No. 2—09—0948
Order filed June 3, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 08—CF—2355
PHILLIP S. HODGE,	)	Honorable Thomas E. Mueller,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: Convictions must be reversed where defense counsel's elicitation of inadmissible prior convictions and sentences was not reasonable trial strategy; retrial on one conviction barred by double jeopardy where police officer did not testify that shove by defendant caused him any pain or injury.

On August 19, 2008, the defendant, Phillip Hodge, was arrested after he struck two police officers. He was charged with aggravated battery of a police officer (720 ILCS 5/12—4(b)(18) (West 2006)) and with resisting arrest (720 ILCS 5/31—1(a) (West 2006)). A jury found him guilty of three counts of aggravated battery of a police officer. He appeals, contending that: (1) the State

impermissibly broadened the scope of the indictment when it amended count I at the close of its case; (2) his trial counsel was ineffective when counsel told the jury about prior convictions of the defendant that would have been inadmissible, and failed to challenge the admissibility of certain other prior convictions; (3) the State failed to prove beyond a reasonable doubt that he caused the second police officer "bodily harm," an essential element of the crime as charged; (4) he did not receive a fair trial because of erroneous evidentiary rulings and prosecutorial misconduct; and (5) the fines and fees imposed on him should be corrected in certain ways. We reverse and remand for a new trial on two of the charges only.

FACTUAL AND PROCEDURAL BACKGROUND

On September 10, 2008, the defendant was charged by indictment with three counts of aggravated battery to a police officer and two counts of resisting arrest. The first two aggravated battery counts alleged batteries against Elgin police officer Susan Garcia. In particular, count I charged that the defendant "caused bodily harm to Officer Garcia, in that he struck said officer while grabbing keys from her hand," knowing her to be a police officer engaged in the execution of her official duties. The case proceeded to a jury trial on July 27, 2009. Prior to trial, the State nolle prossed the charges of resisting arrest.

During the State's opening statement, it described the alleged batteries against Officer Garcia as follows:

> "He [the defendant] walked up to Elgin police officer Susan Garcia, and he snatched a ring of keys from her hand that she had the ring over her finger and she was holding it, trying to write a report, and this Defendant walked up and snatched those keys right out of her hand.

At that point and shortly thereafter, Officer Garcia and Officer Lopez attempted to place the Defendant under arrest. They each had an arm. He smacked Officer Garcia's hands off of his arm when she grabbed his arm. That's aggravated battery right there.

Then he continued to struggle with both officers, they grabbed him again, and at this point he flung Officer Garcia across the hood of her car, aggravated battery."

The defendant's attorney began his opening statement by describing the defendant as a man active in his church, indeed an associate pastor of the church, and a family man. He then continued:

"But I'm going to be honest with you, and the evidence is going to be honest with you. Life has not always been a bed of roses for Mr. Hodge. Mr. Hodge has not always led a law-abiding life; in fact he's a convicted felon, and I want to be up front with you.

During his younger years and even more recently as 2005, he's picked up some charges. In 1992 and 1993 he picked up a couple theft and burglary charges and served some time in the Illinois Department of Corrections. And in 1995 he picked up an aggravated burglary and was sentenced to 13 years in the Illinois Department of Corrections.

*** [Objection regarding misidentification of the conviction.]

I'm sorry, aggravated robbery. This time he was sentenced to 13 years, and I think he served six or seven years.

But that time in prison really changed his life at that point in time because he was able to get an Associate's degree, he was able to come clean off the addictions that had been demons on his life for many years, including crack cocaine and many other substances in his life, and he had really dedicated his life to God and the church at that point in time. But he

did slip. He got out and in 2005 he picked up a retail theft charge and he was on probation for that."

Defense counsel continued with the opening, describing the events on August 19, 2008, from the defendant's point of view. He stated that, other than taking the keys from Officer Garcia, the defendant had not touched the police officers in any way, and simply ran away when it became clear that the police were about to use Mace or a gun on him.

Officer Garcia, the first witness for the State, testified that she was sitting in her squad car at about 4 p.m. on August 19, 2008, parked near the intersection of South Street and Marguerite in Elgin. She heard music coming from a new Buick Rendezvous that was loud enough to violate an Elgin ordinance, and she pulled the Rendezvous over to issue a citation. When she asked the driver, Ryan Echols, for his license and insurance card, Echols told Officer Garcia that his license was suspended. Officer Garcia returned to her squad car and ran Echols' name and the car's VIN through the computer, during which time she saw Echols using his cell phone. The computer indicated that the car was not registered. Officer Garcia decided to arrest Echols for driving with a suspended license and to tow the Buick Rendezvous for impoundment, as permitted by an Elgin ordinance. She called for backup to assist with the arrest and towing. Elgin police officer Mirko Lopez arrived at the scene soon afterwards. The two officers arrested Echols without incident. Officer Lopez then took Echols back to his squad car, which was parked in back of Officer Garcia's squad car. Officer Garcia left the ignition key for the Rendezvous in the ignition and took the other keys on the key ring, and began writing up paperwork for the arrest and the tow of the car. Echols complained to Officer Lopez that his handcuffs were too tight, and Officer Lopez removed him from the squad car to adjust them.

Officer Garcia was standing near the front of her squad car and writing up the tow receipt when an SUV pulled up across the street from the police cars. The defendant got out of the passenger seat of the SUV and began to approach Officer Lopez. Officer Garcia testified that the defendant was tense, his fists were balled up, and he seemed to be angry, and she was unsure whether he might attack Officer Lopez or attempt to free Echols. The defendant told Officer Lopez, "Give me the keys, I'm taking the car." Officer Garcia addressed the defendant, saying, "No, you're not taking the car, and you need to stay away from that officer." The defendant then approached Officer Garcia and repeated his statement. Officer Garcia told the defendant that she had the keys (they were dangling from her left hand as she worked) and he was not taking the car. The defendant came toward her, grabbed the keys, and said, "Nope, I'm taking the car." Officer Garcia testified that she felt pain because the defendant ripped the keys out of her hand and his hand hit hers while doing that.

Officer Garcia put down her paperwork, told the defendant that he was not taking the car and that it was being towed because of a violation of the noise ordinance. When the defendant repeated that he was taking the car and turned to walk toward it, Officer Garcia told him that he was under arrest. The defendant stated that he was not going to jail. Officer Garcia placed her hands on his wrist, and the defendant slapped them off with his hand. This slap caused her pain. Officer Lopez came over to assist and both officers tried to grab his wrists. Officer Garcia testified that the defendant was pulling his wrists, jerking them, and moving his body. The defendant pulled away and pushed Officer Lopez in the upper chest with his left hand. The police officers grabbed the defendant's wrists again and he continued pulling and jerking, and pushed Officer Garcia onto the hood of her squad car. Her back landed on the car and she "semi-rolled" across it. Although her back did not hurt "right at that point," it was sore for a couple of days afterwards.

