2015 IL App (4th) 130856-U

NO. 4-13-0856

FILED
December 4, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
TERRANCE L. GARRETT,	)	No. 13CF204
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justice Holder White concurred in the judgment.
Justice Harris specially concurred.

ORDER

¶ 1 *Held*: (1) Defendant was not prejudiced by the trial court's decision to bar him from presenting his theory of self-defense to the jury in an opening statement.

(2) The trial court did not abuse its discretion in two evidentiary rulings.

(3) Defendant forfeited any challenge to the order for restitution.

¶ 2 In August 2013, defendant, Terrance L. Garrett, was convicted by jury of aggravated battery to a police officer (720 ILCS 5/12-3.05(d)(4) (West 2012)). In September 2013, the trial court sentenced defendant to eight years' imprisonment and ordered him to pay $2,481.39 restitution. On appeal, defendant argues the trial court erred by (1) preventing him from mentioning the theory of self-defense during his opening statement; (2) barring cross-examination of the allegedly battered police officer to show the officer did not report an injury to

his hand incurred during the altercation with defendant; (3) prohibiting testimony showing defendant was not photographed, contrary to established book-in procedures; and (4) ordering restitution without considering defendant's ability to pay and without setting a payment schedule. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In April 2013, defendant was charged by information with two counts of aggravated battery to a peace officer. Count I asserts defendant, on or about April 11, 2013, committed a battery that knowingly caused harm to Jonathan Maloney, a correctional officer, while performing his official duties (720 ILCS 5/12-3.05(d)(4)(i) (West 2012)). Count II asserts the same conduct by defendant and that contact was of an insulting or provoking nature (720 ILCS 5/12-3.05(d)(4) (West 2012)).

¶ 5 A jury trial was held in August 2013. Before opening statements, defense counsel and the trial court had the following conversation:

> "[DEFENSE COUNSEL]: *** Based on your ruling earlier this morning, I just wanted to be clear before opening statements so I don't cross any lines. You ruled that we cannot mention self-defense. It had been my intention to state what we believe the evidence will show, which is that Officer Maloney entered the cell alone, struck my client first, and that [defendant] defended himself.
>
> THE COURT: Nope.
>
> [DEFENSE COUNSEL]: Based on what you said earlier

today, it's my belief that I'm not allowed to do that.

THE COURT: That's correct. I'm not saying that you can't raise self-defense. I'm just saying that you can't raise it in your opening statement and then have your client decide he doesn't want to testify and then have that out in front of a jury with no way of addressing it. We've had that issue before. I'm not going to have it again."

¶ 6 At trial, Officer Maloney testified he worked as a correctional officer at the Public Safety Building (jail), the local correctional facility for Vermilion County. Officer Maloney typically worked in the booking area of the jail. When individuals were arrested and brought to the PSB, they were processed in the book-in area. Their basic information was taken. Officers took the arrestees' property and photographed and fingerprinted the individuals before taking them to a cell.

¶ 7 Officer Maloney testified, on April 10, 2013, he worked third-shift in the book-in area. Around midnight, defendant arrived at the book-in area. Defendant was not cooperating and would not enter the area on his own. Defendant acted as if he was passed out. Officer Maloney had to call other officers for assistance. Approximately four officers, including Sergeant Colin Osterbur, carried defendant into the book-in area and laid defendant on the floor. Officers attempted to wake defendant by using smelling salts. The salts had no effect. Defendant remained on the ground and did not respond. Because of his conduct, defendant was unable to be processed. The officers took defendant's property and carried him to a cell, which was approximately 4 by 8 feet. They closed the door, and Officer Maloney walked "to the area

as far as the control room where [he] usually [sat] for the rest of the evening." Approximately 30 to 45 minutes later, Officer Maloney heard defendant knocking on the door and yelling. Defendant wanted to speak to someone. Defendant was the only one in that area at the time.

