FOURTH DIVISION
August 20, 2015

No. 1-13-2469

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. 12 CR 11845
	)	
ARTHUR McNEAL,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Convictions for unlawful use of weapon by felon and aggravated unlawful use of weapon affirmed. State laid adequate foundation for admission of defendant's clothing at trial. Two State witnesses did not offer inadmissible opinion testimony where they observed hole in defendant's pants and testified regarding possibility that defendant had shot himself. Defendant's mittimus should be corrected to reflect conviction for Class 2 unlawful use of weapon by felon, and fines and fees should be reduced to $725.

¶ 2 A jury convicted defendant of unlawful use of a weapon by a felon (UUWF) and aggravated unlawful use of a weapon (AUUW). At trial, the evidence showed that, as defendant fled from two police officers, they heard a gunshot. One officer saw defendant pull an object out of his waistband before the gunshot, and the other saw defendant throw a gun away. Defendant suffered a gunshot wound in his left leg. The State's theory at trial was that defendant shot

himself as he tried to toss away the gun. The State introduced into evidence the pants defendant had been wearing on the night of his arrest, which had a hole in the left leg where defendant had been shot. The police officer who accompanied defendant to the hospital identified the pants as defendant's.

¶ 3 The emergency-room doctor and paramedic who treated defendant both testified. The doctor testified that defendant's wound and his pants were consistent with a gunshot wound, but he could not be sure what caused defendant's injury. He also opined that it was "possible" that defendant's injury had been self-inflicted. The paramedic observed defendant's pants and identified fibers around the hole that appeared to come from the inside of the pants toward the outside. The paramedic suggested this was "[m]ore indicative" of a bullet coming from inside of the pants.

¶ 4 On appeal, defendant first contends that the introduction of the pants was improper because the State failed to establish an adequate chain of custody for their admission. Defendant notes that, once the paramedic removed defendant's pants, no one testified as to how the pants were maintained before they appeared at trial. Defendant also argues that the testimony of the doctor and paramedic regarding the fibers of defendant's pants was improper because they were not experts in "fiber analysis."

¶ 5 We reject each argument. The State was not required to establish a chain of custody, as defendant's pants were not a readily substituted or altered item. Thus, the officer's testimony that defendant was wearing these pants on the night in question, and that they were in the same or substantially the same condition, was sufficient to establish the foundation for the pants' admission. We also find that neither the testimony of the doctor nor the paramedic deprived defendant of a fair trial. The doctor was admitted as an expert in emergency-room medicine and

could offer his opinion on whether defendant's injury was consistent with a self-inflicted gunshot wound. And the paramedic simply described the hole in defendant's pants and drew a basic inference that did not require any expertise in fiber analysis. In any event, even if their testimony was improper, its admission would not rise to the level of plain error requiring reversal despite defendant's forfeiture of the issue.

¶ 6 Finally, the parties agree that defendant's mittimus should be corrected to reflect a conviction for Class 2 UUWF and that the fines and fees levied on him should be reduced from $795 to $725. We direct the clerk of the circuit court to do so.

¶ 7 I. BACKGROUND

¶ 8 The State charged defendant with five offenses related to his possession of a firearm. The State proceeded to trial on two counts: Count 1, which charged defendant with UUWF, and Count 5, which charged defendant with AUUW. In Count 1, the State alleged that defendant had "been previously convicted of the felony offense of aggravated assault."

¶ 9 At defendant's trial, Chicago police officers Daniel Pacelli and Robert Stegmiller testified that they were patrolling the Englewood neighborhood in Chicago on February 8, 2012, around 8:50 p.m. As Pacelli and Stegmiller rode in separate, unmarked cars, they saw a group of about 10 people standing near 5920 South Wood Street. Pacelli testified that defendant, who was among the group, looked at his and Stegmiller's cars, then walked away from the group and stood near a gate in front of 5920 South Wood. Stegmiller drove his car to the alley behind 5920 South Wood, preparing for the possibility that defendant might flee. Pacelli parked about 15 feet away from the group and got out of his car. As Pacelli approached defendant, he said, "[P]olice," and defendant ran into a nearby gangway.

