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2026 IL App (3d) 250099-U

Order filed October 30, 2026

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2026

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 18th Judicial Circuit,
	)	Du Page County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-25-0099
v.	)	Circuit No. 23-CF-2219
	)	
ODELL A. WRIGHT,	)	Honorable
	)	Daniel Patrick Guerin and
Defendant-Appellant.	)	Brian F. Telander
	)	Judges, Presiding.

JUSTICE BERTANI delivered the judgment of the court.
Justices Peterson and Davenport concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The circuit court did not err in imposing defendant's extended-term sentence. (2) The circuit court failed to exercise its discretion in finding defendant fit to stand trial by accepting a stipulation to the expert's ultimate fitness conclusion.

¶ 2 Defendant, Odell A. Wright, appeals his aggravated robbery conviction (720 ILCS 5/18-1(b)(1) (West 2022)), and his sentence of 22 years' imprisonment. He argues that his extended-term sentence violates section 111-3(c-5) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/111-3(c-5) (West 2024)) and is unconstitutional under *Apprendi v. New Jersey*, 530 U.S.

466, 481 (2000), and its progeny. He further contends that the circuit court violated his due process rights by failing to exercise its discretion when it determined him fit to stand trial. We conclude that defendant was eligible for an extended-term sentence and that its imposition did not violate the Code or constitution. However, we agree that the court failed to exercise its discretion when it found him fit without conducting an independent inquiry into his fitness. Accordingly, we affirm defendant's extended-term eligibility, reverse the court's finding of fitness, and remand for a new fitness hearing.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged on one count of aggravated robbery (720 ILCS 5/18-1(b)(1) (West 2022))[1] arising from an incident on April 26, 2023, at Stella's Place, a café and gaming lounge in Glendale Heights, Illinois. During the incident, which was captured on video, an individual brandished what appeared to be a handgun, pointed it at an employee, and demanded cash from the register. Judge Daniel Patrick Guerin presided over the majority of defendant's case including his trial; however, because Judge Guerin was unavailable for defendant's fitness hearing, Judge Brian F. Telander conducted that proceeding.

¶ 5 The record reflects defendant's overall noncooperation, his distrust of and refusal to speak with appointed counsel, and his failure to participate in pre-trial and post-trial proceedings. Defendant refused to appear at the two status hearings following his arraignment.

¶ 6 During a January 2024 court appearance, defendant conveyed that his counsel had disrespected him and demanded an immediate trial, stating that he himself was unfamiliar with the charges brought against him. He informed the court that he was not going to speak to his counsel

[1]The State did not proceed on the separate armed robbery count (720 ILCS 5/18-2(a)(1) (West 2022)) charged against defendant in a superseding indictment.

under any circumstances. The court explained that if he did not want to proceed with his appointed public defender, his alternatives were to hire a private attorney or proceed self-represented. Defendant rejected these options but maintained his steadfast refusal to communicate with counsel. The colloquy continued:

> "THE COURT: Okay. If you don't speak to him.
>
> THE DEFENDANT: I'm not going to speak to him.
>
> THE COURT: And you want a trial, the situation is going to be that he's not going to be effective—
>
> THE DEFENDANT: I'm fine with that."

Defendant explained his prior interactions with his counsel were one of "interrogation" where counsel "approach[ed] *** like he is a detective." The court found no conflict of interest and "absolutely no neglect of the case" by the public defender. Instead, it noted defendant's lack of communication had made the public defender's efforts to work on the case difficult.

¶ 7 At a March 2024 status hearing, defense counsel raised the issue of defendant's fitness under the second prong of the fitness standard (see 725 ILCS 5/104-10 (West 2022)), noting that defendant's continued lack of meaningful engagement inhibited his ability to assist in his own defense. Addressing defendant, the court stated his counsel had brought up "this concern regarding an aspect of being fit to stand trial, which is the ability to communicate with and cooperate with the defense." Following further dialogue, the court explained the process to defendant: "what I am going to do *** is what is called a bona fide doubt raised about your ability to cooperate and communicate with your lawyer" and that it was "going to enter [an] order that [a] doctor come over and talk to you in the jail" to conduct an evaluation. Following the hearing, the court entered

contemporaneous orders finding a "bona fide doubt as to fitness raised by defense counse[l]" and directing an examination.

