2016 IL App (4th) 140533-U

NO. 4-14-0533

FILED
October 18, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
WILLIAM D. JENKINS,	)	No. 13CF702
Defendant-Appellant.	)	
	)	Honorable
	)	Diane M. Lagoski,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Steigmann and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The prosecutor's questions on redirect examination and statements made during rebuttal argument did not shift the burden of proof to defendant.

(2) Defendant did not raise an ineffective-assistance-of-counsel claim at sentencing sufficient to implicate a *Krankel* hearing.

(3) Defendant was entitled to an additional two days of sentence credit for time spent in pretrial custody.

¶ 2 Following a trial, a jury convicted defendant, William D. Jenkins, of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)). He was sentenced to 14 years in prison.

¶ 3 On appeal, defendant asserts (1) the State deprived him of a fair trial by improperly shifting the burden of proof; (2) the trial court erred by failing to conduct a *Krankel* inquiry after defendant stated at sentencing he "had an inadequate defense" (see *People v.*

Krankel, 102 Ill. 2d 181, 464 N.E. 2d 1045 (1984)); and (3) he is entitled to two additional days of sentence credit for time spent in pretrial custody. We affirm in part and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 On November 6, 2013, defendant was charged by an amended information with aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)). The charges stemmed from an October 29, 2013, incident in which James Gallaher was shot in the leg. On December 17, 2013, the grand jury returned a superseding three-count indictment, charging defendant with attempt (armed robbery) (count I) (720 ILCS 5/8-4(a), 18-2 (West 2012)); aggravated battery with a firearm (count II); and aggravated discharge of a firearm (count III). The attempt (armed robbery) charge alleged that defendant, with the intent to commit the offense of armed robbery, performed a substantial step toward the commission of that offense by knowingly attempting to take property from Gallaher and, while doing so, shot him in the leg. The aggravated-battery-with-a-firearm charge alleged that defendant, in committing a battery, knowingly discharged a firearm and shot Gallaher in the leg. The aggravated-discharge-of-a-firearm charge alleged that defendant knowingly fired a pistol in the direction of Gallaher, "against the peace and dignity of the people of the State of Illinois."

¶ 6 On April 14, 2014, defendant's jury trial commenced. Gallaher testified that on the evening of October 29, 2013, he was at home at his second-floor apartment on 11th Street in Quincy, Illinois. His two roommates, Josh McVey and Jordan McColez, were also home, along with several friends, including McColez's girlfriend, Kristin Tucker; Shelby Perkins; and Kourtni Shankland. McColez and Tucker had been in McColez's room and Gallaher and the other three

had been hanging out in the living room and had smoked cannabis. According to Gallaher, he later left his apartment and walked down the apartment's stairwell to talk on the phone with his then-girlfriend, Casey Ringerberg.

¶ 7 Gallaher testified that he and Ringerberg had been on the telephone for approximately an hour and a half when "a random African-American black man approached me, came to my door," as he was sitting near the bottom of the stairwell. The man, whom he had never seen before, and whom he described as "a black middle-aged, or young man" asked him for a "light." Gallaher told Ringerberg he would have to call her back. He then leaned his head out of the doorway and asked the man how he knew him. According to Gallaher, the man replied, "Skins from school," and Gallaher responded, "I don't know anybody named Skins." At that point, Gallaher stated the man "kind of backed up" and "reached in his pocket and pulled out a gun with his right hand, and then in his other hand he reached forward and grabbed the bat [Gallaher had been holding] and pulled it out of [Gallaher's] hand." Gallaher testified the man pointed the gun at him, told him to turn around, and then they started walking up the steps. When they arrived at the top of the landing, the man told Gallaher he was " 'going to go in there' " and " 'put [his] stuff and [his PlayStation 3] in [the man's] bag.' " Gallaher stated that he hesitated at the door because his friends were inside, and the man said, " '[d]on't be stupid over this; you could lose your life.' " Gallaher told the man he was "not coming in." At that point, Gallaher stated the man took a step back and shot him in the leg. Gallaher jumped into the apartment and slammed the door while yelling, " 'Get our gun!' " Gallaher's friends attended to him until an ambulance arrived, and he was taken to the hospital for treatment.

¶ 8 Gallaher admitted that he smoked cannabis prior to being shot and that he had previously sold cannabis out of the apartment. He testified that smoking cannabis "might affect

[his] memory," in the sense he might not be able to remember how many slices of pizza he ate the night before, but he would remember he had eaten pizza.