¶ 10 Pacelli followed defendant on foot through the gangway. During his pursuit, Pacelli saw defendant remove an object from the waistband of his pants. Pacelli then heard a gunshot, but did not see any muzzle flashes. Defendant turned the corner at the back of the house at 5920 South Wood, out of Pacelli's view.

¶ 11 Stegmiller, still waiting in the alley, also heard the gunshot. He looked through a fence into the backyard of 5920 South Wood and saw defendant run into the yard, bend down, and toss an object against the fence. Stegmiller broke through the fence and detained defendant. While searching defendant, Stegmiller felt blood near defendant's waist. Defendant said, "I am shot." Stegmiller saw a handgun sitting in the yard in the area where he had seen defendant throw the object.

¶ 12 After Stegmiller detained defendant, Pacelli entered the backyard. He saw the handgun, too. Later, Pacelli recovered a bullet from the gangway where defendant had been running.

¶ 13 An ambulance arrived and took defendant to the hospital. Paramedic Mitchell Bartecki treated defendant in the back of the ambulance. Stegmiller accompanied defendant in the ambulance. Stegmiller testified that he saw Bartecki remove defendant's pants in the ambulance and that he "may have" helped Bartecki remove defendant's pants.

¶ 14 The State asked Stegmiller to identify the items of clothing defendant had been wearing on February 8, 2012. Stegmiller identified State's Exhibit 5F as "the pants that [defendant] was wearing that night that [were] removed *** inside the ambulance." He said that the pants were in the same, or substantially the same, condition as when he saw defendant wearing them.

¶ 15 Bartecki testified that he removed defendant's clothing once he was in the ambulance. Bartecki put defendant's clothes "in a pile" in the ambulance and later gave them to a nurse at the

hospital. Bartecki saw a graze wound on defendant's lower left abdomen and an "entrance exit" wound on defendant's upper left thigh.

¶ 16 Bartecki identified Exhibit 5F as "a pants" with a hole "in the upper left hand portion" of the leg. Bartecki testified that the hole "could be" consistent with a bullet hole. Bartecki identified fibers "coming from the inside [of the pants] outside." The State then asked Bartecki about what those fibers showed:

> Q. And you have treated patients before who have been shot; correct?
>
> A. Correct[.]
>
> Q. And have you treated patients who have been shot by an individual standing outside the body?
>
> A. Yes.
>
> Q. Have you had occasion to look at their clothing right after they have been shot?
>
> A. Multiple times[.]
>
> Q. And in the course of all of that experience, sir, would you agree that the fibers on this [*sic*] particular pants is [*sic*] more indicative or less indicative of a person being shot from the outside or the bullet coming from within the pants?
>
> A. Less indicative [of] being shot from the outside. More indicative [of] being shot from the inside.

Bartecki testified that the pants had no other holes in them.

¶ 17 On cross-examination, Bartecki testified that he had no forensic-science training or experience. He had "no idea" how the bullet entered defendant's leg. He also "couldn't say" whether or not the hole in the pants had been made by a pencil.

¶ 18 Dr. Jason Koob, a doctor in the third year of his residency, treated defendant at the emergency room. Koob had treated approximately 50 gunshot wounds in his time as a doctor. The trial court received Koob as an expert in emergency room medicine.

¶ 19 Koob observed abrasions on defendant's right elbow and on the lower left side of his stomach. He also saw two puncture wounds on defendant's left thigh. The puncture wounds appeared to be consistent with a gunshot wound.

¶ 20 The State had Koob examine Exhibit 5F. Koob did not remember defendant wearing pants on February 8, 2012, and he did not recognize the pants when the State showed them to him. The pants had "nothing to do with" his diagnosis of defendant. Koob identified a small hole on the left side of the pants. He testified that it was "possible" that the hole could have been caused by a bullet. Like Bartecki, the State questioned Koob about fibers surrounding the hole:

> Q. And can you describe for the members of the jury exactly what the fibers looked like with that hole?
>
> A. The fibers of the pants *** are maroon-ish [*sic*]. There is also some black fibers and they appear to be kind of coming outward.

Koob also identified a brown stain on the left side of the pants, which, he testified, "could resemble" dried blood.

