2017 IL App (4th) 150448-U

NO. 4-15-0448

FILED
August 1, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
ANTONIO FLORENCE,	)	No. 14CF183
Defendant-Appellant.	)	
	)	Honorable
	)	Christopher Perrin,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) On appeal, defendant is estopped from disputing the legal accuracy of a supplemental jury instruction which, in the trial court, he characterized as being "accurate."

(2) Assuming, for the sake of argument, that there was a *bona fide* doubt as to defendant's fitness to stand trial and that, hence, there was even a need for a fitness hearing, the record shows that instead of merely acceding to the expert's conclusion of fitness, the trial court considered the "contents" of the expert's report, thereby using its own independent judgment in arriving at its finding of fitness.

(3) The trial court did not abuse its discretion by omitting to find, *sua sponte*, a *bona fide* doubt as to defendant's fitness to be sentenced.

(4) If defense counsel had requested another fitness examination before the sentencing hearing, there is no reasonable probability that the trial court, acting in accordance with the law, would have granted the request and subsequently would have found defendant unfit to be sentenced, and thus, the omission of such a request does not amount to ineffective assistance.

(5) Because the State may assume the truth of its evidence, a prosecutor may assert to the jury that the State's witnesses testified truthfully.

(6) Because, in the jury trial, a prior consistent statement was admitted, without objection, as substantive evidence, the prosecutor did nothing objectionable, in his closing argument to the jury, by referring to the prior consistent statement as substantive evidence.

(7) In his surrebuttal, the prosecutor wrongfully appealed to the jury's emotions by his repeated references to the battered police officer's wife and three young children, but since defense counsel never objected and never reiterated the objection in the posttrial motion, this issue is procedurally forfeited.

(8) For purposes of the doctrine of plain error, the references to the police officer's family caused defendant no substantial prejudice, given the overwhelming evidence against him, and thus, it would be an exaggeration to say that these references threatened to put the judicial system in disrepute.

(9) Even if defense counsel had objected to the references to the police officer's family, there is no reasonable probability that the jury would have acquitted defendant, and thus, there is no prejudice for purposes of a claim of ineffective assistance of counsel.

¶ 2 A jury found defendant, Antonio Florence, guilty of various charges arising from his sexual assault of his ex-girlfriend and his physical violence toward a police officer who responded to the ex-girlfriend's 9-1-1 call. The trial court imposed upon him a lengthy composite prison sentence. Defendant appeals on the following grounds.

¶ 3 First, he argues the trial court erred by giving a supplementary jury instruction that, being an incorrect statement of the law, contradicted the other, previously given jury instructions. We hold that because defense counsel expressly took the position, in the trial court, that the proposed supplementary instruction was "accurate," defendant is estopped from making this argument.

¶ 4 Second, defendant argues the trial court failed to use its own independent discretion when finding him to be fit to stand trial, as opposed to merely acceding to the expert's conclusion of fitness. Assuming, for the sake of argument, that there was a *bona fide* doubt as to defendant's fitness to stand trial and that, hence, a fitness hearing was even required, the court

stated, on the record, that it had considered the "contents" of the expert's report (not merely the conclusion of fitness at the end of the report). Thus, the record shows the court used its own independent discretion when finding defendant to be fit to stand trial.

¶ 5 Third, defendant argues the trial court, *sua sponte*, should have ordered another fitness examination before holding the sentencing hearing, because the court had notice of facts tending to show that defendant's psychological condition had deteriorated since the trial. On the record before us, we are unable to say the court abused its discretion by omitting to find, in the sentencing hearing, a *bona fide* doubt as to defendant's fitness.

¶ 6 Fourth, in alternative to the third argument, defendant argues his defense counsel rendered ineffective assistance by failing to request another fitness examination before sentencing. We find no reasonable probability the request would have been granted or that the trial court ultimately would have found defendant to be unfit to be sentenced. Thus, we find no ineffective assistance in this regard.

¶ 7 Fifth, defendant complains the prosecutor deprived him of a fair trial by injecting impermissible matters into his arguments to the jury. Acknowledging that defense counsel never objected (and never reiterated the objections in the posttrial motion), defendant seeks to avert the resulting forfeiture by invoking the doctrine of plain error, and, alternatively, he claims his defense counsel rendered ineffective assistance by causing the forfeiture. The only impermissible matters we see in the prosecutor's arguments to the jury are his references to the police officer's family, most notably, his three young children. This was an attempt to arouse sympathy. Given the overwhelming evidence against defendant, however, we are unconvinced the references to the police officer's family engendered substantial prejudice against defendant such that it is impossible to say whether or not the verdicts of guilt resulted from the references. Thus, for

purposes of the doctrine of plain error, we are unconvinced that this emotional gimmick put the judicial system in disrepute. Also, we find no reasonable probability that omitting the references to the police officer's family would have resulted in an acquittal, and thus, the alternative claim of ineffective assistance fails.

¶ 8 Sixth, defendant argues the circuit clerk exceeded his authority by imposing fines on defendant, fines the trial court never imposed. The State agrees, and so do we. Later in this order, we specifically identify those fines, and we vacate them because they are void and not part of the trial court's judgment.

¶ 9 Therefore, we affirm the trial court's judgment.

¶ 10 I. BACKGROUND

¶ 11 A. The Indictment

¶ 12 On March 13, 2014, a grand jury returned an indictment against defendant. The indictment had 10 counts, all of which were based on his alleged actions on February 21, 2014, at the residence of Sonya Cornell, the mother of his child. She lived in Springfield, Illinois, at Gregory Court.

¶ 13 Count I was home invasion (720 ILCS 5/19-6(a)(6) (West 2014)); counts II and III were criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2014)), counts IV and V were aggravated battery (720 ILCS 5/12-3.05(d)(4) (West 2014)), count VI was criminal sexual abuse (720 ILCS 5/11-1.50(a)(1) (West 2014)), count VII was resisting a peace officer (720 ILCS 5/31-1(a) (West 2014)), counts VIII and IX were attempt to disarm a peace officer (720 ILCS 5/31-1a(b) (West 2014)), and count X was interfering with the reporting of domestic violence (720 ILCS 5/12-3.5(a) (West 2014)). (Counts VIII and IX of the indictment erroneously cited subsection (a) of section 31-1 (720 ILCS 5/31-1(a) (West 2014)) instead of subsection (b) (720

ILCS 5/31-1a(b) (West 2014)), but those counts clearly charged defendant with attempt to disarm a peace officer, explicitly naming that offense and alleging its elements.)

¶ 14 B. The Fitness Examination by Terry M. Killian

¶ 15 On March 13, 2014, at the arraignment, defense counsel moved for an examination of defendant to determine if there was a *bona fide* doubt as to his fitness. See 725 ILCS 5/104-11(b) (West 2014). The trial court granted the motion, appointing a psychiatrist, Terry M. Killian, to perform the examination.

¶ 16 On April 11, 2014, Killian interviewed defendant for 45 minutes in the Sangamon County jail. Afterward, that same day, he wrote his report, entitled "Forensic Psychiatric Evaluation."

¶ 17 1. *The "History of the Present Situation," as Defendant Recounted It to Killian*

¶ 18 According to the report, Killian asked defendant what was his own understanding of how he ended up getting arrested. Defendant replied that Sonya Cornell falsely accused him of raping her, even though they actually had a " 'good relationship,' " and that when a police officer barged into Cornell's house with the intention of having sex with Cornell, he hit the police officer in the face, and bit him, purely in self-defense. Defendant (who was shackled during the interview) became angry when Killian "gently" noted that, according to Cornell's statement to the police, she and defendant actually were *not* in a relationship. Defendant said that was a lie: he insisted that Cornell had telephoned him in the jail, had sent him a "picture," and had even promised him "she [was] going to drop charges against him and [that] he [would] be free." He denied having sex with her on the occasion in question, let alone raping her. When Killian "gently" mentioned that, according to the police report, defendant himself had told the police he

had sex with Cornell, defendant became angry again, and his body language became threatening. He denied saying any such thing to the police.

