

No. 1-12-3159

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 06707
)	
TERRY GILL,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err when it commented on the reasonable doubt standard of review during *voir dire*; the trial court erred when it denied defendant's request to be evaluated for the drug abuse treatment program (TASC Probation); \$200 DNA analysis fee must be vacated.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Terry Gill was found guilty of possession of a controlled substance pursuant to section 402(c) of the Illinois Controlled Substances Act (720 ILCS 570/402(c) (West 2012)), and was sentenced to four years in prison. On appeal, defendant contends that: (1) the trial court improperly instructed the jury on the

reasonable doubt standard of proof during *voir dire*; (2) the trial court improperly refused defendant's request to be evaluated for the drug abuse treatment program (commonly known as TASC); and (3) the \$200 DNA analysis fee was assessed in error and should be vacated. For the following reasons, we uphold defendant's conviction, vacate the sentence and remand for further proceedings consistent with this order, and vacate the \$200 DNA analysis fee.

¶ 3 During *voir dire*, the trial court defined the reasonable doubt standard of proof while speaking to prospective jurors. The trial court stated:

"Some of you have served on civil juries, and the definition of burden of proof there is preponderance of the evidence, and if we had a scale, all you have to do is tilt it. And the legal definition of preponderance is it's more likely than not that the event occurred. In a criminal case, in all criminal cases in the United States and the State of Illinois, the [S]tate has the burden of proof, and that's proof beyond a reasonable doubt. Illinois does not define reasonable doubt. That's up for you to decide. But an analogy would be if there was the scales again, like that (indicating)."

¶ 4 At trial, Chicago police officer Keith Hoffman (Officer Hoffman) testified that on March 9, 2012 at approximately 11:50 a.m., he was working on a tactical team with two other officers. The officers were driving in an unmarked car and wearing plain clothes while patrolling the 15th district near the area of Lamon Avenue and Iowa Street in Chicago, Illinois. As the officers were patrolling, Officer Hoffman observed defendant running westbound in the north alley of Iowa Street. Defendant then entered into the rear of the abandoned building located at 4932 West Iowa Street. Officer Hoffman stopped the car, and all the officers exited. As they approached

defendant, the officers saw defendant remove an object from under the siding of the west side of the abandoned building. Defendant looked in the direction of police, tossed the object above his head and over a fence, and placed his hands in the air. One of the officers recovered the object, which appeared to be narcotics. Defendant was then placed under arrest. The object was later identified as 12 tinfoil packets of heroin attached to a strip of tape. Six of the packets were later subjected to chemical testing and found to contain 1.385 grams of heroin.

¶ 5 Defendant was found guilty of possession of a controlled substance. At defendant's sentencing hearing, the State recommended five years of imprisonment based on defendant's criminal history and the nature of the offense, and also noted that defendant was eligible for extended-term sentencing. In mitigation, defense counsel argued that defendant suffered from a "severe heroin addiction" since the age of 18 and asked that defendant be sentenced to TASC probation based on his history of substance abuse, which was documented in defendant's presentencing investigation report (PSI report). Defendant personally asked for drug treatment in his statement to the court. The court rejected defendant's request for TASC probation, but stated that I "like[d] the idea that you want treatment. I was thinking of a higher sentence, even thinking of going along with the State. I will sentence you to [four] years. " The court also recommended substance abuse counseling.

¶ 6 On appeal, defendant first contends that his right to a fair trial was violated when the trial court improperly instructed the jury on the reasonable doubt standard of proof.

¶ 7 Initially, we note, and defendant concedes, that defendant failed to preserve the issue of improper jury instructions on appeal, where he failed to object to the remarks during *voir dire* or file a written post-trial motion raising the issue. This generally results in forfeiture of an issue. See *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009). However, defendant contends the issue should

be reviewed under the plain error doctrine, which allows a reviewing court to reach an unpreserved issue when: (1) "a clear and 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) 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." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Nonetheless, before we can determine whether an error actually fits under either category, we must first determine whether an error actually occurred. *People v. Crosby*, 231 Ill. 2d 262, 273 (2008).