¶ 8 Dr. Kristin Schoenbach, a clinical psychologist, completed defendant's fitness examination and issued a four-page report concluding he was fit to stand trial. While defendant was unwilling to answer fitness-specific questions during the 45-minute evaluation, Schoenbach reported that his disagreements with counsel "appear[ed] volitional in nature and not the result of mental illness." The report concluded that he understood the nature of the proceedings and had the ability to assist in his defense "if he so chooses."

¶ 9 On April 19, 2024, the issue of defendant's fitness came before Judge Telander, who was substituting for Judge Guerin. Defense counsel addressed the court, stating "I don't know if the Court, not being this Court's case, wishes to proceed *** and make a [fitness] finding necessary or not." The court responded, "Whatever you'd like." Defense counsel and the State then stipulated to defendant's fitness based on Schoenbach's report:

> "MR. ARD [(DEFENSE COUNSEL)]: At this point since the evaluation found him fit, I would be in a position to stipulate to that.
>
> MS. RABULINKSI [(ASSISTANT STATE'S ATTORNEY)]: I would stipulate to the report as well as to the credentials of Dr. Schlenbach [*sic*] ***, a licensed clinical psychologist."

The court stated it had reviewed the report, which "indicate[d] a variety of things," noting Schoenbach's conclusion "that the defendant is currently fit for trial." The court then found, "based on the stipulation," that defendant was fit to stand trial.

¶ 10 Defendant's refusal to meaningfully communicate with counsel and insistence on proceeding to trial persisted. He further demonstrated a high degree of disengagement by wearing earbuds during court proceedings and choosing to wear his orange jail jumpsuit during trial.

¶ 11 The matter proceeded to a two-day jury trial in December 2024. The victim, Tavannah Milam (née Houston), testified that in April 2023, she worked as a host at Stella's Place. When she arrived for her shift shortly after 1:10 p.m. on April 26, 2023, only one patron was present, playing a slot machine. The business required patrons to provide identification upon entry. Its check-in documentation system later showed the lone patron—an African American man wearing a jacket and baseball hat—had entered the establishment at 12:16 p.m. and that his name was "Odell."

¶ 12 Milam's colleague left around 1:30 p.m., leaving her alone with the patron, who asked her for a beer before entering the bathroom. When he emerged, his appearance had changed. He was now wearing a white facemask, described by Milam as a "COVID mask," with his jacket hood pulled over his baseball hat. He approached the register and requested change for a $20 bill. As soon as Milam opened the register, he demanded that she hand over the funds. She grabbed the cash and change from the register and threw it on the counter. She observed that he had what she thought was a gun with a "light colored tip" pointed towards her just a couple inches away. It was later established that the item was not an actual firearm, though Milam believed it was. The individual demanded more money and personal items from her, which she did not have. Moments later, the business's phone rang. Seemingly startled, the individual instructed Milam to go into the bathroom before he fled. The entire encounter was captured on surveillance footage.

¶ 13 Arturo Venegas, defendant's federal probation officer, positively identified defendant as the perpetrator based on a video clip and stills from the surveillance footage both in October 2023

and during trial. A police detective also retrieved a beer bottle from a trash can near the slot machine where the defendant was situated. There were no other bottles in the trash can. Results from the DNA and fingerprint analysis of the bottle yielded a positive match for the defendant.

¶ 14 The jury returned a guilty verdict, and defendant's motion for a new trial was denied.

¶ 15 At a status hearing prior to sentencing, the court asked defendant whether he wanted to participate in the presentence report interview, remarking on the brevity of the report it received and its indication that he had declined to participate. Defendant confirmed that he did not wish to participate.

¶ 16 The court held defendant's sentencing hearing on February 7, 2025. The four-page presentence investigation report (PSI) listed defendant's criminal history which included a 1996 conviction for aggravated discharge of a firearm, a 2001 conviction for aggravated unlawful use of a weapon, and a June 2, 2003, federal conviction for use of a firearm in relation to a bank robbery. Concerning the bank robbery conviction, the PSI erroneously indicated that defendant had been sentenced to 175 months of probation on three counts, followed by a consecutive 84 months on a separate count. The certified copy of that conviction, however, indicated that defendant was actually sentenced to concurrent terms of 175 months' imprisonment on three counts and a consecutive 84 months' imprisonment on the remaining count, followed by 5 years of supervised release. The PSI indicated that defendant committed the aggravated robbery while on probation for his federal bank robbery conviction.