¶ 21 The State asked Koob, "Would [defendant's] injuries as presented to you be consistent with having a gun inside of a waistband and that gun firing?" Before Koob could answer, the trial court granted defense counsel's request for a sidebar. Outside the jury's presence, defense counsel argued that Koob was not qualified to give an opinion about whether the gun could have been fired from inside defendant's pants because he had no experience with forensic pathology. The trial court ruled that Koob could testify "about consistency," but said that Koob could not

give "an opinion that, in fact," defendant shot himself. After the sidebar concluded, the State asked whether, based on defendant's injury "and the pants," defendant could have shot himself. Koob testified that it was "possible" that defendant had shot himself.

¶ 22 Firearms identification testing could not determine whether or not the bullet that Pacelli recovered had been fired from the handgun found in the backyard of 5920 South Wood. The tests excluded both Pacelli's and Stegmiller's firearms as possible sources of the bullet.

¶ 23 The parties stipulated that defendant had been convicted "of a qualifying felony offense for purposes of the charge of unlawful use of a weapon by a felon." At the conclusion of the State's case, the court admitted Exhibit 5F without objection from defense counsel.

¶ 24 In closing, the State argued that defendant had accidentally shot himself while he removed the gun from his waistband. The State argued that Bartecki testified that the hole in defendant's pants matched up with the wound on his left leg, and that Koob testified that the wound was consistent with a gunshot wound. The State then urged the jury to view the pants in the jury room:

> "I *** submit to you that the pants in this case, the condition of the pants, when you look at the hole, is very unique, because, as you will see in the jury room, when you look at it, the fibers of the pants, the fibers, are sticking out of the pants. They're not going in; they're sticking out.
>
> So, again, if you got shot from somebody who was standing right in front of you, they shot you; the bullet entered your leg through your pants; the pant fibers would be going in, not out. It's going out, ladies and gentlemen, because he has the gun in his waistband, and he's running away with his legs obviously moving and angulating [*sic*],

> when he pulls it out, it goes off through the leg, and out the pants. Strongly probative circumstantial evidence."

Defense counsel argued that Koob, whom defense counsel called the "linchpin" for the State's case, "couldn't tell [the jury] anything for sure." In its rebuttal closing argument, the State said that Koob was not the linchpin of its case, the pants were:

> "The pants. This is my linchpin. This is my independent evidence, the maroon pants that the Defendant was wearing, and I'm folding them in half to show the left leg, and the hole that's in them. And let's take a look at the backside. No hole.
>
> If the Defendant had been shot by anyone else, there would be two holes in these pants to explain the entrance and the exit. There is none. The Defendant shot himself while wearing those pants."

The jury found defendant guilty of both UUWF and AUUW.

¶ 25 At sentencing, the State presented a certified copy of defendant's conviction for "two counts of reckless endangerment" in Tennessee, which, according to the State, made defendant eligible for "a Class 2 [sentence] on Count 1," the UUWF count. The court said that Count 5, the AUUW count carried a greater sentence than Count 1. Thus, the court merged Count 1 into Count 5 and sentenced defendant to nine years' incarceration.

¶ 26 The court also imposed $725 in fines, fees, and costs, including a $15 state police operations fee and a $5 electronic citation fee. Defendant's mittimus showed he had earned 63 days of pretrial detention credit for his time spent in custody awaiting trial. Defendant appeals.

¶ 27 II. ANALYSIS

¶ 28 A. Foundation for Defendant's Pants

¶ 29 Defendant first argues that the trial court erred in allowing the State to admit Exhibit 5F, the pants defendant allegedly wore on the night in question, because the State did not lay an adequate foundation for their admission. The State claims that defendant forfeited review of this issue by failing to object to the admission of Exhibit 5F at trial.

¶ 30 Defendant acknowledges his forfeiture, but argues that forfeiture does not bar review of this error both because it constituted plain error, and because his trial counsel was ineffective for failing to object. Because the first step of plain-error review is to determine whether any error occurred (*People v. Thompson*, 238 Ill. 2d 598, 613 (2010)), we first examine the admissibility of the pants.

¶ 31 Evidentiary rulings are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, or so unreasonable that no reasonable person would take the view adopted by the trial court. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009).

