THIRD DIVISION
August 29, 2018

No. 1-16-0897

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 15 CR 2501
	)	
FABIAN VILLAGOMEZ,	)	The Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was not deprived of effective assistance of counsel when his attorney did not file a motion *in limine* to exclude prior convictions in a bench trial and instead elicited testimony about them on direct examination; defendant's statements to court during his sentencing hearing did not trigger a *Krankel* hearing; comments made by prosecutor in rebuttal closing argument did not amount to plain error; mittimus is corrected.

¶ 2 Following a bench trial, defendant Fabian Villagomez was found guilty of burglary and sentenced as a Class X offender to seven years in prison. On appeal, the defendant contends that:

(1) he was deprived of the effective assistance of counsel when his trial counsel did not file a motion *in limine* to exclude evidence of his prior convictions; (2) the trial court failed to make a proper inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), based on certain statements the defendant made to the court at his sentencing hearing; (3) the State committed plain error by making improper comments in closing argument; and (4) his mittimus should be corrected to reflect his proper pre-sentence custody credit. For the reasons that follow, we affirm the judgment of the trial court and order the clerk of the circuit court to amend defendant's mittimus to reflect an additional 10 days of pre-sentence credit, bringing the total to 397 days.

¶ 3 BACKGROUND

¶ 4 At the trial of this case, the first witness called by the State was John Monreal. He testified that on the evening of January 30, 2015, he and about 15 to 20 friends were at the house where he lived with his father, Jesus Monreal. They were celebrating John's recovery from a gunshot wound. At about 11:25 p.m., John received a phone call, so he went outside where it was quieter to talk. Once outside, he noticed the security lights for the detached garage were activated. He was able to see through a window in the back of the garage that the garage door, which faced the alley, was open. He stated that he did not believe it was his father who had opened the garage door. He testified his father does not park in the garage because the door is too heavy for him to lift by himself, although a stronger person could do so. John also testified that his father was not home at that time, and he knows his father arrives home at exactly 11:45 p.m. John testified he did not see anyone in the garage or any car parked in front of it. However, he testified he uses a cane to walk and did not want to investigate himself. Thus, he went back inside the house and told his friends that somebody was inside the garage. The friends then ran outside to investigate, and John did not see where they went after they went toward the garage.

¶ 5 The second witness called by the State was Paul Chavez. He testified he was a friend of John and Jesus Monreal. He testified that he arrived at the Monreals' house sometime before 11:30 p.m. that evening. Before he parked, he noticed a small, silver hatchback car in the back of the Monreals' house, but he "didn't think much of it." He stated that within a few minutes of his arrival, John rushed in through the back door and said something was going on in the garage. Chavez ran to the garage and noticed the garage door was open. He entered the garage through the back door and saw that some tools had been set apart inside the garage. He also noticed the silver car he had seen earlier parked outside of the garage with its hatchback open and tools inside. He did not see anybody, but he heard footsteps going to the car, a car door open, and the ignition start. The car then drove away.

¶ 6 Chavez ran to his car, accompanied by his friend Asuscion Cervantes. Chavez pursued the silver hatchback in his car and caught up to it at the intersection of 47th Street and Wolcott Avenue. Chavez testified that at that point, the driver of the car, whom he identified in court as the defendant, stopped the car to close the hatchback. He testified that he got out of his car and yelled to the defendant to give him the stolen items back. He stated the defendant got back into the car and drove away. Chavez explained that he continued to chase the defendant for about 15 minutes, at speeds approaching 90 to 100 miles per hour, until the defendant's car ultimately crashed into the side of a house and came to a stop. Chavez stated that he got out of his car and approached the defendant, who appeared to be in shock. He asked the defendant why he was stealing. The defendant responded, "Oh, I'm sorry bro, I didn't mean to rob you. I didn't know anybody lived there." Chavez testified that the defendant attempted to throw a crate of tools at him. Chavez also testified he pulled the defendant out of the car and struck him numerous times with his hands and detained him until the police arrived.