¶ 17 In aggravation, the State presented certified copies of the above-mentioned convictions to the court. See 730 ILCS 5/5-5-3.2(a)(3) (West 2022). The State requested 26 years' imprisonment followed by a year of mandatory supervised release (MSR). It outlined the three prior convictions, demonstrating how each involved the use or threat of use of a firearm. It also explained that for

each subsequent offense, defendant recidivated while out on parole, and like his prior offenses, defendant committed the instant offense "[w]hile on supervised release or parole for the federal bank robbery."

¶ 18 Defense counsel sought leniency, presented two character letters from family members in mitigation, and requested a sentence of four years' imprisonment. Defendant did not exercise his right of allocution.

¶ 19 The court noted the aggravated robbery conviction, a Class 1 felony (720 ILCS 5/18-1(c) (West 2022)), carries a standard term of imprisonment ranging from 4 to 15 years (730 ILCS 5/5-4.5-30(a) (West 2022)), but "because of [defendant's] prior criminal record, he is extended term eligible to four to 30 years." Based on his extended-term eligibility, it sentenced defendant to 22 years' imprisonment with one year of MSR to follow. It recounted the facts leading to defendant's conviction before addressing the pertinent statutory aggravation and mitigation factors. It recognized the severity of defendant's prior convictions but acknowledged that these convictions were dated. It noted his pattern of reoffending on parole, and that defendant was "on probation for *** bank robbery when this crime occurred." The court did not find any statutory factors of mitigation present. It noted that while criminal history is a factor to consider, it was "not sentencing him for the things he did in the past," but rather for the instant offense.

¶ 20 Defendant's motion to reconsider his sentence was denied, and he timely appealed.

¶ 21 II. ANALYSIS

¶ 22 Defendant argues that his extended-term sentence for aggravated robbery imposed by the circuit court was unlawful and unconstitutional, and that the appropriate recourse is to remand this cause for resentencing. He also contends that the circuit court's fitness finding was inadequate and

deprived him of due process. He alternatively contends his trial counsel rendered him ineffective assistance for both appellate issues that he raises.

¶ 23 While these issues were not preserved in defendant's motion for a new trial or his motion to reconsider his sentence, defendant maintains we may nonetheless consider his arguments. He asserts that the second prong of the plain error rule applies to his extended-term sentence challenge. See *People v. Crawford*, 2023 IL App (4th) 210503, ¶ 46. Alternatively, he argues we may reach the issue because his counsel's failure to challenge the sentence amounted to ineffective assistance. See *People v. Coopwood*, 2025 IL App (3d) 240579-U, ¶ 15. Similarly, he states that the failure to raise the adequacy of his fitness determination in the court below does not evade our review, as we have previously overridden the forfeiture rule in this context. *People v. Cleer*, 328 Ill. App. 3d 428, 431 (2002); *People v. Brown*, 2020 IL 125203, ¶ 25 (noting forfeiture, not waiver, is the failure to make the timely assertion of a right). In any event, defendant maintains that the determination of his fitness warrants consideration under plain-error review. *People v. Cook*, 2014 IL App (2d) 130545, ¶ 13. We address defendant's arguments in turn.

¶ 24 A. Extended-Term Sentence

¶ 25 Defendant asserts that the facts considered by the circuit court necessary to impose his extended term sentence, namely the timelines of his prior felony conviction, his time served, and his probation status, go beyond permissible statutory and constitutional considerations. Specifically, he argues that his sentence violates section 111-3(c-5) of the Code, is unconstitutional under *Apprendi*, and requests we vacate his sentence and remand for resentencing. Defendant raises an alternative claim arguing his trial counsel was ineffective in failing to challenge the imposition of an extended-term sentence. The State contends that Illinois appellate courts have uniformly rejected defendant's positions, citing this court's non-precedential decision in *People v.*

Coopwood, 2025 IL App (3d) 240579-U, ¶¶ 15-20, and the Second District's decision in *People v. Holman*, 2025 IL App (2d) 240513, ¶¶ 46-48. During the pendency of this appeal, the Fifth District addressed the issue in *People v. Cooper*, 2026 IL App (5th) 250282, ¶ 60, and the State filed a motion for leave to cite this decision as additional authority, which we took with the case. We conclude that the circuit court properly imposed defendant's extended-term sentence and note that the arguments defendant raises have been considered and uniformly rejected by the Illinois appellate courts.

