NOTICE
This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2023 IL App (4th) 220553-U

NO. 4-22-0553

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 19, 2023
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of McLean County
v.	)	No. 21CF27
HENRY E. DAVIS, Defendant-Appellant.	)	
	)	Honorable William G. Workman, Judge Presiding.

JUSTICE LANNERD delivered the judgment of the court.
Justices Cavanagh and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding (1) the evidence was sufficient to prove defendant's guilt beyond a reasonable doubt, (2) defense counsel was not ineffective for failing to object to prior bad acts testimony and failing to request a corresponding limiting instruction, and (3) the trial court conducted an adequate preliminary *Krankel* inquiry.

¶ 2 In April 2022, defendant, Henry E. Davis, was convicted of resisting a peace officer (720 ILCS 5/31-1(a) (West 2020)) and domestic battery (*id.* § 12-3.2(a)(1)). The trial court sentenced defendant to 180 days in jail. Defendant timely appealed, alleging (1) the evidence was insufficient to prove his guilt beyond a reasonable doubt, (2) defense counsel was ineffective for failing to object to testimony regarding prior bad acts and failing to request a corresponding limiting instruction, and (3) the court erred by failing to conduct an adequate preliminary *Krankel* inquiry (see *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984)). We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was arrested and charged in McLean County with aggravated battery (*id.* § 12-3.05(d)(4)), resisting a peace officer (*id.* § 31-1(a)), and domestic battery (*id.* § 12-3.2(a)(1)). Following a jury trial, defendant was convicted of resisting a peace officer and domestic battery but acquitted of aggravated battery. As defendant was acquitted of aggravated battery, we include only those facts necessary to address the issues raised on appeal.

¶ 5 A. Jury Trial

¶ 6 At defendant's jury trial, the State presented testimony from: the victim, Sarah A.; Sarah's daughter, M.A.; and two City of Bloomington police officers, Jerrad Freeman and Tyler Elston. We note, because both Sarah and defendant are hearing impaired, there were five American Sign Language interpreters present and interpreting throughout the trial.

¶ 7 1. *Testimony of Sarah A.*

¶ 8 On January 10, 2021, Sarah A. was staying at the Econo Lodge with defendant and her three children. At some point in the evening, she and defendant got into an argument. During the argument, defendant struck her multiple times on the arm and leg with an ironing cord. Sarah testified State's exhibit Nos. 1 and 2 were photographs of the bruises on her arm and thigh after being struck.

¶ 9 During cross-examination, Sarah admitted she was drinking on January 10 but contended defendant was also drinking. When asked about being struck by defendant, she stated defendant struck her "[m]any times" and she tried to move, but she is handicapped on her left side. Because of this handicap, she could not get away and "[t]here was nothing [she] could do" to protect herself. According to Sarah, all three children were present when defendant struck her. When asked about her daughter, M.A., speaking to the police on January 10, Sarah responded that M.A. was "brainwashed" by defendant. When defense counsel inquired further about this

comment, Sarah made allegations that defendant had been touching M.A. sexually. Thereafter, defense counsel attempted to clarify these allegations, and the following exchange occurred:

> "Q. So just to be clear, you are saying now under oath that my client, [defendant], has sexually touched your daughter?
>
> A. He has been trying to—
>
> [THE STATE]: Judge, I am going to object.
>
> THE COURT: Hold on. Tell her to wait. The objection?
>
> [THE STATE]: Relevance to the charges at hand.
>
> [DEFENSE COUNSEL]: Judge, this goes directly to bias.
>
> A. I'm—he has really pissed me off. I am really pissed off right now because you keep interrupting me.
>
> THE COURT: Hold on.
>
> A. And he touched my fucking daughter. And he keeps beating me up over and over and over and over again, and I am fed up. For six years. I am fed up with him. That man. Right there.
>
> THE COURT: Okay. Tell her to hold on a second. We need to take a few moments.
>
> A. Don't ever touch me. Don't ever beat me up over and over and over again.
>
> [DEFENSE COUNSEL]: I would ask the witness to please stop speaking while the Court rules.
>
> THE COURT: All right. What is the objection again?
>
> [DEFENSE COUNSEL]: It was the State's objection.

[THE STATE]: Relevance, Your Honor.

[DEFENSE COUNSEL]: Judge, my response was that it goes directly to bias.

(INTERPRETER MATHEWS)

THE COURT: I am going to overrule the objection. The answer will stand."

