FIRST DIVISION
FILED: AUGUST 6, 2012

No. 1-11-3001

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. 08 CR 17424
	)	
JOSEPH N. JOHNSON,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

O R D E R

Held: The defendant's myriad of objections are without merit, and his conviction is affirmed.

¶ 1 The defendant, Joseph Johnson, appeals from his jury trial conviction and subsequent sentence for first-degree murder. On appeal, he argues that his conviction should be reversed because (1) he was deprived of due process when the State asked improper questions of him during cross-examination; (2) the trial court failed to instruct the jury properly regarding second-degree murder; (3) he was deprived of his right to a public trial when a spectator was barred from the courtroom; (4) the trial court erred in barring certain parts of his testimony; (5) he was deprived of his right to due process when the trial court commented regarding his attorney's off-the-record

discussions with him; and (6) the trial court should have submitted the question of his fitness for trial to a jury. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 2 At trial, the State's theory of the case was that, on August 9, 2008, the defendant took the victim to a motel and stabbed her to death. As laid out in his attorney's opening statement, the defendant's theory of the case was that the two went to the motel after the victim propositioned him for sex but that the defendant changed his mind. In the ensuing fight, the victim hit him with a bottle, and he stabbed her in self-defense. His attorney explained that the defendant, who has no left eye, feared losing his other eye in the fight.

¶ 3 The desk clerk at the motel testified that the defendant, a regular customer, rented a room with the victim on the day she was killed. When the defendant checked out of the motel, the clerk recalled, he was covered in blood and reported to her that his wife needed an ambulance. The clerk went to the room and saw the victim's body, then returned to speak with the defendant, who told her that he did not do anything to the victim. The clerk testified that the defendant left when she contacted the police. On cross-examination, she agreed that the defendant either did not have a left eye or had some problem with his left eye. The State's next witness, a woman who saw the defendant later at a bus stop and alerted police, also noted on cross-examination that the defendant had a bad eye.

¶ 4 The police officer who arrested the defendant the day after the murder testified that the defendant had dried blood on him but had no wounds on his face, head, or hands. He agreed on cross-examination that the defendant had a left-eye problem. Another officer, a forensic investigator, identified several photographs he took of the scene of the killing. He agreed that those photographs depicted, among other things, the victim's body, an unbroken 22-ounce malt liquor bottle on a table in the motel room, a garbage can containing bloody paper towels, and bloody furniture and linens. The forensic investigator testified that he found the victim with pants pulled down to her knees. Another officer, who met with the defendant after his arrest, noted no wounds on the defendant and also noted that the defendant could not see out of one eye.

¶ 5 A forensic pathologist who reviewed the victim's autopsy records testified that there was a stick, which "looked like a piece of a tree branch," found "between her legs and the underwear." He also noted a fatal stab wound at the base of her left neck as well as defensive stab wounds on her hands. He stated that the toxicology tests revealed the presence of cocaine and alcohol in the victim's system. On cross-examination, the forensic pathologist stated that he could not say when the victim had ingested cocaine, nor could he say how the stick came to be in her clothing.

¶ 6 After the trial court denied his motion for a directed finding at the close of the State's case, the defendant testified on his own behalf. The defendant began his testimony by noting that he had no left eye. As he testified regarding the start of his encounter with the victim, the following exchange occurred:

"Q. Did she approach you?

A. Yes, she did.

Q. Did she have a conversation with you?

A. Yes.

Q. What did she say?

A. She asked me did I date.

[PROSECUTOR]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: It's not being introduced for the truth of the conversation, just to show –

THE COURT: Sustained. Ask another question.

[DEFENSE COUNSEL]: May I ask the nature of the objection?

THE COURT: Hearsay.

[DEFENSE COUNSEL]: It is not being –

THE COURT: Then it's irrelevant. The objection is sustained. Please ask another question.

Q. What was the nature of the conversation?

[PROSECUTOR]: Same objection, Judge.

