

No. 1-12-1020

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 10 CR 15312
)	
GARY DAVIS,)	Honorable
)	Neil J. Linehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in considering the State's evidence or at sentencing. Remand for Rule 605(a) admonishments is unnecessary. Defendant's order of protection remains in effect. Defendant is entitled to an additional day of pretrial custody credit. Defendant's DNA analysis fee is vacated.

¶ 2 Defendant Gary Davis was convicted of two counts of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2010) and two counts of aggravated battery (720 ILCS 5/12-4(a) (West 2010) following a bench trial. He was sentenced to 8 years' imprisonment. Defendant now appeals and argues: (1) the trial court erred when it used impeachment evidence as substantive

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and when it made scientific assertions and factual findings unsupported by the record and when it considered an element of the offense in sentencing; (2) defendant was not properly admonished under Supreme Court Rule 605(a); (3) the order of protection should be vacated; (4) he is entitled to an additional day of pretrial custody credit; and (5) this court should vacate the DNA analysis fee imposed. For the following reasons, we affirm the judgment of the trial court but correct the mittimus and vacate the \$25 DNA fee.

¶ 3

BACKGROUND

¶ 4 Defendant was charged with home invasion, two counts of aggravated domestic battery, and two counts of aggravated battery after he broke into his girlfriend's house and hit her in the face, fracturing her left eye. The following evidence was adduced at trial.

¶ 5 Britt Camel testified that defendant was her fiancé, and they had been together for six years. Camel testified that she was having drinks at a friend's house on August 7, 2010. Around 1:30 a.m. on August 8, 2010, defendant picked her up from her friend's house and she and defendant argued about missing keys. Camel testified that she was drunk, as she had consumed a fifth of whiskey. While still inside the vehicle, Camel slapped defendant in the mouth and, afterwards, defendant grabbed her arm. Camel stated she then got out of the vehicle and walked home.

¶ 6 Upon arriving home, Camel testified that she locked the back door and went to sleep. Camel was then awakened by the sound of a door being kicked in. Camel testified that she heard a loud boom and then defendant walked into her bedroom. Camel stated she was yelling at defendant, and proceeded to ask him why he had kicked in the door. Camel walked into the

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kitchen, got a knife, and “stuck him.” Specifically, Camel testified that she stabbed defendant with a butcher knife in the mouth, only once. Camel testified that defendant hit her in her left eye, but could not recall if defendant used an open or closed hand. Camel fell against the cabinet in the kitchen. Camel testified that she blacked out, and that defendant was not there when she woke up. Camel stated that her head was bleeding. She went upstairs to have her neighbor, Regina Coleman, call the police.

¶ 7 Camel was taken to Holy Cross Hospital. The bone behind Camel’s left eye was fractured. Camel was then transferred to Christ Hospital because she needed reconstructive surgery on her left eye. A metal plate was surgically implanted. Camel also had eighteen stitches to the right side of her forehead.

¶ 8 Officer Luis Garcia, the responding officer, testified. Upon entering Camel’s residence with his partner, Officer Anthony Wilson, Officer Garcia stated the front door was wide open and appeared to be kicked in. The apartment was in disarray and there was a blood trail leading upstairs. No one was on the first floor. The officers went upstairs and heard Camel, screaming hysterically. Camel’s neighbors were trying to put pressure on her wound with towels. Officer Garcia stated that he noticed a large laceration on the top of Camel’s head that was bleeding profusely. Camel told Officer Garcia that her ex-boyfriend, defendant, caused her injuries. Officer Garcia and Officer Wilson escorted Camel to the hospital and spoke with her about the events that occurred earlier in the evening. At no time did Camel ever mention a knife, or that she had stabbed defendant.

¶ 9 Later that evening, Officer Garcia and Officer Wilson responded to a call of a wanted

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person at Camel's residence. When they arrived, they saw defendant and arrested him. At the time of arrest, the officers did not notice any injuries on defendant. At the police station, the officers did notice a small cut on defendant's chin, which was not bleeding. Defendant refused medical treatment for this injury.

