FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2260

DEONTRAE THOMAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Mark Borello, Judge.

November 22, 2022

NORDBY, J.

Deontrae Thomas appeals his criminal judgment and sentence. He argues that the trial court erred by failing to hold a competency hearing, denying his motion to suppress, denying his motion to compel discovery, committing cumulative error, improperly imposing fees, using an incorrect scoresheet, and failing to file an amended restitution order. We reverse and remand for a *nunc pro tunc* competency evaluation, vacate the sentencing order as to the imposition of certain fees, and remand for entry of a corrected restitution order. We affirm on all other issues.

I.

This murder case began in the early morning hours of May 27, 2017. Eighteen-year-old Z.B. was at home sleeping. His sixteen-year-old sister S.B. and four other children were also in the house asleep. A crashing noise from the kitchen awakened the occupants, and they all gathered in the living room to find that a sliding glass door had been broken with a rock. Someone outside then began shooting into the house, and everyone tried to take cover. Thomas walked into the house holding a gun. S.B. recognized him; she had communicated with him over social media and seen him in a music video on YouTube. Although S.B. had never met Thomas in person, she knew him as "Trae Shorty," which was his Facebook name.

Thomas walked into the living room, fired his gun multiple times, and then left. Z.B., S.B., and one other child had been shot. The police and paramedics arrived soon after. Z.B. died from multiple gunshot wounds, S.B. had gunshot wounds to her leg and foot, and the third victim had gunshot wounds throughout her body.

S.B. told the police that "Trae Shorty" was the shooter and showed an officer his Facebook profile. The police obtained an arrest warrant for Thomas and arrested him the next day. After his arrest, Thomas was taken to a homicide office where detectives conducted a video-recorded interview.

At the start of the interview, Thomas told the detectives that he was nineteen years old, he was in twelfth grade, he could read and write English, he was not under the influence of alcohol or drugs, he was not taking any medications, he did not need glasses or contacts, and he had never seen a mental health counselor. The detectives then showed Thomas a form listing his constitutional rights. To prove that Thomas could read English, the detectives asked him to read the form's first sentence aloud, at which point Thomas read out, "You have the following rights under the United States Constitution." The detectives then went through the form with Thomas:

> THE DETECTIVES: Okay. I'm going to read the rest of it out loud to you. Just give me a verbal yes that you

understand. Okay? You do not have to make a statement or say anything. You understand?

THE DEFENDANT: Yes, sir.

THE DETECTIVES: Okay. Anything you say can be used against you in court.

THE DEFENDANT: Yes, sir.

THE DETECTIVES: All right. You have the right to talk to a lawyer for advice before you make a statement or before any questions are asked of you and to have them with you during any questioning. Understand?

THE DEFENDANT: Yes, sir.

THE DETECTIVES: Okay. If you cannot afford to hire a lawyer, one will be appointed for you before any questioning, if you wish. If you do answer questions, you have the right to stop answering questions at any time and consult with a lawyer.

THE DEFENDANT: All right.

THE DETECTIVES: You understand? All right. Just sign right there for me, if you mind.

Thomas signed the form certifying that he understood his constitutional rights.

Thomas then answered the detectives' questions about his activities over the past several days, whether he had a Facebook page, how he found out about the shooting, and whether he knew Z.B. Eventually, the detectives asked Thomas if they could take a sample of his DNA. Thomas said they could. But less than a minute later, Thomas changed his mind and said he did not want to give a DNA sample. Even after the detectives said that a DNA sample could help clear things up, Thomas refused. The detectives then asked Thomas if they could look through his backpack, which he had told them was in his mom's car. They told Thomas that they

were asking for his consent to search his backpack and gave him a consent form, but Thomas refused. The detectives later asked Thomas for his cell phone password, but Thomas did not provide it.

The detectives then confronted Thomas about several lies he had told them during the interview, including his statements that he did not have a Facebook page and that he was at his girlfriend's house at the time of the shooting. As a detective was saying that they knew he was not at his girlfriend's house, Thomas interrupted to say, "I don't wanna talk no more." The detectives immediately got up and left.

