2013 IL App (1st) 110510-U

FOURTH DIVISION
September 12, 2013

No. 1-11-0510

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. 10 CR 5444 (02)
	)	
JENNIFER GOODMAN,	)	The Honorable
	)	James Etchingham,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

HELD: Defendant's conviction should be affirmed since trial court properly instructed jury with respect to aggravated battery of a child by using a nonpattern jury instruction, did not interfere in *voir dire* with its comments and analogy to a different crime, and properly handled a situation in which defendant alluded to proceeding *pro se* but never clearly demanded this and, regardless, acquiesced to representation via her subsequent acts and silence. However, defendant's fines and fees order must be modified as directed herein pursuant to the State's concessions and to an error committed by the trial court with respect to a Document Storage fee and an Automation fee.

¶ 1 Following a jury trial, defendant-appellant Jennifer Goodman (defendant) was convicted of aggravated battery of a child and sentenced to three years' imprisonment and $655 in fines and fees. She appeals, contending that the trial court erred when it: (1) failed to instruct the jury that the State had the burden of proving beyond a reasonable doubt that she was not legally justified in her use of force; (2) interfered in *voir dire*, thereby denying her a fair and impartial jury; (3) refused to rule on her request to proceed *pro se*; and (4) made mistakes in imposing its fines and fees order and failed to award her credit against these. She asks that we reverse her conviction and remand the matter for a new trial and, alternatively, that we reduce her fines and fees. For the following reasons, we affirm defendant's conviction but modify her fines and fees order.

¶ 2 BACKGROUND

¶ 3 Defendant was charged with aggravated battery of a child, her 9-year-old daughter A.H., related to events that occurred in August 2009. Mack Goodman, defendant's husband and A.H.'s stepfather, was also charged.[1] Defendant and Mack were tried simultaneously but separately, as their trials were severed and they had separate juries.

¶ 4 Prior to trial, defendant and Mack appeared in court, whereupon Mack, against the advice of his counsel, described to the court his objection to severing his case from defendant's and his desire to represent himself, as his and defendant's attorneys were "not working in [their] favor" but, instead, had "already" convicted them. After stating that there was no current motion to sever pending at that time, the court explained that, while it understood Mack's comments, the attorneys present had an obligation to represent them with the highest degree of skill, that it was

[1]Mack Goodman is not a party to this appeal.

sure they were doing so, and that the presumption of innocence always lay with him and defendant. When the trial court asked defendant if she wished to comment, she stated:

> "I speak for myself. She's [defense counsel] been here. I haven't not really talked to her. Most I talked to her through the glass.
>
> Everything she said to me is everything saying, I am wrong, this and this. She is not telling me no advise or nothing like that. She is telling me, I am going down. That is basically what she is saying to me.
>
> I feel if she is going to be that way, there is no need for her to represent me."

Defense counsel responded that she has spent "quite awhile" with defendant and, per her responsibility, had told defendant things she "might not like" to hear, and that, because Mack was present and the sheriff wanted to keep them apart, she had yet to have an opportunity to speak to defendant on that particular day. Following this exchange, the trial court informed defendant that it would give her the opportunity to speak to defense counsel after court, and extended the same to Mack and his counsel. The court then stated that it was considering both Mack's and defendant's requests as motions to represent themselves, and that it would take them under advisement and rule on them on the next court date. It then admonished both Mack and defendant about the importance of counsel, their duties and obligations, and that fact that, if they chose to represent themselves, they would be held to the same standard as an attorney.

¶ 5 When the cause was called on the next date, the trial court began by asking, "[w]hat's going to happen here?" Defendant and her counsel presented a motion to sever her case from Mack's. Neither Mack nor defendant ever discussed proceeding *pro se* with the trial court. The

cause was then set for trial.

¶ 6 Prior to jury selection, defendant presented questions she wanted the court to ask potential jurors during *voir dire*. The court agreed to ask two additional questions:

> "As a child were you ever physically disciplined or spanked? Is there anything about the nature of that experience that would cause you not to be fair?"

and

> "The nature of this case involves physical discipline of a child. Is there anything about the nature of this case that would cause you to not be fair?"

¶ 7 The defense theory at trial was that, at the time of the incident, defendant was exercising her parental right to use corporal punishment to discipline her daughter. A.H. testified that, in August 2009 while she was living with her mother, Mack and three siblings, her parents punished her by refusing to allow her to eat. After a day of not being allowed to eat, A.H. took a pickle out of the refrigerator and ate it. When defendant and Mack asked her if she had eaten a pickle, A.H. lied to them and told them she had not. Later, however, A.H. confessed the truth to them, whereupon defendant and Mack gave her a "bad whooping." A.H. stated that defendant and Mack ordered her to take off all her clothes and go into the living room where her siblings were sitting on the couch. They then told her to lay down on the floor. After she did so, Mack used an extension cord twisted together with a belt to beat her on her back, bottom and legs more than 25 times while defendant held her down. A.H. described that, following that beating, Mack and defendant switched places so that defendant used the extension cord and belt to beat her on her back, bottom and legs while Mack held her down. When defendant and Mack were done,

they ordered A.H. to take a bath. A.H. tried to take a bath, but she was in too much pain to sit down in the bathtub. As A.H. got out of the bathtub, Mack hit her again with a belt on her back, bottom and legs; defendant was present in the bathroom. A.H. then went to her room and got dressed. Sometime later, she tried to use the restroom and noticed that her underwear was stuck to her bottom because the blood from her injuries had dried.

¶ 8 A.H. further testified that neither Mack nor defendant treated her for her injuries, nor did they take her to the hospital. A week later, A.H. went to visit her grandmother. When A.H. was undressing to take a bath, she told her grandmother that defendant and Mack had beaten her. A.H.'s grandmother immediately took her to the hospital.

¶ 9 Dr. Faheem Jesani testified that he was the attending emergency room physician on duty when A.H.'s grandmother brought her to the hospital. Dr. Jesani averred that A.H. told him that her parents had whipped her. During his examination, Dr. Jesani noted that A.H. was very small for her age and was very thin, with prominent bony features. He further observed that she had multiple, and some severe, abrasions on her back, bottom, face and extremities, as well as scarring on her back and chest. He identified for the jury several photographs of these injuries.

¶ 10 Detective Josh Norum testified that he was assigned to investigate A.H.'s case. He spoke with a caseworker from the Department of Children and Family Services who had set up an interview with A.H. Detective Norum observed this interview, during which A.H. named defendant and Mack as the people who beat her. Detective Norum further testified that he met with defendant later at the police station. After he gave defendant her *Miranda* rights, she waived them and admitted that she hit A.H. with the extension cord several times on her butt

causing her to bleed. She described that she gave A.H. this "whooping" because she caught A.H. doing inappropriate sexual acts with her little brother and she thought it would correct A.H.'s behavior. Defendant further confessed that she hit A.H. because A.H. had "been acting bad for a long time," but that she loved A.H. and that was the only way she knew to correct her behavior. Detective Norum testified that defendant's confession was reduced to writing and, after she reviewed it, she signed her statement.

¶ 11 During the jury instruction conference, without objection from the parties, the trial court permitted a nonpattern instruction to be given to the jury based on *People v. Roberts*, 351 Ill. App. 3d 684 (2004), stating that "a parent is legally justified in using reasonable force when necessary for reasonable discipline of a child." This was given in addition to the definitional instruction for aggravated battery of a child and the issues instruction for aggravated battery of a child. Before closing argument, however, defendant asked that the definitional instruction for aggravated battery be modified to include the phrase "without legal justification," to signify defendant's assertion of an affirmative defense in the cause. Following a discussion with the parties, the trial court denied defendant's request.

¶ 12 The cause was then submitted to the jury, who returned a verdict of guilty. The trial court sentenced defendant to three years in jail, with 335 days' credit. It also entered an order for fines and fees in the amount of $655.

