

NOTICE
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2012 IL App (4th) 100219-U

Filed 3/26/12

NO. 4-10-0219

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
PERRY E. HAMPTON,)	No. 09CF1903
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The trial court did not abuse its discretion in ordering defendant to pay \$1,462 in restitution based on the testimony of the victim regarding his out-of-pocket expenses.
- (2) Defendant was not denied effective assistance of counsel due to trial counsel's failure to object to the restitution order at the sentencing hearing because the trial court did not err in ordering the restitution.
- (3) Defendant forfeited claims the trial court failed to (a) specify the manner in which he must pay restitution, (b) the length of time to satisfy the restitution order, or (c) his financial capacity to pay restitution.
- (4) The \$200 DNA analysis fee was improperly imposed and is vacated.
- (5) Defendant is entitled to a credit up to \$640 for time spent in custody, which may be applied to satisfy his \$5 drug court fine.
- ¶ 2 Following a February 2010 jury trial, defendant, Perry E. Hampton, was found

guilty of residential burglary. In March 2010, defendant was sentenced to 29 years in prison and ordered to pay, in pertinent part, \$1,462 in restitution, a \$200 genetic marker grouping analysis fee, and a \$5 drug court fee.

¶ 3 Defendant appeals, arguing the following: (1) his case must be remanded because (a) the trial court failed to determine a proper restitution amount for the television damaged during the burglary, or in the alternative, defendant was denied effective assistance of counsel due to counsel's failure to object when the trial court imposed the restitution order, and (b) the trial court failed to set payment terms for the restitution amount; (2) the \$200 deoxyribonucleic acid (DNA) analysis fee must be vacated because it was improperly imposed; and (3) defendant is entitled to a up to \$640 in credit against his fines for time served in jail prior to sentencing.

¶ 4 I. BACKGROUND

¶ 5 In February 2010, a jury found defendant guilty of residential burglary (720 ILCS 5/19-3(a) (West 2008)) for his role in the unlawful entry into the home of Robert Brown, with the intent to commit a theft. During the March 2010 sentencing hearing, the following conversation, relevant to this appeal, ensued regarding damages Brown sustained as a result of defendant's actions:

"Q. Mr. Brown, we have already heard your testimony regarding this case. I want to first briefly discuss with you your out-of-pocket losses for financial matters in this case. Is it accurate that you had to spend \$815.00 to replace doors and door jambs?

A. Yes.

Q. Damaged during the course of these offenses?

A. Right.

Q. Your TV was damaged and you had to spend \$497.00, or that's the cost of the damage but your television has not yet been replaced?

A. No, it has not.

Q. And you had [\$150] in damage done to your storm door that has not been replaced also as a result of these offenses?

A. Right.

Q. So your total loss out-of-pocket as you expect is \$1,462.00?

A. Right, somewhere along in there."

The trial court sentenced defendant, who was extended-term eligible, to 29 years in prison and ordered him "to pay all fines, fees and costs as authorized by statute; restitution of \$1,462.00." Further, the court stated defendant should, "if he has not, submit a sample for genetic testing and pay the [\$200] genetic marker grouping analysis fee." This order is memorialized in a docket entry dated March 11, 2010. This docket entry also states "[a]ll financial obligations shall be paid in equal monthly installments to the Champaign County Circuit Clerk by [empty spaces]."

¶ 6 On March 12, 2010, defense counsel filed a motion to reconsider sentence, or, in the alternative, for a new sentencing hearing arguing only defendant's sentence was excessive. On March 16, 2010, the trial court denied this motion. Notice of appeal was filed on March 19, 2010, and an amended notice of appeal was filed on March 26, 2010.

¶ 7 In April, 2010, defendant filed a *pro se* "motion to re-coupe [*sic*] personal funds."

In the *pro se* motion, defendant seemed to challenge a portion of the restitution order by asserting "[t]here never has been a hearing to determine how much the broken door costs. Nor [were] any fines, restitutions or any costs mentioned during trial, and after verdict." In May 2010, the trial judge responded to defendant's motion by sending him a letter informing defendant the money seized following his arrest would be held while his appeal was pending and reminding defendant he was represented by the office of the State Appellate Defender (OSAD).

