2016 IL App (1st) 132526-U

SECOND DIVISION
February 16, 2016

No. 13-2526

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Respondent-Appellee,	)	
	)	
v.	)	No. 11 CR 15232
	)	
DEON LIVINGSTON,	)	
	)	Honorable Dennis J. Porter
Petitioner-Appellant.	)	Judge Presiding

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it allowed the State to introduce at trial other-crimes evidence involving defendant's previous attempt criminal sexual assault of another victim. Defendant's trial counsel was not ineffective.

¶ 2 Following a jury trial, defendant Deon Livingston was found guilty of criminal assault and sentenced to 9 years in prison. On appeal, defendant claims that: 1) the trial court committed reversible error in admitting into evidence defendant's previous attempt sexual assault of another victim, 2) he received ineffective assistance of counsel, and 3) the trial court should reduce the fines and fees order assessed against defendant. For the following reasons, we affirm the trial

court's judgment and modify the fines and fees order.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with the criminal sexual assault of 19-year old Y.H which occurred on August 21, 2011, in defendant's car near Clark and Division Streets in Chicago. Initially following a jury trial, the jury was unable to reach a unanimous decision and the trial court declared a mistrial on January 31, 2013. Defendant was retried in a second jury trial on April 30, 2013. The jury found defendant guilty of criminal sexual assault and subsequently the trial court sentenced defendant to 9 years in prison.

¶ 5 Before defendant's trial, the State filed a pretrial "Motion to Use Proof of Other Crimes as Evidence" asking the court to introduce at trial defendant's previous attempt sexual assault of C.B., another victim, to show defendant's motive, intent, knowledge, absence of mistake, *modus operandi* or the circumstance of defendant's arrest as well as to show defendant's propensity to commit criminal sexual assault pursuant to 725 ILCS 5/115-7.3 (West 2012). Defendant's trial counsel argued that the Y.H. and C.B. incidents were factually dissimilar and that the prejudice of the C.B. incident outweighed the probative value of the evidence. The trial court granted the State's motion allowing the attempt criminal sexual assault into the evidence at trial to establish defendant's "intent, knowledge, and propensity to commit sexual assault."

¶ 6 At trial, the victim, 19-year old Y.H. testified as follows. On August 21, 2001, at approximately 11 p.m., she was returning home after visiting her friends and exited the red line train at the Clark and Division stop. She went to a food market located at the intersection of Clark and Division to get a snack, but the store was closed. Y.H continued walking until she saw defendant standing in front of a fast food restaurant. Y.H. knew defendant as "Tay" or "Dean" and she met him approximately three months before that night.

¶ 7 Defendant asked Y.H. where she was going and she responded that she was going home. Y.H. was planning to take the bus home. Defendant offered Y.H. a ride home. Initially, she declined, but then agreed because she knew defendant and defendant had given her and her friend a ride before to an area near her home. Y.H. and defendant walked across the street towards his car in the Jewel parking lot. When they arrived in the parking lot, defendant opened the car door and they both got in. They sat in the car for a few minutes searching for a radio station. Defendant drove off. Y.H. told defendant to drive her home and drop her off at Clybourn, which was near her house. Defendant drove west on Division Street and then turned right on Wells Street. In order to get to Y.H.'s house they should have continued straight on Division Street. Y.H. asked defendant where he was going and he responded to his "hang out spot." Y.H. told him that she did not want to go there and that she was ready to go home. Defendant continued driving towards his "hang out spot."

¶ 8 Y.H. testified that she did not know what place defendant was referring to, and that they did not discuss going anywhere other than driving her home. Defendant drove to Franklin Elementary School and parked his car in the parking lot. The parking lot was dark. Defendant backed his car into a parking spot right next to a white truck, the only other vehicle in the parking lot.