¶ 8 According to Officer Maloney, he went to defendant's cell. The door was solid, with a window and a food slot. Defendant yelled through the door, asking why he was there. Officer Maloney told defendant he was not cooperating when he arrived so they placed him in the cell. Officer Maloney told defendant they would get him processed and get him "out of there." When Officer Maloney opened the door, he explained to defendant, had he been processed, defendant would have been taken to a cell where others were. Defendant asked why he was at the jail. Officer Maloney responded he did not know the reason; he was only concerned about getting him processed. Officer Maloney stepped into the cell. Defendant stepped toward him and punched the officer in his eye. Officer Maloney stepped in, grabbed defendant by the shoulders and ordered defendant to the floor. Defendant continued to struggle against Officer Maloney. He flailed and swung his arms. Officer Maloney took control of defendant by getting him to the floor and punching defendant twice in the face. Officer Maloney picked up defendant and put him on his bunk. Officer Maloney exited the cell.

¶ 9 Officer Maloney testified he then went to the fourth floor to inform Sergeant Osterbur of the attack. Officer Maloney had blood running down his face. His face was swollen and throbbing near his right eye. Officer Maloney's hand was swollen. Officer Maloney sought medical treatment at the emergency room. At the emergency room, his wound was cleaned, glued, and x-rayed. Officer Maloney received a tetanus shot and was released. Officer Maloney photographed his injuries.

¶ 10 On cross-examination, Officer Maloney testified he did not mention the injury to his right hand in his report, but he did mention he struck defendant with a closed fist twice.

¶ 11 Defense counsel attempted to ask Officer Maloney questions regarding his injury to his hand and whether he reported the injury in his police report. The following discussion occurred before the trial court:

> "[DEFENSE COUNSEL]: Your Honor, what I'm trying to show is that Officer Maloney has had various—he's done police reports; he's done memorandums; he's been in court. He's never mentioned the injury to his right hand. So I'm simply stating, your Honor, that there is an issue here.
>
> THE COURT: It's not an issue because the Defendant's charge isn't based on his injury to his right hand. The Defendant's charge is based on the injury to the eye.
>
> [DEFENSE COUNSEL VAN FLEET]: I understand that.
>
> THE COURT: The fact that he doesn't mention the right hand isn't relevant to any material issue.
>
> [DEFENSE COUNSEL VAN FLEET]: Your Honor, I would just say it would be relevant to his self-defense issue.
>
> THE COURT: There is no self-defense issue presently before the Court.
>
> [DEFENSE COUNSEL VAN FLEET]: Well, if there is self-defense—if your Honor would allow self-defense, I would ask

that this issue be brought up later. I'd ask for him to be held so we can bring up the issue later.

THE COURT: We'll see what happens, but I can't—it's not relevant to any material issue, and the fact whether he reports the injury or not isn't relevant to self-defense.

[DEFENSE COUNSEL MORRIS]: Your Honor, if I may, we believe it is relevant to the issue of self-defense because we believe that the officer purposefully left out that information in his report—in his report to his supervisor, in his testimony, and we believe that that will indeed be something we can use to show the jury that he has been—he has been less than forthright about his interaction with the defendant.

THE COURT: That's an inference that you want to make with absolutely nothing to back it up. There is no evidence.

[DEFENSE COUNSEL MORRIS]: I think it's fair evidence.

THE COURT: No, it's not the fair evidence. It is the type of inference you want to make without any evidence whatsoever. When we get there, then I guess I'll address it; but until we get there—

[DEFENSE COUNSEL MORRIS]: We would ask that when the State releases its witness that he be ordered to remain

available, because we're going to want to put all that back on as our witnesses.

THE COURT: Sure."

¶ 12 Cross-examination continued. Officer Maloney testified he was six feet tall. He did not call for backup. On redirect examination, Officer Maloney testified he did not have time to call for backup after defendant punched him. If Officer Maloney had not secured defendant, he could have gotten out of the cell.

¶ 13 Sergeant Osterbur testified he worked third-shift at the jail on April 10, 2013. He was called to the book-in area after a report defendant was not cooperating. Sergeant Osterbur stood in the control room, operating the doors, while the other officers carried defendant inside. Usually, when someone is "passed out," that individual would swipe his or her hand at the tablet. Sergeant Osterbur knew defendant was conscious because, instead of swatting at the tablet, he began using his mouth to breathe as opposed to breathing through his nose. Sergeant Osterbur believed defendant was pretending to be asleep. Defendant was unresponsive to the questions asked of him. Defendant kept his eyes closed like he was sleeping. Sergeant Osterbur assisted in carrying defendant to a book-in isolation cell. Sergeant Osterbur did not see defendant again until later in the evening. At some point in the evening, Officer Maloney stopped Sergeant Osterbur. Sergeant Osterbur observed Officer Maloney had an injury to his right eye.