¶ 19 2. *Defendant's Understanding of the Legal Proceedings Against Him*

¶ 20 Defendant was able to identify for Killian the various court participants and to describe, in a rudimentary way, what they did. The judge " 'agree[d] with what [was] going on' " and " 'pass[ed] a judgment.' " The State's Attorney " 'put you in [a] correctional facility.' " The defense counsel " 'help[ed] you from not going to [a] correctional facility.' " Defendant understood he had " '[10] counts of various charges' " against him and that a plea bargain would mean he was " 'not going down.' " To Killian, defendant "appear[ed] capable of adequately relating to his attorney" and "of disclosing to his attorney the available pertinent facts surrounding the alleged offenses and of challenging prosecution witnesses realistically." It appeared to him that defendant "manifest[ed] self-serving as opposed to self-defeating motivation."

¶ 21 3. *Defendant's Mental Status*

¶ 22 In Killian's estimation, defendant, age 37, was of "roughly average or slightly below average intelligence," and his "insight and judgment could [be] describe[d] as fair at best." Although defendant mentioned hearing voices "outside" his head, the voices were silent during the interview, and he could not recall anything the voices had said to him. Despite these reported "perceptual auditory hallucinations," he did not appear to Killian to be psychotic in any way.

¶ 23 4. *Killian's Previous Evaluation of Defendant, From June 2010*

¶ 24 Killian noted that, on a previous occasion, in June 2010, he evaluated defendant's fitness—this was at the request of the McLean County public defender's office—and he diagnosed defendant as suffering from post-traumatic stress disorder as a result of having been

stabbed and shot in his late teens or early twenties. Nevertheless, on that occasion, Killian found defendant "was not suffering from the type or severity of psychiatric illness which would have substantially interfered with [his] capacity to appreciate the criminality of his alleged conduct."

¶ 25 5. *Killian's Present Diagnoses and Conclusion*

¶ 26 In the present report, Killian diagnosed (1) post-traumatic stress disorder, (2) antisocial personality disorder (given that defendant had spent most of his adult life in prison and had shown no remorse about his unlawful behavior, past or present), and (3) a gunshot wound to the leg (from his struggle with a police officer). Although defendant had "perceptual disturbances," *i.e.*, "hear[ing] voices when he [was] alone," "[h]is thought process was linear and goal[-]directed," and "there was no formal thought problem or any disorganization in his thought process." He "appear[ed] to be in touch with reality," and it was "unlikely that at this time [he had] any primary psychotic disorder."

¶ 27 Killian concluded: "It is our opinion, within a reasonable degree of psychiatric certainty[,] that [defendant] is fit to stand trial at this time. He demonstrated to us a more than adequate understanding of the nature and purpose of the proceedings against him, and he appears easily capable of assisting his attorney in his defense."

¶ 28 C. The Judicial Finding of Fitness

¶ 29 In a hearing on May 12, 2014, the defense counsel told the trial court:

> "MS. EVANS: ***
>
> We tendered to the Court a copy of a recent psychiatric evaluation. The evaluation finds [defendant] fit. We would stipulate to that finding and ask that that finding be reflected by the Court.

MR. COX [(prosecutor)]: Your Honor, the State is in receipt of that report, and we would stipulate to the findings therein.

THE COURT: Based on the contents of the report and the stipulation of the parties, I find the Defendant fit to stand trial."

¶ 30 D. Evidence in the Jury Trial

¶ 31 The jury trial occurred on March 16, 17, 18, and 19, 2015. Twenty-two witnesses testified. We need not recount the testimony of each and every witness. Instead, we will summarize the testimony of six of the witnesses, and that should give an adequate idea of the evidence.

¶ 32 1. *The Testimony of Sonya Cornell*

¶ 33 Sonya Cornell lived in a house at Gregory Court, in Springfield, with her two children. Defendant was the father of her teenage daughter. Although Cornell and defendant had not had sex with each other for over 12 years, he stopped by her house now and then to visit with their daughter.

¶ 34 On February 21, 2014, Cornell was at home, alone, in her back bedroom, talking on her cell phone with her sister, Catrina Porter—they were making plans to meet for lunch that day—when Cornell heard knocking at her front door. Carrying her cell phone (Porter was still on the line), she went to the front door, which was unlocked, and opened it without first looking to see who was outside. It was defendant. She told him to leave because she was about to go out for lunch. Instead of leaving, defendant pushed the door the rest of the way open, went around Cornell, and entered her house. He did not make any bodily contact with her when entering. She already was standing somewhat to the side. He just walked around her and into the house.

¶ 35 Even though Cornell kept telling him to leave, defendant walked through her house, "looking to see if somebody was there." Cornell told Porter she would have to call her right back, and she ended the cell-phone call. Cornell returned to her back bedroom (in her testimony, she could not remember why she did so, but she assumed she must have had a reason). Defendant followed her into the back bedroom. He pushed her down, onto her bed, and began touching her breasts, even though she told him to stop. He took off her pants and then his own pants, and while pinning her down on the bed with his arm, he penetrated her vagina with his penis. He stifled her yells for help by covering her mouth and nose with his hand. Eventually, he withdrew his penis and performed oral sex on her, sticking his tongue into her vagina.

¶ 36 Her cell phone was still in her right hand. While he was on top of her, she tried to call Porter back, thinking that Porter would be the easiest to call since the last call had been to her. Before Cornell could press the call button, however, defendant snatched the cell phone out of her hand and threw it. Cornell also had a landline, and one of the landline telephones was on the bed, under a pillow. She managed to dial 9-1-1 on the landline, but before anyone on the other end could answer, defendant snatched that telephone out of her hand, too, and threw it. As he continued the sexual assault, she "kept hearing the call back, the ringing."

¶ 37 Eventually, defendant desisted. He put his pants back on, and she put her pants back on, and they returned to the living room. He sat down on the couch and asked her to sit down beside him and "cuddle with him." Too scared to refuse, she sat down beside him. He asked her what was wrong. Again, she told him to leave.

¶ 38 She heard a knock on the front door, which was still slightly ajar. "Come in," she said. A police officer poked his head in and asked if everything was all right. Defendant stood up from the couch and assured the police officer that everything was just fine. That was when she

saw the black handle of a pistol protruding from defendant's pants pocket. She yelled, " 'Help! He just raped me.' " The police officer told defendant to step outside. Cornell warned the police officer that defendant had a gun. The two of them, defendant and the police officer, were standing in the doorway. She did not see the police officer reach out toward defendant or touch him. She just saw defendant swing at the police officer and hit him. The struggle went into the front yard. She got up off the couch and looked out the front door, and defendant was "on top of the police officer, hitting him with the gun." She paced around inside her house, trying to find her shoes. When she heard a gunshot, she gave up trying to find her shoes, and she just ran outside.

¶ 39 As she was running to a neighbor's house, other police officers arrived in their squad cars. From her neighbor's house, she waved them in the direction of her house. Afterward, she was taken to the hospital, where she underwent a sexual-assault examination.

¶ 40 On cross-examination, Cornell admitted that, in her interview at the police department, she did not weep but that, instead, there were "[s]everal instances of laughter between [her] and the detectives." For example, she "sort of chuckled" when a detective asked her to describe her morning from " 'the minute [her] feet hit the floor.' " She and the two detectives had a laugh together when Cornell remarked that after taking her daughter to school in the morning, she stopped at a relative's house for breakfast because that relative cooked a good breakfast: not just cereal, but "probably some eggs involved." The three of them laughed at Cornell's having to motivate her son to get out of bed in the morning and earn money to pay off a fine. She also laughed about a detective's request that she "draw [a] room out on a piece of paper."

¶ 41 2. *The Testimony of Catrina Porter*

¶ 42 Catrina Porter testified she was very close to Cornell, her sister. They spoke with one another every day, and Porter lived only five minutes away from Cornell's house on Gregory Court. She knew it had been at least 10 years since Cornell and defendant had a relationship—she knew because she, Porter, was always around and because she and Cornell talked about everything.

¶ 43 On February 21, 2014, around 1:35 p.m., she was speaking with Cornell on the phone. The plan was for Cornell to pick her up at 2 p.m. so they could go out to lunch together.

