2017 IL App (1st) 150590-U

No. 1-15-0590

Order filed December 14, 2017

Fourth Division

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. 10 CR 5414
	)	
GREGORY HAYNES,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The record establishes that the trial court did not conflate the burdens of proof for self-defense and second-degree murder or hold defendant to a higher standard than allowed under the law. The fines and fees order is corrected.

¶ 2 Following a bench trial, defendant Gregory Haynes was convicted of the first-degree murder of Terrell Thomas and was sentenced to 55 years in prison. On appeal, defendant contends his conviction should be reversed and this case remanded for a new trial because the trial court's remarks conflated the legal standards for self-defense and second-degree murder and

held the defense to a higher burden of proof. Defendant also challenges the imposition of various fines and fees and seeks credit against some of those assessments based on his time spent in custody prior to sentencing.

¶ 3 The charges against defendant arose from his shooting of Thomas at a party on March 8, 2008. Defendant and Thomas were playing cards in a bedroom with four other people. One person present, Krystal Kennedy, testified she had known defendant since the eighth or ninth grade. About five or six months before the shooting, defendant told Kennedy he did not like Thomas and that Thomas was involved in the killing of defendant's cousin. Kennedy told Thomas about that conversation but did not tell defendant she had told Thomas.

¶ 4 On the night of the shooting, Kennedy did not see Thomas with a weapon. She testified that during the card game, defendant pulled out a gun and shouted "F--- this," or something to that effect. She did not know if defendant shouted first or fired the weapon first. She testified that after defendant stopped shooting, he "just walked out of the room."

¶ 5 Brandi Thompson testified she also was involved in the card game and had met defendant for the first time that night. During a break between games, defendant said to her that his team was going to "beat [their] ass," referring to Thomas's team. After playing cards, defendant pulled out a gun and shot Thomas seven or eight times. Thompson testified the first shot struck Thomas's outstretched hand and the remaining shots "went straight to his chest." Defendant continued to pull the trigger on his gun until it emptied. Thompson testified there was no weapon near Thomas. After the shooting, defendant ran to the back door but found it locked and ran out the front door.

¶ 6 Another card player, Marshall Stewart, offered testimony largely consistent with that of Kennedy and Thompson. Stewart did not see what Thomas was doing immediately before defendant fired the gun.

¶ 7 Michael Baker, who also was in the card game, testified that he saw defendant "just lean back and take out the gun and start shooting [Thomas] in the chest[.]" Thomas raised his hands and said "no, no" when defendant began shooting. According to Baker, Thomas did not have a weapon in his hands. Baker did not hear Thomas and defendant argue before the shooting.

¶ 8 The parties stipulated to the testimony of Dr. John Ralston, an expert in the field of forensic pathology, that he performed a post-mortem examination on Thomas. Thomas had seven gunshot wounds to the chest and four wounds to his arms and hands. Defendant was arrested in Missouri in 2010 and had several forms of identification bearing the name of Devon Davis.

¶ 9 The defense presented the testimony of defendant and his cousin, Alexis Crenshaw. Defendant testified he did not know Stewart, Baker and Thomas would be at the party and had problems with them since grade school. Defendant played cards with Thompson as his partner. Defendant said he was joking when he said to Thomas he was going to "beat [their] ass" and that he was referring to beating the women's team at cards.

¶ 10 Between card games, defendant was seated, and Stewart and Baker stood behind him. Stewart said something to defendant that he did not hear, and defendant looked at Stewart, who had a "threatening" facial expression.

¶ 11 When asked if Thomas then reached for a gun, defendant testified: "No, I reached for mine first." Defendant said he "jumped up" and grabbed his gun and said "what the f---." Thomas then came up out of his seat and pulled out a gun, at which time defendant started

shooting. Defendant first shot Thomas in the chest but did not know where the additional shots landed.

¶ 12 Defendant said he drew his gun "to protect himself from these guys that was coming up on me," though he did not know if either of those men had a gun. On cross-examination, defendant acknowledged that Thomas did not threaten him or speak to him before being shot.

¶ 13 The court allowed the defense to offer testimony regarding Thomas's violent character pursuant to *People v. Lynch*, 104 Ill. 2d 194, 199-201 (1984). In 2001, defendant had a conversation with Anthony Howard, who said Thomas had shot him in the stomach. In 2004, Crenshaw told him Thomas had killed her boyfriend, Jamarcus English, while she and English sat in a car. Defendant testified Crenshaw also told him about a 2000 incident in which she was with Thomas at a park and he pulled out a gun "saying how he wanted to pop somebody."