Officer Garcia then pulled out a spray can of Mace, intending to use it on the defendant. The defendant saw it, said, "Oh no, that's not happening," and began to move toward the SUV. According to Officer Garcia, as the defendant passed Officer Lopez, the defendant's arm was up and "pushed or something" on Officer Lopez, and the officer leaned back and got out of the way. Officer Garcia told Officer Lopez to move out of the way because she was going to spray the defendant. The defendant began running and Officer Lopez pursued him while Officer Garcia remained at the scene with Echols and the Rendezvous.

After the defendant was arrested, Officer Garcia returned to the police station. At that point, both of her hands were sore and she had redness and a minor bruise and scratch on her right wrist. Her right hand and wrist were photographed. According to her, her left hand was also red but it was not photographed. The photograph was admitted as a trial exhibit.

Officer Lopez then testified, generally confirming Officer Garcia's account of the events leading up to the defendant's arrest. Officer Lopez stated that, after the defendant swung Officer Garcia onto the hood of her car, he was able to break free from the officers' grip. At that point, the defendant "kind of ran towards" Officer Lopez with his arm up, and "just pushed [him] off balance." The State's attorney then asked Officer Lopez, "And once he pushed you, did that hurt?" Officer Lopez answered, "Hard enough to, you know, push me back." Officer Lopez pursued the defendant and caught him in a fenced yard four to six blocks away. On cross-examination, Officer Lopez repeated his description of the defendant's contact with him as pushing him out of the way.

The State then called Elgin police officer Jeffrey Wiltberger to testify regarding a statement allegedly made by the defendant after his arrest. Officer Wiltberger testified that when he was transporting the defendant to the police station, the defendant said something to the effect that "if

that pussy ass mother fucker would have sprayed me, I would have beat the fuck out of him." The defense objected to the State's calling of Officer Wiltberger, arguing that the alleged statement had nothing to do with whether the defendant committed the charged offenses. At a sidebar, the State argued that the statement showed the defendant's state of mind and attitude, and was relevant to show the defendant's willingness or intent to batter the police officers. The trial court overruled the defense objection and allowed the testimony.

After the close of its case in chief, the State moved to amend count I of the indictment. Specifically, it sought leave to change the conduct charged slightly so that the amended indictment alleged that the defendant caused bodily harm to Officer Garcia by striking her "on her hand " instead of "while grabbing the keys from her hand." The trial court granted the motion over the defendant's objection.

The defendant presented five witnesses including himself. Ryan Echols testified that he was driving a car belonging to his fiancée, Yvonne Munoz, at the time he was pulled over on August 19, 2008. He called his father (the defendant) and stepmother (Vicki Hodge), and asked them to come get Yvonne's car. They arrived while he was out of the squad car with Officer Lopez. He saw the defendant walk toward Officer Garcia and try to grab the keys from her. He did not see the defendant push anyone. At that point, Officer Lopez pushed Echols into the back seat of the squad car. When Echols sat up, he saw Officer Lopez reach for something at his waist and the defendant took off and ran away.

Edward Orive, who lived across the street from where the Rendezvous and the squad cars were parked, was the uncle of Echols's fiancée Yvonne Munoz. He was standing outside his home, holding his granddaughter, when the defendant and his wife pulled up. The defendant got out of his

car and walked toward the squad cars, but the officers told him that he could not go that way. He continued walking, but Orive did not see him make physical contact with either of the officers. The defendant did make a motion with his arm to prevent the officers from grabbing him. The defendant began running when the female officer began pulling something out.

Vicki Hodge, the defendant's wife, testified that she and the defendant had just returned from a funeral service for one of their fellow church members when she got a phone call from Munoz, telling her that Echols had been pulled over by the police. She and her husband drove to the place where the traffic stop had occurred. They both got out of the car and approached Officer Garcia, whom Vicki recognized from an earlier contact involving a friend of the Hodges' daughter. Vicki asked Officer Garcia what was going on. After a brief exchange, Vicki went back to the sidewalk. She saw the defendant go up to Officer Garcia and snatch the keys from her, and the officer snatch them back. Officer Garcia then pushed the defendant. She saw the other officer push Echols against the other squad car and come running toward the defendant. That officer was reaching for his gun, and Vicki said, "What are you doing? There's a baby here." The officer then switched to reaching for his Mace can. The defendant began backing up and then took off running. She never saw any physical contact between the defendant and either of the police officers, including any pushing, shoving, or grabbing. On cross-examination, Vicki denied telling Officer Garcia that she did not know what was wrong with her husband or that she did not know that he was going to charge out of the car at the officers or she would not have brought him there. She also denied telling Officer Garcia, later at the police station, that she could not believe the defendant was that angry and "would strike or run from the police officers because he is not normally like that." Vicki testified that Yvonne Munoz was with her the entire time that she was at the police station.

Yvonne Munoz, the fiancee of Ryan Echols, testified that she went with Vicki to the police station and was with her the whole time they were there. Defense counsel asked Munoz whether she heard Vicki say that she did not believe the defendant was that angry and would strike or run from the police officers. The State objected, and the following sidebar occurred:

> "MR. STAJDOHAR [ASSISTANT STATE'S ATTORNEY]: It's a hearsay response, and he absolutely cannot call this witness – I can prove up my impeachment, but he can't call this witness to say it didn't occur.
>
> MR. CASEMENT [DEFENSE ATTORNEY]: He brought it up.
>
> THE COURT: But this is – you can't rehabilitate through this witness. She can't testify as to that incident.
>
> MR. CASEMENT: As to what she heard Vicki say?
>
> THE COURT: (Moved his head up and down).
>
> MR. STAJDOHAR: That is –
>
> THE COURT: It was back at the police station. I'll sustain the objection. Counsel can ask the next question."

When asked whether, at the police station, Officer Garcia was talking to Vicki or Vicki was talking to Officer Garcia, Munoz testified that Officer Garcia was talking to Vicki.

The defendant then testified on his own behalf. He testified that he was a licensed minister for the Second Baptist Church in Elgin, and had been married to Vicki Hodge since 1991. His attorney asked him if he had been "previously convicted of felonies," and he said yes. When asked about the dates of those convictions, he stated that he had "done two, maybe three sentences," including a five-year sentence for burglary in 1982, an aggravated robbery in 1995, and "the rest, if

there's any more, it just eludes me right now." Defense counsel then asked, "But needless to say, you've been convicted of multiple felonies?" The defendant agreed that he had.

