

No. 1-10-2434

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09C22045201
)	
RICHARD SUVICK,)	The Honorable
)	Larry G. Axelrood,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The evidence was sufficient for the jury to find defendant guilty beyond a reasonable doubt of aggravated driving under the influence of alcohol because defendant exhibited physical signs of alcohol usage, had an open can of alcohol in his car, admitted to having consumed alcohol, failed field sobriety tests, and declined to take a Breathalyzer exam. In light of this evidence, any erroneous admission of the HGN test would have been harmless. Defense counsel did not make an offer of proof regarding why defendant ceased treatment from his chiropractor, thus forfeiting his claim that certain testimony was relevant. Forfeiture aside, the exclusion of that testimony, too, was harmless. Defendant forfeited his claim that the State committed prosecutorial misconduct in closing argument and did not establish the claimed error amounted to plain error. This court affirmed the judgment of the trial court while correcting the fines and fees order.

¶ 2 Following a jury trial, defendant Richard Suvick was found guilty of aggravated driving under the influence of alcohol and driving while his driver's license was revoked, then sentenced to a total term of six years' imprisonment. Defendant appeals contending the State failed to prove him guilty beyond a reasonable doubt of the offense because the evidence did not establish the consumed alcohol rendered him incapable of driving safely. Defendant further contends the State failed to establish a foundation for admission of the horizontal gaze nystagmus (HGN) test and that the trial court erred in denying his counsel the opportunity to question defendant's former chiropractor (the sole defense witness) regarding defendant's cessation of treatment for leg and back pain some nine months before his DUI arrest. Defendant also alleges prosecutorial misconduct in closing argument which deprived him of a fair trial. Finally, defendant challenges certain fines and fees. We affirm the trial court judgment but adjust the fines and fees order.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested, then charged with the above-stated offenses, after Glenview police officer Hector Pena stopped defendant's vehicle around 7 p.m. on July 17, 2009, and observed various indicia of alcohol usage. The combined trial testimony of Officer Pena and Sergeant David Sostak revealed the following. The case grew out of a 911 call to police that a "suspicious person," who was intoxicated, drove up and down the street following the caller. Based on the vehicle description provided, Officer Pena located the vehicle and followed it for several blocks. Although he did not observe any traffic violations or other signs the driver was drunk, Officer Pena curbed the vehicle, which was driven by defendant and contained a passenger. Officer Pena approached the driver-side window, where he stood some two feet away, while defendant searched his wallet for about 30 seconds before reporting that he had neither a license nor an insurance card. Defendant had glassy bloodshot eyes, slurred speech, and

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there was a strong smell of alcohol on his breath. Officer Pena asked defendant if he had been drinking, to which he replied he had consumed “one or two beers earlier.” Sergeant Sostak, also at the scene, meanwhile observed from his stance at the passenger-side window a cup holder with a can of Icehouse beer inside, directly behind the driver’s seat. It contained liquid that smelled of beer. He corroborated that defendant’s breath was “exuding” the odor of alcohol. Defendant eventually admitted his license was “suspended,” but Officer Pena determined defendant’s license in fact was revoked, prompting defendant’s arrest. They escorted defendant to the police department, where he agreed to take a series of field sobriety tests, which were videotaped inside a well-lit, flat, and dry area of the station. The video was admitted into evidence and published to the jury. Officer Pena, who had made 20 or 30 arrests for driving under the influence, said he had administered the field sobriety tests in all of them. After defendant responded that there were no problems with his eyes, Officer Pena first administered the HGN test, in which he asked defendant to follow the tip of his finger held about 12 inches in front of defendant’s face from one side to the other with defendant using only his eyes and without turning his head. Officer Pena explained that nystagmus is the involuntary jerking of the eye that can occur when someone is impaired by alcohol. Officer Pena observed the onset of nystagmus prior to 45 degrees, at the maximum deviation, and further observed that defendant’s eyes did not track smoothly. Officer Pena next administered the walk and turn test, measured by whether the individual can listen to the instructions and then execute on them. Officer Pena instructed defendant, with hands at his side, to walk nine heel-to-toe steps along a marked straight line, then pivot and return, but defendant began to perform the test before Officer Pena had completed the instructions. Officer Pena stopped defendant, instructed him, then demonstrated the task for defendant. Once done, defendant initiated the test but was not walking heel-to-toe as instructed; he stepped off line

