2016 IL App (2d) 140817-U
Nos. 2-14-0817 & 2-15-1259, cons.
Order filed September 14, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CF-752
KENNY D. HARRIS,	)	Honorable Patrick L. Heaslip,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The improper admission of other-crimes evidence did not deny the defendant a fair trial. The trial court's misapprehension of the appropriate sentencing credit did not rise to the level of plain error. The mittimus is modified to reflect the proper presentence custody date.

¶ 2 On June 6, 2014, following a jury trial, the defendant, Kenny Harris, was found guilty of aggravated driving under the influence of drugs resulting in death (see 625 ILCS 5/11-501(a)(6), (d)(1)(F) (West 2012)), and sentenced to 20 years' imprisonment. On appeal, the defendant argues that (1) the improper admission of other-crimes evidence denied him a fair trial; (2) he is entitled to a new sentencing hearing; and (3) the mittimus should be modified to reflect the

proper amount of presentence custody credit. The State concedes error on the third issue. We affirm the defendant's conviction and modify the mittimus.

¶ 3 BACKGROUND

¶ 4 In an indictment filed on April 3, 2013, and amended on April 18, 2013, the defendant was charged with four alternative counts of aggravated driving under the influence (DUI) involving death (625 ILCS 5/11-501(a)(1), (a)(2), (a)(5), (a)(6), (d)(1)(F) (West 2012)); four alternative counts of aggravated DUI (625 ILCS 5/11-501(a)(1), (a)(2), (a)(5), (a)(6), (d)(1)(G) (West 2012)); leaving the scene of a personal injury accident (625 ILCS 5/11-401(a) (West 2012)); and aggravated driving after revocation (625 ILCS 5/6-303 (West 2012)). The aggravated DUI counts alleged that the defendant drove while under the influence of alcohol, drugs, or a combination thereof, during a time when his driving privileges were revoked due to a prior DUI, and that the driving caused the death of the victim, Brandon Moore. The defendant was also charged by complaint with driving under the influence (625 ILCS 5/11-501(a) (West 2012)); driving while license revoked (625 ILCS 5/6-303 (West 2012)); and operating an uninsured vehicle (625 ILCS 5/3-707 (West 2012)). Prior to the start of trial, the charges of leaving the scene of an accident and aggravated driving after revocation were *nolle prossed*.

¶ 5 A jury trial commenced on June 3, 2014. Matthew Brieschke testified that he was a Rockford police officer. On March 17, 2013, he was on patrol with his partner Officer Sean Welsh. About 10:16 p.m., they observed a silver Jeep Liberty driving southbound on 7th Street swerving and crossing the center line. They followed the Jeep as it turned east onto 12th Avenue. The Jeep stopped at stop signs on 8th and 9th Streets. After the Jeep stopped at 9th Street, it turned northbound onto 9th Street and took off at a high rate of speed. The officers turned onto 9th Street and saw the Jeep a few streets ahead. It bottomed out underneath a viaduct, veered right and left, and then they lost sight of it.

¶ 6 Officer Brieschke testified that as they continued down 9th Street, they noticed a large amount of debris in a yard just north of 7th Avenue near a creek bed. They pulled over, exited the squad car, and walked to the creek. They saw the Jeep lying upside down in the creek. They heard a female, later identified as Tyvesha Iverson, screaming for help. They also saw a man, later identified as the defendant, staggering around in the creek in front of the Jeep. Officer Brieschke identified the defendant in court as the individual he saw walking in the creek. As the defendant was staggering westbound in the creek, the officer yelled for him to pull his hands out of his pocket and show them. The defendant eventually did so and walked over to the officer. Officer Brieschke testified that he detected a strong odor of alcohol coming from the defendant. On cross-examination, Officer Brieschke acknowledged that when he saw the Jeep driving and swerving, he was unable to see how many people were in the vehicle or who was driving. When he and his partner reached the Jeep in the creek, it was unoccupied. Officer Welsh also testified and corroborated Officer Brieschke's testimony.

