NOTICE
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2015 IL App (4th) 130811-U

NO. 4-13-0811

FILED
June 23, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
STACEY MARRISSETTE,	)	No. 13CF901
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Under the one-act, one-crime doctrine, defendant's conviction for domestic battery must be vacated.

(2) The trial court did not err in instructing the jury; and, alternatively, defense counsel was not ineffective for submitting an incomplete self-defense instruction.

(3) The trial court did not err in sustaining the State's general objection to defendant's testimony regarding the victim rubbing her vagina before pushing her hand into his face.

(4) The trial court did not fail to conduct an adequate *Krankel* inquiry into defendant's posttrial ineffective-assistance-of-counsel claims.

¶ 2 In August 2013, a jury found defendant guilty of domestic battery and aggravated battery. In September 2013, the trial court sentenced defendant to concurrent prison terms of 3 and 10 years, respectively. Defendant appeals, arguing (1) his conviction for domestic battery

must be vacated under the one-act, one-crime doctrine; (2) the trial court either erred when it granted the State's request to instruct the jury with the second paragraph of Illinois Pattern Jury Instruction, Criminal, No. 24-25.06 (4th ed. 2000) (hereafter, IPI Criminal 4th No. 24-25.06), or defendant was denied effective assistance of counsel when his counsel submitted an incomplete self-defense instruction; (3) the court erred by sustaining the State's general objection to defendant's testimony explaining the victim rubbed her vagina before cramming her hand into his face; and (4) the court failed to conduct an adequate *Krankel* inquiry into defendant's posttrial ineffective-assistance-of-counsel claims. We vacate defendant's domestic battery conviction and sentence, affirm the trial court's judgment in all other respects, and remand the cause for an amended sentencing judgment consistent with this order.

¶ 3 I. BACKGROUND

¶ 4 In June 2013, defendant, Stacey Marrissette, was charged by information with domestic battery with a prior domestic battery conviction in that defendant struck Olivia Butts repeatedly and had been previously convicted of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2012)) (count I) and aggravated battery in that while Olivia Butts was on or about a public way he knowingly caused bodily harm to her (720 ILCS 5/12-3.05(c) (West 2012)) (count II).

¶ 5 At the August 2013 jury trial, the victim, Olivia Butts, testified defendant had been her boyfriend for almost two years in May 2013. On May 27, 2013, she and defendant attended a Memorial Day barbecue at his mother's home in Champaign. They drove her car, arriving in the afternoon and staying into the evening. Butts stated she "drank a lot" and consequently did not remember everything that happened that day. In the evening, Butts and defendant got into a minor argument when he got in a car with some girls and left the party.

Butts was angered by a sexual comment defendant made about what he could do with the other girls. Butts walked around the corner to a friend's house. When she came back, Butts pulled her car into the driveway and told defendant she was ready to go home. Defendant drove because he said Butts had had too much to drink.

¶ 6 While they were driving home, Butts and defendant were "fussing." Butts could not remember specifically why, but she admitted having a smart mouth and probably said something to defendant. Although Butts could not specifically recall hitting defendant first, she could not say for sure who hit whom first. Butts also could not recall if she was shoving her hand in defendant's face as he was driving. At some point, defendant backhanded Butts in the mouth, causing her lip to split open. Butts screamed. She wanted to jump out of the vehicle, but the front passenger door was broken so she jumped into the backseat. After Butts got in the backseat, she kicked at defendant, trying to keep him from attacking her. There was a beer bottle in the backseat and Butts hit defendant on the back of the head with it. The hit caused a small cut on defendant's head, less than an inch long. Defendant then stopped the vehicle, got out of the car, opened the back door, and pulled Butts out of the vehicle by her feet and legs. She landed on her "butt" and side. She got up and tried to run away from defendant but he grabbed her by the hair. She was wearing a wig, so it came off. Butts fell to the pavement near a driveway. She fell on her side.

¶ 7 Butts put her hands up to shield herself and told defendant to "stop, stop, stop." Defendant stood over her and hit her in the nose, breaking it. He hit her a second time in the eye and cracked her eye socket. He hit her again and broke her jaw. Butts also thought defendant may have kicked her because of how sore her body felt. During this attack, Butts was screaming

for help. Defendant did not stop. Butts stated her height was approximately six feet. She weighed 267 pounds on May 27, 2013. She said defendant was a little shorter than her. Butts stated she was strong, but defendant was stronger; he was strong enough to pick her up and overpower her.

¶ 8 While Butts was on the ground, she heard someone yell in the background the police were on their way. With that, defendant stopped hitting Butts, jumped in the vehicle, and sped off. After defendant drove away, a woman came and was standing next to Butts. The police and an ambulance arrived, and Butts was taken to the hospital emergency room. Butts was treated for her injuries, including stitches to her eye. Later, she had to go back for surgery.

