

FOURTH DIVISION
MARCH 22, 2012

No. 1-09-3363

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	Appeal from the
)	Circuit Court of
v.)	Cook County.
)	
KENNETH SHARPLES,)	05 CR 11285
)	
Defendant-Appellant.)	The Honorable
)	Timothy J. Chambers,
)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

HELD: (1) The trial court did not abuse its discretion in denying defendant's motion to suppress statements where the facts were disputed and the manifest weight of the evidence established that officers observed defendant's rights and that defendant initiated subsequent contact with officers. (2) The trial court's denial of defendant's motion for a continuance to interview and/or obtain the testimony of a witness and medical records for *Lynch* evidence was not an abuse of discretion because the witness was dead and not available to testify and because the defense was not diligent in obtaining the records. (3) Defense counsel's failure to investigate the alleged *Lynch* evidence earlier was not

ineffective assistance of counsel. (4) Defendant forfeited review of the propriety of admitting a "Freddy Krueger" knife found in defendant's apartment and could not establish any plain error where the knife was admissible because it was connected to defendant and the crime and was a weapon suitable for commission of the offenses. (5) Defendant forfeited review of prosecutorial misconduct during closing argument and could not establish plain error where there was only one isolated comment by the prosecutor apparently shifting the burden of proof, the evidence was not closely balanced, and error in closing argument is not structural error. (6) Defense counsel was not ineffective for failing to request separate verdict forms. (7) Defendant's convictions and sentences were affirmed for first-degree murder and aggravated kidnapping, but the additional convictions and sentences for murder reflected on defendant's *mittimus* were vacated and the clerk of the circuit court was ordered to amend the *mittimus* to reflect a single conviction and sentence for first-degree murder, leaving the conviction and sentence for aggravated kidnapping unchanged, and a sentence credit of 1,690 days spent in pretrial custody. Defendant's \$200 State DNA ID System fee was vacated because defendant had previously provided his DNA on a prior conviction and a \$5 Court System fee was vacated because the fee only applied to violations of the Illinois Vehicle Code or similar provisions. However, the \$10 fee for the Arrestee's Medical Costs Fund was affirmed because the fee is not subject to reduction by a prisoner's \$5 per day credit.

¶1 BACKGROUND

¶2 Defendant, Kenneth Sharples, was arrested on March 15, 2005, and was charged with three counts of first-degree murder, felony murder, and two counts of aggravated kidnapping of Stephen Trafford. Defendant provided several statements to police detailing how the crimes occurred and led officers to Trafford's body. On September 25, 2009, a jury found defendant guilty of aggravated kidnapping and murder under a general verdict. The court sentenced defendant to prison terms of fifty years for first-degree murder and thirty years for aggravated kidnapping, which were mandatorily consecutive.

¶3 Motion to Quash Arrest and Suppress Statements

¶4 Prior to trial, defendant filed a motion to suppress statements, arguing the statements he made to the police should have been suppressed because they occurred after he exercised his

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right to remain silent and requested counsel. The following facts were adduced at defendant's Motion to Quash Arrest and Suppress Statements.

¶5 In March 2005 defendant was on felony parole. Officer John Rusten was assigned as defendant's parole officer. On Sunday, March 13, 2005, at 1:30 p.m., Officer Rusten performed a residence check of defendant at his apartment in Rosemont to make sure defendant was not living in a drug house or Section 8 housing where felons are not authorized. Rusten identified himself to defendant, as they were meeting for the first time. Defendant answered the front door of the apartment building downstairs wearing only shorts. Rusten and defendant proceeded inside defendant's apartment and defendant told a female guest to make herself "decent." Rusten told the female to sit on one of the couches and defendant to sit on another couch. Rusten determined that the apartment was not Section 8 housing or a drug house and then asked defendant how his parole had been going. Defendant stated he had one case that had been dropped, and he had served five months in DuPage County Jail on another case. Rusten had not run defendant's rap sheet prior to the residence check and thus was unaware of this parole violation. Defendant stated he was on probation for mob action and had assumed Rusten was his probation officer. Rusten noticed defendant's pupils were dilated and asked defendant if he would test positive if he gave him a drug test. Defendant stated he would test positive for marijuana, which was also a parole violation.

¶6 Rusten asked defendant if he was familiar with the mandatory supervised release agreement he had signed and defendant stated he remembered it. Rusten told defendant that under the agreement parole officers had the right to check any room under defendant's control.

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They began walking toward defendant's bedroom. Along the way defendant told Rusten he had a toy knife he wanted to discuss with him. When they went into the bedroom in the back, Rusten saw the knife on the window sill, which was a glove with large knives coming out of it, commonly referred to as a "Freddy Krueger"¹ knife. Rusten told defendant he was not allowed to have such a knife while on parole. Then Rusten looked more closely at the glove and knives and saw some blood on one of the finger holes. Defendant said he had cut himself and Rusten then saw that defendant had a bandage on one finger, but it did not match up with the hole in the glove where the blood stain was. Rusten looked behind a chair in the bedroom and saw a large blanket covered with a lot of what looked like blood. Rusten asked defendant to pull out the blanket and put it on top of an air mattress in the room. As defendant was pulling out the blanket he explained he had a friend who called him to assist moving a dog that had been hit by a truck. There was also a black bag which Rusten asked defendant to open and inside there was clothing which looked like it had more blood on it.

¶7 Rusten called the Rosemont Police for assistance because the policy of the Illinois Department of Corrections was that to arrest a parolee Rusten had to have two other law enforcement agents with him for safety. Rusten told defendant that his story about the dog was plausible but as a mandated parole reporter Rusten had to call the authorities and have them make a determination. Rosemont police officer Jeff Caldwell arrived and put handcuffs on defendant. Defendant stated the blood came from a dead dog. Caldwell then called for

¹ Freddy Krueger is a character in the horror film *A Nightmare on Elm Street* (1984) by director Wes Craven. Freddy Krueger was a disfigured serial killer who used a glove outfitted with large knives to kill his victims in their dreams.

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assistance because under the police department policy in Rosemont officers do not take anyone into custody alone. At first Caldwell did not tell defendant he was under arrest. When three other Rosemont officers arrived, Caldwell then informed defendant he was under arrest. The female was placed under arrest for an outstanding warrant. Rusten subsequently wrote a parole violation report in which he noted the mob action probation, the glove with the knives, and defendant's drug use as parole violations.

¶8 Defendant was transported to the Rosemont police station and placed in a patrol interview holding room for the parole violations. At 3:05 p.m. Detective Ronald Muich advised defendant of his *Miranda* rights with Officer Mike McDonald present. Defendant stated he understood his rights, initialed a waiver form after each right and signed the form at the end. Muich asked defendant if he would be willing to sign a consent to search form for his apartment and defendant stated yes but wanted to call his uncle, Tom Muncie, first. At 3:40 p.m., after the call, defendant signed the consent to search just the rear bedroom.

¶9 Detective John Hansen knew that defendant had already been read his *Miranda* rights and asked defendant if he had anything to say. Defendant stated, "I don't have anything to say. If you are out of cigarettes, take me back to my cell. I want an attorney." Hansen then took defendant back to the cell and notified the other officers that defendant asked for an attorney.

¶10 The next day, March 14, at about 1 p.m., Hansen was doing a prisoner welfare check in the cell block and defendant asked to speak to him. Hansen told defendant he could not speak to him because he asked for an attorney. Defendant said, "I'd like to talk to you." Defendant was taken out of the cell to an interview room. Hansen informed the director of the major case

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assistance team that defendant wanted to speak with him and the director assigned Commander James Keegan of Streamwood to sit in with Hansen during the interview. Hansen read defendant his *Miranda* rights from a written waiver which defendant read, initialed after each right, and signed at the end. Defendant then provided a statement about the murder and agreed to go with Hansen and Keegan to show them where he left the body of the victim.

¶11 At 2:15 p.m. the next day, March 15, 2005, defendant signed yet another *Miranda* form and provided another statement to Hansen and Keegan. Hansen and an assistant state's attorney interviewed defendant again at about 6:45 p.m. This statement was not memorialized.

