

NOTICE
Decision filed 05/28/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 120235-U

NO. 5-12-0235

IN THE

APPELLATE COURT OF ILLINOIS

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).

FIFTH DISTRICT

| | | |
|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Fayette County. |
| |) | |
| v. |) | No. 10-CF-205 |
| |) | |
| JEREMY WAYNE McMILLAN, |) | Honorable |
| |) | S. Gene Schwarm, |
| Defendant-Appellant. |) | Judge, presiding. |

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Welch and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was not denied a fair trial by the prosecutor's closing argument. Defendant's cause is remanded for a recalculation of fines and fees to be assessed and for correction of the mittimus to correct the spelling of defendant's last name.

¶ 2 Defendant, Jeremy Wayne McMillan, was convicted after a jury trial of two counts of aggravated criminal sexual abuse and one count of criminal sexual assault. At sentencing, the circuit court of Fayette County merged the three counts and sentenced defendant to four years' imprisonment plus a term of mandatory supervised release for three years to life on the criminal sexual assault conviction. Defendant appeals contending that he was denied a fair trial when the prosecutor, during closing argument,

relied on facts not in evidence. He further asserts that he is entitled to 75 additional days' credit against his sentence and that the fines and fees assessed against him need to be recalculated, which would result in a balance that should be refunded to him. Defendant also requests that the mittimus be corrected to reflect the correct spelling of his last name.

¶ 3 The evidence presented at trial revealed that on the evening of November 12, 2010, the 14-year-old victim, L.C., was spending the night with her best friend, Shyan, one of defendant's stepdaughters. The victim and Shyan had known each other their entire lives. Earlier in the evening, the girls attended a junior high school basketball game, returning to Shyan's home around 9:30 or 10 p.m. Upon returning, they found numerous people visiting and watching television in the living room. Present was defendant, Shyan's mom, Lori, Shyan's younger brother and older sister, along with the sister's boyfriend, and two neighbors. Around 10:30, Shyan went upstairs to her room. Her brother had already left and was playing video games in his room adjacent to the living room. The victim was still on the living room couch watching television. The neighbors left around 11:30, by which time the victim had fallen asleep on the couch. Shyan's mother, Lori, testified that she went to bed upstairs around 11:45 p.m., leaving defendant downstairs in the living room to finish watching his show. After the show ended, according to Lori, defendant came upstairs around midnight, and stayed until morning. Because defendant is a rather large man, Lori testified she generally knows if defendant leaves the bed because the bed shifts whenever he gets in or out of it.

¶ 4 The victim testified that she fell asleep on the living room couch after returning from the basketball game and watching television. She woke up in the middle of the

night because of "a disturbance in [her] private area." She saw defendant kneeling next to her with his hand down her pants and she could feel his finger inside her. She sat up and looked at defendant. Defendant shushed her and then pulled the covers up to her shoulder. She lay back down and closed her eyes. When she reopened her eyes, defendant was gone. She had not heard him leave the room nor did she hear any other sounds. According to the clock on the television, it was 3:30 a.m. She got up from the couch and went into the brother's bedroom. She woke him, telling him she was upset because she had had a very bad dream and asked him to stay up with her. The brother corroborated her story about being woken up in the middle of the night and about the victim being upset and crying. He, however, could not stay awake. Once he fell back asleep, the victim went upstairs to Shyan's room. She woke Shyan, again stating that she had had a bad dream. She asked to sleep in her room with her and eventually fell asleep until the next morning. She did not tell Shyan what had happened nor did she ask to use the phone to call home.

¶ 5 The next morning, everyone ate breakfast and went to Walmart. Upon their return, the victim and Shyan stayed in the kitchen playing with Shyan's pet bunny. All of Shyan's family members testified that the victim was acting normal that morning. The victim's mother came to pick her up later that day. The victim never called her mother to come get her nor did she report the incident to her mother. It was not until the following Monday at school, during lunch, when she told another friend what had happened to her over the weekend. Her friend encouraged her to tell her mother. After school, the victim finally told her mother what had happened to her while at Shyan's house. Her mother

called the victim's father who then called Lori. The three of them, plus the victim, went to the police department. The victim testified that she did not tell Shyan or Shyan's brother what had happened because she did not know how to explain it to them and because she did not think they would believe her. She also did not want to ruin her friendship with Shyan. She did not immediately tell her mother either, because she was afraid her mother would not believe her and because her mother was best friends with Shyan's mother as well.

