2013 IL App (3d) 110301-U

Order filed March 4, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
| | ) | of the 10th Judicial Circuit, |
| | ) | Peoria County, Illinois, |
| Plaintiff-Appellee, | ) | |
| | ) | Appeal No. 3-11-0301 |
| v. | ) | Circuit No. 10-CF-614 |
| | ) | |
| JOSEPH A. BEADLES, | ) | Honorable |
| | ) | Stephen A. Kouri, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE SCHMIDT delivered the judgment of the court.
Justice Carter concurred in the judgment.
Presiding Justice Wright concurred in part and dissented in part.

## ORDER

¶ 1 *Held:* (1) Defendant's second stalking conviction is vacated under one-act, one-crime principles; (2) any error in admitting defendant's mugshot into evidence was harmless; (3) the State's comments during closing argument did not unfairly prejudice defendant; (4) defendant was proven guilty of stalking beyond a reasonable doubt; (5) the lack of a jury instruction defining knowledge was not an abuse of discretion; and (6) defendant's public defender fee is vacated.

¶ 2 Following a jury trial, defendant, Joseph A. Beadles, was convicted of two counts of

stalking[1] (720 ILCS 5/12-7.3(a) (West 2010)) and sentenced to 30 months' probation and 120 days in jail. On appeal, defendant argues that: (1) one of his convictions for stalking must be vacated under the one-act, one-crime rule; (2) the trial court abused its discretion when it admitted his mugshot photograph; (3) the State made improper comments during closing arguments; (4) the evidence was insufficient to support his conviction; (5) the court abused its discretion when it failed to include a jury instruction defining the mental state for the offenses; and (6) the court erred in assessing a public defender fee without a reimbursement hearing. We affirm in part and vacate in part.

¶ 3 FACTS

¶ 4 Defendant, Joseph A. Beadles, was charged by indictment with two counts of stalking. Both counts alleged that he "repeatedly sent unsolicited e-mails" to the victim. At a jury trial, James Feehan testified that he was a detective for the Peoria police department, but he was detailed and deputized by the United States Secret Service. Feehan stated that he investigated computer crimes.

¶ 5 On June 9, 2010, the victim informed Feehan that she had received several alarming e-mails. The victim asked Feehan to identify the sender and ask him to stop sending the e-mails. Feehan identified defendant as the sender, and attempted to contact him at his apartment on June 10, 2010. However, defendant did not answer. Feehan left a note on defendant's door and

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[1] In his brief, defendant states that he was convicted of two counts of "cyberstalking." However, he was charged and convicted of two counts of stalking (720 ILCS 5/12-7.3(a) (West 2010)); he was not charged with the separate offense of cyberstalking (720 ILCS 5/12-7.5 (West 2010)).

returned to his office, where he tried to call defendant. Later that evening, he received a call from the victim, who indicated that she had received an e-mail from defendant that referenced Feehan's visit. The following day, Feehan met defendant outside of his apartment. Defendant initially stated that he and the victim were "drinking buddies[,]" but when Feehan asked him about the e-mails, he denied knowing the victim. Feehan told defendant not to e-mail the victim anymore, as his e-mails had caused the victim "emotional grief[.]" Defendant told Feehan that he wanted to send the victim an apology e-mail, but Feehan stated that this was unwise and might cause the victim additional grief.

¶ 6 On June 14, 2010, the victim notified Feehan that defendant sent her another e-mail. That afternoon, Feehan arrested defendant. Feehan stated that defendant was cooperative. However, defendant later sent an e-mail to the victim alleging that the police broke his cheekbone and injured his shoulder during the arrest. In response to these allegations, the State sought to introduce defendant's mugshot photograph, which did not show an injury to defendant's face. Defense counsel objected, and following a conference outside the presence of the jury, the parties agreed to enter a stipulation that stated "[t]he parties hereby agree and stipulate that when [defendant] was arrested on June 14, 2010, he was not 'roughed up.' Nor was his cheekbone broken or shoulder maimed." However, defendant had concerns about the stipulation because he claimed that he hurt his shoulder during the arrest. Nonetheless, he would permit its use on the advice of counsel. In response, the trial court admitted defendant's mugshot and directed the State not to argue that the photograph was representative of defendant's everyday appearance or that defendant looked "menacing, that he cleaned himself up for trial, et cetera[.]" Feehan testified that the mugshot was a fair and accurate depiction of defendant after he was arrested.