The defendant then provided his account of the events on August 19, 2008. He and his wife Vicki went to the scene of the traffic stop, which was about five minutes from their home, after his wife received a call from her son Ryan. When they got there, he got out of the car, approached Officer Garcia, and asked her what was going on. He asked her, "Where are his [Echols's] car keys?" In response, she held up her left hand which had the keys dangling from her fingers and told him that the police were towing the car. He grabbed the keys but did not touch Officer Garcia. He then began walking toward Officer Lopez, who was putting Echols in the back of the squad car. At some point, he must have given the keys back to Officer Garcia because he no longer had them. Officer Lopez turned toward the defendant, and the defendant saw him reach for his gun. The defendant thought to himself, "What have I gotten myself into?" and started running. He ran until he got into a backyard where two people were standing outside, where he felt safe. He thought the yard he stopped in was less than a block from the scene of the traffic stop. Officer Lopez arrived 20 to 25 seconds later and the defendant surrendered.

The defendant stated that he was not angry at the officers when he arrived at the scene, although he was "adrenalized." He did not fling Officer Garcia on to the hood of her car, grab her hand and smack it off his hand, or push Officer Lopez in the chest. His only interaction with Officer Garcia was when she tried to handcuff him and he rolled his wrists to avoid that. When he was being transported to the police station, the officer was trying to engage him in conversation and he might have responded, but he did not recall what he said.

In its rebuttal case, the State introduced certified copies of the defendant's 1996 conviction for aggravated robbery and his 2006 conviction for retail theft. The defense did not object to this evidence. The State also recalled Officer Garcia. Officer Garcia testified that Vicki did make the statements Vicki was asked about during her testimony, both at the scene and at the police station. Officer Garcia agreed that Munoz was present with Vicki when Officer Garcia spoke with Vicki at the police station. The conversation at the scene between Officer Garcia and Vicki was not recorded. In addition, although the officers' squad cars were equipped with videotape systems and Officer Garcia requested that any videotape from the date of the incident be preserved, when Officer Garcia checked the records department for any videotape of the events, they did not have one.

Immediately before closing arguments, during its preliminary remarks to the jury, the trial court advised the jurors that the charge on count I had been amended to allege that the defendant struck Officer Garcia "on her hand" rather than "while grabbing keys from her hand." In its closing argument, the State identified the battery to Officer Garcia's hand as having occurred when the defendant "hit Officer Garcia's hand and ripped the keys out." Throughout the remainder of its initial closing argument, the State continued to describe the battery to Officer Garcia's hand as having been caused by the defendant's act of taking the keys from Officer Garcia. In his own closing, the defendant argued that the State had not proved any injury to Officer Garcia's hand, because although the testimony was that the keys had been grabbed out of her left hand, the only photograph introduced was of her right hand, and it was difficult to see any injuries to that hand in the photo. The defendant also argued that the accounts of all of his witnesses were consistent that he did not have any physical contact with either of the police officers, and that the officers' stories were inconsistent with each other as well as with the other witnesses. Finally, the defendant pointed

out that Vicki denied ever making the statements that Officer Garcia attributed to her, and that it was one witness's word against another's on that issue.

The State's rebuttal argument included the following. It conceded that the photograph of Officer Garcia's right hand showed redness and that it was "very difficult to see any cut or scratch on this photograph," but the photograph was not the only evidence of the injury, as Officer Garcia had testified about the injuries to her hands. The State continued:

> "We don't have to prove whether it was the left hand, we don't have to prove whether it was the right hand. We have to provide that there was bodily harm committed to Officer Garcia. *** We don't have to prove what hand it is. There's a charge that relates to the hand."

Later in its rebuttal, the State revisited this point:

> "The first striking of the hands is when he grabs the keys. That may be the left hand. The second striking of the hand is when he strikes both of her hands and hits her right hand, and that's what causes the red mark. And all we have to prove is that he struck her hand and caused bodily harm. We don't have to prove which hand or which of those strikes it was. She was struck on more than one occasion."

The State also emphasized Officer Garcia's testimony regarding Vicki's comments at the police station. It argued that although some of Vicki's testimony (that the defendant was calm during the incident) could be disregarded as biased, "what she said at the police department is important because there she said she cannot believe that Phillip [the defendant] was that angry and would strike a police officer." The State continued:

"She was there. She saw it. She saw the Defendant strike the police officers, and that's what we have to prove, that he struck the police officers and caused bodily harm."

Later, when the State returned to the subject of the statements it asserted Vicki made at the police station, defense counsel objected on the ground that the State was treating the statements as substantive evidence of guilt, rather than as impeachment of Vicki's testimony at trial. The trial court overruled the objection. However, thereafter the State referred to Vicki's statements not as substantive evidence, but as prior inconsistent statements that were introduced to show that Vicki's testimony at trial was not credible and could be disregarded.

While the jury was deliberating, it sent out a note indicating that it was hung and wanted to know the definition of "knowingly" causing harm in the context of aggravated battery. With the agreement of the parties' attorneys, the trial court sent back a response stating the definition of "knowingly" used in the Illinois pattern jury instructions. The jury found the defendant guilty of all three counts of aggravated battery. On September 10, 2009, the trial court denied the defendant's posttrial motion, conducted a sentencing hearing, and sentenced the defendant as a Class X offender (based on his criminal history) to eight years in prison on each count, to be served concurrently. The trial court also imposed various fines, fees, and costs on the defendant, including a fine of $300 and a trauma center fee of $100. The defendant filed a notice of appeal the same day.

ANALYSIS

In his appeal, the defendant raises five issues: (1) the State impermissibly broadened the scope of the indictment when it amended count I at the close of its case; (2) his trial counsel was ineffective when counsel told the jury about prior convictions of the defendant's that would have been inadmissible, and failed to challenge the admissibility of certain other prior convictions; (3) the

State failed to prove beyond a reasonable doubt that he caused Officer Lopez "bodily harm" by pushing him; (4) he did not receive a fair trial because of erroneous evidentiary rulings and prosecutorial misconduct; and (5) the $100 trauma center fee imposed on him should be vacated, and he should be given a credit of $5 per day for the days he spent in jail prior to sentencing. We take each contention in turn. We begin by addressing his first contention regarding the indictment.

Amendment of Count I Indictment

The defendant argues that the trial court abused its discretion in allowing the State to amend the indictment for count I to allege that the defendant committed a battery when he struck Officer Garcia "on her hand" rather than "while grabbing keys from her hand." The defendant asserts that the amendment violated his constitutional due process rights because it impermissibly broadened the scope of the indictment. A trial court's decision to permit the amendment of a charging instrument is within its discretion, and we will not disturb that decision absent an abuse of that discretion. *People v. James,* 337 Ill. App. 3d 532, 534 (2003).

