2016 IL App (1st) 133530-U

SIXTH DIVISION
DECEMBER 9, 2016

No. 1-13-3530

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 09 C4 41438
	)	
RAYMOND OCHOA,	)	Honorable
	)	Noreen Valeria-Love,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's convictions and sentences are affirmed in part and vacated in part where: (1) the evidence was sufficient to prove him guilty beyond a reasonable doubt of attempt first degree murder; (2) his conviction for aggravated battery violated the one-act, one-crime doctrine because the State failed to apportion the multiple stab wounds as separate offenses; (3) the circuit court committed error when it failed to properly admonish the prospective jurors under Rule 431(b), but the defendant's forfeiture of this issue was not excused because the evidence was not closely balanced; and (4) his counsel did not provide ineffective assistance in failing to present mitigating evidence at the sentencing hearing. Additionally, we modify the order assessing fines, fees, and costs to reflect the defendant's pre-sentence incarceration credit, offset certain fines from that credit, and vacate a fee that is not applicable to the defendant.

¶ 2 Following a jury trial, the defendant, Raymond Ochoa, was convicted of attempt first degree murder, aggravated battery, and aggravated unlawful restraint, and sentenced to eight years' imprisonment for the attempt first degree murder conviction, five years' imprisonment for the aggravated battery and aggravated unlawful restraint convictions to run concurrently, and a three-year mandatory supervised release (MSR) term. On appeal, the defendant argues that: (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt of attempt first degree murder and aggravated battery; (2) his conviction for aggravated battery violates the one-act, one-crime doctrine; (3) the circuit court erred when it did not properly admonish prospective jurors under Illinois Supreme Court Rule 431(b) (eff. July 1, 2012); (4) his counsel was ineffective in failing to present mitigating evidence at the sentencing hearing; and (5) he was entitled to a pre-sentence incarceration credit, certain fines should have been offset from that credit, and one of his fees should be vacated. For the following reasons, we affirm in part; vacate in part; and modify the order assessing fines, fees, and costs.

¶ 3 In December 2009, the defendant was charged by information with one count of attempt first degree murder (720 ILCS 5/8-4, 9-1 (West 2008)), one count of aggravated unlawful restraint (720 ILCS 5/10-3.1 (West 2008)), one count of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2008)), and one count of aggravated battery (720 ILCS 5/12-4(a) (West 2008)) based upon an incident resulting in stab wounds to Jeremy Dombrowski's head and body.

¶ 4 On January 21, 2009, the circuit court entered a written order mandating Forensic Clinical Services (FCS) to evaluate the defendant's sanity, ability to understand *Miranda* warnings, and fitness to stand trial. In February and April of 2010, Susan Messina, a clinical psychologist with FCS, and Dr. Jonathan Kelly, a forensic psychiatrist with FCS, evaluated the defendant. Based upon their examinations, both Messina and Dr. Kelly opined—in reports and

letters addressed to the court—that the defendant was legally sane and fit to stand trial, and that he was able to comprehend *Miranda* warnings. At a hearing in June 2010, defense counsel stipulated that the defendant was able to understand *Miranda* warnings at the time of his arrest, and that he was legally sane and fit to stand trial.

¶ 5 On September 23 and 24, 2013, the case proceeded to a jury trial and the following evidence was adduced.

¶ 6 Jorge Flores testified that, on November 8, 2009, at approximately 6 p.m., he went to the defendant's apartment located at 3137 South Oak Park Avenue in Berwyn. He stated that the defendant and Dombrowski were roommates and shared a studio apartment, which contained a space where they placed their beds (the beds were approximately 10 to 15 feet apart from each other), a bathroom, and a kitchen. When Flores arrived at the apartment, the defendant and "this guy named Rudy" were there. The defendant told Flores that he believed Dombrowski was poisoning him and "showed [Flores] some stuff" to support his theory, including his mouth which had "some white stuff inside." According to Flores, the defendant informed him that they "were going to confront [Dombrowski] and call the police and ask [Dombrowski] why he was poisoning" the defendant.

¶ 7 Flores stated that, shortly thereafter, Dombrowski entered the apartment, went to his bed, and laid down on his stomach. He and Rudy were both sitting on the defendant's bed and the defendant was standing up. The defendant approached Dombrowski and asked where his pills were. Dombrowski replied that he did not know; then, the two of them began arguing. According to Flores, the argument escalated and the defendant accused Dombrowski of poisoning him. Dombrowski responded that he did not know what the defendant was talking

about. During the duration of this argument, Dombrowski was still laying on his bed. The defendant then punched Dombrowski in the face and Dombrowski fell to the floor.