THE COURT: Sustained."

¶ 7 The defendant testified that the two went to a motel room and that she hit him twice in the face and head with a glass bottle. He said that he then tried to protect himself, but he testified that he did not remember stabbing her. Later in the direct examination, the following exchange took place when defense counsel asked the defendant questions about a picture of himself:

"Q. Do you have on your right wrist anything?

A. Oh, that's a band from the hospital?

Q. What hospital had you been in?

A. About my medical condition.

Q. What hospital?

A. Stroger Hospital.

Q. What was your medical condition?

[PROSECUTOR]: Objection to the relevance.

THE COURT: Sustained."

After a question about the date he was in the hospital, the defendant explained that his "left eye is always closed becuase there's not an eye there, it's just a growth." Defense counsel then closed his direct examination by asking why the defendant stabbed the victim. The defendant responded that he did so because she had hit him and he was afraid that he would lose his right eye.

¶ 8 At the outset of the State's examination, the defendant became confrontational and began giving non-responsive answers. The trial judge prompted the defendant to answer the questions posed to him, and the judge noted for the record that the prosecutor was speaking in an "orderly tone." When the defendant's confrontational tone continued, the judge ordered a recess. After the recess, the State continued its cross-examination. During that examination, the defendant repeated that he feared losing his only eye during the confrontation, and he explained that the victim carried

the knife into the motel room. When the defendant gave non-responsive answers to subsequent questions, the judge admonished him, and he complained that he was answering to the best of his ability but did not remember the answers to all of the prosecutor's questions. In response to several more questions about details of the altercation, the defendant answered that he did not know or did not remember the answers. The following exchange is representative:

"Q. Yes or no, did you grab the knife out of her hand?

A. I can't say yes or no because I don't remember.

Q. So you don't know if you stabbed her or not?

A. Man, you're trying to put words in my mouth. I told you I don't remember. All I know is I tried to protect myself after she hit me. Simple as that.

Q. From where did [the victim] pull the knife out?

A. I don't know, sir. I got one eye and I couldn't see. I don't know where she pulled it out. She could have pulled it out of her purse or whatever she had. I don't know.

Q. Well, [the victim] didn't have her pants on or her underwear on when she was stabbed, correct?

A. Well, I don't know whether she had her pants or underwear on or not. I didn't do nothing with her.

* * *

Q. After you stabbed [the victim], you tried to cover it up, didn't you?

* * *

THE WITNESS: I never saw that lady before in my life.

[PROSECUTOR]: Objection, nonresponsive.

THE WITNESS: She was a total stranger. She approached me. I never saw her.

THE COURT: Sustained.

THE WITNESS: I didn't have nothing to do with her. I'm minding my own business walking down the street."

At that point, the trial judge interrupted to admonish the defendant to answer the questions put to him, and the following exchange ensued:

"[DEFENSE COUNSEL]: Your Honor, would you tell him that when there's an objection, he has to wait until your Honor rules, and if it's sustained, he doesn't have to answer. He's not familiar with court. It's probably my fault.

[PROSECUTOR]: Objection.

THE COURT: That will be sustained and stricken, Counsel.

[DEFENSE COUNSEL]: I'm asking you –

THE COURT: You're not going to, first of all, inform the jury of something that's not true, and, second of all, testify. And I'm sure you explained to your client at our recess –

[DEFENSE COUNSEL]: Yes.

THE COURT: –that he had to answer and not answer if an objection was sustained.

[DEFENSE COUNSEL]: I did not explain that.

THE COURT: I will."

¶9 The judge then explained the principle to the defendant, and, when the defendant claimed not to understand, allowed a recess so that the defendant and counsel could confer. When cross-examination resumed, the prosecutor asked the defendant how he met the victim. The prosecutor first asked if the defendant had been drinking; the defendant denied drinking but admitted carrying a bottle of liquor. The following exchange then occurred:

"Q. And she came right up to you and solicited you, correct?

