

FIRST DIVISION  
September 30, 2011  
Modified upon denial of rehearing  
November 14, 2011

No. 1-09-0332

**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. 03 CR 4836      |
|                                      | ) |                     |
| IVORY LLOYD, a/k/a IVORY LOYD,       | ) |                     |
|                                      | ) | Honorable           |
|                                      | ) | Bertina E. Lampkin, |
| Defendant-Appellant.                 | ) | Judge Presiding.    |

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JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

**ORDER**

- ¶ 1 **HELD:** Defendant's murder conviction affirmed, where: (1) defendant failed to obtain ruling on motion to depose State's expert witnesses; (2) defendant's offer of proof was insufficient to preserve any error with respect to cross-examination of a State expert witness; (3) evidence of other crimes was properly admitted; (4) alleged constitutional violations, if any, were harmless; and (5) State's arguments did not overstate DNA evidence presented at trial.
- ¶ 2 Following a jury trial, defendant, Ivory Lloyd<sup>1</sup>, was convicted of murder and sentenced to

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<sup>1</sup> Throughout the record on appeal, defendant's last name is spelled both "Lloyd" and "Loyd." Where this order contains a direct citation to that record, we will retain the original spelling.

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a term of natural-life imprisonment. On appeal, defendant asserts that the trial court erred by: (1) prohibiting defense counsel from deposing two of the State's expert witnesses; (2) improperly limiting cross-examination of one of the State's expert witnesses; (3) admitting evidence of other crimes without proper justification; and (4) allowing the State to introduce evidence violative of defendant's constitutional rights to remain silent and to confront his accusers. Defendant also asserts that he was denied a fair trial when the State overstated the scientific evidence against him during its arguments. For the following reasons, we affirm.

¶ 3 I. Background

¶ 4 In February of 2003, defendant and his codefendant, William Atkins, were charged by indictment with the 1981 murder of Elvio Mercuri. Defendant and Mr. Atkins were each charged with one count of intentional murder, one count of knowing murder, and three counts of felony murder predicated on a further allegation of either rape, deviate sexual assault, or armed robbery. The State filed a notice of intent to seek the death penalty, and both defendants waived their right - should they be found guilty - to a jury during the eligibility and sentencing phases. The charges against defendant and Mr. Atkins ultimately proceeded to simultaneous, but severed, jury trials in August and September of 2008. Mr. Atkins is not a party to this appeal.

¶ 5 Prior to trial, the trial court ruled on a number of relevant motions. Among these was the State's motion to admit evidence of other crimes to establish "the defendants' identity, *modus operandi*, and common scheme or design." In its motion, the State asserted that, in the January 4, 1981, incident for which the two defendants were charged:

"around 1:30 a.m., Elvio Mercuri and [T.C.] had just finished a date and were sitting in the

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front seat of Mercuri's car that was parked in front of [T.C.]'s home at 5361 N. Nordica, Chicago. At that time, the defendants both forced their way into the front seat of Mercuri's car and began demanding money. Loyd was armed with a pistol and struck Mercuri in the face with it before he pushed Mercuri into the back seat. Atkins drove Mercuri's car away from that location while Loyd raped [T.C.] vaginally and anally. [T.C.] was ordered to look away from her attackers. At one point, the car stopped and the defendants pulled Mercuri from the back seat and threw him in the trunk of the car where the defendants shot him once in the neck killing him. The defendants returned to the car and Atkins anally raped [T.C.] while Loyd drove. After driving further, one of the defendants said, 'Don't you move for fifteen minutes or I will blow you away.' [T.C.] waited for a few minutes before she drove away to get help."

¶6 With respect to the evidence of other crimes that the State sought to admit at trial, the State's motion indicated:

"Late on January 3, 1981 into January 4 \*\*\*, a few hours before Mercuri and [T.C.] were attacked at 5361 N. Nordica, Al McNair and his girlfriend, [C.K.], were outside the rear entrance to the Maxi Club Lounge located at 141 S. Troy. McNair managed the lounge and he and [C.K.] were loading bottles of champagne into a 1978 Chevy Monte Carlo when two male blacks confronted them. One of the men pushed a silver revolver to McNair's side and forced him into the back seat of the Monte Carlo where he held the gun to McNair's neck. The other man drove the Monte Carlo after he directed [C.K.] into the front seat. The offenders warned [C.K.] and McNair not to look at them. The armed offender hit McNair

in the face with the gun and took \$200 from him. He also took some jewelry from [C.K.]. After driving for a time, the car stopped and the offenders wanted to put McNair in the trunk but McNair had accidentally locked that key inside the trunk when loading the champagne earlier. The offenders then took McNair and [C.K.] into an abandoned building at 32 N. Long where they separated McNair and [C.K.] and then the offenders both raped [C.K.]. Before leaving, the offenders told McNair and [C.K.] that they would return."

