FOURTH DIVISION
March 30, 2017

No. 1-13-3175

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. 07 CR 2970
	)	
ANTHONY TRIPLETT,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for first degree murder and natural life sentence are affirmed; the trial court did not abuse its discretion when it denied defendant's request to cross-examine the prosecution's expert DNA witness on an Arizona DNA database, defendant failed to object to the alleged hearsay "course of investigation" testimony of detectives Powell and Carr, and therefore forfeited any objection and the admission of the alleged hearsay testimony is not plain error, defendant forfeited the *Apprendi* error he raised on appeal by failing to object to the jury instructions that deviated from the Illinois pattern instructions, and the use of the flawed sentence enhancement instructions did not

arise to the level of plain error. Finally, we correct defendant's mittimus to reflect a conviction on only a single count of first degree murder.

¶ 2 After a jury trial, defendant Anthony Triplett was convicted of the first degree murder of Urszula Sakowska and sentenced to serve a prison term of natural life. Defendant argues his conviction and sentence should be vacated and a new trial ordered. He argues that the trial court improperly prevented the defense from cross-examining the prosecution's expert witness concerning results of studies on searches of offender databases; that the trial court erred in allowing inadmissible hearsay and prior consistent statements; and, that the jury was improperly instructed on the sentencing enhancement factor because necessary elements were not included. For the following reasons we affirm defendant's conviction and sentence.

¶ 3 BACKGROUND

¶ 4 A jury found defendant guilty of the first degree murder of Urszula Sakowska. Evidence of another victim's murder, Janice Ordidge, was admitted at defendant's trial as other crimes evidence. The jury found defendant was eligible for an enhanced sentence and he was subsequently sentenced to a term of natural life in prison.

¶ 5 Discovery of Urszula Sakowska's Body

¶ 6 The record shows that defendant was employed as a cable technician by Premier Cable, a subcontractor of Comcast cable. Defendant was scheduled to go to the decedent's home on December 8, 2006, before noon, to install an internet connection. Greg Magiera testified he shared the home located on South McVicker, in Chicago, Illinois with his fiancé, Urszula Sakowska (Urszula). Magiera, who worked as a truck driver, testified that he left for work on Wednesday December 6, 2006, to drive to New Jersey. Magiera returned to Chicago on Thursday night to switch truck trailers and then drove back to New Jersey. He left behind a Seiko watch that Urszula had given him. He spoke with Urszula Thursday night. The next day,

after repeatedly calling Urszula and getting no reply, Magiera called his friends Piotr and Arleta Czechowski. Piotr and Arleta testified at trial. They went to Magiera's home to check on Urszula. When Piotr and Arleta came to Magiera and Urszula's home, they noticed the lights were on in the basement and computer room. They entered the home through an unlocked storm door. While Arleta waited by the back door, Piotr checked the house, eventually checking the bathroom. Though the shower curtain was partially closed, he saw a woman's leg. He immediately left the house with Arleta and called the police. The police found Urszula's naked body submerged in her bathtub, with duct tape wrapped around her head and face. Police found no signs of forced entry into the home, though they did observe a dining room window was open. Detectives also spoke with Urszula's neighbor, Valerie Almaguer. Almaguer informed police that she saw a white cable van parked in front of Urszula's home on the morning of December 8, 2006. After talking with the Czechowskis, Magiera returned to Chicago on Saturday morning and he went on a walk-through of his home with the police. On the walk-through, Magiera testified that he noticed his Seiko watch was missing from its box, and that a jar of coins was missing (some coins were scattered throughout the home). Urszula's wallet was lying on their bed, with no money inside, and two credit cards missing: one from TCF and one from Mid America Bank. Urszula's jewelry box was found on the kitchen counter, which Magiera noted Urszula normally kept in the computer room. Magiera stated that two of Urszula's rings were missing. The basement carpet had two red stains that detectives cut out to test for blood.

¶ 7 The Medical Examiner's Office conducted an autopsy on Urszula's body. The medical examiner testified Urszula's body had numerous bruises and abrasions, she suffered a blow to the head, and died from suffocation due to strangulation. The exam noted she had blonde hair. The medical examiner collected fingernail clippings, head hair, blood, and swabs from Urszula's

oral, vaginal, and rectal cavities. These were sent to a forensic laboratory for analysis. The medical examiner testified that in general, it takes 2½ minutes of consistent pressure on the neck to render someone unconscious and, soon after that, death will occur.

¶ 8 Urszula's neighbor, Valerie Almaguer, testified that she told police that on December 8, 2006, she left her home just before 10:30 a.m. to pick her son up from school. Almaguer used the back door to leave with her dog; from there she could see the cable pole behind her home and that no one was working on the cable pole. When Almaguer walked to the front of her home, she saw a white van parked in front of Urszula's home. The van had small black letters on the side indicating it was a cable van. Almaguer saw the same van parked there when she returned from picking up her son. Almaguer then played with her dog in the front yard for 20-30 minutes and did not see anyone go to the van, nor did she see anyone in the van.

¶ 9 Ronzell Strong testified that he was a Comcast customer and he was scheduled for service on December 8, 2006 at his home located on South LaCrosse. Strong testified at trial that defendant arrived at his home at noon or 1 p.m., but did not perform any work because Strong did not have the required money for installation. Thomas Franz testified he lived two blocks away from Strong on South LaCrosse. Franz found Urszula's Mid America Bank card in the street outside his home. He reported the card stolen and destroyed it. After seeing Urszula's case on the news he put the pieces of the card together and gave it to police.

¶ 10 Police Investigation of the Sakowska Murder

¶ 11 Detectives Anthony Powell and Janet Scanlon were assigned to investigate Urszula's murder. Powell testified that he had interviewed the Czechowskis at the scene and also spoke with neighbor Almaguer. Powell also testified that he conducted the walk-through with Magiera, and listened to a voicemail message left on December 8, 2006, at 10:44 a.m. on Urszula's

answering machine. The message was from a Comcast employee, Dwayne Green, who was inquiring whether anyone was at home. Powell testified that he learned Urszula had a Comcast cable appointment the day she was murdered, learned of her two missing credit cards, and that he spoke with Thomas Franz. Powell testified he later conferred with detective Thomas Carr, who was assigned to investigate the murder of Janice Ordidge. The detectives noted a number of similarities in their cases, including how the same cable technician had been assigned to service both women's addresses on the days of their murders, respectively.

¶ 12 Police then began searching for defendant. Officers were unable to locate him at any of his known addresses and believed that he was living in his work van. They obtained a warrant to search the van and went to the business location of Premier Cable to search the van. When officers arrived at Premier Cable on December 12, 2006, defendant arrived in his work van, exited the van, and then walked to the back of it. Detective Carr testified at trial that as detectives approached defendant he observed defendant throw a shiny object to the ground before walking away, and that nothing obstructed Carr's view. Defendant then approached Carr's vehicle and asked if Carr was looking for him. Carr asked who defendant was. Defendant then walked away but returned immediately to identify himself, and then walked away again. Detectives then approached defendant and detained him. His van was taken to a police auto pound for processing.