¶ 7 Following defendant's postarrest e-mail, he was arrested a second time by Peoria police detective Randall Schweigert. Schweigert testified that defendant did not have any outward signs of injury at the time of the arrest.

¶ 8 The victim testified that she was a news anchor at WEEK television. She had never met defendant before she received the first e-mail. Initially, she thought the e-mails were spam, and she did not read them until she received the third e-mail. The third e-mail referenced the victim's biography, and specifically noted that she volunteered at "PARC." The e-mail also contained a discussion of bicycling and ended with the statement "enough chatting.....grab your ankles (just kidding, no I'm not)."

¶ 9 The victim then read the first two e-mails. The first e-mail began "[t]hought I would cyber-stalk you for a while (just kidding)" and later stated "if I was about to say anything about [your purse], it would have only been in an effort to get a better angle on checking out your ass. Just kidding....no I'm not." The second e-mail read in part "most people would probably think we are brother and sister (Kinda Kinky actually). I suppose that would beat being a 51 year old Hall of Fame Football Star getting all pedophile by raping a 16 year old prostitute (I just [*sic*] not that competitive, I guess)." The victim was alarmed by defendant's knowledge of her personal e-mail address and background, and by the sexual references, but she did not reply.

¶ 10 The fourth e-mail referenced the victim's cell phone carrier, which made her feel "[f]reaked out" because this information was not readily available. In the ninth e-mail, defendant stated "I always viewed back pain as sexual prowessness. I can't speak for the masses but, it always helped me keep an erection." The victim testified that the she became more fearful as a result of defendant's repeated sexual references.

¶ 11 In the thirteenth e-mail, defendant discussed a documentary about the mating practices of a rooster. The e-mail stated in part:

> "[w]hat [the rooster] does is to call a hen over to share some of his corn kernels with her, and as she bends over to eat, he quickly mounts her in an attempt of.....[*sic*] fornicate.....that dingy broad falls for that old trick every time.
>
> I'm not sayin' I [*sic*] above the practice but, I'd risk jail time if caught doing such a thing in public.
>
> BONO's tornado Warning."

The victim viewed this e-mail as a warning signal.

¶ 12 On May 28, 2010, the victim reported defendant's unwanted e-mails to the police. The victim informed the police that she had moved out of her apartment the week before and that defendant's e-mails were affecting her life. On June 9, 2010, the victim contacted Feehan after receiving the thirteenth e-mail. The victim felt that this e-mail had crossed the line and was now more than a nuisance. Feehan contacted defendant thereafter.

¶ 13 On June 10, 2010, defendant sent a fourteenth e-mail. In the message, defendant stated that a:

> "U.S. Secret Service agent left a note on [his] door to call him ASAP today and also a voice message of the same on my machine. I don't have a clue but, if you had said my name near [the victim's coworker] in the same sentance [*sic*] with the words CYBER STALKER perhaps that would be the reason."

Defendant's fifteenth e-mail, also sent on June 10, included biographies of Feehan and the victim's coworker.

¶ 14 On June 11, 2010, defendant sent a sixteenth e-mail. In this e-mail, defendant discussed his meeting with Feehan, stating:

> "Secret Service dude was a little short to be taken seriously and he never even showed me his I.D., Badge, or Gun yet, demanded to see mine in front of his decked out buddy in combat gear. *** He also threatened me with jail time...yet, couldn't come up with the law against being an average, working class,heterosexual male [*sic*], named JOE, (who actually is quite wealthy from working at CAT but, who cares it's NOT like you and I are even talking socially."

¶ 15 On June 15, 2010, defendant sent a seventeenth and final e-mail. In the message, defendant referenced his arrest and stated that "a simple do not e-mail me anymore Mr. Beadles would have stopped [him] on the first day." The message ended with the statement "[j]ust think, I only get to sue you and the COPS for three days pay and a broken cheek bone not [*sic*] mention a mamed [*sic*] shoulder." The e-mail also included a purported mugshot.

¶ 16 As a result of defendant's 17 e-mails, the victim began carrying pepper spray, and she asked friends and family to escort her into and out of the building where she worked.