¶ 8 Flores testified that he next observed the defendant wielding a small to medium-sized knife in his right hand. He did not know where it came from; he never saw the defendant go into the kitchen and retrieve a knife. According to Flores, the defendant stabbed both of Dombrowski's arms, and his chest and head. Dombrowski was screaming at that time. Flores got off of the bed and "went up to [the defendant] and told him to stop;" however, the defendant threatened him, stating: "don't get closer or I will stab you, too." After the defendant stabbed Dombrowski in the head, Dombrowski crawled to the door, attempting to escape. The defendant yelled, "call the police. He's trying to run away," and climbed on Dombrowski's back to prevent him from leaving. Shortly thereafter, Dombrowski, who was bleeding from his arms and head, was able to flee the apartment. Flores grabbed his belongings and went downstairs where he encountered the police. He informed them that the defendant was upstairs.

¶ 9 Bernadette Duplessis testified that she lived in an apartment just "[a]round the corner" from the defendant and Dombrowski. On the day of the incident, she was in her apartment when she heard yelling and knocking at her door. According to Duplessis, when she opened the door, she observed Dombrowski who had "blood gushing down his face and on his shirt." The defendant was also standing in the hallway. Duplessis called the police.

¶ 10 Sergeant Earl Briggs testified that, on November 8, 2009, he was a patrol sergeant with the Berwyn Police Department. At 6:21 p.m. that night, he responded to a call regarding a stabbing. When Sergeant Briggs arrived at the building, he met two tactical officers—Officers Henry Feret and Juan Ortiz—as well as a uniformed officer outside. When the officers entered the building's lobby, they saw Dombrowski and Flores. According to Sergeant Briggs,

Dombrowski was "bleeding profusely from the head." Flores directed Sergeant Briggs and Officers Feret and Ortiz to the defendant's and Dombrowski's apartment on the second floor.

¶ 11 Sergeant Briggs stated that, when he went upstairs, he observed "some blood in the hallway, some blood splatter on the walls." Upon entering the defendant's apartment, the officers found the defendant hiding behind a door. Sergeant Briggs also observed blood splatter on the walls and "blood in the carpeting." The defendant informed the officers that he hid the knife behind the television set and Officer Ortiz recovered it.

¶ 12 Officer Ortiz testified and corroborated the testimony of Sergeant Briggs. He elaborated, however, that he recovered the knife from a sewing box located behind the television stand. He described the knife as a "[s]tandard kitchen knife *** like a steak knife" with a serrated and sharp blade. He also observed "fresh blood-like items" on the blade. Although Officer Ortiz photographed and inventoried the knife, he later learned that the police department accidentally destroyed it during a yearly evidence "burn."

¶ 13 Gary Unger, a paramedic, testified that, on the day of the incident, at approximately 6:26 p.m., he arrived at the apartment building and encountered Dombrowski. Unger observed three lacerations on Dombrowski: one on the left tricep; one on the right tricep; and one on the top of his head. Because the wounds were bleeding, Unger applied pressure and bandages to them, and Dombrowski was then transported to McNeal Hospital.

¶ 14 Dr. Mary Margaret Tosiou testified that she examined and treated Dombrowski at the hospital. She noted that the laceration on the tricep area of Dombrowski's left arm was one centimeter and that he had an abrasion—"just a scratch"—on the lower portion of that arm. She described the difference between an abrasion and a laceration as follows: "An abrasion is a superficial cut through the skin, whereas a laceration is much more deep." The lacerations on

Dombrowski's right arm and head were also one centimeter, and there was bruising and swelling around the head wound. Dr. Tosiou used three staples on the head laceration to "bring the wound edges together." She also conducted a brain scan, which revealed a right-sided parietal cephalohematoma or bruising and swelling to the scalp. Dr. Tosiou opined that all three of Dombrowski's lacerations were consistent with stab injuries. Dombrowski was released from the hospital after approximately three hours.

¶ 15 Detective Michael Fellows corroborated the testimony of Sergeant Briggs and Officer Ortiz. He also stated that, on the night of the incident, he observed blood on the defendant's clothing. According to Detective Fellows, in April 2012 (before the trial commenced), Dombrowski died from an unrelated cause.

¶ 16 The State entered into evidence several photographs depicting the knife, Dombrowski's wounds, and the bloodstains in the apartment and hallway and on the defendant's clothes. The State then rested and the defendant moved for a directed finding, which the circuit court denied. Thereafter, the defense rested and both parties presented their closing arguments.

¶ 17 After deliberations, the jury found the defendant guilty of attempt first degree murder, aggravated battery, and aggravated unlawful restraint. The defendant filed a motion for a new trial, alleging, *inter alia*, that the State failed to prove him guilty beyond a reasonable doubt.