Defense counsel then asked how old M.A. was, and in response, Sarah stated:

> "And he has been touching my daughter. You know, and asking me please he wants to have sex with her, and I told him no. And he has begged me to have permission to have sex with my daughter and I keep telling him no over and over again. And he keeps beating me up. You know, I mean, I could be dead. I should be. I am pissed off about this. I need to protect my children. My daughter is my first priority. You know, she is my first daughter."

After this statement, defense counsel inquired why Sarah would allow defendant to stay in a hotel with her and her children. Sarah responded that she was "trying to be nice to him. You know, because he had no other place to go. And I told him, don't hurt me. You promised this to me. And he lied. And he keeps hurting me over and over." Sarah then acknowledged she told M.A. to "tell Officer Freeman that [defendant] had forced [M.A.] to touch his penis."

¶ 10 2. *Testimony of M.A.*

¶ 11 M.A. is the daughter of Sarah A. and was 12 years old at the time of her testimony. She identified defendant as someone her mother went to school with and that "[t]hey were dating at some point." On January 10, 2021, she was staying at the Econo Lodge with her mother and defendant. That evening, defendant was sewing masks and her mother was drinking. Defendant became frustrated with Sarah and "grabbed something that hit her and told her to sit down." M.A.

then clarified it was an ironing cord defendant hit her mother with. She believed her mother had bruises on her arm after being hit that night. After being shown State's exhibit No. 2, M.A. agreed it was a photograph of a bruise on her mother's arm or leg.

¶ 12 On cross-examination, M.A. acknowledged she only observed defendant strike her mother once with the cord and no other physical altercation occurred that night. When the police arrived, M.A. served as a translator for her mother. After the initial conversation with the officers, Officer Freeman took M.A. aside to speak with her privately because her mother kept interrupting while M.A. was translating. While M.A. was speaking privately to Officer Freeman, her mother came over and kept trying to interrupt. Her mother then told her to "tell the officer that [defendant] had forced [her] to *** touch his penis." M.A. contended this never happened and her mother was only saying it because she was intoxicated. M.A. agreed her mother asked her to tell the officers defendant "had drank four beers that evening" even though defendant did not drink any. Sarah also asked M.A. to tell the officers she only had two beers even though she "drank the rest of the pack."

¶ 13 3. *Testimony of Officer Freeman*

¶ 14 Jerrad Freeman is a patrol officer with the City of Bloomington Police Department. On January 10, 2021, he was dispatched to the Econo Lodge around 3 a.m. Upon arrival, he went inside and checked with the hotel clerk about a 911 call. The clerk told Freeman he did not call 911 and could not tell who did, but that the group outside had "possibly been fighting earlier." Freeman went outside and met with the group, which included defendant, Sarah, and M.A. He spoke with Sarah, who "seemed upset, distraught," and was "pacing back and forth." After speaking with Sarah, he photographed bruising on her right arm and left leg. Freeman testified State's exhibit Nos. 1 and 2 were the photographs he took of Sarah's arm and leg on January 10.

¶ 15 On cross-examination, Freeman acknowledged that M.A. was interpreting for

Sarah during his conversation with Sarah. He eventually took M.A. aside and spoke to her privately, but while he was speaking with M.A., Sarah came over and interrupted. Freeman did not recall what Sarah asked M.A. to translate when Sarah came over and interrupted. Freeman also did not recall Sarah alleging that defendant had inappropriate sexual contact with M.A.

¶ 16 4. *Testimony of Officer Elston*

¶ 17 Tyler Elston is a patrol officer with the City of Bloomington Police Department. Around 3 a.m. on January 10, 2021, he was dispatched to the Econo Lodge for a domestic situation. Elston was driving a "fully-marked police squad car" and wearing his "department-issued police uniform" that night. On arrival, he spoke with defendant. Elston acknowledged defendant has a hearing impairment, but he insisted he was able to communicate with defendant because defendant could read lips. To Elston, it "appeared as though [defendant] [understood] what [he] was saying, to an extent." During their conversation, defendant told Elston that Sarah was his girlfriend. After speaking with defendant, Elston placed defendant in handcuffs and secured him in the back of a squad car. Elston sat in the front seat of the squad car and attempted to read defendant his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)). However, it became clear to Elston defendant could not understand him due to the plexiglass barrier separating the front and rear portions of the squad car. Because of this, Elston exited his squad car and opened the rear passenger door so defendant could read his lips while Elston read the *Miranda* rights. Elston testified State's exhibit No. 4 was the video from his body-worn camera on January 10. This video was admitted and published to the jury. While Elston was trying to explain the situation to defendant, defendant kept interrupting and eventually stepped out of the squad car. Elston told defendant to "have a seat back in the car," but defendant did not comply. He repeated this command "at least 25 times." Defendant kept insisting he did nothing wrong and asking what he did wrong. Elston told defendant he was

under arrest for domestic battery, and defendant responded "he did not do anything." After defendant's continued noncompliance, Elston was eventually able to push defendant back into the car.