¶ 7 The State's third and final witness was Jesus Monreal. Jesus testified that he did side jobs involving welding and landscaping, and for this he owned tools that he stored in his garage. He testified that on the night in question, he was driving home from work when his wife called him and said that items had been stolen from the garage. He was directed to go meet the police, and when he arrived, he observed tools inside the trunk of a car, including a snow blower and toolbox. He identified photographs taken at the scene showing the tools that had been in the trunk of the car. He testified that the tools belonged to him, and they had been stored in his garage. He testified that he did not have receipts for the tools, and there were no markings on the tools to identify them as his. He testified that he did not know the defendant, and he did not give the defendant permission to enter his garage or take his tools. Jesus also testified that he had a security camera directed at his garage, and he had viewed video footage of the date and time in question showing someone taking items out of the garage. Jesus testified he told the police about it, but nobody asked him for it. He testified that the video of the incident had automatically erased, and he could not provide a copy of the footage.

¶ 8 In the defendant's case-in-chief, a stipulation was presented that if called to testify, Detective David Matual of the Chicago Police Department would testify that he interviewed Paul Chavez on the night in question as part of his investigation of the incident. Detective Matual would testify that Chavez never told him that he observed the defendant's vehicle stop at 47th Street and Wolcott Avenue, or that he observed the defendant exit his vehicle there to close his hatchback. Detective Matual would further testify that Chavez told him that it was John Monreal who informed him of the suspicious silver vehicle in the alley.

¶ 9 The defendant then testified on his own behalf. At the outset of his direct examination, the defendant's attorney elicited the fact that he had previously been convicted of two felonies, one

for aggravated robbery, under case number 10 CR 16631, and one for aggravated vehicular hijacking with a weapon, under case number 02 CR 18290. He testified that as of the date of the incident in question, he was employed as a union roofer. He described his job duties as welding beams for roofing, installing shingles, and snow cleaning and removal. He testified that all his jobs required him to use tools, and all the tools in his trunk that night belonged to him. These included a welding machine, snow blower, miter saw, weed whacker, and other hand tools. He testified that he needed the snow blower to blow snow off the flat roofs he worked on. He testified he carried the weed whacker in case he needed to cut bushes or branches off of roofs. He testified that he needed the generator to power the tools when there was no electricity.

¶ 10 The defendant testified he lived near the Monreals' house. His cousin lived a few houses down from them, and he would often go to his cousin's house to play video games in the evenings after work. That is what he was planning to do on the night in question. He testified that earlier that day he had been working in Waukegan, Illinois, which he left about 7:00 p.m. He drove back to Chicago and went to a restaurant with friends. Between 11:00 and 11:30 p.m., he was sitting in his car in the alley waiting for his cousin to arrive home. His car was a silver hatchback. He testified he never went to a garage or removed any items from a garage that night.

¶ 11 He testified that while he was waiting in his car, he was approached by two individuals who he was familiar with from the neighborhood. He identified one as John Monreal, and the other was John Cervantes. He stated that John Monreal said to him, "What are you doing in my neighborhood? You a Disciple." He testified that John Monreal then accused him of having some involvement in his shooting. The defendant testified that he denied to them that he was still involved in a gang and told them he was there to see his cousin. He also testified the area was clearly lit, and he knew the men could see that he had gang tattoos on his hands. He testified that

John Monreal then struck him with his fist, and because of this he drove away.

¶ 12 He testified that a high-speed chase then ensued for about three miles. He explained that he was in fear for his life and thought the men were chasing him in order to hurt him. He believed the reason they were chasing him was because they thought he had something to do with John Monreal "getting injured, I think shot or injured by some faction or by way of gang violence." He also testified that he heard some loud bangs during the chase, although he did not know if they were gunshots. He stated he never stopped his car at 47th Street and Wolcott Avenue. He explained that the chase ended when he crashed into a house. He stated that after the crash, the individuals pulled him out of his car and assaulted him. He testified he never threw anything at any of the individuals, as he was almost unconscious from the crash. He testified an ambulance came, and he later woke up in the hospital to find out he had been charged with burglary.

¶ 13 On cross-examination, the prosecutor asked the defendant if his two previous convictions were "convictions where you were a convicted thief." The trial court sustained an objection to that question. He was also questioned on cross-examination about a letter he sent to the State's Attorney's Office Victim Assistance Unit asking that office to charge Chavez and Cervantes with battery. In the letter, the defendant claimed Chavez and Cervantes had shot at him approximately six times while they were chasing him. However, he acknowledged that his trial testimony was that he did not know if he was being shot at. He acknowledged the letter did not mention John Monreal accusing him of causing his injury or punching him in the face.