¶ 8 Generally, an issue concerning the propriety of a jury instruction is reviewed under an abuse of discretion standard; however, review is *de novo* when the issue is whether the applicable law was correctly conveyed in the jury instruction. *People v. Franklin*, 2012 IL App (3d) 100618, ¶ 21. "The law in Illinois is clear that neither the court nor counsel should attempt to define the reasonable doubt standard for the jury." *People v. Speight*, 153 Ill. 2d 365, 374 (1992). A trial court's attempt to explain reasonable doubt is improper because there is no better definition of reasonable doubt than the words themselves. *People v. Jenkins*, 89 Ill. App. 3d 395, 398 (1980). "[T]he concept of reasonable doubt needs no explanation." *Id.*

¶ 9 We find no error in the trial court's comments to potential jurors during *voir dire*. Under Illinois law, there is a long-followed rule that reasonable doubt needs no definition. *Speight*, 153 Ill. at 374. In this case, during *voir dire*, the court explained the burden of proof in a civil case by analogizing it to "tipping the scale," and then told the jury that the definition of reasonable doubt was "up for you to decide." The comment the court made in this case is almost identical to

the court comment made in *People v. Johnson*, 2013 IL App (1st) 111317. In *Johnson*, the trial court stated:

“The State has the burden of proof beyond a reasonable doubt. In Illinois we do not—it is not defined by the Supreme Court or by the State legislature. That's something for you to decide. But if any of you have served on a civil jury, if you use the analogy of a scale, all you have to do is tilt it. And that's proof beyond a preponderance of the evidence. In a criminal case, if you use the same scale, it's a balance like this. (Indicating.) Proof beyond a reasonable doubt is the highest burden that there is at law in Illinois and the United States.” *Id.* at ¶ 52.

¶ 10 The *Johnson* court found that the trial court did not err and concluded that “[a]lthough we do not condone the reference and comparison to the civil standard, we cannot say that the trial court's comments constitute error, particularly where the court told jurors that reasonable doubt was the highest burden at law and that it was for them to decide what reasonable doubt meant.” *Id.* at ¶ 54. Because we agree with the reasoning of the *Johnson* court, which found no error in the trial court's almost identical statement in *Johnson*, we similarly do not find error here.

¶ 11 Nonetheless, even if an error occurred, we reject defendant's arguments that this court should review the trial court's instruction under the second prong of plain error review. In support, defendant relies heavily on *People v. Turman*, 2011 IL App (1st) 091019 and *Jenkins*, 89 Ill. App. 3d 395, to argue that the court's comments to the potential jurors substantially affected defendant's rights. In both cases, this court found that the trial court made a reversible error when it attempted to define reasonable doubt for a jury. However, *Turman* involved remarks made by the court after a *deliberating* jury sent a note to the court asking for a “more explicit, expansive definition of reasonable doubt.” *Id.* at ¶ 19. Here, the court simply made

general comments to potential jurors during *voir dire*, before the presentation of the case. Additionally, *Jenkins* has limited value because it was decided prior to *People v. Thompson*, 238 Ill. 2d 598, 611 (2010), which held that the failure to provide proper admonishments to prospective juror under Supreme Court Rule 431(b) (eff. May 1, 2007) questioning did not constitute second-prong plain-error. In this case, defendant has failed to explicitly show how the trial court's comment to potential jurors during *voir dire* seriously affected the fairness of his trial and challenged the integrity of the judicial process. Thus, we reject defendant's argument that the court erred.

¶ 12 In the alternative, defense alleges that his counsel was ineffective for failing to properly preserve the issue. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant must show that: (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) there exists a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.* A "reasonable probability" is one that sufficiently undermines confidence in the outcome. *Id.* at 694. However, a reviewing court may analyze the facts of the case under either prong first, and if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008). Here, defendant cannot establish that he suffered prejudice as a result of counsel's alleged deficient performance, where the evidence against him was overwhelming. As noted, immediately prior to defendant's arrest, police officers observed him tossing an object over a fence. Chemical testing later revealed that the object contained 1.385 grams of heroin. Thus, defendant has failed to establish that he was denied effective assistance of counsel.

