2011 IL App (1st) 091961-U

No. 1-09-1961

SIXTH DIVISION
September 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 07 CR 08033
	)	
PAMELA MYLES,	)	Honorable
	)	Lawrence P. Fox,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Cahill and Garcia concurred in the judgment.

O R D E R

¶ 1 *Held*: (1) The trial court did not abandon its role as an impartial arbiter of fact; (2) the trial court's consideration of hearsay reports to assess the value of the expert witnesses' competing opinions was not error; (3) defendant's sentence should be reduced by presentence custody credit but not by the time she spends in the care of a mental health facility as a result of a prior adjudication of not guilty by reason of insanity for an entirely different offense, and this court rejects her request to be removed from the Illinois Department of Human Services and into

the custody of the Department of Corrections; and (4) the trial court relied on proper evidence at the sentencing hearing.

¶ 2 After a bench trial, defendant Pamela Myles was found guilty but mentally ill of aggravated battery of a senior citizen. She was sentenced to 78 months in prison. On appeal, she contends that:

(1) she was denied due process when the trial judge abandoned his role as a neutral arbiter of fact and interjected questions to expert witnesses that established critical facts concerning defendant's sanity;

(2) the trial court improperly relied on hearsay reports;

(3) she should receive credit for the full time she spent in custody for this aggravated battery offense, including the time, following her sentencing, that she spends committed in a mental health facility as a result of a prior adjudication in a separate matter that found her not guilty by reason of insanity, or, in the alternative, she should be immediately delivered into the custody of the Department of Corrections so that her mental health commitment for the prior offense does not delay her from serving her prison sentence for this aggravated battery offense; and

(4) she was denied a fair sentencing hearing where the trial court allowed the State to present testimony that the defense had no meaningful ability to challenge or rebut.

¶ 3 We correct the mittimus to credit defendant for time spent in presentence custody as a result of this aggravated battery offense but otherwise affirm the judgment of the trial court.

¶ 4 I. BACKGROUND

¶ 5 This appeal arises from defendant's arrest and charge for aggravated battery of a senior

citizen, based upon her stabbing of the victim, Ruth Kim, on March 18, 2007. However, a brief summary of the background concerning defendant's prior crime of attempted armed robbery and the resulting criminal proceeding and commitment to a mental health facility is relevant to understanding the issues raised in this appeal.

¶ 6 Defendant's history of schizoaffective disorder bipolar type has been documented and treated since 1992, and she has been psychiatrically hospitalized on several occasions. Her most recent psychiatric hospitalization occurred in August 2006. On September 23, 2006, about one week after she was discharged, she was arrested and charged with attempted armed robbery. She was held and treated at Cermak Health Services, but was released from custody on March 15, 2007, after posting bond. Three days later, she committed the stabbing offense at issue in this appeal. She was arrested near the scene and charged.

¶ 7 At the May 2007 fitness hearing, the State presented the stipulated testimony of Dr. Nishad Nadkarni, a forensic psychiatrist who examined defendant and concluded that she was unfit to stand trial. The trial court ordered defendant placed in the custody of the Illinois Department of Human Services (DHS) on an inpatient basis. In February 2008, the trial court held a restoration hearing and ruled that defendant had been restored to fitness and was fit to stand trial with medication.

¶ 8 The bench trial for the 2006 attempted armed robbery charge commenced in June 2008. The evidence established that defendant entered a currency exchange with a black BB gun concealed in a bag. She approached a teller window, pulled out the gun and demanded money. The teller contacted the police, and defendant fled the premises. The police stopped her about one block away from the scene, and she admitted that she attempted to rob the currency

exchange. The defense presented two expert medical witnesses who testified that defendant was legally insane at the time of the offense, and the State presented one expert medical witness who opined that defendant was legally sane at the time of the offense. The trial court found defendant not guilty by reason of insanity. In August 2008, after the trial court heard stipulated testimony that defendant required inpatient mental health services, the court ordered her remanded to the care of DHS in accordance with section 5-2-4(a) of the Unified Code of Corrections (730 ILCS 5/5-2-4(a) (West 2008)), for a maximum of 15 years.

¶ 9 The bench trial for the stabbing offense at issue in this appeal commenced in November 2008. The victim testified that, on the afternoon of March 18, 2007, she was 68 years old and had finished work at a hospital on the south side of Chicago. While she was waiting for a bus, she noticed defendant walking toward the bus stop. The victim looked away in the other direction. Then, she felt a pain in her back, fell to the ground and saw blood. She looked up and saw defendant with a knife in her right hand and a gun in her left hand. Other people came forward to assist the victim, and she was taken to the hospital.