¶ 18 On cross-examination, Elston testified the only training, if any, he received on interactions with hearing impaired citizens was at a "Crisis Intervention Training" eight years ago. Elston insisted defendant was able to read his lips on January 10 but conceded that not all defendant's statements were responsive to the questions asked. He then agreed it was possible defendant misread his lips. Elston acknowledged when he first spoke to defendant, defendant was cooperative, willing to talk, and did not resist while being handcuffed or placed in the squad car. Additionally, even after defendant exited the squad car, defendant did not "attempt to walk away from the vehicle or run."

¶ 19 5. *Verdict*

¶ 20 Following Elston's testimony, the State rested. The defense did not present any evidence. During the jury instruction conference, defense counsel did not request any jury instructions on other crimes evidence. After closing arguments and deliberations, the jury found defendant guilty of resisting a peace officer and domestic battery and not guilty of aggravated battery.

¶ 21 B. Sentencing

¶ 22 At defendant's sentencing hearing, the State requested the trial court sentence defendant to 180 days in jail. The State based its recommendation on defendant's prior criminal history and the nature of the domestic battery offense. Defense counsel requested 18 months of conditional discharge with 180 days in jail stayed pending defendant's completion of an anger management course. To support this argument, he cited defendant's minimal criminal history and

noted defendant would benefit from anger management counseling. During defendant's statement in allocution, defendant explained, "I have been trained to understand people orally and talk orally, but it's not perfect." As defendant's statement in allocution continued, defendant made the following remarks:

> "I had a witness, a witness was taken from me like my witnesses in the hallway today.
>
> * * *
>
> I wanted to show the video, but I couldn't bring the phone into the courthouse. This courthouse doesn't let you. Sangamon County you can bring your phone in to show your own evidence. It's very difficult to just sit there when I have evidence, but I couldn't bring it in.
>
> If I showed the video, the state's attorney would look bad. The officer did have the camera on. I was sewing on the sewing machine, I put my phone in the position where it could be seen from my point of view, and I tried to put it on a USB but someone had stolen my—but—but the partner that I was living with took my laptop. I spent all of my income on that hotel and everything that I had on that laptop for the last five years was there and I had the video on my phone and my laptop and she took that.
>
> And I told Mr. McEldowney that I wanted a better judge, I wanted, you know, a better situation to show what I could show. Really, the video could speak for itself, you could see all of it with your own eyes, but here I'm blocked from access. *** I really, I had the evidence had I been able to present it, but I feel like I was barred from presenting it.

I just feel at every turn here, I can't, can't, can't, can't, can't, when I do have proof. And then you have somebody accusing me of saying that I did it, but I have a video showing a different point of view, a different story? Right now I'm stuck. There are things that I can't bring into the courtroom. It's one barrier after another and I'm sitting here patiently.

* * *

I'm upset. The jury didn't see what my side of the story was, they didn't get to see my video. I feel this has been very unfair."

At that point, the court stopped defendant and engaged in the following colloquy with defense counsel:

"THE COURT: [Defense counsel], there has been some allegations here that you were made aware of some evidence, but did not produce it. Can you talk to me about that?

[DEFENSE COUNSEL]: Yes, your Honor. Fairly early in my discussions—I guess, Judge, I should stop here. Presumably, this is of the nature of a *Krankel* inquiry.

THE COURT: Initially that's what I'm doing here.

[DEFENSE COUNSEL]: So with respect to confidentiality, I wanted to address before going on."

Defense counsel then indicated he spoke with defendant about the video but did not believe it had evidentiary value. He opined that "a video not showing a battery was not particularly persuasive evidence that a battery did not occur at a time outside of what was captured on the video," and he "did not believe that [the video] was particularly useful evidence given what was described."

Defense counsel admitted he had not seen the video but reiterated he "[did] not believe it had any substantial evidentiary value."

¶ 23 Following defense counsel's proffer, the trial court did not make any findings regarding the preliminary *Krankel* inquiry. Instead, it proceeded directly with handing down defendant's sentence. The court sentenced defendant to 180 days in jail due to defendant's prior failure to comply with "community-based sentences."

¶ 24 This appeal follows.