¶ 8 OSAD filed a motion for summary remand pursuant to Illinois Supreme Court Rule 606(b) (eff. Mar. 20, 2009), asking this court to remand defendant's case to the trial court so the merits of defendant's *pro se* motion could be evaluated. *People v. Hampton*, 2011 IL App (4th) 100219, ¶ 9, 959 N.E.2d 1158, 1160 (2011). In September 2011, this court denied OSAD's motion for summary remand. *Id.* at ¶ 17, 959 N.E.2d at 1162.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant argues the following: (1) his case must be remanded because (a) the trial court failed to determine a proper restitution amount for the television damaged during the burglary, or in the alternative, defendant was denied effective assistance of counsel due to counsel's failure to object when the trial court imposed the restitution order, and (b) the trial court failed to set payment terms for the restitution amount; (2) the \$200 DNA analysis fee must be vacated because it was improperly imposed; and (3) defendant is entitled to a credit of up to \$640 against his fines.

¶ 12 A. Propriety of Restitution Order

¶ 13 Defendant first argues the trial court erred by ordering defendant to pay \$497 for

the damaged television without determining the value of the television on the date of the burglary, or in the alternative, defendant was denied effective assistance of counsel due to counsel's failure to object when the trial court imposed the restitution order. Next, defendant asserts the trial court failed to set payment terms for the restitution amount. Defendant contends his case must be remanded for a hearing to determine a proper restitution amount and to establish a payment schedule for the restitution. We disagree.

¶ 14 *1. Amount of Restitution Ordered*

¶ 15 Defendant concedes the issue of whether the trial court erred in ordering the \$497 in restitution was not preserved for review. However, defendant argues we may review this issue on appeal because the restitution order is void and may be attacked at any time. See *People v. Thompson*, 209 Ill. 2d 19, 25, 805 N.E.2d 1200, 1203 (2004). The State responds if any error occurred at all, the error is voidable rather than void and, thus, the error can be forfeited. See *People v. Greco*, 336 Ill. App. 3d 253, 259, 783 N.E.2d 201, 206 (2003) (citing *People v. Fouts*, 319 Ill. App. 3d 550, 552, 754 N.E.2d 1284, 1286 (2001)). In his reply brief, defendant argues this court can alternatively review the propriety of the restitution order under the plain-error doctrine.

¶ 16 *a. Void or Voidable Order*

¶ 17 Whether an order is void or voidable depends on whether the court had jurisdiction to render the judgment. *People v. Davis*, 156 Ill. 2d 149, 155-56, 619 N.E.2d 750, 754 (1993). "Where jurisdiction is lacking, any resulting judgment rendered is void and may be attacked either directly or indirectly at any time. [Citation] By contrast, a voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack." *Id.*

"[V]oidable judgment[s] [are] correctable on review only if timely appealed." *People v. Welch*, 392 Ill. App. 3d 948, 953, 912 N.E.2d 756, 761 (2009)(citing *People v. Raczkowski*, 359 Ill. App. 3d 494, 497, 834 N.E.2d 596, 599 (2005)). "[O]nce a court has acquired jurisdiction, no subsequent error or irregularity will oust the jurisdiction thus acquired. Accordingly, a court may not lose jurisdiction because it makes a mistake in determining either the facts, the law[,] or both. [Citation.] However, a judgment or decree may be void where a court has exceeded its jurisdiction." *Davis*, 156 Ill. 2d at 156-57, 619 N.E.2d at 754-55.

¶ 18 On appeal, a trial court's restitution order will be reversed only where the trial court has abused its discretion. *People v. Graham*, 406 Ill. App. 3d 1183, 1193, 947 N.E.2d 294, 304 (2011) (citing *People v. Stites*, 344 Ill. App. 3d 1123, 1125, 802 N.E.2d 303, 305 (2003)). "However, '[w]hether a judgment is void is a question of law which we review *de novo*.'" *Graham*, 406 Ill. App. 3d at 1193, 947 N.E.2d at 304 (quoting *People v. Hauschild*, 226 Ill. 2d 63, 72, 871 N.E.2d 1, 6 (2007)).

¶ 19 Under the Unified Code of Corrections (730 ILCS 5/5-5-6 (West 2008)), a trial court is statutorily authorized to order restitution in any criminal case in which a "person received any injury to their person or damage to their real or personal property as a result of the criminal act of the defendant." 730 ILCS 5/5-5-6 (West 2008). "In fixing the amount of restitution to be paid in cash, *** the court shall assess the actual out-of-pocket expenses, losses, damages, and injuries" proximately caused by the defendant's criminal conduct. 730 ILCS 5/5-5-6(b) (West 2008). Pursuant to this statute, the trial court had jurisdiction to order defendant to pay restitution. Defendant argues, however, the trial court exceeded its jurisdiction, making the order void, because no evidence was submitted to support the \$497 restitution order for the television. We

disagree.

