

NOTICE
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2012 IL App (4th) 110137-U

Filed 8/21/12

NO. 4-11-0137

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
JAMES MICHAEL TIPSORD,)	No. 10CF116
Defendant-Appellant.)	
)	Honorable
)	Charles G. Reynard,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner concurred in the judgment.
Justice Steigmann dissented.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's judgment where (1) the State proved defendant knew his victim was unable to give knowing consent to digital penetration as required by statute (720 ILCS 5/12-13(a)(2) (West 2010)); (2) the trial court's improper admission of gang-related evidence was harmless error; and (3) the court did not abuse its discretion when it refused to dismiss the venire; however, the appellate court remanded with directions to conduct a *Krankel* hearing where the trial court did not conduct a hearing on defendant's ineffective-assistance-of-counsel allegations.

¶ 2 In February 2010, a grand jury indicted defendant, James Michael Tipsord, for criminal sexual assault based on defendant knowingly committing an act of sexual penetration upon B.T. by placing his finger in B.T.'s vagina when B.T. was unable to give knowing consent (720 ILCS 5/12-13(a)(2) (West 2010)). In July 2010, the State filed a motion *in limine* to admit evidence of defendant's gang affiliation. Following a hearing that month, the trial court granted

the State's motion in part.

¶ 3 In September 2010, defendant's jury trial commenced. During *voir dire* questioning, in front of all but four members of the venire, one of the potential jurors indicated he worked in the jail and thus saw defendant on an almost daily basis. Another potential juror subsequently stated he also worked in the jail and also knew defendant. Defense counsel asked the trial court to strike the venire based on the potential jurors' statements. The court denied defense counsel's request and offered to give a limiting instruction.

¶ 4 Following a two-day trial, the jury found defendant guilty of criminal sexual assault. Defense counsel subsequently filed a posttrial motion alleging, among other things, (1) the State failed to prove defendant guilty beyond a reasonable doubt, (2) the trial court erred in allowing testimony regarding defendant's gang affiliation, and (3) the court erred when it refused to dismiss the venire. In October 2010, defendant filed a *pro se* document entitled "MOTION TO: RECONSIDER VERDICT," asserting defense counsel was ineffective and the State's evidence was insufficient to prove defendant guilty. Prior to defendant's sentencing hearing in December 2010, the trial court struck defendant's *pro se* motion and denied defense counsel's posttrial motion. Thereafter, the court sentenced defendant to 12 years in prison. This appeal followed.

¶ 5 On appeal, defendant argues (1) the State failed to present any evidence establishing defendant knew B.T. was unable to give knowing consent to digital penetration as required by section 12-13(a)(2) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-13(a)(2) (West 2010)); (2) the trial court improperly admitted gang-related evidence because the prejudicial effect of the evidence substantially outweighed its probative value; (3) the trial court

abused its discretion when it refused to dismiss the venire after two potential jurors told all but four members of the venire that defendant was in jail; and (4) the trial court failed to conduct any inquiry into defendant's allegations of ineffective assistance of counsel. We affirm the trial court's judgment but remand with directions for the limited purpose of conducting a *Krankel* hearing on defendant's ineffective-assistance-of-counsel claims.

¶ 6

I. BACKGROUND

¶ 7 In February 2010, a grand jury indicted defendant for criminal sexual assault for knowingly committing an act of sexual penetration upon B.T. by placing his finger in the vagina of B.T. when B.T. was unable to give knowing consent (720 ILCS 5/12-13(a)(2) (West 2010)). Prior to defendant's trial, the State filed a motion *in limine* seeking to introduce evidence of defendant's prior gang affiliation. The State asserted in February 2010, B.T. told a police officer she waited to report the sexual assault, which occurred in April 2009, because defendant was in a gang and she was afraid of what he might do. Specifically, B.T. stated on the day of the assault, but prior thereto, defendant told her he was a "G.D." (Gangster Disciple). Defendant had also shown B.T. a gang-related tattoo on his chest.

¶ 8

In July 2010, the trial court addressed the State's motion at a pretrial hearing. Defense counsel objected to the evidence of defendant's gang affiliation, arguing it was irrelevant and prejudicial. The court found the State could admit (1) B.T.'s testimony concerning the statements defendant made to her about his gang involvement, (2) a 1996 statement defendant made to Officer Daugherty wherein defendant admitted he was "G.D." and (3) a photograph of defendant's chest that showed defendant's gang-related tattoos. The court reasoned the statements defendant made to B.T. related directly to her state of mind and dissuaded her from

making an earlier disclosure of the alleged misconduct, and defendant's statement to police and the photograph of defendant's chest corroborated B.T.'s testimony.