¶ 26 Defendant's challenge to his extended-term sentence raises concerns of the constitutionality of a statute, which is a question of law subject to *de novo* review. *People v. Tooley*, 328 Ill. App. 3d 418, 423 (2002). Whether there is plain error in imposing the extended-term sentence (*People v. Marcum*, 2024 IL 128687, ¶ 28) and defendant's claim that he received ineffective assistance of counsel for failure to challenge his sentence also present questions of law which are reviewed *de novo*. *People v. Max*, 2012 IL App (3d) 110385, ¶ 64. When a defendant claims plain error and alternatively ineffective assistance of counsel, we first address whether he has established a clear or obvious error. *People v. Gilker*, 2023 IL App (4th) 220914, ¶ 78. Absent clear or obvious error, neither a claim of plain error nor a claim of ineffective assistance of counsel can be sustained. *People v. Jones*, 2020 IL App (4th) 190909, ¶ 179.

¶ 27 Aggravated robbery is a Class 1 felony and carries a sentencing range of 4 to 15 years' imprisonment. 720 ILCS 5/18-1(c) (West 2022); 730 ILCS 5/5-4.5-30(a) (West 2022). A Class 1 felony carries an extended-term sentencing range of 15 and 30 years. 730 ILCS 5/5-4.5-30(a) (West 2022). Here, the court found that defendant was eligible for an extended sentence under section 5-5-3.2(b)(1) of the Unified Code of Corrections based on his prior federal conviction for bank robbery and imposed a sentence of 22 years' imprisonment. 730 ILCS 5/5-5-3.2(b)(1) (West

2022). Under that subsection, if convicted of a felony, a court may impose an extended-term sentence based on whether the defendant has a previous conviction "of the same or similar class felony or greater class felony" and if so, whether the present conviction "has occurred within 10 years after the previous conviction, excluding time spent in custody" and whether the present charges were separately brought, tried, and arise "out of a different series of acts" than the previous conviction. *Id.* The clear implication of the provision's phrase "time spent in custody" is that the period of incarceration "is not to be counted in determining whether 10 years have elapsed since the offender's prior conviction." *People v. Robinson*, 89 Ill. 2d 469, 476 (1982).

¶ 28 Defendant's position is that the court improperly considered facts necessary for its finding of his extended-term eligibility. In support, he cites the landmark decision *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), which foundationally established that other than "the fact of a prior conviction," any fact that increases a defendant's penalty beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. This rule originates from the rights conferred by the due process clause and jury trial guarantees in the fifth and sixth amendments and extends to state law considerations through the fourteenth amendment. See *id.* at 476.

¶ 29 Soon after *Apprendi* was decided, its prior-conviction exception was harmonized with Illinois law once our legislature incorporated its holding into section 111-3(c-5) of the Code. *People v. Jones*, 2016 IL 119391, ¶ 14. The amendment integrated *Apprendi*'s "prior-conviction exception as well as the due process protections afforded to defendants when an extended-term sentence is sought." *Id.* That section now provides

> "in all cases if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the

offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt." 725 ILCS 5/111-3(c-5) (West 2022).

¶ 30 Defendant also relies on a recent United States Supreme Court decision, *Erlinger v. United States*, 602 U.S. 821, 838 (2024), which addressed the prior-conviction exception pronounced in *Apprendi*. In *Erlinger*, the Supreme Court evaluated whether, under the Armed Career Criminal Act (ACCA), the fact that a defendant's prior offenses were committed on separate occasions must be presented to the jury during the guilt phase of trial or can simply be considered by the court at sentencing. *Id.* at 825. The defendant there pleaded guilty to the underlying charge of being a felon unlawfully in possession of a firearm, which then ordinarily carried a sentence of up to 10 years' imprisonment. *Id.* at 825-26. The government pursued a 15-year sentence, however, arguing that the defendant had committed a crime spree "within a span of days," burglarizing different establishments 26 years before the instant charge. *Id.* at 826. The government argued that because these crimes occurred on "different occasions" they served as a predicate to an enhanced sentence under the ACCA, which required three prior convictions committed on separate occasions for enhancement. *Id.* at 825-27. The defendant responded that these prior acts were committed "during a single criminal episode," did not satisfy the ACCA's requirements for an increased sentence, and whether those offenses were committed "on separate occasions" was a question for the jury to decide. *Id.* at 827. The district court disagreed, found that the 26-year-old crimes were three distinct offenses, and under the ACCA imposed a 15-year sentence. *Id.* at 827.