¶ 13 When Carr searched the area where he saw defendant throw the shiny object, Carr found a Seiko watch. No other shiny objects were in the vicinity, and Carr testified that no other car or foot traffic was present in the area at the time. Carr left the watch on the ground and called for an evidence technician, who observed that the watch band was disengaged from the body of the watch, but that the main locking mechanism was still intact. At the police station later, detective

Powell showed Magiera a photo of the watch, which Magiera identified as his own. Magiera testified that he had attempted to find a replacement watch but was unable to find the same Seiko model.

¶ 14 A forensic investigator, Fred Heidemann, processed defendant's van at the police pound. He observed, among other things, that the driver's seat was wrapped in duct tape, and there was a plastic bin in the back. Heidemann recovered three shirts, layered one inside the other, from the top of the plastic bin. Heidemann observed several long, blonde hairs on the left armpit area of a black Comcast shirt.

¶ 15 On December 13, 2006, detectives went to the apartment of Tzadekiel Sutton, who shared the apartment with defendant. Sutton testified that defendant had lived with him for a year. Sutton consented to the search of the apartment. Sutton pointed out defendant's clothes to detectives. Detectives removed a box of clothes, a bag of clothes, and two pairs of pants.

¶ 16 Other Crimes Evidence - The Murder of Janice Ordidge

¶ 17 Other crimes evidence was admitted at trial. The record shows that on October 23, 2006, Janice Ordidge's body was found submerged in her bathtub clothed only in a pair of underwear. The coroner, Mitra Kalelkar, testified that Ordidge died of strangulation, had hemorrhages to her tongue indicating she had bit it, and a waterline on her right thigh indicating prolonged submersion in water. Andrew Ohlson, Ordidge's boyfriend at the time of her murder, testified that Ordidge had a Comcast appointment for October 21, 2006. He testified that he received a call from Ordidge at 12:08 p.m. on that day, that Ordidge spoke with him concerning the cable appointment, and how her voice sounded uneasy. Police confirmed that defendant was the technician sent to Ordidge's apartment.

¶ 18 Detective Carr testified that he spoke with Ordidge's sister and her building manager at

the scene of the crime, and then with Ohlson at the police station. Carr testified that he checked Ordidge's phone's call log and saw a call from October 21, 2006 to Ohlson at 12:03 p.m. and a final call to METRA at 12:18 p.m. He also testified that two credit cards and an iPod were missing from Ordidge's apartment. According to the testimony of Emanuel Newsom, defendant wanted to sell an iPod defendant received from one of his "white customers." Newsom said that defendant left the iPod with him and that he contacted detectives on December 13, 2006. The police recovered the iPod. Both Ohlson and Ordidge's sister testified that they recognized the iPod police later recovered as belonging to Ordidge.

¶ 19 Forensic Evidence Admitted Against Anthony Triplett

¶ 20 The State presented the results of DNA testing conducted on samples from the Janice Ordidge and Urszula Sakowska murders. Defense counsel wanted to confront the State's witnesses concerning the DNA evidence with the results of surveys of offender DNA databases conducted in Arizona and Cook County. Defense claimed these surveys were studies of DNA databases indicating DNA tests on a partial profile could match multiple profiles in the database. The studies were cases where a partial DNA profile was checked against an offender database to see if it would generate a match. The surveys defendant wished to use demonstrated that multiple matches can occur even when the probability was astronomically low of there being more than one match. The State filed a motion *in limine* to preclude defense from using the studies to question witnesses. The trial court held the motion in abeyance until the forensic experts testified. At trial, just before the forensic experts testified, the court then ruled in favor of the State finding the studies were irrelevant and likely to confuse the jury.

¶ 21 Forensic expert Gitana Wallace testified that she tested Urszula's oral and vaginal swabs for the presence of semen, and that she detected a single sperm cell on each of the swabs.

Forensic expert Lisa Fallara testified that the sperm found on the vaginal swab matched with Magiera's DNA. The sperm found on the oral swab could only be tested at seven of twelve loci for identification. Forensic expert Karris Broaddus testified that because defendant's DNA matched at those seven loci, defendant could not be excluded as a suspect. Broaddus testified that this profile could be expected to occur in one in four white males, one in eleven black males, and one in seven Hispanic males (defendant is a black male). Broaddus further testified that the watch recovered by detective Carr contained the profiles of two males. The major profile, as identified at nine loci, matched with defendant's DNA. Broaddus testified that the probability of any other unrelated male matching was one in 165 whites, one in 374 blacks, and one in 298 Hispanics. Wallace also testified that the stains from Urszula's basement carpet were blood. Forensic expert Janice Youngstedt testified that the blood stains matched Urszula's DNA.

¶ 22 Forensic expert Maria Salazar testified that a hair found on a towel in Urszula's basement was tested at two of thirteen loci. She explained that defendant's DNA matched at those two loci, that therefore defendant could not be excluded as the suspect, and that such a profile would be expected to occur in one in 6,600 black persons, one in 28,000 white persons, and one in 14,000 Hispanic persons. Forensic expert Ellen Chapman testified that a hair found on the shirt from defendant's van was consistent with Urszula's hair. Forensic expert Mohamed Sedqi testified that defendant could be excluded as a source of the hair, but that Urszula could not be excluded. Youngstedt testified that of the six blood stains found on a jacket taken from the bag of clothes from the apartment defendant shared with Sutton, four matched Urszula's DNA profile and the other two matched defendant's DNA.

¶ 23 Youngstedt also testified that the sperm taken from Ordidge's oral swab contained a mixture of two individual's profiles. One of the profiles matched defendant. She explained this,

and how the probability of any other person matching was one in 40 quadrillion black men, one in 28 quintillion white men, and one in 16 quintillion Hispanic men. Swabs from Ordidge's left and right fingernails also had complete male DNA profiles, and Broaddus testified that they matched defendant's DNA. Broaddus testified that the probability this profile would match another unrelated male was one in 443 white men, one in 370 black men, and one in 298 Hispanic men.

¶ 24 Testimony of Defendant Anthony Triplett

¶ 25 Defendant, Anthony Triplett, testified he worked as a cable technician for Premier Cable Company from August through December of 2006. Premier Cable was a subcontractor for Comcast Cable. Defendant leased a white work van from Tracey Jones, the owner of Premier Cable. The vans had removable magnetic placards used to identify them as cable contractors for Comcast. Defendant testified that he did not have a placard for his truck because he gave it to another individual. Defendant, like the other technicians, had a Nextel radio with an internet connection used to upload work orders for technicians. Technicians would then use the device, called a TecNec, to report their work order times and work service times. They would note the time when they arrived and left the property. Comcast assigned the work orders to Premier, where someone would assign the work orders to Premier's technicians.