¶ 9 In September 2010, the matter proceeded to jury trial. During jury selection, the trial court asked the jurors whether they were acquainted with defendant or the attorneys and whether they recognized any names on the list of witnesses. In response, one of the potential jurors, Juror Maaks, stated, "I've supervised at least two of the police officers that are on that list, and since I work in the jail now, I see the Defendant almost on a daily basis." Thereafter, another potential juror, Juror Frank, stated, "I'm acquainted with two, the two Bloomington officers ***. I also work in the jail. I'm acquainted with the Defendant as well." After Frank's statement, the court followed up with him about his experience with the two police officers. The court then stated, "As to the other matter, I think what I'm going to do is follow up with you later with a further inquiry, so I'm not going to follow up nor will the attorneys follow up on the other acquaintance that was mentioned by the juror."

¶ 10 At the time the potential jurors made statements about knowing defendant, all but four members of the venire were seated in the courtroom. Defense counsel had used four of his peremptory challenges. After the State and defense counsel further questioned the venire, the court dismissed the venire to the hallway except for Frank. The court then questioned Frank about his relationship with defendant, advising Frank not to mention anything to the jurors about defendant's custodial status.

¶ 11 Outside the presence of all potential jury members, defense counsel asked the court to strike the venire. Counsel argued the two potential jurors' statements had tainted the entire group of jurors because the jurors became aware defendant was incarcerated. The State

responded the evidence at trial would show defendant was incarcerated when he was arrested, and the jurors had not stated anything "with any certainty" regarding defendant's then-current custodial status. The trial court denied defense counsel's request to strike the venire, finding the statements were "very incidental" and "brief" and that the jurors would not know whether defendant was currently in custody. The court also pointed out jurors often speculate as to the custodial status of defendants when they see a sheriff's deputy in the courtroom sitting behind the defendants. Finally, the court offered to provide a curative instruction to the jurors directing them not to consider the fact defendant was in custody with regard to this matter. The court told defense counsel he would allow counsel "to address the need for a curative instruction at a later time" before the trial started, advising counsel to "give some thought to what kind of instruction" counsel might like.

¶ 12 Defense counsel used three more peremptory challenges, including one for Frank. Counsel did not challenge any of the venire for cause. The court, on its own initiative, dismissed Maaks for cause. Neither counsel nor the trial court later addressed the court's initial offer to provide a curative instruction to the jury. The matter proceeded to trial, and the following evidence was presented.

¶ 13 In April 2009, on the Friday after B.T.'s 14th birthday, B.T.'s father gave her permission to spend the night at the home of H.G., defendant's stepdaughter. B.T.'s father was a race car driver and was at the racetrack that night. B.T. met H.G. in the neighborhood when she was approximately seven or eight years old and regularly spent the night at H.G.'s home. B.T. testified she had known defendant for at least five years.

¶ 14 B.T. and H.G. began "hanging out right after school." Around 6 or 7 p.m., they

returned to H.G.'s home to babysit H.G.'s sister, stepbrother, and another little girl. Defendant and defendant's wife, Michelle, went out that night with another couple, Chris and Heather. H.G.'s grandmother, Phyllis Griffin, was home but spent most of the night in her bedroom.

¶ 15 B.T. testified she and H.G. spent the evening playing with the little girls outside, cooking them dinner, and watching TV. Later, B.T. and H.G. made a pallet for the girls and laid them down in the living room to sleep. H.G.'s stepbrother fell asleep in either a corner of the living room or in the bedroom. Defendant and Chris returned home around midnight, and Chris took the little girls home. B.T. knew defendant was intoxicated because she could smell alcohol on defendant's breath and she had been around defendant on other occasions when he was intoxicated. Defendant started smelling B.T.'s hair, telling her that her "hair smelled like [her] mom's." B.T. testified her mom and defendant knew each other from the neighborhood. H.G. asked defendant why he kept smelling B.T.'s hair and told him to stop.

¶ 16 Defendant sat down on the floor in front of the couch and began rubbing B.T.'s legs, first starting low but then moving his hand higher. B.T. was wearing basketball shorts. H.G. had fallen asleep on the other side of the couch. B.T. told defendant to stop and told him she was scared. She also tried to wake H.G. up by kicking at her. Defendant then exposed his penis to B.T. B.T. pulled a blanket over herself and turned away from defendant. At some point before exposing his penis, defendant left to change clothes and use the bathroom. While he was gone, B.T. sent her father a text message that said "hey," but her father did not respond.

¶ 17 Michelle returned home approximately half an hour to an hour later. She woke up H.G., and H.G. and B.T. went into the back bedroom to sleep. B.T. described the room as containing both a queen-sized bed and a recliner. The bed was pushed against the wall, and the

recliner was located at the foot of the bed such that it could recline backward over the bed.

¶ 18 B.T. lay on the bed against the wall and H.G. lay next to B.T. H.G.'s grandmother was already lying on the outside edge of the bed. After awhile, defendant came into the room and sat in the recliner. H.G. and H.G.'s grandmother were both asleep. Defendant removed one of B.T.'s socks and began sucking on her toe. B.T. told him to stop, and defendant did.

Thereafter, he began rubbing B.T.'s legs again. He then stuck his hands "down [her] underwear," touched her vagina, and "put a finger inside of [her]." B.T. said H.G. was "sleeping so hard" during all of this that she was "grinding her teeth the whole time."