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several times and used his hands for balance. Officer Pena finally administered the one-leg stand test, which also measures whether the individual can follow and execute given instructions.

Defendant told Pena he had been a carpenter for 35 years and suffered from back pain, but said he would nonetheless try to perform the test. Defendant was told to stand with feet together and hands at his side, then lift one foot about six inches with the bottom parallel to the ground, look at his toe, and, finally, count aloud to 30. Although defendant successfully lifted one foot from the ground, he futilely used his arms for balance, swayed, and then put his foot down. Defendant was given another chance with the other foot, but the results were the same, and he did not complete the test. Defendant mentioned that he saw a chiropractor frequently. According to Officer Pena, defendant's performance on all three tests indicated impairment from alcohol. Sergeant Sostak added that defendant had performed "poorly" on the tests.

¶ 5 Officer Pena also asked defendant if he would take the breath alcohol test, but defendant refused. Based on Officer Pena's common sense, professional experience, and observations of defendant, he was of the opinion that defendant had been driving under the influence of alcohol.

¶ 6 Defendant's sole witness was Dr. Daniel VanFossen, his treating chiropractor. Dr. VanFossen testified that he had treated defendant for lower back and leg pain in October 2008. Dr. VanFossen testified that based on defendant's physical state, which included a suspected herniated disc in his back and a "drop foot," he would have had a difficult time performing both the walk and turn and the one-leg stand field sobriety tests. Dr. VanFossen further testified that he had not treated defendant since late October 2008 and, at that time, although defendant's condition had improved by 60 to 70 percent, he was not cured.

¶ 7 Following evidence and argument, the jury found defendant guilty of aggravated driving under the influence of alcohol and driving while his license was revoked. Defendant filed a

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motion for a new trial, which was denied. Based on defendant's prior convictions for driving under the influence of alcohol, one which involved the reckless homicide of his father, the trial court sentenced defendant to six years' imprisonment for aggravated driving under the influence and to a concurrent term of 364 days' imprisonment for the charge of driving with a revoked license. Defendant filed this timely appeal.

¶ 8

ANALYSIS

¶ 9 On appeal, defendant first challenges the sufficiency of the evidence to sustain his conviction for driving under the influence of alcohol. The standard of review when assessing the sufficiency of evidence is, considering all the evidence in the light most favorable to the State, whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). It is the jury's responsibility to determine the witnesses credibility and the weight given to their testimony, to resolve conflicts in evidence, and to draw reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 225.

¶ 10 In this case, the State was required to show that defendant operated a vehicle while under the influence of alcohol, an act prohibited by section 11-501(a)(2) of the Illinois Vehicle Code (625 ILCS 5/11-501(a)(2) (West 2010)) and which occurs when, as a result of drinking any amount of alcohol, a person's mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care. *People v. Gordon*, 378 Ill. App. 3d 626, 631 (2007), citing Illinois Pattern Jury Instructions, Criminal No. 23.29 (4th ed. 2000). Here, although defendant concedes he was driving the vehicle and also that he had consumed alcohol, he maintains this did

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not render him incapable of driving safely. He claims there is “no evidence” that his “driving was impaired.” However, all the State had to circumstantially prove was that defendant was *less able*, either mentally or physically, or both, to exercise clear judgment, and with steady hands and nerves to operate his vehicle safely. *People v. Weathersby*, 383 Ill. App. 3d 226, 229 (2008) (noting a DUI case may be proven with circumstantial evidence); *Gordon*, 378 Ill. App. 3d at 632. Where there is credible testimony to that effect from the arresting officer, scientific proof of intoxication is unnecessary to sustain a conviction for driving under the influence of alcohol. *Gordon*, 378 Ill. App. 3d at 632.