¶ 10 Detective William Murawski testified that he was assigned to his case and went to Christ Hospital to speak with Camel. Camel told Detective Murawski that defendant struck her with a closed fist on her left eye and then she blacked out.

¶ 11 Detective Murawski stated that he later went to Camel's residence and spoke with Camel's relative. Detective Murawski noticed that the front door was unsecure and that the jamb section of the front door was missing. Detective Murawski also noticed that there were pieces of broken wood from the door frame. Detective Murawski noticed broken glass, and wiped blood.

¶ 12 Afterwards, Detective Murawski went back to Christ Hospital to do a follow up interview with Camel. This time, Detective Murawski was accompanied by Assistant State's Attorney (ASA) Holly Kremin. Camel gave a very similar description to ASA Kremin as she had to Detective Murawski earlier that day. During the interview with ASA Kremin, Camel never mentioned a knife. This statement was handwritten and signed by Camel. Additionally, it was read aloud to Camel by ASA Kremin and Camel did not make any changes to the statement.

¶ 13 According to her statement, Camel had dated defendant for years, but they had broken up about five months before the evening in question. Camel asked defendant for a ride home because she was celebrating her birthday at a friend's house. She denied being drunk, but stated that defendant was drunk when he arrived to pick her up and was slurring his words. After

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dropping off a friend, defendant drove Camel toward her home. Defendant was jealous because Camel's child's father had wished her a happy birthday and made her laugh. Camel stated she was scared and got out of the car. She walked home and locked the door. She was awakened by a loud boom and saw defendant standing in the bedroom. Defendant did not speak but his look scared her. Camel ran to the door, but defendant blocked her way. Defendant chased Camel around the apartment and, in the kitchen, punched her. Camel fainted. When she awoke, her forehead was bleeding and she could not stand. Defendant was gone. She crawled to the second floor for help. Her neighbor, Coleman, tried to stop the bleeding and called 911.

¶ 14 At trial, Camel stated that she remembered speaking with ASA Kremin and Detective Murawski and remembered making a statement and signing it. She further stated that she was under the influence of Vicodin and Morphine when she gave the statement. She acknowledged that she had not admitted to the police that she had stabbed defendant. Camel explained that she had five children, and feared being arrested herself. She further stated that she never feared defendant and only petitioned for an order of protection because she was angry. She remembered testifying at the preliminary hearing in this case and saying that she tried to run away from defendant when he knocked down her door and hit her in the eye. She did not remember stating that defendant hit her with a closed fist, but did remember answering that she blacked out after she was hit and woke up on the kitchen floor in a puddle of blood.

¶ 15 Camel further testified that she decided not to pursue charges against defendant in August 2010. In September or October 2010, she admitted to her friend Chalaka that she had stabbed defendant on that night. She told defendant counsel about the stabbing in February 2011. Camel

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stated that she wanted defendant out of jail, that she spoke with defendant twice a day and had visited him several times in jail.

¶ 16 The State introduced photographs of Camel's injuries, photographs of defendant after the incident, the order of protection, and Camel's handwritten statements. Additionally, the State entered into evidence two prior convictions of defendant. After the State rested, defendant made a motion for directed finding. The trial court denied this motion.

¶ 17 Coleman testified for the defense. She stated that she lived on the second floor of Camel's building. On the night in question, Coleman opened her door and saw Camel standing in the doorway, bleeding profusely. Coleman called the police.

¶ 18 Defendant testified on his own behalf. He testified that he drove Camel to her friend's house, and later picked her up. Defendant stated that Camel was angry at him for being so late to pick her up, and began to accuse him of cheating. Defendant also testified that Camel was angry that defendant lost his keys and slapped him. Defendant testified that he grabbed Camel's arm to calm her down, and that Camel eventually got out of his car and walked home.

