2014 IL App (1st) 130017-U

FIRST DIVISION
September 15, 2014

No. 1-13-0017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTHONY THOMAS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 10 CR 5410 Honorable Carol M. Howard, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court properly admitted other-crimes evidence of a sexual assault that occurred after the subject offense. No error occurred when the trial court tendered a jury instruction that allowed the jury to consider other-crimes evidence for *modus operandi* purposes. The plain-error doctrine did not apply to the forfeited issue of whether the jury was entitled to an instruction defining the term *modus operandi*. The disparity of the 10-year sentence offered during plea negotiations and the 15-year sentence ultimately imposed does not establish that the sentence was imposed as a punishment because defendant exercised his right to a jury trial. The trial court conducted no inquiry regarding defendant's *pro se* posttrial motion alleging ineffective assistance of counsel, requiring a remand for limited purposes. We affirm defendant's conviction and sentence, but remand with directions for the trial court to conduct the required preliminary investigation pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 2 A jury convicted defendant Anthony Thomas of aggravated criminal sexual assault and the trial court sentenced him to 15 years' imprisonment. In this direct appeal, defendant argues the court erred by permitting the State to introduce evidence of a criminal sexual assault that he committed after the subject offense to establish propensity and *modus operandi* to commit this crime. Defendant contends the jury should have received an instruction defining "*modus operandi*." Defendant also asserts the court penalized him for exercising his right to a jury trial by increasing his sentence from the 10 years proposed at a Supreme Court Rule 402 conference to the 15 years he received after trial. Finally, defendant argues the court erred by not conducting a preliminary hearing under *People v. Krankel*, 102 Ill. 2d 181 (1984) after he challenged trial counsel's effectiveness in a *pro se* motion. We affirm, but remand for a *Krankel* hearing.

¶ 3 BACKGROUND

¶ 4 The State alleged defendant sexually assaulted J.B. on January 14, 2006. However, the State did not charge him until March 2010. A grand jury indicted defendant with six counts of aggravated criminal sexual assault in violation of section 12-14 of the Illinois Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-14 (West 2004)) and two counts of criminal sexual assault in violation of section 12-13 of the Criminal Code (720 ILCS 5/12-13 (West 2004)). In the interim, defendant pled guilty in 2008 to sexually assaulting O.L. on January 14, 2007, for which he received a 15-year sentence. The State proceeded to trial on two counts of aggravated criminal sexual assault: one count of alleged contact between defendant's penis and J.B.'s vagina, and one count of alleged contact between defendant's penis and J.B.'s anus, both involving bodily harm to J.B.

¶ 5 During a conference conducted pursuant to Illinois Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 1997)), the trial court admonished defendant that the court would hear the facts of the case, defendant's version of events leading to his arrest, and what the State's evidence would show if there was a trial. The court admonished defendant that it would consider his criminal background and social history when considering what the appropriate sentence should be. In addition, the court admonished defendant that after it recommended a sentence, defendant would have a choice as to whether to accept and plead guilty.

¶ 6 The State detailed the facts it believed it could prove about both of the alleged assaults of J.B. and O.L. The State explained that it charged defendant in this case because a computer search showed his DNA matched in another sexual assault case involving O.L. In exchange for defendant's guilty plea to two counts of aggravated criminal sexual assault, one for each alleged act of penetration, the State offered a total sentence of 20 years. The trial court agreed with the State and approved its offer of two, consecutive 10-year prison terms for each alleged act. Defendant declined the State's offer.

¶ 7 Before trial, the State moved to allow other-crimes evidence of the facts and circumstances surrounding defendant's 2008 conviction for aggravated criminal sexual assault of O.L. to prove defendant's propensity to commit sex offenses, motive, intent, and lack of consent. The State alleged that, on January 14, 2006, defendant and J.B. met at a club in Chicago, where they talked and had drinks. When J.B. left the club, defendant offered her a ride home. Once she entered defendant's vehicle, defendant drove to a remote parking lot where he choked her, cut her face by hitting her, and pinned her arms behind her back. Defendant removed J.B.'s pants and then anally and vaginally penetrated her with his penis from behind while subduing her. Afterwards, he threw J.B. out of his vehicle. She flagged down assistance and was taken to

the hospital where the staff performed a criminal sexual assault assessment. Semen from the anal swab matched that in defendant's DNA records. A buccal swab from defendant confirmed the DNA match.

¶ 8 In the case involving O.L., the State alleged she and defendant met while O.L. was waiting at a bus stop. After exchanging phone numbers, defendant called O.L. and they agreed that defendant would pick her up. On January 11, 2007, defendant picked up O.L., bought an alcoholic beverage at a liquor store, and drove around while defendant drank it. Defendant stopped his vehicle in an empty park. He grabbed O.L., pulling her closer to him. She struggled and managed to free herself from defendant and flee. Once out of the vehicle, defendant chased her and pushed her to the ground. Defendant then punched and kicked O.L. repeatedly and removed her pants and underwear. While subduing her around the neck, defendant anally penetrated O.L. with his penis. After the assault, defendant drove away and O.L. went to the hospital for treatment of, among other things, a broken nose and dislocated jaw. The police recovered defendant's semen by the completion of a criminal sexual assault kit.