¶ 7 Furthermore, the State's motion asserted: (1) both Mr. McNair and C.K. provided a description of the offenders that generally matched defendant and Mr. Atkins; (2) fingerprint evidence from the Monte Carlo matched Mr. Atkins; (3) the Monte Carlo was found parked on the same block where Mr. Mercuri and [T.C.] were abducted; (4) DNA evidence linked both defendants to the rape of [T.C.]; and (5) James Covington, an associate of defendant, would testify that defendant told him of a plan to rob someone coming out of the Maxi Club and had observed defendant with a handgun.

¶ 8 Over defendant's objection, that there was no evidence tying him to the first incident, the trial court granted the State's motion to admit the evidence of the McNair/C.K. incident as "proof of *modus operandi*," concluding: "Here, the defendant's crimes against the McNair/[C.K.] couple and the Mercuri/[T.C.] couple possessed significant and compelling similarities."

¶ 9 The trial court also addressed defendant's pretrial motion, brought in light of the State's intent to seek the death penalty and pursuant to Supreme Court Rule 416(e), to depose two of the State's expert witnesses involved in the analysis of the DNA evidence. Ill. S. Ct. R. 416(e) (eff. March 1, 2002). Defendant's motion asserted that, in order to properly defend this case, defense counsel

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needed to "fully understand the protocols, statistical formulae and basis of scientific opinions" that were involved in the DNA analysis.

¶ 10 This motion was filed on December 28, 2007, and was initially addressed in court on that same day. After noting that defense counsel had a great deal of experience with death penalty cases and had deposed State DNA experts about their analyses in other such cases, the trial court asked defense counsel what would be gained by repeating the process in this case. The trial court also asked defense counsel if the defense had any expert opinions that differed from those disclosed by the State's DNA experts. Defense counsel indicated the DNA evidence could vary from case to case, that the DNA samples could have degraded over time, and that these and other such complex matters would be better addressed initially in a deposition rather than at trial. Defense counsel also stated he had not yet asked any experts for any differing opinions.

¶ 11 In response to this motion, the trial court stated: "I want the discovery completed before I allow to you [*sic*] depose anybody. So you have to get your discovery completed. When your discovery is completed, then I'll make this decision." However, at the very next hearing in this case, defense counsel withdrew the request to depose the State's expert witnesses. Additionally, the record does not reflect defendant ever identified or disclosed any expert opinions or expert witnesses that would testify for the defense at trial.

¶ 12 At trial, the State presented testimony regarding the Mercuri/T.C. incident that generally paralleled the description contained in their pretrial motion to admit evidence of other crimes - albeit with additional detail. Specifically, T.C. testified and described the two men who abducted her and Mr. Mercuri as two black men wearing army fatigue jackets and hats. The man who got into the

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passenger side of Mr. Mercuri's car had the gun, and he also wore sunglasses and had sideburns. T.C. testified that the man with the gun raped her orally, vaginally, and anally, while the man who initially drove the car raped her anally. After the incident, T.C. was taken to the hospital, and DNA rape kits were completed. T.C. also subsequently provided prosecutors with a DNA sample. T.C. testified that she was never able to identify the offenders as it was dark, the men wore hats, and she was told to keep her eyes closed during the incident.

¶ 13 At this point in the trial, the State indicated it would begin offering evidence regarding the prior McNair/C.K. incident. The State indicated it would begin with the testimony of James Covington, the man identified in the pretrial motion as an associate of defendant, who would testify that defendant told him of a robbery plan involving someone coming out of the Maxi Club. However, after Mr. Covington indicated to the State and the trial court that he was reluctant to testify and did not recall his prior statements, the State informed the court that they would not call Mr. Covington as a witness.

¶ 14 Defense counsel then renewed his objection to the admission of any evidence of the McNair/C.K. incident as other-crimes evidence, in light of the absence of Mr. Covington's testimony tying the defendant to the prior incident. The trial court found that the other-crimes evidence was still admissible without Mr. Covington's testimony. The court noted that its original ruling finding the evidence admissible did not rely upon Mr. Covington's proposed testimony, but was based upon the factual similarity of the incidents, the physical evidence tying Mr. Atkins to the McNair/C.K. incident, and the fact that the DNA evidence from T.C.'s rape kits indicated the presence of defendant's DNA in T.C.'s vagina and could not exclude either defendant or Mr. Atkins from

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producing the DNA sample recovered from T.C.'s anus.

¶ 15 Thereafter, C.K. testified regarding the incident involving her and Mr. McNair, and again her testimony largely mirrored the description contained in the State's pretrial motion. She further indicated the offenders were two black men, although only one wore an army fatigue jacket and neither man wore a hat or gloves. Both men raped her vaginally, and one also raped her orally. After the incident, Mr. McNair's car was missing. No DNA evidence was collected from the rape of C.K., as she did not inform the police of the incident for two days.