An indictment returned by the grand jury may not be broadened through amendment except by the grand jury itself. *People v. Ross,* 395 Ill. App. 3d 660, 667 (2009). However, the State may amend the charging instrument at any time to correct a defect that is "formal," that is, the amendment affects the form of the indictment but does not materially alter the nature and elements of the offense charged. 725 ILCS 5/111—5 (West 2006); *People v. Jones,* 219 Ill. 2d 1, 35 (2006). Formal amendments permitted by statute include, but are not limited to, the correction of scrivener's errors and the "use of alternative or disjunctive allegations as to the acts, means, intents or results charged." 725 ILCS 5/111--5(a), (f) (West 2006). Formal amendments to a charging instrument are

permissible unless they surprise or prejudice a defendant. See *People v. Gancarz,* 369 Ill. App. 3d 154, 174-75 (2006).

In this case, the original indictment fully informed the defendant of the charge he faced (battery to a police officer by striking her and causing bodily harm), and also included language regarding the time frame during which the battery allegedly occurred ("while grabbing keys from her hand"). This additional language was not an essential element of the charge, and thus its inclusion in the indictment was surplusage. *People v. Nathan,* 282 Ill. App. 3d 608, 611 (1996) ("The particular details of the means defendant allegedly used do not constitute essential elements of the offense of aggravated battery"). Moreover, this language did not identify the conduct which the defendant was charged with committing—both before and after the amendment, the conduct at issue was striking Officer Garcia—but simply described in general terms when the battery took place. (Contrary to the defendant's suggestion, the phrase "while grabbing the keys" does not specify the location of the injury or indicate that the only hand injured was the one holding the keys.) Thus, the substitution of language describing where Officer Garcia was struck ("on her hand") did not materially alter any of the essential elements of the charge, and the amendment was formal, not substantive. See *Ross,* 395 Ill. App. at 670-71 ("amendments changing the manner in which the defendant committed the offense are formal, not substantive"); *Nathan,* 282 Ill. App. 3d at 611.

The defendant argues that even formal amendments are unconstitutional if they broaden the charges the defendant is facing. As an initial matter, this argument misses the mark. If an amendment indeed broadens the charges faced by the defendant, then it materially alters those charges and it must be considered substantive, not formal. We also note that, in connection with this argument, the defendant has cited federal case law relating to the "constructive amendment" of an

indictment—that is, the presentation of a broader or substantially different basis for conviction to the jury, beyond that specified in the indictment. See *United States v. Stirone,* 361 U.S. 212 (1960); *Ex parte Bain,* 121 U.S. 1 (1887). This case, however, does not concern constructive amendment but rather the actual amendment of an indictment (see *United States v. Budd,* 496 F.3d 517, 521 (6th Cir. 2007) (distinguishing actual from constructive amendments to an indictment)), and thus the defendant's citations are inapposite. Moreover, federal case law regarding the actual amendment of an indictment mirrors Illinois law. See *United States v. Lorefice,* 192 F.3d 647, 753 (7th Cir. 1999) ("[a]n indictment may be altered without resubmission to the grand jury as long as the alteration makes no material change and there is no prejudice to the defendant").

The defendant contends that even if the amendment was merely formal, it should not have been permitted because it prejudiced him. He argues that the inclusion of the surplus language in the original indictment focused his attention, and accordingly his defense, on possible contact with Officer Garcia's left hand (which was holding the keys), and that the State's amendment of the language to "on her hand" allowed it to switch the focus to different conduct, that is, the battery to Officer Garcia's right hand that occurred when the defendant swatted her hands off of his wrist. He suggests that the State only sought the amendment because his cross-examination of Officer Garcia established that there was no "visible physical injury to the hand in which she was holding the keys." This last assertion is contradicted by the record. In its opening statement, the State identified the first battery to Officer Garcia as occurring when the defendant struck her hands off of his wrist, not when he grabbed the keys, and the State elicited testimony from Officer Garcia that her hands were injured in both ways (by the key-grabbing and hitting of her hands off of his wrist) during its direct examination of her. We also reject the broader contention that the defendant was prejudiced in

preparing his defense, because his defense was that he had no physical contact whatsoever with either of the officers—a defense that would apply equally to either manner of alleged battery to Officer Garcia's hands.

The defendant attempts to distinguish the leading cases holding that amendments that change only the manner in which the offense is alleged to have been committed do not broaden its scope (*Nathan* and *People v. Coleman,* 49 Ill. 2d 565 (1971)). He argues that those cases are inapplicable because in both of those cases the State was seeking conviction on only one charge, and simply alleged alternate theories in which the charged offense occurred. We fail to see what difference this makes in the underlying legal principles. We also note that although the State was able to obtain two convictions for aggravated battery to Officer Garcia (one to her hand and the other to her body via throwing her onto the car hood), the multiple convictions had no practical prejudicial effect, as the trial court sentenced the defendant to concurrent sentences on all of the convictions. We conclude that the trial court did not abuse its discretion in granting the State's motion to amend the indictment as to count I.

Ineffective Assistance of Counsel

The defendant next argues that he received ineffective assistance of counsel when his attorney mentioned certain of his prior criminal convictions in his opening statement and elicited testimony from him regarding those convictions and the sentences he served, although none of that information would have been admissible otherwise. He asserts that the introduction of this evidence prejudiced him, and asks that his convictions be reversed and that he be granted a new trial.

Under *Strickland v. Washington,* 466 U.S. 668 (1984), a defendant arguing ineffective assistance of counsel must show not only that counsel's performance was deficient but that the

defendant suffered prejudice as a result. *People v. Houston,* 226 Ill. 2d 135, 143 (2007). Under the two-prong *Strickland* test, "a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *Houston,* 226 Ill. 2d at 144. Because a defendant must satisfy both prongs of the *Strickland* test, the failure to establish either is fatal to the claim. *Strickland,* 466 U.S. at 687.

Applying that standard here, we first examine whether the defendant's representation at trial was deficient. This requires the defendant to show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Counsel's representation of a defendant is afforded "a strong presumption that it constitutes sound trial strategy." *People v. Alexander,* 354 Ill. App. 3d 832, 843 (2004). However, this presumption is overcome where "no reasonably effective criminal defense attorney, confronting the circumstances of the defendant's trial, would engage in similar conduct." *Id.*

The defendant argues that three aspects of his counsel's representation were deficient. The first was his counsel's presentation of argument and evidence regarding convictions that would not otherwise have been admissible, specifically the "couple theft and burglary charges" the defendant "picked up" in 1992 and 1993 (which counsel brought up in his opening statement) and the 1982 conviction for burglary that counsel permitted the defendant to mention (in response to a question regarding convictions in 1997) without moving to strike it as nonresponsive. The defendant states that, under *People v. Montgomery,* 47 Ill. 2d 510, 516 (1971), convictions occurring more than 10 years before the trial are not admissible. *People v. Naylor,* 229 Ill. 2d 584, 597 (2008) (convictions

lying outside the 10-year limit are beyond the reach of the trial court's discretion and are absolutely inadmissible). The defendant argues that his attorney's representation incontestably fell below an objective standard when the attorney mentioned (or allowed him to mention) the 1982, 1992, and 1993 convictions that were inadmissible under *Montgomery*—there was no strategic value in doing so because otherwise the jurors would never have heard about the convictions. Thus, the information served only to inflame the hostility of the jurors by providing them with information indicating that the defendant had a lengthy criminal record.

