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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-0191
)	
JAMES MURPHY,)	Honorable
)	Daniel P. Guerin,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* Because Y-STR DNA testing is generally accepted in the scientific community, the trial court did not err in admitting such evidence without a *Frye* hearing. In addition, we vacated one of defendant's convictions for aggravated criminal sexual abuse pursuant to the one-act, one-crime doctrine and modified the mittimus to reflect that defendant's 14-year sentence for the remaining aggravated criminal sexual abuse conviction to run concurrently with defendant's conviction for predatory criminal sexual assault. Thus, we vacated in part and affirmed as modified.

¶ 2 Following a jury trial, defendant, James Murphy, was convicted of one count of predatory criminal sexual assault of a child, two counts of aggravated criminal sexual abuse, seven counts of criminal sexual assault, and one count of home invasion. Thereafter, the trial court sentenced

defendant to consecutive sentences of 40, 28, 72, and 8 years' imprisonment, respectively. Defendant now appeals, contending that the admissibility of Y-STR DNA testing required a *Frye* hearing; (2) one conviction of criminal sexual abuse must be reversed pursuant to the one-act, one-crime doctrine; and (3) the sentence for the remaining count of criminal sexual abuse must be reduced to eight years. For the following reasons, we vacate in part and affirm in part, as modified.

¶ 3

I. BACKGROUND

¶ 4 The record reflects that, on January 17, 2008, a grand jury indicted defendant with 7 counts of criminal sexual assault, 3 counts of criminal sexual abuse, 2 counts of aggravated criminal sexual abuse, a single count of predatory criminal sexual assault of a child, and 13 counts of home invasion. The indictment stemmed from an incident on August 27, 2005, where a masked intruder entered a ground-floor apartment in Wheaton and committed numerous sex acts with K.R. and K.R.'s five-month-old daughter, L.R.

¶ 5 At trial, K.R. testified that, while she was sleeping on the morning of August 27th, defendant, who was wearing a mask and gloves, awakened her in her bedroom by covering her mouth, nose, and face. The man told K.R. to be quiet and asked her if there was anyone else in the apartment; K.R. responded that L.R. was in the other room. Defendant guided K.R. into the bathroom and told her to take off her clothes. Once undressed, defendant lifted K.R.'s legs against the doorframe, retrieved a camera from his pocket, and took photographs of K.R. After removing his gloves, defendant inserted his finger into K.R.'s vagina and grabbed her breasts. K.R. testified that defendant's mask would "ride up on him" and that she noticed that he had a dimple on his chin.

¶ 6 K.R. testified that defendant guided her back to her bedroom, then back to the bathroom, and again inserted his finger into her vagina and into her anus. Defendant also told K.R. to insert her finger into her anus, which she did. Defendant then told her to insert two fingers into her anus, which she also did. Defendant took pictures of K.R. penetrating herself. Thereafter, defendant advised K.R. that “this is going to hurt” and proceeded to pull K.R.’s vagina open with both hands, her anus open with both hands, and squeezed her nipples “very hard.”

¶ 7 Thereafter, defendant ordered K.R. to go into L.R.’s room. Defendant asked K.R. if the minor was a boy or a girl, and K.R. responded that L.R. was a five-month-old girl. Defendant instructed K.R. to remove L.R.’s clothes, including her diaper, and to take L.R. into the bathroom. K.R. testified that, once they were in the bathroom, defendant spread L.R.’s legs open and “was looking and touching her vagina.” Defendant opened L.R.’s vagina with both hands and instructed K.R. to perform oral sex on L.R., which she did. Defendant snapped photographs of K.R. “doing that.” Defendant then ordered K.R. to L.R.’s room and K.R. placed L.R. back in her crib.