¶ 16 Willie Alice Atkins, Mr. Atkins' wife, and Lafondraetta Lanier, defendant's former girlfriend, also testified at trial. Ms. Atkins and Ms. Lanier testified that Mr. Atkins and defendant were good friends in 1981. Ms. Atkins stated defendant may have worn an army fatigue jacket at that time, but she did not recall that Mr. Atkins did so. Ms. Atkins also testified that, in the late 1970's and early 1980's, she lived on or near the 3300 block of West Maypole Avenue in Chicago, including, for a time, with Ms. Atkins. Ms. Atkins' father lived on that block as well. At trial, the State presented evidence that items belonging to Mr. Mercuri and T.C. were found in an alley on the 3300 block of West Maypole Avenue on the day after they were abducted.

¶ 17 The State also presented additional evidence regarding the police investigation of this case. After Mr. McNair's Monte Carlo was found parked near where Mr. Mercuri and T.C. were abducted, the vehicle was processed and a number of latent fingerprints were identified. Over a dozen of these finger prints matched Mr. Atkins, while the rest were unidentified. None of the prints matched defendant. Additionally, the State introduced evidence that Mr. Mercuri died of a single gunshot wound to the neck.

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¶ 18 Defendant was ultimately arrested in connection with the Mercuri/T.C. incident in January of 2003, following a number of interviews conducted by Detective Daniel Engel of the Chicago police department's cold case unit. The day after defendant's arrest, Detective Engel spoke with Mr. Atkins. The following day, Detective Engel again interviewed defendant. Over a defense objection, Detective Engel testified that, after he showed defendant a picture of Mr. Atkins taken the previous day, defendant began to cry. Defense counsel attempted to question Detective Engel about this photo on cross-examination, and the following colloquy occurred:

"Q. Now, when you showed him this picture, he didn't say, 'My God, you've got me –'

THE COURT: Counsel, you may not go into anything he said. Not one word. Don't do that again in front of me.

BY [defense counsel]:

Q. Isn't it true –

THE COURT: You may not say one word about any conversation, Mr. Hicks; not one word. You may proceed."

¶ 19 Finally, the State presented testimony regarding the DNA evidence in this case. The State presented testimony that buccal swabs were obtained from defendant, Mr. Atkins, and T.C., and that DNA profiles were created for all three individuals. These profiles were then compared to the DNA profiles created from the rape kits initially completed at the time of T.C.'s rape in 1981.

¶ 20 Kathleen Kozak, a forensic scientist working at the Illinois State Police lab, testified as an expert witness without objection. Ms. Kozak testified that she examined the anal and vaginal DNA

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samples produced from the rape kits. With respect to the evidence from the anal swabs, the most Ms. Kozak could say was there were two male DNA profiles present and defendant and Mr. Atkins could not be excluded as the donors. However, the vaginal samples indicated the presence of one male and one female DNA profile. Assuming T.C. was the donor of the female profile, Ms. Kozak testified that the male profile "matched" defendant's DNA profile. Ms. Kozak further testified that the male DNA profile identified from the vaginal slides would be expected to occur in only 1 in 3.7 quintillion black, 1 in 200 quintillion white, and 1 in 5.5 quintillion Hispanic individuals that were not related.

¶ 21 On cross-examination, defense counsel asked Ms. Kozak about her knowledge of the DNA population databases that were used to provide the statistical calculations with respect to the DNA samples in this case. Ms. Kozak testified that, while the issue was beyond the scope of her expertise, she believed the probability calculations were based upon a 400-person database. Defense counsel then attempted to ask Ms. Kozak about her knowledge of "much larger databases," but the trial court sustained the State's objection. At a subsequent sidebar, defense counsel made an offer of proof regarding this line of questioning. Defense counsel indicated that he was aware of studies completed in Arizona and Illinois that included several hundred thousand people and indicated that DNA profile matches occurred at a much higher frequency than predicted by the statistical methods employed by Ms. Kozak. While defense counsel did not know if Ms. Kozak was aware of these studies, defense counsel wished to question her about them and their potential to cast doubt on her analysis. The trial court found defense counsel had not demonstrated the relevance of these studies and would not be allowed to further question Ms. Kozak about them.

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¶ 22 The state rested its case, the trial court denied a defense motion for directed verdict, and the defense rested without introducing any evidence. The jury returned a verdict finding defendant guilty of murder. The trial court found defendant was not eligible for the death penalty, because the evidence at trial did not establish whether defendant or Mr. Atkins shot Mr. Mercuri. Because defendant had a prior murder conviction in an unrelated case, however, the trial court sentenced him to a term of life imprisonment. Defendant timely appealed.

¶ 23 II. Analysis

¶ 24 As noted above, on appeal, defendant has raised five separate issues. We will address each argument in turn.

¶ 25 A. Depositions of State Expert Witnesses

¶ 26 We first address, and reject, defendant's argument that the trial court improperly denied his pretrial motion to depose two of the State's DNA experts.