¶ 9 Y.H. testified that defendant asked her why they were not together and asked whether she had a boyfriend. Y.H. told defendant that she had a boyfriend and that she was pregnant. She told him that she did not want to be with him and that they should be friends. Y.H. told defendant that she was ready to leave and defendant responded "let's chill …for a little bit." Defendant rubbed her stomach to see whether or not she was pregnant. Defendant searched for a radio station and then sat back staring at Y.H. Y.H. testified that she did not know what he

wanted and she stared back at him. Defendant leaned over and kissed her neck. Y.H. stated that she pushed him back and told him "What you doing, I ain't on that." Defendant sat back in his seat. Y.H. testified that she was ready to leave. Defendant then jumped on top of her, put his hands around her neck and chocked her hard. She was unable to breathe.

¶ 10 Y.H. testified that she tried to get her phone from her pocket to call 911, but defendant grabbed her phone and threw it in the back seat. Defendant raised Y.H.'s hands over her head and pinned her over the seat. Defendant placed one hand on Y.H.'s neck and held her arms down with his other hand. Y.H. testified that she was crying and trying to push defendant off, but he pinned his body against her. Y.H. tried to open the door, but she couldn't. She continued to struggle in an attempt to escape. Y.H. testified that one of her shoes came off because it was "unzipped." Defendant unbuckled her pants and pulled her pants off one leg and her underwear. Y.H. testified that defendant "shoved his penis" in her vagina "really hard." Y.H. was screaming, crying and telling him to stop, but he did not stop. Defendant told Y.H., "I want this, don't tell nobody…" Y.H. testified that she could not believe what was happening and that she did not want defendant to put his penis in her vagina.

¶ 11 Y.H. stated that she began urinating in the seat, and she thought that she was bleeding. She continued to urinate in the seat because she was nervous and wanted a reason to get out of the car. She told defendant that she was urinating. Defendant told her to stop. She wasn't able to stop and she wanted to get out of the car. Defendant opened the door and pushed her out of the car. Defendant told her to urinate outside but she got up and ran out of the parking lot, naked from the waist down. She was only wearing one shoe and her shirt. She left her phone, keys and lip gloss in defendant's car. She saw three men on the street but they did not help her. She continued to run down the street and defendant ran behind her. She approached a couple on

Division and Wells Streets who helped her put on her pants, and flagged down a police vehicle.

¶ 12 Y.H. testified that she was shaken and nervous. She told the officers that she had just been raped. The officers drove Y.H. back to the area of Clark and Division Streets but defendant was not there. Two additional police vehicles arrived and Y.H. again relayed what had just happened to her. Y.H. told the officers she knew defendant and provided his name. Y.H. was then taken to Northwestern Hospital where her clothes were collected and she was submitted for a rape kit.

¶ 13 On August 23, 2011, Y.H. identified defendant in a showup. She also identified her keys. At trial, Y.H. identified her cell phone that defendant threw in the back seat of his car. Y.H. testified that she did not want defendant to kiss her neck or put his penis in her vagina. She testified that she told defendant "no" and "stop." She testified that she did not consent to have sex with defendant.

¶ 14 Chicago police Officer John Burke testified that on April 21, 2011, he and his partner were on patrol driving in a marked squad car in the area of Clark and Division Streets. The officer observed Y.H. in distress. She was crying frantically and waiving her arms to get their attention. The officers pulled over to assist Y.H. Officer Burke attempted to speak with Y.H. but she was crying frantically and he could not understand her. Officer Burke noticed that Y.H. was missing a shoe. The officer stated that Y.H. did not exhibit any visible injuries. Officer Burke told her to sit down in the squad car and, after Y.H. calmed down, she told him what happened.

¶ 15 Officer Michael Rowan testified that, shortly after midnight on August 22, 2011, he and Officer Aaron Holton responded to a robbery call at the intersection of Clark and Division. Upon arriving there, they spoke with Officer Burke. Officer Rowan stated that Y.H. appeared

"visibly upset like something had happened to her." Y.H. told the officers that defendant sexually assaulted her. She told them that defendant kissed her neck, jumped on top of her, began to choke her, and removed her pants off one leg. Y.H. told the officers that she began to scream and that defendant put his hand over her mouth. Y.H. told the officers that defendant penetrated her vagina repeatedly and that she told defendant no. Y.H. also stated that one of her shoes came off during the assault. Subsequently, the officers transported Y.H. to the hospital. Officer Rowan testified that he arrested defendant and then recovered Y.H.'s cell phone from defendant's pants' pocket and Y.H.'s keys from defendant's vehicle.

