2015 IL App (1st) 122105-U
No. 1-12-2105

THIRD DIVISION
March 18, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08 CR 21981
	)	
DAVID SIDENER,	)	The Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: defendant's first degree murder conviction affirmed where: (1) the circuit court did not abuse its discretion in denying defendant's request for a fitness examination; and (2) defendant was not prejudiced by the admission of other crimes evidence.

¶ 2 Following a jury trial, defendant David Sidener was convicted of first degree murder and was sentenced to 60 years' imprisonment. On appeal, he challenges his conviction, arguing that the circuit court erred in: (1) denying his request for a fitness examination to determine whether there was a *bona fide* doubt as to his fitness to stand trial; and (2) allowing the State to play a videotape of his custodial statement that contained an improper reference to defendant's other

pending criminal cases and plea negotiations. For the reasons contained herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On October 15, 2008, 57-year-old Randy Hilderbrandt's dead body was found tied to a pole in the basement of Lucca's, the restaurant that he managed. Defendant was subsequently charged with various offenses in connection with Hilderbrandt's death, including robbery, felony murder predicated on robbery, and multiple other counts of first degree murder. Defendant elected to proceed by way of a jury trial.

¶ 5 Pre-Trial Proceedings

¶ 6 Before *voir dire* commenced, one of defendant's court-appointed attorneys advised the court that her client desired a fitness examination. She reported that defendant had informed her that he had recently been transferred to the psychiatric unit of the jail and that the treatment and medication he had begun receiving allowed him to recall certain details of his case that he had previously been unable to remember. Counsel, however, emphasized that a fitness examination was "the defendant's request that [she] was putting before the court" and that she was merely bringing it to the court's attention as "his legal spokesman." In response to questions by the court, defense counsel acknowledged that fitness had not previously been an issue with her client and admitted that she had always been able to communicate with defendant about his case. Counsel indicated that she believed that defendant was simply apprehensive of his impending trial and stated: "With due respect to the Court, I will tell you what I told [defendant.] If this Court was to ask me whether I feel [defendant] is fit or whether I have a *bona fide* doubt as to his fitness, my answer would have to be I believe he is fit, okay. I told [defendant] that would be my answer to the Court."

¶ 7 Following defense counsel's representations to the court, defendant addressed the court himself, stating: "Sir, if I might say something here. The last eight months I have been in the psychiatric division of the Cook County Jail, Division 10 with daily psychiatric counseling and helping the professionals [*sic*]. I'm on psych meds. I have not at all, been able to communicate with these two attorneys about anything, on any level. I don't even know what my defense is." In response to questions by the court, defendant conceded that his attorneys had visited him in prison but insisted that he not been able to assist in his own defense. Moreover, defendant reported that during the previous two weeks, he had suffered "a complete mental breakdown, mental exhaust, [and] just totally lost it." As a result, he had been taken to the psychiatric ward of Cermak Hospital where he received treatment. During his time at the hospital, defendant explained his situation to hospital personnel and they advised him to ask the court for a mental health evaluation.

¶ 8 After hearing from both defense counsel and defendant, the court stated:

> "There's a legal definition of fitness, and fitness is whether or not somebody understands the charges against them is, able to assist their attorneys in their own defense, whether somebody is emotionally distraught, overly anxious, or even depressed, is not the legal definition of fitness.
>
> I will note that this case has been pending for two and a half years. There's a lot of things that have gone on in this matter. * * * The time I did talk to [defendant], I had interaction with him. There's no doubt in my mind he was oriented to time and place and situation.
>
> I believe he's oriented right now to the time, place and situation. The fact that something might have happened in the jail, that there might have been unfortunate

> circumstances that now he has additional charges, that is, in and of itself, not enough for me to think that there's a *bona fide* doubt of fitness. Volitional non-cooperation with an attorney is different than being unable to legally assist the attorney that's defending the defendant, or to understand the proceedings against him, the trial, the choices that can be made.
>
> The issue of fitness here, I don't know whether or not it's dilatory, I don't know if it's just a reaction of someone that's anxious about a trial. But, I do not believe, and I defer to the attorney being able to cooperate with the defendant [] that this defendant is unfit to stand trial."

¶ 9 Accordingly, the court ordered that defendant's trial would proceed as scheduled. When defendant heard the court deny his request for a fitness hearing, he responded: "Listen, I'm not going to sit in here for this. You go ahead and have this trial without me." He denied that he was raising the issue of his lack of fitness because he did not want to go to trial, explaining: "I do want to go to trial, don't you understand me. I have not—I don't even know what the strategy is. I have not been able to talk to them. I don't even know what they are doing. I have not been able to—any kind of way help myself with these attorneys. I have not been able to tell them what I need, the evidence that I need to pull out, the things I need them to do. I just told them this morning. I said, 'listen, hey there's evidence. I have evidence that's going to exonerate me and prove my innocence. I need to tell you about that.' Up until this point, we have never even discussed what my innocence or the defense or anything [*sic*]."

¶ 10 The court replied by informing him of his right to be present for his trial, his right to confront witnesses against him, his right to present evidence and his right to testify and then stated: "But, the bottom line is this, your choice not to be present, I believe is a dilatory tactic

and it's something that basically is premised on you not wanting to go to trial, not that you're not competent to stand trial, or not that your attorneys have not talked to you." The court then advised defendant that if he had any evidence he wanted to present, he should discuss those matters with his attorneys. The parties then commenced *voir dire* and selected a jury.

¶ 11 After a jury was selected, the parties litigated several motions *in limine*. Defendant, again, interjected and stated that he "oppose[d] this trial" and reiterated that he had not been able to assist in his defense until recently. After additional discussion, trial commenced.

