

SECOND DIVISION  
May 12, 2015

No. 1-13-0695

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 2549
	)	
ABDELHAMID A. ABDELNABI,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PIERCE delivered the judgment of the court.  
Presiding Justice Simon and Justice Neville concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Trial court's alleged error in stating that defendant was convicted of two specific acts of sexual abuse where the jury returned a single general guilty verdict did not rise to the level of plain error or prejudice defendant where each act was supported by the record, consistent with the jury's verdict, and the court's alleged error was purely semantic.

¶ 2 Following a jury trial, defendant Abdelhamid Abdelnabi was found guilty of aggravated criminal sexual abuse and sentenced to 78 months' incarceration. On appeal, defendant contends that while sentencing him, the trial court considered an improper factor in aggravation where it stated that defendant was convicted of two separate acts of aggravated criminal sexual abuse, but

the jury returned only a single, general verdict of guilty. He also argues that the trial court erred in assessing a \$200 "State DNA ID System" fee under section 5-4-3(j) of the Unified Code of Corrections ("the Code"), (730 ILCS 5/5-4-3(j) (West 2012)), where his DNA was already in the State's database. We affirm and correct the fines and fees order.

¶ 3 Defendant was charged by indictment with 63 counts of aggravated criminal sexual abuse, predatory criminal sexual assault, and indecent solicitation of a child. The charges arose from an incident between defendant and his 9-year-old step-daughter, A.D., at their home in Bridgeview on January 15, 2012. The State proceeded to trial on three counts of aggravated criminal sexual abuse, two counts of predatory criminal assault, and one count of indecent solicitation of a child.

¶ 4 At trial, A.D. testified that defendant, her step-father, called her into her mother's bedroom and locked the door. He pushed her onto the bed and began to squeeze her breasts underneath her top. He removed her pajama pants and squeezed her "butt." He squeezed her "front private part" and placed his hand inside it. He turned A.D. around, pulled his own underwear down, and told her to touch "his private part." He grabbed her hand and moved it back and forth on his penis. He turned A.D. around again and placed his penis "in [her] butt." Eventually, defendant pulled up his underwear and ran into the bathroom. A.D.'s younger sister, A.A., opened the door, and A.D. told her to get their mother. The State subsequently introduced a video-recording of an interview A.D. gave the day after the incident. Her statement in the interview was largely consistent with her testimony.

¶ 5 A.D.'s mother Ashley D. testified she was sleeping on her living room couch on January 15, 2012. Her daughter A.A. woke her and told her that defendant "did something bad" to A.D.

Ashley saw defendant walk out of the master bedroom in his underwear. She went into the bedroom, called A.A. and A.D. into the room, and questioned the girls. A.A. said defendant had been lying on top of A.D. and A.D. said that was true. Ashley left the girls and confronted defendant. Defendant repeatedly hit her. Ashley went into the children's bedroom and defendant followed her. He grabbed A.D. by the back of the head and asked her in a loud voice, "Was I laying on top of you? Did I touch you?" Defendant then grabbed and shook A.A., asking her why she was lying. He put her down and threw a water bottle at her. He then left. Ashley asked A.D. if defendant had touched her. A.D. at first just put her head down, but eventually said he had touched her "everywhere" and burst into tears. Ashley called the police and defendant was arrested shortly thereafter.

¶ 6 A.A. testified, but was generally unable to remember anything from that day. The State introduced a video-recording of an interview A.A. had given the day after the incident. During the interview, A.A. said that she had seen defendant standing behind A.D. while her head was on the bed. Defendant had his hands on A.D.'s hips. A.A. then told her mother.

¶ 7 Dr. Marjorie Fujara testified that she had examined A.D. on January 17, 2012. A.D. had redness around her genitalia and buttocks which was consistent with having been sexually abused. A.D. had no other visible injuries or markings.

¶ 8 Defendant testified that he was napping in the master bedroom on January 15, 2012. A.A. and A.D. knocked on the bedroom door and asked to watch television in the room. Defendant told A.D. to clean the room and she replied no. Defendant pushed her head into the bed and again told her to clean the room. A.D. swore at defendant and told him he was not her father. Defendant became angry, pushed A.D.'s head into the bed once more, and yelled at her.

Defendant left the room. Shortly thereafter, Ashley approached defendant and accused him of raping her daughter. Defendant denied her accusations and subsequently "beat her up" when she would not stop accusing him.

¶ 9 Following arguments by both parties, the jury was given eight verdict forms. Two of those forms were general verdict forms for the offense of aggravated criminal sexual abuse. While instructing the jury on the elements of aggravated criminal sexual abuse, the trial court instructed the jury that the State was required to prove that "defendant committed an act of sexual conduct with [A.D.]" Neither the verdict forms nor the instructions regarding aggravated criminal sexual abuse mentioned specific acts by defendant.

¶ 10 The jury found defendant not guilty of both counts of predatory criminal sexual assault and the count of indecent solicitation of a child. It found defendant guilty of aggravated criminal sexual abuse.