¶ 9 Butts saw defendant the next day but did not call the police because she loved defendant and did not want him to go to jail. They stayed together until defendant was arrested on June 7, 2013.

¶ 10 Butts identified photographs taken by a police officer depicting the injuries to her face and a shoe print indicating kick marks on her leg. She testified they fairly and accurately portrayed the way her injuries appeared at the hospital after she was attacked.

¶ 11 While defendant was in jail, he contacted Butts a few times by phone. Those conversations were recorded and relevant parts of three of them were played to the jury. During the first call, on June 7, 2013, defendant asked Butts to make a statement recanting what she had told the police. He asked her to say she was drunk and accused the wrong person of hitting her. They discussed the contents of the statement and it sounded like Butts was writing down what defendant wanted her to say. Defendant advised her to go to the library to have it notarized. He also wanted Butts to obtain her medical records to show how intoxicated she was on the night of

the attack.

¶ 12 On June 11, 2013, Butts filed a statement in which she said she did not want to pursue charges against defendant because she was under the influence, was not 100% sure of everything that happened that night, and needed to be sure because people's lives were at stake. That statement was admitted into evidence. In her testimony, Butts stated the attack by defendant had really happened.

¶ 13 In the second taped conversation, which took place on June 16, 2013, Butts' voice sounded muffled. She explained that was due to the pins in her mouth holding her jaw together. She was on a no-chew diet but had eaten something that caused the pins to shift. In the conversation, defendant said he loved her and talked about wanting to go to counseling. Butts told defendant she hit him with the beer bottle to protect her life. Defendant suggested Butts not show up to testify, but she said she could not dodge a subpoena and did not want to be put in a situation where she could get arrested for doing so. Defendant suggested she testify someone else beat her. Butts said she could not lie and say defendant did not do it. She also reminded him other people may show up at the trial who had seen what happened. Defendant said those people did not know what he looked like.

¶ 14 In the third conversation, which took place later the same day, Butts asked defendant why he had beaten her. He responded by saying she had not asked him that while he was out of jail and she should not ask him now on the jail phone. Defendant said he wanted to make it right with Butts. He said he missed and loved her. He said he "fucked up." Butts was heard sobbing. Through her sobs, she said she loved defendant, asked why he had done this to her, and wondered why everyone was trying to get him out of trouble.

¶ 15 Brandy Coad testified she lived on South Cottage Grove Avenue in Urbana, Illinois. Her house sits approximately 12 feet back from the road and there is a big tree in the front yard. On the evening of May 27, 2013, she was sitting in her living room watching television when she heard loud screaming by a female voice. She went to the door to see what was happening. Although it was dark out, the streetlights provided enough light for Coad to see a man striking a woman who was lying against the curb in the street. Coad saw the man standing over the woman. He hit her three times by her face. The woman was squirming around in the road. She was not fighting back. Coad got her kids out of the way, shut the door, and called the police. After she got the police on the phone, Coad opened the door again and saw the vehicle speed away. Coad went outside and noticed the woman stumble across the street with someone else. The woman was screaming repeatedly she could not see. Coad told the woman the police were on the way. The woman Coad saw being struck was Olivia Butts.

¶ 16 Urbana police officer Cortez Gardner testified on May 27, 2013, he responded to a call reporting an incident on South Cottage Grove Avenue in Urbana, Illinois. When he arrived on the scene, he observed two females, one holding up the other. One female, Butts, was bleeding from the left eye, which was dark and swollen. She had some difficulty standing up and her speech was slurred. From his experience, Butts was exhibiting signs and symptoms of intoxication; however, she was still lucid and able to speak to Gardner. He also observed she had very serious injuries. She was wearing a long, black dress that went down to her ankles.

¶ 17 Gardner gathered information about the suspect, the vehicle, and the suspect's direction of travel. Gardner described South Cottage Grove Avenue as a public-use street.

¶ 18 Gardner took a statement from Butts but it was not a detailed statement. Butts

provided Gardner with the type of car the defendant was driving, spelled his last name, and gave the exact address where she thought he might have gone. Butts did not tell Gardner she had hit defendant over the head with a bottle or kicked him. The goal of Gardner's interview of Butts was to gather information quickly to put out on the airwaves.

¶ 19 Gardner later arrested defendant at Butts' apartment.

¶ 20 The State made a motion *in limine* relating to the potential testimony of two of defendant's witnesses, who the State anticipated would testify about the level of Butts' intoxication. Additionally, the State anticipated these witnesses would testify Butts was allegedly running around taking off her clothes prior to the battery, which they did not witness. Defense counsel maintained this information was relevant because defendant intended to testify the physical altercation started because Butts was reaching underneath her dress after she had taken off her pants, was rubbing her genitalia, and then began smashing her hand into defendant's face while accusing defendant of making statements he wanted the other women who had been at the party instead of wanting her. The trial court responded:

> "That testimony is not coming out, [defense counsel]. There's not going to be any testimony about disrobing. Now he can testify as to what happened in the car, but there is not going to be any testimony at this party or barbecue about her taking her clothes off. That portion of his [m]otion *in* [*l*]*imine* will be allowed."