¶ 12 Trial

¶ 13 James Davies testified that he worked as a bartender at a Little Jim's, a gay bar located on the north side of Chicago. On the evening of October 14, 2008, Davies started his shift at 8 p.m. and noticed a few regulars at the bar. At approximately 9 p.m., Davies observed defendant at the bar and noticed him approaching and conversing with other patrons. Davies had not seen defendant at Little Jim's prior to that night and overheard defendant telling people that he was from Evansville. Hilderbrandt, a regular, arrived at Little Jim's at approximately 9:30 p.m. that evening and took his usual seat at the corner of the bar. Hilderbrandt, who was "a friend and an acquaintance for about ten years," told Davies that he had just come from a birthday party. Davies testified that he observed defendant approach Hilderbrandt that evening and that the two men talked for a while and took several cigarette breaks outside together. He confirmed that both men were drinking alcohol that evening and recalled serving Hilderbrandt gin and tonics and serving defendant beer. At one point, Hilderbrandt relayed to Davies that he was interested in defendant. Davies observed the two men leave together around midnight and testified that they did not return to the bar that evening.

¶ 14 The next evening when Davies arrived to work, he was approached by several Chicago detectives and was asked to review video from Little Jim's security monitoring system. Davies explained that the bar was equipped with three exterior security cameras that recorded images "24 hours a day, seven days a week, 365 days a year" and that the images captured by the cameras were sent to a small monitor and recording device that was located in an office at the rear of the bar. After reviewing the footage with the detectives, Davies was able to identify defendant as the patron who had left the bar with Hilderbrandt the previous night. Thereafter, on October 30, 2008, Davies viewed a physical lineup at Area 3 and identified defendant as the man he had seen with Hilderbrandt on the evening of October 14, 2008.

¶ 15 Ciprian Iuga testified that in 2008, he was employed by Flash Cab as a taxi cab driver and "dr[o]ve [the] night shift, 5:00 p.m. to 5:00 a.m." Iuga recalled that on October 14, 2008, at approximately 11:50 p.m., he was driving around the "Boys Town area, Halsted and Cornelia." At that time, he remembered picking up two men who were standing on a corner near a bar called Little Jim's. The men were both Caucasian, approximately 6 feet tall and appeared to be "in their 50's". One of the passengers had a "feminine voice" and directed Iuga to drive them to Lucca's restaurant. Iuga testified that the trip took approximately 7 minutes and that the man with the feminine voice paid the cab fare and gave Iuga a "good tip." Although the restaurant appeared to be closed, the man with the feminine voice had keys and Iuga watched the men enter Lucca's. Thereafter, Iuga testified that he made a U-turn and continued his shift. He did not see either man again that night.

¶ 16 Approximately one week later, Iuga confirmed that he was interviewed by Detectives Gillespie and Thompson and was shown a picture of Hilderbrandt. Iuga confirmed that he

recognized Hilderbrandt "from [his] cab," and indicated that he was the passenger with the feminine voice that he had driven on October 14, 2008.

¶ 17 Edith Van Der Hoeven Teich, the owner of Lucca's, a restaurant, located on North Southport, testified that Hilderbrandt was a close "personal friend," as well as the manager of her restaurant in 2008. Lucca's was a two-story restaurant with the dining room and bar on the first floor. The kitchen and Hilderbrandt's office were located in the basement. Van Der Hoeven Teich recalled that on October 14, 2008, she threw a birthday party for her ex-husband, Kurt Teich, at Cornelia's, another restaurant that she owned that was located next door to a bar called Little Jim's. She confirmed that Hilderbrandt attended the party and arrived early with balloons and cake. During the party, Van Der Hoeven Teich recalled that Hilderbrandt left "several times to go outside and smoke and go next door" and testified that he left the party for good sometime between 9 and 9:30 p.m.

¶ 18 The following morning, Van Der Hoeven Teich received a phone call from Billy, Hilderbrandt's roommate, who was trying to locate him. After talking with Billy, Van Der Hoeven Teich tried to locate Hilderbrandt and called his cellular phone "many, many times," but he never answered her calls. Sometime that afternoon, she also placed a call to Lucca's and the restaurant's phone was answered by Gary, one of Lucca's regular exterminators. After talking to him, Van Der Hoeven Teich "immediately jumped in [her] car and went to the restaurant." When she arrived, police officers were already at the scene. Once she entered Lucca's, she immediately noticed that the cash register, which usually contained $250, was open and empty.

¶ 19 When she was interviewed by police, Van Der Hoeven Teich reported that she had loaned Hilderbrandt $1000 in cash two days earlier. On cross-examination, she denied telling officers that Hilderbrandt's roommate, Billy, was actually his boyfriend. She also did not recall

telling them that Hilderbrandt had been mad at Billy during the party or that he had told her that he did not want to return home that evening. Van Der Hoeven Teich also did not recall informing investigating officers that she had warned Hilderbrandt not to use Lucca's as a bedroom as he had done in the past.

¶ 20 Gary Salzer, a pest control technician employed by Aerex Pest Control (Aerex), testified that he and Leonard Williams, a trainee, arrived at Lucca's at approximately 2:30 p.m. on October 15, 2008, to provide their monthly extermination services. At that time, Lucca's had been a regular client of Aerex's for "[a]t least five, six years." Salzer and Williams entered the restaurant through the restaurant's unlocked front door and Salzer immediately looked for Hilderbrandt, who was "usually sitting at the bar where the phone is," but he was not there. Salzer assumed that Hilderbrandt was somewhere else in the restaurant so he and Williams began to exterminate Lucca's first floor. After they finished spraying the first floor, Salazar and Williams moved down to the basement. Once they began their work in the basement, Salzer testified that he observed an overturned bucket and coins strewn across the restaurant's kitchen counter and floor. He also saw a wallet, checkbook, smock, and butcher's knife on the kitchen floor. When Salzer opened the wallet, he found that it contained Hilderbrandt's driver's license. At that point, Salzer thought that there was "something weird going on." He began walking around the kitchen, but when he could not find additional light switches to illuminate the rest of the basement, he went back upstairs.

