

NOTICE

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2014 IL App (4th) 130031-U

NO. 4-13-0031

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 15, 2014

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
CLINT STEVEN FORREST,)	No. 11CF861
Defendant-Appellant.)	
)	Honorable
)	Rebecca Simmons Foley,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.

Justices Pope and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding that the trial court did not abuse its discretion by (1) admitting evidence that the defendant, contemporaneously with the charged offense, made statements and gestures indicating his affiliation with a street gang, and (2) refusing to give the defendant's proposed jury instruction regarding uncharged conduct.

¶ 2 In October 2012, a jury convicted defendant, Clint Steven Forrest, of aggravated battery (720 ILCS 5/12-3.05(d)(4) (West 2010)) for spitting upon a police officer. In December 2012, the trial court sentenced defendant to three years in prison.

¶ 3 Defendant appeals, arguing that the trial court erred by (1) admitting irrelevant and prejudicial evidence of defendant's gang affiliation and (2) refusing to give defendant's version of Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. Supp. 2009) (hereinafter, IPI Criminal 4th No. 3.14 (Supp. 2009)), regarding evidence of uncharged conduct. Defendant also asserts that the circuit clerk improperly imposed fines. We affirm defendant's conviction and

prison sentence, but we vacate the improperly imposed fines and remand with directions.

¶ 4

I. BACKGROUND

¶ 5 In September 2011, the State charged defendant with two counts of aggravated battery, alleging that defendant (1) spat upon Robert Cherry, a police officer engaged in the performance of his official duties (720 ILCS 5/12-3.05(d)(4) (West 2010)), and (2) hit John Sherring, a bouncer, in a public place of accommodation (720 ILCS 5/12-3.05(c) (West 2010)).

¶ 6

A. Defendant's Motion *in Limine*

¶ 7 In October 2012, defendant filed a motion *in limine*, requesting, in pertinent part, an order prohibiting the State from "introduc[ing] or comment[ing] that defendant is/was a gang member (reference to 'gang tattoos' and various alleged statements relating to 'Latin Kings')."

¶ 8

At the hearing on the motion, the State argued that the gang-related evidence—which was based on defendant's own statements and gestures—was necessary to provide the jury with a complete picture of defendant's mindset and behavior at the time of the alleged offenses. In response, defendant argued that his alleged gang membership was more prejudicial than probative and ultimately irrelevant to the charged offenses. The trial court disagreed and denied defendant's motion *in limine*, reasoning as follows:

"Based upon what the court has heard at this point in time, again noting there is purpose here, identification, it's part and parcel of the events that occurred. While there is no gang motive necessarily, the court concurs with the [State's] position that if the court were to remove that and simply allow the jury to hear evidence in a vacuum without the other surrounding circumstances, it would handcuff the [State] severely in terms of [its] ability to pre-

sent evidence. Because it came up in the course of events with this, the court does not believe it's unnecessarily prejudicial to the defendant."

¶ 9 B. The October 2012 Trial

¶ 10 1. *The Pertinent Evidence*

¶ 11 Joshua Jacobs testified that on the evening of September 29, 2011, he was working as the head bouncer at Pub II, a sports bar in Normal, Illinois. It was "Pub Wednesday" and the beer specials had attracted a large crowd. As Jacobs surveyed the outdoor beer garden from an elevated stoop, he witnessed a fight break out. Defendant and a companion were throwing punches at a man in another group. Jacobs and his fellow bouncer intervened, physically removing defendant and his friend from the premises. As Jacobs and additional bouncers tried to remove the remaining belligerents, defendant's group turned on the bouncers. Jacobs and another bouncer received punches to the face as they attempted to remove the aggressors from the bar. Outside, a third bouncer was kicked in the head by another member of defendant's group. The fighting between the five bouncers and the five members of defendant's group spilled out onto College Avenue, in a spectacle that several witnesses described as "chaos."