¶ 13 ANALYSIS

¶ 14 Defendant presents four contentions for our review on appeal. We address each separately.

¶ 15 I. Jury Instructions

¶ 16 Defendant's first contention on appeal is that the trial court committed reversible error when it failed to instruct the jury that the State was required to prove beyond a reasonable doubt that she was not legally justified in her use of force. Accepting the trial court's use of the nonpattern jury instruction based on *Roberts*, she claims that the court nevertheless erred when it failed to modify the definitional instruction for aggravated battery of a child to include the phrase "without legal justification," and that it erred when it failed to modify the issues instruction for aggravated battery of a child to include the language "*Fourth Proposition*: the discipline used exceeded the standards of reasonableness." Defendant insists that, without these modifications, the jury was not properly instructed on the State's burden of proof and, thus, her conviction must be reversed. We disagree.

¶ 17 At the outset, we note, again, as the parties do, that a nonpattern instruction was given in the instant cause based on *Roberts*. As indicated by the parties in their briefs, neither one contests the propriety of this. Nonpattern jury instructions should be used if a pattern instruction does not contain an accurate instruction on the matter at hand upon which the jury should be instructed. See *Roberts*, 351 Ill. App. 3d at 688. Whether to give a specific instruction to the jury is within the sound discretion of the trial court. See *Roberts*, 351 Ill. App. 3d at 688, citing *People v. Simms*, 192 Ill. 2d 348, 412 (2000). "Whether a court has abused its discretion will depend on whether the nonpattern instruction is an accurate, simple, brief, impartial, and nonargumentative statement of the law." *Roberts*, 351 Ill. App. 3d at 688.

¶ 18 Let us begin with a review of the record here. Defendant was charged with aggravated

battery of a child. Her theory on the case was that she properly exercised her parental right to use corporal punishment to discipline her daughter. During the jury instruction conference, defendant proposed a jury instruction, based on *Roberts*, stating: "A parent is legally justified in using reasonable force when necessary as part of reasonable discipline of a child." The State did not object to this and the trial court accepted it as an instruction to give to the jury. However, before closing argument, defendant asked if, in addition to the *Roberts*-based instruction as agreed to earlier, the definitional instruction for aggravated battery could be modified by adding the phrase "without legal justification" to state, ultimately, that a person commits this crime when she, "being a person of the age of 18 years or more, intentionally or knowingly, without legal justification, by any means, causes bodily harm to any child under the age of 13 years." Defendant argued to the trial court that this change was necessary since she had asserted an "affirmative defense" in her cause, namely, her theory that she had been exercising her parental right to discipline her child when she hit A.H. with the belt-twisted extension cord. In contradiction, the State argued that this change was not proper because, while the phrase "without legal justification" is necessary to jury instructions in cases with proposed statutory affirmative defenses, defendant's "affirmative defense" was not statutory but derived from common law and, thus, the *Roberts*-based instruction was the proper statement of the law. The trial court agreed with the State. The court acknowledged that the right asserted by defendant was not based on any statute and, reviewing the decision in *Roberts*, found that the instruction as agreed to by the parties was an accurate statement of the law as applicable in the instant cause. Therefore, it denied defendant's request to modify the instruction.

¶ 19 On appeal, defendant's argument deals with two different portions of the jury instructions at issue. Defendant makes clear that she does not take issue with the trial court's use of the nonpattern instruction based on *Roberts*; rather, she embraces it and reminds us that she was the one who proposed it in the first place. Instead, her argument is, essentially, that the use of that nonpattern instruction, alone, was not enough. Thus, she first attacks the definitional instruction of aggravated battery of a child given by the trial court as lacking the phrase "without legal justification." This was, again, the same issue she presented to the trial court when she asked for the instruction modification before closing arguments. She then also attacks the issues instruction on appeal which, she insists, is missing a necessary proposition with respect to discipline of a child. We address each in turn.

¶ 20 First, regarding the definitional instruction and the inclusion, as defendant requested, of the phrase "without legal justification," we note that, very similar to the instant cause, *Roberts* involved a claim of domestic battery against the defendant for allegedly pulling his 16-year-old daughter's hair and striking her in the face. The defendant, whose theory on the case, much like defendant's theory here, was that he was justified in his actions pursuant to his right to discipline, offered two nonpattern instructions which focused on the concept of reasonable force and reasonable discipline. The trial court, however, rejected both of his proposed instructions, choosing instead to instruct the jury pursuant to Illinois Pattern Jury Instruction 11.11, which states, " '[u]se the phrase "without legal justification" whenever an instruction is to be given on an affirmative defense contained in [a]rticle 7 of [c]hapter 720.' " *Roberts*, 351 Ill. App. 3d at 688, quoting Illinois Pattern Jury Instructions, Criminal, No. 11.11 (4th ed. 2000)). Accordingly,

the trial court issued a pattern instruction to the jury defining domestic battery that stated: " 'A person commits the offense of domestic battery when he knowingly[,] *without legal justification* [,] and by any means causes bodily harm to any family or household member.' " (Emphasis in original.) *Roberts*, 351 Ill. App. 3d at 688.

¶ 21 Following his conviction, the defendant appealed, contending, in part, that the trial court erred in giving the pattern instruction with the phrase "without legal justification" and in refusing to give his nonpattern instructions which focused on reasonable force and reasonable discipline. The *Roberts* court agreed. It began by noting, significantly, that the right to discipline one's child is not a statutory affirmative defense but, rather, a common law rule that derives from one's constitutional right to privacy. See *Roberts*, 351 Ill. App. 3d at 688. The *Roberts* court acknowledged that discipline has been interpreted by our courts to extend to "reasonable" corporal punishment. See *Roberts*, 351 Ill. App. 3d at 688-89, citing *In re F.W. and C.W.*, 261 Ill. App. 3d 894, 898 (1994) (a parent may utilize corporal punishment against his child so long as it is necessary and reasonable), and *People v. Ball*, 58 Ill. 2d 36, 39 (1974) ("parental rights of discipline are limited by a standard of reasonableness"). As such, it found that "[r]easonableness is the proper standard for the jury to apply in determining whether the parental discipline is justified." *Roberts*, 351 Ill. App. 3d at 690.

¶ 22 Based on this, the *Roberts* court then turned to a review of the specific pattern instruction given by the trial court in the underlying cause. It concluded that the instructions, when taken as a whole, did not fully and fairly define the applicable law. See *Roberts*, 351 Ill. App. 3d at 690. This was precisely because the pattern jury instruction, which used the phrase "without legal

justification," failed to instruct the jury that the standard in discipline cases is whether the parent was legally justified in the use of reasonable force in disciplining his child. See *Roberts*, 351 Ill. App. 3d at 690. The *Roberts* court noted that the trial court should have given the instructions proposed by the defendant–the nonpattern instructions that focused on the legally relevant, and key, concept of "reasonableness" of the force used, and not the pattern instruction which used the term "without legal justification," since this was, essentially, an irrelevant standard. See *Roberts*, 351 Ill. App. 3d at 690. Ultimately, the *Roberts* court found that the instruction the trial court chose to give was not an accurate, simple, brief, impartial and nonargumentative statement of the pertinent law regarding a parent's discipline of a child and, thus, was erroneous. See *Roberts*, 351 Ill. App 3d at 690; see also *People v. Walker*, 130 Ill. App. 3d 58, 60 (1985) ("[i]n matters of discipline *** a standard of reasonableness has been applied to determine whether a parent's conduct toward his child was legally justified and authorized by law").