¶ 10 Maurice Harris was driving his car at the scene when he saw defendant pull a knife with an eight-inch blade out of the victim's back. He stopped, briefly talked to some people at the scene, and then drove next to defendant, who was walking down the street. He yelled to her but saw, when she turned around, that she had a gun, so he drove off. He drove around the block, found defendant again, and continued to follow her until she went into an alley. He returned to the scene and later led police officers to the area where he last saw defendant.

¶ 11 Chicago police officer Lou Toth testified that he searched the alley looking for defendant. In the backyard of a house, he saw white gym shoes sticking out from underneath a

porch. He called for assistance and removed defendant from underneath the porch. He found a black BB gun where defendant had lain but did not locate the knife used to stab the victim.

¶ 12 The defense called Dr. John Meiszner, a psychiatrist at the mental health center where defendant was sent in July 2008 after being adjudicated not guilty by reason of insanity in the attempted armed robbery case. At the center, she was prescribed the same mood stabilizers and antipsychotic medication that she had received in jail while awaiting her attempted armed robbery trial. When she was tested 7 to 10 days after her arrival at the center, the results revealed that her lithium levels were low, which suggested that she was not compliant with taking her medication. Furthermore, staff sometimes saw that defendant pretended to swallow her medication but actually put it in her cheek and spat it out later. Nevertheless, her mental status was stable and she had no signs or symptoms of active mental illness. There did not seem to be any clinical effect in defendant's behavior as a result of her failure to take her medication. Sometimes, however, people who were not on medication were not symptomatic. Dr. Meiszner could not conclude that defendant's failure to take her medication as prescribed had no effect on her judgment, impulses or ability to function.

¶ 13 Dr. Meiszner testified that the time period of defendant's incarceration from early September 2006 until March 15, 2007, during which time she was prescribed her medication, was a sufficient amount of time for her medication to build up in her body to be effective. He testified that it would be very unlikely that a person would decompensate by not taking the medication for three days. It would generally take weeks, not days, before the person would decompensate. He did not give any opinion concerning defendant's sanity at the time of the March 18, 2007 stabbing.

¶ 14 The defense also called Dr. Gerson Kaplan, a psychiatrist who had treated defendant, off and on, since approximately 1992. Sometimes he saw her weekly, bimonthly or every three months. When she refused to cooperate and come into the office, they usually had telephone contact. He had hospitalized her on three or four occasions because she was a danger to herself and others, but that was several years before she committed the attempted armed robbery offense in September 2006. In November 2007, he visited defendant in jail and performed an evaluation in connection with this March 2007 stabbing case. Before November 2007, Dr. Kaplan last saw defendant several months before she was jailed for the September 2006 attempted armed robbery offense.

¶ 15 Dr. Kaplan opined that defendant was unable to appreciate the criminality of the stabbing to a reasonable degree of medical certainty because her behavior at the time was based on delusional thinking. In forming his opinion, Dr. Kaplan reviewed defendant's mental health records. Her March 20, 2007 emergency room admission record, which indicated that she lied about being allergic to certain medication, and her Cermak Health Services progress notes, which indicated that she attempted to avoid swallowing her medication, were consistent with her history of noncompliance with taking her medication. Dr. Kaplan stated that defendant also seemed resistant to medication because it took a long time to get her on a fairly decent level. For example, she had ostensibly been receiving medication for approximately six months before she was released from jail in March 2007 and committed the stabbing. Furthermore, Dr. Nadkarni's May 2007 analysis indicated that defendant was very unstable and unfit to stand trial despite receiving medication in jail for two months. In addition, at her November 2007 interview with Dr. Kaplan, defendant still harbored delusional thinking even though she had been receiving

regular medication for approximately six months.

¶ 16 At the November 2007 interview, Dr. Kaplan thought defendant was in better shape than he had remembered ever seeing her before. During the interview, she told him that she did not take her medication during the few days following her release from jail on March 15, 2007. She said that, at the time of the offense, she was upset, confused, and had a lot of energy that she did not know how to handle. Moreover, she had the idea that she needed to draw blood from someone to protect her ailing parents. Dr. Kaplan testified that defendant's statement about not taking her medication was consistent with her history of noncompliance over the years. When she was not on medication, she was more disturbed, delusional, heard voices, had pronounced mood swings, laughed inappropriately and talked nonsense.

¶ 17 Dr. Kaplan also reviewed some police reports, *i.e.*, the two-page general police case report, the ½ page typed report by Officer Toth, and the crime scene processing report. Those documents indicated that the stabbing was a very random act without any motive for robbery or revenge and, thus, supported the conclusion that defendant's behavior was due to delusional thinking.