¶ 14 Defendant testified that in 2006, Thomas shot at him while defendant was in a car after dropping his child off at a relative's house. One bullet hit the back window of defendant's car. Defendant did not report the incident to police; he did not think anything could be done about it because the bullet did not strike him.

¶ 15 Crenshaw testified she went to the police station to report the 2003 shooting of her boyfriend but did not implicate Thomas for fear of retribution. In 2004, she told defendant about her boyfriend's shooting and about the 2000 incident when she and Thomas were dating.

¶ 16 During the State's closing argument, the trial court noted that "the defense seems to fall into the area [of] whether this should be second-degree [murder], whether or not the defendant had an unreasonable belief that his life was threatened," and the court asked the State to address that argument. The State asserted that defendant did not establish the factors of self-defense.

¶ 17 In response, defense counsel argued:

> "The standard is, once you raise self-defense, it can be by a scintilla of evidence. That's all it takes to get the second-degree jury instruction, is a scintilla of evidence on the part of the defense and we have given you more than that."

¶ 18 During the defense's closing argument, the court noted defendant was the "first one that pulled out the gun" and was "the initial aggressor." The court said defendant's act of pulling out a gun "certainly was not justifiable."

¶ 19 The court added it did not "even know if it rises to the level of unreasonable belief," and asked defense counsel to address that point. Counsel made alternative arguments that defendant had either a reasonable belief in the need for self-defense, based on his knowledge of Thomas's prior violent acts as testified to by defendant and Crenshaw, or an unreasonable belief in the need to defend himself against Thomas based on the circumstances at the card game, which would support a finding of second-degree murder.

¶ 20 The court asked defense counsel to "explain to me exactly what evidence you think is in the record that points to second-degree [murder]." Counsel responded that Thomas's friends were standing behind defendant, and defendant thought Thomas had a weapon and had to "make a decision."

¶ 21 In rebuttal closing argument, the State asserted that defendant acted with the intent to kill Thomas. The court interjected during the State's argument:

> "[L]et me direct your attention to -- I think you're focusing on the first elements that have to be proven in first-degree murder. There is no doubt that he committed the acts which caused Mr. Thomas's death. He fired the gun. He should have known that firing such a

gun created a strong probability of death or great bodily harm. That is not where the dispute in this case lies.

The dispute in this case lies in the issue as to whether or not they have proved the presence of a mitigating factor by a preponderance of the evidence. That is what they have to do to shift the burden, so I want you to address that."

¶ 22 The State responded the question of defendant's unreasonable subjective belief in the need for self-defense was not relevant unless the defense had "properly raised" all the elements of self-defense." The State asserted defendant's self-defense claim should be rejected and he should be found guilty of first-degree murder.

¶ 23 The trial court found defendant guilty of first-degree murder, stating it "was not persuaded that the defense of self-defense is applicable in this case." Noting that defendant "stood up and shot" Thomas during a card game, the court pointed out defendant's testimony that two men were "too close to him and he felt intimidated," though defendant did not explain why he felt uneasy. The court observed defendant's admission that "he was the first one to pull out a gun." The court acknowledged defendant's history with the victim and that defendant "may have been afraid" of Thomas but noted defendant could have left the card game.

¶ 24 The trial court concluded:

"[T]here's nothing in the record to suggest that the deceased did anything to prompt the firing of the shots or to prompt the defendant to pull out the gun and start shooting, and because of that, I don't feel that the elements of self-defense have been met.

I think that the defendant was the initial aggressor. I do not find that there was an imminent danger of harm, so I am finding the defendant guilty of first-degree murder."

¶ 25 Defendant filed a posttrial motion in which he asserted he had met the elements of self-defense "by a preponderance of the evidence" and that the court erred in not convicting him of second-degree murder. Defendant contended he was the initial aggressor and believed in the need to defend himself; however, he asserted his belief was unreasonable because no gun was recovered from Thomas.

¶ 26 At the hearing on defendant's motion, defense counsel argued it had "filed a self-defense answer," noting "the court had several concerns with that by finding my client guilty of first degree murder and rejecting the second degree murder" verdict sought by the defense.

