2015 IL App (3d) 120147-U

Order filed June 3, 2014
Modified Upon Denial of Rehearing April 8, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0147
v.	)	Circuit No. 10-CF-460
	)	
EDJUAN PAYNE,	)	Honorable Stephen Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Carter concurred in part and dissented in part.
Presiding Justice McDade specially concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The matter is remanded for a retrospective fitness hearing because the trial court's finding of fitness based on a stipulation was ambiguous since it did not indicate whether the court accepted the stipulation to the psychiatrist's testimony or the psychiatrist's ultimate conclusion. The court did not err when it determined defendant did not raise a *bona fide* doubt as to his fitness to stand trial or by admitting testimony of the results of the victim's CT scan. Although the prosecutor made an improper remark during closing argument suggesting defendant engaged in postmortem anal intercourse with the victim, defendant forfeited review of this issue pursuant to plain error because the evidence was not closely balanced.

¶ 2 A jury convicted defendant Edjuan Payne of two counts of first-degree murder, attempted first-degree murder and aggravated battery of a child, and the trial court imposed a sentence of natural life for first-degree murder and a consecutive 60-year sentence for attempted murder. On appeal, defendant contends the trial court erred when it accepted the parties' stipulation that defendant had been restored to fitness and should have *sua sponte* ordered a subsequent fitness examination before trial. Defendant also argues the State's evidence included improper hearsay and the prosecutor's closing argument was improper. The trial court's order finding defendant fit to stand trial is vacated and the matter is remanded for a retrospective fitness hearing.

¶ 3 I. BACKGROUND

¶ 4 On May 25, 2010, the State indicted defendant for two counts of first-degree murder, alleging he struck, cut and choked Orvette Davis, thereby causing her death. 720 ILCS 5/9-1(a)(1), (2) (West 2010). With respect to the serious injuries to A.G., Davis's infant granddaughter, the State charged defendant with one count of attempted first-degree murder and one count of aggravated battery of a child, alleging he struck A.G. in the head and caused a skull fracture. 720 ILCS 5/8-4(a), 12-4.3(a) (West 2010).

¶ 5 A. Defendant's Conduct Leading to Finding of Unfitness

¶ 6 Defendant appeared with defense counsel at a scheduling conference on July 23, 2010. Defense counsel advised the trial judge that defendant's "capacity for coherent thought right now is a bit limited" and defendant did not understand the nature of the charges, the range of penalties, the function of his attorney, or the role of the state's attorney or the judge. Defense counsel reported defendant exhibited "some extremely bizarre behavior" during his interactions with the police. Defense counsel further stated defendant had three prescriptions for medications "for a condition which is unclear at this point." Counsel also noted defendant was unkempt and

did not appear to be taking care of his personal hygiene. Consequently, defense counsel requested a continuance for fitness and sanity evaluations. The court entered a written order allowing defendant's request for a continuance to August 27, 2010, for the purpose of obtaining a fitness and sanity examination to be performed by Dr. Ryan Finkenbine.

¶ 7 Defendant refused to come to court, but appeared by video on August 27, 2010. At that hearing, defense counsel indicated the parties would stipulate that if Dr. Finkenbine were called as a witness, he would testify he diagnosed defendant with a single psychiatric mood disorder and concluded defendant was not fit to stand trial at that time, but believed defendant could be restored to fitness within the next 12 months. The court found defendant unfit to stand trial but would attain fitness within one year with proper treatment.

¶ 8 Dr. Nageswararao Vallabhaneni filed a 90-day fitness evaluation with the court dated February 17, 2011. The February 17, 2011, fitness report indicated defendant "was basically coherent but he appeared evasive." Dr. Vallabhaneni opined defendant had "no AXIS I diagnosis either mood disorder or Bipolar disorder." The psychiatrist opined defendant's behavioral problems, defiance, and inability to get along with others indicated "typical Antisocial Personality Disorder." The psychiatrist further stated defendant performed well on the fitness test, and understood the charges, the consequences of trial and possible penalties, including prison time. Dr. Vallabhaneni opined defendant was capable of cooperating with defense counsel and assisting counsel in his defense and did not need "psychotropics because [defendant] ha[d] no serious mental illness." Dr. Vallabhaneni further opined defendant's "character pathology including substance dependence, Antisocial Personality Disorder are going to effect [*sic*] him to be defiant and not cooperate to avoid trial. [Defendant] is purposeful to prolong trial for his benefit."

¶ 9 Thereafter, on March 11, 2011, defendant appeared with counsel at a fitness restoration hearing. At that hearing, defense counsel indicated:

> "The parties have received a report from DHS [the Department of Human Services] dated February 17, 2011. In therapy, [defendant] has now attained fitness for trial. I believe the parties would stipulate to this report and stipulate that Dr. Vallabhaneni would testify consistent with that report. We would so stipulate as to a finding of fitness."

Defense counsel requested a continuance so that defendant could undergo an evaluation to determine his sanity at the time of the offense.

¶ 10 The prosecutor agreed "with the stipulation and the finding" and had "no objection to the continuance to get an evaluation." The court stated it would "make the finding based on the stipulation that the defendant is now fit to stand trial." The court ordered "further evaluation" of defendant and set the matter for a later hearing. The court entered a written order indicating the "parties stipulate to DHS report dated 2-17-11 finding [defendant] fit to stand trial." This order also stated defendant was "now fit to stand trial, [defendant] remanded to custody of PCSD; Dr. Finkenbine to evaluate [defendant] re: insanity at the time of the offense."

¶ 11 B. Defendant's Conduct After Finding of Fitness

¶ 12 The record indicates defendant attended court hearings with counsel on April 15 and 29, 2011, May 2 and 27, 2011, June 3, 2011, and August 19, 2011. At the May 27, 2011, hearing, defense counsel indicated after reviewing the evaluation and speaking with Dr. Finkenbine, defendant would not submit a defense of not guilty by reason of insanity. Also at the hearing, defense counsel informed the court defendant filed a complaint with the Attorney Registration and Disciplinary Commission against him. At the June 3, 2011, hearing, defendant indicated he

intended to file a lawsuit against the city of Peoria and desired to tender a "[n]otice of intent to sue" to the State. Defense counsel reviewed the documents defendant prepared and indicated defendant proposed a lawsuit under section 1983 and also alleged ineffective assistance of counsel. In this pleading, defendant alleged he had been held in a room without water for two weeks, had to drink his own urine, and had been "tazed" more than five times. The court read defendant's pleading, and specifically referenced defendant's allegation he was held without water and forced to drink his own urine. The court stated "that's a pretty bizarre –" and indicated it would have the state's attorney "be in a position to represent to the Court that that didn't happen[.]"

¶ 13 Defendant refused to attend court hearings on September 23, 28 and 30, 2011. At the September 23, 2011, hearing, the court stated defendant indicated "there would be quote 'war' end of quote if [police] forced him to have video conferencing or come to court." At the September 30, 2011 hearing, defense counsel represented he visited the jail and had contact with defendant for approximately 30 minutes. Defense counsel pled with defendant to come to court and began reviewing discovery with defendant when defendant left the meeting without explaining why he did not want to attend court. Defense counsel stated defendant acted erratically in the past, but he initially believed he was "making some headway" with defendant.

¶ 14 Defendant attended a court hearing on October 3, 2011, but refused to speak. The court admonished defendant that if he did not appear in court, the cause would proceed to trial and, if necessary, sentencing, in his absence.

¶ 15 The record indicates police transported defendant to the courthouse for a final pretrial hearing on October 28, 2011, but he refused to come out of the holding cell. Defense counsel stated that defendant removed his spit mask and caused a disturbance in the holding cell,

requiring the police to subdue defendant with pepper spray. The court stated it would not require police officers and the jail staff to force defendant's presence at his trial if defendant indicated he did not want to attend.

¶ 16 Defendant's trial occurred from November 7 to 9, 2011, and the record indicates defendant was present for trial during these days. Prior to jury selection on November 7, defense counsel informed the court defendant was in the holding cell at the courthouse, but he could not ascertain whether defendant wanted to be present for trial. When the court asked defendant if he wanted to attend his trial on that date, defendant stated that he was "forced" to come. Defendant explained that on a prior occasion, the police forced him to come to court, shackled his arms and legs, and he was "electrocuted with tazers" and "maced." Defendant also stated that police had come into his cell and shackled and "taze[d]" him, withheld food and water and also "cut[] off all manner of communications to the outside." Defendant complained he had not received a ruling on his civil rights complaint. Defendant indicated that if he had to go to trial without a ruling on his discrimination claim, the case would "go through the appeal process and have to come right back to [the trial court]."

