NOTICE
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2017 IL App (4th) 160592-U

NO. 4-16-0592

FILED
April 25, 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.	)	Macon County
MATTHEW L. MOURNING,	)	No. 11CF166
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State's questioning of a witness about another witness's credibility did not constitute plain error; (2) the State's questioning of a witness about the victim's initial report of alleged abuse was not error; and (3) certain fines must be vacated because they were imposed by the circuit clerk.

¶ 2 The State charged defendant, Matthew L. Mourning, with two counts of predatory criminal sexual assault of a child, alleging that he placed his finger in the vagina of his half-sister, M.M.

¶ 3 Prior to trial, defendant filed a motion *in limine* seeking to prevent the State from introducing evidence of M.M.'s reporting of the allegations to her mother and the police. The trial court ruled that the State could introduce evidence that M.M. made the reports but not substantive evidence about the contents of the reports.

¶ 4 At the December 2013 jury trial, M.M.'s mother testified that in January 2011, M.M. made "a report" to her that "something" had happened.

¶ 5 Later at trial, during the State's cross-examination of defendant, the State asked whether defendant thought M.M. was lying and what motivation she might have for doing so. Defendant testified that M.M. was lying but that he did not know why.

¶ 6 The jury found defendant guilty on both counts. The trial court sentenced him to eight years in prison for count I and nine years for count II, to be served consecutively. The circuit clerk later imposed various fines and fees.

¶ 7 On appeal, we remanded for the trial court to conduct an inquiry into defendant's posttrial claims of ineffective assistance of counsel. *People v. Mourning*, 2016 IL App (4th) 140270, ¶ 1, 51 N.E.3d 1122. On remand, in August 2016, the trial court conducted a hearing and determined that defendant's claims of ineffective assistance lacked merit or pertained to trial strategy.

¶ 8 Defendant appeals, arguing that (1) the State improperly elicited testimony from defendant about M.M.'s credibility; (2) M.M.'s mother improperly testified about M.M.'s reporting of the alleged abuse; and (3) the circuit clerk improperly imposed several fines. We affirm in part and vacate in part.

¶ 9 I. BACKGROUND

¶ 10 In February 2011, the State charged defendant with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1 (West 2010)). Both counts alleged that defendant, who was 17 years of age or older, placed his finger in the sex organ of M.M. (born November 23, 1995), who was less than 13 years of age.

¶ 11 A. Motion *in Limine*

¶ 12 In April 2013, defendant filed a motion *in limine* seeking to prohibit the State from introducing any prior statements made by M.M. reporting the alleged offenses. The State

responded that some testimony about M.M.'s reporting of the alleged offenses was necessary to explain to the jury the course of the investigation and why M.M. waited approximately six years to report. The trial court decided that the State could question witnesses about if and when M.M. reported the alleged offenses but not about the substance of her reports.

¶ 13 B. Trial

¶ 14 At the December 2013 jury trial, M.M.'s mother testified that defendant was her son and M.M.'s half-brother. Defendant lived with M.M. and their mother when M.M. was between six and nine years old. The following exchange occurred about a "report" that M.M. made to her mother in January 2011:

> "[THE STATE]: I would like to turn your attention to January 26, 2011. At that time, did [M.M.] make a report to you?
>
> [M.M.'S MOTHER]: Yes.
>
> [THE STATE]: How old was [M.M.] when she made this report to you?
>
> [M.M.'S MOTHER]: 15.
>
> [THE STATE]: And when [M.M.] made this report to you, where were you and other family members located?
>
> [M.M.'S MOTHER]: She waited for her dad to go to work and I was sitting on the love seat. She asked me to pause the television, she had something to discuss with me.
>
> [THE STATE]: Okay. Now I can't go into at this point to what [M.M.] told you, but you were in the living room of your home?
>
> [M.M.'S MOTHER]: Yes.
>
> * * *

[THE STATE]: Did she tell you something then that had happened to her?

[M.M.'S MOTHER]: Yes.

[THE STATE]: Again, without going into detail about what she told you, was this the first time that you had heard of this?