¶ 14 On cross-examination, Sergeant Osterbur testified he did not know Officer Maloney broke his hand.

¶ 15 A stipulation was read to the jury indicating Officer Maloney fractured a bone in his hand. Rebecca Hill, a registered nurse, testified Officer Maloney arrived with a laceration in

his eyebrow area and swelling to his right knuckles. Officer Maloney suffered a fracture on a knuckle.

¶ 16 The State rested. Defendant testified on his own behalf. On April 10, 2013, defendant, 5 feet 4 inches tall, was in a padded cell in the booking area of the jail. He remembered being carried into the jail and being placed in the cell. He was by himself in the cell, but there were other inmates in the cell next door. Defendant testified Officer Maloney entered defendant's cell. Defendant used profane words and provoked the officer. Officer Maloney entered the cell with his hands in a fighting position. He punched defendant twice, and defendant "self-defended [himself] and hit him back one time."

¶ 17 According to defendant, no one photographed his injuries. Defendant wrote a medical slip, stating he had a busted lip and nose that kept bleeding. No one responded to the medical slip.

¶ 18 On cross-examination, defendant testified he was brought into the jail on an unrelated charge. He confirmed he was carried into the jail and into the cell. Defendant admitted using profanities toward Officer Maloney. Defendant asserted the cell was padded and, contrary to Officer Maloney's testimony, the cell had a bench and a sink.

¶ 19 According to defendant, he was in the cell 15 to 20 minutes before Officer Maloney returned. Defendant was yelling the entire time, because he was angry he was in jail. When Officer Maloney entered the cell, defendant "got on [his] feet," and Officer Maloney punched him twice. Defendant did not immediately fall to the ground. Defendant hit the officer once. Defendant denied knowing Officer Maloney was attempting to book him.

¶ 20 Raymond A. Lewellyn, a captain with the Vermilion County sheriff's department,

testified he was in charge of the jail and the correctional officers who worked there. Captain Lewellyn described booking procedures. When an arrestee is brought in, the booking officer takes the arrestee's personal information, a photograph, and fingerprints. The arrestee is processed and bonds out or is locked up.

¶ 21 When counsel asked if a photograph was taken of defendant, the State objected and the trial court sustained the objection on relevancy grounds.

¶ 22 Defendant called no further witnesses.

¶ 23 Approximately one hour after the jury began deliberations, the jury informed the bailiff it was hung. They also sent out a note, "Is self-defense legal justification?" After a discussion with counsel, the trial court responded with the following note to the jury, "You have an instruction defining legal justification, and you should consider it along with all the other instructions in reaching your verdict." After a time shown as "pause" in the record, the trial court indicated the jury was still saying it was hung. After another pause, the trial court indicated it had received another note from the jury, "Judge, we are hung up on Proposition Number Four that the State hasn't proven without a doubt." The jury provided "the division" and indicated it "won't change." The court noted the jury had been out only one hour and forty minutes.

¶ 24 The trial court told them to continue deliberating and a menu for dinner would be provided at six p.m. At 6:57 p.m., court resumed. The jury indicated it reached a verdict. The jury found defendant not guilty of aggravated battery of an insulting or provoking nature, but guilty of aggravated battery, bodily harm. In September 2013, the court sentenced defendant to eight years' imprisonment with credit for time served and ordered him to pay $2,481.39 in restitution.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 A. Opening Statement

¶ 28 Defendant argues the trial court violated his constitutional right to present a defense. Defendant first contends the trial court did so by prohibiting counsel from mentioning self-defense in the opening statement. Defendant maintains counsel informed the court she intended to argue and prove defendant acted in self-defense. Counsel did not intend to dispute evidence defendant struck Officer Maloney and caused an injury to his eye. The court, however, prohibited counsel from referencing self-defense in any way until defendant took the stand. As a result, defendant maintains, the jury sat through the first half of the case without knowing defendant planned to concede he struck Officer Maloney and without knowing defendant did so while believing he was defending himself. Defendant further contends the jury was unable to judge Officer Maloney's testimony accordingly.

