2018 IL App (5th) 150382-U

NO. 5-15-0382

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Union County.
	)	
v.	)	No. 14-CF-79
	)	
JESSIE BELL,	)	Honorable
	)	Mark M. Boie,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was not denied effective assistance of counsel for counsel's failure to argue *Montgomery* balancing test or for counsel's failure to redact portions of the defendant's videotaped confession, and remand is not required for purposes of a *Krankel* inquiry; however, the defendant is entitled to credit against fines.

¶ 2 Following a jury trial in the circuit court of Union County, the defendant, Jessie Bell, was convicted in the circuit court of Union County of second degree murder (720 ILCS 5/9-2(a) (West 2014)) and sentenced to 20 years' imprisonment. On appeal, the defendant argues that he was denied effective assistance of counsel, that the circuit court failed to conduct an adequate *Krankel* inquiry (*People v. Krankel*, 102 Ill. 2d 181, 187

(1984)), and that his fines should have been offset by credit for time spent in custody prior to sentencing. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Ricky Turner, the defendant's uncle, and Ricky's girlfriend, Jennifer Smith, had paid a deposit and a two-month rent payment to rent a home from James Morrison. On April 11, 2014, they were cleaning and moving into the home, and the defendant, Ricky's sons, Travis and Patrick Turner, and Jennifer's daughter, Deanna Smith, were assisting in the move. The defendant, Ricky, and Jennifer were intoxicated, and Morrison, who was also intoxicated, arrived later that evening to walk Ricky through the home and note the home's condition.

¶ 5 After Morrison arrived in the home, he walked through the kitchen door and elbowed the defendant, who was sitting at the kitchen table, in the mouth. The defendant did not physically respond to Morrison at that time but told him that he would rather be his friend than his enemy. Later, when opening boxes of beer, the defendant busted open Morrison's 12-pack. Morrison acted angry and continued to act angrier as the night progressed. Morrison ultimately told everyone to leave.

¶ 6 Although the defendant initially exited the home, he did not leave the scene. Instead, he returned and entered the home through the side door. Morrison and the defendant then engaged in a fistfight. After the defendant and Morrison's fight backed them out of the home onto the home's concrete pad, Travis hit Morrison on the side of the head with a two-by-four board, and Morrison fell to the concrete. After Morrison fell, the defendant punched Morrison in the head until the defendant was pulled away. After

being pulled away a first time, the defendant broke loose and began punching Morrison in the head again. The defendant was pulled away again, and thereafter, the defendant left the scene.

¶ 7 At approximately 3 a.m. on April 12, 2014, the Anna Police Department received a noise complaint, and Officer Nathan Smith and Deputy Robby McGee arrived on the scene. When they arrived, Ricky and Jennifer were pacing near the back door on the porch, and Morrison was lying facedown on the concrete. Morrison was unconscious with blood coming from his face, and he was gasping for air.

¶ 8 On the same day, the defendant was arrested and charged with first degree murder for causing Morrison's death. The State filed an indictment alleging that the defendant, acting together and in concert with Travis, caused Morrison's death by repeatedly striking him about the head with his fists (720 ILCS 5/9-1(a)(2) (West 2014)).

¶ 9 At around 2 or 3 p.m. on April 12, 2014, Sergeant Chad Brown and Detective Bryan Watkins first interviewed the defendant, and this interview was recorded and later played for the jury, without objection, at trial. During this initial interview, the defendant stated that he arrived at the house between 6 and 9 p.m. and was listening to the radio and drinking beer at the kitchen table when Morrison arrived. The defendant stated that when Morrison entered the kitchen, he asked Morrison how he was doing, and Morrison elbowed him in the mouth. The defendant stated that he told Morrison that he wanted to be his friend. The defendant stated that he "held his cool for hours" even though it had "pissed him off."

¶ 10 During this videotaped interview, the defendant stated that Morrison then led Ricky into the basement, and the defendant followed in order to check on Ricky. The defendant stated that he thereafter returned to the kitchen and opened Morrison's 12-pack of beer. When Morrison returned to the kitchen and acted angry about the beer, Jennifer told Morrison that her daughter had opened his 12-pack. The defendant stated that he corrected Jennifer and told Morrison that he had done it. The defendant stated that Morrison became "meaner and meaner" as the night progressed until he ultimately told everybody to "get the fuck out" of the house.

¶ 11 The defendant stated that although he had begun to leave, he returned to the house to ask Morrison about the rent that had been paid. The defendant stated that as he entered the house, he asked Morrison if he was planning to repay Ricky, and Morrison, who had been sitting at the kitchen table by himself, said "fuck you" and started "swinging" at him, backing him outside. The defendant stated that he protected himself, "throwing some punches back to keep" Morrison off of him. The defendant told officers that Morrison was "a dangerous man too."

¶ 12 The defendant stated that after they backed out of the house, Travis hit Morrison in the side of the head with a two-by-four board, and Morrison fell facedown. The defendant stated that Morrison was moving, so the defendant punched him a few more times on the head. The defendant also stated, however, that Morrison was dead on the spot but that the defendant was mad and "you can't push [him] all the way over the limit and think that [he's] just [going to] stop after that." The defendant stated that he hit Morrison in the head four or five times and then Patrick told him to stop and pulled him

back. When questioned further, the defendant stated that he probably hit Morrison more than five times, "maybe five or six or seven times," but that he did not remember. The defendant stated that he did not understand why he hit Morrison after he fell other than he had "lost his mind" or that he wanted to cover for Travis. The defendant stated that it was the "first time ever that [he] beat someone and just kept beating them." The defendant also stated that he was leaving a message. The defendant acknowledged that Morrison was defenseless and helpless on the ground when the defendant was hitting him on the head.