¶ 18 Dr. Kaplan acknowledged that prior to forming his opinion he did not interview the police or any doctors from the jail. Furthermore, he did not interview the victim, eyewitnesses or defendant's family members concerning her behavior around the time of the stabbing. He also acknowledged that because he did not review the police detectives' supplemental reports, he had formed his opinion without the knowledge of certain facts and statements defendant made to the police when she was arrested. Specifically, the supplemental reports documented that: defendant was found hiding under a porch immediately after the stabbing; she told the detectives

that she had not been found with the knife at the time of her arrest; when the detectives confronted her with the witnesses' observations, defendant responded, "I can't admit I did it"; and she never told the detectives that she acted to protect her parents. Dr. Kaplan agreed that defendant's hiding and unwillingness to acknowledge her actions indicated that she understood that she had done something wrong. He maintained, however, that her understanding occurred after the fact and the basis of her behavior at the time of the stabbing was delusional.

¶ 19 The defense called Dr. Nadkarni, who testified that, when he first evaluated defendant in May 2007 to assess her fitness to stand trial, she was in an acutely psychotic and manic state. Specifically, defendant, who had admitted not taking her medication, was delusional, her speech and thoughts were very disorganized, and she had significant mood instability. Dr. Nadkarni believed that she was not complying with taking her oral medication, but there was no way to determine how long she had been noncompliant. He stated that, generally, someone with a psychotic illness would have to be off her medication for approximately two to six weeks before her mental status would deteriorate to the point where it would be obvious based on clinical experience and her spontaneous verbalizations that she was noncompliant with taking her medication. He did not give any opinion concerning defendant's sanity at the time of the March 18, 2007 stabbing.

¶ 20 In rebuttal, the State called Dr. Andrew Segovia Kulik, a forensic psychiatrist, who testified that he evaluated defendant in April 2008 regarding her sanity at the time of the stabbing. He opined that–based on his review of defendant's medical records, the Cermak Health Services records, all the police reports in this matter, defendant's criminal history report, psychiatric evaluations and reports done by himself and other doctors, and his interviews with

defendant–she was legally sane at the time of the stabbing.

¶ 21 The Cermak Health Services Records from March 2007 stated that defendant was alert and oriented concerning person, place, time and situation. She was sleeping comfortably and was not a behavioral problem. Although she had some flight of idea, she did not have loose associations. She was described as not having auditory or visual hallucinations or paranoid ideation. She was not delusional, and her recent and remote memory were both intact. Moreover, the evidence did not establish that defendant was not taking her medication at the time of the stabbing because the March 20, 2007 emergency room record indicated that defendant told the hospital staff that she was taking "psyche" medication. The medical records indicated that there were times–including the February just before her March 15, 2007 release from jail–when defendant was noncompliant with medication. Nevertheless, Dr. Kulik believed that if a person was taking that medication as prescribed for a sustained period of time, it would take approximately 10 days for the medication to be out of the person's system.

¶ 22 Dr. Kulik stated that the totality of the facts in this case indicated that defendant understood the stabbing might get her into trouble because she hid afterwards and would not acknowledge her actions. Defendant told Dr. Kulik that she was walking in her neighborhood when she saw the victim and was "real mad and angry." She never told Dr. Kulik or any police officer or doctor aside from Dr. Kaplan that she stabbed the victim to save her parents. Furthermore, the randomness of the stabbing did not necessarily demonstrate insanity because many sane individuals commit random acts of violence. Although defendant has a severe mental illness and does not function as a normal individual does, she did not have "significant severe mental illness symptoms at the time of the [stabbing] that would have rendered her to be insane

at that time."

¶ 23 Finally, Dr. Kulik testified that the ethical guidelines of the American Academy of Psychiatry and the Law indicate, as a general rule, that testifying forensic experts should not have a treating role with defendants. The rationale for the rule is that a doctor establishes a relationship when he treats a patient and the nature of the relationship creates a bias. Dr. Kulik noted that Dr. Kaplan had testified on defendant's behalf despite his role in her treatment.

¶ 24 The court found defendant guilty of aggravated battery of a senior citizen. After the subsequent hearing on defendant's motion for a new trial, the trial court denied the motion. However, the trial court *sua sponte* vacated its guilty finding and instead found defendant guilty but mentally ill.

¶ 25 At the sentencing hearing, the defense sought to bar the State from calling police officers to testify regarding an investigation of alleged conduct by defendant. The defense argued that the investigation did not result in a prosecution, the testimony would be irrelevant and prejudicial, and the defense had not received any police reports concerning the investigation. The trial court denied the defense's motion *in limine*.