¶ 44 The prosecutor asked Porter:

"Q. Okay, and do you recall anything happening when you were talking to your sister on the phone?

A. She answered the door. When she opened her door, all I hear her saying was, 'I'm about to go. You can't come in,' and then I heard her say, 'Tony, don't walk through my house.'

Q. And you can hear this? You can hear your sister saying this?

A. Yes.

Q. And could you hear [defendant] in the background?

A. I didn't hear him saying anything. I just heard her saying it to him. 'Don't walk through my house.'

Q. And did you hear her say that repeatedly?

A. Yes.

Q. And did you hear her tell him to leave?

A. Yes.

Q. Okay, now did this phone conversation, at some point, end?

A. Yes.

Q. Okay, and how did it end?

A. She told me she had to go, she would call me back.

Q. Okay. Did she call you back?

A. No."

¶ 45 3. *The Testimony of Bryan Henson*

¶ 46 After eliciting from Bryan Henson that he was a patrol officer for the city of Springfield and that he resided in Springfield, the prosecutor asked Henson, without any objection by the defense attorney:

"Q. Can you tell us what your immediate family consists of?

A. Wife and three kids, three boys under the age of six.

Q. Three boys?

A. Yes."

¶ 47 Then, after questioning Henson about his training and experience in law enforcement and his duties as a patrol officer, the prosecutor began questioning him about what happened during the afternoon of February 21, 2014.

¶ 48 Around 1:49 p.m., the dispatcher notified Henson of a dropped 911 call from an address at Gregory Court. The dispatcher's office had called back but had been unable to get anyone to pick up. Henson went to the address to investigate, because that was what the Springfield police did whenever there was a dropped 911 call. Upon arriving, he at first walked around the house and waited for backup. Hearing nothing from inside the house, he decided to look for himself and see if anything was going on.

¶ 49 Henson knocked on the front door and began to open it. At the same time, the handle was turned and pulled from the inside. The door swung open, and defendant was standing in the doorway. Defendant looked surprised—his eyes widened—and he stepped back. His pants, Henson noticed, were unzipped. A woman inside the house said, " 'I want him out of my house. He just raped me. He has a gun.' "

¶ 50 Henson grabbed defendant by the wrists and began to pull him out of the house. Defendant wrenched one of his hands free, and that is when Henson saw something in defendant's hand: it looked like a black semiautomatic pistol (it really was a BB pistol, an air pistol, but Henson did not know that at the time). Henson did not think he had time to draw his own pistol, so, with his left hand, he grabbed the muzzle of defendant's pistol, and with his other hand, he grabbed defendant's right wrist. With the muzzle of the BB pistol pointed down, the two of them began wrestling over it.

¶ 51 After five or six seconds of struggle, perceiving he would not be able to handle this by himself, Henson let go of defendant's right wrist while keeping hold of the muzzle of the pistol with his left hand, and, with his freed hand, he radioed for immediate assistance. Henson then got hit on the left temple with a hard object—he assumed it was defendant's pistol. Dazed and disoriented and close to being knocked out, Henson turned away and tried to run, to get some distance between himself and defendant, at least long enough to recover his faculties. Defendant ordered him, "Give me your gun," and Henson felt the butt of his holstered pistol being pulled back. Henson "started weapon retention," as he had been trained to do: with his right hand, he pushed down on his pistol and lowered his center of gravity, all the while trying to move away from defendant. As Henson tried to walk away, he felt a pain in his left arm, and

when he looked over, it was defendant biting him on the back of his left arm while continuing to pull on his pistol. They both fell. Henson hit his head on the frozen ground when he went down.

¶ 52 Defendant straddled Henson and continued to pull on his pistol while Henson pushed it down, with both hands, into his holster. He felt defendant "latch down and bite onto [his] cheek" and then thrash back and forth as if to tear away a chunk of flesh. Unwilling to take his hands off his pistol, Henson told him, " 'Stop biting me and get off.' "

¶ 53 At last, defendant stopped biting, but then Henson could feel defendant tugging on the left side of his belt where his Taser was. It was as if defendant were methodically "going through everything on [his] belt, flipping stuff open to see what was there." Defendant was not "wildly flail[ing]"; rather, his movements were "[s]low and intentional." Henson knew that if defendant got hold of his Taser and shocked him, he would be incapacitated for five seconds—long enough for defendant to get control of his pistol. So, as defendant seemed momentarily preoccupied with trying to get possession of the Taser, Henson drew his pistol, pulled it up, and pushed it forward into defendant's body—keeping it low, just above the holster, in the hope that defendant would not notice he had drawn it—and he pulled the trigger. One round fired off. There was no change in defendant's demeanor; he appeared to be unaffected. Henson pulled the trigger again and again, but the pistol was jammed: after that first shot, it would not fire anymore. Even so, he did not want defendant to get possession of his pistol, and as defendant punched him in the head over and over again, he tried to reholster his pistol and also to keep possession of his Taser.

¶ 54 Then Henson heard sirens and verbal commands. Defendant twice attempted to stand but was unable to do so. Other police officers converged on defendant and pulled him away. Henson warned them that defendant had a gun and also that defendant had been shot.

¶ 55 From the moment Henson first laid eyes on defendant to the moment he heard the sirens of the arriving backup, a mere 1 1/2 minutes to two minutes elapsed, by Henson's estimate.

¶ 56 The State's Attorney showed Henson the BB pistol that defendant had wielded. He asked Henson:

> "Q. And what do you recognize this as?
>
> A. That's the gun that [defendant] produced when I initially pulled him outside the house and broke his hand free from it.
>
> Q. When you see this gun, what do you think? Is it a real gun or a BB gun?
>
> A. Death. I think I'm going to die. I think I'm not going to go home and see my kids."

¶ 57 4. *The Testimony of Jason Sloman*

¶ 58 Jason Sloman testified he was a Springfield detective and that he, along with Detective Carpenter, was one of the police officers who sped to Henson's aid on February 21, 2014. The two of them were in the same police car, and when they arrived at Gregory Court, a black woman was gesturing toward the address. They turned a corner, and Sloman saw "a black male on top of Officer Henson in the front yard," and he was "punching and struggling with Officer Henson," who was on his back. Sloman and Carpenter told defendant to get off of Henson and to stop resisting, but he seemed to ignore them, and he continued struggling with Henson. Carpenter kicked defendant in the head. This caused defendant, who was hunched over Henson, to sit up straight, giving Sloman an opportunity to shoulder him off of Henson.

¶ 59 Even then, defendant did not give in to the arrest. He now was on his back, struggling with Sloman and Carpenter. Defendant reached up, and Sloman heard Carpenter tell him, " 'Let go of my gun.' " Another police officer used a Taser on defendant, which was effective for a few seconds, but then he began fighting again and rolled over onto his stomach with his hands underneath him, refusing to present his hands. After shocking him again, the officers were able to get the handcuffs on him. They picked him up, but he fell down, unable to bear his own weight. That is when they realized he had been shot in the leg. They administered first aid, using defendant's belt as a tourniquet, and they awaited the arrival of the ambulance.

¶ 60 5. *The Testimony of Lindsey Fulcher*

¶ 61 Lindsey Fulcher was an emergency room nurse at St. John's Hospital, and on February 21, 2014, between 5 and 6 p.m., Cornell came into the emergency room. Fulcher performed an examination using People's exhibit No. 166, a sexual-assault kit. The kit had instructions, and in accordance with step two of the instructions, Fulcher obtained a narrative from Cornell of what had happened. She wrote down Cornell's narrative on a yellow sheet, which was included in the kit.

¶ 62 The prosecutor asked Fulcher:

> "Q. Could you tell us what she said concerning what happened?
>
> A. On here, the patient told me that the father of her daughter came to her house, knocked on the door of her home, and then she was yelling at him to get out, and when she opened the front door, he barged in.
>
> Q. Did she go further and say what happened next?
>
> A. Yes, she did. She was yelling at him to get out, and [defendant] pushed her onto the bed and held her down.

Q. Okay, and did she describe what he did to her?

A. She did.

Q. What did she say?

A. She had told me, the patient [*sic*] pulled her shirt down, and he began kissing and licking her breasts and held her down, pulled her pants down, and began kissing and licking, as the patient quoted, 'Down there.'