¶ 19 Defendant then testified that he drove around to find Camel, but was unsuccessful in his efforts. He then went to Camel's home, and there was no answer. Fearing that Camel was in danger and that "someone could be doing something to her," defendant testified that he pushed the door in. Camel was angry that he broke the door. Defendant walked into the kitchen, and he stated that Camel came at him from behind with a knife. Defendant testified that he then hit Camel with the heel of his hand on the left side of her face, by her eye. Defendant testified that he did this to stop Camel from stabbing him. Defendant then ran out of the house and went to his

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sister's home. After returning to Camel's home and learning that she had been taken to Holy Cross Hospital, defendant went to the hospital but that the hospital would not let him see her. Defendant again returned to Camel's house where he was arrested.

¶ 20 After defendant was arrested, Detective Murawski interrogated him. Defendant acknowledged that he did not tell the police that he was stabbed because he wanted to keep Camel out of trouble, and did not want her to lose her children. As a result, he invented a story for the detective and, later, for a prosecutor that he pushed Camel on a bed and she hit her head on the headboard. Defendant denied punching Camel but acknowledged grabbing her. Furthermore, defendant stated he got the cut on his chin during his arrest.

¶ 21 After hearing all of the evidence, the trial court found defendant guilty of two counts of aggravated domestic battery and two counts of aggravated battery. The court sentenced defendant to two concurrent terms of eight years in prison. It is from this judgment that defendant now appeals.

¶ 22 ANALYSIS

¶ 23 Defendant makes three separate claims of error by the trial court. First, defendant contends that the trial court erroneously considered Camel's prior inconsistent statements as substantive evidence, rather than merely impeachment evidence. Second, defendant asserts that in finding him guilty, the trial court improperly made "scientific assertions" based on its own "personal, outside-the-record knowledge or beliefs." Finally, defendant contends that the trial court improperly considered Camel's injuries, which is an element of the offense of aggravated domestic battery, at sentencing. Defendant acknowledges that he has forfeited these issues

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because they were not preserved in a post-trial motion (*People v. Enoch*, 122 Ill. 2d 176 (1988) (issues not objected to at trial and raised in a posttrial motion are waived for purposes of review.)) Defendant asks us to overlook these forfeitures and consider his arguments under the plain error rule.

¶ 24 Generally, the failure to set forth the alleged errors made by the trial court and to specify grounds for a new trial in a post-trial motion constitutes a procedural default of the issue on review in the absence of plain error. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). The waiver principle encourages the defendant to raise issues before the trial court, allowing the court to correct its own errors before the instructions are given, and consequently disallowing the defendant to obtain a reversal through inaction. *People v. Herron*, 215 Ill. 2d 167, 175 (2005). The plain-error doctrine is a limited and narrow exception to the general rule of procedural default and allows a reviewing court to consider unpreserved error when one of two conditions is met: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) 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. *Walker*, 232 Ill. 2d at 124. Under both prongs of the plain-error doctrine, the burden of persuasion remains with defendant. *People v. Naylor*, 229 Ill. 2d 584 (2008). If a defendant fails to satisfy this burden, the procedural default must be honored. *Walker*, 232 Ill. 2d at 124. When dealing with the plain-error doctrine, we must first decide whether an error has occurred. *People v. Sims*, 192 Ill. 2d 592, 621 (2000). We consider each

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issue in turn.

¶ 25 As a general rule, hearsay refers to “an out of court statement offered to establish the truth of the matter asserted” and is inadmissible. (Internal quotation marks omitted.) *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008). As an exception to the hearsay rule, the prior inconsistent statements of a testifying witness may be admitted to impeach the witness' credibility. *People v. McCarter*, 385 Ill. App. 3d 919 (2008). In addition, section 115–10.1(c) of the Code of Criminal Procedure (Code) allows a prior inconsistent statement to be offered for purposes of impeachment and as substantive evidence, if the witness is subject to cross-examination and the statement: “(1) was made under oath at a trial, hearing, or other proceeding, or (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and (A) the statement is proved to have been written or signed by the witness [.]” 725 ILCS 5/115–10.1(c) (West 2010). A witness has "personal knowledge" when the witness whose prior inconsistent statement is being offered into evidence actually witnessed the events that are the subject of the statement. *McCarter*, 385 Ill. App. 3d at 930.

