2014 IL App (1st) 120583-U

No. 1-12-0583

March 31, 2015

FIFTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONALD JORDAN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 05 CR 15107 The Honorable Neera Lall Walsh, Judge, presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Reyes concurred in the judgment.

O R D E R

Held: Defendant's conviction was affirmed where the challenged evidence was properly admitted, defendant cannot establish ineffective assistance of counsel regarding whether to request a limiting instruction, and the trial court did not err in prohibiting defense counsel's cross-examination of codefendant regarding the length of sentence he faced before entering into a plea bargain. The trial court conducted an adequate *Krankel* hearing regarding defendant's posttrial ineffectiveness claim and defendant was not entitled to the appointment of new counsel. Defendant's right to self-representation was violated when the trial court denied his posttrial request to proceed *pro se*, and the case

was remanded for new postrial and sentencing proceedings so that defendant may be afforded the right to proceed *pro se*.

¶ 1 Following a jury trial, defendant Donald Johnson was convicted of first degree murder, two counts of armed robbery, and three counts of aggravated kidnapping. He was sentenced to a total of 105 years' imprisonment. On direct appeal, defendant raises several claims of error regarding the admission of marital privilege and other-crimes evidence, failure of trial counsel to request a limiting instruction, impermissible restriction of his cross-examination of his codefendant, the denial of his right to self representation during posttrial proceedings, and failure to appoint new counsel to argue his *pro se* ineffectiveness claim. Defendant requests that this court reverse his convictions and remand for a new trial because of the evidentiary errors. Alternatively, regarding his claims involving posttrial proceedings, he requests a remand for resentencing and other posttrial proceedings or a remand for the appointment of new counsel for posttrial proceedings.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged by indictment with the aggravated kidnapping, armed robbery, and shooting death of Michael Ortiz; the aggravated kidnapping and armed robbery of Angelina Jones; and the aggravated kidnapping of Edward Sampson, as a result of events which transpired during the late hours of July 22, 2004, and the early morning hours of July 23, 2004. Defendant's case proceeded to a jury trial on November 28 through December 1, 2011.

¶ 4 Angel Twyman, who was 32 years of age at the time of trial, testified that she has known defendant since grade school and started dating him in 2002. They started living together in 2003 and became engaged that year. She testified that defendant and the victim, Michael Ortiz, were "good friends" and she met the victim for the first time in 2003. She testified that defendant and the victim became acquainted through a Chrysler car club.

¶ 5 According to Twyman, in November of 2003, she and defendant were in Milwaukee, Wisconsin, when they were arrested on narcotics charges and incarcerated. Twyman was in jail for two weeks until defendant's grandfather posted a $5,000 bond for her to be released. Defendant remained in jail and his bond was set at $25,000 cash. In June 2004, defendant's bond was reduced to $5,000 cash. Twyman did not have the money, so she spoke to the victim and they arranged for the victim to hold defendant's Lincoln Continental car and Suzuki motorcycle as collateral for a $7,500 loan. The loan would pay for defendant's bond and an attorney. The victim and Twyman spoke with defendant about the arrangement through a three-way call, and defendant agreed to it. Twyman testified that she and members of defendant's family transported these vehicles from defendant's grandparents' property in Kankakee back to defendant's mother's house in Robbins, where the victim gave her $7,500 in cash and took the vehicles. Twyman posted defendant's bond and defendant went to live with Twyman in Posen, Illinois.

¶ 6 Twyman testified that the victim initially told defendant to "just take your time" in repaying the money and that defendant could "give it to me [Ortiz] when you get it." Twyman testified that during June and July 2004, she was present for multiple conversations between defendant and the victim regarding repayment of the loan. Defendant indicated to her that, over time, the conversations with the victim "became irritated and impatient."

¶ 7 On July 20, 2004, Twyman and defendant married. Twyman testified that on the evening of July 22, 2004, she was home with defendant and his 1 ½ year old daughter. She had a conversation with defendant regarding the plans for that evening, and then she and the baby went to the Baymont Hotel in Alsip, Illinois. She checked into the hotel, but returned to her house to get some clothes for the baby. Defendant was home and Eric Heard, defendant’s cousin, was present. She gave defendant the hotel room number and defendant told her that the victim "was

coming over so they can reach a middle ground about repayment of the money." Twyman left with the baby and returned to the hotel.

¶ 8 Twyman next saw defendant in the early morning hours of July 23, 2004, when she let him into the hotel room. She testified that defendant looked "like he had seen a ghost." Defendant and Twyman had a conversation about the evening's events and went to sleep. Twyman testified that at 7 a.m. that morning, she, defendant and the baby picked up Heard. Twyman had known Heard since 2002 and saw him two or three times per week. Defendant drove them in his Chrysler 300M car to defendant's grandparents' property in Kankakee. Twyman asked defendant why they were going there, and he responded that they "were going to bury the gun that they used and get rid of the clothes." Twyman testified that defendant stated that the gun was used "[t]o kill Miguel [the victim]." He told her that the clothing was what "they had on that night."

¶ 9 Twyman testified that they pulled into the yard by the gate of the property and defendant and Heard got out of the car. Defendant pulled a bag from the trunk and Heard and defendant walked further into the yard. Twyman and the baby remained in the car. Twyman saw them near a tree in the middle of the yard, which was approximately 75 feet from the car. Defendant went behind the house on the property and returned to the tree with a shovel. Twyman testified that she observed them go behind the tree; she could not see everything, but she could see defendant's arms moving up and down vertically, like a digging motion.

¶ 10 Twyman testified that there was a garbage can next to the tree and she saw a fire burning inside. She saw items from the bag being placed in the garbage can. She testified on cross-examination that she saw Heard place things in the can, but she acknowledged that the transcript from the grand jury hearing showed that she testified that she did not see whether defendant or

Heard placed anything in the garbage can. She further acknowledged that according to the transcript, she previously testified that she could not see whether any digging was occurring.

¶ 11 When they returned to the car, she did not see them with anything in their possession. She testified that as they drove away, she asked defendant, "did you bury it and burn the clothes up, and they said yeah." They dropped Heard off at his home and defendant and Twyman drove back to their house.

¶ 12 Twyman testified that on August 11, 2004, she was driving the Chrysler 300M to defendant's mother's house that evening with defendant and Twyman's two sons in the car when she noticed that a car without its headlights was following her. She did not know at the time that it was an unmarked police vehicle. Eventually, other, marked police vehicles started following her with their emergency lights and sirens on. The police pursued her for approximately 10 minutes. She drove to defendant's mother's house and parked the car. At that point, defendant jumped out of the car and ran toward some nearby trees and bushes. Twyman was arrested and charged with aggravated fleeing and eluding, child endangerment, and possession with intent to deliver, but defendant avoided apprehension that night. Twyman spent three days in jail before defendant's mother paid her bond for her release. Twyman testified that when she was arrested, she refused to tell police anything about the homicide.

¶ 13 Twyman saw defendant about one or two days after her release; Twyman picked him up in the Alsip area. Initially, they returned to their house in Posen, but then moved to Dolton, Illinois, a few days later. Twyman testified that they lived there for approximately six or seven months, and then moved to Calumet City.

¶ 14 Twyman also testified that in the months following the victim's murder, defendant changed his appearance by gaining significant weight and growing out his hair. He had

previously been "very clean cut" and in good physical condition, but his weight increased from approximately 200 pounds before the murder, to approximately 300 pounds following the murder. He previously wore his hair "[b]ald," but defendant grew it out when they moved to Dolton.

¶ 15 According to Twyman, defendant's treatment toward her changed after July 22, 2004. She testified that he became "very physically abusive towards me and verbal." Prior to July 22, 2004, he had not been physically abusive towards her, although she testified that he was verbally abusive when they argued. She also testified that defendant threatened her after that date when the topic of the "incident with Miguel [the victim]" would arise; defendant told her that "[i]f I ever told anybody, that he would kill me."

¶ 16 On cross-examination, Twyman testified that defendant hit her on multiple occasions, every other day, and he was verbally abusive everyday. She conceded that she never sought help when she was alone, but she testified that she told defendant's mother that he abused her. She indicated that the reason she did not tell anyone what she knew about the murder was because she was scared. On redirect examination, she testified that she did not report the physical abuse because she was afraid for the safety of herself and her children.

¶ 17 Twyman testified that defendant was not arrested until May 23, 2005. She testified that in February 2005, she pleaded guilty to the aggravated fleeing and eluding charge. She also pleaded guilty to a bail bond violation as part of a plea agreement concerning the narcotics matter in Milwaukee, which required her to testify against defendant in the Milwaukee case. Twyman ultimately divorced defendant in May 2006.

¶ 18 Twyman testified that when she came to court in April 2009, she saw the victim's mother and sister crying and their looks "just tore me [Twyman] up." Twyman testified that she went

upstairs to the Assistant State's Attorney's (ASA) office and informed the ASA that she "had some other information" about the case. She spoke with the ASA, an additional ASA, and an investigator. She also agreed to give and sign a written statement. She testified that she told the ASA about defendant's abuse. In July 2010, she went to the Kankakee property with the police, but they did not recover any evidence.

¶ 19 Heard was 32 years old at the time of trial and is one year younger than defendant, with whom he grew up. Heard testified that in July 2004, he was living in Robbins, Illinois, and defendant was living in Posen. On the night of July 22, 2004, defendant called him and then came and picked him up. Defendant told Heard to "take a ride with him somewhere." Defendant arrived in a gray Dodge Neon, and there was a Hispanic male in the front passenger seat whom Heard did not recognize. Heard testified that the Hispanic male was the victim. Heard testified that at some point, the victim made two calls and told whomever he called that "he needed something [*sic*] to get some money for him out of a front drawer, out of a dresser drawer and bring it outside to him" and to "bring money outside to his car" and to "hurry up." At the time of the second call, defendant had parked the car in the parking lot of an apartment complex in Blue Island, Illinois. It was approximately midnight.