¶ 11 Here, the State established that Officer Pena, acting on a tip from a concerned citizen, stopped defendant in his vehicle for suspected intoxication. Defendant did not prove the tipster wrong. With glassy eyes, slurred speech, and the strong scent of alcohol emanating from his breath, defendant admitted he had consumed “one or two beers earlier,” an admission strikingly consistent with the open can of beer resting directly behind his driver’s seat. After defendant feigned an attempt to find his license and insurance even though his license was revoked, defendant agreed to take three field sobriety tests, including the HGN test, the walk-and-turn test, and the one-leg stand test, all of which he failed. Officer Pena testified the failed tests indicated impairment from alcohol. As further testament to consciousness of his own guilt, defendant then declined to take a Breathalyzer test. See *Weathersby*, 383 Ill. App. 3d at 230. Contrary to defendant’s contention otherwise, the fact that defendant did not commit a traffic violation is of no moment under these circumstances. See *Weathersby*, 383 Ill. App. 3d at 229-30, and cases cited therein. The evidence, drawn from the testimony of Officer Pena, Sergeant Sostak, and the video, was more than sufficient for a reasonable jury to find defendant was impaired by alcohol while driving his vehicle; it was not so improbable or unsatisfactory as to create a reasonable

doubt of the defendant's guilt.

¶ 12 In reaching this conclusion, we reject defendant's contention that his case is analogous to *People v. Winfield*, 15 Ill. App. 3d 688 (1973), and *People v. Sullivan*, 132 Ill. App. 2d 674 (1971). In each case, the defendants contradicted the prosecution for presenting weak cases. In *Winfield*, the defendant testified that he had not consumed alcohol prior to a car crash caused by a tire blow-out, and the arresting officer – who otherwise described the defendant as maintaining fair speech, a calm attitude, and normal behavior with alcohol on his breath – did not administer sobriety tests. In *Sullivan*, the defendant testified that although he had consumed two drinks, he was not intoxicated when the arresting officer stopped him; he further testified that he was alert and responsive while at the station and suffered from low blood pressure and an eye injury, thus explaining his “staggering.” The *Sullivan* court observed that while the defendant's testimony was positive and unimpeached, the arresting officer's testimony was almost entirely in answer to leading questions.

¶ 13 In this case, by contrast, defendant did not testify. As stated, Officer Pena and Sergeant Sostak provided competent testimony that defendant exhibited physical signs of alcohol impairment, that he not only consumed alcohol but actually had an open beer can in his car, and that he failed the field sobriety tests. We thus find defendant's challenge to the legitimacy of the walk-and-turn and one-leg-stand tests based on his back and leg problems singularly unpersuasive. Defendant agreed to take the walk-and-turn test with nary a mention of such problems. Although he advised the officers of his condition at the outset of the one-leg-stand test, he still agreed to take it, stating that he could perform the test with his one good leg. Only upon that observed failure did defendant attribute his performance to chiropractic issues. Common sense dictates that had defendant been suffering from back and leg pain, he would have

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stated as much at the very outset of the field sobriety tests or declined to take them. Regardless, whether defendant's claimed physical ailments adversely affected his performance on the two tests ultimately boils down to a matter of credibility, which is within the particular province of the jury and a determination this court is not at liberty to disturb.