[M.M.'S MOTHER]: Yes."

M.M.'s mother testified that M.M. was "very upset" and "very emotional" and that it was "hard to understand what she was saying through her tears."

¶ 15 M.M. testified that when she was between the ages of five and nine, while she and defendant were living in the same home, defendant twice placed his finger in her vagina. The first time, after she and defendant had finished swimming, he locked her in the bathroom and placed his finger inside her vagina. He told her not to talk about it and that it was "normal." M.M. testified that she "knew that it didn't feel right, but I knew I couldn't say anything." On another occasion, defendant entered M.M.'s bedroom while she was in bed and placed his fingers in her vagina, which made M.M. feel "[s]cared and wrong." M.M. did not tell anyone about these two instances until she was 15 years old. She was inspired to report the allegations after attending a program at church called "True Love Waits."

¶ 16 Macon County Detective Kris Thompson testified that he interviewed M.M. at the Child Advocacy Center in Decatur, Illinois. During that interview, M.M. did not mention any incident with defendant that occurred in the bathroom after swimming. Instead, M.M. described two or three separate occasions when defendant placed his finger in her vagina while M.M. was in bed in her pajamas.

¶ 17 Thompson testified further that after interviewing M.M., he arrested and interrogated defendant. Defendant denied having any sexual contact with M.M. Defendant told Thomp-

son that he was "best friends" with M.M. and that having sexual contact with her would be "gross." Thompson asked defendant whether he thought that M.M. was lying about her accusations. Defendant responded that he did not know why M.M. would lie.

¶ 18 Defendant testified that he never put M.M. to bed or made any sexual contact with her. Although their mother occasionally left defendant alone with M.M. in the evenings, he was never left alone with her overnight. On cross-examination, the following interchange occurred:

> "[THE STATE]: Do you remember when you talked to Detective Thompson saying that you knew you were not lying about what happened with [M.M.]?
>
> [DEFENDANT]: That is correct.
>
> [THE STATE]: And he asked you if you thought [M.M.] was making this up or lying and you didn't respond?
>
> [DEFENDANT]: That is correct.
>
> [THE STATE]: Why?
>
> [DEFENDANT]: Because I know that.
>
> [THE STATE]: Why didn't you—is [M.M.] lying or making it up?
>
> [DEFENDANT]: Yes, she is.
>
> [THE STATE]: Why?
>
> [DEFENDANT]: Because—I don't know—can you say that again?
>
> [THE STATE]: Your position is that [M.M.] is lying or making up what she says about you touching her?
>
> [DEFENDANT]: Yes, I do.
>
> [THE STATE]: And I'm saying why would she lie about that?
>
> [DEFENDANT]: I don't know why she would lie about that.

[THE STATE]: Can you think of any reason at all why she would lie?

[DEFENDANT]: Because maybe somebody put her up to it.

[THE STATE]: Like who—did you know that someone did?

[DEFENDANT]: No, I don't."

¶ 19 During closing argument, the State argued the following:

"When asked—when the defendant was asked why would she make it up? He said, I don't know. He went on it [*sic*] say, maybe someone put her up to it. That's the best he can come up with. Well, who put her up to it? He said, I don't know. What this comes down to is who do you believe."

¶ 20 The trial court sentenced defendant to eight years in prison for count I and nine years for count II, to be served consecutively. The court did not impose any fines. The circuit clerk later imposed several assessments against defendant.

¶ 21 On appeal, we remanded, pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), for an inquiry into defendant's posttrial claims of ineffective assistance of counsel. *Mourning*, 2016 IL App (4th) 140270, ¶ 1, 51 N.E.3d 1122.

¶ 22 On remand, in August 2016, the trial court conducted a *Krankel* hearing and determined that defendant's claims of ineffective assistance lacked merit or pertained to trial strategy.

¶ 23 Defendant appeals.

¶ 24 II. ANALYSIS

¶ 25 Defendant raises the following arguments on appeal: (1) the State improperly elicited testimony from defendant about M.M.'s credibility, (2) M.M.'s mother improperly testified about M.M.'s reporting of the alleged abuse, and (3) the circuit clerk improperly imposed several

fines.