¶ 19 B.T. testified she did not immediately tell anybody what happened because she "was too scared." She explained earlier that day, H.G. spoke to defendant about H.G.'s ex-boyfriend's claim he was a G.D. (Gangster Disciple). Defendant told H.G. her ex-boyfriend was not a G.D. because he did not know who the leaders were. Defendant claimed he knew the leaders. He also told B.T. and H.G. some of the gang symbols and showed B.T. and H.G. one of the symbols he had tattooed on his chest. Defense counsel did not object to B.T.'s testimony about defendant's gang involvement.

¶ 20 The following Wednesday, B.T. attended youth group with her friend S.B. S.B. testified B.T. was "really quiet" and "in tears," which was unusual behavior for B.T. After S.B. asked her multiple times what was wrong, B.T. finally told S.B. about the incident. S.B. said after telling her the story, B.T. became sick. B.T. told S.B. not to tell anybody, and S.B. never disclosed the incident to anyone.

¶ 21 After later making statements to her counselor about the incident, B.T. went to the Children's Advocacy Center in February 2010 to give a recorded interview about what had

happened. Officer Michael Burns then interviewed defendant. Burns testified at the time of his interview, defendant was under arrest. During defendant's interview, Burns could smell alcohol on defendant's breath. The trial court admitted into evidence People's exhibit No. 1, a video recording of Burns' interview with defendant, and played it for the jury. Defendant said he consumed two beers before the interview but stated he felt clear about things. Defendant asked Officer Burns whether he was under arrest, and Burns answered affirmatively, telling defendant he was not free to go. Defendant told Burns he previously dated B.T.'s mom for about a year. During that time, B.T.'s mom lived with defendant and B.T. lived with her dad but would come over on the weekends. Defendant asserted he could not remember anything from the evening but could not imagine B.T.'s story being true. If anything happened, defendant stated, he was too drunk to remember it.

¶ 22 Defendant stated he used to be affiliated with a gang but was not anymore. He denied ever telling B.T. or H.G. he was in a gang. He said the girls had noticed his tattoos and H.G. had looked up their meaning on the Internet.

¶ 23 Officer Tory L. Daugherty testified in July 1996 defendant told Daugherty he was "G.D." or a Gangster Disciple. Daugherty also noticed the six-pointed star tattooed on defendant's chest, which indicated to Daugherty defendant was a Gangster Disciple. Defendant entered a continuing objection based on relevancy, which the trial court overruled. After Daugherty testified, the court addressed the jury as follows:

"Ladies and gentlemen, the evidence that you've heard from Officer Daugherty with respect to gang affiliation, that's what we call limited purpose evidence. You can only consider it for

purposes of the, considering the mental state of the victim in this case in relation to corroborating what she had testified to. You may not consider it for any other purpose other than considering the effect of that information on the victim's mental state."

¶ 24 The State moved to admit into evidence People's exhibit No. 2, a photograph a police officer had taken depicting the tattoos on defendant's chest. The trial court asked defense counsel whether he wished to add any comments other than the record he had already made, and counsel responded, "No." The court then admitted People's exhibit No. 2, informing the jury it was being admitted for "the limited purpose, ladies and gentlemen, of relating to and corroborating the state of mind that you heard testimony about from the victim."

¶ 25 H.G. testified she had known B.T. for five years and she and B.T. often took turns spending the night at each other's houses. She remembered B.T. staying at her house the Friday after B.T.'s birthday. That night, she and B.T. babysat H.G.'s cousin and sisters while H.G.'s parents went out. Around 10 p.m., H.G. fell asleep on the couch. B.T. woke up H.G. at one point, and H.G. saw defendant sitting on the floor by B.T.'s head, moving her hair and telling B.T. "she smelled like her mom." H.G. told defendant to leave B.T. alone, and H.G. went back to sleep. H.G. did not remember sleeping in the back bedroom or anywhere else that night. She also did not remember seeing B.T. the next morning and did not see B.T. crying or upset on the night of the incident.

¶ 26 Michelle Tipsord, H.G.'s mother, testified she remembered going out drinking on the night of the incident, but she could not remember the details of that night. She said she and defendant often went out on Friday nights and both usually consumed alcohol. After hearing in

the summer of 2009 that an incident occurred between defendant and B.T., Tipsord questioned defendant. Defendant denied anything had happened. Tipsord said she trusted B.T. and B.T. had babysat Tipsord's kids before. B.T. and H.G. had been friends for "six, seven years, maybe longer" and often stayed over at each other's homes. Tipsord testified H.G. is "sometimes" a heavy sleeper, and H.G.'s grandmother is "pretty much" a heavy sleeper.

¶ 27 Phyllis Griffin testified she lived with defendant and Tipsord, and B.T. visited their home "every once in awhile," sometimes staying overnight. When B.T. spent the night, she and H.G. either slept in the front room on the couch or in the back room with Griffin and the other grandchildren. She said B.T. and H.G. sometimes fought, and sometimes got along well. Griffin said she was a heavy sleeper and H.G. could also be a heavy sleeper.