¶12 The trial court denied defendant's motion to quash arrest, finding Rusten had a right to conduct a residence check of defendant and that defendant was in violation of several terms of his parole agreement. The court also denied defendant's motion to suppress statements, finding no coercion by the police, that defendant was given his *Miranda* warnings, and that, "When [defendant] asked for an attorney, those rights were scrupulously observed." The court also found that defendant "initiated the conversation."

¶13 Motion For Continuance

¶14 A jury trial was scheduled to begin on September 21, 2009. One week before trial, on September 14, 2009, defense counsel filed an answer to the State's discovery motion listing Cheryl Trafford, the estranged wife of the victim, Stephen Trafford, as a possible *Lynch* witness for the defense (see *People v. Lynch*, 104 Ill. 2d 194 (1984)), noting that Cheryl had obtained an order of protection against Stephen a few weeks before defendant killed Stephen. The police had discovered a copy of this order of protection during their search of Stephen Trafford's apartment.

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There was a video recording of this search showing the order of protection, and defense counsel signed a discovery receipt on May 31, 2005, nearly four years earlier, for the video of the search. Defense counsel had also seen photographs of the order of protection. On September 14, 2009, defense counsel requested a copy of the order of protection. Two days later, prosecutors tendered the order.

¶15 On that date, September 16, 2009, defense counsel orally moved for a continuance based on the order of protection. The order of protection contained allegations by Cheryl Trafford that Stephen Trafford had poured bleach on her clothes, cut up her jackets and poured sugar in her gas tank, and that he also suffered from schizophrenia and bipolar disorder, had been in the hospital three times and was not taking his medications. Defense counsel wanted a continuance to obtain the medical records from the hospitals and to interview Cheryl Trafford. However, defense counsel admitted he had sent out an investigator to look for her but had not found her. The prosecutor told the court that she had also sent out investigators and was unable to locate Cheryl Trafford. Regarding the medical records, defense counsel stated, "[T]at's something that was new to me, and I apologize for not getting it earlier."

¶16 The State objected to the continuance stating that defense counsel had not previously sought to interview Cheryl Trafford. The prosecutor also stated that she informed defense counsel that the State would not be calling Cheryl Trafford as a witness.

¶17 The court then ruled as follows:

"Well, with all due respect, he was arrested March 13 of 2005 – four years and six months ago. We're going on Monday. Monday is our jury. And Monday we've got a jury

set aside. We will see you on Monday morning. That's our date. Motion for continuance is respectfully denied."

¶18 However, on September 18, 2009, the court did issue an order allowing defense counsel to subpoena Stephen Trafford's medical records from both Alexian Brother Hospital and Glen Oaks Hospital. Defense counsel further filed a written motion for a continuance on September 21, 2009, which the court apparently did not grant, though the record does not reflect a ruling.

¶19 Also on September 21, 2009, defense counsel filed a motion of intent to introduce evidence in support of self defense under *Lynch*. In that motion, defense counsel sought a ruling by the court allowing use of the allegations by Cheryl Trafford concerning her domestic dispute with Stephen and his alleged mental problems. This motion stated that the allegations were found in Cheryl Trafford's verified petition for an order of protection filed in DuPage County on February 22, 2005. There is no indication in the record whether the petition was for an emergency order of protection or plenary order of protection, or whether an order of protection of either type was ever entered by the court.

¶20 During jury selection, defense counsel tendered to the court a record from Glen Oaks Hospital that had just arrived. The record indicated Stephen Trafford was hospitalized for two days due to "extreme agitation" and had tested positive for substances including cocaine, marijuana, heroin, and alcohol. The case went to trial the next day, on September 22, 2009.

¶21 Trial

¶22 The following relevant facts were adduced at defendant's jury trial: Rosio Alviso testified through an interpreter that in March 2005 she lived in apartment 206 of the Malibu apartment

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complex at 2539 Ballard in Des Plaines, Illinois, with her husband and their children. On March 12, 2005, at around 9 p.m., she was in her apartment and heard a man screaming for help. She turned out the light so she could look out the window and saw somebody was hitting a man who was on the ground in the parking lot. The person who was hitting the victim put the victim in a car and then drove away. The car was white and the lights were off. Alviso did not call the police the same evening because she was scared. On March 16, 2005, when police officers came to her apartment, she then told them what she witnessed on March 12.

¶23 Rusten's testified at trial consistently with his testimony on defendant's motion to quash arrest and suppress statements, except that the parties agreed that Rusten would not testify concerning the fact that he was a parole officer or that defendant was on parole. Detective Muich also testified consistently with his testimony on defendant's motion.

¶24 Detective Hansen testified regarding defendant's statements. Defendant made his first statement to Hansen and Keegen at 1 p.m. on March 14, 2005. Defendant told them that at about 8 p.m. on March 12, 2005 the victim, Stephen Trafford, picked him up and they drove to the home of an individual named Brad in Park Ridge, and Trafford picked up some money Brad owed him. Defendant and Trafford then drove to Evanston and bought some cocaine. While driving home, they stopped in a parking lot on Golf Road and defendant got in the back seat to cut up the cocaine. Trafford asked defendant for some cocaine, then attacked him with a knife. They fought ten to fifteen minutes in the back seat. Defendant then took the knife from Trafford and may have stabbed Trafford in the chest. After the fight, defendant got into the driver's seat and leaned the seat back, pinning Trafford down in the back seat while he drove. As he drove,

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defendant contacted an individual named Donna Kozak several times. Defendant drove east on I-90 and then south on I-55 before exiting onto a frontage road and stopping near a wooded area. Defendant got out of the car and pulled Trafford out of the back seat. As he did so, Trafford grabbed defendant's arm, and defendant "freaked," and then dragged Trafford into the water. Defendant then drove away and went home.

¶25 When defendant got home, his uncle was there, as well as Donna Kozak. Defendant and Kozak went down to clean out the car. They wrapped the bloody contents in a blanket and brought them upstairs and put them in a plastic bag and put the bag on the chair in defendant's bedroom. They then took to the car to two gas stations to clean the interior and the exterior of the car. Defendant finished his statement at about 4 p.m. and Hansen asked him if he would take the police to where Trafford's body was located. Defendant directed them to the area and pointed out his tire tracks and footprints. Hansen contacted fellow officers and Tri-State Fire and Rescue and the DuPage County Sheriffs. Then Hansen, Keegan and defendant returned to the Rosemont police station at around 8:30. At about 10:30 Hansen showed defendant five photos of the bloody clothing and a photo of the knife recovered from his apartment. Defendant identified the clothes and knife as the clothes he wore on the night of the murder and the knife he used to stab Trafford and signed the photos.

¶26 Hansen further testified that the next day, March 15, at about 2:15 p.m., defendant gave another statement. Hansen again read defendant his *Miranda* rights and defendant signed and initialed the form. Defendant provided further details. Defendant said Trafford owed him \$100 and Trafford paid him and gave him some marijuana. Defendant further said that in the car on

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Golf Road when he was cutting the cocaine Trafford reached from the front seat with his right hand and grabbed defendant's throat, choking him. Defendant then noticed the knife in Trafford's left hand. This time when Hansen asked defendant if he stabbed Trafford defendant said, "[y]es, I stabbed him a lot" and "I kept on hitting him until he stopped." Defendant made his third unmemorialized statement to Assistant State's Attorney Gerber and recounted the same events.

¶27 Donna Kozak testified that she had a relationship with Trafford. She used cocaine, marijuana and heroin and abused prescription drugs. She had prior convictions for driving under the influence, possession of a controlled substance, possession of prescription narcotics without a prescription and was convicted of and served a sentence for a deceptive practice charge. Kozak and Trafford were both diagnosed as bipolar, for which they took medication, and would binge on drugs together. About a week before Trafford's murder, Kozak and Trafford took a break from their relationship. Kozak was close friends with defendant. Kozak and Trafford owed defendant a few hundred dollars for drugs. Defendant told Kozak that he would make sure he got the money out of Trafford. Defendant said he would "kill the motherfucker." On March 12, Kozak was at defendant's apartment. Trafford came to pick up defendant at about 4 p.m. Kozak remained in defendant's apartment. Defendant called Kozak several times. Kozak heard Trafford's voice once but did not hear his voice after midnight.