Q. Did she, then, describe what else was done to her?

A. She did. She said he tried to have sex with her, but he wasn't able to, quoted by the patient, 'Get hard,' and then, she didn't feel him inside of her and 'Once he wasn't able to get hard, he got off of me and went to the living room.' "

¶ 63 A swab from the sexual-assault kit was a match for defendant in every location tested.

¶ 64 On cross-examination, Fulcher testified she did not remember Cornell's ever telling her that defendant had put his hand over her mouth. Also, Fulcher testified that Cornell appeared to be physically uninjured but that she was weeping before the examination.

¶ 65 6. *The Testimony of Paula Crouch*

¶ 66 The evening of February 21, 2014, Paula Crouch, a Springfield detective, accompanied two State police officers, Larry Piotrowski and John Ward, to the hospital to interview defendant. They began by giving him the *Miranda* warnings (see *Miranda v. Arizona*, 384 U.S. 436 (1966)) verbally and in writing. He indicated, verbally and by his signed initials, that he understood each warning. He answered yes when asked if he was willing to talk about what happened earlier that day.

¶ 67 Defendant provided essentially the following account. He stopped by Cornell's house to give her money for "[his] kids" (we quote from People's exhibit No. 197, the transcript of his statement), and Cornell let him into her house. "She let [him] in" willingly. He denied she told him she was about to leave. They hugged and kissed and "kicked it." They were "[n]ot really" having any "sexual contact," although "[his] penis [was] on her vagina or in her vagina" and she was "putting her legs all the way up in the air," "laughing and carrying on." Then—he was unsure why—she told him to stop, maybe because "it was too hard or something." He stopped. At first, he denied taking her phone from her and throwing it. Then he admitted throwing her phone off the bed—he did not know why he had done so—but it never occurred to him at the time that she was trying to call the police. She "got all mad and shit"—she "started crying and stuff"—he assumed because he had not given her the money, as he was supposed to have done. He "guess[ed] *** she dialed the police officer." Evidently, she was going to tell the police officer that he had "raped her or something when [he] didn't." Indeed, that was what she told the police officer, while defendant was right there in the room. After walking right into the house through the open door, without knocking, the police officer grabbed defendant by the hands, and defendant responded by "kinda push[ing] him" "out the door." "It was a couple pushes, that's all it was." His preference would have been to run, but he was unable to run while the police officer had him by the wrists. He was scared. He grabbed the police officer's gun, pushed him to the ground, and bit him on the cheek in an attempt to keep from getting shot, but the police officer shot him anyway. He kept holding onto the police officer, because he did not want to be shot again. He did not want to die. From the very start, he was afraid the police officer would shoot him, judging from the way the police officer had his hands on his pistol, as if he were about to draw it and open fire. Although defendant admitted having a BB gun stuffed in his

pants, to scare away troublemakers, he initially denied pulling the BB gun out or using it in any way. “I didn’t do shit with it,” he said. Then he admitted pulling the BB gun out of his pants as he was pushing the police officer out the door, and he admitted he might have hit the police officer somewhere with the BB pistol, maybe on the arm. He realized it was “not legal to scuffle with [the police officer].” He did not know what would, or should, happen to somebody who hit and bit a police officer. “I don’t know[,] man,” he said, “probably, I don’t know, see the courts.”

¶ 68 E. The State’s Closing Argument and Surrebuttal

¶ 69 During the first portion of his closing argument, the prosecutor stated: “[Y]ou’ve heard testimony, from about 22 witnesses I believe, from that stand, where they all told you the truth under oath.”

¶ 70 In his surrebuttal, the prosecutor read aloud for the jury Fulcher’s notes from the sexual-assault kit, including the following: “ ‘Patient says the father of her daughter came to her house, knocked on the door. She states she was yelling at him to get out of the house. When she opened the front door, he barged in. Patient was yelling at him to get out, following him.’ ”

¶ 71 Also, in his surrebuttal, the prosecutor told the jury: “Officer Henson, married. Neighborhood police officer. Three boys at home under the age of six, responding to a dropped 9-1-1 call.” He also said: “You saw the police come in here for Bryan Henson, his powerful testimony recounting when he was first in that fight for his life, when it started when the defendant brought up that gun; what did he say? [‘]What did you think when you saw that gun?[’] ‘I thought I was going to take two in the chest, one in the head, and never see my boys again.’ ” He argued: “The Springfield Police Department should be proud of the actions of its officers in this case. Bryan Henson’s wife should be proud of her husband. Bryan’s three boys

should be proud of their dad, and they still get to see him, because, thank God, he came home that night."

¶ 72 F. The Jury Instructions

¶ 73 One of the instructions the trial court gave the jury was People's instruction No. 18, an issues instruction on home invasion, based on Illinois Pattern Jury Instructions, Criminal, No. 11.54 (4th ed. 2000). That instruction read as follows:

> "To sustain the charge of home invasion, the State must prove the following propositions:
>
> *First Proposition*: That the Defendant was not a police officer acting in the line of duty; and
>
> *Second Proposition*: That the Defendant knowingly and without authority entered the dwelling place of another; and
>
> *Third Proposition*: That when the Defendant entered the dwelling place he knew or had reason to know that one or more persons was present; and
>
> *Fourth Proposition*: That the Defendant committed, against any person within that dwelling place, a criminal sexual assault or criminal sexual abuse.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty."

¶ 74 The trial court also gave the jury People's instruction No. 17, which was based on Illinois Pattern Jury Instructions, Criminal, No. 11.53A (4th ed. 2000) (hereinafter, IPI, Criminal, No. 11.53A). That instruction read as follows:

> "The Defendant's entry into a dwelling of another is 'without authority' if, at the time of entry into the dwelling, the Defendant has an intent to commit a criminal act within the dwelling regardless of whether the Defendant was initially invited into or received consent to enter the dwelling.
>
> However, the Defendant's entry in the dwelling is 'with authority' if the Defendant enters the dwelling without criminal intent and was initially invited into or received consent to enter the dwelling, regardless of what the Defendant does after he enters." *Id.*

¶ 75 The committee note to IPI, Criminal, No. 11.53A states: "This instruction should be given *only* when an issue arises regarding the defendant's criminal intent when he entered the dwelling, and whether this intent, or lack thereof, affects the status of his entry—'with authority' or 'without authority'. See *People v. Bush*, 157 Ill.2d 248, 253-54, 623 N.E.2d 1361, 1364, 191 Ill.Dec. 475, 478 (1993)." (Emphasis in original.) Illinois Pattern Jury Instructions, Criminal, No. 11.53A, Committee Note (4th ed. 2000). At the cited pages of *Bush*, the supreme court expounded the limited authority doctrine:

> "[W]hen a defendant comes to a private residence and is invited in by the occupant, the authorization to enter is limited[,] and *** criminal actions exceed this limited authority. [Citation.] No individual who is granted access to a dwelling can be said to be an authorized entrant if he intends to commit criminal acts therein, because, if such intentions had been communicated to the owner at

the time of entry, it would have resulted in the individual's being barred from the premises *ab initio*. [Citation.]" *Bush*, 157 Ill. 2d at 253-54.

¶ 76 The jury began its deliberations at 2:43 p.m. on March 19, 2015.

¶ 77 At 3:35 p.m., the jury sent out a note asking: "Can we get a transcript of Sonya Cornell's testimony? Or any transcripts available?" By agreement of the parties, the trial court replied that no transcript was available.

¶ 78 At 4:53 p.m., the jury sent out a note asking: "Could we get more clarification between two definitions of 'without authority' and 'with authority' in regards to home invasion?" By agreement, the trial court replied: "No, we are unable to provide you with any further definition."

¶ 79 At 5:18 p.m., the jury sent out a third note, which read: "If the jurors are in d[e]finitive disagreement of one of the propositions, is the charge considered not guilty or what is it considered?" By agreement, the trial court replied: "If the jury is deadlocked as to an individual charge the jury is considered 'hung' as to that particular charge. Your verdict must be unanimous as to each individual charge. You should continue your efforts to reach a verdict as to each individual charge."