¶ 13 During this videotaped interview, the defendant stated that he knew Morrison was a violent man. The defendant stated that he was afraid that Morrison was going to beat him. The defendant stated that Morrison was "cocky" and "bullheaded" and wanted to "try people with a reputation like [the defendant's]." The defendant explained that he "wanted to make sure that the big man [would not] come back and try to kill *** or hurt [the defendant]."

¶ 14 This videotaped interview revealed that during police questioning, the defendant acknowledged that he had been locked in the county jail before. The defendant stated that he had been fighting with his fists his whole life. The defendant stated that his fists did not kill Morrison and that he had hit people way harder and had not killed them. The defendant stated that he was under a lot of stress because he was facing 30 years in prison for another domestic battery charge, his mother had cancer, and someone had been threatening to beat Ricky. The defendant also stated that he had engaged in many fights throughout his life and had been charged for aggravated battery. The defendant stated

that about 10 years ago, he "did three years in prison" for "hit[ting] a guy in the trailer court *** for no reason *** and put[ting] him in the hospital." The defendant stated that he had tattoos of his kids on his arms to help prevent him from fighting. The defendant stated that he was supposed to take "psychotropic medications for bipolar paranoid schizophrenic" but that he instead self-medicated with marijuana and alcohol. The defendant also admitted that he had previously used methamphetamines. The defendant stated that he was tired of doing prison time and tired of not seeing his kids. The defendant stated that he had "six years in prison and about twelve years of [his] life" and "all that place does is make you an animal *** and *** eat[ ] your mind." The defendant stated that he did not want to live his life in prison where he had "just been for half [his] life" and that he preferred a mental institution. The defendant stated that he was a driver in an accident that killed a man 10 years ago. The defendant referenced "all the fighting [he's] done" and "all the prisons [he's] been in." The defendant stated that his mind was violent and that he was mean.

¶ 15 Two days later, on April 14, 2014, the defendant was interviewed again, and this interview was also recorded and later played for the jury, without objection, at trial. In the second videotaped interview, the defendant reiterated that he had returned to the house to ask Morrison about the rent money. The defendant stated that Travis had been raging about the rent money and would not calm down. The defendant reiterated that Morrison had attacked him and had backed him out of the doorway. The defendant stated that once he saw Travis with the board, he "gave [Travis] eye contact," gave him a look that said "do what you gotta do," and thought "fuck it" because Morrison may kill the

defendant. The defendant explained that he "gave [Travis] the green light" with a look. The defendant also stated that he was unsure if he said "go ahead" or if he gave the go-ahead by nodding his head. The defendant stated that he would take all responsibility if Travis would not be sent to prison.

¶ 16 During this second videotaped interview, the defendant stated that he continued to beat Morrison after he fell because no one should "fuck with [him]." The defendant stated that after Morrison had fallen, Morrison had moved, and the defendant thought Morrison was getting back up. The defendant stated that if the job had not been finished with the board, he finished the job. The defendant stated that he beat Morrison for approximately 10 minutes. The defendant stated that he was drunk and did not know if Morrison would beat him to death.

¶ 17 During the second videotaped interview, the defendant stated that he had fought a lot of men in his life and that his "record shows [he] can fight." The defendant stated that he had spent "12 years of [his] life in prison." The defendant stated that he was facing 30 years for a domestic battery charge and that every time he had been locked away, there had been a reason for it.

¶ 18 On April 9, 2015, the State filed an amended pretrial motion seeking to impeach the defendant with three convictions: (1) a 2006 conviction for aggravated fleeing or attempting to elude a peace officer; (2) a 2009 conviction for aggravated battery; and (3) a 2012 conviction for retail theft. In this motion, the State noted that in *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971), the Illinois Supreme Court outlined the mandatory rules of conditional admissibility later adopted in Illinois Rule of Evidence

609, and the State discussed the balancing test which gives the court discretion as to what is admissible. In the motion, the State argued that the probative value of the prior convictions as impeachment evidence outweighed any prejudicial effect to the defendant. The defendant's trial counsel did not object to the State's amended motion, and he and the court agreed that the three priors could be admitted because they were felonies occurring within the last 10 years. At the hearing held on the same day, the defendant's trial counsel orally referenced *Montgomery*, stating, "Whether you look at the Rules of Evidence or *Montgomery*, either one, they come in."

¶ 19 The case thereafter proceeded to trial. At trial, Jennifer testified that when Morrison told the group to leave, she and Ricky went to her vehicle that was parked in the front of the driveway. Jennifer testified that although she did not witness fighting that occurred prior to Morrison's hitting the ground, she saw the defendant hitting Morrison when Morrison was lying on his stomach. Jennifer testified that Ricky pulled the defendant off of Morrison, and the defendant returned to Morrison and hit him. Jennifer testified that Morrison did not strike back because he was still facedown on the concrete.

