2018 IL App (1st) 153152-U

No. 1-15-3152

Order filed April 2, 2018

FIRST DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 145
	)	
CRAIG BARBOUR,	)	Honorable
	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for aggravated battery over his contention that his trial counsel was ineffective for failing to object to the State's presentation of the victim's prior consistent statements because those statements were properly admitted to rebut a charge on cross-examination that the victim's direct testimony contained a recent fabrication. Fines, fees, and costs order modified.

¶ 2 Following a bench trial, defendant Craig Barbour was convicted of aggravated battery and sentenced to two years' imprisonment. On appeal, defendant contends that he received

ineffective assistance of counsel where his trial counsel failed to object to evidence of the victim's prior consistent statements and he asks us to correct his fines and fees order. For the following reasons, we affirm and correct the fines and fees order.

¶ 3 The State charged defendant with two counts involving the strangulation of Karen Myles on October 28, 2013. One count alleged aggravated battery (720 ILCS 5/12-3.05(a)(5) (West 2012)), based solely on the strangling, and one count alleged aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2012)), based on the strangling and also that defendant and Myles shared a common dwelling at the time of the offense.

¶ 4 Myles and her cousin, Angelo Hinton, also known as Chico, testified for the State. Myles and Hinton lived in Myles's two-story house on Jeffery Boulevard in Chicago. Defendant moved into Myles's house in October 2013 and paid Myles $700 for two months' rent. Myles, in her mid-50s at the time, had known defendant for over 30 years and had lived with him twice when they were in their 20s. On October 28, 2013, she called defendant on her way home and told him that it would be best if he moved out. Hinton was on the back porch painting when defendant came home and when Myles returned home sometime later.

¶ 5 After coming home, Myles went to her bedroom to lie down. She heard someone coming up the stairs and saw defendant walk into her bedroom. When he demanded his money back, she told him that they could go to the bank. Myles asked defendant about the car she had loaned him, but he put up his hand and refused further discussion. The "next thing [she] knew," she was up against the wall and defendant had his hands around her throat. Myles called Hinton's name once before defendant squeezed harder. Hinton, who was in the kitchen, ran upstairs and pried defendant's hands off Myles's neck. He saw Myles hit defendant with her hand.

¶ 6 Myles owned a gun and kept it in the upstairs closet. Everyone in the house, including defendant, knew its location. Defendant opened the closet and grabbed the gun, putting it to Myles's neck and threatening to kill her before Hinton intervened. Defendant refused to give the gun to Myles or Hinton, and put it in his pocket before leaving the house. Defendant, who called the police, stayed in front of the house. Since Myles's dog had escaped when defendant opened the front door, Hinton left to look for the dog. As Myles was standing on the front porch, defendant walked up to her and hit her in the face, causing her to black out. When Hinton returned after finding the dog, he saw Myles lying on the stairs and not moving. She had blood coming from her nose and injuries to her face. Hinton brought her into the house to rest on the living room couch and the police arrived approximately 5 to 10 minutes later. Myles spoke to the police, who returned her gun and bullets to her. She declined an ambulance, but went to a hospital later that day. The State presented Myles with photographs taken of her after the offense and she confirmed that they showed injuries defendant inflicted to her neck and head.

¶ 7 Defense counsel and Myles had the following exchange on cross-examination:

"Q. And when you got a chance to talk to the police you never mentioned to them about a gun, did you?

A. Yes, I did.

Q. You never mentioned to the police that [defendant] took a gun and put it at your neck, did you?

A. Yes, I did.

Q. And when you talked to the police you never told them that there was a gun in the house that everyone knew about, did you?

A. Sir, I had been knocked out for I don't know how long a period of time. I still speak with a slur, my memory is still bad. The doctors don't know if it's from the strangulation or from me being knocked out and my head hitting concrete. So timeframes I can't tell you.

Q. So yes or no: Did you tell the police?

A. Tell the police what?

Q. That you had a gun pulled on you?

A. Yes."

¶ 8 During the State's redirect-examination of Myles, the prosecutor presented Myles with People's Exhibit No. 5 which Myles identified as the typewritten statement from an interview conducted by Assistant State's Attorney Dawson and Chicago police detective Williams on December 3, 2013. Myles confirmed it was accurate. The State recited a series of questions and answers from the interview and asked Myles to confirm that she had made the statements, which she did. That exchange included the following:

"Q. Did you tell that state's attorney and the detective that after the defendant retrieved a gun that he held a gun to your neck and threatened to kill you?

A. Yes.

Q. Did you tell the detective and the state's attorney that the gun was loaded at the time?

A. Yes.

Q. Did you tell the detective and the state's attorney that after the defendant threatened you with the gun that he placed the gun in his pants pocket?