¶ 17 The court continued by explaining defendant's civil action was separate from the instant proceedings, which were criminal in nature, to which defendant replied "[t]he victim is not a victim" and he was "just finding out, man, that the child was [his] daughter." Defendant explained that "through recollection" he realized the child was his daughter and his "baby mama was in the County [jail]." Defendant commented that the instant trial was a "mockery" and that, while the court allowed him to speak, "but in talking, just like the voice, you know what I'm saying, of God giving man breath." Defendant continued, stating he had been trying to make telephone calls to "two character witnesses" on his behalf. Defendant explained, "[o]ne is the

President of the United States, man, Obama. I know him personal. He can, man vouch for me. I got Carol Mosely-Braun is another, man, character witness that knows me personally[,]" and defendant explained Mosely-Braun was a former senator. Defendant continued, "And my baby mama and another female by the – I forgot her name, but the daughter of, you know what I'm saying, that they saying is the victim of this, of some brutal crime is my daughter."

¶ 18 The court indicated defendant's trial was set to begin shortly and the court did not believe the President would be attending. The court stated that if defendant had brought up the general issue of obtaining assistance with telephone calls, it may have been able to help him. The court further told defendant it was "counting on [him] to be respectful and so far [he] ha[d] been."

¶ 19 After a recess, a deputy indicated defendant was wearing a "react belt on his calf." Defense counsel stated he was unsure if the device was necessary as defendant had "been fairly mild-mannered" that day as well as "communicative" and "cooperative." The court stated that due to past security concerns with defendant, the belt would remain in place.

¶ 20 Defense counsel then stated he had a "concern about [his] client's continued fitness." After a discussion about the charges defendant faced, defendant stated:

> "Yeah, the names of the victim have a similarity to do with, um, rest in peace, a relative by the name of Evette Street, auntee of the defendant, man, or the petitioner, however you want to put it in this case, 2, 4, 6, 10-CF-460.
>
> And the daughter, I mean, well, the infant victim, um, first name is [A.G.], by relations the name was given because the father likely have [*sic*] been a female artist by the name of [A]. The last name is not known of the infant or the mother because of just promiscuousness going on."

¶ 21 At that point, defense counsel stated defendant's remarks about President Obama, Carol Mosely-Braun, his daughter A.G., in addition to defendant's speech, behavior, and mannerisms caused defense counsel to once again question defendant's continued fitness. Counsel further stated that, in conversing with defendant many times, counsel did not have the opportunity to address the specific evidence the State intended to bring against defendant. Defense counsel also noted defendant's previous finding of unfitness.

¶ 22 The State responded that the report indicating defendant was fit to stand trial stated defendant was defiant and would attempt to prolong trial. The State further noted that defendant spoke of his civil rights action, witnesses he wanted to call, and there was no evidence that defendant did not understand the charges, but defendant was choosing not to be cooperative with defense counsel. The court denied defense counsel's motion to examine defendant's continued fitness to stand trial.

¶ 23 C. Trial Testimony

¶ 24 After jury selection, the cause proceeded to trial. Katrina G., Davis's daughter, testified Davis, who was from Chicago, was visiting Katrina G. and her siblings, Terrell G., and Latina G., in Peoria during the week preceding her death. Around 3 p.m. on May 12, 2010, all of Davis's children left the house to go to work in Mossville. They left Terrell's daughter, A.G., in Davis's care and also left Katrina's cellular phone with Davis. Davis's children could not reach Davis through Katrina's cellular phone throughout the afternoon. When they arrived home from work, neither Davis nor A.G. were at the apartment, prompting them to call police. An officer accompanied them to the home of Cecelia Payne, "CeeCee," a friend of Davis's and defendant's mother. They knocked on the door to CeeCee's apartment at 1401 NE Monroe Street, but no one answered.

¶ 25 Peoria police detective Javier Grow testified he discovered an abandoned red Oldsmobile or Chevrolet Achieva near Perry and Lavelle Streets in Peoria around 7 a.m. on May 13, 2010. The driver's side door was open, the passenger side window was down, and the vehicle was damaged. Unable to locate the vehicle's registered owner, Grow had the car towed. While on the scene, Grow received a report of a female and infant down in a nearby alley. After Grow approached these individuals, he discovered the adult female was cold and stiff with a cut on her head and blood coming from her mouth. It had been raining that night, and the infant was lying on her back in a puddle near the woman's feet. The infant blinked, so Grow retrieved a blanket from his trunk, picked up and wrapped the baby, and called for an ambulance.

¶ 26 DeMarco Williams, Terrell's friend, testified he drove Terrell and his girlfriend to the area of Monroe Street in his white Chevrolet Monte Carlo. When they arrived, Terrell, who was sitting in the front seat, yelled when he saw police cars at the scene, causing Williams to hit the curb and bust his tire. Terrell and his girlfriend then exited the car and ran toward the scene. As Williams sat alone in his car, defendant approached and requested to use Williams' cellular phone. Williams told defendant to wait, but defendant "started cussing [him] out" and then stabbed Williams' window and the two tires on the driver's side of the car with an unidentified object. Williams began honking his horn to attract the attention of the police.

¶ 27 Peoria police officer Doug Burgess testified that, as he pulled up to the scene, he observed defendant "reach[] into his pocket and he pulled something out and started to stab the back tires of the vehicle." Burgess "couldn't see that [defendant] had anything in his hand" but he saw defendant make a "stabbing motion." At that point, defendant, who was wearing a black jacket, began slowly walking toward a house, so Burgess ordered him to lie on the ground. Peoria police officer Brian Skaggs testified he then handcuffed and searched defendant. During

the search, Skaggs found a hammer in defendant's waistband, a knife, and a knife handle without a blade, inside defendant's pockets. Skaggs located a bent knife blade near the Monte Carlo that appeared to match the handle found in defendant's pocket.

¶ 28 Darryl Deese testified he dated defendant's mother and lived with her and defendant at 1401 NE Monroe Street. On May 11, 2010, while Davis visited their apartment, defendant asked Davis if she needed some baby clothes. Davis stated she may stop back to see the clothes. Deese left the apartment and did not return until after police discovered Davis's body in the alley. A few days later, Deese telephoned the police and turned over an extension cord he found in the apartment. He also turned over some unused medications belonging to defendant. Peoria police officer Eric Ellis testified he went to the apartment to retrieve the extension cord, and noticed there was "apparent blood staining on the exterior of the cord."

¶ 29 Peoria police officer Scott Bowers testified he discovered a jacket, two diaper bags, and tire tracks in the alley behind Monroe Street where police discovered Davis's body. Bowers noticed Davis's shoes were loose on her feet and not tied well, her belt was twisted, her pants were loose around her waist, her shirt was torn, and her underwear was on, but around her thighs. Davis had a bloody cellular phone in her back pocket. Bowers observed Davis had a ligature mark around her neck, bruises on her forehead, both eyes and cheeks, and cuts on her fingers. Bowers attended Davis's autopsy, and took possession of a sexual assault kit performed during the autopsy containing Davis's fingernail clippings, a blood standard, and vaginal and anal swabs.

¶ 30 Later at the police station, Bowers took the buccal swab of defendant, and he noticed defendant had cuts to his hand, cheek and the bridge of his nose, and an abrasion on the backside of his right shoulder. He also took possession of defendant's black, zip-up jacket. Bowers

subsequently searched the red Oldsmobile Grow located in the alley near the scene of the offense while it was at the police station. Bowers saw what he believed to be blood on the steering wheel and using a spray, Bowers detected presumptive blood on a grey mat in the trunk. Bowers preserved the mat and a sample of the blood from the steering wheel for analysis. Bowers took this evidence, as well as a sample of blood recovered from the kitchen table at the apartment at 1401 NE Monroe, for analysis.

¶ 31 Peoria police officer Paul Tuttle testified he searched inside the lower apartment at 1401 NE Monroe Street. He discovered blood stains on the door frame and a child's headband with a red stain on it lying at the bottom of the door. He also observed red stains he believed to be blood on the end of the mattress of a pull-out sofa, on a stereo cabinet, and on the walls. In the bathroom, he saw a wet mop in the tub and a small pink ornamental baby carriage in the sink that had suspected blood on the bottom of it. Tuttle noted the carpet by the pull-out sofa was wet.

¶ 32 Tuttle used a spray in the apartment to attempt to discover blood invisible to the naked eye, which fluoresces blue if blood is detected. Tuttle noted the kitchen floor, a portion of the hallway from the front room to the kitchen, a bucket, the floor of a back bedroom, the sink, pipes, and floor in the bathroom, and the carpeting at the foot of the pull-out bed each fluoresced when he used the spray in those areas. Tuttle acknowledged this spray indicated a presumptive test for blood, but a scientist would have to determine whether blood was actually present. Tuttle found a roll of clear packing tape in the kitchen and noted the cardboard core of the tape had a possible blood stain on it. Tuttle also noticed possible blood on one of the legs of the kitchen table, so he took a sample of the suspected blood for further testing. Tuttle discovered socks with possible blood stains, keys, a baby headband, clear tape, and a shower curtain in a garbage can behind the home.