¶ 20 Patrick testified that Morrison was angry because he thought someone had been drinking his beer and told everybody to "[g]et the fuck out of the house." Patrick testified that after they had left and he, the defendant, and Travis were getting into his truck, Morrison came toward the door "hollering and stuff." Patrick testified that the defendant jumped out of the truck and went to the house door. Patrick testified that Morrison "threw a couple punches at" the defendant, and the defendant blocked him. Patrick testified that Morrison tried to kick the defendant, and the defendant "caught

[Morrison] with one in the side of the jaw and dazed him a little bit." Patrick testified that Travis was standing behind Morrison at the edge of the porch. Patrick testified that the defendant told Travis, "Fuck *** it, Travis, just go ahead and hit him." Patrick testified that "whenever [Morrison] turned around[,] *** he saw that [Travis] was back there ***, and that's whenever *** Travis hit [Morrison] with the board." Patrick testified that after Travis hit Morrison with the board, Morrison "was staggering around, and that's whenever [the defendant] hit [Morrison] again." Patrick testified that Morrison then hit the ground, and he was unconscious. Patrick testified that the defendant "jumped on [Morrison's] back and started hitting him in the back of the head." Patrick testified that Morrison "was laying [*sic*] on the ground[,] *** knocked out because he was snoring kind of, and he had his *** arms kind of beside his sides." Patrick testified that the defendant "was on his back hitting him in the back of the head with his fists." Patrick testified that he and Ricky pulled the defendant off of Morrison. Patrick testified that the defendant hit Morrison "probably eight to ten times in the back of the head" with his fists.

¶ 21 Patrick testified that after he and Ricky pulled the defendant off of Morrison, the defendant "took his shirt off, and he started hollering and stuff." Patrick testified that after he, Travis, and the defendant returned to the truck, the defendant said, "Fuck that, I'm not going to let him live," "and he ran back over there and started hitting him in the back of the head again." Patrick testified that Morrison was still unconscious and that "[i]t sounded like he was still knocked out." Patrick testified that "whenever [the defendant] got on him the second time, he probably hit him 18 to 20 times." Patrick

testified that Morrison was making no effort to fight back at that point. Patrick testified that the defendant had Morrison "by the hair of his head the second time, and he was punching him." Patrick testified that they pulled the defendant off again.

¶ 22 Patrick acknowledged that at the time, there was an outstanding warrant for his arrest for failing to appear in court so he, Travis, and the defendant then left the scene. Patrick also acknowledged that during his first police interview, he did not implicate Travis and did not tell police that the defendant ran out of the truck stating he would not let Morrison live. Patrick testified that he did not want to see Travis in trouble.

¶ 23 At trial, the defendant testified that he had been convicted of aggravated fleeing or attempting to allude a peace officer in 2006, aggravated battery in 2009, and felony retail theft in 2012. The defendant also testified that he had known Morrison for 10 or 15 years and that he knew Morrison was an alcoholic who became very violent and "beat people up." The defendant testified that in 2007, the defendant went to visit Morrison and "have a beer." The defendant testified that when he entered, Morrison told him to "come look at [his] work" and led the defendant to a back bedroom, where an unconscious man was covered in blood and lying on the bed. The defendant interpreted Morrison's gesture to mean that if he and Morrison "ever fought, this is what [the defendant] [was] going to look like."

¶ 24 The defendant testified that on the evening before the incident, Ricky had asked him to help move a sofa bed into the newly-rented home. The defendant testified that he, Patrick, and Ricky had later left but had returned after 11 p.m. The defendant testified that Morrison thereafter arrived at the home, walked through the door into the kitchen,

and elbowed the defendant in the mouth. The defendant testified that he told Morrison that he would rather be his friend than his enemy.

¶ 25 The defendant testified that he thereafter "went to open the beer to set up beers for me, Rick[,] and Jimmy, to show that *** it is forgiven." The defendant testified that when he opened the beer container, beers fell out of the box, and when Morrison returned, he noticed that his beer had been busted open. The defendant testified that he was scared so he said, "I busted your beer open, [but] I did not mean to." The defendant testified that when Jennifer told Morrison that Deanna did it, Morrison said it was okay. The defendant testified that it "kind of ticked [him] off a little *** because *** [he] told [Morrison] the truth already." The defendant testified that he and Morrison left the kitchen and then returned, and Morrison kicked his chair backwards and said, "Everybody get the 'F' out of the house."

¶ 26 The defendant testified that he left the house and "crawled in the middle of the seat of the truck, ready to go." The defendant testified that Travis was standing outside of the truck, jumping up and down, saying Morrison owed his father money. The defendant testified that to keep Travis from fighting with Morrison, he returned to the house and knocked on the side of the door. The defendant testified that he asked Morrison when he would repay the rent money to Ricky. The defendant testified that Morrison "jumped out of his chair with no questions and started swinging on me with both hands." The defendant testified that Morrison struck him in the head, but the defendant was blocking the blows as he backed out of the door. The defendant testified that he and Morrison backed up out of the house, onto the concrete pad. The defendant

testified that Morrison pulled the shirt off of the defendant and kicked him. The defendant testified that he then hit Morrison. The defendant testified that when he hit Morrison, he noticed Travis standing behind Morrison with a board.

¶ 27 The defendant testified that he gave Travis "the okay to go ahead—[to] help *** stop this man from attacking." The defendant testified that he never told Travis to hit Morrison with the board. The defendant testified that he "gave him eye contact." The defendant testified that he would not have wanted Travis to hit Morrison in the head. The defendant testified that he would have preferred the leg, the arm, or the back. The defendant testified that Travis nevertheless hit Morrison very hard in the head with the board, and Morrison fell onto the concrete pad.

¶ 28 The defendant testified that after Morrison fell, he thought Morrison was getting back up so he "ran over and hit [Morrison] two, three times" until he was pulled away. The defendant testified that he was pulled back, but he broke loose and hit Morrison two or three more times. The defendant testified that he was pulled back again, got in the truck, and left. The defendant testified that he hit Morrison five or six times altogether.