¶ 29 In presenting opening statements, counsel has a right "to state briefly, within reasonable limits, the facts defendant relied on and expected to prove in his defense." *People v. McDowell*, 284 Ill. 504, 511, 120 N.E. 482, 485 (1918). This is "an important right" and counsel should "not be prevented or unreasonably hindered by the court in the performance of his duty at every stage of the trial, within the requirements of the law." *Id.*; see also *People v. Hampton*, 78 Ill. App. 3d 238, 243, 397 N.E.2d 117, 121 (1979) (observing "the accused has the right to have his attorney present in opening statement the facts which he intends to prove, without unreasonable restrictions"). "The purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove." *People v. Kliner*, 185 Ill. 2d 81, 127, 705 N.E.2d 850,

874 (1998). Counsel may include in opening statement a discussion of expected evidence and reasonable inferences from that evidence. *Id.*

¶ 30 The trial court has discretion in determining the character and scope of opening statements. *People v. Pasch*, 152 Ill. 2d 133, 184-85, 604 N.E.2d 294, 315 (1992). Reversible error does not occur unless the defendant shows he was prejudiced by the trial court's decision. *People v. Abrams*, 260 Ill. App. 3d 566, 581, 631 N.E.2d 1312, 1323 (1994).

¶ 31 In this case, the question of whether the trial court abused its discretion in limiting defendant's opening statement is close. While defense counsel articulated the intention defendant would testify, the court limited discussion of self-defense during opening statements because of a previous experience of an accused introducing self-defense but choosing not to testify later. Case law does not show this is a problem that pervades our judicial system. The approach of knowingly introducing self-defense as a theory and intentionally not testifying or introducing the evidence to support that theory is not a favorable approach for a defendant. Juries would be told such evidence is coming and then question why the evidence was not submitted. As the case law establishes, "little is more damaging than to fail to produce important evidence that had been promised in an opening." *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003) (quoting *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988)). In addition, without evidence of self-defense at trial, an instruction on self-defense would not go to the jury. See *People v. Dunlap*, 315 Ill. App. 3d 1017, 1024, 734 N.E.2d 973, 981 (2000) ("The trial court *** may properly refuse a defendant's proferred instruction on a theory of self-defense, when there is no evidence to support the theory."). Here, there were no other witnesses to provide evidence supporting a theory of self-defense. The likelihood of defendant following

through with his promise to the court and the jury to testify was high. It is thus arguable the trial court should have allowed the comments because it could not have foreseen the defendant would not testify. See, *e.g.*, *Abrams*, 260 Ill. App. 3d at 581, 631 N.E.2d at 1323 (holding "although defendant never carried out his objected-to opening comments by producing the unnamed alibi witnesses, we do not believe that the court could have foreseen that failure at the beginning of trial, and, thus, it should have allowed his comments"). It can also be argued opening statements are not evidence and have minimal impact on trials.

¶ 32 We need not decide whether the trial court abused its discretion, because we find defendant has not established prejudice. At the start of the trial, the jury knew it would be required to judge and question the truthfulness of Officer Maloney's testimony. While the State told the jury during opening statements Officer Maloney would testify defendant punched him, defense counsel cautioned the jury, "there's [*sic*] two sides to every story at least." In addition, although defendant emphasizes the jury was unaware of his intent to argue "self-defense" during the "first half of trial," the "first half of trial" lasted a short time. Opening statements began shortly after 1 p.m. The State called three witnesses to testify. Defendant testified on his own behalf and called one witness. The jury began deliberations after 3:30 p.m. Given this short time period, it is unlikely the jury would have been unable to weigh defendant's credibility against Officer Maloney's once it learned of defendant's side to the story. Although defendant was unable to raise the theory in his opening statement, he was able to introduce his theory through his own testimony, in closing argument before the jury, and in jury instructions. See generally *People v. Tenner*, 175 Ill. 2d 372, 391, 677 N.E.2d 859, 868 (1997) (finding no prejudice, in a claim for ineffective assistance, to the prohibition of mentioning self-defense in

opening statement, as defendant was, in part, able to present the defense during testimony and argument). The jury was also instructed on self-defense and, given its question to the trial court, considered the defense.

¶ 33 B. Evidentiary Rulings

¶ 34 Defendant next contends he was further hindered in presenting his defense when the trial court failed to allow him to impeach Officer Maloney regarding the omission of his hand injury in his police statements. Defendant argues the omission should have been exposed, as it shows Officer Maloney repeatedly concealed he struck defendant with such force "he caused a serious injury to his hand." Defendant maintains this testimony was relevant to the motives underlying his testimony.