¶ 12 John Sheering, a bouncer, testified that he was punched in the side of the head while he was outside assisting the other bouncers. Sheering spun around to see defendant, whom he wrestled to the ground and held there until defendant assured Sheering that he was "done." Sheering released defendant and returned back to the bar entrance to control the crowd.

¶ 13 Officer Cherry, who was already at Pub II conducting underage drinking enforcement, went outside to help break up the fight. Other officers soon arrived. After the police restored order, the bouncers involved in the fight set out to help the police identify the aggres-

sors. Sheering located defendant, who was now shirtless and walking out of the bar. As Sheering approached, defendant began yelling, pointing to his tattoos, and "giving gang signs." Sheering grabbed defendant by the arm and brought him to Cherry.

¶ 14 Jacobs described defendant's appearance and demeanor at the time:

"[JACOBS]: *** [H]e didn't have a shirt on, yelling and screaming. All tattooed up.

[THE STATE]: And when you say all tattooed up, where were these tattoos if you recall?

[JACOBS]: I think maybe arms and chest, I know chest for sure, not sure about arms.

[THE STATE]: When you say he was screaming, what was he saying?

[JACOBS]: Gang stuff, you know, F U, swear words, I'll kill you, threatening us with his gang, just stuff like that.

[THE STATE]: Okay. When you say gang stuff, what do you mean by that?

[JACOBS]: He brought up Latin Kings, that he's a Latin King, and they are going to kill us or they are going to come back and kill us or shoot us or just threats like that."

¶ 15 Another bouncer, Luke Kabbes, testified that he observed defendant shirtless and screaming at the bouncers and officers. Kabbes described defendant's demeanor, as follows:

"[H]e was just yelling at us, telling us him and his gang beat our butts, you know, he was mad, he was angry. I'm going to

say he was under the influence at the time. So he was just yelling out repeatedly different gang signs and showing us his tats on his chest, showing his gang signs."

¶ 16 Officer Jeff Longfellow placed defendant in handcuffs and stood behind him as Cherry spoke with defendant. Longfellow testified that defendant was screaming at the bouncers and attempting to gesture towards his tattoos with his handcuffed hands.

¶ 17 Cherry described his observations of defendant, as follows:

"He identified himself as being affiliated with the Latin King[s] street gang. Kept pointing to tattoos that were on his chest. As I said before, he didn't have a shirt on. He kept saying I'm going to have my people, my family come shoot the place up. I'm going to come back and shoot the place up. He kept saying Latin Kings—pardon me, Latin Kings, mother fucker, I'm coming back with my people."

The State also questioned Cherry about defendant's tattoos:

"[THE STATE:] And do you recall what [the tattoos] looked like at this time?

[CHERRY:] Yes. On his right shoulder is a 12, on his left shoulder is an 11, and written across is what I would consider a banner or a rocker tattoo, it says [']amor del rey.[']

[THE STATE:] And do you know what [']amor del rey['] means?

[DEFENSE COUNSEL:] Objection, foundation.

THE COURT: Overruled.

[CHERRY:] It's Spanish, depending on the loose affiliation, either [']king love['] or [']love from the king.[']

[THE STATE:] You said there's a 12 and an 11?

[CHERRY:] Yes.

[THE STATE:] Do you know at this time what the 12th letter of the alphabet is?

[CHERRY:] Yes, it's L.

[THE STATE:] What is the 11th letter of the alphabet?

[CHERRY:] It's K."

¶ 18 While handcuffed and facing Cherry, defendant spat toward bouncers Sheering and Kabbes. Cherry and Longfellow both testified that defendant's spit struck the entire left side of Cherry's face.

¶ 19 Defendant testified that he took no part in any fighting. According to defendant, as Kabbes was removing one of defendant's companions from the bar, another bouncer grabbed defendant by the sweatshirt, pulled the sweatshirt over defendant's head, and began punching him in the face and body. After the bouncer let defendant go, defendant noticed that his sweatshirt was stretched to the point of ruin, so he removed it. Defendant remained outside near the commotion until he and a friend agreed that they should leave. Just then, Sheering grabbed defendant and brought him to Cherry, accusing defendant of punching Sheering earlier.