¶ 14 Defendant also raises a number of points relating to the National Highway and Traffic Safety Administration "DWI Detection and Standardized Testing Manual" (NHTSA manual). For example, defendant notes that according to the manual, during the HGN test the stylus must be presented for a minimum of four seconds, but complains that Officer Pena only held it for three seconds. Defendant, however, did not present the manual at trial. Citing the online source, defendant urges this court to take judicial notice of the NHTSA manual because "it is readily available to the public." We decline the invitation. While readily available, the manual was not presented to the jury here. A reviewing court will not take judicial notice of critical evidentiary material that was not presented to and not considered by the fact finder during its deliberations. See *People v. Barham*, 337 Ill. App. 3d 1121, 1130 (2003), citing *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166 (1983). Besides, defense counsel established on cross-examination that pursuant to Officer Pena's police academy exam, he was required to hold the stylus, which was his finger in this case, for a minimum of four seconds. Officer Pena acknowledged that was the requirement and that he did not comply with it. Defense counsel emphasized that point in his closing argument. Again, it's for the jury to determine the weight of evidence and matters of credibility, and apparently this incongruity was insufficient to deter the jury from finding defendant guilty.

¶ 15 This brings us to defendant's second contention on appeal. Defendant contends the State failed to lay a proper foundation for Officer Pena's testimony regarding the HGN test because

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there was no evidence that he performed the test in compliance with the NHTSA protocol, per *People v. McKown*, 236 Ill. 2d 278 (2010). In *McKown*, on the heels of a *Frye* hearing, the supreme court held that the HGN test was generally accepted in relevant scientific fields and the test results could be admitted to show a defendant may have consumed alcohol, perhaps causing impairment. For the test to be admissible, the court held the State must establish an adequate foundation that a properly trained officer performed the HGN test according to NHTSA protocol.

¶ 16 Defendant specifically complains that Officer Pena did not hold the stimulus for a minimum of four seconds, merely doing so for three; did not testify regarding how fast he moved his finger; and failed to adequately repeat HGN test, all in contravention of the NHTSA rules. Here, although defendant challenged the admissibility of testimony on the HGN test through a motion *in limine* and also in his posttrial motion, he did not raise a contemporaneous objection at trial. While the Illinois Supreme Court has stated that a motion *in limine* or an objection at trial in conjunction with a posttrial motion preserves an issue for appeal, it also has stated that when a motion *in limine* is denied, a contemporaneous objection to the evidence at the time it is offered is required to preserve the issue for review. *People v. Belknap*, 396 Ill. App. 3d 183, 208 (2009), citing respectively *People v. Hudson*, 157 Ill. 2d 401, 434-35 (1993) and *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002). Regardless, since the State has not argued forfeiture (see *McKown*, 236 Ill. 2d at 308; *People v. Harris*, 228 Ill. 2d 222, 229-30 (2008)), we apply the harmless error analysis intended for preserved error (see *People v. Johnson*, 218 Ill. 2d 125, 141-42 (2005)).

¶ 17 Error will be deemed harmless and a new trial unnecessary when the competent evidence in the record establishes the defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result. *McKown*, 236 Ill. 2d at 311. Even were we to assume the HGN test lacked a

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sufficient foundation for admissibility, as set forth above, the evidence was more than sufficient to find defendant guilty of the charged offense. See *People v. Graves*, 2012 IL App (4th) 110536, ¶ 33. Defendant's claim fails.

¶ 18 Defendant next contends the trial court erred by precluding defense counsel from presenting evidence regarding why defendant ceased treatment from the chiropractor for his back and leg problems. Defendant argues Dr. VanFossen should have been permitted to testify that treatment ceased as a result of defendant's insurance running out. However, the trial court sustained the State's objection to this testimony, and defendant did not make a formal offer of proof as to what Dr. VanFossen's testimony actually would be. As a result, technically, there is no record from which this court can determine if the excluded evidence had any relevance to the proceedings, and defendant failed to save the error for our review. See *People v. Andrews*, 146 Ill. 2d 413, 421-22 (1992). Setting forfeiture aside, Dr. VanFossen testified that defendant's condition was not cured when defendant stopped his chiropractic visits and that defendant had only improved 60 to 70 percent. Why defendant ceased going to the chiropractor certainly would have been helpful background information, especially given the State's cross-examination question posed to Dr. VanFossen regarding whether defendant had sought treatment since the end of October 2008 and also given the State's rebuttal argument in closing that defendant could not have been in physical pain because he had not seen a chiropractor in nine months. It bore on the credibility of the defense theory. Nonetheless, even assuming suppression of the claimed testimony constituted error, it was indeed harmless. The central point of this defense theory was that defendant was not cured of his ailments at the time he participated in the field sobriety tests. That much was clear from Dr. VanFossen's testimony. The State also later emphasized in its rebuttal argument that 9 months earlier defendant was only "70 percent better after 14