A. Yes, that's right.

Q. Hey, you want to go have a good time, something like that?

A. No, uh-uh.

Q. What did she do?

A. She just asked me did I date."

The prosecutor next asked about the defendant's and the victim's actions in the motel room:

"Q. Had a little party in the room, right?

A. No.

Q. You had a bottle of alcohol, right?

A. You said a party. We never partied.

Q. You had booze, right?

A. Had what?

Q. Alcohol?

A. Yes, but it wasn't used.

Q. And you and [the victim] were drinking alcohol, right?

A. No.

[DEFENSE COUNSEL]: Objection to the term 'right'.

THE COURT: Overruled.

* * *

Q. So you weren't drinking?

A. No.

* * *

Q. You and [the victim] were smoking crack cocaine, right?

A. I don't smoke. I ain't never smoked a cigarette in my life.

Q. You get high?

A. No, I don't. High off what?

Q. Cocaine?

A. No, I don't know what cocaine is. I know how to spell it."

Aside from his initial objection to the use of the word "right," defense counsel raised no additional objections during this line of questioning.

¶ 10 The prosecutor later questioned the defendant about the condition of the body. After the defendant gave non-responsive answers to questions asking why the defendant was undressed, the

following exchange occurred:

"Q. *** The top of that photograph, Mr. Johnson, is a wooden stick next to a pair of blue underpants. Do you see the stick and the underpants?

A. Where's the stick at?

Q. Right here, Mr. Johnson.

A. That don't look like a stick to me.

Q. What does it look like to you?

A. I don't know. ***

Q. Could you explain to the ladies and gentlemen of the Jury how that stick got there?

[DEFENSE COUNSEL]: Objection, he doesn't have to explain anything.

THE COURT: Overruled.

Q. Explain to them, Mr. Johnson, how that stick got into [the victim's] underpants?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

THE WITNESS: I don't know. I don't know nothing about no stick.

* * *

Q. Isn't it true, Mr. Johnson, you put that stick in [the victim's] vagina?

A. Mister, you crazy. I aint did nothing like that. I'm not no sadist."

Later in his testimony, the defendant claimed both that he never stabbed the victim and that there was a third person in or near the motel room.

¶ 11 During re-direct examination of the defendant, the court ordered a recess after an interruption. At the conclusion of the recess, the following exchange took place outside the presence of the jury:

"THE COURT: *** Do you know that person who passed out in the courtroom?

[DEFENSE COUNSEL]: Yes, your Honor.

THE COURT: He's intoxicated and he's refusing medical treatment. He's going to

be not allowed back in. Do you understand?

[DEFENSE COUNSEL]: I don't know if he's intoxicated.

THE COURT: Well, I'm telling you what EMS has told us. So I want you to understand what is going on.

[DEFENSE COUNSEL]: I would think there would need to be a hearing on that because courtrooms are open courtrooms. You can't excuse a person, keep them out of a courtroom, unless there's ground after an evidentiary hearing.

THE COURT: Well, yesterday he was intoxicated in the courtroom, he was unable to walk. The sheriffs escorted him out. He returned back today and passed out in the gallery in front of the jurors. He is now outside.

If he refuses medical treatment, I'm not going to allow him back in the courtroom. I just want the record to reflect that.

[DEFENSE COUNSEL]: I'm saying what I said. Without an evidentiary hearing, I don't think that can be done.

THE COURT: I believe I can excuse anyone who's unruly from the courtroom. And at the risk of holding him in contempt should he pass out again in front of this jury. I'm going to tell the sheriffs not to allow him back in.

¶ 12 After deliberating, the jury returned a verdict finding the defendant guilty of first-degree murder. After the verdict, defense counsel filed a motion seeking a hearing before a jury to determine whether the defendant's faulty memory rendered him unfit for sentencing. The trial court denied the motion on the ground that the defendant had been deemed fit already. The court sentenced the defendant to 30 years' imprisonment, and this appeal followed.