¶ 17 On cross-examination, the victim stated that it was possible that she could have met defendant at the bar, Mushrush, between May 16 and June 12, 2010, but she did not recall going out during that time period. Overall, the victim did not recall meeting defendant either at a Halloween party or any time at Mushrush.

¶ 18 The State moved to admit the 17 e-mails and a copy of defendant's mugshot into evidence. Defense counsel objected, and the exhibits were admitted over the objection.

¶ 19 Defendant testified that he first met the victim in 2008 at a Halloween contest hosted by

Ron Jeremy at Club Yeager. At the time he was taking pictures as "Joe the photographer," and he was costumed as Bono, the lead singer of U2. Defendant next met the victim on May 16, 2010, at Mushrush. Defendant introduced himself to the victim and her boyfriend and engaged in a 10-minute conversation. At the end of the conversation, he said "I'll talk to you." Defendant intended this closing to be humorous, but honest.

¶ 20 Defendant found the victim's e-mail and cell phone number through a Google search. On the same day that he met the victim at Mushrush, he sent her the first e-mail. The first e-mail began with the statement "Thought I would cyber stalk you for a while. Just kidding." Defendant stated that he was "[l]iterally, just kidding." Defendant testified that in the third e-mail he was asking if the victim would like to go bicycle riding, as he had two bicycles. The "grab your ankles" comment in that e-mail referred to a common stretching movement.

¶ 21 After his fourth e-mail, defendant allegedly received a spoken reply from the victim at a bar. Defendant stated that his ninth e-mail referenced singer Bono's actual back injury. The addition of his personal views, relating back pain to sexual prowess, were the result of "e-mails between two people that have met each other at a single's bar[,]" and he did not think "it entirely out of line to talk like a single." Defendant further testified that his statement "Bono's Tornado Warning" from the thirteenth e-mail was in regard to a conversation he had with the victim in which he mentioned the Tasmanian Devil cartoon character that spins like a tornado.

¶ 22 Defendant stated that when he received the note from Feehan it did not occur to him that Feehan wanted to speak to him about the e-mails. When defendant later met Feehan, he did not have a badge or photo identification, and he was not carrying a firearm. Feehan approached defendant like a jealous former boyfriend and informed defendant that the victim did not want to

receive e-mails from him anymore. Defendant did not take Feehan's warning seriously because he did not have a badge or identification. Therefore, he sent the final two e-mails. Defendant stated that he would have stopped sending the e-mails if the victim had asked; however, she did not seem scared because he saw her at the bar every Saturday night between May 16 and June 15, 2010. On several of these nights, defendant approached the victim and had brief conversations. Defendant never intended to cause the victim alarm or to suffer emotional distress, and he continued sending the e-mails, even though the victim did not respond, for social networking purposes.

¶ 23 At the close of defendant's testimony, the court held a jury instruction conference. During the conference, the State sought to allow defendant's mugshot photograph to go to the jury during deliberations. Defense counsel objected. The court stated that it thought the picture was prejudicial and that it was not going to let it go back to the jury; however, if the jury asked for the photograph, it generally allowed the jurors to see the exhibit. The court would allow the State to refer to defendant's mugshot during its closing argument and noted that the State had handled the photograph appropriately during the trial.

¶ 24 During closing arguments, the State argued that defendant was a "stalker," and "creepy." The State referred to defendant, and his conduct, as "vulgar," "insolent," "boarish," and "bizarre." It also stated that defendant's e-mails were "terrifying," "creepy," and "obscene." The State argued that the victim was a more credible witness and noted that the victim testified that she had never met defendant and had "[n]ever been to a party thrown by a porn star." Defense counsel objected to the statement, and the court instructed the jury that "[a]ny argument that's not based on what you understand the evidence to be collectively should be disregarded."

¶ 25 Following closing arguments, the trial court read the jury instructions. The court did not issue an instruction on the definition of knowledge, and the jury did not request the instruction during deliberations. The jury returned a guilty verdict on both counts.

¶ 26 On April 21, 2011, the court sentenced defendant on both counts to 30 months of probation and 120 days in jail. Without holding a hearing, the court also ordered defendant to pay a $100 public defender fee. Defendant appeals.