¶ 14 The State reserved closing argument until rebuttal. The defendant's attorney argued in closing that the credibility of the State's witnesses should be questioned based on their actions that evening. He pointed out the defendant's own testimony that as he was waiting for his cousin to arrive home, several individuals approached him and began accusing him of crimes based on

his "past association." He argued the State's witnesses were "taking the law into their own hands" by chasing him in their car, beating him after detaining him, and not calling the police. He argued that none of the witnesses had testified they saw the defendant inside the Monreals' garage or saw him take any items from there. He argued that the defendant had presented a plausible explanation for why he would have the tools at issue in his trunk, based on his job.

¶ 15 The prosecutor then began rebuttal closing by stating the following:

> "Your Honor, if the idea is that this is a conspiracy theory here that these state's witnesses, I believe the inference is that they are gang members, that were seeking retaliation against this defendant. It's interesting that gang bangers generally do not work in this fashion, but what would prevent the whole party from coming out and just beating the living life out of this defendant in the alley. But now we have this idea that, no, snowblowers are involved and the welding machine, and Jesus then comes back from work, now he's missing his wrench and things of that nature. It doesn't add up."

¶ 16 Following the parties' closing arguments, the trial judge stated, "It's a matter of credibility, frankly. I think the credibility lies with the State's witnesses. So there will be a finding of guilty as charged." The defendant filed a motion for a new trial, which was denied. At the subsequent sentencing hearing, the trial court inquired if the defendant wished to say anything before he was sentenced. The defendant stated the following:

> "I just wanted to say, Judge Porter, that I felt that I was not given a fair trial for the simple fact that the arresting officers were not present at my trial.
>
> Also, your Honor, at preliminary hearing the officers were giving a whole another testimony on their behalf saying that the witnesses had seen me remove items from this alleged crime scene that took place, and State's open argument on the day of the trial

> stated that I committed a burglary at 11:30 p.m. that night when that night the officers responded to gunshots fired, battery in progress, a very bad accident call at 11:30 p.m., your Honor.
>
> So how does that put me at a burglary site when the officers were arresting me at 11:30 p.m. at three miles away from the crime scene, your Honor? I would just—I wanted just a fair trial. Why weren't these officers present at trial?"

The trial judge responded that he did not have any control over who the defendant called, but rather he just listened to the witnesses who testified. The defendant was then sentenced to seven years in the Illinois Department of Corrections. This appeal followed.

¶ 17 ANALYSIS

¶ 18 Ineffective Assistance of Trial Counsel

¶ 19 The defendant first argues on appeal that he was deprived of effective assistance of counsel when his attorney did not file a motion *in limine* to prevent the State from impeaching him with his two prior convictions, for aggravated vehicular hijacking and aggravated robbery, and instead elicited testimony from him on direct examination about the existence of both convictions. He argues that if his attorney had filed such a motion, there is a reasonable probability it would have been granted and the outcome of his case would have been different.

¶ 20 We review claims alleging ineffective assistance of counsel under the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). To establish such a claim, a defendant must demonstrate that (1) counsel's performance was objectively unreasonable compared to prevailing professional standards, and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81; *Strickland*, 468 U.S. at 688, 694. Both prongs must be satisfied

before a defendant can prevail. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). Satisfying the first prong requires a defendant to overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *Id.*; *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010). Concerning the second prong, the "reasonable probability" required is "a showing sufficient to undermine confidence in the outcome, rendering the result unreliable or fundamentally unfair." *Patterson*, 2014 IL 115102, ¶ 81.