¶ 31 The Supreme Court held that the district court improperly determined whether the *Erlinger* defendant's prior offenses had occurred on at least three separate occasions. *Id.* at 838-39. It

explained that restricted documents, similar to the judgment of conviction utilized by the court in the matter before us, serve a " 'limited function' " to the sentencing judge "of determining the fact of a prior conviction and the then-existing elements of that offense." *Id.* at 839 (quoting *Descamps v. United States*, 570 U.S. 254, 260 (2013)). It ruled that the inquiry into whether the defendant's offenses were committed on different occasions went beyond these considerations and this "fact-laden task" was one that the jury must resolve. See *id.* at 834-35.

¶ 32 In light of these legal developments, defendant asserts that the court's consideration of his prior federal bank robbery conviction and its related timelines went beyond what is acceptable to impose an extended-term sentence under *Apprendi*'s rule. He directs our attention to the PSI and argues it did not show how much time he spent in custody serving his prior convictions. Furthermore, the court could do " 'no more' " than determine "the fact of a prior conviction and the then-existing elements of that offense" based on the documentation before it. *Id.* at 839 (quoting *Mathis v. United States*, 579 U.S. 500, 511 (2016)). Therefore, defendant argues, the issue of whether his federal bank robbery conviction occurred within 10 years of his aggravated robbery conviction for purposes of sentence enhancement was a question for the jury to decide. He similarly posits that the failure of the indictment to include facts alleging that he was extended-term eligible also violated section 111-3(c-5) of the Code.

¶ 33 The State responds that the dates associated with defendant's federal bank robbery conviction could appropriately be considered by the court at sentencing under section 5-5-3.2(b)(1) and that defendant's arguments were previously addressed and rejected by this court in *Coopwood*, 2025 IL App (3d) 240579-U, ¶ 15, the Second District in *Holman*, 2025 IL App (2d) 240513, ¶ 45, and most recently, the Fifth District in *Cooper*, 2026 IL App (5th) 250282, ¶ 60.

¶ 34 Like in *Coopwood*, *Holman*, and *Cooper*, the court here imposed an extended-term sentence based on section 5-5-3.2(b)(1) of the Unified Code of Corrections. *Coopwood,* 2025 IL App (3d) 240579-U, ¶ 17; *Holman*, 2025 IL App (2d) 240513, ¶ 42; *Cooper*, 2026 IL App (5th) 250282, ¶¶ 56, 58. These defendants challenged the circuit courts' imposition of an extended-term sentence, making three related arguments: (1) an identical argument defendant makes here that his sentence is in violation of *Apprendi* and section 111-3(c-5) of the Code (*Coopwood*, 2025 IL App (3d) 240579-U, ¶ 15), (2) that failure to submit his extended-term eligibility to the jury was a constitutional violation under *Erlinger* (*Holman*, 2025 IL App (2d) 240513, ¶ 38), and (3) a facial challenge to the constitutionality of section 5-5-3.2(b)(1) in light of *Erlinger* (*Cooper*, 2026 IL App (5th) 250282, ¶ 58).

¶ 35 In upholding defendants' extended sentences and the constitutionality of section 5-5-3.2(b)(1), the appellate courts found that in considering *Erlinger*, a defendant's age, date of a prior conviction, and the date of release from custody are not facts that must be submitted to a jury but rather facts "intrinsic to the conviction." *Coopwood*, 2025 IL App (3d) 240579-U, ¶ 17; *Holman*, 2025 IL App (2d) 240513, ¶ 47 (date of release from custody was a fact intrinsic to the conviction and therefore one that the court may properly determine); *Cooper*, 2026 IL App (5th) 250282, ¶ 48 (quoting *Holman*'s holding). Further, the *Holman* court explained that courts may take judicial notice of public records providing the dates of conviction and release from custody. *Holman*, 2025 IL App (2d) 240513, ¶ 47.