¶ 26 A. Testimony About Credibility

¶ 27 Defendant argues that the State improperly elicited testimony from him about M.M.'s credibility. In this case, the State asked defendant whether he thought M.M. was lying. When defendant responded that he thought she was, the State followed up by asking defendant why M.M. would lie.

¶ 28 Defendant failed to object to the testimony at trial. Therefore defendant forfeited his claim, and we review it under the plain-error doctrine. *People v. Thompson*, 238 Ill. 2d 598, 611, 939 N.E.2d 403, 412 (2010). Under the plain-error doctrine, we will reverse a forfeited error if the error was clear and obvious and either (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against defendant or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467, 475 (2005). First, we choose to address whether a clear and obvious error occurred.

¶ 29 1. *Was There Clear and Obvious Error?*

¶ 30 "Under Illinois law, it is generally improper to ask one witness to comment directly on the credibility of another witness." *People v. Becker*, 239 Ill. 2d 215, 236, 940 N.E.2d 1131, 1143 (2010); see also *People v. Young*, 347 Ill. App. 3d 909, 926, 807 N.E.2d 1125, 1139 (2004) (collecting cases). That is because credibility determinations are the responsibility of the trier of fact, not other witnesses. *Id.* Further, "a witness may only testify as to facts which are within his personal knowledge and recollection." *People v. Enis*, 139 Ill. 2d 264, 294-95, 564 N.E.2d 1155, 1167 (1990). A party may not "ask a witness to speculate about matters beyond his personal knowledge or to judge the veracity of other witnesses or evidence." *Id.* at 295, 564

N.E.2d at 1167.

¶ 31 In this case, the State's questioning of defendant was improper. The law is clear and well established that a witness may not testify as to the credibility of another witness. The State asked defendant about his opinion of M.M.'s credibility by asking whether defendant thought she was lying. Defendant responded that he thought she was. That was an improper question, which resulted in defendant's opining about M.M.'s credibility. The State then followed up by asking defendant why M.M. would lie. Defendant responded that he did not know. The State then asked defendant to speculate about a matter outside his personal knowledge by asking, "Can you think of any reason at all why she would lie?" This entire line of questioning was improper and constituted clear and obvious error.

¶ 32 2. *Was the Error Reversible Under the Plain-Error Doctrine?*

¶ 33 Defendant argues that the error was reversible under the closely balanced prong of the plain-error doctrine. In support of that assertion, he points out that there were no independent witnesses to the alleged assaults, no physical evidence, and no confession. As a result, the outcome of the case depended on whether the jury believed M.M. Under those conditions, defendant argues that testimony concerning M.M.'s credibility was highly damaging and prejudicial.

¶ 34 To reverse under the closely balanced prong of the plain-error doctrine, the evidence must be "so closely balanced that the guilty verdict may have resulted from the error." *Thompson*, 238 Ill. 2d at 613, 939 N.E.2d at 413.

¶ 35 In this case the evidence was not closely balanced. Although the jury's verdict depended in large part on how credible it found M.M.'s testimony, defendant's testimony about his opinion of M.M.'s credibility did not usurp the jury's duty to examine her credibility on its own. A credibility contest does not necessarily mean that the evidence was so closely balanced

that reversal under the plain-error doctrine is required. *People v. Naylor*, 229 Ill. 2d 584, 609-10, 893 N.E.2d 653, 669 (2008) (determining that the evidence was closely balanced where the prejudicial effect of the error was "unmistakable" but refusing to establish a rule that evidence is always closely balanced when the fact finder is faced with resolving a credibility contest). The jury was still tasked with determining whether to believe M.M.'s accusations or defendant's denial. Despite defendant's testimony that M.M. was lying, the jury nonetheless determined that she was telling the truth. We conclude that the evidence was not so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence. Therefore, the error is not reversible under the closely balanced prong of the plain-error doctrine.

