2018 IL App (5th) 140465-U

NO. 5-14-0465

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 08-CF-1453
	)	
LORTEZ THOMAS,	)	Honorable
	)	Jan V. Fiss,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BARBERIS delivered the judgment of the court.
Justices Goldenhersh and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for first degree murder affirmed over his claim that he was denied due process with regard to his fitness to stand trial; mittimus corrected.

¶ 2 Following a jury trial, the defendant, Lortez Thomas, was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and sentenced to 60 years' imprisonment. The defendant appeals, arguing his due process rights were violated when the circuit court failed to make an independent determination of his fitness to stand trial and when the court failed to implement special provisions at trial. Alternatively, the defendant argues that the mittimus in this case should be amended to give him credit for

time spent in the custody of the Illinois Department of Human Services (DHS). We affirm as modified.

¶ 3 I. Background

¶ 4 On December 5, 2008, the defendant was charged by indictment with one count of first degree murder and two counts of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)). In January 2009, the defendant's case was assigned to the Honorable Jan V. Fiss, who presided throughout the remainder of the proceedings relevant to the issues raised in this appeal.

¶ 5 On July 14, 2009, defense counsel moved to appoint an expert to conduct an evaluation of the defendant's psychological and mental capacities to waive his *Miranda* rights. On that same day, the circuit court, after briefly questioning the defendant, granted defense counsel's motion and appointed Dr. Daniel J. Cuneo, a clinical psychologist, for purposes of examining "the defendant's ability to read, write, and waive his *Miranda* warnings."

¶ 6 Pursuant to the circuit court's order, Dr. Cuneo examined the defendant on both October 19, 2009, and March 5, 2010. Dr. Cuneo prepared an evaluation report, dated March 5, 2010, detailing his evaluation of the defendant. In his report, Dr. Cuneo noted that the defendant scored in the upper end of the "Moderate Mentally Retarded Range of Intelligence" on the Wechsler Adult Intelligence Scale III (WAIS-III), with a verbal IQ of 56, a performance IQ of 49, and a full scale IQ of 48, placing him in the bottom 0.4 of the nation intellectually. Dr. Cuneo explained that the defendant's cognitive abilities were equivalent to those of an eight-year-old. Based on his findings and interview with the

defendant, Dr. Cuneo diagnosed the defendant with a history of head trauma, drug (*i.e.*, alcohol, cocaine, and cannabis) dependence, and moderate mental retardation. At the conclusion of his report, Dr. Cuneo opined that the defendant's drug dependence and moderate mental retardation "substantially impaired his ability to knowingly, intelligently, and willingly waive" his *Miranda* rights.

¶ 7 On May 6, 2010, defense counsel raised a *bona fide* doubt regarding the defendant's fitness to stand trial. On that same day, the circuit court ordered a fitness evaluation and appointed Dr. Cuneo to conduct the evaluation. Pursuant to the court's order, Dr. Cuneo evaluated the defendant and prepared a second evaluation report, dated May 20, 2010. In his report, Dr. Cuneo essentially reaffirmed the findings and diagnoses made in his March 5, 2010, report. Dr. Cuneo believed that the defendant's drug dependence and extreme mental deficits substantially impaired his ability to understand the nature and purpose of the proceedings against him and to assist in his own defense. Thus, Dr. Cuneo opined that the defendant was unfit to stand trial but noted that there was a substantial probability the defendant could attain fitness within the course of one year if provided with inpatient rehabilitative treatment.

¶ 8 On June 16, 2010, the circuit court, having received Dr. Cuneo's report, held a hearing to address the defendant's fitness to stand trial. The defendant was present at the hearing, with defense counsel. The parties stipulated to the expertise of Dr. Cuneo and that he would testify in conformance with his May 20, 2010, report. Based upon the stipulation, the court found the defendant unfit to stand trial and remanded him to the

custody of DHS for treatment. The court also found there was a substantial probability the defendant would attain fitness within one year.

¶ 9 In August 2010, Mike Jasmon, a forensic unit administrator employed by DHS, submitted reports, dated August 18, 2010, to the circuit court regarding the defendant's progress and treatment at DHS. Dr. Linda Hollabaugh, a clinical psychologist employed by DHS, prepared the treatment plan report, which set forth her findings and opinions regarding the defendant's fitness to stand trial. In her report, Dr. Hollabaugh noted that the defendant was an active participant in the "Legal Fitness Restoration Training" classes and that the defendant had displayed a "burgeoning" understanding of terms and concepts. Dr. Hollabaugh believed, however, that the defendant's understanding of the pending charges and certain legal concepts was not yet satisfactory. Thus, she opined that the defendant remained unfit to stand trial but noted that treatment would continue and opined that the defendant would be restored to legal fitness within one year.