¶ 11 At a separate sentencing hearing, defense counsel stated that the presentence investigation indicated that defendant had been convicted of all 63 initial charges. The court stated it was "well aware" that defendant had been convicted of both counts of aggravated criminal sexual abuse and asked both defense counsel and the State if they agreed. Both indicated that they did. The court explained that it was considering all the evidence put before the jury. It stated, "[t]he defendant is before me convicted of two separate counts of aggravated criminal sexual abuse." Subsequently, the trial court stated:

"In considering that the charge before the Court is a class two felony, the minimum sentence is probation. The maximum sentence is seven years in the Illinois Department of Corrections.

I considered the acts that the defendant was convicted of. The defendant was convicted on two separate counts of touching [A.D.]'s \*\*\* vaginal area for the purpose of sexual arousal or gratification, and \*\*\* committed an act of sexual conduct upon the victim, [A.D.], in that [defendant]'s penis touched [her] buttocks. Those are the two counts that the defendant was convicted of."

The trial court then explained that "the facts of the case are serious" because defendant was A.D.'s step-father. It also considered defendant's criminal background in aggravation, noting defendant's "many prior misdemeanor [convictions] \*\*\* involving violent acts" and defendant's prior felony conviction of theft. The court also considered voicemails defendant made threatening Ashley and the children. The court sentenced defendant to 78 months of incarceration and stated it was merging the aggravated criminal sexual abuse counts. The court also imposed \$1,054 in fines and fees on defendant, including a \$200 "State DNA ID System" fee under section 5-4-3(j) of the Code. 730 ILCS 5/5-4-3(j) (West 2012)). Defendant appeals.

¶ 12 Defendant first contends that the trial court considered an improper factor in aggravation when it sentenced defendant on the basis of two convictions for two separate acts where the jury returned only one general verdict. He notes that the trial court during sentencing stated that defendant was convicted of one count of aggravated criminal sexual abuse based upon contact between his hand and A.D.'s vaginal area and another count based upon contact between his penis and A.D.'s buttocks. The jury returned a single verdict that did not specify the nature of the guilty contact. Defendant also notes that the trial court explicitly took those acts into consideration and crafted a sentence that was only six months less than the statutory maximum.

¶ 13 The State responds that the trial court considered only proper factors when sentencing defendant. It notes that defendant's sentence is within the statutory guidelines and that the court considered proper factors like the possibility of defendant's rehabilitation and the nature of his offense. Alternatively, the State argues that defendant forfeited this issue by failing to object during the sentencing hearing.

¶ 14 Before addressing the merits of defendant's claim, we must determine whether the claim has been properly preserved. To preserve a sentencing issue, a defendant must contemporaneously object and include the issue in a post-sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant concedes that he failed to object at the sentencing hearing; however, he urges this court to apply plain error analysis to his claim under that doctrine's second prong. Under plain error analysis, a reviewing court may consider an error, despite forfeiture, when a clear and obvious error occurred and either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant or (2) the error is so serious as to challenge the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Under either prong, a defendant bears the burden of persuasion. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Before considering defendant's claim under either prong, we must first determine whether error has occurred. *Piatkowski*, 225 Ill. 2d at 565.

¶ 15 A trial court's determination of a defendant's sentence is reviewed for an abuse of discretion. *People v. Johnson*, 347 Ill. App. 3d 570, 573-74 (2004). However, the trial court's consideration of an improper factor in aggravation constitutes an abuse of discretion. *People v. McAfee*, 332 Ill. App. 3d 1091, 1096 (2002). In considering whether a factual error affected the

trial court's decision, the reviewing court must look to whether the lower court's comments actually show a reliance on the factual error in fashioning the sentence. *People v. Cotton*, 393 Ill. App. 3d 237, 266 (2009). A reviewing court presumes that the trial court considered only competent and proper evidence in determining a sentence. *People v. Ashford*, 168 Ill. 2d 494, 508 (1995).

¶ 16 In fashioning a sentence, the trial court may consider the circumstances of an offense, the degree of harm caused, and the manner in which the offense was committed. See *People v. Saldivar*, 113 Ill. 2d 256, 270 (1986). The sentencing court must consider the evidence adduced at trial. 730 ILCS 5/5-4-1 (West 2012).