¶ 32 The party seeking to introduce an object into evidence must lay an adequate foundation in one of two ways: (1) by a witness identifying the object; or (2) by a chain of possession. *People v. Woods*, 214 Ill. 2d 455, 466 (2005). If the object has readily identifiable and unique characteristics, and its composition is not easily subject to change, then the proponent of the evidence lays an adequate foundation by having a witness testify that the object being admitted is the same object recovered, and that it is in substantially the same condition as when it was recovered. *Id.* If, however, the object is "not readily identifiable or may be susceptible to tampering, contamination or exchange," then the proponent of the evidence must establish a

chain of custody to prove that the object being admitted is the same object that was recovered. *Id.* at 467.

¶ 33 The State claims that it laid a sufficient foundation for defendant's pants in this case because Stegmiller identified Exhibit 5F as defendant's blood-stained pants, which Stegmiller saw Bartecki remove from defendant in the ambulance. But defendant argues that Stegmiller's testimony was insufficient to lay a foundation, because the hole in the pants was susceptible to being altered, and the State failed to establish a chain of custody for the pants.

¶ 34 The State cites *People v. Morris*, 2013 IL App (1st) 111251, in support of its contention that it laid a sufficient foundation. In *Morris*, the defendant alleged that the State failed to establish an adequate chain of custody for the introduction of his pants and boots, which had the victim's blood on them, at his trial. *Id.* ¶¶ 3-4. At trial, four witnesses had identified the pants and boots as the defendant's, and two of those witnesses said that the pants and boots were in the same or substantially the same condition as when they saw the defendant wearing them. *Id.* ¶¶ 40, 43, 46, 50. This court held that, in light of these witnesses' identification of the bloody clothing, the State established a sufficient foundation without proving a chain of custody. *Id.* ¶¶ 87-88. We noted that the pants and boots were items that were "readily identifiable by unique characteristics," not fungible, transferrable items that required a chain of custody for possession. *Id.* ¶ 87.

¶ 35 We also rejected defendant's argument that, because the blood on the pants and boots was a substance capable of being contaminated, a chain of custody was necessary. *Id.* ¶¶ 89, 91. We distinguished cases finding that vials or samples of blood required a chain of custody, stating that, while "a sample of blood itself" might require a chain of custody, the blood at issue "was

contained on unique articles of clothing that were identified by several witnesses at trial." *Id.* ¶ 91.

¶ 36 We find *Morris* to be persuasive. Like the bloody clothing worn by the defendant in *Morris*, defendant's bloody pants in this case were readily identifiable by unique characteristics that were not easily subject to change. Defendant's pants were not items that could easily be tampered with or substituted without changing their obvious appearance. Thus, they were distinct from readily interchangeable, fungible items such as a bullet, a bag of narcotics, or a vial of blood. *Cf. People v. Smith*, 2014 IL App (1st) 103436, ¶ 46 ("Bullets and cartridge cases are not readily identifiable or unique items."); *People v. Britton*, 2012 IL App (1st) 102322, ¶ 18 (chain of custody necessary for narcotics unless somehow made unique); *People v. Bradney*, 170 Ill. App. 3d 839, 864-65 (1988) (chain of custody necessary for blood sample). Moreover, the bloodstain and hole on defendant's pants set them apart from other pairs of maroon pants. The State could thus rely on identification alone to lay the foundation for their admission, which it did when it presented Stegmiller's testimony identifying Exhibit 5F as the pants he saw defendant wearing on the night of his arrest.

¶ 37 Defendant argues that *Morris* is distinguishable because, in this case, defendant's pants had a hole in them that could have been manipulated or altered. We disagree for two reasons. First, defendant ignores the fact that Stegmiller testified that the pants were in the same or substantially the same condition as when he saw Bartecki take them off of defendant, at which time they already had the hole in them. If Stegmiller had testified that he did not recognize the hole on the pants, or that the hole looked different, then the State's foundation may have been inadequate. But Stegmiller did not, and defendant presented no evidence to suggest that the hole had been altered since the night of his arrest. Second, we rejected a similar argument in *Morris*,

where the defendant argued that the bloodstains on his pants and boots could have been tampered with or contaminated. Like the bloodstains in *Morris*, the hole in defendant's pants, although capable of being altered, did not fundamentally change the nature of the pants from an item with unique characteristics to a fungible, easily manipulated item such as a vial of blood or bag of drugs.