¶28 When defendant arrived back at his apartment, his hands were very bloody and he had cuts, and he was wet and shivering. Kozak asked what happened and defendant told her not to ask any more questions or he would have to kill her. Defendant changed his clothes and took a shower. Kozak helped him shampoo his head because his hands stung due to the cuts. There

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was blood on defendant's neck. Defendant told Kozak that Trafford bit him to get the knife and Kozak saw a mark on defendant's knuckle that looked like a tooth mark. Defendant then asked Kozak for some bleach to clean his cell phone. They went down to the car and Kozak helped defendant clean up the car with bleach but she saw strands of hair, a clump of blood and handprints in blood. Defendant had said a dog was hit. Kozak said it was not dog's blood and defendant said, "That's our story." Defendant took everything out of the car himself, put it in a bag and tied it up in a blanket and brought everything up to the apartment. Among the items was an orange and black knife. Kozak was still present in the apartment when Rusten arrived.

¶29 Rosemont Police Sergeant Al Brannon, a forensic supervisor, was called to defendant's apartment at 3:30 p.m. on March 13, 2005, due to the bloody clothing on the scene. After the consent to search was signed by defendant, Sergeant Brannon created a diagram of the apartment and took photos, primarily in the back bedroom. An additional search was performed the next day pursuant to a search warrant. The clothing in the bedroom appeared to have blood on it and some of the clothing was damp. An orange fleece and a bloody sock were collected along with other clothing. There was a substantial amount of blood on the bloody sock but no corresponding amount was found in any shoes at the apartment. There were also two gray floor mats from a car. There was a strong odor of bleach and gasoline in the room and there was a bottle of bleach and a gas can in the corner of the room behind the chair. There was also some very wet clothing in a plastic bag which was taken to the station and dried. The officers also found a knife inside the plastic bag and there was blood near the teeth and handle of the knife. Sergeant Brannon collected the box for the "Freddy Krueger" knife. Brannon also found two

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Ford keys on a keychain.

¶30 Brannon testified that the only car parked in the rear of the apartment building was a Ford. The interior of the car was gray, the same color as the floor mats discovered in defendant's bedroom. It appeared that there was blood inside the car and there was a film on the windows which looked like somebody had tried to clean them. There were several large areas of blood on the ceiling of the car. It looked like someone had attempted to cover the seats up by placing sheets over them and tilting the floor mats up. Brannon used the Ford key found in defendant's apartment to open the car. There was a towel on the front seat and extensive blood on the back seat. Testing was positive for blood. On March 16, 2005, Brannon went to defendant's apartment building to look at a bloody towel that was found in a dumpster. Nearby in the parking lot was a pool of blood .

¶31 DuPage County Sheriff's Police Officer Michael Kuczynski was assigned to aid the Rosemont police on March 14, 2005 to find Trafford's body. At 8:45 p.m. a dive team found Trafford's body floating face down under the roadway bridge. Trafford was taken to the DuPage County Coroner. Dr. Jeffrey Harkey, a forensic pathologist at the coroner's office, conducted Trafford's autopsy on March 15, 2005. X-rays showed skull fractures. Trafford had a total of 61 cut or stab wounds. There were also superficial scratches, abrasions and bruises. Most wounds were on the head and neck. There were stab wounds across the top of the back between the shoulders, defensive wounds including stabs, cuts and scratches on the hands and wrists, and there were two stab wounds to the left leg and a very shallow stab wound on the lower back. There was blunt force trauma and bruises under Trafford's scalp and a hemorrhage where a stab

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wound penetrated his skull. Dr. Harkey also found injuries consistent with drowning, including a dusky discoloration of the petrous bones of the skull, wet lungs, and the aorta was stained red instead of tan, which happens when water is inhaled into the lungs and is proof Trafford was underwater while blood was still circulating. Harkey also found that recent cocaine use contributed to Trafford's death through indirect toxic effects on his heart. Harkey concluded that Trafford died of craniocephalic injury, exsanguination and drowning as a result of blunt force head trauma, the cut and stab wounds, and submersion in the creek water.

¶32 The only witness called by the defense was Dr. Shaku Teas, who was hired to determine if drowning played any role in the cause of death. Teas reviewed the autopsy report, photographs of the scene, histology slides, and the police reports. Teas agreed that Trafford died of multiple sharp-force injuries and that cranial cerebral injuries due to blunt force trauma played a contributing role but she disagreed that Trafford was alive when thrown into the creek and drowned or that cocaine use contributed to his death.

¶33 The parties stipulated that Anh Chun, a DNA analyst at Orchard Cell-Mark Laboratory in Dallas, Texas, would testify that the blood stain on the knife found in the bag of wet clothing in defendant's apartment contained a mixture of DNA profiles, and the major profile was consistent with the DNA of the victim, Stephen Trafford. Defendant's DNA profile was also found on the blood stains from the rear-view mirror and the steering wheel. Stephen Trafford's DNA was on the sock, the fleece, and the blood in the parking lot. The profile of Trafford's DNA would be expected to occur in approximately one in 14.08 quadrillion white individuals, one in 49.7 quadrillion black individuals, one in 16.47 quadrillion southeastern Hispanic individuals, or one

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in 26.4 quadrillion southwestern Hispanic unrelated individuals. Chun would also testify that the minor alleles were consistent with defendant's DNA and would occur only in one in 1,059,000 black individuals, one in 534 white individuals, one in 1,032,000 southeastern Hispanics, and one in 1,055,000 southwestern Hispanics.

¶34 The jury found defendant guilty of first degree murder and aggravated kidnapping. Defendant filed two *pro se* post-trial motions, alleging that his counsel was ineffective in refusing to allow defendant to testify at the pre-trial hearing and at trial, threatening to withdraw during trial, ignoring opportunities to impeach State witnesses, and failing to investigate possible *Lynch* evidence. Defense counsel also filed a motion for a new trial, alleging the court erred in denying defendant's motion to suppress statements and in denying defendant's motion for a continuance to locate Cheryl Trafford and subpoena Stephen Trafford's mental health records. The court denied the motions.

¶35 At sentencing, the State presented evidence in aggravation that defendant had been charged with aggravated battery after punching a courthouse guard on May 30, 2006 and had one prior conviction for armed robbery, for which he received a six-year sentence. In mitigation, the court heard evidence that defendant completed his GED during his armed robbery imprisonment and was 21 years old at the time of the crime. The court also heard evidence in mitigation that defendant was abandoned by his mother at an early age and was raised by his paternal grandmother in Des Plaines. Defendant stated he was "physically and emotionally abused by his father," and was also homeless for a time when he was thirteen. In allocution, defendant described himself as an addict. He addressed Trafford's family and stated that Trafford bought

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drugs from him, that Trafford was "completely consumed by the narcotics," and that defendant had seen Trafford "commit violence." Defendant also stated that Kozak told him that Trafford used to beat her, that he carried knives, and that he went to jail for charges of unlawful use of a weapon.

¶36 The court sentenced defendant at first to concurrent terms of fifty years for the murder conviction and thirty years for the aggravated kidnapping conviction. The State pointed out that the sentences must run consecutively. The court then clarified that the 30-year sentence for the aggravated kidnapping conviction would be consecutive. Defendant filed a motion to reconsider his sentence, arguing that his sentences were excessive and should not be consecutive because, due to the single verdict form for the murder conviction, the court could not presume the jury convicted him of knowing murder instead of felony murder. The trial court found that the verdict form was proper and that the sentences were mandatorily consecutive and therefore denied the motion. Defendant appealed.