¶ 9 At defendant's trial, a number of Gallaher's roommates and friends, including Josh McVey, Jordan McColez, Kristin Tucker, Shelby Perkins, Kourtni Shankland, and Casey Ringerberg, corroborated Gallaher's testimony regarding the events leading up to and immediately following the shooting. However, none of them saw the shooter.

¶ 10 Shortly after arriving at the hospital, Gallaher spoke to Cathy Martin, a criminal investigator for the Quincy police department. Martin testified that Gallaher did not know the person who shot him, but he described the shooter as "[a] skinny, scrawny, black male somewhere between 16 and 19 years of age." After speaking to Gallaher, Martin went to Gallaher's apartment. At the apartment, Martin observed a baseball bat located outside the apartment building's entrance and a .22-caliber shell casing located inside the apartment building at the top of the landing. According to Martin, Gallaher's wounds were consistent with having been inflicted by a .22-caliber bullet.

¶ 11 Martin further testified that the day after the shooting, she spoke with Ella Epperson, Amaya Blankenship, and Madison Burton, and the information they provided resulted in defendant becoming a suspect. Thereafter, Martin created a photo array that included a photograph of defendant, which she then showed to Gallaher. According to Martin, Gallaher identified defendant as the shooter from the photo array. At trial, Gallaher identified defendant as the man who shot him.

¶ 12 After Gallaher identified defendant as the shooter from the photo array, Martin arrested defendant. According to Martin, after waiving his *Miranda* rights (*Miranda v. Arizona*,

384 U.S. 436 (1966)), defendant denied having any involvement in the shooting or having been with Ella Epperson, Amaya Blankenship, or Madison Burton on October 29, 2013.

¶ 13 Emily Pezzella, a crime scene technician with the Quincy police department, testified that she was dispatched to Blessing Hospital to take photographs of Gallaher and his injuries, and to Gallaher's apartment to process the crime scene. While at Gallaher's apartment, Pezzella collected a baseball bat that was located outside the entrance to the apartment; a shell casing located on the landing near the apartment's entrance; and from inside the apartment, cannabis, drug paraphernalia, and prescription medication.

¶ 14 Amaya Blankenship testified that on the night of October 29, 2013, she had been riding in a car with Ella Epperson, who was driving, and Madison Burton when they picked up "Illy" around 10:30 p.m. Blankenship identified defendant as the man she knew as Illy. According to Blankenship, Epperson asked defendant "if he was ready to rob somebody," and he said he was but he had to pick up something first. They stopped at another house and defendant ran in and returned with a bag or a jacket. Blankenship stated that Epperson then dropped her off at her house at approximately 10:45 p.m. She did not know where the group went after she was dropped off at home.

¶ 15 Madison Burton testified that she was in a car with Ella Epperson, who was driving, and Amaya Blankenship on the evening of October 29, 2013. According to Burton, the three of them picked up Illy, whom she identified as defendant. Burton stated that after defendant got into the car, Epperson asked him "[i]f he wanted to rob [Gallaher]," and defendant responded that he did. Burton testified that defendant then "went back inside the house" and returned with a "jacket or a bookbag or something." Burton further stated that once defendant got back into the car, he said he had "a banger," which she took to mean "a gun or something."

Burton admitted she did not see a gun. According to Burton, Epperson then took Blankenship home, and then she dropped Burton off at her house at approximately 11:45 p.m. Burton did not know what Epperson and defendant did afterward.

¶ 16 Ella Epperson testified that on the evening of October 29, 2013, she was in her car with Madison Burton and Amaya Blankenship. They later picked up Illy, whom she identified as defendant. According to Epperson, after they picked up defendant, she took Blankenship and Burton home. Epperson stated that she then dropped Illy off in the general area of Washington and Payson Streets, which is less than one block from Gallaher's house, at approximately 10:30 or 11 p.m. Epperson testified she then turned her car around and parked on the right side of the street. According to her, defendant was out of her car for "[a] minute," just "[l]ong enough for [her] to turn [her car] around," and then he got back in the car. When asked what defendant was doing outside of the car, Epperson stated, "we were going to get weed," and she assumed he was going to get "weed" from Gallaher. Epperson testified she then dropped defendant off by Burger King and went home.

¶ 17 After the State rested its case, defense counsel moved for a directed verdict, which was denied. Thereafter, the defense rested without presenting any evidence.