¶ 21 In criminal trials, a defendant's prior convictions are generally inadmissible to demonstrate propensity to commit the crime charged. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 36. However, prior convictions may be admissible for impeachment purposes to attack the credibility of a defendant who testifies at trial. *Id.* Our supreme court has set forth the factors to be considered when evaluating whether a prior conviction may be admitted for the express purpose of attacking the credibility of a testifying defendant. *People v. Montgomery*, 47 Ill. 2d 510, 516-17 (1971). Under the *Montgomery* test, evidence of a prior conviction is admissible for that purpose only if (1) the crime was punishable by death or imprisonment in excess of one year, or the crime involved dishonesty or false statement regardless of the punishment; (2) less than 10 years has elapsed since the date of the prior conviction or the release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction is not substantially outweighed by the danger of unfair prejudice. *Id.*; *People v. Naylor*, 229 Ill. 2d 584, 596 (2008); Ill. R. Evid. 609(a), (b) (eff. Jan. 1, 2011).

¶ 22 The defendant's arguments on appeal concern the third prong of the above test. He does not argue that his counsel was ineffective for failing to challenge the admissibility of his convictions under either of the first two prongs. He was sentenced to a seven year prison term for the aggravated vehicular hijacking conviction and a five year term for the aggravated robbery

conviction. Further, the record reflects that as of the date of trial, less than ten years had lapsed since the defendant was released from confinement on both convictions.

¶ 23 The focus of the defendant's argument is that his counsel provided ineffective assistance by failing to argue, under the third prong of the *Montgomery* test, that the probative value of admitting the two prior convictions was substantially outweighed by the danger to him of unfair prejudice. Because the defendant disclosed the existence of his convictions on direct examination, the trial court was not called upon to conduct this balancing test. *People v. Milligan*, 327 Ill. App. 3d 264, 269 (2002). However, if it had been done, the factors bearing on the trial court's consideration may have included (1) whether the prior convictions were for offenses related to veracity, (2) the circumstances surrounding them, (3) how recent they were, (4) the defendant's conduct subsequent to them, (5) the extent of the defendant's criminal record, (6) whether the crimes were similar to that for which the defendant is on trial, (7) the need for the defendant's testimony and the likelihood he would forego his opportunity to testify, and (8) whether the defendant's credibility as a witness was central to the determination of the truth. See *People v. Robinson*, 299 Ill. App. 3d 426, 441 (1998). If trial counsel had filed a motion raising this issue, the burden would have been on the defendant to show that the risk of unfair prejudice substantially outweighs the probative value of the prior convictions. *People v. Elliot*, 274 Ill. App. 3d 901, 912 (1995).

¶ 24 The defendant argues that his trial counsel could have raised the fact that his conviction for aggravated vehicular hijacking would not be considered veracity related. He argues that since his release from prison for the armed robbery conviction in 2012, he had been working as a roofer earning an honest living. He also argues that both of the prior offenses were similar to the charged offense of burglary, as all of the offenses involve the taking of property. He argues that

the need for his testimony was paramount, as his own account was the crux of his defense.

¶ 25 We disagree with the defendant that his trial counsel provided ineffective assistance when he did not file a motion *in limine* to exclude evidence of the defendant's two prior convictions. We do not believe the defendant has overcome the "strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *Coleman*, 183 Ill. 2d at 397. Under the circumstances of this case, it is understandable why an attorney might choose not to file a motion *in limine* to exclude the prior convictions. Succeeding in such a motion would require the defendant's attorney to persuade the trial judge that that the probative value of the evidence of the prior convictions was "substantially outweighed by the danger of unfair prejudice." *Montgomery*, 47 Ill. 2d at 516; Ill. R. Evid. 609(a). Unfair prejudice in this context is the risk that the evidence of prior convictions would be used by the trier of fact not to determine issues surrounding the defendant's credibility, but would instead induce the trier of fact to decide the case on an improper basis involving the defendant's past criminal acts. See *People v. Walker*, 335 Ill. App. 3d 102, 111 (2002). In this case, the trier of fact was the trial judge, not a jury. The danger that the trial judge would use this evidence for an improper purpose instead of a proper one is minimal. See *Naylor*, 229 Ill. 2d at 603 (as a matter of law, a trial judge in a bench trial is presumed to consider a defendant's prior conviction only with respect to the purpose for which it is competent).

¶ 26 We disagree with the defendant's argument that his prior convictions were not at all probative of his credibility and that a motion to exclude them would have prevented their introduction for any purpose. As the defendant points out, his trial testimony was "the crux of his defense." Thus, his own credibility was a central issue in the case, and his prior convictions were important to the trier of fact in measuring his credibility. *People v. Diehl*, 335 Ill. App. 3d 693,

704 (2002). We find nothing suggesting ineffective assistance in the decision by the defendant's trial counsel not to file a motion to exclude evidence of the prior convictions in this bench trial.