¶ 8 After L.R. was placed in her crib, defendant again ordered K.R. into the bathroom. Once back in the bathroom, K.R. lied down and defendant kneeled, pulled down his pants, and began to rub his penis on K.R.’s vagina. K.R. testified that defendant could not maintain an erection, so he guided her back to L.R.’s room and ordered her to perform oral sex on him. K.R. testified that defendant told her stop and he guided her back to the bathroom. Defendant once again tried to insert his penis into K.R.’s vagina, but according to K.R.’s testimony, “[i]t wasn’t working.” Defendant ordered K.R. to “stroke” his penis, which she did, and he again tried to insert his penis into her vagina. At that point, L.R. began to cry and defendant became frustrated. Defendant told K.R. to get into the shower and wash herself with soap, particularly her vagina and anus.

Defendant snapped photographs of K.R. while she was in the shower. Defendant asked K.R. if he could keep her underwear and she agreed. Defendant put on his clothes, picked up his camera, and left. K.R. called a friend after defendant left her apartment and her friend called 911.

¶ 9 The police arrived and transported K.R. by ambulance to Central Du Page Hospital, where hospital personnel performed a rape evaluation, which included a rape kit. Tamara Camp testified at trial that none of the tests she performed on the swabs from the rape kit resulted in DNA indicating a suspect.

¶ 10 Douglas Saul, technical leader and forensic biology DNA section supervisor for the Du Page County Crime Laboratory, testified regarding K.R.'s vaginal swabs. Saul testified that the Y-STR results "were very low," which indicated that there was not a large quantity of male DNA present. Saul specified that he was able to retrieve results from 8 of 16 locations examined. Saul explained that Y-STR profiles are different than typical STR DNA analyses because it looks for the Y chromosome, which is unique to males. Saul testified that, absent a mutation, the Y chromosome passes from father to son.

¶ 11 Saul explained that because "some of the statistics are not as discriminatory with Y-STR testing as they are with other types of DNA testing ***, so that's why we don't normally begin with Y-STR testing." Y-STR involves a national database of profiles, and every time a unique Y-STR profile is observed, the lab enters that profile into the database. Law enforcement can then compare evidence in a future case to the national database and count how many times a particular Y-STR profile has been observed before. Saul opined that Y-STR testing is the "best course of action" when there is a large amount of DNA from a female and a very small amount from a male, such as when a male places his finger into a woman's vagina. Saul testified that, at

the time the DNA retained from the eight locations on the victim was entered into the database, there were 6,601 individuals in the database. Using those eight locations, defendant's profile had been seen seven times in the Y-STR database. Saul opined that, after using a confidence interval, he would not expect the locations that were observed to occur in more than 1 out of every 542 individuals. Saul cautioned that Y-STR testing does not have the same "distinguishing power that conventional DNA testing has." During cross-examination, Saul acknowledged that he could not specifically say that the Y strand DNA found and tested in this case belonged to defendant.

¶ 12 The State further introduced evidence that K.R. identified defendant in a lineup, other-crimes testimony regarding another incident where defendant committed a similar assault in Cook County, and child pornography. Lisa Malec, defendant's former fiancée, also testified at trial. During her testimony, Malec read portions of letters that she received from defendant while he was in the Cook County Jail. In one letter, when asked if he was involved in the Wheaton case described in a press release, defendant responded "[y]es, that was me." Defendant expressed concern about being charged.

¶ 13 After the close of evidence, the jury returned a guilty verdict. Thereafter, the State *nolle prossed* three counts which involved criminal sexual abuse charges relating to K.R. The trial court sentenced defendant to 10 years' imprisonment for count 1 (criminal sexual assault), 12 years' imprisonment for count 3 (criminal sexual assault), 10 years' imprisonment for count 4 (criminal sexual assault), 10 years' imprisonment for count 6 (criminal sexual assault), 14 years' imprisonment for count 7 (aggravated criminal sexual abuse with respect to L.R.), 14 years' imprisonment for count 8 (aggravated criminal sexual abuse with respect to L.R.), 40 years' imprisonment for count 9 (predatory criminal sexual assault of a child), 10 years' imprisonment

for count 10 (criminal sexual assault), 10 years' imprisonment for count 11 (criminal sexual assault), 10 years' imprisonment for count 12 (criminal sexual assault), and 8 years' imprisonment for count 14 (home invasion) to be served consecutively. The trial court noted that the maximum extended term sentence could not exceed 120 years' imprisonment. Defendant timely appealed.