¶ 18 At the sentencing hearing, held in November 2013, the circuit court denied the motion for a new trial. At the beginning of the sentencing hearing, the court stated that it received the pre-sentence investigation (PSI) report and asked defense counsel if he had any corrections, omissions or additions. As evidence in aggravation, the State emphasized that the defendant's attack on Dombrowski was "unwarranted, *** unprovoked, and *** inexcusable." The State, thus, requested that the court impose a 15-year sentence for the attempt first degree murder

conviction and 5-year sentences for the aggravated battery and aggravated unlawful restraint convictions. As mitigating evidence, the defense called the defendant's mother, Jacqueline Moreno, and step-father, Peter Moreno, as character witnesses. Peter described the defendant as a hard-working, "good kid" who "had a very rough childhood." He explained that Jacqueline "was having issues," and the defendant became a ward of the State, was separated from his younger brother, and eventually dropped out of school "to go work." Peter also stated that their church community was willing to do anything "to make sure that [the defendant] stays on the right track." Jacqueline acknowledged that she "made some wrong choices in life" and, despite this, the defendant went to school and worked, and did not join any gangs. She also stated that her friend, a teacher with the Second Chance Program, was willing to help the defendant.

¶ 19 After considering the aggravating and mitigating evidence, and a statement in allocution, the circuit court sentenced the defendant to eight years' imprisonment for the attempt first degree murder conviction, five years' imprisonment for the aggravated battery and aggravated unlawful restraint convictions to run concurrently, and a three-year MSR term. The defendant filed a motion to reconsider sentence, which the court denied. This timely appeal followed, therefore this court has jurisdication.

¶ 20 On appeal, the defendant first contends that his conviction for attempt first degree murder should be reversed and his conviction for aggravated battery should be reduced to simple battery because the evidence was insufficient to prove him guilty beyond a reasonable doubt.

¶ 21 The due process clause of the United States Constitution's fourteenth amendment ensures that an accused defendant is not convicted of a crime "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *People v. Carpenter*, 228 Ill. 2d 250, 264 (2008); *People v. Brown*,

2013 IL 114196, ¶ 52 ("the State bears the burden of proving beyond a reasonable doubt each element of a charged offense and the defendant's guilt."). When a defendant presents a challenge to the sufficiency of the evidence, it is not the function of a reviewing court to retry the defendant or to substitute its judgment for that of the trier of fact. *Brown*, 2013 IL 114196, ¶ 48; *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Hall*, 194 Ill. 2d at 330. This standard applies to both circumstantial and direct evidence. *People v. Ehlert*, 211 Ill. 2d 192, 202 (2004). Also, because the trier of fact saw and heard the witnesses, its credibility determinations are entitled to great weight. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007).

¶ 22 We first address the defendant's challenge to his conviction for attempt first degree murder. "A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2008). Section 9-1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1) (West 2008)) provides, in relevant part, as follows:

> "A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death *** he either intends to kill or do great bodily harm to that individual ***, or knows that such acts will cause death to that individual." 720 ILCS 5/9-1(a)(1) (West 2008).

To sustain a conviction for attempt first degree murder, the State must establish that a defendant acted with specific intent to kill. *People v. Brown*, 2015 IL App (1st) 131873, ¶ 14. The trier of

fact is tasked with determining whether the requisite intent is present in a particular case and its decision on this matter "will not be disturbed on review unless it clearly appears that there is a reasonable doubt." *Id.*

¶ 23 Here, the defendant argues that the evidence did not establish beyond a reasonable doubt that he intended to kill Dombrowski. Because "intent to kill is a state of mind, it is 'usually difficult to establish by direct evidence' and thus it is normally 'inferred from the surrounding circumstances.' " *People v. Teague*, 2013 IL App (1st) 110349, ¶ 24 (quoting *People v. Parker*, 311 Ill. App. 3d 80, 89 (1999)). The surrounding circumstances could include the character of the attack, the use of a deadly weapon, and the nature and extent of the victim's injuries. *Id.*

¶ 24 The defendant contends that the surrounding circumstances in this case belie the State's position that he acted with intent to kill. According to the defendant, the evidence showed that he merely intended to detain Dombrowski and call the police—not kill him. In support of this argument, he points to his actions before and after the stabbing. Specifically, the plan he conveyed to Flores before Dombrowski returned home and his action of jumping on Dombrowski's back and yelling, "call the police. He's trying to run away," after he stabbed Dombrowski. The defendant also points to the facts that he allowed Dombrowski to escape and Dombrowski's injuries were not serious—especially when considering that Dombrowski did not fight back. None of these facts, however, establish that the defendant did not possess the intent to kill *at the time he stabbed Dombrowski*.