¶ 20 Heard testified that Angelina Jones approached the car and got into the back seat on the driver's side. She gave a stack of money to the victim. Heard observed the victim give defendant the money. Heard testified that when the victim gave defendant the money, defendant "got mad" and pulled out a gun while they were still in the parking lot.[1] Defendant told Jones to close her door, and defendant put the gun to the victim's head and began driving. Heard testified that the victim asked defendant to let him out and stated that he had given defendant the money, but

[1] Heard also testified, somewhat confusingly, that he saw the gun for the first time when the victim made his first telephone call.

defendant responded that he was not going to stop. Heard also asked defendant to let him out, but defendant refused and drove onto Interstate 57.

¶ 21 Heard testified that defendant exited at 123rd Street. At the stoplight, both Heard and the victim told defendant to let them out of the car. In response, defendant "hit the gas." Defendant reentered the expressway and exited at 119th Street. However, as defendant exited, defendant shot the victim in the head. Heard testified that he heard two gunshots; he saw only the second one. He testified that defendant had the gun at the victim's head. The victim slumped over and was not moving. Heard testified that after defendant shot the victim, defendant turned around and pointed the gun at Jones; Jones was screaming. Heard told Jones to "shut the f*** up" and told her to put her head down. Heard testified that defendant tried to pass him the gun and told Heard to shoot Jones. Heard testified that he did not have a gun and he refused to take defendant's gun or shoot Jones.

¶ 22 Heard testified that defendant drove into an alley and parked. Defendant asked Jones a couple of times whether she knew who he was; Jones responded that she did not know him. Heard testified that Jones was hysterical and crying. Heard testified that he told defendant, "she don't know you, she said she don't know you." Heard could hear the victim struggling to breathe. Heard testified that defendant exited the car with the gun and opened the door for Jones to get out. Heard also exited the car and he told defendant to put Jones in the trunk "so nothing would happen to her." Defendant opened the trunk, Jones climbed into the trunk. Heard told Jones to kick out the backseat of the car so she could get out after they left. Defendant shut the trunk door.

¶ 23 Heard also testified that before putting Jones in the trunk, her cellular telephone was ringing, and defendant told Heard to take it from her. Jones gave Heard the telephone. Heard testified that he placed it on the center console of the car.

¶ 24 Heard further testified that he ran down the alley and vomited in a small wooded area. Heard testified that defendant grabbed him and told him to come with him. Defendant had a duffel bag with him. Heard had blood on his left leg and shoe and on his hand and arm. Heard removed his shirt and wiped his hands with it, and then held the shirt wrapped in one hand.

¶ 25 Heard and defendant walked to the street, where they approached a burgundy SUV parked across the street. There was a man in the driver's seat and a woman in the front passenger seat. (Although Heard did not know their names at the time, these individuals were identified as Edward Sampson and Cicely Beal.) Defendant went to the driver's side window and tapped his gun on the windowsill. Heard testified that the windows were open. Heard stood near the rear of the SUV on the driver's side; he could not hear the exchange between Sampson and defendant. Defendant told Heard to get in the SUV, so Heard got in the rear passenger seat. Defendant went around the front while Beal exited the car and went inside of a nearby house. Defendant told Sampson to drive.

¶ 26 They traveled east on 119th Street. Heard did not see any police vehicles, but he heard sirens in the distance and it appeared to be coming from the alley where he and defendant left the Dodge Neon. Heard testified that Sampson received a telephone call and defendant directed him to answer it. Heard testified that defendant directed Sampson to take Interstate 57 and exit on 147th Street. Defendant directed Sampson for a few blocks and then told Sampson to stop and pull over. Heard observed defendant give Sampson a ball of money. Sampson drove away and defendant and Heard walked to defendant's house, which was half a block away.

¶ 27 Heard testified that when they reached the back door of defendant's home, defendant instructed Heard to remove his clothes and defendant placed them in a black duffel bag. Defendant did the same with his own clothes. Defendant still had the gun. Heard testified that defendant gave him a change of clothes and then cleaned the floor with ammonia.

¶ 28 Heard testified that after a short period of time, defendant's wife, Twyman, came home. Heard testified that defendant asked Twyman if she had gotten the hotel room, and Twyman affirmed that she had. Heard testified that they all left together and defendant took Heard home in his Chrysler 300M. When he dropped Heard off, defendant told him, "don't say nothin'."

¶ 29 Early that same morning, defendant called and told Heard to come outside. When Heard refused, defendant stated, "come outside or I gonna [*sic*] make you come outside, I'm commin' to get you." Heard went outside and saw defendant in the Chrysler 300M with Twyman and the baby. Heard got into the car. Defendant drove south to Kankakee, where defendant stopped at a gas station, purchased a gas can, and filled it with gas. Defendant drove to their grandparents' property near Kankakee, where he pulled in and parked. He and Heard exited the car while Twyman and the infant stayed behind. Defendant instructed Heard to find a barrel. Defendant had the same black duffel bag and he began removing items from it and placing them inside the barrel. Heard saw that the items were the clothing he and defendant had worn the night before. Defendant soaked the clothing with gasoline and set it on fire. Heard testified that he asked defendant "what happened or why did he kill that boy" and defendant responded that the victim "f*** him over." They stood by the barrel until everything had burned and the fire extinguished.

¶ 30 Heard testified that defendant tipped the barrel over and put water on it. Defendant dug a hole with a shovel from their grandfather's tool shed and buried the remains of their clothing. According to Heard, the remains of Jones's and the victim's cellular telephones were also in the

barrel and were buried. Heard testified that he did not think Twyman could see what they were doing.

¶ 31 Heard testified that he saw defendant had the gun in the duffle bag. Heard observed defendant remove the gun and place it under the hood of his car in the air filter compartment, along with a bag of cocaine, which defendant had also taken from the duffle bag. They left the property and defendant drove Heard back home. Defendant told Heard "don't ever say nothin' about nothin'."

¶ 32 Heard testified that he next saw defendant approximately one week later. Defendant heard that the police were looking for him, so he went to Heard's house around midnight. Defendant was outside near the side of the house and had a gun. He told Heard to come to the side of the house and then threatened him. Heard stated that defendant "told me to get on my knees. He asked me did I tell—did I report him to the police and I said no, I didn't tell nothin'." Defendant told Heard that "he was gonna kill me. I told him don't kill me 'cause I didn't call the police on him, I didn't tell nobody [*sic*]." Defendant hit Heard on the head with the hand that held the gun and left.

¶ 33 Heard was eventually arrested in May 2009, and he is presently incarcerated. He was charged in connection with the victim's homicide with first degree murder, aggravated kidnapping, and armed robbery. He affirmed that he was testifying as part of a plea agreement with the State pursuant to which he pleaded guilty to concealment of a homicidal death and kidnapping, and for which he received concurrent sentences of 5 years' and 9 years' imprisonment, respectively. Heard testified that he could be eligible for parole after 4 ½ years based on good-time credit. He affirmed that the plea agreement required him to testify truthfully.

¶ 34 He agreed on cross-examination that, after he signed the plea agreement, he was moved to the witness protection section of the jail, where he received money for the commissary from the jail and he was able to watch movies, listen to the radio, have free coffee, and use a hotplate. Heard conceded that he did not plead guilty to murder. He also agreed that he knew he was facing substantially more time for the murder charge than the nine years he actually received under the plea agreement. He understood the potential prison time he faced to be "[a] long time" and that he also would not have gotten good time credit. He testified that he was afraid of going to prison and of defendant.

¶ 35 On cross-examination, Heard conceded that in the facts set forth in his plea agreement, it did not indicate that defendant tried to pass him the gun when they were in the Dodge Neon with the victim and Jones. The plea agreement also did not indicate that Heard told Jones to kick out the backseat. Additionally, Heard admitted that he initially did not tell police the truth when he was arrested; he denied any involvement and stated that he was working in a different state at the time of the murder. He also denied wearing glasses. However, Heard testified that he was telling the truth at trial. Heard denied possessing a gun on the night of the murder. Heard testified that at the time of the incident, he weighed 210 to 215 pounds, was 5'6" tall, wore his hair closely cropped, wore wire frame glasses, and he has a tattoo on his left arm. He testified that defendant had a bald head at that time.

¶ 36 Jones, who was 27 years old at the time of trial, testified that in 2004, she was living in a condominium in Blue Island, Illinois, with her boyfriend Ortiz and his mother, Susan Viramontes. Jones arrived home from her job as a bartender on the night of July 22, 2004, at approximately 11:30 p.m. The victim was not home. Jones called the victim on his cellular telephone, but did not reach him. He called her back and asked her to retrieve some money from

a cabinet in the bedroom. She did not find any money in the cabinet, so she called him again, but again did not reach him. The victim called her back and told her to get the money from underneath their mattress. She found $1,500 bound with a rubber band when she looked under the mattress. She again unsuccessfully tried to call the victim, and he called her back. The victim told Jones to meet him in the parking lot of the condominium building. Jones estimated that it was about midnight at this point.

¶ 37 Jones testified that she went to the parking lot and observed the victim sitting in the passenger seat of his mother's Dodge Neon. She did not recognize the man in the driver's seat or the other man in the back passenger seat. (She subsequently identified defendant from a photographic lineup and at trial as the man who was in the driver's seat, and she later identified Heard in a live lineup.) Jones testified that she opened the door behind the driver, entered the car, and then tossed the money to the victim. She observed the victim give the money to defendant. She did not see any restraints on the victim or any weapons at the time. She testified that defendant put the car in reverse, but the victim asked defendant to let Jones out of the car as defendant started to pull away. Defendant refused and continued driving.

¶ 38 Jones testified that defendant drove to 127th Street and Ashland. The victim asked defendant to put $5 worth of gas in the car, but defendant "said no and that is when the guns came out." Jones testified that both defendant and Heard pulled out a gun. Jones explained that Heard pulled out a revolver and pointed it at her. Defendant had a silver automatic or semi-automatic pistol, which he pointed at the victim. She was able to see this because it "was right in front of me." She testified that when defendant pointed the gun at the victim, defendant stated, "you f*** with the wrong m***." Jones testified that defendant instructed Heard to take both her

and the victim's cellular telephones. Her telephone was clipped to her shirt and Heard "snatched it" off of her.