¶ 9 The State argued that defendant met the victims and a short time later drank alcohol and used a vehicle to take them to a secluded area where he forcefully battered them about the face, choked them, and raped them. In both cases, defendant did not wear a condom and his semen was found in the victims' anuses.

¶ 10 At the hearing on the State's motion, the defense argued that the 2007 incident with O.L. could not be used to prove propensity for the 2006 incident with J.B. because the O.L. incident occurred after the subject offense and its probative value was substantially outweighed by the danger of unfair prejudice and confusion to the jury. The defense conceded that neither the language of section 115-7.3 of the Illinois Code of Criminal Procedure (725 ILCS 5/115-7.3

(West 2004)), nor case law, precludes the admission of other-crimes evidence when that proof consists of subsequent crimes.

¶ 11 The trial court granted the State's motion to allow the 2007 incident to prove propensity, lack of consent, intent, and motive. The court noted that section 115-7.3 of the Code of Criminal Procedure allows the admission of other-crimes evidence in sex cases for any matter which is relevant. The court determined the probative value of the 2007 incident outweighed the danger of unfair prejudice. The court found that these two incidents occurred sufficiently close in time and were factually similar.

¶ 12 The defense moved to reconsider the trial court's ruling, arguing that the inflammatory nature of the evidence was such that defendant would not receive a fair trial if the 2007 incident was admitted. The defense conceded that, based on the supreme court's ruling in *People v. Donoho*, 204 Ill. 2d 159 (2003), the evidence was admissible on its face. The court denied defendant's motion based on the *Donoho* decision.

¶ 13 Defendant also filed a motion to allow J.B.'s prior sexual activity as evidence and requested an *in camera* hearing. Defendant's motion alleged that he would assert the defense of consent and that on previous occasions, as well as the current charged occasion, defendant and J.B. engaged in consensual sexual activity. During the *in camera* hearing, defendant testified that he picked up J.B. by Kostner Avenue and 16th Street at night, approximately one to two months before the subject allegation, and paid her for consensual oral sex. Defendant stated that it was not the only time he had paid to have sex with J.B. and that he paid her full price for the first encounter, but the last time on January 14, 2006, he did not finish paying her, "but I paid her something." The trial court granted defendant's motion to allow evidence of prior sexual activity.

¶ 14 At trial, J.B. testified that, on the night of January 14, 2006, a female friend drove her to the Nice and Easy Lounge near Pulaski Road and Harrison Street in Chicago. She consumed a few cocktails and stayed at the club until closing time at 4:00 a.m. She saw defendant in the club, but did not speak to him. J.B. testified that she had no prior interaction with defendant until that night. After she exited the club, defendant asked her if she needed a ride. He offered to take her for more cocktails and to get something to eat. She accepted and entered the passenger side of his vehicle because "[h]e seemed like a nice gentleman at the time."

¶ 15 Defendant drove J.B. to the back of an alley. He told J.B. to get in the back seat. After she refused, he exited the car, walked around to the passenger side, opened the door, grabbed her by the arm, pulled her pants down, and raped her. J.B. testified that defendant grabbed her right arm, pinned it behind her back, and penetrated her vagina with his penis. He did not insert his penis into her anus. She continually screamed at defendant to stop while he was raping her. Defendant also hit J.B. in her face and punched her. He pulled her out of the vehicle, her head hit a pole, and he hit her again. He drove off with J.B.'s purse and coat.

¶ 16 The police took J.B. to the hospital for examination. J.B. testified that she never agreed to have sex with defendant.

¶ 17 Corazon Reyes, a nurse, testified that she was working in the emergency room when J.B. arrived at the hospital. J.B. told Reyes that she had been pulled into a car and raped. According to a report Reyes prepared, J.B. had abrasions to the left side of her forehead.

¶ 18 Dr. Asma Khatoon testified that J.B. presented as a patient with the complaint of having been sexually assaulted. J.B. told Dr. Khatoon that the perpetrator used force and that he penetrated her vaginally and rectally. In her examination of J.B., Dr. Khatoon noted an abrasion to the left side of her forehead and cheekbone, with swelling. Dr. Khatoon also found a small

abrasion on the lower left leg. Dr. Khatoon conducted a vaginal and anal exam. She swabbed the inside of J.B.'s vaginal canal and anal area. Although Dr. Khatoon did not note any injuries to J.B.'s vaginal canal or anal area, in Dr. Khatoon's opinion, it is possible for an individual to have been sexually assaulted without having any vaginal or anal injuries.