¶ 25 The defendant's argument that he was merely attempting to detain Dombrowski when he stabbed him is unavailing because Dombrowski did not attempt to leave the apartment until he was attacked. Dombrowski was lying on his bed when the defendant struck him in the face. The

impact of the punch caused Dombrowski to fall onto the floor. It was *then* that the defendant wielded the knife and began stabbing Dombrowski.

¶ 26 We also reject the defendant's argument that his intent to kill was not demonstrated because he allowed Dombrowski to escape. See *People v. Mitchell*, 105 Ill. 2d 1, 10 (1984) ("abandonment of the intent to kill, once the elements of attempted murder are complete, is no defense to the crime"). Prior to Dombrowski managing to flee the apartment, the defendant threatened Flores for attempting to intervene, jumped on Dombrowski's back to hinder him from leaving, and stabbed Dombrowski three times, including once in the head. It is of no import that the defendant told Flores to call the police after he stabbed Dombrowski. Lastly, the argument that Dombrowski's injuries would have been more severe if the defendant intended to kill him also fails. This is but one inference the jury could have made from that particular evidence. Another inference to be drawn was that Dombrowski was able to escape the apartment before the defendant could inflict more injuries or that Dombrowski's skull prevented the "knife from penetrating deeper into [his] head." See *People v. Green*, 339 Ill. App. 3d 443, 451-52 (2003) (where a defendant unsuccessfully argued that he could not have intended to kill police officers because he fired a gun from close range and missed them). Accordingly, we believe that the evidence here was enough to allow a rational trier of fact to conclude beyond a reasonable doubt that the defendant acted with the specific intent to kill.

¶ 27 In support of his argument that the State's evidence was insufficient, the defendant relies on *Brown*, 2015 IL App (1st) 131873, a case that this court recently decided, and *People v. Thomas*, 127 Ill. App. 2d 444 (1970); however, we find these cases inapposite. In *Brown*, 2015 IL App (1st) 131873, ¶¶ 3, 5, the defendant stabbed the victim four times in the back when she ordered him to move out of her apartment. The victim testified that, at the time of the attack, she

felt "punching" and, upon realizing that she was injured, she drove to the police station. *Id.* ¶ 3. Although the victim's treating physician stated that the wounds could have been life-threatening based upon their location, his testimony made it "quite clear *** that the lacerations that [the victim] actually suffered turned out to be superficial [(they "were not deep")] and not life[-]threatening." *Id.* ¶¶ 5, 16. Based upon this testimony and the facts that there was no evidence of any struggle either before or after the attack and the defendant did not pursue or threaten the victim, this court held that the evidence did not justify an inference of intent to kill. *Id.* ¶ 16. Here, in contrast to the circumstances in *Brown*, the defendant planned his attack in advance by arming himself with a knife and waiting for Dombrowski to come home. When Dombrowski came home, the defendant accused him of poisoning him and then attacked Dombrowski as he was lying on his bed. Also unlike *Brown*, in this case there was evidence of a struggle and pursuit after the attack—the defendant physically tried to restrain Dombrowski as he attempted to escape. Dr. Tosiou's testimony indicates that Dombrowski's lacerations, especially the head wound, were deep and required staples. Furthermore, the locations of the stabbings are notable: the defendant in *Brown* stabbed the victim in the back; here, the defendant stabbed Dombrowski in the head.

¶ 28 In *Thomas*, 127 Ill. App. 2d at 447, 455-56, the defendant stabbed the victim in the shoulder, nicked her with a knife multiple times, and slammed her head into a dresser; then, he raped and robbed her. All of this occurred over the course of approximately 45 minutes. *Id.* The appellate court reversed the defendant's conviction for attempt first degree murder, stating: "We believe *** that the opportunity for murder was such that there was insufficient proof that [the] defendant intended or attempted to commit that crime." *Id.* at 456. Unlike *Thomas*, in this case, the defendant seized the opportunity to use potentially deadly force: immediately after

punching Dombrowski, as he lay in bed, defendant pulled out the knife and began stabbing Dombrowski. Additionally, the defendant in *Thomas* used his knife in a way that did not appear calculated to inflict a fatal injury upon the victim—he used it to stab her in the shoulder and "pick[] at" her (*id.* at 447, 455-56); whereas, here, the defendant drove his knife into Dombrowski's head, among other places. We find that the character of the defendant's actions and the injuries that he inflicted on Dombrowski are distinguishable from *Brown* and *Thomas*.