¶ 27 Counsel continued:

> "[W]hen you assert the defense of self-defense, the burden is very slight. It boils down to a civil burden of preponderance of the evidence which means one grain of sand tips the scale in his favor with respect to his evidence. That's enough to get him over the hump, to get him to the very least second-degree.
>
> Here, I would be asking for a straight-out not guilty of first degree murder as well; however, since there was no gun recovered at the scene, that then turns his belief into an unreasonable belief and therefore, second degree murder."

¶ 28 Defense counsel noted the testimony regarding Thomas's prior violent acts toward defendant.

¶ 29 The trial court responded that no one other than defendant testified Thomas had a gun at the card game; in fact, Kennedy, Thompson and Stewart testified Thomas did not have a gun.

¶ 30 Counsel said the court did not need to find Thomas "in fact, pulled out a gun." The colloquy continued:

> "DEFENSE COUNSEL: Well, respectfully, Judge, no. You don't have to make a finding that he, in fact pulled out a gun. You don't have to do that at all. That's what makes his belief reasonable. If in his mind he saw him pull out a gun, even if it turned out not to be, that makes it unreasonable. You don't have to find that he had a gun. And in fact, the only thing you have to do, as this Court knows, is by a preponderance of the evidence. His testimony, if you believe his testimony -- it isn't beyond a reasonable doubt; just slightly. If you believe --
>
> THE COURT: But that's what I'm getting to. The question is whether I believe the defendant when the defendant testified that [Thomas] pulled out a gun."

¶ 31 Counsel replied the key issue was not whether Thomas displayed a gun but "whether or not the shooter believed he was pulling out a gun," noting "it depends on what's in the mind of the person who has got to defend himself under those split second circumstances." Counsel renewed his argument that defendant was not the initial aggressor and recounted the trial testimony in which defendant said Stewart and Baker stood behind him. The court noted that other witnesses were surprised by defendant's act of shooting Thomas "because the deceased wasn't doing anything [] except playing cards."

¶ 32 Defense counsel argued that even if "in his mind [defendant] was wrong, that makes it unreasonable, and it's simply by a preponderance of the evidence." Counsel argued defendant was honest and "did not make up something to tell this court."

¶ 33 The court responded:

> "Let's talk about this burden of proof. You have to raise self-defense by a preponderance of the evidence and then the burden shifts back to the State and they have to rebut that beyond a reasonable doubt.
>
> DEFENSE COUNSEL: That's correct.
>
> THE COURT: So even if I accept your argument for the purposes of this discussion that you and the defendant raised the defense of self defense by his testimony, couldn't this court also conclude that the State rebutted it with the testimony of those four or five witnesses that contradicted the defendant's testimony?"

¶ 34 Counsel responded that at trial, he had impeached the testimony of the other witnesses in the card game. The court pointed out defendant could have left the room if he felt uncomfortable. Counsel again noted defendant's belief could have been deemed unreasonable because no gun was recovered that could have belonged to Thomas. Counsel told the court that "I think second degree murder instead of first degree murder was appropriate."

¶ 35 Counsel added:

> "[T]here is enough for this -- in this record with the slight burden of proof being a preponderance of the evidence, that we reached that burden and that this Court will be on solid footing by reversing itself and finding [defendant] guilty of second degree murder."

¶ 36 The State responded that the court was not required to accept defendant's testimony that Thomas had a gun over the accounts of the other witnesses. The court asked the State to address defendant's contention that he should be found guilty of second-degree murder based on an unreasonable belief in the need for self-defense. The State argued the defense had not met the

five requirements of self-defense, most notably that he was not the aggressor and was not under a threat of imminent harm.

¶ 37 In rebuttal, defense counsel reiterated that his client acted in self-defense, asserting that "the law says for self-defense you don't have to wait to get hit, shot or anything else if you reasonably believe it's about to happen to you, and he did." Counsel asserted that "since this court can find that [defendant] was not the initial aggressor, then he gets second degree murder based on a preponderance," adding defendant's "testimony alone gets you to the preponderance."

¶ 38 The trial court noted *People v. Hawkins*, 296 Ill. App. 3d 830 (1998), on which defendant relied in seeking a new trial. The court observed that in *Hawkins*, the defendant's version of the fatal encounter was unrebutted, whereas here, several witnesses rebutted defendant's version of what occurred immediately before the shooting.