¶ 26 Thereafter, Chicago police detective Lorenzo Sandoval testified that he investigated the murders of two women who were killed on separate days in April 2006. One was killed with an axe-like object and the other was killed with a knife. On May 8, 2006, Detective Sandoval went to defendant's residence and spoke to her nephew. The nephew gave Detective Sandoval a bag the nephew said he got from defendant. The bag contained an ax, some rope and some gloves. With defendant's consent, Detective Sandoval searched her room and found in a drawer a note containing a list of names and the words "murder" and "Congratulations to me." The list of

names included the two victims in Detective Sandoval's murder investigation. No charges were filed against defendant for either of the murders. Defendant's mother also testified regarding the history of defendant's mental illness and her behavior.

¶ 27 The trial court sentenced defendant to 78 months in prison, and defendant appeals.

¶ 28 II. ANALYSIS

¶ 29 A. Role of the Trial Judge

¶ 30 Defendant argues that she was denied due process because the trial judge assumed the role of a prosecutor. Specifically, defendant contends the judge's questioning of the expert witnesses during the trial established that the judge was searching for facts to build a case to defeat defendant's insanity defense. Defendant acknowledges that this issue was not properly preserved for review with both a timely-made objection and inclusion in a posttrial motion. Nevertheless, defendant asks this court to either relax the forfeiture rule based on the trial judge's alleged misconduct or review this matter under the plain-error doctrine.

¶ 31 The application of the forfeiture rule is less rigid where the basis for the objection is the trial judge's conduct. *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009). However, courts generally relax application of the forfeiture rule only in the "most compelling of situations," such as when a trial judge makes inappropriate remarks to the jury or in cases involving capital punishment. *Id*. Here, defendant has not established that an extraordinary or compelling reason exists to relax application of the forfeiture rule. See *People v. Faria*, 402 Ill. App. 3d 475, 478 (2010) (forfeiture rule was not relaxed where there was no indication in the record that objections would have fallen on deaf ears in defendant's bench trial for a noncapital offense). This matter proceeded as a bench trial, so there was no danger of the judge's questions or

remarks influencing jurors. Furthermore, the record does not indicate that defendant's objections would have fallen on deaf ears. Throughout the trial, after the judge initially had questioned the relevance or repetitious nature of defense counsel's line of inquiry, defense counsel persuaded the judge to afford her some leeway. Moreover, when the trial judge ruled adversely to defendant during the questioning of the expert witnesses, the judge often took the time to explain the basis of his rulings to defense counsel and allowed her to pursue her line of inquiry provided that she properly rephrased her questions. Consequently, we decline to relax the forfeiture rule in this case.

¶ 32 Furthermore, defendant is not entitled to relief under the plain-error doctrine. The plain-error doctrine allows a reviewing court to remedy a clear or obvious error either (1) when the evidence is so closely balanced that the guilty verdict may have resulted from the error and not the evidence, or (2) where the error is so serious that the defendant was denied a substantial right and, thus, a fair trial. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Before addressing either prong of the doctrine, the court must determine whether a clear or obvious error occurred at all. *Id*.

¶ 33 We have reviewed each allegation of improper conduct cited by defendant and find that no error occurred. During a bench trial, the judge has greater latitude to interject and question witnesses because the danger of prejudice to the defendant is lessened. *Faria*, 402 Ill. App. 3d at 479, citing *People v. Palmer*, 27 Ill. 2d 311, 314-15 (1963). The trial judge is responsible for the prompt and convenient dispatch of court proceedings, and the judge's questioning of witnesses is justified when the court's purpose is to clarify issues. *Faria*, 402 Ill. App. 3d at 479. The judge, however, must remain neutral and cannot assume the role of an advocate. *Id*. Whether the trial

judge's questioning is proper depends on the circumstances of each case and rests largely within the discretion of the trial court. *People v. Williams*, 173 Ill. 2d 48, 79 (1996).

¶ 34 The record shows that both the judge and the expert witnesses had trouble understanding defense counsel's confusing or repetitive questions, so the judge found it necessary to ask questions and seek clarification to the witnesses' responses. Moreover, the judge interjected to correct defense counsel's misstatement of the evidence and to move the proceedings along.

¶ 35 For example, defendant complains that the judge interposed questions to Drs. Meiszner and Nadkarni that prompted testimony "designed to establish that there was no way to reliably determine either the period of [defendant's] noncompliance or the symptoms that would result." We disagree. According to the record, the trial judge's questions did not "establish" any new evidence not previously presented by the parties but, rather, clarified the testimony of both doctors. When defense counsel's questions implied the evidence had established that defendant was not compliant with her medication at the time of the stabbing and the doctors had conceded that her delusional behavior resulted from that noncompliance, the trial court interjected questions to clarify that the doctors, who had testified merely about defendant's general history of noncompliance during other time periods, could not render an opinion regarding her mental state at the time of the stabbing.