Nearly two years later in March 2019, while Thomas was awaiting trial, his defense counsel deposed S.B. Just a couple of months later, in May 2019, S.B. became the victim of a second shooting. While S.B. and several friends were sitting in a car parked outside her house, someone fired a gun into the car, injuring S.B. and one of the other passengers. S.B. was shot fourteen times, but she survived after multiple surgeries. She at first identified the shooter as Caleb Sheffield, who was friends with Thomas. But after learning that Sheffield was out of town at the time, she could not identify the shooter.

During this time, Thomas was in jail but used a tablet to exchange messages with people. Messages he sent between March and June 2019 suggested Thomas arranged the shooting after S.B.'s deposition to prevent her from testifying at trial. Based on these messages, the State added a charge of witness tampering.

After the addition of the witness tampering charge, Thomas moved to compel discovery of information related to the 2019 shooting. He requested all statements S.B. gave to law enforcement about Caleb Sheffield and the identity of the other victim. He also made a broader request for the State to turn over all information about its investigation into the 2019 shooting because it was related to the witness tampering charge. He

explained that the information constituted *Brady*[1] material that the State had to disclose.

The trial court held a hearing on the motion. The crux of the issue was that the defense wanted to cross-examine S.B. about her misidentification of Caleb Sheffield in the 2019 shooting based on a theory that she had identified Sheffield because of his friendship with Thomas. The purpose was to impeach S.B. by showing that she was biased against Thomas, thus casting doubt on her identification of Thomas as the 2017 shooter.

By that point, the defense had deposed S.B. two times: in March 2019 (before the second shooting) and then again in August 2019 (after the second shooting). During S.B.'s second deposition, she told defense counsel the names of the other people in the car during the shooting, including the one who was injured. Although S.B. said that she did not see who the shooter was, the other victim told her it was Caleb Sheffield. Based on that, S.B. told the police that Sheffield was the shooter, and she selected his photo from a photo lineup.

Even after S.B.'s second deposition, Thomas wanted more information from the State about its investigation in order to more effectively impeach S.B. The State opposed admitting any evidence that S.B. had identified Caleb Sheffield as the 2019 shooter because it was not relevant to her identification of Thomas two years earlier. The State also opposed Thomas's discovery request because the investigation into the 2019 shooting was still ongoing.

The trial court ultimately ruled that the defense was allowed to question S.B. about her identification of Caleb Sheffield in the 2019 shooting. But the trial court also ruled that the defense could not introduce extrinsic evidence because it was impeachment on a collateral matter. The defense would simply have to accept S.B.'s answers.

The trial court then denied Thomas's request for additional discovery. The trial court reasoned that the defense had

---

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

questioned S.B. about the 2019 shooting and Caleb Sheffield in her second deposition, which gave the defense the information it needed. The trial court said that other information about the investigation was not relevant to impeaching S.B. and was unlikely to lead to admissible evidence.

Defense counsel also filed two other pretrial motions. The first was a motion to determine competency. The trial court granted the motion and appointed an expert to evaluate Thomas. But the trial court never held a competency hearing or issued a competency order.

Thomas also moved to suppress all statements he made to the police during his interview, arguing that he had not validly waived his *Miranda*[2] rights. At a hearing on the motion, the State called just one witness: a detective from the Clay County Sheriff's Office. The detective testified that he conducted an interview with Thomas in an unrelated case in 2015, during which he went over Thomas's *Miranda* rights. Thomas said he understood his rights but agreed to talk to the detective anyway. Other than that, the parties relied on the video recording of the interview. Based on the video, the trial court found that Thomas understood his rights and that he freely and voluntarily waived them. It denied the motion to suppress.

A jury ultimately convicted Thomas of six offenses: (I) first-degree murder; (II) attempted second-degree murder with a weapon; (III) attempted second-degree murder with a weapon; (IV) armed burglary with assault or battery; (V) shooting or throwing missiles; and (VI) tampering with a witness, victim, or informant. The sentencing scoresheet listed first-degree murder as the primary offense and the other five convictions as secondary offenses, leading to a lowest permissible sentence of 286.5 months (23.875 years) in prison. The trial court sentenced Thomas to life imprisonment for Count I, twenty years' imprisonment for Counts II and III, twenty-five years' imprisonment for Count IV, ten years' imprisonment for Count V, and twenty years' imprisonment for Count VI.