¶ 29 The defendant next asserts that the evidence was insufficient to prove him guilty beyond a reasonable doubt of aggravated battery. We need not address this argument, however, because we vacate this conviction and its associated sentence pursuant to the one-act, one-crime doctrine. According to the defendant, vacating his conviction for aggravated battery is proper because it was predicated on the same act as his attempted first degree murder charge. The defendant admits that he forfeited this issue because he did not raise it in the circuit court proceedings or in a post-trial motion, but argues that review under the plain-error doctrine is warranted.

¶ 30 Under the plain-error doctrine, a reviewing court may consider a forfeited issue when:

> "(1) a clear or obvious error occur[r]ed and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occur[r]ed and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

Our supreme court has held that "forfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process." *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). We review *de novo* whether a conviction must be vacated under the one-act, one-crime doctrine. *People v. Almond*, 2015 IL 113817, ¶ 47.

¶ 31 The one-act, one-crime doctrine prohibits multiple convictions when they are " 'carved from the same physical act.' " *People v. Miller*, 238 Ill. 2d 161, 165 (2010) (quoting *People v. King*, 66 Ill. 2d 551, 566 (1977)). In determining whether the one-act, one-crime doctrine has been violated, courts use the following two-step analysis: "(1) *** whether the defendant's conduct consisted of one physical act or separate physical acts and, if the court concludes that the conduct consisted of separate acts[;] (2) *** whether any of those offenses are lesser-included offenses." *In re Rodney S.*, 402 Ill. App. 3d 272, 281-82 (2010) (citing *People v. Harvey*, 211 Ill. 2d 368, 389 (2004)). In the instant case, the jury found the defendant guilty of attempt first degree murder and aggravated battery because he stabbed Dombrowski three times—once in the right arm, once in the left arm, and once in the head. The defendant argues that his conviction for aggravated battery violated the one-act, one-crime doctrine because the State "failed to apportion the multiple stab wounds into separate charges." We agree.

¶ 32 In the charging instrument here, both the attempt first degree murder and aggravated battery counts stated that the defendant "STABBED *** DOMBROWSKI ABOUT THE HEAD AND BODY WITH A KNIFE." During its opening argument, the State described where Dombrowski was stabbed as well as the charges against the defendant. While discussing the defendant's attempted first degree murder charge during closing arguments, the prosecutor stated, in pertinent part, as follows:

> "[The defendant] used th[e] knife multiple times stabbing *** Dombrowski *** in the arms and in the head.
>
> * * *
>
> The defendant performed an act which constituted a substantial step toward the killing of an individual. *** You may say to yourself what is a substantial step? *** [G]etting a knife, taking that knife and repeatedly stabbing someone while they're face down. Ladies and gentlemen, this is a substantial step. *** Nothing in the attempt first-degree murder charge requires the victim to have any drop of blood. *** But [Dombrowski] did. He had a lot of blood *** on his head [and] his arms. *** That's more than a substantial step. That's absolutely an intent to kill. And [the defendant] didn't do it just once, he did it multiple times."

Additionally, when it was presenting argument on the defendant's aggravated battery charge and whether he intentionally caused great bodily harm to Dombrowski, the State said, "Dombrowski [had a] stab wound to his head requiring staples. *** [He had s]tab wounds to each arm. A stab wound to each of his arms. *** Great bodily harm, ladies and gentlemen. Absolutely."

¶ 33 We find the analysis in *People v. Crespo*, 203 Ill. 2d 335 (2001), instructive. In *Crespo*, the defendant stabbed the victim three times and was charged with, *inter alia*, aggravated battery and armed violence. *Crespo*, 203 Ill. 2d at 338-39. The defendant's indictment for these two counts did not differentiate the separate stab wounds; "[r]ather, the[y] *** charge[d the] defendant with the same conduct under different theories of criminal culpability." *Id.* at 342. At trial, the State also "portray[ed the] defendant's conduct as a single attack." *Id.* at 344. The

supreme court held that the defendant's aggravated battery conviction should have been vacated, explaining that, in order for multiple convictions to be sustained, the defendant's indictment must indicate that the State intends to treat his conduct as multiple acts. *Id.* at 345. In so holding, the court noted that a defendant has a fundamental right to be informed of the nature and cause of the criminal accusations against him so that he may prepare a defense. *Id.* The court went on: "If we were to agree with the State, [the] defendant would not have known until the cause was on appeal that the State considered each of the separate stabs to be separate offenses, and therefore he would not have been able to defend the case accordingly." *Id.*

¶ 34 Similar to *Crespo*, in this case, the State failed to treat each stab as the basis of a separate offense. Instead, in the defendant's charging instrument, both the attempt first degree murder and aggravated battery counts alleged that he stabbed Dombrowski about the head and body. The State also portrayed his conduct as a single act at trial. Accordingly, pursuant to *Crespo*, the defendant's two convictions for attempt first degree murder and aggravated battery violated the one-act, one-crime doctrine. We, thus, vacate the defendant's conviction and sentence for aggravated battery, which, as a Class 3 felony (see 720 ILCS 5/12-4(e) (West 2008)), is a less serious offense than the attempt first degree murder conviction—a Class X felony (see 720 ILCS 5/8-4(c) (West 2008)). See *People v. Lee*, 213 Ill. 2d 218, 226-27 (2004) (under the one-act, one-crime doctrine, the less serious offense must be vacated).