¶ 16 Dr. Allison Foster, a resident physician at Northwestern Memorial Hospital testified that, upon arriving at the emergency room, Y.H. appeared "shooken up" and upset. Y.H. told Dr. Foster that she was sexually assaulted. Dr. Foster testified that Y.H. explained that she was in a car with a man she knew, he attacked her, choked her and vaginally penetrated her. Y.H. told Dr. Foster that she was unable to get out of the car until defendant told her to get out after she urinated. Y.H. was next submitted to a sexual rape kit completed by Dr. Foster and Nurse Andrea Finley. Y.H.'s neck was swabbed because she indicated that the offender kissed her neck. Dr. Foster testified that she did not observe any physical injuries to Y.H.'s vaginal area but stated that in the majority of sexual assault cases that she had seen, there were no injuries to a person's vaginal area. Dr. Foster also testified that although she did not see any injuries to Y.H.'s skin, it is not uncommon for sexually assaulted victims to exhibit no physical injuries.

¶ 17 Detective Jeffery Hansson testified that he interviewed Y.H. at the hospital and that she seemed upset. Y.H. gave Detective Hansson a description of the offender and told him that he went by the name of "Tay" or "Deonte." Detective Hansson testified that Y.H. identified defendant at the police station. Officers Rowan and Holton gave Detective Hansson Y.H.'s cell

phone and keys. Detective Hansson testified that Y.H. told him that her phone was only capable of texting and that it could not make or receive phone calls.

¶ 18 DNA results were introduced into evidence through the testimony of Greg Didomenic, a forensic scientist. Defendant's DNA profile matched the profile recovered from Y.H.'s neck swab.

¶ 19 C.B. testified that August 22, 2011, she was asleep in her house in her brother's first floor bedroom. She woke up because she was unable to breathe. Someone was over her choking her with one hand, pinning her down while covering her mouth with another hand. C.B. attempted to scream. The attacker had his face partially covered by a black t-shirt and threatened her to get her to stop screaming, which she did. The attacker tried to grab the waistband of her pajama and pull them down. C.B. was trying to say "no" and was pushing the attacker. In the struggle, the attacker lost his balance and C.B was able to see his shoes. C.B. recognized the shoes as defendant's, and asked him what he was doing. The attacker got off, removed the black shirt that was covering his face and put it on his body. She recognized the attacker as the defendant. Defendant said he was "just playing" and just wanted to talk. She asked defendant to leave. He approached her again and told her that they should talk, but C.B. refused. As soon as defendant left, C.B. ran upstairs and told her aunt what happened. Her aunt called the police. C.B. identified defendant in a lineup on September 5, 2011, as the person who attacked her on August 22, 2011.

¶ 20 C.B. testified that, prior to attack, defendant tried to befriend C.B. and talked to her occasionally. She saw him in the neighborhood and was her brother's friend. On one occasion, defendant attempted to talk with her when she was walking down the street after leaving a store, but she continued to walk home. On another date, defendant pulled his car next to her as she left

a currency exchange and offered her a ride. She refused his offer. About one week later, defendant was inside her house with her little brother when she arrived home from work. She did not invite defendant to her house and requested that he leave. C.B. testified that she had never dated defendant. C.B. stated that her brother gave defendant her phone number, but she did not answer his calls and put his number on the "don't answer" list on her phone.