¶ 39 Jones testified that defendant drove onto the expressway, going north on Interstate 57, and got off after one or two exits at 119th or 111th Street. She testified that as they came to a blinking red light on the exit ramp, Heard stated, "I think you should call old girl and check something—" and then defendant "just reached over" and shot the victim. Jones testified that defendant fired five or six shots, "all head shots," and she saw the flash. She could tell that the victim was hit; he slumped against the window and door. As defendant started to drive again, the victim slumped over onto the middle counsel; defendant took the victim's head and slammed it to the over side of the car. Jones testified that the victim was bleeding and blood was getting on her clothes. Jones testified that Heard stated, "just calm down, be cool." The victim was not speaking, but Jones could "hear him trying to breathe."

¶ 40 She testified that defendant told Heard "to do me [Jones] in." Jones testified that she was "begging and pleading I don't know nothing [*sic*]. I don't know nothing [*sic*]." Defendant responded, "you know me[,]" "what is my name?" and "say my name." Jones stated she did not know him and did not know his name. She testified that Heard stated, "she good, she cool, she don't know nothing [*sic*], just hit an alley."

¶ 41 Jones testified that defendant found a deserted alley and parked. Defendant told Jones to get out of the car and Heard instructed her to get in the trunk. She got in the trunk and they closed the trunk door. She heard the men state "get your shit." At some point, when she no longer heard their voices, she kicked the back seat in. She could hear the victim, who was still in the front passenger seat, struggling to breathe. She left and knocked on doors of nearby houses until someone answered her and the police were summoned. Jones gave police a physical

description of the two men. She described the driver as bald with dark clothing, approximately six feet tall, and weighing 250 pounds.

¶ 42 Jones testified that approximately two weeks later, she was shown a photographic array of six individuals and she identified the photograph in the upper right as defendant, the shooter. She testified that almost a year later, on May 24, 2005, she was called to the police station to view a lineup. She did not identify anyone from the five-person lineup. After she viewed the live lineup, the police then showed her the photographic array that she was shown initially. She again identified defendant. She again identified defendant's photograph in the array when interviewed by an ASA the next day and during her grand jury testimony. Jones testified that a few years later, on May 2, 2009, detectives asked her to come to the police station to view another live lineup. She identified the second man from the left as the person who was sitting next to her in the back seat of the Dodge Neon, Heard.

¶ 43 On cross-examination, Jones disagreed that the victim was a drug dealer. She conceded that when the police arrived after the shooting, she told them that the victim called her that night and wanted her to bring a cellular telephone, not money to the parking lot.

¶ 44 Sampson, who was 40 years of age at the time of trial, testified that in the late evening of July 22, 2004, he was with his friend, Cicely Beal, and they were parked in front of Beal's house on 115th Street near Laflin in his new Ford Expedition. Sampson testified that as they were sitting in the car, a black man of medium build with a bald head walked up to his window. Sampson had never seen the man before, but he rolled down his car window. Sampson testified that the man asked him for a ride, but Sampson responded, "I don't know you." Sampson testified that the man stated he would "give you 2,000 if you give me a ride." Sampson told the man, "no thanks, I don't know you." At that point, the man pulled out an automatic pistol and pointed it at

Sampson and told him "well, give me the truck then." Sampson did not want to give defendant his truck, so Sampson stated, "why didn't you say you wanted a ride." Sampson indicated that while defendant pointed the gun at him, another man got into the back passenger seat. The other man was black, heavyset, wore glasses, and had a "little mini afro." He appeared to be bleeding as he had a stained sheet wrapped around one hand. Sampson testified that the man with the gun walked around the front of the vehicle as Beal exited the front passenger seat and went into her house. The man with the gun got into the front passenger seat. Sampson identified defendant at trial as the man with the gun.

¶ 45 Defendant instructed Sampson to "pull off" and stated that "everything was going to be fine" and defendant "just needed to get out of here, just drop him off. At the same time he was ram belling [*sic*] with his automatic." Sampson testified that at the intersection of 115th Street and Racine, he ran the red traffic light because he saw police cars and he hoped they would pull him over. Sampson could hear sirens and he saw fire trucks and police cars gathered at 112th Street and Laflin. However, he did not get pulled over. Defendant told Sampson, "[d]on't do that again or he would have to shoot me [Sampson]." Sampson received several calls on his cellular telephone while the men were in the car, and defendant directed him to answer and "tell my friends that I was okay"; Sampson did as instructed.

¶ 46 Sampson testified that defendant directed him onto Interstate 57 and told him to exit at 147th Street and Sibley. After driving a few blocks, defendant told Sampson to stop, and defendant and Heard got out. Before leaving, defendant told Sampson, "I told you nothing going to happen to you." Defendant instructed Heard in the backseat to "take care of him." Heard "put two bloody 20s on my council [*sic*]." Sampson returned to Beal's house and he and Beal drove to the crime scene at 112th Street and spoke with police.

¶ 47 Sampson testified that one week later, on July 31, 2004, he was shown a photographic array of six individuals and he identified the photograph of defendant as the man with the gun. Sampson also viewed a live lineup at the police station on May 24, 2005, but he did not identify anyone from the lineup. The detectives showed him a copy of the photographic array, and he again identified defendant. Sampson testified that on May 2, 2009, he viewed a five-person live lineup at the police station and identified Heard, as the man who entered the back seat of his car.

¶ 48 On cross-examination, Sampson testified that the man who came up to his window was African-American, had a medium complexion, and was bald, but he did not recall telling police that the man had a tattoo on his left arm. Sampson also did not recall telling detectives that Beal was his girlfriend, and he denied that she was his girlfriend.

¶ 49 Beal's testimony was similar to Sampson's testimony. She saw two men running toward their SUV, one of whom was bald, and the other wore glasses. She identified defendant at trial as one of the men she saw. She testified that the men came up to the car and Sampson rolled down his window. Defendant stated "I need you to run me somewhere." Beal testified that Sampson refused and stated, "I need you to get away from my truck." At that point, defendant pulled a semi-automatic gun from his pants and pointed it at Sampson, "and said you have to get the F up out the car." Beal testified that once defendant raised the gun, she slid out of the car, and she heard Sampson tell defendant, "why didn't you say that." She ran into her house and saw defendant walk around the front of the car and get in on the passenger side, while the other man walked around the back and got in. Beal drove her own car to Sampson's friends and explained what happened. Sampson's friends tried calling him. Sampson answered and stated that he was "okay."

¶ 50 Beal identified defendant in a photographic array on July 31, 2004. She viewed a live lineup on May 24, 2005, but failed to identify anyone. She was shown a copy of the same photographic array she viewed previously, and she again identified the photograph of defendant. She viewed another live lineup on May 2, 2009, at the police station, but she did not identify anyone.

¶ 51 Chicago police detective Brian Johnson was assigned to investigate the shooting. At the crime scene on 112th Street on July 23, 2004, he learned there were two offenders and also learned about the carjacking that had occurred on 115th Street. He received a description of the shooter and driver as a black male, approximately 30 years old, with a stocky build and a shaved head, and the other suspect was 30 to 35 years old, had an Afro, and wore unusual glasses. Johnson testified that Sampson told police that night that the bald suspect had a tattoo on his left arm and that Beal was Sampson's girlfriend. Johnson indicated that Jones did not initially tell him that money was taken, in addition to her telephone.

¶ 52 Johnson viewed the victim's body at the hospital and observed that the victim had sustained multiple gunshot wounds to the head and had duct tape wrapped around his ankle. Johnson also visited the victim's home in Blue Island and obtained permission to search his room, where he found 187 grams of cocaine, which had an estimated street value of $25,000. Johnson searched the parking lot of the condominium complex and observed a Lincoln Continental registered to defendant.

¶ 53 Johnson obtained call information for Jones's cellular telephone. There were multiple calls from Jones's telephone to the number (708) 612-1680. Upon further investigation, Johnson learned that this number was registered to defendant at a post office box in Blue Island, and he also learned defendant's birth date. With that information, Johnson was able to acquire a

photograph of defendant, which he then included in the photographic array that was shown to the witnesses, who identified defendant's photograph.

¶ 54 Johnson did not locate defendant at his last known address with his mother in Robbins, so he prepared an investigative alert. He was contacted the next day, August 1, 2004, by Oak Forest police officer Todd Arthur, who stated that he was familiar with defendant and would set up a meeting with him. However, defendant failed to appear at the scheduled meeting. Johnson was also contacted by the Blue Island police on August 11, 2004, after defendant was observed in the passenger seat of a vehicle. Although defendant avoided arrest, Twyman was apprehended and interviewed. Johnson was informed on May 24, 2005, that defendant had been arrested in Calumet City, and Chicago police took custody of him.

¶ 55 Johnson testified that after he was provided with Twyman's handwritten statement on April 1, 2009, he sought to locate Heard in connection with the case. The Robbins police department took Heard into custody on May 2, 2009. Heard was placed in a lineup, and Jones and Sampson identified him, but Beal failed to make an identification. In July 2010, Johnson went with Twyman to the property in rural Kankakee, but he did not find anything of evidentiary value.

¶ 56 Oak Forest police officer Arthur testified that at the time of the incident, he was working for the Drug Enforcement Administration (DEA) and was investigating narcotics in the Chicago area. In connection with that work, he came into contact with defendant and met with him for the first time on May 6, 2004, in Milwaukee, Wisconsin, at a municipal building. Defendant agreed to provide information to Arthur. Arthur testified that they met approximately 12 times between June 2004 and August 2004. Arthur would typically call defendant to set up a time and location

to meet, and occasionally they would do an undercover operation or make a recorded telephone call. Defendant would generally appear for meetings.