¶ 19 Tara Kubin, a forensic scientist with the Illinois State Police Forensic Lab, testified that she conducted an analysis of the evidence in J.B.'s case. Defendant's semen was found on the vaginal swab, but not the anal swab. Katrina Gomez, another forensic scientist with the Illinois State Police Forensic Lab, testified that the human DNA profile of the vaginal swab taken from J.B. matched the DNA profile of defendant. Defendant's DNA profile was then entered into the DNA database. Defendant's DNA profile from the vaginal swab in this case matched the DNA extracted from the rectal swab of O.L.

¶ 20 The State presented the testimony of O.L. for evidence of other crimes. On January 10, 2007, O.L. and defendant first met at a bus stop located at Fillmore Avenue and Pulaski Road in Chicago. The next day, defendant called O.L. and asked her if he could pick her up from her sister's house. O.L. agreed, he picked her up, and they drove to a liquor store. After defendant purchased and consumed alcohol, he drove her to an isolated area. Defendant requested sex and when O.L. refused, he punched her in the nose. O.L. tried to get out of the car while defendant continued to grab her. She got out of the car with one shoe on and began running towards a park. Defendant caught O.L. and shoved her to the ground and kicked her. Defendant put O.L. in a headlock and took off her pants and underwear. He inserted his penis into her rectum. O.L. screamed and told him to stop. He continued forcing his penis into her rectum for two to three minutes. Afterwards, he drove away. O.L. walked to a hospital for treatment. She had two

black eyes and a broken nose. O.L. later picked out defendant from a police line-up. She identified defendant in court as the person who sexually assaulted her.

¶ 21 Defendant pled guilty to one count of aggravated criminal sexual assault in the case involving O.L. As a result of that conviction, defendant's DNA profile was entered into the state's DNA database.

¶ 22 On August 10, 2009, J.B. was arrested for a traffic offense. Chicago police detective Elizabeth Miller testified that she interviewed J.B. regarding the January 14, 2006 incident. Detective Miller received information regarding the individual identified as matching the DNA found during the investigation of J.B.'s case. Detective Miller compiled a photograph array for J.B. to view, wherein she identified defendant as the person who assaulted her. After J.B. identified defendant, Detective Miller tracked him down.

¶ 23 In September 2009, Detective Miller, along with Detective David Kupczyk and assistant State's Attorney Meg O'Sullivan, met with defendant while he was serving his sentence in the O.L. case. When shown a photograph of J.B., defendant denied knowing her or having sexual relations with her. Defendant stated that he would have remembered J.B. if he had engaged in sexual relations with her. Detective Miller brought defendant to the Area 4 detective division for an in-person line-up on March 8, 2010. J.B. identified defendant as the person who sexually assaulted her. Defendant was charged with criminal sexual assault based on the identification, his interview, and the DNA evidence.

¶ 24 After the State rested, the trial court granted defendant's motion for a directed verdict on the aggravated criminal sexual assault count alleging penis-to-anus contact. The court denied the State's motion for directed verdict on the count alleging penis-to-vagina contact. Defendant chose not to testify.

¶ 25 During the jury instruction conference, the defense objected to Illinois Pattern Jury Instruction, Criminal, No. 3.14 (4th ed. 2000) (hereinafter I.P.I. 3.14), entitled "Proof of Other Offense or Conduct," which would permit the jury to consider defendant's involvement in the subsequent offense with O.L. for propensity, *modus operandi*, and lack of consent purposes. The defense argued that the instruction highlighted the issue of propensity, prejudicing defendant. Defense counsel conceded that the instruction was proper, "but the Defense still doesn't like it." The trial court noted it may be error not to give a limiting instruction since other-crimes evidence was admitted at trial. The court overruled defendant's objection based on the supreme court's decision in *People v. Ward*, 2011 IL 108690. The jury found defendant guilty of one count of aggravated criminal sexual assault based upon penis-to-vagina sexual penetration.

¶ 26 Defendant moved for a new trial arguing that the trial court erred by allowing proof of other-crimes evidence and I.P.I. 3.14. The court denied defendant's motion, finding *Donoho* supports that "proof of other crimes is admissible to show propensity and that there is no requirement[] that the case constituting the other crime must predate the crime that *** is being tried." As to I.P.I. 3.14, the court found that the language of the instruction itself "indicates that the instruction should have been given when proof of other crimes is admitted."

¶ 27 On October 4, 2012, the trial court sentenced defendant to 15 years in prison to be served consecutively to the sentence from his 2008 conviction. Defense counsel moved to reconsider the sentence on October 10, 2012. On October 13, 2012, defendant mailed a *pro se* motion for new trial alleging ineffective assistance of counsel. The trial court received the *pro se* motion on October 19, 2012 and a stamp indicates the motion was filed on October 23, 2012. A trial court document shows defendant's motion for new trial was set for hearing on November 2, 2012.