¶ 23 Defendant here seeks to turn *Roberts* on its head. Again, the trial court in that case refused the instruction which would have had the jury focus on reasonable force and reasonable discipline and chose instead to give an instruction using the phrase "without legal justification." The *Roberts* court concluded that this was error because it did not provide the jury with an accurate, simple, brief, impartial and nonargumentative statement of the pertinent law regarding a parent's discipline of a child, which was the defendant's theory on the case. See *Roberts*, 351 Ill. App. 3d at 690. In the instant cause, defendant reverses the argument. She insists that the trial court in her case erred in giving the nonpattern instruction which focused on reasonable force and reasonable discipline–an instruction the *Roberts* court held should have been given–and, instead,

that the court should have given a pattern instruction using the phrase "without legal justification–an instruction the *Roberts* court declared was improper in the context of a case where a parent's right to discipline is raised because it does not accurately state the law.

¶ 24 Citing *People v. Green*, 2011 IL App (2d) 091123, ¶ 16, defendant asserts that, while the parental right to discipline is not a statutory affirmative defense, it has been held to be a legal justification for an otherwise criminal act. She is correct; this is, indeed, what the *Roberts* court said. See *Roberts*, 351 Ill. App. 3d at 688. Defendant is also correct that, because of this, and to negate this justification, the State must prove her guilty beyond a reasonable doubt as to the justification together with all the other elements of the offense, *i.e.*, aggravated battery of a child. See *Green*, 2011 IL App (2d) 091123, ¶ 16. However, defendant ignores the crux of *Roberts*. That is, to sustain a conviction, as in her case, of aggravated battery where a claim of parental right to discipline has been asserted, the State's burden is to prove beyond a reasonable doubt that the discipline used exceeded the standards of reasonableness. See *Roberts*, 351 Ill. App. 3d at 690; see also *Green*, 2011 IL App (2d) 091123, ¶ 16. Again, it is reasonableness, and not "without legal justification," that is the proper standard for the jury to apply in determining whether the parental discipline was justified. See *Roberts*, 351 Ill. App. 3d at 690.

¶ 25 In the instant cause, we find that the trial court's decision to deny defendant's request to change the agreed-upon instruction was proper and not erroneous, in light of the context of the cause at hand. Just as in *Roberts*, defendant asserted her parental right to discipline her child as her defense. This common law “defense” was her assertion of a legal justification for her actions. The trial court took this into account and, properly focusing on the appropriate standard

of reasonableness, instructed the jury that "[a] parent is legally justified in using reasonable force when necessary as part of reasonable discipline of a child." This clearly tracked the language found proper by our court in the identical case of *Roberts* and provided an accurate, simple, brief, impartial and nonargumentative statement of the pertinent law regarding a parent's right to discipline her child, which, again, pursuant to defendant's own assertion, was the crux of her case. Without more, we find no reason to depart from our holding in *Roberts* to find that the additional language defendant here sought–the use of the phrase "without legal justification" which the *Roberts* court specifically concluded was improper because it was explicitly not an accurate, simple, brief, impartial and nonargumentative statement of the pertinent law regarding a parent's right to discipline her child–to now be appropriate.

¶ 26 Having so concluded with respect to defendant's first claim regarding the cited definitional instruction, we now turn to her other claim of error, this time with respect to the issues instruction of aggravated battery given at her trial. That instruction stated:

> "To sustain a charge for aggravated battery to a child, the State must prove the following propositions:
>
> *First proposition:* That the defendant intentionally or knowingly caused bodily harm to [A.H.].
>
> *Second proposition:* That when the defendant did so, [s]he was of the age of 18 years or older; and
>
> *Third proposition:* That when the defendant did so, [A.H.] was under 13 years.
>
> If you find from your consideration of all the evidence that each one of these

propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

On appeal, defendant argues that the issues instruction should have been modified to include the following:

"*Fourth proposition:* that the discipline used exceeded the standards of reasonableness."

She claims that, without this addition, the instruction as given improperly shifted the burden of proof to her. Again, we do not find defendant's claim here to have any merit.

¶ 27 First and foremost, as the State points out, defendant has waived this issue. Pursuant to our review of the record, there is no indication anywhere that she objected to the cited jury instruction; in fact, at the time it reviewed the instructions, the trial court specifically asked defendant if she had any objection to this specific instruction as given, and she responded, "no objection." Defendant also never presented an alternative instruction in line with her arguments herein at the time of trial and she failed to raise this issue in her posttrial motion. Having done none of these things to preserve this matter for review, it is now forfeited. See *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007) (a defendant must timely object and file posttrial motion to preserve issue for review and, with respect to the preservation of jury instruction issue on appeal, this requires that a defendant object to the instruction, offer an alternative one at trial and

raise issue in posttrial motion).

¶ 28 The plain error doctrine allows us to consider a forfeited error when either the evidence is close or when the error is of sufficient seriousness. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Under the first prong, a defendant must prove a prejudicial error occurred, namely, that there was plain error and that the evidence was so closely balanced that this error alone severely threatened to tip the scales of justice against her. See *Herron*, 215 Ill. 2d at 187. The second prong of the plain error doctrine examines the seriousness of the error, regardless of the closeness of the evidence. See *Herron*, 215 Ill. 2d at 187. The defendant must prove that there was plain error and that the error was so serious that it affected the fairness of her trial and challenged the integrity of the judicial process. See *Herron*, 215 Ill. 2d at 187. Ultimately, before a plain error analysis may be undertaken, the defendant must show that an error occurred, for, absent error, there can be no plain error. See *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010), citing *Herron*, 215 Ill. 2d at 187. Based on the circumstances presented in the instant cause, we find that there was no error with respect to the issues instruction and, even if there was, defendant cannot meet her burden under either prong of plain error here.

¶ 29 The purpose of jury instructions is to provide the jury with correct legal principles that apply to the evidence, thereby allowing it to reach the proper conclusion based on the applicable law and the evidence as presented. See *People v. Parker*, 223 Ill. 2d 494, 500 (2006); accord *People v. Hudson*, 222 Ill. 2d 392, 399 (2006). On appeal, a reviewing court will reverse a trial court's determination as to what instructions to give only if it finds that the trial court abused its discretion. See *People v. Walker*, 392 Ill. App. 3d 277, 293 (2009). In determining this, we are

to examine whether the instructions given, when taken as a whole, fairly, fully and comprehensively apprised the jury of the relevant law. See *Parker*, 223 Ill. 2d at 501; *Walker*, 392 Ill. App. 3d at 293. Moreover, we are not to reverse the trial court's determination, even if it gave faulty instructions, unless the instructions misled the jury and prejudiced the defendant. See *Walker*, 392 Ill. App. 3d at 293-94.

¶ 30 Reviewing the jury instructions given by the trial court here as a whole, we find that they fairly and fully stated the law involved in this case as it related to the evidence. The record makes clear that the jury was properly instructed regarding aggravated battery to a child when the trial court gave the cited instruction, as it covered all of the necessary elements of the crime charged, namely, that defendant intentionally and knowingly caused bodily harm to A.H., that defendant was 18 years of age or older at the time, and that A.H. was under the age of 13 at the time. See 720 ILCS 5/12-4.3 (West 2008). The "*Fourth proposition*" defendant proposes for the first time on appeal was covered by the trial court pursuant to its prior *Roberts*-based instruction with respect to defendant's claim of legal justification, *i.e.*, that a parent is legally justified in using reasonable force when necessary as part of reasonable discipline of a child. These two instructions, combined, fairly, fully and comprehensively apprised the jury of the relevant law here. Thus, we find no error.