¶ 29 The defendant testified that Morrison used force against him first, that he thought harm was going to happen immediately to him, and that he felt he was in very real danger. The defendant testified that he did not use any greater force against Morrison than he was using with his hands. The defendant testified that he believed his actions were reasonable because he "would be the one laying [*sic*] there on the ground and probably dead." The defendant testified that he had not stated that he was going to kill Morrison.

¶ 30 Dr. John Heidingsfelder, a forensic pathologist, performed an autopsy on Morrison on April 12, 2014. Dr. Heidingsfelder testified that he found Morrison's blood alcohol level was 0.194% and found recent, "multiple bruises present on [Morrison's] scalp *** on both the right and the left sides of his head," "[a]nd there were also bruised areas *** towards the back of the head." Dr. Heidingsfelder testified that "Morrison died of a respiratory arrest due to a clinical diffuse axonal injury due to multiple blunt trauma to his head." Dr. Heidingsfelder testified that both the linear two-by-four blow to the head, in addition to multiple fist blows to the scalp, would have the same type of effect on the brain and that "probably the combination of both *** contributed to his death." Dr. Heidingsfelder testified that the multiple blows to the head contributed to Morrison's death. Dr. Heidingsfelder explained that both groups of injuries, occurring at the same time, could cause the diffuse axonal injury. Dr. Heidingsfelder testified that Morrison was beaten to death.

¶ 31 The jury was instructed on the defendant's claim of self-defense. Over the State's objection, the circuit court also granted defense counsel's request for second degree murder instructions. The jury began deliberating at 2:39 p.m. After the jury asked in a note what the term "or one for whose conduct he is legally responsible" meant, it was provided with the accountability instruction, which had initially been omitted. At approximately 6:30 p.m., the jury asked for "a definition of second-degree murder," and the court instructed it to read the "proposition" instruction, along with the "mitigating factor" instruction, "justified force" instruction, "use of force" instruction, and "initially

provoked the use of force" instruction, which had been provided. At 9 p.m. the jury sent a note revealing it was in conflict. The note stated as follows:

> "Seven say all three propositions have been met. Five say all three have not been met. We have all individual [*sic*] read the instruction for both first-degree murder and the review [*sic*] of instructions concerning self-defense. What do you suggest?"

The attorneys and court agreed that the *Prim* instruction should be given. See *People v. Prim*, 53 Ill. 2d 62, 75-76 (1972) (court tailored an instruction appropriate to guide but not coerce a jury that is unable to reach a verdict). Six hours later, the jury found the defendant guilty of second degree murder based upon an unreasonable belief that deadly force was justified.

¶ 32 On August 3, 2015, at the defendant's sentencing hearing, the defendant stated the following:

> "I believe that my rights ha[ve] been violated, as well as Jimmy's respect to a fair trial in just the conflict of interest of Scott Harvel working here at this place, my lawyer letting Scott Harvel swab my DNA without him being present, because he chose not to. I would like to fire him here on the spot. Yes, sir, I would. I am not appealing this situation. No. I want—I am going to be my own—represent myself, if I can do that, Your Honor. And I would ask for legal assistance that would treat this whole situation with due respect to Jimmy Morrison. That is how I am asking that.

And I think that I put it on paper that you should not be able to sentence me due to the fact that here at this time that a change of venue—he lied to me and told me after I picked the 12 jurors that I would get a change of venue, and I did not get a change of venue. Both you men told me, yes, sir, you would get a change of venue. But I—I thought—

Anyway, here in this courthouse, knowing the fact that the family had, you know, the fundraising thing for Jimmy, so everybody in the public could be on that side, which is fine with me, because I put it in God's hands and God said, no, you are not murder one. But murder two, I might agree to that myself. But I was provoked. Not just by Jimmy. There is [*sic*] men that stand behind Jimmy that evidence did not get let out, that I didn't get to speak and tell, because no one wants to hear the man in the man. You know what I am saying? They were there when the situation happened. They just want to go and do what they want to do. That is not right.

So if at any given day we can have a good, fair trial on this, I have *** all of the good information in my mind ***. ***

*** I am asking, please, can you please put this off until we get me some counsel to guide me whether I should appeal it or not appeal; whether we should proceed on with a sentencing hearing. ***

*** So nobody is perfect. I understand. So I forgive anything that did happen. My lawyer has done a great job. It is just people do make mistakes. Maybe he didn't realize it. I don't know. ***

***

So I am willing to proceed with a post-conviction lawsuit against my rights being violated, number one. If I can. I don't know. I need legal assistance. ***

***

I gave it a chance and a try, and it just didn't happen that way. And I am not being mean to my lawyer. He did a great job because he did not lie about any of it. He may have missed a point. And I believe that. And I can see all honesty. Because, hey, I am not a perfect man, but I deserve a fair chance at trying hard again."

¶ 33 After hearing the defendant's statements, the court noted that there was no doubt "that the jury took their oath seriously and meticulously deliberated on this case." The court noted the evidence showing that after Morrison had told everyone to leave the home, there was no threat, and the defendant should have left. The court noted that the defendant deliberately returned to the house to confront Morrison. Referencing the photographs of Morrison that depicted his arms at his side and his feet apart, the court noted that Morrison's body position indicated he had not tried to get up. Referencing Morrison's autopsy photographs, the court noted that Morrison suffered repeated traumas to the back of the head. The court stated that it was sentencing the defendant to 20 years in the Department of Corrections, with a 2-year mandatory supervised release.