¶ 28 Gary Turpin testified his daughter, B.T., told him in the summer of 2009 she did not want to go back to H.G.'s home. B.T. never told Turpin why, and he never really asked, figuring "it was something to do with her and [H.G.]." At a later date, B.T. told Turpin defendant had tried to touch her, but she did not give any details of the touching.

¶ 29 The trial then proceeded to closing arguments. During the State's rebuttal argument, the State asserted the following in reference to defendant's tattoos: "This is what [B.T.] got to see permanently engraved in the Defendant's flesh, something that he wears as a badge of honor, something that [B.T.] saw as a threat, so you can't tell me that the fear wasn't justified. He was her neighbor. She had a father and a little brother. She had a lot to think about that evening." Defense counsel did not object to the State's argument.

¶ 30 On this evidence, the jury found defendant guilty of criminal sexual assault. Later that month, defense counsel filed a posttrial motion, arguing (1) the State failed to prove

defendant guilty beyond a reasonable doubt, (2) the trial court erred in allowing testimony regarding defendant's gang affiliation, and (3) the court erred when it refused to dismiss the venire.

¶ 31 In October 2010, defendant filed a *pro se* "MOTION TO: RECONSIDER VERDICT," alleging he received ineffective assistance of counsel and the State had presented insufficient evidence of his guilt. In December 2010, the parties appeared for defendant's sentencing hearing. The trial court asked defense counsel whether he took into consideration the contents of defendant's *pro se* motion when counsel filed his posttrial motion. Defense counsel answered, "to the extent that I believe they are appropriate, I believe *** his post-trial motions are primarily addressed by Paragraphs 3, 6, and 7 of the Post-Trial Motion having to do with sufficiency of the evidence." The trial court then struck defendant's *pro se* motion, telling defendant when he was represented by an attorney he was not able to file motions as if he were his own attorney. When defendant asked to address the court, the court responded, "No. You're represented by counsel. You can ask [counsel] to speak on your behalf, but you don't speak on your behalf." Shortly thereafter, the trial court denied defense counsel's posttrial motion and sentenced defendant to 12 years in prison. This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 On appeal, defendant argues (1) the State failed to present any evidence establishing defendant knew B.T. was unable to give knowing consent to digital penetration as required by section 12-13(a)(2) of the Criminal Code (720 ILCS 5/12-13(a)(2) (West 2010)); (2) the trial court improperly admitted gang-related evidence because the prejudicial effect of the evidence substantially outweighed its probative value; (3) the trial court abused its discretion

when it refused to dismiss the venire after two potential jurors told all but four members of the venire that defendant was in jail; and (4) the trial court failed to conduct any inquiry into defendant's allegations of ineffective assistance of counsel. We address each argument in turn.

¶ 34 A. The Victim's Ability To Give Knowing Consent to Digital Penetration

¶ 35 Defendant first argues his conviction must be vacated because the State failed to present any evidence establishing defendant knew B.T. was unable to giving knowing consent to digital penetration as required by section 12-13(a)(2) of the Criminal Code (720 ILCS 5/12-13(a)(2) (West 2010)). Specifically, defendant argues the State's reliance on B.T.'s age alone was insufficient to establish B.T. could not knowingly consent to defendant's advances under section 12-13(a)(2) because section 12-13(a)(2) applies only to victims who are (1) mentally impaired, or (2) rendered temporarily unable to give knowing consent. The State responds this court already concluded in *People v. Lloyd*, 2011 IL App (4th) 100094, 961 N.E.2d 344, *pet. for leave to appeal allowed*, No. 113510, a victim's age could render her unable to consent for purposes of section 12-13(a)(2). We agree with the State that *Lloyd* rejected defendant's argument.

¶ 36 A person commits criminal sexual assault under section 12-13(a)(2) of the Criminal Code if he "commits an act of sexual penetration" and he "knew that the victim was unable to understand the nature of the act or was unable to give knowing consent[.]" 720 ILCS 5/12-13(a)(2) (West 2010)). As we stated in *Lloyd*, the mere fact a victim is under the age of consent is insufficient to prove a defendant "knew that the victim was unable to understand the nature of the act or was unable to give knowing consent." *Lloyd*, 2011 IL App (4th) 100094, ¶ 34, 961 N.E.2d at 352. Rather, the focus of the analysis under section 12-13(a) is "on what defendant *knew*." (Emphasis added.) *Id.* "The State must present sufficient evidence from

which an inference of knowledge can be made, and any inference must be based on established facts and not pyramided on intervening inferences.' " *Id.* (quoting *People v. Weiss*, 263 Ill. App. 3d 725, 731, 635 N.E.2d 635, 639 (1994)).