¶ 7 Ryan Fleming testified that he was a Rockford police officer and responded to Officer Brieschke's request for backup at the scene of the overturned Jeep. He heard Iverson screaming for help. The area was poorly lit so he turned on his flashlight. He saw a trail of blood about 40 feet southeast of the Jeep. He followed the trail of blood and discovered the victim, Brandon Moore, in the snow. The victim was on his stomach and it looked like he had suffered major injuries to his head. It appeared that he had slid on the ground for quite a distance. The victim had very labored breathing. He was a light-skinned black male and had braided hair. Officer Fleming called for medical help, which arrived very quickly. He then went back to the Jeep where Iverson was being removed from the creek. He eventually drove her to Swedish American Hospital. She appeared to be intoxicated. The record indicates that the victim was also transported to Swedish American Hospital but died shortly thereafter.

¶ 8 Allison Sowell testified that, prior to his death, she dated the victim for a little over a year. The victim had braids in his hair but did not have any gold teeth. On March 17, 2013, at 3:30 p.m., she was at home. The defendant, the victim, and one of the victim's other friends were also there. At 4 p.m., the three left her home. At 8:30 p.m., the victim called her and asked her to pick him up on 15th Avenue and Seminary Street. She owned a silver Jeep Liberty and went to pick up the victim. The victim and the defendant both got in her vehicle. The defendant seemed a little upset. She drove home and went in her house. The victim also came into her house. She assumed the defendant was still in her car. Once inside her home, the victim seemed like his normal self and was not intoxicated. At some point, the victim left the house and she saw the Jeep drive away. Since they were dating, the victim had permission to drive her vehicle and he regularly did so. The defendant did not have permission to drive her vehicle. The victim called her between 9:45 and 10 p.m. When she tried calling him back between 10:15 and 10:30 p.m., he did not answer.

¶ 9 Rosemary Mathews testified that she was a Rockford police officer. On March 17, 2013, around 11 p.m., she interviewed the defendant at the hospital. The defendant said he did not know he was involved in a car accident but he did remember climbing out of a car window and standing in some water. At one point the defendant said he was not driving, but also indicated that he could have been driving. The defendant admitted drinking tequila and some beer but denied he had used other drugs. The defendant had a strong odor of alcohol on his breath, his speech was slurred and his eyes were glassy and bloodshot. Officer Mathews opined that the defendant was under the influence of alcohol and she placed him under arrest for driving while intoxicated. Officer Mathews checked the defendant's driver's license status and learned that it was revoked. She obtained a search warrant to test the defendant's blood and urine because the defendant refused such tests.

¶ 10 Officer Mathews further testified that at 4:35 a.m. on March 18, 2013, she transported the defendant to the public safety building. She and another officer interviewed the defendant. The defendant waived his rights. The interview was audio and video recorded. The videotape of that interview was admitted into evidence and played for the jury. In the interview, the defendant stated that he was unable to remember if he had been driving the Jeep. The defendant did not remember being in the vehicle and did not remember who else was in the car with him. When Officer Mathews told the defendant that a female in the car said that he was driving, the defendant said it was possible but he did not remember.

¶ 11 The record indicates that after 2:30 a.m., the defendant's blood and urine were collected pursuant to a search warrant. Results of the testing indicated that the defendant had a blood alcohol level of 0.144. Tests also indicated the presence of marijuana and cocaine metabolites. A forensic scientist testified that cocaine metabolites can remain in a person's body for 72 hours, and marijuana metabolites for weeks. The autopsy of the victim indicated that he sustained numerous head fractures. The cause of death was determined to be blunt force trauma to the head. The victim was found to have a blood alcohol content of 0.134. No glass particles were found in the victim's wounds.