¶ 14

II. ANALYSIS

¶ 15

A. Y-STR EVIDENCE

¶ 16 Defendant's first contention on appeal is that the trial court erred in admitting the Y-STR DNA evidence without a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). See Ill. R. Evid. 702 (eff. Jan. 1, 2011). Defendant argues that, pursuant to *Frye*, scientific evidence is only admissible if the "methodology upon which the opinion is based has gained general acceptance in the particular field in which it belongs." *Frye*, 293 F. at 1014 (D.C. Cir. 1923); see also *People v. McKown*, 226 Ill. 2d 245, 254 (2007).

¶ 17 Initially, defendant concedes that he did not properly preserve this issue for appellate review, but nonetheless urges us to review his contention under the plain-error doctrine. The plain-error doctrine allows a reviewing court to reach a forfeited error affecting substantial rights in two circumstances: (1) where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, the reviewing court may consider the forfeited error to preclude an argument that an innocent person was wrongly convicted; and (2) where the error is so serious that the defendant was denied a substantial right and thus a fair trial, the reviewing court may consider the forfeited error in order to preserve the integrity of the judicial process. *People v. Cosby*, 231 Ill. 2d 262, 272 (2008) (citing *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005)). However, the first step in plain-error review is to

determine whether an error occurred because “[a]bsent reversible error, there can be no plain error.” *Cosby*, 231 Ill. 2d at 273.

¶ 18 In this case, the plain-error doctrine is not applicable because the trial court did not commit reversible error. Recently, a different panel of this Court rejected the exact argument that defendant is making here. In *People v. Zapata*, 2014 IL App (2d) 120825, the court concluded that Y-STR DNA testing has gained general acceptance in the relevant field; and therefore, the trial court did not err in admitting such evidence without a *Frye* hearing. *Id.* ¶¶ 14-16. We are persuaded by the thoughtful reasoning in *Zapata* and agree with its holding. Thus, because Y-STR DNA testing has gained general acceptance in the scientific community, the trial court did not error in admitting such evidence in this case without a *Frye* hearing. *Id.* ¶ 16 “Because no error occurred, we need not consider the application of [the plain-error doctrine] to this appeal.” See *Cosby*, 231 Ill. 2d at 285.

¶ 19 **B. One Act, One Crime**

¶ 20 Defendant’s next contention on appeal is that one of his two convictions for aggravated criminal sexual abuse must be vacated because the evidence adduced at trial reflected that defendant touched L.R.’s sex organ a single time. According to defendant, his multiple convictions for this single act violates the one-act, one-crime doctrine pursuant to *People v. King*, 66 Ill. 2d 551, 556 (1997). The State counters that the evidence reflects that defendant committed two separate acts with respect to touching L.R.’s sex organ. The first act occurred when defendant and the two victims arrived in the bathroom, with defendant “looking and touching” L.R.’s vagina. The second act occurred when defendant opened L.R.’s vagina with both hands and ordered K.R. to perform oral sex on L.R.

¶ 21 The one-act, one-crime doctrine provides that multiple offenses may not be “carved from the same physical act.” *Id.* at 566. Whether a defendant’s convictions violate the one-act, one-crime doctrine is a question of law subject to *de novo* review. *People v. Strawbridge*, 404 Ill. App. 3d 460, 462 (2010). Moreover, “ ‘an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affect[] the integrity of the judicial process,’ ” thus satisfying the second prong of the plain-error doctrine, as outlined above. *Id.* (quoting *People v. Harvey*, 211 Ill. 2d 368, 369 (2004)).

