendant to consecutive terms of 10 years' imprisonment for count 5 and 11 years' imprisonment for count 6. The conviction for unlawful restraint merged into the other convictions of aggravated criminal sexual assault.

¶ 16 Defendant timely appealed.

¶ 17

## II. ANALYSIS

¶ 18 Initially, we note that the State Appellate Defender was appointed to represent defendant on appeal on August 3, 2009, and was allowed to withdraw on August 26, 2010, after defendant filed a motion to dismiss based on a "conflict of interest" with his attorney. Defendant proceeded *pro se* and raised several issues on appeal. A *pro se* litigant must comply with the rules of procedure required of attorneys and we will not apply a more lenient standard to *pro se* litigants. See *People*

*v. Adams*, 318 Ill. App. 3d 539, 542 (2001). However, a reading of the entire brief enables us to determine the questions and issues raised, and, therefore, we will address each in turn. *Id.*

¶ 19 A. Motions for Directed Verdict

¶ 20 Defendant first argues that the trial court erred when it denied defendant's motion for a directed verdict at the close of the State's case, and again when it denied defendant's motion for a directed verdict at the close of all the evidence. Defendant merely cites to one page of the record at the beginning of the arguments regarding the motions for a directed verdict; however, he cites no caselaw or statutes in support of his contention, and, thus, these arguments are forfeited. See *People v. Harris*, 384 Ill. App. 3d 551, 560-561 (2008) (“[I]t is well settled that a contention that is supported by some argument but does not cite any authority does not satisfy the requirements of [Illinois] Supreme Court Rule 341(h)(7), and bare contentions that fail to cite any authority do not merit consideration on appeal.”).

¶ 21 B. Self-defense Instruction

¶ 22 “[A] trial court's refusal to issue a specific jury instruction is reviewed under an abuse of discretion standard. *People v. Moore*, 343 Ill. App.3d 331, 338-39 (2003); *People v. Pinkney*, 322 Ill. App.3d 707, 720 (2000) (rejecting a similar argument urging *de novo* review).” *People v. Douglas*, 362 Ill. App. 3d 65, 76 (2005). Defendant argues that the trial court erred “in not granting the defendant's request for the affirmative defense of self defense.” At trial, defendant requested a jury instruction (IPI 24-25.06) regarding the affirmative defense of self defense. Citing *People v. Thomas*, 35 Ill. App. 3d 773 (1976), he asserts “in a case tried by a jury, it is the province of the jury to decide guilt or innocence and a defendant is entitled to the benefit of any defense based on the evidence even if it is inconsistent with his own testimony.” He further argues that the trial court

erred when it ruled that unlawful restraint is a forcible felony and, therefore, defendant was not entitled to a self-defense instruction.

¶ 23 “Self-defense exists when (1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm is imminent; (4) the threatened force is unlawful; (5) the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively *reasonable*. (Emphasis in original.)” *People v. Moore*, 343 Ill. App. 3d 331, 340 (2003). The *Moore* court found that the defendant’s belief, *i.e.*, that deadly force in self-defense was necessary, was unreasonable under the circumstances. Similarly, even if we conclude that defendant was somehow in fear of imminent harm, this fear would not be objectively reasonable such that his actions were justified as purely self-defense. The only evidence that McIver was the initial aggressor is the testimony of defendant that he duct-taped her wrists and ankles to deter her because she threatened him with a knife.

The State points out that, pursuant to section 2-8 of the Code, aggravated criminal sexual assault is a specifically enumerated forcible felony for which a self-defense instruction would not apply. See 720 ILCS 5/2-8 (West 2008). The statute also provides that “any other felony which involves the use or threat of physical force or violence against any individual” constitutes a forcible felony. *Id.* When the trial court denied the proffered self defense instruction, it stated the following:

“The State has charged the defendant by way of indictment with aggravated criminal sexual assault, aggravated unlawful restraint and unlawful restraint. The defense has submitted the lesser-included offense of criminal sexual abuse. And now the defense is requesting the jury be instructed as to self defense.