Second, the defendant argues that his counsel compounded the error by mentioning, and permitting him to testify without objection about, the sentences he served for various convictions. As with the older convictions described above, this information was clearly inadmissible. *People v. DeHoyos,* 64 Ill. 2d 128, 132 (1976) (improper to allow the admission of excessive facts about the prior convictions, including the sentences served); *People v. Pruitt,* 165 Ill. App. 3d 947, 954 (1988) ("it is improper to indicate the sentence received by a defendant for a prior conviction, since it is obviously immaterial to the question of a defendant's credibility").

Last, the defendant contends that his counsel should have challenged the admission of evidence concerning his 1996 conviction for aggravated robbery. Although this conviction fell within the 10-year limit of *Montgomery*,[1] the supreme court has noted that even as to eligible prior convictions, the trial court must conduct a balancing test to determine whether the prejudicial impact of the conviction outweighs its probative value. *Montgomery,* 47 Ill. 2d at 515-16. In conducting

[1]Under *Montgomery*, either the conviction or the date of release from that conviction must have occurred less than 10 years before the current trial. *People v. Naylor,* 229 Ill. 2d 584, 594-600 (2008). Here, the defendant was released in 2002, six and a half years prior to the trial.

this test, a trial court should consider the nature of the prior offense, the length of the witness's criminal record, the age and subsequent conduct of the witness, the similarity between the prior conviction and the present charge (which requires additional caution in admitting the prior conviction), and whether the witness's credibility is central to the determination of the present charges. *People v. Whirl,* 351 Ill. App. 3d 464, 467 (2004). The defendant argues that here, the nature of his 1996 conviction—aggravated robbery—diminished its probative value as an indicator of his credibility as a witness. See *People v. Williams,* 161 Ill. 2d 1, 39 (1994) (defendant's prior conviction for voluntary manslaughter should not have been admitted because it bore little relationship to the defendant's "testimonial credibility"); *People v. Moore,* 279 Ill. App. 3d 152, 158 (1996) (trial counsel was ineffective for failing to object to or move to bar the introduction of a prior conviction for criminal damage to property, because that conviction had "little bearing on defendant's credibility as a witness").

The State does not dispute that 1982, 1992 and 1993 convictions were inadmissible under *Montgomery*, or that the sentences served by the defendant were not admissible even if the underlying convictions were admissible. However, the State argues that the admission of information about the older prior convictions and the sentences served by the defendant, like the failure to challenge the admission of the 1996 aggravated robbery conviction, was a tactical decision reflecting the defense attorney's strategy to show that the defendant was candid about his troubled past and had overcome that past. The State argues that a reasonable trial strategy does not become ineffective assistance of counsel just because it was ultimately unsuccessful. *People v. Spears,* 256 Ill. App. 3d 374, 279 (1993).

We acknowledge that defense counsel's strategic choices are subject to a presumption of reasonableness. *Alexander,* 354 Ill. App. 3d at 843. However, in this instance the "strategy" pursued by the defense attorney did not appear to include any consideration of the likely impact of such a strategy. We agree with the reviewing court in *People v. McMillin,* 352 Ill. App. 3d 336, 346 (2004), where defense counsel similarly chose to highlight the defendant's criminal past (a lengthy record of convictions for DUI and driving with a revoked license) in an effort to contrast that past with his current probity:

> "We think it decidedly unsound strategy to inform a jury that the accused is a perpetual outlaw who has engaged in a decade of criminal activity. We find it a decidedly defective tactic to disclose repeated and admitted law-breaking behavior identical to the charged conduct, in an effort to heighten the credibility of current denials. There is nothing reasonable about such a strategy. Reasonably effective criminal defense lawyers would never pursue it.
>
> The reason is simple. Reasonably effective advocates would worry about the downside from such a strategy, based upon the true impact that such evidence would have upon law-abiding people who sit as jurors. This kind of evidence bears a high degree of prejudice. It carries an overwhelming ability to dominant [*sic*] decisionmaking, swaying people to convict, regardless of what the actual evidence to support the charged conduct can establish. This is precisely why the State, despite its strong desire to present the kind of evidence elicited by defense counsel in this case, is generally barred from introducing it."

See also *People v. Sanchez,* 404 Ill. App. 3d 15, 18 (2010) (reviewing court was "unable to discern any valid strategic reason for trial counsel's failure to object to the admission of prior conviction";

conviction was inadmissible and therefore "served only to damage the defendant's credibility as a witness"); *Moore,* 279 Ill. App. 3d at 159 (sound trial strategy "embraces the use of established rules of evidence and procedure to avoid, where possible, the admission of incriminating statements *** and prejudicial facts"). Accordingly, we find that the conduct complained of here fell below the standard of reasonably effective trial counsel.

Of course, our analysis does not stop here: we must proceed to examine whether counsel's defective performance prejudiced the defendant such that there is "a reasonable probability that, but for counsel's professional shortcomings, the result of the proceeding would have been different." *McMillin,* 352 Ill. App. 3d at 347, citing *Strickland,* 466 U.S. at 694. A defendant is not required to show that it is more likely than not that counsel's deficiencies altered the outcome of the case in order to meet this standard. *Moore,* 279 Ill. App. 3d at 159, citing *Strickland*, 466 U.S. at 693. Rather, "[t]he prejudice referred to by the Supreme Court [in *Strickland*] *** calls for review of the fundamental fairness of the proceeding as a whole, to determine whether, in light of the professional errors of counsel, the result was worthy of confidence." *Id.* at 161-62.

Courts have found that, where the question of the defendant's innocence or guilt is essentially a credibility contest between two versions of the facts, the improper admission of prior convictions is likely to weigh substantially in the jurors' determination of the defendant's credibility and thus cause impermissible prejudice to the defendant. In such circumstances, "the verdict necessarily turn[s] on how the jury resolve[s] the credibility contest between" the defendant and the State's witnesses. *Pruitt,* 165 Ill. App. 3d at 952. The pivotal role of the credibility determination means that there is a reasonable likelihood that the improperly admitted information influenced that credibility determination, thereby affecting the result of the trial. For instance, in *Valentine,* 299 Ill.