¶ 28 In an October 19, 2012 hearing, the State informed the trial court that the parties agreed to a November 2, 2012 hearing for "a motion" and to prepare a writ to allow defendant to appear in court. The court continued the proceedings until November 2, 2012. On that date, the court denied defendant's motion to reconsider sentence. The parties made no mention of defendant's *pro se* motion and the record of proceedings does not indicate whether defendant was present for the hearing. This appeal followed.

¶ 29 ANALYSIS

¶ 30 Defendant argues that the trial court erred by allowing the State to present other-crimes evidence for propensity purposes because the "other crime" occurred after the subject offense. Defendant contends the court erred by giving I.P.I. 3.14 because it allowed the jury to consider *modus operandi* when identity was not at issue in the case. Defendant also claims an error occurred when the jury was not provided with a definition of *modus operandi*. In addition, defendant asserts the court improperly penalized him for exercising his right to a jury when it sentenced him to 15 years' imprisonment after agreeing as part of the Rule 402 conference to sentence him to 10 years on the count for which he was found guilty. Finally, defendant argues the court erred by failing to conduct any inquiry into the *pro se* motion he filed alleging ineffective assistance of trial counsel.

¶ 31 Standard of Review

¶ 32 A trial court's decision to admit other-crimes evidence will not be disturbed absent a clear abuse of discretion. *People v. Wilson*, 214 Ill. 2d 127, 136 (2005). An abuse of discretion occurs if the trial court's determination is arbitrary, fanciful, or unreasonable, or if no reasonable person would take the view adopted by the trial court. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). As defendant here challenges the interpretation of section 115-7.3 of the Code of

Criminal Procedure, we review the issue *de novo*. See *Donoho*, 204 Ill. 2d at 172 (the interpretation of a statute is subject to *de novo* review).

¶ 33 We review an issue concerning the instruction of the jury for an abuse of discretion. *People v. Mohr*, 228 Ill. 2d 53, 65-66 (2008). The determination of a sentence likewise rests solely within the discretion of the trial court and we may not substitute our judgment absent an abuse of that discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 34 Our review of defendant's claim of error involving his *pro se* posttrial motion necessarily turns on the adequacy of the inquiry made by the trial court under *Krankel*. *People v. Moore*, 207 Ill. 2d 68, 75 (2003). The question of the adequacy of the inquiry is one of law and, therefore, we review that issue *de novo*. *People v. Vargas*, 409 Ill. App. 3d 790, 801 (2011).

¶ 35 The Admission of Other-Crimes Evidence

¶ 36 Defendant first challenges the admission of evidence from the sexual assault involving O.L., which occurred after the subject offense. Defendant argues that section 115-7.3 of the Code of Criminal Procedure was not enacted with the intention of allowing the State to admit other-crimes evidence for propensity purposes for events that occurred after the subject offense. Defendant contends that the language of section 115-7.3 is ambiguous as to whether evidence of other crimes occurring after the alleged act in the subject case is admissible, thereby requiring this court to turn to the legislative history of the statute to interpret the legislature's intent.

¶ 37 The primary goal in construing the language of a statute is to determine the intent of the legislature. *People v. Marshall*, 242 Ill. 2d 285, 292 (2011). The best indicator of legislative intent is the statutory language, given its plain and ordinary meaning. *People v. Giraud*, 2012 IL 113116, ¶ 6. If the plain language of the statute is unambiguous, we will not resort to further aids of statutory construction. *People v. Collins*, 214 Ill. 2d 206, 214 (2005).

¶ 38 Other-crimes evidence "encompasses misconduct or criminal acts that occurred either *before or after* the allegedly criminal conduct for which the defendant is standing trial." (Emphasis added.) *People v. Spyres*, 359 Ill. App. 3d 1108, 1112 (2005); see also *People v. Young*, 2013 IL App (2d) 120167, ¶ 22; *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 61; *People v. Norwood*, 362 Ill. App. 3d 1121, 1128 (2005). Generally, courts prohibit the admission of other-crimes evidence to protect against the jury convicting a defendant because he or she is a bad person deserving punishment. *Donoho*, 204 Ill. 2d at 170. Section 115–7.3 of the Code of Criminal Procedure creates an exception to the common law bar against the use of other-crimes evidence to show propensity in cases, where, as here, a defendant is accused of aggravated criminal sexual assault. 725 ILCS 5/115-7.3 (West 2004); *Donoho*, 204 Ill. 2d at 176.