¶ 21 After he returned to the first floor, Salzer began to take a closer look around the restaurant and noticed that the restaurant's cash register was open and that the cash drawer inside of the register was missing. As he continued to look around Lucca's, a stove technician arrived at the restaurant to change the stove filters in the kitchen. The technician completed his task

after several minutes and left the restaurant. Because of Hilderbrandt's unexplained absence and the odd condition of the restaurant, Salazar called the police.

¶ 22 After police arrived at Lucca's, Salzer accompanied them to the basement and pointed out the items that appeared to be out of place. Police then searched the entire basement and found Hilderbrandt's body in a dark hallway tied to a post. His body had been wedged into a small space between the post and the wall.

¶ 23 Salvador Sanchez confirmed that he arrived to change the stove filter at Lucca's on October 15, 2008, at approximately 2:30 p.m. Although Sanchez expected to see Hilderbrandt, he never saw him that afternoon. He did, however, see two exterminators at the restaurant. Sanchez testified that it only took him three to five minutes to change the restaurant's stove filter and that he left the bill for his services on the bar before leaving for his next appointment. He did not recall observing a wallet, checkbook, or other personal effects strewn about the kitchen that afternoon.

¶ 24 Chicago Police Officer Johanna Chorba, a member of the Department's Tactical Team, testified that she and her partner received a dispatch call at approximately 2:35 on October 15, 2008, and were directed to Lucca's to perform a "wellbeing check." When they arrived at the location, they were met by two male subjects who identified themselves as exterminators. After speaking with the men, the officers entered the restaurant. Officer Chorba did not immediately notice anything amiss on the first floor. When she reached the basement, however, Officer Chorba noticed a wallet on a stainless steel table with its contents scattered on the table and floor. She also noticed a knife on the floor as well. As Officer Chorba examined the kitchen, her partner proceeded down a darkened hallway. When her partner called out to her, Officer Chorba walked down the same hallway and observed "a male subject on the floor, his hands

were bound to a pole, [and] he was partially obscured by vacuum cleaners." After discovering the body, Officer Chorba and her partner relayed their findings over the police radio and requested assistance.

¶ 25 Detective John Gillespie testified that on October 15, 2008, at approximately 2:35 p.m., he and his partner received an assignment to investigate a possible homicide and proceeded to Lucca's, a restaurant located on North Southport. After arriving on scene, they viewed Hilderbrandt's body, which was still tied to a pole in the basement of the restaurant. Once they were then able to gain access to Hilderbrandt's office, they found it "in disarray" with an empty cash register drawer on the desk. Having viewed the crime scene, Detective Gillespie and his partner proceeded to interview Gary Salzer and Edy Van Der Hoeven Teich, two civilians who were also present at the restaurant. Following his conversation with Van Der Hoeven Teich, Detective Gillespie dispatched Detectives Dolan and Oleary to a bar located on Chicago's north side called Little Jim's.

¶ 26 The following day, Detective Gillespie viewed surveillance footage that Detectives Dolan and Oleary had obtained from Little Jim's. In the video, he observed Hilderbrandt leave the bar "with an unknown male white and enter a taxicab." Based on the design of the cab, Detective Gillespie contacted the manager of Flash Cab and was able to identify the cab driver seen in the video as Ciprian Iuga and conducted an interview with him. He also interviewed James Davies, the bartender who worked at Little Jim's on the night in question. Based on those conversations, Detective Gillespie contacted the Evansville Indiana Police Department and provided the department with a still image of the suspect that had been generated from the surveillance footage. On October 27, 2008, Evansville authorities identified defendant as the suspect depicted in the image. Following the identification, Detectives Gillespie and several other

officers drove to Evansville and met with defendant, who had been taken into custody. He questioned defendant for several hours prior to the arrival of Romano DiBenedetto, an Assistant State's Attorney (ASA) with the Cook County State's Attorney's Office, and defendant agreed to memorialize his statement via videotape. Defendant also voluntarily provided a buccal swab sample. After defendant provided his statement and the buccal swab sample, Detective Gillespie and his partner transported defendant back to Illinois and took him to the Area 3 Police Station in Chicago. On October 30, 2008, Detective Gillespie contacted Little Jim's bartender, James Davies, and requested him to view a physical lineup. Davies did so and identified defendant as the individual he had seen with Hilderbrandt at Little Jim's on the evening of October 14, 2008.

¶ 27 Chicago Police Officer Christine Dolan testified that on October 15, 2008, she and her partner received an assignment to investigate Hilderbrandt's death. She confirmed that as part of their assignment, they went to Little Jim's bar and obtained video surveillance footage, which they then turned over to Detective Gillespie at Area 3. After the footage was logged, Officer Dolan testified that she viewed the footage, which depicted scenes outside of Little Jim's. Various clips on the video showed the victim in the presence of another man. Officer Dolan confirmed that a still image was then generated from the video surveillance footage.

¶ 28 Romano DiBenedetto testified that on October 29, 2008, he was an ASA with the Cook County State's Attorney's Office, and received an assignment to investigate the homicide of Randy Hilderbrandt. As part of his investigation, ASA DiBenedetto traveled to the Evansville Indiana Police Department, where defendant, the suspect in Hilderbrandt's death, had been taken into custody. When he arrived, ASA DiBenedetto met with Detective Gillespie and several other Cook County detectives, who briefed him about their investigation into Hilderbrandt's death. At approximately 9 p.m., ASA DiBenedetto met with defendant, identified himself as an ASA,

advised defendant of his *Miranda* rights, and indicated that he wanted to speak with defendant "about an incident that had happened in Chicago." Defendant acknowledged that he understood his rights and indicated that he was willing to speak to ASA DiBenedetto and Detectives Gillespie and Thompson. After the one-hour initial interview, defendant agreed to memorialize his statement on videotape. The videotape statement commenced at 11:07 p.m. the same night and lasted approximately one hour.