¶ 25 II. ANALYSIS

¶ 26 Defendant presents three arguments on appeal. First, defendant contends the State did not present sufficient evidence to prove his guilt beyond a reasonable doubt. Second, defendant alleges defense counsel was ineffective for failing to object to Sarah's testimony regarding prior bad acts and failing to request a corresponding limiting instruction. Lastly, defendant argues the trial court erred by failing to conduct an adequate preliminary *Krankel* inquiry into his allegations of ineffective assistance of counsel. We address each argument in turn.

¶ 27 A. Sufficiency of the Evidence

¶ 28 When faced with a challenge as to whether the State has failed to prove a defendant's guilt beyond a reasonable doubt, this court must determine " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "[I]n applying this standard, we will neither reweigh evidence nor judge witness credibility; rather, we defer to the fact finder's credibility determinations." *People v. Acklin*, 2020 IL App (4th) 180588, ¶ 15, 175 N.E.3d 215. Furthermore, we will not

reverse a defendant's conviction for insufficient evidence " 'unless the evidence is so improbable or unsatisfactory that a reasonable doubt remains as to the defendant's guilt.' " *People v. McKown*, 2021 IL App (4th) 190660, ¶ 49, 180 N.E.3d 909 (quoting *People v. Harris*, 2018 IL 121932, ¶ 26, 120 N.E.3d 900).

¶ 29 1. *Resisting a Peace Officer*

¶ 30 In order to convict a defendant for resisting a peace officer, the State must establish the defendant "resist[ed] or obstruct[ed] the performance by one known to the [defendant] to be a peace officer *** of any authorized act within his or her official capacity" (720 ILCS 5/31-1(a)(2) (West 2020)). In this case, the State charged defendant with resisting a peace officer for

> "knowingly resist[ing] the performance of Bloomington Police Department peace officer Tyler Elston of an authorized act within his official capacity, being the arrest of teh [*sic*] defendant, said defendant knowing officer Elston to be a peace officer engaged in the execution of his official duties, in that said defendant refused to sit in a squad car despite repeated orders to do so, and pulled away from and pushed against officer Elston."

¶ 31 Defendant does not dispute he knew Elston was a peace officer or that Elston was authorized to arrest him based on Elston's capacity as a peace officer. Instead, defendant contends the State failed to prove (1) his action of failing to sit in the squad car constituted resistance under the statute and (2) he knowingly resisted Elston.

¶ 32 a. Defendant's Failure to Sit in the Squad Car

¶ 33 Section 31-1(a) of the Code of Criminal Procedure of 1963 "proscribe[s] only some physical act which imposes an obstacle which may impede, hinder, interrupt, prevent or delay the performance of the officer's duties, such as going limp, forcefully resisting arrest or physically

aiding a third party to avoid arrest." *People v. Raby*, 40 Ill. 2d 392, 399, 240 N.E.2d 595, 599 (1968). " 'Resist' is defined as 'to withstand the force or the effect of' or the exertion of 'oneself to counteract or defeat.' [Citation.] Thus, 'resist' implies some type of physical exertion in relation to the officer's actions." *People v. Baskerville*, 2012 IL 111056, ¶ 25, 963 N.E.2d 898.

¶ 34 Defendant argues his refusal to sit in Elston's squad car did not constitute a physical act sufficient to sustain a conviction for resisting a peace officer. However, defendant's argument fails to acknowledge he was not charged with three separate counts of resisting a peace officer for each of his actions. Instead, defendant was charged with resisting a peace officer for his cumulative actions of failing to sit in the squad car, pulling away from Elston, and pushing against Elston. Even if, arguably, refusing to sit in Elston's squad car, by itself, may not have been a sufficient physical exertion to sustain a conviction for resisting a peace officer, this inaction combined with his other actions of pulling away from and pushing against Elston to prevent Elston from placing him back in the squad car constitute sufficient physical exertion to sustain a conviction for resisting a peace officer. See *People v. Sadder-Bey*, 2023 IL App (1st) 190027, ¶ 42 ("Passive acts, or failing to act when ordered to, can be acts of 'resistance,' but they often will need to be combined with some other act of opposition or counteraction to reach a level of materiality that is criminal.").

¶ 35 We conclude defendant's actions were sufficient to constitute resisting a peace officer, and we now turn to whether defendant acted knowingly when he resisted Elston.

¶ 36 b. Whether Defendant Acted Knowingly

¶ 37 The offense of resisting a peace officer requires knowing conduct by the defendant. Therefore, "a conviction under [Section 31-1(a)] cannot be sustained unless the defendant acted with knowledge." *People v. Allison*, 2021 IL App (4th) 190182-U, ¶ 35 (unpublished order under Supreme Court Rule 23). Section 4-5 of the Criminal Code of 2012 defines "knowledge" as:

"A person knows, or acts knowingly or with knowledge of:

(a) The nature or attendant circumstances of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that his or her conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists.