¶ 57 Arthur testified that on August 1, 2004, he recognized defendant's photograph on a poster at the police department indicating that defendant was wanted for a homicide. He contacted Johnson and advised him of his professional relationship with defendant, and Arthur agreed to set up a meeting with defendant as a ruse. Despite numerous calls, Arthur was unable to reach defendant or set up a meeting. The few times he was able to speak with defendant, defendant told Arthur that he unable to meet with him because he was "tied up with something." He told Arthur that he was at a hospital for a family member, but the police were not able to find him at that hospital. Defendant eventually stopped answering the telephone.[2]

¶ 58 The State presented physical evidence and the testimony of several evidence technicians. Illinois State Police forensic scientist Marc Pomerance testified that he examined two nine-millimeter Luger fired cartridge cases that were recovered and concluded that they had been fired from the same firearm based on the marks on the casings. Illinois State Police forensic scientist Christine Prejean testified that the two cartridge casings tested positive for the presence of blood. The blood stains on the two $20 bills matched the victim's DNA profile. A blood sample taken from the passenger side dashboard of the Ford Expedition also matched the victim's profile. Illinois State Police forensic scientist and latent fingerprint analyst Cynthia Prus testified that Jones's fingerprints matched the latent prints lifted from the rear exterior window and driver's side rear door handle of the Dodge Neon. Of the 12 latent fingerprint impressions that were found on the Dodge Neon and were suitable for comparison, she was unable to match any of them to defendant or Heard.

[2] Twyman testified that she was aware that defendant was working with Arthur and met with him periodically. She also knew that Arthur attempted to speak with defendant on August 1, 2004, but defendant did not meet with Arthur.

¶ 59 The State also offered several stipulations, which were, in pertinent part: (1) the medical examiner would testify that the victim died of multiple gunshot wounds to the head and the manner of death was homicide; (2) a cigarette butt found inside the Dodge Neon was analyzed for DNA evidence and defendant was excluded as a possible contributor to the male DNA profile; (3) defendant's and Jones's cellular telephone numbers; (4) telephone records from July 23, show that Jones's telephone called defendant's telephone at 12:02 a.m.; 12:03 a.m.; 12:04 a.m.; 12:06 a.m.; and 12:07 a.m.; and (5) at the crime scene, Jones described the two offenders as an African-American male, 25 to 30 years old, approximately 6' tall, weighing approximately 250 pounds, bald, wearing dark clothing, and armed with a silver semi-automatic pistol, and an African-American male, 25 to 30 years old, approximately 5'9" tall, weighing approximately 175 pounds, with a mustache and an Afro, wearing dark clothing, and armed with a silver revolver; Sampson described the offenders as an African-American male, 30 to 33 years old, approximately 6'2" tall, weighing 210 pounds, bald, tattoo on his left arm, armed with a silver nine-millimeter Glock semi-automatic pistol, and an African-American male, 30 to 32 years old, 5'8" tall, 230 pounds, wearing an Afro, bifocal glasses, and a gray T-shirt.

¶ 60 In its case in chief, the defense submitted several stipulations: (1) Chicago police officer David Beaston spoke with Sampson at the crime scene, who informed him that the man at the driver's side door of his car had a tattoo on his left arm and the weapon he had was a silver 9-millimeter Glock semi-automatic pistol; (2) Heard stated that he was working in Minnesota at the time of the murder; (4) when defendant was arrested on May 23, 2005, the booking officer listed defendant's weight as 235 pounds; and (5) Twyman never disclosed to the ASA that she told defendant's mother that she was physically or verbally abused by defendant.

¶ 61 The jury convicted defendant of first degree murder, two counts of armed robbery, and three counts of aggravated kidnapping. Following his conviction, defendant's counsel filed a motion for a new trial and a supplemental motion for a new trial and defendant filed several *pro se* motions, all of which the trial court denied.

¶ 62 The trial court sentenced defendant on February 6, 2012, to 75 years' imprisonment for the first degree murder conviction (50 years for first degree murder and 25 years, added on for personally discharging the weapon), 6 years' imprisonment each for the two armed robbery convictions, and 6 years' imprisonment each for the three aggravated kidnapping convictions. The sentences are to be served consecutively to each other, totaling 105 years' imprisonment, with credit for 2449 days served. Defendant's timely appeal followed.

¶ 63 II. ANALYSIS

¶ 64 A. Marital Privilege Evidence

¶ 65 In his first claim on appeal, defendant argues that the trial court erred in allowing into evidence Twyman's testimony regarding defendant's physical abuse of her and his verbal threats to kill her if she told anyone about the shooting of the victim. Defendant asserts that this testimony was inadmissible pursuant to the marital privilege statute (725 IlCS 5/115-16 (West 2010)), and that, given the prejudicial nature of the challenged evidence and the weakness of the other evidence presented by the State, the error was not harmless.

¶ 66 Defendant preserved this issue for appellate review by raising it in a motion *in limine* and in his posttrial motion for a new trial. *People v. Denson*, 2014 IL 116231, ¶ 11. "When an issue is preserved for review, the State has the burden of proving that the error was harmless beyond a reasonable doubt." *People v. Donahue*, 2014 Ill App (1st) 120163, ¶ 109 (citing *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). Moreover, "[e]videntiary rulings are within the sound

discretion of the trial court and will not be disturbed on review unless the trial court has abused its discretion." *People v. Boclair*, 129 Ill. 2d 458, 476 (1989). An abuse of discretion occurs only if the trial court's decision is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Johnson*, 368 Ill. App. 3d 1146, 1155 (2006).

¶ 67 The marital privilege statute provides that, "[i]n criminal cases, husband and wife may testify for or against each other. Neither, however, may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage[.]" 725 IlCS 5/115-16 (West 2010). The statute carves out several exceptions, none of which are directly applicable or at issue in this case. *Id*.

¶ 68 Although defendant initially relied on *People v. Trzeciak*, 2012 IL App (1st) 100259, in his opening brief, this case was reversed by the Illinois Supreme Court in *People v. Trzeciak*, 2013 IL 114491, during the pendency of defendant's appeal. Defendant therefore attempts to distinguish *Trzeciak*, 2013 IL 114491, in his reply brief.

¶ 69 In *Trzeciak*, 2013 IL 114491, ¶ 1, the defendant was convicted of murdering a man with whom the defendant believed his wife was having an affair and with whom he planned to run away. The wife was permitted to testify at trial regarding the defendant's threat to kill her and the victim and the defendant's abusive actions toward his wife, as the trial court concluded that these communications were not barred by the marital privilege. *Id.* ¶ 6. The appellate court reversed the defendant's conviction, finding that the communications were protected by the marital privilege and that this evidence had contributed to the defendant's conviction. *Id.* ¶ 37.

¶ 70 As stated, our supreme court reversed the appellate court. *Id.* ¶ 1. The court observed that the purpose of the marital privilege was to promote marital harmony by encouraging full

disclosure between spouses, with the caveat that the privilege "applies only to communications which are intended to be confidential." *Id.* ¶¶ 41-42. While private conversations between spouses are presumed confidential, the court held that, "where it appears from the nature or circumstances under which the communication was made that confidentiality was not intended, the communication is not privileged." *Id.* Additionally, for a nonverbal action to be considered a privileged communication, it must clearly be "intended to convey a message." *Id.* ¶ 43. Thus, the supreme court directed that for any communication to be privileged, it "must be an utterance or other expression intended to convey a message" and it "must be intended by the communicating spouse to be confidential in that it was conveyed in reliance on the confidence of the marital relationship." *Id.* ¶ 44.

¶ 71 As applied to the communications at issue in *Trzeciak*, the supreme court held that the evidence of defendant's physical acts, *i.e.*, that defendant beat his wife, tied her up, tossed her in his truck, and drove to the victim's house, was not protected by the marital privilege because his nonverbal conduct was not intended to convey a message. *Id.* ¶ 47. In addition, "it is commonly recognized that '[a] spouse's testimony as to physical acts of cruelty or abuse by the other spouse is admissible on the ground that no confidential communication is involved, or that the information was not gained as a result of the marital relation.' " *Id.* (quoting 81 Am.Jur.2d *Witnesses* §§ 287, 313 (2004)).

¶ 72 Regarding defendant's threat to his wife that he would kill his wife and the victim, the supreme court found that the defendant's verbal threat was not barred by the marital privilege because it did not qualify as a confidential communication. *Id.* ¶ 49. Examining the meaning of "confidential," the supreme court reasoned that not every conversation between spouses is confidential as the privilege " 'covers only those private exchanges which would not have been

made but for the absolute confidence in, and included by, the marital relationship and prompted by the affection, confidence and loyalty engendered by such relationship.' " (Internal quotation marks omitted.) *Id.* ¶ 50 (quoting *People v. D'Amato*, 430 N.Y.S.2d 521, 522-23 (N.Y. Sup. Ct. 1980). Accordingly, the court concluded that "[w]hether a particular communication is privileged as having been made in reliance upon the marital confidence depends on the nature and form of the communication and the circumstances immediately surrounding its making. Such a determination is a preliminary question of fact to be decided by the trial court." *Id.* ¶51. The court held that the defendant's threat was not made in reliance on the confidence of his marriage because it was evident that the defendant intended his wife to reveal the threat to the victim and it was also "the type of communication that [his wife] might have revealed to one of her family members, or even the police." *Id.* ¶ 52. The circumstances in which the threat was made showed that it "was not motivated by [the defendant's] reliance on the intimate, special trust, and affection of his marital relationship. The threat had no correlation to the mutual trust between defendant and [his wife] as husband and wife." *Id.*

¶ 73 In his reply brief, defendant argues that *Trzeciak*, 2013 IL 114491, is distinguishable from the instant case because the defendant's threats in *Trezciak* were made before the crime was committed and the circumstances showed that they were intended to be conveyed to a third party (the decedent), whereas defendant's statements to Twyman were made after the murder and, therefore, could not have been intended to be conveyed to the victim. Defendant asserts that, as Twyman was not suspected of having an affair, defendant did not intend for the threats to be communicated to any third parties in hopes of ending an affair, unlike in *Trezciak*.