¶ 12 Iverson testified that on March 17, 2013, she was at a friend's house on Broadway and 8th Street. When she left her friend's house and went outside, a car honked the horn at her. She went over to the vehicle and got in. Inside the vehicle were "Gold" and the victim. She identified the defendant in court as the person she knew as "Gold." She had known them for about a year. The defendant was driving and the victim was in the passenger seat. She had been drinking and smoking crack cocaine before entering the vehicle. All three of them were drinking tequila in the Jeep while driving around. She reiterated that "Gold" was driving. At some point, they saw the police and the defendant started driving faster. Then she remembered flipping into

a creek. She climbed out of the car and the police helped her out of the creek. She acknowledged that she had previous convictions for misdemeanor theft, misdemeanor aggravated assault, and possession of a controlled substance. She was currently on probation for those convictions but testified that the State had not made any promises about her probation in exchange for her testimony.

¶ 13 On cross-examination, Iverson admitted that she was worried that if she did not agree with the State's version of events, it would jeopardize her probationary status. She acknowledged that before getting into the Jeep on the day of the accident, she had been smoking crack all day and had been drinking heavily. At that time she knew the defendant as Gold, but she did not know the victim's name. Iverson testified that she was so intoxicated on that day, that she could be wrong about who was driving. She did not really recall who was driving the vehicle. The defendant and the victim may have been taking turns driving. They may have switched more than once. She really could not recall who was driving the Jeep that night.

¶ 14 On re-direct, Iverson acknowledged giving the police a written statement on the night of the accident. In that statement, she identified the defendant as the driver. She also stated that when they saw the police, the defendant started driving real fast. She never told the police that the defendant and the victim were taking turns driving. However, Iverson testified that she believed that her memory on the witness stand was better than her memory on the night of the accident.

¶ 15 Dan Stewart testified that he was a Rockford police officer and was involved in the investigation of the victim's death. On March 18, 2013, at about 4 a.m., he interviewed Iverson at the public safety building regarding the events leading to the car accident. He did not make any promises or threats to Iverson. He identified People's Exhibit 60, which was a typed written statement that Officer Stewart took from Iverson. After it was taken and typed, Iverson reviewed

it and initialed before and after each paragraph to show that she reviewed it and that it was accurate. Iverson did not note any mistakes or inaccuracies in the written statement. The exhibit was admitted into evidence. The State asked Officer Stewart to read Iverson's statement to the jury:

> "Q. [Assistant State's Attorney:] Yeah, the paragraph starting with 'the passenger,' sir?
>
> A. Okay. 'The passenger was a light skinned black male. He was chubby, kind of fat; and he had braids. I don't know what he was wearing. The passenger was always with Gold. I had seen them both about five times before. I've bought crack cocaine from Gold in the past.'"

Defense counsel objected and a sidebar ensued. The trial court asked the State how that happened. The trial court denied the defendant's motion for a mistrial. A 10-minute recess was taken for the parties' attorneys to review and redact Iverson's statement. When the trial resumed, the trial court admonished the jury "to disregard that portion of the statement where Ms. Iverson had stated that the defendant, who she referred to as Gold, had sold her crack cocaine. You're to disregard that." Thereafter, Officer Stewart read Iverson's written statement to the jury with the exception of the statements that were barred by evidentiary rules. In her written statement, Iverson identified the defendant as the driver and the victim as the passenger. On cross-examination, Officer Stewart acknowledged that Iverson was intoxicated when she gave her written statement.