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treatments” with regard to his drop foot condition. Defendant’s claim, as a result, fails.

¶ 19 Defendant next contends the State committed prosecutorial misconduct in its closing argument by implying that defendant refused the breath test “because he knew he was guilty” and by accusing defense counsel of distracting the jury with a “red herring,” along with lodging other disparaging remarks.

¶ 20 During the rebuttal argument in this case, the State began, “I don’t know. I - - I’m at a loss. I - - I think the Defendant was at a different trial,” then asserted it was “ridiculous” to expect Officer Pena to follow defendant in his car to see if he crossed the line when there had already been a 911 call on defendant. The State later queried whether anyone would like to “fashion a guess” as to why defendant didn’t want to take the Breathalyzer test. The State commented: “Well, he’d just blown the fields. It’s not looking good. And when you know you’re guilty –[.]” At this point, defense counsel raised an objection, which was sustained regarding the last portion of the State’s comment. The court told the jury to disregard it. The State then continued: “He knew what the results of that test were gonna be, and he didn’t want them – *** Defying those results in front of some jury in some courtroom some day.” Also during rebuttal the State asserted defense counsel presented a “red herring” to jurors when arguing that defendant had not received proper instruction on the pivot during walk-and-turn test. The State argued Officer Pena never testified that defendant’s pivot indicated impairment and suggested the defense argument in that regard was “fundamentally weak,” describing the red herring as something “shiny and fancy” that people look at “while the rest of the argument just sort of fails ***.” On the heels of this, the State suggested defense counsel was acting as defendant’s “expert witness,” but told the jury to focus on the evidence and not what either defense counsel or the State had argued.

¶ 21 Defendant now argues that as a result of the alleged errors, he is entitled to a new trial. The State responds, and we agree, that defendant has forfeited this argument by failing to raise the issue in his posttrial motion. To preserve error for consideration on review, a defendant must raise an objection both at trial and in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant implicitly acknowledges forfeiture here by arguing that the plain error rule applies. Indeed, plain error bypasses rules of forfeiture, allowing a reviewing court to consider unpreserved error where the evidence is closely balanced or where the error is so serious as to threaten the integrity of the judicial process. *Johnson*, 218 Ill. 2d at 138; *People v. Herron*, 215 Ill. 2d 167, 186 (2005). Suffice it to say, there can be no plain error if there is no error at all. *Id.* at 139.

¶ 22 This order has already demonstrated that the evidence was not closely balanced in this case. Thus, to establish plain error, defendant bears the burden of persuading this court that the State's remarks were both improper and so prejudicial that real justice was denied or that the jury verdict may have resulted from the error. See *Johnson*, 218 Ill. 2d at 141-42. Viewing the State's comments in the context of the entire closing argument, as we must, and knowing the State can permissibly comment on evidence and inferences during closing argument, defendant simply has not fulfilled that burden. *Id.* at 141; *Graves*, 2012 IL App (4th) 110536, ¶ 43.