¶37 ANALYSIS

¶38 I. Motion to Suppress Statements

¶39 Defendant argues that the trial court erred in denying his motion to suppress the statements he made to police. Defendant makes the same argument he made to the trial court below in his motion and maintains that the police ignored his request for counsel, thereby depriving his right against self incrimination under both the federal and Illinois constitutions (U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, § 10) and also violating his right to due process under the Illinois Constitution (Ill. Const. 1970, art. I, § 2). A criminal defendant has a

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constitutional right to counsel at all custodial interrogations, as provided by both the United States and Illinois Constitutions. U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, § 10. In order to invoke the *Miranda* right to counsel, a defendant must be in custody and subject to interrogation or under imminent threat of interrogation. *People v. Villalobos*, 193 Ill. 2d 229, 241-42 (2000). An accused who has expressed his desire to deal with the police only through counsel "is not subject to further interrogation until counsel has been made available, or unless the accused himself initiates further communications, exchanges or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

¶40 We apply a two-step standard of review to rulings on motions to suppress. *People v. Schuning*, 399 Ill. App. 3d 1073, 1081 (2010). We review the trial court's findings of historical fact and will reverse those findings only if they are against the manifest weight of the evidence. *Schuning*, 399 Ill. App. 3d at 1081 (citing *People v. Crotty*, 394 Ill. App. 3d 651, 655 (2009)). We review *de novo* the trial court's ultimate legal ruling as to whether suppression is warranted. *Schuning*, 399 Ill. App. 3d at 1081 (citing *Crotty*, 394 Ill. App. 3d at 655).

¶41 Defendant claims that this issue should be reviewed only *de novo*, as "the facts surrounding [defendant's] statements are not in dispute." However, there is indeed a factual dispute, as defendant claims the police ignored his request for counsel, while the State presented evidence at the suppression hearing that defendant initiated the conversation with the police. As there is a factual dispute, we must determine whether the trial court's factual determination at the suppression hearing was against the manifest weight of the evidence. We determine it was not.

¶42 Here, the testimony at the suppression hearing by Detective Muich and Detective John

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Hanson established that defendant At 4:10 p.m. on March 13, 2005, Detective Muich and Sergeant Aichinger questioned defendant about the bloody clothes in his bedroom. They read defendant his *Miranda* rights and defendant told them he hit a dog with a car and moved the dog. After about 10 minutes, defendant informed Muich and Aichinger that he wanted to go back to the cell to sleep, and so they took defendant back to his cell. Then, shortly before 6 p.m., Detective Hansen was informed defendant wanted a cigarette. Hansen arranged for defendant to be brought out of his cell and placed into an interview room where Hansen gave defendant a cigarette. Hansen asked defendant if he had anything to say. Defendant stated, "I don't have anything to say. If you are out of cigarettes, take me back to my cell. I want an attorney." Hansen then took defendant back to the cell and notified the other officers that defendant asked for an attorney. The next day, however, at about 1 p.m., defendant asked to speak to Hansen when Hansen was doing a prisoner welfare check in the cell block. Hansen told defendant he could not speak to him because he asked for an attorney, but defendant insisted and said, "I'd like to talk to you." Defendant was taken out of the cell to an interview room, where Hansen read defendant his *Miranda* rights from a written waiver which defendant read, initialed after each right, and signed at the end. Defendant then confessed to the murder and agreed to go with Hansen and Keegan to show them where he left the body of the victim. The trial court found no coercion by the police, that defendant was given his *Miranda* warnings, and that, "When [defendant] asked for an attorney, those rights were scrupulously observed." The court also found that defendant "initiated the conversation."

¶43 Defendant concedes that the police properly terminated questioning upon defendant's

invocation of his right to counsel, yet maintains that his rights were somehow violated because the police themselves did not provide access to an attorney or provide defendant a telephone and left him in his cell. However, none of defendant's citations stand for the proposition that the police are required to do any of these things. Rather, under *Edwards* the police are required to cease questioning, which they did.

¶44 The manifest weight of the evidence establishes that the officers indeed scrupulously observed defendant's rights, that defendant initiated subsequent contact with Hansen, and that defendant's confession thereafter was freely and voluntarily given. The fact that defendant wanted to speak with Hansen could be found credible where Hansen had been the officer who provided defendant a cigarette. There was no controverting evidence. The determination of the credibility of the witnesses on a motion to suppress is a function of the trial court (*People v. Redd*, 135 Ill. 2d 252, 268 (1990)), and a reviewing court may not substitute its judgment as to the credibility of the witnesses (*People v. Johnson*, 114 Ill. 2d 170, 190 (1986)). Here the manifest weight of the evidence supports the trial court's factual findings and, therefore, we determine the trial court did not err in denying defendant's motion to suppress his statements.

¶45 II. Denial of Motion for Continuance

¶46 Defendant argues that the trial court erred in denying his motion for a continuance to locate a witness, Cheryl Trafford, the victim's estranged wife, and to obtain the victim, Stephen Trafford's, mental health records. Defendant argues that his defense rested in large part on his assertion that Trafford was the initial aggressor and that defendant acted in self-defense, and that therefore a continuance to obtain Cheryl Trafford's testimony and Stephen Trafford's medical

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records should have been allowed. Cheryl Trafford had petitioned for an order of protection against Stephen Trafford three weeks before defendant murdered Trafford. Cheryl alleged that Stephen poured bleach on and cut up her clothes, poured sugar in her gas tank, continuously called her at home and work, and was treated for mental health issues. Defense counsel had been aware of Cheryl Trafford's petition for an order of protection but did not ask to see it until five days before trial. Based on the information in the order of protection, defendant obtained some medical records which showed that Stephen Trafford tested positive for numerous drugs and that he was extremely agitated and had suicidal and homicidal thoughts. Defendant maintains the trial court should have granted a continuance to interview Cheryl Trafford and obtain further medical records, as this constituted *Lynch* evidence. In *Lynch*, our supreme court held that, when self-defense is properly raised, evidence of the victim's aggressive and violent character may be offered for two reasons: (1) to show that the defendant's knowledge of the victim's violent tendencies affected defendant's perceptions of and reactions to the victim's behavior; or (2) to support the defendant's version of the facts where there are conflicting accounts of what happened. *Lynch*, 104 Ill. 2d at 199-200.

¶47 Whether to grant or deny a motion for a continuance to secure the presence of a witness is within the sound discretion of the trial court, and its ruling will not be reversed on appeal in the absence of a clear abuse of discretion. *People v. James*, 348 Ill. App. 3d 498, 504 (2004) (citing *People v. Ward*, 154 Ill. 2d 272, 307 (1992)). Upon review of the denial of a motion, the factors to be considered are: (1) whether the defendant was diligent in attempting to secure the witness for trial; (2) whether the defendant has shown the testimony was material and might have

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affected the jury's verdict; and (3) whether the defendant was prejudiced by the denial of the motion for a continuance. *James*, 348 Ill. App. 3d at 504-05 (citing *Ward*, 154 Ill. 2d at 307).

Absent a clear abuse of discretion, we will not disturb a trial court's ruling to grant or deny a continuance. *People v. Hatchett*, 397 Ill. App. 3d 495, 508 (2009) (citing *People v. Walker*, 232 Ill. 2d 113, 125 (2009)).

¶48 Here, the denial of defendant's motion for a continuance to interview and/or obtain the testimony of Cheryl Trafford for *Lynch* evidence was not an abuse of discretion because Cheryl Trafford was not available to testify and thus there was no admissible *Lynch* evidence. Under *Lynch* and its progeny, proof is needed that the victim committed the crimes. *People v. Cook*, 352 Ill. App. 3d 108, 128 (2004). "[A] prior altercation or an arrest, without a conviction, can be adequate proof of violent character if it is supported by firsthand testimony." *Cook*, 352 Ill. App. 3d at 128 (citing *People v. Bedoya*, 288 Ill. App. 3d 226, 235-36 (1997); *People v. Hanson*, 138 Ill. App. 3d 530, 536-38 (1985)). The denial of a motion for continuance is not an abuse of discretion where there is no reasonable expectation that the witness will be available in the foreseeable future. *People v. Scales*, 307 Ill. App. 3d 356, 358 (1999) (citing *People v. Bramlett*, 276 Ill. App. 3d 201, 205 (1995)).