¶ 35 The defendant's next assignment of error is that the circuit court did not properly admonish the prospective jurors during *voir dire* in violation of Illinois Supreme Court Rule 431(b) (eff. July 1, 2012)). The defendant acknowledges that he forfeited this issue by failing to object during the circuit court proceedings or in a post-trial motion, but again contends that we should review it under the plain-error doctrine. "The ultimate question of whether a forfeited

claim is reviewable as plain error is a question of law that is reviewed *de novo*." *People v. Johnson*, 238 Ill. 2d 478, 485 (2010). As stated above, a forfeited issue may be reviewed under the plain-error doctrine if one of the two prongs is satisfied. *Piatkowski*, 225 Ill. 2d at 565. The defendant in this case argues that plain-error review is appropriate only under the first prong—the evidence was so closely balanced that the error alone threatened to tip the scales of justice. The first step in considering whether this doctrine applies, however, is to determine whether any error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 36 Rule 431(b) provides as follows:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section."

The circuit court must confirm that the prospective jurors understand and accept each of the four principles set forth above. *People v. Jackson*, 2016 IL App (1st) 133741, ¶ 44. "The failure to

address even one of the four principles, by itself, constitutes noncompliance with Rule 431(b)." *Jackson*, 2016 IL App (1st) 133741, ¶ 43 (quoting *People v. Thompson*, 238 Ill. 2d 598, 607 (2010)).

¶ 37 Here, during *voir dire*, the circuit court questioned the jurors, in relevant part, as follows:

> "Let me ask everyone now, if the State proved the defendant guilty beyond a reasonable doubt, if you were convinced of that, would you be willing to sign a verdict form that was for guilty? If you are willing to do that please raise your hands?
>
> Let the record reflect that all hands were raised.
>
> If you were not convinced that the State proved the defendant guilty beyond a reasonable doubt, would you then sign a verdict form of not guilty? If you would do that, please raise your hands.
>
> Let the record reflect that all hands were raised."

The court also asked each prospective juror, individually, whether he or she "promise[d] to be fair to both sides."

¶ 38 The defendant recognizes that the circuit court mentioned the second prong of Rule 431(b) (the State's burden of proof); however, he argues that the court failed "to mention the remaining 431(b) principles" and "ascertain[] that the venire understood and accepted" all of the four principles. We agree. During the *voir dire* examination of prospective jurors, the court only mentioned the second principle; it did not address—let alone determine whether the prospective jurors understood and accepted—the principles regarding the defendant's presumption of innocence, that the defendant is not required to offer any evidence on his own behalf, and that, if he does not testify, it cannot be held against him. Therefore, the court failed comply with Rule

431(b) and, in doing so, it committed error. *People v. Belknap*, 2014 IL 117094, ¶ 44 ("the court's failure to ask the jurors whether they understood [and accepted] the principles is error in and of itself").

¶ 39 Because we find that an error occurred, we now must determine whether review of this issue is appropriate under the first prong of the plain-error doctrine. In determining whether the evidence was closely balanced, "a reviewing court must undertake a commonsense analysis of all the evidence in context." *Belknap*, 2014 IL 117094, ¶ 50. The defendant carries the burden of demonstrating that the evidence was closely balanced. *People v. Wilmington*, 2013 IL 112938, ¶ 43. "Closely balanced assumes the presence of some evidence from which contrary inferences can be drawn." *People v. Reeves*, 314 Ill. App. 3d 482, 489 (2000).

¶ 40 The defendant argues that the evidence was closely balanced because it did not establish that he possessed intent to kill Dombrowski—he merely wanted to detain Dombrowski and call the police. He further asserts that the State failed to prove his intent to kill and "the requisite level of harm to sustain a conviction for aggravated battery" because Dombrowski's injuries were not serious. We disagree; rather, the evidence overwhelming favored the State. The State presented the eyewitness testimony of Flores and Duplessis. The State also introduced the testimony of several police officers who found the knife and saw blood everywhere as well as the testimony of medical personnel who treated Dombrowski's injuries. Photographs of the crime scene and the injuries were introduced and the defendant does not dispute that he struck Dombrowski in the face and stabbed him multiple times including in the head. A commonsense analysis of the evidence reveals that this case is not closely balanced. Therefore, although the circuit court committed error when it failed to properly admonish the prospective jurors under

Rule 431(b), the defendant's forfeiture of this issue is not excused under the first prong of the plain-error doctrine.