¶ 26 Defendant was assigned the work order for Urszula's home. Defendant testified that he arrived at Urszula's home at around 9:30 a.m. on December 8, 2006. He stated he pulled into the alley because he was going to run cable wire from the main cable pole to the customer's house. Defendant claimed that he was wearing layers of shirts and was not wearing a coat because that would violate his employer's safety policy while working on the ladder. Defendant stated that he could not connect the cable wire from the pole to Urszula's house because he did not see any

outgoing cable lines even though the work order indicated they would be there. Defendant testified he could not complete installation because he needed his drill which he had loaned to another technician. He could not remember the name of the technician. Defendant stated that when he arrived at Urszula's house he saw a cable control auditor truck parked there. Defendant testified that after speaking with the auditor he rang Urszula's bell and she answered the door. Defendant claims he only stepped two or three feet inside her house and attempted to explain to her that he would have to reschedule her appointment because he did not have his drill. Defendant stated that Urszula spoke with an accent and he understood her to say appointment, Comcast, reschedule and then she closed the door. Defendant returned to the alley to retrieve his ladder and cable wire. He claimed that from the alley he watched Urszula leave the front of her house get inside her car and drive off.

¶ 27 Defendant testified that he contacted the Comcast dispatcher to report the job as "no access" so that he could avoid getting in trouble for not having his drill. After contacting Comcast, defendant stated he took a nap in the front seat of his van while parked on McVicker Street. Defendant also testified that he did not kill Urszula and he did not take the watch.

¶ 28 On cross-examination, defendant admitted that when he first spoke to police he told them he was never inside Urszula's home. Defendant admitted he lied about not having access to Urszula's residence and also admitted that when he is in trouble, he will lie to help himself. Defendant admitted the gray coat with Urszula's bloodstains belonged to him, but defendant denied ever wearing a coat to work. Defendant was unable to explain how Urszula's blood appeared on his jacket since he claimed he was unable to gain access to her home. Defendant also denied that he possessed and then threw away the Seiko watch when police approached him on the date of his arrest.

¶ 29 In response to the other crimes evidence, defendant testified that he was admitted to Ordidge's home to repair her cable. Defendant testified that while he was in Ordidge's home, another man was present. Ordidge was having an argument with the other man. The man threw a wastepaper basket at Ordidge. Ordidge ducked when the wastepaper basket was thrown and it hit defendant. Ordidge ran and hid behind defendant. Defendant testified he ordered the man to leave the home. Defendant explained his DNA was on Ordidge's body because after the man left, Ordidge voluntarily performed oral sex upon him. Defendant also explained his possession of Ordidge's iPod. Defendant testified Ordidge requested that defendant install a "hot box" that would allow Ordidge to receive all the channels free of charge. Although installing such a device is illegal, defendant agreed to do so and he quoted her a fee of $200 to install the "hot box." Defendant testified she didn't have the $200 so she gave him her iPod as collateral.

¶ 30 Jury Instructions

¶ 31 The jury received instructions for their deliberation concerning a charge of first degree murder and a sentencing enhancement based on felony murder. The State charged defendant under four theories of first degree murder: intentional murder, knowing murder, strong probability of death or great bodily harm, and felony murder predicated on robbery or aggravated criminal sexual assault. The jury returned a general verdict finding defendant guilty of first degree murder. The State sought to increase defendant's sentence to natural life based on the felony murder aggravating factor. The jury was instructed that defendant was eligible for the sentencing enhancement if the jury found:

> "That during the commission of the offense of first degree murder, the murdered person was killed in course of another felony if the murdered person was actually killed by the defendant; or the other felony was one or more of the following:

robbery or aggravated criminal sexual assault."

The jury determined that he was eligible for an enhanced sentence. This appeal followed.

¶ 32 ANALYSIS

¶ 33 Defendant raises three contested arguments in this appeal: 1) whether the court erred when it prevented defendant from introducing the studies of other Arizona offender databases in its cross-examination of the state DNA witness; 2) whether the court committed plain error when it allowed alleged hearsay evidence under the course of investigation exception; and 3) whether errors in the jury instructions for enhanced sentencing constituted plain error which requires a new sentencing hearing for defendant.

¶ 34 Because the admission of evidence is within the sound discretion of the trial court, we review the trial court's exclusion of the DNA database studies for abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). An abuse of discretion occurs when the trial court's decision is arbitrary, fanciful, unreasonable, or when no reasonable person would take the same view as the trial court. *People v. Morris*, 2013 IL App (1st) 110413, ¶ 47.

¶ 35 Under a harmless-error analysis, the State must prove beyond a reasonable doubt that the result would have been the same absent the error. *People v. Thurow*, 203 Ill. 2d 352, 363 (2003). Under plain-error analysis, defendant must persuade the court that the error was prejudicial. *Id*; *People v. Nitz*, 219 Ill. 2d 400, 410 (2006).

¶ 36 The Trial Court Did Not Abuse Its Discretion When It Prevented Defense Counsel from Introducing Results from Unrelated Searches of Offender Databases

¶ 37 Defendant argues the trial court abused its discretion by denying defendant the ability to confront the State's forensic experts with the results of a search of an Arizona DNA database. Defendant claims it was unreasonable for the trial court to prevent him from questioning experts concerning the results of unrelated surveys of DNA databases. Defendant argues the surveys

were necessary to put into context the probability of identifying defendant through a hair sample where only a partial profile at 2 loci could be completed instead of the desired 13 loci.

¶ 38 Given the exigencies of trial, trial judges are afforded wide latitude in their decisions as to what is allowed on cross-examination. *People v. Arze*, 2016 IL App (1st) 131959, ¶ 113. Hence, "a reviewing court should not interfere absent a clear abuse of discretion resulting in manifest prejudice to the defendant." *Id*. An abuse of discretion occurs when the trial court's decision is arbitrary, fanciful, unreasonable, or when no reasonable person would take the same view as the trial court. *Morris*, 2013 IL App (1st) 110413, ¶ 47. For the following reasons we find no abuse of discretion here.

¶ 39 Defendant claims this issue is controlled by our decision in *People v. Wright*, where we held that a trial court abused its discretion in preventing cross-examination concerning the Arizona study. *People v. Wright*, 2012 IL App (1st) 073106, ¶¶ 117-30. In *Wright*, the defendant was charged with aggravated sexual assault. It was a cold case where the alleged sexual assault occurred years earlier and the primary identification of the defendant was through a 9-loci match of a partial STR-DNA profile. *Id*. at ¶ 86. The victim could not identify the defendant as the offender in the case. The defendant filed a pretrial motion to exclude DNA evidence because the analysis was only done at 9 loci and due to certain discrepancies in the laboratory work. *Id*. at ¶ 8. In the alternative, the defendant requested that should the trial court allow the DNA evidence, it should also order the State to search its databases to see if there existed any other matches to the 9-loci profile. *Id*. at ¶ 11. Defendant supported this argument by citing an Arizona study which involved a search of the convicted offender database for a match at 9 loci. This revealed 120 matches in a database of only 65,493. *Id*. The state's DNA expert in his testimony exaggerated the scientific significance of a 9-loci match:

> "the State's DNA expert, indicated that, in his experience, he had never seen a nine-profile match that was not accurate. Defense counsel then tried to immediately follow up with questions about the Arizona study, which had been provided to [the forensic scientist] before trial and which contained over a 100 pairs of 9–loci matches. The trial court barred any questions about it." *Id*. at ¶ 118.