¶ 33 Dr. Mary Baker testified she examined A.G. after she was brought to the emergency room on the morning of May 13, 2010. A.G. had a body temperature of 90 degrees, so medical personnel placed her in an infant warmer to attempt to bring her body temperature up. Dr. Baker noticed signs of trauma, including a bruised lip and multiple areas of soft tissue swelling on the right and back side of A.G.'s head. She also noticed "grass and debris" in A.G.'s mouth. Dr. Baker ordered a CT scan to evaluate A.G.'s head injuries, during which time A.G. was still under Dr. Baker's care. The prosecutor asked Dr. Baker if she received the results of the CT scan "in order to determine what care to provide [A.G.?]" Dr. Baker responded that once she received the results, she "made several phone calls to specialists to further evaluation [*sic*] and treat the child. In response to a question from the prosecutor requesting the results of the CT scan, Dr. Baker testified A.G.:

> "had multiple skull fractures. She also had signs of bleeding within the brain. There was bleeding outside the brain in addition to bleeding within the brain and then a questionable subdural hematoma, which is a collection of blood just under the skull."

Dr. Baker further explained A.G. had "potential swelling with midline shift[,]" which meant one-half of A.G.'s brain swelled and shifted itself into the other side of her brain. Dr. Baker described the injuries as life-threatening.

¶ 34 Dr. Scott Denton performed Davis's autopsy. He documented a ligature strangulation mark on her neck, swelling in her brain, and a fractured hyoid bone indicating pressure on her neck. There was internal bleeding to the left and center of Davis's neck, which were further signs of trauma or strangulation. Dr. Denton opined Davis died from strangulation due to an assault. In addition, the autopsy revealed three stab wounds to Davis's back left side of her head,

two black eyes, contusions on her upper lip and the inside of her lip, and scrapes on her lower lip. She had internal bruising beneath her scalp which Dr. Denton concluded was due to blunt trauma to both sides of her head. Overall, Dr. Denton noted 21 injuries to Davis's head, including both blunt and sharp trauma.

¶ 35 Dr. Denton also noted nine injuries to Davis's chest, abdomen, and back, including six fractured or broken ribs, a tear in the membrane that kept the ribs together, and a bruised lung. Dr. Denton opined it would take "a severe amount of force" to break one rib in particular since it was floating, and that doing so would require "much more force than the arm is capable of." Davis also had scrapes and abrasions on her back. She suffered 22 additional blunt trauma and fracture injuries to her hips and legs, including a bruise over one-foot long on her lower right leg, which was also fractured. Davis had bruising on her arms and hands, some of which indicated defensive wounds. Dr. Denton testified he collected a blood standard and "a sexual assault kit" from Davis, including "rectal swabs and smear." Dr. Denton placed these swabs and the blood standard into their own sealed envelopes, and then into a box and gave it to the police evidence technician who attended the autopsy.

¶ 36 Kevin Zeeb, a forensic scientist, testified he tested various items of evidence for blood or semen, including the rectal and vaginal swabs taken during Davis's autopsy. He found semen on the rectal swabs and a trace amount of semen on the vaginal swab. He preserved the rectal swab for further DNA analysis. He also screened defendant's black jacket, the grey mat from the Oldsmobile, the swabs of presumptive blood from the steering wheel, and the leg of the kitchen table for the presence of blood. He found a small blood stain on the left cuff of the jacket, and also discovered blood on the mat, the steering wheel, and the table leg. Zeeb preserved the samples from the jacket, the steering wheel, and the table leg for DNA analysis.

¶ 37 Jennifer Macritchie, a forensic scientist, testified she performed DNA analysis on, among other things, the rectal swab taken from Davis. She explained she first determined the DNA profiles of defendant and Davis. She concluded the anal swab taken during Davis's autopsy revealed defendant could not be excluded as the contributor and his DNA was consistent with the DNA on the swab. Macritchie explained the male DNA profile found on Davis's rectal swab occurred in one and 14 trillion African-American males, one in 13 quadrillion Hispanic males and one in 6.2 quadrillion Caucasian individuals. Macritchie also performed DNA analysis on the blood found on defendant's jacket and leg of the kitchen table, and concluded both samples matched the DNA profile of Davis. Macritchie's DNA analysis of the blood discovered on the steering wheel revealed it matched defendant's DNA profile.

¶ 38 D. Content of DVD Recordings

¶ 39 Peoria police detective Timothy Moore testified he and detective Garner interviewed defendant on two occasions on May 13, 2010. The DVD recordings of these interviews were admitted into evidence at trial and are included in the record on appeal. During the initial interview, defendant told the officers he drove a red car and during the early morning hours of May 13, he saw his stepfather and the police looking into his car, but he did not go outside to ascertain why they were doing so.

¶ 40 At the outset of this interview, defendant denied any involvement in Davis's death. Defendant explained to the detectives he spent the preceding night at a bar in downtown Peoria. Defendant acknowledged he had met Davis on one occasion, about two and a half weeks before her death. Davis was looking for defendant's mother. However, defendant's mother was in jail, so Davis spent time with defendant and Darryl Deese. Defendant did not know who cleaned the blood from his apartment.

¶ 41 Defendant then explained he and Davis got into a physical altercation because defendant heard Davis was having a relationship with Darryl while his mother was in jail. At some point during the fight, however, the two engaged in consensual vaginal intercourse. Defendant denied having sex with Davis after her death. Defendant contended Davis hit him with a statue from the mantel, and he punched her and pulled on the strings of her hoodie until she passed out. Defendant stated he cut Davis with a razor blade, which he threw in the alley. Defendant then put Davis's body in a shower curtain, carried her out the back door and laid her in the grass. When he was running with A.G., she fell out of his arms, and he set the baby next to Davis's body. Defendant acknowledged he saw the police knocking on his door, but he did not answer. During this interview, defendant stated the situation was "crazy," he realized he shouldn't say anything, and that he heard screaming. Defendant and the detectives took a break after about an hour and a half.

¶ 42 After the break, the police conducted a second interview. They confronted defendant with evidence of Davis and A.G.'s substantial injuries, and defendant stated he wanted to return to his original statement denying his involvement in Davis's death. Defendant stated he did not rape Davis and did not touch the baby. Defendant blamed the offenses on guys with whom defendant was at "war." After the police left the interview room, apparently speaking to himself, defendant stated "[he] did," but then, after the officers returned, defendant stated his "pops" did it.

¶ 43 After the State rested, defendant moved for a directed verdict, which the trial court denied. Defendant did not testify on his own behalf or otherwise present evidence. When the court asked for defendant's decision as to whether he would testify, defendant indicated he

would rely on "the prior testimony in the interrogation." In response to the court's questions, defendant indicated he chose not to testify and he understood the decision was his alone to make.

¶ 44 E. Defendant's Behavior During Trial

¶ 45 The trial court permitted defendant to speak at various breaks in the trial outside the presence of the jury. Defendant made some statements pertaining to the trial, including that he "object[ed] to a lot of the statements and evidence that was presented based on leading and *** the way the evidence was obtained and introduced from the different hands and things like that" and "the officer's statement being taken as face value." The court explained to defendant he would have an opportunity to put on evidence and, if he so chose, to testify. At a later time, defendant also stated his attorney "made some nice attempts on the objections, the way certain questions and evidence was admitted into evidence[,]" but defendant wanted the record to reflect he "disagree[d] with a lot of the way the evidence and things like there [were] handled." At another point, defendant informed the court that it may be surprised, but there was

> "such thing as ESP. That's – I guess that's extrasensory perception. It's a well-known documented cases in the scientific world but it haven't been proven because of an, I guess, man, circumstances but it's been – it's been documented but it just haven't been I guess prevalent. And it's been called to my attention that it exists."

¶ 46 Defendant later stated he had a question about the stenographer's machine, but then stated, "[n]onintegrated jury selection and many Caucasians called as witnesses. Three African-Americans called as such, reason unstipulated." Defendant further stated, "[p]hone call made by cell phone at approximate time 5:00 a.m. to 9-1-1 dated 5-10-10. Call directed to Sheriff's Department ***. Call made. Drive-by, which the police car made a drive-by at 7 a.m."

Defendant continued by stating, "Counsel refused to a bench trial. Refused to relinquish copies of discovery, VIA unknown. Judge ruling. A copycat, mimic, malign, comment, intent." Defendant further alleged various correction officers were "not given notification."