¶ 29 In his videotaped statement, defendant indicated that on October 14, 2008, he rode a Greyhound bus from his home in Evansville, Indiana, to Chicago to meet with federal marshals and discuss a fugitive they were seeking. Defendant explained that he had been previously approached by the marshals when he was in police custody in Indiana because they believed he had knowledge about the location of a known fugitive. Although he could not recall the names of the marshals that he spoke with and did not have an appointment to meet with them in Chicago, defendant indicated that he was planning on showing up at the federal building on Dearborn unannounced. When he did so, however, no marshals were immediately available to meet with him. As a result, defendant decided to take another bus to Addison Street. After getting off the bus, he walked around the area for a while before he ultimately entered a bar named "[Little] Jim's."

¶ 30 While defendant was at the bar, Hilderbrandt approached him and offered to buy him a drink. That evening, the two men spent some time talking and smoking cigarettes together and defendant learned that Hilderbrandt was a manager of a nearby Italian restaurant called Lucca's. When Hilderbrandt offered to take defendant there and cook him a nice meal, defendant agreed, and the two men left the bar and took a cab to Lucca's. Once they arrived, defendant indicated that he remained on the first floor of the restaurant and smoked a cigarette while Hilderbrandt

went down to the basement of the restaurant to get ice. When Hilderbrandt did not return to the dining room after a few minutes, defendant walked down to the restaurant's basement and found Hilderbrandt in the kitchen holding a knife. Hilderbrandt, who was visibly intoxicated, then came toward the defendant with the knife and said, "I know you're here to rob me." Despite the fact that Hilderbrandt had pulled a knife on him, defendant stated that he was not afraid because Hilderbrandt was a "little guy." Defendant was initially able to calm Hilderbrandt and he began to persuade him to lower the knife. As Hilderbrandt began doing so, however, he lost his balance and struck his head on the kitchen counter. He then began repeating that he knew defendant was there to rob him and then took off running down a hallway. Defendant stated that he became fearful that Hilderbrandt was going to get a gun and that he ran after him. After catching up to Hilderbrandt, defendant placed his neck in a chokehold to restrain him and asked, "What is it with you?" Hilderbrandt responded that he was going to show defendant where the money was at.

¶ 31 Although defendant denied that he had come to the restaurant to rob Hilderbrandt, he explained that he began to believe that there was a lot of money at the restaurant based on Hilderbrandt's actions and his repeated references to robbery and ordered Hilderbrandt to "show [him] the money then." Hilderbrandt unlocked his office door and opened a cash box, which contained stacks of one-dollar bills. Because he had been expecting more money in the box, defendant asked Hilderbrandt where the restaurant's safe was located. Hilderbrandt replied that the restaurant did not have a safe and urged defendant to take the money in the cash box. At that point, defendant divided the money into two piles and told Hilderbrandt that they could split the money, but Hilderbrandt responded that he did not want to take any of the money and ran out of the office.

¶ 32 Defendant again ran after Hilderbrandt. He explained that he initially intended to leave the restaurant, but became fearful that Hilderbrandt would call the police. Because defendant was on parole and did not want Hilderbrandt to contact the authorities, he decided that he needed to restrain Hilderbrandt in some way so that he would have time to get away before the police became involved. Defendant found some electrical cords and used those to secure Hilderbrandt to a pole. He also used tape to bind Hilderbrandt's hands and feet. Defendant reported that he also initially put a rag into Hilderbrandt's mouth to ensure that he did not yell out, but removed it because he became concerned that the rag would prevent Hilderbrandt from breathing properly. When he did so, Hilderbrandt's dentures fell out. Defendant denied using force to subdue Hilderbrandt because he "didn't want to hurt the old fool." After allowing Hilderbrandt to smoke two cigarettes, defendant took $600 and left Hilderbrandt alone in the basement of Lucca's. Defendant walked to a CVS and then to a Dunkin' Donuts shop where he thought about the "thing" with the federal marshals and "what [he] was gonna do about that" before ultimately deciding to return to Evansville.

¶ 33 Cook County Assistant Medical Examiner Joseph Cogan performed Hilderbrandt’s autopsy. He testified that he observed "more than 20" different types of external injuries to Hilderbrandt’s body including abrasions and contusions on the victim’s hands, forehead, face, calves and ankles. In addition, Hilderbrandt sustained six rib fractures and his dentures has been broken. Cogan testified that these injuries indicated that Hilderbrandt had sustained blunt force trauma prior to his death. Cogan also identified signs of congestion and hemorrhaging to Hilderbrandt’s head and neck and indicated that such findings are common when a person experiences positional asphyxiation. He explained that positional asphyxia occurs when a person is wedged into a contained area or when a heavy weight is placed on the chest, making it difficult

for the victim to breathe. He further explained that the position in which Hilderbrandt's body was found, the fact that he suffered rib fractures and had bite marks on his tongue also supported the likelihood that Hilderbrandt experienced positional asphyxiation. The hemorrhaging around Hilderbrandt's neck, in turn, suggested that he also experienced manual strangulation in addition to positional asphyxiation.

¶ 34 Cogan acknowledged that at the time of his death, Hilderbrandt had an enlarged heart and some calcified arteries, but testified that these conditions were unrelated to the injuries that he sustained at the time of his death. Ultimately, Cogan opined that Hilderbrandt died as a result of numerous injuries that he sustained during an assault and classified the manner of death homicide.