¶ 39 Section 115-7.3 states in pertinent part that when the defendant is accused of aggravated criminal sexual assault, "evidence of the defendant's commission of another offense or offenses *** may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.3 (West 2004). The plain language of the statute does *not* contain any temporal limitations. The mere absence of temporal language in section 115-7.3 does not create an ambiguity. Our supreme court has explained:

> "There is no rule of construction which allows the court to declare that the legislature did not mean what the plain language of the statute imports. Where an enactment is clear and unambiguous, the court is not free to depart from the plain language and meaning of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express, nor is it necessary for the court to

search for any subtle or not readily apparent intention of the legislature." (Internal citations omitted.) *People v. Woodward,* 175 Ill. 2d 435, 443 (1997).

¶ 40 If the legislature intended to limit the admission of other-crimes evidence only to crimes that occur before the subject offense, it could have explicitly specified as such. The legislature has provided temporal requirements in multiple instances for statutes concerning criminal offenses. See, *e.g.*, 720 ILCS 5/10-2(b) (West 2004) ("A person who is convicted of a *second or subsequent* offense of aggravated kidnaping shall be sentenced to a term of natural life imprisonment; provided, however, that a sentence of natural life imprisonment shall not be imposed under this Section unless the *second or subsequent* offense was committed *after* conviction on the *first* offense." (Emphasis added.)); 720 ILCS 5/12-7.3(a)(1) (West 2004) ("[a] person commits stalking when her or she *** *at any time* transmits a threat of *immediate or future* bodily harm" (emphasis added)).

¶ 41 Moreover, Illinois courts repeatedly have held that admitting other-crimes evidence for crimes committed after the subject offense is not error. See *People v. Whalen*, 158 Ill. 2d 415, 429 (1994) (evidence of the defendant's purchase and use of cocaine after he committed the subject murder was admissible as relevant to his intent and motive); *People v. Coleman*, 158 Ill. 2d 319, 335 (1994) (evidence concerning the defendant's participation in killing a drug dealer subsequent to the killing of two of the dealer's employees during an armed robbery for which the defendant was on trial was admissible to show the circumstances of the defendant's arrest); *People v. Maxwell*, 148 Ill. 2d 116, 130 (1992) (evidence of robberies committed by the defendant one week after offenses from which the subject prosecution arose were relevant and admissible).

¶ 42 We must give effect to the intent of the legislature, the best evidence of which is the language used in section 115-7.3 of the Code of Criminal Procedure. *People v. Hari*, 218 Ill. 2d 275, 292 (2006). Since the legislature did not specify a temporal limitation in section 115-7.3 for the admission of other-crimes evidence, we may not read the legislation to the contrary, or search for any subtle or not readily apparent intention of the legislature. *Hari*, 218 Ill. 2d at 292; *Woodward*, 175 Ill. 2d at 443.

¶ 43 Our legislature enacted section 115-7.3 "to enable courts to admit evidence of other crimes to show defendant's propensity to commit sex offenses if the requirements of section 115-7.3 are met." *Donoho*, 204 Ill. 2d at 176. In determining whether to admit other-crimes evidence, the trial court considers whether the probative value of such evidence outweighs the prejudice against the defendant, taking into account: (1) "the proximity in time to the charged or predicate offense"; (2) "the degree of factual similarity to the charged offense or predicate offense"; or (3) "other relevant similar facts and circumstances." 725 ILCS 5/115-7.3(c) (West 2004); see also *Donoho*, 204 Ill. 2d at 171. The admission of other-crimes evidence depends on whether it has " 'some threshold similarity to the crime charged.' " *Donoho*, 204 Ill. 2d at 184 (quoting *People v. Bartall*, 98 Ill. 2d 294, 310 (1983)). Defendant argues that the facts and circumstances of the assault involving O.L. varied greatly from the subject case. The record, however, belies defendant's contention.

¶ 44 Both sexual assaults occurred within one year of each other. In addition to the close proximity in time, the degree of factual similarity was strong and highly probative of defendant's propensity to commit a sexual offense. In both cases, defendant invited the victims into his car, drove them to a remote location, physically beat them, stripped their clothes, and sexually penetrated them. Also, defendant's semen was found in both victims' genital region. The

existence of some differences between the subject offense and the sexual assault involving O.L. "does not defeat admissibility because no two independent crimes are identical." *Donoho*, 204 Ill. 2d at 185 (citing *Ilgen*, 145 Ill. 2d at 373). We find that the trial court considered and meaningfully assessed all the factors required under section 115-7.3 for purposes of admitting the other-crimes evidence of the sexual assault involving O.L. *Donoho*, 204 Ill. 2d at 186. No abuse of discretion occurred.

¶ 45 Jury Instructions for *Modus Operandi* Evidence

¶ 46 Defendant next contends that identity was not at issue in this case and, therefore, the trial court improperly instructed the jury to consider the O.L. incident for *modus operandi* purposes. Defendant did not contest that he had intercourse with J.B. on January 14, 2006, but instead challenged whether the intercourse was consensual. Defendant argues *modus operandi* evidence is not relevant when identity is not at issue.