¶ 17 The State cites *People v. Cardona*, 158 Ill. 2d 403, 411 (1994), and *People v. Kidd*, 178 Ill. 2d 92, 126 (1997), for the proposition that where there is a general verdict of guilt, a defendant is guilty of every specific charge supported by the record. Defendant responds that the logic of those cases is inapplicable to the present facts. However, we need not address the applicability of *Cardona* and *Kidd*, because even if we accept, *arguendo*, defendant's contention that the jury's general verdict of guilt does not constitute convictions on the more specific underlying charges, we are not persuaded that the trial court's alleged error rises to the level of plain error. While defendant describes his claim as a consideration of an improper factor in aggravation, we find that the error, if any, by the trial court was merely semantic. The court at multiple points referred to defendant being "convicted of two separate counts" of aggravated criminal sexual abuse. However, it is clear from the context of the statements that the court was focusing on the underlying acts which were evidenced at trial, and through examining those acts considering the circumstances and seriousness of defendant's offense. Specifically, the court

stated that defendant touched A.D.'s vaginal area with his hand and her buttocks with his penis. The evidence adduced at trial, which the court is required by statute to consider, supported those statements. A.D. stated, both in her testimony and her videotaped interview, that defendant touched her "private part" with his hand and touched her "butt" with his "private part." Dr. Fujara's testimony corroborated A.D.'s testimony. The doctor examined A.D. and found redness around her vaginal area and buttocks, consistent with prior sexual abuse by an adult. Thus, whether or not the trial court was correct in referring to multiple convictions, it was both permitted and required to consider the seriousness of defendant's offense and the degree of harm caused as evidenced at trial.

¶ 18 Defendant notes that the instruction defining aggravated criminal sexual abuse given to the jury referred to only "an act of sexual conduct," and that many less serious acts could have supported the jury's finding. He argues that because the jury could have found defendant guilty based upon a single, less serious act, the trial court erred in considering the specific acts evidenced at trial. We find defendant's argument unpersuasive. At sentencing, the trial court is not bound to consider only the explicit findings contained within a verdict form, but rather, it "may search anywhere, within reasonable bounds, for facts which tend to aggravate or mitigate the offense." See *People v. Meeks*, 81 Ill. 2d 524, 535 (1980). Without considering the evidence presented at trial, the court could not fully consider the circumstances or the seriousness of the offense, as a verdict form rarely contains every circumstantial detail proven at trial. See *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007) ("[T]he most important factor a court considers when deciding a sentence is the seriousness of the offense.") While a court could not properly consider



details contradicted by the fact-finder's verdict or unsupported by the record, neither error occurred in the present case.

¶ 19 Defendant argues that there was "serious doubt within the jury room about what actually occurred" because the jury found defendant not guilty on every count where the jury instructions "stated a specific act." Defendant's speculation on the jury's doubt is misleading. The jury found defendant not guilty on the counts of predatory criminal sexual assault and indecent solicitation of a child. The jury was instructed that each of these counts required proof of penetration or solicitation of an act of penetration. While the jury found defendant not guilty of every charge alleging penetration, there is nothing in the record to indicate that the trial court considered an act of penetration as an aggravating factor. The record indicates that the trial court only considered acts consistent with the jury's verdict and supported by the record.

¶ 20 Consequently, we conclude that even if the trial court erred in using the term "convicted" in reference to defendant's specific acts, its consideration of acts supported by the record and consistent with the jury's verdict was not error. Thus, the issue before the court is not whether the trial court considered an improper aggravating factor, as defendant claims, but rather, whether the court committed a semantic error in referring to separate convictions. A merely semantic error cannot be said to challenge the integrity of the judicial process, and thus is not reviewable under the second prong of plain error analysis. See *Piatkowski*, 225 Ill. 2d at 565. As defendant does not argue that the first prong applies, the issue is forfeited. See *Hillier*, 237 Ill. 2d at 547.

¶ 21 Defendant also argues that his trial counsel was ineffective for failing to object to the trial court's alleged error in stating that defendant was convicted on two separate acts. To prevail on a claim of ineffective assistance of counsel a defendant must show that counsel's performance

"was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36, quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984). As already discussed, any error by the trial court was purely semantic, and therefore defendant was not prejudiced by trial counsel's failure to object. Because defendant was not prejudiced, we need not determine the reasonableness of trial counsel's actions. See *People v. Rucker*, 346 Ill. App. 3d 873, 885 (2003).

¶ 22 Defendant next contends that the trial court erred by assessing a \$200 "State DNA ID System" fee against him under section 5-4-3(j) of the Code, (730 ILCS 5/5-4-3(j) (West 2012)), where his DNA was already on file in the State's database. The State concedes that the fee should be vacated and we accept the State's concession. The "State DNA ID System" fee cannot be assessed against a defendant whose DNA is already on file. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Defendant was previously convicted of a felony and we may presume he submitted a DNA sample to the State. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38. Accordingly, we vacate the fee and order the correction of the fines and fees order to reflect a total amount owed of \$854.

¶ 23 For the foregoing reasons we find that the sentencing court did not err by considering defendant's specific acts which were supported by the record and consistent with the jury's general verdict of guilt. Any semantic error by the court in stating that defendant was separately convicted of those acts did not rise to the level of plain error and did not prejudice defendant. We also find defendant's fines and fees order to be in error. Accordingly, we vacate the "State DNA ID System" fee, order the circuit court clerk to correct defendant's fines and fees order to reflect

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a total owed of \$854, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 24 Affirmed; fines and fees order corrected.