¶ 35 Several forensic investigators assigned to process the crime scene testified that they recovered various items from Lucca's including cigarette butts, several pieces of masking tape, and electrical cords. All of the items were recovered and inventoried in accordance with police protocol. Several items recovered from the crime scene were sent to the Illinois State Police and a latent fingerprint examiner, found six latent fingerprints on the items that were suitable for comparison. None of the six fingerprints belonged to defendant. Multiple items were also tested for DNA. A forensic analyst tested several cigarette butts and electrical cords that were recovered from the scene and concluded that the DNA on four of the butts matched Hilderbrandt's DNA, two additional butts contained DNA from which Hilderbrandt could not be excluded, DNA on a single butt matched Sidener's DNA, and another butt contained the DNA profile of an unknown female. DNA analysis of an electrical cord revealed that it contained Hilderbrandt's profile. Finally, the analyst tested four pieces of tape recovered from the scene, and concluded that three of those pieces contained a DNA profile from which Hilderbrandt could

not be excluded and another piece contained a DNA profile from which defendant could not be excluded.

¶ 36 After presenting the aforementioned evidence, the State rested its case and defendant, against the advice of defense counsel, elected to testify on his own behalf. He acknowledged voluntarily making the aforementioned videotaped statement introduced in the State's case-in-chief and admitted that the statement was "more or less" accurate. Defendant, however, indicated that some of the details that he initially provided to detectives were not true. Specifically, defendant testified that he did not get the money by robbing Hilderbrandt; rather, he was given the money in exchange for engaging in sex acts with Hilderbrandt, stating: "I was offered six hundred dollars for—to participate in a sex act, and that's what I took, six hundred dollars." Defendant denied that he had ever prostituted himself before and indicated that he elected to do so that evening because he "didn't have a regular job and *** needed money." Defendant explained that he did not initially relay this information to police investigators because he was embarrassed of his actions. Defendant further testified that he never actually went into Hilderbrandt's office even though he had indicated that he had done so in his videotaped statement.

¶ 37 Defendant, however, did confirm that other details that he provided in his statement were correct. Specially, he confirmed that he met Hilderbrandt at a bar and that they left together and went to Lucca's where they engaged in sex acts. He further confirmed that Hilderbrandt subsequently accosted him with a knife and accused defendant of wanting to rob him. Defendant kept his distance and reminded Hilderbrandt that he had just paid him $600 for sex and that there was no reason for defendant to rob him. In response, Hilderbrandt, who was "extremely intoxicated" and high on methamphetamine, dropped the knife on the ground and running toward

his office. Defendant explained that he "thought [Hilderbrandt] was going for a pistol or something," so he ran after him, and restrained him from behind. He indicated that he did not have to use force because Hilderbrandt was so intoxicated and was easy to subdue. After Hilderbrandt calmed down, the two men then talked for another ten to fifteen minutes until defendant received a phone call from a federal marshal who he had tried to meet with earlier.

¶ 38 Once defendant finished his phone call, Hilderbrandt informed him that he was going to call the police. Because defendant "c[ould] not let [him] do that," he told Hilderbrandt to sit down by a pole and used masking tape and electrical cords that he found in a closet to secure him to the pole. He did not secure Hilderbrandt tightly, however, because he "was concerned about his well being" and did not want to "cut off his circulation." Defendant admitted, however, that he stuffed a handkerchief in Hilderbrandt's mouth to prevent him from making any noise, but testified that he removed it when he saw that Hilderbrandt was having problems breathing. When he did so, Hilderbrandt's dentures fell out of his mouth.

¶ 39 After securing Hilderbrandt, defendant testified that he left Lucca's with $600 and went to a nearby Dunkin Donuts where he met with a federal agent named "Keith." During his conversation with the federal marshal, defendant told him that he had left a "geeked up and amped" guy tied up in a restaurant and that he was going to go back and untie the man. The marshal, however, told defendant not to worry about it and instructed him to return to Evansville. Defendant followed the marshal's instructions and took a bus back to Evansville. Approximately two weeks later, defendant confirmed that he was taken into custody by the Evansville Police Department. He denied that he ever struck Hilderbrandt or that he caused any of the injuries identified by the medical examiner and testified that when he left Hilderbrandt at Lucca's, the man was alive and had not suffered any physical injuries.

¶ 40 Following defendant's testimony, the parties delivered closing arguments. After receiving relevant instructions, the jury commenced deliberations and ultimately returned with a verdict finding him guilty of first degree murder. The cause then proceeded to a sentencing hearing, and after considering the arguments advanced by the parties in aggravation and mitigation, the court sentenced defendant to 60 years' imprisonment, to be followed by a 3-year mandatory supervised release term. Defendant's post-trial and post-sentencing motions were denied and this appeal followed.

¶ 41 ANALYSIS

¶ 42 Fitness to Stand Trial

¶ 43 Defendant first argues that the circuit court erred in denying his request for a fitness examination to determine whether there was a *bona fide* doubt as to his fitness to stand trial. He maintains that the court's ruling constituted an abuse of discretion because the court applied an incorrect standard in determining that a fitness examination was not warranted and because the "record establishe[d] that a question as to [his] fitness to stand trial existed."

¶ 44 The State responds that the circuit court properly exercised its discretion in denying defendant's request for a fitness examination because "there was ample evidence that defendant was fit for trial, negating any need for a psychological examination to assist the trial court" and because the trial court "was never obligated to grant him a fitness examination *** as a prelude to determining whether there was a *bona fide* doubt of fitness."