¶ 36 Defendant also complains that, without any objection posed by the State, the judge sustained his own objection to a question defense counsel had posed to Dr. Meiszner. The record, however, establishes the judge properly objected to the hypothetical form of the question, not its substance. We also find no merit to defendant's claim that the judge improperly pressured Dr. Meiszner to agree with an earlier statement he had made. On cross-examination, the State

asked Dr. Meiszner if he previously testified that there was no clinical effect on defendant when she was "cheeking" her medication. When Dr. Meiszner qualified his testimony, the judge stated that his notes were consistent with the State's representation, and Dr. Meiszner then acknowledged his previous testimony. The trial judge acted well within his role to clarify the ambiguity and correct an apparent inconsistency in the evidence. Moreover, the record establishes that the trial judge's notes concerning Dr. Meiszner's previous testimony were accurate.

¶ 37 Concerning Dr. Kaplan's testimony, defendant complains the judge: interrupted him with questions about defendant's hiding after the offense and her lies to hospital staff about allergic reactions to medication; "probed" Dr. Kaplan's past to establish his long history as defendant's treating physician; and questioned him about terms and statements contained in defendant's medical records. We find that all of these complained-of remarks were proper inquiries by the judge aimed at moving the hearing along in an expeditious manner, clarifying Dr. Kaplan's history with defendant, and clarifying the information Dr. Kaplan relied on in forming his expert opinion.

¶ 38 Concerning Dr. Kulik's testimony, defendant complains that the judge: interrupted defense counsel's cross-examination with questions about defendant's motive to lie about her medications, the ethical guidelines concerning the testimony of forensic psychiatrists, and the distinction between cognitive impairment and legal sanity; complained about the premise of one of defense counsel's questions; gave a basis for numerous unspecified objections lodged by the State; and denied defense counsel a chance to explain the relevance of a particular inquiry. None of defendant's complaints has merit. The record establishes that the judge posed pertinent

questions to clarify the testimony and issues. Moreover, the judge assisted defense counsel by explaining his basis for sustaining the State's objections to her improper questions. The judge even went so far as to show counsel how to properly phrase some of her questions. Finally, the judge properly stopped counsel from pursuing repetitive and irrelevant lines of questioning that were far outside the scope of the direct and redirect examinations.

¶ 39 The record establishes that the judge acted well within his discretion to clarify the issues and testimony. Moreover, the judge conducted the proceeding in an expeditious manner yet still gave defense counsel extremely wide latitude to question all of the expert witnesses.

¶ 40 B. Hearsay

¶ 41 Defendant argues she was denied a fair trial because the trial court clearly considered and relied on hearsay reports to find her guilty. Specifically, defendant complains the court used the police reports and Cermak Health Services records to attribute numerous statements to defendant and then used those statements as substantive evidence to conclude that she was legally sane. Defendant acknowledges that she failed to preserve this issue for review but asks this court to either relax the forfeiture rule based on the alleged misconduct of the trial judge or consider this matter under the plain-error doctrine because the evidence was closely balanced and defendant was deprived of a fair trial.

¶ 42 We find no basis to relax the forfeiture rule for the reasons discussed above. Defendant cites *People v. Freeman*, 404 Ill. App. 3d 978, 995 (2010), to support the proposition that counsel does not need to interrupt the trial judge's ruling to point out the consideration of improper matters. We note, however, that defense counsel here was not at all timid about interrupting the trial judge's ruling, as evidenced by a lengthy dispute in the transcript

concerning the inference the court should draw from the fact that the knife was never recovered. Moreover, defendant is not entitled to any relief under the plain-error doctrine because we find that no error occurred.

¶ 43 "[The] prohibitions against the admission of hearsay do not apply when an expert testifies to underlying facts and data, not admitted into evidence, for the purpose of explaining the basis of his opinion." *People v. Lovejoy*, 235 Ill. 2d 97, 142 (2009). "[A]n expert may give opinion testimony which relies upon facts and data not in evidence, as long as the underlying information is of the type reasonably relied upon by experts in the particular field." *Id*. Under these circumstances, an expert is permitted to testify to the contents of the underlying record. *Id*. at 143. However, the testimony regarding the contents of the underlying records is only admitted for a limited purpose and is not considered substantive evidence. *People v. Pasch*, 152 Ill. 2d 133, 176 (1992). "In a bench trial, it will generally be presumed that the trial judge considered only competent evidence and disregarded that which was inadmissible." *People v. Johnson*, 327 Ill. App. 3d 203, 210 (2001). The presumption that the trial court considered competent evidence is rebutted only when it affirmatively appears that the court: (1) considered inadmissible evidence; and (2) was misled or improperly influenced thereby. *Id*.