¶ 16 Kareem Mankarious testified that he was a Rockford police officer and was an expert in the field of traffic accident reconstruction. At the time of the car accident, it was cold outside and the roads were clear and dry. Looking at the tire marks, he opined that the Jeep lost control and slid sideways until it eventually went off the road. Based on measurements at the scene, he opined that the Jeep flipped over three or four times before it landed in the creek. It was about a

10-foot drop down from street level to where the Jeep landed in the creek. He opined that the victim was in the front passenger seat, not wearing a seatbelt, and was ejected from the vehicle while it was rolling. This was based on the fact that the driver's-side window was intact and the passenger-side window was broken out. The front windshield was also damaged, but he opined that this damage occurred when the Jeep landed in the creek. The glass of the windshield was still in place, but it was shattered. Based on measurements at the scene and accepted standards, Mankarious opined that the vehicle was traveling between 57 and 65 miles per hour when it went off the road. The speed limit at the scene was 30 miles per hour. He did not believe that the other occupants of the vehicle were ejected because they were down by the creek and were not severely injured.

¶ 17 Michael Moore, the victim's brother, testified for the defense. Moore had a 2009 conviction for unlawful use of weapons. Moore testified that the defendant and the victim were best friends. On March 17, 2013, at about 9:15 or 9:30 p.m., the victim came over to his house. The defendant was with him. The victim was driving a silver Jeep Liberty that belonged to the victim's girlfriend, Sowell. The defendant was passed out in the passenger seat. The victim stayed for about 10 minutes and then left. The victim then called him around 10 p.m. to say that they were coming back to pick him up. However, the victim never arrived. Moore received a phone call around midnight informing him that the victim was at the hospital. Moore never told the police about what happened that night.

¶ 18 On June 6, 2014, the jury returned guilty verdicts on all eleven counts, including count I, aggravated driving under the influence of drugs resulting in death (625 ILCS 5/11-501(a)(6), (d)(1)(F) (West 2012)). Following the denial of his post-trial motion, the cause proceeded to a sentencing hearing where the parties presented evidence in aggravation and mitigation.

¶ 19 On July 31, 2014, the trial court pronounced sentence. As to count I, aggravated driving under the influence of drugs involving death, the trial court found that special sentencing applied, with a range of 6-to-30 years' imprisonment and three years of mandatory supervised release. The trial court further found that the defendant would have to serve 85 percent of the imposed sentence. The State then interjected and informed the trial court that the defendant's sentence was not subject to 85 percent truth-in sentencing. The trial court indicated that it stood corrected. The trial court then imposed a sentence of 20 years' imprisonment on count I and concurrent fines and costs on the three traffic counts. The other counts merged. The defendant was credited with 499 days served in custody, with the custody dates listed as March 18, 2014, to July 30, 2014. The defendant was actually in custody since March 18, 2013. On August 22, 2014, the trial court denied the defendant's motion to reconsider sentence. Thereafter, the defendant filed a timely notice of appeal that was docketed in this court as case no. 2-14-0817.

¶ 20 On October 5, 2015, the defendant filed an amended *pro se* petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). In that petition, the defendant argued that he was sentenced to 20 years' imprisonment and day-for-day good conduct credit but that, pursuant to the relevant statute, he would be required to serve at least 85% of his sentence. Because his sentence was allegedly in violation of statutory requirements, the defendant argued his sentence was void. He requested that his sentence be vacated and his case remanded for resentencing.

¶ 21 On November 17, 2015, a hearing was held on the defendant's petition. The defendant represented himself *pro se*. The trial court denied the defendant's petition. The trial court stated as follows:

> "THE COURT: *** I'll tell you exactly what happened. *** I made a decision. I sentenced you to 20 years. I made a finding that I felt the sentence had to be served at 85

> percent. The State [*sic*] attorney, who apparently was [in] error at the time said, no, Judge, State believes that's 50 percent. And I said, okay, well, if that's what you think it is.
>
> The years that I sentenced you have nothing to do, nor would it ever, what I consider in the years I would assign to your sentence whether it's 85 percent, 50 percent or anything else. That has nothing to do with this sentence, nothing whatsoever. It's not even a thought that goes through my mind. *** And whether it's 50 percent or 85 percent, my intention was to serve—to sentence you to 20 years, period, that's it."