¶ 27 ANALYSIS

¶ 28 I. One-Act, One-Crime

¶ 29 Defendant argues that one of his convictions for stalking must be vacated under the one-act, one-crime doctrine. The State concedes the issue, and we agree with its concession.

¶ 30 Where the indictment charges a defendant for a single course of conduct, even if multiple theories of culpability are presented, the trial court cannot convict defendant of separate criminal acts. *People v. Crespo*, 203 Ill. 2d 335 (2001) (indictment must indicate that the prosecution intended to treat defendant's conduct as multiple acts for multiple convictions to be sustained). In the instant case, the State charged a course of conduct in each count, alleging that defendant had "repeatedly" sent e-mails to the victim. The State did not assign any of the e-mails to a particular count. Therefore, we vacate defendant's second stalking conviction, as it was derived from the same course of conduct as his first stalking conviction.

¶ 31 II. Mugshot

¶ 32 Defendant argues that the admission of his mug shot deprived him of a fair trial. Defendant contends that the mugshot was not pertinent to any material issue in the case and it was prejudicial because it gave the jury an image of a menacing individual who was described as

a stalker.

¶ 33 The admission of evidence lies within the sound discretion of the trial court. *People v. Becker*, 239 Ill. 2d 215 (2010). We will not reverse the trial court's decision absent an abuse of discretion. *Id.*

¶ 34 We are not quite sure just what relevance the defendant's mugshot had in this case. Whether defendant was or was not roughed up by police seems irrelevant to the issues before the jury. Nonetheless, we do not reach the issue of the photograph's admissibility because we find that even if had been error, any error was harmless beyond a reasonable doubt. The jury already knew that defendant had been arrested. The mugshot only showed that defendant looked differently at the time of that photograph than he looked while sitting in the courtroom. The prosecution did not give undue attention to the photograph. We do not believe, absent the admission of the photograph, that the result would have been any different. See *People v. Thurow*, 203 Ill. 2d 352, 368-69 (2003).

¶ 35 III. Closing Argument

¶ 36 Defendant argues that the State's improper comments during closing arguments, combined with other errors in the case, caused substantial prejudice and warrant a new trial. Defendant acknowledges that he failed to include this issue in his posttrial motion, but requests plain-error review.

¶ 37 The question of whether comments made by the prosecution in closing argument were so egregious as to warrant a new trial is a question of law that we review *de novo*. *People v. Wheeler*, 226 Ill. 2d 92 (2007).

¶ 38 We apply the plain-error doctrine when error occurred and: (1) the evidence is so closely

balanced that the error threatened to tip the scales of justice against defendant; or (2) that error was so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551 (2007).

¶ 39 The first step in plain-error analysis is determining whether error occurred. *People v. Thompson*, 238 Ill. 2d 598 (2010). A prosecutor is afforded wide latitude in closing arguments, and improper remarks will not merit reversal unless they result in substantial prejudice to defendant. *Wheeler*, 226 Ill. 2d 92. A prosecutor may comment unfavorably on the evil effects of a defendant's crimes when such argument is based upon competent and pertinent evidence. *People v. Nicholas*, 218 Ill. 2d 104 (2005). A prosecutor may also comment on the evidence and any fair, reasonable inferences it yields, even if those inferences reflect negatively on defendant. *Id.*

¶ 40 We find no error in the State's closing argument comments. The "stalker" comments referred to "the nature of the charge and the conduct" of defendant. *People v. Delgado*, 30 Ill. App. 3d 890, 897 (1975). Similarly, the statement "[n]ever been to a party thrown by a porn star" was based on defendant's testimony that he allegedly first met the victim at a party hosted by Ron Jeremy, a pornographic film star. See *State v. Hallenbeck*, 878 A.2d 992 (2005) (factual reference stating that Ron Jeremy was a pornographic film star).

¶ 41 The defendant also argues that he was prejudiced by the prosecutor's comments during closing argument that characterized him as "creepy," "vulgar," "insolent," "boorish," "bizarre," "weird," "obscene," "terrifying," and "frightening." First of all, we note that the whole point of a criminal prosecution is to prejudice the defendant. Only improper or unfair prejudice constitutes error. In the case before us, we find that each of the characterizations to which defendant objects

is supported by the evidence. That is, it is not error, for example, to refer to creepy behavior as "creepy."