¶ 27 In this case, the State sought the death penalty. Supreme Court Rule 416(e)(I) (eff. March 1, 2002) contains specific procedures to be followed in such capital cases, including a provision specifying:

"A party may take the discovery deposition upon oral questions of any person disclosed as a witness pursuant to Supreme Court Rules 412 or 413 with leave of court upon a showing of good cause. In determining whether to allow a deposition, the court should consider the consequences to the party if the deposition is not allowed, the complexities of the issues involved, the complexity of the testimony of the witness, and the other opportunities available to the party to discover the information sought by deposition."

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The trial court's determination of a party's request for such a deposition is generally reviewed for an abuse of discretion. *People v. Sutherland*, 223 Ill. 2d 187, 280 (2006).

¶ 28 The record in this case, however, clearly reflects that the trial court never made a final determination on defendant's motion to depose the State's witnesses. Defendant made a written motion for the depositions of two of the State's DNA experts, including Ms. Kozak. That motion was discussed in open court the day it was filed, with the trial court inquiring about the need for the depositions. After some discussion on that issue, the trial court simply stated it would reserve this decision until discovery had been completed. The trial court specifically indicated, "[w]hen your discovery is completed, then I'll make this decision." Nevertheless, the record indicates defense counsel withdrew the request to depose the State's DNA experts at the very next hearing in this case. The matter was never addressed again below, and the motion was never renewed.

¶ 29 Our supreme court has generally recognized that, where a defendant denies the trial court an opportunity to rule on an issue, that issue should not be considered on appeal. *People v. Nitz*, 219 Ill. 2d 400, 424 (2006). More specifically, this court addressed a very similar situation in *People v. Stack*, 311 Ill. App. 3d 162 (1999). In that case, a murder defendant sought leave to take evidentiary depositions of two witnesses who would not be able to testify at trial. *Id.* at 176-77. The trial court reserved ruling on the motion, but the defendant never raised the matter again until he filed a posttrial motion. *Id.*

¶ 30 On appeal, this court found the defendant had waived any argument that the trial court erred when it "refused" to permit the depositions. *Id.* This court noted, our "supreme court [has] addressed the issue of waiver when a judge reserves ruling on a motion and held that '[a] movant has

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the responsibility to obtain a ruling from the court on his motion to avoid waiver on appeal.' " *Id.* at 176 (quoting *People v. Redd*, 173 Ill.2d 1, 35 (1996)). As such, this court held "the defendant's failure to obtain a ruling from the trial court on the issue of evidence dispositions resulted in waiver on appeal." *Id.* at 176-77.

¶ 31 We come to a similar conclusion in this case. Indeed, not only did defendant here fail to obtain a ruling on his motion for depositions after the trial court had reserved the issue, defense counsel affirmatively withdrew the request for those depositions. On such a record, we need not and will not further consider defendant's assertion that the trial court "refused" to grant his request for pretrial depositions.

¶ 32 **B. Limitation on Cross-Examination**

¶ 33 Next, we consider defendant's argument that the trial court improperly denied him the opportunity to fully cross-examine Ms. Kozak. While defendant asserts that this limitation violated his constitutional right of confrontation, we find defendant has failed to preserve this issue by failing to provide an adequate offer of proof in the trial court.

¶ 34 The confrontation clause states, "[i]n all criminal prosecutions, the accused shall enjoy the right \*\*\* to be confronted with the witnesses against him." U.S. Const., amend. VI. As such, under the confrontation clause defense counsel is guaranteed an opportunity for effective cross-examination, however that guarantee does not include "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). The trial court, therefore "has discretion to impose reasonable limits on cross-examination to limit possible harassment, prejudice, jury confusion, witness safety, or

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repetitive and irrelevant questioning, and we review a defendant's claim of a violation of the confrontation clause under the abuse-of-discretion standard." *People v. Tabb*, 374 Ill. App. 3d 680, 689 (2007). "[U]nless the defendant can show his or her inquiry is not based on a remote or uncertain theory, a court's ruling limiting the scope of examination will be affirmed." *Id.*

¶ 35 Such a showing is typically established by a sufficient offer of proof, with such offers of proof having been required in the context of a claim that limits on cross-examination violated the confrontation clause. *Id.* (citing *People v. Phillips*, 186 Ill. App. 3d 668, 678 (1989)). Specifically, "when a defendant claims that he has not been given the opportunity to prove his case because the trial court improperly barred evidence, he 'must provide [the] reviewing court with an adequate offer of proof as to what the excluded evidence would have been.'" *People v. Pelo*, 404 Ill. App. 3d 839, 875 (2010) (quoting *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 773 (2002)). As our supreme court has stated:

"The purpose of an offer of proof is to disclose to the trial judge and opposing counsel the nature of the offered evidence and to enable a reviewing court to determine whether exclusion of the evidence was proper. [Citation.] The failure to make an adequate offer of proof results in a waiver of the issue on appeal. [Citation.]