¶ 21 Defendant testified to the following facts. On August 21, 2011, he was outside a fast food restaurant on the south side of Division Street just west of Clark Street. While looking at the menu, he saw Y.H. Defendant parked his recently purchased car in the Jewel parking lot across the street. Defendant knew Y.H. for about three months and had previously given Y.H. a ride in his car, dropping her off at Sedgwick and Chicago Avenue. When defendant saw Y.H., she seemed upset. Y.H. told him that someone was supposed to have picked her up and she asked defendant whether the bus had arrived. Defendant responded that the bus had not yet arrived. Defendant testified that he told her that he was going to take her home. Y.H. was initially reluctant, but she eventually agreed.

¶ 22 Defendant testified that they were talking while heading to the parking lot. Y.H. initially indicated that she wanted to go home but then agreed to "chill" with defendant. Defendant drove Y.H. to the neighborhood near Sedgwick and Blackhawk, but she did not want to hang out there. Defendant asked her if she wanted to go to Franklin Elementary School. Defendant testified that Y.H. agreed and that she did not ask him to drive her home again. Defendant stated that he usually brought a girl to the Franklin Elementary School parking lot two or three times a month.

¶ 23 Defendant testified that once they arrived in the parking lot, he parked next to a truck, turned the car off and turned on the radio. Defendant stated that he talked with Y.H. for about 20 minutes. Defendant leaned over the console and they started kissing and touching each other for

about 5 minutes. Defendant testified that Y.H. asked him how he felt about having sex with her since she was pregnant and he responded "yeah." Defendant stated that Y.H. asked him to let her seat back, so he got on top of her to adjust the seat down. They continued kissing and Y.H. took one shoe and her pants off. Defendant stated that he took his pants down and they started to have sex. Defendant denied that he choked Y.H. or pinned down her arms. Defendant testified that they had sex for about 7 minutes and Y.H. then urinated on him.

¶ 24 Defendant testified that he was angry and opened the door to let her out of the car to let her finish urinating. Defendant yelled at Y.H. from the inside of the car calling her "bitch, you pissy tail girl." Defendant did not exit his car and slid back into the driver's seat to get himself back together. While he was pulling up his pants, Y.H. started to run toward Division Street. Defendant chased Y.H. a half block but then could not see her anymore. Defendant got back in his car and tried to find Y.H. He drove his car toward 61st Street and Francisco Avenue where he lived. He parked his car on 62nd Street because he could not find parking on 61st Street. He smoked a cigarette with a Latino woman on her porch, walked home and went to sleep.

¶ 25 Defendant testified that he did not go to C.B.'s house in the early morning hours of August 22, 2011. Defendant denied sexually assaulting Y.H. and attempting to sexually assault C.B. Defendant testified that he knew C.B. from the neighborhood. Defendant stated that he and C.B. spoke on the phone, were Facebook friends and went to a restaurant a few times. Defendant stated that C.B. never told him to stay away from her house and he had been there at least 4 or 5 times. Defendant testified that he was wearing his Nike Air Max shoes between August 21st and August 23rd 2013.

¶ 26 Defendant testified that the next day, on August 22, 2011, while in his car, he heard a phone ringing and vibrating. Defendant found Y.H.'s phone in the passenger seat and saw

"nasty" test messages from Y.H.'s sister alleging that he had raped Y.H. Defendant attempted to return the text but the phone was unable to send outgoing texts. He called Y.H.'s sister but she hung up the phone. When he called back, Y.H.'s mother answered and they had a conversation. She was supposed to call him back, but never did. Defendant testified that on August 23, 2011, he was stopped by the police. He was with another girl in the Jewel parking lot. He had Y.H.'s cell phone in his pocket and the officers got it. The officers found Y.H.'s house keys in his car. Defendant testified that he had two prior convictions for possession of a controlled substance.

¶ 27 After all the evidence was presented, defendant filed a motion for directed verdict and the trial court denied it. The jury found defendant guilty of criminal sexual assault. Defendant's motion for a new trial was denied. Following a sentencing hearing, the trial court sentenced defendant to 9 years in prison. Defendant's motion to reconsider the sentence was denied. This appeal followed.