¶ 20 To support defendant's contention his case must be remanded to determine the extent of the damage to the television and to assess Brown's out-of-pocket expenses, defendant cites *People v. Jones*, 145 Ill. App. 3d 835, 839, 495 N.E.2d 1371, 1373 (1986) (restitution ordered for economic losses "should be determined by using the fair market value of the property at the time the property was damaged or destroyed"). However, this court has held the goals of restitution are "(1) to make victims whole for *any* injury received at the hands of the criminal to be sentenced; and (2) to make criminals pay *all* of the costs which arise as a result of the injuries the victims suffered." (Emphases in original.) *People v. Strebini*, 209 Ill. App. 3d 1078, 1084, 568 N.E.2d 420, 424 (1991). We can think of many instances in which a victim would not be made "whole" or would not be fully compensated if restitution was limited to fair market value of the damaged property. This case is one such instance because the only way to make the victim whole, and to make defendant pay all costs arising from his conduct, is to replace the damaged television.

¶ 21 Defendant also cites *People v. Guajardo*, 262 Ill. App. 3d 747, 636 N.E.2d 863 (1994), in his reply brief. In *Guajardo*, the First District Appellate Court set aside a restitution order because the trial court failed to adequately assess the expenses incurred by the victim on the record. *Guajardo*, 262 Ill. App. 3d at 770-71, 636 N.E.2d at 880. This case is distinguishable, however, because record evidence supports the restitution order. Defendant argues the trial court erred in awarding \$497 in restitution for the television because the record does not disclose the type of damage done to the television or the television's value at the time of the burglary. We disagree.

¶ 22 The State asserts Brown testified at the sentencing hearing "the cost of damage" to the television was \$497. As defendant points out in his reply brief, however, the actual testimony elicited at trial was as follows:

"Q. Your TV was damaged and you had to spend \$497.00, or that's the cost of the damage but your television has not yet been replaced?

A. No, it has not."

The question the State posed to Brown was a compound question, asking (1) whether the damage was \$497 and (2) whether the television had been replaced. It appears Brown was answering only the second part of this compound question. Nonetheless, the State mentioned a figure of \$497 for the television with no objection from defense counsel.

¶ 23 We agree with defendant to the extent the State's question concerning the damage to the television, alone, cannot serve as the basis for assessing restitution. See *People v. Galmore*, 382 Ill. App. 3d 531, 535, 889 N.E.2d 238, 242 (2008) (finding the court's acceptance of the State's recommended street-value fine "cannot simply be brushed aside as a typical trial mistake"); *People v. Otero*, 263 Ill. App. 3d 282, 287, 635 N.E.2d 1073, 1076-77 (1994) ("Because the only basis for the instant fine was an incorrect statement by the assistant State's Attorney, we must vacate the \$200 street-value fine and remand the cause for a hearing to determine the appropriate street-value fine to impose."). However, in this case Brown also testified during defendant's trial he purchased the 32-inch, flat screen television for \$500 which he had been unable to replace because he did not have the money to do so. Additionally, Brown testified at the sentencing hearing he expected his total "out-of-pocket" loss to be close to \$1,462.

This figure is the sum of the damages Brown testified to during sentencing, *i.e.*, \$815 to replace doors and door jambs, \$150 for a storm door, and \$497 for the television. Defendant accepted Brown's testimony regarding the cost of damages without challenge. See *People v. Duff*, 152 Ill. App. 3d 896, 898, 505 N.E.2d 36, 37 (1987) (victim's testimony regarding costs of damages is sufficient evidence for restitution order.)

¶ 24 Our review of the record shows sufficient evidence supported the trial court's \$1,462 restitution order, which is meant to cover a victim's out-of-pocket expenses incurred as a result of a defendant's conduct. Thus, no voidable error occurred and this issue is forfeited.

¶ 25 b. Plain-Error Doctrine

¶ 26 In his reply brief, defendant asserts as an alternative to reviewing the propriety of the restitution order under the auspice the order is void, this court can review the order under the plain-error doctrine.

¶ 27 The plain-error doctrine set forth in Supreme Court Rule 615(a) (Ill. S.Ct. R. 615(a) (eff. Jan. 1, 1967)) provides a narrow exception to the general rule of procedural default. *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009). The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

"(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. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

¶ 28 We have already determined the trial court did not commit any error in fashioning the restitution order and, therefore, any analysis under the plain-error doctrine would be futile.