¶ 80 Afterward, while the jury was still deliberating, the trial court told the attorneys it was having second thoughts about declining to answer the jury's second question, the question about the definitions of "without authority" and "with authority." The court was in a quandary, however, as to what answer to give to that question. The prosecutor told the court:

"MR. MILHISER: Judge, I do have what I believe we've agreed upon a response for the second question.

MS. EVANS [(defense counsel)]: I don't agree it should be given. I agree that what you're writing is accurate.

MR. MILHISER: Oh, okay. My response would be, ['I]f you find from the evidence that the defendant did not enter with authority, you are not required to consider the two definitions given for ["]without authority["] and ["]with authority[," '] which specifically answers their question, ['C]an we have further definitions of that[?']"

At 5:40 p.m., the court sent into the deliberation room the supplementary instruction the prosecutor had recommended: "If you find from the evidence that the Defendant did not enter with authority you are not required to consider the two definitions for [']without authority['] and [']with authority.[']"

¶ 81 G. The Verdicts

¶ 82 At 6:12 p.m. on March 19, 2015, the jury found defendant guilty of home invasion, both counts of criminal sexual assault, both counts of aggravated battery, criminal sexual abuse, resisting a peace officer, and both counts of attempting to disarm a peace officer. The jury acquitted him of the remaining charge of interference with the reporting of domestic violence.

¶ 83 H. An Observation by a Social Worker,
Mentioned in the Presentence Investigation Report

¶ 84 The presentence investigation report, dated May 22, 2015, included the following paragraph:

"Per information received from Sangamon County Jail, the defendant is seen weekly by a Licensed Clinical Social Worker to assess his mental health status. Essentially, this consists of a few minutes to assess if the defendant is in

crisis, is suicidal or homicidal. This is done in part due to the defendant being in segregation and not in general population, as well as his mental health issues. During these check ins, the Social Worker indicated about one quarter to one third of the time, the defendant is out of touch with reality."

¶ 85 I. The Sentencing Hearing

¶ 86 On May 28, 2015, after denying defendant's posttrial motion, the trial court held a sentencing hearing. In arguing for leniency, defense counsel told the trial court:

"I did *** have him evaluated for fitness. Dr. Killian did find him fit. I would note for Your Honor that this was Dr. Killian's second time encountering [defendant]. What we learned from Dr. Killian's report is that Dr. Killian had evaluated him for fitness in McLean County. He found, in McLean County, that [defendant] was fit. He found, again, here in Sangamon County in the instant case that he was fit. I am no expert in psychiatry, but I have never agreed with that finding.

If capable of assisting me in his defense, [defendant] was unwilling to rationally assist me in crafting his defense. His efforts, particularly early on, Judge, were mostly delusional. He insisted to me, repeatedly, that he was conversing with both Officer Henson and Sonya Cornell on a secret phone that only he could access in his jail cell. He persisted in this delusion to the extent that I finally called both Sonya Cornell and Officer Henson to verify whether it was true that neither of them wanted to see this case move forward. I, obviously, found that they supported the charges and wanted to see [defendant] prosecuted.

His delusions also continued on, in terms of explaining to me his behavior that day, his explanation to myself, to Dr. Killian, and to the probation department in his [presentence investigation] that he believed Officer Henson was there to hurt him that day and had come to the residence to take his woman."

¶ 87 Defendant made the following statement in allocution:

"Yeah. I'm in this courthouse right now, right? And I'm convicted. They found me guilty for kissing and raping Sonya Cornell, right? And you know what I'm saying? I did not believe it. So don't believe everything people tell you. You know what I'm saying? Cause they will lie to you. You know what I'm saying? And as far as these state's attorney [*sic*] coming to me, I didn't do nothing to anybody. You know what I'm saying? I didn't harm him or go at him or nothing. He came at me. He's in a rage. You know what I'm saying? You go to develop his mental status. This man is coming at me. I didn't come at him. You know what I'm saying? And I mean, I can't talk like he can talk, but you know what I'm saying? He's got the badge, but I don't have the badge. If I had a badge, I would be able to prove to you and stand to you. You know what I'm saying? This is my child. This is my ex-girlfriend. You know what I'm saying? As far as right now, you know, I went to my baby momma house to see her, and we get along, and everybody is jealous of me and her getting back together, being that I got out of the penitentiary about that criminal conviction that we had. You know, I had a criminal conviction a long time ago, but you know, I went through that. You know what I'm saying? I got through there. You know, I did my time. I worked out. I did everything I could. I stayed stress free. You know what I'm saying? I

walked through that valley of death. I fear no evil. You know what I'm saying? I've been in battles, plenty of them, and Bryan Henson, who happened to be one of those guys on my tail, he's spying on me. You know what I'm saying? She already explained to me that she's scared cause everybody is trying to get her. You know what I'm saying? I got to protect. I got to bark. Because if you [don't] bark, they will take advantage of you. You can't call police all the time, because people, they will get you for every dime you got. All these females, they ain't all good to the good. You know, they will turn you. You know? Yeah. Thank you.

MS. EVANS: Tell the Judge out loud.

THE DEFENDANT: You know, I love everybody. You know, everybody's good looking to me. You know what I'm saying? And so, the Judge, everybody around this place looking real nice. I mean, you know? I'm just saying I don't want to be in my penitentiary for 25 years for kissing Sonya Cornell. That's all I have. I didn't do no home invasion. I knocked on the door. I didn't kick the door in. I didn't do none of that. Don't believe what everybody tells you. Just stand up to me, because they seen me steal that car a long time ago, but I got out of jail. I walked up out the jail. I did my time. I paid my fines. Got on parole. I didn't do anything, just walking around. Kicking. Went to Sonya Cornell's house. We kicked it and had a good time, and all of a sudden, the police show up from the door please depart from Sonya and all of these people around here."

¶ 88 The trial court sentenced defendant to 24 years' imprisonment for count I, home invasion; 24 years' imprisonment for count II, criminal sexual assault; 24 years' imprisonment for count III, criminal sexual assault; 10 years' imprisonment for count IV, aggravated battery;

10 years' imprisonment for count V, aggravated battery; 4 years' imprisonment for count VI, criminal sexual abuse; 4 years' imprisonment for count VII, resisting a peace officer; 10 years' imprisonment for count VIII, attempting to disarm a peace officer; and 10 years' imprisonment for count IX, attempting to disarm a peace officer. The court ordered that the sentences on the first three counts run consecutively to each other.

¶ 89 The sentencing order, entered on July 1, 2015, mistakenly provides "720 ILCS 5/31-1(a)" as the statutory citation for counts VIII and XI, attempt to disarm a peace officer. Actually, the citation in both counts should be to subsection (b) of section 31-1a of the Criminal Code of 2012 (720 ILCS 5/31-1a(b) (West 2014)). The sentencing order correctly identifies "attempt to disarm a peace officer" as a Class 2 felony (see 720 ILCS 5/31-1a(b) (West 2014)). Also, it is clear, from the issues instructions and the signed verdicts, that the jury found defendant "guilty of the offense of attempt to disarm a peace officer (Bryan Henson)" and "guilty of the offense of attempt to disarm a peace officer (Paul Carpenter)."

¶ 90 J. The Imposition of Fines by the Circuit Clerk

¶ 91 In the sentencing hearing, the trial court never mentioned any fines, and the record lacks any signed court order imposing fines. Nevertheless, in a document labeled "Court Ordered Payment," the circuit clerk imposed the following assessments (among others): $50 for "COURT SYSTEMS," $10 for "CHILD ADVOCACY," $15 for the "ISP [(Illinois State Police)] OP [(Operations)] ASSISTANCE FUND," and $100 for the "VICTIMS ASSIST[ANCE] FUND."

¶ 92 II. ANALYSIS

¶ 93 A. The Supplementary Jury Instruction

¶ 94 Defendant argues in his opening brief: "[T]he jury was given conflicting instructions when it was first given two definitions necessary for complete deliberations, and then later instructed that it could disregard these two definitions if it found that the State had proved that the entry was not with authority. Conflicting instructions give the jury both a correct statement of law and an incorrect statement of law, creating error. *People v. Pollock*, 202 Ill. 2d 189, 212 (2002)." The "later" instruction, which, defendant argues, introduced a conflict into the instructions, was the supplementary instruction that read: "If you find from the evidence that the Defendant did not enter with authority you are not required to consider the two definitions for without authority and with authority."