¶ 31 Even if error did somehow occur, the evidence presented was not closely balanced and any alleged error was not so serious as to have affected the fairness of the trial or the integrity of the judicial process here. A.H. testified, without any impeachment, that defendant and Mack twisted a belt around an extension cord and beat her with it about her back, bottom and legs

several times in an effort to punish her. First, Mack whipped A.H. with this contraption more than 25 times while defendant held her down on the living room floor. Then, the two traded places and defendant whipped A.H., more times than A.H. could count, while Mack held her down. Mack whipped her again when A.H. was in the bathroom and while defendant was present. As a result, A.H. had injuries to the point of bleeding and being unable to sit down–injuries that plagued her at least until the next week when she visited her grandmother. Emergency room physician Dr. Jesani corroborated A.H.'s testimony. When A.H. was taken to the hospital, she told Dr. Jesani that her parents had beaten her. He examined A.H. and noted that, in addition to being very small and very thin for her age, she had multiple, and severe, abrasions on her back, bottom, face and extremities, as well as scarring on her back and chest. In addition, Detective Norum testified that, not only did he observe a Department of Children and Family Services interview with A.H. during which she named defendant and Mack as the people who beat her, but also, and quite significantly, defendant confessed to him that she gave A.H. this "whooping" and hit A.H. with the extension cord several times until she bled in an effort to correct A.H.'s behavior and as an expression of her love for her. From this uncontroverted evidence, highlighted by defendant's own admission, we fail to find that the evidence against her was in any way closely balanced with respect to the crime charged, even considering defendant's assertion of her right to parental discipline as a legal justification for her actions here. See, *e.g.*, *Green*, 2011 IL App (2d) 091123, ¶ 24 (in assessing whether the discipline exerted by the parent exceeded the bounds of reasonableness, several factors are to be considered, including the degree of injury inflicted, the likelihood of future punishment that might be more injurious, the

psychological effects of the discipline and whether the parent was calmly attempting to discipline the child or whether she was lashing out in anger).

¶ 32 Nor do we find that the instruction, as given without her proposed "*Fourth proposition,*" prejudiced defendant so as to have affected the fairness of her trial or challenged the integrity of the judicial process. As we stated earlier, the combination of the *Roberts*-based nonpattern definitional instruction and the instant issues instruction regarding aggravated battery to a child properly instructed the jury here with respect to the correct legal principles to apply to the evidence presented. The former was accurate, impartial, simple, brief and nonargumentative. The latter clearly and properly described each and every element of the offense charged. Together, these instructions, as given, in no way misled the jury with respect to the burden of proof or prejudiced defendant in any way.

¶ 33 Based on all this, we find no error regarding the jury instructions given herein. When they are viewed as a whole, they fully, fairly and properly apprised the jury of the correct legal principles that applied to the evidence, and the circumstances presented allowed it to reach a proper conclusion regarding defendant's guilt. Even assuming, *arguendo*, there was some error, pursuant to the plain error analysis under which we have proceeded, the evidence in this case was not closely balanced nor was defendant prejudiced. Therefore, any error in instructing the jury, here, if any occurred, was harmless. See, *e.g.*, *People v. Cotton*, 393 Ill. App. 3d 237, 260 (2009) (finding that the trial court did not err in instructing jury and, even if there was error, under plain error analysis, it would have been harmless).

¶ 34 II. *Voir Dire* and the Trial Court's Comments

¶ 35 Defendant's next contention on appeal is that she was denied a fair and impartial jury. She focuses on comments made by the trial court during *voir dire* and asserts that, via these, the court interfered with the selection of an unbiased jury by undercutting questions designed to reveal prejudice among potential jurors and by conveying to them its disapproval of her actions in this cause. Based upon our review of the record before us, we disagree.

¶ 36 As a threshold matter, the State posits that defendant has forfeited this issue on appeal, as she failed to object at trial and raise it in her posttrial motion. While defendant concedes that she failed to object to the comments at issue during *voir dire* or at any point during trial, she insists she raised this issue in her posttrial motion by stating therein that the trial court erred in "admonish[ing] the jury that no one likes child abusers or murderers." Even giving defendant the benefit of the doubt that she sufficiently raised this issue in her posttrial motion (though her specificity was sorely lacking),[2] she has admitted, and the record confirms, that she did not object at the time the alleged errors were made. We would further note that the allegedly erroneous comments cited by defendant here occurred on five different occasions during *voir dire*; defendant never objected during any of these instances she now cites on appeal. A defendant must both object to the alleged error in court and include it in her written posttrial motion if she wishes to preserve it for our review; otherwise the issue is forfeited. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); see also *Herron*, 215 Ill. 2d at 175; *People v. Reddick*, 123 Ill. 2d 184,

[2]It is imperative, for preservation, that a defendant cites her claim of error with sufficient specificity in her posttrial motion; general or nondescript claims of error will not be reviewed. Compare *People v. Maldonado*, 402 Ill. App. 3d 411, 416-17 (2010) (citation of error in posttrial motion too general and thus not preserved), with *People v. Lewis*, 223 Ill. 2d 393, 400-01 (2006) (citation of error sufficiently specific and thus preserved for direct review).

198 (1988); accord *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 58 (addressing failure to preserve particular issue of propriety of trial court comments for review).

¶ 37 Acknowledging this, defendant insists that this issue may be reviewed pursuant to plain error. As we have already discussed, the plain error doctrine allows us to consider a forfeited error when either the evidence is close or when the error is of sufficient seriousness. See *Herron*, 215 Ill. 2d at 186-87. Under this second prong, upon which defendant relies,[3] she must, again, prove not only that there was plain error, but that this error was so serious that it affected the fairness of her trial and the integrity of the judicial process. See *Herron*, 215 Ill. 2d at 187. And, as we have already noted, before a plain error analysis may be undertaken, we must first determine whether any error occurred, for, absent error, there can be no plain error. See *McGee*, 398 Ill. App. 3d at 794, citing *Herron*, 215 Ill. 2d at 187.

¶ 38 A trial court has broad discretion in conducting *voir dire* and in determining the manner and scope of the examination of the potential jurors; accordingly, the proper standard of review is abuse of discretion. See *People v. Terrell*, 185 Ill. 2d 467, 484 (1998). The purpose of *voir dire* is to ascertain sufficient information about prospective jurors' beliefs and opinions so as to allow removal of those member of the venire whose minds are "so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath." See *People v. Cloutier*, 156 Ill. 2d 483, 496 (1993). There is no "catechism" for *voir dire* or how it is conducted.

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[3]Defendant does not argue for a review of this issue under the first prong of plain error. Even were she to have done so, we have already discussed at length that the evidence presented in this cause was not closely balanced in any sense and, thus, any claim under this first prong would fail.

Morgan v. Illinois, 504 U.S. 719, 729 (1992). In determining whether *voir dire* was properly and effectively conducted, we review whether the questions and procedures employed to test the prospective jurors' impartiality or bias were sufficient to create a reasonable assurance that any prejudice on the part of the jurors would be discovered, if present. See *People v. Rivera*, 307 Ill. App. 3d 821, 832 (1999); accord *People v. Faulkner*, 186 Ill. App. 3d 1013, 1026-27 (1989). An abuse on the part of the trial court will be found to have occurred only upon a finding from the record that the court's actions during *voir dire* thwarted the selection of an impartial jury. See *Cloutier*, 156 Ill. 2d at 496 ("only when the court's actions have frustrated the purpose of *voir dire* will an abuse of discretion be found").

¶ 39 As defendant rightly notes, she is entitled to a fair and impartial jury trial which is free from improper and prejudicial comments from the trial court. See *People v. Falaster*, 173 Ill. 2d 220, 231-32 (1996); *People v. Kelley*, 113 Ill. App. 3d 761, 767 (1983) (the defendant's constitutional right in this regard includes a jury free from influence or intimidation by the trial court). Thus, it is improper for a trial court to suggest, through its comments or its conduct, any opinion regarding the facts presented in the cause or the credibility of any of the witnesses, including the defendant. See *Falaster*, 173 Ill. 2d at 231-32; see also *Kelley*, 113 Ill. App. 3d at 767 (noting that jurors are watchful of the trial court's attitude and its influence upon them, purposeful or not, is liable to have great weight upon them). This is true, as well, during *voir dire*: a trial court cannot use this process "as an opportunity to even slightly indoctrinate a juror." *Cloutier*, 156 Ill. 2d at 496.