¶ 29 *2. Ineffective Assistance of Counsel*

¶ 30 Alternatively, defendant argues trial counsel was ineffective for failing to object when the trial court ordered defendant to pay \$497 in restitution for the television.

¶ 31 Claims of ineffective assistance of counsel are determined under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687 (1984)). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 32 Decisions regarding whether to make an objection at trial are matters of trial strategy, and reviewing courts are highly deferential to trial counsel on matters of trial strategy.

People v. Perry, 224 Ill. 2d 312, 344, 864 N.E.2d 196, 216 (2007). Generally, counsel's determination regarding "what matters to object to and when to object," or whether to cross-examine a witness, will not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326-27, 677 N.E.2d 875, 891 (1997).

¶ 33 Here, defense counsel did not object when the trial court ordered defendant to pay \$1,462 in restitution, nor did counsel say anything about the restitution order when asked by the trial judge if she had anything further to add. We also note defense counsel chose not to cross-examine Brown during sentencing, where counsel could have inquired further into the cost of damages, including the age of the television to determine depreciation, if any. It is likely counsel chose not to do so, because an estimate in the range of \$500 for a 32-inch flat screen television did not seem implausible. Additionally, counsel may likely have concluded the total figure of \$1,462 in damages as ordered at defendant's sentencing hearing seemed reasonable and any objection would have been futile. Moreover, we have already determined the trial court did not err in calculating the restitution amount and, therefore, defendant's argument trial counsel was ineffective for failing to object to the restitution order is without merit.

¶ 34 *3. Restitution Schedule*

¶ 35 Defendant next asserts his case must be remanded because the trial court failed to specify (1) the manner in which he must pay, (2) the length of time defendant has to satisfy the restitution order, or (3) whether defendant had the ability to pay restitution. The State concedes remand is necessary only so the trial court can set a time limit in which restitution must be paid. We do not accept the State's concession because we find defendant's claims have been forfeited.

¶ 36 Defendant asserts these claims are not forfeited based on the decision of our

supreme court in *People v. Love*, 177 Ill. 2d 550, 687 N.E.2d 32 (1997). In *Love*, the defendant was ordered to pay a public defender fee. *Id.* at 553, 687 N.E.2d at 33. On appeal, the defendant argued the trial court was required to conduct a hearing before a public defender fee could be imposed. *Id.* at 555, 687 N.E.2d at 34. The court held, pursuant to section 113-3.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1 (West 1994)), a hearing to determine the defendant's financial resources was "a precondition to ordering reimbursement." *Id.* at 555, 687 N.E.2d at 35. Further, the court stated the following:

"[S]ection 113-3.1(a) plainly requires that the trial court conduct, within the specified time period, a hearing into the defendant's financial resources to determine his ability to pay reimbursement. *** According to the State, a trial court may avoid the legislature's express mandate to consider the defendant's financial circumstances by simply dispensing with a hearing. We are under a duty to interpret statutes so as to avoid absurd consequences. [Citation.] Moreover, we find nothing in the language of section 113-3.1 which supports the State's contention that a hearing into the defendant's financial circumstances is merely optional." *Id.* at 556, 687 N.E.2d at 35.

¶ 37 Section 5-5-6(f) of the Unified Code of Corrections, however, "does not require any preliminary determination of defendant's financial capacity before ordering defendant to pay restitution. This requirement was eliminated by statutory amendment in 1983." *People v. Gray*, 234 Ill. App. 3d 441, 444, 600 N.E.2d 887, 888 (1992); 730 ILCS 5/5-5-6 (West 2008). Section

5-5-6(f) of the Unified Code of Corrections provides, in pertinent part:

"Taking into consideration the ability of the defendant to pay, *** , the court shall determine whether restitution shall be paid in a single payment or in installments, and shall fix a period of time not in excess of 5 years or the period of time specified in subsection (f-1), not including periods of incarceration, within which payment of restitution is to be paid in full." 730 ILCS 5/5-5-6(f) (West 2008).

A defendant's ability to pay restitution is only a consideration when determining the manner in which the defendant should pay. *Gray* at 444, 600 N.E.2d at 888. Thus, even absent forfeiture, defendant's argument the trial court did not determine his financial ability to pay restitution is without merit.