¶ 21 Defendant's mother, Helen Marrissette, testified on May 27, 2013, she had a barbecue at her house. Helen testified Butts was drinking and defendant and Butts argued.

¶ 22 Defendant's sister, Shavon Marrissette, testified she lived approximately half a mile from where defendant and Butts lived. Shavon was at the barbecue on May 27, 2013, when defendant and Butts arrived. She saw Butts drinking. Shavon also corroborated the testimony about Butts and defendant arguing and walking away in opposite directions. A few minutes later, Shavon saw Butts drive her vehicle into the driveway. Shavon left and went home. About 10 minutes later, defendant knocked on her door. He was sweaty and was bleeding from the back of his head. Shavon went to defendant and Butts' apartment and then she went to the hospital. Shavon witnessed Butts being very loud and obnoxious at the hospital. Butts told Shavon she had struck defendant on the head with a bottle.

¶ 23 Defendant testified he and Butts went to his mother's for a barbecue at about 4 p.m. on May 27, 2013, in Butts' vehicle. Defendant left the party on two occasions to cut hair. When he arrived back the second time, he noticed people in the driveway greeting someone. He realized it was a family friend of his who shared his birthday. As he approached to greet her, Butts came up beside him acting aggressively and grabbed him tight around the waist. Defendant gave her a hug back to let her know the other woman was not more important than her. When defendant tried to give the other woman a hug, Butts snatched him back and said, "What the fuck you think you doin? You my mother-fuckin' man." They had a verbal argument. Defendant walked away with his cousin.

¶ 24 As defendant was returning to his mother's, Butts pulled her vehicle into the driveway and said, "come on, get in, let's go home." Defendant walked around to the driver's side and told Butts to scoot over. She scooted over into the front passenger seat. As they were riding along, Butts started saying, "you want to fuck her." When asked what happened next,

defendant responded, "[S]he touched her vagina." The State objected, and the trial court sustained the objection. Defendant testified the verbal argument continued in the car. At some point during the drive, Butts repeatedly pushed her hand in defendant's face and screamed at him. Defendant was praying they would make it home. When they did, he was going to leave her. Defendant denied making physical contact with Butts.

¶ 25 Defendant saw a police car at a stop sign. Butts was still pushing his face. Defendant directed Butts to get in the backseat so as not to draw the attention of the police officer and get pulled over. Butts complied. After defendant pulled the vehicle onto Cottage Grove Avenue, the police car went past. Defendant turned and told Butts they were "just three blocks away from me leaving your ass." The next thing defendant knew, he got hit on the head, causing him to become dizzy and black out for a second. When he came to, Butts was striking him with closed fists. After Butts struck defendant on the head with the beer bottle, he pulled the car over and put the car in park so as not to endanger anyone else. As he did so, the back door opened, the driver's side door opened, and Butts grabbed defendant by the shirt. With the other hand, she was striking defendant in the face and yelling he was not going to leave her. While Butts was hitting defendant, he unfastened his seat belt. Butts pulled defendant out of the car; he was still dizzy. As she was backing up, Butts tripped on the curb. She was still holding defendant's shirt and striking him as she fell down. Defendant caught his balance but he was bent over on top of Butts because she was still holding his shirt.

¶ 26 Defendant "defended" himself. He struck Butts three times, got back in the car, and left. Defendant took the car home and walked to Shavon's house. He was not thinking about the police when he left the scene; he was just thinking about leaving Butts. Defendant stated he

still loved Butts and did not want to see her get in trouble.

¶ 27 On cross-examination, defendant admitted he was the person who made the phone calls to Butts from the jail. He admitted he told her to recant her original statements and say someone else hit her.

¶ 28 Defendant testified on cross-examination he repeatedly told Butts to stop putting her hand in his face. She did not stop. Defendant told Butts to calm down, but she did not. She also would not stop hitting him. Basically, Butts was not doing anything defendant asked of her. When defendant saw the police car and asked Butts to get in the backseat, she suddenly started following his orders and got in the backseat. Defendant claimed, despite the fact Butts was shoving her hand in his face and hitting him on the back of the head, he did nothing to her. Butts continued to hit him and pulled him out of the car. Up to that point, defendant had done nothing whatsoever wrong to Butts. Defendant testified he was the victim.

¶ 29 Defendant testified he wanted Butts to stop attacking him, and he would have taken any kind of help available to make her stop. However, he did not want Butts to get in any kind of trouble or go to jail. He just wanted to leave her. Defendant maintained he hit Butts to defend himself. Despite the severe injuries Butts sustained, defendant claimed she was still holding his shirt and hitting him. He maintained he did not hear anyone say the police were on the way.

¶ 30 The State tendered the following self-defense jury instruction:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.