¶ 6 Officer Hart interviewed Lori the evening everyone came to the police station. She told Officer Hart that defendant left for work around 11:30 p.m., about the same time the neighbors left. She reported that he generally only worked a few hours on such nights and that he had not returned by the time she went to bed around midnight. Lori admitted that her testimony at trial was inconsistent with her earlier police interview and explained that she was not thinking clearly when she spoke to the officer. According to her trial testimony, it was true that defendant left the house momentarily that evening to help her oldest daughter, but he returned shortly thereafter once the help was no longer needed. She stated that defendant was off work that particular evening. She further claimed she tried to clarify the timing to Officer Hart a few days later but Hart told her that it was too late. Officer Hart testified that although he spoke with Lori several more times, she never said that she thought she had made any mistakes, particularly with respect to the timing of defendant's presence or absence from the house, during the initial interview.

¶ 7 Defendant testified that on the night of November 12, he was home all evening except for a brief period when he left to help his oldest stepdaughter, who had locked

herself out of her house. When he returned home, he watched the end of a television show and then went to bed around midnight. He further testified that he never fondled the victim.

¶ 8 Everyone testifying on defendant's behalf corroborated the fact that the stairs at defendant's house were very creaky. Even the cat and dog make the stairs creak when they walk upon them. While everyone testified they never heard defendant go up or down the stairs in the middle of the night, no one testified that they heard him go up the stairs to go to bed initially. Similarly, no one heard the victim go upstairs to Shyan's room in the middle of the night, although she clearly did so after waking from her "bad dream." The jury ultimately found defendant guilty of all three counts.

¶ 9 Defendant argues on appeal that he was denied a fair trial because, during closing argument, the prosecutor relied on facts not in evidence. Defendant points out that the State's case against him rested upon the credibility of the victim. Accordingly, defendant established that the victim acted normally on the morning after the alleged incident and that she told no one what had happened until the following Monday at school, inferring that her allegations against defendant were untrue. As a counter to this evidence, the prosecutor, relying on the news and the experiences of some of the prospective jurors as elicited during *voir dire*, stated that it was common for victims of sexual abuse to not say anything initially. Defendant also established that it would have been impossible for defendant to walk silently up and down the stairs at his house in the middle of the night because they were extremely creaky, thereby inferring he could not have assaulted the victim without everyone in the house knowing about it. To undermine this argument, the

prosecutor asserted that it did not matter if the stairs were squeaky because people become accustomed to and do not notice noises with which they live on a daily basis. Because neither of these arguments was based on the facts in evidence, defendant contends the prosecutor's misconduct deprived him of his constitutional right to a fair trial. Defendant believes he is therefore entitled to a new trial.

¶ 10 The State initially points out that defendant did not object to the comments during closing argument nor did he raise them in his posttrial motion. His claims are therefore forfeited. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1129 (1988). It is for this reason that defendant attempts to argue that the remarks support a claim for prosecutorial misconduct. This claim too is forfeited, however. See *People v. Jackson*, 391 Ill. App. 3d 11, 38, 908 N.E.2d 72, 96 (2009) (comments still remained subject to forfeiture rule despite argument that State's comments in closing argument supported claim for prosecutorial misconduct). Accordingly, the State contends that when a defendant frames forfeited claims pertaining to closing argument as prosecutorial misconduct, review is still plain error. See *People v. Phillips*, 392 Ill. App. 3d 243, 274-75, 911 N.E.2d 462, 491 (2009).