¶49 The State argued that Cheryl Trafford was deceased at the time of trial and could not have been called as a witness in any event. Regarding locating Cheryl Trafford, defense counsel argued that when "the State informed [the defense] that they were not planning on calling Cheryl Trafford, neither party knew that she had actually passed away." The record is not entirely clear whether Cheryl Trafford is deceased. However, even if it was not ever conclusively established

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whether or not Cheryl Trafford was dead, it is undisputed that she was never located and there was no indication she would ever be available for trial. Thus, the trial court was well within its discretion to deny defendant's motion for a continuance on this basis. See *Bramlett*, 276 Ill. App. 3d at 204 (denial of motion for continuance affirmed where the police had unsuccessfully attempted to locate the witness and, due to an outstanding arrest warrant, there was no indication the witness would ever be available, and the witness still had not been located by the time of the hearing on post-trial motions, six weeks after trial).

¶50 Regarding the medical records, defense counsel stated, "[T]hat's something that was new to me, and I apologize for not getting it earlier." The court then ruled as follows:

"Well, with all due respect, he was arrested March 13 of 2005 – four years and six months ago. We're going on Monday. Monday is our jury. And Monday we've got a jury set aside. We will see you on Monday morning. That's our date. Motion for continuance is respectfully denied."

¶51 We find the trial court's reasoning for denying defendant's motion for a continuance to obtain the medical records was well-grounded due to the apparent lack of diligence in obtaining the records. We also find that defendant has failed to establish that the records were material and would have affected the jury's verdict. See *People v. Flores*, 269 Ill. App. 3d 196, 201-202 (1995) (holding the trial court did not abuse its discretion in denying the defendant's motion for continuance to investigate defendant's medical records and records of fire investigation where neither was likely to yield sufficient relevant evidence and case had been set for trial for over one year).

¶52 Defendant's reliance on *People v. Walker*, 232 Ill. 2d 113, 129 (2009), against a "myopic insistence upon expeditiousness in the face of a justifiable request for delay" is misplaced. In *Walker*, counsel sought a continuance because she had written the wrong trial date in her calendar and was unprepared for trial, but the trial court denied counsel's motion for a continuance on the sole basis that the case had been set for trial and did not analyze any other relevant factors. *Walker*, 232 Ill. 2d at 127-129. The instant case is a far cry from *Walker*. Here, the defense had no good reason for the delay in investigating the evidence it claimed was potentially *Lynch* evidence and requesting a continuance. Therefore, we find the trial court did not clearly abuse its discretion in denying defendant's motion for a continuance.

¶53 III. Ineffective Assistance of Counsel for Alleged Failure to Investigate *Lynch* Evidence

¶54 Defendant also argues that his counsel was ineffective for not investigating the alleged *Lynch* evidence earlier. In order to establish an ineffective assistance of counsel claim, defendant must overcome the strong presumption that his counsel's representation was constitutionally adequate. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To establish ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance was objectively unreasonable; and (2) counsel's deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. A defendant must satisfy both prongs of this test, and the failure to establish either prong is fatal to the claim. *Strickland*, 466, U.S. at 700. Under *Strickland*'s performance prong, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Because of the difficulties in making the evaluations, a court must indulge a

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strong presumption "that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Under *Strickland*'s prejudice prong, defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Curry*, 178 Ill. 2d 509, 518-19 (1997).

Defendant must overcome a strong presumption that counsel's actions or inactions were the result of sound trial strategy. *People v. Houston*, 226 Ill. 2d 135, 144 (2007) (citing *People v. Peebles*, 205 Ill. 2d 480, 512 (2002)). Decisions concerning what evidence to present are matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999).

¶55 Defendant has not established either prong under *Strickland* – that his counsel's performance was objectively unreasonable, or that counsel's alleged deficient performance prejudiced him. We presume that defendant's counsel's previous decision not to investigate the allegations in the petition for an order of protection was sound trial strategy. According to defendant's motion of intent to introduce *Lynch* evidence filed September 21, 2009, the allegations were in a petition for an order of protection, and there is no indication in the record whether an order of protection was ever even entered. Further, we do not discern how the victim's drug addiction and mental instability or domestic dispute – not involving any physical violence – with his estranged wife would constitute evidence of his *violent* character admissible under *Lynch*. See *Lynch*, 104 Ill. 2d at 201 (holding that convictions for crimes of violence, such as convictions for battery, are reasonably reliable evidence of a violent character). Defendant also cannot establish a reasonable probability that the result of his trial would have been

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different. Defendant presented his theory of self-defense and the jury did not find it credible.

¶56 Defendant also argues that the trial court failed to conduct an inquiry into his *pro se* claim that counsel was ineffective for failing to investigate *Lynch* evidence. "The trial court must conduct an adequate inquiry into allegations of ineffective assistance of counsel, that is, inquiry sufficient to determine the factual basis of the claim." *People v. Banks*, 237 Ill. 2d 154, 213 (2010) (citing *People v. Johnson*, 159 Ill. 2d 97, 124 (1994); *People v. James*, 362 Ill. App. 3d 250, 256 (2005)).

¶57 However, the record reveals that the trial court indeed held the requisite hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181, 189 (1984). The court asked defendant regarding the allegations in his *pro se* motions for a new trial and then stated the following:

"All right. I've had the opportunity to review quite a bit of case law on these matters – Krankel hearings as they are known. Quite frankly, after examining the factual matters, it seems to me – it's clear to me that this claim lacks merit, and the allegations against [defendants' trial counsel] are completely unfounded. At every point in the trial, Mr. Sharples you have been, up to the trial and after trial, a very verbal person, very assertive in what it was you wanted to say on your behalf. I simply do not believe that you were asked to lie to me. I do not believe that you were denied the opportunity to testify at the motion or the trial. I see no reason to appoint separate counsel to represent you on your motion for a new trial."

The court denied defendant's motion on ineffective assistance of counsel grounds. Defendant then asked to testify on his motion for a new trial and specifically argued the *Lynch* issue, and the

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court again denied his motion on the basis of ineffective assistance for failure to investigate alleged *Lynch* evidence, although the court did not further elaborate on its ruling.

¶58 The record also reveals the following colloquy occurred during hearing on defendant's post-trial motions:

"THE DEFENDANT: Okay. Now, when [defendant's trial counsel] put in the motion for – to – for the Lynch motion to introduce the Lynch material and the motion –

THE COURT: That's included in his motion for new trial.

THE DEFENDANT: It was included in mine. What was your decision? You told him this case has been on the docket four and a half years. You could have got it from the State any time. The man never went and got it until right before the trial to stall. And the witness, from my understanding, is dead and has been dead for two years. If he would have investigated –

THE COURT: Who's been dead?

THE DEFENDANT: – four and a half years ago –

THE COURT: Who died two years ago?

THE DEFENDANT: My understanding, Cheryl Trafford is dead.

THE COURT: I hadn't heard that.

THE DEFENDANT: You sure? During the sidebar, he even said, she might be dead. During the sidebar when he was questioning Donna Kozak.

THE COURT: Well, as I say, your motion, as it relates to the ineffective assistance of counsel [sic], is denied."

¶59 Based on our review of the record of the hearing, the trial court did consider the argument and determined it had no merit. It is apparent that the trial court felt that defendant's ineffective assistance claim based on failure to obtain *Lynch* evidence was, like his other ineffective assistance claims, without merit. The trial court conducted an "inquiry sufficient to determine the factual basis of the claim" (*Banks*, 237 Ill. 2d at 213), and therefore we determine that defendant's claim on appeal is groundless.

¶60 IV. Admission of the "Freddy Krueger" Knife

¶61 Next, defendant argues that the trial court abused its discretion in admitting into evidence the "Freddy Krueger" knife seized from his apartment and photographs of the knife. Defendant argues that this evidence was extremely prejudicial and had no probative value because the knife had no connection to the charged offenses. Defendant maintains that the probative value, "minimal at best, was vastly outweighed by the prejudicial impact of such a frightening weapon."

¶62 A trial court's decision concerning the admissibility of evidence will not be reversed absent a clear abuse of discretion resulting in prejudice to the defendant. *People v. Ward*, 101 Ill. 2d 443, 455-56 (1984). In meeting that standard, it is incumbent upon the complaining party to demonstrate that the trial court's determination was " 'arbitrary, fanciful, or unreasonable,' or 'where no reasonable [person] would take the view adopted by the trial court.' [Citations.]" *People v. Donoho*, 204 Ill. 2d 159, 182 (2003).