¶ 28 ANALYSIS

¶ 29 On appeal, defendant argues that the trial court improperly allowed the State to introduce at trial other-crimes evidence involving defendant's attempt criminal sexual assault of C.B., another victim, to establish defendant's intent and knowledge in committing the criminal sexual assault of the victim in the instant case. Defendant also contends that the trial court erred in allowing this other-crimes evidence to establish defendant's propensity to commit sexual assault pursuant to 725 ILCS 5/115-7.3 (West 2012) because attempt criminal sexual assault was not one of the enumerated offenses covered by the statute. In addition, defendant argues that his trial counsel was ineffective for failing to object to the admission of other-crimes evidence on the grounds that this evidence was outside the scope of section 5/115-7.3.

¶ 30 We review a trial court's decision to admit or deny other-crimes evidence under an abuse

of discretion standard. *People v. Donoho*, 204 Ill. 2d 159, 182-183 (2003). A trial court abuses its discretion only when its ruling is arbitrary, fanciful, or where no reasonable person would take the view adopted by the trial court. *Id*. at 183.

¶ 31 Other-crimes evidence is admissible to prove certain facts, such as "intent, *modus operandi*, identity, motive, [and] absence of mistake." *Id*. at 173 (citing *People v. Illgen*, 145 Ill. 2d 353, 364-65 (1991)). The Illinois Rules of Evidence provide that other crimes evidence can be used for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." Ill. R. Evid. 404(b) (eff. Jan.1, 2011). Meanwhile, evidence concerning other crimes is inadmissible when its purpose is to demonstrate a propensity to commit a crime with the exception of the situations when a defendant is accused of various sexual assault offenses listed in section 115–7.3 of the Code of Criminal Procedure. *Donoho*, 204 Ill. 2d at 170. Section 115–7.3 states in pertinent part:

> "(a) This Section applies to criminal cases in which:
>
> (1) the defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, child pornography, aggravated child pornography, or criminal transmission of HIV;
>
> * * *
>
> (b) If the defendant is accused of an offense set forth in paragraph (1) or (2) of subsection (a) or the defendant is tried or retried for any of the offenses set forth in paragraph (3) of subsection (a), evidence of the defendant's commission of another offense or offenses set forth in paragraph (1), (2), or (3) of subsection (a), or evidence to rebut that proof or an inference from that proof, may be admissible

> (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant."

725 ILCS 5/115-7.3 (West 2012).

¶ 32 Here, the trial court did not abuse its discretion in admitting proof of other-crimes evidence to show defendant's intent or lack of innocent state of mind when defendant's theory at trial was that Y.H. consented to the sexual intercourse. The record reflects that defendant argued that the victim consented to sexual intercourse in his opening statement, in his closing argument as well as during his testimony at trial. Proof of other-crimes evidence is admissible to prove defendant's criminal intent or lack innocent state of mind when a defendant raises consent as a defense. See *People v. Boyd*, 366 Ill. App. 3d 84, 91-92 (2006) (when defendant claimed that the victim consented to sexual intercourse, other-crimes evidence was admissible to prove a defendant's criminal intent or lack of innocent frame of mind); *People v. Harris*, 297 Ill. App. 3d 1073, 1086 (1998) (evidence of prior sexual assault was admissible to establish lack of innocent intent where defendant claimed that the victim consented); *People v. Johnson*, 239 Ill. App. 3d 1064, 1075 (1992) (evidence of defendant's prior sexual assault was admissible to prove defendant's absence of innocent state of mind when the defendant argued that the victim consented to his sexual advances).

¶ 33 Furthermore, the trial court admitted into evidence defendant's previous attempt sexual assault of C.B to establish defendant's intent and knowledge based to the factual similarities between the two offenses: both victims were black females between 17-19 years old; both victims were acquaintances with defendant; defendant attempted to remove both victims' clothing; defendant used force and straddled the victims, and defendant attacked both victims when they were alone. In addition, the two offenses occurred just few hours apart. Thus,

because the other-crimes evidence was relevant as to defendant's intent and knowledge to commit the sexual assault of the victim, the trial court properly admitted that evidence.