---

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The trial court also imposed various costs and fees on Thomas, including $201 paid to a domestic violence fund under section 938.08, Florida Statutes and $151 paid to a rape crisis trust fund under section 938.085, Florida Statutes. The trial court separately ordered that Thomas pay restitution to the victim in the amount of $2,745.00 with a 12% annual interest rate.

While this appeal was pending, Thomas filed timely motions to correct sentencing errors, in which he challenged the imposition of fees, the interest rate on the restitution payment, and the inclusion of the first-degree murder conviction on the scoresheet. The trial court agreed that it erred by imposing a 12% interest rate on the restitution payment, and it ordered the Clerk of Court to change the interest rate in the Judgment and Restitution Order from 12% to 6.83%. The trial court denied Thomas's motion as to the imposition of fees, and it never issued an order on the inclusion of the murder conviction on the scoresheet. No amended Judgment and Restitution Order reflecting the change in interest rate was ever filed.

II.

A.

The State properly concedes error on the competency issue. The trial court failed to hold a competency hearing or issue a written competency order. *See* Fla. R. Crim. P. 3.210(b) (requiring the trial court to set a competency hearing if it has reasonable grounds to believe the defendant is not competent); Fla. R. Crim. P. 3.212(b) (requiring the trial court to enter an order on the defendant's competence before proceeding); *Anderson v. State*, 303 So. 3d 288 (Fla. 1st DCA 2020) ("Failure to hold a competency hearing and enter a written order is fundamental error and requires reversal."). We therefore reverse and remand for the trial court to conduct a *nunc pro tunc* competency evaluation or conduct a new trial. *See id.*; *Ramsey v. State*, 315 So. 3d 1244, 1245 (Fla. 1st DCA 2021). If the trial court determines that Thomas was competent at the time of trial, it should enter a written *nunc pro tunc* competency order with no change to the judgment. *See Zern v. State*, 191 So. 3d 962, 965 (Fla. 1st DCA 2016).

B.

Thomas argues that the statements he made to the police during his interview should have been suppressed because he did not knowingly and voluntarily waive his *Miranda* rights. We review an order denying a motion to suppress under a mixed standard. *Taylor v. State*, 326 So. 3d 115, 117 (Fla. 1st DCA 2021). We generally defer to the trial court's factual findings if supported by competent, substantial evidence and review its legal conclusions de novo. *Id.* That said, the trial court's factual findings are almost entirely based on the video of the interview. Because we have equal access to the video, we apply a less deferential standard to the trial court's factual findings to the extent that they are based on the video. *See State v. Hineline*, 159 So. 3d 293, 296 (Fla. 1st DCA 2015) (explaining that a less deferential standard of review applies to factual findings that are based on evidence other than live testimony); *Black v. State*, 59 So. 3d 340, 344 (Fla. 4th DCA 2011) ("[T]o the extent that the trial court's findings are based on viewing the interrogation DVD, which this court of course has also viewed, we utilize a much less deferential standard.").

Thomas does not dispute that the police gave him a full and accurate description of his constitutional rights. The only issue is whether Thomas validly waived those rights before speaking to the detectives without counsel present. In making that determination, the State has the burden of proving by a preponderance of the evidence that the defendant's waiver was knowing, intelligent, and voluntary. *Bevel v. State*, 983 So. 2d 505, 515 (Fla. 2008). Whether the waiver was "knowing, intelligent, and voluntary" involves two separate inquiries:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Ramirez v. State, 739 So. 2d 568, 575 (Fla. 1999) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). These determinations are

based on the totality of the circumstances. *Id.*; *Pierce v. State*, 221 So. 3d 1218, 1221 (Fla. 1st DCA 2017).