App. 3d at 4, where defense counsel inadvertently "opened the door" to the introduction of otherwise inadmissible prior arrests, the court found prejudice under *Strickland* where "the evidence was essentially 'he said/she said'" and both sides presented limited corroborating evidence. The court commented:

> "Given the closeness of the conflicting evidence and the facts of this case, the jury's verdict was based upon its determination of the credibility of the witnesses. Because the outcome of the case depended upon the jury's credibility determination, and because the introduction of inadmissible evidence of defendant's prior unrelated battery arrests undermined his credibility, there is a reasonable probability that this error affected the outcome of the trial." *Id.* at 4-5.

See also *Sanchez,* 404 Ill. App. 3d at 19 (reversing and remanding for new trial on the basis of ineffective assistance of counsel where trial involved a credibility contest between police officer and defendant, and evidence of defendant's prior conviction was improperly admitted); *McMillin,* 352 Ill. App. 3d at 348 (reversing and remanding for new trial where defense counsel deliberately introduced evidence of otherwise inadmissible prior convictions); *Pruitt,* 165 Ill. App. 3d at 952-53 (where verdict hinged on jury's determination whether to accept defendant's version of facts or the State's, improper admission of prior conviction was prejudicial and required reversal). *Cf. Naylor,* 229 Ill. 2d at 608-09 (where "evidence boiled down to the testimony of the two police officers against that of defendant" and "credibility was the only basis upon which defendant's guilt or innocence could be decided," supreme court could not say that the improper admission of a prior conviction did not prejudice defendant's right to a fair trial, and the "closely balanced" prong of the plain error test was satisfied).

Here, the case likewise presented a credibility contest between the two police officers, who testified that the defendant intentionally tussled with them and struck them, and the defense witnesses, all of whom testified that the defendant did not intentionally strike the officers although he did take the keys from Officer Garcia. The State argues that the verdict was not based solely on the jury's determination of the witnesses' credibility, because it also offered photographic evidence—the photo of Officer Garcia's right hand and wrist. However, the evidence of injury in the photo was limited to red areas of skin, and thus the photo itself required some interpretation that was subject to the jury's assessments of witness truthfulness. Thus, this case, like the cases above, boiled down to a credibility contest in which the jury was required to decide which side was telling the truth. Our supreme court has commented that, in assessing witness credibility, the prejudicial effect of evidence about a witness's prior conviction is "'unmistakeable.'" *Naylor,* 229 Ill. 2d at 610, quoting *Montgomery,* 47 Ill. 2d at 514. The jury apparently found the evidence to be closely balanced, as it sent out a note saying it could not come to agreement. Under these circumstances, and in light of the substantial amount of information about the defendant's criminal history that the defense elicited, we believe that there is a reasonable probability that the errors of counsel altered the outcome of the case. Accordingly, the defendant was deprived of his constitutional right to the effective assistance of counsel, and we must reverse the defendant's convictions and remand for a new trial.

Sufficiency of the Evidence and Double Jeopardy

Because we are remanding this cause for a new trial, we must consider for double jeopardy purposes whether the evidence was sufficient to sustain the defendant's convictions beyond a reasonable doubt. *People v. Jiles,* 364 Ill. App. 3d 320, 330-31 (2006). The double jeopardy clause

forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence that it failed to muster in the first proceeding. *Id.* at 331. However, it does not preclude retrial if the evidence introduced at trial was legally sufficient to convict but the conviction must be set aside because of errors in the trial process. *Id.,* citing *People v. Olivera,* 164 Ill. 2d 382, 393 (1995).

The defendant does not contest that the evidence was sufficient to convict him on the charges of aggravated battery involving Officer Garcia. However, he contends that the State failed to prove beyond a reasonable doubt an essential element of the battery to Officer Lopez, *i.e.*, that the officer suffered bodily harm from the defendant's contact with him. In evaluating this contention, we consider "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (Emphasis in original.) *People v. Collins,* 106 Ill. 2d 237, 261 (1985), quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

In *People v. Mays,* 91, Ill. 2d 251, 256 (1982), the supreme court defined the element of "bodily harm" as requiring a showing of "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent." In reaching this conclusion, the supreme court distinguished this type of battery (battery involving the element of bodily harm) from a separate type of battery based upon contact of an insulting or provoking nature. In this case, the State alleged that the defendant committed an aggravated battery when he "knowingly caused bodily harm to Officer Lopez, in that he struck said officer about the body." Where the State has chosen to proceed on a theory of battery by bodily harm, it may not obtain a conviction based solely upon evidence of battery by insulting or provoking contact. *People v. McBrien,* 144 Ill. App. 3d 489, 496

(1986). Accordingly, in considering the defendant's argument, we must determine whether, viewed in the light most favorable to the State, there was sufficient evidence of bodily harm to Officer Lopez that a rational trier of fact could have found that the defendant committed a battery by bodily harm.

In this case, both police officers testified that the defendant pushed or shoved Officer Lopez in his upper chest or shoulder area as the defendant was attempting to get away from the officers. However, there was no direct evidence that the push or shove caused Officer Lopez physical pain or damage—bodily harm as defined in *Mays*. Officer Garcia stated that Officer Lopez was "pushed or something" and leaned back and got out of the way. Officer Lopez said that the defendant "kind of ran towards" him with his arm up and "just pushed me off balance." When the State's attorney asked Officer Lopez, "And once he pushed you, did that hurt?," Officer Lopez did not directly answer but stated, "Hard enough to, you know, push me back." On cross-examination, Officer Lopez described the defendant's actions as follows:

"[H]e turns and uses his arm to push up against this way. *** He pushes me out of the way." Neither officer testified that Officer Lopez sustained "damage" such as a laceration, bruise or other injury as a result of the shove. Thus, the issue becomes whether the above testimony was sufficient that a reasonable juror could find that Officer Lopez suffered physical pain from the defendant's shove.

Generally speaking, courts have reversed convictions for aggravated battery to a police officer when there is no evidence that the officer incurred physical damage or felt pain as the result of the injury. See *People v. Fuller,* 159 Ill. App. 3d 441, 445 (1987) (reversing aggravated battery conviction where the officer did not testify that he was injured in any way and the evidence showed that the defendant's position at the time of the blow was such that he could not have exerted much

force); *McBrien*, 144 Ill. App. 3d at 497 (insufficient evidence of aggravated battery where the officer testified only that he felt a "tingling sensation" on his skin from defendant's attempt to spray Mace on the officer); *People v. Veile,* 109 Ill. App. 3d 847, 850 (1982) (no bodily harm when officer testified that female defendant struck him from two feet away with her fist; officer was wearing soft body armor and testified that he was not injured). Because the determination of whether there was sufficient evidence of physical damage or pain rests on the particular evidence offered in each case, it must necessarily be done on a case-by-case basis.