¶ 34 Defendant contends that even if proof of other-crimes evidence was admissible for intent and knowledge, reversible error still occurred because the trial court improperly admitted the evidence for propensity purposes pursuant to section 5/115-7.3 and the jury was specifically instructed it could consider the other-crimes evidence to show defendant's propensity to commit the criminal sexual assault of Y.H. Although defendant challenged the introduction of the attempted criminal sexual assault of C.B. in the trial court proceedings on the grounds that the two offenses were not factually similar, he did not object to the admission of the evidence on the grounds that the evidence was outside the scope of 725 ILCS 5/115-7.3 (West 2012). When a party objects to the admissibility of evidence at trial, but raises a different ground for inadmissibility on appeal, the trial objection is insufficient to preserve the error for review. *People v. Scott*, 2015 IL App (4th) 130222, ¶ 30. A specific objection made at trial forfeits all grounds not specified, and a ground of objection not presented at trial will not be considered on appeal. *People v. Gales*, 248 Ill. App. 3d 204, 229 (1993).

¶ 35 Defendant asks us to review the forfeited error under the plain error doctrine. Defendant also asks us to review the forfeited error on the basis that he was denied effective assistance of counsel as a result of his counsel's failure to object based on the proper grounds and for counsel's failure to preserve the error for review. Even if we find error in the admission of the attempt criminal sexual assault of C.B. for propensity purposes, for the reasons that follow, we hold that defendant cannot establish plain error.

¶ 36 Under plain error review, we will grant relief to a defendant in either of two circumstances: (1) if the evidence is so closely balanced that the error alone threatened to tip the

scales of justice against the defendant, or (2) if the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Under the closely-balanced prong of plain error review, the defendant must show prejudicial error. *People v. Herron*, 215 Ill. 2d at 187. The defendant bears the burden of persuasion with respect to prejudice. *People v. Lewis*, 2015 IL App (1st) 130171, ¶ 31.

¶ 37 Defendant claims that he is entitled to a reversal of his conviction and a new trial under plain error review on the basis that the evidence of his guilt was closely balanced and he was prejudiced by the trial court's error in admitting the attempt sexual assault of C.B. as propensity evidence. Defendant maintains the evidence was closely balanced because defendant's first jury trial resulted in a mistrial from a hung jury. However, although defendant's first trial resulted in a hung jury, we are not compelled to view the evidence in the subsequent trial as closely balanced. *People v. Davis*, 228 Ill. App. 3d 835, 840 (1992). Defendant argues that the evidence was closely balanced because it was a credibility contest between Y.H. and defendant as to whether she consented to the sexual intercourse.

¶ 38 We find that the evidence at trial was not closely balanced. Defendant's theory at trial presented through his own testimony was that Y.H. had consensual sexual intercourse and then ran down the street from defendant's car because she was embarrassed for urinating in defendant's car. While the jury heard two different accounts of what occurred in defendant's car that night, it ultimately found Y.H.'s testimony that defendant sexually assaulted her credible based on the entire evidence presented. Y.H.'s testimony was corroborated by Officer Burke, Officer Rowan, Dr. Foster and Detective Hansson that each testified to Y.H.'s outcry statements that defendant sexually assaulted her. They all described Y.H.'s emotional and physical state as

being visibly upset.

¶ 39 Defendant also claims that the evidence was closely balanced based on the lack of evidence of physical injury. However, while there was no physical injury to Y.H.'s neck from being choked, Dr. Foster testified that patients who have complained of being choked do not always have marks because several factors such as the amount of force, whether an object was used, and the individual's skin type all influence the existence of scars or marks. Similarly, the fact that there were no signs of injury to the vaginal area does not undermine Y.H.'s testimony that defendant sexually assaulted her. Dr. Foster testified that in the majority of the sexual assault cases that she had examined, there had not been any injury noted because the vaginal canal is very elastic.