¶ 13 The defendant's first argument on appeal is that the trial court committed reversible error by allowing the State to ask him whether he had used cocaine during the encounter with the victim. The defendant identifies three lines of questioning that, in his view, lacked sufficient evidentiary basis. First, the defendant argues that the State should not have been allowed to question him about

whether he used cocaine, because "[t]here was no factual basis for this question." The State argues that the defendant failed to raise an objection at the time of this questioning, and it asserts that the defendant has thus forfeited this argument. To preserve an issue for review, a defendant must both object at trial and raise the issue in a written post-trial motion. People v. Bush, 214 Ill. 2d 318, 332, 827 N.E.2d 455 (2005); People v. Enoch, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988). Although defense counsel raised an objection near the time the prosecution inquired about his drug use, that objection was to the prosecutor's use of the word "right" in a question, not to the content of the questions themselves. The objection was therefore one to the format of the prosecutor's questioning, not to its substance, and it does not match the argument the defendant now raises on appeal. Further, to the extent counsel was unable to raise a contemporaneous objection without knowing whether the State would present additional evidence to substantiate its questioning, we also note that counsel raised no later objections at the end of the State's case but prior to the submission of the case to the jury. We therefore agree with the State that the defendant has forfeited this objection.

¶ 14 This conclusion, however, does not end our analysis, because we must determine whether to excuse the forfeiture under the plain-error doctrine. See Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999)). The first step of plain-error review is to determine whether any error occurred at all. People v. Lopez, 2012 IL App (1st) 101395, ¶ 64. If there was no error in the first instance, there can be no plain error. Lopez, 2012 IL App (1st) 101395, ¶64. We therefore consider whether the prosecutor's questioning regarding the defendant's drug use constituted trial error.

¶ 15 As the State explains in its brief, "it is proper for a party to explore all the circumstances within a witness's knowledge that tend[] to explain, qualify, discredit or destroy that witness's direct testimony." People v. Rivera, 145 Ill. App. 3d 609, 622, 495 N.E.2d 1088 (1986). However, "[i]t is improper for a prosecutor to raise unsupported allegations of misconduct by a defendant so as to substitute insinuation and innuendo for proof." People v. Brown, 170 Ill. App. 3d 273, 283, 524 N.E.2d 742 (1988). "It is well-recognized that [a] prosecutor may not ask leading questions which would imply improper conduct unless evidence can be presented to substantiate the conduct."

People v. Sanchez, 240 Ill. App. 3d 533, 534, 608 N.E.2d 477 (1992). "The latitude to be allowed on cross-examination rests within the sound discretion of the trial court; a reviewing court should not interfere absent a clear abuse of discretion resulting in manifest prejudice to the defendant." People v. Hall, 195 Ill. 2d 1, 23, 743 N.E.2d 126 (2000). Here, we agree with the defendant that the State demonstrated no basis for its questions regarding the defendant's drug use. Although there was evidence that the victim had cocaine in her system at the time of her death, there was no evidence that she ingested the drugs during her time with the defendant. The forensic pathologist who testified regarding her autopsy could not say when the cocaine was ingested, and there was no evidence of any signs of drug use in the motel room. Standing alone, the fact that the victim had taken drugs is insufficient to allow the State to suggest that the defendant likewise took drugs. We therefore conclude that the State's questioning regarding the defendant's drug use was improper.

¶ 16 Because we determine that the defendant has identified a trial error, we next consider whether the error qualifies as plain, so that we may excuse his failure to raise a timely objection. The plain error doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." People v. Herron, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467 (2005). The burden to establish either of these prongs rests with the defendant. Herron, 215 Ill. 2d at 187. The defendant has established neither prong in this case.