¶ 23 The State's comments on the red herring were in response to defense counsel's questions directed at Dr. VanFossen and cross-examination of Officer Pena, as well as defense counsel's closing argument, all of which attempted to explain away defendant's inability to pivot when it was not at issue. See *People v. Jenkins*, 333 Ill. App. 3d 534, 541 (2002). Officer Pena testified that defendant failed the walk-and-turn test because he did not listen to instructions, did not touch heel-to-toe, stepped off the line several times, and used his hands for balance. Per his

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testimony, these signs indicated impairment, not the pivot. Although defendant complains of the State using the word “tricky” in reference to the “red herring,” that was in direct response to defense counsel’s argument that the defendant was subject to “tricky police tricks.” The State’s red herring comments and opening comments on rebuttal, while perhaps overly strident and hyperbolic, were ultimately based on the trial evidence, were relatively brief, and they permissibly challenged defendant’s theory of the case. See *People v. Ligon*, 365 Ill. App. 3d 109, 125 (2006). Unlike in *People v. Emerson*, 97 Ill. 2d 487, 497 (1983), and like cases, cited by defendant, the State did not suggest defense counsel fabricated the evidence. The comments were not so disparaging, inflammatory, or prejudicial as to constitute error. See *People v. Johnson*, 239 Ill. App. 3d 1064, 1070-71 (1992).

¶ 24 And, as stated, when a person refuses a Breathalyzer test, that evidence may be used to argue the defendant’s consciousness of guilt. *Johnson*, 218 Ill. 2d at 140; *Graves*, 2012 IL App (4th) 110536, ¶ 43. The State simply cannot blur the distinction between the defendant’s state of mind and the State’s burden of proof. *Id.* Here, the trial court struck the State’s comment implying defendant’s guilt *vis a vis* his refusal to take the Breathalyzer. Moreover, the court instructed the jury that neither opening statements nor closing argument are considered evidence, thus rectifying any possible prejudice. See *People v. Kliner*, 185 Ill. 2d 81, 159 (1998). To the extent the State might have overstated its argument in that regard, the comments made up only a few lines of some 25 pages of argument, and the State did not rely on that fact to prove its case. The State, instead, emphasized the dispatch made based on the 911 call indicating defendant was driving drunk, the physical signs of alcohol impairment that Officer Pena observed on stopping defendant’s vehicle, the beer can behind the driver’s seat, defendant’s admission to having consumed alcohol, and defendant’s failure to perform adequately on the field sobriety tests.

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Thus, even assuming any impropriety occurred, it did not affect the verdict. See *Johnson*, 218 Ill. 2d at 143. For the reasons set forth, defendant has not established plain error.

¶ 25 Finally, defendant contends that he was entitled to \$5-per-day credit for time spent in presentencing custody. See 725 ILCS 5/110-14 (West 2010). He requests that the credit be applied against the \$1,000 DUI law enforcement charge (625 ILCS 5/11-501.01(f) (West 2010)), \$10 mental health court fine, \$5 youth diversion/peer court fine, \$5 drug court fine, and \$30 children’s advocacy fine (55 ILCS 5/5-1101 (d-5),(e),(f), (f-5) (West 2010)). Because defendant has accumulated 396 days worth of presentencing credit, defendant may apply up to \$1,980 of credit against his fines. This credit applies only against a “fine,” not a fee. 725 ILCS 5/110-14(a) (West 2010); see *People v. Jones*, 397 Ill. App. 3d 651, 663 (2009).

The State concedes, and we agree, that defendant is entitled to a \$1,980 credit to be applied against his fines. See *Jones*, 397 Ill. App. 3d at 663-64 (\$30 children’s advocacy center charge is a fine); *People v. Paige*, 378 Ill. App. 3d 95, 102 (2007) (mental health court and the youth diversion/peer charges are characterized as fines); *People v. Diaz*, 377 Ill. App. 3d 339, 351 (2007) (DUI law enforcement charge is a fine). We therefore order the clerk of the circuit court to modify the fines and fees order to reflect the application of credit against \$1,050 of fines, resulting in a total fines and fees order of \$845.

¶ 26

CONCLUSION

¶ 27 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed; Fines and Fees order corrected.