2019 IL App (1st) 161939-U

No. 1-16-1939

Order filed September 11, 2019

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 C6 60359
	)	
ASYA HUNTER,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice Gordon specially concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's judgment, concluding the trial court's comments directed toward defendant's attorney throughout trial did not prejudice the jury and deprive defendant of a fair trial. Pursuant to Illinois Supreme Court Rule 472(e), we remand so defendant may raise to the trial court her challenges to the electronic citation fee and application of *per diem* presentence incarceration credit.

¶ 2 Following a jury trial, defendant was found guilty of aggravated battery to a nurse and was sentenced to two years' probation. Defendant appeals, arguing (1) the trial court's pervasive

comments in which it demeaned, ridiculed, and chastised defendant's attorney in front of the jury prejudiced defendant such that she is entitled to a new trial and (2) the electronic citation fee was imposed in error and she is entitled to application of *per diem* credit against certain other fines. We affirm defendant's conviction but remand the matter to the trial court for further proceedings consistent with Illinois Supreme Court Rule 472.

¶ 3 The State charged defendant by information with aggravated battery (720 ILCS 5/12-3.05(d)(11) (West 2014)), alleging defendant bit Adrienne Lynch while Lynch was performing her duties as a nurse.[1] Prior to trial, the State filed a motion *in limine* which, *inter alia*, sought to bar defendant from "mention[ing] or presenting any evidence of any statements made by the defendant as these statements would be hearsay." The trial court granted the State's motion.

¶ 4 The matter proceeded to a five-day jury trial, at which the following evidence was presented. Lynch testified that on March 25, 2014, she was on duty as the charge nurse in the emergency department at Ingalls Memorial Hospital in Harvey, Illinois, and was wearing her navy blue uniform and ID badge, which identified her as an employee of the hospital. Defendant was brought into the emergency department at approximately 8:30 p.m., by the Robbins police department. Defendant was immediately taken to a room where Lynch performed triage. Lynch then left the room.

¶ 5 At approximately 9:28 p.m., Lynch was with a security guard, Angela Jones, and heard a noise which she believed to be the cart on which defendant was lying. In response to the noise, Lynch and Jones entered defendant's room. When Lynch and Jones entered the room, defendant

[1] The record shows after the offense at issue, Adrienne Lynch's name changed to Adrienne Driscoll. Because the parties referred to her as Adrienne Lynch throughout the proceedings and on appeal, we will also refer to her as Lynch.

was agitated. Lynch saw defendant sitting up and trying to rock the cart back and forth. Lynch thought defendant was trying to flip the cart and worried defendant would get hurt. Attempting to prevent defendant from hurting herself, Lynch "put [her] front arm across [defendant's] torso to lay her back so she was not able to tip the cart."

¶ 6 When Lynch put her arm across defendant's torso, defendant bit Lynch's left breast. Lynch informed Jones defendant bit her and left the room to seek medical treatment. Before Lynch left the room, defendant called Lynch "fat," "a honky," and "a b***," and said she bit Lynch. Lynch checked herself into the emergency room and was evaluated by one of the healthcare providers. Lynch had blood drawn, received a tetanus shot, and was prescribed antibiotics.

¶ 7 Lynch testified she looked at her left breast after defendant bit her and saw red marks in the shape of a mouth or teeth. That same day, the Cook County Sheriff's Department took photographs of her injuries, which were admitted into evidence and published to the jury. Lynch testified she continued to monitor her injuries and, over the next few days, she developed "quite a bit of bruising." According to Lynch, the bite was painful.

¶ 8 Lynch testified that, as a matter of routine procedure, defendant had blood drawn while she was in the emergency department. The blood draw revealed defendant's blood-alcohol content was .155. Lynch was unable to identify defendant in court.

¶ 9 On cross-examination, Lynch testified that when defendant came into the emergency department, she was in four canvas restraints. Defendant was wearing a T-shirt and underwear. Upon arrival, a physician placed an order to keep defendant in restraints, which is typically done when the patient is violent.

¶ 10 Lynch testified she heard the noise which prompted her to the room while she was at her nurse's station, which was approximately 100 feet away from defendant's room. Lynch described the noise as an arrhythmic rocking noise. When Lynch entered the room, she did not observe a call light in defendant's hand. Lynch testified there are alternatives to deescalate a patient a nurse can take when a patient is being combative and in restraints, including therapeutic conversation, decreasing stimuli, and medication, but Lynch did not use the deescalation methods. At 9:32 p.m., a nurse, Kelly Doherty, administered medication to defendant.

¶ 11 Lynch did not recall how long she was in the room after defendant bit her. Lynch could not recall the exact time she checked herself into the emergency department for treatment after she was bitten or whether the Cook County Sheriff's Department took photographs before or after she was treated. Lynch was treated by a physician's assistant for her injuries. The next day, Lynch was examined by the hospital's occupational health nurse, Patricia Wilderspin, who noted in a progress sheet Lynch's skin was intact, and there was no open wound or bleeding. Lynch acknowledged the physician assistant who treated her after she was bitten noted she had a visible bite mark and broken skin. Wilderspin told Lynch she could return to work.

¶ 12 Jones testified she is employed as an armed security officer at Ingalls Memorial Hospital and is the second-shift supervisor. At about 9:28 p.m., Jones entered defendant's room with Lynch and another female security officer because defendant was combative, yelling, screaming, and rocking the bed as if she wanted to turn it over. Jones positioned herself by defendant's feet so she could check the restraints to determine whether they needed to be adjusted. Lynch was near defendant's head.

¶ 13 Jones saw defendant open her mouth and bite Lynch on her breast. Defendant then said "Adrienne, I got your breasts, and you are lucky I'm still in restraints because otherwise I would f*** you up." Lynch left the room after she was bitten and Jones and the other female security guard remained. Jones reported what she saw to the Cook County Sheriff's Department.

¶ 14 On cross-examination, Jones testified she did not complete an incident report with respect to the bite despite the hospital's policy which required her to do so. After the incident, police officers arrived on scene to investigate the incident. Jones could not recall whether she informed the police officers she saw defendant bite Lynch. Detective Abel Torres came to the hospital the next day, and Jones spoke with him.

¶ 15 The incident with Lynch occurred the second time Jones was in defendant's room. Jones had gone into defendant's room the first time to place defendant in the restraints. Hospital policy required security officers to place patients in restraints when ordered by a doctor. Once defendant was placed in the restraints, Jones went back to her vehicle and patrolled the hospital grounds. After defendant bit Lynch, Jones and her partner checked the restraints to make sure they were secure because defendant was "still sitting up and trying to knock the bed over."

¶ 16 Torres testified he was assigned to investigate the case and, on March 26, 2014, he interviewed defendant in the holding area in the Sixth Municipal District courthouse in Markham. Defendant waived her *Miranda* rights and agreed to give a statement.

¶ 17 Defendant told Torres she had been drinking alcohol before she was taken to the emergency department at Ingalls Memorial Hospital. Defendant was agitated and attempted to get out of the hand restraints. Defendant stated when Lynch tried to sedate her, Lynch "had her

big old t*** in my face, so [I] bit them." Defendant also told Torres "If you are going to treat me like a dog, I'll act like a dog."

¶ 18 On cross-examination, Torres testified he spoke to Lynch on the telephone before he spoke with defendant in the holding cell. Torres knew defendant had been a patient at Ingalls Memorial Hospital the night of the offense but did not know what medication had been administered to her. Defendant was asleep when Torres approached her in the holding cell.

¶ 19 Torres did not record the interview on videotape, and he did not ask a court reporter to transcribe it even though it took place during business hours at the courthouse. Torres did not ask defendant to write down what occurred. Torres did not take down defendant's statement verbatim.