¶ 22 In determining whether defendant’s two convictions for aggravated criminal sexual abuse against L.R. violate the one-act, one-crime doctrine, we find *People v. Sanford*, 119 Ill. App. 3d 160 (1984) instructive. In *Sanford*, the State charged defendant with rape and two counts of deviate sexual behavior based upon two separate acts of oral-genital contact, and a jury convicted defendant of all three counts. *Id.* at 161. On appeal, the reviewing court vacated one conviction for deviate sexual behavior. In doing so, the court concluded that the defendant’s two convictions “were based upon two acts with a single victim which were almost simultaneous in time.” *Id.* at 162.

¶ 23 In this case, after our careful review of the evidence, defendant’s two convictions for aggravated criminal sexual abuse for touching L.R.’s vagina violate the one-act, one-crime doctrine. Initially, we note that counts seven and eight of the indictment both alleged aggravated criminal sexual abuse. Count seven alleged that the act was “a different act than that alleged in count [eight]”; and count eight alleged that the act was “a different act than that alleged in count seven.” While the State argues that two separate touching acts occurred, *i.e.*, defendant initially “looking [at] and touching” L.R.’s vagina and subsequently opening L.R.’s vagina, the testimony

at trial reflects that, as in *Sanford*, those acts occurred almost simultaneously. Therefore, we vacate one of defendant's convictions for aggravated criminal sexual abuse. See *id.*

¶ 24

C. Sentence

¶ 25 Defendant's final contention is that the trial court erred in sentencing by ordering his sentences for aggravated criminal sexual abuse in counts 7 and 8 (14 years each) to run concurrently with defendant's home invasion conviction for count 14 (8 years). Defendant argues "[t]hat a 14-year sentence cannot run fully concurrent with an [8]-year term is obvious – the [8]-year term will end [6] years before the 14-year one. This [6]-year overhang makes the 14-year sentences unlawful." The State does not dispute this discrepancy, but argues that the trial court "clearly intended that the sentences for the two [] aggravated criminal sexual abuse convictions run concurrent to the remaining sentences imposed and not just home invasion." The State requests that we modify the mittimus to reflect that the remaining conviction for aggravated criminal sexual abuse runs concurrent with the other sentences imposed. In his reply, defendant states that he "has no qualms" with the State's suggestion and urges us to order that any terms for aggravated criminal sexual abuse run concurrently to the 40-year term imposed for defendant's conviction on count 9, predatory criminal sexual assault of a child.

¶ 26 "[T]he trial court is in the best position to fashion a sentence that strikes an appropriate balance between the goals of protecting society and rehabilitating the defendant." *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). Thus, we may not disturb a sentence within the applicable range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). A sentence is an abuse of discretion only if it is at great variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id.* at 210.

¶ 27 Here, we agree with the parties that we should modify and correct the mittimus to reflect that defendant's 14-year sentence for the remaining aggravated criminal sexual abuse conviction runs concurrently with the sentence imposed for count 9. See generally *People v. Whitmore*, 313 Ill. App. 3d 117, 121 (2000)(modifying a mittimus to reflect a sentencing credit). As defendant concedes, the trial court was aware that the sum of the maximum extended terms to be imposed for the two most serious felonies was 120 years. It is clear from our review of the record that the trial court intended to impose the maximum extended terms, or 120 years' imprisonment. Thus, to reduce defendant's sentence by six years because the trial court inadvertently ordered that defendant's convictions for aggravated criminal sexual abuse should run concurrently with his conviction for home invasion would be to, in effect, disturb the trial court's sentence absent an abuse of discretion. Accordingly, we modify the mittimus as noted above.

¶ 28

III. CONCLUSION

¶ 29 For the foregoing reasons, we vacate one of defendant's conviction for aggravated criminal sexual abuse, modify the mittimus to reflect that defendant's remaining conviction for aggravated criminal sexual abuse shall run concurrently with the term of imprisonment imposed for defendant's conviction for predatory criminal sexual assault of a child, and affirm the judgment of the circuit court of Du Page County in all other respects.

¶ 30 Affirmed as modified; vacated in part.