¶ 47 After the jury instruction conference, defendant stated:

> "I call this the indirect communications racial discriminatory in the form of a witness contract and defendant proof of approved by counsel. No formal questions in their favor. Favorable witnesses would preside during my trial in present issue of criminality, effects of constituencies alignment in a conscience of malfeasance, conscious choice before this 7th circuit, 222, basis female African-American and children lost in the state injury detachment, damage, physical and mental hardship, actual and present perpetuation, indirect communication and is interpretation, now made by a federal officer by swearing in by Senator Barrack Obama, now chief and commanding officer, initiative domestic terrorism."

The State requested the court to strike this comment from the record. The court declined, but indicated it was irrelevant.

¶ 48 F. Closing Argument

¶ 49 During the State's closing argument, the prosecutor asserted, among other things, defendant's statements to police about the events that occurred on the night of Davis's death were not credible. Regarding defendant's claim he and Davis engaged in consensual vaginal intercourse, the prosecutor stated,

> "with injuries like that, do you think [the intercourse] was consensual? With her clothes put back on her? Remember the belt is twisted. Nobody

> does that. I don't know if [defendant] had sex with [Davis] before he killed her and that was the reason he killed her because she didn't want it. Or after. I don't care. We don't have to prove that. But the point is, we know [defendant] wasn't completely truthful in his statement because what's he say? Oh, we had vaginal sex. And, yeah, there was semen in the vaginal swab too if you recall what Kevin Zeeb said. But it was the anal swab that we then link to the DNA testing on [defendant] and he never said anything about that."

¶ 50 The prosecutor further argued to the jury that the evidence presented was sufficient to satisfy each element of the offenses for which defendant was charged. Regarding first-degree murder, the prosecutor noted the State was required to prove defendant performed the acts that caused Davis's death. The prosecutor asserted Davis's blood was on defendant's jacket "[a]nd, by the way, [defendant was] found with two knives and a hammer. Hum, maybe that's somebody who would have done all of these injuries and done all this stuff. Wouldn't that make sense?" The prosecutor concluded this portion of her closing argument asserting the State had met each element of all of the offenses charged and her closing argument as a whole by stating, "that apartment was a blood bath. The screaming that had to have been going on as [defendant] was doing those acts, I hope he hears in his head for the rest of his life."

¶ 51 During closing argument, defense counsel asserted defendant's statement to police admitting he committed the offenses was unreliable because he almost immediately recanted it and there was insufficient evidence to support defendant's guilt beyond a reasonable doubt.

¶ 52 The jury found defendant guilty of both counts of first-degree murder, attempted first degree murder, and aggravated battery of a child. Thereafter, defense counsel filed a motion for

a new trial. The court conducted a hearing on that motion and for sentencing on January 13, 2012, and defendant refused to attend. The court denied the motion for a new trial and the cause proceeded to sentencing. In mitigation, defense counsel contended defendant had a history of mental illness and he exhibited bizarre behavior at trial. The court sentenced defendant *in absentia* to a term of natural life for the first-degree murder conviction and a consecutive 60-year term of imprisonment for attempted murder. Defendant filed a motion to reconsider sentence, which the trial court denied. Defendant appeals.

¶ 53 G. Appellate Proceedings

¶ 54 On June 3, 2014, this court issued an order holding the circuit court did not err when it did not order another fitness examination, no error occurred with regard to the admission of Dr. Baker's testimony into evidence, and no error arose from the prosecutor's comments during closing argument. In addition, a divided court remanded the matter for a retrospective fitness hearing due to an ambiguity in the record concerning the nature of the court's treatment of the stipulation of the parties concerning the expert's fitness report. Defendant filed a petition to reconsider the court's ruling on June 17, 2014. This petition challenged our decision to order a retrospective fitness hearing on the grounds that more than three years had passed since the date of the original restoration hearing on March 11, 2011. The members of this panel requested and considered the State's response and defendant's reply to the petition for rehearing.

¶ 55 After careful consideration, one member of the original majority was persuaded by the petition for rehearing and now respectfully concludes a retrospective fitness hearing would not be appropriate. However, the other member of the original majority maintains the case law requires a retrospective hearing as the appropriate way to remedy an inadequate fitness hearing in the trial court. The third panel member and the author now agree a retrospective fitness

hearing is the appropriate remedy for an inadequate fitness restoration hearing. Therefore, this court denies the petition for rehearing, but modifies the original order in addition to incorporating a dissent.

¶ 56 ANALYSIS

¶ 57 I. Fitness to Stand Trial

¶ 58 On appeal, defendant first contends the trial court did not conduct an adequate fitness restoration hearing because it failed to make an independent determination of defendant's fitness to stand trial. Defendant acknowledges this issue is subject to plain error review since he did not properly preserve it at trial, and asserts the seriousness of the error warrants review under the second prong of the plain error test. The State contends the court did not abuse its discretion at the fitness restoration hearing because it accepted a stipulation to Dr. Villabhaneni's report and findings. Thus, according to the State, the court neither erred nor committed plain error.

¶ 59 To properly preserve an alleged error for appellate review, a defendant must offer a contemporaneous objection at trial and include the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). If a defendant does not take both steps, review of the issue is subject to forfeiture and the defense must establish plain error to obtain relief. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). A court can review a forfeited claim when (1) an error occurred and the evidence is so closely balanced, regardless of the seriousness of the error, or (2) the error is so serious it affected the fairness of defendant's trial, regardless of the strength of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). However, the first step in plain error analysis requires us to determine whether the court's ruling qualifies as error at all. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 60 When a defendant has previously been found unfit, a finding of restored fitness must be based not only upon a stipulation to the conclusion of psychiatric reports, but upon an affirmative exercise of the court's discretion to determine defendant's mental state. *People v. Esang*, 396 Ill. App. 3d 833, 839 (2009). The trial court must analyze and evaluate the basis for the expert's opinion whether a defendant is fit for trial, and it may not merely rely on the expert's ultimate conclusion. *Esang*, 396 Ill. App. 3d at 839. A trial court's determination a defendant is restored to fitness may not be based solely on the existence of the treating psychiatrist's findings or conclusions. *People v. Contorno*, 322 Ill. App. 3d 177, 179 (2001).

¶ 61 The distinction between a stipulation to a treating psychiatrist's findings or conclusions and a stipulation the treating psychiatrist would testify that, in his or her opinion, defendant is fit for trial, is a "fine one." *People v. Robinson*, 221 Ill. App. 3d 1045, 1050 (1991). However, it is one that has been drawn by our supreme court and must be properly made when reviewing a trial court's exercise of discretion when finding a defendant has been restored to fitness. *Robinson*, 221 Ill. App. 3d at 1050. A reviewing court will not reverse a trial court's determination a defendant is fit to stand trial absent an abuse of discretion. *Contorno*, 322 Ill. App. 3d at 179.

¶ 62 In this case, defense counsel, made a two-sentence stipulation to the court, indicating the parties would stipulate "to this [fitness] report and stipulate that Dr. Vallabhaneni would testify consistent with that report. We would so stipulate as to a finding of fitness." The record shows the court made "the finding based on the stipulation that the defendant [was] now fit to stand trial." Based on this statement, it is unclear to the author whether the trial court found defendant fit to stand trial based on the parties' stipulation to the psychiatrist's report, the psychiatrist's finding of fitness, or both. Justice Carter's view is supported if the trial court relied only on the first portion of the stipulation, specifically, the psychiatrist "would testify consistent with [his]

report." Based on this construction, Justice Carter concludes the finding of fitness was proper. On the other hand, Justice McDade's view is supported if the trial court relied only on the second portion of defense counsel's stipulation, specifically, "we would so stipulate as to a finding of fitness." Based on this construction, Justice McDade concludes the finding of fitness was improper and requires a new trial. Since the basis for the trial court's finding based on stipulation is capable of at least two logical constructions as set forth above, the author believes the trial court's finding of fitness is ambiguous, but not necessarily erroneous.

¶ 63 A trial court's failure to independently analyze and weigh expert testimony in making a fitness finding is a constitutional error, properly considered under the plain error doctrine and reversible unless it can be proved harmless beyond a reasonable doubt. *Esang*, 396 Ill. App. 3d at 840; *Contorno*, 322 Ill. App. 3d at 180. Although the State urges this court to conclude any error was harmless because the content of the stipulated report demonstrated defendant was fit to stand trial, the author are unable to say, beyond a reasonable doubt, the error was not harmless to this defendant. Therefore, the author cannot conclude the trial court's error in finding defendant fit based solely on the stipulation, constituted harmless error. See *Esang*, 396 Ill. App. 3d at 840; *Contorno*, 322 Ill. App. 3d at 180.