¶ 39 Defense counsel responded that the testimony of Stewart and Baker should be discounted because they were friends of Thomas. Counsel added:

> "And mind you, his burden of proof is only preponderance, with his two buddies, their bias is ingrained versus [defendant], I think we get to preponderance for that issue that the court has concerns with."

¶ 40 The court then stated to defense counsel:

> "You get the preponderance in the sense that he raises the defense of self-defense, but then once he raises that by a preponderance of the evidence, the State has an opportunity or is required to rebut it with proof beyond a reasonable doubt. And again, the question that the court is asking is whether or not the testimony of the four other witnesses who

testified; not just the deceased's friends but the two girls in the room is enough to rebut the defense of self-defense beyond a reasonable doubt.

I understand that you raised it by a preponderance of the evidence, but I also believe that the State rebutted it beyond a reasonable doubt with the testimony of the other witnesses present at the time of the shooting."

¶ 41 In denying defendant's motion for a new trial, the court found defendant to be the "initial aggressor" and said the testimony of the State's witnesses did not corroborate his account.

¶ 42 The court further stated:

"Though the defendant did testify regarding being shot at by the deceased on a previous occasion, and one might argue that there is enough in the record to satisfy the preponderance of the evidence standard for the defendant to raise the defense of self-defense, I believe that the defense of self-defense was rebutted beyond a reasonable doubt by the testimony of the witnesses.

Considering all the facts in their totality, the scene set [by] all the witnesses, I just do not believe that the defendant's actions were justified. I find that the defendant was the initial aggressor."

¶ 43 On appeal, defendant contends argues the court conflated the legal standards for self-defense and second-degree murder. He thus asserts he was denied a fair trial because the trial court imposed a more onerous standard of proof on the defense than was required under the law.

¶ 44 Defendant was convicted of first-degree murder. To convict a defendant guilty of first-degree murder, the State must prove that the defendant killed an individual by performing acts that were intended to kill, do great bodily harm or create a strong possibility of death or great

bodily harm and that those acts were committed without lawful justification. 720 ILCS 5/9-1(a) (West 2008). The State carries the burden of proving each element of a charged offense beyond a reasonable doubt; that burden remains on the State throughout the proceedings and does not shift to the defendant. *People v. Howery*, 178 Ill. 2d 1, 32 (1997).

¶ 45 One justification for first degree murder is the affirmative defense of self-defense. 720 ILCS 5/7-1(a) (West 2008); see also *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995). The self-defense statute provides that a person "is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another" against the other person's imminent use of unlawful force. 720 ILCS 5/7-1(a) (West 2008). A person is justified in the use of that force, however, only "if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." *Id*.

¶ 46 To raise the affirmative defense of self-defense, the defendant is only required to present some evidence as to each of these elements: (1) force was threatened against the defendant; (2) the defendant was not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) the defendant actually and subjectively believed a danger existed that required the use of the force applied; and (6) the defendant's beliefs were objectively reasonable. *Jeffries*, 164 Ill. 2d at 127-128; *People v. Castellano*, 2015 IL App (1st) 133874, ¶ 149. If a defendant presents some evidence as to each element, the State must prove beyond a reasonable doubt that any one of those six factors was not present. *Jeffries*, 164 Ill. 2d at 127-28. If the State does so, thereby disproving the defendant's claim that he acted in self-defense, a conviction for first-degree murder can be sustained. *Id*. at 128.

¶ 47 Where the State has established the elements of first-degree murder and any one of the defendant's self-defense claims has been negated by the State, the trial court may then, and only then, consider whether the defendant is guilty of second-degree murder. *Id*. at 128-29. Second-degree murder is a lesser mitigated offense of first-degree murder. *People v. Wilmington*, 2013 IL 112938, ¶ 48. A defendant commits second-degree murder when he commits first-degree murder with the mitigating factor that he acted under an unreasonable belief that the killing was justified. 720 ILCS 5/9-2(a)(2) (West 2008).

¶ 48 Also known as imperfect self-defense, this form of second-degree murder "occurs when there is sufficient evidence that the defendant believed he was acting in self-defense, but that belief is objectively unreasonable." *Castellano*, 2015 IL App (1st) 133874, ¶ 149 (citing *Jeffries*, 164 Ill. 2d at 113). In contrast to self-defense, which is an affirmative defense requiring the defendant to raise only "some evidence" as to each element *(Jeffries*, 164 Ill. 2d at 127-128), a defendant faces a higher burden in a second-degree murder analysis. Due process "does not forbid a State from requiring a defendant to prove, by a preponderance of the evidence, the mitigation necessary to reduce the severity of a homicide charge." *Id*. at 116.