Where an objection is sustained to the offered testimony of a witness, an adequate offer of proof is made if counsel makes known to the trial court, with particularity, the substance of the witness' anticipated answer. [Citation.] An offer of proof that merely summarizes the witness' testimony in a conclusory manner is inadequate. [Citation.] Neither will the unsupported speculation of counsel as to what the witness would say suffice.

[Citation.] Rather, in making the offer of proof, counsel must explicitly state what the excluded testimony would reveal and may not merely allude to what might be divulged by the testimony. [Citation.] The offer serves no purpose if it does not demonstrate, both to the trial court and to reviewing courts, the admissibility of the testimony which was foreclosed by the sustained objection." *People v. Andrews*, 146 Ill. 2d 413, 420-21 (1992).

¶ 36 The record reflects that, on cross-examination, defense counsel attempted to ask Ms. Kozak about her knowledge of DNA population databases "much larger" than the one used to generate the statistical models she used in her analysis. At a sidebar following the State's objection to this line of questioning, defense counsel made an offer of proof in which he indicated, "I don't know that this witness is aware of them, but I do know of studies that have been done. \*\*\* would like to ask her if she knows about that." Defense counsel then indicated these studies included the examination of DNA profile databases in Illinois and Arizona, and intimated that these studies contained results that might cast doubt on Ms. Kozak's analysis and conclusions. Defense counsel indicated if Ms. Kozak testified that she did know about these studies, he would ask her about the results of those studies.

¶ 37 Clearly, this offer of proof was inadequate in light of the requirements enunciated by our supreme court. Indeed, not only did the offer utterly fail to "explicitly state" what Ms. Kozak's testimony in response to defense counsel's questions might be, defense counsel affirmatively stated he *did not know* the extent of her knowledge of the Illinois and Arizona studies or what her testimony about them might contain. Nor did the defense counsel ask for leave to conduct a full formal offer of proof in order to ask Ms. Kozak about these issues outside the presence of the jury. *Pelo*, 404 Ill. App. 3d at 875 ("The traditional way of making an offer of proof is the 'formal' offer,

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wherein counsel offers the proposed evidence or testimony by placing a witness on the stand, outside the jury's presence, and asking him questions to elicit with particularity what the witness would testify to if permitted to do so."). At most, the offer of proof contained a conclusory summary of what the *questions* to Ms. Kozak would be.

¶ 38 Nevertheless, on appeal, defendant contends defense counsel made a sufficient offer of proof by "citing the specific studies he intended to ask about, describing the nature of the studies, and explaining their relevance." Defendant then cites to *People v. Phillips*, 186 Ill. App. 3d 668, 679 (1989), for the proposition that "an informal offer of proof, where counsel merely summarizes what the proposed evidence or testimony may show, may be sufficient to preserve the error if it is specific enough in nature, and if it is not based merely on speculation or conjecture. [Citations.] An offer of proof is sufficiently specific, therefore, if it adequately shows the court what the evidence would be, allowing a court of review to assess the prejudice allegedly inuring from the exclusion." Furthermore, defendant also contends it was clearly appropriate to utilize the cited studies to cross-examine Ms. Kozak, citing to *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 336 (1965), for the proposition that "[a]n individual becomes an expert by studying and absorbing a body of knowledge. To prevent cross-examination upon the relevant body of knowledge serves only to protect the ignorant or unscrupulous expert witness."

¶ 39 We disagree with these assertions. Again, the offer of proof never identified what Ms. Kozak's testimony would be at all. It merely identified the general nature of the proposed questioning. Questions are not evidence, and this court cannot "assess the prejudice allegedly inuring from the exclusion" of mere questions. Moreover, cross-examination of an expert with

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reference to recognized texts is only proper where either: (1) the court takes judicial notice of the author's competence; (2) the witness to be cross-examined concedes the text is authoritative; or (3) the cross-examiner proves the text or treatise is authoritative via testimony from another witness with expertise in the relevant subject matter. *Stapleton ex rel. Clark v. Moore*, 403 Ill. App. 3d 147, 158 (2010); *People v. Johnson*, 206 Ill. App. 3d 875, 879 (1990). In this case, defendant never attempted to have Ms. Kozak concede the authoritativeness of the Arizona and Illinois studies, never allowed the trial court to take judicial notice by providing the actual studies or specific citations to those studies (nor did defendant include them in the record on appeal), and never indicated, in any way, he intended to call any other expert witness who would vouch for the competence of these studies. Indeed, the record indicates that, before trial, defendant indicated it intended to call *no* witnesses in addition to those called by the state. Thus, defendant's offer of proof never established the relevance of the studies he wished to use in cross-examination of Ms. Kozak.

¶ 40 Defendant next contends, to the extent that its offer of proof was deficient, that deficiency resulted from the fact that the trial court cut his offer of proof short. In support of this argument, defendant notes the offer of proof ended with the following quote from the trial court: "It's not relevant. And if you've finished, you've finished you've made your offer of proof, we may go back." On appeal, defendant contends the statement "you've finished you've made your offer of proof" demonstrated the trial court "told counsel he had finished making his offer" and "impeded" any opportunity to provide additional details. We disagree.