¶ 20 Defendant admitted that while he was handcuffed, he was upset, yelling swear words, and threatening to beat up Sheering, who was at the time explaining to Cherry that defendant had punched him. Defendant denied threatening to return with his boys and shoot the place up. Defendant felt blood running down his lip, so he spit on the ground in front of him.

end. But I think regardless of the underaged drinking or fighting or anything else, the gang references alone, this would be, you know, conduct of another that may be frowned upon and could be prejudicial. So I believe that this instruction is most appropriate in this case."

¶ 23 The trial court stated that although it was inclined to give an instruction directed at the other-crimes and gang-related evidence, it would not give an instruction that simply (1) referred to evidence of unspecified "conduct" and (2) limited the jury's consideration of that evidence to identification. The State proposed that the first paragraph of defendant's instruction should be changed to reflect that evidence had been presented that defendant is associated with a gang, instead of merely stating that defendant has been involved in "conduct." Defendant objected to that change, asserting that IPI 4th No. 3.14 (Supp. 2009) simply says "conduct" and "the jury can figure out what conduct is." The court responded to defendant's position, as follows:

"Well, I think part of the problem is the jurors weren't instructed on this during the course of the trial, so without any further specifics, they are going to be left to their own devices as to what in the world we are talking about. So without anything further in terms of specifics that you [defendant] want to be addressed, the court is not inclined to give the instruction. So if you wish to submit it with ["]conduct["] in the first paragraph ***, the court would refuse that instruction."

Defendant declined to make the instruction more specific, and the court refused it.

¶ 24

3. *The Verdict and Sentence*

¶ 25 The jury found defendant guilty of aggravated battery for spitting upon Cherry, but it could not reach a verdict on the charge that defendant committed an aggravated battery against Sheering. Accordingly, the trial court declared a mistrial as to the latter count.

¶ 26 In December 2012, following a hearing, the trial court sentenced defendant to three years in prison.

¶ 27 This appeal followed.

¶ 28

II. ANALYSIS

¶ 29 Defendant argues that the trial court erred by (1) admitting irrelevant and prejudicial evidence of defendant's gang affiliation and (2) refusing to give defendant's version of IPI Criminal 4th No. 3.14 (Supp. 2009) regarding evidence of uncharged conduct. We address defendant's contentions in turn.

¶ 30

A. Evidence of Gang Affiliation

¶ 31 Defendant argues that he was deprived of a fair trial because the evidence of his apparent gang affiliation was irrelevant and prejudicial. We disagree.

¶ 32

As with other evidentiary rulings, we review the trial court's rulings with respect to gang-related evidence for an abuse of discretion. *People v. Johnson*, 208 Ill. 2d 53, 102, 803 N.E.2d 405, 433 (2003). Evidence of gang affiliation "may be admitted so long as it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect." *Id.* "Evidence of gang affiliation is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

¶ 33

Initially, we note that the State has taken the position throughout this case that the

gang-related evidence at issue was not offered to prove that defendant was actually a member of the Latin Kings, but instead to show defendant's mental state and demeanor at the time of the charged offense. The State argues on appeal that "the [trial] court was not required to sanitize the continuing narrative of the offense to eliminate defendant's own references to gang membership and threats of gang retaliation." We agree.

¶ 34 Whether truthful or not, defendant's statements to the bouncers and police officers—that he was a member of the Latin Kings and that he and his gang would exact revenge on the bouncers—were probative of defendant's mental state and level of agitation at the time of the offense. The fact that defendant was so worked up that he was willing to identify himself as a gang member and make threats in front of police officers made it more believable that he might also be willing to intentionally spit at someone. Defendant's demeanor and threatening statements toward the bouncers were especially probative in light of defendant's testimony that he intended only to spit toward the ground, and not toward the bouncers or Cherry. (We note that defendant also placed his state of mind at issue by requesting, and receiving, a jury instruction on the lesser included offense of reckless conduct. See Illinois Pattern Jury Instructions, Criminal, No. 11.37 (4th ed. Supp. 2009).)