¶ 13 Next, defendant contends that the trial court erred in failing to order an evaluation for substance abuse (TASC) pursuant to the Alcoholism and Other Drug Abuse and Dependency Act (the Drug Abuse Act) See 20 ILCS 301/40-10 (West 2012). Again, defendant acknowledges that he has forfeited this issue, but advises the court to consider the issue under plain error. Specifically, defendant contends that the second prong applies, that is, "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." *Piatkowski*, 225 Ill. 2d at 565. The State does not argue that no error occurred, but only that the error did not rise to the level of plain error. First, we must determine whether any error occurred at the trial level. *People v. Nesbit*, 398 Ill. App. 3d 200, 212 (2010).

¶ 14 Section 40-10 of the Drug Abuse Act provides that if a court has reason to believe that a person who is charged with or convicted of a crime suffers from alcoholism or other drug addiction and is eligible to elect treatment under the Drug Abuse Act, "the court shall advise the individual that he or she may be sentenced to probation *** if he or she elects to submit to treatment and is accepted for treatment by a designated program." If the defendant is eligible for treatment and elects to undergo such treatment, the Drug Abuse Act requires the court to order a substance abuse evaluation. 20 ILCS 301/40-10 (West 2012); *People v. Wallace*, 331 Ill. App. 3d 822, 836 (2002). The designated program is then required to report to the court the results of the examination and to recommend whether the defendant should receive treatment. The trial court, on the basis of the report and other information, must then make a determination whether to grant defendant probation to receive treatment. *People v. Meeks*, 236 Ill. App. 3d 193, 197 (1992).

¶ 15 Here, the trial court erred when it failed to order a TASC examination once defendant made a showing that he suffered from heroin addiction. The State argues that the court's actions did not amount to plain error. We disagree. The trial court's action was not consistent with the Drug Abuse Act and the manner in which courts have interpreted it, when, without the benefit of a TASC examination, the court sentenced defendant to a four-year sentence with a recommendation for substance abuse counseling. We recognize that defendant does not have an absolute right to the treatment alternative provided by the Drug Abuse Act. *People v. Pulliam*, 254 Ill. App. 3d 92, 95-96 (1993). We also acknowledge that the trial court has broad discretion to deny or grant a defendant's request to participate in the treatment program. *Meeks*, 236 Ill. App. 3d at 198. However, in light of how the statute has been interpreted, a decision to grant or deny a defendant's request for treatment is not appropriate until after an evaluation has been ordered and considered by the court. *Id.* We conclude that the trial court committed plain error when it refused to grant a TASC evaluation prior to sentencing defendant. The court's action affected defendant's substantial rights under the Drug Abuse Act. See *People v. Mobley*, 383 Ill. App. 3d 89, 92 (2008). Therefore, we remand this cause to the trial court to allow the court to order the required evaluation.

¶ 16 Finally, the parties correctly agree that the \$200 DNA analysis fees must be vacated. Section 5-4-3 of the Unified Code of Corrections mandates that all individuals convicted of an offense that is classified as a felony under Illinois law after January 1, 1998, submit to the taking, analyzing, and indexing of their DNA, and the payment of an analysis fee. 730 ILCS 5/5-4-3(a), (j) (West 2012). However, a defendant is only required to submit to and pay for the DNA assessment when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Thus, we vacate the \$200 DNA analysis fee because defendant was already

in the DNA database resulting from his prior conviction for aggravated criminal sexual assault, and order the clerk of the circuit court to modify the fines and fees order accordingly. 730 ILCS 5/5-4-3(j) (West 2012); *Marshall*, 242 Ill. 2d at 303.

¶ 17 For the foregoing reasons, we affirm defendant's conviction, vacate the sentence and remand for further proceedings consistent with this order; and modify the order for fines, fees and costs as stated.

¶ 18 Affirmed in part; vacated in part; cause remanded.