¶ 74 We disagree. First, it is clear that defendant's physical abuse of Twyman was not shielded by the marital privilege because his actions were not intended to convey a message. *Trzeciak*,

2013 IL 114491, ¶ 47. Additionally, as recognized in *Trzeciak*, this evidence also falls within the well-recognized exception for a spouse's testimony about physical acts of cruelty or abuse by the other spouse on grounds that no confidential communication is involved. *Id*.

¶ 75 With respect to defendant's verbal threats, we do not believe that these communications were intended to be confidential given the circumstances before us. We do not find it significant that they occurred after the murder instead of before the murder as in *Trzeciak*. Although there is no indication that defendant intended the threats to be communicated to a third party, given the nature of the threats, they were nevertheless "the type of communication that [Twyman] might have revealed to one of her family members, or even the police." *Id.* ¶ 52. We are not persuaded that defendant's threats were made in reliance on the "intimate, special trust, and affection of his marital relationship." *Id.* ¶52. See *Id.* ¶ 50 (quoting *Rubalcada v. State*, 731 N.E.2d 1015, 1022 (Ind. 2000) ("defendant's threats to kill wife and whatever she loved most if she disclosed facts about murder he committed not barred by spousal privilege because '[s]uch communications do not enhance the mutual trust and confidence of the marital relationship that the privilege is intended to protect' ") and *State v. Edwards*, 260 P.3d 396 (Mont. 2011) ("a spouse does not rely on the confidence of the marital relationship when the purpose of the communication is to 'terrify and intimidate' the other spouse; wife's testimony that defendant 'pulled a shotgun and put it in [her] face and told [her] if [she] ever went to the cops, or ever told anyone, that he would kill [her], kill [her] family, and burn [her] grandmother's house down' admissible in prosecution of defendant for murder because communication not made in reliance on confidences of marital relationship")).

¶ 76 Accordingly, the marital privilege did not bar admission of the challenged testimony in this case. The trial court did not abuse its discretion in admitting this evidence. *Boclair*, 129 Ill. 2d at 476.

¶ 77 B. Other-Crimes Evidence

¶ 78 Defendant next contends that the trial court erred in admitting several pieces of other-crimes evidence because the probative value of this evidence was strongly outweighed by its prejudicial effect. In particular, defendant challenges the admission of Twyman's testimony about defendant's physical and verbal abuse after the shooting, evidence that defendant was arrested for a drug offense in Milwaukee, and evidence that defendant had worked as a police informant. Defendant argues that he is entitled to a new trial because of these errors under either a harmless error or plain error standard of review.

¶ 79 As previously noted, a trial court's evidentiary rulings are reviewed for an abuse of discretion on appeal. *Boclair*, 129 Ill. 2d at 476. See *People v. Figueroa*, 341 Ill. App. 3d 665, 670 (2003) ("The decision as to whether to admit other-crimes evidence lies within the trial court's sound discretion, and the appellate court will not reverse the trial court's decision absent a clear abuse of that discretion.").

¶ 80 Additionally, "[i]n criminal cases, this court has held consistently that, to preserve an issue for review, a defendant must raise it in either a motion *in limine* or an objection at trial, and in a posttrial motion." *Denson*, 2014 IL 116231, ¶ 11. Defendant concedes that his contention regarding Twyman's testimony about the abuse was not properly preserved as he only challenged this evidence on marital privilege grounds in the trial court, and, as a result, it should be reviewed for plain error. *Denson*, 2014 IL 116231, ¶ 11; *People v Simpson*, 2015 IL App (1st) 130303, ¶ 34. Under the plain error rubric, the defendant bears the burden of showing that either:

"(1) a clear or obvious error occur[red] and the evidence [wa]s so closely balanced that such error threatens to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) a clear or obvious error occur[red] and [wa]s so serious that it affect[ed] the fairness of the defendant's trial and challenges the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Jones*, 2015 IL App (2d) 130387, ¶ 21 (citing *People v. Walker*, 232 Ill. 2d 113, 124 (2009); *People v. Herron*, 215 Ill. 2d 167, 178–79 (2005)).

¶ 81 Regarding evidence of defendant's arrest for a drug offense in Milwaukee and evidence that he was an informant for Arthur, defendant properly preserved these issues by including them in his pretrial motion *in limine* and at oral arguments regarding the motion, and including them in his posttrial motion for a new trial. *Denson*, 2014 IL 116231, ¶ 11. As previously stated with regard to preserved issues, the State is required to prove that any error was harmless beyond a reasonable doubt. *Donahue*, 2014 Ill App (1st) 120163, ¶ 109.

¶ 82 Other-crimes evidence "is admissible where relevant to prove any material question other than the defendant's propensity to commit a crime ***." *Figueroa*, 341 Ill. App. 3d at 670-71. "Other-crimes evidence is relevant if it places the defendant in proximity to the time and place of the offense, proves a fact in issue, rebuts an alibi defense, demonstrates a consciousness of guilt, or establishes motive, intent, absence of mistake, identity, or a common design or scheme." *People v. Ingram*, 389 Ill. App. 3d 897, 901-02 (2009). "Such evidence is relevant where it has any tendency to make the existence of a fact that is of consequence in the case more probable or less probable than it would be without the evidence." *People v. Jackson*, 357 Ill. App. 3d 313, 323 (2005). In ruling on the admissibility of other-crimes evidence, the trial court "must weigh the probative value of the evidence against its prejudicial effect, and may exclude the evidence if

its prejudicial effect substantially outweighs its probative value." *People v. Moss*, 205 Ill. 2d 139, 156 (2001).

¶ 83 Turning first to Twyman's testimony about defendant's abuse, defendant contends that the trial court should not have allowed this evidence because, although other-crimes evidence may be used to show consciousness of guilt, the challenged testimony was too speculative to be relevant and its prejudicial effect was significant. Defendant's argument hinges on his assertion that defendant's verbal threats were inadmissible under the marital privilege, without which, in his view, the evidence of his physical abuse was rendered too speculative because one could not infer that his physical abuse was intended to prevent Twyman from coming forward with information. "Other-crimes evidence cannot be admitted if the grounds for establishing its relevance are speculative." *People v. Lindgren*, 79 Ill. 2d 129, 140 (1980).

¶ 84 However, as discussed in the previous section, Twyman's testimony regarding defendant's verbal threats was properly admitted into evidence. Moreover, we find that this evidence, in conjunction with the evidence of physical abuse, was relevant in several respects. Evidence that defendant verbally threatened Twyman against revealing information about the victim's murder, in addition to the evidence that he became violent toward her following the murder, demonstrated defendant's consciousness of guilt. The evidence was relevant to show that defendant was trying to intimidate a witness and avoid police detection. It also explained why Twyman waited so long to come forward to the police. Indeed, evidence of physical abuse or violence has been found relevant and admissible as demonstrating consciousness of guilt, intent, motive, attempt to avoid police detection, and explain a victim's delay in reporting. See *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 21 (evidence that defendant's placed the victim's hand in a vice and threatened to cut it off and threatened to kill the victim and a witness was

admissible to show why the victim and witness did not immediately report the incident and to show consciousness of guilt, and the prejudicial effect did not outweigh the probative value as the evidence against the defendant was overwhelming); *People v. Jones*, 306 Ill. App. 3d 793, (1999) (evidence of the defendant's prior domestic assaults against the victim in the months before her murder was properly admitted to show intent and motive); *People v. Illgen*, 145 Ill. 2d 353, 366 (1991) (evidence of the defendant's prior physical abuse of his wife in prosecution for her murder was relevant to show absence of accident and to prove motive and state of mind); *People v. Jones*, 82 Ill. App. 3d 386, 393 (1980) (evidence of attempt to intimidate witness was relevant as it showed consciousness of guilt); *People v. Gambony*, 402 Ill. 74, 80 (1948) (evidence of attempting to suppress evidence or obstruct investigation is relevant to consciousness of guilt).

¶ 85 Accordingly, we believe this evidence was relevant and admissible. Given its clear relevance to the case, the potential prejudicial effect of this evidence did not substantially outweigh its probative value. *Moss,* 205 Ill. 2d at 156.

¶ 86 Next, defendant argues that the prejudicial effect of testimony that he was arrested on a drug charge in Milwaukee several months before the victim's murder outweighed the probative value of this evidence. The trial court found this evidence admissible because the fact that defendant borrowed money from the victim to make bond for the Milwaukee charge was probative of the State's theory of the case, that is, the debt ultimately led to defendant's motive for committing the murder. Defendant contends that the trial court should have only allowed evidence that defendant owed the victim money, and excluded evidence regarding how the debt was incurred.

¶ 87 We find that the drug arrest in Milwaukee was relevant because it tended to show defendant's motive for committing the murder, and that the prejudicial effect of this evidence did not outweigh its probative value. The trial evidence demonstrated that because defendant was arrested for the narcotics offense and placed in jail in Milwaukee, he arranged, with assistance from Twyman, to borrow money from the victim in order to make bail and hire an attorney. As collateral, defendant gave the victim his motorcycle and Lincoln Continental. The police later observed a Lincoln Continental registered to defendant parked in the lot near the victim's condominium. Further, although the victim initially told defendant to take his time repaying him, Twyman's testimony showed that over time, their relationship deteriorated and the victim became impatient and irritated with defendant. Thereafter, defendant kidnapped and shot the victim. As stated, other-crimes evidence is admissible to establish motive. *Ingram*, 389 Ill. App. 3d at 901-02. Moreover, other-crimes evidence is also admissible to establish "facts leading up to the commission of the crime for which [a defendant] is charged ***." *Figueroa*, 341 Ill. App. 3d at 671. Considering the circumstances, it would have been confusing to the jury if its understanding of the relationship between defendant and the victim leading up to the murder consisted only of evidence that defendant owed him money, without the full context of the loan or the reasons for it. Moreover, the trial court took pains to limit the prejudicial nature of this evidence in ruling that defendant could not be referred to as a "drug dealer" by the State or its witnesses.