¶ 64 Having concluded the trial court's ruling resulted in a potentially deficient fitness restoration hearing in this case, the author now considers the appropriate remedy. Before 1997, the remedy ordinarily would have been to vacate defendant's conviction and sentence and grant him a new trial. *People v. Hill*, 297 Ill. App. 3d 500, 514 (1998). However, the practice of conducting retrospective fitness hearing was recognized in *People v. Neal*, 179 Ill. 2d 541 (1997), our supreme court cautioned that a retrospective fitness hearing would normally be inadequate to protect defendant's rights when it had been more than one year since defendant's

original trial and sentencing. *Neal*, 179 Ill. 2d at 554. However, the *Neal* court noted that, in certain cases, circumstances may suggest that the issue of defendant's fitness or lack of fitness at the time of trial may be fairly and accurately determined long after the fact. *Neal*, 179 Ill. 2d at 554. Importantly, after our supreme court's decision in *Neal*, our supreme court stated that "it appears that retrospective fitness hearings are now the norm. What was constitutionally forbidden three years ago is now compelled." *People v. Mitchell*, 189 Ill. 2d 312, 339 (2000).

¶ 65 In this case, the author and Justice Carter both agree that in this case defendant's fitness to stand trial can be "fairly and accurately determined" upon remand for a retrospective fitness hearing. On remand for the retrospective fitness hearing, the trial court should consider the contents of the psychiatrist's 2011 report regarding defendant's fitness as well as the transcript of the hearings occurring between the trial court's initial finding of unfitness and the March 2011 fitness restoration hearing, when determining whether the previous finding of defendant's unfitness had been cured. Consequently, the matter is remanded the cause for a retrospective hearing on the issue of defendant's fitness to stand trial.

¶ 66 II. *Bona Fide* Doubt of Fitness

¶ 67 Defendant next contends the trial court abused its discretion when it did not order a second fitness examination after defense counsel told the court he had concerns about defendant's fitness to stand trial and due to the court's observations of defendant's unusual behavior during the course of trial. On appeal, defendant contends his irrational behavior before and during trial and his previous finding of unfitness warranted a *sua sponte* order by the court for a second fitness examination of defendant. The State responds the trial court acted within its discretion when it determined no *bona fide* doubt concerning defendant's fitness to stand trial existed.

¶ 68 In Illinois, a defendant is presumed fit to stand trial and is only considered unfit when his mental or physical condition prevents him from understanding the nature and purpose of the proceedings against him or assisting in his own defense. *People v. Hill*, 345 Ill. App. 3d 620, 625 (2003); 725 ILCS 5/104-10 (West 2010). When a *bona fide* doubt of defendant's fitness exists, the court must order a fitness hearing to resolve the question of fitness before the case proceeds any further. *Hill*, 345 Ill. App. 3d at 625; 725 ILCS 5/104-11 (West 2010). Whether a *bona fide* doubt as to defendant's fitness arose is generally a matter within the discretion of the trial court and we will not reverse its decision absent an abuse of that discretion. *Hill*, 345 Ill. App. 3d at 625-26. Our supreme court has stated that, when determining whether a *bona fide* doubt of defendant's fitness exists, a trial court should consider certain factors, including, defendant's irrational behavior and demeanor during the proceedings, any previous medical opinion regarding defendant's fitness, and counsel's representations concerning his client's competence. *People v. Eddmonds*, 143 Ill. 2d 501, 518 (1991).

¶ 69 Our careful review of the record reveals the trial court did not have an obligation to *sua sponte* order another fitness examination of defendant in this case. Although defendant made strange comments and defense counsel raised concerns regarding defendant's lack of cooperation, the February 2011 fitness report included an opinion that defendant's antisocial personality disorder would manifest itself in similar defiant behavior, including "purposeful" behavior aimed at prolonging or postponing defendant's trial. We note that a defendant who is able to assist in his defense, but who is unwilling to cooperate with counsel, is fit. *People v. Easley*, 192 Ill. 2d 307, 320 (2000). In this case, the record reflects that prior to, and during, defendant's trial, defendant understood the nature and purpose of the proceedings against him and was able to cooperate in his defense. Under these circumstances, we conclude a *bona fide*

doubt concerning defendant's fitness did not arise and, therefore, the trial court did not err by failing to order an additional fitness examination of defendant.

¶ 70 III. Hearsay Testimony

¶ 71 Defendant next asserts the trial court abused its discretion when it admitted Dr. Baker's testimony of the results of A.G.'s CT scan without additional testimony from the radiologist who interpreted the CT scan. Specifically, defendant argues that, without this hearsay testimony, the State would not have been able to prove defendant intended to kill or cause great bodily harm to A.G. Defendant acknowledges he forfeited this issue on appeal because he neither objected to the testimony during trial nor included it in a posttrial motion, but argues this court can reach the error pursuant to either prong of the plain error doctrine. Before we reach the issue of plain error, we must determine whether any error occurred at all. *People v. Walker*, 392 Ill. App. 3d 277, 294 (2009).

¶ 72 It is well settled that an expert witness may base his or her opinion on facts, data, or opinions not introduced into evidence if those facts, data, or opinions are of the type reasonably relied upon by experts in the field to form opinions. *Wilson v. Clark*, 84 Ill. 2d 186, 192-96 (1981) (adopting Federal Rules of Evidence 703 and 705); Ill. Rs. Evid. 703, 705 (eff. Jan. 1, 2011) (stating in part that "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence"). In this case, Dr. Baker testified that in her ER treatment of the infant victim, she ordered a CT scan to evaluate the extent of the head injuries. She stated that a radiologist reads the CT scan results and reports those findings to the treating physician, which was what occurred with regard to the CT scan in this case. Based on the radiologist's report, Dr. Baker referred the infant victim to specialists for further treatment. Contrary to the defendant's protestations on

appeal, Dr. Baker's opinion in relation to the CT scan results was of the type contemplated by our supreme court in *Wilson* when it adopted the relevant Federal Rules of Evidence, as reflected today in Illinois Rules of Evidence 703 and 705. See *Wilson*, 84 Ill. 2d at 192-95 (discussing the rationale behind Federal Rules of Evidence 703 and 705, including the "high degree of reliability of hospital records"); Ill. Rs. Evid. 703, 705 (eff. Jan. 1, 2011).

¶ 73 The defendant's argument that the CT scan evidence was inadmissible hearsay is unpersuasive. The defendant cites cases for a proposition that "[t]he content of a report relied upon by an expert is inadmissible as hearsay *** if it is offered for the truth of the matter asserted." However, the radiologist's report was not substantive evidence in this case. See Michael H. Graham, Graham's Handbook of Illinois Evidence § 703.1 (10th ed. 2010) (explaining that facts, data, and opinions reasonably relied upon are not substantive evidence unless they are otherwise admitted in the case). For these reasons, I believe that no error occurred in the admission of Dr. Baker's testimony into evidence. Because no error occurred, the defendant's forfeiture of this issue must be honored. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 74 IV. Closing Argument

¶ 75 Defendant's final contention on appeal asserts certain comments made by the prosecutor during closing argument were so egregious they warrant a new trial. Defendant acknowledges he forfeited review of the prosecutor's statements during closing argument, but requests this court to consider the issue under the closely balanced prong of plain error analysis. However, before we may consider plain error, we must first determine whether any of the contested comments constitute error. *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 34.

¶ 76 We review *de novo* whether a prosecutor's statements during closing argument were so egregious they warrant a new trial. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). Even when the prosecutor makes an improper comment, the jury's verdict will not be disturbed unless the comment caused substantial prejudice to the defendant. *People v. Johnson*, 208 Ill. 2d 53, 115 (2003). A prosecutor is afforded wide latitude during closing argument and may argue fair and reasonable inferences drawn from the evidence presented at trial. *People v. Porter*, 372 Ill. App. 3d 973, 978 (2007). When we review the propriety of a comment made during closing argument, we must examine both parties' closing arguments in their entirety, placing the complained-of remarks in proper context. *Jackson*, 2012 IL App (1st) 092833, ¶ 42.

¶ 77 Here, defendant contends three separate comments made by the prosecutor were improper and require reversal for a new trial. We first address defendant's contention that the prosecutor's statement, "[t]he screaming that had to have been going on as [defendant] was doing those acts, I hope he hears in his head for the rest of his life[,]" constituted an improper attempt to inflame the passions of the jurors. The context in which this comment was made is important. The prosecutor was wrapping up her closing argument when she commented on the appalling nature of the injuries sustained by Davis and Gaston at the hands of the defendant. She then commented on the scene in the apartment itself, noting that it "was a blood bath" and creating an image of the screaming that must have occurred as the injuries were being inflicted. She closed with a comment that the jury should acknowledge that the defendant was a murderer by returning a guilty verdict.