¶ 35 The State contends defendant forfeited this argument because the trial court did not prevent defendant from asking Officer Maloney about the injury to his hand and his failure to report it. The State emphasizes, while the trial court initially found the evidence irrelevant, it agreed to address the issue again after defendant admitted evidence showing self-defense.

¶ 36 We find no error, as the trial court did not prohibit the evidence regarding Officer Maloney's failure to report his injury to his hand. The discussion quoted above clarifies the trial court did not rule finally on the issue, but agreed to wait to determine relevancy once defendant began developing his self-defense theory. The court authorized recalling Officer Maloney as a witness and stated it would "address" the relevancy issue then. Defendant did not avail himself of this opportunity. Defendant has not forfeited this argument; he simply cannot show error because the matter was not ruled upon. The court reserved the ruling for a later time, and defendant did not revisit it.

¶ 37 Defendant asserts reraising the issue would have been fruitless because the trial court already determined the issue was irrelevant to self-defense. We disagree. The court stated the testimony regarding Officer Maloney's hand was irrelevant, but, after defense counsel argued for its relevancy, the court agreed to address it when defendant introduced evidence of self-defense. Defendant failed to reraise the issue. The court did not prevent defendant from introducing this testimony.

¶ 38 Defendant next argues the trial court erred when it barred him from presenting evidence the police failed to photograph defendant during the booking process in violation of standard procedures. Defendant contends the photographs would have shown he suffered a "busted nose and *** busted lip" during the altercation. Defendant maintains Officer Maloney denied knowing whether defendant suffered injuries, and this evidence would have shown defendant had injuries. Defendant argues, contrary to the court's finding the testimony irrelevant, the evidence was relevant to show the police department, as a whole, attempted "to play down the fact that [defendant] was injured."

¶ 39 Evidence is relevant if it tends to make the existence of any fact of consequence to the determination of an action more or less probable than it would be absent the evidence. *People v. Morgan*, 197 Ill. 2d 404, 455-56, 758 N.E.2d 813, 842-43 (2001). The decision whether evidence is relevant and admissible is within the discretion of the trial court. *Id.* at 455, 758 N.E.2d at 842. We will reverse a decision on the relevancy of evidence only when the record reveals a clear abuse of discretion, meaning the trial court's decision was fanciful, unreasonable or arbitrary, or no reasonable person would take the view of the trial court. *Id.*, at 455, 758 N.E.2d at 842-43.

¶ 40 The trial court did not abuse its discretion in finding the proffered testimony irrelevant, as the evidence did not make defendant's assertion of self-defense more or less likely. The evidence does not support either the State's or the defendant's theory at trial. It does not show whether Officer Maloney struck first or after defendant struck him. The injuries to defendant would have occurred in either scenario. In addition, the absence of photographs does not make a fact of consequence more or less likely. There is no evidence showing Officer Maloney was involved in the booking procedures that followed his altercation with defendant. According to the testimony of defendant and Officer Maloney, no officer witnessed the altercation. Thus, any decision to photograph or not photograph defendant as part of a scheme to hide Officer Maloney's alleged guilt was not made by anyone with knowledge of the events that occurred. The testimony was irrelevant.

¶ 41 C. Prejudice

¶ 42 Defendant argues the trial court's errors, individually and together, denied him a meaningful opportunity to prepare his defense. This argument fails. As shown above, this court found no error on the two challenged evidentiary rulings. This decision leaves only the trial court's judgment regarding the opening statement. We determined above defendant suffered no prejudice as a result of that decision.

¶ 43 D. Restitution

¶ 44 Defendant last argues this court should vacate the restitution order because the trial court entered the order without considering defendant's ability to pay and without setting a payment schedule, in violation of section 5-5-6 of the Unified Code of Corrections (730 ILCS 5/5-5-6 (West 2012)). Defendant concedes he did not raise this issue when the restitution order

was imposed or in a postsentencing order, but he urges this court to consider the issue not forfeited.