Thomas relies on *Ross v. State*, 45 So. 3d 403 (Fla. 2010) to argue that his waiver was not knowingly made because the detectives improperly downplayed the significance of the *Miranda* rights. In *Ross*, the police did not administer the *Miranda* warnings until several hours into the interrogation. 45 So. 3d at 418. When the police did administer the warnings, they downplayed their importance by asserting they were only a "matter of procedure" and implied that remaining silent was futile because the police could still use the defendant's earlier admissions against him. *Id.* at 428. The police also lulled the defendant into a false sense of security by telling him he was not under arrest even though they already had probable cause to arrest him. *Id.* at 430–31. Based on these circumstances, the Court held that the defendant's waiver was not valid due to the delay in administering the *Miranda* warnings and because "the officers minimized and downplayed the significance of the warnings." *Id.* at 432.

None of those factors are present in Thomas's case. The detectives exclusively referred to the *Miranda* warnings as Thomas's "constitutional rights," and they never told him that he was not under arrest. Furthermore, the analysis in *Ross* was in the context of the *Miranda* warnings being administered after the police had spent time interrogating the suspect. The Court explained that whether the police "minimized and downplayed the significance of the *Miranda* rights" is important "to ensure that a suspect who is provided with a tardy administration of the *Miranda* warnings truly understands the importance and the effect of the *Miranda* warnings in light of the problems faced when warnings are delivered midstream." *Id.* at 428. The police did not question Thomas before delivering the *Miranda* warnings, so the problems associated with delivering the warnings midstream do not exist in this case.

The other facts in the record support the trial court's conclusion that Thomas's waiver was knowingly made. Before delivering the *Miranda* warnings, the detectives confirmed that Thomas could read and write English, had at least a twelfth grade

education, was not under the influence of alcohol or drugs, and had never seen a mental health counselor. The detectives then gave him a written form containing a full and accurate description of his rights and read each of them out loud. The State also presented testimony that Thomas had been told his rights during a police interrogation in a different matter and that he spoke to officers in that matter too. *See J.H. v. State*, 344 So. 3d 616, 620 (Fla. 1st DCA 2022) (defendant's prior experience with the criminal justice system supported determination that he knowingly waived his *Miranda* rights). Under the totality of the circumstances, the trial court was correct to say that Thomas's waiver was knowingly and intelligently made.

A waiver must also be voluntary, which means it must not result from police intimidation, coercion, or deception. *Brookins v. State*, 704 So. 2d 576, 577 (Fla. 1st DCA 1997). Thomas, once again relying on *Ross*, argues that the waiver of his rights was not voluntary because the detectives instructed him to "just give me a verbal yes that you understand" without giving him to the option to say "no." But this argument does not hold up under the totality of the circumstances test. When the detective was reading Thomas his rights, he paused several times to ask, "you understand?" or "understand?" These are questions to which Thomas could have answered "no," not an instruction for him to say "yes." Throughout the process, Thomas answered each question by nodding his head and saying he understood. Similarly, the detective's request for Thomas to sign the form by saying "just sign on it there for me, if you mind" cannot be viewed as an order for Thomas to sign the form when viewed under the totality of the circumstances.

Finally, Thomas argues that his decision not to consent to a search of his backpack shows that his initial waiver was neither knowing nor voluntary. He says that until the detectives explained that he was not required to consent to a search of his backpack, he did not realize that he had the option of refusing consent. But Thomas's argument is inconsistent with the facts. Even before the detectives requested consent to search his backpack, Thomas refused to consent to the detectives taking a DNA sample. This shows that he was aware of his right to refuse consent before the detectives asked to search his backpack. More than that, Thomas first did give his consent to giving a DNA sample before changing

his mind. This shows that he not only understood his right to refuse consent but that he also understood his right to revoke consent after he had given it.

Ultimately, Thomas did exercise his right to remain silent when he told the detectives that he did not want to talk anymore. Thomas's choice to exercise this right—at the point in the interview when he first seemed to realize that he may have said something incriminating—shows that he understood the nature of his rights and the consequences of not exercising them. Based on the totality of the circumstances, we conclude that Thomas's waiver was knowing, intelligent, and voluntary. We affirm the trial court's order denying his motion to suppress.

C.