Wright's defense counsel also failed to argue at trial that "a 9–loci search of the Illinois database had already been done, that it had revealed that close to 2,000 individuals had matched at 9 loci, and that the State's own director of that database had concluded that 9–loci 'matches' were not, in fact, matches." *Id*. at ¶ 113. The defendant was convicted and argued on appeal that the trial court erred in its ruling regarding the DNA testing because it failed "to order the Illinois State Police to determine the number of nine-loci matches in its offender database," and by preventing the defense from questioning the State's expert witness about the results of similar searches of the Arizona offender database. *Id*. at ¶ 55.[1]

¶ 40 On appeal, we found that the trial court in *Wright* abused its discretion because the defendant was prevented from meaningfully probing the statistical evidence. *Id*. at ¶¶ 125-27. In *Wright*, we found the error was not harmless because of how defense counsel's cross-examination was limited. For one, the primary evidence identifying the defendant in *Wright* was the State's expert testimony that the result of a 9-loci analysis "matched" defendant, even though a 13-loci analysis revealed "defendant could be neither excluded nor identified as the

[1]In the present appeal, defendant Triplett does not claim the trial court erred in failing to order a search of the Illinois offender database. Rather, defendant's only argument is that the trial court erred in preventing defense counsel from presenting evidence regarding the Arizona study in order to confront the DNA evidence concerning the 2-loci partial profile based on the STR match.

perpetrator." *Id*. at ¶ 101. This was in spite of how the State's director of that database gave a deposition "that 9-loci 'matches' were not, in fact, matches." *Id*. at ¶ 113. Moreover, the State's expert witness testified that he had never seen a 9-loci match that was inaccurate though he had been provided with the Arizona study indicating 120 matches of a 9-loci profile. *Id*. at ¶ 118. In order to impeach the witness, defense counsel required the ability to confront the witness with the results of the Arizona study because the witness had seen the results of that study and somehow testified that he had never seen a 9-loci match that was not accurate. *Id*. We found that in those particular circumstances the defense was entitled to cross-examine the State's expert witness concerning the Arizona study because it was necessary for effective cross-examination. *Id*. at ¶¶ 127-29. Accordingly, our examination of whether the trial court unreasonably prevented defendant Triplett from introducing the results of the Arizona study turns on whether defendant was able to conduct effective cross-examination without it.

¶ 41 In this case we find that defendant was able to meaningfully probe the statistical evidence and mount effective cross-examination without the use of the Arizona study. Defendant's case is distinguishable from *Wright* because the State did not elicit testimony from its expert witnesses that a 9-loci match was never inaccurate, and defense counsel was able to meaningfully probe the statistical evidence. In *Wright*, the State's expert "did not testify whether, to generate these numbers, he used the FBI's database, the Illinois database, some combination of the two, or some other population database altogether." *Id*. at ¶ 40. In contrast, forensic expert Salazar provided detailed information about how the statistics were generated and approximate numbers of people within those databases. Defense counsel vigorously questioned the State's expert witnesses, brought out context for the probabilities, and presented its own expert witness to testify as to the results of the State's forensic analysis. The defense asked questions about the reliability of the

evidence, whether it was degraded, and went into detail about how potential suspects may be excluded but not "matched" with a 2-loci partial profile. Counsel noted how there are thirteen possible loci to test and that lack of a match at any one locus excludes a suspect. The Constitution entitles defendant to conduct effective cross-examination, "not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Gensterer*, 474 U.S. 15, 20 (1985). Defense counsel did not need to use unrelated surveys of other offender databases in order to probe the statistical meaning of DNA evidence to conduct an effective cross-examination. In this case the defense had ample opportunity to probe and contextualize the DNA evidence through its cross-examination of the State's witnesses.

¶ 42 Defendant was also able to mount his defense and question the State's evidence through his own expert witness. Defense counsel elicited from defense witness, Dr. Reich, testimony regarding the significance of a 2-loci match.

> "Q. -- do you recall or can you find in your notes there what significance the ISP attributed to that two locus match?
>
> A. Well, [Illinois State Police] did make a record of that result and issued a statistics based on a two loci match as they have to if they are going to provide a report. The scientific significance of a two locus match for either somatic STRs or YSTRs is either minimal or almost none. The amount of information to identify one person from another cannot be obtained from two or one or three STR comparisons. You need many more than that to come anywhere near identity."

Defense counsel also elicited testimony from Dr. Reich as to how Triplett could be excluded from the male DNA found under the fingernail on Urszula's left hand. The reason for using the

Arizona study evidence was to contextualize the statistics, but defense counsel was able to contextualize the statistics without the Arizona study. To determine the constitutional adequacy of defendant's ability to conduct cross-examination, we evaluate what the defense was "allowed to do, not to what the defendant was prohibited from doing" (*Arze*, 2016 IL App (1st) 131959, ¶ 113). Because we evaluate whether what defendant was allowed to do was constitutionally sufficient, rather than looking at what defendant was prohibited from doing, the trial court did not abuse its discretion by preventing defense counsel from putting into evidence or examining witnesses concerning the results of surveys of other offender databases. We find that defendant was still able to meaningfully probe the statistical evidence. *Id*; *People v. Watson*, 2012 IL App (2d) 091328, ¶ 25. Our review of whether the trial court abused its discretion looks to whether no reasonable person would take the same view as the trial court. *Morris*, 2013 IL App (1st) 110413, ¶ 47. Defendant was able to meaningfully probe the statistical meaning of the evidence presented against him. We cannot say that no reasonable judge would also rule that unrelated surveys of offender databases were inadmissible, therefore, we find no abuse of discretion.

¶ 43 Course of Investigations Testimony – Admission of Hearsay Testimony

¶ 44 Defendant next argues the trial court improperly allowed hearsay testimony from both detectives Carr and Powell. Defendant complains Carr's testimony consisted of inadmissible hearsay when he testified to ascertaining that Janice Ordidge had spoken with her boyfriend. Carr testified that he interviewed the boyfriend and building manager. He also testified that he recovered Ordidge's cell phone and noted the last outgoing call log. He stated that he learned Ordidge's iPod and credit cards were missing. Carr further stated that he interviewed customers along defendant's route, that he spoke with Powell concerning similarities in their cases, and that he learned Triplett had exclusive use of the van. Defendant did not raise a hearsay objection to

the complained of testimony. Defendant complains detective Powell's testimony contained the facts he learned during the investigation: how he learned that Urszula had a Comcast appointment and that Triplett was the technician, as well as how he interviewed the Czechowskis, Magiera, and the neighbors. Powell testified that Magiera told him the blood stains in the carpet were not there previously, that Magiera was out of town due to his work as a truck driver, and that Magiera identified the watch police saw defendant toss to the ground as his. Powell testified that Urszula died due to strangulation and semen was found on the oral swab. He then relayed his interview with Thomas Franz about the credit card found outside his home. Defense counsel objected to Powell's testimony after Powell had testified as to a number of investigatory steps, including his learning that Urszula died of strangulation. Defense counsel objected to Powell testifying that two credit cards were missing from Urszula's home. The objection was that the testimony was both hearsay and leading. The State argued the testimony was not being offered for the truth of the matter asserted. The court agreed, but offered to sustain the objection on the leading question ground counsel requested. The court further informed defense counsel this would open the door to more specific questioning and defense counsel withdrew the objection. Defendant now claims that Powell's and Carr's testimonies were wholly irrelevant because they were unnecessary to explain the investigation.