(b) The result of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5 (West 2020).

Furthermore, in criminal cases, because of the inherent nature of knowledge, it "may be, and ordinarily is, proven circumstantially." *People v. Ortiz*, 196 Ill. 2d 236, 260, 752 N.E.2d 410, 425 (2001); see *People v. Monteleone*, 2018 IL App (2d) 170150, ¶ 26, 112 N.E.3d 637 ("Direct proof of a defendant's knowledge is unnecessary, and a defendant's knowledge can be inferred from the surrounding facts and circumstances.").

¶ 38 Defendant contends the State failed to prove he knowingly resisted Elston. In support of his contention, defendant states the evidence presented "does not support a reasonable inference that [defendant] could hear Elston's commands, and therefore does not support any reasonable inference that [defendant] knowingly resisted a peace officer by refusing to sit in the squad car, pulling away from Elston, or pushing against Elston." Defendant suggests many of his answers to Elston's questions were not responsive, and thus, it is clear he could not hear or understand Elston. However, after reviewing Elston's testimony, along with State's exhibit No. 4, we find a reasonable jury could have determined defendant understood Elston's commands and acted knowingly when refusing to follow them. Throughout the video, a multitude of defendant's responses to Elston's questions or statements were responsive, and if not responsive, they appeared

to be argumentative, rather than a reflection of misunderstanding. It was a reasonable conclusion based on Elston's testimony and the video that defendant understood Elston's commands but chose to disobey them because he did not feel he did anything wrong and wanted to plead his case to Elston. Based on this, we find there was sufficient evidence to support the jury's conclusion that defendant knowingly resisted Elston.

¶ 39 After reviewing the evidence in the light most favorable to the State, we conclude there was sufficient evidence presented for a rational trier of fact to determine the State proved defendant guilty of resisting a peace officer beyond a reasonable doubt.

¶ 40 2. *Domestic Battery*

¶ 41 To sustain a conviction for domestic battery under subsection (a)(1), the State must prove the defendant "knowingly without legal justification by any means *** cause[d] bodily harm to any family or household member." 720 ILCS 5/12-3.2(a)(1) (West 2020). Bodily harm is defined as "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent." *People v. Mays*, 91 Ill. 2d 251, 256, 437 N.E.2d 633, 635-36 (1982). In this case, defendant was charged with domestic battery for "caus[ing] bodily harm to Sarah [A.], a household or family member, by striking her, causing injury." Defendant does not challenge that Sarah was a family or household member. Therefore, we focus our analysis solely on whether the State proved defendant struck her and caused bodily harm.

¶ 42 Defendant first contends the State failed to prove his guilt beyond a reasonable doubt because Sarah was an incredible witness. This contention is based on inconsistencies in her testimony, specifically, her inability to remember details about the incident and her unfounded allegations that defendant was sexually abusing M.A. Defendant is correct that Sarah's testimony was somewhat inconsistent, and her credibility was attacked by defense counsel. However, our

supreme court has determined "it is for the fact finder to judge how flaws in part of the testimony affect the credibility of the whole." *Cunningham*, 212 Ill. 2d at 283. Simply put, although her credibility was damaged, the jury could choose to believe Sarah's testimony about defendant striking her. Furthermore, at least some of Sarah's testimony was corroborated by M.A.'s testimony. Sarah testified defendant struck her multiple times on the arm and leg with the ironing cord. M.A. testified she observed defendant strike Sarah once with the ironing cord. Both Sarah and M.A. testified that State's exhibit No. 2 was a photograph of bruising on Sarah after being struck by defendant. Based on this testimony, there was sufficient evidence presented for the jury to find defendant struck Sarah with the ironing cord and caused bruising.

¶ 43 Next, defendant contends the bruising depicted in State's exhibit Nos. 1 and 2 could not have been caused by defendant striking Sarah even once with the ironing cord. Defendant asserts the color and shape of the bruising is inconsistent with Sarah's description of events. Thus, according to defendant, without this bruising, the State failed to prove defendant caused bodily harm to Sarah. However, even if we accept defendant's contention the bruising in the photographs was not caused by defendant striking Sarah, bodily harm only requires "some sort of physical pain *or* damage to the body." (Emphasis added.) *Mays*, 91 Ill. 2d at 251. During her testimony, Sarah repeatedly stated defendant struck and caused her pain: "It hurt really, really bad, too. *** It was extremely painful. Like, wow, really bad. It hurt a lot." Consequently, there was sufficient evidence presented for the jury to find defendant caused Sarah bodily harm by striking her at least once with the ironing cord.