¶ 88 In his final contention regarding other-crimes evidence, defendant maintains that the trial court should not have allowed evidence that defendant served as an informant to Arthur. Defendant asserts that it was speculative to infer consciousness of guilt based on the fact that defendant did not meet with Arthur on August 1, 2004, and there was no indication that

defendant knew he was a suspect in the murder at the time Arthur contacted him. The trial court held that Arthur could testify to having a professional relationship with defendant and about his attempts to contact defendant after the murder because this was part of the police's course of investigation.

¶ 89 Our review of the record leads us to conclude that the trial court did not abuse its discretion in finding this evidence admissible. Although defendant believes that the fact that he failed to meet with Arthur was merely speculative evidence that he was avoiding the police, we disagree. Arthur's testimony established that defendant was an informant for him and they had met numerous times between June 2004 and August 2004, that Arthur would typically call him to set up a meeting, and defendant typically attended their meetings. Arthur's testimony revealed that approximately two weeks after the murder, on August 1, 2004, Arthur discovered that defendant was wanted by the police and he tried to set up a meeting. However, defendant's behavior was much different from past interactions. Defendant was elusive and refused to answer his phone, or, when he did answer, to commit to a meeting time, and he eventually stopped answering his phone. The police were unable to find defendant at the hospital where defendant stated he was with family. Besides Arthur's testimony, Twyman also testified that defendant typically met with Arthur periodically, but did not meet with him on August 1, 2004.[3] Considering these facts, the challenged evidence tended to show defendant's consciousness of guilt and desire to avoid apprehension by the police. It also explained to the jury the course of the police investigation and why defendant was not apprehended immediately. Other-crimes evidence "may be proper to establish the investigatory process." *People v. Ross*, 329 Ill. App. 3d 872, 884 (2002).

[3] We also note that the fact that defendant was arrested and placed in jail on a drug charge in Milwaukee was relevant to show how he first met Arthur and became an informant. Arthur testified that he first met defendant in May 2004 in Milwaukee and defendant agreed to become an informant.

¶ 90 In addition, we find that the evidence showed that it was possible that defendant knew the police suspected him of the murder at the time Arthur contacted him. "Evidence of intentional concealment is relevant and admissible as a circumstance tending to show consciousness of guilt. The inference of guilt that may be drawn from such evidence, however, depends upon the defendant's knowledge that a crime has been committed and that he is suspected of committing it." *People v. Haynes*, 139 Ill. 2d 89, 132 (1990). Heard testified that approximately one week after the murder, defendant learned that the police were looking for him, and defendant came to Heard's house and threatened him. Johnson visited defendant's mother's house on July 31, 2004, to see if defendant was there. Both of these events occurred before August 1, 2004. As such, in this case, there were facts from which "the jury could validly infer that the defendant knew he was a suspect and consciously avoided the police." *Id*. at 132. We further observe that this case is similar to *Haynes*, where the supreme court held that "[t]estimony that the police were unable to find the defendant was part of the narrative of police activities leading to the defendant's arrest and was intertwined with the circumstances of the arrest." *Id.* at 131 (officer's testimony that he searched for the defendant for two weeks before arrest was properly admitted). Thus, the challenged evidence was also admissible not only to show consciousness of guilt, but also to show the circumstances regarding how the police attempted to apprehend defendant.

¶ 91 Moreover, the trial court limited any prejudicial effect of the challenged evidence in forbidding any reference to specific narcotics transactions or charges in presenting Arthur's testimony. Arthur did not testify that he met defendant while defendant was incarcerated or that he assisted Arthur in setting up drug transactions. Rather, Arthur testified that he came into contact with defendant in connection with his work for the DEA and he met him in a "municipal"

building in Milwaukee. Based on this record, we cannot say that the prejudicial effect of the evidence that was admitted substantially outweighed its probative value.

¶ 92 C. Ineffective Assistance of Counsel

¶ 93 In a related argument, defendant asserts that he was deprived of the effective assistance of trial counsel because his counsel failed to request that the jury be given Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed.2000) to limit its consideration of the other-crimes evidence presented by the State. Defendant argues that, given the highly prejudicial nature and the quantity of the other-crimes evidence, it was impossible for the jury to overlook this evidence and, therefore, counsel could not have been acting strategically in foregoing a request for this instruction in order to avoid drawing further attention to this evidence. Defendant asserts that the evidence was closely balanced, and there is a reasonable probability that this instruction would have changed the outcome of the trial.

¶ 94 The State counters that the only instructions necessary to ensure a fair trial are those regarding the elements of the crime, the presumption of innocence, and the burden of proof, and whether to request a limiting instruction is a matter of strategy. The State asserts that defendant underestimates the weight of the evidence against him and argues that a limiting instruction would not have affected the outcome of the trial.

¶ 95 To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011), citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome ***." *People v. Enis*, 194 Ill. 2d 361, 376-77 (2000).

"There is a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance." *Id.* at 377. Defendant's failure to establish either defective representation or prejudice precludes a finding of ineffective assistance of counsel. *Id.*

¶ 96 "Jury instructions are necessary to provide the jury with the legal principles applicable to the evidence presented so that it may reach a correct verdict." *People v. Falco,* 2014 IL App (1st) 111797, ¶ 15. This court has recognized the importance of providing a limiting instruction regarding other-acts evidence. *People v. Harris*, 288 Ill. App. 3d 597, 605-06 (1997*)*; *People v. Denny*, 241 Ill. App. 3d 345, 360–61 (1993).

¶ 97 However, "[i]t is well settled in Illinois that counsel's choice of jury instructions *** is a matter of trial strategy." *Falco,* 2014 IL App (1st) 111797, ¶ 16 (citing *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007)). " 'Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence,' and therefore, are 'generally immune from claims of ineffective assistance of counsel.' " *Id.* (quoting *Enis*, 194 Ill. 2d at 378). Nevertheless, failing to request such an instruction may lead to a finding of ineffective assistance of counsel "if the instruction was so critical to the defense that its omission den[ied] the right of the accused to a fair trial." (Internal quotation marks omitted.) *Id.*

¶ 98 The record does not support that trial counsel rendered deficient assistance in failing to request a limiting instruction regarding the other-crimes evidence. Counsel "may have made a tactical decision not to request such an instruction to avoid unduly emphasizing the other-crimes evidence." *People v. Johnson*, 368 Ill. App. 3d 1146, 1161 (2006) (finding that defense counsel was not ineffective for not requesting a limiting instruction as it may have been a strategic decision and defendant could not show prejudice). Along similar lines, the defendant in *Figueroa*, 341 Ill. App. 3d at 672, argued that his counsel was ineffective for failing to request an

other-crimes limiting instruction. In rejecting the defendant's claim, the court noted that "defendant's counsel was clearly aware of the nature of the evidence of other crimes, having offered a motion *in limine* with respect to them, so trial counsel's decision not to request such an instruction may be considered a matter of trial strategy." *Id.* As in *Figueroa*, the other-crimes evidence here was the subject of pretrial motions and discussion, and counsel objected to the admission of this evidence. Presumably, therefore, counsel was aware of the nature of this evidence and his decision not to request a limiting instruction "may be considered a matter of trial strategy." *Id.* Defendant has not overcome the strong presumption that counsel's decision regarding the instruction was a matter of sound trial strategy. *Falco,* 2014 IL App (1st) 111797, ¶ 16.

¶ 99 In addition, even assuming for argument purposes that counsel's performance fell below constitutional standards in not requesting a limiting instruction, defendant cannot establish that, had a limiting instruction been given, there was a reasonable probability that the outcome of the trial would have been different. *Manning*, 241 Ill. 2d at 326; *Figueroa*, 341 Ill. App. 3d at 672-73. Defendant has not shown that this instruction was so critical that it deprived him of a fair trial. *Falco,* 2014 IL App (1st) 111797, ¶ 16. We observe that there was a large quantity of incriminating evidence against defendant. Heard and Twyman provided extremely damaging testimony regarding defendant's role in the murder, kidnappings, and armed robberies. The victim's blood was found on the $20 bills which were given to Sampson, and the victim's blood was also found inside the Dodge Neon and the Ford Expedition. Also of great importance was the fact that defendant was positively identified by the surviving victims in the case. Jones, Sampson, and Beal identified defendant in the photographic array they viewed shortly after the incident. Although they were unable to identify him in a live lineup, the evidence showed that

defendant significantly changed his appearance in the months between the commission of the crimes and his eventual apprehension by gaining a large amount of weight and growing out his hair. We disagree with defendant that any inconsistencies in their accounts were so significant as to render them unbelievable. Juxtaposed to this evidence, a limiting instruction for the other-crimes evidence would not have made a difference in the outcome of the trial, particularly considering that the trial court wisely prohibited the witnesses from testifying about any aspects of the other-crimes evidence that it found to be overly prejudicial or irrelevant, such as specific narcotics transactions or referring to defendant as a drug dealer.

¶ 100 D. Cross-Examination of Eric Heard

¶ 101 Defendant next argues that the trial court violated his confrontation rights in curtailing defense counsel's cross-examination of Heard about the specific sentencing ranges Heard faced on the original charges before he entered into the plea agreement with the State. Defendant asserts that the probative value of this evidence as it reflects on Heard's credibility outweighed any potential prejudice, as Heard would have faced a minimum of 43 years' imprisonment on the original charges. Instead, Heard received concurrent sentences of 9 and 5 years' imprisonment and potentially would only serve 4 ½ years because of good time credit. Defendant concedes that the trial court's restriction was in accordance with prevailing law. However, defendant requests that this court disregard prior precedent and follow cases from federal circuits where the defense was allowed to inquire into a codefendant's potential sentence even where the jury could infer the defendant's possible sentence from this evidence. Defendant suggests that the trial court could have issued a limiting instruction to address any potential prejudice. Defendant maintains that the State cannot show that this error was harmless given the weak evidence against him, Heard's

motive to lie, the witnesses' failure to identify defendant in a live lineup, and the inconsistencies in their accounts.