> However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself."

Defense counsel objected, arguing the State had not proved the force used by defendant was likely to cause death or great bodily harm. The trial court allowed the instruction as submitted, finding the broken jaw, shattered eye socket, broken nose, and split lip were bodily harm. The court denied defendant's request to submit an instruction containing only the first paragraph of the self-defense instruction.

¶ 31 On August 8, 2013, the jury convicted defendant of both counts.

¶ 32 On August 14, 2013, defense counsel filed a motion for acquittal or, in the alternative, a motion for a new trial.

¶ 33 On August 29, 2013, defendant filed a letter in the trial court alleging several claims of ineffective assistance of counsel, including counsel's failure to (1) object to a continuance, (2) seek suppression of the recorded telephone calls, (3) subpoena Butts' medical records, and (4) get photos of the scene of the incident. The court denied both motions. The court sentenced defendant to concurrent prison terms of 10 years for the aggravated battery conviction and 3 years for the domestic battery conviction.

¶ 34 This appeal followed.

¶ 35 II. ANALYSIS

¶ 36 On appeal, defendant argues (1) his sentence for domestic battery must be vacated under the one-act, one-crime doctrine; (2) the trial court erred by granting the State's request to

instruct the jury on the second paragraph of IPI Criminal 4th No. 24-25.06 over defendant's objection, and, alternatively, his counsel was ineffective for submitting an incomplete self-defense instruction; (3) the court erred by sustaining the State's general objection to defendant's testimony explaining Butts rubbed her vagina before cramming her hand into his face; and (4) the court failed to conduct an adequate *Krankel* inquiry into defendant's claims of ineffective assistance of counsel (*People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984)).

¶ 37 A. The One-Act, One-Crime Doctrine

¶ 38 Defendant argues his convictions for both domestic battery and aggravated battery violate the one-act, one-crime rule because both charges were based on the same physical act, *i.e.*, repeatedly striking Butts. The State concedes respondent's conviction for domestic battery should be vacated. Our supreme court has held "[p]rejudice results to the defendant *** in those instances where more than one offense is carved from the same physical act." *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844 (1977). Although respondent failed to preserve this issue in the trial court, we can consider this error under the second prong of the plain-error doctrine as the error affects the integrity of the judicial process. See *People v. Harvey*, 211 Ill. 2d 368, 389, 813 N.E.2d 181, 194 (2004). We accept the State's concession and vacate respondent's conviction and sentence for domestic battery.

¶ 39 B. The Self-Defense Instruction

¶ 40 Defendant argues the trial court erred when it granted the State's request to tender both paragraphs of IPI Criminal 4th No. 24-25.06. Alternatively, defendant argues he was denied effective assistance of counsel because counsel submitted an incomplete, alternative self-defense instruction for the jury's consideration.

¶ 41 *1. The Trial Court Did Not Err in Instructing the Jury on the Second Paragraph of IPI Criminal 4th No. 24-25.06*

¶ 42 Jury instructions express "the legal rules applicable to the evidence presented at trial and thus guide the jury's deliberations toward a proper verdict." *People v. Mohr*, 228 Ill. 2d 53, 65, 885 N.E.2d 1019, 1025 (2008). The record must contain some evidence to justify an instruction, and the matters of which issues are raised by the evidence and whether an instruction should be given lie within the trial court's discretion. *Id.*, 885 N.E.2d at 1025-26. Jury instructions not supported by either the evidence or the law should not be given. *Id.*, 885 N.E.2d at 1026. A reviewing court determines "whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense." *Id.* Generally, the reviewing court applies the abuse-of-discretion standard of review. *Id.* at 66, 885 N.E.2d at 1026. " 'A trial court abuses its discretion if jury instructions are not clear enough to avoid misleading the jury *** .' " *Id.* (quoting *In re Timothy H.*, 301 Ill. App. 3d 1008, 1015, 704 N.E.2d 943, 948 (1998)). However, when the question is whether the jury instruction accurately conveyed the applicable law, the issue presents a question of law, which we review *de novo*. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13, 951 N.E.2d 1131. Moreover, we also review *de novo* the question of whether the record includes sufficient evidence to support the giving of a jury instruction. *People v. Washington*, 2012 IL 110283, ¶ 19, 962 N.E.2d 902.

¶ 43 IPI Criminal 4th No. 24-25.06 states:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend [(himself) (another)] against the imminent use of unlawful force.

[However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent [(imminent death or great bodily harm to [(himself) (another)] (the commission of _____)].]"