¶ 20 Torres admitted his testimony at the preliminary hearing did not include the fact defendant told him she had been consuming alcohol, that she was in soft restraints in the emergency room, that she became combative when Lynch tried to sedate her, and that she bit Lynch's breasts when Lynch "had her big white t*** in [defendant's] face." Torres explained the question at the preliminary hearing was whether defendant had made any admissions, to which he responded that defendant told him "I bit that b***'s t***. I bit it good."

¶ 21 The State rested, and defendant moved for a directed verdict, which the trial court denied.

¶ 22 Defendant first called Investigator Michael Raab, who testified he was assigned to take photographs of Lynch's injuries. Raab took photographs of Lynch's face and body, but did not photograph her breasts. The photographs of Lynch's breasts were taken by a female sergeant.

¶ 23 Defendant next called Wilderspin, who testified she was employed as the nurse manager of the occupational health department at Ingalls Memorial Hospital. Lynch came to see

Wilderspin after her shift at approximately 7:15 or 7:30 a.m. to report an injury that occurred while she was on duty. Wilderspin examined Lynch and recorded her findings on a progress sheet.

¶ 24 Lynch reported to Wilderspin she was bitten while on duty the previous evening. Lynch told Wilderspin blood had been drawn from her and defendant, and she was given an antibiotic. Wilderspin examined Lynch's breast but did not see a bite mark or drainage anywhere. Wilderspin asked Lynch why she was taking the antibiotic, and Lynch told her "just in case."

¶ 25 Wilderspin testified she completed a form which is required when an employee is exposed to blood or bodily fluids. On the form, Wilderspin noted there was no blood exposure and Lynch's skin was intact. Wilderspin checked boxes on the form which stated the injury was a "uniform needlestick injury" and was nonpreventable.

¶ 26 As part of her evaluation of Lynch, Wilderspin reviewed the medical records for Lynch's treatment in relation to the bite. The medical records indicated Lynch was bitten on the left breast over her clothing, which left teeth marks, redness, and broken skin, which Wilderspin did not see when she evaluated Lynch.

¶ 27 Wilderspin was then shown the photographs of Lynch's breast which were admitted into evidence during Lynch's testimony. Wilderspin testified the photographs did not show bite marks she would expect to see if someone was bitten on bare skin but noted the bite occurred over clothing and stated she saw redness. Wilderspin did not see teeth impressions, an open wound, or broken skin in the photographs.

¶ 28 On cross-examination, Wilderspin testified the medical records reflected the bite occurred at 9:28 p.m. on March 25, 2014, and she did not see Lynch until approximately 7:30

a.m. the next morning. Wilderspin testified she made a mistake on the form which is required when an employee is exposed to blood or bodily fluids. Wilderspin checked the box for "uniform needlestick and sharp object injury report" when she should have checked the box for "mucocutaneous," meaning "the mucous membranes of the skin," exposure to the skin. Underneath the box for mucocutaneous, Wilderspin wrote "Bite. No broken skin."

¶ 29 Wilderspin did not state in her report that the injury she observed was conclusively not a bite mark. Wilderspin testified bites can leave teeth impressions and break the skin but do not always do so.

¶ 30 According to Wilderspin's review of Lynch's medical records, the final primary diagnosis made by Dr. Guneeh Saluja was a human bite. In his physical examination of Lynch, Dr. Saluja noted there was a two-centimeter bite mark and redness on Lynch's left breast. Wilderspin agreed the photographs of Lynch's breast showed redness, but she did not see any redness the next day.

¶ 31 Defendant next called Doherty, who testified she was the primary nurse for defendant at Ingalls Memorial Hospital. During her assessment of defendant, Doherty noted the cart was in the lowest position, about a foot off the ground, and the side rails were up. The call light was within defendant's reach but was not placed in her hand.

¶ 32 At about 9:30 p.m., Doherty administered Haldol, which is an antipsychotic medication, and Ativan, which is an antianxiety medication, to defendant. Those medications make an individual drowsy and should not typically be taken with alcohol.

¶ 33 On cross-examination, Doherty testified she administered the Haldol to defendant at 9:32 p.m. and the Ativan at 9:33 p.m. Those medications are typically given to psychiatric patients

who are combative and cannot be redirected. Defendant could not be redirected on March 25, 2014.

¶ 34 Doherty made an entry in defendant's medical records that defendant remained agitated and was using derogatory language toward Lynch at 1:45 a.m. Doherty testified defendant called Lynch a "white b***," and she knew defendant had bitten Lynch.

¶ 35 On redirect, Doherty testified defendant was taken out of the restraints at 3:22 a.m. and was calm and cooperative. At 3:15 and 3:30 a.m., the "sitter" assigned to defendant recorded that defendant was sleeping. Additionally, at 1:45 a.m., when Doherty noted defendant remained agitated and was using derogatory language toward Lynch, the sitter noted defendant was sleeping.

¶ 36 Defendant testified that on March 25, 2014, she was out drinking to celebrate obtaining her master of business administration degree in health administration. She split a fifth of alcohol with a friend.

¶ 37 That evening, defendant was taken to Ingalls Memorial Hospital in an ambulance. She arrived at the hospital in custody of the Robbins police department but was not under arrest. According to defendant, the police had kicked in the door to her home and removed her while she was wearing a T-shirt and underwear. The police did not allow defendant to put on pants prior to taking her away. Defendant was in restraints while in the ambulance and remained in restraints when she arrived at the hospital. Defendant's wrists and ankles were secured to the hospital bed, and defendant was not able to move. Defendant was in a reclined position, between 30 and 45 degrees, and the call light was on the wall behind her.

¶ 38 After she arrived at the hospital, Lynch came into defendant's room and tightened the four restraints. Defendant asked for a charge nurse, to which Lynch replied, "I am a charge nurse." Defendant told Lynch she was a certified nursing assistant (CNA) and asked her to loosen the restraints, and Lynch told her to "shut up." Defendant said to Lynch, "What are you, fat? You're not a charge nurse. You're a fat-a*** white b***. You're evil."

¶ 39 Lynch then grabbed defendant by her hair and pushed and pinned down her head. At the time, the Robbins police and a CNA, who was assigned to be a sitter, were in the room. Defendant told Lynch she was not supposed to abuse patients and defendant was going to call her lawyer. Lynch told defendant she was "just a drunk psychotic black b***," and left the room.

¶ 40 After Lynch left the room, defendant tried to loosen the restraints so she could get the call light. Defendant called out for a charge nurse other than Lynch. Doherty entered the room and told defendant not to worry. Defendant began crying and told Doherty, "[t]his don't make no sense." Defendant also told Doherty that Lynch "thinks she's going to get away with this. I'm going to get my lawyer. I'm going to sue her." Defendant also asked Doherty to loosen the restraints but Doherty did not do so. Defendant asked Doherty for a grievance letter to complain about Lynch's treatment of her but Doherty did not give her one.

¶ 41 Defendant testified she underwent a psychiatric evaluation toward the end of her stay at the hospital. Defendant told the evaluator the police had kicked in the door to her home and took her away in a T-shirt and underwear. Defendant asked the evaluator for a grievance letter but did not receive one. During the evaluation, the evaluator asked defendant whether she had any family, to which defendant replied, "Yeah, I got family. His name Dennis Sherman." According to defendant, "Dennis Sherman is a predominant lawyer that's in every courthouse, Markham,

26th and California, everywhere." The evaluator continued the interview but defendant stopped answering her questions and told the evaluator "to call [her] lawyer."

¶ 42 Defendant denied Jones ever entered her room. She never said she was going to bite Lynch when the restraints were removed. Defendant never bit Lynch on her breast or any other part of her body. She denied she rocked the cart back and forth and testified the cart was too big to be rocked.