¶ 49 Accordingly, the second-degree murder statute provides that the defendant has the burden of proving a mitigating factor by a preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2008). The defendant must show by a preponderance of the evidence that the first five factors of self-defense were present: (1) force was threatened against the defendant; (2) the defendant was not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; and (5) the defendant actually and subjectively believed a danger existed that required the use of the force applied. *Castellano*, 2015 IL App (1st) 133874, ¶¶ 149, 154 (the defendant "is not

compelled to show that he had an unreasonable belief in the necessity for the use of force to obtain a second degree murder conviction"); see also *Jeffries*, 164 Ill. 2d at 129.

¶ 50 If the defendant shows each of those factors by a preponderance of the evidence, the burden shifts to the State to prove the absence of circumstances at the time of the killing that would justify or exonerate the killing under a theory of self-defense. 720 ILCS 5/9-2(c) (West 2008). To sustain a first-degree murder conviction, the State must prove beyond a reasonable doubt that one of the five factors of self-defense is not present or that the defendant lacked an unreasonable belief in the need to use force to protect himself. *Castellano*, 2015 IL App (1st) 133874, ¶ 149. If the trier of fact determines that a defendant has proven the other elements of self-defense by a preponderance of the evidence but that the defendant's actual belief in the need to use force was unreasonable, the defendant should be found guilty of second-degree murder. *People v. Spiller*, 2016 IL App (1st) 133389, ¶ 30 (citing *Jeffries*, 164 Ill. 2d at 129).

¶ 51 Defendant asserts the trial court's repeated references to the "preponderance of the evidence" standard when discussing the defense's burden of proof subjected him to a higher standard than was required. He contends the court "conflated the two standards into one standard," requiring the defense to prove the elements of self-defense by a preponderance of the evidence, rather than only requiring the defense to offer "some evidence."

¶ 52 A reviewing court must presume the trial court knows the law regarding the burden of proof and to apply the law properly. *Howery*, 178 Ill. 2d at 32. However, that presumption may be rebutted when the record contains strong affirmative evidence to the contrary, *i.e.*, evidence that the trial court incorrectly allocated the burden of proof to the defendant. *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 28. The trial court is free to comment on the implausibility of the

defense's theories, as long as it is clear from the record that the court applied the proper burden of proof in finding the defendant guilty. *Howery*, 178 Ill. 2d at 35. Therefore, efforts by the trial court to test, support or sustain the defense's theories cannot be viewed as improperly diluting the burden of proof or shifting that burden to the defendant. *Id.; Cameron*, 2012 IL App (3d) 110020, ¶ 28; see also *People v. Schuit*, 2016 IL App (1st) 150312, ¶ 113. Whether the trial court applied the correct legal standard is a question of law which a court reviews *de novo. Cameron*, 2012 IL App (3d) 110020, ¶ 26.

¶ 53 The record in this case does not contain strong affirmative evidence to rebut the presumption that the trial court applied the correct standard of proof. The record establishes that, in finding defendant guilty of first-degree murder, the trial court applied the preponderance of the evidence standard in considering and ultimately rejecting defendant's theory of second-degree murder. During closing argument, the court found defendant was the initial aggressor against Thomas and stated that defendant's act did not even rise "to the level of unreasonable belief." The court repeatedly asked defendant to address that aspect of a second-degree murder analysis, and the court noted "[t]he dispute in this case [was] whether or not they have proved the presence of a mitigating factor by a preponderance of the evidence." The court found defendant guilty of first-degree murder because the defense had not shown two factors of self-defense; the court found defendant was the initial aggressor and was not facing an imminent danger of harm.

¶ 54 Defendant also focuses on the court's remarks at the hearing on defendant's posttrial motion; however, those remarks do not rebut the presumption that the court applied the correct standard. There, the arguments again focused on whether defendant had met its burden of proving the mitigating factor of self-defense by a preponderance of the evidence, as set out in the

posttrial motion. Defendant had been convicted of first-degree murder, and the discussion centered on whether he had shown evidence in mitigation to support a second-degree murder conviction and whether defendant had an unreasonable belief in the need for self-defense. The court's references to the preponderance of the evidence standard involved the proof required to shift the burden to the State on the issue of whether defendant was the initial aggressor.