¶ 41 The defendant also argues that this case should be remanded for resentencing because his counsel provided ineffective assistance by failing to present mitigating evidence at the sentencing hearing. A brief review of the pre-trial fitness reports and the defendant's sentencing hearing is necessary for a proper evaluation of this assertion.

¶ 42 Messina's report, which was prepared for the purpose of the fitness hearing, conveyed, in pertinent part, that the defendant consumed "a liter and [a] half of vodka," 20 to 24 "Coricidin Cough and Cold" pills, and 4 marijuana joints per day. The defendant told her that he last used alcohol and marijuana on the day of the incident and that he had been consuming Coricidin for six months prior to the incident. He denied ever receiving treatment for substance abuse. Additionally, Dr. Kelly's report states, *inter alia*, that the defendant was experiencing "derealization" just before the incident. The defendant told Dr. Kelly that, on the day of the incident, he was "mentally impaired" or "high" from his consumption of Vicodin, Coricidin, and marijuana. The defendant further stated that he would not have stabbed Dombrowski if he had not been on drugs. According to Dr. Kelly, the defendant "admitted several diagnostic criteria for substance dependence for alcohol, marijuana, [and] Coricidin," but had never received treatment.

¶ 43 A licensed social worker with FCS, Marcy Lerner, also prepared a "Psychosocial History" report of the defendant, dated February 16, 2010, based upon her interview with Jacqueline and Peter Moreno. In her report, Lerner stated, in part, that Jacqueline and Peter informed her that the defendant had been taking Coricidin for over six months prior to the incident. The defendant told Jacqueline and Peter that he believed that Dombrowski was

attempting to poison him and, through internet research, they learned that long-term use of Coricidin "causes paranoia." Lerner wrote that her impression of the defendant, based upon this interview, was that he "was abusing alcohol and the over the counter medication Coricidin that induced physical illness and possibly distortion of reality or psychosis i.e. paranoid delusions, prior to the arrest."

¶ 44 The circuit court ordered a pre-sentence investigation (PSI) in September 2013. The PSI, which was summarized in a report, revealed that, in 2006, the defendant was charged with a misdemeanor for possession of cannabis. The defendant reported that he first consumed marijuana when he was 19 years old and last consumed it when he was 25 years old. Similarly, he began drinking at age 19 and last drank "over a year and a half ago." The defendant indicated that he started to develop a drinking problem when he was 22 years old: he "drank *** heavily for about a year;" then, started attending Alcoholics Anonymous meetings. At the time of the PSI, the defendant did not believe he had an alcohol or substance abuse problem.

¶ 45 At the sentencing hearing, after considering the aggravating and mitigating evidence as well as the defendant's statement in allocution, the circuit court explained: "You know, I keep hearing this [']made a mistake.['] When someone is lying on a bed doing nothing and he is attacked with a knife and stabbed repeatedly, I don't know how that's a mistake." The court also recalled that Dombrowski "crawled out of the apartment and went to another door to try and get away from the attack."

¶ 46 The defendant contends that the information contained in the reports of Messina, Lerner, and Dr. Kelly—essentially, that he consumed "20 to 24 C[oricidin] cough pills and a liter-and-a-half of vodka a day," and that he last used these substances on the day of the incident—was necessary mitigating evidence in order for the circuit court to understand his mental state at the

time of the offense as well as his rehabilitative potential. According to the defendant, if the court had "been apprised of the role the drugs and alcohol played in [his] state of mind at the time of the offense, there is a reasonable probability that he would have received a lower sentence." Thus, he argues, his counsel provided ineffective assistance. We disagree.

¶ 47 Claims of ineffectiveness of counsel are judged using the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under *Strickland*, the defendant must show that: (1) his counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* (citing *Strickland*, 466 U.S. at 688, 694). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Simon*, 2014 IL App (1st) 130567, ¶ 69. Here, the defendant's claim fails under the second prong.