¶ 42 The defendant also argues that the State made an improper reference to his mugshot during closing argument. Not so. It is clear that when referring to a "picture," the prosecutor was referring to the e-mails. The prosecutor argued, "We've all heard the saying that a picture is worth 1,000 words. Well, folks, these 17 terrifying, creepy, obscene, anxiety-causing and downright frightening e-mails, the 17 exhibits are worth exactly one word. That's guilty."

¶ 43 The State also did not impermissibly refer to defendant's mugshot, as there is no indication in the record that the mugshot was displayed during closing arguments and its earlier display was limited.

¶ 44 Finally, the trial court cured any impropriety that may have resulted from the State's comments when it instructed the jury that "[a]ny argument that's not based on what you understand the evidence to be collectively should be disregarded." See *People v. Graca*, 220 Ill. App. 3d 214 (1991) (any error caused by the prosecutor's statements were cured by the jury receiving the proper instructions). Therefore, we find no error with regard to the State's closing arguments. Without error, there can be no plain error. We must honor defendant's procedural default.

¶ 45 IV. Sufficiency of the Evidence

¶ 46 Defendant argues that the State failed to prove his guilt of stalking beyond a reasonable doubt in that it did not prove that he knew his actions would cause the victim emotional distress or to fear for her safety.

¶ 47 When presented with a challenge to the sufficiency of the evidence, it is not our function

to retry defendant. *People v. Sutherland*, 223 Ill. 2d 187 (2006). Rather, we must determine, after viewing the evidence in the light most favorable to the State, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1 (2011).

¶ 48 To convict a defendant of stalking, the State must prove beyond a reasonable doubt that defendant engaged in a course of conduct directed at a specific person, and he knew or should have known that this course of conduct would cause a reasonable person to: (1) fear for her safety or the safety of a third person; or (2) suffer other emotional distress. 720 ILCS 5/12-7.3(a) (West 2010).

¶ 49 Here, defendant solely argues that the State failed to prove that he acted with knowledge. However, the evidence was sufficient for the jury to find that defendant acted with knowledge or should have known that his e-mails would cause the victim to fear for her safety or suffer emotional distress. Defendant's e-mails contained not just sexually provocative comments, but also comments referencing rape, and referred to personal information about the victim. The jury could reasonably infer that defendant should have known that his e-mails, that were repeatedly sent without a response, would cause the victim emotional distress. Furthermore, defendant had actual notice that his e-mails were causing the victim to fear for her safety when Feehan (1) left a message on his door, (2) contacted him in person, and (3) arrested him. Nonetheless, defendant sent e-mails to the victim after each of these incidents. Consequently, the evidence was sufficient for the jury to find defendant guilty of stalking beyond a reasonable doubt.

¶ 50 V. Jury Instruction

¶ 51 Defendant argues that the trial court abused its discretion when it failed to instruct the

jury on the definition of knowledge. Defendant acknowledges that he raises this contention for the first time on appeal, but he argues that this was reversible under the plain-error doctrine.

¶ 52 We review an issue concerning the instruction of the jury for an abuse of discretion. *People v. Mohr*, 228 Ill. 2d 53 (2008).

¶ 53 As noted previously, the first step of plain-error review is determining whether the trial court erred. Here, we find that the trial court did not err.

¶ 54 Initially, we note that defendant did not specify an instruction on knowledge that he wanted the trial court to issue. However, the mental state of "knowledge" is defined in Illinois Pattern Jury Instruction, Criminal 4th No. 5.01B. Illinois Pattern Jury Instructions, Criminal, No. 5.01B (4th ed. 2000). The committee note is instructive on the use of this instruction. It states in part:

> "[t]he Committee takes no position as to whether this definition should be routinely given in the absence of a specific jury request." Illinois Pattern Jury Instructions, Criminal, No. 5.01B, Committee Note (4th ed. 2000).

¶ 55 Generally, a jury need not be instructed on the definition of knowledge, because the term has a plain meaning within the jury's common knowledge. *People v. Sanders*, 368 Ill. App. 3d 533 (2006). However, the trial court has a duty to instruct the jury on the definition, if the jury requests clarification when the original instructions are insufficient or when the jurors are manifestly confused. *Id.*

¶ 56 In the instant case, the trial court did not instruct the jury on the definition of knowledge, but the jury did not request clarification. *Cf. People v. Lovelace*, 251 Ill. App. 3d 607 (1993) (knowledge instruction was required because the original jury instructions were incomplete and

the jury requested clarification of terms, including "knowingly"). After reviewing the record, we conclude that the jury instructions were complete and there is no indication that the jury was confused. Therefore, we agree that the plain meaning of "knowledge" was within the jury's understanding and a specific instruction was not required.