¶ 78 Even if the prosecutor's comment regarding screams was erroneous, this comment does not require a reversal in this case. Erroneous comments made by a prosecutor in closing argument will not warrant a reversal unless they substantially prejudiced the defendant, which

occurs when the opposite verdict would have been reached had the comments not been made. *People v. Cisewski*, 118 Ill. 2d 163, 175 (1987); *People v. McCoy*, 378 Ill. App. 3d 954, 964-65 (2008). Given the defendant's shifting stories to the police and the strength of the circumstantial evidence linking the defendant to these crimes, we cannot say that the prosecutor's comment was a material factor in the jury arriving at their guilty verdicts. See *People v. Evans*, 209 Ill. 2d 194, 224 (2004) ("[t]he accused is denied a fair and impartial trial where the prejudice reveals a total breakdown in the integrity of the judicial process").

¶ 79 Next, defendant contends the prosecutor's comment concerning the fact that defendant had a hammer and two knives on his person at the time of his arrest and, therefore, defendant was "somebody who would have done all this stuff. Wouldn't that make sense[,]" constituted an improper attempt by the prosecutor to paint defendant as a bad person and someone with a propensity to commit crimes. However, the context in which this comment was made is important. The prosecutor made this comment while discussing the evidence in relation to the first element of first degree murder; namely, that the defendant caused the injuries sustained by Davis that led to her death. The evidence presented at trial included the circumstances surrounding the defendant's apprehension by police, at which time he was in the process of confronting Williams about using a cell phone. Williams alleged that the defendant pulled out a knife and stabbed at the window and the tires of Williams' car. A police officer also testified that he witnessed the defendant stab at the car's tires. The implication from the prosecutor's statement that the defendant was found with two knives and a hammer appears to have been aimed at painting a portrait of an armed, violent, and calculating individual. In this context, this comment was also within the reasonable bounds of closing argument.

¶ 80 Finally, defendant argues the prosecutor's comment stating defendant's intercourse with Davis may have occurred after her death was unsupported by the evidence and made solely for the purpose of inflaming the passions of the jurors. When the prosecutor made this comment, she was challenging the credibility of the defendant's statements to police, including his statement that the sex was consensual. Given the injuries Davis sustained, the disarray of her clothes, and the defendant's various accounts of the events of that day, this comment by the prosecutor was within the reasonable bounds afforded to prosecutors in closing argument.

¶ 81 CONCLUSION

¶ 82 For the foregoing reasons, the circuit court's order finding defendant fit to stand trial is vacated and remanded for a retrospective fitness hearing, and otherwise affirmed.

¶ 83 Affirmed in part, and vacated and remanded in part.

¶ 84 JUSTICE CARTER, concurring in part and dissenting in part:

¶ 85 I concur with the majority's ruling that the circuit court did not err when it did not order another fitness examination. I also concur with the majority's rulings that no error occurred with regard to the admission of Dr. Baker's testimony into evidence and with regard to the prosecutor's comments in closing argument. However, I respectfully dissent from the majority's ruling that the court abused its discretion when it found the defendant fit to stand trial at the March 11, 2011, fitness review hearing. Although I find the fitness hearing was adequate, as to the legal issue of the proper remedy for an inadequate fitness hearing I would find the proper remedy in this case to be a remand for a retrospective fitness hearing.

¶ 86 When a defendant has been found unfit to stand trial and has been ordered to undergo treatment, the circuit court must re-examine the issue of the defendant's fitness periodically. 725 ILCS 5/104-20(a) (West 2010). In addition, when the court receives a report from the individual

supervising the defendant's treatment, the court typically must set the case for a hearing to review the defendant's fitness to stand trial. 725 ILCS 5/104-20(a) (West 2010). At this fitness review hearing:

> "[If] the parties stipulate to what an expert would testify, the trial court may consider this stipulated testimony in reaching its determination of defendant's fitness. *People v. Lewis*, 103 Ill. 2d 111, 116 (1984). However, the defendant's fitness may not be determined solely on the parties' stipulation to the expert's *conclusions* that defendant is fit to stand trial." (Emphasis in original.) *People v. Taylor*, 409 Ill. App. 3d 881, 896 (2011).

The court must engage in its own analysis and cannot simply rely on the expert's opinion. *People v. Contorno*, 322 Ill. App. 3d 177, 179 (2001). We review a circuit court's decision on whether a defendant is fit to stand trial for an abuse of discretion. *Id.*

¶ 87 My review of the record in this case reveals no error in the circuit court's fitness determination of March 11, 2011. I believe that the parties were actually stipulating to the evaluating professional's report and that he would testify in accord with that report if called at the hearing. The defendant's focus on defense counsel's statement that "[w]e would so stipulate as to a finding of fitness" is misplaced. I believe that the "[w]e would so stipulate" portion of that statement refers to the stipulation to the report and the evaluating professional's testimony, and the "as to a finding of fitness" portion of that statement is more accurately read as with regard to or regarding a finding of fitness. Such an interpretation is supported by the fact that defense counsel went on to *ask* for a finding of fitness, and that the prosecutor stated she agreed with the stipulation and the finding.

¶ 88 It is true that the circuit court's oral ruling that "[t]he Court will make the finding based on the stipulation that the defendant is now fit to stand trial" is a somewhat ambiguous statement. However, there is no requirement in the statute or the case law that the court set forth all of its reasons or its analysis for its fitness determination. Because I believe that the stipulation in this case was to the evaluating professional's report and testimony, I respectfully disagree with the majority that the statement is fatally problematic. The key here, as has been stated in cases since *Lewis*, is that the stipulations in this case were to the evaluating professional's report and testimony. *Lewis*, 103 Ill. 2d at 116 ("[t]he stipulations were not to the fact of fitness, but to the opinion testimony which would have been given by the psychiatrists"); *People v. Thompson*, 158 Ill. App. 3d 860, 863 (1987) ("the distinguishing factor in these cases is whether the parties recite a detailed stipulation as to what the testimony of the psychiatrist or psychologist would be rather than just stipulations to the conclusions of the psychiatrist"); *People v. Robinson*, 221 Ill. App. 3d 1045, 1050 (1991) ("[a]t the fitness hearing in *Thompson*, the parties simply stipulated to findings of doctors contained in reports and their conclusion that defendant was fit to stand trial rather than stipulating that, if called to testify, the qualified psychiatrist or psychologist who had examined defendant would testify that in their opinion he was fit to stand trial"). Under the circumstances of this case, I would hold that the circuit court did not abuse its discretion when it found the defendant fit to stand trial at the March 11, 2011, fitness review hearing. If the fitness hearing was adequate there would be no reason to remand.

¶ 89 However, in this case, the two other panel members are remanding after finding the fitness hearing was inadequate but disagree as to the proper remedy on remand. The parties have briefed the issue of the proper remedy for an inadequate fitness hearing in their original and

supplemental briefs. As to that issue, I would find the proper remedy for an inadequate fitness hearing is to remand for a retrospective fitness hearing in this case.

¶ 90 For the foregoing reasons, I concur in part with, and dissent in part from, the majority's decision.

¶ 91 PRESIDING JUSTICE McDADE, specially concurring in part, dissenting in part.

¶ 92 Defendant, Edjuan Payne, filed a Petition for Rehearing in the above-captioned action, challenging the adequacy of a retrospective fitness hearing as a remedy for what we had found to be an inadequate fitness restoration hearing.

¶ 93 In our original order, a majority of the panel agreed that the hearing was inadequate but, rather than vacating the convictions and ordering a new trial, we ordered a "retrospective" fitness hearing. I concurred in that majority decision. In the wake of the Petition for Rehearing, we experienced shifting majority positions, finally resulting in a majority finding the hearing inadequate, although on differing bases, and a different majority finding a retrospective hearing to be an appropriate corrective remedy. I concur in the finding that the original fitness restoration hearing was inadequate, but I respectfully dissent from the finding that a retrospective fitness hearing would be either appropriate or sufficient.

¶ 94 As clearly set out above, the author finds the original restoration hearing inadequate based on ambiguity in the proceedings. My special concurrence has two bases: I believe the flawed hearing constituted (1) procedural error, which ultimately contributed to (2) substantive error. Such errors resulted in defendant's denial of a fair trial. My dissent is based on my belief that a retrospective fitness hearing now would prove wholly inadequate.

¶ 95 I. Restoration Hearing

¶ 96 A. Procedural error.

¶ 97 The fitness restoration hearing at issue took place on March 11, 2011. It was necessary because the defendant had, according to his attorney, exhibited limited capacity for coherent thought, an inability to understand the fundamentals of trial, and bizarre behavior. On July 23, 2010, the trial court allowed defense counsel's request for a continuance for fitness and sanity evaluations of the defendant. Dr. Ryan Finkenbein concluded--and on August 27, 2010, the trial court, by order, agreed--that defendant was unfit to stand trial but could attain fitness within one year. This fact rebuts any argument that there was not a *bona fide* doubt of defendant's fitness to stand trial at *that* time.