¶ 11 When reviewing claims of prosecutorial misconduct in closing argument, the court is to consider the entire closing arguments of both the prosecutor and the defense attorney in order to place the complained-of remarks in context. *Phillips*, 392 Ill. App. 3d at 275, 911 N.E.2d at 491. Even if the challenged remarks were improper, the complained-of remarks must have resulted in substantial prejudice to the accused in order to constitute reversible error, such that absent the remarks, the verdict would have been

different. *People v. Cisewski*, 118 Ill. 2d 163, 175, 514 N.E.2d 970, 976 (1987). Comments in closing argument constitute reversible error only when they engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments. *People v. Nieves*, 193 Ill. 2d 513, 533, 739 N.E.2d 1277, 1286 (2000).

¶ 12 Besides the fact that prosecutors are given wide latitude during closing argument (see *People v. Walker*, 262 Ill. App. 3d 796, 804, 635 N.E.2d 684, 692 (1994)), we also note that, generally, it is not error for a prosecutor to discuss subjects of general knowledge, common experience, or common sense in closing argument (*People v. Ngo*, 388 Ill. App. 3d 1048, 1055, 904 N.E.2d 98, 105 (2008)). We further note that jurors are not expected to leave their common sense behind upon entering the courtroom. *People v. Runge*, 234 Ill. 2d 68, 146, 917 N.E.2d 940, 984 (2009).

¶ 13 We recognize that the issue of the inferences to be drawn from the victim's delay in reporting the incident was one of the main contentions at trial. The State, in its opening statement, informed the jury of the delay in the victim's reporting of the incident but also drew attention to the fact that immediately after the alleged assault, the victim woke first Shyan's brother who was nearby in the adjacent room and then Shyan herself once the brother fell back asleep. The victim stated she did not want to tell either of them what had just happened because Shyan was her best friend and she was fearful as to what such information would do to her and their friendship. Defendant, on the other hand, used the victim's delay to support his assertion of innocence. In response, the prosecutor argued that it was:

"not uncommon for people who have been victims of this sort of an offense not to say anything for awhile or even ever. If you pay any attention to the news at all, not just recently but for the past several years, you know that it's common for victims of sexual abuse to not say anything initially. Sometimes they wait days, sometimes they wait months, sometimes they wait years, and sometimes they never tell."

The prosecutor continued:

"You heard some of your fellow perspective [*sic*] jurors. During questioning they were asked if they knew anybody who had been victims of sexual abuse, and several of them did and several of them were then asked was it reported, was anybody charged. No, they didn't report it. Unfortunately, it's a very common and very frequent occurrence that the victim doesn't immediately report it. It happens that way. And especially with children."

These statements do not constitute error. They are a discussion of a matter of general knowledge, common experience, or common sense. The State made a permissible appeal to the jury to evaluate the evidence before it in light of the jurors' common sense and general knowledge that child sexual assault victims do not always immediately report such crimes and that the victim's delay in reporting was reasonable as well in light of this fact. The victim explained why she did not immediately report the assault; she did not know how to explain it and she did not want to ruin everyone's relationships. The prosecutor's statements clearly did not cause the guilty verdict because the jury did not have to rely on them to find an explanation for the victim's delay in reporting the assault.

Moreover, the jury was sworn to consider only the evidence, and we, as a reviewing court, presume that the jury followed the court's instructions (see *People v. Taylor*, 166 Ill. 2d 414, 438-39, 655 N.E.2d 901, 913 (1995)).

¶ 14 We similarly find no error with respect to the prosecutor's comments in closing argument pertaining to people sleeping through sounds to which they have been become accustomed. After noting that there was conflicting evidence as to defendant's whereabouts during the early morning hours when the victim fell asleep on the living room couch, the prosecutor acknowledged that defendant's home had squeaky stairs. The prosecutor also noted, however, that no one testified to hearing defendant come upstairs to bed no matter what time he actually did walk up the stairs. For that matter, no one testified to the victim's walking up those same stairs in the middle of the night either. The prosecutor continued: "Does that mean the stairs don't squeak? No. It's like many other sounds that people deal with where they live; you become accustomed to them. You get used to them and they don't wake you up." Clearly the prosecutor was referring to residents of the home who were asleep when the victim testified that the crime occurred. The prosecutor's statements were not meant to bolster the victim's account of the crime or to explain any inconsistency in her testimony but to explain why three sleeping residents of the house were not awakened when defendant walked up the house's squeaky stairs after committing the offense in the middle of the night. Moreover, Shyan's brother testified that, even though his bed is on the other side of the wall from the stairs, it does not wake him up when people go upstairs. We conclude that the statements were based on the evidence and or reasonable inferences stemming from the evidence. See