¶ 45 The principles of due process prohibit the conviction of a criminal defendant who is unfit to stand trial. *People v. Burson*, 11 Ill. 2d 360, 368 (1957); *People v. Stahl*, 2014 IL 115804, ¶ 24. A criminal defendant is deemed legally unfit "if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in

his defense." 725 ILCS 5/104-10 (West 2010); see also *People v. Easley*, 192 Ill. 2d 307, 320 (2000) ("Fitness speaks only to a person's ability to function within the context of a trial. It does not refer to sanity or competence in other areas. A defendant can be fit for trial although his or mind may be otherwise unsound"). Every criminal defendant is presumed fit to stand trial, enter a plea, and be subject to sentencing absent the existence of circumstances that create a *bona fide* doubt as to the defendant's fitness. 725 ILCS 5/104-10 (West 2010); *Easley*, 192 Ill.2d at 318; *People v. Sanchez*, 169 Ill. 2d 472 (1996). A *bona fide* doubt has been defined as a "real, substantial and legitimate doubt" and the test is an objective one. *People v. Eddmonds*, 143 Ill. 2d 501, 518 (1991). Factors to consider in determining whether a *bona fide* doubt of fitness exists include a defendant's irrational behavior, the defendant's demeanor, any prior medical opinion on the defendant's competence to stand trial, and counsel's representations concerning the competence of his or her client. *Easley*, 192 Ill. 2d at 319; *Eddmonds*, 143 Ill. 2d at 518. These factors are not dispositive, however, as there "[t]here are 'no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.' " *Eddmonds*, 143 Ill. 2d at 518, *quoting Drope v. Missouri*, 420 U.S. 162, 180 (1975). Ultimately, the question of whether there is a *bona fide* doubt as to a defendant's fitness to stand trial involves a fact-specific inquiry (*People v. Tapscott*, 386 Ill. App. 3d 1064, 1077 (2008)) and the final determination rests within the sound discretion of the circuit court, which is in the best position to observe the defendant and evaluate his conduct. *People v. Simpson*, 204 Ill. 2d 536, 550 (2001); *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 53. An abuse of discretion will be found only where the ruling is arbitrary, fanciful or unreasonable or where no

reasonable person would take the view adopted by the circuit court. *Tolefree*, 2011 IL App (1st) 100689, ¶ 53.

¶ 46 Section 104-11 of the Illinois Code of Criminal Procedure of 1963 (Code) sets forth the conditions pursuant to which fitness examinations and fitness determinations are governed. It provides as follows:

> "§104-11
>
> (a) The issue of the defendant's fitness for trial, to plead, or to be sentenced may be raised by the defense, the State or the Court at any appropriate time before a plea is entered or before, during, or after trial. When a bona fide doubt of the defendant's fitness is raised, the court *shall* order a determination of the issue before proceeding further.
>
> (b) Upon request of the defendant that a qualified expert be appointed to examine him or her to determine prior to trial if a bona fide doubt as to his or her fitness to stand trial may be raised, the court, in its discretion, *may* order an appropriate examination. However, no order entered pursuant to this subsection shall prevent further proceedings in the case." (Emphasis added.) 725 ILCS 5/104-11 (a), (b) (West 2008).

¶ 47 While section (a) "places a mandatory burden on the trial court judge to order a determination of a defendant's fitness when a *bona fide* doubt of that fitness is raised," (*People v. Mitchell*, 189 Ill. 2d 312, 330 (2000)), section (b), in contrast, affords a circuit court that has not been convinced that a *bona fide* doubt of fitness exists, with the discretion to appoint an expert to examine the defendant and help the court determine whether a *bona fide* doubt of fitness exists (*People v. Garcia*, 2012 IL App (1st) 103590, ¶ 124).

¶ 48 In *People v. Hanson*, 212 Ill. 2d 212 (2004), the supreme court explained the interplay between sections (a) and (b) as follows:

> "Sections 104-11(a) and (b) may be applied in tandem or separately, depending on if and when the trial court determines a *bona fide* doubt of fitness is raised. If the trial court is not convinced *bona fide* doubt is raised, it has the discretion under section 104-11(b) to grant the defendant's request for appointment of an expert to aid in that determination. 725 ILCS 5/104-11(b) (West 2000). Even for a motion filed under section 104-11(a), the trial court could specify its need for a fitness examination by an expert to aid in its determination of whether a *bona fide* doubt is raised without a fitness hearing becoming mandatory. In either instance, after completion of the fitness examination, if the trial court determines there is a *bona fide* doubt, then a fitness hearing would be mandatory under section 104-11(a) (725 ILCS 5/104-11(1) (West 2000)) [Citations.] Conversely, if after the examination the trial court finds no *bona fide* doubt, no further hearings on the issue of fitness would be necessary. Alternately, section 104-11(b) may be bypassed entirely if the trial court has already determined without the aid of a section 104-11(b) examination that there is a *bona fide* doubt of the defendant's fitness. In that instance, the trial court would be obligated under section 104-11(a) to hold a fitness hearing before proceeding further. 725 ILCS 5/104-11(a) (West 2000). In sum, the primary distinction between sections 104-11(a) and 104-11(b) is that section 104-11(a) ensures that a defendant's due process rights are not violated when the trial court has already found *bona fide* doubt to have been raised while section 104-11(b) aids the trial court in deciding whether there is a *bona fide* doubt of fitness." *Id*. at 217-18.

¶ 49 Here, after reviewing the record, we are unpersuaded by defendant's claim that there existed a *bona fide* doubt as to his fitness to stand trial and that the circuit court erred when it found that no such doubt existed and failed to appoint an expert to examine defendant and assist the court in making its fitness determination. Notably, the issue of defendant's fitness to stand trial was raised by defense counsel at defendant's express request. Counsel, however, indicated that she did not personally have fitness concerns regarding her client and that she had never had any problem communicating with defendant about his case during the previous two years that his case had been pending. In finding that no *bona fide* doubt as to defendant's fitness to stand trial existed, the court was mindful of counsel's representations to the court and indicated that it "defer[red] to the attorney being able to cooperate with defendant." See *Eddmonds*, 143 Ill. 2d at 518 (recognizing that any representation made by counsel regarding her client's competence or lack thereof is an important factor to consider when determining whether a *bona fide* doubt of fitness exists).