¶ 37 We review a challenge to the sufficiency of the evidence by determining "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶ 38 In *Lloyd*, this court considered the Fifth District's decision in *People v. Whitten*, 269 Ill. App. 3d 1037, 1042-43, 647 N.E.2d 1062, 1066 (1995), where the court stated section 12-13(a)(2) sets forth two different ways to commit the crime: (1) knowingly having sexual relations with someone who is unable to understand the act, or (2) knowingly having sexual relations with someone who, *for any reason*, is unable to give knowing consent. *Lloyd*, 2011 IL App (4th) 100094 ¶ 29, 961 N.E.2d at 350. We noted the Illinois legislature's age-based criminal statutes show the age of consent in Illinois is generally 17, and sometimes 18. *Lloyd*, 2011 IL App (4th) 100094, ¶ 31, 961 N.E.2d at 351. Because section 12-13(a)(2) does not contain any limiting language, this court concluded the legislature did not intend to exclude the inability to consent based on age as a means of showing defendant committed criminal sexual assault. *Lloyd*, 2011 IL App (4th) 100094, ¶ 33, 961 N.E.2d at 352.

¶ 39 In this case, the State's evidence established B.T. turned 14 the week before defendant assaulted her. In addition, the evidence in this case showed defendant knew B.T.'s approximate age. Specifically, the testimony at trial established B.T. had been friends with H.G., defendant's stepdaughter, for approximately six or seven years, and B.T. frequently spent time at

H.G. and defendant's home. B.T. testified she had known defendant for at least five years. She and defendant lived in the same neighborhood. Defendant stated he dated B.T.'s mom for about a year, during which time B.T. would come over to visit on the weekends. Based on the frequency of contact between defendant and B.T., and the fact he was a stepfather, a rational trier of fact could have found defendant knew B.T. was unable to consent to digital penetration.

Accordingly, it was rational for the jury to find defendant knew B.T. was unable to consent based on her young age.

¶ 40 We note simply proving the victim was a minor is not enough to support a conviction under section 12-13(a)(2) of the Criminal Code. The facts must provide a reasonable inference the defendant *knew* the victim was unable to consent due to the victim's youth. Thus, it is necessary to consider such things as the defendant's characteristics, the victim's characteristics, and the relationship between the defendant and the victim. In many cases, presenting sufficient evidence to show what the defendant knew will be difficult. As noted above, the facts of this case support the jury's verdict.

¶ 41 B. The Gang-Related Evidence

¶ 42 Defendant next argues the trial court erred in admitting evidence of his gang involvement because the prejudicial effect of the evidence substantially outweighed its probative value. Defendant further argues the error was exacerbated by the State's "improper closing argument." The State responds the gang-related evidence was highly relevant to B.T.'s state of mind, and any prejudicial effect of the evidence was reduced by the limiting instructions the trial court gave to the jury. We agree with the State in part.

¶ 43 Evidence of gang membership is admissible only when there is sufficient proof

membership is related to the crime charged. *People v. Johnson*, 208 Ill. 2d 53, 102, 803 N.E.2d 405, 433 (2003). Such evidence is relevant if it tends to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Johnson*, 208 Ill. 2d at 102, 803 N.E.2d at 433. Our supreme court has long recognized "there may be strong prejudice against street gangs." *People v. Smith*, 141 Ill. 2d 40, 58, 565 N.E.2d 900, 907 (1990). On the other hand, however, the supreme court has stated "evidence of gang affiliation need not be excluded if it is otherwise relevant and admissible." *Smith*, 141 Ill. 2d at 58, 565 N.E.2d at 907. Accordingly, "[t]rial courts should exercise great care in exercising their discretion to admit gang-related testimony." *People v. Weston*, 2011 IL App (1st) 092432 ¶ 22, 956 N.E.2d 498, 503 (quoting *People v. Davenport*, 301 Ill. App. 3d 143, 152, 702 N.E.2d 335, 342 (1998)).

¶ 44 "Evidentiary rulings regarding gang-related evidence are reviewed for abuse of discretion." *People v. Villarreal*, 198 Ill. 2d 209, 232, 761 N.E.2d 1175, 1187 (2001). A court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court. *Illgen*, 145 Ill. 2d at 364, 583 N.E.2d at 519.

¶ 45 In this case, the trial court granted the State's motion *in limine* in part, allowing the State to present the following other-crimes evidence: (1) B.T.'s testimony regarding statements defendant made to B.T. about his gang membership; (2) Officer Daugherty's testimony regarding a 1996 admission defendant made to Daugherty that defendant was a "G.D."; and (3) a photograph of defendant's chest depicting his gang tattoos. Defense counsel objected to Officer Daugherty's testimony, arguing whether or not defendant was actually a G.D. was a

"separate issue" from whether or not he told B.T. he was a G.D. Counsel also objected to the photographs of defendant's tattoos, arguing defendant's actual status as a gang member did not need to be proved. The trial court, however, found the statements defendant made to B.T. about his gang membership possibly dissuaded B.T. from reporting the crime, and Daugherty's testimony and the photograph both corroborated B.T.'s testimony.