¶ 43 According to defendant, she told Lynch she needed the call light and that is what started the incident. When Lynch did not give defendant the call light and left the room, defendant "scream[ed] and holler[ed] for the call light" for what felt like an hour. At about 9:30 p.m., Lynch came back into defendant's room and that is when Lynch pulled her hair and struck her in the head. Doherty then came into the room and administered medication to her.

¶ 44 Defendant testified that, after she left the hospital, she was taken to the holding cell in the Sixth Municipal District courthouse in Markham. Defendant woke up in the holding cell and believed she had been there for three or four days. Defendant was taken to a room, where three detectives were waiting.

¶ 45 When defendant entered the room, she asked where her kids were and asked to use a phone. The detectives told defendant to sign a *Miranda* waiver form and they would then let her use a phone. Defendant initialed the form but did not sign it. Defendant did not read the form or understand it because she was "out of it," but she initialed it because she wanted information about her kids.

¶ 46 While speaking with the detectives, defendant told them Lynch pulled her hair and punched her in the face. The detectives asked defendant if she bit Lynch, and defendant said she did not. Defendant then went back to the holding cell and fell asleep.

¶ 47 Defendant was awoken again and taken back to an interview room, where the same detectives had been joined by an assistant state's attorney. Defendant was questioned again about the incident. Defendant again told the police Lynch had pulled her hair and punched her in the face. Defendant denied making the comment, "If you treat me like a dog, I'm going to act like a dog."

¶ 48 On cross-examination, defendant testified the Robbins police came to her house in relation to a domestic disturbance. Defendant denied her daughter opened the door and allowed the police into her home. When the police arrived, defendant cracked the door and stated, "Wait, let me put on some pants," and the police kicked the door in.

¶ 49 Defendant denied she began yelling and screaming at the police officers when she cracked the door. Defendant denied her daughter grabbed a pair of jeans for her. Defendant denied she continued to yell and scream after the police entered her apartment. She denied the police ordered her to sit still. Defendant denied she was placed in handcuffs at that time and denied she continued to yell and scream in the police officers' faces after she was placed in handcuffs. Defendant denied she kicked Detective Bobby Young of the Robbins police department twice in the groin, and she denied she was placed in restraints after she kicked him.[2] Defendant denied the police asked her to put on the pants which had been brought by her daughter, and she denied she refused to do so.

[2] Young was a patrol officer on March 25, 2014, but, at the time of trial, he had been promoted to detective.

¶ 50 Defendant explained her daughter was deaf. She and her daughter communicate through sign language. According to defendant, her daughter can write but no one other than defendant can comprehend it.

¶ 51 Defendant denied she told Torres that Lynch had leaned over defendant and put her breast in defendant's face and that defendant bit it. Defendant believed she had been forced to sign the *Miranda* waiver because the police would not tell her where her son was.

¶ 52 Defendant confirmed she told the psychiatric evaluator that Dennis Sherman was part of her family, but admitted she is not related to him. Defendant explained she knows of Dennis Sherman and that he is a neighborhood lawyer.

¶ 53 In rebuttal, the State called Young, who testified he was called to defendant's apartment on March 25, 2014, in relation to a domestic battery in progress. When he arrived at the apartment building, defendant's daughter opened the door for Young and the other responding officers. Young went to the second floor and went to defendant's door. Defendant opened the door, then shut it in his face. Defendant was irate and belligerent. Young and Officer Henderson entered the apartment. Henderson was communicating with defendant's daughter with a notebook, and Young was attempting to get defendant to calm down.

¶ 54 Young asked defendant for identification and told her to put clothes on. Young placed defendant in handcuffs, and defendant became more irate. Young sat defendant on the edge of a mattress that was in the living room, and defendant started to kick. Defendant kicked Young in the groin twice. The Cook County sheriffs arrived and put defendant into leg restraints. Defendant was taken from the apartment in leg restraints, wrapped in a sheet, and placed into the ambulance.

¶ 55 On cross-examination, Young testified he did not file a complaint or press charges against defendant. Young did not write the report relating to the incident at defendant's home. He did not write a report with respect to defendant kicking him and did not press charges because his sergeant made those decisions.

¶ 56 The jury found defendant guilty of aggravated battery to a nurse. Defendant filed a posttrial motion, which she later amended. The trial court denied the motion and sentenced defendant to two years' probation.

¶ 57 This appeal followed.

¶ 58 Defendant first contends she was denied her right to trial by an impartial jury. According to defendant, the trial court's conduct toward her attorney before, during, and after trial demonstrated its bias against defendant and her attorney and, because the court's bias manifested itself in front of the jury, the jury was prejudiced against her. For the sake of simplicity, we categorize the court's conduct into two categories—that which occurred before and after trial and that which occurred during trial—and address each category in turn.

¶ 59 Before addressing the trial court's conduct, we must first address whether defendant forfeited review of this issue, because although she raised this issue in her amended motion for new trial, she did not make contemporaneous objections during the proceedings. Defendant argues we should excuse her failure to make a contemporaneous objection under the *Sprinkle* doctrine. See *People v. Sprinkle*, 27 Ill. 2d 398 (1963). In the alternative, defendant contends if she forfeited the issue, we may grant her relief under the plain-error doctrine. The State argues even if we were to excuse defendant's forfeiture of this issue, we must affirm because a thorough

review of the record establishes no judicial misconduct and, even if there was misconduct, it was harmless error and a new trial is not warranted.

¶ 60 "[T]rial counsel has an obligation to raise contemporaneous objections and to properly preserve those objections for review" by raising them in a posttrial motion. *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009). "The failure to raise claims of error before the trial court denies the court the opportunity to correct the error immediately and grant a new trial if one is warranted, wasting time and judicial resources." *Id.* Thus, the uniform application of the forfeiture rule must prevail except in the most compelling of situations. *Id.* Although *Sprinkle* may be applied to excuse a party's forfeiture where the conduct of the trial court is directly at issue, we may still honor the party's procedural default where "the trial court's comments during its evidentiary rulings and closing argument, even if unnecessary or incorrect, were not extraordinary circumstances to justify excusing the forfeiture by defense counsel." *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 60.

¶ 61 In any event, the first step is to determine whether an error occurred. *People v. Johnson*, 2015 IL App (1st) 123249, ¶ 46. We note defendant does not raise each instance of the alleged improper conduct as freestanding error, but rather argues the court's conduct, when viewed in its entirety, demonstrates its bias against defendant, resulting in an unfair trial.

¶ 62 A defendant is entitled to a fair and impartial trial by a jury, and a trial judge has wide discretion in the conduct of such a trial. *People v. Williams*, 209 Ill. App. 3d 709, 718 (1991). However, "[a] trial judge 'must not interject opinions or comments reflecting prejudice against or favor toward any party.' " *Lopez*, 2012 IL App (1st) 101395, ¶ 57 (quoting *Williams*, 209 Ill. App. 3d at 718). The trial court's comments are improper if they show disbelief in the testimony

of defense witnesses, confidence in the credibility of the prosecution witnesses, or an assumption of the defendant's guilt. *Id.* "A trial judge may convey improper or prejudicial impressions to the jury by displaying a hostile attitude toward defense counsel, by inferring that defense counsel's presentation is unimportant, or by suggesting that defense counsel is attempting to present a case in an improper manner." *People v. Young*, 248 Ill. App. 3d 491, 501 (1993). Remarks which belittle or demonstrate hostility to defense counsel may prevent the defendant from receiving a fair trial. *People v. Romero*, 2018 IL App (1st) 143132, ¶ 105. Nevertheless, the fact a judge displays displeasure or irritation with an attorney's behavior is not necessarily evidence of judicial bias against the defendant or his counsel. *Id.*

¶ 63 The trial court must take great care to restrain itself from conduct which may intimate to the jury its prejudice against or favor toward a party. *Young*, 248 Ill. App. 3d at 502. "Jurors are ever watchful of the attitude of the [court] and [its] influence upon them is necessarily and properly of great weight, thus [the court's] lightest word or intimation is received with deference and may prove controlling." *People v. Marino*, 414 Ill. 445, 450-51 (1953).