¶ 36 The *Holman* court also adequately distinguished the dissimilarity between the "fact-laden task" presented in *Erlinger* of determining whether prior offenses had occurred on separate occasions as was necessary to impose an enhanced sentence under the ACCA, versus what the circuit court was tasked with in the present case. *Erlinger*, 602 U.S. at 834. Here, as in *Holman*,

the defendant was found eligible for an extended-term sentence based on a single prior felony conviction. *Holman*, 2025 IL App (2d) 240513, ¶ 45. "The mere fact of this conviction does not need to be submitted to the jury." *Id.*

¶ 37 *Coopwood* supplementally provides that it is proper for a court to rely upon the PSI to establish the fact that a defendant's prior conviction occurred within the previous 10 years in order to impose an extended-term sentence. *Coopwood*, 2025 IL App (3d) 240579-U, ¶ 18. Further, the *Coopwood* court determined that there was no violation of section 111-3(c-5) of the Code for failing to include prior offenses in the indictment, as the indictment was not required to allege the specific facts of defendant's prior conviction. *Id.*

¶ 38 Defendant does not explain why we should depart from the reasoning established in *Coopwood* and our sister districts which reconcile the relevant section of the Unified Code of Corrections with *Erlinger*. Nor does he address how the court's considerations here differ from those that supported the holdings that dates of conviction and release are intrinsic facts appropriately considered by courts at sentencing. The court here properly considered the PSI, which listed defendant's prior convictions, including his conviction for federal bank robbery. The State presented a certified copy of the federal bank robbery conviction, which informed the court of defendant's prior sentence—175 months of incarceration on each of three counts to run concurrently, and 84 months on a fourth count to run consecutive to the others, followed by 5 years of supervised release. The PSI also informed the court that defendant was on probation when he committed the instant offense. Based on the recent line of cases, these facts were "intrinsic" to defendant's bank robbery conviction, making an extended-term sentence finding under section 5-5-3.2(b)(1) permissible. In line with *Coopwood*, we reject defendant's contention that the failure

to include defendant's prior sentence in the charging instrument ran afoul of section 111-3(c-5) of the Code. *Coopwood*, 2025 IL App (3d) 240579-U, ¶ 18.

¶ 39 Finally, we allow the State's motion to cite *Cooper*. The purpose of permitting citation to additional authority is to draw attention to relevant or dispositive case law decided during or subsequent to appellate briefing on the matter. *People v. Molina*, 379 Ill. App. 3d 91, 99 (2008). *Cooper* meets this aim, adding to the growing body of case law that upholds the legality and constitutionality of extended-term sentences imposed under section 5-5-3.2(b)(1) of the Unified Code of Corrections.

¶ 40 B. Adequacy of Fitness Hearing

¶ 41 Defendant argues that the circuit court failed to exercise its discretion because it did not conduct an independent analysis of Schoenbach's fitness conclusion. He claims the court instead merely accepted the parties' stipulation to the ultimate fitness conclusion, thereby violating his due process rights. Defendant raises an alternative argument that his counsel was ineffective for permitting a substitute judge, one who had not had prior exposure to defendant, to make a determination as to his fitness. The State posits that the circuit court exercised its judicial discretion, basing its fitness finding not just on the report's conclusion, but on the parties' stipulation to the contents of the report, as well as the court's own independent evaluation.

¶ 42 The prosecution of an unfit defendant is prohibited by the due process clauses of the Illinois and United States Constitutions. Ill. Const. art. I, § 2; U.S. Const., amends. VI, XIV. Generally, a circuit court's fitness determination will not be reversed absent an abuse of discretion. *Cleer*, 328 Ill. App. 3d at 431. However, because a defendant's fitness is a matter of constitutional dimension, "the record must show an affirmative exercise of judicial discretion regarding" the court's determination of fitness. *Id.*; *Cook*, 2014 IL App (2d) 130545, ¶ 13. This means the court should

"not be passive, but active" in making its fitness assessment. *People v. Thompson*, 158 Ill. App. 3d 860, 865 (1987). The sufficiency of a fitness determination involves a substantial right, and it is therefore appropriately reviewed under the plain-error doctrine. *Cook*, 2014 IL App (2d) 130545, ¶ 13.

¶ 43 A defendant is presumed to be fit to stand trial. 725 ILCS 5/104-10 (West 2022). Unfitness is established under two circumstances: where, because of a mental or physical condition, defendant (1) is unable to understand the nature and purpose of the proceedings against him, or (2) is unable to assist in his defense. *Id.* The defense, State, or court may raise the issue of defendant's fitness before, during, or after trial. *Id.* § 104-11(a). When a *bona fide* doubt of defendant's fitness is raised, the court must resolve the issue before the case proceeds. *Id.*; *People v. Griffin*, 178 Ill. 2d 65, 79 (1997).