A. Yes.

Q. Did you tell the detective and the state's attorney that you and [Hinton] asked the defendant for the gun back and that [defendant] refused to give you the gun?

A. Yes."

¶ 9 The parties stipulated that Dawson would testify that, on December 3, 2013, she met with Myles and Williams and that Myles gave a typewritten statement regarding the incident, which Dawson would identify as People's Exhibit No. 5. Myles's written statement was entered into evidence. Defendant moved for a directed verdict, which was granted as to the aggravated domestic battery charge but denied as to the aggravated battery charge.

¶ 10 Defendant testified that, on October 28, 2013, Myles was upstairs smoking cannabis when he came home from work. Defendant told her he was not comfortable living with her and that if he moved out early, she owed him the $350 in rent he had already paid for the following month. The two agreed to go to the bank, but then Myles "started talking crazy." Defendant said he did not want to hear anymore. Myles jumped on his back and started hitting him. Defendant pushed Myles off of him and then she hit him in the face. Defendant pushed her and Myles fell, "[b]ut when she got back up she had a gun in her hand." She hit defendant in the head and mouth with the gun before defendant twisted her arm, which caused her to drop the weapon. Defendant put the gun in his pocket and went downstairs. As he walked downstairs, Hinton was walking up. Defendant called 911 and gave the gun to police when they arrived. Defendant identified a

photograph of his face showing an injury to his lip. When recalled as a rebuttal witness by the State, Myles denied that she jumped on defendant's back and hit him.

¶ 11 The parties stipulated that Chicago police officers James Bansley and Crystal Bell would testify that, on October 28, 2013, they responded to a 911 call and Myles ran out of the house to speak to them when they arrived. At that time, Myles never mentioned a gun to Bansley or Bell.

¶ 12 In defendant's closing argument, defense counsel argued that the State failed to meet its burden and that defendant established he acted in self defense. Counsel stated:

> "So the only issue is was the strangling of Karen Myles justified? It was justified in the circumstances. Karen Myles was impeached. Because when the police officers did arrive she made no mention of the most important fact in this case, that there was a gun pulled on her. She never told the police."

¶ 13 The trial court found defendant guilty of aggravated battery, explaining that it found Myles and Hinton credible. Defendant filed a motion for a new trial. The trial court denied the motion and sentenced defendant to two years' imprisonment.

¶ 14 On appeal, defendant contends that he received ineffective assistance of trial counsel when counsel failed to object to Myles's prior consistent statements elicited on redirect examination, and stipulated to Dawson's testimony which laid the foundation for admitting Myles's written statement from her interview with Dawson and Williams. The State responds that evidence of Myles's prior consistent statements was properly admitted to rebut defense counsel's allegation on cross-examination that Myles fabricated the presence of a gun during the offense. Alternatively, the State argues that defendant was not prejudiced by any improper admission of those statements.

¶ 15 Illinois courts evaluate ineffective-assistance-of-counsel claims under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Albanese*, 104 Ill. 2d 504, 525-27 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for defense counsel's unprofessional errors, a different result would have been achieved. *Strickland*, 466 U.S. 668 at 694. Because a defendant's failure to establish either part of the *Strickland* test will defeat an ineffectiveness claim, a court need not address both components of the inquiry if the defendant makes an insufficient showing on one component. *Id.* at 697.

¶ 16 Counsel cannot be deemed ineffective for failing to raise an objection to admissible evidence. *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 33. The admission of testimony is within the sound discretion of the trial court, and on review, we will not disturb the court's ruling absent an abuse of that discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). An abuse of discretion occurs only where the trial court's ruling is unreasonable, arbitrary, fanciful, or where no reasonable person would agree with the trial court's view. *Id.*

¶ 17 Generally, statements made by a witness prior to trial that are consistent with the witness' trial testimony are not admissible to corroborate or rehabilitate the trial testimony. *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005). An exception exists, however, where there is a claim that either the witness recently fabricated the testimony or the witness has a motive to testify falsely. *People v. Heard*, 187 Ill. 2d 36, 70 (1999). Under the first exception, the prior consistent statement is admissible if it was made before the motive to testify falsely came into existence. *Id.* Under the second exception, a prior consistent statement is admissible if it was made prior to the

alleged fabrication, because it shows that the witness told the same story before the time of the alleged fabrication. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 52.