¶ 55 Defendant further contends the trial court operated under additional misconceptions of the law. First, defendant argues the court mistakenly believed that, to convict him of second-degree murder, it was required to find that Thomas had a gun. Second, defendant argues the court commented both in issuing its verdict and in denying the posttrial motion, that defendant should have left the party if he feared Thomas and that "the court should not have considered whether or not [defendant] could have left before the altercation began."

¶ 56 A review of those comments reveals that the court did not convict defendant under a mistaken view of the law. The court's comments were made in the context of the court's analysis of whether defendant had a reasonable or unreasonable belief in the need to protect himself from Thomas. The court correctly indicated it did not have to accept defendant's testimony that Thomas had a gun. Moreover, as the State points out, in weighing the defense's theories that he was afraid of Thomas, the court could consider the fact that defendant remained in the room with someone whom he had testified was dangerous. See *People v. McGee*, 287 Ill. App. 3d 1049, 1053 (1997) (a defendant's testimony that he was afraid and needed to use deadly force could be addressed by State's argument that the defendant failed to easily extricate himself from that situation).

¶ 57 Defendant next argues that the court imposed a requirement that defendant's use of force be justified because a person responding to force, whether it turns out to be justified or unjustified, will "very often" be the initial aggressor. As part of that assertion, defendant argues that the court's finding that he was the initial aggressor in this encounter "is not part of the second-degree murder analysis." A defendant commits second-degree murder if he acts under an unreasonable belief that the killing was justified. 720 ILCS 5/9-2(a)(2) (West 2008). To be convicted of second-degree murder, the defendant must show by a preponderance of the evidence each of the first five factors of self-defense. *Castellano*, 2015 IL App (1st) 133874, ¶ 149. Therefore, the defendant must show, *inter alia*, by a preponderance of the evidence that he was not the aggressor. *Id*. The State countered that by proving beyond a reasonable doubt that defendant was the initial aggressor.

¶ 58 Defendant's remaining contentions on appeal involve the imposition of various fines and fees. He contends two charges were improperly assessed against him and should be vacated. In addition, defendant asserts several other charges are fines subject to offset by a monetary credit for time that he spent in custody prior to sentencing.

¶ 59 A defendant forfeits a sentencing issue by failing to object in the trial court and include the issue in a posttrial motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant acknowledges he did not raise these arguments earlier but argues this court can review the issue under the second prong of the plain error doctrine. This court has issued differing opinions as to whether defendant's claims can be reviewed as plain error. *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9; *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 15; *contra People v. Cox*, 2017 IL App (1st) 151536, ¶ 102 (holding that the improper imposition of fines and fees affects

"substantial rights" and thus may be reviewed under the second prong of the plain error doctrine).

¶ 60 The State responds that defendant's claims are "reviewable" and addresses the merits of defendant's arguments. Because the State does not argue defendant has forfeited such review, the State has waived any forfeiture argument. See *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000); *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. Because the State does not argue these claims are forfeited, we proceed to their merits. The propriety of the fines and fees imposed by the trial court is reviewed *de novo*. *People v. Green*, 2016 IL App (1st) 134011, ¶ 44.

¶ 61 First, defendant contends, and the State agrees, that the $5 electronic citation fee was erroneously imposed. Section 27.3e of the Clerk of Courts Act specifies that this fee applies only to a defendant involved in "any traffic, misdemeanor, municipal ordinance or conservation case." 705 ILCS 105/27.3e (West 2008). Here, defendant was convicted of first-degree murder, which does not fall under any of the categories listed in the statute. Therefore, that charge is vacated.

¶ 62 We reach the same result as to the $250 State DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2008)) because a defendant is only required to submit a DNA sample and pay the fee if he is not currently registered in the DNA database. See *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Here, as the State concedes, defendant has previous felony convictions that would have required a DNA sample to be taken. Accordingly, those two charges, which total $255, are vacated.

¶ 63 Defendant's remaining contentions involve the application of presentence custody credit to several other monetary assessments imposed against him. A defendant is entitled to a credit of $5 for each day he is incarcerated, with that amount to be put toward the fines levied against him

as part of his conviction. 725 ILCS 5/110-14(a) (West 2008). Here, defendant spent 1,804 days in custody and, accordingly, has accumulated $9,020 worth of credit toward his eligible fees. The trial court imposed $629 in total assessments. Pursuant to the plain language of section 110-14(a), that credit can be applied only to fines and not to fees. *Id*.; see also *People v. Johnson*, 2011 IL 111817, ¶ 8. A "fine" is punitive in nature and is imposed as part of a sentence for a criminal offense. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). In contrast, a "fee" seeks to recoup expenses incurred by the state or compensate the State for expenditures incurred in prosecuting the defendant. *Id*.