At issue, in the court’s opinion, is the propriety of instructing the jury on the issue of self defense with respect to the charges that they will be charged with considering.

The term ‘forcible felony’ is defined at 720 ILCS 5/2-8. Aggravated criminal sexual assault is specifically defined as a forcible felony in that section.

The only remaining question before the court is this. Are unlawful restraint, aggravated unlawful restraint or criminal sexual abuse forcible felonies under the residual category of Section 5/2-8. That section states, quote, ‘Any other felony which involved the use or threat of physical force or violence against any individual.’ close quote.”

¶ 24 Trial court then discussed the holding in *People v. Belk*, 203 Ill. 2d 187 (2003), where the supreme court framed the issue as “whether, under the particular facts of this case, there is any evidence which would give rise to an inference that at some point during his attempt to elude the police, [the defendant] contemplated that escape might involve the use of force or violence against an individual.” *Belk*, 203 Ill.2d at 195. In *Belk*, there was no evidence that the defendant or his accomplice was armed, and no evidence that they contemplated or were willing to use force to accomplish an escape; therefore, no inference could be drawn and the aggravated possession of a stolen car could not be considered a forcible felony under the residual clause of Section 5/2-8.

“It is the contemplation that force or violence against an individual might be involved combined with the implied willingness to use force or violence against an individual that makes a felony a forcible felony under the residual category of section 2-8.” *Belk*, 203 Ill.2d at 196.

¶ 25 The jury verdict was guilty of unlawful restraint. McIver’s testimony indicated defendant threatened her with violence during the commission of the offense as well as the other two forcible felonies which flowed from the restraint arising out of taping both her hands and feet at the ankles. Immobilizing her hands might constitute an act of self defense, but taping the feet did not. We have reviewed the trial court's reasoning regarding its finding that the unlawful restraint in this case

involved the use of force and that finding is not against the manifest weight of the evidence. That the force was committed simultaneously with the other offenses for which self defense was not available and was consistent with coercion, rather than with self defense, supports the trial court's exercise of discretion.

¶ 26 We believe the special concurrence conflates the alleged aggression of the victim, McIver, with a knife and the aggression of defendant which led to the assault charges. These were not simultaneous acts such that the response to her alleged aggression is relevant to defendant's act of restraint with regard to carrying out the sexual assaults. The alleged aggression with a knife did not entitle defendant to unlawfully restrain McIver and commit multiple sexual assaults under the guise of a claim of self defense. We determine that the trial court's refusal to submit a self defense instruction was not an abuse of its discretion.

¶ 27 We also note that, even were the instruction to have been submitted, we do not believe the jury would have rendered a different verdict(s) in this case. Thus, assuming, *arguendo*, the trial court had abused its discretion, it would have constituted harmless error.

¶ 28 C. Physical Evidence

¶ 29 Defendant next contends that the trial court erred in admitting a gun, gun clip and ammunition into evidence. Defendant cites to no authority and simply points out that the evidence showed that "the items were never used nor taken out of the drawer during the incident" and he then concludes that the prejudicial impact of showing these items to a jury outweighed any probative value. Defendant's claim is forfeited for failure to cite to any authority. See *People v. Harris*, 384 Ill. App. 3d 551, 560-561 (2008) ("[I]t is well settled that a contention that is supported by some argument but does not cite any authority does not satisfy the requirements of [Illinois] Supreme

Court Rule 341(h)(7), and bare contentions that fail to cite any authority do not merit consideration on appeal.”).

¶ 30 Forfeiture notwithstanding, decisions concerning the admissibility of evidence are left solely to the trial court acting in its discretion, and we, as the reviewing court, will not reverse any such evidentiary determinations unless the record “clearly demonstrates” that this discretion was abused. *People v. Antonio*, 404 Ill. App. 3d 391, 403 (2010). We agree with the State that the trial did not abuse its discretion and that any prejudicial effect did not outweigh the relevance of the gun and its location in the dresser drawer in the bedroom. The proximity of the gun was sufficient to support a conclusion that defendant was capable of executing his threat, as testified to by McIver.