¶ 38 Also, contrary to defendant's claim, the trial court did set the manner in which the restitution was to be paid. The docket entry dated March 11, 2010, provides "All financial obligations shall be paid in equal monthly installments to the Champaign County Circuit Clerk by [empty spaces]. We acknowledge the court failed to specify a payment schedule. However, defendant has forfeited this argument because he did not raise it at his sentencing hearing or in his postsentencing motion. See *Graham*, 406 Ill. App. 3d at 1194, 947 N.E.2d at 305 ("As for the defendant's argument that the trial court's restitution order should be set aside because the court failed to consider his ability to pay restitution and failed to specify, *inter alia*, a payment schedule, these objections have been forfeited by the defendant's failure to raise them at his sentencing hearing."); *People v. Kirkpatrick*, 272 Ill. App. 3d 67, 72-73, 650 N.E.2d 267, 271

(1995) ("[T]he record contains no showing that defendant objected to the trial court's failure to set a time for payment either at the time the court imposed the restitution order or in any subsequent motion contesting that order. Accordingly, we hold that he has waived this issue on appeal. [Citation.] To hold otherwise would require this court on appeal to address and correct a matter which, if it were of any real import to defendant in the first place, could have been—and should have been—called to the attention of the trial court for easy corrective action at that level. Permitting defendants to raise this sort of issue for the first time on appeal squanders our scarce judicial resources and should not be permitted.")

¶ 39

B. DNA Analysis Fee

¶ 40 Defendant next asserts the \$200 DNA analysis fee imposed must be vacated because defendant's DNA was already in the State's DNA database at the time of his conviction in this case. The State points out the report appended to defendant's brief shows a DNA sample taken in 2007, but lists the sample as "No Good/Rejected/Aborted." In response, defendant submitted a second report with his reply brief which shows a DNA sample was obtained from him in 2003. The State concedes the record establishes the \$200 DNA analysis fee had been previously assessed against defendant and agrees the instant fee should be vacated. We accept the State's concession.

¶ 41

Although our review of the record does not show when the previous \$200 DNA analysis fee was imposed, the fact defendant's DNA is already in the DNA database is sufficient to vacate this fee. See *People v. Marshall*, 242 Ill. 2d 285, 303, 950 N.E.2d 668, 679 (2011) (holding a trial court may only "order the taking, analysis and 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" and the \$200 analysis fee is only appropriate one time). Further, to vacate a DNA fee, a defendant need only show he was convicted of a felony after the DNA requirement went into effect on January 1, 1998. *People v. Leach*, 2011 IL App (1st) 090339 ¶ 38, 952 N.E.2d 647, 656 (2011). Here, defendant's presentence investigation report reveals he was convicted of at least two felonies after the DNA requirement was enacted.

¶ 42 Because defendant should not have been assessed a \$200 DNA analysis fee, the assessment is void and we vacate this fee. See *People v. Thompson*, 209 Ill. 2d 19, 27, 805 N.E.2d 1200, 1204 (2004) (A sentence which does not conform to a statutory requirement is void and may be attacked at any time.). We further note the trial court ordered the DNA fee assessed only if defendant had not previously submitted a sample for DNA testing. It appears then the circuit clerk erroneously assessed this fee.

¶ 43 C. Presentence-Detention Credit

¶ 44 Last, defendant argues he is entitled to a \$5 credit against his fines for each day he spent in pretrial custody. The State concedes defendant is entitled to a credit up to \$640, which may be applied to any fines assessed against him. See 725 ILCS 5/110-14 (West 2008). We accept the State's concession.

¶ 45 Sentence credit against a fine based on time served is governed by section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2008)), which provides in relevant part:

"(a) Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so

incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine." *Id.*

Such credit may only be applied to offset fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 580, 861 N.E.2d 967, 974 (2006). The State maintains the \$5 charge assessed against defendant for "drug court program" is a fine because it was not sought to reimburse the State for any costs incurred as a result of prosecuting defendant. See *People v. Sulton*, 395 Ill. App. 3d 186, 193, 916 N.E.2d 642, 647-48 (2009).

¶ 46 The trial court awarded defendant 128 days' credit for time spent in pretrial custody. Therefore, defendant is entitled to a credit up to \$640 (\$5 per day for 128 days spent in custody) which may be applied to any fines assessed against him. 725 ILCS 5/110-14 (West 2008). Defendant is entitled to apply this credit to satisfy his \$5 drug court fine. We remand for issuance of an amended judgment of sentencing to reflect this credit.

¶ 47 III. CONCLUSION

¶ 48 As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 49 Affirmed in part as modified, vacated in part, and cause remanded with directions.