¶ 45 Defendant lists several reasons this court should review his error despite his failure to bring the matter to the trial court's attention. Defendant, citing *People v. Doguet*, 307 Ill. App. 3d 1, 7, 716 N.E.2d 818, 822-23 (1999), asserts the fact his sentence was not "fair" "compels judicial review" despite forfeiture. Citing *People v. Guajardo*, 262 Ill. App. 3d 747, 769-71, 636 N.E.2d 863, 879-80 (1994), defendant states the restitution order may be reviewed because the restitution statute does not include a waiver provision. Defendant further provides three examples where restitution issues were addressed without any mention of whether the challenge was preserved. *People v. Dickey*, 2011 IL App (3d) 100397, ¶¶ 25, 27, 961 N.E.2d 816; *People v. Hamilton*, 198 Ill. App. 3d 108, 114-16, 555 N.E.2d 785, 788-89 (1990), rev'd on other grounds, *People v. Williams*, 149 Ill. 2d 467, 495, 599 N.E.2d 913, 926 (1992); *People v. White*, 146 Ill. App. 3d 998, 1002-03, 497 N.E.2d 888, 891-92 (1986).

¶ 46 Defendant's laundry list of reasons is unconvincing. The one-sentence or one-parenthetical statements, supported by one cite, do not comply with Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). This court is not a repository in which a defendant can place the burden of research and argument. See *People v. Jacobs*, 405 Ill. App. 3d 210, 218, 939 N.E.2d 64, 72 (2010). Moreover, each case cited is distinguishable. *Doguet* involves the trial court's failure to properly admonish a defendant who entered a guilty plea. *Doguet*, 307 Ill. App. 3d at 6-7, 716 N.E.2d at 822. Three cases involving restitution do not show whether the issue of forfeiture applied to the facts of the case or if forfeiture was even considered. See *Dickey*, 2011 IL App (3d) 100397, ¶¶ 11, 23-28; *Hamilton*, 198 Ill. App. 3d at 114-16, 555 N.E.2d at 788-89;

White, 146 Ill. App. 3d at 1002-03, 497 N.E.2d at 891-92. It takes a tremendous leap of logic to infer from cases that do not mention forfeiture in regard to restitution that forfeiture does not apply to restitution claims. We reject the invitation to take that leap. Last, *Guajardo*'s holding regarding waiver had to do with arguments before the trial court, not with how to preserve the issue for appellate review. See *Guajardo*, 262 Ill. App. 3d at 770, 636 N.E.2d at 880 (rejecting the State's argument the trial court need not explain its calculations and holding "[i]t is not relevant that defendant did not request an accounting; the statute does not include a waiver provision").

¶ 47 Defendant also argues this court should consider restitution under the plain-error rule. Under the plain-error doctrine, sentencing errors not challenged until appeal are reviewable if the evidence was closely balanced or the error was so grave it "deprived the defendant of a fair sentencing hearing." *People v. Hanson*, 2014 IL App (4th) 130330, ¶ 26, 25 N.E.3d 1 (quoting *People v. Ahlers*, 402 Ill. App. 3d 726, 734, 931 N.E.2d 1249, 1256 (2010)). By invoking the plain-error rule, the defendant carries the burden of persuasion. *Id.*, 25 N.E.3d 1.

¶ 48 In urging this court to consider the restitution argument as plain error, defendant does not explain how the error in this case falls within either prong of the plain-error rule. Defendant does not assert the evidence regarding restitution was "closely balanced," or the error was so grave it denied him a fair sentencing hearing. Instead, defendant simply cites three cases in support of his apparent contention any error in a restitution order is *per se* plain error: *People v. Jones*, 206 Ill. App. 3d 477, 482, 564 N.E.2d 944, 947 (1990); *People v. McCormick*, 332 Ill. App. 3d 491, 499, 774 N.E.2d 392, 399-400 (2002); and *People v. Rayburn*, 258 Ill. App. 3d 331, 335, 630 N.E.2d 533, 536 (1994).