¶ 46 We do not find the trial court abused its discretion in admitting the evidence of defendant's conversation with B.T., as it was relevant to her state of mind as to why she did not report the assault sooner. The evidence had probative value even though defendant did not directly threaten B.T. B.T. testified on the day of the assault, defendant told H.G. and B.T. that H.G.'s ex-boyfriend was not a Gangster Disciple because he did not know who the leaders were. Defendant then told H.G. he knew who the leaders were, and further, he told the girls about some of the gang symbols and showed them his chest tattoos. B.T. testified she was afraid to tell anyone about what happened because she did not want defendant to come after her. She was afraid he would come after her because of his affiliation with the Gangster Disciples. Accordingly, the evidence of defendant's conversation with B.T. was relevant. See *People v. Dixon*, 378 Ill. App. 3d 535, 550, 882 N.E.2d 668, 681 (2007). ("Gang-related evidence is probative if it explains a witness's motive to lie about the defendant's involvement in the offense." (citing *People v. Johnson*, 208 Ill. 2d at 103, 803 N.E.2d at 434)); see also *People v. Felder*, 224 Ill. App. 3d 744, 757, 586 N.E.2d 729, 737 (1992) (Witnesses' testimony they did not tell detectives about a shooting because they were afraid of what would happen to them was admissible to explain why witnesses did not initially provide information to the police.).

¶ 47 However, we do find the trial court abused its discretion in admitting both

People's exhibit No. 2, the photograph of defendant's gang-related chest tattoos, and Officer Daugherty's testimony concerning defendant's 1996 confession. We note defendant properly preserved review of the admission of Daugherty's testimony and People's exhibit No. 2 by (1) opposing the State's motion *in limine* on the grounds of relevancy, (2) objecting at trial to the relevancy of both pieces of evidence, and (3) raising the issue of the court's admission of the gang-related evidence in his posttrial motion because the evidence "prejudiced the Defendant and deprived him of a fair trial." See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988).

¶ 48 First, we conclude the trial court abused its discretion in admitting People's exhibit No. 2. B.T. testified on direct examination she was afraid to report the assault because defendant had shown her his gang tattoos and explained the symbols to her. Arguably, People's exhibit No. 2 may have carried some probative value in this case if defense counsel had cross-examined B.T. to imply she was lying about defendant's gang-related tattoos or if defendant had testified he did not have gang-related tattoos. At that point, the photograph would have served to rebut the implication B.T. was lying about seeing a tattoo on defendant's body. See *People v. Casillas*, 195 Ill. 2d 461, 483, 749 N.E.2d 864, 879 (concluding the trial court did not abuse its discretion in allowing the State to cross-examine defendant about his gang affiliation because the State's evidence rebutted the implication, "raised during defendant's own cross-examination of [the witness], that he was testifying untruthfully.").

¶ 49 However, in this case, defendant did not imply B.T. was lying about defendant having gang-related tattoos. In fact, in People's exhibit No. 1, defendant *admitted* having gang-related tattoos, denying only that he told the girls about the tattoos' meaning. Accordingly, the

photograph of defendant's gang tattoos should not have been admitted, as the little probative value it carried was substantially outweighed by the highly prejudicial effect of the gang-related evidence.

¶ 50 Likewise, we find the trial court abused its discretion in admitting Officer Daugherty's testimony about defendant's 1996 confession to being a Gangster Disciple. Daugherty's testimony could not be relevant to B.T.'s statement of mind, as B.T. was not present when defendant admitted his gang membership to Daugherty. (B.T. was born in 1996.) The issue present in this case was not whether defendant was in fact a member of the Gangster Disciples, but whether B.T. *thought* he was a member of a gang. Accordingly, this evidence should have been excluded.

¶ 51 Nevertheless, we conclude the trial court's errors in admitting People's exhibit No. 2 and allowing Officer Daugherty to testify about defendant's 1996 confession were harmless. "The erroneous admission at trial of *** gang evidence does not automatically warrant reversal." *People v. Easley*, 148 Ill. 2d 281, 330, 592 N.E.2d 1036, 1058 (1992). An error is harmless where the court is satisfied beyond a reasonable doubt the error did not contribute to the defendant's conviction. *People v. Colon*, 162 Ill. 2d 23, 32, 642 N.E.2d 118, 122 (1994). In deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it may have contributed to the conviction; (2) examine the other evidence in the case to determine if overwhelming evidence supports the conviction, or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. *People v. Becker*, 239 Ill. 2d 215, 240, 940 N.E.2d 1131, 1145 (2010).

¶ 52 In light of the overwhelming evidence, we are satisfied the court's errors in

admitting Officer Daugherty's testimony and People's exhibit No. 2 were harmless. Specifically, B.T.'s testimony about the events leading up to the assault were corroborated by H.G., who remembered waking up to see defendant touching B.T.'s hair and telling B.T. she "smelled like her mom." B.T.'s father, Turpin, and B.T.'s friend, S.B., both testified to changes in B.T.'s behavior after the night of the assault. In People's exhibit No. 1, the video recording of defendant's interview with Officer Burns, defendant asserted he could not imagine B.T.'s story being true, but he also stated he could not remember anything from the evening and, if anything happened, he was too drunk to remember it.