¶63 Defendant acknowledges he made no objection to the admission of the knife and photographs at trial, but maintains we should still consider this forfeited claim under both prongs of the plain error doctrine. Under the plain error doctrine, we may still consider a forfeited claim

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where "(1) a clear or obvious error occurs 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 occurs 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). See also *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶64 Regarding the first prong, defendant argues that the evidence was closely balanced in this case such that the admission of the knife "may have tipped the balance in the jury room." However, defendant fails to explain how the evidence in this case was closely balanced. To the contrary, we find the evidence in this case was not closely balanced. Defendant admitted to killing Trafford and disposing of his body. Kozak testified concerning defendant's motive to kill Trafford for drug money and his succinct statement to her that he would "kill the motherfucker." Kozak also testified to defendant's efforts after the crime to clean up the evidence. Though the defense theory was self-defense, the evidence established that Trafford suffered blunt force trauma to the head and 61 stab wounds, including defensive wounds on his hands and wrists and stab wounds in his back, which are facts suggestive of "overkill" and that defendant was actually the aggressor. These facts heavily tipped the scales in favor of a verdict of guilt.

¶65 Regarding the second prong, defendant argues that "because admission of an unconnected weapon is always extremely prejudicial – and this has never been more true than in this case – the trial court's erroneous introduction of the Freddy Krueger knife constituted serious error." Here, however, the admission of the knife and photographs of the knife was not error at all, much

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less serious error. "The general rule is that physical evidence may be admitted provided there is proof to connect it with the defendant and the crime." *People v. Pulliam*, 176 Ill. 2d 261, 276 (1997) (citing *People v. Free*, 94 Ill. 2d 378, 415 (1983)). "In order to be admissible, evidence must be legally relevant, that is, it must tend ' "to make the existence of any fact in consequence to the determination of the action more or less probable than it would be without the evidence." ' "*People v. Kirchner*, 194 Ill. 2d 502, 539 (2000) (quoting *People v. Hope*, 168 Ill. 2d 1, 23 (1995), quoting *People v. Peebles*, 155 Ill. 2d 422, 455-56 (1993)).

¶66 A weapon found in a defendant's possession when arrested may be admitted only if it bears a connection with the charged offense. *People v. Maldonado*, 240 Ill. App. 3d 470, 478-79 (1992) (citing *People v. Jackson*, 195 Ill. App. 3d 104, 112 (1990)). The admission of unconnected weapons is improper since they " 'only serve to arouse the jury and prejudice the defendant's position.' " *People v. Evans*, 373 Ill. App. 3d 948, 960 (2007) (quoting *People v. Smith*, 413 Ill. 218, 223 (1952)). However, a weapon is generally admissible if it is connected to both the defendant and the crime. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 102 (citing *People v. Babiarz*, 271 Ill. App. 3d 153, 159 (1995)). In cases where the weapon used in the offense is not recovered, but a weapon is seized from defendant and is suitable for commission of the charged offense, a connection between the two weapons is sufficiently present. *Cosmano*, 2011 IL App (1st) 101196, ¶ 102. "Even when the connection of a weapon to the defendant is tentative, a defendant " "may point out the weakness of its probative value, but he cannot bar its admission." ' " *People v. Bragg*, 277 Ill. App. 3d 468, 480-81 (1995) (quoting *People v. Free*, 94 Ill. 2d 378, 417 (1983), quoting *People v. Scott*, 29 Ill. 2d 97, 114 (1963)). Here, the "Freddy

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Krueger" knife was properly admitted because it was suitable for commission of the charged offenses.

¶67 The bulk of the State's argument is that the "Freddy Krueger" knife was properly admissible because it established the circumstances of defendant's arrest, in that defendant was arrested for parole violations, one of which was the possession of this knife, but any reference to defendant being on parole was barred at trial. The State cites no authority for this proposition, instead merely restating the general proposition that evidence of other crimes is admissible if it is relevant for any purpose other than to show the propensity to commit crime. However, the admission of the knife itself was not necessary to establish the circumstances of defendant's arrest; testimony summarizing the circumstances of his arrest would have sufficed. See *People v. Dixon*, 133 Ill. App. 3d 1073, 1084-85 (1985) (holding that referring to a knife in testimony but not admitting it as evidence is "particularly appropriate" under the theory of establishing the details of an arrest); *People v. Brown*, 100 Ill. App. 3d 57, 69 (1981) (affirming the denial of a motion *in limine* and subsequent ruling allowing testimony referring to a gun but that the gun itself was not admissible in evidence to establish the circumstances of the arrest). The State only briefly argues that the knife was admissible because it was suitable for the commission of the crime. However, this is the real crux of the issue.

¶68 A similar issue was addressed by our supreme court in *People v. Sutherland*, 155 Ill. 2d 1 (1992). In *Sutherland*, at the time of the defendant's indictment in connection with the death of the victim, he was serving a 15-year sentence in the Federal penal system after pleading guilty to randomly sniping at employees of the National Park Service at Glacier National Park in

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Montana. *Sutherland*, 155 Ill. 2d at 18-19. The defense moved to exclude from evidence a number of knives seized from the defendant at the time of his arrest in Glacier National Park. *Sutherland*, 155 Ill. 2d at 19. The trial court denied the motion stating that the knives had "some slight probative value" and would not prejudice the defendant by their introduction into evidence. *Id.* On appeal, the defendant argued that the introduction of the knives resulted in substantial prejudice and that the knives had little or no probative value because the evidence indicated that the wound was not particularly distinctive and could have been caused by any sharp instrument with any length blade. *Id.* The supreme court held:

"In this case, the victim suffered a wound approximately 14.22 centimeter in length. It is not unreasonable to think that such a wound could have been caused by a large sharp knife such as the ones in defendant's possession. Also, the choice of method of execution tends to indicate an affinity for such a weapon. Thus, the trial court found the knives probative of defendant's propensity towards possession and use of knives and determined that it was not so prejudicial as to warrant their exclusion. We agree with the trial court determination and hold that it did not abuse its discretion." *Sutherland*, 155 Ill. 2d at 20.

¶69 Similarly, in this case the "Freddy Krueger" knife, even if not the weapon used in the murder, was suitable for commission of the murder, and thus a connection to the crime and to the murder weapon used, also a knife, was sufficiently present to allow its admission. Further, under the holding of *Sutherland*, we find that the "Freddy Krueger" knife was admissible where it showed defendant's affinity for knives and propensity to use knives. We therefore determine

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there was no error in admitting this knife. Thus, defendant has failed to establish either prong of plain error and has thereby forfeited his argument regarding the admission of the knife and photographs. We therefore decline to review the merits of the issue.

¶70 Defendant also argues in the alternative that his counsel was ineffective for failing to object to the introduction of the knife. However, due to the connection to both defendant and the crime committed, the knife was admissible and thus no error occurred. Therefore it cannot be said that (1) his attorney's representation fell below an objective standard of reasonableness, or (2) that defendant was prejudiced by his counsel's performance. See *Strickland*, 466 U.S. at 687-88.

¶71 V. Prosecutorial Misconduct in Comments in Closing Argument

¶72 Defendant next contends that the State improperly shifted the burden of proof in closing argument and that this constituted plain error despite defendant's forfeiture of the issue. When the prosecutor recited the elements of aggravated kidnapping, the prosecutor stated the following: "To sustain the charge of aggravated kidnapping, *the defendant* must prove the following propositions." (Emphasis added.) The prosecutor continued: "If you find *** that any one of the [elements of aggravated kidnapping] has not been proved beyond a reasonable doubt, you should find the defendant guilty." The remainder of the propositions recited by the prosecutor properly delineated that the burden of proof was with the State.

¶73 We note this is another argument defendant has forfeited by failing to object at trial and failing to include it in his post-trial motion. See *People v. Enoch*, 122 Ill. 2d 176 (1988) (holding that alleged trial errors must be specifically objected to at trial and specified in a post-trial motion

in order to preserve them for appeal). Defendant fails to establish that plain error occurred to allow our review of the issue. First, as we recognized earlier, the evidence in this case is not closely balanced, which is the first prong of the plain error analysis. See *Herron*, 215 Ill. 2d at 187.