¶ 27 Further, when evaluating claims of ineffective assistance, this court has recognized that a decision by trial counsel to "front" evidence of prior convictions by eliciting such testimony from a defendant on direct examination can be considered a matter of sound trial strategy. *People v. Davis*, 2017 IL App (1st) 142263, ¶ 49; *People v. Sergeant*, 326 Ill. App. 3d 974, 982 (2001). It would be a reasonable decision by trial counsel that it is better to bring out this testimony on direct examination, rather than allow it to be brought out by the State as impeachment. It could further be considered a matter of trial strategy in a bench trial to try to quickly front the prior convictions during direct examination and move on, rather than draw additional attention to them by filing and arguing a motion *in limine*. We again find nothing suggesting ineffective assistance in the decision by counsel to inquire about the prior convictions on direct examination.

¶ 28 Finally, we do not believe that the defendant has demonstrated that a reasonable probability exists that, but for the actions of his trial counsel about which he complains, the result of his proceeding would have been different. *Patterson*, 2014 IL 115102, ¶ 81. After the testimony concerning the prior convictions was elicited on direct examination, the issue was barely mentioned. The defendant points out that on cross-examination, the prosecutor asked the defendant whether the prior convictions he had were "convictions where you were a convicted thief, right?" However, the trial court sustained the defendant's objection to that question, a fact which bolsters the presumption that the trial court did not consider this evidence for any improper purpose. *Naylor*, 229 Ill. 2d at 603. Other than that, the only questions on cross-examination that even touched upon his prior convictions was a brief line of questions clarifying his testimony that he had worked as a roofer since 2007 when he had been in prison part of the

time after that on the aggravated robbery conviction. The prior convictions were not mentioned in either party's closing argument or in the trial court's ruling. After reviewing all the testimony and evidence in the case, we cannot conclude that a reasonable probability exists that the outcome of this trial would have been different if the defendant's attorney had filed a motion to exclude his prior convictions and not elicited testimony about them on direct examination.

¶ 29 Requirement of a *Krankel* Hearing

¶ 30 The defendant next argues that, during his sentencing hearing, he made claims of ineffective assistance of counsel, and the trial court improperly failed to conduct an inquiry into those claims according to the procedure that developed following *Krankel*, 102 Ill. 2d at 189. The defendant's claim arises out of the following exchange between himself and the trial judge during allocution:

> "THE COURT: Mr. Villagomez, is there anything you want to tell me before I sentence you?
>
> THE DEFENDANT: Yes, Your Honor. I just wanted to say, Judge Porter, that I felt that I was not given a fair trial for the simple fact that the arresting officers were not present at my trial.
>
> Also, Your Honor, at preliminary hearing the officers were giving a whole another testimony on their behalf saying that the witnesses had seen me remove items from this alleged crime scene that took place, and State's open argument on the day of the trial stated that I committed a burglary at 11:30 p.m. that night when that night the officers responded to gunshots fired, battery in progress, a very bad accident call at 11:30 p.m., Your Honor.
>
> So how does that put me at a burglary site when the officers were arresting me at

> 11:30 p.m. at three miles away from the crime scene, Your Honor? I would just—I wanted just a fair trial. Why weren't these officers present at trial?
>
> THE COURT: Well, I don't have any control over who you called. It's up to—I don't pick which witnesses were called. I just listen to the ones that come in. That's what I do. So you're asking the wrong guy I'm telling you."

The defendant argues this exchange demonstrates a sufficient claim of ineffective assistance to warrant further inquiry by the trial court. He argues that these statements were complaints to the trial court that his attorney had failed to call witnesses that would have impeached the State's witnesses and would have supported the defendant's version of events. He argues that the trial court "understood that [his statements] directly implicated defense counsel's performance," but nevertheless the court ignored his claims instead of conducting an inquiry into their factual basis.