Thomas next argues that the State committed a *Brady* violation by failing to disclose the information he requested in his motion to compel discovery. But the *Brady* rule only applies to "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *Rhodes v. State*, 986 So. 2d 501, 507 (Fla. 2008), *as modified on denial of reh'g* (July 3, 2008) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). It does not apply to the trial court's denial of a motion to compel discovery. Where a *Brady* claim assigns error to the State due to its suppression of material exculpatory evidence, Thomas's actual assignment of error is with the trial court's discovery order.

Even if Thomas had properly raised a *Brady* claim, it would still fail on the merits. Due process requires the prosecution to disclose material evidence favorable to the defendant to avoid depriving the defendant of a fair trial. *United States v. Bagley*, 473 U.S. 667, 674–75 (1985). This includes both exculpatory evidence and impeachment evidence. *Id.* at 676. "To establish a *Brady* violation, the defendant has the burden to show that: (1) the evidence was either exculpatory or impeaching; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) because the evidence was material, the defendant was prejudiced." *Davis v. State*, 136 So. 3d 1169, 1184 (Fla. 2014) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)).

Thomas cannot establish a *Brady* claim based on his request for S.B.'s statements about Caleb Sheffield and the identity of the other victim from the 2019 shooting because he already received that information in S.B.'s second deposition. A *Brady* violation cannot be based on information already known to the defense. *See Rhodes*, 986 So. 2d at 507; *Pagan v. State*, 29 So. 3d 938, 948 (Fla. 2009) ("If the evidence in question was known to the defense, it cannot constitute *Brady* material."). Because Thomas received the exact evidence he requested in his motion, he cannot establish a *Brady* violation based on a failure to disclose it.

Thomas's broader request for all information related to the investigation also cannot establish a *Brady* claim. To establish a *Brady* violation, the defendant must identify specific exculpatory evidence suppressed by the State. A defendant's general request for *Brady* material is insufficient. *See State v. Lewis*, 838 So. 2d 1102, 1119 (Fla. 2002) (affirming denial of defendant's *Brady* claim because "Lewis does not point to any specific request for exculpatory material under *Brady*; it is merely a general request"); *Johnson v. Butterworth*, 713 So. 2d 985, 987 (Fla. 1998) (affirming dismissal of defendant's *Brady* claim because "Johnson's request in this case was no more than a general request under *Brady*").

When a defendant makes only a general request for *Brady* material, "'it is the State that decides which information must be disclosed' and unless defense counsel brings to the court's attention that exculpatory evidence was withheld, 'the prosecutor's decision on disclosure is final.'" *Roberts v. Butterworth*, 668 So. 2d 580, 582 (Fla. 1996) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987)); *see also Agurs*, 427 U.S. at 106–07 (if the prosecution has a duty to respond to a general request for *Brady* material, "it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor"). Since Thomas made only a general request for *Brady* material but failed to identify specific exculpatory evidence, he cannot establish a *Brady* claim.

We instead review the trial court's order denying Thomas's motion to compel as we would any other discovery order. An order denying criminal discovery is reviewed for an abuse of discretion. *Hill v. State*, 307 So. 3d 897, 899 (Fla. 1st DCA 2020).

Thomas's motion to compel was a request for additional discovery under rule 3.220(f). *See* Fla. R. Crim. P. 3.220(f) ("On a showing of materiality, the court may require such other discovery to the parties as justice may require."); *see also Franklin v. State*, 975 So. 2d 1188, 1189 (Fla. 1st DCA 2008). "In the discovery context, material means reasonably calculated to lead to admissible evidence." *Id.* at 1190. Under rule 3.220(f), Thomas had the burden of establishing materiality. *State v. Stephens*, 288 So. 3d 104, 106 (Fla. 2d DCA 2019).

As explained, Thomas already received the evidence he needed to impeach S.B. from her deposition. S.B. told defense counsel everything he needed to know about her identification of Caleb Sheffield as the shooter. The defense then used that information when cross-examining S.B. at trial. Thomas has failed to show how more information about the investigation would have been useful for impeaching S.B. when S.B. herself testified about her misidentification of Sheffield. He has also failed to show how the information could have led to admissible evidence, especially given the trial court's ruling that Thomas could not introduce extrinsic evidence to impeach S.B. on a collateral matter. Under these circumstances, the trial court did not abuse its discretion by finding that the requested information was unlikely to lead to admissible evidence.