¶ 53 In addition, the improperly admitted evidence was cumulative and duplicative of properly admitted evidence. First, the aforementioned evidence concerning B.T.'s conversation with defendant revealed to the jury defendant had gang tattoos. In addition, in People's exhibit No. 1, defendant acknowledged prior gang involvement and that he had gang-related tattoos. In light of the foregoing, we conclude the trial court's errors were harmless.

¶ 54 Defendant argues the trial court's errors in admitting the gang-related evidence were not harmless because the "prosecutor's improper closing argument further exacerbated" the trial court's error in admitting the gang-related evidence. Specifically, defendant contends the State should not have been allowed to argue defendant "wore his tattoo like a badge of honor" or that B.T.'s fears were justified because (1) the evidence at trial did not establish defendant was an active G.D. or that he had threatened or retaliated against B.T., and (2) the State's argument unfairly bolstered B.T.'s credibility.

¶ 55 We note, initially, defendant failed to object to the State's closing argument either at trial or in his posttrial motion. Accordingly, defendant has forfeited review of his claim. *People*

v. *Caffey*, 205 Ill. 2d 52, 129, 792 N.E.2d 1163, 1211 (2001). However, were we to address the State's closing argument on the merits or under a plain-error analysis, we would not conclude the State's argument constituted error. See *Caffey*, 205 Ill. 2d at 130, 792 N.E.2d at 1211 ("[B]efore considering the plain error doctrine, we determine whether any error occurred at all.").

¶ 56 "Prosecutors are afforded wide latitude in closing argument." *People v. Wheeler*, 226 Ill. 2d 92, 123, 871 N.E.2d 728, 745 (2007). "The prosecutor may comment during closing argument on the evidence and on any fair and reasonable inference the evidence may yield, even if the suggested inference reflects negatively on the defendant." *People v. Perry*, 224 Ill. 2d 312, 347, 864 N.E.2d 196, 217-18 (2007). Closing arguments must be viewed in their entirety, and the challenged remarks must be viewed in context. *Wheeler*, 226 Ill. 2d at 122, 871 N.E.2d at 745.

¶ 57 First, the State's argument that defendant "wore his tattoo like a badge of honor" was not improper. B.T. testified defendant told H.G. her boyfriend was not a G.D. because he "didn't know who the leaders were." Defendant claimed he knew the leaders and showed the girls some of the gang symbols on his chest. B.T.'s testimony thus raised a reasonable inference defendant bragged about his tattoo, thereby supporting the State's argument he wore his "tattoo like a badge of honor."

¶ 58 In addition, the State's argument B.T.'s fears were justified was not improper. Earlier in the State's rebuttal argument, the prosecutor made the following comments:

"Fear was a big emotion here, and it wasn't unjustified. It wasn't an unjustified fear, especially for a 14[-]year[-]old girl with a vivid imagination of life and the possibilities of what could happen. Number one, being the fear of retaliation, whether that was real or

imagined."

¶ 59 Thus, the State did not argue (1) defendant was an active gang member or (2) defendant threatened to retaliate against B.T.. In fact, the State acknowledged B.T.'s fear may have been imagined, emphasizing she was a "14[-]year[-]old girl with a vivid imagination." We do not find the State's argument was improper.

¶ 60 Based on the foregoing, we conclude the trial court's errors in admitting People's exhibit No. 2 and defendant's 1996 confession were harmless.

¶ 61 C. The Trial Court's Refusal To Excuse the Venire

¶ 62 Next, defendant argues the trial court erred when it refused to excuse the venire after two potential jurors mentioned, in front of all but four members of the venire, they saw defendant at the jail. The State responds defendant forfeited this argument when he failed to (1) challenge the jurors for cause, (2) use peremptory challenges for the jurors, or (3) avail himself of the court's offer to conduct further *voir dire* or provide a limiting instruction. The State also asserts, even if defendant had not forfeited his argument, his argument fails on the merits because defendant was afforded a fair trial. Defendant replies that any effort to exercise for-cause or peremptory challenges would have been futile, and although the trial court initially offered to provide a limiting instruction, the court did not again bring up this offer.

¶ 63 We agree with the State defendant has forfeited his ability to challenge the court's refusal to excuse the venire. While we agree with defendant his exercise of for-cause or peremptory challenges would have been futile, we note defense counsel did not address the court's earlier offer to provide a curative instruction, even though counsel had the opportunity to do so outside the presence of the venire on multiple occasions. Counsel cannot fail to avail himself of

the resources provided only to complain about the result on appeal. *People v. Bowens*, 407 Ill. App. 3d 1094, 1101, 943 N.E.2d 1249, 1258 (2011).