¶ 95 The State responds that defendant should be estopped from making this argument (see *People v. Johnson*, 334 Ill. App. 3d 666, 680 (2002); *In re E.S.*, 324 Ill. App. 3d 661, 670 (2001); *In re Stephen K.*, 373 Ill. App. 3d 7, 25 (2007)), or at least he should be held to have forfeited this argument (see *People v. Cuadrado*, 214 Ill. 2d 79, 88-89 (2005); *People v. Travis*, 170 Ill. App. 3d 873, 889 (1988)), because, in the trial court, instead of objecting that the proposed supplementary instruction was erroneous in its statement of the law, defense counsel admitted it was "accurate."

¶ 96 In his reply brief, defendant accuses the State of "mischaracterizing" his argument in order to maneuver him into a "waiver." He denies that, in his opening brief, he "argue[d] that the supplementary instruction misstated the law." He writes: "Instead, he argued that the additional instruction conflicted with the original pattern jury instructions and advised the jury that they could disregard part of these instructions, if they agreed with the State's interpretation of the facts regarding [his] entry into the residence."

¶ 97 In his opening brief, however, defendant defined "conflicting jury instructions" as those that "g[a]ve the jury both a correct statement of law and an incorrect statement of law, creating error." Necessarily, then, by arguing, in his opening brief, that the supplementary instruction introduced a conflict into the jury instructions, defendant argued that the supplementary instruction was an incorrect statement of the law—despite his concession in the trial court that the supplementary instruction was "accurate." (Defendant does not suggest there was anything wrong with the previously given jury instructions.)

¶ 98 Does this concession in the trial court result in an estoppel, or does it result merely in a forfeiture? The question matters because in the event that we agree with the State's "characterization" of defendant's argument (we do), he invokes the doctrine of plain error (see Ill. S. Ct. 615(a) (eff. Jan. 1, 1967)), and although the doctrine of plain error can avert a forfeiture (*People v. Sebby*, 2017 IL 119445, ¶ 48; *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)), it cannot avert an estoppel (*People v. Harvey*, 211 Ill. 2d 368, 385 (2004); *People v. Villarreal*, 198 Ill. 2d 209, 227-28 (2001)).

¶ 99 A forfeiture results from passivity: the defendant failed to make a contemporaneous objection or to reiterate the objection in a posttrial motion (*Sebby*, 2017 IL 119445, ¶ 48; *Herron*, 215 Ill. 2d at 175), or the objection the defendant or the State made in the trial court was not the objection the defendant or the State makes now (*Cuadrado*, 214 Ill. 2d at 88-89; *Travis*, 170 Ill. App. 3d at 889). An estoppel, by contrast, results from activity: in the trial court, the party actively procured, or expressly agreed to, the ruling or procedure of which the party complains now, on appeal (*Harvey*, 211 Ill. 2d at 385; *Villarreal*, 198 Ill. 2d at 227-28), or the position the party takes now, on appeal, is at odds with the position the party expressly took

in the trial court (*McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000); *Johnson*, 334 Ill. App. 3d at 680; *E.S.*, 324 Ill. App. 3d at 670-71; *Stephen K.*, 373 Ill. App. 3d at 25).

¶ 100 In the trial court, defendant, through his counsel, expressly took the position that the proposed supplementary jury instruction, drafted by the prosecutor, was "accurate." Defense counsel told the prosecutor, on the record: "I don't agree [that the supplementary instruction] should be given. I agree that what you're writing is accurate." Consequently, on appeal, defendant is estopped from disputing the accuracy of the supplementary instruction—he is estopped from disputing that the supplementary instruction is an accurate statement of the law. See *Katholi*, 191 Ill. 2d at 255; *Johnson*, 334 Ill. App. 3d at 680; *E.S.*, 324 Ill. App. 3d at 670-71; *Stephen K.*, 373 Ill. App. 3d at 25. Defendant's theory of conflicting jury instructions presupposes that the supplementary instruction was an incorrect statement of law. He cites *Pollock*, 202 Ill. 2d at 212, for the proposition that "[c]onflicting instructions give the jury both a correct statement of law and an incorrect statement of law, creating error." Therefore, his theory of conflicting jury instructions is barred by estoppel (see *Katholi*, 191 Ill. 2d at 255; *Johnson*, 334 Ill. App. 3d at 680; *E.S.*, 324 Ill. App. 3d at 670-71; *Stephen K.*, 373 Ill. App. 3d at 25), and the doctrine of plain error does not avert the estoppel (see *Harvey*, 211 Ill. 2d at 385; *Villarreal*, 198 Ill. 2d at 227-28).

¶ 101 B. Defendant's Fitness

¶ 102 1. *The Trial Court's Independent Analysis of Defendant's Fitness*

¶ 103 Citing *People v. Contorno*, 322 Ill. App. 3d 177, 179 (2001), defendant argues that by "accept[ing] the parties' stipulation to the evaluation's conclusion of fitness without conducting any independent inquiry into [defendant's] fitness," the trial court violated his right to due process. "When a *bona fide* doubt as to a defendant's fitness exists, the trial court has a

duty to hold a fitness hearing," in which the court must use its own independent judgment in deciding whether the defendant is fit. *Contorno*, 322 Ill. App. 3d at 179. The court may not base its determination of fitness "solely upon a stipulation to the existence of psychiatric conclusions or findings." *Id.*

¶ 104 For the sake of argument, let us assume that, initially, before the trial, there was a *bona fide* doubt as to defendant's fitness. But see *People v. Hanson*, 212 Ill. 2d 212, 222 (2004) ("The mere act of granting a defendant's motion for a fitness examination cannot, by itself, be construed as a definitive showing that the trial court found a *bona fide* doubt of the defendant's fitness."). *Contorno* nevertheless is distinguishable because it was unclear, from the record in that case, that the trial court made an independent determination of fitness as opposed to "merely accept[ing] [the psychiatrist's] conclusion." *Contorno*, 322 Ill. 2d at 179. In the present case, by contrast, the trial court expressly based its conclusion of fitness not only on the parties' stipulation to Killian's conclusion of fitness but also on "the contents of [Killian's] report." The contents of Killian's report included his observations and reasoning—his bases for concluding that defendant was fit to stand trial. Thus, instead of automatically and uncritically accepting Killian's conclusion and the parties' stipulation to his conclusion, the trial court read Killian's report and scrutinized how Killian had arrived at his conclusion. See *People v. Cook*, 2014 IL App (2d) 130545, ¶ 20 ("Here, had the court stated that it read the report and agreed with [the expert's] conclusion based on the facts set out in the report, or had it recited the facts it relied on in making its own fitness determination, there would have been no ambiguity about the court's exercise of discretion."). Contrary to defendant's argument, the record shows the court used its own independent judgment in finding him to be fit to stand trial.

¶ 105 2. *Alleged Deterioration of Defendant's Fitness From the Trial to the Sentencing Hearing*

¶ 106 Defendant makes an alternative argument in case we disagree that the trial court failed to use its independent judgment when finding him to be fit on May 12, 2014, before the trial (we do disagree). He argues, alternatively, that his condition deteriorated from May 12, 2014, to the date of the sentencing hearing, May 28, 2015, and, thus, before sentencing him, the court should have found, *sua sponte*, a *bona fide* doubt as to his fitness and should have ordered a new fitness evaluation. See 725 ILCS 5/104-11(a) (West 2014) ("The issue of the defendant's fitness for trial, to plead, or to be sentenced may be raised by the defense, the State[,] or the Court at any appropriate time before a plea is entered or before, during, or after trial.").