¶ 57 We, again, state the obvious: without error, there can be no plain error.

¶ 58 VI. Public Defender Fee

¶ 59 Finally, defendant argues that the trial court erred when it assessed a public defender fee without a reimbursement hearing. The State, citing *People v. Gutierrez*, 2012 IL 111590, concedes that the public defender fee ought to be vacated. As the dissent points out, we are under no obligation to accept this concession. However, we find no reason not to accept it in this case.

¶ 60 Section 113-3.1 of the Code of Criminal Procedure of 1963 permits a court to order a defendant to pay a fee for the service of a public defender. 725 ILCS 5/113-3.1(a) (West 2010). However, a hearing must be conducted, either on the court's own motion or on the motion of the State, to determine the amount of the fee. *Id.* A public defender fee may be imposed only by the circuit court after a proper hearing. *Gutierrez*, 2012 IL 111590.

¶ 61 In *Gutierrez*, the supreme court clearly expressed its "disappointment that, 14 years after this court's decision in *Love*, defendants are still routinely being denied proper hearings before public defender fees are imposed." *Id.* at ¶ 25. It is clear that in so stating, the *Gutierrez* court was referring not only to public defender fees assessed by a circuit clerk, but also those assessed by a circuit court without a hearing. We agree with the dissent that there is case law supporting the proposition that the proper course of action would be to remand this case for a hearing on the

public defender fee issue. We note that on appeal, defendant is represented by the office of the State Appellate Defender. Any fee which is assessed against the defendant after a remand in hearing is likely to be a small percentage of the cost of a remand and hearing. The State did not argue for a remand for a new hearing, and we will not argue on the State's behalf for a remand and hearing. There are cases in which it is appropriate for the court to reject a concession by the State; this is not one of them.

¶ 62 VII. Summary

¶ 63 We vacate defendant's second stalking conviction and the public defender fee. Otherwise, we affirm the judgment of the trial court.

¶ 64 CONCLUSION

¶ 65 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed in part and vacated in part.

¶ 66 Affirmed in part and vacated in part.

¶ 67 PRESIDING JUSTICE WRIGHT, concurring in part and dissenting in part.

¶ 68 I agree defendant’s conviction is supported by the evidence beyond a reasonable doubt, the record does not contain a jury instruction error, defendant’s second stalking conviction should be vacated, and the prosecutor’s closing arguments were not improper.

¶ 69 I do not share the majority’s confusion regarding the relevance of the mugshot because defendant’s last email insinuated that the victim was accountable, in some respect, for the painful injuries defendant claimed were inflicted upon him by the police. Consequently, after viewing the mugshot, this jury was free to conclude that defendant intended his unreasonable insinuation to cause the victim further emotional distress based on his statement about his purported injuries.

¶ 70 Next, I disagree that we should accept the State's concession of error. For purposes of my analysis, I focus on the State's language of concession which is set forth below for the convenience of the reader:

> It appears that, although a written order requiring the public defender fee be imposed, there was no motion, or indeed, any discussion of a public defender fee prior to or at sentencing. Therefore, the People concede that the $100 fee imposed under 725 ILCS 5/113-3.1(a) (West 2010), must be vacated pursuant to *Gutierrez*, 2012 IL 111590 ¶ 24, in which the Illinois Supreme Court stated, "...because neither the State nor the circuit court was seeking a public defender fee, the appellate court should have vacated the fee outright."

¶ 71 The State's position misconstrues the *Gutierrez* holding and potentially creates a slippery slope for future cases involving other fees and costs which are not discussed in open court, but are ultimately incorporated into the sentencing order signed by the judge. Frankly, even the most conscientious trial judge may not discuss all mandated and permissive fines, fees and costs, before issuing a written order requiring a defendant to pay those costs. In those situations, where the court takes some time to calculate the additional financial consequences arising out of a conviction, with the assistance of the circuit clerk, the judge must then accurately disclose these court-ordered amounts into the final, written order. In this case, the judge's written order clearly set out defendant's financial obligations arising out of his conviction, including the public defender reimbursement fee.