¶ 34 When the circuit court asked whether the defendant was requesting to file motions for a new trial "or things such as that," the defendant answered, No, sir. *** I don't want a new trial. I will take what you just gave me." When the circuit court asked the

defendant if he "might want a new attorney to help [him] file some sort of motions," the defendant stated that he did not wish to appeal. The defendant stated that he "won the trial, because they said second-degree, because what they come with."

¶ 35 Accordingly, on August 4, 2015, the circuit court entered its order sentencing the defendant to 20 years' imprisonment for second degree murder (720 ILCS 5/9-2(a)(2) (West 2014)). The court found that the defendant was entitled to receive credit for time served in custody, from April 12, 2014, until August 3, 2015. The defendant did not file a posttrial motion. On September 2, 2015, the defendant placed his notice of appeal in the prison mail system.

¶ 36 ANALYSIS

¶ 37 Prior Convictions

¶ 38 On appeal, the defendant argues that his trial counsel was ineffective where he conceded the admission of three prior felony convictions into evidence without arguing that their prejudicial effect outweighed their probative value. The defendant alternatively argues that the circuit court abused its discretion in admitting the three prior convictions without balancing their prejudicial effect against their probative value or determining whether all three convictions were necessary for impeachment. The defendant argues that he was denied his sixth amendment right to effective assistance of counsel and his right to fair trial and that this court should therefore reverse and remand for a new trial.

¶ 39 The State counters that because defense counsel and the trial court were aware of the *Montgomery* balancing test, defense counsel was not ineffective because there was no

valid reason to object to the three crimes included in the amended motion, and the trial court properly allowed the convictions as evidence.

¶ 40 Both the United States and the Illinois Constitutions guarantee criminal defendants the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Whether counsel was ineffective is determined under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). Under *Strickland*, to prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense in that counsel's errors deprived the defendant of a fair trial with a reliable result. *Id.* "More specifically, the defendant must demonstrate that 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.' *Id.* at 694." *People v. Cherry*, 2016 IL 118728, ¶ 24. "Because a defendant must satisfy both prongs of the *Strickland* test to prevail, the failure to establish either precludes a finding of ineffective assistance of counsel." *Id.*

¶ 41 A defendant's prior conviction, if within 10 years of trial, may be admitted to impeach his credibility if (1) the offense was punishable by imprisonment in excess of one year or (2) involved a crime of dishonesty, unless (3) the trial court concludes that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d at 516; Ill. R. Evid. 609(a), (b) (eff. Jan. 1, 2011). "This last element involves a balancing of probative value and prejudicial effect." *People v. Whirl*, 351 Ill. App. 3d 464, 467 (2004). In balancing these factors, the trial

court should consider the nature of the prior crimes, the length of the criminal record, the age and circumstances of the witness, and, most importantly, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction. *People v. Cox*, 195 Ill. 2d 378, 383 (2001); *Montgomery*, 47 Ill. 2d at 518. "The more the prior conviction smacks of testimonial dishonesty, the more probative weight it has." *Stokes v. City of Chicago*, 333 Ill. App. 3d 272, 279 (2002). "Convictions involving deceit, fraud, cheating, or stealing are the kinds of crimes that ' "press heavily on the probative value side of the scale" ' (*Torres* [*v. Irving Press, Inc.*], 303 Ill. App. 3d [151,] 160 [(1999)], quoting *People v. Elliot*, 274 Ill. App. 3d 901, 909 (1995)), although a conviction that had little or nothing to do with truth-telling survived supreme court scrutiny in [*People v.*] *Williams*, 173 Ill. 2d [48,] 83 [(1996)] (no error to allow use of an aggravated battery conviction to impeach a defendant charged with murder)." *Id.*

¶ 42 "A slight tipping of the scales toward the risk of unfair prejudice is not enough to exclude the prior conviction." *Id.* "To exclude the evidence, the trial court must find the risk of unfair prejudice *substantially* outweighs the probative value of the conviction for impeachment purposes. *Montgomery*, 47 Ill. 2d at 516." (Emphasis in original.) *Id.*

¶ 43 The trial court has discretion in balancing the factors and determining whether a prior conviction is admissible. *People v. White*, 407 Ill. App. 3d 224, 233 (2011). Nonetheless, the trial court should not apply the balancing test mechanically, and the record should include an indication that the trial court was aware of its discretion to exclude a prior conviction. *Id.* at 233-34. If the prejudice to the defendant substantially

outweighs the probative value of admitting the impeachment evidence, the evidence of the crimes must be excluded. *Cox*, 195 Ill. 2d at 386.

¶ 44 In this case, the court allowed the State to impeach the defendant with three convictions: (1) a 2006 conviction for aggravated fleeing or attempting to elude a peace officer; (2) a 2009 conviction for aggravated battery; and (3) a 2012 conviction for retail theft. These three felonies were punishable by imprisonment and were committed within 10 years prior to the case *sub judice*. The defendant does not dispute that the three crimes fall within Rule 609 and *Montgomery*. Ill. R. Evid. 609(a) (eff. Jan. 1, 2011); *Montgomery*, 47 Ill. 2d at 516. The defendant also does not assert how the crimes were substantially more prejudicial than probative. See *People v. Spates*, 77 Ill. 2d 193, 204 (1979) (theft has its basis in "lying, cheating, deceiving or stealing, bears a reasonable relation to testimonial deceit[,] and should be admissible for impeachment purposes"); *People v. Graves*, 142 Ill. App. 3d 885, 897-98 (1986) ("[d]efendant's conviction for aggravated battery only four years prior to this trial [where defendant was charged with the offenses of murder and armed violence] was extremely probative of his credibility"). The defendant argues that his trial counsel was ineffective and the circuit court abused its discretion in failing to recognize the balancing test at the hearing.