¶ 44 After reviewing the evidence in the light most favorable to the State, we conclude there was sufficient evidence presented for a rational trier of fact to determine the State proved defendant guilty of domestic battery beyond a reasonable doubt.

¶ 45 B. Ineffective Assistance of Counsel

¶ 46 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Veach*, 2017 IL 120649, ¶ 29, 89 N.E.3d 366. To prevail on a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show "counsel's performance 'fell below an objective standard of reasonableness.' " *People v. Valdez*, 2016 IL 119860, ¶ 14, 67 N.E.3d 233 (quoting *Strickland*, 466 U.S. at 688). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 47 1. *Failing to Object*

¶ 48 First, defendant contends defense counsel's failure to object to statements made by Sarah regarding prior bad acts constituted ineffective assistance of counsel, specifically, the following statements contained in Sarah's testimony: (1) "he keeps beating me up over and over and over and over again, and I am fed up. For six years"; (2) "Don't ever touch me. Don't ever beat me up over and over and over again"; (3) "And he keeps beating me up. You know, I mean, I could be dead. I should be. I am pissed off about this"; and (4) "And I told him, don't hurt me. You promised this to me. And he lied. And he keeps hurting me over and over." All the foregoing statements were either blurted out by Sarah while no question was pending or part of a completely nonresponsive answer to defense counsel's questioning. It is undisputed that defense counsel did

not object to any of these statements. However, the State objected to the prior-bad-acts testimony. Furthermore, defense counsel's response to the State's objection suggests a trial strategy.

¶ 49 Specifically, the State objected to defense counsel questioning Sarah about her allegations of sexual misconduct between defendant and M.A. Before the trial court had an opportunity to rule on the objection, Sarah interjected two of the statements noted above: (1) "he keeps beating me up over and over and over and over again, and I am fed up. For six years;" and (2) "Don't ever touch me. Don't ever beat me up over and over and over again." These two statements were made by Sarah after the State's objection but before defense counsel responded. In defense counsel's response to the State's objection, defense counsel explained to the court, "it goes directly to bias." The court then overruled the State's objection. This suggests defense counsel had a strategic purpose in soliciting the prior bad acts information. Sarah continued to make these statements throughout defense counsel's cross-examination. However, after the court's ruling on those two sentences, neither the State nor defense counsel followed up on the prior-bad-acts statements. Furthermore, we note these statements were never mentioned by the State in its closing argument.

¶ 50 Based on the other evidence presented at defendant's jury trial, coupled with the fact that these statements were never referenced by the State, we conclude defendant has not demonstrated prejudice resulting from defense counsel's failure to object to these statements. This case is factually similar to *People v. Whitney*, 2021 IL App (4th) 180517-U, ¶ 44 (unpublished order under Supreme Court Rule 23), in which a witness responded to a question by saying he "awoke to [his] mother screaming, ' "He did it again." ' " In that case, defense counsel objected to the statement but the trial court overruled the objection. This statement was then repeated by the State in its closing argument. Even so, we found it was an isolated statement which likely did not

contribute to the defendant's conviction. *Id*. While in *Whitney*, the witness only made one statement regarding prior bad acts, the statement was highlighted by the State during its closing argument. *Id*. In this case, although there were multiple statements, the statements were unresponsive to any questioning, neither party followed up on the statements, and the statements were not discussed in closing arguments. There was also sufficient evidence, even without these statements by Sarah, to find defendant guilty of domestic battery, as discussed above. Consequently, we find defendant cannot establish he was prejudiced by defense counsel's failure to object to Sarah's statements.

¶ 51 We note that appellate counsel urges us to find that the State has forfeited its argument regarding the prejudice prong of *Strickland* by failing to address it in its brief. Appellate counsel points us to Illinois Supreme Court Rule 341(h)(7) (eff. Oct. 1, 2020) to support its contention. However, "it is well-established this court may affirm on any basis appearing in the record. [Citation.] In so doing, we are not limited to only those arguments made by the State or appellee." *People v. Rolfe*, 2023 IL App (4th) 220364-U, ¶ 47 (unpublished order under Supreme Court Rule 23). For this reason, although the State failed to address the prejudice prong of *Strickland* in its argument, we do not find this forfeiture prevents us from analyzing defendant's ineffective assistance of counsel claim under the second prong of *Strickland*.