¶ 31 D. Evidence of Prior Incident

¶ 32 Next, defendant contends that the trial court erred by “admitting evidence of a previous incident of domestic abuse by defendant against the victim.” Prior to trial, the State sought admission of three previous incidents of domestic abuse. The trial court excluded any evidence of two separate incidents from 2005, finding these to be too remote in time relative to the incident involved in this case. The trial court then granted the State’s motion as to the November 23, 2007, incident. Defendant restates the facts of that occurrence and concludes that “other than the fact they both allege the defendant hit Ms. McIver, they are not similar in fact.”

¶ 33 The supreme court, upholding the constitutionality of the statute allowing, under certain circumstances, evidence of a defendant’s commission of another offense of domestic violence, stated “[t]he admissibility of other-crimes evidence [t] is within the sound discretion of the trial court, and its decision on the matter will not be disturbed absent a clear abuse of that discretion.” *People v. Dabbs*, 239 Ill. 2d 277, 284 (2010). The legislature “specifically provided that the other-crimes evidence ‘may be considered for its bearing on any matter to which it is relevant.’ 725 ILCS 5/115-

7.4(a) (West 2008).” *Dabbs*, 239 Ill. 2d at 290. Thus, such evidence is not admissible under the statute if it is not relevant to an issue in the case. *Dabbs*, 239 Ill. 2d at 290. Further, even where the evidence is determined to be relevant, the trial court is required to weigh the probative value of the evidence against undue prejudice to the defendant, and, in doing so, may consider the proximity in time to the charged offense, the degree of factual similarity to the charged offense, or “other relevant facts and circumstances.” 725 ILCS 5/115-7.4 (b)(3) (West 2008). In other words, under *Dabbs*, evidence of a defendant's commission of other acts of domestic violence may be admitted in a prosecution for domestic violence, so long as the evidence is relevant *and* its probative value is not substantially outweighed by the risk of undue prejudice. *Dabbs*, 239 Ill. 2d at 290.

¶ 34 In this case, the trial court allowed testimony regarding an incident that occurred in November 2007, a little over a year earlier than this incident in December 2008; both incidents involved defendant's consumption of alcohol and defendant's hitting McIver. Defendant argues that the two incidents are dissimilar in that the 2007 incident involved hitting McIver with a toilet plunger, not just hands, and the 2008 incident involved sexual assault, while the 2007 incident did not. In our view, these supposed differences are insignificant. On both occasions, defendant had been drinking and physically assaulted McIver. She also testified that on both occasions they had been arguing before he began hitting her. Further, the trial court excluded two other incidents proffered by the State; although relevant, the trial court found that the two 2005 incidents had occurred three years prior, and were too remote in time and, therefore, the possibility of undue prejudice outweighed any probative value. However, after “looking at those facts and balancing the probative and prejudicial nature of it” pursuant to the statute (725 ILCS 5/115-7.4 (West 2008)), the trial court properly allowed the jury to hear evidence regarding the 2007 incident.

¶ 35

E. Closing Argument

¶ 36 Defendant asserts that error occurred when the State, in its closing argument, told the jury that criminal sexual abuse was a lesser included offense of aggravated criminal sexual assault. Defense counsel's objection to the comment was sustained and the court instructed the jury to disregard the comments. Defendant concludes that since no curative instruction was given to the jury in this case, he was "prejudiced by the prosecutor's comments and the motion for a mistrial should have been granted."

¶ 37 Generally, prosecutors have wide latitude in the content of their closing arguments. *People v. Evans*, 209 Ill.2d 194, 225 (2004). Comments made by prosecutors during closing argument are reversible error only if they were improper and resulted in prejudice such that real justice was denied for the jury verdict may have resulted from the error. *Evans*, 209 Ill.2d at 225. The decision of whether to grant a mistrial is within the discretion of the trial court, and a mistrial should be declared "only if there is some occurrence at trial of such a character and magnitude that the party seeking a mistrial is deprived of a fair trial." *People v. Leak*, 398 Ill. App. 3d 798, 819 (2010).