¶ 64 Defendant contends, and the State correctly concedes, that the $15 State Police operations assessment (705 ILCS 105/27.3a (1.5) (West 2012)) is a fine that can be offset by this credit. See *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 147; *People v. Maxey*, 2016 IL App (1st) 130698, ¶¶ 140-41 (finding that charge is a fine).

¶ 65 However, the remaining charges challenged by defendant cannot be similarly offset. Defendant contends his credit should apply to the $25 court services fee (55 ILCS 5/5-1103 (West 2012)), the $15 clerk automation fee (705 ILCS 105/27.3a(1), (1.5) (West 2012)) and the $15 document storage fee (705 ILCS 105/27.3c(a) (West 2012)) are fines because they do not compensate the State for any portion of his prosecution, relying on *Graves*.

¶ 66 This court has issued numerous decisions, both before and after our supreme court decided *Graves*, finding these charges to be fees, as opposed to fines subject to offset. See *People v. Heller*, 2017 IL App (4th) 140658, ¶ 74 (clerk automation and document storage assessment and sheriff's court services charge are fees); *Warren*, 2016 IL App (4th) 120721-B, ¶¶ 114-16 (State's Attorney records automation charge is a fee because it is not punitive); *People*

v. Martino, 2012 IL App (2d) 101244, ¶¶ 29-30 (clerk automation and document storage fees assist in funding the maintenance of those systems); *People v. Pohl*, 2012 IL App (2d) 100629, ¶¶ 11-12 (statute authorizing court services fee is intended to defray the cost of court expenses and providing court security); *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006) (clerk automation and document storage fees and court services fee are compensatory and represent a "collateral consequence" of a conviction). The fact that such assessments are not tailored to each defendant does not negate that they compensate the State in part for the costs incurred in the prosecution. See *Graves*, 235 Ill. 2d at 250 (a fee recovers the State's costs "*in whole or in any part"* for prosecuting the defendant (emphasis added)).

¶ 67 As to the clerk automation and document storage fees, defendant contends those charges are comparable to the $50 court system charge that was held to be a fine in *People v. Smith*, 2013 IL App (2d) 120691, ¶¶ 17-21. However, those charges are not similar. *Smith* held that the charge imposed pursuant to section 5-1101(c) of the Counties Code (55 ILCS 5/5-1101(c) (West 2012)) was a fine because it was payable upon a defendant's conviction for a criminal offense and its amount "is correlated directly with the severity of the offense." *Id*. ¶ 21. As held by the cases cited above, the clerk automation and document storage assessments compensate the State for expenses incurred in his conviction.

¶ 68 Defendant further contends the $2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2012)) and the $2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2012)), asserting that the funding of record-keeping systems does not relate to the prosecution or defense of an individual criminal case.

¶ 69 We agree with prior decisions holding that those assessments are in fact fees, not fines, because they do not include a punitive aspect. See *People v. Brown*, 2017 IL App (1st) 142877, ¶¶ 73, 75; *Maxey*, 2016 IL App (1st) 130698, ¶ 144; *People v. Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17; *People v. Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65 (finding "no reason to distinguish between the two statutes" given their nearly identical language); but see *People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56 (the assessments are fines because they do not compensate the State for any costs associated in prosecuting a particular defendant). We agree with *Brown* and similar decisions that the State's Attorney and Public Defender records automation charge are fees not subject to offset by defendant's presentence custody credit.

¶ 70 In conclusion, the trial court did not use an incorrect standard in convicting defendant. Moreover, the $5 electronic citation fee and the $250 State DNA analysis fee imposed against defendant are vacated. Accordingly, defendant owes a total of $374 in assessments, as opposed to the $629 imposed by the trial court. Furthermore, defendant is entitled to have the State Police operations fine offset by a portion of his presentence custody credit, reducing the amount owed by an additional $15 to $359. We direct the clerk of the court to correct defendant's fines and fees order. The judgment of the trial court is affirmed in all other respects.

¶ 71 Affirmed as modified.