¶ 40 However, not all improper comments made by a trial court constitute reversible error.

See *Lopez*, 2012 IL App (1st) 101395, ¶ 57. Rather, where such comments do not constitute a material factor in the defendant's conviction, or where prejudice to the defendant was not the probable result of the comments, the trial's outcome will not be disturbed. See *Lopez*, 2012 IL App (1st) 101395, ¶ 57; see also *People v. Jimerson*, 404 Ill. App. 3d 621, 630 (2010) (trial court's improper comments will only rise to reversible error if the defendant can show prejudice and that the comments were material factor in her conviction; otherwise, they constitute only harmless error and conviction will not be reversed). Accordingly, reversal is warranted only pursuant to a showing of prejudice and harm as a result of the trial court's improper comments. *People v. Tatum*, 389 Ill. App. 3d 656, 662 (2009) (there must have been prejudice and harm to the defendant); *People v. Jennings*, 364 Ill. App. 3d 473, 483 (2005) (same). Ultimately, even improper remarks may very well constitute only harmless error, particularly if the evaluation of the effect of the trial court's comments on the jury, when made in conjunction with the evidence presented, the context in which they were made and the circumstances surrounding the trial, bears this out. See *Lopez*, 2012 IL App (1st) 101395, ¶ 57, quoting *People v. Williams*, 209 Ill. App. 3d 709, 719 (1991).

¶ 41 In the instant cause, as we noted earlier, defendant asked the trial court if, due to the extremely controversial nature of a parent's corporal punishment of her child, two additional questions could be posed to potential jurors during *voir dire*. The State did not object to these, and the trial court allowed defendant's request. The two additional questions proposed and given to the venire were: (1) "As a child were you ever physically disciplined or spanked? Is there anything about the nature of that experience that would cause you not to be fair?"; and (2) "The

nature of this case involves physical discipline of a child. Is there anything about the nature of this case that would cause you to not be fair?" The basis of defendant's current contention on appeal is her citation to remarks made by the trial court while it was asking these additional questions during the *voir dire* of five particular members of the venire. However, upon our thorough examination of each of these as found in the record, we conclude that the trial court committed no error since these comments, even if they could be considered improper, did not, when considered in light of the evidence, their context and the circumstances of defendant's trial, constitute a material factor in her conviction or result in any prejudice to her during her trial.

¶ 42 The first comment defendant cites occurred after the trial court posed the two additional questions proposed by defendant to potential juror Troy Hoggard. In response to the questions, Hoggard stated during *voir dire* that he had been physically disciplined as a child, but that nothing about that or the nature of defendant's case would prevent him from being fair. Following this, the trial court stated:

> "Ladies and gentlemen, this is not a murder case, okay? And I say that because oftentimes you're called upon – a jury might be called upon to decide someone's guilt or innocence who's charged in a murder case, okay? Most jurors who are selected would say 'I could never commit a murder,' okay? But that doesn't disqualify you as a juror. And that's the context that I ask you that question."

The court then ended its comments to Hoggard by asking him if he understood this and by stating to all the venire: "then I'll ask all of you. Do you think you can give both sides a fair trial?" Hoggard responded that he understood, could give both sides a fair trial and there was nothing

else the trial court needed to know about his qualifications as a juror.

¶ 43 We find nothing improper about the court's comments here. Clearly, the impetus behind its comments was to ensure that Hoggard could be fair. After all, Hoggard had just revealed that he had experienced the same type of conduct as the victim in this case, A.H., *i.e.*, that he, as a child, had been on the receiving end of physical discipline by a parent–the same situation for which defendant here was on trial. Coming from such a vantage point and having been in the exact same shoes as the victim, this clarification was critical. Then, the trial court reversed its line of questioning and approached Hoggard from the perspective of defendant. That is, it went on explain to the entire venire that a juror did not have to engage in the alleged conduct in order to be fair. In other words, having just revealed a juror who had been the victim of physical discipline as a child, the court then wanted to inform the venire that, as adults, they did not have to have used physical discipline on a child nor even condone it to be fair jurors. The court used a tried and true analogy to exemplify this; while most people would say they would never commit murder, this would not excuse them as a juror on a murder case. The trial court was simply noting for the venire that one who may not condone the actions of a defendant at issue, and regardless of his personal feelings on the topic at issue, need not necessarily exclude himself from the judicial process but, rather, could, indeed, still be a fair and impartial juror. In direct contradiction to defendant's argument, we do not find that these comments shifted the focus away from the case at hand and to society's general disapproval of murder. Instead, these comments and, in particular, the trial court's analogy, in fact made the cause and the venire's potential concerns with respect to the physical discipline of a child, along with the duties of a

juror, more relatable and connected to their daily lives and beliefs.

¶ 44 The second series of comments made by the trial court which defendant cites as error occurred during an exchange with venireman Richard Huynh. Huynh indicated that he would not hesitate to sign a not guilty verdict if he felt the State did not prove its case against defendant beyond a reasonable doubt. The court then posed the two additional questions to him. After noting that this cause involved physical discipline of a child, it asked Huynh whether this would prevent him from being fair. The following occurred in response:

"[Huynh] Guess not.

[Trial Court] All right. Would you listen to the evidence? Look. Nobody likes – remember my analogy about murder?

[Huynh] Uh-huh.

[Trial Court] But every person is entitled to a fair trial. Would you agree?

[Huynh] Yes.

[Trial Court] Are you a fair person?

[Huynh] Yeah.

[Trial Court] Well, would you tend to favor the State or the defense?

[Huynh] You have to listen to both sides, I guess."

¶ 45 Again, here, it is clear that the trial court's comments and questions were designed to determine whether this potential juror had any bias with respect to the controversial subject matter of this cause. Huynh had just responded to defendant's target questions about physical discipline of a child and fairness toward someone who used this with hardly a definitive answer.

To the contrary, Huynh exhibited hesitation and doubt. In an effort to flush this out, the trial court returned to its simple-to-understand analogy with respect to potential jurors and a crime like murder to show Huynh that, just because he may not partake in the same kind of behavior, did not mean he could not be a juror on this cause. Immediately following its reference to its prior analogy, the court also asked Huynh if he agreed that, regardless of the crime charged, every defendant was entitled to a fair trial. Again, the court's efforts at selecting a fair and impartial jury were very clear.

¶ 46 The same can be said of defendant's third citation of error. This time, after again explaining that this cause involved the physical discipline of a child, the court asked potential juror Hilary Price if there was anything about such an allegation that would not enable her to be fair. She and the court exchanged the following:

> "[Price] I'm not sure. Well, I've never spanked my kids. I don't really –
>
> [Trial Court] Well, I've never committed a murder, but I could probably sit as a juror in a murder case. Could you promise that you would listen to the –
>
> [Price] Well, yeah.
>
> [Trial Court] – the evidence, the arguments that the lawyers make, accept the law that I give you before making up your mind about anything having to do with this case?
>
> [Price] Yes.
>
> [Trial Court] Could you be fair to both sides?
>
> [Price] Yes."

The trial court was once again faced with a juror who was relating defendant's cause to her own

beliefs regarding the physical discipline of a child. The court used its analogy to show that one's personal belief regarding the crime charged–whatever it is–and one's ability to be a fair and impartial juror are two separate concepts. At the outset of this exchange, Price revealed that she personally did not believe in corporal punishment and that she never used this with her own children; thus, she said, she did not know if she could be fair in evaluating defendant's actions. However, once the trial court made clear that a good juror is one who can put her personal beliefs aside and instead focus on her duty to examine the evidence, the arguments and the law before reaching a conclusion, she definitively and affirmatively stated she could be fair and impartial. Far from error, the trial court's comments here were asserted in an effort to reveal any lasting bias.