¶ 50 The court also relied upon its own observations of and interactions with defendant in finding that there existed no *bona fide* doubt as to his fitness. Specifically, the court indicated that it had previously had the opportunity to observe defendant's conduct and demeanor during pre-trial proceedings and had not observed anything that would suggest defendant was unable to understand the nature of those proceedings. Rather, the court found that defendant appeared to be correctly "oriented to the time and place and situation." Although the court did not receive or review any medical records pertaining to defendant's fitness, defendant was provided with the opportunity to discuss his psychiatric struggles and treatment. Defendant reported that he had been taken to the psychiatric unit of the jail, been prescribed unspecified psychotropic medication, and had recently received treatment at Cermak Hospital. Defendant further

represented that the treatment and medications that he recently received had enabled him to communicate with his attorneys and informed the court that he had just told his attorneys that he "ha[d] evidence that [was] going to exonerate [him] and prove [his] innocence." In finding that no *bona fide* doubt of fitness existed, the court acknowledged defendant's recent issues, but correctly observed that legal fitness was not synonymous with mental illness and that one who is "emotionally distraught, overly anxious, or even depressed [does not meet] the legal definition of fitness." See *Easley*, 192 Ill. 2d at 322 (recognizing that "the fact that a defendant suffers from mental disturbances or requires psychiatric treatment does not necessarily raise a *bona fide* doubt as to the defendant's ability to understand the proceedings and to assist counsel in the defense").

¶ 51 Although defendant is correct that "the court did not consider whether a fitness examination [pursuant to section 104-11(b) of the Code] would be helpful to make [its] determination," we emphasize that such an examination is discretionary rather than mandatory and that a circuit court is under no obligation to order an examination where, as here, it finds that no *bona fide* doubt of fitness exists. 725 ILCS 5/104-11(b) (West 2008); *Hanson*, 212 Ill. 2d at 217-218. Ultimately after reviewing the record, we do not find that the circuit court's fitness determination constituted an abuse of discretion and conclude that remand for a fitness examination is not warranted.

¶ 52 Other Crimes Evidence

¶ 53 Defendant next contends that he was denied a fair trial because the videotaped statement that was shown to the jury included an inadmissible reference to defendant's other pending cases and plea negotiations. He argues that the "improper admission of other crimes evidence and plea negotiations unfairly damaged [his] credibility because this case ultimately came down to [defendant's] credibility."

¶ 54 The State initially responds that defendant failed to properly preserve this claim for review because he never objected to the portion of the videotaped statement in which defendant referenced a misdemeanor and a "bad check" case in Indiana. On the merits, the State maintains that the evidence was "properly admitted because its prejudicial impact was negligible and because it showed that defendant's statement was voluntary."

¶ 55 As a threshold matter, defendant concedes this argument was not raised in the circuit court and that it was thus not properly preserved for appellate review. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (To properly preserve an issue for appeal, a defendant must object to the purported error at trial *and* specify the error in a post-trial motion); *People v. Bannister*, 232 Ill. 2d 52, 65 (2008) (same). In an effort to avoid forfeiture, defendant urges this court to review this claim for plain error. The plain error doctrine provides a limited exception to the forfeiture rule and allows for appellate review of forfeited issues in two limited circumstances: (1) where the evidence is closely balanced; or (2) where the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *Bannister*, 232 Ill. 2d at 65. Under the closely balanced prong of the plain error doctrine, the defendant must establish that the error prejudiced him. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). In contrast, under the second prong, prejudice to the defendant is presumed. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010); *Herron*, 215 Ill. 2d at 187. Ultimately, the defendant bears the burden of persuasion under either prong of the plain error doctrine. *Herron*, 215 Ill. 2d at 187.

¶ 56 Alternatively, defendant argues that counsel's failure to object to the inadmissible other crimes evidence amounted to ineffective assistance of counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must satisfy the two-prong test set forth in

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced him. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Evans*, 209 Ill. 2d 194, 220 (2004). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *Evans*, 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008). Reviewing courts have recognized that "the closely-balanced-evidence prong of the plain error doctrine and ineffective assistance claims based on evidentiary error are similar in that '[b]oth analyses are evidence-dependent and result-oriented.' " *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 47, quoting *People v. White*, 2011 IL 109689, ¶¶ 133-34. That is, under either analysis, the defendant is required to show prejudice. *White*, 2011 IL 109689, ¶ 133. Thus, where a defendant cannot establish prejudice, his claims of ineffective assistance of counsel and plain error under the closely-balanced-evidence prong both fail. *White*, 2011 IL 109689, ¶ 133; *Hensley*, 2014 IL App (1st) 120802, ¶ 47. Keeping these principles in mind, we address the substantive merit of defendant's claim.

¶ 57 As a general rule, evidence of other crimes or prior bad acts, that is, evidence of crimes or acts for which a defendant is not on trial, may be admitted only if it is relevant for a purpose other than to establish the defendant's bad character or his propensity to commit the charged offense. *People v. Pike*, 2013 IL 115171, ¶ 11; *People v. Evans*, 373 Ill. App. 3d 948, 958 (2007). Accordingly, other crimes evidence may be admitted to show modus operandi, intent, motive, identity, or the absence of mistake. *Pike*, 2013 IL 115171, ¶ 11. Other crimes evidence may also be used to rebut the defendant's assertion that he was coerced into making a false statement and to establish the credibility and reliability of the confession. *People v. King*, 109

Ill. 2d 514, 531 (1986); *People v. Walker*, 2012 IL App (1st) 083655, ¶ 47; *People v. Hale*, 2012 IL App (1st) 103537, ¶ 27. However, even where the other crimes evidence is relevant for purposes other than the defendant's criminal propensity, the evidence should not be admitted where its probative value is outweighed by its prejudicial effect. *Pike*, 2013 IL 115171, ¶ 11. Ultimately, the improper admission of other crimes evidence only necessitates reversal where it can be concluded that the evidence "must have been a material factor in the defendant's conviction such that, without the evidence, the verdict likely would have been different." *People v. Hall*, 194 Ill. 2d 305, 339 (2000).