¶ 48 To establish that counsel was ineffective under the second prong, the defendant must show that he suffered prejudice due to his attorney's performance. *People v. Metcalfe*, 202 Ill. 2d 544, 562 (2002). "[T]he prejudice prong of *Strickland* is not simply an 'outcome-determinative' test but, rather, may be satisfied if [the] defendant can show that counsel's deficient performance rendered the result of *** the proceeding fundamentally unfair." *People v. Jackson*, 205 Ill. 2d 247, 259 (2001); see also *People v. Evans*, 209 Ill. 2d 194, 220 (2004) ("a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result *** unreliable or fundamentally unfair"). When a reviewing court is evaluating whether a defendant has suffered prejudice due to counsel's failure to present specific mitigating evidence, "it is appropriate to consider the strength of the proffered mitigating evidence and whether the

[']admission of the evidence [that the defendant] now offers might even have been harmful to his case.['] " *People v. Peeples*, 205 Ill. 2d 480, 550 (2002) (quoting *Strickland*, 466 U.S. at 700). "[T]he nature and extent of the evidence in aggravation must also be considered." *People v. Coleman*, 168 Ill. 2d 509, 538 (1995). Accordingly, the mere availability of a lesser sentence is insufficient to demonstrate prejudice. See *People v. Palmer*, 162 Ill. 2d 465, 481 (1994) ("Proof of prejudice, however, cannot be based on mere conjecture or speculation as to outcome").

¶ 49 Alcohol and drug addiction, which are not statutorily mandated mitigating factors, "may be considered as such in appropriate cases." *People v. Smith*, 214 Ill. App. 3d 327, 339-40 (1991). Our supreme court, however, has held that "there is nothing inherently mitigating about evidence regarding a defendant's history of drug and alcohol abuse." *People v. King*, 192 Ill. 2d 189, 201 (2000); see also *People v. Mertz*, 218 Ill. 2d 1, 83 (2005) ("a history of substance abuse is a double-edged sword at the aggravation/mitigation phase of a penalty hearing"); *People v. Montgomery*, 192 Ill. 2d 642, 674 (2000) (although a defendant might submit history of substance abuse "as an explanation for his misconduct, the sentencer is not required to share [his] assessment of the information."). This trial court could well have discounted the substance abuse entirely on the belief that defendant made a choice to abuse drugs and alcohol so he cannot now look to that choice to mitigate his crime. Therefore, counsel is not necessarily ineffective for failing to present this type of evidence in mitigation at a sentencing hearing. *King*, 192 Ill. 2d at 201.

¶ 50 Based upon our review of the record in this case, we find that the defendant was not prejudiced by his counsel's performance at the sentencing hearing. Like Messina's, Lerner's, and Dr. Kelly's reports, the defendant's PSI report also contained information regarding his history of consuming mind-altering substances. Because the circuit court considered the PSI in sentencing

the defendant, the reports of the FCS staff would have been cumulative. See *People v. Phyfiher*, 361 Ill. App. 3d 881, 886 (2005) (holding that trial counsel was not ineffective in failing to introduce mitigation evidence that was already presented in the report because that evidence was cumulative to evidence already in the record); *People v. Griffin*, 178 Ill. 2d 65, 88 (1997) (same). In addition to gleaning this information from the PSI report, the sentencing judge had the opportunity to review the actual reports as she presided over the pre-trial proceedings, and ordered and received the defendant's evaluations for the fitness hearing.

¶ 51 In determining the appropriate sentence based upon the evidence presented at the hearing, the circuit court placed the most weight on the fact that Dombrowski was attacked while merely lying in his bed. Given the court's emphasis on the nature of the offense, evidence that the defendant was a substance-abuser, and may have been impaired during the attack, is not so significant that it reasonably suggests that the court would have imposed a lesser sentence. Indeed, this information could have been used against the defendant. See *Peeples*, 205 Ill. 2d at 550 (quoting *Strickland*, 466 U.S. at 700); *King*, 192 Ill. 2d at 201; *Mertz*, 218 Ill. 2d at 83; *Montgomery*, 192 Ill. 2d at 674. We, thus, find that the defendant was not prejudiced and his counsel was not ineffective.

¶ 52 The defendant's final argument on appeal is that the circuit court failed to apply his $2,500 worth of pre-sentence incarceration credit to his fines—specifically, the following charges: $10 for mental health court; $5 for youth diversion/peer court; $5 for drug court; $30 for the children's advocacy center—as prescribed by section 110-14(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-14(a) (West 2012)). He also contends that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2012)) was not applicable to him and, thus, should be vacated. The State concedes and we accept its concession.

¶ 53 Based upon the State's concession, we modify the circuit court's order assessing fines, fees, and costs as follows: (1) award defendant a presentence custody credit of $2,500; (2) apply the credit to the $10 mental health, $5 youth diversion/peer court, $30 children's advocacy center, $5 drug court fines; and (3) vacate the $5 electronic citation fee.

¶ 54 For the foregoing reasons, we affirm the defendant's convictions and sentences for attempt first degree murder and aggravated unlawful restraint; vacate the defendant's conviction and sentence for aggravated battery; and modify the circuit court's order assessing fines, fees, and costs.

¶ 55 Affirmed in part; vacated in part; fines, fees, and costs order modified.