¶ 47 The State responds that it did not request to admit other-crimes evidence for *modus operandi* purposes. During the jury instruction conference, the defense objected to I.P.I. 3.14, which permitted the jury to consider the other-crimes evidence for purposes of propensity, *modus operandi*, and lack of consent. However, defense counsel made a non-specific objection and did not expressly contest the *modus operandi* language or offer an alternative jury instruction. According to the State, the inclusion of *modus operandi* in the jury instruction was superfluous language that was not stricken. Moreover, defense counsel conceded the instruction was proper.

¶ 48 "Generally, a defendant forfeits review of any putative jury instruction error if the defendant does not object to the instruction or offer an alternative instruction at trial and does not raise the instruction issue in a posttrial motion." *People v. Herron*, 215 Ill. 2d 167, 175 (2005). The defendant must make a specific objection at the time of the jury instruction conference

because a general objection ordinarily is not enough to preserve an issue for review. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 60; *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 34. Here, defendant did not make a specific objection either at the jury instruction conference or in his posttrial motion and did not offer an alternative instruction. Therefore, defendant has forfeited this issue.

¶ 49 Defendant argues that even if defense counsel failed to preserve the issue at trial, we should review it for plain error. The plain error doctrine allows a reviewing court to bypass normal forfeiture principles and consider an otherwise unpreserved error affecting substantial rights when either: "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Herron*, 215 Ill. 2d at 187; see also Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The threshold step in any plain error analysis is to determine whether an error occurred in the first place. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). If there is no error, there can be no plain error. *People v. Johnson*, 218 Ill. 2d 125, 139 (2005); see also *People v. Keene*, 169 Ill. 2d 1, 17 (1995) ("[I]f in the end, the error is found not to rise to the level of a plain error as contemplated by Rule 615(a), the procedural default must be honored"). Accordingly, before we can address defendant's claim of plain error, we must decide whether any error occurred.

¶ 50 Our supreme court has explained what the trial court should consider when instructing the jury and what the reviewing court should assess on appeal:

> "Instructions convey the legal rules applicable to the evidence presented at trial and thus guide the jury's deliberations toward a proper verdict. There must be some evidence in the record to justify an instruction, and it is within the trial court's discretion to determine which issues are raised by the evidence and

> whether an instruction should be given. Instructions which are not supported by either the evidence or the law should not be given. The task of a reviewing court is to determine whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense." (Internal citations omitted.) *People v. Mohr*, 228 Ill. 2d 53, 65 (2008).

¶ 51 Illinois courts have found that *modus operandi* evidence can be relevant even when the defendant's identity is not at issue. The term, "*modus operandi*" literally means, "method of working," and "refers to a pattern of criminal behavior so distinct that separate crimes or wrongful conduct are recognized as the work of the same person." *People v. Kimbrough*, 138 Ill. App. 3d 481, 486 (1985). Evidence of other-crimes offered to prove *modus operandi* must have "some clear connection between the other crime and the crime charged which creates a logical inference that if defendant committed one of the acts, he may have committed the other act." *Id*. Similar to this case, the defendant in *Kimbrough* contested whether the encounters were consensual. The *Kimbrough* court held that the subject offense and the subsequent incident offered as other-crimes evidence, taken together, demonstrated the defendant's *modus operandi*, which was relevant "not only to the issue of who committed a crime, but also to the issue of whether a crime was committed at all." *Id.* at 487.

¶ 52 In this case, we find the evidence of the O.L. incident had a clear connection to the subject crime considering the means and methods defendant used to commit the two sexual assaults, which, in turn, created a logical inference that if defendant committed one of the acts, he may have committed the other act. Accordingly, the evidence justifies the trial court's tender of I.P.I. 3.14 instructing the jury to consider *modus operandi* on the issue of whether a crime was

committed at all. *Kimbrough*, 138 Ill. App. 3d at 487; see also *People v. Wilson*, 343 Ill. App. 3d 742, 748-50 (2003). We find no abuse of discretion and, thus, no error.

¶ 53 Defining *Modus Operandi* in the Jury Instructions

¶ 54 Defendant also contends that the trial court erred by not providing a definition of *modus operandi* to the jury. Defendant failed to object at the jury instruction conference and in his posttrial motion regarding the lack of a definition for this term. Defendant also did not offer an alternative instruction defining *modus operandi* for the trial court to tender. Defendant cites in support *People v. Jackson*, 331 Ill. App. 3d 279, 293 (2002), which reversed a jury conviction for aggravated criminal sexual assault because the reviewing court found the defendant was entitled to a jury instruction defining "*modus operandi*."