Thereafter, the defendant filed a motion for leave to file a late notice of appeal. On January 29, 2016, this court granted that motion and entered an order appointing the office of the State appellate defender to represent the defendant on appeal. On February 1, 2016, the defendant filed his notice of appeal. It was docketed in this court as case no. 2-15-1259. On June 13, 2016, on the State's motion, this court entered an order consolidating case nos. 2-14-0817 and 2-15-1259 for purposes of appeal.

¶ 22 ANALYSIS

¶ 23 On appeal, the defendant first argues that he was denied a fair trial by the reading of Iverson's statement that the defendant had sold her crack cocaine in the past. Generally, evidence of other crimes is not admissible if it is relevant merely to establish a defendant's propensity to commit crimes. *People v. Kliner*, 185 Ill. 2d 81, 146 (1998). "Such evidence overpersuades the jury, which might convict the defendant only because it feels he is a bad person deserving punishment." *People v. Thingvold*, 145 Ill. 2d 441, 452 (1991). Accordingly, evidence that a defendant has engaged in prior criminal activity should not be admitted unless it is relevant. *People v. Lewis*, 165 Ill. 2d 305, 346 (1995). In this case, the State concedes that the admission of Iverson's statement was error, but argues that the error was harmless beyond a

reasonable doubt. Improper admission of other-crimes evidence is harmless error when a defendant is neither prejudiced nor denied the right to a fair trial. *People v. Nieves*, 193 Ill. 2d 513, 530 (2000).

¶ 24 In the present case, the defendant was neither prejudiced nor denied the right to a fair trial when Officer Stewart read Iverson's statement that the defendant had sold her crack cocaine in the past. Generally, if a timely objection is made to an improper remark, a trial court can often cure any error by sustaining the objection or instructing the jury to disregard the comment. *People v. Lewis*, 269 Ill. App. 3d 523, 526-27 (1995). Jurors are presumed to follow the trial court's instructions. *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). In this case, once the improper statement was read to the jury, defense counsel objected. Following a brief recess where the parties reviewed and redacted Iverson's entire written statement, the trial court admonished the jury to disregard the comment. Accordingly, any error was cured. *Lewis*, 269 Ill. App. 3d at 526-27.

¶ 25 The defendant argues that the error was not cured because the trial court compounded the error by repeating the improper comment. Specifically, in its admonishment to the jury, the trial court stated that the jury should "disregard that portion of the statement where Ms. Iverson had stated that the defendant *** had sold her crack cocaine." The trial court's admonishment did not further exacerbate the error. The record indicates that after the defense objected to the improper statement, a sidebar ensued and then there was a minimum of a 10 minute recess. Accordingly, when the trial resumed, it was necessary for the trial court to remind the jury of the improper comment to ensure they understood what the admonishment was in reference to. Following the admonishment, Iverson's statement, excluding the improper statement, was read to the jury. The improper comment was not further referenced and the defendant was thus not prejudiced.

¶ 26 Moreover, the error was harmless as the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt. *People v. Bailey*, 88 Ill. App. 3d 416, 422 (1980) (harmless error to admit other-crimes evidence where remaining evidence proved the defendant's guilt beyond reasonable doubt); see also *People v. Hall*, 194 Ill. 2d 305, 339 (2000) ("Although the erroneous admission of other-crimes evidence ordinarily calls for reversal, 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"). Both in her statement to the police and on direct-examination, Iverson testified that the defendant was driving the vehicle at the time of the accident. Further, Mankarious opined that the victim was in the passenger seat and was thrown from the vehicle as the passenger side window was the only window that was completely broken out. On the contrary, the driver's side window was intact and the defendant was not severely injured. We acknowledge that Iverson equivocated on cross-examination as to whether the defendant was the driver and testified that perhaps the defendant and the victim had taken turns driving. However, even with Iverson's equivocation, we cannot say the improper admission of the other-crimes evidence was a material factor in the defendant's conviction.