¶ 36 B. M.M.'s Mother's Testimony About M.M.'s "Report"

¶ 37 Defendant argues that M.M.'s mother improperly testified about M.M.'s reporting of the alleged abuse. Specifically, defendant takes issue with (1) the State asking the mother, "Did [M.M.] tell you something then that had happened to her?"; and (2) the mother's responding, "Yes." (Defendant does not take issue with Detective Thompson's testimony.) We disagree that the testimony in question was error.

¶ 38 In this case, the mother's testimony about M.M.'s report was analogous to a police officer's testimony about an inculpatory statement made by a codefendant. In the case of a police officer, the officer is "permitted *** to testify to their investigatory process, and can refer to statements made by a codefendant so long as the officer does not testify to the content of the statement." *People v. Moore*, 2016 IL App (1st) 133814, ¶ 45, 49 N.E.3d 938. "Such evidence is not offered for the truth of the matter asserted against the defendant, but rather, it is offered to show the steps taken that led to defendant's arrest." *Id.*

¶ 39 In this case, the trial court and the State took precautions to ensure that no sub-

stantive evidence of M.M.'s report came into evidence. The court's ruling on defendant's motion *in limine* clearly ordered that the mother could testify to the fact that a report occurred but could not testify to the substance of that report. When questioning the mother, the State asked whether M.M. made "a report." The State then sought to elicit testimony about where and when that report occurred, both of which were permissible under the court's ruling. The State carefully limited its questioning by stating, "Now I can't go into at this point to what [M.M.] told you [***]" and again, later, prefaced a question by stating, "Again, without going into detail about what she told you."

¶ 40 The trial court and State thereby prevented the substance of M.M.'s report from coming into evidence. The mother's testimony about M.M.'s statement did not include any specific details about what M.M. reported; nor did it include an accusation that defendant was the perpetrator or what offense, if any, might have been perpetrated. Because the mother's testimony did not include the substance of M.M.'s accusations, that testimony complied with the court's order and did not constitute hearsay. See *People v. Gacho*, 122 Ill. 2d 221, 248, 522 N.E.2d 1146, 1159 (1988) (testimony that a conversation occurred that does not reveal the substance of the conversation is not hearsay).

¶ 41 C. Fines and Fees

¶ 42 Defendant argues that the circuit clerk improperly imposed several fines, which he asks us to vacate.

¶ 43 The State concedes that the following assessments were indeed fines and must be vacated because they were improperly imposed by the circuit clerk: $50 "Court" fine; $100 "Violent Crime" fine; $15 "State Police Ops" fine; $28.50 "Child Advocacy Fee"; $4.75 "Drug Court" fine; $10 "Medical Costs" fine; $20 "Lump Sum Surcharge"; $5 "Youth Diversion"; and

$10 “State Police Svcs.” fine. We accept the State’s concession and order those fines vacated. We do not remand for the trial court to impose those vacated fines. *People v. Daily*, 2016 IL App (4th) 150588, ¶ 30; *People v. Wade*, 2016 IL App (3d) 150417, ¶ 13, 64 N.E.3d 703.

¶ 44 The State contends that the $2 “State’s Attorney Automation” assessment; $15 “Automation” assessment; and $15 “Document Storage” assessment were fees and were therefore properly imposed by the circuit clerk. We agree.

¶ 45 The State’s Attorney Automation assessment is a fee. *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 115, 55 N.E.3d 117; but see *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 56, 64 N.E.3d 647 (determining that the State’s Attorney automation assessment is a fine). The document storage assessment is a fee and may be imposed once per case. *Warren*, 2016 IL App (4th) 1120721-B, ¶ 101, 55 N.E.3d 117. Likewise, the $10 “Automation” assessment is a fee that may be imposed once per case. *Id.* at ¶ 103. Those three fees were properly imposed by the circuit clerk.

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, we affirm defendant’s conviction. We vacate the aforementioned fines imposed by the circuit clerk. In all other respects, we affirm the fees imposed and defendant’s sentence.

¶ 48 As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 49 Affirmed in part and vacated in part.