¶ 38 Defendant cites *People v. Rogers*, 42 Ill. App. 3d 499 (1976), in support of his claim that the State's foundation was inadequate. In *Rogers*, the State introduced a pair of bloody shorts and a bloody undershirt in order to show the severity of the beating the victim sustained. *Id.* at 501. The victim's mother testified that the shorts and shirt belonged to the victim, but did not say that the victim wore those clothes on the date of the incident. *Id.* Nor was there any evidence showing that the shorts or shirt were taken from the victim at the hospital, or that the blood on the clothing was the victim's. *Id.* The court held that the "sparse foundation" laid by the State failed to show the items' "connection to the crime or to the defendant" and were thus inadmissible. *Id.* at 502.

¶ 39 The State's foundation in this case was markedly different from the sparse foundation laid in *Rogers*. Unlike *Rogers*, where no one said that the victim wore the clothing on the night of the offense, Stegmiller testified in this case that he saw defendant wearing the pants introduced at trial on the night he arrested him. Stegmiller also said that those pants were in the same or substantially the same condition as when he saw defendant wearing them. Thus, unlike *Rogers*, the State established an adequate foundation for the admission of Exhibit 5F.

¶ 40 Because we hold that the trial court's admission of the pants into evidence was not error, we obviously find no plain error, either. Nor do we need to address whether counsel was ineffective for failing to object to the pants' admission based on the supposed lack of foundation, because such an objection would have been futile. See *Smith*, 2014 IL App (1st) 103436, ¶ 64

(counsel could not be ineffective for objecting to lack of foundation when foundation was sufficient).

¶ 41 B. Opinion Testimony

¶ 42 Next, defendant contends that the trial court erred in allowing Bartecki and Dr. Koob to opine that the location of the fibers surrounding the hole in defendant's pants suggested that a bullet had been fired from inside the pants. Defendant argues that neither Bartecki nor Koob had any training or experience in fiber analysis and were thus unqualified to state such an expert opinion. The State contends that defendant forfeited review of this issue, that Bartecki was qualified to testify as to the characteristics of the alleged bullet hole in defendant's pants, and that Koob did not testify as to what the fibers may have shown.

¶ 43 Once again, defendant acknowledges his forfeiture but seeks review under the plain-error doctrine and on the basis that his trial attorney was ineffective for failing to object. We turn first to whether the trial court improperly admitted this testimony. See *Thompson*, 238 Ill. 2d at 613 (first step of plain-error review is to determine whether error occurred).

¶ 44 Illinois Rule of Evidence 702 (eff. Jan. 1, 2011) provides that a witness "qualified as an expert by knowledge, skill, experience, training, or education" may render an opinion as to matters requiring "scientific, technical, or other specialized knowledge." A witness cannot offer an opinion on matters outside his or her training or expertise. See, *e.g.*, *People v. Park*, 72 Ill. 2d 203, 208-11 (1978) (sheriff's deputy without training in identifying narcotics could not offer opinion on whether substance was cannabis); *People v. Leahy*, 168 Ill. App. 3d 643, 650 (1988) (substance abuse counselor could not offer opinion on symptoms of diabetic insulin reaction). The proponent of the expert testimony bears the burden of establishing the expert's

qualifications. *People v. Thill*, 297 Ill. App. 3d 7, 11 (1998). The decision to admit expert testimony, and to admit evidence generally, is reviewed for an abuse of discretion. *Id.*

¶ 45 We turn first to Koob's testimony. The trial court permitted Koob to testify as an expert in emergency-room medicine, a qualification that defendant does not challenge. When the State showed Koob defendant's pants, it asked him to describe the hole. He said that there were black and maroon fibers near the hole that "appear[ed] to be kind of coming outward." Later, the State asked whether, "based on [defendant's] injury and the pants," it was "possible" that defendant shot himself. Koob said that it was possible.

¶ 46 This testimony was not outside Koob's expertise as an emergency-room physician. He simply testified that it was "possible" that defendant's injury was a self-inflicted gunshot wound. As a doctor with experience treating gunshot wounds, Koob could opine as to the source of defendant's injury. Koob did not affirmatively say that the fibers showed that the bullet came from inside defendant's pants. In fact, he clarified that defendant's pants had nothing to do with his diagnosis or treatment of defendant. Koob did not testify outside his area of expertise, and we see no abuse of discretion in the admission of his testimony.