¶ 10 In September 2010, the circuit court, having received the reports from DHS, held a hearing on the question of whether the defendant had regained fitness to stand trial. The parties stipulated to the expertise of Dr. Hollabaugh and that she would testify in conformance with her report, dated August 18, 2010. Based on the stipulation, the court found the defendant remained unfit but that he possessed the capacity to be restored to fitness within one year.

¶ 11 In October 2010, Jasmon submitted to the circuit court additional reports, dated October 14, 2010, regarding the defendant's progress and treatment. In Dr. Hollabaugh's treatment plan report, she indicated that the defendant passed both the "Illinois Forensic

Fitness Test" (IFFT) and the "Competence Assessment for Standing Trial for Defendants with Mental Retardation" (CAST-MR). Dr. Hollabaugh also reported that the defendant displayed a "strong understanding of concepts, terms, and procedures considered essential to a finding of legal fitness" during a structured clinical interview. In addition, she noted that the defendant was able to discuss the events leading to his arrest, the charges against him, and the potential sentencing dispositions. Based on her evaluation of the defendant, Dr. Hollabaugh opined, within a reasonable degree of psychological certainty, that the defendant had achieved legal fitness.

¶ 12 On October 21, 2010, the circuit court, having received the reports, held a hearing to determine whether the defendant had regained fitness to stand trial. The defendant was present at the hearing, with defense counsel. The State informed the court that the parties had agreed to "stipulate to the expertise of Dr. Hollabaugh, as well as that she would testify consistent with a report dated October 14, 2010." The State also indicated that the report contained "findings" that the defendant was fit to stand trial. The State then requested that the court make a "finding based upon the stipulation." The court confirmed that defense counsel was in agreement with the State's representations. When no further argument or evidence was presented on the issue, the court stated, "that will be the finding of the court then." The court then briefly questioned the defendant regarding his right to a speedy trial and signed a written order finding the defendant fit to stand trial. According to the written order, the parties stipulated to the expertise of Dr. Hollabaugh, and that she would testify, consistent with her October 14, 2010, report, that the

defendant had achieved legal fitness and was able to understand the nature of the charges against him and to cooperate in his own defense.

¶ 13 On June 1, 2011, defense counsel filed a motion to suppress all oral and written communications made by the defendant before or after his arrest. In support of the motion, defense counsel attached Dr. Cuneo's March 5, 2010, report setting forth Dr. Cuneo's opinion that the defendant could not knowingly and intelligently waive his *Miranda* rights. At the State's request, the circuit court appointed Dr. John Rabun, a forensic psychiatrist, to conduct an additional evaluation of the defendant's ability to waive his *Miranda* rights.

¶ 14 On March 7, 2012, following several continuances, the circuit court held a hearing on defense counsel's motion to suppress. At the hearing, the parties stipulated that Drs. Cuneo and Rabun were experts in their respective fields and that they would testify in conformance with their respective reports. Based on the parties' stipulation, the court granted the motion to suppress, finding that the defendant could not knowingly and intelligently waive his *Miranda* rights. On that same day, defense counsel requested an additional evaluation of the defendant for purposes of determining whether he was eligible for "a guilty but mentally ill plea" and whether special provisions were necessary for the defendant to remain fit during trial pursuant to section 104-22 of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-22 (West 2012)). With no objection from the State, the court granted defense counsel's request and appointed Dr. Cuneo to evaluate the defendant for the purposes of establishing opinions regarding the defendant's

eligibility for a guilty but mentally ill plea and the necessity of special trial provisions. The court also briefly questioned the defendant regarding his right to a speedy trial.

¶ 15 Pursuant to the circuit court's order, Dr. Cuneo evaluated the defendant on May 1, 2012, and submitted a report, dated May 2, 2012, to the circuit court setting forth his findings and opinions. In his report, Dr. Cuneo opined that the defendant was legally sane at the time of the alleged offenses but that he would qualify for a guilty but mentally ill plea. While Dr. Cuneo reported that the defendant had displayed a sufficient understanding of legal concepts and opined that the defendant remained fit to stand trial, Dr. Cuneo recommended special trial provisions due to the defendant's limited cognitive abilities. Specifically, Dr. Cuneo recommended that the parties "keep their vocabulary and sentence structure simple" and "periodic checks to insure that [the defendant] understands what is happening during the trial." During the periodic checks, Dr. Cuneo suggested that the defendant be asked to explain the trial proceedings in his own words, not "yes or no questions."