¶ 35 The evidence of defendant's gang-related statements and gestures was also probative in that it established consistency among the State's witnesses, who generally described seeing and hearing the same things from defendant. During his cross-examination, defendant often called into question the ability of the State's witnesses to observe or recall the events at issue. Had the trial court excluded evidence of everything defendant said or did relating to his gang affiliation, the testimony of the State's witnesses would have been lacking in important cross-corroborating details. Indeed, because defendant was so preoccupied with making references to

his gang affiliation at the time of the offense, those gang references were some of the only details about defendant's demeanor that the witnesses could individually describe. Without those details, the State's witnesses would have collectively provided a dubiously thin description of defendant's demeanor: he was shirtless and yelling threats. Had the court granted defendant's motion *in limine*, anything more specific would have required the State to elicit impermissible gang-related evidence. Under those circumstances, the jury would be left wondering why the State's witnesses could provide so few details about defendant's demeanor. The court properly concluded that barring this evidence would have unduly restricted the State's ability to present its case.

¶ 36 We also conclude that Cherry's interpretation of the meaning of defendant's tattoos was probative of defendant's mindset at the time of the offense. Because the evidence established that defendant was gesturing to his tattoos, the supposed gang-related meaning of those tattoos was relevant to show the jury that defendant was in a hostile, threatening state of mind at the time of the spitting.

¶ 37 Defendant also complains of the testimony of Officer Matthew Badalamenti, who responded to the scene of the fight and testified that the police "later determined that they [(the members of defendant's group)] were affiliates of the Latin Kings." We need not decide whether that statement was admissible, however, because Badalamenti made the statement on cross-examination by defendant. And although the answer was not responsive to defendant's question, defendant did not move to strike the answer. Defendant's failure to move to strike Badalamenti's answer results in forfeiture of his claim of error as it pertains to that particular testimony. *People v. Outlaw*, 388 Ill. App. 3d 1072, 1088, 904 N.E.2d 1208, 1223 (2009).

¶ 38 Finally, we note that the jury could not reach a verdict as to the charge that defendant punched Sheering. If the evidence of defendant's gang affiliation was indeed so prejudi-

cial that it deprived him of a fair trial and prevented the jury from dispassionately weighing the evidence, it stands to reason that the jury would have convicted defendant on both charges. Although our ultimate conclusion would be the same had the jury convicted on both counts, the existence of a partially hung jury weighs against defendant's claim of unfair prejudice.

¶ 39 B. Defendant's Proposed Instruction

¶ 40 Defendant next argues that the trial court erred by refusing to give his proposed version of IPI Criminal 4th No. 3.14 (Supp. 2009). We disagree.

¶ 41 Defendant's proposed version of IPI Criminal 4th No. 3.14 (Supp. 2009) would have required the jury to limit its consideration of unspecified "conduct other than those [*sic*] charged in the indictment" to the limited purpose of "issues of the defendant's identification." The proposed instruction would have further informed the jury, "It is for you to determine whether defendant was involved in that conduct and, if so, what weight should be given to this evidence on the issues of identification." The trial court properly refused this cryptic instruction, which made no sense under the facts of this case and would have left the jurors in a state of uncertainty.

¶ 42 In his brief to this court, defendant cites cases discussing (1) the high risk of prejudice inherent in other-crimes evidence and (2) the corresponding importance of giving a limiting instruction whenever such evidence is admitted. Although we have no quarrel with his cited authority, defendant's argument is inapposite in this case because (1) the evidence that defendant made statements and gestures suggesting his gang affiliation did not constitute evidence of other crimes, and (2), more important, defendant expressly declined a limiting instruction that would have specifically addressed the evidence of his gang affiliation.