¶ 44 Defendant argues the presumption has been rebutted here because the trial judge's ruling shows that he expressly relied on the contents of the hearsay reports and used the statements therein as substantive evidence of defendant's sanity at the time of the stabbing. Our review of the record, however, establishes that defendant's characterization of the trial judge's ruling is not accurate.

¶ 45 According to the record, the trial judge began his ruling by discussing the defense's attempt to prove, by clear and convincing evidence, that defendant was legally insane at the time she committed the offense. The judge noted that the theory of the defense revolved around various statements defendant made concerning taking her medication and whether those statements were lies or the truth. The judge noted that all the evidence concerning defendant's statements "came by way of hearsay testimony," which was not direct evidence and was admissible only to enable the experts to explain the information they relied on in forming their opinions. The judge emphasized that he was not making any findings on defendant's credibility or whether she actually made those statements. The judge stated that, although there was no question that defendant was intermittently noncompliant with her medication, the defense produced little evidence to show that defendant was off her medication for a long enough period of time to have been delusional at the time of the stabbing.

¶ 46 The judge stated that Dr. Kaplan's testimony concerning the time it would take a noncompliant patient to decompensate was contradicted by the testimony of Drs. Meiszner and Kulik. The judge discussed the testimony concerning the Cermak Health Center records and disagreed with the inferences defense counsel drew from various notes contained within those records. The judge stated that Dr. Kaplan's testimony was discredited by his failure to review all the police records and by some potential for bias due to his history as defendant's treating doctor. Finally, the judge discussed the competing opinions of Dr. Kaplan and Dr. Kulik concerning defendant's sanity. Specifically, the judge contrasted Dr. Kaplan's reliance on certain alleged statements by defendant to conclude that she was delusional at the time of the stabbing, with Dr. Kulik's reliance on the totality of the evidence to conclude that defendant understood her action

was wrong. The judge then concluded that Dr. Kulik's testimony was credible.

¶ 47 Our review of the trial court's ruling establishes, contrary to defendant's assertion, that nothing therein rebuts the presumption that the trial court considered competent evidence in finding defendant guilty but mentally ill. The record clearly shows that the judge did not consider inadmissible evidence and was not misled or improperly influenced thereby.

¶ 48 C. Sentence Credit

¶ 49 "[A] defendant is entitled to custodial credit for every day spent in custody, including the day of his sentencing and commitment." *People v. Williams*, 239 Ill. 2d 503, 505 (2011). Here, defendant received 790 days credit, but she argues that she is entitled to credit for three more days she spent in custody prior to sentencing, including the day the circuit court calculated her presentencing custody credit. The State responds that defendant is missing credit for only two days because legal custody of defendant transferred to the Department of Corrections when her mittimus issued, so the date of her mittimus is calculated as a day of sentence, not a day of presentence custody.

¶ 50 Our supreme court recently resolved this issue, holding that the date a defendant is sentenced and committed to the Department of Corrections is to be counted as a day of sentence and not as a day of presentence credit. *Id*. at 510. Thus, we agree with the State here and correct the mittimus to add two more days to reflect a total of 792 days of presentence custody.

¶ 51 Defendant also argues that she is entitled to further sentencing credit against her 78-month aggravated battery prison term. Specifically, she contends her aggravated battery sentence should be reduced by the time she spends receiving court-ordered, inpatient mental health treatment as a result of her prior adjudication of not guilty by reason of insanity for the

attempted armed robbery offense. Citing section 5-8-7(b) of the Unified Code of Corrections (730 ILCS 5/5-8-7(b) (West 2008)), she argues that her confinement at the mental health center meets the requirements for mandatory credit according to the plain language of the statute. She acknowledges that her current custody at the mental health center is the result of a separate prior adjudication for a different offense; nevertheless, she contends, citing *People v. Robinson*, 172 Ill. 2d 452, 459 (1996), that she is still entitled to credit for this detainment against her aggravated battery sentence because she must be considered in simultaneous custody on both offenses.

¶ 52 Defendant also acknowledges that she failed to file a motion to reconsider sentence in the circuit court, but argues that she may raise this issue on appeal because a sentence that fails to grant statutorily-mandated credit is void and may be challenged at any time. See *People v. Roberson*, 212 Ill. 2d 430, 440 (2004). We find that defendant's sentence complies with the statute and thus is not void.

¶ 53 The purpose of the credit-against-sentence provision is to ensure that defendants do not ultimately remain incarcerated for periods in excess of their eventual sentences. *People v. Ramos*, 138 Ill. 2d 152, 159 (1990). Because the question is one of statutory interpretation, our review is *de novo*. *Williams*, 239 Ill. 2d at 506. Our primary objective when construing the meaning of a statute is to ascertain and give effect to the intent of the legislature. *Id*. The most reliable indicator of legislative intent is the language of the statute itself. *Id*. When that language is clear and unambiguous, we must apply the statute without further aids of statutory construction. *Id*.