¶ 45 In the State's initial motion *in limine* to impeach the defendant with prior convictions, as well as in its amended motion, the State set forth the requirements of *Montgomery*, as codified in Rule 609, noting that the court must determine whether the probative value of the evidence of the crime was substantially outweighed by the danger of unfair prejudice and discussing the balancing test and the relevant factors the trial

court must consider. In matters such as the case *sub judice*, where a defendant claims self-defense or otherwise attempts to justify his actions, his testimony, which made up his entire defense, necessarily placed his credibility at issue, and the admission of prior convictions was crucial in measuring the defendant's credibility. See *People v. Atkinson*, 186 Ill. 2d 450, 462 (1999). Although the record reveals that the circuit court did not expressly articulate the balancing test required by *Montgomery* and thereby find that the probative value of the prior convictions was not outweighed by the danger of unfair prejudice to the defendant, the circuit court was aware of its discretion under *Montgomery* (*In re N.B.*, 191 Ill. 2d 338, 345 (2000) ("[t]he circuit court is presumed to know the law and apply it properly, absent an affirmative showing to the contrary in the record")) and properly allowed the three convictions for impeachment purposes. See *People v. Williams*, 173 Ill. 2d 48, 83 (1996) (although trial court did not explicitly state it was balancing interests pursuant to *Montgomery*, the trial transcript established the court was aware of *Montgomery* and the analysis it requires); *People v. Redd*, 135 Ill. 2d 252, 326 (1990) (where State argued to the circuit court regarding the court's "discretion *** under *Montgomery*," circuit court understood its discretion even if the circuit court did not articulate that it performed the balancing test required by *Montgomery*); *Graves*, 142 Ill. App. 3d at 898 ("[w]hile the record does not expressly indicate that the trial judge applied the aforementioned balancing test in the instant case, the court was well aware of the *Montgomery* provisions, and it must therefore be assumed that the judge gave appropriate consideration to the relevant factors," even when consideration does not appear of record).

¶ 46 Moreover, additional safeguards in the court's determination of whether to allow the prior convictions were provided when the circuit court gave the jury limiting instructions that the "previous conviction of an offense may be considered *** only as it may affect his believability as a witness and must not be considered *** as evidence of his guilt of the offense with which he is charged." Accordingly, we conclude that the trial court did not abuse its discretion in admitting the three prior convictions. See *People v. Gomez*, 402 Ill. App. 3d 945, 956 (2010) (where defendant claims self-defense, his testimony places his credibility at issue, and prior conviction for aggravated discharge of a firearm could be relevant to issue of whether defendant was initial aggressor). Thus, as argued by the State, it was reasonable for defense counsel to conclude that the probative value of these prior crimes was not substantially outweighed by the danger of unfair prejudice and that any objection to the admission of the three felonies would, therefore, be rejected by the trial court. *People v. Casillas*, 195 Ill. 2d 461, 486-87 (2000). "Defense counsel is not required to make losing motions or objections in order to provide effective legal assistance." *People v. Moore*, 2012 IL App (1st) 100857, ¶ 45. "Absent a potential judicial error, a defendant cannot show counsel's performance created a reasonable probability that the result of the proceeding would have been different." *Id.* Consequently, defendant suffered no prejudice from trial counsel's failure to object to the admission of the three felonies on the basis that the danger of unfair prejudice outweighed their probative value. See *Strickland*, 466 U.S. at 697; *Casillas*, 195 Ill. 2d at 486-87.

¶ 47 Unredacted Interrogation Footage

¶ 48 The defendant also argues that his counsel was ineffective because he permitted the jury to be inundated with numerous irrelevant and highly prejudicial criminal acts through the unredacted interrogation footage. The defendant argues that where trial counsel agreed that only three prior convictions would be admissible for impeachment purposes, counsel was ineffective for failing to move to redact the numerous references to the defendant's other prior and pending charges and other bad acts. The defendant argues that the prejudice was "palpable" because the jury was told that the defendant "was an institutionalized animal with a violent crime-filled past." The defendant also argues that the prejudice to him was indisputable because the evidence was so closely balanced, in that the jury could have found his actions were justified and in self-defense. The defendant argues that he was denied his sixth amendment right to effective assistance of counsel, and this court should therefore reverse and remand for a new trial.

¶ 49 Trial counsel did not object to the contents of either of the videotaped interviews, and the State concedes that portions of the defendant's interview with police, including evidence of the defendant's prison time, familiarity with police and jail, illegal drug use, and other criminal acts, were irrelevant and not inextricably intertwined with the offense charged. Accordingly, these statements should have been redacted from the defendant's interview, and the State concedes that it was unreasonable for defense counsel not to redact those portions of the interview. The State argues that the defendant has nevertheless failed to show that he was prejudiced under *Strickland*.

¶ 50 Again, to establish prejudice under *Strickland*, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *People v. Peterson*, 2017 IL 120331, ¶ 79; *People v. Frazier*, 2017 IL App (5th) 140493, ¶ 20. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

¶ 51 A person commits second degree murder when he commits the offense of first degree murder and at the time of the killing he believes the circumstances to be such that, if they exist, would justify the use of deadly force under the principles of self-defense, but his belief is unreasonable. 720 ILCS 5/9-2(a)(2) (West 2014). "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself *** against such other's imminent use of unlawful force." *Id.* § 7-1(a). "[H]e 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 or another, or the commission of a forcible felony." *Id.* An "aggressor" may not invoke self-defense. *Id.* § 7-1(b).