¶ 27 Defendant cites *People v. Romero*, 66 Ill. 2d 325 (1977), *People v. Paull*, 176 Ill. App. 3d 960 (1988), *People v. Henderson*, 142 Ill. 2d 258 (1990), and *Lewis*, 269 Ill. App. 3d 523, in support of his contention that the trial court's subsequent admonishment and instructions to the jury did not cure the error. We find the defendant's reliance on these cases unpersuasive. In *Romero*, it was reversible error for the State to introduce evidence of subsequent offenses on the day of the offense at issue. *Romero*, 66 Ill. 2d at 332. However, in *Romero* the evidence of the other offenses "was permitted at length during the State's case in chief, over repeated objections by defense counsel, and was admitted, on the State's theory, for the express and limited purposes of proving defendants' intent and design." *Id.* at 328. In the present case, unlike *Romero*, the

other offense was mentioned once, was immediately objected to by defense counsel, and the trial court admonished the jury to disregard the other-crimes evidence.

¶ 28 In *Paull*, the admission of other-crimes evidence was but one of multiple errors which required the case to be reversed and remanded for a new trial. *Paull*, 176 Ill. App. 3d at 963-65 (errors included an improper reading of the indictment to the jury, improper impeachment, and improper admission of other-crimes evidence). In the present case, unlike *Paull*, the other-crimes evidence is the only evidentiary trial error complained of.

¶ 29 In *Henderson*, the defendant's confession was read to the jury. *Henderson*, 142 Ill. 2d at 305. The confession included statements that, following the murder at issue, the defendant decided to murder another person. *Id.* The reviewing court concluded that the statements were not relevant and should have been redacted from the defendant's confession. *Id.* at 307. However, the reviewing court further concluded that the error was not reversible because the State did not mention the defendant's desire to murder another person at any other time during the trial and did not try to persuade the jury that the defendant's desire to murder another person increased the likelihood that he had committed the murder at issue in the case. *Id.* at 308. The reviewing court also noted that the statements were not prejudicial because the defendant merely expressed a never-realized intent to commit another murder and any prejudicial effect was overshadowed by the substantial evidence of the defendant's guilt. *Id.* at 308-09.

¶ 30 The defendant argues that, unlike in *Henderson*, the other-crimes evidence in this case was prejudicial because Iverson's statement alleged the commission of an actual crime and not merely the intent to commit a crime. The defendant also argues that the prejudice was compounded when the trial court repeated Iverson's statement when it admonished the jury. Nonetheless, *Henderson* supports a determination that the error here was not reversible. In the present case, the other-crimes evidence was mentioned only once and, as in *Henderson*, the State

did not try to persuade the jury that the defendant's alleged involvement in another crime made it more likely that he committed the instant crime. See *id.* at 308. Additionally, any prejudicial effect was overshadowed by the other evidence of the defendant's guilt. Iverson testified that the defendant was driving and, pursuant to Mankarious, the physical evidence indicated that the victim was ejected from the passenger seat. Accordingly, as in *Henderson*, the erroneous admission of the other-crimes evidence was not reversible error.

¶ 31 Finally, in *Lewis*, a witness made a reference to a polygraph examination taken by the victim. *Lewis*, 269 Ill. App. 3d at 526. The trial court sustained defense counsel's objection to the comment, struck the comment from the record and instructed the jury to disregard the statement. *Id.* The trial court denied the defendant's motion for a mistrial and the defendant filed an appeal. *Id.* In determining whether the trial court abused its discretion in denying the request for a mistrial, the reviewing court noted that "[t]he Supreme Court of Illinois has repeatedly and emphatically condemned references at trial to polygraph examinations, particularly when a jury might consider such a reference to constitute some evidence of defendant's guilt." *Id.* at 527 (citing *People v. Baynes*, 88 Ill. 2d 225, 244 (1981), and *People v. Gard*, 158 Ill. 2d 191, 201 (1994)). The reviewing court also emphasized that there was conflict between the witnesses' testimony and statements by defendant that were introduced at trial. The reviewing court held that, because the improper polygraph reference could have substantially enhanced the credibility of the victim in the eyes of the jury, the reference denied the defendant his right to a fair trial. *Id.*