¶ 31 The common law procedure that developed after *Krankel* is triggered when, following a trial, a defendant raises a *pro se* claim of ineffective assistance of trial counsel. *People v. Jolly*, 2014 IL 117142, ¶ 29. The purpose of the procedure is to allow the trial court to decide whether to appoint independent counsel to argue the defendant's *pro se* ineffective assistance claims. *People v. Ayres*, 2017 IL 120071, ¶ 11. When a defendant presents a *pro se* claim of ineffective assistance of counsel following trial, the trial court should first examine the factual basis of the defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. *Id.* at 78. By contrast, if the allegations show possible neglect of the case, new counsel should be appointed. *Id.* Whether a trial court has properly conducted a *Krankel* inquiry is reviewed *de novo*. *Jolly*, 2014 IL 117142, ¶ 28.

¶ 32 To trigger a trial court's duty to conduct a *Krankel* inquiry, a defendant must make some

posttrial statement that constitutes a claim of ineffective assistance of counsel. *People v. Taylor*, 237 Ill. 2d 68, 75-77 (2010); *People v. King*, 2017 IL App (1st) 142297, ¶ 15. The statement does not need to include factual support for the claim or cite specific examples, as the purpose of the inquiry is to ascertain the claim's factual basis. *Ayers*, 2017 IL 120071, ¶ 19. Instead, our supreme court has held that "when a defendant brings a clear claim asserting ineffective assistance of counsel, either orally or in writing, this is sufficient to trigger the trial court's duty to conduct a *Krankel* inquiry." *Id.* at ¶ 18.

¶ 33 Thus, the question becomes whether the defendant's statement to the trial court at his sentencing hearing amounts to a "clear claim asserting ineffective assistance of counsel." We find that it does not. Most significantly, the defendant's statement does not even mention his attorney. A defendant's failure to mention his or her attorney has been a factor in cases where reviewing courts have concluded a particular statement was not a clear enough statement of ineffective assistance to trigger a trial court's duty to conduct a *Krankel* inquiry. *Taylor*, 237 Ill. 2d at 77; *People v. Thomas*, 2017 IL App (4th) 150815, ¶¶ 27-28. While the defendant stated to the court that he did not believe he was given a fair trial because the arresting officers were not present at the trial, he did not express this as a criticism of his trial counsel. He did not make any statement to the effect that he was dissatisfied with the representation he received at trial. A mere complaint to the court that a certain witness did not appear at the trial does not amount to a clear claim of ineffective assistance. See *People v. Jindra*, 2018 IL App (2d) 160225, ¶ 20.

¶ 34 We find this case similar to the situation this court addressed in *King*, where we held that a defendant's statements to the court at a sentencing hearing were insufficient to trigger the trial court to conduct a *Krankel* inquiry. *King*, 2017 IL App (1st) 142297, ¶¶ 17-20. In that case, the defendant made a statement to the court that "[a] witness wasn't called." *Id.* at ¶ 10. She also

stated, apparently concerning a State's witness, "I asked her to pull her medical background, her criminal background. She has heroin possession charges." *Id.* at ¶ 11. On appeal, the defendant argued these statements amounted to *pro se* claims of ineffective assistance by trial counsel in failing to call a witness and to impeach the State's witness with a prior conviction and her use of medication and heroin. *Id.* at ¶ 13. We disagreed. We first noted that nowhere in the statement did the defendant say that her trial counsel was ineffective. *Id.* at ¶ 18. As discussed above, the same can be said of the defendant's statement in this case, which does not even mention his trial counsel. Second, we noted that while it was clear from the defendant's statements that she was upset about the witness at issue, it was not clear from her statement that she was complaining about her attorney or unhappy with her representation at trial. *Id.* at ¶¶ 18-20. Again, as discussed above, the same can be said about the statement in this case. We concluded by noting that although the defendant's statements may have "insinuated" that her attorney did not investigate the witness to her satisfaction, this did not amount to a clear claim that trial counsel was ineffective, so as to trigger a *Krankel* inquiry. *Id.* at ¶ 20. Here, even assuming for argument's sake that the defendant's statements amounted to "insinuation" of some fault on the part of his attorney, we find those statements were not sufficient to bring to the trial court's attention a *pro se* claim by the defendant that his trial counsel was ineffective.