¶ 55 There, the court considered whether the defendant forfeited the issue because, although he proffered an alternative instruction that defined *modus operandi*, there was a question as to whether the definition was suitable for the jury. *Id*. at 291. The *Jackson* court ruled an error occurred when the defendant's proposed definition was not tendered because Illinois cases defined *modus operandi* in the same manner as the defendant. *Id*. at 293.

¶ 56 In contrast to *Jackson*, defendant in this case did not submit an alternative jury instruction defining *modus operandi* for the trial court's consideration. We find defendant has forfeited this issue, but will review it for plain error.

¶ 57 Defendant argues plain error under both prongs of the doctrine. Defendant contends the evidence is so closely balanced that the error of allowing the jury to consider an improper instruction affected the verdict. According to defendant, the evidence was closely balanced because J.B.'s testimony included many inconsistencies with her prior statements and the physical evidence. Defendant asserts his substantial right to a fair trial was violated when the

trial court improperly instructed the jury on a term necessary to properly determine his guilt. A defendant has the burden of persuasion under both prongs of the plain error analysis. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 58 As to the first prong, we find the evidence presented at defendant's trial was far from closely balanced. DNA evidence established defendant's sperm was in J.B.'s vagina immediately after the attack. Dr. Khatoon testified that she treated J.B. for injuries consistent with the physical beating that occurred before the sexual assault. She also stated that it is possible for an individual to have been sexually assaulted without having any vaginal or anal injuries. J.B. testified credibly that defendant sexually assaulted her and positively identified defendant as her attacker in a police photo array, a police line-up, and in open court. J.B.'s testimony included some minor inconsistencies, but she was consistent in her claims that defendant assaulted her. Furthermore, O.L. testified that defendant attacked her in a very similar fashion, namely, by inviting her into his car, driving her to a remote location, physically beating her after she refused to have sex with him, and engaging in non-consensual sexual penetration before driving away and leaving her. Overwhelming evidence supported the verdict against defendant.

¶ 59 Nor do we find that any error if it occurred at all was so serious that it affected the fairness and the outcome of the trial. In *People v. Glasper*, 234 Ill. 2d 173 (2009), our supreme court equated the second prong of plain-error review with structural error, asserting that "automatic reversal is only required where an error is deemed 'structural,' *i.e.*, a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *Glasper*, 234 Ill. 2d at 197-98 (quoting *Herron*, 215 Ill. 2d at 186). Structural error occurs in cases that include "a complete denial of counsel, trial before a biased

judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *People v. Thompson*, 238 Ill. 2d 598, 609 (2010). Defendant has not established that any of these structural errors occurred. Furthermore, defendant has not shown that the inclusion of *modus operandi* in I.P.I. 3.14 without a definition for that term constituted a material factor in his conviction. Accordingly, the second prong of plain-error review does not provide a basis for excusing defendant's procedural default. We conclude the plain-error doctrine is inapplicable to reach this forfeited issue.

¶ 60 Contesting the Imposition of Defendant's 15-Year Sentence

¶ 61 Defendant next argues the trial court improperly penalized him for exercising his right to a jury by sentencing him to 15 years in prison after the State offered to recommend a sentence of 10 years on the single count for which he was found guilty. Defendant contends that a 50% increase in his punishment from the proposed 10-year sentence can only lead to the conclusion that the court punished him for exercising his constitutional right to a jury trial. Defendant seeks to reduce his punishment or vacate his sentence and remand the case for a new sentencing hearing before a different judge.

¶ 62 In support of his argument, defendant cites *People v. Dennis*, 28 Ill. App. 3d 74, 78 (1975), which held the trial court abused its discretion by imposing "an extremely harsh sentence" in comparison to the sentence offered during plea negotiations. In that case, however, the defendant was offered a sentence of no more than 2 to 6 years in return for a guilty plea, but received a sentence of 40 to 80 years after his trial. *Id.* Notably, the *Dennis* court limited its holding to the facts of that case:

> "Finally, we wish to make it clear that our holding that petitioner suffered a constitutional deprivation which must be remedied is limited to the facts of the instant case, namely, a sentence imposed following a jury trial approximately 20 times greater than that offered during plea negotiations. We do not intend it to erode the well established principle that a mere disparity between the sentence offered during plea bargaining and that ultimately imposed, of itself, does not warrant the use of our power to reduce a term of imprisonment imposed by the trial court." *Id.* (citing *People v. Hill*, 58 Ill. App. 2d 191, 195-96 (1965)).