¶ 17 On the first prong, the evidence in this case was anything but close. The evidence established conclusively that the defendant fatally stabbed the victim; even the defendant, for most of his testimony, did not dispute that point. The defense instead relied on the notion that he acted in self-defense. However, the only evidence the defendant presented in support of his theory was his equivocal, evasive, and inconsistent testimony regarding the events surrounding the stabbing. In that testimony, the defendant asserted, among other things, that he did not recall the incident, that he acted in self-defense, that the victim brought a knife to the motel room, that he could not recall from where the victim drew the knife, that his eye problem kept him from seeing from where the victim

drew the knife, that a third person was in the motel room, that he checked into the motel room with the victim for privacy after she propositioned him, that he had no physical relations with the victim, and that he had no physical relations with the victim but could not remember or did not know how her pants were removed. The defendant also avoided answering questions that would have strongly impeached his testimony, and became vague when pressed for any meaningful details of the encounter. The defendant's evidence in support of a self-defense theory was, as a result, very weak. The State's evidence, on the other hand, was quite strong. The State introduced evidence that the defendant had no injuries to his head or face despite his claims that the victim struck him with a bottle, as well as evidence that the victim exhibited defensive wounds to her hands. Given the balance of this evidence, we cannot say that the evidence presented at trial was closely balanced.

¶ 18 In order to establish plain error under the second prong, the defendant must show that "the error was so serious that it affected the fairness of [his] trial and challenged the integrity of the judicial process." Herron, 215 Ill. 2d at 187. Incomplete impeachment of a witness is not so serious that it amounts even to reversible error, much less plain error, unless it is accompanied by other aggravating circumstances. See People v. Amos, 204 Ill. App. 3d 75, 82, 561 N.E.2d 1107 (1990) (explaining that incomplete impeachment of a witness does not constitute even reversible error unless it is unfounded, substantial, repeated, and prejudicial). However unjustified the State's line of questioning was here, the error is not the type that by itself throws into question the fairness of his trial. Accordingly, the defendant cannot establish plain error under either prong of the plain error test, and we must honor his forfeiture of his objection to the State's cross-examination regarding his drug use.

¶ 19 The second line of cross examination that the defendant argues deprived him of a fair trial is the State's inquiry regarding the placement of the stick on the victim's body. The defendant raised a timely objection to this line of questioning, and so he need not satisfy the plain-error test to have this argument considered on its merits. On the merits, the question for us is whether the State asked improper questions implying his bad conduct without any evidence to substantiate the insinuation.

Sanchez, 240 Ill. App. 3d at 534. Again, we agree with the defendant that the State's questioning was improper. The State certainly presented sufficient evidence to ask the defendant how the stick came to be on the victim's person: it produced evidence of the stick, as well as extensive evidence that the defendant was the last to see the victim alive. The prosecutor could thus have inferred logically that the defendant placed the stick. However, the evidence offered no basis for the prosecutor to suggest as he did that the defendant placed that stick in the victim's vagina. Without any such evidence, the trial court erred in allowing the State to present that insinuation to the jury.

¶ 20 This error warrants reversal, however, only if we find that it is not harmless. See People v. Wilson, 2012 IL App (1st) 101038, ¶55. An error is harmless where there is no reasonable probability that the jury would have acquitted the defendant absent the error. Wilson, 2012 IL App (1st) 101038, ¶55. In our discussion of the defendant's objection to the drug-related questions asked of him during cross-examination, we detail the reasons that the evidence against him was overwhelming. Based on that same evidence, we also conclude that there is no reasonable probability that he would have been acquitted had the prosecutor not asked whether he placed a stick in the victim's vagina. Accordingly, although the presentation of this question was error, the error does not amount to reversible error.

¶ 21 The third, and final, line of cross-examination to which the defendant now objects is the prosecutor's asking the defendant to explain the presence of the stick at the scene of the stabbing. However, as explained just above, we conclude that the prosecutor had sufficient basis to ask this question. Based on the above discussion, we reject the defendant's argument that his conviction should be reversed due to improper cross-examination by the State.