¶ 49 This court, in *Hanson*, 2014 IL App (4th) 130330, ¶¶ 33-41, 25 N.E.3d 1, recently rejected the argument defendant makes—*i.e.*, "all errors pertaining to a restitution order are *per se* plain error." In reaching this conclusion, the *Hanson* court expressly considered two cases upon which defendant relies, *Jones* and *McCormick*. In its analysis, the *Hanson* court first addressed *Jones* and expressly declined to follow it. *Id.* ¶ 36, 25 N.E.3d 1. The *Hanson* court observed the *Jones* court did not undertake any analysis whether an error affecting substantial rights was committed, but simply determined one existed: "the record clearly shows that an alleged error affecting substantial rights was committed." *Id.* ¶¶ 36, 38, 25 N.E.3d 1 (quoting *Jones*, 206 Ill. App. 3d at 482, 564 N.E.2d at 947). The *Hanson* court found this approach flawed as " 'plain error requires more in-depth analysis'." *Id.* ¶ 37, 25 N.E.3d 1 (quoting *People v. Rathbone*, 345 Ill. App. 3d 305, 311, 802 N.E.2d 333, 338 (2003)). Regarding *McCormick*, *Hanson* found it, too, did not stand for "the blanket proposition that restitution errors affect a defendant's substantial rights." *Id.* ¶ 39, 25 N.E.3d 1 (citing *McCormick*, 332 Ill. App. 3d at 494, 774 N.E.2d at 395). The *Hanson* court observed "a panel of this court specifically disagreed with *McCormick* to the extent it applied the plain-error doctrine 'without applying the analysis that granting exceptions to the forfeiture rule ordinarily requires.' " *Id.* ¶ 41, 25 N.E.3d 1 (quoting *Rathbone*, 345 Ill. App. 3d at 311 802 N.E.2d at 338).

¶ 50 Similarly, *Rayburn* is unconvincing. The *Rayburn* court did not engage in an in-depth analysis of whether the plain-error rule applied. It simply stated, "[r]eviewing courts have considered questions regarding restitution orders as a matter of plain error" and cited *Jones*. *Rayburn*, 258 Ill. App. 3d at 335, 630 N.E.2d at 536 (citing *Jones*, 206 Ill. App. 3d at 477, 564 N.E.2d at 944). In support, *Rayburn* simply cites *Jones*.

¶ 51 *Hanson* thus establishes defendant's reliance on a *per se* rule of plain error in restitution-related errors is incorrect. Defendant, however, has not undertaken the effort of showing either prong of the plain-error rule applies. Defendant, therefore, has not met his burden. See *Hanson*, 2014 IL App (4th) 130330, ¶ 26, 25 N.E.3d 1. We will not review the matter as plain error.

¶ 52 III. CONCLUSION

¶ 53 We affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of $50 against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 54 Affirmed.

¶ 55 JUSTICE HARRIS, specially concurring.

¶ 56 I write separately to comment on the trial court's restriction on the defendant's opening statement. Defense counsel indicated to the trial court she intended "to state what we believe the evidence will show, which is that Officer Maloney entered the cell alone, struck my client first, and that [defendant] defended himself." The trial court prohibited defense counsel from doing so, stating, "I'm not saying that you can't raise self-defense. I'm just saying that you can't raise it in your opening statement and then have your client decide he doesn't want to testify and then have that out in front of the jury with no way of addressing it. *We've had that issue before. I'm not going to have it again.*" (Emphasis added.)

¶ 57 Pursuant to Illinois Supreme Court Rule 235 (eff. Jan. 1, 1967), a defendant has the right to make an opening statement in a jury trial. "While the scope and latitude of an opening statement are subject to the circuit court's discretion, the accused has the right to have

his attorney summarize in an opening statement, without unreasonable restrictions, the facts which he intends to prove." *People v. Rogers*, 123 Ill. 2d 487, 501, 528 N.E.2d 667, 674 (1988). See also *McDowell*, 284 Ill. at 511, 120 N.E. at 485 ("Counsel had a right, in his opening statement in behalf of the defendant, to state briefly, within reasonable limits, the facts defendant relied on and expected to prove in his defense.").

¶ 58 Here, defendant was being tried for the first time on this charge. Therefore, when the trial court stated, "[w]e've had this issue before," it was apparently referring to another trial, presumably one involving a different defendant, where defense counsel raised the theory of self-defense in an opening statement and then failed to substantiate the defense when the defendant elected to not testify. However, the trial court did not identify any particular circumstances in *this* case justifying its proscription of defendant's ability to present facts raising the theory of self-defense during his opening statement. Thus, I conclude the restriction was unreasonable. However, as explained by Presiding Justice Knecht, defendant has failed to establish he suffered any prejudice under the circumstances.