¶ 47 We also disagree with defendant's argument that Bartecki was required to be an expert in "fiber analysis" to render his opinion. Bartecki testified that the fibers surrounding the hole were "coming from the inside [of the pants] outside." Based on that observation, and his having observed the clothing of other gunshot victims, Bartecki testified that the fibers were "[m]ore indicative" of the bullet having come from inside the pants. This was not a display of "scientific, technical, or other specialized knowledge." Ill. R. Evid. 702 (eff. Jan. 1, 2011). Instead, Bartecki drew a simple inference that the bullet came from inside the pants because the fibers looked like they had been blown from the inside of the pants outward. This was an inference that any

individual could have drawn, regardless of their lack of experience or training. In fact, the State drew the same inference during its closing argument, without relying on any opinion testimony. The appearance of the fibers alone was sufficient to support such an inference.

¶ 48 By way of comparison, a witness would not need to be an expert in order to draw the inference that glass located just outside a broken window meant that it was more likely that the window was broken from the inside. Nor would a witness need to be an expert to draw the inference that a dent in a car door suggested that something hit it from the outside rather than the inside. Likewise, Bartecki did not need any heightened knowledge of pant fibers to draw the conclusion he did. He just relied on the appearance of the fibers and his common sense.

¶ 49 Defendant cites *People v. Sanchez*, 115 Ill. 2d 238 (1986), in support of his contention that Bartecki should have had some specialized training or experience in fiber analysis. But *Sanchez* illustrates why Bartecki's testimony was not expert testimony. In *Sanchez*, an expert testified that he conducted a microscopic analysis of hairs and fibers located near the victim's body with hairs and fibers found in the defendant's house and car. *Id.* at 255. In contrast, Bartecki did not conduct any comparison or microscopic analysis of the fibers surrounding the hole in defendant's pants. He simply said the fibers appeared to be the product of something coming from inside the pants. This was not the type of forensic science used in *Sanchez*.

¶ 50 Defendant may have had an argument that Bartecki's opinion testimony was irrelevant or unhelpful because the jury could have easily looked at the pants and drawn the same conclusion without hearing Bartecki's opinion. See Ill. R. Evid. 701(b) (eff. Jan. 1, 2011) (lay opinion testimony must be "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue"); *People v. Mister*, 2015 IL App (4th) 130180, ¶ 68 (witness may only give opinion as to person's identity on a videotape if there is some reason the witness

would be more likely to correctly identify the person; jury could just as easily form opinion regarding identity). But defendant makes no such argument on appeal, and he has thus forfeited it. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Myers*, 386 Ill. App. 3d 860, 863 (2008) (arguments not raised on appeal are forfeited). Instead, he relies solely on the argument that Bartecki lacked the expertise to draw conclusions from the direction of the fibers. We do not agree that any specific qualifications were necessary to draw such a basic conclusion.

¶ 51 Moreover, even assuming that the admission of Koob's and Bartecki's testimony was erroneous, we would still find that it did not constitute plain error. Plain error occurs in two scenarios: (1) where 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) where 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. *Thompson*, 238 Ill. 2d at 613. Here, defendant relies solely on the second prong of plain error. Specifically, he claims that the erroneous admission of this "key evidence" denied him a fair trial and challenged the integrity of the judicial process.

¶ 52 We disagree that Koob or Bartecki provided the State with "key evidence." The key issue at trial was whether defendant carried the handgun found in the backyard of 5920 South Wood on his person. See 720 ILCS 5/24-1.1(a) (West 2012) (person commits UUWF when he knowingly possesses a firearm on or about his person and has been convicted of felony); 720 ILCS 5/24-1.6(b) (person commits AUUW when he knowingly possesses a firearm on or about his person on a public street). Neither Koob nor Bartecki could offer any testimony regarding that issue; they were not present when defendant was being chased by the police. While the fact

that a bullet was fired from inside defendant's pants would suggest he had carried the gun on his person, Stegmiller testified that he saw defendant throw the gun away in the backyard. And Pacelli testified that he heard a gunshot after defendant removed an object from his waistband. This testimony was certainly more probative of the elements of the offenses than Koob's and Bartecki's inferences about the appearance of defendant's pants after the fact.