¶ 22 The defendant's second argument on appeal is that the trial court erred in tendering a second-degree murder instruction to the jury, for two reasons. First, he argues that the trial court's second-degree murder instruction improperly shifted the burden to him to prove mitigating circumstances by a preponderance of the evidence. However, our supreme court has already rejected this challenge. See People v. Jeffries, 164 Ill. 2d 104, 110-21, 646 N.E.2d 587 (1995). As the supreme court has

explained, the second-degree murder statute requires the State to prove beyond a reasonable doubt that a defendant committed murder, then allows a defendant to reduce the severity of the conviction by proving mitigating circumstances. Jeffries, 164 Ill. 2d at 118. This scheme is constitutional. Jeffries, 164 Ill. 2d at 117-18.

¶ 23 The defendant's second challenge to the court's second-degree murder instruction is his assertion that the instruction was inadequate because it was not accompanied by any instruction defining the phrase "preponderance of the evidence." However, as the State points out, the defendant is mistaken. The trial court tendered an instruction defining that phrase. We therefore reject the defendant's argument that the trial court erred in tendering a second-degree murder instruction.

¶ 24 The defendant's third argument on appeal is that the trial court deprived him of his right to a public trial when it excluded one spectator from the courtroom. See U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"); Ill. Const. Art. I, § 8 ("the accused shall have *** a speedy public trial"). Where a party seeks to close a hearing, that party must advance " 'an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.' " *People v. Taylor*, 244 Ill. App. 3d 460, 464-65, 612 N.E.2d 543 (1993) (quoting *Waller v. Georgia*, 467 U.S. 39, 48 (1984)). This standard has also been applied to a court's decision to exclude disruptive individuals from the courtroom. See *People v. Cooper*, 365 Ill. App. 3d 278, 282, 849 N.E.2d 142 (2006). " 'The standard to be applied in determining whether there is a sufficient record to support a trial judge's finding that grounds exist to exclude spectators from a courtroom is whether there has been an abuse of discretion.' " *Cooper*, 365 Ill. App. 3d at 282 (quoting *People v. Seyler*, 144 Ill. App. 3d 250, 252, 494 N.E.2d 267 (1986)).

¶ 25 Here, we agree with the State that the trial court did not abuse its discretion in finding that there was sufficient reason to exclude a spectator. As the court stated on the record, the spectator had appeared to be drunk on two consecutive days of the trial. The record further demonstrates that

his losing consciousness in the courtroom forced the court to pause proceedings. With or without further evidence that the spectator was actually intoxicated, these first-hand observations were sufficient to justify the trial judge's decision to exclude that spectator. As the trial court explained, it has the right to exclude unruly spectators from the courtroom.

¶ 26 The defendant's next argument is that the court erred in excluding as hearsay his testimony regarding his conversation with the victim at the time they met. The defendant argues that this evidence was neither hearsay nor irrelevant, and that he should have been allowed to present it. However, as the State points out in its brief, during cross-examination the defendant relayed the contents of that conversation. Thus, the substance of the testimony he argues should have been presented to the jury was, in fact, presented to the jury. For that reason, any error in excluding the testimony on direct examination is harmless beyond a reasonable doubt, and it cannot warrant reversal of the defendant's conviction.

¶ 27 For the same reason, we reject the defendant's next argument, that he was deprived of due process when the trial court sustained objections to his counsel's inquiries into his medical condition. The defendant asserts on appeal that his medical condition–the absence of his left eye–was "relevant as to why [he] believed he had to act in self-defense to protect his [remaining eye]." The fact that the defendant lacked a left eye was mentioned by several witnesses, and the defendant himself explained later in his testimony that he feared losing his remaining eye during his altercation with the victim. Because the jury was presented with the evidence that the defendant argues was improperly excluded, any error in this regard is harmless.