¶ 16 On February 18, 2014, defense counsel filed a motion requesting that the circuit court employ special provisions at the defendant's trial, "pursuant to 725 ILCS 5/104-22," and in accordance with Dr. Cuneo's May 2, 2012, report. On May 13, 2014, the court addressed defense counsel's motion at a pretrial hearing. Defense counsel acknowledged that Dr. Cuneo had found the defendant remained fit to stand trial but asked that the court adopt Dr. Cuneo's recommendations that the parties keep their vocabulary and sentence structure simple and that the court periodically ask the defendant to explain the trial

proceedings in his own words. Without objection from the State, the court granted defense counsel's request.

¶ 17 On May 19, 2014, the case proceeded to a jury trial. During the trial, the circuit court periodically asked the defendant whether he understood the proceedings but did not require that the defendant explain the proceedings in his own words. While the court gave the defendant an opportunity to explain the proceedings on one occasion, the defendant declined. Defense counsel informed the court that she had discussed the proceedings with the defendant during breaks and that, based on their discussions, counsel believed the defendant did not "seem to have any problems understanding" the proceedings. The jury subsequently found the defendant guilty of first degree murder but not guilty of the two sexual assault charges. The defendant was sentenced to 60 years' imprisonment. The defendant did not receive sentencing credit for the time he spent undergoing treatment in DHS. The defendant filed a timely notice of appeal

¶ 18 II. Analysis

¶ 19 A. Fitness to Stand Trial

¶ 20 On appeal, the defendant argues that the procedure followed by the circuit court at both his fitness restoration hearing and trial failed to meet the minimal requirements of due process, creating a substantial likelihood that he was unfit when tried and convicted. "The due process clause of the fourteenth amendment bars prosecution of a defendant unfit to stand trial." *People v. Holt*, 2014 IL 116989, ¶ 51 (citing *People v. Shum*, 207 Ill. 2d 47, 57 (2003)). Pursuant to section 104-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-10 (West 2010)), a defendant is unfit to stand trial if a mental or

physical condition prevents him from understanding the nature and purpose of the proceedings against him or assisting in his defense.

¶ 21 As an initial matter, we note that the defendant failed to properly preserve his claims for review. Generally, to preserve a claim of error for review, a defendant must both raise an objection during the proceedings and include the claim in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Because the defendant here did neither, he forfeited review of his claims.

¶ 22 The defendant argues, nevertheless, that his claims are reviewable under the second prong of the plain-error doctrine. A reviewing court may consider forfeited claims under the second prong of the plain-error doctrine only "where the error is so serious that the defendant was denied a substantial right," and, thus, a fair trial. *People v. Herron*, 215 Ill. 2d 167, 179 (2005). The defendant bears the burden of persuasion in plain-error review. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009) (citing *Herron*, 215 Ill. 2d at 182). Although prejudice is presumed under the second prong of plain-error analysis, "the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 187. "The plain error exception will be invoked only where the record *clearly* shows that an alleged error affecting substantial rights was committed." (Emphasis in original.) *People v. Hampton*, 149 Ill. 2d 71, 102 (1992). Although we agree that the issue of fitness concerns a fundamental right permitting review under the second prong of the plain-error doctrine (*People v. Sandham*, 174 Ill. 2d

379, 382 (1996)), we must first determine "whether a 'clear or obvious' error occurred at all." *McLaurin*, 235 Ill. 2d at 489.

¶ 23 According to the defendant, the circuit court committed two clear or obvious errors concerning his fitness to stand trial. First, the defendant argues that the procedure followed by the circuit court at his fitness restoration hearing failed to meet the minimal requirements of due process. Second, he argues that the procedure followed by the court at trial failed to meet the requirements of due process. We address the defendant's contentions in turn.

¶ 24 1. Fitness Restoration Hearing

¶ 25 The defendant first argues that the circuit court committed reversible error when it found him restored to fitness based solely on the stipulated report of an expert, without making an independent inquiry into his fitness or otherwise exercising its discretion. We disagree.