¶ 44 Defendant refers to the Committee Note for IPI Criminal 4th No. 24-25.06, which states the second paragraph of the instruction is to be used "when there is some evidence that the force used by the defendant was likely to cause death or great bodily harm." He argues he could not have anticipated striking Butts in the face with his bare hand would cause great bodily harm. Defendant also cites *People v. Crenshaw*, 298 Ill. 412, 131 N.E. 576 (1921), and *People v. Mighell*, 254 Ill. 53, 98 N.E. 236 (1912), to support this argument. In *Crenshaw*, the defendant's murder conviction was reversed and remanded for a new trial where the court reasoned "[t]he striking of a blow with the fist on the side of the face or head is not likely to be attended with dangerous or fatal consequences." *Crenshaw*, 298 Ill. at 416-17, 131 N.E. at 577. In *Mighell*, the defendant's murder conviction was reversed and remanded for a new trial where the victim died after punches to the side of the head and neck. The court found "[t]here is not the slightest reason, however, to suppose that [defendant] contemplated the [deceased's] death or even any serious injury to him." *Mighell*, 254 Ill. at 59, 98 N.E. at 239. Based on these cases, defendant maintains the State failed to present any evidence demonstrating his acts were likely to cause death or great bodily harm.

¶ 45 However, in *People v. Farrell*, 89 Ill. App. 3d 262, 265, 411 N.E.2d 927, 930 (1980), the defendant punched the victim once in the side of the face near the eye, causing the

victim to suffer a bone fracture and permanent scarring. The reviewing court found, because the defendant chose to punch the victim in one of the more sensitive areas of the body, the defendant knew "[s]erious damage would be the natural result of such a punch." *Id.*

¶ 46 In *People v. Rice*, 234 Ill. App. 3d 12, 15, 599 N.E.2d 1253, 1256 (1992), the defendant was charged with aggravated battery for inflicting three punches to the victim's face. The victim suffered a laceration over her left eye requiring four stitches and a "blow-out fracture" of the left orbit of her eye. *Id.* at 16-17, 599 N.E.2d at 1257. The defendant claimed the victim scratched his face and he "reflexively reacted" by hitting her three times, unaware he was hitting her in the face. *Id.* at 17, 599 N.E.2d at 1258. The reviewing court found no error when the trial court granted the State's request for a self-defense instruction over the defendant's objection since he testified he was " 'protecting' " himself when he hit the victim. *Id.* at 27, 599 N.E.2d at 1264. The court also found, even if the instruction had been given in error, it was harmless error because the evidence was overwhelming defendant did not " 'reactively' " hit the victim, but rather, the injuries suffered by the victim were indicative of a severe and violent beating. *Id.*, 599 N.E.2d at 1264-65.

¶ 47 Here, the testimony of Butts and Coad showed defendant struck Butts repeatedly in the face with his fist while she was lying on the ground. A person may not anticipate a punch to the face would cause death. However, a man could reasonably anticipate multiple punches to a woman's face with a closed fist would likely cause great bodily harm. Defendant's actions were indicative of a severe beating to one of the most sensitive areas of the body, and it is disingenuous for him to suggest he did not anticipate such a beating would result in great bodily harm.

¶ 48 Defendant asserts a head injury he suffered by way of a violent attack by a "considerably larger" Butts so disadvantaged him he could not have anticipated his actions would cause great bodily injury. Butts testified defendant was much stronger than her and had no problem picking her up. Moreover, the fact Butts was physically larger than defendant does not persuade us he was unaware punching Butts in the face with his closed fist while she was lying on the ground was likely to cause great bodily harm to the bones in her face.

¶ 49 Defendant argues the Committee Note for IPI Criminal 4th No. 24-25.06 required the trial court to examine whether defendant's conduct was intended or likely to cause death or great bodily harm before tendering the second paragraph of the self-defense instruction. He maintains the court instead looked at the resulting injuries and concluded they constituted great bodily harm, which defendant argues was irrelevant. He argues had the jury not been instructed on the second paragraph, it would have concluded he properly used force against Butts to protect himself since she had just violently assaulted him. However, because the jury was instructed on the second paragraph, it could not have found he validly used self-defense unless the jury also concluded he reasonably believed his conduct was necessary to prevent his death or the infliction of great bodily harm.

¶ 50 In *People v. Cochran*, 178 Ill. App. 3d 728, 738, 533 N.E.2d 558, 565 (1989), the defendant argued the trial court erred when it instructed the jury on the second paragraph of Illinois Pattern Jury Instruction, Criminal, No. 24-25.06 (2nd ed. 1981) because that paragraph was inapplicable. The defendant maintained the second paragraph should be given "only when the evidence shows the existence of deadly force" and that the second paragraph "misled the jury by focusing its attention on whether defendant intended to cause great bodily harm." *Id.* at 739,

553 N.E.2d at 565. This court found:

> "The plain language of the instruction refutes defendant's argument. The second paragraph is to be used when the evidence shows the existence of force intended or likely to cause death or great bodily harm. The instruction is not confined to circumstances in which a defendant intends to inflict great bodily harm if his actions are likely to cause that type of harm. The phrase 'great bodily harm' in No. 24-25.06 defines the type of force used by defendant, not his mental state." *Id.*

¶ 51 In the case *sub judice,* the evidence showed defendant used force intended or likely to cause great bodily harm when he struck Butts repeatedly in the face, one of the most sensitive parts of the body. According to Butts' testimony, by the time defendant hit her repeatedly in the face, defendant had already backhanded her inside the car, dragged her out of the vehicle by her feet and legs, and grabbed hold of her wig while she tried to get away from him. Further, Butts testified she was trying to shield her face and telling defendant to stop while he was punching her in the face. The trial court appropriately concluded defendant's actions were intended or likely to cause great bodily harm. Therefore, it was not error for the court to instruct the jury with the second paragraph of IPI Criminal 4th 24-25.06.