¶ 45 Hearsay testimony is testimony about an out-of-court statement offered to establish the truth of the matter asserted. *People v. Simms*, 143 Ill. 2d 154, 173 (1991). "Testimony about an out-of-court statement which is used for a purpose other than to prove the truth of the matter asserted in the statement is not 'hearsay.' [Citation.]" *Id.* Further, out-of-court statements that are not offered to prove the truth of the matter asserted, but to detail the progress of a police investigation, are not considered hearsay. *People v. Rush*, 401 Ill. App. 3d 1, 15 (2010). The

testimony is admissible "for the limited purpose of explaining why the police conducted their investigations as they did or why they arrested defendant." *People v. Armstead,* 322 Ill. App. 3d 1, 12 (2001). Under the course of investigation exception to hearsay, the officer may testify as to conversations that took place, and how the officer acted as a result, because it goes to the officer's personal knowledge. *People v. Sample*, 326 Ill. App. 3d 914, 920 (2001). When course of investigation testimony is offered for some purpose other than the truth of the matter asserted, the trial court must still determine whether the out-of-court words "have any relevance to an issue in the case. If they do, the judge then must weigh the relevance of the words for the declared nonhearsay purpose against the risk of unfair prejudice and possible misuse by the jury." *People v. Warlick,* 302 Ill. App. 3d 595, 600 (1998). Even if an officer is describing police procedure, the officer may not testify as to the substance of conversations. *People v. Gacho*, 122 Ill. 2d 221, 248 (1988). Testimony recounting the substance of a conversation is testimony that goes "to the very essence of the dispute: whether the defendant was the man who committed the crime." *People v. Jura*, 352 Ill. App. 3d 1080, 1088 (2004). The State cannot rely on the substance of the course of investigations testimony to prove defendant committed the crime. *Id*.

¶ 46 We note that the issue has been forfeited for review because defendant failed to lodge this objection during detective Carr's testimony and defense counsel withdrew the objection to detective Powell's testimony. A defendant forfeits an issue on appeal when no timely objection at trial was raised and the alleged error was not included in a posttrial motion. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). Withdrawing an objection also forfeits the issue such that it is not properly preserved for appellate review. *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 801 (2002). Forfeiture is important not only because a timely objection allows a

trial court to promptly correct error, but also to prevent a party from strategically obtaining a reversal by their failure to act. *People v. Roberts*, 75 Ill. 2d 1, 11 (1979). Defendant claims that when counsel's failure to preserve an issue is due to the judge's conduct, the forfeiture doctrine may be relaxed. Defendant cites to *People v. Kliner*, *People v. Sprinkle*, and *People v. Dameron* for this position. However, these cases are easily distinguishable. In both *Sprinkle* and *Kliner*, there were direct allegations of judicial impropriety. In *Sprinkle*, the judge repeatedly bolstered the State's witness such that the jury would infer the defendant was the actual criminal. *People v. Sprinkle*, 27 Ill. 2d 398, 401 (1963). In *Kliner* the alleged judicial impropriety was the judge's *ex parte* communications. *People v. Kliner*, 185 Ill. 2d 81, 165 (1998). And in *Dameron*, the judge brought out a social sciences book because the judge thought it was relevant to tell a non-fictional story the trial reminded him of to the jury at sentencing. *People v. Dameron*, 196 Ill. 2d 156, 172 (2001). Defendant's brief does not contain an argument for judicial impropriety, though defendant does state the judge misunderstood the law and would have improperly allowed more specific questions to Powell. However, this error was directly due to defense counsel's objection on both grounds of hearsay and leading. When the State explained the testimony was not being introduced to prove the truth of the matter asserted, the judge ruled that the testimony was not hearsay. The judge offered to sustain defendant's objection on the other grounds the defense provided: improper leading questions. Defendant cannot now claim that the court erred when it was defense counsel who objected on grounds of leading question and the court offered to sustain defense counsel's objection.

¶ 47 When error has not been preserved for review, we may still consider the error if either:

> "(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." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

"The first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Under either prong of plain-error analysis, defendant must first prove there was error and the error was plain. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 48 This was not a case of closely balanced evidence: defendant's work order indicated he went to Urszula's home; Urszula's neighbor Almaguer saw defendant's van outside Urszula's home for over half an hour with no one going to the van; hairs matching Urszula's DNA were found on defendant's shirt in his work van. Detective Carr testified to seeing defendant toss Magiera's watch to the ground. We also note defendant testified at the trial that he initially told police officers he did not enter Urzula's home. At trial, defendant testified that he actually entered Urzula's home but only went a few steps into the entrance hallway. However, defendant was unable to explain at trial how the victim's blood got on his clothing.

¶ 49 Evidence of Janice Ordidge's murder helped the State establish proof of defendant's guilt by demonstrating a *modus operandi* where another murder victim, Ordidge, was also found strangled, practically naked, submerged in her bathtub after she had a Comcast cable repair appointment with defendant. Additionally, in admitting the testimonies of detectives Carr and Powell, the court did not commit any error that threatened the integrity of the judicial process. "Erroneous admission of hearsay will not be held reversible if there is no reasonable probability the jury would have acquitted the defendant had the hearsay been excluded." *Warlick*, 302 Ill.

App. 3d at 601. Under plain-error doctrine, defendant bears the burden of persuasion with respect to prejudice. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). We believe the jury would have reached the same verdict without the course of investigation evidence. Therefore, the admission of the evidence did not prejudice defendant. Hence, the trial court's admission of the course of investigation testimonies of detectives Carr and Powell was not plain error.

¶ 50 Carr repeated how an unknown source explained defendant had exclusive use of his van, which defendant argues is hearsay because it was used to prove the truth of the matter asserted. We find that this testimony was hearsay because it went to the essence of the dispute and was used to prove the truth of the matter asserted. Police obtained a search warrant to search the van because they could not locate defendant and suspected that he was living in his work van. Detective Carr did not need to include that he learned defendant had exclusive use of the van to search it. The testimony was only relevant as identifying information, which would go to the essence of the dispute. *Jura*, 352 Ill. App. 3d at 1088. However, defendant has the burden of persuasion (*Herron*, 215 Ill. 2d at 182) and has not shown the jury would have acquitted him had this hearsay been excluded given the other evidence implicating defendant. *Warlick*, 302 Ill. App. 3d at 601.