¶ 102 The State urges this court to follow established precedent and points out that defense counsel was permitted to cross-examine Heard on many aspects of the plea agreement and elicited the fact that Heard faced "[a] long time" for the murder charge.

¶ 103 Defendant has preserved this issue for appellate review because he presented it at trial and it was contained in his posttrial motion for a new trial. *Denson*, 2014 IL 116231, ¶ 11. "The latitude to be allowed on cross-examination rests within the sound discretion of the trial court; a reviewing court should not interfere absent a clear abuse of discretion resulting in manifest prejudice to the defendant." *People v. Hall*, 195 Ill. 2d 1, 23 (2000). As stated, the State bears the burden of proving that a preserved error was harmless beyond a reasonable doubt. *Donahue*, 2014 Ill App (1st) 120163, ¶ 109.

¶ 104 A criminal defendant has a constitutional right to confront the witnesses against him. *People v. Triplett*, 108 Ill. 2d 463, 474-76 (1985). "Cross-examination may concern any matter that goes to discredit, modify, explain or destroy the testimony of the witness." *People v. Truly*, 318 Ill. App. 3d 217, 224 (2000). However, "[t]he trial court's discretionary authority to restrict cross-examination comes into play after the court has allowed sufficient cross-examination to satisfy the confrontation clause." *People v. Martinez*, 335 Ill. App. 3d 844, 856 (2002) (citing *People v. Averhart*, 311 Ill. App. 3d 492, 497 (1999)). Thus, while a defendant's right to cross-examine includes the opportunity for "effective cross-examination," it does not extend to "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."(Internal quotation marks omitted.) *People v. Kirchner*, 194 Ill. 2d 502, 536 (2000). In reviewing the trial court's exercise of its discretion in that regard, we consider "whether the

limitation created a substantial danger of prejudice to the defendant by denying the defendant the right to test the truth of the testimony he sought to challenge." *Martinez*, 335 Ill. App. 3d at 856. "[T]he right to cross-examine is satisfied when counsel is permitted to 'expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.' " *Truly*, 318 Ill. App. 3d at 226 (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). "If the entire record shows that the jury has been made aware of adequate factors concerning relevant areas of impeachment of a witness, no constitutional question arises merely because defendant has been prohibited on cross-examination from pursuing other areas of inquiry." *Id.* "To determine the constitutional sufficiency of cross-examination, a court looks not to what a defendant has been prohibited from doing, but to what he has been allowed to do." *Id*. at 227-28.

¶ 105 Having reviewed counsel's cross-examination of Heard, we do not believe that the trial court abused its discretion in curtailing counsel's inquiry into the specific sentences applicable to first degree murder. *Hall*, 195 Ill. 2d at 23. Rather, defendant was given an adequate opportunity to test the truth of Heard's testimony and expose potential areas of bias. *Martinez*, 335 Ill. App. 3d at 856. Defense counsel's cross-examination revealed that Heard knew that because of the plea agreement, he avoided consecutive sentencing, he was able to plead to fewer and less severe charges than murder, and he was able to take advantage of good-time credit. The jury was apprised of the specific concurrent sentences of 9 and 5 years which Heard received. Counsel's inquiry also elicited the fact that Heard received favorable treatment in jail once he agreed to become a witness and was moved to the witness protection quarters. Specifically, counsel asked Heard:

"Q. You knew when you were charged with murder that you were facing substantially more time than nine years, correct?

A. Correct.

Q. What do you understand the time you were facing for murder to be?

A. A long time.

Q. Do you have years on that long time that you knew of?"

¶ 106 At the State's objection to this question, the trial court prohibited counsel from further inquiry and instructed counsel that he could not inquire into the sentencing range of 20 to 60 years for first degree murder or whether the charges would have run consecutively or concurrently.

¶ 107 In addition to the above inquiries, counsel extensively cross-examined Heard regarding his version of the events surrounding the murder, including inconsistencies in his testimony. Counsel confronted Heard about the fact that Heard initially lied to the police. Counsel also questioned Heard concerning possible motivations Heard he would have for lying at trial. In sum, considering the numerous questions counsel's cross-examination raised about Heard's credibility, the jury " 'could appropriately draw inferences relating to the reliability of the witness' " in light of this information. *Truly*, 318 Ill. App. 3d at 226 (quoting *Davis*, 415 U.S. at 318). The trial court allowed defense counsel to bring out Heard's potential bias by eliciting the terms of the plea agreement and sentences, the original charges Heard faced, and the fact that the murder charge carried a much more severe penalty.

¶ 108 As defendant recognizes, the trial court was constrained by precedent which prohibits inquiry into a cooperating accomplice's specific sentence "when such disclosure would also reveal the potential sentence facing the defendant," and thereby prejudice the State's right to a

fair trial. *People v. Brewer*, 245 Ill. App. 3d 890, 891-93 (1993) (no abuse of discretion when the trial court prohibited inquiry into the potential 90-year prison term that the codefendant would have faced where the codefendant testified that his plea agreement called for the State's recommendation of a 20-year prison term). Defendant urges that Illinois law grants wide latitude to expose a codefendant's motivation for testifying, citing *People v. Graves*, 54 Ill. App. 3d 1027 (1977) (error in prohibiting inquiry into potential sentences the accomplice faced if he had not taken the plea deal where the defendant was charged with the same offenses). However, in *Brewer*, the court "decline[d] to follow *Graves* to the extent that it may conflict with" other cases forbidding inquiry into the potential sentence where disclosure would have also revealed the defendant's potential sentence. *Brewer*, 245 Ill. App. 3d at 892-93 (citing *People v. Lake*, 61 Ill. App. 3d 428 (1978); *People v. Portis*, 147 Ill. App. 3d 917 (1986); and *People v. Roy*, 172 Ill. App. 3d 16 (1988)). We continue to hold that such evidence is properly excluded "in cases where the record shows that the defendant was able to conduct an extensive inquiry into the nature of the plea agreement with the State." *Id.* at 893. As in *Brewer*, the trial court here did not abuse its discretion in preventing inquiry into the specific sentence for first degree murder considering that defendant was facing the same charge. *Id.* at 892-93.

¶ 109 E. Right to Self-Representation

¶ 110 Defendant asserts that the trial court violated his constitutional right to self-representation when it refused to allow him to represent himself in posttrial proceedings. The State agrees that the trial court erred in denying his motion to represent himself and that this case should be remanded for resentencing and new posttrial proceedings.

¶ 111 A criminal defendant has a constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 833-36 (1975). "The United States Supreme Court has expressly held that the

denial of self-representation at trial is a structural error that renders a criminal trial fundamentally unfair and requires automatic reversal." *People v. Pena*, 2014 IL App (1st) 120586, ¶ 26. A defendant's waiver of his right to counsel must be clear and unequivocal, and not ambiguous. *People v. Baez*, 241 Ill. 2d 44, 116 (2011). Whether a defendant's relinquishment of his right to counsel was knowing and intelligent depends on the particular facts and circumstances present in each case, including the background, experience, and conduct of the defendant. *Id.* at 116. The court must examine the overall context of the proceedings in determining whether the defendant's request was clear and unequivocal, that is, whether defendant "articulately and unmistakably" demanded to proceed *pro se*. *Id.* at 116 (citing *People v. Burton*, 184 Ill. 2d 1, 22 (1998)). "Courts must indulge in every reasonable presumption against waiver of the right to counsel." (Internal quotation marks omitted). *Id.* Even where a defendant indicates that he wants to proceed *pro se*, he may later acquiesce to representation by counsel. *Id.* at 117. On appeal, we review the trial court's determination for an abuse of discretion. *Id.* at 116.

¶ 112 Here, the record reflects that before sentencing, defendant filed a *pro se* motion alleging ineffective assistance of counsel. After the trial court denied this motion, defendant filed another written *pro se* motion entitled, "Motion to Proceed Pro Se and Dismiss Appointed Counsel," seeking to dismiss his appointed counsel and represent himself. The motion recounted defendant's dissatisfaction with his appointed counsel, his mother's attempt to hire an attorney, the fact that this other attorney refused to represent defendant, and that defendant did not wish to prolong the proceedings and requested the trial transcripts and time to review them.

¶ 113 The trial court advised defendant that he was facing "serious sentencing ranges." The court queried defendant about his age, education, and prior experience with the criminal justice system. The court discussed the risks and requirements of self-representation at the sentencing

phase and the benefits of being represented by counsel at this stage, and defendant indicated that he understood. The court informed him that it would not give him additional time to review transcripts or prepare. The trial court then ruled that:

> "Well, considering the nature of the charges that you have before you, that you have been found guilty of, and the strong range of sentences that you are facing, the amount of years that you could be facing here, I haven't heard the motion for new trial yet, that [defendant's appointed counsel] not only filed, but he may have some points he wants to go into there. I have reviewed it, but I haven't made my decision about that ***.
>
> So based on what I see here, as far as the seriousness of what you're facing if this was to go to sentencing, sir, I'm not going to allow you to represent yourself. Because I think it would be just an absolute miscarriage of judgment for you not to have an attorney, somebody who knows what to argue in a motion for a new trial, and to go into sentencing if that is what happens."

¶ 114 In addition, during the sentencing proceeding when defendant was given the chance to speak, he again requested to represent himself: "I just stress [*sic*] to you that I would like a chance to proceed *pro se*. I stress that to you. Also, I asked you previously on the January 27th court date that I would like time to get counsel in, other counsel. I just wanted to have that on record." The trial court responded that it had already addressed these issues and explained that defendant had "very limited legal experience" or contact with the criminal justice system, and that this "played a great role in why the court" denied his request.