¶ 98 On February 17, 2011, seven months into the one-year window identified above, Dr. Nageswararao Vallabhaneni filed a fitness evaluation. In it, despite defendant's long-standing mental problems and the prior finding by Dr. Finkenbein *and the court* of unfitness, he essentially opined that defendant was not genuinely ill but was merely acting out to avoid trial. On March 11, the parties stipulated, *on the basis of the report*, that the defendant was fit. The court then stated that it would "make the finding *based on the stipulation* that the defendant is now fit to stand trial." (Emphasis added.) The author finds this statement to be "ambiguous but not necessarily erroneous," and ultimately is "unable to say, beyond a reasonable doubt, the error was not harmless to this defendant." The author, therefore, "cannot conclude the trial court's error in finding defendant fit based solely on the stipulation, constituted harmless error."

¶ 99 It is worthy of note that there was *no time* between hearing and accepting the parties' stipulation and making its fitness finding for the court to undertake any analysis or formulate and articulate any reasons for the finding. Nor did the court give any indication it had received

and/or read Dr. Vallabhaneni's report. Moreover, the one-page transcript of the restoration hearing shows no evidence or argument was presented to or considered by the court during the restoration hearing. There is certainly no evidence that the court made any independent effort to question the defendant—who was in the courthouse but not the courtroom--or confirm whether he understood the basics about the charge and was able to assist his counsel or was, as Dr. Vallabhaneni opined, merely acting out.

¶ 100 The earlier iteration of our order found that there was no evidence in the record that the court considered anything other than the stipulation of the parties in making the fitness determination and, therefore, no evidence of an *affirmative exercise* of the court's discretion.[1] Without such evidence, there is an abuse of discretion. *People v. Esang*, 396 Ill. App. 3d 833, 839 (2009); *People v. Contorno*, 322 Ill. App. 3d 177, 179 (2001). None of that has changed.

¶ 101 Unlike the author I find nothing dispositively ambiguous in the court's statement. The finding of fitness was, as clearly stated by the trial judge, based on the stipulation that the defendant is now fit to stand trial." Regardless, however, of whether the stipulation was that the defendant was fit to stand trial or that Dr. Vallabhaneni, if called as a witness, would testify that the defendant was fit[2], there is no evidence in the record of an exercise of discretion by the trial court and there is a clear statement that the finding was based on the stipulation of defendant's

[1] *People v. Lewis*, 103 Ill. 2d 111, 114 (1984) (citing *People v. Greene*, 102 Ill. App. 3d 639, 643 (1981)). Judicial determination of fitness cases require "'an adversarial hearing and have disapproved of verdicts of fitness based solely on unsupported stipulations, agreements, pleas made by the accused or his counsel.'" *Greene*, 102 Ill. App. 3d at 643 (quoting *People v. Williams*, 92 Ill. App. 3d 608, 612 (1980))

[2] Cf. *Lewis*, 103 Ill. 2d at 117 (distinguishing and affirming the trial court's decision of defendant's fitness based on the stipulation to possible psychiatric testimony as the decision also included affirmative showings of an exercise of discretion).

fitness to stand trial. The original restoration hearing and resultant order were procedurally inadequate. I agree with the author that error was created by this flawed procedure.

¶ 102 B. Substantive error.

¶ 103 As discussed above, defense counsel initially stipulated to Dr. Vallabhaneni's conclusion that defendant had no serious mental illness and was acting out to avoid going to trial. That stipulation was made jointly by defense counsel and the prosecutor on March 11, 2011.

¶ 104 Defendant then underwent an additional assessment to determine whether he was legally insane at the time he committed the offense. On May 27, 2011, defense counsel, after considering Dr. Finkenbine's evaluation and consulting with him, advised the court that defendant would not be submitting an insanity defense.

¶ 105 During the eight months following the finding of fitness in March 2011, counsel attempted to prepare his client and his client's defense for the November 7-9, 2011, trial. During those eight months, there were numerous hearings, some of which defendant attended and many which he did not. Defendant also filed a complaint against his attorney with the Attorney Registration and Disciplinary Commission (ARDC) and filed a civil rights action against Peoria County, alleging inhumane treatment at the county jail.

¶ 106 On the first day of trial, prior to jury selection, defense counsel again raised "concern about [his] client's continued fitness." Defendant was present in the court on that day (November 7). When the trial judge asked him if he intended to be present for the trial, defendant stated that he was "forced" to be there and recounted that on a prior occasion his attendance had been compelled when his arms and legs were shackled and he was "electrocuted with tazers" and "maced."

¶ 107 When the judge attempted to explain to him that his unresolved civil action was separate from the criminal proceedings, defendant responded: "[t]he victim is not a victim" and he was "just finding out, man, that the child was [his] daughter." He explained that "through recollection" he realized the child was his daughter. He characterized his trial as a "mockery," claiming that although the court allowed him to speak, "but in talking, just like the voice, you know what I'm saying, of God giving man breath." Defendant said the sole purpose of his trial was to face his accusers and he was facing them already, one of whom was his attorney.

¶ 108 He stated that he had been trying to contact "two character witnesses"—"[o]ne is the President of the United States, man, Obama. I know him personal. He can, man, vouch for me. I got Carol Mosely-Braun is another, man, character witness that knows me personally." "And my baby mama and another female by the—I forgot her name, but the daughter of, you know what I'm saying, that they saying is the victim of this, of some brutal crime is my daughter."

¶ 109 During a discussion about the charges against him—still on November 7—defendant stated:

> "Yeah, the names of the victim have a similarity to do with, um, rest in peace, a relative by the name of Evette Street, auntee of the defendant, man, or the petitioner, however you want to put it in this case, 2, 4, 6, 10-CF-460.
>
> "And the daughter, I mean, well, the infant victim, um, first name is [A.], by relations the name was given because *the father likely have been a female artist* by the name of [A.]. The last name is not known of the infant or the mother because of just promiscuousness going on." (Emphasis added.)

¶ 110 Following this statement, defendant's attorney told the court that his client's speech, behavior and mannerisms as well as remarks like those he had just made about President Obama, Carol Mosely-Braun, and his daughter, A.G., had caused him, as his counsel, to rethink his earlier position and to question defendant's continued fitness. He reminded the court of defendant's earlier finding of unfitness and told the judge that he had talked with the defendant many times, but had still not been able to address the State's specific evidence against him.

¶ 111 In response the State discounted defense counsel's concerns, reminding the court and counsel that the report nine months earlier had concluded defendant was defiant and would attempt to delay the trial. The State also pointed out that the defendant had spoken of his civil rights action and the witnesses he intended to call—without apparent concern about the irrationality of his allegations and intentions—and argued that there was no evidence that defendant did not understand the charges. The State asserted defendant was simply refusing to cooperate with his counsel as predicted by Dr. Vallabhaneni, and the court denied defense counsel's motion for an examination of defendant's continued fitness to stand trial.

¶ 112 Based on the record before us, there is strong evidence of defendant's limited capacity for coherent thought, leading to a very real probability that he was, in fact, unfit to stand trial in November 2011. I would also find that the unexplored and unchallenged conclusions in Dr. Vallabhaneni's February 17, 2011, report were a direct cause of the State's attack on and the trial court's denial of defense counsel's motion to reexamine his client's fitness to understand the charges and to assist him in presenting a defense.

¶ 113 For these reasons, I would find substantive error as well as the procedural error discussed above.

¶ 114 C. Plain Error Review

¶ 115 Because the defendant failed to preserve this error for appeal, his claim is forfeited and can only be reviewed by this court if he can show plain error. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). Plain error can be found if (1) an error occurred and the evidence is closely balanced, regardless of the seriousness of the error, or (2) an error occurred and it is so serious that it affected the fairness of defendant's trial, regardless of the strength of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). As discussed above, entry of the order finding the defendant fit to stand trial without the requisite exercise of the trial court's discretion is an abuse of its discretion and constitutes a predicate error enabling plain error review.

¶ 116 Defendant has made no claim that the evidence against him is closely balanced but asserts the existence of plain error under the second prong.

¶ 117 The prosecution of a defendant who is not fit to stand trial is a violation of due process under both the Constitution of the United States (U.S. Const., Amend XIV) and that of the State of Illinois (Ill. Const. of 1970, Art I, §2). See also *People v. Haynes*, 174 Ill. 2d 204, 226 (1996). A defendant is not fit to stand trial if he is unable, because of his physical or mental condition, to (1) understand the nature and purpose of the criminal proceedings or (2) assist in his defense. 725 ILCS 5/104-10 (West 2011); *Haynes*, 174 Ill. 2d at 226.