¶ 64 To be entitled to a new trial, the defendant must show the comments by the trial judge were prejudicial and he or she was harmed by the comments. *Lopez*, 2012 IL App (1st) 101395, ¶ 57. The verdict will not be disturbed unless the defendant demonstrates the comments constituted a material factor in the conviction or were such that an effect on the jury's verdict was the probable result. *People v. Harris*, 123 Ill. 2d 113, 137 (1988). Even improper remarks may be harmless error. *Lopez*, 2012 IL App (1st) 101395, ¶ 57. We must evaluate the trial court's comments in light of the evidence, the context in which they were made, and the circumstances surrounding the trial. *Id.*

¶ 65 We first address the conduct of the trial court which occurred before and after trial. "[T]he need for judicial restraint in the court's conduct and remarks is not limited to the presence of the jury but must be maintained throughout all of its dealings with the litigants who come before it." *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 80. However, "[i]t is axiomatic that any comments made outside the presence or hearing of the jury cannot effect [*sic*] the jurors." *Young*, 248 Ill. App. 3d at 502 (1993).

¶ 66 The first comment with which defendant takes issue occurred at a pretrial hearing on Dr. Guneesh Saluja's motion to quash subpoena. In his motion, Dr. Saluja alleged defense counsel issued him a subpoena which required his appearance on three consecutive days. According to the motion, defense counsel contacted Dr. Saluja's employer and asked to speak to him regarding medical records defense counsel had in her possession. Defense counsel spoke with Dr. Saluja's employer's legal assistant who, after the conversation, worked diligently with defense counsel to schedule a meeting between defense counsel and Dr. Saluja despite the fact defense counsel never provided information regarding the underlying lawsuit, the patient to be discussed, or why Dr. Saluja's care was at issue. The motion further indicated Dr. Saluja's attorney asked for information regarding the nature of the case, the medical care at issue, and a copy of the medical records so Dr. Saluja could prepare for his testimony but was ignored by defense counsel.

¶ 67 At the hearing on the motion, Dr. Saluja's attorney began explaining the basis for the motion, and the following colloquy occurred:

> "THE COURT: I read the motion, counsel.
>
> So what's the problem here? Why are you asking a physician to be here for three days straight?

[Defense counsel]: Judge, initially when this subpoena was sent, we were set for trial, and those were the trial dates.

THE COURT: Yeah, but you don't tell him to come in – you tell him those are possible dates; I will get in touch with you if needed.

Second of all, why haven't you told him what you want him to testify about? Is he supposed to be God?

[Defense counsel]: I had an appointment with the doctor on June 10th.

THE COURT: And it didn't go?"

The court then permitted defense counsel to rebut the allegations of Dr. Saluja's motion, after which the following colloquy occurred:

"THE COURT: Okay let's do this: No more arguing. Tell the doctor what – what subject you want him to be prepared on, first of all, to testify about. According to this motion, they don't know what you want him to talk about.

[Defense counsel]: That's not correct, because when I first made contact with them, I talked to this paralegal. She indicated to me before I could even get the HIPA [*sic*] I had to get my client's name, I had to get the date of service, and I told him about the medical records.

THE COURT: Okay, so he does know that.

[Defense counsel]: He does know.

***

THE COURT: *** So this is what we are going to do: I'm not going to order the doctor to come in until such time it's ready to go to trial or for hearing, all right? So he's

> under subpoena of this court, and I will tell Dr. Saluga's [*sic*] attorney that if you give him [48] hours notice to be here, he should be here, okay, on a specific date, or if it's set for trial. ***
>
> ***
>
> So we will enter and continue this subpoena. He's been served, and he is under subpoena of this court. Give him proper notice when he has to be here or contact counsel here."

¶ 68 Defendant states the trial court immediately "chided" defense counsel with the question regarding whether Dr. Saluja was "supposed to be God," which demonstrated the acrimonious nature of the court and counsel's relationship from the outset of the proceedings. However, viewing the proceedings in context, we find the court did not commit error. This comment, while perhaps sarcastic, did not demonstrate an acrimonious relationship between the court and defense counsel. After making the comment, the court permitted defense counsel to fully rebut Dr. Saluja's allegation she had not informed him what she wished him to testify about and even accepted as true her representation that she had given this information, and then denied Dr. Saluja's motion to quash, *i.e.*, ruling in counsel's favor.

¶ 69 Defendant also argues the trial court erroneously found Dr. Saluja, who treated defendant and Lynch at the hospital, was an expert witness who was entitled to expert fees. Defendant asserts "[t]his erroneous ruling was symptomatic of the judge's bias against the defense." In support of her assertion the court's ruling was erroneous, defendant relies on *Tzystuck v. Chicago Transit Authority*, 124 Ill. 2d 226 (1988), wherein the supreme court held a treating physician was not a retained expert witness for purposes of Illinois Supreme Court Rule 220 (107 Ill. 2d R.

220 (eff. Oct. 1, 1984)), which required a party to identify the witness and disclose his or her opinions.

¶ 70 "A judge's rulings alone almost never constitute a valid basis for a claim of judicial bias or partiality." *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). This is true even if the rulings are alleged to be erroneous. *In re Estate of McHenry*, 2016 IL App (3d) 140913, ¶ 147. Thus, even if we were to assume the trial court's ruling was erroneous, it cannot serve as a basis for defendant's claim of judicial bias.

¶ 71 The next comment of which defendant complains occurred on the day trial commenced, prior to jury selection. On the day of trial, defense counsel informed the trial court and the State she had filed a third amended answer to discovery "to include her expert witness Patricia Wilderspin." The court asked defense counsel whether Wilderspin had previously been disclosed as an expert witness, and defense counsel explained she had disclosed her as a witness but not an expert witness. The State indicated its concern was not the disclosure of Wilderspin but the fact defense counsel had not disclosed what Wilderspin's expert opinion would be. The court allowed the parties to discuss the matter off the record, following which defense counsel asked the court to continue the trial so she could speak with Wilderspin to determine her opinion and argued at length the basis for her request to continue the case. The following exchange then occurred:

> "THE COURT: No. Motion is denied. We're going to trial today.
>
> [Defense counsel]: Your Honor, I'm not trying to offend the Court, but is there any reason why the defense can't have one continuance when the State has had several?

THE COURT: Ma'am, you come in today. You file a motion, a third amended answer with an expert witness, and now you're telling me you need time to talk to the expert witness. That doesn't –

[Defense counsel]: It was –

THE COURT: Let me finish.

[Defense counsel]: Yes, sir.

THE COURT: That doesn't make any sense. First of all, I don't think she's an expert witness to be honest with you. If, she's going to testify to whatever she wrote in the report I'll let her testify to whatever she wrote in the report. There's no problem with that. You have a right to ask her those questions. But why is she an expert witness? Because she's a nurse and filled out some reports?

[Defense counsel]: Your Honor, I would just like to –

THE COURT: No.

[Assistant State's Attorney]: Judge, as I understand it after speaking with counsel, what she does intend is to call this person as a witness as to what she wrote in her reports. It doesn't appear that there is any additional expert testimony that she will be providing above and beyond the report that she has already authored.