¶ 53 Defendant notes that the State relied heavily on the pants in its closing argument, characterizing them as the "linchpin" of its case. It is important to note that the State never called either Koob or Bartecki key witnesses or said that their testimony was the linchpin of the case. Instead, the State argued that the pants *themselves* were the key to its case, then drew inferences from the appearance of the bullet hole to argue that a bullet had been fired from inside them. The State did not rely on any witness's opinion regarding the bullet hole in drawing those inferences; it simply relied on the appearance of the hole itself. Thus, any improper testimony had little effect on defendant's case, and it cannot be said that it threatened defendant's right to a fair trial.

¶ 54 Finally, we note that defendant cannot establish that his attorney was ineffective for failing to object to Koob or Bartecki's testimony, because he cannot show that his attorney's failure to object prejudiced him. See *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). (defendant asserting ineffective assistance of counsel must establish prejudice). As we noted above, this testimony had little impact on his case. And objecting to it would do nothing to change the fact that Stegmiller saw defendant throw the gun away. Thus, there is no reasonable likelihood that the outcome of the trial would have been different had his trial attorney objected. See *id.* (to establish prejudice, defendant must show that there was reasonable probability that, but for counsel's deficient performance, result of proceedings would have been different).

¶ 55 C. Defendant's Sentence

¶ 56 In his opening brief, defendant argued that the trial court erred in sentencing him on his Class 3 UUWF conviction, because his Class 2 AUUW was actually the more serious offense, despite carrying a lower sentencing range. In response, the State argued that defendant had actually been charged with and convicted of Class 2 UUWF, not Class 3 UUWF. The State asked this court "to modify defendant's void sentence to a Class 2 felony." In his reply brief, defendant conceded that he was convicted of Class 2 UUWF, but argued that "his sentence of nine years should not be increased because it [was] within the legal range for Class 2" UUWF.

¶ 57 The UUWF statute provides for differing penalties depending on the nature of the defendant's prior felony conviction. When the defendant has been convicted of a prior "forcible felony," UUWF is a Class 2 offense, with a 3-to-14-year sentencing range. 720 ILCS 5/24-1.1(e) (West 2012). When the defendant has not been convicted of a "forcible felony," UUWF is a Class 3 offense with a 2-to-10-year sentencing range. *Id.* When the defendant has a prior felony conviction, AUUW is a Class 2 felony with a sentencing range of three to seven years. 720 ILCS 5/24-1.6(d)(3) (West 2012).

¶ 58 At sentencing, the State presented defendant's Tennessee conviction and argued that it qualified defendant for the Class 2 sentencing range for UUWF. But the trial court sentenced defendant on Count 5, his Class 2 AUUW conviction. The trial court said that it did so because that count carried a higher sentencing range, even though it did not. The trial court also said that it was sentencing for a Class 3 offense, even though defendant had not been convicted of a Class 3 offense. And defendant's mittimus reflects a violation of section 24-1.1(a), the UUWF statute, and says that it was a Class 3 offense. As best we can tell, the trial court thought that Count 5 had charged defendant with UUWF, and that defendant was only guilty of the Class 3 form of UUWF.

¶ 59 Regardless of how the trial court was mistaken, defendant's mittimus should be corrected to reflect a conviction for Class 2 UUWF, the actual offense of which he was convicted. See *People v. Gordon*, 378 Ill. App. 3d 626, 641 (2007) (reviewing court may order mittimus corrected to reflect defendant's actual conviction). Defendant's Tennessee conviction was for aggravated assault, an offense which, the parties agree, constituted a "forcible felony" under the UUWF statute. See 720 ILCS 5/2-8 (West 2012) (defining "forcible felony" as "any *** felony which involves the use or threat of physical force or violence against any individual"); Tenn. Code Ann. § 39-13-102 (Supp. 2011) (defining aggravated assault as an assault that causes "serious bodily injury," involves the use or display of "a deadly weapon," or involves an attempt "to cause bodily injury to another by strangulation"). Thus, defendant should have been sentenced on Count 1, in the Class 2 range in section 24-1.1(e).