¶ 107 Defendant argues that, at the sentencing hearing, this deterioration was evident in three ways. First, defense counsel told the trial court:

> "If capable of assisting me in his defense, [defendant] was unwilling to rationally assist me in crafting his defense. His efforts, particularly early on, Judge, were mostly delusional. He insisted to me, repeatedly, that he was conversing with both Officer Henson and Sonya Cornell on a secret phone that only he could access in his jail cell. He persisted in this delusion to the extent that I finally called both Sonya Cornell and Officer Henson to verify whether it was true that neither of them wanted to see this case move forward. I, obviously, found that they supported the charges and wanted to see [defendant] prosecuted.
>
> His delusions also continued on, in terms of explaining to me his behavior that day, his explanation to myself, to Dr. Killian, and to the probation department in his [presentence investigation] that he believed Officer Henson was there to hurt him that day and had come to the residence to take his woman."

¶ 108 Second, the presentence investigation report, dated May 22, 2015, stated that "[d]uring *** check ins [at the jail], the Social Worker indicated about one quarter to one third of the time, the defendant is out of touch with reality."

¶ 109 Third, defendant's statement in allocution "showed that his thought process was rambling."

¶ 110 Before sentencing defendant, the trial court had to hold another fitness hearing if, since the trial, the court had become aware of facts raising a *bona fide* doubt as to his fitness. See 725 ILCS 5/104-11(a) (West 2014). There was a *bona fide* doubt as to his fitness if, from an objective point of view, there was a "real, substantial[,] and legitimate doubt" (internal quotation marks omitted) (*People v. Tuduj*, 2014 IL App (1st) 092536, ¶ 87) as to whether, given his "mental or physical condition," he was "[able] to understand the nature and purpose of the proceedings against him or to assist in his defense" (725 ILCS 5/104-10 (West 2014)). "Because the trial court is in the best position to observe a defendant's conduct, whether a *bona fide* doubt of fitness to proceed exists is a matter that lies within the discretion of that court." *People v. Simpson*, 204 Ill. 2d 536, 550 (2001).

¶ 111 Defendant argues he was unfit to be sentenced, as evidenced by (1) the social worker's observation, from her weekly visits to the jail, that he was "out of touch with reality" one-fourth to one-third of the time; (2) his delusion, recounted by defense counsel, that Cornell and Henson would refrain from pressing charges, as they supposedly had assured defendant *via* a secret telephone in his jail cell; and (3) his delusion, recounted by defense counsel and also expressed in defendant's statement in allocution, that Henson had entered Cornell's house for the purpose of harming defendant and having sex with Cornell.

¶ 112 As for (1), "out of touch with reality" is vague. "Out of touch with reality" in what ways and to what extent? Specifically, how did this untethering from reality manifest itself? Apparently, the social worker meant that sometimes, one-fourth to one-third of the time, defendant was delusional (but that, by the same token, he was nondelusional most of the time). Delusions, caused by a physical or mental disorder, do not necessarily make a defendant unfit to stand trial or be sentenced. See *People v. Easley*, 192 Ill. 2d 307, 323 (2000) ("The issue is not mental illness, but whether [the] defendant could understand the proceedings against him and cooperate with counsel in his defense."). It depends on what the delusions are, the extent to which the defendant is subject to them, and what effect they have on his or her ability to understand the nature of the criminal proceedings and to assist with the defense.

¶ 113 As for (2), it appears that by the time of the sentencing hearing, defendant had abandoned any delusion that Cornell and Henson would refrain from pressing charges against him. He began his statement in allocution by observing: "And I'm convicted. They found me guilty for kissing and raping Sonya Cornell, right?"

¶ 114 Besides, while this delusion—we refer to (2)—might have affected defendant's *willingness* or *incentive* to assist his defense counsel in the trial, it did not necessarily affect his *ability* to do so. Defense counsel told the trial court: "If capable of assisting me in his defense, [defendant] was *unwilling* to rationally assist me in crafting his defense." (Emphasis added.) The test for fitness is concerned with *capacity*, not willingness. See 725 ILCS 5/104-10 (West 2014); *Easley*, 192 Ill. 2d at 320. A defendant is unfit only if the defendant's physical or mental condition makes him or her "*unable* to understand the nature and purpose of the proceedings against him or to assist in his defense." (Emphasis added.) 725 ILCS 5/104-10 (West 2014).

¶ 115 In *People v. Moore*, 159 Ill. App. 3d 850, 857-58 (1987), for example, there was evidence that the defendant "suffered 'paranoid delusions' with regard to certain areas, including the legal system." Specifically, he suffered from " 'paranoia psychosis with a delusion or fixed belief in a conspiracy against him within the judicial system[,] which he felt was tainted with satanic influences.' " *Id.* at 854. This delusion regarding the judicial system might well have affected the defendant's *willingness* to cooperate with his defense counsel (reasoning with the devil would be futile), but "a defendant's unwillingness to cooperate with counsel [could not] be deemed equivalent with his inability to do so." *Id.* at 855.

¶ 116 As for (3), it is unclear how this delusion incapacitated defendant from assisting with his defense in the sentencing hearing. Arguably, he looked better in the sentencing hearing if, on the afternoon of September 21, 2014, he had a sincere (though unreasonable) belief in the need to defend himself and Cornell against Henson. It would have been a factor in mitigation that "[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense." 730 ILCS 5/5-5-3.1(a)(4) (West 2014). If defendant could have convinced the trial court that he earnestly and sincerely held this belief, bizarre as it was, he might have looked better than if, when attacking Henson, he knew and appreciated that he was in the wrong. Misguided, delusional acts of violence might be less ugly than consciously wicked acts of violence.

¶ 117 It appears, from his statement in allocution, that defendant's interpretation of reality could at times be rather implausible, but it is consistently a self-serving interpretation. Instead of being completely untethered from reality, he interacts with the facts and puts a self-justifying slant on them. Henson was hounding him and spying on him, opening the door of a private residence, uninvited, and looking in. Henson was a raging aggressor, and defendant

merely defended himself. Cornell was the mother of his child, and defendant had to defend her from Henson, a lustful intruder. Defendant had served his sentence and had paid the penalty for his past crime, so his criminal record should not be held against him. Instead of kicking down the door, as a home-invader would do, defendant knocked. He and Cornell were having a good time, and Henson barged in for no reason. The statement in allocution displays a sufficient grasp of reality to merit the conclusion that defendant was able to assist in his defense. See 725 ILCS 5/104-10 (West 2014). He also evinced an understanding of the nature and purpose of the proceedings. See *id.*

¶ 118 Thus, we are unable to say the trial court abused its discretion in the sentencing hearing by omitting to find a *bona fide* doubt as to defendant's fitness. See 725 ILCS 5/104-11(a) (West 2014); *People v. Murphy*, 72 Ill. 2d 421, 431 (1978). A trial court has abused its discretion only if its decision is indefensible or, in other words, only if its decision is arbitrary, fanciful, or unreasonable. *People v. Washington*, 2016 IL App (1st) 131198, ¶ 72. Those adjectives are inapt in this case, especially when we bear in mind that the trial court, unlike us, "was in a position to observe the defendant and evaluate his conduct" (*Murphy*, 72 Ill. 2d at 431).

¶ 119 C. New Objections to the Prosecutor's Arguments to the Jury

¶ 120 Defendant complains that, in the State's closing argument and surrebuttal, the prosecutor made remarks to the jury that had the effect of depriving him of a fair trial. Specifically, defendant complains that, in his initial argument, the prosecutor vouched for the credibility of the State's witnesses. Also, he complains that, in his surrebuttal, the prosecutor introduced inadmissible hearsay to bolster the testimony of Cornell and that he appealed to the jury's passions by repeatedly mentioning Henson's family, right down to the fact that all three of his children were under the age of six. Defendant acknowledges that defense counsel never

objected to these comments, but defendant invokes the doctrine of plain error and, alternatively, argues that by failing to object and to reiterate the objection in a posttrial motion, his defense counsel was ineffective.

¶ 121 First, we will consider these alleged improprieties one at a time. Then, insomuch as we agree that they are indeed improprieties, we will consider their cumulative impact against the backdrop of the State's evidence.

¶ 122 1. *Asserting That the State's Witnesses Told the Truth*

¶ 123 In his initial argument to the jury, the prosecutor stated: "[Y]ou've heard testimony, from about 22 witnesses I believe, from that stand, *where they all told you the truth under oath*." (Emphasis added.) Because the defense called no witnesses, all these witnesses necessarily were witnesses for the State. So, the prosecutor asserted to the jury that these witnesses for the State had told the truth on the stand.