¶ 54 Section 5-8-7 provides, in pertinent part:

> "(a) A sentence of imprisonment shall commence on the date on which the offender is received by the Department or the institution at which the sentence is to be served.
>
> (b) The offender shall be given credit on the determinate sentence *** for time spent in custody *as a result of the offense for which the sentence was imposed* ***. [T]he trial court may give credit to the defendant for time spent in home detention, or when the defendant has been confined for psychiatric or substance abuse treatment *prior to judgment*, if the court finds that the detention or confinement was custodial." (Emphasis added.) 730 ILCS 5/5-8-7 (West 2008).

¶ 55 The unambiguous language of the statute establishes that defendant is not entitled to credit for postjudgment time spent in DHS custody because that commitment is based on a different crime than the aggravated battery for which the 78-month prison sentence was imposed. Allowing postsentencing credit for time in custody that is a result of a separate and distinct offense would thwart the plain meaning of the statute. The trial court may give defendant credit for her simultaneous pretrial incarceration for aggravated battery and inpatient confinement (*Robinson*, 172 Ill. 2d at 459), but the plain language of the statute does not allow the trial court to use her DHS confinement to credit her aggravated battery prison sentence after the judgment. Defendant's reliance on *Robinson* for such postjudgment credit is misplaced because that case addressed presentence credit for time spent in custody simultaneously for separate offenses. *Id.*

¶ 56 Defendant argues, in the alternative, that she should be delivered into the custody of the Department of Corrections immediately because her commitment at a mental health center as a result of another offense does not justify the indefinite delay of the execution of her aggravated battery prison sentence. She contends that there is no reason to justify a separate and independent period of confinement to the DHS and her commitment at the mental health center can proceed simultaneously while she serves her aggravated battery prison sentence.

¶ 57 She cites sections 5-8-5 and 5-8-6 of the of the Unified Code of Corrections (730 ILCS 5/5-8-5, 5-8-6 (West 2008)), to support her contention that the sheriff, pursuant to the trial court's order of commitment and sentence, must take her into custody and deliver her to the Department of Corrections, which then must take her into custody and confine her in a manner provided by law until her aggravated battery sentence is fulfilled. According to defendant, those statutory provisions make no exception and accommodation for a defendant subject to a commitment in a DHS mental health center, and the trial court has no authority to suspend the commencement of her aggravated battery sentence indefinitely.

¶ 58 We reject defendant's request for an order transferring her custody. This court has no authority to alter the commitment order entered for her unrelated and unappealed judgment of not guilty of attempted armed robbery by reason of insanity. See *People v. Smith*, 228 Ill. 2d 95, 104 (2008) (a reviewing court has no jurisdiction unless there is a properly filed notice of appeal). Defendant may not use this appeal of her aggravated battery conviction to litigate the propriety of her continued commitment to DHS, and she has provided no relevant authority to suggest that her request is one this court may consider. Delivering her immediately into the custody of the Department of Corrections would violate the purpose of her commitment, which

is to treat her mental illness and protect her and society from her potential dangerousness. *People v. Pastewski*, 164 Ill. 2d 189, 197 (1995). She may be remanded to the custody of the Department of Corrections when the circuit court finds that she is no longer in need of mental health services on an inpatient basis. See 730 ILCS 5/5-2-4(a) (West 2008). The legislative scheme provides a detailed process in the circuit court in order to effect any change in defendant's custodial status. See 730 ILCS 5/5-2-4(d), (e), *et seq.* (West 2008); *People v. Maglio*, 398 Ill. App. 3d 327, 328-32 (2010) (defendant must file a petition for conditional release in the trial court).

¶ 59 This court cannot remove defendant from the care of DHS. Before the maximum length of time for her period of commitment has lapsed, she may petition the circuit court for either a discharge or change in her custodial status. If the circuit court grants such a petition, then she may begin to serve her aggravated battery sentence.

¶ 60 D. Sentencing Hearing

¶ 61 Defendant argues she was denied a fair sentencing hearing when the trial court allowed the State to present Detective Sandoval's testimony, which implicated defendant in the 2006 murders of two elderly women even though the investigation had not yet resulted in any charges against defendant.[1] She contends that this inflammatory and unreliable testimony "ambushed" defense counsel, who could not properly cross-examine Detective Sandoval because the State did not tender to the defense any police reports related to the investigation. According to

[1] We take judicial notice that defendant was charged with the two murders in question in September 2011.

defendant, counsel's inability to test the State's allegations undermined the normal adversarial process, rendered the allegations of prior misconduct plainly unreliable, and created doubt about the justness of the sentence imposed.