¶ 51 Powell's testimony repeating Magiera's statement identifying the watch defendant threw to the ground was improper because it repeated identifying information going to the essence of the dispute. Similarly, in *People v. Bruce* it was improper to admit out-of-court statements identifying jewelry in defendant's possession as belonging to the murder victim because they "went beyond what was necessary to explain police procedure." *People v. Bruce*, 299 Ill. App. 3d 61, 67 (1998). Magiera already testified how he identified the watch as the one stolen from his home. Had the hearsay evidence been excluded, the jury would still have been able to reach

the same conclusion. There is no indication the jury may have acquitted defendant had the testimony been excluded and therefore the admission of the testimony was not prejudicial. *Warlick*, 302 Ill. App. 3d at 601.

¶ 52 Apart from the introduction of those two statements, the other statements were not hearsay: they were not offered for the truth of the matter asserted, but instead to explain the course of the detectives' investigations. *Rush*, 401 Ill. App. 3d at 15. The course of investigations testimony was necessary to prove the steps detectives took in their investigation. Significant connections existed between the murders of Urszula Sakowska and Janice Ordidge (they were both found strangled, naked or practically naked, submerged in their bathtubs following an appointment with the same Comcast cable technician; the missing credit cards and jewelry; indication of sexual assault), and from those connections police took each of the steps they did to find and arrest defendant. Police needed to talk to the crime lab in order to know how to conduct their investigation. It was not irrelevant to talk about the Ordidge murder because of that close connection and how important it was for their investigation. A detective does not violate the rule against hearsay by testifying about a conversation with an individual and the resulting steps taken in the investigation of the crime. *People v. Hunley*, 313 Ill. App. 3d 16, 33 (2000).

¶ 53 Defendant argues that Powell and Carr impermissibly testified as to the contents of interviews they conducted. Specifically how the detectives recounted Urszula's cause of death, Magiera's description of the home's condition, the missing items from the residences, and information about Ordidge's last calls. However, these statements were necessary to explain the steps the detectives took in investigating the crime and arresting defendant. *Warlick*, 302 Ill. App. 3d at 599. Their testimonies did not go to the essence of the dispute. *Jura*, 352 Ill. App. 3d

at 1088. Defendant was not directly implicated by any of this testimony. Defendant further claims the statements of detectives Powell and Carr were offered to prove the truth of the matter asserted, and therefore hearsay. However, the prosecution did not rely on the testimonies to make their case. *Rush*, 401 Ill. App. 3d at 16. Defendant explicitly stated the admissible evidence came in from other witnesses and there is no indication the State relied on Carr or Powell's testimony for the truth of those statements. Even if we assume that hearsay evidence was improperly admitted when detectives testified they "learned" of Urszula's cause of death, that she had a cable appointment, was missing credits cards, and of Ordidge's last calls, we still find the error was harmless. It is defendant's burden to persuade this court that the jury would have acquitted him but for this error (*Herron*, 215 Ill. 2d at 187), and defendant has not done so given the overwhelming amount of other evidence linking defendant to Urszula's murder. Defendant cannot explain how Urzsula's blood was found on his jacket, nor has he controverted the wealth of DNA evidence linking him to the murder.

¶ 54 Powell testified that there was no activity on Urszula's credit cards since they went missing, which he learned from an unknown source. Defendant's complaint is not that this was irrelevant to the police investigation, but that the defense was unable to question the source of the information about determining that Urszula's cards were not used. However, defendant cannot point to anywhere in the record where defense counsel asked Powell any question concerning credit card activity. Whether the cards were used was a collateral issue. Defense counsel easily could have probed how Powell learned of the lack of activity on the credit cards and Powell could have explained how he verified that information. Defendant has the burden of persuasion (*Herron*, 215 Ill. 2d at 187) and has not shown the jury would have acquitted him had this testimony about the credit card use has been excluded given the other evidence implicating

defendant. *Warlick*, 302 Ill. App. 3d at 601.

¶ 55 Defendant further complains that where the content of interviews was not relayed, the State was able to improperly bolster the credibility of its own witnesses. However, it is not improper for police to explain that they interviewed people concerning a crime. "[T]here is no hearsay problem when the officer merely testifies he spoke to someone or heard some unspecified words and then did something. The jury is free to reach its own conclusions." *Warlick*, 302 Ill. App. 3d at 599. Accordingly, the trial court committed no error in allowing the detectives to testify that they conducted interviews and explained the steps in their investigation. *Id*. Since there is no error, there can be no plain error. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008). Moreover, as we noted earlier, the evidence in this case was not closely balanced and defendant has not met his burden of persuasion to show some structural error occurred implicating the integrity of the judicial process. Therefore, we find defendant has not shown any plain error in the admission of the course of investigations testimony given by detectives Carr and Powell.

¶ 56 Sentencing Enhancement Instructions

¶ 57 Defendant argues his natural life sentence should be vacated and the cause remanded for a new sentencing hearing because the jury was improperly instructed on the felony murder enhancement findings which were required to be made by the jury before defendant could be sentenced to a natural life sentence.

¶ 58 Initially, we address the state's argument that this issue is moot. The state argues that because defendant was found guilty of the murder of Janice Ordidge in the trial that took place after this case and was sentenced to natural life in that case, we cannot grant defendant effective relief. Therefore, the case is moot. Defendant argues that he has filed a notice of appeal in the

Ordidge case which could result in reversal of that conviction and/or sentence. A fundamental tenet of justiciability is that reviewing courts will not decide moot questions. *In re J.T.*, 221 Ill. 2d 338, 349 (2006). An appeal is moot when there is no controversy for the court to review or when the reviewing court is unable "to grant effectual relief to the complaining party." *Id*. at 349-50. A controversy is present and we have the ability to grant defendant effectual relief. Because defendant has a pending appeal in the Janice Ordidge case, his conviction and/or sentence could be reversed. Were defendant to receive that relief, then a reversal of his sentence here could result in defendant no longer facing a natural life sentence. See 730 ILCS 5/5-8-1 (West 2016). This court is able to grant effective relief to defendant. Therefore, we find the case is not moot and address the sentencing issues raised by defendant.

¶ 59 I. *Apprendi* Error

¶ 60 Under Illinois law, a criminal defendant convicted of first degree murder shall be sentenced to imprisonment for a term of at least 20 years and no more than 60 years. 730 ILCS 5/5-4.5-20 (West 2016). In this case defendant was given a natural life sentence, which is in excess of the statutory maximum. Illinois law requires three elements must be proven before a defendant is given a sentence in excess of the statutory maximum: (1) defendant actually killed the victim, (2) acted with intent to kill the victim, and (3) was also in the commission of an inherently violent felony. 720 ILCS 5/9-1(b)(6) (West 2016). In *Apprendi,* the Supreme Court of the United States held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Defendant argues that because the enhanced sentencing instruction was flawed, an *Apprendi* error occurred and he is entitled to a new sentencing hearing.

¶ 61 As noted earlier, a trial court may sentence a defendant to a term of natural life imprisonment for a murder that was committed during the course of a felony. *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 51 (citing 730 ILCS 5/5-8-1(a)(1)(b) (West 2008)). Consistent with the Illinois sentencing statute, the Illinois pattern instructions on enhanced sentences applicable to this case reads as follows:

> "the murdered person was killed in the course of another felony if
>
> [1] the murdered person was actually killed by the defendant;
>
> [2] in performing the acts which caused the death of the murdered individual *** the defendant acted with the intent to kill the murdered individual or with the knowledge that his acts created a strong probability of death or great bodily harm to the murdered person (or another); and
>
> [3] the other felony was one or more of the following: [robbery] or [aggravated criminal sexual assault]." Illinois Pattern Jury Instructions, Criminal, No. 28.01(c) (4th ed. Supp. 2009).