¶ 124 Defendant regards this assertion as prosecutorial misconduct. He cites *People v. Roach*, 213 Ill. App. 3d 119, 124 (1991), in which the appellate court said: "[A prosecutor] may not *** state his personal opinion regarding the veracity of a witness or vouch for a witness's credibility." In *Roach*, the prosecutor had told the jury, over and over, that he had gotten " 'this feeling in [his] stomach' " that certain of the witnesses were " 'sincere' " and that another witness had " 'lied.' " *Id.* at 123-24. The prosecutor also told the jury: " 'And to me he just looks sincere,' " and " 'I couldn't believe a word he said after that ***.' " *Id.*

¶ 125 In the present case, by contrast, the prosecutor merely asserted to the jury: "[T]hey all told the truth under oath." An assertion by the prosecutor that the State's witnesses testified truthfully is construed as an argument rather than as an expression of the prosecutor's personal opinion or a guarantee by the State's Attorney's office. See *People v. Rivera*, 262 Ill.

App. 3d 16, 27 (1994) ("In the remarks of which [the] defendant complains, the prosecutor merely asserted that certain witnesses testified truthfully," and the prosecutor "is entitled to assume the truth of the State's evidence."); *People v. Pryor*, 170 Ill. App. 3d 262, 273 (1988) (by telling the jury, " 'Downs is right. Downs has told you what he saw. Downs is believable. *** Downs is correct,' " the prosecutor merely assumed the truth of the State's evidence, as the prosecutor had a right to do, instead of placing the integrity of the State's Attorney's office behind the credibility of Downs); *People v. Agosto*, 70 Ill. App. 3d 851, 857 (1979) ("It is legitimate argument for the prosecutor to tell the jury the State's witnesses told the truth ***."). By asserting to the jury that all of the State's witnesses had told the truth, the prosecutor did nothing wrong. He merely assumed the truth of the State's evidence, as he had a right to do. See *Rivera*, 262 Ill. App. 3d at 27.

¶ 126 2. *Pointing Out to the Jury a Prior Consistent Statement by Cornell*

¶ 127 In his surrebuttal, the prosecutor read Fulscher's notes from the sexual-assault kit, which included the following: "Patient says the father of her daughter came to her house, knocked on the door. She states she was yelling at him to get out of the house. When she opened the front door, he barged in. Patient was yelling at him to get out, following him." Defendant complains that these notes were a prior consistent statement, a form of inadmissible hearsay, the purpose of which was to unfairly bolster Cornell's credibility. See *People v. Watt*, 2013 IL App (2d) 120183, ¶ 42 (a prior consistent statement "is inadmissible hearsay and cannot be used to bolster a witness's credibility").

¶ 128 In the jury trial, however, Fulscher's notes were admitted, without objection, as substantive evidence. When hearsay evidence is admitted without objection, "it is to be considered and given its natural probative effect." *People v. Akis*, 63 Ill. 2d 296, 299 (1976).

Because Fulscher's notes had been admitted without objection, defense counsel had no reasonable grounds to object when the prosecutor, in his surrebuttal, urged the jury to consider them as evidence. See *People v. Petty*, 2017 IL App (1st) 150641, ¶ 45 ("Having found the prosecutor's comments in closing argument were not improper, it follows that the issue would have been similarly meritless if defense counsel objected. Counsel was not ineffective for failing to make a meritless objection.").

¶ 129 3. *References to Henson's Family*

¶ 130 Near the end of his surrebuttal argument, the prosecutor told the jury: "Officer Henson, married. Neighborhood police officer. Three boys at home under the age of six, responding to a dropped 9-1-1 call." The prosecutor further told the jury: "You saw the police come in here for Bryan Henson, his powerful testimony recounting when he was first in that fight for his life, when it started when the defendant brought up that gun; what did he say? What did you think when you saw that gun? 'I thought I was going to take two in the chest, one in the head, and never see my boys again.' " The prosecutor also argued to the jury: "The Springfield Police Department should be proud of the actions of its officers in this case. Bryan Henson's wife should be proud of her husband. Bryan's three boys should be proud of their dad, and they still get to see him, because, thank God, he came home that night."

¶ 131 Defendant argues that those remarks about Henson's family, which served no purpose other than to arouse the passions of the jury, were plain error that "undermine[d] the very foundation of our criminal justice system," to quote *People v. Johnson*, 208 Ill. 2d 53, 87 (2003). We agree that whether Henson had a wife and children was irrelevant to the question of defendant's guilt and that it was wrong of the prosecutor to use Henson's family to try to win sympathy from the jury. See *id.* at 83 ("[T]he prosecutor interjected references to [the police

officer's family] that, given their context, can only be construed as strained attempts to invoke the jury's sympathy and thus influence its decision."); *People v. Harris*, 228 Ill. App. 3d 204, 209 (1992) ("[I]t is improper for the State to say anything during closing argument, the only effect of which is to arouse the prejudice and passion of the jury against the defendant without shedding any light on the paramount question presented to the jury.").

¶ 132 We are unconvinced, however, that the remarks about Henson's family members "so seriously undermine[d] the integrity of judicial proceedings as to support reversal under the plain-error doctrine." *Johnson*, 208 Ill. 2d at 64. Unlike the prosecutorial misconduct in *Johnson*, *e.g.*, displaying the bloody and brain-spattered uniform of the murdered police officer to the jury on a mannequin and sending it into the deliberation room, comparing the defendant to an animal, and equating a guilty verdict to a blow against "evil," the prosecutorial misconduct in this case was hardly "pervasive." *Id.* at 84-87. Instead, in his surrebuttal, the prosecutor made improper references to Henson's family. This certainly was a defect in the proceedings, but it was not a "structural defect affecting the framework within which the trial proceed[ed]." (Internal quotation marks omitted.) *Id.* at 85.

¶ 133 If defense counsel had objected to the prosecutor's references to Henson's family, we assume the trial court would have sustained the objection (see *Strickland v. Washington*, 466 U.S. 668, 695 (1984)), but, even so, the evidence against defendant was so strong that we find no reasonable probability the jury would have acquitted him (see *id.* at 694; *People v. Hale*, 2013 IL 113140, ¶ 17 (a court may dispose of a claim of ineffective assistance by proceeding directly to the prejudice prong without addressing counsel's performance)). We have recounted the evidence in considerable detail to show how strong the evidence of guilt was.

¶ 134 D. Fines Imposed by the Circuit Clerk

¶ 135 The trial court imposed no fines on defendant. The circuit clerk, however, in a document labeled "Court Ordered Payment," imposed upon defendant a "COURT SYSTEMS" fine of $50 (see 55 ILCS 5/5-1101(c) (West 2014); *People v. Smith*, 2014 IL App (4th) 121118, ¶ 54), a "CHILD ADVOCACY" fine of $10 (see 55 ILCS 5/5-1101(f-5) (West 2014); *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009)), an "ISP [(Illinois State Police)] OP [(Operations)] ASSISTANCE FUND" fine of $15 (see 705 ILCS 105/27.3a(6) (West 2014); *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31), and a "VICTIMS ASSIST[ANCE] FUND" fine of $100 (see 725 ILCS 240/10(b)(1) (West 2014); *Smith*, 2014 IL App (4th) 121118, ¶ 63). Defendant argues we should vacate these clerk-imposed fines since circuit clerks lack authority to impose fines. See *Smith*, 2014 IL App (4th) 121118, ¶ 63. The State agrees, and so do we.

¶ 136 III. CONCLUSION

¶ 137 For the foregoing reasons, we affirm the trial court's judgment, but we vacate the following fines imposed by the circuit clerk: the "COURT SYSTEMS" fine of $50, the "CHILD ADVOCACY" fine of $10, the "ISP [(Illinois State Police)] OP [(Operations)] ASSISTANCE FUND" fine of $15, and the "VICTIMS ASSIST[ANCE] FUND" fine of $100. We award the State $50 in costs against defendant.

¶ 138 Affirmed and remanded with directions.