THE COURT: Well, she already said that. She already told me that. She filled out some report, and she's going to testify. She said that in the beginning when I asked her why this lady is going to be called as an expert. I don't think she's an expert. She's just a nurse who filled out an incident report as I understand. So she will be allowed to testify to that.

Motion for continuance is denied. We're going to trial. Pass it."

¶ 72 Defendant asserts the trial court's determination that Wilderspin was not an expert witness was "a notable reversal of [its] own legal theory" that treating physician Dr. Saluja was an expert witness. Further, defendant asserts, the court "scoffed" at defense counsel when it stated her request for continuance "[did] not make any sense." Defendant argues the court's conduct was indicative of the antipathy it exhibited toward defense counsel, which repeatedly flared up at trial.

¶ 73 When viewed in context, the trial court was merely explaining the basis for its denial of defendant's request for a continuance, which was that defense counsel's request for a continuance in order to obtain the opinion of a purported expert witness, who was disclosed as an expert on the day trial was set to commence, was unwarranted when that witness was not actually an expert witness. We do not see how this comment illustrates the court's antipathy toward defense counsel, particularly where the outcome—that Wilderspin would be permitted to testify with respect to what was contained in her reports—was favorable to defendant.

¶ 74 Defendant also takes issue with a comment made by the trial court after the jury reached its verdict. The State made an oral motion to revoke defendant's bond, and the following exchange occurred:

"THE COURT: Defendant and counsel, please rise.

[Defense counsel]: Judge, may I respond, please?

THE COURT: Okay. Go ahead.

[Defense counsel]: Your Honor, bond is set solely as part of flight risk. [Defendant] has been here on every occasion. Actually she's been in court before her

counsel has arrived. There is no reason to believe that she is a flight risk. She does have a seven-year-old son that is in her care. The other two children are adults, but she is the sole person who is over her son. There will be no one to take care of him. And the oldest daughter, Vanessa, is deaf. So we would ask that [defendant's] bond stay as is before and there is no reason to take her into custody or to revoke her bond."

The court entered judgment on the jury's verdict, revoked defendant's bond, and asked defense counsel to provide a date for sentencing. Thereafter, the following discussion occurred:

"[Defense counsel]: Judge, I did take – I know the next date that I will be out in this particular courthouse would be March 17. So if I can just do a short date for that.

THE COURT: It's going to take more time than that to do the PSI.

[Defense counsel]: I'm just saying that – well.

THE COURT: It takes usually four weeks to do a PSI.

[Defense counsel]: Judge, I guess I'm still trying to deal with the fact that you're revoking her –

THE COURT: Ma'am. I don't want to hear it. Give me a date, otherwise I'll give you a date.

[Defense counsel]: What I'm saying if I can give a short date. I don't have my calendar with me. If I could just come in as a status and from there we can [*sic*] the PSI date.

THE COURT: Motion Defendant 3/17/16. Okay. That's it.

[Defense counsel]: Judge, but if I still – [defendant] does work and what's to become of her child?

THE COURT: The case is over with. Take her in."

¶ 75 Defendant takes issue the trial court's command to defense counsel that she "Give me a date, otherwise I'll give you a date." According to defendant, this was a "quick and frustrated dismissal" of defendant's argument and was indicative of the atmosphere which pervaded the trial." The record shows the court was not quick to dismiss defendant's position. Rather, it permitted defense counsel to fully state her position with respect to the State's motion to revoke bond and then, after it had made its ruling and requested a date, defense counsel continued to argue the issue, which she had done on several occasions throughout the proceedings. The court acted within its discretion to keep the proceedings moving in an orderly fashion. See *People v. Thigpen*, 306 Ill. App. 3d 29, 40 (1999). The trial court's frustration with defense counsel did not demonstrate bias but merely served to move the matter to its conclusion after defense counsel was given the opportunity to fully state defendant's position. See *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 174.

¶ 76 In sum, the trial court's conduct which occurred before and after trial was not improper and we do not see how it demonstrated the court's bias against defendant or her attorney. Moreover, as that conduct occurred outside the presence and hearing of the jury, it could not have affected the jury and influenced its decision. See *Young*, 248 Ill. App. 3d at 502. Accordingly, we reject defendant's reliance on this conduct as a basis for her argument she was denied her right to trial by an impartial jury.

¶ 77 We next address the trial court's conduct which occurred during trial. The first occasion of alleged impropriety occurred during defense counsel's cross-examination of Lynch. During cross-examination, defense counsel asked Lynch about alternatives that could be used to

deescalate a combative patient, which included therapeutic conversation, decreasing environmental stimuli, and frequent observation. Defense counsel then asked Lynch about a form on which she checked a box next to the statement "Qualified RN was called to perform 1 Hour Face to Face Evaluation" but did not complete the entry by noting who performed the evaluation or the date and time at which it occurred. When defense counsel asked if Lynch had made this entry, she answered the form is not used in the emergency room and she was the qualified nurse. Defense counsel again asked Lynch whether she filled in a name next to the entry, to which Lynch replied that is not done in the emergency room. Defense counsel again asked the same question, to which the court sustained the State's objection that the question had been asked and answered, and directed defense counsel to "move on."

¶ 78 Defense counsel returned to the topic of deescalation methods and asked Lynch whether she performed any of those methods when she entered defendant's room the second time. Lynch responded by stating, "I'm not sure how you are supposed to deescalate someone who is trying to flip her cart." Defense counsel again went over the de-escalation methods to which Lynch had previously testified. The following exchange then occurred:

> "Q. Similarly, on that restraint order, someone – she came in at 8:31. A qualified nurse should have been there having a face to face –
>
> [Assistant State's Attorney]: Objection; argumentative.
>
> THE COURT: Sustained. Move on, Counsel. You already went over that question. You're not going to go over the same thing over and over again. Move on."

Defense counsel again asked if Lynch had performed any of the deescalation methods when she came into defendant's room the second time, and the State objected. The trial court overruled the objection, and the following exchange occurred:

> "THE COURT: Let me ask you this. What did you do when you went into the room the second time? In your expert opinion, what could have been done to bring the patient under control?
>
> THE WITNESS: Nothing at that point."

¶ 79 Defendant argues the trial court "not only interrupted the defense's cross-examination, he did so in order to bring out a fact favorable to the State." Further, defendant argues the court elevated Lynch to "expert" status, bolstering her testimony, and made defense counsel "appear as an inferior attorney unable to conduct her own cross-examination." According to defendant, the trial court's conduct was prejudicial to defendant and likely biased the jury against her.

¶ 80 A trial court has discretion to interject during questioning to avoid repetitive interrogation and it may question witnesses for the purpose of clarifying issues. *People v. Faria*, 402 Ill. App. 3d 475, 479 (2010). The court must remain impartial and cannot assume the role of an advocate. *Id.* The appropriate scope of the court's questioning is determined by the facts and circumstances of the case. *Romero*, 2018 IL App (1st) 143132, ¶ 88. The court's solicitation of evidence favorable to the State's case does not transform it into an advocate. *Id.*

¶ 81 We disagree that the trial court acted as an advocate for the State in this instance and that its question made defense counsel appear inferior and incapable of conducting a cross-examination. In the context of defense counsel's cross-examination of Lynch, which was fraught with repeated questions on the issue of whether Lynch complied with hospital protocol by

attempting to deescalate defendant, the court acted properly when it merely asked a question for the purpose of clarifying the issue and moving the proceedings along.

¶ 82 Later during the cross-examination of Lynch, defense counsel inquired into the qualifications of Rebecca Kalla, who treated Lynch in the emergency room after she was bitten. Lynch testified Kalla was a physician's assistant, and the following colloquy occurred:

"Q. And do you know the difference between an RN, physician assistant[,] and a practical nurse?