¶ 26 When a prior inconsistent statement meets the basic requirements of reliability under section 115–10.1 of the Code, either party in a criminal case may introduce the prior inconsistent statement as substantive evidence. See *People v. Santiago*, 409 Ill. App. 3d 927, 932–33 (2011). Section 115–10.1 seeks to advance the legislature's goal of “prevent[ing] a ‘turncoat witness’ from merely denying an earlier statement when that statement was made under circumstances indicating it was likely to be true.” *People v. Thomas*, 354 Ill. App. 3d 868, 882.

¶ 27 Pursuant to section 115–10.1, Camel's statement to Detective Murawski and ASA

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Kremin was properly considered by the trial court as substantive evidence of defendant's guilt, even though the State indicated that it was being offered for impeachment. When Camel strayed from her earlier statements in response to a defense objection, the State advised the court that it had a prior written statement that was "an exception to hearsay" and her "inconsistent testimony" was the basis for the State "trying to impeach her on that point" without reference to sections 115-10.1 or 115-10.2(a) (725 ILCS 5/115-10.1, 10.2(a) (West 2010)). Camel testified at trial and was cross-examined. The statement she gave to Detective Murawski and ASA Kremin was signed by her. In addition, there is no dispute that Camel was present on the night of the incident and that defendant hit her. We do not consider this isolated statement, taken in context, to indicate that the State intended to use the prior statements only to contradict its witness and, in any event, we are aware of no requirement that a party specifically identify statutory authority for admission of hearsay statements. Therefore, the statement was properly considered by the trial court as substantive evidence. *People v. Madrowski*, 296 Ill. App. 3d 735 (1998). Accordingly, there was no error and plain error analysis is unnecessary.

¶ 28 Defendant next alleges that the trial court made assertions unsupported by the trial evidence and discounted defense testimony with theories not of record. As previously discussed, defendant has forfeited this error for failing to object at trial and for failing to include this issue in his posttrial motion. Before we engage in plain error analysis, we must determine if defendant's allegation constitutes error by the trial court.

¶ 29 It is fundamental that a fair bench trial is one based on the consideration of only that evidence introduced at trial and reasonable inferences to be drawn there from. *People v.*

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Gonzalez, 175 Ill. App. 3d 466 (1987). Further, in a bench trial it is presumed that the trial court considered only relevant evidence and that presumption may be rebutted only when the record affirmatively shows the contrary. *People v. Bradford*, 187 Ill. App. 3d 903 (1989). The trial court is free to accept or reject as much or as little as it pleases of a witness' testimony. *People v. Nelson*, 246 Ill. App. 3d 824, 830 (1993). It is the function of the trier of fact to determine the inferences to be drawn from the evidence. *People v. Herring*, 324 Ill. App. 3d 458 (2001).

“When weighing the evidence, the trier of fact is not required to disregard the natural inferences that flow normally from the evidence, nor is it required to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt.” *Id.* at 464 (citing *People v. Bull*, 185 Ill. 2d 179, 205 (1998)).

¶ 30 In the instant case, defendant claims that the judge used his outside knowledge of sports injuries and car accidents to find that defendant could have only broken Camel’s bone with a closed fist. The court stated:

"The Defendant was saying he was doing it [not telling the police that Camel stabbed him] because he was protecting her and the victim and she was doing that because she didn't want to get herself into trouble. I don't believe that.

I don't believe that at all. The Defendant's version of the facts [was] that he struck her with an open palm at the bottom on the hand and that it cause the injuries.

The injury that the victim suffered sustained to the orbit of her eye is a severe injury. It takes a tremendous amount of force to have that injury take place.

It is not like breaking a thumb or breaking a finger. That portion of your skull

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is a very dense bone material and either, excuse me, you either have a closed fist or some type of object to cause an injury like that.

That injury is a very common injury to people that play sports with high contact where they don't wear any head gear, a hockey player, if you don't have any head gear on, a hockey stick would cause that, if you're a baseball player getting hit with a pitch or hit with a ball, common in automobile accidents where people hit their head on the dashboard or on the steering wheel and causes those injuries."