Finally, Thomas argues that the trial court erred by not conducting an *in camera* review of the requested material before denying his motion. But Thomas never requested an *in camera* review in the trial court, so this argument is not preserved. *See Hill*, 307 So. 3d at 901 ("[B]ecause Hill did not raise with the trial court his argument that in camera review of the affidavit was required, we find that Hill did not preserve this issue for appellate review."). The trial court's order denying the motion to compel is affirmed.

D.

Thomas argues that he was denied a fair trial due to the cumulative effect of the errors set forth in the previous issues. As we have not found multiple errors, a cumulative error analysis is unnecessary. *See Smith v. State*, 333 So. 3d 255, 263 (Fla. 1st DCA 2022).

E.

Thomas points to three sentencing errors: (1) the trial court erroneously imposed fees under sections 938.08 and 938.085, Florida Statutes; (2) the trial court erroneously scored the first-degree murder offense on the scoresheet; and (3) an amended restitution order was never filed after the trial court granted Thomas's motion to correct the interest rate. We review a trial court's ruling on a motion to correct sentencing error de novo. *Smith v. State*, 336 So. 3d 370, 371 (Fla. 1st DCA 2022).

i. Fees

Section 938.08 mandates the imposition of a surcharge to be deposited into the Domestic Violence Trust Fund in some cases:

> In addition to any sanction imposed for a violation of s. 784.011, s. 784.021, s. 784.03, s. 784.041, s. 784.045, s. 784.048, s. 784.07, s. 784.08, s. 784.081, s. 784.082, s. 784.083, s. 784.085, s. 794.011, or for any offense of domestic violence described in s. 741.28, the court shall impose a surcharge of $201.

§ 938.08, Fla. Stat. Section 938.085 mandates the imposition of a surcharge to be deposited into the Rape Crisis Program Trust Fund:

> In addition to any sanction imposed when a person pleads guilty or nolo contendere to, or is found guilty of, regardless of adjudication, a violation of s. 775.21(6) and (10)(a), (b), and (g); s. 784.011; s. 784.021; s. 784.03; s. 784.041; s. 784.045; s. 784.048; s. 784.07; s. 784.08; s. 784.081; s. 784.082; s. 784.083; s. 784.085; s. 787.01(3); s.

> 787.02(3); 787.025; s. 787.06; s. 787.07; s. 794.011; s. 794.05; s. 794.08; former s. 796.03; former s. 796.035; s. 796.04; s. 796.05; s. 796.06; s. 796.07(2)(a)-(d) and (i); s. 800.03; s. 800.04; s. 810.14; s. 810.145; s. 812.135; s. 817.025; s. 825.102; s. 825.1025; s. 827.071; s. 836.10; s. 847.0133; s. 847.0135(2); s. 847.0137; s. 847.0145; s. 943.0435(4)(c), (7), (8), (9)(a), (13), and (14)(c); or s. 985.701(1), the court shall impose a surcharge of $151.

§ 938.085, Fla. Stat.

The jury convicted Thomas of armed burglary with assault or battery under section 810.02(2), Florida Statutes, which is not on either list of offenses (nor is any other offense he was convicted of). But the State points out that both lists include sections 784.011 (assault) and 784.03 (battery). Although Thomas was not separately charged with either of those offenses, the jury was instructed on the elements of assault and battery as part of the burglary charge, and it found beyond a reasonable doubt that Thomas committed an assault or battery during the commission of the burglary. The State argues that this is enough to impose the surcharges. Thomas argues that the plain language of sections 938.08 and 938.085 requires him to be convicted under one of the enumerated statutes, which he was not.