[Assistant State's Attorney]: Objection; relevance.

THE COURT: What difference does it make?

[Defense counsel]: I want to get to the point that if the physician assistant can only work under an M.D.

THE COURT: Okay. Let's assume that happened. What's the big deal? Was that the issue whether or not the complaining witness was bitten.

[Defense counsel]: I believe it's going to go to the issue of what occurred that night with the medical staff at Ingalls as opposed to the occupational registered nurse [Wilderspin].

THE COURT: What does that have to do with it?

[Defense counsel]: If you would give me latitude?

THE COURT: You have five minutes for that and you're done after these questions. Half these questions are not even related to the time of the attack."

¶ 83 Defendant contends the trial court's comments implicated to the jury that the evidence she presented and the questions she asked were irrelevant. We disagree. The court was inquiring

with defense counsel in relation to the State's objection to relevance. The qualifications of the person who examined Lynch after she was bitten was not relevant to defendant's guilt or innocence, and the trial court properly gave defense counsel the opportunity to explain otherwise. The court was within its power to control the proceedings when it told defense counsel he would allow defense counsel five more minutes to conduct her examination and that most of her cross-examination had been on collateral issues. Moreover, the court did not comment on the quality of the evidence defendant had presented or intimate to the jury his opinion as to the believability of the evidence.

¶ 84 Defendant next takes issue with the trial court's statement later during Lynch's cross-examination, in which defense counsel was questioning Lynch about inconsistencies between the medical records from her treatment and the records from Wilderspin's evaluation of her. Defense counsel asked Lynch if a physician assistant noted in her medical records that there was a visible bite mark with broken skin, and Lynch responded in the affirmative. Defense counsel then moved to the topic of Wilderspin's evaluation of Lynch the following day. Before asking a question, defense counsel sought to admit Wilderspin's progress report relating to her evaluation of Lynch, and the court interjected, "Counsel, I don't know where you are going. You are admitting different documents, but nothing is relevant so far."

¶ 85 Defendant again contends the trial court's comment was improper because it suggested to the jury the evidence she was presenting was irrelevant. When viewed in context, however, much of counsel's cross-examination of Lynch was related to collateral matters, such as what occurred before and after the bite but not during the bite, and the court's comment was merely an attempt

to keep counsel's examination of the witness on issues material to defendant's innocence or guilt.

¶ 86 Defense counsel then asked whether the progress report completed by Wilderspin indicated Wilderspin had examined Lynch and found the skin was intact with no open wound or bleeding, to which Lynch responded in the affirmative. Lynch confirmed another form filled out by Wilderspin indicated her injury was a bite with no broken skin. The following colloquy then occurred:

> "Q. So in your medical records it says that the skin has been broken, correct?
>
> A. Yes.
>
> Q. But in the occupied health nurse, it says no broken skin, correct?
>
> [Assistant State's Attorney)]: Objection.
>
> THE COURT: Sustained. That's not impeaching. I don't know what the exercise of all this is. What are you trying to show me? I don't know what you are trying to show me.
>
> [Defense counsel]: Judge, I'm showing – she stated earlier she went to the ER.
>
> THE COURT: And they felt it was broken skin.
>
> [Defense counsel]: The next morning she went –
>
> THE COURT: According to that report there was no broken skin.
>
> [Defense counsel]: Correct."

¶ 87 Defendant contends trial court's comments that it was unsure "what [was] the exercise of all this" and that it "[did not] know what [defense counsel] was trying to show [the court]" were prejudicial to her because the court disparaged defendant's trial strategy, told the jury he

believed the testimony was irrelevant, and confused the jurors by suggesting defendant was presenting testimony to the court rather than the jury. We disagree.

¶ 88 When taken in context, the trial court's comments, while perhaps evidencing the court's frustration with defense counsel's repetition of the same point, were an attempt to control the trial and move the proceedings along rather than to disparage defense counsel and her trial strategy. See *People v. Garrett*, 276 Ill. App. 3d 702, 713 (1995) (judge attempted to control trial and did not disparage defense counsel where its comments had a valid basis and did not display a specific bias or prejudice against defense counsel). The court's comments did not intimate any opinion as to the believability of the evidence, and we do not believe the court's comments confused the jury with respect to who was to resolve factual disputes. See *Lopez*, 2012 IL App (1st) 101395, ¶ 97.

¶ 89 Defendant argues the trial court's repeated admonitions to defense counsel to "move on," while "chiding her in front of the jury that she failed to present new or relevant evidence," demonstrated the court's bias. Specifically, defendant points to the court's comment that it "[would] not give [defense counsel] any more leeway"; the fact it hurried defense counsel during her examination of Doherty and admonished it would stop the examination of Doherty if counsel did not "bring anything new to it"; and its comment during defense counsel's cross-examination of Jones that she "[was] saying the same thing over and over again" and telling counsel he would "cut her off unless [she] start[ed] asking relevant questions."[3]

[3] We note the trial court's statement was not, as defendant represents in her brief, "I will not give you any more leeway." The trial court's statement, which occurred during defense counsel's direct examination of Wilderspin in relation to a written form, was "I'm giving you some leeway. It's not going to happen anymore."

¶ 90 When viewed in the context of the proceedings, the trial court's remarks were made only after defense counsel had repeatedly elicited the same information from the same witness or where she questioned witnesses on matters which were collateral to the issue of defendant's guilt. In these instances, in light of the circumstances, the court was entitled to limit the examination and control the proceedings. See *Garrett*, 276 Ill. App. 3d at 712. We do not find the court's conduct was improper.

¶ 91 Defendant also argues two instances of the trial court's conduct at sidebars demonstrated the judge's open contempt toward and bias against defense counsel. The first such sidebar occurred during defense counsel's cross-examination of Torres. Defense counsel asked Torres whether defendant told him "the [w]hite girl grabbed her by the hair." Torres testified defendant made that statement, and the following colloquy occurred:

"Q. And in fact, [defendant] indicated that she was punched by [Lynch], correct?

[Assistant State's Attorney]: Objection. Hearsay.

THE COURT: Sustained.

[Defense counsel]: Officer, when [defendant] stated to you that [Lynch] grabbed [defendant] by her hair – that her hair was grabbed and she was punched –

[Assistant State's Attorney]: Objection, Judge.

Can we have a sidebar?

THE COURT: Sure.

[Assistant State's Attorney]: The State's objection is that this is clearly something we talked about in the motion *in limine*. You cannot elicit the [d]efendant's statement through the [d]etective. It is a violation of the motion *in limine*, and we ask that [c]ounsel

refrain or be instructed to refrain from asking the questions that she has now asked three times.

[Defense counsel]: Well, I guess I am somewhat confused. If you are going to say it is okay for [defendant] to say that, oh, she had her breast in front of me and I bit her, and it is a fat lady, these are all statements that [defendant] allegedly said –

THE COURT: You cannot ask those questions.

Your objection is sustained. I don't want you to get into that again because I am going to hold you in contempt.

That is my ruling."

During a second sidebar, following a lengthy discussion of the rule prohibiting prior consistent statements, defense counsel indicated she wanted to clarify whether she could elicit certain evidence before she was held in contempt.

¶ 92 With respect to the first sidebar, defendant characterizes the court's comments as a threat to hold her in contempt when defense counsel was merely trying to elicit defendant's exculpatory statement that Lynch had physically assaulted her and the bite was defensive. Defendant argues her counsel's conduct did not merit the court's reaction, especially where "[t]he legal doctrine of completeness *may* have allowed the admission of [defendant's] statement and the [court's] ruling *may* have been wrong."[4] (Emphases added.) Defendant argues her counsel's apprehension regarding the court's attitude toward her was demonstrated by her counsel's statement in the second sidebar that she believed she could be held in contempt for an attempt to present evidence.