¶ 35 The defendant argues this case is analogous to *People v. Barnes*, 364 Ill. App. 3d 888, 892 (2006), in which the defendant told the trial court at his sentencing hearing that he had not had a "fair chance" because he was not able to prepare himself for trial. The defendant stated to the trial court that he had asked his attorney for transcripts, which he never received, and he had asked his attorney to investigate alibi witnesses, which he did not do. *Id.* The trial court did not inquire further into the substance of these allegations, instead stating that they were matters of

trial strategy and summarily rejecting them. *Id.* at 893. This court held that the trial court had not sufficiently inquired into the specifics of the defendant's claims, and we remanded the cause to the trial court to conduct a *Krankel* inquiry. *Id.* at 899.

¶ 36 We do not find that *Barnes* helps the defendant in this case. There, the defendant made a specific complaint to the trial court referencing his trial counsel and how he had provided ineffective assistance to the defendant. By contrast, here, the defendant's statements include no specific mention of his attorney and no indication that his complaints about not receiving a fair trial were tied to his attorney's conduct.

¶ 37 Comments in Closing Argument

¶ 38 The defendant next argues that the prosecutor made improper comments during rebuttal closing. First, he contends the prosecutor improperly characterized the defense theory of the case as a "conspiracy theory," which had the effect of distorting the burden of proof by suggesting that in order to find the defendant not guilty, the trial court would have to believe that the State's witnesses had lied as part of a plan to retaliate. Second, the defendant contends it was improper for the prosecutor to claim that he had referred to the State's witnesses as "gang bangers" and to argue without a basis in the evidence that "gang bangers generally do not work in this fashion."

¶ 39 The defendant acknowledges that this issue was not properly preserved for appellate review, but he urges us to review it under the plain-error exception to the forfeiture rule. *People v. Sebby*, 2017 IL 119445, ¶ 48; Ill. S. Ct. R. 615(a) (eff. Jan 1, 1967). Courts may review a forfeited error under the plain error doctrine in two instances: (1) where "a clear and obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," and (2) where "a clear or obvious error occurred and that error is so serious that it affected the fairness of the

defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Sebby*, 2017 IL 119445, ¶ 48 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (quoting *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005))). The initial analytical step under either prong of the plain error doctrine is determining whether there was a clear and obvious error at trial. *Sebby*, 2017 IL 119445, ¶ 49. To do so, we conduct a substantive review of the issue. *People v. Walker*, 232 Ill. 2d 113, 125 (2009).

¶ 40 When reviewing the propriety of a closing argument, courts recognize that a prosecutor has wide latitude in making a closing argument. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in context. *Id.* Prosecutors may not argue assumptions or facts not supported by the evidence. *Id.* However, a prosecutor may comment on the persuasiveness of the defense theory of the case, as well as any supporting evidence and reasonable inferences to be drawn from it. *People v. Love*, 377 Ill. App. 3d 306, 314 (2007). When the defense counsel makes an argument that provokes a response, the defendant cannot complain that the prosecutor's reply in rebuttal denied him a fair trial. *People v. Evans*, 209 Ill. 2d 194, 225 (2004). Further, where the remarks complained of are in response to defense counsel's own statements contradicting the credibility of a witness, there is no prejudicial error. *Love*, 377 Ill. App. 3d at 314.

¶ 41 After reviewing the challenged remarks in the context of the evidence and closing argument as a whole, we find that the prosecutor's statements were fair comments in response to the defendant's evidence and closing argument by defense counsel. At trial, the defendant presented testimony that he was sitting in the alley waiting for his cousin to arrive home. John Monreal and others approached him there and began questioning what he was doing in that neighborhood, as he was "a Disciple." He testified they could also see his gang tattoos on his hands. He testified

that he fled in his car after John Monreal struck him in the face. He testified that the he believed the reason the individuals chased him was because they thought he had something to do with John Monreal being "shot or injured by some faction or by way of gang violence."

¶ 42 Then, in closing arguments, the defendant's attorney began by questioning the credibility of the State's witnesses based on "the actions they took that evening." He argued that while the defendant was sitting and waiting for his cousin, "[t]hese individuals approached him and started accusing him of certain crimes against them because of what they felt was his past association." He pointed out that John Monreal testified he had recently been shot and was celebrating his recovery from the gunshot wound that night. And then he argued that the individuals who chased the defendant were, "to a certain extent, taking the law into their own hands" by chasing him in their car, beating him once they were able to detain him, and not calling the police. He stated that the defendant's version of events was corroborated by this testimony.