¶ 38 In this case, the prosecutor argued:

"Now, one of the other options you're going to have, ladies and gentlemen, in this case is going to be should the defendant be found guilty of aggravated criminal sexual assault, or you're also going to be instructed about what's considered a lesser offense of criminal sexual abuse."

Defense counsel objected at this point and in a sidebar moved for a mistrial, which motion was denied. The trial court then told the jury "the last argument that [the prosecutor] made you are not to consider. It is stricken from the record."

¶ 39 Defendant relies on *People v. Lee*, 294 Ill. App.3d 738, 741 (1998), pointing out that after an objection to closing argument was sustained and the defendant's motion for mistrial was denied,

the trial court gave a curative instruction as to the lesser included offense, whereas in this case the trial court did not give the instruction. The *Lee* court held that the evidence was “overwhelmingly balanced in favor of the defendant’s conviction” and this, together with the curative instruction, demonstrated that the defendant suffered no prejudice. *Lee*, 294 Ill. App. 3d at 744. However, defendant’s assertion that, in contrast to *Lee*, the evidence was not overwhelmingly against him, is unfounded.

¶ 40 We find that the immediate objection, which was sustained, to the comment in closing argument, and the trial court’s prompt admonishment to the jury that the comment was stricken, cured any error that might have occurred. The record does not support defendant’s contention of prejudicial error. See *People v. Wheeler*, 226 Ill. 2d 92, 128 (1996) (the act of sustaining an objection and properly admonishing the jury is generally viewed as sufficient to cure any prejudice engendered by improper closing argument).

¶ 41 F. Effectiveness of Counsel

¶ 42 Defendant next contends that he was provided ineffective assistance of counsel. Under the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984), defense counsel is ineffective only if: (1) counsel's representation fell below an objective standard of reasonableness and the shortcomings of counsel were so severe as to deprive defendant of a fair trial; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). We may dispose of an ineffectiveness claim on the prejudice prong alone by determining that the defendant was not prejudiced by counsel’s representation. *People v. Munson*, 171 Ill. 2d 158, 184 (1996).

¶ 43 Our review of the record reveals that on June 26, 2009, the trial judge held a hearing on defendant's claims of ineffective assistance of trial counsel, at which time defendant was given ample opportunity to argue his motion.

¶ 44 First, defendant asserted his counsel was ineffective because no request was made for a jury instruction regarding the impeachment of a witness for prior inconsistent statements; *i.e.*, the prior written statement that McIver gave to the police *vis-a-vis* her testimony at trial. Defense counsel pointed out that on cross-examination McIver agreed that there were omissions and explained why certain points were not originally included in the written statement.

¶ 45 Second, defendant asserted that defense counsel failed to object to allowing medical records and exhibits in the jury room during deliberations, and such failure prejudiced the jury against defendant. However, defense counsel pointed out that the sexual assault kit was allowed to go to the jury room over defense objection. The trial court stated:

“It was all referenced in testimony. \*\*\* The Court in its discretion allowed it to go back. I didn't think there was anything prejudicial or inflammatory about it.”

Therefore, defendant's argument is unsupported by the evidence.

¶ 46 Third, defendant alleged that counsel failed to subpoena witnesses who might have corroborated his self-defense claim. Defendant names Debra Gray, a friend, and Christopher Stark, McIver's son, as potential witnesses. Defense counsel pointed out that none of the witnesses was present during the incident and therefore, as a matter of trial strategy, only Tiffany Stovall was subpoenaed to testify for defendant. Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel; these decisions have long been viewed as matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. See *People v. West*, 187 Ill. 2d 418, 432-433 (1999). This general rule is

predicated upon the maxim that the right to effective assistance of counsel refers to competent, but not necessarily perfect, representation. *West*, 187 Ill.2d at 432-433. The only exception to this rule is when counsel's chosen trial strategy is so unsound that “counsel entirely fails to conduct any meaningful adversarial testing.” *West*, 187 Ill. 2d at 432-433. In this case, the record demonstrates defense counsel very competently and vigorously represented defendant during pre-trial and post-trial motions, as well as during the jury trial.