¶ 26 Where, as here, a defendant has been found unfit and treatment has been ordered, section 104-20 of the Code of Criminal Procedure of 1963 requires that the circuit court periodically review the issue of that defendant's fitness to stand trial at a hearing, unless waived by the defense. 725 ILCS 5/104-20(a) (West 2010). At the hearing, the circuit court, sitting without a jury, must determine whether defendant is fit to stand trial, and, if not, whether defendant is making progress toward attaining fitness within the statutorily required time period. *Id.* § 104-20(a)(1), (2). If the circuit court finds defendant fit, the court shall set the matter for trial. *Id.* § 104-20(b). Ordinarily, a circuit court's fitness determination will not be reversed absent an abuse of discretion. *People v. Newell*, 196

Ill. App. 3d 373, 377 (1990). However, a circuit court's complete failure to exercise discretion when required by law may constitute an abuse of discretion. *People v. Newborn*, 379 Ill. App. 3d 240, 248 (2008).

¶ 27 In *People v. Lewis*, 103 Ill. 2d 111 (1984), our supreme court first considered whether a finding of restored fitness could be based on stipulated expert testimony. In *Lewis*'s two consolidated cases, each defendant had been found restored to fitness based on a stipulation that an expert, if called to testify, would testify that they had examined defendant and, based upon their examinations, defendant was mentally fit for trial, able to understand the nature of the pending charges, and was able to cooperate with counsel. *Id.* at 113. The appellate court reversed and remanded both cases, holding that the circuit court, in each case, improperly exercised its discretion in finding defendant fit to stand trial solely on the basis of a stipulation. *Id.* at 113-14. On review, our supreme court clarified that stipulations to experts' opinion testimony were proper, whereas stipulations to experts' ultimate conclusions, or the fact of fitness, were improper. *Id.* at 115-16. Because each case on review involved a stipulation to the opinion testimony that would have been given by an expert, our supreme court found no error and concluded that, "[u]pon considering these stipulations and personally observing defendants, the circuit court could find defendants fit, seek more information, or find the evidence insufficient to support a finding of restoration to fitness." *Id.* at 116. The *Lewis* court recognized, however, that the ultimate issue of a defendant's fitness must be decided by the circuit court, not the experts. *Id.* (quoting *People v. Bilyew*, 73 Ill. 2d 294, 302 (1978)).

¶ 28 In *People v. Cook*, 2014 IL App (2d) 130545, our colleagues in the Second District examined the more recent line of cases that followed the *Lewis* decision and observed a distinction between cases where a circuit court's consideration of stipulated evidence violated a defendant's due process rights and cases where a court's consideration of stipulated evidence did not violate a defendant's due process rights. Specifically, the Second District observed that a defendant's due process rights are violated when a circuit court relies exclusively on the parties' stipulation to a psychological report finding defendant fit, without conducting an independent inquiry into defendant's fitness. *Id.* ¶ 15 (citing *People v. Cleer*, 328 Ill. App. 3d 428, 431-32 (2002); *People v. Contorno*, 322 Ill. App. 3d 177, 179 (2001); *People v. Thompson*, 158 Ill. App. 3d 860, 865 (1987); *People v. Greene*, 102 Ill. App. 3d 639, 643 (1981)). However, a defendant's due process rights are not violated where a circuit court's fitness determination is based on its observations of the defendant and a review of a psychological report, in addition to the parties' stipulation. *Id*. (citing *Lewis*, 103 Ill. 2d at 116; *People v. Robinson*, 221 Ill. App. 3d 1045, 1050 (1991); *People v. Mounson*, 185 Ill. App. 3d 31, 37-38 (1989)).

¶ 29 In the present case, the procedure followed by the circuit court at the defendant's fitness restoration hearing did not clearly violate the defendant's due process rights. The court found the defendant had attained fitness to stand trial in October 2010, based on the parties' stipulation to the opinion testimony that Dr. Hollabaugh would have provided if called to testify as a witness. The court also made its determination with the benefit of observing, and even briefly questioning, the defendant at multiple pretrial hearings, including hearings where the defendant's fitness was at issue. In particular, at a hearing in

June 2010, the court, having received Dr. Cuneo's report, found the defendant unfit to stand trial and remanded him to the custody of DHS for treatment. At a hearing in September 2010, the court, having received Dr. Hollabaugh's report, found the defendant remained unfit to stand trial. As such, the court considered a proper stipulation and personally observed the defendant at multiple pretrial hearings before finding him restored to fitness.