The State argues that, in some circumstances, a court can rely on common experience to find that a particular type of contact caused physical pain or damage. For instance, because a kick is ordinarily delivered with more force than other types of contact, evidence that a defendant kicked a police officer may be sufficient to prove bodily harm. See *People v. Claudio,* 13 Ill. App. 3d 537, 540 (1973) (pre-*Mays* case holding that "It seems self-evident that the kicking of the police officers is in and of itself the cause of bodily harm"). This inference was applied in *People v. Rotuno,* 156 Ill. App. 3d 989, 993 (1987), in which the conviction was affirmed because there was evidence not only that the defendant kicked the police officers repeatedly in the legs and chest as they were attempting to get her into the squad car, but also that the defendant's struggles were so forceful that the officers required assistance from a bystander to complete the arrest. On the other hand, in *Fuller,* 159 Ill. App. 3d at 445, where the defendant was lying on his back with the officer straddling him when he allegedly kicked the officer, and there was no testimony that the officer was injured by the kick, the court held that there was insufficient evidence of bodily harm to sustain the conviction for aggravated battery. The State has not cited any cases in which the type of shove that occurred in this case was held to be sufficient evidence of bodily harm, despite the lack of any testimony by the

officer that he was injured or felt pain. We hold that the evidence produced at the defendant's trial was insufficient to prove beyond a reasonable doubt that the defendant caused Officer Lopez bodily harm, an essential element of count III. Accordingly, double jeopardy prohibits the State from retrying the defendant on count III. *Jiles,* 364 Ill. App. 3d at 331. On remand the State may retry the defendant only on counts I and II, the counts charging him with batteries against Officer Garcia.

Evidentiary Rulings and Prosecutorial Misconduct

In light of the fact that we are remanding for a new trial, we need not address all of the remaining issues raised by the defendant. However, as some of the evidentiary issues may arise again on retrial, we discuss them here. The defendant argues that he was denied a fair trial by the trial court's erroneous evidentiary rulings on several issues and the State's improper use of evidence during its closing argument. The first three errors he raises relate to Vicki Hodge's alleged statements to Officer Garcia at the scene and at the police station, to the effect that she was shocked by the defendant's actions, which included "striking" the officers and running away from them, and which were admitted as prior inconsistent statements. (At trial, Vicki testified that the defendant did not strike anyone or make contact with the officers.) The first alleged error is that the trial court refused to allow the defendant to present Yvonne Munoz's testimony that, contrary to Officer Garcia's testimony, Vicki never made the alleged prior inconsistent statement at the police station. Second, the defendant argues that the first error was magnified by the deletion of some language from the jury instruction regarding prior inconsistent statements—a deletion that suggested that Vicki's making of the statements was not in doubt. The third error relating to Vicki's alleged prior inconsistent statements relates to the prosecutor's comments, on one occasion during closing argument, that the jury could view Vicki's alleged statements as substantive evidence that the

defendant committed the crimes at issue, rather than as impeachment evidence relating solely to the credibility of Vicki's trial testimony. Finally, the defendant also argues that the testimony of Officer Wiltberger regarding the profane and combative statement allegedly made by the defendant after his arrest was improperly admitted, because it was irrelevant to his guilt or innocence and was highly prejudicial.

1. Restriction of Yvonne Munoz's Testimony

We begin with the trial court's refusal to allow Yvonne Munoz to testify that, when she and Vicki were at the police station and Vicki was speaking with Officer Garcia, Vicki never made the alleged prior inconsistent statement attributed to her (that she could not believe the defendant was so angry and that he would "strike or run from" the officers). The defendant argues that this testimony was admissible to show that Vicki did not make the alleged statement as Officer Garcia contended—in essence, to impeach Officer Garcia's testimony that Vicki made the statement.

The flaw in the defendant's argument is that Officer Garcia *had not yet testified* regarding Vicki's alleged statement at the time the defense sought to call Yvonne Munoz, which was during the defense's case in chief. Officer Garcia did not mention Vicki's alleged statement until she testified on rebuttal. Thus, the defense was seeking to impeach Officer Garcia's rebuttal testimony in advance, which the trial court rightly refused to allow. The defendant's arguments on this point might justify calling Yvonne Munoz in surrebuttal to impeach Officer Garcia's testimony (see *People v. Shatner,* 174 Ill. 2d 133, 153 (1996) (when an issue is raised as to whether a prior inconsistent statement was made, any admissible evidence may be introduced on that point), but they do not establish that the trial court erred in refusing to permit such impeachment before Officer

Garcia had even testified regarding Vicki's alleged statement. We find no error in the trial court's ruling on this point.

2. Jury Instruction on Prior Inconsistent Statements

The defendant next argues that the error relating to Vicki's alleged inconsistent statements was heightened because the jury was instructed inappropriately regarding such statements. Illinois criminal pattern instruction (IPI Crim.) 3.11 states:

> "The believability of a witness may be challenged by evidence that on some former occasion he [(*made a statement*) (*acted in a manner*)] that was not consistent with his testimony in this case. Evidence of this kind may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom.
>
> ***
>
> It is for you to determine [whether the witness made the earlier statement, and, if so] what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made."

I.P.I. Crim. No. 3.11 (4th ed. 2008). The State tendered a version of this instruction that omitted the bracketed material in the second paragraph. The defendant did not object, and the trial court gave the version without the bracketed material.

We review a trial court's decision to give a particular jury instruction for abuse of discretion. *People v. Calderon,* 369 Ill. App. 3d 221, 235 (2006). Jury instructions must "provide the jury with correct legal principles applicable to the evidence so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Wales,* 357 Ill. App. 3d 153, 157 (2005). The test

for jury instructions is "whether the instruction, taken as a whole, fairly and accurately states the law and whether it is sufficiently clear as not to mislead the jury." *People v. Miller,* 363 Ill. App. 3d 67, 77 (2005).

At oral argument, the State conceded that the bracketed phrase should have been included, but maintained that the omission of the phrase did not deprive the defendant of a fair trial. We agree that the failure to include the bracketed phrase had the effect of incorrectly indicating to the jury that Vicki's making of the alleged statements was not in doubt, because without that phrase the instruction referred only to the jury's ability to weigh those statements, not its ability to determine whether the statements were made. The committee comments to this instruction state that trial courts should "[u]se the bracketed phrase 'whether the witness made the earlier statement' in the last paragraph whenever the making of the statement is an issue in the case." I.P.I. Crim. No. 3.11, Committee Note (4th ed. 2008). Here, Vicki denied that she made any of the inconsistent statements attributed to her, and so that remained an issue of fact to be determined by the jury. Accordingly, if this instruction is given on retrial, the bracketed phrase should be included.