¶ 41 Defendant's assertion completely ignores the first portion of the trial court's statement, which plainly appears to be a *question* asking defense counsel "if you've finished." Thus, the record could

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easily be read to indicate the trial court asked defense counsel "if you've finished," received a nonverbal or unrecorded response, and only then stated "you've finished you've made your offer of proof, we may go back." At best, the trial court's statement is ambiguous, and defendant never identifies what, if anything, he would have included if only the trial court had not "imped[ed] a more expansive offer of proof."

¶ 42 Finally, we note that much of defendant's assertions regarding the authoritative and relevance of the Arizona and Illinois studies, as well as the purported prejudice flowing from the trial court's refusal to allow questioning about these studies, is premised upon the decision of another panel of this court in *People v. Wright*, 2010 WL 1194903 (March 26, 2010). Defendant asserts that, in *Wright*, this court recognized the very studies at issue in this case as authoritative and relevant in similar circumstances.

¶ 43 However, as even the briefs in this case recognize, the *Wright* decision was subject to a petition for rehearing that was pending at the time this case was briefed. On June 3, 2011, the opinion in *Wright* was withdrawn. *Id.* "A withdrawn opinion has no precedential value, since it does not express the views of the court." *Nationwide Bank & Office Management v. Industrial Commission*, 361 Ill. App. 3d 207, 210 (2005) (citing *People v. Jordan*, 103 Ill. 2d 192, 205 (1984)). Thus, in light of the fact that defendant's offer of proof in the trial court was insufficient and his primary legal support on appeal is no longer valid, we find defendant cannot establish that the trial court's limitation of his cross-examination of Ms. Kozak prevented the introduction of any admissible or relevant testimony and therefore violated his constitutional right to confrontation.

¶ 44

#### C. Other-Crimes Evidence

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¶ 45 We next address defendant's contention that the trial court improperly allowed the State to introduce evidence of the McNair/C.K. incident as other-crimes evidence of his *modus operandi*. Defendant specifically argues that the State failed to provide sufficient evidence of his involvement in the McNair/C.K. incident to support its admission.

¶ 46 While the admission of evidence of other crimes in a criminal trial is permissible, the following considerations apply to the trial court's determination of admissibility:

"Evidence of other crimes is admissible if its probative value outweighs the risk of unfair prejudice to the defendant. [Citation.] Other-crimes evidence is admissible to prove any material fact relevant to the case [citation], but it is inadmissible if it is relevant only to demonstrate a defendant's propensity to engage in criminal activity [citation]. Such evidence may be admissible when it is relevant to show, among other things, motive, intent, identity, absence of mistake or accident, *modus operandi*, or the existence of a common plan or design. [Citation.]

' "[B]efore such evidence is admitted, the State must first show that a crime took place and that the defendant committed it or participated in its commission." ' [Citation.] 'Proof that the defendant committed the crime, or participated in its commission, need not be beyond a reasonable doubt, but it must be more than a mere suspicion.' [Citations.]" *Village of Kildeer v. Munyer*, 384 Ill. App. 3d 251, 255 (2008).

¶ 47 Additional consideration must be given in a case, such as this one, where the State seeks to admit evidence of other crimes to establish a defendant's *modus operandi*. Specifically, it has been recognized:

"*Modus operandi* or 'method of working,' refers to a pattern of criminal behavior so distinct that separate crimes are recognized as the work of the same person. [Citation.] If evidence of other crimes is offered to prove *modus operandi*, there must be some clear connection which creates a logical inference that if defendant committed the former crime, he may have committed the crime charged. [Citation.] Accordingly, there must be distinctive features that are not common to most offenses of that type. [Citation.]

Although there must be a 'strong and persuasive showing' of similarity between the crimes, 'it is not necessary that the crimes be identical' for the other crime to be admitted into evidence to prove *modus operandi*. [Citation.] Where common features may be insufficient to raise the inference of *modus operandi* on an individual basis, the combination of such features may reveal a distinctive combination so as to suggest the work of the same person. [Citation.] The test is not one of exact, rigorous identity, as some dissimilarity will always exist between independent crimes [citation]; rather, it is the similarity of the conduct as a whole, not the uniqueness of any single factor, which is the key to establishing *modus operandi*." *People v. Colin*, 344 Ill. App. 3d 119, 127 (2003).

The determination as to the admissibility of other-crimes evidence rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Id.* An abuse of discretion "occurs when the court's decision is arbitrary, fanciful, or unreasonable." *People v. Gwinn*, 366 Ill. App. 3d 501, 515 (2006).