¶ 32 *Lewis* is distinguishable from the present case. Although other-crimes evidence is generally inadmissible, it is allowed in for various purposes, so the rule prohibiting such reference is not as strict as that prohibiting reference to polygraph examinations. Further, in the present case, Officer Stewart was asked to read Iverson's statement. He did not offer gratuitous

testimony as did the witness in *Lewis*. Additionally, unlike the improper evidence at issue *Lewis*, the other crimes evidence in this case did not enhance the credibility of any witness.

¶ 33 The defendant's second contention on appeal is that he is entitled to a new sentencing hearing based on the trial court's misapprehension of the law as to whether his sentence was subject to day-for-day (50%) good-conduct credit or to truth-in-sentencing (85%). The defendant's contention is in reference to the following colloquy during the trial court's pronouncement of the defendant's sentence:

> "THE COURT: *** That truth in sentencing applies and that the defendant, pursuant to 730 ILCS 53-6-33 will serve 85 percent of the sentenced imposed—
>
> ***
>
> MS. DEHN-MILLER [Assistant State's Attorney]: I would also indicate because he's the 6 to 30 range, the sentence can't be a rate of 85 percent.
>
> THE COURT: It cannot be.
>
> MS. DEHN-MILLER: It cannot be.
>
> THE COURT: All right. Thank you.
>
> MS. DEHN-MILLER: It's only if it's the 3 to 14.
>
> THE COURT: All right. Thank you. I stand corrected on that.
>
> MS. DEHN-MILLER: Thank you.
>
> THE COURT: As to Count I, the defendant is sentenced to a period of 20 years in the Illinois Department of Corrections. He'll be subject to three years of mandatory supervised release. ***"

The defendant acknowledges that he did not object when the State incorrectly stated that his sentence would be served at a rate of 50% and he did not raise the issue in his motion to

reconsider his sentence. Nonetheless, he argues that we should review this contention for plain error.

¶ 34 Plain-error review permits us to consider a forfeited claim of clear error where the evidence is so closely balanced that the error alone might have resulted in the defendant's conviction, or where, regardless of the closeness of the evidence, the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). The first step in plain-error analysis is to determine whether a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 35 Section 3-6-3(a)(2.1) of the Unified Code of Corrections sets forth the general rule that those imprisoned will be entitled to day-for-day good-conduct credit against their sentences. 730 ILCS 5/3-6-3(a)(2.1) (West 2012). The term "truth-in-sentencing" refers to a change in the statutory method that the Department of Corrections uses to calculate the amount of good-conduct credit. *People v. Davis*, 405 Ill. App. 3d 585, 602 (2010). Under the truth-in-sentencing provisions, a person convicted of aggravated driving under the influence of drugs would receive no more than 4.5 days of credit for each month of his sentence. 730 ILCS 5/3-6-3(a)(2.3) (West 2012). Thus, in the present case, the defendant must serve at least 85% of his sentence and does not receive normal day-for-day good-conduct credit. *Id.*

¶ 36 "Where the trial court imposes a sentence due to a misapprehension of the applicable law, the defendant is entitled to a new sentencing hearing." *People v. Wilkins*, 343 Ill. App. 3d 147, 150 (2003). In determining whether a mistaken belief influenced the trial court's sentencing decision, a reviewing court should consider the trial court's comments to determine whether the trial court relied on the mistaken belief. *People v. Myrieckes*, 315 Ill. App. 3d 478, 484 (2000).