¶ 40 Moreover, contrary to defendant's argument, Y.H.'s testimony was corroborated not only by the testimony of the police officers, Detective Hansson and Dr. Foster, but also by the physical evidence in the case. Defendant's DNA was found on Y.H.'s neck and Y.H.'s phone and keys were recovered by the police from defendant's person and car, respectively, two days after the sexual assault. Also, the fact that Y.H. urinated in the car and then run down the street in obvious distress, crying for help, only wearing her shirt and one shoe, abandoning her phone and keys refutes defendant's argument that he and Y.H. had consensual sexual intercourse. Meanwhile, defendant's evidence at trial consisted of his own self-serving testimony that the victim consented to the sexual intercourse and that she ran away because she was embarrassed for urinating in defendant's car. Based on this record, we find that the evidence presented at trial was not closely balanced but overwhelmingly established defendant's guilt.

¶ 41 Even if the trial court erred in admitting the attempt criminal sexual assault of C.B. to establish defendant's propensity and instructed the jury to consider the evidence as propensity

evidence, defendant did not establish that the error was prejudicial. In other words, defendant did not establish that had the other-crimes evidence not been admitted for propensity purposes he would not have been convicted of criminal sexual assault. See *People v. Herron,* 215 Ill. 2d at 178.

¶ 42 Furthermore, regardless of the closeness of the evidence, the admission of other-crimes evidence to establish defendant's propensity was not an error so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. See *People v. Strawbridge*, 404 Ill. App. 3d 460, 469 (2010). Similarly, because the trial court properly instructed the jury that it could consider the other-crimes evidence as to establish defendant's intent and knowledge, its instruction that the jury could also consider the evidence for propensity purposes is not ground for reversal. *People v. Johnson*, 2014 IL App (2d) 121004, ¶ 52.

¶ 43 Defendant also argues that the second prong of plain error occurred when counsel performed deficiently by not objecting to the evidence on the proper grounds which, according to defendant, would have led to the evidence not being admitted at trial. To be entitled to relief for ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and that he suffered prejudice as a result. *People v. Scott*, 2015 IL App (1st) 131503, ¶ 27. To satisfy the prejudice prong of an ineffective assistance of counsel claim, the defendant must show that, but for counsel's deficient performance, a reasonable probability exists that the result of the proceeding would have been different. *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 45.

¶ 44 Here, as previously established, the trial court properly admitted the attempt sexual assault of C.B. to prove defendant's intent and knowledge and the jury was going to hear this other evidence regardless of whether trial counsel objected to its admissibility under the scope of

section 115-7.3. *People v. Carter*, 38 Ill. 2d 496, 504 (1967); see also *Boyd*, 366 Ill. App. 3d at 95 (admission of other-crimes evidence for propensity was proper, even though it should not have been admitted for design). Moreover, in the light of the substantial evidence against him, defendant has failed to prove that had the other-crimes evidence not been allowed for propensity purposes, the outcome of his trial would have been different. Accordingly, defendant has failed to show that he was prejudiced by counsel's failure to object and he is not entitled to relief for ineffective assistance of counsel. See *People v. White*, 2011 IL 109689, ¶¶ 132-34.

¶ 45 Therefore, we hold that that the evidence presented to the jury that defendant sexually assaulted Y.H was not closely balanced and defendant suffered no prejudice from his counsel's failure to preserve the error for review nor did the admission of the attempt criminal sexual assault of C.B. for propensity purposes prevented defendant from receiving a fair trial. Accordingly, defendant is not entitled to relief under the plain error doctrine or under his claim of ineffective assistance of counsel.

¶ 46 Finally, defendant argues that certain fines and fees should be vacated. Defendant argues, and the State concedes, that the $250 DNA ID system fee imposed pursuant to 730 ILCS 5/5-4-3(j) (West 2012) should be vacated because defendant had a prior conviction for which his DNA was obtained and placed in the Illinois State Database. Pursuant to *People v. Marshall*, 242 Ill. 2d 285, 301-302 (2011), because defendant was already registered in the DNA database, this charge is vacated.