¶ 18 Following closing arguments, the jury found defendant guilty of aggravated battery with a firearm and aggravated discharge of a firearm, but not guilty of attempt (armed robbery).

¶ 19 At the sentencing hearing, the trial court found that defendant's conviction for aggravated discharge of a firearm merged with his conviction for aggravated battery with a firearm. The State noted that aggravated battery with a firearm is a Class X felony and recommended a sentence of 20 years' imprisonment. Defense counsel recommended the

minimum sentence of six years' imprisonment. Thereafter, the trial court sentenced defendant to 14 years' imprisonment and found that defendant was entitled to 85 days of sentence credit.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant asserts (1) the State deprived him of a fair trial by improperly shifting the burden of proof; (2) the trial court erred by failing to conduct a *Krankel* inquiry after defendant stated at sentencing "he had an inadequate defense"; and (3) he is entitled to two additional days of sentence credit for time spent in pretrial custody.

¶ 23 A. Whether the State Shifted the Burden of Proof to Defendant

¶ 24 Defendant first contends that the State deprived him of a fair trial by improperly shifting the burden of proof when it "suggest[ed] that the defense should have presented evidence to show that [his] fingerprints were not at the scene of the crime." Specifically, defendant takes issue with the following testimony and closing arguments.

¶ 25 On cross-examination, defense counsel elicited from Investigator Martin that the bullet casing and the baseball bat she had observed at Gallaher's apartment had not been tested for fingerprints. On redirect-examination, the following exchange between the prosecutor and Martin occurred, without objection:

> "Q. Now, as far as a couple other things I want to talk about, the shell casing that was found, you did not request that it be sent for testing. Fair?
>
> A. Correct.
>
> Q. You never received any request from the State's Attorney's Office that it be sent for testing?

A. No, I did not.

Q. Likewise, you never received any request from the defense attorney—

A. No.

Q. —that it be tested?

A. No.

Q. The same thing with the bat. You did not ask it to be tested?

A. No. I had no reason to believe the suspect touched it.

Q. No request from the State's Attorney it be tested?

A. No.

Q. But, likewise, the defense never asked that it be tested as well?

A. No, they did not."

¶ 26 Later, during cross examination of Pezzella, defense counsel likewise elicited that no fingerprint testing had been requested or conducted on the baseball bat or the shell casing that had been collected from Gallaher's apartment. On redirect-examination, the following exchange occurred between the prosecutor and Pezzella, without objection:

"Q. But to be fair, [the shell casing] was not tested [for fingerprints] in this case?

A. No, it was not.

Q. There was no request form the State's Attorney's Office that that shell casing be tested?

A. No, there was not.

Q. Likewise, there was no request from the defense attorney that the shell casing be tested?

A. No there was not.

* * *

Q. But, again, let's be fair. That bat was not tested for fingerprints?

A. No, it was not.

Q. No request from the State's Attorneys' Office for that bat to be tested?

A. No.

Q. No request, likewise, from the defense attorney that that bat be tested for fingerprints?

A. No."

¶ 27 Finally, during closing argument, defense counsel noted that the State had failed to present any physical evidence which tied defendant to the crime. In part, defense counsel referred to the shell casing and the bat and stated, "[t]hey have no fingerprints on the bullet casing," and, "[t]here w[ere] no fingerprints done on the bat." In rebuttal, the prosecutor stated, in part, as follows, without objection:

"I want to talk first about the fingerprints, and the defense is right, we don't have any fingerprints in this case. But I also want to be clear about one thing, and you need to understand. The defense can talk about fingerprints all they want, but the defense

> has the same opportunity and the same right to ask for any testing they want, and if the defense was so interested in fingerprints and so worried about fingerprints, then why didn't they ask [that] the bat be tested for fingerprints, and why didn't they ask that the shell casing be tested for fingerprints? They have the same right to that and the same opportunity for that as the People, but they chose not to do that either. So for him to say we don't have it, fair enough. Fair. They had the same chance, though."

The prosecution then focused its rebuttal argument on the circumstantial evidence the State had presented.