¶ 64 Even if we were to address defendant's arguments on the merits, however, we find the trial court did not abuse its discretion in refusing to strike the venire. "A defendant's right to a jury trial mandates a fair trial by a panel of impartial jurors." *People v. Boston*, 383 Ill. App. 3d 352, 354, 893 N.E.2d 677, 680 (2008) (quoting *People v. Gay*, 377 Ill. App. 3d 828, 834, 882 N.E.2d 1033, 1037 (2007)). *Voir dire's* purpose is to "assure the selection of an impartial panel of jurors free from either bias or prejudice." *Boston*, 383 Ill. App. 3d at 354, 893 N.E.2d at 680 (quoting *People v. Williams*, 164 Ill. 2d 1, 16, 645 N.E.2d 844, 850 (1994)). We will not disturb a trial court's finding a juror is impartial unless it is against the manifest weight of the evidence. *People v. O'Toole*, 226 Ill. App. 3d 974, 986, 590 N.E.2d 950, 958 (1992).

¶ 65 Here, defendant contends two potential jurors' statements they knew defendant by virtue of working in the jail tainted the jury because the jurors' statements revealed to all but four members of the venire defendant was incarcerated. Defendant asserts disclosing defendant was incarcerated biased the jury in the same way forcing a defendant to appear at trial in shackles and a uniform would. We disagree.

¶ 66 As noted by the trial court, the potential jurors' references to defendant's custodial status were brief and did not definitively indicate defendant was in custody at the time of his trial. Indeed, in People's exhibit No. 1, which was played for the jury, the defendant asked the officer whether he was under arrest, and the officer answered in the affirmative, telling defendant he was not free to go. Officer Burns also testified at trial that defendant was under arrest when he interviewed him. Thus, the jury learned during defendant's trial defendant was in custody at some

point. In addition, the court minimized the prejudicial effect caused by the potential jurors' statements by (1) not asking any follow-up questions in front of the panel, (2) instructing the attorneys not to follow up after the second juror mentioned he worked at the jail and was acquainted with defendant, and (3) instructing Frank not to discuss defendant's custodial status with any other members of the venire.

¶ 67 Moreover, even if the jury did know defendant was in custody at the time of trial, the jury's knowledge alone does not automatically indicate the jury was biased against defendant. See *People v. Jackson*, 195 Ill. App. 3d 104, 118, 551 N.E.2d 1025, 1033 (1990) ("[E]ven had the jurors been able to view defendant in the lockup area, no substantial prejudice resulted so as to deprive defendant of a fair trial.") Contrary to defendant's argument, learning defendant was incarcerated at the time of his trial is not tantamount to seeing a defendant in shackles, as seeing a defendant in shackles would imply to a juror defendant was "too dangerous to sit unshackled during trial." *O'Toole*, 226 Ill. App. 3d at 985, 590 N.E.2d at 958.

¶ 68 Here, the record reflects the trial court questioned and determined the jurors understood a defendant is presumed innocent. Defense counsel also questioned and determined the jurors would not have difficulty serving as fair and impartial jurors. Accordingly, we conclude the court did not abuse its discretion in denying defendant's motion to strike the jury panel.

¶ 69 D. Defendant's Ineffective-Assistance Claim

¶ 70 Finally, defendant argues the trial court erred when it failed to inquire into defendant's claims of ineffective assistance of counsel. Defendant contends his case should be remanded for a hearing on his ineffective-assistance allegations in light of *People v. Krankel*, 102

Ill. 2d 181, 464 N.E.2d 1045 (1984), and its progeny. The State concedes this issue, and we accept the State's concession.

¶ 71 In *People v. Moore*, 207 Ill. 2d 68, 797 N.E.2d 631 (2003), the Illinois Supreme Court described the *Krankel* rule as follows. When a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel, the trial court should determine the factual basis of the defendant's claim. *Moore*, 207 Ill.2d at 77-78, 797 N.E.2d at 637. If the court determines the claim lacks merit or pertains only to matters of trial strategy, then the court may deny the *pro se* motion. *Id.* The "operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638 (citing *People v. Johnson*, 159 Ill. 2d 97, 125, 636 N.E.2d 485, 498 (1994)).

¶ 72 In this case, defendant filed a *pro se* "MOTION TO: RECONSIDER VERDICT" in October 2010, alleging counsel was ineffective for failing to (1) communicate with defendant, (2) file various motions, (3) raise various defenses, (4) call various witnesses, and (5) notice defendant's right to a speedy trial was violated. In December 2010, the trial court asked defense counsel whether he considered the contents of defendant's *pro se* motion when defense counsel prepared his own posttrial motion. Defense counsel answered the portions of counsel's posttrial motion relating to the sufficiency of the State's evidence addressed defendant's *pro se* motion. The court struck defendant's *pro se* motion and told defendant he was unable to file his own motions when he was represented by an attorney. Thereafter, defendant asked to address the court, and the court responded, "No. You're represented by counsel. You can ask [counsel] to speak on your behalf, but you don't speak on your behalf."

¶ 77 JUSTICE STEIGMANN dissenting:

¶ 78 For the reasons set forth in my dissenting opinion in *Lloyd*, ¶¶ 44-96, 2011 IL App (4th) 100094, 961 N.E.2d at 355-63, I respectfully dissent.