¶ 31 Camel testified at trial that she didn't remember if defendant hit her with a closed fist or if he punched her. However, shortly after the incident occurred, Camel told Detective Murawski that defendant hit her with a closed fist. Later, Camel signed a written statement containing the information she provided to Detective Murawski and ASA Kremin. In that statement, Camel stated that defendant punched her. Defendant testified at trial that he hit Camel with an open hand, but after he was arrested, he denied hitting Camel at all. As a result of the injuries she received at defendant's hand, Camel was hospitalized with substantial injuries. The bone under her left eye was fractured and required reconstructive surgery, where a metal plate had to be placed underneath her left eye. Camel also received eighteen stitches on the right side of her head.

¶ 32 We find that based on the facts of this case, the comments defendant complains of do not constitute error. It is the function of the trier of fact to resolve inconsistencies in the evidence, assess the credibility of the witnesses and the weight to be given to their testimony (*People v.*

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Cox, 377 Ill. App. 3d 690, 697 (2007)), and the inferences to be drawn from it. *People v. McCoy*, 295 Ill. App. 3d 988, 995 (1998).

¶ 33 The court, as the trier of fact in this case, found defendant's version of the events, that he hit Camel with an open hand, to be incredible. The trial judge explained the reasoning behind this finding and simply used his common knowledge and ordinary observations of life to conclude that the blow defendant inflicted to Camel's eye was delivered with enough force to fracture her eye bone. It was the court's observation that the injuries Camel sustained also occurred frequently where athletes who are not wearing protective headgear are struck in the eye area with some amount of force. The court also observed that individuals involved in car accidents received similar injuries when hit in the eye area with a steering wheel or the dashboard. These are reasonable observations by the trial judge made while articulating his view of the testimony and the weight given to all the evidence in resolving inconsistencies and assessing the credibility of the witnesses.

¶ 34 In addition, defendant in this case was charged with aggravated domestic battery. That section provides: "[a] person who, in committing domestic battery, knowingly causes great bodily harm * * * commit aggravated domestic battery." 720 ILCS 5/12-3.3(a) (West 2010). Accordingly, one of the elements the State was required to prove was that defendant inflicted "great bodily harm" on Camel. 720 ILCS 5/12-3.3(a) (West 2010). What conduct constitutes great bodily harm is generally a question of fact for the trier of fact. *People v. Pulgar*, 323 Ill. App. 3d 1001 (2001).

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¶ 35 In *In re J.O.*, 269 Ill. App. 3d 287 (1995), this court held that the defendant possessed a deadly weapon when he committed the offense of first-degree murder and aggravated battery. The judge went on to say that “reasonable people know that a beating with a golf club and baseball bats can cause death and/or great bodily injury.” *Id.* In making these statements, the judge was found to have used common knowledge and experience to come to his determination. *Id.*

¶ 36 Similarly, in the instant case, the judge noted that Camel’s injuries were severe and extensive treatment was needed to treat the injuries. The trial court's comments can also be attributed to its factual finding that Camel's injuries were sufficient to constitute great bodily harm. Where there is no error, there can be no plain error.

¶ 37 Defendant next argues that the trial court improperly considered a fact inherent in the offense of aggravated domestic battery as a factor in aggravation. Defendant claims that Camel's severe injury could not be used as both an element of the offense and a factor in aggravation at sentencing. Again, defendant has forfeited this error but urges us to consider it as plain error.

¶ 38 Sentencing issues are forfeited unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Forfeited issues relating to sentencing may be reviewed for plain error. *Id.* at 545. To establish plain error, a defendant must show either that: "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* Defendant bears the burden of persuasion under either prong of the plain error rule. *Id.* Before we can determine whether defendant has met his burden

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under either prong of plain error, we must first decide whether a clear or obvious error occurred.

Piatkowski, 225 Ill. 2d 551, 565 (2007).