¶ 37 The defendant argues that, in imposing a 20-year sentence, the trial court clearly envisioned that he would serve only 50% of that sentence, or 10 years in prison. Because he actually has to serve 85% of his sentence, the defendant argues that the trial court should have sentenced him to no more than 11 years' imprisonment. The defendant argues that the trial court abused its discretion in imposing his sentence based on a misapprehension of the applicable credit provisions.

¶ 38 A similar argument was presented in *People v. Sumler*, 2015 IL App (1st) 123381, ¶ 64. In *Sumler*, the defendant argued he was entitled to a new sentencing hearing because, when imposing sentence, the trial court was under the mistaken impression that the defendant was subject to day-for-day good conduct credit when, in fact, he was required to serve 85% of his sentence. *Id.* The reviewing court reviewed the defendant's contention for plain error. The reviewing court held that it could not preclude a finding of error for purposes of plain error review where the trial court and the attorneys, at sentencing, acted under the misapprehension that the defendant would be eligible for day-for-day credit. *Id.* ¶ 80. The reviewing court further noted, however, that the question remained as to "whether the sentencing court relied on any mistaken belief that defendant was eligible for day-for-day credit when fashioning defendant's sentence." *Id.* The reviewing court remanded the case for resentencing because "[f]rom the record before us, we are unable to discern what, if any, weight the court accorded to the good-conduct credit issue in fashioning its sentence." *Id.* ¶ 81.

¶ 39 In the present case, as in *Sumler*, the record indicates that there was confusion at the defendant's sentencing hearing as to whether the defendant's sentence was subject to day-for-day good conduct credit. While the trial court initially noted that the defendant would have to serve 85% of his sentence, the State informed the trial court that the sentence was subject to day-for-

day credit and the trial court stated that it stood corrected. The trial court then imposed a sentence of 20 years' imprisonment on count I.

¶ 40 However, unlike the facts in *Sumler*, in this case we are able to discern from the record the weight the trial court accorded to the good-conduct credit issue. In dismissing the defendant's section 2-1401 petition, the trial court reviewed the defendant's claim that his sentence was void as a result of the misapprehension concerning the applicable sentencing credit. The trial court rejected the argument and stated the amount of good-conduct credit was not a consideration in its determination of the defendant's sentence. The trial court specifically stated that "whether it's 50 percent or 85 percent, my intention was *** to sentence you to 20 years, period, that's it." Accordingly, while we find error at the defendant's sentencing hearing as to the amount of sentencing credit that was applicable to the defendant's sentence, we hold that the error did not amount to plain error. The record clearly demonstrates that the trial court accorded no weight to the applicable sentencing credit in determining the defendant's sentence. As such, the defendant was not prejudiced nor did the error affect the integrity of the judicial process.

¶ 41 The defendant's final contention on appeal is that the mittimus must be corrected to reflect the proper day of credits for time served prior to sentencing. The defendant notes that the mittimus reflected a presentence custody date of March 18, 2014, rather than the correct date of March 18, 2013. The State concedes error. A defendant has a right to one day of credit for each day or portion of a day spent in custody before sentencing. See 730 ILCS 5/5-8-7(b) (West 2012); *People v. Whitmore*, 313 Ill. App. 3d 117, 120 (2000). The miscalculation of this credit is an error that can be corrected at any time. *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008). Supreme Court Rule 615(b)(1) allows this appellate court to modify the sentencing order without remand to reflect credit for the amount of time served in presentence custody. Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. Bussan*, 306 Ill. App. 3d 836, 840 (1999). In the

present case, the trial court correctly noted that the defendant was entitled to 499 days of credit for time served in custody prior to sentencing. However, the trial court erroneously indicated that this was based on the custody dates of March 18, 2014, through July 30, 2014. The defendant had actually been in custody since March 18, 2013. Therefore, we modify the mittimus to reflect that the defendant was taken into custody on March 18, 2013.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed and we modify the mittimus to reflect an initial custody date of March 18, 2013.

¶ 44 Affirmed; mittimus modified.