¶ 47 Just as with venire member Price, defendant attacks another exchange between the trial court and a potential juror following the revelation that this cause involved the physical discipline of a child. Venire member Anne Doyle, when asked by the court if there was anything with respect to the nature of these allegations that would prevent her from serving on the jury, responded, just as Price, that she would "try [her] best," but that she did not "believe in any kind of hitting." Again, attempting to separate personal beliefs from the duties of a juror, the trial court responded:

> "I may agree with you. That's a personal choice. But do you think, simply because a person is charged with that offense, they're guilty[?]"

When Doyle responded in the negative, the trial court stated:

> "Okay. No one likes the issue of physical discipline of a child. Even though you

yourself do not believe in that manner of discipline, many people do. As you've heard, many people have been spanked, okay? That's a form of physical punishment or discipline.

Can you promise me that you would listen to the evidence, the arguments that the lawyers make, and accept the law that I give you before making up your mind?"

When Doyle responded that she thought she could be fair but that this would be "hard," the trial court stated:

"Like I said to other jurors in the past, there are juries every day of the week in a murder case. Most jurors don't believe in murder. That doesn't mean they're not qualified to serve as a juror in a murder case. Similarly, this case involves something you don't believe in. I understand that. But can you be fair to both sides?"

Doyle promised she would try her best.

¶ 48 The trial court was presented with yet another venire member who would not clearly answer the question of whether she could be fair in light of the actions at issue, citing as her reason for this her personal belief that hitting children is wrong. The court was again forced to rephrase its questions and to clarify that her personal beliefs were irrelevant to her ability to be a fair and impartial juror. By this time, it was clear that several of the venire did not personally condone the physical discipline of children. Via its comments that it may or may not agree with this, the court was making it clear that others in our society may, indeed, espouse some of its forms as their own personal choice. Regardless, the key for the trial court, as it stated, was to determine if Doyle would find defendant guilty simply because she was charged with this, or if

Doyle would weigh the evidence and follow the law.

¶ 49 The fifth and final citation of error presented by defendant regarding the trial court's comments during *voir dire* occurred when the trial court asked venire member Jo Ann Klopack if she had ever been physically disciplined as a child, to which she responded, "No, I have to say I had very loving parents." The following exchange then took place:

"[Trial Court] Okay. Well, I did to, but that doesn't mean –

[Klopack] They didn't believe in hitting, and neither do I.

[Trial Court] Okay. I tend to agree with you. But I know people that do believe in it and are wonderful parents.

[Klopack] Correct.

[Trial Court] Even though you don't believe in it, could you be fair to the person charged with this offense?

[Klopack] Well, to tell you the truth, when I was called to jury duty, this was the one case I didn't want to be called for.

[Trial Court] Ma'am –

[Klopack] Because –

[Trial Court] Ma'am?

[Klopack] I'm involved with five grandchildren. I have great love for children.

[Trial Court] All right. Ma'am, I tell you what. I want 12 fair people. If you're not one of them, tell me, and I'll get you out of here.

[Klopack] I don't know how fair I could be, and that's just being honest with

you."

¶ 50 This exchange demonstrates that Klopack's answers to the two question asked by the trial court, at defendant's request, were nonresponsive and irrelevant to the cause at hand. That is, it did not matter that Klopack had loving parents; as the trial court pointed out, there is no relation between whether a parent loves a child and whether that parent uses appropriate physical discipline on the child. Even more significant, neither of those concerns has any relevance with respect to whether someone can follow the law while sitting on a jury. However, as the trial court sought to explain this to Klopack by making the situation relatable to daily life, Klopack made clear that she could not separate these concepts. Thanks to the trial court's comments, it discovered that she would not be able to be a fair and impartial juror.

¶ 51 Ultimately, we find nothing improper with the trial court's comments regarding any of the instances cited by defendant here. Perhaps some of its comments were a bit personal, and it did use an analogy to another type of crime. However, we do not find that the comments, in any way, frustrated the purpose of *voir dire*, as defendant suggests. Contrary to her arguments, not only do the trial court's comments demonstrate that it sought extreme honesty from the venire, but also that the trial court would not accept anyone who could not separate their personal feelings from the requirements of jury service, which are to ensure a fair and impartial trial based on the evidence, the arguments and the law presented. All five of the prospective jurors involved in these exchanges at issue displayed severely negative attitudes toward the crime for which defendant was charged or wavered when asked if they could be fair. It was only after the trial court involved them in further discussion with its comments that it was able to expose for itself,

and the parties viewing *voir dire*, whether they were being honest and whether they could be adequate jurors of defendant's fate. In none of these exchanges do we find that the trial court made any specific reference to defendant in particular, nor did it express any opinion with respect to her guilt or innocence. Instead, the trial court made only general comments about corporal punishment and the physical discipline of children, and it was clear that its intent was to expose any biases among the venire and to determine if they could separate their beliefs from their ability to be impartial and follow the law. Critically, because of the very comments defendant calls erroneous, four of these venire members (Huynh, Price, Doyle and Klopack)–all of whom expressed doubt in their ability to be fair and impartial in this cause due to the controversial issue at hand–were dismissed and never served on the jury.

¶ 52 Accordingly, having failed to show us the required elements that would merit reversal, namely, that the trial court's comments were a material factor in her conviction or that she was prejudiced or harmed by them, we find no error upon the trial court with respect to any of the comments cited by defendant on appeal and, thus, we find no reason to reverse her conviction on this ground.

¶ 53 III. *Pro Se* Representation

¶ 54 Defendant's third contention on appeal is that the trial court erred when it refused to rule on her request to dismiss her counsel and proceed *pro se*. She claims that, by doing so, the court effectively denied her request, which she asserts was clear and unequivocal, and, by failing to conduct any inquiry into whether her waiver of counsel was knowingly and intelligently made, the court violated her right to self-representation, thereby meriting the vacation of her conviction

and remand for a new trial. We disagree.

¶ 55 As a threshold matter, the State insists that defendant has forfeited this issue on appeal, as she failed to object at trial and raise it in her posttrial motion. Again, in order to preserve a claim of error for appellate review, a defendant must both object to the alleged error in court and include it in her written posttrial motion. See *Enoch*, 122 Ill. 2d at 186; see also *Herron*, 215 Ill. 2d at 175. When she fails to meet these requirements, the issue is forfeited. See *Reddick*, 123 Ill. 2d at 198. The plain error doctrine allows us to consider a forfeited error when either the evidence is close or when the error is of sufficient seriousness. See *Herron*, 215 Ill. 2d at 186-87. Again, defendant relies only on the second prong,[4] pursuant to which she must prove there was plain error and that the error was so serious that it affected the fairness of her trial and challenged the integrity of the judicial process. See *Herron*, 215 Ill. 2d at 187. And, we are reminded that before a plain error analysis may be undertaken, we must first determine whether any error occurred, since there is no plain error if there is, simply, no error. See *McGee*, 398 Ill. App. 3d at 794, citing *Herron*, 215 Ill. 2d at 187.

¶ 56 Defendant is correct that she has a constitutional right to represent herself. See *People v. Baez*, 241 Ill. 2d 44, 116 (2011); see also *Faretta v. California*, 422 U.S. 806, 835 (1975). To exercise this right, however, she must make a knowing and intelligent relinquishment of her right to counsel. See *Baez*, 241 Ill. 2d at 116. The defendant must make "an articulate and

[4]As with her second contention on appeal, defendant does not argue for a review here under the first prong of plain error, but only under the doctrine's second prong. Again, even were she to have done so, the evidence presented in this cause was not closely balanced and, thus, any claim under this first prong would fail.

unmistakable demand to represent h[er]self; otherwise, [s]he waives h[er] right to self-representation." See *People v. Span*, 2011 IL App (1st) 083037, ¶ 59.