¶ 43 The prosecutor then began her rebuttal closing with the following statement, which contains the remarks the defendant challenges here as being improper:

> "Your Honor, if the idea is that this is a conspiracy theory here that these state's witnesses, I believe the inference is that they are gang members, that were seeking retaliation against this defendant. It's interesting that gang bangers generally do not work in this fashion, but what would prevent the whole party from coming out and just beating the living life out of this defendant in the alley. But now we have this idea that, no, snowblowers are involved and the welding machine, and Jesus then comes back from work, now he's missing his wrench and things of that nature. It doesn't add up."

¶ 44 The defendant argues that the prosecutor's reference to a "conspiracy theory" was improper. He argues it is tantamount to burden-shifting, because it implies the defendant is not

only claiming he was framed, but also that a successful defense depends on his proving the witnesses lied. We disagree. We find that the prosecutor's reference to a "conspiracy theory," considered in its context, was a permissible response to the defendant's characterization of the evidence and its theory of the case. See *People v. Fountain*, 2016 IL App (1st) 131474, ¶ 89. Specifically, the prosecutor's comment that the defense was implying a "conspiracy theory" on the part of the State's witnesses that "doesn't add up" was a response invited by the defendant's attorney's arguments that the State's witnesses were not credible in their testimony. *Id.* at ¶ 90. We do not agree with the defendant that the prosecutor's rebuttal argument amounted to an argument that the defendant would have to prove the State's witnesses were lying or had fabricated evidence in order to acquit the defendant. *Id.* at ¶¶ 90-92 (rejecting same argument).

¶ 45 The defendant also takes issue with the prosecutor's statement that "gang bangers generally do not work in this fashion." The defendant argues he never claimed the State's witnesses were "gang bangers," and it was improper for the prosecutor to claim he did. He further argues that the prosecutor's statements imply there are ways in which "gang bangers" generally work, and to conspire by lying in court against a defendant is not generally one of them. He argues there was no evidence presented at trial regarding the way in which "gang bangers" generally operate when they wish to retaliate against someone.

¶ 46 When we view this remark in its full context, we cannot say it was impermissible and not invited by the defendant's argument. It is certainly not clear and obvious error. As set forth above, the defendant injected the issue of gang affiliation into this case through his own testimony and his attorney's closing argument. While we agree with the defendant that neither he nor his attorney used the phrase "gang bangers," certainly the implication from his testimony was that the State's witnesses were members of a rival gang who intended to hurt the defendant

in retaliation for his involvement in John Monreal's gang-related shooting. Thus when the prosecutor remarked that "gang bangers generally do not work in this fashion," it was in response to the defendant's implication that these were gang members interested in retaliation through violence. When this phrase is viewed in its full context, she was essentially arguing to the trial court that if, as the defendant contended, the State's witnesses were actually gang members interested in violent retaliation against the defendant, then they would have "just beat[ ] the living life out of this defendant in the alley." Instead of just doing that, however, under the defense theory of the case they also had to have fabricated testimony including that the defendant stole a snow blower, welding machine, and other tools from Jesus Monreal's garage. She argued this contention by the defense did not make sense. We do not find any clear and obvious error in the prosecutor's remarks, and thus there can be no plain error.

¶ 47 Modifying Pre-Sentence Custody Credit

¶ 48 Finally, the defendant argues his mittimus should be corrected to reflect 397 days of pre-sentence custody credit instead of 387. The State agrees the mittimus should be corrected. Thus, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan 1, 1967) to order the correction of a mittimus without remanding the cause to the trial court, *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995), we order the clerk of the circuit court to amend defendant's mittimus to reflect an additional 10 days of pre-sentence credit, bringing the total to 397 days.

¶ 49 CONCLUSION

¶ 50 The judgment of the trial court is affirmed. The clerk of the circuit court is ordered to amend defendant's mittimus to reflect an additional 10 days of pre-sentence credit, bringing the total to 397 days.

¶ 51 Affirmed.