¶ 43 The gang-related evidence in this case may have revealed defendant's *status* as a

gang member, but that evidence cannot be characterized as evidence of uncharged *conduct*. Even accepting defendant's contention that his status as a gang member was prejudicial in the eyes of the jury, an instruction limiting the jury's consideration of unspecified "conduct" would have done nothing to limit the jury's consideration of the evidence of defendant's gang affiliation.

¶ 44 Further, even if the jury would have understood the instruction's use of the word "conduct" as referring to the evidence of defendant's apparent gang affiliation, we do not understand how the issue of defendant's gang affiliation was relevant to identification. Defendant's identity was never at issue. Defendant never claimed that any of the State's witnesses mistook him for someone else. More importantly, the gang-related evidence was admitted for an entirely different purpose than identification. The evidence that defendant made statements and gestures referring to his gang affiliation was admitted to show his state of mind at the time of the offense. To give the jury defendant's proposed instruction would have been to admit the evidence for one limited purpose (to show defendant's state of mind) and to limit the jury's consideration of that evidence to an entirely different purpose (defendant's identification).

¶ 45 Defendant's proposed version of IPI Criminal 4th No. 3.14 (Supp. 2009) was flawed both in terms of the evidence it purported to target and in the limitations it sought to impose on the jury's consideration of that evidence. For these obvious reasons, the trial court refused to give the instruction as written. As previously noted, the State suggested that the proposed instruction be amended to reflect that evidence had been presented that defendant was associated with a gang. Defendant refused to add that language to his proposed instruction, instead insisting that the language remain no more specific than "conduct." The court correctly determined that such an instruction would have left the jurors "to their own devices as to what in the world we are talking about."

¶ 46 If, as defendant now argues on appeal, the gang-related evidence was so prejudicial that it required a limiting instruction, defendant should not have objected to a limiting instruction directed at the gang-related evidence. The trial court properly refused to give defendant's proposed version of IPI Criminal 4th No. 3.14 (Supp. 2009), which would have done nothing to appropriately limit the jury's consideration of the gang-related evidence.

¶ 47 C. Improperly Imposed Fines

¶ 48 Finally, in what has become an unfortunate recurring event in this court, we now turn to defendant's claim that the circuit clerk improperly imposed fines—specifically, a \$5 State Police OP Assistance fee, \$10 probation and court services operation fee, \$100 violent crime victims assistance fine, and \$4 probation testing fee. As it usually does, the State concedes that the clerk improperly imposed the fines at issue. Our response is familiar: We accept the State's concession, vacate the fines, and remand for the trial court to determine the proper fines to be imposed. In this case, however, we decline to provide yet another detailed analysis explaining why the circuit clerk should not have imposed the fines at issue. Our previous decisions have explained the law governing fines and fees *ad nauseam*, and a separate analysis in this case would be of little use. See, e.g., *People v. Warren*, 2014 IL App (4th) 120721, ¶¶ 75-173, ___ N.E.3d___; *People v. Larue*, 2014 IL App (4th) 120595, ¶¶ 54-73, 10 N.E.3d 959; *People v. Montag*, 2014 IL App (4th) 120993, ¶¶ 36-40, 5 N.E.3d 246; *People v. Rogers*, 2014 IL App (4th) 121088, ¶¶ 26-39, 13 N.E.3d 1280. We direct the parties to provide copies of their briefs on appeal to the trial court and the circuit clerk on record. We direct our clerk to provide an extra copy of our disposition directly to the attention of the circuit clerk.

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we affirm defendant's conviction and prison sentence. We

vacate the aforementioned fines and remand to the trial court to determine the proper fines to be imposed. As part of our judgment, we award the State its \$50 statutory assessment as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 51 Affirmed in part and vacated in part; remanded with directions.