The sentence enhancement jury instruction given at defendant's trial read as follows:

> "That during the commission of the offense of first degree murder, the murdered person was killed in course of another felony if the murdered person was actually killed by the defendant; or the other felony was one or more of the following: robbery or aggravated criminal sexual assault."

Defendant argues the sentencing enhancement instructions contained two flaws: (1) failure to include a requirement that the jury find defendant intentionally murdered the victim, and (2) stating the other two requirements the jury had to find in the disjunctive: either that defendant committed the murder or that the murder was committed during the course of a robbery or

aggravated criminal sexual assault.

¶ 62 Defendant did not object at trial to the flawed jury instructions, therefore defendant's objections are deemed forfeited. *Thompson*, 238 Ill. 2d at 611. "Generally, a defendant forfeits review of any putative jury instruction error if the defendant does not object to the instruction or offer an alternative instruction at trial and does not raise the instruction issue in a posttrial motion." *Herron*, 215 Ill. 2d at 175. Because the error was not preserved defendant urges us to review the error as plain error. Defendant argues this court may review forfeited instructional errors because of the substantial implication to his rights. Instructional errors which are forfeited are addressed in Supreme Court Rule 451(c), which provides that errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court:

> "Supreme Court Rule 451(c), however, provides that 'substantial defects' in criminal jury instructions 'are not waived by failure to make timely objections thereto if the interests of justice require.' [Citation.] Rule 451(c) crafts a limited exception to the general rule to correct 'grave errors' and errors in cases 'so factually close that fundamental fairness requires that the jury be properly instructed.' " *Id*.

Unpreserved instructional errors are construed in the same manner as plain error under Supreme Court Rule 615(a):

> "Rule 451(c) is coextensive with the 'plain error' clause of Supreme Court Rule 615(a), and we construe these rules 'identically.' [Citation.] Rule 615(a) provides: 'Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial

> rights may be noticed although they were not brought to the attention of the trial court.' [Citation.]" *Id*. at 175–76.

¶ 63 Because defendant failed to preserve the instructional errors we review the evidence under the plain error standard. Thus, to perform the plain-error review in this case, we examine the evidence at trial and make an objective determination whether a rational jury would have found that: (1) defendant actually killed the victim, (2) defendant acted with intent to kill the victim, and (3) defendant was also in the commission of an inherently violent felony. 720 ILCS 5/9-1(b)(6) (West 2016).

> "In sum, we reaffirm the holdings of *Thurow*, *Crespo*, and *Kaczmarek* that plain-error review applies to *Apprendi* errors to which the defendant has not timely objected, while harmless-error analysis applies when the defendant has objected to the error. We therefore hold that plain-error review is the appropriate standard in this case. To execute either analysis, a reviewing court must examine the evidence adduced at trial and determine objectively whether a rational jury would have made the finding in question." *Nitz*, 219 Ill. 2d at 414.

¶ 64 Because we are considering a claim of plain error in the sentencing context we focus not on the issue of the guilt or innocence of defendant but rather on the sentencing of defendant: "In the sentencing context, a defendant must then 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." *People v. Hall*, 195 Ill. 2d 1, 18 (2000). Defendant bears the burden of proving the jury would have rendered a different decision had they been given proper instruction as to the sentencing enhancement. *Herron*, 215 Ill. 2d at 197. "Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion. [Citations.] If the defendant fails to

meet his burden, the procedural default will be honored. [Citation.]" *Hillier*, 237 Ill. 2d at 545.

¶ 65 "The first step of plain-error review is determining whether any error occurred." *Thompson*, 238 Ill. 2d at 613. We have already noted the jury was not adequately instructed as to the proper findings for the felony murder sentencing enhancement. See 720 ILCS 5/9-1(b)(6) (West 2016). Therefore, we find an *Apprendi* error occurred. We will now examine the record to determine whether a rational jury would find that first, defendant actually murdered the victim; second, defendant intentionally murdered the victim; and third, at the time of the murder defendant was also in the course of committing another inherently violent felony.

¶ 66 II. Whether Defendant Actually Killed the Victim and Whether the Murder was Intentional

¶ 67 Initially, we note that the jury convicted defendant of first degree murder. The State argues that the jury made a finding on two elements - that defendant actually killed the victim and that he intentionally killed the victim - because the elements are inherent to the guilty verdict of first degree murder. It is uncontested here that the jury was given the correct instruction as to first degree murder and returned a general verdict finding defendant guilty. The jury received instructions pertaining to four theories of first degree murder: intentional murder, knowing murder, strong probability of death or great bodily harm, and felony murder predicated on the commission of a robbery or an aggravated criminal sexual assault. At the trial there was no evidence produced or argument made that there were codefendants involved in the case. The jury returned a general verdict finding defendant guilty of first degree murder. Therefore, we find the issue of whether a rational jury could find defendant guilty of intentional murder is controlled by our supreme court's decision in *People v. Armstrong*, 183 Ill. 2d 130 (1998).

¶ 68 In *Armstrong* the defendant was convicted of first degree murder and three other felonies. *Armstrong*, 183 Ill. 2d at 137. For the death penalty enhancement the jury was not given the

correct instruction because it only listed two of the necessary elements, but not the intent component. *Id*. at 150. The court found that this did not constitute plain error because the jury already returned a general verdict on first degree murder, which meant that it found the most serious charge – intentional murder. *Id*. at 151-52. That meant the jury already had to find the intent component satisfied in the murder charge, so an erroneous death penalty instruction omitting the intent component was harmless error as the jury already had made that finding. *Id*. at 152. Like in *Armstrong*, at the guilt stage here the jury made a finding that defendant intentionally killed the victim. Under Illinois law, the jury found defendant guilty of intentional murder. See *People v. Thompkins*, 121 Ill. 2d 401, 455-56 (1988).

¶ 69 Defendant argues that the instructions were not sufficient for a jury finding of intent, relying on *People v. Ramey*, 151 Ill. 2d 498 (1992) and *People v. Fuller*, 205 Ill. 2d 308 (2002). We find defendant's argument unpersuasive because both *Ramey* and *Fuller* are distinguishable from this case. First of all in *Ramey*, the defendant preserved the error by objecting to the instructions and including the error in a posttrial motion; secondly and more importantly, the *Ramey* jury never found that the defendant intentionally or knowingly murdered the victim because the jury instructions stated the jury could enter a guilty verdict without finding the defendant actually killed the victim or finding that it was the intent of the defendant or his accomplice to murder the victim. The trial court in *Ramey* gave the following instruction at the guilt phase:

> " 'The Court instructs the Jury as a matter of law that in this case to constitute the crime of murder it is not necessary for the State to show that it was or may have been the original intent of the defendant or his accomplice to kill the deceased, Derrick Quincy Wilkinson.