¶ 18 Here, Myles testified that there was a gun present during the events giving rise to defendant's aggravated battery charge and that defendant threatened her with it. On cross-examination, defense counsel asked Myles, "And when you got a chance to talk to the police you never mentioned to them about a gun, did you?" and Myles answered, "Yes, I did." Defense counsel followed up with similar questions, asking Myles to confirm that she "never mentioned" or "never told" the police that defendant "took a gun and put it at [her] neck," "that there was a gun in the house that everyone knew about," or that she "had a gun pulled" on her by defendant. Each time, Myles answered that she had told police about the gun. On redirect-examination, the prosecutor elicited Myles's prior statements to Dawson and Williams about the gun and the written statement resulting therefrom. The State asked Myles if she remembered Dawson asking certain questions and whether she gave specific responses. Myles confirmed that she told Dawson and Williams about the gun.

¶ 19 Defendant contends defense counsel should have objected to this line of questioning because it was improper for the State to elicit prior consistent statements from Myles absent the implication that her direct testimony contained a recent fabrication or she had a motive to testify falsely. The State responds that when defense counsel asked Myles on cross-examination to confirm she never told the police about a gun, counsel was clearly implying that she had fabricated her testimony. We agree that defense counsel's cross-examination of Myles implied that her testimony concerning the gun was recently fabricated. Therefore, the State properly presented Myles's prior statements to Dawson and Williams in order to rebut defense counsel's

implication that she had recently fabricated her testimony regarding a gun. *Harris*, 123 Ill. 2d at 139; see also *People v. Thomas*, 278 Ill. App. 3d 276, 282 (1996) (prior consistent statements permissible where defense counsel raised an inference of recent fabrication) and *People v. Smith*, 242 Ill. App. 3d 668, 673 (1992) (same). Because we conclude Myles's prior consistent statements were properly admitted under the recent fabrication exception, defense counsel was not ineffective for failing to object and therefore, defendant's ineffective assistance of counsel claim must fail. *People v. Edwards*, 195 Ill. 2d 142, 165 (2001). ("Counsel cannot be considered ineffective for failing to make or pursue what would have been a meritless objection.").

¶ 20 However, defendant cites *People v. Randolph*, 2014 IL App (1st) 113624, as support that Myles's prior consistent statements to Dawson and Williams did not qualify under the recent fabrication exception. In *Randolph*, a police officer testified that he and his partner placed the defendant in custody when defendant, upon seeing the officers, acted suspiciously, walked away quickly, and dropped an item on the ground. *Id.* ¶ 4. On cross-examination, the officer acknowledged that his police report omitted the suspicious behavior that he testified about on direct examination, and also acknowledged that the report indicated he exited the car after he saw the defendant drop the item while he testified that he exited the car first. *Id.* On redirect examination, the officer testified that his report and testimony were consistent where the "important" details were concerned, *i.e.*, both reflected that the defendant saw the officers, crossed the street, and dropped an object. *Id.* at ¶ 5. On appeal, this court found the prior consistent statements elicited on redirect-examination inadmissible because the statements merely emphasized consistent facts in the officer's report and did not "disprove, explain, or qualify" the inconsistencies between the his report and his direct testimony. *Id.* ¶ 19.

¶ 21 The facts in *Randolph* are distinguishable from this case. Here, unlike in *Randolph*, Myles's prior consistent statements on redirect-examination were used to "disprove" defense counsel's insinuation on cross-examination that she never told police about a gun and therefore, her testimony about a gun was a recent fabrication. The holding in *Randolph* does not change our determination here that Myles's prior consistent statements were properly admitted and defendant's trial counsel was not ineffective for failing to object.

¶ 22 Defendant next argues that the trial court improperly assessed the $5 electronic citation fee and the $5 court system fee against him and that it failed to give him $5 per day of presentence custody credit against other monetary assessments which qualified as fines. The State agrees that the $5 electronic citation and the $5 court system fee should be vacated and that the $15 State Police Operations fee and $50 court system fee are fines subject to offset by presentence custody credit. However, while the State agrees that the $10 Mental Health Court fee, the $5 Youth Diversion/Peer Court assessment, the $5 Drug Court fee, and the $30 Children's Advocacy Center assessment are fines subject to offset by presentence custody credit, it argues that the fines, fees, and costs order already reflects the proper credit.

¶ 23 Defendant did not challenge these assessments at trial and acknowledges his claims are, therefore, forfeited. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). He contends, however, that this issue may be raised for the first time on appeal pursuant to Illinois Supreme Court Rule 615(b). He asserts, alternatively, that we may review his claims under plain error or as a claim that his trial counsel was ineffective for failing to object to the assessments.