¶ 52 *2. Defendant Was Not Denied Effective Assistance of Counsel*

¶ 53 Alternatively, defendant argues his counsel was ineffective because she did not ask the trial court to include the "forcible felony" language in the second paragraph of IPI Criminal 4th No. 24-25.06. Ineffective-assistance-of-counsel claims are governed by the

familiar two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Supreme Court of Illinois in *People v. Albanese*, 104 Ill. 2d 504, 526-27, 473 N.E.2d 1246, 1255-56 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both counsel's performance was deficient and the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. Put another way, the defendant must show counsel's performance was "objectively unreasonable under prevailing professional norms 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. Petrenko*, 237 Ill. 2d 490, 496-97, 931 N.E.2d 1198, 1203 (2010) (quoting *Strickland*, 466 U.S. at 694). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697. If an instruction was so critical to the defense that its omission denied defendant the right to a fair trial, failure to request the instruction may be grounds for a finding of ineffective assistance of counsel. *People v. Falco*, 2014 IL App (1st) 111797, ¶ 16, 17 N.E.3d 671.

¶ 54 The second paragraph of the instruction provides "a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent [***(the commission of _____)].]" IPI Criminal 4th No. 24-25.06. The Committee Note states the blank space should be filled in with the applicable forcible felony. Offenses deemed "forcible felonies" are listed in section 2-8 of the Criminal Code of 2012 as follows:

> " 'Forcible felony' means *** aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other

> felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2012).

¶ 55 Defendant argues the jury should have been instructed that he was justified in the use of force intended or likely to cause death or great bodily harm if he reasonably believed such force was necessary to prevent a forcible felony, namely aggravated battery for having been struck on the head with a bottle and/or being assaulted on a public way. He asserts, had the jury been so instructed, it would have found him not guilty.

¶ 56 In *People v. Chamness*, 129 Ill. App. 3d 871, 473 N.E.2d 476 (1984), the defendant was convicted of armed violence, aggravated battery and attempt murder. The trial court gave a self-defense instruction that provided force likely to cause death or great bodily harm is justified to prevent like injury to oneself, but refused to include the "forcible felony" language. *Id.* at 875, 473 N.E.2d at 479. On appeal, the court found defendant received the jury's informed consideration on self-defense and that any instructional error was harmless. The court stated:

> "When a jury determines whether a defendant acted to protect himself from great bodily harm or death, it necessarily considers the same evidence which would be involved in a determination of whether that defendant acted to prevent the commission of an attempted murder or aggravated battery upon himself. There is no logic in the suggestion that a jury which found that a defendant was not protecting himself from great bodily harm or death could find that that defendant was trying to prevent an attempted murder

or aggravated battery from being committed upon himself." *Id.* at 876, 473 N.E.2d at 480.

¶ 57 In *People v. Hanson*, 138 Ill. App. 3d 530, 485 N.E.2d 1144 (1985), the defendant was convicted of armed violence and aggravated battery. He asserted the same argument raised by the defendant in *Chamness, i.e.*, even though the trial court instructed the jury force likely to cause great bodily harm or death was justified to prevent similar harm to oneself or another, the court erred in refusing to instruct the jury with the "forcible felony" language from the self-defense instruction. Adopting the analysis in *Chamness*, the appellate court found the defendant's argument was without merit. *Id.* 539-40, 485 N.E.2d at 1150-51.

¶ 58 Further, the felony offense of aggravated battery, when based on the underlying offense of a simple battery that occurs on or about a public way (which defendant contends was perpetrated on him) (720 ILCS 5/12-3.05(c) (West 2012)), is not a forcible felony. See *People v. Rodriguez*, 258 Ill. App. 3d 579, 585, 631 N.E.2d 427, 432 (1994) ("Simple battery upon a public way intentionally was omitted from the definition of forcible felony[.]"). More importantly, the aggravated battery to Butts occurred after she struck defendant, at a time when she was lying in the street. Thus, the evidence did not support giving this part of the instruction because defendant was not acting to prevent a forcible felony.