¶74 Second, no error occurred, and even if it did, it was cured. It is well settled that prosecutors are afforded wide latitude in closing argument, and even improper remarks do not merit reversal unless they result in substantial prejudice to the defendant. *Cosmano*, 2011 IL App (1st) 101196, ¶ 57 (citing *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994)). In reviewing whether comments made during closing argument are proper, the closing argument must be viewed in its entirety, and remarks must be viewed in context. *Cosmano*, 2011 IL App (1st) 101196, ¶ 57 (citing *Kitchen*, 159 Ill. 2d at 38). Here, it is clear from the record that the prosecutor merely misspoke and did not intentionally make a statement shifting the burden of proof, and the prosecutor made only one such comment. See *People v. Leger*, 149 Ill. 2d 355, 400 (1992) (no error found, in part, because the prosecutor made only one comment which allegedly shifted the burden of proof).

¶75 Even if we were to find error, such error was cured given that the trial court properly instructed the jury regarding the burden of proof. See *People v. Flores*, 128 Ill. 2d 66, 95 (1989) ("Even if the remarks did give an improper impression to the jury, it was cured when the jury was properly instructed by the trial court on the State's burden of proof."). Given the context of the entirety of the prosecutor's closing argument, and the fact that the court properly instructed the jury, we cannot say that the prosecutor's isolated erroneous statement "severely threatened to tip

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the scales of justice against" defendant (*Herron*, 215 Ill. 2d at 187).

¶76 Further, the comment here cannot satisfy the second prong of plain error. See *Herron*, 215 Ill. 2d at 187. "Error under the second prong of plain error analysis has been equated with structural error, meaning that automatic reversal is only required where an error is deemed to be a systemic error that serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.'" *Cosmano*, 2011 IL App (1st) 101196, ¶ 78 (quoting *People v. Glasper*, 234 Ill.2d 173, 197–98 (2009)). "Error in closing argument does not fall into the type of error recognized as structural." *Cosmano*, 2011 IL App (1st) 101196, ¶ 78. In the absence of plain error, the procedural default may not be excused. *People v. Keene*, 169 Ill. 2d 1, 18 (1995). Thus, the remark by the prosecutor does not rise to the level of plain error and the argument has been procedurally defaulted. Therefore we decline to review this issue.

¶77 VI. Separate Verdict Forms

¶78 Defendant argues that his trial counsel was ineffective for failing to request separate verdict forms for first-degree murder where there were serious sentencing consequences as a result of that failure. The court instructed the jury on justification for the use of force and both forms of second-degree murder. Regarding the verdict forms for the murder charges, the prosecutor stated to the trial court that she and defense counsel "agreed that a single first-degree murder verdict is appropriate."

¶79 As noted above, to establish a claim of ineffective assistance of counsel, a defendant must show that: (1) his attorney's representation fell below an objective standard of reasonableness; and (2) he was prejudiced by this deficient performance. *Strickland*, 466 U.S. at 687-88. Here,

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defendant cannot establish the first prong. *People v. Braboy*, 393 Ill. App. 3d 100 (2009), is precisely on point. The defendant in *Braboy* made exactly the same argument as defendant here: that his counsel was deficient for failing to request separate verdict forms for first-degree murder and felony murder where the presumption under a general verdict that the jury convicted the defendant under the more serious offense prejudiced defendant because it resulted in a mandatory consecutive sentence. *Braboy*, 393 Ill. App. 3d at 104. We rejected this argument and held that the defendant's claim "fail[ed] because he [was] unable to show the requisite deficient performance of counsel. Specifically, defendant has failed to overcome the presumption that counsel's decision not to request specific verdict forms was trial strategy." *Braboy*, 393 Ill. App. 3d at 108. Similarly here, we find that defendant has failed to overcome the presumption that his counsel's decision was trial strategy. Defendant provides no authority or argument against this presumption, and in fact acknowledges that none of the reviewing courts in his cited authorities found ineffective assistance of counsel. Thus, we reject defendant's ineffective assistance of counsel claim.

¶80 VII. Sentence and Correcting the *Mittimus*

¶81 Finally, defendant argues that the trial court abused its discretion in sentencing him to two mandatory consecutive terms totaling 80 years, a term ten years short of the aggregate maximum. Defendant takes issue with the fact that the court imposed the consecutive sentence "with little reasoning" and did not "carefully consider" the evidence in aggravation and mitigation as required. The State argues that consecutive terms were mandatory and thus the court had no discretion. We agree with the State.

¶82 Section 5-4-1 of the Unified Code of Corrections (730 ILCS 5/1-1-1 *et seq.* (West 2008)) requires a trial court at a sentencing hearing to "consider evidence and information offered by the parties in aggravation and mitigation." 730 ILCS 5/5-4-1(a)(4) (West 2008). However, "a trial court need not articulate the process by which it determines the appropriateness of a given sentence." *People v. Bobo*, 375 Ill. App. 3d 966, 988 (2007) (citing *People v. Wright*, 272 Ill. App. 3d 1033, 1045 (1995)). "[T]he trial court [is] not obliged to recite or assign a value to each fact upon which it relied in determining a sentence." *People v. Pugh*, 325 Ill. App. 3d 336, 346-47 (2001) (citing *People v. Lucien*, 109 Ill. App. 3d 412, 420 (1982)). "[I]f the sentence is justified by the record, the absence of specific findings is not fatal." *Pugh*, 325 Ill. App. 3d at 347. In determining an appropriate sentence, the nature of the crime, protection of the public, deterrence and punishment are relevant as well as the defendant's rehabilitative prospects and youth. *People v. Whitehead*, 171 Ill. App. 3d 900, 908 (1988). There is "a strong presumption that a trial court's sentencing is based upon proper legal reasoning, and the court will be presumed to have considered any evidence of mitigation which is before it." *People v. Partin*, 156 Ill. App. 3d 365, 373 (1987). The trial court's judgment with regard to appropriate punishment is entitled to great deference. *People v. Illgen*, 145 Ill. 2d 353, 379 (1991) (citing *People v. Godinez*, 91 Ill. 2d 47, 55 (1982)).

¶83 Here, the trial court heard evidence in aggravation and mitigation and the record indicates the court considered all the evidence it heard. The fact that the trial court commented on defendant's statements to the victim's family in allocution does not mean that the trial court did not consider all other evidence in mitigation and aggravation. The evidence adduced at trial

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established that defendant brutally committed the aggravated kidnapping and murder of Stephen Trafford, which supports the sentences imposed. Also, it is apparent from the record that the fact that defendant sought fit to malign the character of Stephen to his own family during allocution evidenced to the court defendant's lack of remorse and lack of rehabilitative potential. The court further considered the fact that defendant was on parole for another crime and yet was still selling drugs when he committed the murder. The court stated:

"Well, Mr. Sharples, over the years, I've heard people show remorse and regret. I've heard people show a lack of remorse and regret. But this is the first time I've heard someone attempt to poison a family's memory of the victim by highlighting drug abuse, drug addiction and what he has – and a side of him that was seen through your eyes – your eyes that chose to kill that man, your eyes that chose to kidnap that man, your eyes that – son of an addict who chose to sell drugs to others after getting out of prison for an armed robbery.

You got a Class X felony when you were on parole, selling drugs at the time you picked up this murder. You said in your comments you have ultimately chosen your life. And so you have."

¶84 The record amply supports the trial court's sentence of fifty years for murder and thirty years for aggravated kidnapping and we properly give it great deference. We affirm the sentences imposed.

¶85 Further, regarding consecutive sentencing, the trial court here had no discretion and was required to impose consecutive sentences by statute. After January 1, 2000, when a defendant

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commits multiple offenses in a single course of conduct, without a substantial change in the nature of the criminal objective, and one of the offenses was first degree murder, consecutive sentences must be imposed. 730 ILCS 5/5-8-4(a) (West 2008). If these conditions are met, the trial court has no discretion in the type of sentence to impose, and failure to impose consecutive sentences renders the trial court's sentencing order void. *People v. Arna*, 168 Ill. 2d 107, 113 (1995). Contrary to defendant's contentions, the trial court was not required to offer any explanation for imposing a consecutive sentence which was statutorily required. We affirm the trial court's sentence.