[4] Defendant does not argue the court's ruling was, in fact, wrong.

¶ 93 The trial court's conduct during these sidebars was not improper. In regard to the first sidebar, the court threatened defense counsel with contempt outside the presence of the jury. The threat was made in response to defense counsel asking Torres, not once, but twice, a question which violated the court's order on the State's motion *in limine* prohibiting defendant from eliciting hearsay statements of defendant, and after the court had sustained the State's objection. Defense counsel's statement that she wanted to make sure she would not be held in contempt was nothing more than a recognition she was aware of the consequences of repeatedly asking improper questions. We note again this conduct, because it occurred outside the presence of the jury, could not have affected the jurors. *Young*, 248 Ill. App. 3d at 502. Moreover, the court was within its discretion to make defense counsel aware of the potential consequences of violating a court order. Accordingly, we find no error in the court's conduct during these sidebars.

¶ 94 Defendant also complains of the trial court's conduct during her closing argument, asserting it demonstrated its bias toward defendant and prejudiced the jury against her. Specifically, defendant argues the court "continuously berated" defense counsel in front of the jurors and did not simply rule on the State's objections during closing argument but added unnecessary commentary to its rulings. Further, according to defendant, defense counsel's argument ended with a final confrontation in which the trial court cut off defense counsel's argument.

¶ 95 The trial court has broad discretion to control and even restrain closing arguments in a criminal case. *Herring v. New York*, 422 U.S. 853, 862 (1975); *People v. Maldonado*, 402 Ill. App. 3d 411, 429 (2010) ("When a trial court places limits on the scope of a defendant's closing, a reviewing court will reverse only if the trial court abused its discretion."). The court may limit

the duration and scope of closing argument by imposing a reasonable time limit and terminating the argument when continuation would be repetitive or redundant. *Herring*, 422 U.S. at 862. The court may keep a party from straying too far from the issues in the case. *Id.* It may ensure the argument does not impede the fair and orderly conduct of the trial. *Id.* Further, "[t]o be proper, closing argument comments on evidence must be either proved by direct evidence or be a fair and reasonable inference from the facts and circumstances proven." *People v. Hood*, 229 Ill. App. 3d 202, 218 (1992). The court may interject during argument without objection from the State to prevent the jury from hearing improper argument. *Johnson*, 2015 IL App (1st) 123249, ¶ 47.

¶ 96 To put this discussion in context, the record shows the trial court afforded the parties 45 minutes each for closing arguments. Defendant's theory during closing argument was that hospital employees and the police conspired to have defendant prosecuted for this offense because she threatened to sue the hospital after Lynch pulled her hair, struck her head, and pinned her head into the hospital bed.

¶ 97 During closing argument, defense counsel commented on the photographs that were admitted into evidence, when the following exchange occurred:

> "[Defense counsel]: So then let's talk about the photos that were taken. What it means, what it doesn't mean, does it corroborate or not?
>
> First we're going to deal with the photos that Detective Raab took, which was Defense Exhibit 4 and 5. These are the photos of what Nurse Lynch was wearing that's going to show her scrubs, that's going to show her ID marking. And it shows, ladies and

gentlemen, that she has a little cotton ball and a tape on it and still she had taken a shot. Now, we spoke she –

THE COURT: There's no evidence of that and you can't even argue that. That is total conjecture on your part. Move on."

¶ 98 The trial court's interjection on this point was not improper. Defense counsel's argument was not supported by evidence as to where Lynch received a shot and whether a cotton ball was placed over that location. Although the court interrupted defense counsel's argument without being prompted by an objection from the State, the court acted within its discretion to control closing arguments to prevent the jury from hearing argument which was not based on evidence which had been presented. See *Johnson*, 2015 IL App (1st) 123249, ¶ 47.

¶ 99 The next exchange of which defendant complains occurred when defense counsel commented on the photograph showing Lynch's injury, when the following occurred:

"[Defense counsel]: Ladies and gentlemen, look to see if this piece of clothing that I thought was a T-shirt, she said it was a bra, does that look like a T-shirt or does it look like a bra? And if the bra is not depicted, where is the bra? Did this bite occur over three pieces of clothing or did it occur over two? But then more importantly now you have a red dot. A red dot.

There's little impression. There's no teeth indentation. There's nothing. You can bite yourself over clothes or not and it will be more rectangular on your print.

[Assistant State's Attorney]: Objection.

THE COURT: Sustained. That's speculation on your part. There's no evidence of that by anywhere in the record. You can't argue what you think happened. You have to argue the evidence."

¶ 100 The trial court's comments in response to the State's objection were not improper. Defense counsel's argument immediately preceding the objection was not supported by the evidence, as no one testified a bite which occurs over clothing leaves a rectangular print. See *Hood*, 229 Ill. App. 3d at 218 (closing arguments must be based on evidence in the record or reasonable inferences to be drawn from the evidence). The court's commentary did not intimate counsel's argument was not worthy of acceptance but rather served to inform counsel of the basis for its ruling and caution counsel to comply with the rules relating to closing argument. See *People v. Barnes*, 2017 IL App (1st) 143902, ¶ 72 (comments by the court were proper where they served to inform defense counsel of the reasons for the court's ruling and how to proceed to avoid further objections).

¶ 101 After commenting on the evidence, defense counsel began to make her point with respect to the case being a conspiracy against defendant, when the following exchange occurred:

"[Defense counsel]: But the State and the people want to say [defendant] is violent and she's a fighter, she is belligerent, she can't control her. I tell you, ladies and gentlemen, yeah, [defendant] is the fighter, the type of fighter she is and she knows her rights. And if she doesn't care who it is, she's not going to be wronged.

The State is trying to have you be convinced that she was full of alcohol, full with a little spirit. I tell you [defendant] was full of a spirit with a capital A, a capital S. The

holy ghost spirit. And the time that I seen how she personified the sorry [*sic*] of David and Goliath.

[Assistant State's Attorney]: Objection.

THE COURT: Sustained.

[Defense counsel]: I'm sorry, what's the objection?

THE COURT: The objection is that it doesn't make any – I don't know what – I don't know what the basis you're saying between David and Goliath. I don't know what you're talking about?

[Defense counsel]: I'm going to explain David and Goliath if [Y]our Honor would allow me to go into my argument.

THE COURT: Go ahead. You got five minutes."

¶ 102 The trial court's conduct in this instance was improper. When defense counsel asked for the basis for the State's objection, the court and not the State responded and told counsel her argument did not make any sense. The court should have permitted the State to provide the basis for its objection and, instead of preemptively interjecting its commentary that it was not sure where counsel was going, the court should have afforded defense counsel the opportunity to develop her argument.

¶ 103 Defense counsel continued, arguing defendant was standing up for her rights as an abused patient, and the following exchange occurred:

"[Defense counsel]: The State is trying to come in here, she's drunk, she's belligerent, she's uncontrollable. No. Adversity. How do you stand up? She asked for a grievance letter from *** Lynch. She asked for a grievance letter when they wanted to do

the psych evaluation. She's saying it's not right. She came out, she said she wanted Dennis Sherman. Dennis Sherman is a reputable criminal defense attorney. Oh, has she been charged? Yeah, she's had her charges come in, but everything was dismissed.

[Assistant State's Attorney]: Objection.

THE COURT: Sustained. First of all, there was no evidence that she told them that Mr. Sherman was a lawyer. She testified [to] that in this courtroom. There's no evidence that she ever told anybody at the hospital, so quit making up evidence that is not in the record. Your objection is sustained. The jury –

[Defense counsel]: Your Honor –

THE COURT: I'm not done. Is instructed to disregard that very last part of the argument.