¶ 44 A court may appoint a qualified expert to conduct a fitness examination upon defendant's request. 725 ILCS 5/104-11(b) (West 2022). The appointed expert must submit a written report to the parties and court within 30 days of the order directing examination. *Id.* § 104-15(a). Within 45 days of receiving the report, the court must conduct a fitness hearing wherein a finder of fact must determine defendant's fitness "[o]n the basis of the evidence before it." *Id.* § 104-16(a), (d).

¶ 45 A defendant's right to due process is violated where a court relies exclusively on the parties' stipulation to an expert's report finding defendant fit, as opposed to conducting its own independent fitness inquiry. *Cook*, 2014 IL App (2d) 130545, ¶ 15. On the other hand, a defendant's due process rights are not violated where the court's fitness finding is based not only on stipulations but also on its review of the expert's report and observations of defendant. *Id.* Based on the record before us, it appears that the circuit court merely accepted the parties' stipulation to

the expert report's fitness conclusion, and we therefore hold that it failed to exercise its discretion in finding defendant fit to stand trial.

¶ 46 The State's position that the parties stipulated to the contents of the report and not to Schoenbach's conclusion is unsupported by the record. There is ambiguity as to whether the State's stipulation "to the report" was intended to stipulate that, if called to testify, Schoenbach would testify in conformance with her report or was merely a stipulation to the report's ultimate conclusion. *People v. Contorno*, 322 Ill. App. 3d 177, 179 (2001). The record is unequivocal, however, that defense counsel stipulated to defendant's fitness because the "evaluation found him fit." In exercising its discretion, a court may consider a stipulation that addresses the content of an expert's hypothetical testimony. See *id.* This did not happen here. Neither stipulation offered a detailed recitation of what Schoenbach would have testified to regarding her report. *Thompson*, 158 Ill. App. 3d at 863.

¶ 47 We also disagree with the State's contention that the circuit court made an "informed, independent determination" of fitness based on the fitness report. The court's statement that the report "indicate[d] a variety of things" along with its discussion of Schoenbach's conclusion demonstrates that the court reviewed the report. Yet the court explicitly stated that its finding of fitness was "based on the stipulation" of the parties, which in turn was based on the report's conclusion. In doing so, the court failed to provide a record reflecting "that it did more than merely base its fitness finding on the stipulation to the expert's ultimate conclusion." *Cook*, 2014 IL App (2d) 130545, ¶ 20.

¶ 48 The substitute judge who conducted defendant's fitness hearing had no prior interaction with defendant before that hearing. It is notable, although not dispositive, that the court neither questioned defendant, who was present at the hearing, nor questioned counsel regarding the

contents of Schoenbach's report. *Thompson*, 158 Ill. App. 3d at 865. This is not to say that a substitute judge may not adequately exercise discretion to make a fitness determination in compliance with what the law requires. Rather, under the facts unique to this case, given the lack of discussion from the parties or the court as to the contents of the report, the limited record reflects that the court merely accepted the parties' stipulation to Schoenbach's fitness conclusion without conducting its own independent analysis of the doctor's opinion. *Cleer*, 328 Ill. App. 3d at 432. This is not the active role that due process requires. *Thompson*, 158 Ill. App. 3d at 865. The ultimate decision of defendant's fitness is one for the court, not the expert, to determine. *People v. Smith*, 2017 IL App (1st) 143728, ¶ 86. Therefore, defendant's fitness hearing failed to meet the minimal due process standards. *Thompson*, 158 Ill. App. 3d at 865.

¶ 49 Because the failure to exercise judicial discretion in finding fitness is an error so serious that it affects the fairness of a defendant's trial (see *People v. Schoonover*, 2021 IL 124832, ¶ 27), it warrants reversal of the court's finding, and we need not reach defendant's ineffective assistance claim on this issue. The proper recourse is to remand the matter for a retrospective fitness hearing to determine whether defendant was fit to stand trial. *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 38. Accordingly, we reverse the circuit court's finding of fitness and remand the cause for a retrospective fitness hearing. *Cook*, 2014 IL App (2d) 130545, ¶ 22.

¶ 50 III. CONCLUSION

¶ 51 The judgment of the circuit court of Du Page County is affirmed as to the court's finding that defendant was eligible for an extended-term sentence, reversed as to the court's fitness finding for its failure to exercise discretion, and remanded for a new fitness hearing, and if needed, further proceedings.

¶ 52 Affirmed in part and reversed in part.

¶ 53 Cause remanded.