¶35 A reasoned judgment as to the proper sentence to be imposed must be based on the particular circumstances of each individual case and depends upon many factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). "In determining an appropriate sentence, the defendant's history, character, rehabilitative potential, the seriousness of the offense, the need to protect society and the need for deterrence and punishment must be equally weighed." *Jones*, 295 Ill. App. 3d at 455. The imposition of a sentence is a matter within the trial court's discretion, and a reviewing court has the power to disturb the sentence only if the trial court abused its discretion. *Jones*, 168 Ill. 2d at 373-74.

¶36 At sentencing, the court indicated that it had reviewed the presentence report and considered the facts of the case, the matters in aggravation and mitigation and the arguments and statements by the parties. The court noted that defendant was Class X eligible based on his criminal history. 730 ILCS 5/5-4.5-95(b) (West 2010). Defendant was therefore subject to a permissible range of punishment between 6 and 30 years in prison. See 730 ILCS 5/5-4.5-25(a) (West 2010). The court stated that it considered the testimony from all of the mitigation witnesses and that it was "sure [defendant] provided well for that family." The court then considered the factors in aggravation and the "severe injuries that the victim sustained. And, the defendant's criminal history." The court stated, "[b]alancing that with those factors in mitigation I can't ignore the aggravation of the beating itself nor of the extensive criminal history."

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¶ 39 A “double enhancement” occurs when either a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, or the same factor is used twice to elevate the severity of the offense itself. *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). However, a court may consider the degree of harm caused or threatened by defendant's conduct, even if the threat of harm is inherent in the offense. *People v. Salvador*, 113 Ill. 2d 256, 271-72 (1986).

¶ 40 Here, the court considered defendant's criminal history and Camel's injuries as factors in aggravation. While Camel's injuries are elements of the offense of aggravated domestic battery, it is not impermissible for the sentencing court to consider the severity of the degree of harm caused to the victim as an aggravating factor. *Id.* The court in this case did not comment on Camel's injuries other than to say that the injuries were a factor in aggravation and that the factors in aggravation outweighed the factors in mitigation. Based on the court's comments in this case, we find no error occurred when defendant was sentenced to 8 years' imprisonment as a Class X offender, where his sentence was in the permissible range for a Class X felony. See 730 ILCS 5/5-4.5-25(a) (West 2010). Accordingly, we decline defendant's invitation to engage in plain error analysis.

¶ 41 Next, defendant argues that the trial court erred when it failed to instruct him on how to avoid forfeiture of sentencing issues under Supreme Court Rule 605(a). Specifically, defendant claims that the trial court did not say that before filing an appeal, defendant was required to file a postsentencing motion raising the issues he wished to preserve or forfeit the issues he did not raise. Defendant requests that we remand this cause for proper admonishments under Rule 605(a).

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¶ 42 Rule 605(a) provides that, when the circuit court has entered a judgment and sentence after a plea of not guilty:

"(3) At the time of imposing sentence or modifying the conditions of the sentence, the trial court shall also advise the defendant as follows:

(C) that any issue or claim of error regarding the sentence imposed or any aspect of the sentencing hearing not raise in the written motion shall be deemed waived." 210 Ill.2d R. 605(a)(3).

¶ 43 The State acknowledges that the trial court did not expressly admonish defendant using the exact language of Rule 605(a) but argues that *People v. Breedlove*, 213 Ill. 2d 509 (2004), is instructive on this issue. In *Breedlove*, our supreme court held that noncompliance with Rule 605(a) does not require remand when the trial court does not strictly comply with it because the defendant who does not file a proper motion to reconsider sentence may still appeal trial errors and raise sentencing issues as plain error. *Id.* at 520. "The purpose of Rule 605(a) is not to advise defendants of every step necessary to preserve claimed errors for review." *Id.* at 522. Rather, "it is to inform defendants who have been convicted and sentenced after trial as to what they must do to perfect an appeal." *Id.* "It was never intended to advise defendant of every step necessary to preserve claimed errors for review." *Id.*