¶ 47 Defendant argues and the State agrees, that the trial court improperly assessed against him a $25 charge to be contributed to the Violent Crime Victims Assistance Fund (VCVAF) pursuant to 725 ILCS 240/10 (c)(1) (West 2012). This section authorizes the imposition of the charge when "no other fine is imposed." Here, the trial court imposed other fines: the $500 sex

offender fine, the $200 sexual assault fine, the $30 children advocacy fine, the $10 mental health court assessment, a $5 youth/diversion/peer court fine, the $5 drug court assessment, and the $30 fine to fund juvenile expungement. Accordingly, we vacate this fine.

¶ 48 Defendant contends and the State concedes, that the $100 Violent Crime Victim Assistance fine imposed by the trial court pursuant to 725 ILCS 240/10(b) (West 2012) must be vacated because the assessment is a fine that was not in effect at the time he committed the offense on August 21, 2011. The legislature enacted this fine on July 16, 2012. P.A. 97-816, § 10 (eff. July 16, 2012). Retroactive application of a law that inflicts greater punishment that did the law that was in effect when the crime was committed is forbidden by the *ex post facto* clause of the United States Constitution. *People v. Prince*, 371 Ill. App. 3d 878, 880 (2007). The prohibition against *ex post facto* law applies to laws that are punitive including fines. *Id*. at 881. We, therefore, vacate this fine.

¶ 49 Defendant claims and the State concedes that the $5 electronic citation fee (clerk and arresting agency) was erroneously assessed when defendant was found guilty of a felony and not "a traffic, misdemeanor, municipal ordinance or conservation, or other citations" as required pursuant to 705 ILCS 105/27.3e (West 2012). As such, the $5 electronic citation fee is vacated.

¶ 50 Defendant claims that the trial court erroneously imposed a $2 Public Defender automation fee and a $2 State's Attorney automation fee. These charge benefit "special funds" to finance "hardware, software, research, and development costs and personnel related thereto." 55 ILCS 5/3-4012 (West 2012); 55 ILCS 5/4-2002.1(c) (West 2012). Defendant claims that both fees are not related to defendant's prosecution and are, therefore, fines. Defendant maintains that since these charges were enacted on June 1, 2012, after defendant committed the offense, their application violates the *ex post facto* principles. P.A. 97-673, § 6 (eff. July 1, 2012).

¶ 51 The $2 State's Attorney automation charge is a fee and not a fine because it is compensatory in nature and "is intended to reimburse the State's Attorneys for their expenses related to automated record-keeping systems." *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30; *People v. Warren*, 2014 IL App (4th) 120721, ¶ 108. Therefore the $2 State's Attorney automation fee was properly imposed. Similarly, since defendant was represented by the Public Defender's Office in the pretrial proceedings, the $2 Public Defender fee was properly assessed against defendant. Even though both charges became effective on June 1, 2012, subsequent to the date of the offense, because these are fees and not fines, they are not subject to *ex post facto* principles.

¶ 52 Defendant contends and the State concedes, that defendant is entitled to pre-sentence incarceration credit for the $15 State Police Operations charge pursuant to 705 ILCS 105/27.3a-1.5 (West 2012). The State Police Operations Fee does not reimburse the State for expenses incurred in defendant's prosecution and, therefore, this charge is a fine. *People v. Milsap*, 2012 IL app (4th) 110668, ¶ 31. Because the charge pursuant to 705 ILCS 105/27.3a-1.5. is a fine, defendant is entitled to a pre-sentence incarceration credit toward it.

¶ 53 In conclusion, the amount of the fines and fees assessed against defendant should be reduced by $380, bringing the total to $1,104. Therefore, we direct the circuit court clerk to enter a corrected order assessing fines and fees to reflect these amendments. The fines and fees order should also reflect that defendant is to receive a $5 per-day pre-sentence incarceration credit against the $15 State Police Operation Fee.

¶ 54 CONCLUSION

¶ 55 Accordingly, we affirm.

¶ 56 Affirmed as modified.