¶ 52 2. *Failing to Request a Limiting Instruction*

¶ 53 Defendant next argues defense counsel was ineffective for failing to request Illinois Pattern Jury Instructions, Criminal, No. 3.14 (approved Oct. 17, 2014) (hereinafter IPI Criminal No. 3.14) be given based on the prior-bad-acts testimony from Sarah. "It is well settled in Illinois that counsel's choice of jury instructions *** is a matter of trial strategy." *People v. Sims*, 374 Ill. App. 3d 231, 267, 869 N.E.2d 1115, 1144 (2007). However, simply because a decision was a

matter of trial strategy does not prevent this court from finding ineffective assistance of counsel based on the finding the trial strategy was "objectively unreasonable." See *People v. Lawson*, 2019 IL App (4th) 180452, ¶ 42, 139 N.E.3d 663. Defendant contends no reasonable strategy existed for defense counsel's failure to request IPI Criminal No. 3.14 to be given. IPI Criminal No. 3.14 states:

> "[1] Evidence has been received that the defendant[s] [(has) (have)] been involved in [(an offense) (offenses) (conduct)] other than [(that) (those)] charged in the [(indictment) (information) (complaint)].
>
> [2] This evidence has been received on the issue[s] of the [(defendant's) (defendants')][(identification) (presence) (intent) (motive) (design) (knowledge) (____)] and may be considered by you only for that limited purpose.
>
> [3] It is for you to determine [whether the defendant[s] [(was) (were)] involved in [(that) (those)] [(offense) (offenses) (conduct)] and, if so,] what weight should be given to this evidence on the issue[s] of ____." IPI Criminal No. 3.14.

¶ 54 Defendant points us to two cases, *People v. Jackson*, 357 Ill. App. 3d 313, 828 N.E.2d 1222 (2005), and *People v. Hooker*, 253 Ill. App. 3d 1075, 625 N.E.2d 1081 (1993), for the proposition that "defense counsel's failure to request a limiting instruction 'when he is entitled to one, is not a matter of discretion or trial strategy.' " We find *Jackson* and *Hooker* distinguishable. In *Jackson*, evidence of the defendant's membership in a gang was admitted for the purpose of "show[ing] motive or intent for the charged offense," and thus, defendant was entitled to IPI Criminal No. 3.14. *Jackson*, 357 Ill. App. 3d at 320. Additionally, the State "focused on this evidence throughout trial and during closing arguments." *Id.* at 321. In *Hooker*, the Second District determined, because defendant was entitled to a limiting instruction regarding other crimes

evidence elicited from the victim on cross-examination, defense counsel was deficient for failing to request one. *Hooker*, 253 Ill. App. 3d at 1085. Similar to *Jackson*, the State focused on this other crimes evidence in its closing argument. *Id*.

¶ 55 Here, although statements of other crimes evidence were volunteered by Sarah during defense counsel's cross-examination, these statements were never followed up on or highlighted by the State in closing arguments. Because of this, we find it was reasonable trial strategy for defense counsel not to request a limiting instruction, to avoid drawing attention to the statements. See *People v. Johnson*, 368 Ill. App. 3d 1146, 1161, 859 N.E.2d 290, 304 (2006) ("Counsel may have made a tactical decision not to request such an instruction to avoid unduly emphasizing the other-crimes evidence."), and *People v. Peel*, 2018 IL App (4th) 160100, ¶ 52, 115 N.E.3d 982 ("The decision to not request a limiting instruction may have been trial strategy in order to avoid drawing undue attention to the other-crimes evidence."). Furthermore, defense counsel utilized the statements made by Sarah regarding allegations of sexual misconduct in his closing argument to demonstrate her bias against defendant. Although defense counsel did not highlight any of Sarah's statements about the prior bad acts, these statements were elicited during the line of questioning regarding the sexual misconduct allegations and supported defense counsel's bias argument, even without defense counsel drawing attention to the specific statements. For these reasons, we find it was reasonable trial strategy for defense counsel not to request a limiting instruction under these circumstances. Because we have determined it was reasonable trial strategy for defense counsel not to request the limiting instruction, we find defendant has not established the deficient performance necessary to prove ineffective assistance of counsel.

¶ 56 C. Preliminary *Krankel* Inquiry

¶ 57 Lastly, defendant alleges the trial court failed to conduct an adequate preliminary *Krankel* inquiry into his claims of ineffective assistance of counsel raised at his sentencing hearing. Defendant asserts the court did not sufficiently explore the two grounds raised in his statement. Specifically, those grounds were (1) defendant had a video he wanted to use as evidence at trial, which defense counsel did not watch, and (2) he had a witness for trial and sentencing, whom defense counsel did not call.