¶ 72 Aware of this information, defendant did not challenge his sentence when before the trial court. In fact, defendant acknowledges that his failure to address the propriety of the public defender fee in a post-trial motion may result in forfeiture but attempts to anticipate the State's response by arguing the public defender reimbursement fee was void, not voidable, on two

alternative grounds.

¶ 73 Surprisingly, the State concedes error without explicitly waiving forfeiture or considering whether the facts of record support the defendant's claim that the court's signed order was void because a hearing did not occur. Therefore, I refuse to accept the State's concession. I first address whether the failure to conduct a hearing before imposing the public defender reimbursement fee results in a void or voidable directive to pay. Turning to defendant's contention that the court's signed order was void, I reject defendant's assertion for multiple reasons. I address each reason separately below.

¶ 74 First, I reject defendant's argument arising out of the holding in *Gutierrez*, that the reimbursement fee is void because the fee was imposed by the circuit clerk, rather than the court. Defendant cautiously suggests that "*if* the circuit clerk acted beyond its authority in imposing the fee, the order was void for that reason." (Emphasis added.) Significantly, the trial judge's signature on the final written order causes me to conclude the judge, not the circuit clerk, ordered reimbursement in this case. Unless the circuit clerk imposed the fee without authority, *Gutierrez* does not require this court to vacate the fee outright without remanding the matter for the required hearing. For these reasons, I do not accept defendant's argument, or the State's concession, that *Gutierrez* requires this court to vacate the fee at issue without remand.

¶ 75 Second, I also reject defendant's position that the reimbursement fee is void because the fee was imposed by the court without a preceding hearing. Defendant's argument is also contrary to other well-established case law that provides that the court's failure to conduct a hearing prior to the imposition of the public defender reimbursement fee renders the sentence voidable, not void. *People v. Morrison*, 298 Ill. App. 3d 241, 244 (1998) (a reimbursement order without a

hearing is voidable, not void). Ignoring forfeiture for the moment, longstanding precedent provides that the remedy on review for a court's failure to conduct a hearing prior to the imposition of the public defender reimbursement fee is an order remanding the matter to the trial court. See *People v. Love*, 177 Ill. 2d 550 (1997); *People v. Brown*, 2012 IL App (2d) 110640.

¶ 76 It is also interesting to me that defendant does not complain on appeal that the $100 assessment at issue was imposed without notice or a hearing, excessive, unfounded, or impossible for him to pay. Had defendant raised any one of these issues in the trial court, the mandated inquiry by the court could have taken place within 90 days of judgment and the court's omission could have easily been corrected. 725 ILCS 5/113-3.1(a) (West 2010). The State's failure to recognize the application of forfeiture serves to encourage similar inaction by future defendants, who may stand silent for 90 days beyond the date of final judgment, and then claim that a remand for a reimbursement hearing would never be warranted since the required hearing could not occur within the time restrictions set out by statute.

¶ 77 In a recent decision, our supreme court seemed to recognize a defendant can forfeit an issue related to the timing of a reimbursement hearing on remand after review. See *People v. Somers*, 2013 IL 114054, ¶ 10. In *Somers*, the State waived forfeiture to allow the supreme court to address the issue on review which had not been raised before the appellate court. In this case, as stated above, the State's concession does not address, or include a waiver of the application of forfeiture. Thus, having concluded the failure to conduct a hearing results in a voidable directive to pay, I strongly believe defendant is unable to overcome the unavoidable hurdle of forfeiture which the State elects to ignore, rather than waive, as part of their concession of error.

¶ 78 I agree with the majority's view that remand for a reimbursement hearing is not in order,

but differ with the majority's conclusion that remand is unnecessary because the State has not requested we do so. In my view, remand is not appropriate because the public defender reimbursement fee should stand based on the principles of forfeiture.

¶ 79 Finally, I write separately because I do not share the majority's observation that "the whole point of a criminal prosecution is to prejudice the defendant." In my view, "the whole point" of a criminal prosecution is to preserve the presumption of innocence and hold the State to its significant burden of proof.

¶ 80 For these reasons, set forth above, I concur in part, and dissent in part.