¶ 62 Defendant acknowledges that she failed to preserve this issue for review by filing a timely motion to reconsider sentence. Nevertheless, she asks this court not to apply the forfeiture rule because trial counsel filed a written motion *in limine* and raised a timely objection at the sentencing hearing. In the alternative, defendant asks us to review the matter for ineffective assistance of trial counsel because counsel's failure to file a motion to reconsider sentence was objectively unreasonable and there is a reasonable probability that defendant's sentence would have been different if the trial court had not considered the damaging evidence. Additionally, defendant argues this issue may be reviewed for plain error because the consideration of improper matters by the trial court at sentencing affects a defendant's fundamental right to liberty.

¶ 63 We find no reason to excuse defendant's forfeiture and conclude that she is not entitled to relief under either an ineffective counsel claim or plain error because no error occurred. The trial court properly exercised its discretion to allow Detective Sandoval's testimony because the evidence was relevant and reliable and defendant was not entitled to discovery in advance of the sentencing hearing. Moreover, defendant availed herself of the opportunity to cross-examine Detective Sandoval, and the record indicates the judge did not give Detective Sandoval's testimony significant weight in determining defendant's sentence.

¶ 64 The rules of evidence are relaxed at sentencing to permit the trial court to consider the fullest information possible concerning the defendant's life and characteristics, but the court

must still cautiously ensure that the information it considers is accurate and reliable. *People v. Jackson*, 149 Ill. 2d 540, 548-49 (1992); *People v. Blanck*, 263 Ill. App. 3d 224, 234-35 (1994). Outstanding indictments, other criminal conduct for which there has been no prosecution or conviction, and even conduct of which the defendant has been acquitted can be considered in sentencing. *Jackson*, 149 Ill. 2d at 548-51; *People v. Deleon*, 227 Ill. 2d 322, 340 (2008).

¶ 65 When the State seeks to present evidence of unprosecuted conduct, such allegations should be presented by witnesses who can be confronted and cross-examined, and the defendant should have an opportunity to rebut the testimony. *Jackson*, 149 Ill. 2d at 548. Nevertheless, discovery is not constitutionally required at the sentencing phase. *People v. Foster*, 119 Ill. 2d 69, 102 (1987). The only requirement for the admission of evidence at sentencing is that the evidence be relevant and reliable, as determined by the trial court within its sound discretion. *Id*. at 96. Moreover, "the trial court is presumed to have considered only properly admitted evidence in determining the sentence." *People v. Kliner*, 185 Ill. 2d 81, 172 (1998).

¶ 66 The record refutes defendant's claims of ambush and complete surprise because, prior to the sentencing hearing, the defense filed a motion *in limine* that sought to bar the State from eliciting any testimony regarding any "ongoing police investigation of any uncharged offense" and complained that the State had not tendered any police reports regarding the alleged investigation. Moreover, the record shows that the judge knew the law because, when he denied the motion *in limine*, he informed the parties that he would entertain any appropriate objections and not consider any evidence that was not relevant and reliable. See *People v. Gomez*, 247 Ill. App. 3d 68, 74 (1993).

¶ 67 The trial court did not abuse its discretion in admitting Detective Sandoval's testimony because it was not inherently unreliable and he was testifying regarding his firsthand knowledge of his search of defendant's room during his official murder investigation. See *Foster*, 119 Ill. 2d at 100; *People v. Thomas*, 96 Ill. App. 3d 443, 456 (1981). Moreover, he was subject to cross-examination, during which the defense established that he did not personally observe where the items the nephew brought outside the house had originated from, and that defendant was never arrested for the murders even though the items taken from her home had been in police custody for three years.

¶ 68 Furthermore, the trial court's ruling shows that Detective Sandoval's testimony, like defendant's 1992 robbery conviction and 2006 attempted armed robbery case, was not accorded significant weight. Instead the judge focused on the facts of the stabbing case, which established that defendant was a very unpredictable, volatile and dangerous person and had caused a very serious injury to the victim. The judge also stated that defendant's behavior since the guilty finding was problematic and noted, referring to the sentencing testimony of defendant's mother, that defendant chose to drink alcohol uncontrollably when she was not confined in a facility.

¶ 69 We find no abuse of discretion. The trial judge properly ensured that the evidence admitted during the sentencing hearing was both relevant and reliable, and defendant was able to confront the witnesses against her.

¶ 70 III. CONCLUSION

¶ 71 For the foregoing reasons, we direct the clerk of the circuit court to correct the mittimus to reflect credit for 792 days of presentencing detention. In all other respects, we affirm the judgment of the circuit court.

1-09-1961

¶ 72 Affirmed; mittimus corrected.