¶86 Defendant also argues the *mittimus* should be corrected to reflect only one conviction for first-degree murder and the *mittimus* should reflect a credit of 1,690 days. The *mittimus* reflects three convictions and sentences for murder and only 1,320 days of credit for time served in pre-sentence custody. The State concedes on both points. Where a defendant commits only one act and there is only one victim, he may only be convicted and sentenced for one count of first-degree murder. *People v. Young*, 365 Ill. App. 3d 753, 777 (2006). Where a defendant is convicted under multiple counts, the judgment should be entered for the most serious count, intentional murder. *People v. Smith*, 233 Ill. 2d 1, 20-21 (2009). We have the authority to correct the *mittimus* and order the clerk of the circuit court to correct it. *Young*, 365 Ill. App. 3d at 777 (citing *People v. Thompson*, 354 Ill. App. 3d 579, 594 (2004)). Thus, we vacate the convictions and sentences for strong probability murder under count II of the *mittimus* pursuant to section 9-1(a)(2) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(2) (West 2008)) and felony murder under count III of the *mittimus* pursuant to section 9-1(a)(3) (720 ILCS 5/9-1(a)(3) (West

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2008)) and order the clerk of the circuit court to correct the *mittimus* to reflect only one conviction and sentence for first-degree murder under count I pursuant to section 9-1(a)(1) (720 ILCS 5/9-1(a)(1) (West 2008)), leaving the conviction and consecutive sentence for aggravated kidnapping unchanged.

¶87 The court credited defendant with 1,320 days of credit for time served. A defendant is entitled to sentencing credit for “time spent in custody as a result of the offense for which the sentence was imposed.” 730 ILCS 5/5-8-7(b) (West 2008). Defendant was arrested on March 15, 2005, and was sentenced on November 5, 2009. Defendant was in custody during that entire time, except for seven days he was out on bond from May 24, 2005, to May 31, 2005. The State concedes the issue. Therefore, we order the clerk of the circuit court to correct the *mittimus* to reflect one conviction for first-degree murder and 1,690 days of credit for time served.

¶88 VIII. Fees

¶89 Defendant further takes issue with various fees he maintains should be vacated. Defendant was charged a total of \$710 in fines and fees. First, defendant argues that the \$200 State DNA ID fee assessed against him pursuant to section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2008)), is improper because he had already provided a DNA sample in connection with a prior armed robbery conviction on April 27, 2001, and "requiring additional samples would serve no purpose." " *People v. Willis*, 402 Ill. App. 3d 47, 61 (2010) (quoting *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009)). This issue was decided by our supreme court's recent decision in *People v. Marshall*, 242 Ill. 2d 285 (2011). In that case, the court held that section 5-4-3 "authorizes a trial court to order the taking, analysis and

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indexing of a qualifying offender's DNA, and the payment of the analysis fee only where that defendant is not currently registered in the DNA database." *Marshall*, 242 Ill. 2d at 303. In *Marshall*, the court vacated the \$200 fee assessed against the defendant, who had already had his DNA extracted in connection with a prior conviction. *Marshall*, 242 Ill. 2d at 303. Thus, we vacate the \$200 fee imposed against defendant.

¶90 Defendant also argues that the \$10 fee for the Arrestee's Medical Costs Fund should be vacated because there is no evidence in the record that the county incurred costs in treating defendant, citing section 17 of the County Jail Act (730 ILCS 125/17 (West 2009)), and *People v. Cleveland*, 393 Ill. App. 3d 700, 714 (2009), *appeal denied*, 235 Ill. 2d 593 (2010). The State does not dispute defendant's contention and agrees to the total reduction in fees defendant seeks. However, since briefing in this case our supreme court has made clear that even under the pre-2008 amendment of section 17 of the County Jail Act, which was in effect at the time of defendant's incarceration, the legislative intent was that imposition of the \$10 fee was authorized even where an inmate did not seek any treatment. *People v. Jackson*, 2011 IL 110615, ¶ 20. Recognizing that appellate cases had already disavowed *Cleveland*, the court in *Jackson* expressly overruled *Cleveland*. *Jackson*, 2011 IL 110615, ¶ 16. Thus, we affirm the imposition of the \$10 fee under the County Jail Act.

¶91 Defendant further argues that the \$5 Court System fee was improper and must be vacated, as his convictions were not related to the Vehicle Code. Here we agree with defendant. The \$5 court System fee, provided for in section 5-1101 of the Counties Code (55 ILCS 5/5-1101(a) (West 2008)), applies only upon conviction for violation of the Illinois Vehicle Code or similar

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provisions contained in county or municipal ordinances. *People v. Anthony*, 2011 IL App (1st) 91528, ¶ 25. We vacate the imposition of the \$5 Court System fee.

¶92 Therefore, we vacate the \$200 State DNA ID System fee and the \$5 Court System fee, but we affirm the \$10 fee for the Arrestee's Medical Costs Fund, thereby reducing defendant's fees from \$710 to \$505.

¶93 In addition, defendant contends that the court did not apply the required credit of \$5 for every day spent in pre-sentence custody to his fines. See 725 ILCS 5/110-14 (West 2008) (defendants are entitled to \$5 per day of credit for fines for each day spent in pre-sentence custody). However, as set forth above we vacate the inappropriate fees, and the \$10 fee for the Arrestee's Medical Costs Fund is not subject to a reduction. The County Jail Act specifically provides that this fee "shall not be considered a part of the fine for purposes of any reduction in the fine." 730 ILCS 125/17 (West 2008). Thus, defendant is entitled only to a reduction of his fees from \$710 to \$505.

¶94 CONCLUSION

¶95 The trial court did not abuse its discretion in denying defendant's motion to suppress statements. We find that the facts here were disputed and the manifest weight of the evidence established that officers observed defendant's rights and that defendant initiated subsequent contact with officers. The trial court's denial of defendant's motion for a continuance to interview and/or obtain the testimony of a witness and medical records for *Lynch* evidence was not an abuse of discretion because the witness was dead and not available to testify and because the defense was not diligent in obtaining the records. Further, defense counsel's failure to

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investigate this alleged *Lynch* evidence earlier was not ineffective assistance of counsel and defendant failed to overcome the presumption of sound trial strategy as it is not clear how the evidence would have been admissible *Lynch* evidence. We find the circuit court conducted a sufficient inquiry into defendant's *pro se* ineffective assistance of counsel claim based on his counsel's alleged failure to investigate potential *Lynch* evidence. We also determine defendant forfeited review of the propriety of the trial court's admission of the "Freddy Krueger" knife found in his apartment and failed to establish any plain error where the knife was admissible because it was connected to defendant and the crime and was a weapon suitable for commission of the offenses. Defendant has also forfeited review of prosecutorial misconduct during closing argument and has failed to establish plain error where there was only one isolated comment by the prosecutor apparently shifting the burden of proof, the evidence was not closely balanced, and error in closing argument is not structural error. We also determine that defense counsel was not ineffective for failing to request separate verdict forms, as again defendant has failed to overcome the presumption of sound trial strategy.

¶96 We affirm defendant's conviction and sentence for first-degree murder but vacate the other convictions and sentences for strong probability murder and felony murder reflected on the *mittimus*. We order the clerk of the circuit court to amend the *mittimus* to reflect defendant's conviction and sentence for a single count of first-murder under count I pursuant to section 9-1(a)(1) (720 ILCS 5/9-1(a)(1) (West 2008)), vacating the convictions and sentences for strong probability murder under count II pursuant to section 9-1(a)(2) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(2) (West 2008)) and felony murder under count III pursuant to section 9-

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1(a)(3) (720 ILCS 5/9-1(a)(3) (West 2008)), but leaving his conviction and sentence for aggravated kidnapping unchanged, and a sentence credit of 1,690 days spent in pretrial custody. We also vacate defendant's \$200 State DNA ID System fee and the \$5 Court System fee, but we affirm the \$10 fee for the Arrestee's Medical Costs Fund and apply a \$5 credit per day of pre-sentence custody to defendant's fees, thereby reducing his fees to \$505.

¶97 Affirmed in part and vacated in part; *mittimus* corrected.