¶ 28 The defendant next argues that he was denied due process when the trial judge stated, in front of the jury, that she was "sure [counsel] explained to [his] client at *** recess" how to answer questions during testimony. According to the defendant, the trial judge's comment implied that counsel had made a false statement when he told the court that he had not fully explained the process to the defendant. The defendant then asserts that a court's suggesting an attorney's impropriety prejudices his client, and the defendant asks that we use that prejudice as a basis to upset his

conviction. As the State observes, however, the case on which the defendant relies for his prejudice argument, *People v. Lewerenz*, 24 Ill. 2d 295, 181 N.E.2d 99 (1962), has facts drastically more extreme than those we see here.

¶ 29 In *Lewerenz*, "[o]n no less than sixteen occasions during trial, usually when defendant's counsel made what appear[ed] to be normal and brief objections to evidence, the court characterized his efforts as 'speeches,' ruled that 'the speech is stricken,' and in some instances admonished counsel not 'to make any speeches to me before the jury.' " *Lewerenz*, 24 Ill. 2d at 300-01. The supreme court opined that the trial court's characterizations did not appear to be justified, and it stated that "their constant repetition could not have done other than to convey to the jury a hostile attitude toward the defense." *Lewerenz*, 24 Ill. 2d at 301. The trial court's approach was, therefore, inconsistent with its duty to uphold the guarantee of a fair trial, and "the impression conveyed to the jury by the remarks of the trial judge *** was prejudicial error." *Lewerenz*, 24 Ill. 2d at 301.

¶ 30 Here, the defendant identifies only a single exchange between the trial judge and defense counsel, far short of the sixteen identified in *Lewerenz*. Further, although the defendant omits this from the recitation in his brief, the trial judge later accepted counsel's representation that he had not fully conferred with the defendant, and the judge ordered a recess to allow that conference. Thus, to the extent the trial judge initially implied that counsel was misrepresenting his need to confer with his client, she reversed course moments later. On the whole, this single and isolated comment, quickly followed by an implicit retraction, does not amount to the type of unfair prejudice that deprived the defendant in *Lewerenz* of a fair trial, and we reject the defendant's argument to the contrary.

¶ 31 The defendant's final argument on appeal is that the trial court violated his due process rights by refusing to grant him a hearing before a jury to determine his fitness for sentencing. However, as the State points out, a defendant has no constitutional right to a jury at a hearing to determine his fitness. See *People v. Manning*, 76 Ill. 2d 235, 238, 390 N.E.2d 903 (1979) (discussing determination of the defendant's fitness to stand trial). Further, as the State also points out, Illinois

law actually provides that fitness issues should be determined "by the court" if raised after a trial has begun, as is the case here. See 725 ILCS 5/104-12 (West 2010).

¶ 32 Moreover, to the extent the defendant argues that the trial court erred in reaching the conclusion that he was fit, we disagree. A defendant is presumed to be fit to stand trial and be sentenced. 725 ILCS 5/104-10 (West 2010). However, a court has a duty to order a fitness hearing if there exists a *bona fide* doubt as to a defendant's fitness. *People v. Sandham*, 174 Ill. 2d 379, 382, 673 N.E.2d 1032 (1996). Whether a *bona fide* doubt as to a defendant's fitness has arisen is generally a matter within the discretion of the trial court. *Sandham*, 174 Ill. 2d at 382.

¶ 33 The defendant argues that he was rendered unfit by a poor memory, as evidenced by his failure during cross-examination to recall many of the details of his interaction with the victim. However, after reviewing the record, we agree with the State that the more reasonable explanation for the defendant's failure to answer the State's questions is that he was trying to avoid them. That point notwithstanding, the defendant's competence was evaluated after trial and before sentencing, and the evaluation states that testing "did not reveal significant memory impairment that would interfere with his fitness." Based on this record, we see no abuse of discretion in the trial court's determination that there was no *bona fide* doubt of the defendant's fitness for sentencing.

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 35 Affirmed.