¶ 57 A trial court may not reject a defendant's request to proceed *pro se* based upon its perception that she lacks legal knowledge, that this decision is unwise, or that she may not be able to defend herself in a court of law. See *People v. Fisher*, 407 Ill. App. 3d 585, 589-90 (2011). Rather, the trial court is only to examine if the defendant can, and has, made a knowing and intelligent waiver of her right to counsel. See *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 23; see also *People v. Ward*, 208 Ill. App. 3d 1073, 1084 (1991) (whether the defendant has knowingly and intelligently waived her right is different from whether she has the ability to do an adequate job defending herself at trial). To determine this, we, as the reviewing court, are to examine the facts and circumstances of the cause, including the background, experience and conduct of the defendant. See *Span*, 2011 IL App (1st) 083037, ¶ 60, citing *Baez*, 241 Ill. 2d at 116. This includes her conduct following her request to represent herself, as she may later acquiesce in representation by counsel by vacillating or abandoning her initial request to proceed *pro se*, or she may forfeit her right to represent herself by remaining silent at critical junctures of the proceedings. See *People v. Burton*, 184 Ill. 2d 1, 23-24 (1998); accord *Span*, 2011 IL App (1st) 083037, ¶ 61.

¶ 58 Based on the facts and circumstances present in the instant cause, we find that defendant never clearly and unequivocally expressed a desire to proceed *pro se* as required and, even if it could be concluded that she had, she abandoned this request as exhibited by her subsequent conduct.

¶ 59 The record demonstrates that defendant made comments regarding her counsel's representation at a pretrial hearing on August 5, 2010. On that date, defendant was before a judge who did not preside over her eventual trial. At this hearing, Mack, against the advice of his attorney, expressed his unwillingness to sever his case from defendant's and his dissatisfaction with the delay in their cause proceeding to trial. He further told the trial court that he did not believe his and defendant's attorneys were working in their favor. The trial court then turned to defendant and asked if she wished to comment. Defendant told the trial court:

> "I speak for myself. She's [defense counsel] been here. I haven't not really talked to her. Most I talked to her through the glass.
>
> Everything she said to me is everything saying, I am wrong, this and this. She is not telling me no advise or nothing like that. She is telling me, I am going down. That is basically what she is saying to me.
>
> I feel if she is going to be that way, there is no need for her to represent me."

¶ 60 Defendant's comments are far from an unequivocal relinquishment of her right to counsel and an unmistakable demand to represent herself. In fact, reviewing her comments in the entire context of the record, it is clear to us that she never actually requested to proceed *pro se* or to represent herself. Instead, she merely attacked her attorney for, first, her attorney's lack of talking to her on this day in court before the proceedings and for, second, essentially, telling her that she was "going down," *i.e.*, that she should not expect a favorable outcome. Defendant then concluded her comments to the court by stating that, if this was how defense counsel would proceed, she did not want this particular attorney representing her. While defendant expressed

dissatisfaction with defense counsel, her trial strategy and her negative views regarding the potential outcome of her trial, defendant never once told the court that she wanted to wholly relinquish her right to counsel and instead represent herself. That is, defendant's statement here that if defense counsel was "going to be that way, there is no need for her to represent me," is entirely different from a statement that she no longer wanted to be represented by any attorney and instead wanted to represent herself. The former indicates that she was open to representation by counsel, even this particular counsel should she change her attitude and behavior, while the latter would be what our law indicates is required in order for a defendant to effectively waive her right to counsel and be properly permitted to proceed *pro se.*

¶ 61 Even if defendant's comments to the trial court could somehow be construed as a clear, definitive and unequivocal expression to proceed *pro se* here, it is obvious, based on the record before us, that she abandoned this request and, instead, acquiesced in the representation provided her by defense counsel. In response to defendant's comments at the August 5, 2010 hearing, defense counsel explained that she had, indeed, spent "quite awhile" with defendant and, per her responsibility, had told defendant things she "might not like" to hear. Defense counsel also explained that, on that day in court, she had not yet had the opportunity to speak with defendant because Mack was also present and the sheriff wanted to keep them apart. Following this exchange, the trial court informed defendant that it would give her the opportunity to speak to defense counsel after the hearing, and that it would also consider her request as a motion to represent herself which it would take under advisement until the next court date. The court then admonished defendant about the importance of counsel and her duties, and told her to "please

listen carefully" and "think about" these until the next court date.

¶ 62 When that next court date arrived, the trial court began the proceedings by asking the parties, "[w]hat's going to happen here?" In response, defendant did not raise a desire to proceed *pro se*. Instead, she, along with her defense counsel, presented a motion to sever her case from Mack's, and the cause was set for trial. That was all that was discussed during that hearing. In addition, at no time thereafter did defendant raise, or even mention, that she wanted to exercise her right to represent herself. This included other hearings that took place before trial, the start of and during trial itself, and the hearings that occurred after trial was over. From this, it can easily be concluded that defendant reconsidered the admonishments of the court and abandoned any notion she may have had to proceed without counsel.

¶ 63 Defendant insists that she did not raise the issue at any later time because she was not required to, as the court's conduct of pushing her request aside and instead lecturing her about the importance of attorneys demonstrated this would have been fruitless. While it is true that a defendant need not continuously renew a request before a trial court that is proved to be fruitless (see, *e.g.*, *Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989); *People v. Gant*, 84 Ill. App. 2d 208 (1967)), defendant here never clearly made a motion to proceed *pro se* in the first place; instead, pursuant to the record here, it was the trial court that offered to take it upon itself to consider her comments similar to such a motion. In addition, it cannot be denied that defendant subsequently remained silent at all junctures of the progression of her cause. And, significantly, during trial, when the trial court was admonishing defendant about her right to testify, the record reflects that defendant stated she was satisfied with defense counsel's representation of her throughout her

trial.

¶ 64 The comments defendant made to the trial court at the pretrial hearing of August 5, 2010 about her representation in no way indicated that she wanted to proceed *pro se* but, rather, only that she had some complaints about how her particular defense counsel was behaving. These were that she did not have a chance to speak to defense counsel that day before court, that defense counsel was not giving her the advice she sought, and that defense counsel had a pessimistic view of the potential outcome of her trial. All these complaints were remedied via defense counsel's explanations and the trial court's permission of the opportunity for defendant to speak to her counsel after the hearing. Following that exchange, defendant never again raised any indication, express or remote, that she wanted to dismiss her counsel and proceed *pro se*. Ultimately, without any sort of definitive or consistent statement made by defendant to the trial court asserting that she wanted to represent herself, and in light of her subsequent conduct during the progression of her trial, it cannot be held that defendant made a knowing and intelligent waiver of her right to counsel. Thus, the trial court, which never conclusively denied a request by defendant to proceed *pro se*, did not err in not granting any such request here.

¶ 65 IV. Fines and Fees

¶ 66 Defendant's final contention on appeal is that the trial court erroneously imposed an unidentified assessment, as well as several other fines and fees, upon her and failed to award her $5 per day credit against these. She claims that certain fines and fees must be vacated and that her fines and fees order must be amended, namely, by reducing it by $105 to a total of $550. The State, meanwhile, admits that some of the fees ordered to be paid by defendant must be vacated,

but asserts that the total amount of fees should be reduced to $580, not $550. Upon consideration of the arguments here, we must agree with defendant.

¶ 67 Following her guilty verdict, the trial court ordered defendant to pay a total of $655 in fines, fees and costs. This included a $30 Juvenile Expungement Fine, a $30 Children's Advocacy Center assessment, a $15 assessment under the heading "Other as Ordered by the Court," a $15 Document Storage fee and a $15 Automation fee. At the same time, the trial court ordered her to be credited with 335 days of pretrial custody.