¶ 44 Subsequent to *Breedlove*, in *People v. Henderson*, 217 Ill. 2d 449 (2005), our supreme court expanded *Breedlove* and held that a trial court's failure to give proper 605(a) admonishments does not necessarily require reversal in every instance. The court adopted a prejudice test, finding that remand is required only where there has been "prejudice or a denial of real justice as a result of the inadequate admonishment." *Id.*

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¶ 45 Defendant claims that because he was precluded from raising his sentencing issue on appeal, that the trial court considered an improper factor in sentencing, his case should be remanded for proper Rule 605(a) admonishments. However, as we have determined that the court did not err in considering Camel's injuries as a factor in aggravation, there was no resulting prejudice from the trial court's failure to properly advise defendant of his right to challenge his sentence. See *Henderson*, 217 Ill. 2d at 46 ("where a defendant is given incomplete Rule 605(a) admonishments regarding the preservation of sentencing issues for appeal, remand is required only where there has been prejudice or a denial of real justice as a result of the inadequate admonishment.") Therefore, remand for Rule 605(a) is unnecessary here.

¶ 46 Defendant argues that pursuant to sections 5/112A-11 and 5/112A-10(a) of the Illinois Domestic Violence Act (Act), in order to request an order of protection in a criminal proceeding, the State must file a summons and provide notice to a defendant. 725 ILCS 5/112A-11, 5/112A-10(a) (West 2010); see also 750 ILCS 60/101 *et seq.* (West 2010). Because the State provided neither, defendant argues that the order of protection is void and should be vacated by the court. We disagree.

¶ 47 As his sole authority, defendant cites *People v. Cuevas*, 371 Ill. App. 3d 192 (2007). In *Cuevas*, the court held that the Act requires an order of protection to be in writing. In the case at bar, the State filed a written petition for an order of protection. Therefore, *Cuevas* is inapplicable.

¶ 48 Defendant did not argue below that neither the State nor the court served him with notice that an order of protection was being sought as required by section 211 of the Act, or that the State failed to serve him with a separate summons in open court, as required by section 210 of the Act, in the trial court. 750 ILCS 60/210, 211 (West 2010); 725 ILCS 5/112A-11, 5/112A-

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10(a) (West 2010). Defendant raises this issue for the first time here. Thus, defendant has waived review of the issues of notice and summons. See *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001) (Where a party acquiesces in a proceeding in a given manner, he is not in a position to claim he was prejudiced there from). Moreover, defendant has not cited any authority to support his argument that the order of protection should be vacated because he was not served with notice and a summons. In addition, defendant had notice of the order of protection.

Defendant was present in open court when the order of protection was issued and acknowledged that he understood it was being issued. After appearing in court, defendant was served at Logan Correctional Center with a notice of filing and proof of service.

¶ 49 Defendant argues, and the State agrees, that he is entitled to credit for 555 days of time spent in pretrial custody. In this case, defendant served 555 days of pretrial custody, but only received 554 days of credit. Defendant is entitled to custodial credit for every day spent in custody, including the day of his sentencing and commitment. *People v. Williams*, 239 Ill.2d 503 (2011). Time-served credit includes the date of arrest, but not the date of sentence. *Id.*

Accordingly, we correct the mittimus to reflect 555 days of pretrial credit.

¶ 50 Finally, defendant argues that because he has previously submitted his DNA to the Illinois State Police due to his 2001 felony conviction, he should not be required to pay a \$250 DNA processing fee in this case as required by the court. The State agrees. If a defendant has already provided a DNA sample and paid the DNA analysis fee after a previous conviction, a trial court's order imposing additional DNA analysis is void. *People v. Marshall*, 242 Ill. 2d. 285 (2011). Because defendant has previously submitted his DNA in conjunction with a 2001 felony conviction, his \$250 DNA fee should be vacated in this case.

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¶ 51

CONCLUSION

¶ 52 Based on the foregoing, the judgment of the trial court is affirmed. We correct the mittimus to reflect 555 days pretrial custody credit. We also vacate defendant's \$25 DNA analysis fee.

¶ 53 Affirmed in part; vacated in part; modified.