¶ 24 Because the State does not argue forfeiture on appeal, it has thus forfeited that argument and we will address the merits of defendant's claims. See *People v. Brown*, 2017 IL App (1st)

142877, ¶ 70 (rules of waiver and forfeiture apply to the State). We review the propriety of a trial court's imposition of fines and fees *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 25 Defendant first claims, and the State properly concedes, that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2012)) was improperly assessed and must be vacated because it only applies to traffic, misdemeanor, municipal ordinance, and conservation cases, and is inapplicable to his felony conviction. See *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 ($5 electronic citation fee does not apply to felonies); *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115 (vacating the fee where the defendant's offense did not fall into an enumerated category). Accordingly, we vacate the electronic citation fee.

¶ 26 Defendant also claims, and the State again properly concedes, that the $5 court system fee (55 ILCS 5/5-1101(a) (West 2012)) was improperly assessed and must be vacated because it only applies to violations of the Illinois Vehicle Code and similar county and municipal ordinances. As defendant was not found guilty of a violation of the Illinois Vehicle code, the $5 court system fee was erroneously assessed against him. See *People v. Price*, 375 Ill. App. 3d 684, 698 (2007). Accordingly, we vacate the $5 court system fee.

¶ 27 Defendant next contends that various assessments imposed against him are fines that should be offset by his presentence custody credit. Although defendant did not challenge these assessments in the trial court, the State does not argue forfeiture and, therefore, has forfeited any claim that the issue has been forfeited. *People v. Whitfield*, 228 Ill. 2d 502, 509 (2007).

¶ 28 A defendant is entitled to a $5 credit toward the fines levied against him for each day he is incarcerated prior to sentencing. 725 ILCS 5/110-14(a) (West 2012). The credit applies only to fines imposed pursuant to conviction and not to any other court costs or fees. *People v. Tolliver*,

363 Ill. App. 3d 94, 96 (2006). A fine is a part of the punishment for a conviction, whereas a fee or cost seeks to recoup expenses incurred by the State. *People v. Jones*, 223 Ill. 2d 569, 582 (2006). Here, defendant accumulated 662 days of presentence custody credit, and, therefore, he is potentially entitled to $3,310 of credit toward his eligible fines.

¶ 29 Defendant contends, the State concedes, and we agree that the $15 State Police Operations fee, the $50 court system fee, the $10 Mental Health Court fee, the $5 Youth Diversion/Peer Court assessment, the $5 Drug Court fee, and the $30 Children's Advocacy Center assessment imposed by the trial court are fines subject to offset by presentence custody credit. See *People v. Brown*, 2017 IL App (1st) 150146, ¶ 36 (finding the State Police operations assessment is a fine); *People v. Reed*, 2016 IL App (1st) 140498, ¶ 15 (finding the court system fee is a fine); *People v, Price*, 375 Ill. App. 3d 684, 700-02 (2007) (finding both the $10 Mental Health Court fee and the $5 Youth Diversion/Peer Court assessment are fines); *People v. Unander*, 404 Ill. App. 3d 884, 886 (2010) ("the $5 [Drug Court] 'fee' is actually a fine"); *People v. Jones*, 397 Ill. App. 3d 651, 660-61 (2009) ("the Children's Advocacy Center charge is a fine rather than a fee."). Accordingly, these fees and assessments should be offset by defendant's presentence custody credit.

¶ 30 As a final matter, the State asserts that the fines and fees order accurately reflects the presentence custody credit defendant is owed, except for the $15 State Police operations fee and the $50 court system fee, which must be corrected to reflect the offset. Defendant, in his reply brief, argues that "contrary to the State's claim, the fines, fees, and costs order does not reflect the offset" and requests a remand with instructions. We agree with the State. The fines and fees order lists the fines and fees assessed against defendant. At the end of the fines and fees order,

the clerk filled in a "Total" of $724 and a "Number of Days Served" of 662. The $724 amount represents the total fines and fees charged, without subtracting the total amount that eligible fines were offset by presentence custody credit. However, after the "Total" and "Number of Days Served," the order also provides, "Allowable fine will be calculated." We find that all of the information required to calculate an accurate total is present on the face of the order. Therefore, we find no need to remand as defendant suggests.

¶ 31 For the foregoing reasons, we vacate the $5 court system fee and $5 electronic citation fee. We direct the clerk of the circuit court to further amend that order to reflect a credit of $115 to offset the $15 State Police Operations fee, the $50 court system fee, the $10 Mental Health Court fee, the $5 Youth Diversion/Peer Court assessment, the $5 Drug Court fee, and the $30 Children's Advocacy Center assessment, which leaves a total of $599 in fines and fees due. We affirm defendant's conviction and sentence in all other respects.

¶ 32 Affirmed; fines and fees order modified.