¶ 47 Citing *People v. Krankel*, 102 Ill. 2d 181 (1984), defendant argues that the trial court “erred in allowing trial counsel to continue to represent defendant in post-trial motions and sentencing.” Defendant ignores that the supreme court, in *People v. Crane*, 145 Ill. 2d 520 (1991), expressly stated that the *Krankel* court did not intend to establish a *per se* rule that all *pro se* motions for a new trial alleging the ineffective assistance of counsel must result in the appointment of new counsel. *Crane*, 145 Ill. 2d at 533. “A trial court's decision not to appoint separate counsel on an ineffective-assistance-of-counsel claim will not be erroneous if the underlying claim is deemed to be without merit or related to a matter of trial tactics.” *Crane*, 145 Ill. 2d at 533. “The law is clear, however, that new counsel is not required in every case, and that the operative concern for a reviewing court is whether the trial court conducted an adequate inquiry into the *pro se* defendant's claim of ineffective assistance. [Citation]. Where the claim lacks merit or pertains to matters of trial strategy, no counsel should be appointed. [Citation].” *People v. Banks*, 237 Ill.2d 154, 214 (2010), citing *People v. Crane*, 145 Ill.2d 520, 533 (1991). We agree with the trial court’s finding that all of the issues raised by defendant in his *pro se* motion for a new trial were matters of trial strategy, and therefore, no new counsel representing defendant was required.

¶ 48 Finally, defendant contends that defense counsel was ineffective for failing to exclude six jurors with peremptory challenges, allowing biased and prejudiced jurors to be seated on the jury.

The right to a jury trial guarantees to one accused of a crime a fair trial by a panel of impartial jurors; this right is so basic that a violation of the right requires a reversal. *Chapman v. California*, 386 U.S. 18; *Tumey v. Ohio*, 273 U.S. 510.

¶ 49 Defendant cites *People v. Cole*, 54 Ill. 2d 401 (1973), and *People v. Johnson*, 215 Ill. App. 3d 713 (1991), apparently for the proposition that defendant is entitled to a fair and impartial trial. In *Cole*, the supreme court specifically stated that the determination of whether or not the prospective juror can be fair and impartial is an issue of fact for judicial determination from the evidence. *Cole*, 54 Ill. 2d at 414. This determination rests in the sound discretion of the trial judge, and will not be set aside unless it is against the manifest weight of the evidence. *Cole*, 54 Ill. 2d at 415.

¶ 50 In *Johnson*, the appellate court found that the defendant's right to a fair and impartial jury was violated because three jurors equivocated when they were asked by the trial court whether they could be fair and impartial, and they testified that they had been victims of crimes, that their family members had been victims of crimes, or that their friends had been victims of crimes, some of which were violent crimes. *People v. Johnson*, 215 Ill. App.3d at 724. We do not find the facts in this case analogous to those in *Johnson*, where the responses of three jurors were ambiguous to a degree that precluded a conclusion that each could be considered fair and impartial.

¶ 51 Moreover, we agree with the State's contention that several of defendant's assertions are not based on the record or are directly refuted by the record. Specifically, Juror number 279 reported that she and her husband had two instances of domestic violence involving alcohol. However, when asked by the trial judge "can you separate what you and your husband have been through—and judge [defendant's] case only on the evidence, the facts and the law?" the juror twice responded "yes." We fail to see how defendant can characterize this juror as biased, when her answers expressly

indicate the opposite. Similarly, contrary to defendant's assertion, juror number 153 responded five times that he would be able to be fair and impartial and would judge the case based only on the facts, evidence and law that he heard in the courtroom. Juror number 145 had worked for fifteen years as an emergency room nurse and had occasion to treat victims of sexual assault. At the time of trial she worked in an express care facility and no longer dealt with critically ill patients. She stated several time that she could be fair and impartial. Juror number 114 was asked whether she would "give a police officer's testimony any more weight or less weight simply because he or she is a police officer" and she answered "I don't think so, no." When asked if she was "sure about that" she replied "yes."