¶ 58 Our supreme court determined in *People v. Ayres*, 2017 IL 120071, ¶ 11, 88 N.E.3d 732, that "[t]he common-law procedure, which has evolved from our decision in *Krankel*, is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel." Once a claim has been raised, the trial court is required to conduct "some type of inquiry into the underlying factual basis, if any, of a defendant's *pro se* posttrial claim of ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d 68, 79, 797 N.E.2d 631, 638 (2003). "If the court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion." *People v. Roddis*, 2020 IL 124352, ¶ 35, 161 N.E.3d 173. On review,

> "[the] reviewing court should consider three factors when determining whether a *Krankel* inquiry was sufficient: (1) whether there was some interchange between the trial court and defense counsel regarding the facts and circumstances surrounding the allegedly ineffective representation, (2) the sufficiency of defendant's *pro se* allegations of ineffective assistance, and (3) the trial court's knowledge of defense counsel's performance at trial and the sufficiency of the defendant's allegations on their face." *People v. Schnoor*, 2019 IL App (4th) 170571, ¶ 71, 145 N.E.3d 544.

We review *de novo* whether the trial court conducted a proper preliminary *Krankel* inquiry. *Roddis*, 2020 IL 124352, ¶ 33.

¶ 59 1. *Video Evidence*

¶ 60 Defendant concedes that the trial court inquired about the video but states "it failed to gather sufficient information to understand [defendant's] allegation." To support this contention, defendant argues the court failed to inquire of defense counsel as to the specific contents of the video and merely accepted defense counsel's statements that the video did not have evidentiary value. However, during defense counsel's colloquy with the court, defense counsel specifically noted he had discussed the contents of the video with defendant, and after those conversations, defense counsel did not believe the video had evidentiary value. Defense counsel further stated that "based on what was described I expressed my opinion that a video not showing a battery was not particularly persuasive evidence that a battery did not occur at a time outside of what was captured on the video and did not believe that that was particularly useful evidence given what was described." Based on these statements, there was an adequate factual basis for the court to determine this claim was insufficient to support a *Krankel* hearing.

¶ 61 2. *Potential Witnesses*

¶ 62 During his statement in allocution, defendant also made the statement that "I had a witness, a witness was taken from me like my witnesses in the hallway today." Defendant did not elaborate on this statement, and the trial court did not inquire further about this statement. Because of the court's lack of inquiry, defendant contends the case must be remanded for a new preliminary *Krankel* hearing so defendant may flesh out this contention. We disagree.

¶ 63 This conclusory allegation is factually similar to the statements raised by the defendant in *People v. Reed*, 361 Ill. App. 3d 995, 1003-04, 838 N.E.2d 328, 335 (2005). In *Reed*,

the defendant wrote a letter to the trial court "complaining that [defense counsel] had failed to subpoena witnesses who might have helped the defense." *Id.* at 998. The trial court did not respond to the defendant's letter or inquire about the allegation. *Id.* at 999. We determined, based on a review of the "conclusory allegations" in the defendant's letter, remand was not required. *Id.* at 1003. In so finding, we noted, "Defendant does not specify what the witnesses would have said on the stand or how they would have helped his case. He calls them 'witnesses,' but it is unclear what they witnessed." *Id*. The same is true in this case.

¶ 64 Here, defendant made a single, conclusory statement that he was unable to present witnesses, some of whom were in the hallway. Defendant failed to raise the issue at trial and failed to provide the trial court with any specific details or names. Further, based on the undisputed evidence at trial, the only individuals present during the incident on January 10 were defendant, Sarah, her three minor children, and the two officers. M.A., Sarah's oldest child, was subpoenaed by defense counsel and testified at trial. Defendant knew the identities of the other minor children and subpoenaed only M.A. Thus, it is reasonable to conclude defendant's other witnesses were not Sarah's other minor children. Accordingly, it is a reasonable inference that any proposed witnesses defendant wished to present at trial would not have had any additional evidentiary value as they were not occurrence witnesses. In support of this inference, we note the same judge who sentenced defendant presided over the jury trial, and thus was familiar with the evidence presented, along with defense counsel's performance at trial. Consequently, we find the court did not err in finding this claim was insufficient to trigger a *Krankel* hearing.

¶ 65 III. CONCLUSION

¶ 66 For the reasons stated, we affirm the judgment of the trial court.

¶ 67 Affirmed.