¶ 60 While the State did not use the words "forcible felony," or indicate its intention to seek a Class 2 sentence on the UUWF count in the information, it was not required to do so. The Illinois Supreme Court recently held that the increased penalties in section 24-1.1(e) are not sentence enhancements; they are simply different sentences for different offenses. *People v. Easley*, 2014 IL 115581, ¶ 22. This court has applied that holding to the "forcible felony" provision of section 24-1.1(e). See, *e.g.*, *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 25; *People v. Wilbourn*, 2014 IL App (1st) 111497, ¶¶ 15-17; *People v. Polk*, 2014 IL App (1st) 122017, ¶¶ 55-57. Because he had a prior conviction for a "forcible felony"—the Tennessee conviction listed in Count 1—the only authorized sentencing range for defendant's UUWF conviction in this case was the Class 2, 3-to-14-year range in section 24-1.1(e). The State was not required to provide him notice of that penalty because it is the only one he could have received. *Easley*, 2014 IL 115581, ¶¶ 22, 24.

¶ 61 Despite the trial court's confusion, defendant's 9-year sentence is within the 3-to-14-year sentencing range in section 24-1.1(e). Thus, his sentence is not void and resentencing is unnecessary. See *People v. Arna*, 168 Ill. 2d 107, 113 (1995) ("A sentence which does not conform to a statutory requirements is void."). We direct the clerk of the circuit court to correct defendant's mittimus to reflect a conviction for Class 2 UUWF.

¶ 62 D. Fines, Fees, and Costs

¶ 63 Finally, defendant argues, and the State concedes, that the fines, fees, and costs imposed by the trial court should be reduced from $795 to $725. Specifically, defendant raises three issues with those charges: (1) $50 in fines should be offset by the $5-per-day credit he accrued while awaiting trial; (2) the $15 state police operations fee should be offset by his $5-per-day credit; and (3) the $5 electronic citation fee should be vacated. We review the propriety of court-ordered fines and fees *de novo*. *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 23.

¶ 64 A criminal defendant earns $5 of credit for every day he or she spends in custody prior to sentencing, which must be applied to offset any fines imposed by the trial court. 725 ILCS 5/110-14(a) (West 2012). But the $5-per-day credit applies only to fines, not to fees. *People v. Jones*, 223 Ill. 2d 569, 580 (2006).

¶ 65 Here, defendant spent 63 days in presentence custody, giving him $315 of available credit to offset his fines. The court imposed $50 in fines subject to offset: a $10 mental health court fine, a $5 youth diversion/peer court fine, a $5 drug court fine, and a $30 Children's Advocacy Center fine. See *People v. Graves*, 235 Ill. 2d 244, 251 (2009) (mental health court and youth diversion/peer court fines subject to offset); *People v. Sulton*, 395 Ill. App. 3d 186, 193 (2009) (drug-court fine subject to offset); *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009) (Children's Advocacy Center fine subject to offset). Moreover, the $15 State Police operations

fee, while labeled as a "fee," is actually a fine subject to offset. *Millsap*, 2012 IL App (4th) 110668, ¶ 31. Thus, $65 in fines should be offset by defendant's $5-per-day credit.

¶ 66 Finally, defendant and the State agree that the court incorrectly imposed a $5 electronic citation fee pursuant to section 27.3e of the Clerk of Courts Act. 705 ILCS 105/27.3e (West 2012). Section 27.3e provides that this fee must be imposed whenever the defendant has been convicted in "any traffic, misdemeanor, municipal ordinance, or conservation case." *Id.* Defendant has not been convicted of any of these types of offenses. Thus, we vacate the $5 electronic citation fee. In sum, defendant's fines, fees, and costs should be reduced from $795 to $725.

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated, we affirm defendant's conviction. The State laid an adequate foundation for the admission of defendant's pants and did not introduce improper opinion testimony regarding the hole in those pants. We direct the clerk of the circuit court to issue a corrected mittimus showing that defendant has been convicted of Class 2 UUWF, and to correct the fines and fees order in accordance with this order.

¶ 69 Affirmed; mittimus corrected; fines and fees order corrected.