¶ 30 The defendant maintains, however, that his fitness restoration hearing was constitutionally deficient because there is no indication in the record that the circuit court conducted any analysis of Dr. Hollabaugh's opinion or exercised its discretion in finding him fit to stand trial, as was the case in both *Contorno*, 322 Ill. App. 3d 177, and *Cook*, 2014 IL App (2d) 130545. While the defendant asserts that the present case is factually analogous to both *Contorno* and *Cook*, we find both cases distinguishable. First, in both *Contorno* and *Cook*, there was ambiguity as to whether the parties had stipulated to an expert's opinion testimony or an expert's ultimate conclusion, which, in turn, made it unclear whether the circuit court had merely accepted an expert's conclusion in finding defendants fit based upon the ambiguous stipulations. *Contorno*, 322 Ill. App. 3d at 179 (parties stipulated "to the report" of an expert finding the defendant fit); *Cook*, 2014 IL App (2d) 130545, ¶¶ 5-6, 19 (parties stipulated to an expert's " 'findings' " in his report and that the expert " 'would testify consistently with his reports dated September 22, 2010, finding the defendant fit to stand trial' "). Whereas, here, as in *Lewis*, and unlike *Contorno* and *Cook*, the parties clearly stipulated to Dr. Hollabaugh's opinion testimony, not her ultimate conclusion that the defendant was fit to stand trial.

¶ 31 Second, as the defendant points out, both *Contorno* and *Cook* involved circuit courts' initial fitness determinations. The defendant argues, without citing to any legal authority, that this distinction supports his position because circuit courts should impose a higher level of scrutiny at a fitness restoration hearing, as opposed to an initial fitness hearing. We note, however, that our legislature has amended section 104-20 since the defendant's fitness restoration hearing. Under the current version of section 104-20, when a defendant's treatment supervisor submits a report to the circuit court stating that defendant has attained fitness, "the court shall immediately enter an order directing the sheriff to return the defendant to the county jail and set the matter for trial." 725 ILCS 5/104-20(e) (West Supp. 2017). If, however, a circuit court finds that a defendant remains unfit after a supervisor of defendant's treatment has recommended that defendant is fit, the statute provides that a copy of any written report, "prepared by a licensed physician, clinical psychologist, or psychiatrist," that identifies "the factors in the finding that the defendant continues to be unfit" must be attached to the court order remanding defendant for further treatment. *Id*. As such, we find the defendant's argument that this distinction "further favors reversal" unpersuasive.

¶ 32 Moreover, we note that, in both *Contorno* and *Cook*, the circuit court considered only one report that was prepared by an expert following a single fitness evaluation in making its initial fitness determination. *Contorno*, 322 Ill. App. 3d at 178; *Cook*, 2014 IL App (2d) 130545, ¶¶ 5-6. In *Cook*, defendant's fitness hearing was held before a different judge over a year after the expert conducted defendant's fitness evaluation. *Cook*, 2014 IL App (2d) 130545, ¶ 5. In contrast, the record here reflects that the same trial judge

examined the defendant's fitness to stand trial at multiple hearings and personally observed the defendant's progress over the course of several months. In that time, the defendant was evaluated by two different experts and the trial judge was presented with several reports regarding the defendant's fitness to stand trial. Thus, the record here, unlike *Contorno* and *Cook*, clearly reflects that the court personally observed the defendant and examined his fitness at several hearings before finding him restored to fitness.

¶ 33 Although the defendant correctly notes that the circuit court here, as in both *Contorno* and *Cook*, did not state that it had read Dr. Hollabaugh's report, provide a factual basis for its fitness determination, or question the defendant on the issue, this court is "aware of no statute or supreme court rule that requires trial courts to either independently question a defendant or make express findings of fact regarding fitness." *People v. Goodman*, 347 Ill. App. 3d 278, 287 (2004). Instead, we conclude, as did our supreme court in *Lewis*, that the court could find the defendant fit to stand trial after considering a proper stipulation and personally observing the defendant. 103 Ill. 2d at 116.

¶ 34 Because the record demonstrates that the circuit court considered a proper stipulation and personally observed the defendant at multiple pretrial hearings, we cannot say "the record *clearly* shows that an alleged error affecting substantial rights was committed." (Emphasis in original.) *Hampton*, 149 Ill. 2d at 102. Therefore, the defendant has failed to establish plain error and we honor his procedural default.

¶ 35 2. Trial

¶ 36 The defendant next argues that the circuit court committed reversible error at trial when it failed to comply with the special provisions, as recommended by Dr. Cuneo. The defendant contends that the court adopted the special provisions under section 104-22 and, thus, adherence to the special provisions was necessary to ensure that he remained fit to stand trial. We disagree.