People v. Hudson, 157 Ill. 2d 401, 441-42, 626 N.E.2d 161, 178 (1993). Additionally, the challenged statements were a permissible appeal to the jury to evaluate the evidence in light of the jurors' general knowledge and life experiences that people will not be awakened by sounds to which they have become accustomed. Even if the statements were improper, defendant failed to prove that the remarks were so prejudicial that the verdict of guilt resulted from them. We accordingly find no error, and given that the prosecutor's statements were not improper, we also find no ineffective assistance of defense counsel for failing to preserve the issue. Again, the challenged remarks did not cause the guilty verdict, consequently counsel's performance was not prejudicial. We need not consider whether defense counsel was professionally deficient if the prejudice prong is resolved adversely to defendant. *People v. Hillenbrand*, 121 Ill. 2d 537, 557, 521 N.E.2d 900, 908 (1988).

¶ 15 Defendant next argues on appeal that the fines and fees assessed against him should be recalculated and a balance refunded to him after recalculating because he does not believe that one of the fees and one of the fines are authorized. He further contends he was awarded monetary credit against his fines for the presentence time that he served even though the record does not reflect such an award. Both the issue of the sentencing credit and whether a fine or fee is authorized by statute are questions of law subject to *de novo* review. *People v. Gomez*, 409 Ill. App. 3d 335, 341, 947 N.E.2d 343, 349 (2011). Such questions are not subject to forfeiture and may be raised for the first time on appeal. See *People v. Roberson*, 212 Ill. 2d 430, 440, 819 N.E.2d 761, 767 (2004).

¶ 16 Defendant was assessed a total of \$1,808 in various fines and fees. The record

does not include a written order itemizing such fines and fees. The basis upon which defendant seeks relief, however, is a circuit clerk worksheet attached to his brief as an appendix. It is not certified as the final record of fines and fees assessed. It also is not included in the record on appeal nor is it the subject of an appropriate motion. We, as a reviewing court, must determine the issues before us on appeal solely on the basis of the record made in the trial court. See *People v. Reimolds*, 92 Ill. 2d 101, 106-07, 440 N.E.2d 872, 875 (1982). Accordingly, we should deny defendant any relief requested. Defendant counters that the trial court issued no formal fines and fees order, consequently there is no documentation to establish the fees and fines other than the clerk's worksheet. Given the circumstances presented here, we choose to remand this cause for a recalculation of the fees and fines assessed. We are also remanding for recalculation because of the possibility of another error having been made in the awarding of a credit of \$5 a day for time served. Defendant is not eligible to receive such a credit against his fines under section 110-14(a) of the Code of Criminal Procedure of 1963. As defendant concedes, subsection (b) specifically states that subsection (a) does not apply to a person incarcerated for sexual assault. See 725 ILCS 5/110-14(b) (West 2010). Given that the bases for the fines and fees assessed is not clear and any possible monetary credit for time served is void, we therefore remand this cause for recalculation of the appropriate fees, fines, and monetary credits to be assessed.

¶ 17 As for defendant's final point on appeal pertaining to the misspelling of defendant's last name on the sentencing order, the State concedes that defendant is entitled to the correction in the spelling of his last name on the mittimus. Pursuant to

Supreme Court Rule 615(b)(1), we order the circuit clerk to correct this error, changing the spelling of defendant's last name from McMillian to McMillan.

¶ 18 For the foregoing reasons, we affirm defendant's conviction. We further order correction of the spelling of defendant's last name on the mittimus. We remand that portion of defendant's sentence pertaining to fines, fees, and monetary credits, however, for proper assessment consistent with this disposition.

¶ 19 Affirmed in part; remanded in part for correction of the mittimus and in part for further proceedings.