¶ 63 The *Dennis* case does not aid defendant. "The fact that a heavier sentence was imposed after trial than the one offered prior to trial does not necessarily justify the inference that the higher sentence was imposed as a punishment." *People v. Gornick*, 107 Ill. App. 3d 505, 513 (1982). The 15-year sentence the trial court imposed was only one half greater than the sentence offered during the Rule 402 conference. A conviction for aggravated criminal sexual assault constitutes a Class X felony (720 ILCS 5/12-14(d) (West 2004)) warranting a sentence of "not less than 6 years and not more than 30 years." 730 ILCS 5/5-8-1(a)(3) (West 2004). So long as the court does not ignore pertinent mitigating factors or consider either incompetent evidence or improper aggravating factors, it has wide latitude in sentencing a defendant to any term within the applicable statutory range. *People v. Perkins*, 408 Ill. App. 3d 752, 762-63 (2011). The sentence imposed upon defendant is within the limits prescribed by law and the record is wholly devoid of any evidence that the trial court imposed a more severe sentence merely because defendant insisted upon a jury trial. The record supports the finding of the court that defendant is a dangerous person and that the public needs protection from him. The disparity of the sentence offered during plea negotiations and the sentence ultimately imposed here does not, standing

alone, establish that the sentence was imposed as a punishment because defendant exercised his right to a jury trial. The trial judge has the power to determine the length of the sentence and absent a clear abuse of discretion, his judgment will not be disturbed on review. *Alexander*, 239 Ill. 2d at 212. We find no abuse of discretion and affirm the sentence imposed by the trial court.

¶ 64 Defendant's *Pro Se* Motion for New Trial

¶ 65 Finally, defendant argues that the trial court erred by failing to conduct any inquiry into his *pro se* motion for new trial alleging trial counsel's ineffectiveness. See *Krankel*, 102 Ill. 2d at 189 (requiring that the trial court conduct an inquiry into the basis of a defendant's *pro se* posttrial claim of ineffective assistance of counsel). Defendant's *pro se* motion was file-stamped and included proof of service. The State concedes that there was no discussion in the record regarding defendant's *pro se* motion during the last trial court hearing on November 2, 2012. Immediately after that hearing, defense counsel filed a notice of appeal.

¶ 66 Our supreme court has held that "when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of defendant's claim." *Moore*, 207 Ill. 2d at 78-79. The main concern for the reviewing court is "whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Id*. at 79. A sufficient inquiry includes "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation." *Id*. If the trial court fails to conduct the necessary preliminary examination, the cause must be remanded for the limited purpose of allowing the trial court to conduct the required preliminary investigation. *Id*. at 81.

¶ 67 In *Moore*, defense counsel informed the trial court that the defendant had prepared a *pro se* motion for the appointment of counsel other than the public defender. The trial court

acknowledged the defendant's motion and appointed the State Appellate Defender as his counsel on appeal without directly addressing the motion. Our supreme court noted that no record at all was made on the defendant's ineffective assistance of counsel claim and remanded the case for the limited purpose of conducting an inquiry pursuant to *Krankel*. *Id*. at 81-82.

¶ 68 The State urges us to follow *People v. Zirko*, 2012 IL App (1st) 092158, ¶¶ 69-72 and *People v. Allen*, 409 Ill. App. 3d 1058, 1077 (2011), both of which held that the defendant failed to timely raise his *pro se* ineffective assistance of trial counsel claim before the trial court and, thus, forfeited the issue. In both of those cases, the trial court was unaware of the defendant's *pro se* ineffective assistance of trial counsel claims. Significantly, in those cases, the record showed that the defendants actually appeared before the court and had an opportunity to raise their *pro se* motions. That does not appear to have occurred here.

¶ 69 In this case, defendant filed his *pro se* posttrial motion after the trial court imposed his sentence, but before the final hearing on the motion to reconsider sentencing, filed by his trial counsel. Defendant's *pro se* motion was file-stamped. A trial court document shows defendant's *pro se* motion was set for hearing on November 2, 2012. The record does not make clear whether he was present for that hearing. It appears from the record that defendant completed his duty to bring his *pro se* posttrial claim of ineffective assistance of counsel to the attention of the trial court as best he could under the circumstances. If the record made clear that defendant had appeared at the November 2, 2012 hearing and failed to raise his posttrial *pro se* motion, this case would fall into the same category as *Zirko* and *Allen*. Considering that defendant did not make an appearance during the final hearing and the trial court did not conduct some inquiry into the basis of defendant's *pro se* motion, we must remand the matter for the limited purpose of allowing the trial court to conduct the required preliminary investigation.

Moore, 207 Ill. 2d at 81. If the trial court determines that defendant's ineffective assistance of counsel claim lacks merit, the court may then deny the motion and leave defendant's conviction and sentence standing. *Id*. In that event, defendant retains the right to appeal his ineffective assistance of counsel claim. *Id.* See also *Krankel*, 102 Ill. 2d at 189.

¶ 70 CONCLUSION

¶ 71 We affirm the judgment of the circuit court of Cook County, but remand the cause for proceedings consistent with this order.

¶ 72 Affirmed and remanded with directions.