¶ 37 Pursuant to section 104-22(a), "[o]n motion of the defendant, the State or on the court's own motion, the court shall determine whether special provisions or assistance will render the defendant fit to stand trial as defined in Section 104-10." 725 ILCS 5/104-22(a) (West 2014). Section 104-22(b) states that "[s]uch special provisions or assistance may include but are not limited to" the appointment of a qualified translator or the appointment of "experts qualified to assist a defendant who because of a disability is unable to understand the proceedings or communicate with his or her attorney." *Id.* § 104-22(b). Section 104-22(c) provides that the "case may proceed to trial only if the court determines that such provisions or assistance compensate for a defendant's disabilities so as to render the defendant fit as defined in Section 104-10." *Id.* § 104-22(c). In such cases, "the court shall state for the record" the qualifications and experience of the experts or other persons appointed to provide assistance, the court's reasoning for selecting or appointing certain experts or persons, and how the appointment of the expert or persons will render the defendant fit. *Id.*

¶ 38 In the present case, the basis for the circuit court's adoption of the special provisions is unclear. We acknowledge defense counsel cited section 104-22 in

requesting an evaluation and in requesting that the court adopt the special provisions set forth in Dr. Cuneo's report. We note, however, that section 104-22 applies in cases where special provisions or assistance "*will render the defendant fit to stand trial* as defined in Section 104-10." (Emphasis added.) *Id.* § 104-22(a). Although Dr. Cuneo recommended two special trial provisions, Dr. Cuneo opined that the defendant was fit to stand trial with no indication that the defendant's fitness was contingent upon the employment of special trial provisions. At the hearing on the motion, defense counsel acknowledged that Dr. Cuneo had found the defendant fit but requested that Dr. Cuneo's recommended provisions be employed at trial. In doing so, defense counsel did not reference section 104-22 or represent that the defendant's fitness was contingent on the court's adherence to the special provisions. Although the court granted defense counsel's request, there was no written order regarding the special trial provisions. As such, the record does not clearly show the court ruled that adherence to the special trial provisions was required to render the defendant fit to stand trial pursuant to section 104-22.

¶ 39 Moreover, neither Dr. Cuneo's report nor the circuit court's ruling specified that *the court* was required to implement the special trial provisions. Dr. Cuneo only recommended that the parties keep the vocabulary simple and that the defendant periodically be asked to explain in his own words what was happening in the proceedings. At trial, the court periodically inquired whether the defendant understood the proceedings and gave him an opportunity to explain the proceedings, but the defendant declined. Although the court did not require the defendant to explain the proceedings in his own words, defense counsel informed the court that the defendant had

discussed the proceedings with counsel during breaks in the trial. Defense counsel also informed the court that she believed the defendant had understood the proceedings based on their discussions. Because it is unclear from the record whether the court, as opposed to defense counsel, was required to ask the defendant to explain the proceedings in his own words, we cannot say "the record *clearly* shows that an alleged error affecting substantial rights was committed." (Emphasis in original.) *Hampton*, 149 Ill. 2d at 102. Consequently, the defendant has failed to establish plain error and we honor his procedural default.

¶ 40 Aside from the defendant's failure to establish plain error, we note, parenthetically, that the record is devoid of any indication that the defendant lacked an understanding of the nature and purpose of the trial proceedings, or that he was unable to cooperate with counsel. Instead, the record shows that the defendant was found fit to stand trial by two different experts and that the defendant conferred with counsel at trial. In addition, the defendant participated in his own defense by filing several *pro se* motions and by testifying during the mitigation phase of sentencing. Thus, the defendant's claim that he was unfit when tried and convicted is unsupported by the record.

¶ 41 B. Mittimus

¶ 42 Lastly, the defendant argues, and the State concedes, that he is entitled to credit against his sentence for time spent undergoing treatment in DHS under section 104-24 of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-24 (West 2014)). The State further concedes, and we agree, that the defendant underwent treatment for legal fitness restoration in DHS from July 30, 2010, to October 21, 2010, entitling the defendant to an

additional 84 days of credit. Thus, pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967), we amend the defendant's mittimus to reflect the 84 days that he spent undergoing treatment in DHS.

¶ 43 III. Conclusion

¶ 44 For the foregoing reasons, we hereby affirm the judgment of the circuit court of St. Clair County as modified.

¶ 45 Affirmed as modified.