¶ 59 Here, the trial court instructed the jury defendant could be justified in using force likely to cause death or great bodily harm to prevent like injury to himself. When the jury determined whether defendant acted to protect himself from great bodily harm or death when he repeatedly struck Butts, it necessarily considered the same evidence involved in a determination of whether he acted to prevent the commission of the forcible felony of aggravated battery upon

himself. The jury determined defendant's actions were not justified when it found him guilty of aggravated battery and domestic violence. We believe the evidence supports the jury's verdict. Therefore, defendant cannot meet the prejudice prong of the *Strickland* test.

¶ 60 C. The State's Objection to Defendant's Testimony Butts Rubbed Her Vagina Before Cramming Her Hand Into His Face

¶ 61 Defendant argues the trial court erred when it sustained the State's objection to testimony explaining Butts rubbed her vagina and then crammed her hand into his face. Defendant concedes he has forfeited this argument since he did not raise it in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1129 (1988) (in order to preserve an issue for review on appeal, a party must both object at trial and raise the issue in a posttrial motion). Defendant argues the issue should be examined for plain error.

¶ 62 The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479 (2005). However, before considering whether the plain-error doctrine applies, we must determine whether any error occurred at all. See *People v. Walker*, 392 Ill. App. 3d 277, 294, 911 N.E.2d 439, 456 (2009). We begin by reviewing for error.

¶ 63 Defendant argues we should apply a *de novo* standard of review because he "is not contesting any factual matters and [the State's] objection to the testimony at issue was sustained for being irrelevant." The State maintains we should review deferentially the trial court's exclusion of this evidence. "The decision whether to admit evidence cannot be made in isolation. The trial judge must consider a number of circumstances that bear on that issue,

including questions of remoteness and prejudice. Generally, then, the admission of evidence is a question reserved to the discretion of the trial judge." *People v. Childress,* 158 Ill. 2d 275, 296, 633 N.E.2d 635, 644 (1994), superseded by statute on other grounds, *People v. Atkins*, 217 Ill. 2d 66, 68-74, 838 N.E.2d 943, 945-49 (2005). On the standard of review, the State is correct.

¶ 64 Defendant maintains evidence Butts rubbed her vagina before cramming her hand into his face was relevant to provide a context for why the argument between them escalated so quickly as well as insight into Butts' state of mind. He alleges this conduct was vulgar and abusive, and it showed Butts was "out of control." Because the trial court sustained the State's objection to this testimony, defendant asserts "the jury was denied necessary context and [defendant] was denied a meaningful opportunity to fully present his self-defense claim." He further claims, without this "context" demonstrating how unreasonably Butts was behaving after leaving the barbecue, the jury was left to believe he " 'backhanded' Butts virtually without cause."

> "Under the generally applicable rules of evidence, evidence may not be admitted unless it is relevant. Ill. R. Evid. 402 (eff. Jan. 1, 2011) (codifying common law rule). Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Ill. R. Evid. 401 (eff. Jan. 1, 2011) (codifying common law rule)." *People v. Ward,* 2011 IL 108690, ¶ 77, 952 N.E.2d 601.

¶ 65 Here, Butts testified she and defendant argued at the party. She was angry at

defendant about a sexual comment defendant made about what he could do with the other girls. Butts admitted she was drunk and could not recall all the details of what occurred in the vehicle. Butts admitted she had a smart mouth and may have said something to defendant. She admitted she could not recall who hit whom first or whether she was shoving her hand in defendant's face while he was driving. Butts did not think she had hit defendant before he backhanded her in the mouth, splitting open her lip. Butts admitted, after she climbed in the backseat of the vehicle, she hit defendant over the head with a beer bottle. Defendant testified Butts pushed her hand in his face several times while he was driving. He denied making any physical contact with Butts while they were in the vehicle.

¶ 66 From Butts' own admissions, the jury was presented with evidence and "context" about her state of mind before she and defendant ended up outside the vehicle. While the objected-to testimony about Butts rubbing her vagina before cramming her hand in defendant's face may have been relevant to show why the verbal argument escalated inside the vehicle to the point defendant backhanded Butts while she was still in the front seat of the vehicle, that evidence was not relevant to the aggravated battery defendant perpetrated upon Butts after he dragged her out of the vehicle and she was lying defenseless on the ground.

¶ 67 Such evidence also would not have given any credence to defendant's claim of self-defense. Butts claimed defendant dragged her out of the vehicle. Defendant claimed Butts took hold of his shirt and repeatedly struck him before she dragged him out of the vehicle. Butts claimed she fell to the ground and defendant hit her in the face while she was lying on the ground trying to ward off the blows. Defendant claimed, after falling to the ground, Butts kept hold of his shirt and continued to hit him. He stated he had no choice but to defend himself by

hitting her in the face. He testified he was the victim.

¶ 68 Based on the facts in this case, the trial court did not abuse its discretion in not allowing this evidence. Defendant was allowed to fully present his self-defense claim. Further, Butts did not deny shoving her hand in defendant's face while he was driving or that she might have hit defendant first.