¶ 58 Before defendant's videotaped statement was played for jury, defense counsel objected to airing portions of his statement that contained references to plea bargain negotiations in the instant case. The circuit court agreed that those references were improper and they were redacted from the videotape. The videotaped statement, however, also contained discussions between defendant and ASA DiBenedetto about charges that were pending against defendant in Indiana. Defense counsel did not raise any objection regarding the propriety of the references to Indiana cases and that portion of the videotape was played for the jury. Specifically, the jury heard and received a transcript of the following exchange:

" [ASA DiBenedetto]: Okay. Now in terms of uh—you do have some uh—you do have some cases pending in Indiana, correct?

[Defendant]: Not anymore.

[ASA DiBenedetto]: Well, let's talk about that. What, in terms of your understand[ing] what…what did you have pending in Indiana?

[Defendant]: I had a misdemeanor case and a possible check case.

[ASA DiBenedetto]: Okay. And we're [*sic*] check case, when you say check case like a …a bad check case or a forgery or something like that?

[Defendant]: Right. A bad…bad check case. ***

[ASA DiBenedetto]: All right. Now uh—we[re] there any agreements made regarding those cases?

[Defendant]: Sure, uh—the uh—the prosecutor agreed that it would be probably in the best interest for all to have all that stuff dismissed so I can proceed to Chicago.

[ASA DiBenedetto]: Okay. Now when you say the prosecutor you're not talking about me? Or, I…I haven't made you any deals about with that check case or any, any exchange, any agreements about the bad check case or anything like that?

[Defendant]: None whatsoever.

[ASA DiBenedetto]: Okay. It was another prosecutor an Indiana prosecutor?

[Defendant]: Sure.

[ASA DiBenedetto]: Okay. Um—Besides that agreement has there been any other agreements that you know of made regarding any cases that you have or anything like that?

[Defendant]: No."

¶ 59 After reviewing the record, we agree with defendant that the admission of this portion of his conversation with ASA DiBenedetto was improper. Although other crimes evidence may be introduced to rebut a defendant's assertion that he was coerced into making a false statement (*King*, 109 Ill. 2d at 531; *Walker*, 2012 IL App (1st) 083655, ¶ 47), neither defendant, nor defense counsel, ever claimed or insinuated that defendant's videotaped statement was involuntary. Indeed, at trial defendant acknowledged making the videotaped statement and

further acknowledged that the details he provided were "more or less" accurate. Although defense counsel made a comment about defendant's "supposed confession" during her opening statement, it is clear from the context of the statement that counsel was not disputing that defendant made the statement voluntarily; rather, counsel referred to the statement as a "supposed confession" because defendant stated that he left Hilderbrandt alive and tied to a pole in the basement of Lucca's and did not actually confess to killing Hilderbrandt. Accordingly, given that there was never any dispute that defendant voluntarily provided the videotaped statement, the State's argument that the other crimes evidence was admissible to rebut a claim of coercion is without merit. Having found that the admission of defendant's other crimes evidence constituted error, we next need to determine whether defendant was prejudiced by the error.

¶ 60 Defendant first argues that the admission of the other crimes evidence was prejudicial because the State's evidence that he killed Hilderbrandt was "entirely circumstantial," and the case against him was thus closely balanced. We disagree. At trial and in his videotaped statement, defendant admitted that he went to Lucca's with Hilderbrandt, restrained Hilderbrandt, and left him alone in the basement and tied to a pole. Although defendant denied beating Hilderbrandt, Cook County Assistant Medical Examiner Joseph Cogan found that Hilderbrandt had six fractured ribs, had sustained "more than 20" different types of external injuries, and concluded that Hilderbrandt had suffered blunt force trauma prior to his death. Although it was suggested that someone else had come into the restaurant and beaten Hilderbrandt, his body was found several hours after defendant admitted leaving the restaurant in exactly the same position in which defendant described. We are thus unpersuaded by defendant's assertion that the evidence against him was so closely balanced such that the reference to a misdemeanor and a bad check case in Indiana tipped the scales of justice against him. This is especially true given that

neither defendant nor defense counsel denied defendant had a criminal history. In his videotaped statement and at trial, defendant discussed meeting federal agents while he was in prison and being "on parole for intimidation" when he met Hilderbrandt. Defense counsel, in turn, conceded during her opening statement that defendant was "a veteran of the justice system." Accordingly, given that defendant cannot establish that he was prejudiced by the brief mention of plea negotiations on pending Indiana charges, his ineffective assistance of counsel claim and his plain error claim predicated on closely-balanced evidence are thus both without merit. See *White*, 2011 IL 109689, ¶¶ 133-34; *Hensley*, 2014 IL App (1st) 120802, ¶ 47.

¶ 61 Defendant, however, also suggests that the improperly admitted other crimes evidence constitutes error under the second prong of the plain-error doctrine. Specifically, he asserts that the admission of the other crimes evidence violated his "fundamental right to be tried solely for the crime with which he [wa]s charged using competent evidence." We disagree. Our supreme court has stated that " 'automatic reversal [under the second plain error prong] is only required where an error is deemed 'structural', *i.e.*, a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010) quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009). Furthermore, the court has cautioned that structural errors occur in only a very limited class of cases. *Glasper*, 234 Ill. 2d at 198.

¶ 62 In this case, although defendant contends that the other crimes evidence impacted his right to a fair trial, he does not argue or provide any authority that the admission of that evidence amounted to a structural error. In addition, we note that other courts have rejected claims that improperly admitted other crimes evidence constitutes plain error under the second prong. See, *e.g.*, *People v. Strawbridge*, 404 Ill. App. 3d 460, 469 (2010) (recognizing that "the admission of

other crimes evidence may be deemed harmless in appropriate circumstances" and that it "c[ould not be said] that such an error is so fundamental that it necessarily satisfies the second prong of the plain-error doctrine"). Ultimately, we find that defendant failed to meet his burden of showing that the error in question affected the fairness of his trial and constituted plain error under the second prong of plain-error review.

¶ 63 CONCLUSION

¶ 64 Accordingly, the judgment of the circuit court is affirmed.

¶ 65 Affirmed.