¶ 48 First, we note defendant cites to *People v. Bedoya*, 325 Ill. App. 3d 926, 938 (2001), for the proposition that the "standard for admissibility of other crimes evidence has not been clearly

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established in Illinois." Defendant then asserts that this court should adopt the federal standard cited in *Bedoya*; *i.e.*, that "other offense evidence is admissible when the jury could reasonably find by a *preponderance of the evidence* that the defendant committed the other offense." (Emphasis added.) *Id.* (citing *Huddleston v. United States*, 485 U.S. 681 (1988)). However, we are aware of no Illinois decision adopting the federal standard. As such, we decline defendant's request to modify the standard traditionally applied to this question, and adhere to the standard long-since established by our supreme court: "Proof that the defendant committed the crime, or participated in its commission, need not be beyond a reasonable doubt [citation], but such proof must be more than a mere suspicion." *People v. Thingvold*, 145 Ill. 2d 441, 456 (1991).

¶ 49 Here, we find the trial court properly found that the State had met its burden to support the admission of the McNair/C.K. incident as other-crimes evidence. As the trial court found, the "crimes against the McNair/[C.K.] couple and the Mercuri/[T.C.] couple possessed significant and compelling similarities." Both incidents involved two black males confronting a man and a women in or near a vehicle. In each instance, the man and women were then abducted and driven to another location and robbed. In both cases, the male victim was beaten and struck in the face with a handgun, while the female victim was both beaten and raped by each offender. The two offenders in each incident attempted to place the male victim in the trunk of the stolen car. Finally, both incidents occurred within hours and within 10 miles of each other. Such similarities reveal a combination of sufficiently distinctive features that, when considered as a whole, suggest the *modus operandi* of the same offenders.

¶ 50 Moreover, we also find that the evidence of defendant's identity as one of the two offenders

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in the McNair/C.K. incident was established well beyond "a mere suspicion." Defendant and Mr. Atkins were good friends at the time of the two incidents, and both C.K. and T.C. provided physical descriptions that generally matched defendant and Mr. Atkins. Both women testified that at least one of the offenders wore an army fatigue jacket, and there was testimony defendant wore such a jacket around the time of the attacks. Fingerprint evidence tied Mr. Atkins to Mr. McNair's vehicle, the vehicle was found parked on the same block where Mr. Mercuri and T.C. were abducted, items belonging to Mr. Mercuri and T.C. were found near where Mr. Atkins lived at the time, and DNA evidence tied defendant to the rape of T.C. and could not exclude Mr. Atkins as one of the offenders who raped T.C.. In total, we find that the evidence sufficiently supported the admission of evidence related to the McNair/C.K. incident as other-crimes evidence of defendant's *modus operandi*, and reject defendant's assertion that he was entitled to a new trial on the basis of the introduction of this evidence.

¶ 51

#### D. Constitutional Violations

¶ 52 Next, defendant contends Detective Engel was improperly allowed to testify that, after defendant was arrested and following an interview with Mr. Atkins, defendant began to cry when he was shown a photo of Mr. Atkins. Defendant asserts on appeal that:

"The direct implication of this testimony was that Lloyd's co-defendant had implicated him in the crime and that Lloyd remained silent in the face of an accusation. Therefore the testimony violated Lloyd's privilege against self-incrimination and his right to confront the witnesses against him. The court compounded this error when it prevented Lloyd from eliciting from the officer the lack of any inculpatory statements during the

encounter. Together, these errors require a remand for a new trial."

We disagree that defendant is entitled to a new trial on this basis as, even if we assume error with respect to this issue, that error was harmless beyond a reasonable doubt.

¶ 53 Defendant essentially argues that Detective Engel's testimony, and the trial court's limitation on his ability to cross-examine regarding this testimony, violated his fifth-amendment right against self-incrimination and his sixth-amendment right to confrontation. U.S. Const., amend. V ("No person \*\*\* shall be compelled in any criminal case to be a witness against himself."); U.S. Const., amend. VI ("In all criminal prosecutions, the accused shall enjoy the right \*\*\* to be confronted with the witnesses against him."). However, violations of these constitutional rights are subject to a harmless-error analysis. *Chapman v. California*, 386 U.S. 18, 22 (1967) (a constitutional error does not automatically require reversal of a conviction); *People v. Dameron*, 196 Ill. 2d 156, 164 (2001) (violation of defendant's post-*Miranda*-warning right to remain silent may constitute harmless error); *People v. Patterson*, 217 Ill. 2d 407, 427-28 (2005) (confrontation clause violations are subject to harmless-error review). Our supreme court has further stated:

"In determining whether a constitutional error is harmless, the test to be applied is whether it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict obtained. [Citations.] The State bears the burden of proof. [Citations.] In *People v. Wilkerson*, [citation], this court listed three different approaches for measuring error under this harmless-constitutional-error test: (1) focusing on the error to determine whether it might have contributed to the conviction, (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction, and (3) determining whether the

improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." *Id.* at 428.