¶ 115 We agree with the parties that the trial court erred in denying his motion to proceed *pro se* during posttrial proceedings. Barring mental disability preventing a defendant from

understanding his request to proceed *pro se*, a trial court should honor it, even if the court believes it would be "disastrous." *People v. Fisher*, 407 Ill. App. 3d 585, 590 (2011). "Although a court may consider a defendant's decision to represent himself unwise, if his decision is freely, knowingly, and intelligently made, it must be accepted." *Baez*, 241 Ill. 2d at 116. That is, a trial court's inquiry into whether a defendant is capable of knowingly and intelligently waiving his right to counsel must not be mistaken for "an inquiry into defendant's ability to do an appropriate job defending himself at trial," which is an unacceptable justification for denying a request to proceed *pro se*. *People v. Ward*, 208 Ill. App. 3d 1073, 1084 (1991).

¶ 116 Here, the trial court did not base its decision to deny defendant's request on permissible grounds, such as upon determining that the request came "so late in the proceedings that to grant it would be disruptive of the orderly schedule of proceedings," that the defendant has "engage[d] in serious and obstructionist misconduct," or that the defendant was unable to make a knowing and intelligent waiver. *Ward*, 208 Ill. App. 3d at 1084. Instead, the trial court refused defendant's request because it felt that it would be "an absolute miscarriage of justice" given the seriousness of defendant's convictions and because of his lack of legal experience. Accordingly, the case must be remanded for new posttrial and sentencing proceedings.

¶ 117 F. Defendant's *Pro Se* Request for a *Krankel* Hearing

¶ 118 In his final claim on appeal, defendant contends that the trial court erred in refusing to appoint defendant new counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), in light of defendant's *pro se* motion for ineffective assistance of counsel. In the motion, he claimed that his counsel was ineffective for failing to investigate witnesses whom defendant alleges would have provided him with an alibi. Defendant asserts that he informed counsel of these witnesses and, although counsel told the court that he was not informed of an alibi, defendant argues that

counsel's failure to investigate demonstrated possible neglect of the case warranting appointment of new counsel.

¶ 119 The State argues that this issue is moot given the resolution of the previous issue because the case should be remanded for new posttrial proceedings for defendant to either represent himself or for the appointment of new counsel. The State asserts that, nevertheless, the trial court properly denied defendant's motion as the trial court conducted an appropriate inquiry, counsel indicated that he was never informed that defendant had an alibi, and counsel indicated that he knew of defendant's mother but that he probably would have not pursued the alibi out of trial strategy.

¶ 120 In his reply brief, defendant disagrees that the issue is moot as he would be entitled to different relief that is "beyond" the relief requested in the previous issue, that is, he would be entitled to the appointment of new counsel for the proceedings on remand.

¶ 121 Generally, this court does not consider moot questions or "consider issues where the result will not be affected regardless of how those issues are decided." *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009). Our supreme court has "consistently held that '[a]n appeal is moot when it involves no actual controversy or the reviewing court cannot grant the complaining party effectual relief.' " *In re Marriage of Donald B.*, 2014 IL 115463, ¶ 23 (quoting *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 522-23 (2001)). However, we disagree with the State that this issue is moot. As defendant argues, and we agree, he could be entitled to additional relief if we were to find in his favor with respect to his claim that the trial court erred in denying his ineffectiveness claim and denying him the appointment of counsel to further argue that claim. We therefore address this substantive issue on appeal.

¶ 122 In conducting a *Krankel* inquiry when a defendant raises a *pro se* post trial claim of ineffectiveness,

> "the trial court should examine the factual basis of the claim to determine if it has any merit. *People v. Moore*, 207 Ill. 2d 68, 77–78 (2003). The court can evaluate defendant's *pro se* claim by either discussing the allegations with defendant and asking for more specific details, questioning trial counsel regarding the facts and circumstances surrounding defendant's allegations, or relying on its own knowledge of counsel's performance at trial and determining whether the allegations are facially insufficient. *Id.* at 78–79. If the court finds that the claims reveal possible neglect of the case, then it should appoint new counsel to represent defendant at a hearing on his *pro se* motion. *Id.* at 78. But, if the trial court finds defendant's allegations to be without merit or to pertain only to matters of trial strategy, new counsel should not be appointed and the court may deny the *pro se* motion without further inquiry. *Id.; People v. Ward*, 371 Ill. App. 3d 382, 433 (2007)." *Pena*, 2014 IL App (1st) 120586, ¶ 33.

¶ 123 On appellate review, we must determine "whether the trial court's inquiry into defendant's *pro se* claim was adequate." *Pena*, 2014 IL App (1st) 120586, ¶ 33. "[E]ven if an appellate court finds that a trial court made an error, it will not reverse if it finds that the error was harmless." *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 23 (citing *Moore*, 207 Ill. 2d at 80; *People v. Nitz*, 143 Ill. 2d 82, 135 (1991)).

¶ 124 In the case at bar, the trial court conducted a *Krankel* hearing on defendant's *pro se* ineffectiveness motion before hearing arguments on defense counsel's motion for a new trial or proceeding to sentencing. The court questioned defendant regarding each of the several claims of

ineffective assistance he raised in his motion. However, on appeal, defendant discusses only one of those claims, failure to investigate alibi witnesses.

¶ 125 Generally, counsel's determinations regarding which witnesses to call at trial constitute a matter of trial strategy "that is unassailable and cannot form the basis of a claim that counsel rendered ineffective assistance." *Pena*, 2014 IL App (1st) 120586, ¶ 33 (citing *Ward*, 371 Ill. App. 3d at 433). See *People v. Richardson*, 189 Ill. 2d 401, 414 (2000) (whether to call a particular witness at trial is a strategic decision which, as a matter reserved to trial counsel's discretion, cannot support a claim of ineffective assistance of counsel). However, "counsel may be deemed ineffective for failure to present exculpatory evidence of which he or she is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense." *People v. Redmond*, 341 Ill. App. 3d 498, 516 (2003).

¶ 126 Here, defendant informed the trial court that he "told Mr. Kusatzky [defense counsel] about alibi witnesses that I wanted" and that he "also gave the alibi witnesses number, to call them. And I went over it to [*sic*] him, I told him again over and over, I got these alibi witnesses I want; he said fine." Defendant indicated that the witnesses he wanted his counsel to call were his mother and grandmother, Ollie Anderson and Wilma Jordan. The trial court inquired whether defense counsel knew about these two witnesses. Counsel responded that he "knew he [defendant] had a mother. I did not know anything in relation to an alibi. I was never told anything in relation to an alibi."

"Q. [Trial court:] Therefore, you didn't choose to call them; is that correct?

A. [Defense counsel:] I didn't pursue an alibi because I was never told about an alibi and I did not call them as witnesses.

> Q. So not only is it because you didn't know about them, but you didn't pursue it, would that have been because of trial strategy?
>
> A. It probably would have been for trial strategy, but he never told me these people were available for witnesses, so it never got to that point."

¶ 127 Defendant also alleged in his motion that counsel failed to "interview witnesses in his favor." When the trial court questioned him about this allegation, defendant indicated that the witnesses to which he was referring were Anderson and Jordan and "another witness named Jatona Gosa." The trial court questioned counsel about Gosa, and counsel responded that this was the "[f]irst I've heard the name."

¶ 128 Ultimately, after reviewing and discussing defendant's numerous claims with defendant and defense counsel, the trial court denied his motion. The court held:

> "[F]rom what the court has seen as far as presiding over this jury trial, the court's knowledge of [defense counsel] on other matters, on his preparedness for this case and how he conducted himself, the court finds that [defense counsel] presented himself in a very effective matter [*sic*]. *** And based on the court's knowledge of the facts of this case, of how the case proceeded, and also of the attorney that represented the defendant in this case, I believe that [defense counsel] was more than effective in this case."

¶ 129 Based on this record, we find that the trial court conducted an adequate inquiry into defendant's allegation of ineffectiveness concerning the alleged alibi witnesses. *Pena*, 2014 IL App (1st) 120586, ¶ 33. The court discussed the allegation with defendant and defense counsel to determine the facts and circumstances surrounding his claim and it relied on that interchange in reaching its decision; it also relied on its own knowledge of the case and observations of defense

counsel's performance during trial. *Pena*, 2014 IL App (1st) 120586, ¶ 36; *Moore*, 207 Ill. 2d at 79. Having determined that counsel was never informed about a possible alibi and that, in any case, counsel would not have presented defendant's close relatives as alibi witnesses as a matter of trial strategy, the trial court appropriately concluded that it was unnecessary to appoint new counsel for defendant and denied the motion. *Pena*, 2014 IL App (1st) 120586, ¶ 33. As noted, decisions regarding which witnesses to present are generally matters of trial strategy which cannot support a claim of ineffectiveness. *Id*.

¶ 130 Defendant relies on *People v. Haynes*, 331 Ill. App 3d 482, 485 (2002), in asserting that the trial court was required to appoint new counsel to argue his motion. In *Haynes*, the trial court erred in not appointing new counsel where the defendant and counsel gave conflicting statements regarding whether witnesses' police statements would contradict defendant's testimony. *Id*. However, the *Haynes* court emphasized the "narrowness" of its holding and advised that the trial court was "not required to appoint new counsel every time a defendant claims that his attorney failed to call all favorable witnesses." *Id.* Unlike in *Haynes*, the record does not "strongly suggest possible neglect" by counsel, and defendant's assertions about alibi witnesses cannot be "readily proved or disproved by consulting the record." *Id.* Rather, there is nothing in the record to indicate what the alleged alibi witness testimony would be. As such, we find no error in the trial court's decision to deny defendant's *pro se* motion alleging ineffective assistance of counsel. Defendant was not entitled to the appointment of new counsel to further argue his ineffectiveness motion.

¶ 131 III. CONCLUSION

¶ 132 For the reasons stated above, we affirm defendant's convictions, but we remand this case for new posttrial and sentencing proceedings wherein the defendant shall be afforded the right to

proceed *pro se* according to the provisions of Illinois Supreme Court Rule 401. We stress however, that as an adequate *Krankel* hearing was held, in the event on remand defendant seeks appointment of new counsel, this request should be denied and the judgment would stand.

¶ 133 Affirmed and remanded with directions.