¶ 52 We further note that defendant, in his reply brief, adds three jurors to his list of jurors who should have been excluded. While, arguably, this omission could be considered a mere detail and not an entirely new issue raised in his reply, we caution defendant that the rule states "[t]he Reply brief, if any, shall be confined strictly to relying on arguments presented in the brief of the appellee \*\*\*." Illinois Supreme Court Rule 341(j) (eff. July 1, 2008). Defendant's assertions against these particular jurors were not included in his opening brief, and, therefore, the State is afforded no opportunity to reply to his assertions regarding them. We find no abuse of discretion in the trial court's determination and no prejudice resulted when any of these jurors was seated on the jury.

¶ 53 Finally, we wish to point out that, while recognizing that defendant's briefs are presented *pro se*, we nevertheless are not a repository into which defendant can "foist" his arguments.

" 'A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented [citation], and it is not a repository into which an appellant may foist the burden of argument and research [citation]; it is neither the function nor the obligation of this court to act as an advocate or search the record for error.' " *People*

*v. Williams*, 385 Ill. App. 3d 359, 368 (2008), quoting *Obert v. Saville*, 253 Ill. App.3d 677, 682 (1993).

We have endeavored to give defendant the attention he deserves, and expect that he will understand the nature of the appellate process and the constraints on the system.

¶ 54

### III. CONCLUSION

¶ 55 For the reasons stated, the judgment of the circuit court of Lake County is affirmed.

¶ 56 Affirmed.

¶ 57 JUSTICE BURKE specially concurs:

¶ 58 I concur in the majority's disposition of this case, but, write separately regarding the self-defense instruction issue.

¶ 59 The majority addresses what it believes to be defendant's argument that the trial court erred in finding that the unlawful restraint in this case was a forcible felony. This is not exactly defendant's argument. Defendant contends that the trial court erred in refusing his self-defense instruction simply because unlawful restraint, under the facts of the case, was a forcible felony. Defendant's contention is borne out by the record.

¶ 60 The majority appears to endorse the trial court's determination that a self-defense instruction is entirely unavailable when a defendant is charged with a forcible felony. Of course, we know that this is not the case as defendants charged with forcible felonies, such a murder and aggravated battery, are entitled to self-defense instructions where justified by the evidence. Whether an offense is a forcible felony is relevant in the context of whether a defendant is the initial aggressor who has set into motion the course of felonious conduct. See *People v. Luckett*, 339 Ill. App. 3d 93, 100 (2003), citing *People v. Mills*, 252 Ill. App. 3d 792, 799 (1993). Section 7-4 of the Criminal Code (720 ILCS 5/7-4 (West 2008)) precludes the giving of a self-defense instruction where a defendant

is attempting to commit, committing, or escaping after the commission of a forcible felony. 720 ILCS 5/7-4(a) (West 2008). Section 7-4 is captioned "Use of Force by Aggressor," and it applies where a defendant is the aggressor who sets in motion a course of conduct that constitutes a forcible felony. He may not thereafter rely on self-defense as justification for his later conduct. See *Luckett* at 100.

¶ 61 Here, there was a factual dispute as to who was the aggressor. Defendant testified that any sexual activity was consensual and that he only bound the victim with duct tape in response to her threatening him with a knife. Defendant's testimony constituted at least "slight evidence" that would justify having the jury instructed on self-defense in relation to the unlawful restraint charge. See *People v. Bratcher*, 63 Ill. 2d 534, 539 (1976) ("slight evidence upon a given theory of a case will justify the giving of an instruction").

¶ 62 The majority posits that the victim's alleged aggression with a knife did not entitle defendant to restrain her and commit multiple sexual assaults under the guise of self-defense. I agree that it is difficult to imagine a situation where a person commits a sexual assault as an act of self-defense. What the majority does not account for is that defendant testified that the sexual acts were entirely consensual. Again, defendant's testimony provided at least "slight evidence" supporting the instruction.

¶ 63 Even though the instruction should have been given, I agree with the majority that the error was harmless beyond a reasonable doubt. Based on the evidence adduced at trial, the jury, even if instructed on self-defense, would not have rendered a different verdict.