3. Improper Comments Referring to Vicki's Statements as Substantive Evidence

The defendant next contends that, during its rebuttal closing argument, the State improperly presented Vicki's alleged prior inconsistent statements to the jury as substantive evidence of the defendant's guilt rather than impeachment of Vicki's testimony at trial. The prosecutor's comments regarding Vicki's statements, taken from throughout its rebuttal closing, were as follows:

> "[THE STATE:] When Vicki Hodge was at the police station afterward, she said she cannot believe Phillip was that angry and would strike or run from police officers because he is normally not like that. She says "strike a police officer." Those are her words.

Now she comes in and testifies before you with bias and interest that nothing happened, he was calm the whole time. He got out of the car, walked up, talked to Officer Garcia, walked back.

He himself admitted that he was adrenalized. Ryan Echols admitted he snatched the keys off her hand. Edward [Orive] testified he snatched the keys out of her hand. But that's not what Vicki Hodge said. He was calm, he took the keys out of her hand.

You can disregard her testimony, but what she said at the Police Department is important because there she said she cannot believe that Phillip was that angry and would strike a police officer. She was there. She saw it. She saw the Defendant strike the police officers, and that's what we have to prove, that he struck the police officers and caused bodily harm. ***

***

Vicki Hodge once again says she does not know what was –

MR. REED [DEFENSE ATTORNEY]: Objection, your Honor.

THE COURT: Basis?

MR. REED: Your Honor, Counsel has used those statements as impeachment. They are not entered into evidence for the truth of matter [*sic*] of what he's asserting them for.

She denied making any statements, and as impeachment Officer Garcia testified that she heard Vickie [*sic*] say something, but none of those is entered as for actual evidence as to what she said. Counsel is fabricating evidence to make the jury believe in something that is not in evidence.

THE COURT: Any response?

MR. STAJDOHAR [STATE'S ATTORNEY]: No, Judge.

THE COURT: I'll overrule the objection. You may proceed.

MR. STAJDOHAR: What I'm arguing is when she makes those statements, it shows that her testimony in court here today is not truthful, because its [*sic*] differs from what she said on a prior occasion. And you'll get another instruction that says when a person's statements differ, you can rely – you can disregard the statements. One second. I will find that.

[Prosecutor then reads the version of I.P.I. Crim. No. 3.11 that was later given to the jury.]

So what it says is you can use the fact that she told the police officers on a prior occasion something different to evaluate her testimony here in court. Was she telling the truth?"

The above comments show that, at one point during closing argument, the State indeed drifted from referring to Vicki's alleged prior inconsistent statements as impeachment of her trial testimony to suggesting that the statements were also substantive evidence of what actually occurred at the scene. ("She was there. She saw it. She saw the Defendant strike the police officers, and that's what we have to prove.") Later during closing, however, the defense objected when the State again began to discuss Vicki's alleged statements. Although the trial court overruled the objection, the State modified its references to the statements after that to make it clear that the statements should be considered as impeachment of Vicki's trial testimony, and did not again suggest that they could be viewed as substantive evidence.

Undoubtedly, it was improper for the State to refer, on one occasion, to Vicki's prior statements as substantive evidence of the defendant's culpability. *People v. Barton,* 286 Ill. App. 3d 954, 961 (1997) ("It is black-letter law that a witness's prior inconsistent statement is admissible only to attack his credibility and cannot be admitted as proof of the substance of the statement"). On retrial, the State should avoid similar references.

4. Officer Wiltberger's Testimony

The last trial error of which the defendant complains is the admission of Officer Wiltberger's testimony. Officer Wiltberger testified that he arrived when the defendant was in a backyard several blocks from the scene of the traffic stop. He arrested the defendant, who was calm and cooperative during his arrest. However, Officer Wiltberger testified that, during his transportation to the police station, the defendant spontaneously remarked, "if that pussy ass motherfucker would have sprayed me, I would have beat his ass." The defendant contends that the testimony should not have been admitted because it was irrelevant to whether he committed the alleged batteries and was also unfairly prejudicial to him.

Evidence may be admitted if it is relevant, that is, "it tends to prove a fact in controversy or render a matter in issue more or less probable." *In re A.W.,* 231 Ill. 2d 241, 256 (2008). Here, Officer Wiltberger testified that the defendant's remark was made some minutes after his confrontation with Officers Garcia and Lopez, after he had become calm and cooperative with his own arrest. Thus, it was not directly probative of the defendant's state of mind or intent at the time he was engaged in the confrontation. Nevertheless, the words purportedly used by the defendant were combative and displayed a continuing hostility toward Officer Lopez (who had pursued the defendant and threatened to pepper spray him) even after the defendant was no longer in Officer

Lopez's presence. As such, it was relevant to show the existence of earlier hostility toward Officer Lopez and also potentially Officer Garcia, who had indicated that she would use the pepper spray on the defendant at the scene. Because it provided some evidence of the defendant's earlier intent to resist the officers' attempts to subdue him, the trial court did not err in finding Officer Wiltberger's testimony relevant.

Determining that evidence is relevant is not the end of the analysis, however, because even relevant evidence should not be admitted if its probative value is substantially outweighed by the danger of unfair prejudice. *People v. Hanson,* 238 Ill. 2d 74, 102 (2010). The testimony of Officer Wiltberger may have posed the risk of unfair prejudice if the defendant's alleged use of profanity and threatening tone portrayed him as having a bad character and possibly persuaded the jury to convict him on that basis alone. "Character evidence offered by the prosecution to show the accused's propensity to violence is generally inadmissible because the danger of unfair prejudice to the defendant in being portrayed as a 'bad man' substantially outweighs the probative value of the evidence." *People v. Randle,* 174 Ill. App. 3d 621, 625 (1986). However, such testimony may be admissible if the defendant has first "opened the door" and put his own character at issue by introducing testimony that he was a peaceful or good person, seeking to persuade the jury to draw the inference that he was therefore unlikely to have committed the crime of violence with which he was charged. *Id.* On remand, if the State seeks to put in such evidence to rebut any testimony of the defense witnesses regarding the defendant's peaceful character, the trial court should carefully weigh the probative value of the testimony against its prejudicial nature.

Remaining Issues

Lastly, the defendant argues (and the State concedes) that his sentence was incorrect, in that the $100 trauma center fee imposed on him was unauthorized, and he was entitled to receive a credit of $5 per day for the 30 days that he spent in custody prior to sentencing (a total credit of $150) toward his $300 fine. We need not address this argument, as we are reversing the defendant's convictions and remanding for a new trial, so the trial court will have the opportunity to impose a corrected sentence upon retrial if necessary.

CONCLUSION

The judgment of the circuit court of Kane County is reversed and the cause remanded for further proceedings consistent with this order.

Reversed and remanded.