¶ 54 Here we find - beyond a reasonable doubt - that Detective Engel's challenged testimony and the trial court's limitation on the cross-examination of Detective Engel did not contribute to the jury's verdict. Indeed, the most defendant claims on appeal is Detective Engel "implied" that Mr. Atkins had implicated defendant and allowed the jury to "infer" that this had occurred. However, Detective Engel never actually testified to the contents of his conversation with Mr. Atkins and never testified to anything defendant did or did not say in his interview the following day. Furthermore, the State never referred to this evidence in its closing arguments. Moreover, the rest of the evidence in this case, including eye-witness testimony, the circumstantial and physical evidence, and the DNA evidence, was overwhelming. As such, we find defendant is not entitled to a new trial on this issue.

¶ 55 E. Improper Argument

¶ 56 Finally, we consider defendant's assertion that he was prejudiced by improper assertions made by the State in its opening and closing arguments. Defendant specifically argues that the State improperly overstated the DNA evidence presented at trial by arguing that the evidence would establish (opening argument) or had established (closing argument) defendant's DNA "matched" that of the DNA found in T.C.'s rape kit and making statements such as "science identifies one of [T.C.'s] rapists, and it's this guy sitting right here Ivory Loyd." We disagree.

¶ 57 As an initial matter, at trial, defendant never objected to the specific arguments he now challenges on appeal and he did not include them in his posttrial motion in the trial court. Therefore, defendant has not preserved this issue for appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to

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preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion). He, therefore, requests this court to review this issue under the plain-error doctrine. This doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error \*\*\*." *People v. Herron*, 215 Ill. 2d 167, 186 (2005). The plain-error doctrine is applied where "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In either circumstance, the burden of persuasion remains with the defendant. *Herron*, 215 Ill. 2d at 182.

¶ 58 We also note that a portion of defendant's argument on this issue again relies upon the *Wright* decision that has now been withdrawn. For the reasons already noted above, we necessarily reject these arguments.

¶ 59 However, defendant also more generally challenges the State's arguments, noting that our supreme court has cautioned the State not to overstate scientific evidence against a defendant in argument. See *People v. Linscott*, 142 Ill. 2d 22, 32-36 (1991). However, we find that no such overstatement of the scientific evidence occurred here. As this court recently stated:

"A prosecutor is allowed wide latitude during closing arguments. [Citation.] A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. [Citation.]

Remarks made during closing arguments must be examined in the context of those made by both the defense and the prosecution, and must always be based upon the evidence presented or reasonable inferences drawn therefrom." *People v. Willis*, 409 Ill. App. 3d 804, \_\_\_, 950 N.E.2d 265, 273 (2011).

¶ 60 Here, the record reflects Ms. Kozak testified on several occasions that the DNA profile of the vaginal sample "matched" the DNA profile of defendant. Ms. Kozak then testified that the statistical rarity of that DNA profile was "one in 3.7 quintillion Black, one in two hundred quintillion White, or one in 5.5 quintillion Hispanic unrelated individuals," and a "quintillion" was 150 times the human population of the planet. Then, referring to Ms. Kozak's testimony, the State argued:

"The male profile in the vaginal smear of [T.C.] matched Ivory Loyd. She told you the frequency that that would be expected to occur. Do you remember – everybody remember that number? One in 3.7 quintillion black men on the face of the planet. One in 3.7 quintillion. That's 18 zeros, folks.

The population is six and a half billion. One in 3.7 quintillion. You know what that means? Break it down to its most simplest, most basic thing. It means Ivory Loyd raped [T.C.]. He scientifically is identified. \*\*\*

Broken down to its most simplest thing, that's what it means. Science identifies Ivory Loyd as being a rapist. It puts Ivory Loyd in that blue Continental. It puts him in that car as being one of the two people who abducted [T.C.] and Elvio Mercuri, one of the two people who raped [T.C.], one of the two people who killed Elvio Mercuri."

¶ 61 We find that, in this and other similar statements during its argument, the State summarized the expert testimony provided by Ms. Kozak, without overstatement, and never implied or asserted that the testimony was any more conclusive than Ms. Kozak actually indicated. When the State made assertions such as "[s]cience identifies Ivory Loyd as being a rapist," the State merely made a fair, reasonable inference from that evidence, one that was well within the wide latitude it was allowed during argument.

¶ 62 Moreover, even if we were to find any of the State's argument improper, we would find that it was cured by the trial court's instructions to the jury. "[I]mproper arguments can be corrected by proper jury instructions, which carry more weight than the arguments of counsel. [Citations.] Moreover, any possible prejudicial impact is greatly diminished by the court's instructions that closing arguments are not evidence." *Willis*, 409 Ill. App. 3d at \_\_\_, 950 N.E.2d at 275-76. Here, the trial court properly instructed the jury that arguments were not evidence and should not be considered as such. We find that any possible error was therefore cured by the admonishments provided by the trial court.

¶ 63 Thus, we find no error, and certainly no plain error, with respect to the arguments of the State in this case.

¶ 64 **III. Conclusion**

¶ 65 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 66 Affirmed.