[Defense counsel]: Your Honor, [defendant] stated in her testimony that when she was talking to the psych –

THE COURT: I know what she said, and that's not what you argue, so therefore the objection is sustained. Move on.

[Defense counsel]: [Defendant] when she told him who's your family member, she said Dennis Sherman.

THE COURT: Right. So *** he was part of her family. She didn't say he was a distinguished known lawyer. That came out during her testimony here. She never told anybody at the hospital. So what you're saying is improper.

[Defense counsel]: But she testified to the Court on her direct that she –

THE COURT: But you are making it look like that she told the hospital people that this guy is a lawyer and they're going to come and sue you. That's not what happened.

[Defense counsel]: No, I did not say.

THE COURT: Oh, yes, you did. That was the implication. So move on. I don't want to argue with you. That was not the evidence.

[Defense counsel]: And I wasn't stating that as the evidence. But [defendant] told you her relationship with Dennis Sherman and she said it was family and she said he should let everybody in the neighborhood know him as a lawyer here today to you is what she said.

THE COURT: You got two minutes."

Defense counsel continued her argument, and the court interjected as follows:

"THE COURT: 30 seconds.

[Defense counsel]: 30 seconds.

Ladies and gentlemen, please look at the photos, listen to everybody's intent. If the nurse had yanked on her hair, hit her in the face, that's her motive. This puncture wound she has, that's the motive. She has access to all the needles in the hospital and she has the opportunity to get it and do as the State do.

She does it in her incident report. Nurse Lynch. Every time it says what were you doing immediately beforehand, it doesn't match up. It's huge Lynch says she comes in with the security guard 'cause the bed was shaking. Angela Jones says she was called in

and she says that her second time she comes is at 8:40. That's the first time on the first restraint.

Ladies and gentlemen, I –

THE COURT: That's not the evidence.

[Defense counsel]: Pardon me?

THE COURT: The evidence is the second time she was called in and then she went into the emergency room – into her room with Nurse Lynch. That's what she testified. She came in at 8:30 and then a second time at 9:40. Well, obviously we must have listed to different trials. Okay. You're done.

[Defense counsel]: If I may have just one second.

THE COURT: No, you're done. I gave you 45 minutes. You've spoken for 46 minutes.

[Defense counsel]: If I could have 30 seconds. I just want to thank the jury. That's it.

THE COURT: You're done.

[Defense counsel]: If I may, [Y]our Honor.

THE COURT: Sure.

[Defense counsel]: In closing, I would like to thank you for your attentiveness, praise you for your civic duty to serve, and ask that you return a verdict of not guilty."

¶ 104 When viewed in the context, we conclude the trial court's conduct in this final exchange was not improper. The court was understandably frustrated with defense counsel's repetitive references to facts that were not in evidence or which could not be inferred from the evidence.

For instance, during closing argument, defense counsel misrepresented Jones's testimony. She argued tetanus shots are taken in the muscle of the arm, bites which occur over clothes will leave a rectangular mark, defendant had not previously been to Ingalls Memorial Hospital, and "all the boss people" were involved after the bite, despite the fact that no evidence in the record supported such arguments. The court correctly instructed the jury to disregard defense counsel's argument relating to Dennis Sherman, as there was no evidence defendant ever told anyone at the hospital that Dennis Sherman was a lawyer, let alone her lawyer. However, defense counsel continued to argue with the court about the evidence after the court explained the reason for its correct ruling. While the court could have exercised more restraint and simply sustained the State's objections and briefly corrected defense counsel's improper statement of the evidence, in the context of the proceedings, the court's conduct did not intimate its feelings about defendant's case or counsel's argument.

¶ 105 Moreover, the court was within its discretion to enforce the time limits it had set for closing argument. See *Herring*, 422 U.S. at 862. It informed defense counsel when she had 5 minutes, 2 minutes, and 30 seconds remaining, which provided defense counsel with warning she should begin to close her argument. But counsel did not do so until she had 30 seconds of her allotted time remaining. Accordingly, we find no error in the court's conduct during this final exchange.

¶ 106 In sum, as noted above, defendant contends the trial court's conduct, when viewed in its entirety, shows the court was so biased against her that it necessarily resulted in a jury which was prejudiced against her, depriving her right to a fair trial. We disagree. We recognize the court could have exercised more restraint and tempered its remarks at certain junctures throughout

trial. However, after reviewing the entire record and placing the court's conduct into the context of the proceedings, we are not convinced the conduct, much of which occurred in isolated instances over the five-day jury trial during which defense counsel's conduct was admittedly "cumbersome," implied to the jury the court so biased against defendant such that she was deprived a fair trial before an impartial jury. Accordingly, we find no error and affirm the trial court's judgment.

¶ 107 In her opening brief, defendant argued for the first time on appeal the electronic citation fee (705 ILCS 105/27.3e (West 2014)) should be vacated and several assessments which are labeled as "fees" are actually fines and should therefore be offset by her presentence custody credit. In her reply brief, however, defendant agrees with the State this matter should be remanded so defendant may file a motion raising these issues under Illinois Supreme Court Rule 472. We agree with the parties.

¶ 108 Illinois Supreme Court Rule 472 provides the circuit court retains jurisdiction to correct certain sentencing errors at any time following judgment, including during the pendency of an appeal. Ill. S. Ct. R. 472(a) (eff. May 17, 2019). Among the errors which may be corrected are "[e]rrors in the imposition or calculation of fines, fees, assessments, or costs" and "[e]rrors in the application of *per diem* credit against fines." Ill. S. Ct. R. 472(a)(1), (2) (eff. May 17, 2019). Pursuant to Rule 472(e), in all criminal cases pending on appeal as of March 1, 2019, in which a party has attempted to raise an error with respect to the imposition or calculation of fines, fees, assessments, or costs for the first time on appeal, the reviewing court must remand the matter to the circuit court to allow the party to file a motion pursuant to the rule. Ill. S. Ct. R. 472(e) (eff. May 17, 2019); see *People v. Sanders*, 2019 IL App (1st) 160718, ¶ 53.

¶ 109 Here, defendant's appeal was pending on March 1, 2019, and she has raised the purported error with respect to the electronic citation fee and application of *per diem* credit against fines for the first time on appeal. Accordingly, we "remand to the circuit court to allow [defendant] to file a motion pursuant to [Rule 472]." Ill. S. Ct. R. 472(e); see *People v. Whittenburg*, 2019 IL App (1st) 163267, ¶ 6.

¶ 110 For the reasons stated, we remand the electronic citation fee and *per diem* credit issues pursuant to Illinois Supreme Court Rule 472(e) and affirm the trial court's judgment in all other respects.

¶ 111 Affirmed and remanded as to fines, fees, and costs.

¶ 112 JUSTICE GORDON, specially concurring:

¶ 113 I agree with the majority decision in this case that the trial court's comments directed toward defendant's attorney throughout the trial did not prejudice the jury and deprive defendant of a fair trial. However, I must write separately because I do not believe any trial judge should make any of these comments in the presence of the jury. The trial judge here is an experienced jurist with much experience in criminal jury matters and did nothing to prejudice the jury and deprive defendant of a fair trial. The trial court was obviously frustrated with defense counsel's trial strategy to continually repeat certain testimony to emphasize points that the defense felt needed to be emphasized. The defense should be given the opportunity to present defendant's case and tell his side of the story, which I believe it did in this case. Comments by the trial court in moving the case on and all the other comments made should be made outside the presence of the jury so that those comments do not give the jury the impression that there is an aire of

impropriety by the conduct of the defense. Although many of the comments made here were outside the presence of the jury, some were not.