¶ 118 In this case, defense counsel raised a question of his client's fitness based on bizarre behavior shown on videos from the police station, his own interactions with the defendant and his review of discovery in the case. The court ordered an evaluation and Dr. Finkenbine found defendant had a psychiatric mood disorder, was unfit to stand trial at that time, but opined he could regain fitness within a year. The court entered an order to that effect and ordered defendant to undergo treatment.

¶ 119 Dr. Vallabhaneni's conclusion seven months later was significantly different. According to his report, defendant had no mood disorder or bipolar disorder. Indeed, he had "no AXIS I diagnosis" and "no serious mental illness." Rather, this doctor believed the defendant had a "character pathology including substance dependence, Antisocial Personality Disorder [that] are going to effect [sic] him to be defiant and not cooperate to avoid trial. [Defendant] is purposeful to prolong trial for his benefit." He opined that the defendant understood the charges and possible penalties and was capable of cooperating with defense counsel and assisting in his defense. In sum, defendant was just manipulating the judicial system.

¶ 120 Despite the startling differences in the two doctors' conclusions about the defendant's underlying mental disorders (or lack thereof) and possible fitness, the trial court, without any analysis or any inquiry or any discussion evident in the record, declared him fit expressly on the basis of the stipulation of the attorneys to the doctor's finding of fitness.

¶ 121 Because the trial of an unfit defendant violates due process under both state and federal constitutional law, I believe the procedural and substantive errors discussed above are so serious and so prejudicial that this defendant was denied due process and, therefore, a fair trial. His conviction should be vacated and he should be retried.

¶ 122 II. Retrospective Fitness Hearing

¶ 123 Defendant filed a Petition for Rehearing following the entry of our original order in this case. The petition challenged the adequacy of a *retrospective* fitness hearing, which we had ordered, to cure the prior inadequacy of the restoration hearing, which we had found. I agree with defendant's contention that in this case such a hearing at this time is inadequate. It is unclear to me what the court could meaningfully consider at a retrospective hearing that could cure the prior inadequacy.

¶ 124 One major problem with a retrospective hearing in this case is that it has been roughly four years since the original fitness restoration hearing. Nothing the court could *observe* now could be remotely relevant to defendant's mental condition at that time.

¶ 125 A second series of concerns for me flow from ¶ 65 of the modified order, in which it is stated:

> "In this case, we conclude defendant's fitness to stand trial can be 'fairly and accurately determined' upon remand for a retrospective fitness hearing. On remand for the retrospective fitness hearing, the trial court should consider the contents of the psychiatrist's report regarding defendant's fitness as well as the transcript of the hearings occurring between the trial court's initial finding of unfitness and the march 2011 fitness restoration hearing, when determining whether the previous finding of defendant's unfitness had been cured. * * * "

¶ 126 This is of concern to me for four reasons. First, there is nothing ambiguous about the court's statement that it would "make the finding based on the stipulation that the defendant is now fit to stand trial." The only way it can be viewed as ambiguous is by the implicit insertion of commas after the words "finding" and "stipulation." Such commas do not appear in the record. Nor is there any indication that defense counsel and the state's attorney based the stipulation on anything more than an uncritical acceptance of Dr. Vallabheneni's report.

¶ 127 Second, although the language has been removed from the modified order, it remains true, as was expressed in the earlier order, that there is no evidence contained in this record the trial court considered any other evidence, including defendant's own behavior and statements

before the court, when concluding defendant had been restored to fitness. Consequently, the record, does not demonstrate that the trial court affirmatively exercised its own discretion to determine defendant's fitness to stand trial. The trial court's conclusion that defendant was fit to stand trial based solely on the psychiatrist's stipulation to that effect was an abuse of its discretion. See *Esang*, 409 Ill. App. 3d at 833."

¶ 128 Third, ¶ 65 invites the trial court to create a new, supplemental record to retrospectively cure what the author now finds to be a potential error and I believe to be an abuse of its discretion. In viewing what the order directs the trial court to consider in its formulation of this supplemental record, a couple of things are conspicuous by their absence. There is no suggestion that the trial court consider (1) the striking foundational differences between the reports of Dr. Finkenbein finding underlying Axis I mental illness and Dr. Vallabhaneni finding no Axis I illness, only a character flaw or (2) the actual conduct of the defendant from the original finding of a *bona fide* doubt of his fitness to stand trial to the time of trial. These omissions bypass considerations that are obviously relevant to any exercise of independent judgment and discretion and also obviate the clear difficulties of reconstruction after the elapse of four years.

¶ 129 The purpose of the inquiry is to determine whether Edjuan Payne was fit to stand trial when he was tried in 2011. How does consideration of that evidence now speak to (1) whether the trial court, contrary to its own representation, considered, *at the time*, anything other than the stipulation or (2) whether, *at the time*, the defendant was or was not fit to stand trial. It makes no sense for this case to be anything other than a “do over”—that is, vacating the conviction and having a new trial.

¶ 130 Fourth, although retrospective fitness hearings may have become "the norm," I have been unable to find any case in which such a hearing, ordered in a circumstance like the one

represented here, resulted in a finding that the trial court had failed to exercise its discretion, properly or at all, and that the conviction(s) should be vacated and defendant should have a new trial. In making this last argument, I do not question the ethics or the integrity of this trial judge or any other. I simply suggest that human nature would strongly urge a judge, convinced that both the decision to go forward with trial and the ultimate conviction were proper and fair, to fill in the blanks to make any doubts go away.

¶ 131 Finally, I would like to address the case of *People v. Mitchell*, 189 Ill. 2d 312 (2000). The State has suggested that *Mitchell* puts the supreme court's *imprimatur* on retrospective fitness hearings generally, citing a partial statement lifted out of context to suggest the court was approving all such hearings. Clearly the court did not make such a sweeping determination in *Mitchell.*

¶ 132 Initially, the type of retrospective hearing we consider here was not at issue in *Mitchell.* Mitchell's relevant claims were that he was denied effective assistance of trial counsel when his attorney failed to demand a fitness hearing to which defendant was entitled because he was taking psychotropic drugs for epilepsy. He also claimed to have been denied reasonable assistance when his appellate counsel failed to assert trial counsel's ineffectiveness for failing to demand such a hearing. His claims were presented in the context of a postconviction petition and he was relying on a statutory proscription from trying persons taking psychotropic drugs without a fitness hearing. To prevail on these claims, the defendant had to meet the *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] standard and prove prejudice by showing there was a reasonable probability that if the fitness hearing had been held, he would have been found unfit to stand trial. The *Mitchell* court's focus was on *stare decisis* and its analysis centered on its prior decisions related to the same type of claim.

¶ 133 In trying to extricate itself from the effect of those prior decisions, Justice Rathje, writing for a divided court, said: "Although not clearly stated in *Kinkead* [182 Ill. 2d at 340], it appears that retrospective fitness hearings are now the norm. What was constitutionally forbidden three years ago is now compelled. *This is not a principled and intelligible development of the law.*" (Emphasis added.) *Mitchell*, 189 Ill. 2d at 339. Even if we were to somehow interpret this as a ringing endorsement of retrospective fitness hearings, the "endorsement" applies to an area of fitness analysis that bears no relationship to the instant case.

¶ 134 The instant case is defendant's direct appeal of his conviction, not a postconviction proceeding; his claim is error by the trial court, not ineffective assistance of counsel; the claim is constitutional in nature as there is no statute involved; and there is no issue of psychotropic drugs. Related to his claim that the court did not exercise its discretion are the following facts: defendant has a history of mental illness; defense counsel sought a fitness evaluation because his client was apparently not able to assist with his defense; defendant's most recent history includes the resultant finding by a court-appointed mental health professional that defendant was not fit to stand trial but that he could be fit in a year and an order entered by the court to that same effect, establishing a *bona fide* doubt of his fitness; a contrary finding approximately seven months later by a different mental health professional, contrary to his prior history of mental problems and the prior finding of unfitness, that defendant was simply acting out to delay or avoid trial. Despite the anomalous nature of the latter conclusion, the trial court engaged in no discussion or analysis but rather announced that it was "mak[ing] the finding *based on the stipulation that the defendant is now fit to stand trial.*"

¶ 135 That is not an exercise of discretion and the earlier order was correct in so finding. Nothing the trial court could do on remand looking backward nearly four years could provide ample assurance that Edjuan Payne was fit to stand trial in 2011.

¶ 136 For these reasons, I respectfully dissent from the remand for a retrospective fitness hearing. I think the conviction should be vacated and defendant should have a new trial at which we can be reasonably sure he is mentally fit to cooperate with his attorney and assist in his defense.