> It is sufficient if the jury believe [*sic*] from the evidence beyond a reasonable doubt that the defendant and his accomplice combined to do an unlawful act, such as to commit a home invasion and that the deceased was killed by one of the parties committing that unlawful act.' " *Ramey*, 151 Ill. 2d at 535.

It is clear the jury never made a finding that the *Ramey* defendant intentionally murdered victim because the jury's instruction did not require a finding of intent to kill. So unlike this case, no jury finding of intent was ever made. Therefore, *Ramey* is distinguishable. Likewise, in *Fuller* the issue of intent was never found by any jury. The defendant entered a guilty plea in the guilt phase of the trial. *Fuller*, 205 Ill. 2d at 314. After impaneling a jury for sentencing, the trial court provided instructions that, like in *Ramey*, failed to include the intent component. *Id*. Hence, *Fuller* is also distinguishable from this case. Therefore, we find *Armstrong* supports the State's arguments that Illinois law construes the jury's guilty verdict in this case as constituting a finding of intent as a matter of law. Thus, we find that a rational jury could find that defendant intentionally murdered victim because by rendering a general guilty verdict the jury found defendant intentionally murdered victim as a matter of law.

¶ 70 Notwithstanding the rule of law of the *Armstrong* case, our independent review of the evidence demonstrates that a rational jury could find that defendant intentionally murdered Urszula. Urszula was strangled to death; her head was wrapped in duct tape and placed under water in the bathtub. The coroner in the case testified that it takes from two to 2½ minutes of constant pressure on the neck for a person being strangled to lose consciousness and death to come later. Defendant was present to personally observe the victim during the 2½ minutes or more it took for her to lose consciousness and subsequently die. We further note that other crimes evidence was submitted in this case. A rational jury could conclude from the other

crimes evidence that defendant committed the murder of Ordidge a few weeks before the murder in this case. Ordidge, the victim in that case, was also killed by manual strangulation. A rational jury could find that because defendant killed Ordidge by strangulation, by pressing on her throat for over 2½ minutes, defendant knew when he pressed on Urszula's throat for 2½ minutes she would die. Based on this record we believe a rational jury could find defendant intentionally killed the victim when he put constant pressure on her neck for more than 2½ minutes.

¶ 71 The next issue presented is whether a rational jury could find that defendant killed the victim in the course of committing another forcible felony. We believe a rational jury could find based on the record before us that defendant killed the victim in the course of an aggravated sexual assault and a robbery. The evidence showed that the victim was sexually assaulted by defendant. The State presented forensic evidence of sexual assault: Urszula was found naked and strangled in her bathtub, she had numerous bruises and abrasions, and defendant could not be excluded as the source of sperm found in Urszula's mouth based on a match of a partial profile at 7 loci.

¶ 72 In addition, we find that a rational jury could conclude that defendant committed a robbery at the time he murdered the victim. The State presented evidence that a watch and Urszula's credit cards were stolen from Urszula and Magiera's home, that the watch was recovered by police after defendant threw it to the ground, that the recovered watch was identified by Magiera as the missing watch, and that defendant could not be excluded as the source of the major DNA profile on the watch. One of Urszula's credit cards was found in the road close to where defendant made another stop that morning. This provided the jury with ample evidence of a robbery.

¶ 73 We find from our review of the record a rational jury could find that during the murder,

defendant committed the offenses of aggravated sexual assault and robbery. Because we find a rational jury could find defendant intentionally killed the victim, and also find that the victim was killed in the course of another forcible felony, defendant suffered no prejudice from the instructional error. Therefore, we honor his forfeiture of the arguments.

¶ 74 Defendant requests we review the instructional error under the second prong of plain error analysis because there is a serious risk the jurors convicted defendant due to a misunderstanding of the applicable law. We find that although an *Apprendi* error occurred, it was not second prong plain-error because it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *People v. Crespo*, 203 Ill. 2d 335, 348-9 (2001). In *Crespo*, the defendant was found guilty of first degree murder, armed violence, aggravated battery based on great bodily harm, and aggravated battery based on a deadly weapon. *Id*. at 339. The judge sentenced the defendant to a 75-year extended term because the defendant committed murder "in a brutal and heinous manner, indicative of wanton cruelty." *Id*. at 346. The defendant argued that the sentencing range for first degree murder is 20-60 years (730 ILCS 5/5-4.5-20 (West 2002)), and that he was given an enhanced sentence by the judge in violation of *Apprendi* because no jury made a finding as to the sentencing enhancement. *Crespo*, 203 Ill. 2d at 346-7. Much like the present case, the defendant in *Crespo* did not object at the time of trial. *Id*. at 347. Our supreme court found that the *Apprendi* violation did not rise to the level of plain error because there was "undisputed forensic evidence" that the "defendant attacked his victim with a kitchen knife with an eight-inch-long blade. He stabbed her repeatedly about the head, neck, and body, inflicting a total of 24 stab wounds. He used such force that after his assault the knife blade was bent at a 90-degree angle." *Id*. at 348. Our supreme court found that the jury sufficiently concluded as to the facts of a brutal and heinous murder, such that the judge

imposing an enhanced sentence was consistent with the jury's findings. Though it may have been an *Apprendi* violation, where the judge's sentence was consistent with the jury's findings, the error did not threaten the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 349.

¶ 75 In the present case, the jury made a finding as to each element of the sentencing enhancement: (1) defendant actually killed the victim, (2) defendant acted with intent to kill the victim, and (3) defendant was also in the commission of an inherently violent felony. Accordingly, we find that defendant cannot satisfy the second prong of plain-error analysis. As noted earlier, the State presented substantial evidence of defendant's guilt. The evidence at trial was not so closely balanced that the error tipped the scales against defendant. We further find defendant was not prejudiced by the irregular enhancement instruction. Therefore, we honor defendant's forfeiture of the sentence enhancement instruction issues.

¶ 76 Defendant's Mittimus is Corrected to Reflect One Count of First Degree Murder

¶ 77 The trial court entered judgment on two counts of first degree murder when it sentenced defendant. However, a defendant "cannot be convicted of more than one murder arising out of the same physical act." *People v. Foreman*, 361 Ill. App. 3d 136, 156 (2005). Defendant's mittimus lists two convictions for first degree murder, both from the murder of Urszula Sakowska. The State agrees with defendant that his mittimus should only reflect one count of first degree murder. Pursuant to Supreme Court Rule 615, this court may correct the mittimus without remanding to the trial court. *People v. Mitchell*, 234 Ill. App. 3d 912, 921 (1992). Accordingly, we order the correction of the mittimus to reflect only one count of first degree murder for the murder of Urszula Sakowska.

¶ 78 We affirm the trial court's conviction of defendant for first degree murder and its

sentence of natural life. We also direct the clerk of the circuit court to correct defendant's mittimus to reflect one count of first degree murder for the murder of Urszula Sakowska.

¶ 79 CONCLUSION

¶ 80 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 81 Affirmed; mittimus corrected.