¶ 69 D. The *Krankel* Claim

¶ 70 Lastly, defendant argues the trial court failed to conduct an adequate inquiry into his *pro se* allegations of ineffective assistance of counsel pursuant to *Krankel*.

¶ 71 In *People v. McLaurin*, 2012 IL App (1st) 102943, ¶¶ 39-40, 982 N.E.2d 832, the appellate court outlined the following process concerning a *pro se* litigant's posttrial claims of ineffective assistance of counsel:

> "Through *** *Krankel* *** and its progeny, the Illinois Supreme Court has provided the trial courts with a clear blueprint for the handling of posttrial *pro se* claims of ineffective assistance of counsel. [Citations.] A trial court is not automatically required to appoint new counsel anytime a defendant claims ineffective assistance of counsel. [Citation.] Instead, the trial court must first conduct an inquiry to examine the factual basis underlying a defendant's claim. [Citation.] The inquiry that the trial court conducts has evolved into what is now known as a '*Krankel* inquiry'. [Citation.]
>
> This court's review of a defendant's claim of error

necessarily turns on the *adequacy* of the trial court's inquiry. [Citation.] If the trial court determines that the defendant's claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. [Citation.] A claim lacks merit if it is conclusory, misleading, or legally immaterial or does not bring to the trial court's attention a colorable claim of ineffective assistance of counsel. [Citation.] However, if a defendant's claims indicate that trial counsel neglected the defendant's case, the trial court must appoint new counsel. [Citation.] During a *Krankel* inquiry, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim. [Citation.] A trial court may base its decision in a *Krankel* inquiry on: (1) the trial counsel's answers and explanations; (2) a brief discussion between the trial court and the defendant; or (3) its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. [Citation.]" (Internal quotation marks omitted and emphasis in original.)

¶ 72 The issue of whether the trial court conducted a proper preliminary *Krankel*

inquiry is subject to *de novo* review. *People v. Jolly*, 2014 IL 117142, ¶ 28, 25 N.E.3d 1127. "The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d 68, 78, 797 N.E.2d 631, 638 (2003).

¶ 73 As noted above, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance of counsel on its knowledge of counsel's performance at trial and the insufficiency of the defendant's allegations on their face. Further, if the trial court determines that the defendant's claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion.

> "Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel. [Citation.] As matters of trial strategy, such decisions are generally immune from claims of ineffective assistance of counsel. [Citation.] The only exception to this rule is when counsel's chosen trial strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing. [Citation.]" *People v. Reid*, 179 Ill. 2d 297, 310, 688 N.E.2d 1156, 1162 (1997).

¶ 74 Here, defendant sent a letter to the trial judge alleging ineffective assistance of counsel in that counsel did not: (1) object to a two-day continuance, (2) file a motion to suppress the recording of his jail conversations with Butts, and (3) obtain Butts' medical records or photos of the crime scene. The trial court stated, had counsel objected to the two-day continuance, she would have been overruled, and any motion to suppress the jail conversations would have been

denied as frivolous "since it was obvious that anyone using that phone system knew that the conversations would be recorded." Regarding Butts' medical records, the court stated:

> "[T]hose I don't know would have been probative. The victim testified as to her injuries, there were photographs of the injuries, *** and the victim testified as to the nature of her injuries. So whether or not we had medical records that verified what the victim said would have been of little or no use, and basically it's indicating that your representation of him was deficient.
>
> * * *
>
> I believe the defendant's suggestions that his representation was less than appropriate is not correct ***."

¶ 75 The allegations of ineffective assistance did not necessitate the appointment of new counsel or a further hearing. The allegations about the two-day continuance and the motion to suppress lacked merit and would not have been granted had counsel requested them. The allegations about Butts' medical records and the photographs of the scene were matters of trial strategy and would have had no probative value. In defendant's phone conversation with Butts, he asked her to get a copy of her medical records to show how intoxicated she was on the night of the attack. However, Butts' level of intoxication was not at issue. Everyone agreed she had been drinking to the point of intoxication. The extent of her injuries was also not at issue since she testified about the injuries she sustained and photographic evidence was admitted corroborating those injuries. Further, photographs of the scene would have had no probative value. The charge of aggravated battery stemmed from Butts sustaining injury on a public way.

Gardner testified South Cottage Grove Avenue was a public-use street, and no one challenged the fact defendant struck Butts while she was lying in the street. Therefore, the trial court did not err in denying defendant's allegations of ineffective assistance based upon his personal knowledge of defense counsel's performance and the insufficiency of defendant's allegations on their face. There is no need to remand for a further *Krankel* inquiry.

¶ 76 III. CONCLUSION

¶ 77 For the reasons stated, we vacate defendant's domestic battery conviction and sentence, affirm the trial court's judgment in all other respects, and remand the cause for an amended sentencing judgment consistent with this order. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal.

¶ 78 Affirmed in part and vacated in part; cause remanded with directions.