¶ 52 "A claim that self-defense justified a use of force that was likely to cause great bodily harm contemplates six distinct elements: (1) unlawful force was threatened against a person, (2) the person threatened was not the aggressor, (3) the danger of great bodily harm was imminent, (4) the use of force was necessary, (5) the person threatened actually and subjectively believed a danger existed that required the use of the force applied, and (6) the beliefs of the person threatened were objectively reasonable." *People v.*

Wilkinson, 2018 IL App (3d) 160173, ¶ 35 (citing *People v. Lee*, 213 Ill. 2d 218, 225 (2004)). "Once a defendant raises the affirmative defense of self-defense, the burden shifts to the State to prove beyond a reasonable doubt that defendant did *not* act in self-defense." (Emphasis in original.) *Id.* "The State satisfies this burden if it negates any of the six elements beyond a reasonable doubt." *Id.*

¶ 53 In light of the overwhelming evidence of the defendant's guilt, we do not believe the outcome of the trial would have been any different had the objectionable portions of the video been redacted. It is undisputed that the defendant and Morrison got into a fistfight, that Travis hit Morrison in the head with a two-by-four board, and that the defendant hit Morrison in the back of the head with his fists after Morrison fell to the ground. It is also undisputed that both the blow with the two-by-four and the punches to the back of Morrison's head with the defendant's fist contributed to Morrison's death. Although the defendant argues that Morrison could have received the bruising to his head before he fell to the ground and at a point where the defendant was indisputably acting in self-defense, the defendant admitted that he hit Morrison in the head several times after Morrison had fallen to the ground, that he "lost [his] cool," that he was pushed over the limit and could not stop, that he lost his mind, and that he "just kept beating" him. The defendant further admitted that while Morrison was defenseless, lying facedown on the concrete, the defendant was pulled off of Morrison but broke loose and returned to hit Morrison some more. The defendant acknowledged that Morrison was not moving after being hit with the board and that Morrison was helpless when the defendant was hitting him in the back of the head with his fists. The photos in evidence showed Morrison in a

position where the defendant's claim that he was rising to fight again was implausible. Instead, the overwhelming evidence supported the conclusion that if the defendant believed he was defending himself as he repeatedly struck Morrison in the head, as Morrison remained facedown on the concrete, his belief was unreasonable. See *Wilkinson*, 2018 IL App (3d) 160173, ¶ 39 (when evidence showed that defendant struck victim repeatedly in the head with hammer while on top of victim and victim was trying to get away, jury could rationally conclude that any belief defendant held that hammer strikes were necessary to protect himself was unreasonable). Moreover, as noted by the State, there was no further mention of the defendant's other crimes during trial. When the competent evidence is considered and weighed, there exists no reasonable probability that the jury would have acquitted the defendant had the comments complained of been excluded. The defendant received a fair trial, a trial resulting in a verdict worthy of confidence. See *People v. Henderson*, 142 Ill. 2d 258, 307 (1990) (although other-crime statements during confession were irrelevant and should have been redacted, error in admitting defendant's entire confession into evidence was not reversible error) (declined to follow on other grounds in *People v. Terry*, 183 Ill. 2d 298, 305 (1998)).

¶ 54 The defendant asserts that the jury's note indicating that five jurors were leaning towards finding him not guilty demonstrates that the evidence was not overwhelming. However, a jury's difficulty in reaching a verdict is but a single factor to be considered in determining whether the evidence was closely balanced. See *People v. Rottau*, 2017 IL App (5th) 150046, ¶ 79 (fact that jury was initially deadlocked and sent some notes was not enough to convince court that evidence was closely balanced); *People v. Vasquez*,

368 Ill. App. 3d 241, 251(2006) (despite jury note indicating deadlock, evidence not closely balanced where two officers testified they saw defendant with firearm, despite defense witness contradicting that testimony). The evidence overwhelmingly proved beyond a reasonable doubt that the defendant's subjective belief that the amount of force he used was necessary to prevent great bodily harm was unreasonable. Accordingly, we hold the defendant was not prejudiced by counsel's failure to redact portions of the video, and therefore, trial counsel was not ineffective.

¶ 55 *Krankel* Inquiry

¶ 56 The defendant further argues that the circuit court failed to conduct an adequate *Krankel* inquiry into his posttrial claims of ineffective assistance of counsel. See *Krankel*, 102 Ill. 2d at 187-89 (alternate counsel appointed for defendant raising possttrial claim of ineffective assistance of counsel); *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003) (although appointment of new counsel is not automatically required when defendant presents posttrial claim of ineffective assistance of counsel, trial court must nevertheless conduct a preliminary inquiry into factual basis of the defendant's claim). The defendant argues that his *pro se* posttrial complaints regarding his trial counsel's effectiveness at the August 3, 2015, sentencing hearing required the trial court to conduct a preliminary inquiry into his complaints. The defendant argues that although the trial court understood that he was complaining about counsel, it failed to conduct any inquiry into his claims, and therefore, the case must be remanded for a proper *Krankel* inquiry.

¶ 57 Under *Krankel* and its progeny, the trial court is obligated to inquire into a defendant's *pro se* posttrial claims that he was denied the effective assistance of counsel.