¶ 68 For its part, the State concedes, in line with defendant's arguments on appeal, that the $30 Juvenile Expungement Fine should be vacated as *ex post facto*, since the statute which underlies the basis for its imposition was not in effect at the time she committed the crime for which she was found guilty. The State also concedes that defendant's presentence credit, as ordered by the trial court, should offset the $30 Children's Advocacy Center assessment, and that the unidentified $15 assessment listed by the trial court under the heading "Other as Ordered by the Court" should be vacated. Accordingly, based on defendant's arguments and the State's concessions, the Juvenile Expungement Fine and the "Other as Ordered by the Court" assessment are vacated, and defendant's pretrial custody credit is to offset the Children's Advocacy Center assessment.

¶ 69 This leaves at issue the $15 Document Storage fee imposed pursuant to 705 ILCS 105/27.3(a) (West 2008), and the $15 Automation fee imposed pursuant to 705 ILCS 105/27.3(c) (West 2008). Citing language in these statutes that indicates these fees may be collected only once when multiple parties are presented in a single pleading, defendant argues that, since the

State filed its indictment in this cause against both her and Mack jointly, and since there was no showing that these fees had not already been collected from her coindictee, they should be stricken as assessed against her. She alternatively argues that an evidentiary hearing should take place to determine if these fees have been collected from Mack. While admitting that defendant and Mack were charged together, the State counters that, because they were tried and convicted separately, defendant's situation does not fall within the ramifications of the statutory language and, thus, these fees should be upheld as against her.

¶ 70 Upon our review of the record, as well as the statutory language at issue, we find that the State mischaracterizes the issue and that its argument has no merit.

¶ 71 Briefly, we note that the propriety of a trial court's imposition of fines and fees raises a question of statutory interpretation and is reviewed *de novo*. See *People v. Price*, 375 Ill. App. 3d 684, 697 (2007). It is well established that the cardinal rule of statutory interpretation is to give effect to the legislature's intent. See *People v. Roland*, 351 Ill. App. 3d 1012, 1015 (2004). The best indicator of this is the language of the statute itself, which should be accorded its plain and ordinary meaning. See *Roland*, 351 Ill. App. 3d at 1015. Additional considerations include the purpose of the statute and the problems it sought to remedy. See *People v. Smith*, 345 Ill. App. 3d 179, 185 (2004). Each portion of the statute is important, and the statute should be interpreted as a whole. See *Smith*, 345 Ill. App. 3d at 185.

¶ 72 The Document Storage fee and the Automation fee were established to aid in the costs associated with funding our court system and its modernization. See, *e.g.*, *Zamarron v. Pucinski*, 282 Ill. App. 3d 354 (1996). Defendant is correct that, after explaining the amounts to be

charged and the method of collection of these fees, both statutes contain the following language: "no additional fee shall be required if more than one party is presented in a single pleading, paper or other appearance." 705 ILCS 105/27.3(a), (c) (West 2008). This language is inherently clear. Although the modernization of our courts is costly, the legislature saw fit to include a provision stating that, in a legal cause where more than one party is presented in any pleading, paper or appearance during the progression of that cause, these fees may only be charged once, and not multiple times simply because multiple parties may be involved.

¶ 73 Here, in the context of this criminal cause, and as demonstrated by the record, defendant and Mack were presented before the trial court at the very outset of this cause together. All of their indictments and charging papers clearly list both of them jointly as codefendants in the matter; they were also arraigned together. Never were they charged separately. It was only a few weeks before trial that their causes were severed, via a motion by defendant, and eventually, they were tried and convicted separately. However, this was long after legal proceedings were initiated against them, jointly. Clearly, in line with the statutory language at issue, and as per the documents contained therein, the record shows that "more than one party [was] presented in a single pleading, paper or other appearance" in this cause. 705 ILCS 105/27.3(a), (c) (West 2008).

¶ 74 Accordingly, as defendant astutely points out, pursuant to these statutes, the Document Storage fee and the Automation fee could only be charged once by the trial court in this matter. The question arises, then, whether Mack was ordered to pay these fees as well as defendant. If so, this was improper; if not, then defendant would be required to pay them and the trial court's

order would have been proper. In light of this dilemma, defendant suggests that remand is necessary so that an evidentiary hearing may be conducted to determine if the trial court ordered Mack to pay these fees, in addition to ordering her to do so as well.

¶ 75 Remand, however, is not necessary, as we are easily able to reach the correct determination here. Although Mack is not a party to this appeal, we may take judicial notice of the fact that he was charged and convicted of aggravated battery to a child with respect to the same events presented at defendant's trial here, that he appealed his conviction to our Court, and that we affirmed his conviction upon review. See *People v. Mack Goodman*, No. 1-11-0390 (December 13, 2012) (unpublished order pursuant to Illinois Supreme Court Rule 23); see also *Jimerson*, 404 Ill. App. 3d at 634 (reviewing court may take judicial notice of public records and other judicial proceedings, including the record in the cause of a different defendant); accord *People v. Jones*, 118 Ill. App. 2d 189, 197 (1969) (in considering sentence imposed, reviewing court could take judicial notice of companion appeal of a defendant who had been jointly indicted with the defendant); see, *e.g.*, *People v. Phillips*, 219 Ill. App. 3d 877, 878 (1991) (reviewing court is able to take judicial notice of related defendant's conviction and sentence, especially because same judge also sentenced the defendant). The record in Mack's case makes clear that the trial court ordered him to pay the $15 Document Storage fee and the $15 Automation fee. The trial court checked both of these off on the fines and fees order it issued against him and added them to the total costs charged to him with respect to the cause. And, significantly, while one of Mack's contentions on his appeal before our Court focused on the propriety of a $200 DNA analysis fee, a $10 Domestic Battery fine (both of which were not

charged to defendant), and the amount of credit to be applied to his fines and fees order, he never contested the imposition of the $15 Document Storage fee or the $15 Automation fee.

¶ 76 From all this, our decision is obvious. It is of no consequence here that defendant and Mack were eventually tried and convicted separately for what happened to A.H., or that they were represented by separate attorneys. The fact is that, at the outset of this litigation, defendant and Mack were presented to the trial court jointly, as proven by the indictments contained in the record. As this satisfies the clear and unambiguous statutory language of the Document Storage fee and Automation fee at issue here, *i.e.*, that "no additional fee shall be required if more than one party is presented in a single pleading, paper or other appearance" (705 ILCS 105/27.3(a), (c) (West 2008)), and as Mack was already ordered to pay these fees and never contested their imposition on appeal, we find that it was improper for the trial court to order defendant to pay these fees as well. Therefore, we vacate the $15 Document Storage fee and the $15 Automation fee as issued against defendant.

¶ 77 Accordingly, with the State's concession to vacate the $30 Juvenile Expungement Fine and the unidentified $15 assessment listed by the trial court under the heading "Other as Ordered by the Court," with its agreement that defendant's presentence credit should offset the $30 Children's Advocacy Center assessment, and now with our determination that the $15 Document Storage fee and the $15 Automation fee must be vacated, we find that defendant's fines and fees order must be reduced, as defendant contends, by $105, to a total of $550.

¶ 78 CONCLUSION

¶ 79 For all the foregoing reasons, we affirm the judgment of the trial court; we modify only to

vacate the $30 Juvenile Expungement Fine, the unidentified $15 assessment listed by the trial court under the heading "Other as Ordered by the Court," the $15 Document Storage fee and the $15 Automation fee, as well as order the offset of the $30 Children's Advocacy Center assessment pursuant to her presentence credit, thereby reducing defendant's fines and fees order by $105 to a total of $550.

¶ 80 Affirmed, fines and fees order modified.