In addressing this issue, we are guided by our previous decision in *West v. State*, 244 So. 3d 1208 (Fla. 1st DCA 2018). In *West*, the defendant was convicted of burglary of a dwelling with battery after breaking into the home of his child's mother and committing battery. 244 So. 3d at 1208. The trial court imposed a $352 "battery surcharge" but did not specify what authority it was relying on to impose it. *Id.* On appeal, we held that section 938.08 mandated imposing a $201 "domestic violence-related surcharge" because the defendant was convicted of "breaking into the home of the mother of his child and committing battery." *Id.* This can be explained by the fact that section 938.08 mandates a surcharge for "any offense of domestic violence described in s. 741.28." § 938.08, Fla. Stat. Section 741.28, in turn, defines "domestic violence" as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting

in physical injury or death of one family or household member by another family or household member." § 741.28(2), Fla. Stat. Because the defendant in *West* broke into the home of his child's mother and committed a battery constituting an offense of domestic violence, the trial court properly imposed section 938.08's surcharge.

But *West* also held that "no authority exists to support the additional $151 surcharge amount imposed by the court." *Id.* Although section 938.085 is not mentioned, $151 is the exact amount of the surcharge in that statute. By explicitly stating that "no authority" supported the $151 surcharge, we rejected the idea that section 938.085 authorized the surcharge for a conviction of burglary with battery.

Our decision in *West* leads us to conclude that the trial court erred by imposing the surcharges. Thomas did not commit a domestic violence offense because he did not commit a criminal offense against his own family or household members. He was also not convicted under any of the statutes enumerated in sections 938.08 and 938.085, Florida Statutes. Accordingly, we vacate the sentencing order as to the $201 and $151 surcharges.

ii. Scoresheet

While this appeal was pending, Appellant filed a 3.800(b) motion arguing that the first-degree murder offense should not have been included on the scoresheet. The trial court never issued a ruling, so the motion is considered denied. *See* Fla. R. Crim. P. 3.800(b)(2)(B) ("[I]f the trial court does not file an order ruling on the motion within 60 days, the motion shall be deemed denied.").

The State concedes that it was error to include the first-degree murder offense on the sentencing scoresheet. *See* § 921.002, Fla. Stat. ("The Criminal Punishment Code shall apply to all felony offenses, *except capital felonies*, committed on or after October 1, 1998.") (emphasis added); § 782.04(1)(a), Fla. Stat. (defining first-degree murder as a capital felony). Yet the State argues that it was harmless error.

When a defendant establishes a scoresheet error on direct appeal, "any error is harmless if the record conclusively shows that the trial court *would have imposed* the same sentence using a correct scoresheet." *Brooks v. State*, 969 So. 2d 238, 241 (Fla. 2007) (emphasis in original). The scoresheet used by the trial court listed the lowest permissible sentence as 286.5 months. A correct scoresheet would have listed the lowest permissible sentence as 243 months. On top of the life sentence for murder, the trial court sentenced Thomas to 1,140 months in prison, most of them to run consecutive to the life sentence and to each other. Because the trial court's sentences are vastly larger than the lowest permissible sentence and are mostly to be served consecutively, the record shows that the lowest permissible sentence played no part in the trial court's sentencing decision. The scoresheet error was therefore harmless and does not warrant a remand for resentencing. *See Ivey v. State*, 324 So. 3d 983, 985 (Fla. 1st DCA 2021).

iii. Restitution

The trial court agreed with Thomas that it erred by imposing a 12% interest rate on the restitution payment, and it ordered that the interest rate be changed to 6.83%. It does not appear that a corrected order has been filed. On remand, the trial court must ensure that an order reflecting the correct interest rate is prepared.

III.

We REVERSE and REMAND for a *nunc pro tunc* competency evaluation or a new trial. We VACATE the sentencing order as to the $201 and $151 surcharges. And we REMAND for the trial court to prepare a corrected restitution order. We AFFIRM on all other issues.

ROWE, C.J., and WINOKUR, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331. No extensions of time will be granted for the filing of such motions.

Michael Ufferman of Michael Ufferman Law Firm, P.A., Tallahassee, for Appellant.

Ashley Moody, Attorney General, Miranda L. Butson, Assistant Attorney General, and Sharon S. Traxler, Assistant Attorney General, Tallahassee, for Appellee.