People v. Ayres, 2017 IL 120071, ¶ 11; *Moore*, 207 Ill. 2d at 77-78. This inquiry, which is sometimes referred to as a "preliminary *Krankel* inquiry" (*People v. Jolly*, 2014 IL 117142, ¶ 28), requires the trial court to ascertain the nature of the defendant's ineffective-assistance-of-counsel claims and evaluate their potential merits (*People v. Mays*, 2012 IL App (4th) 090840, ¶ 58). To understand the factual bases of the defendant's allegations, it is permissible for the trial court to question both trial counsel and the defendant. *Ayres*, 2017 IL 120071, ¶ 12. If the defendant's allegations show that trial counsel may have neglected the defendant's case, the trial court should appoint new counsel and set the matter for a hearing. *Id.* ¶ 11; *Moore*, 207 Ill. 2d at 78. If the court determines that the claims lack merit or pertain only to matters of trial strategy, however, then no further action is required. *Id.* A preliminary *Krankel* inquiry "serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance claims." *People v. Patrick*, 2011 IL 111666, ¶ 39.

¶ 58 A defendant's *pro se* claim lacks merit if it is misleading, conclusory, or legally immaterial or fails to " 'bring to the trial court's attention a colorable claim of ineffective assistance of counsel.' " *People v. Cook*, 2018 IL App (1st) 142134, ¶ 104 (quoting *People v. Johnson*, 159 Ill. 2d 97, 126 (1994)). "The court may, of course, rely on its own legal knowledge of what does and does not constitute ineffective assistance." *Mays*, 2012 IL App (4th) 090840, ¶ 57. The court may also base its evaluation of the defendant's claims on its knowledge of counsel's performance at trial and "the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 79. "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." *Id.* at 78. Whether the trial court properly conducted a preliminary *Krankel* inquiry is a legal question that we review *de novo*. *Jolly*, 2014 IL 117142, ¶ 28.

¶ 59 On appeal, the defendant argues that the trial court failed to adequately inquire into his request to fire counsel on the spot, his claim that counsel permitted his DNA to be obtained without counsel present, his assertion that his counsel lied to him about obtaining a change of venue, and his claims that counsel "missed a point," "that evidence did not get let out," and that the defendant did not "get to speak and tell."

¶ 60 The defendant's claim that his counsel was ineffective for failing to move for a change of venue due to the Morrison family's publicized fundraiser was legally immaterial and failed to bring to the circuit court's attention a colorable claim of ineffective assistance of counsel. During *voir dire*, each juror stated either that she had not heard or read anything about the case or that, if she had, she would be able to put aside anything she had heard or read about the case and base her decision solely on the evidence. As stated in *People v. Nitz*, 143 Ill. 2d 82, 121 (1991):

> " 'It is not necessary that jurors be unaware of the case before they assume their role in the jury box. Crimes, especially heinous crimes, are of great public interest and are extensively reported. *** Total ignorance of the case is exceptional, and it is not required. [Citation.] *What is required is the assurance that a juror will be able to set aside all information he has acquired outside the courtroom, along with any opinions he has formed, and decide the case strictly on the evidence as*

presented in the courtroom.' (Emphasis added.)" *Id.* at 121 (quoting *People v. Taylor*, 101 Ill. 2d 377, 386 (1984)).

¶ 61 Moreover, the defendant's claim that his counsel was ineffective for failing to be present during his DNA swab test is also legally immaterial. The defendant's DNA was not a central issue in the case, and the absence of his counsel during the test did not prejudice him at trial. Moreover, the defendant's claim that he did not "get to speak and tell" was misleading and belied by the defendant's testimony at trial.

¶ 62 Instead, the defendant failed to bring to the trial court's attention a colorable claim of ineffective assistance of counsel. With regard to the alleged missing evidence, the circuit court questioned whether the defendant wanted a new attorney to help him file a motion, and the defendant declined. The defendant stated that he considered the conviction for second degree murder a win and that he agreed with it. The trial court is not required to "somehow glean an ineffective-assistance-of-counsel claim from every obscure complaint or comment made by a defendant" (*People v. Thomas*, 2017 IL App (4th) 150815, ¶ 30) and is in the best position to assess a defendant's credibility (*People v. Payne*, 294 Ill. App. 3d 254, 259 (1998)). Accordingly, viewing the defendant's ineffective-assistance-of-counsel allegations in the context of the entire record on appeal, we conclude that the trial court's inquiry and the defendant's statements supported a determination not to appoint new counsel because the defendant's claims lacked merit.

¶ 63 Credit Against Fines

¶ 64 The defendant argues that his fines should have been offset by the $5 *per diem* credit for time spent in custody prior to sentencing. He argues that he was in presentence

custody from April 12, 2014, until his sentencing hearing on August 3, 2015. The defendant argues that he did not receive his $5 *per diem* credit toward his fines as permitted by statute. 725 ILCS 5/110-14(a) (West 2014).

¶ 65 The State concedes this issue. However, the State notes that in no case shall the amount so allowed or credited exceed the fines. *Id.*; *People v. Jones*, 223 Ill. 2d 569, 580 (2006). Thus, the State concedes that the defendant is entitled to a credit of $65 against the $50 court system fee fine and the $15 state police operations assistance fine.

¶ 66 Accordingly, we conclude that the defendant is entitled to the $5 *per diem* credit for the 479 days he was in custody prior to sentencing, which amounts to $65 against the $50 court system fee fine and $15 state police operations assistance fine.

¶ 67 CONCLUSION

¶ 68 For the foregoing reasons, we affirm the judgment of the circuit court of Union County and deny the defendant's request that the cause be remanded for further proceedings.

¶ 69 Affirmed.