¶ 28 While defendant acknowledges this issue has been not preserved for review as it was neither objected to at trial nor included in a posttrial motion (see *People v. Thompson*, 238 Ill. 2d 598, 611, 939 N.E.2d 403, 412 (2010) ("[t]o preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion)), he asserts we may review the issue for plain error. "The plain-error doctrine permits a reviewing court to by-pass normal rules of forfeiture and consider '[p]lain errors or defects affecting substantial rights *** although they were not brought to the attention of the trial court.' " *People v. Eppinger*, 2013 IL 114121, ¶ 18, 984 N.E.2d 475 (quoting Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). "Plain-error review is appropriate under either of two circumstances: (1) when 'a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error'; or (2) when 'a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the

evidence.' " *Id*. (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)). Here, defendant contends that plain error may be found under either prong of the plain-error doctrine.

¶ 29 "The first step in our analysis is to determine whether an error occurred." *Id.* ¶ 19. If error occurred, we will then consider whether either of the two prongs of the plain-error doctrine has been satisfied. *People v. Sargent*, 239 Ill. 2d 166, 189-90, 940 N.E.2d 1045, 1059 (2010). " 'In both instances, the burden of persuasion remains with the defendant.' " *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410. "The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*." *People v. Johnson*, 238 Ill. 2d 478, 485, 939 N.E.2d 475, 480 (2010).

¶ 30 Defendant correctly points out that "[t]he defense is under no obligation to produce any evidence, and the prosecution cannot attempt to shift the burden of proof to the defense." *People v. Beasley*, 384 Ill. App. 3d 1039, 1047-48, 893 N.E.2d 1033, 1039 (2008). "Courts have found error where the prosecution implied that the defendant had an obligation to come up with evidence to create a reasonable doubt of his guilt" because "a defendant in a criminal case can never 'open the door' to shift the burden of proof." *Id*. at 1048, 893 N.E.2d at 1039-40. However, "a defendant cannot ordinarily claim error where the prosecutor's remarks are in reply to and may have been invited by [the] defense." *People v. Dixon*, 91 Ill. 2d 346, 350-51, 438 N.E.2d 180, 183 (1982).

¶ 31 Defendant argues that the comments made by the prosecutor in this case resemble those made by the prosecutor in *Beasley*—comments which this court found created an "erroneous burden of proof before the eyes of the jury." *Beasley*, 384 Ill. App. 3d at 1048, 893 N.E.2d at 1040. In that case, during closing argument, the defense noted that the State failed to

have several items it had collected tested for fingerprints. *Id*. at 1043, 893 N.E.2d at 1036. In rebuttal, the following exchange occurred regarding the absence of fingerprint testing:

> " 'STATE: You, also, learned that evidence can be requested to be sent to the [l]ab for examination. There was no request [by defendant] to do so.
>
> DEFENSE: Objection as to this line of argument which shifts the burden impermissibly.
>
> THE COURT: Overruled.
>
> STATE: If *** it's unconscionable on the part of [the State,] it's just as unconscionable on the part of the defense. So, if you want something tested, you can get it tested. You can't sit back and say, "Well, nobody tested it; therefore, the evidence fails." ' " *Id*. at 1043-44, 893 N.E.2d at 1036.

In rejecting the State's contention that its comments were appropriate because the defense opened the door, this court noted, "while defendant may have invited the State to explain why it chose not to submit certain items for fingerprinting, a defendant in a criminal case can never 'open the door' to shift the burden of proof." *Id*. at 1048, 893 N.E.2d at 1040. We continued, "defendant, though *able* to submit evidence for analysis, has no burden to do so. A defendant's failure to submit evidence for analysis cannot be considered 'unconscionable.' " (Emphasis in original.) *Id*. Thus, in *Beasley*, it was the State's assertion that the defendant's failure to submit the items for testing was unconscionable—which implied that the defendant had a burden to prove his innocence— that improperly shifted the burden of proof.

¶ 32 In *People v. Patterson*, 217 Ill. 2d 407, 445-46, 841 N.E.2d 889, 911 (2005), during cross-examination, the defense repeatedly questioned the State's deoxyribonucleic acid (DNA) expert about the degradation of the blood sample she tested and the validation methods used to verify her results in an effort to cast doubt on the results. On redirect examination, the prosecutor established that the blood sample used by its DNA expert had been available to the defense for independent testing, but that the defense had made no request to have the sample tested. *Id*. at 445, 841 N.E.2d at 911. On appeal, the defendant argued plain error applied because the prosecutor's line of questioning implied that the defense chose not to have the sample tested for fear of the results, and thus impermissibly shifted the burden of proof. *Id*. The supreme court disagreed, finding "[t]he purpose of the State's questioning on redirect, which was invited by defense counsel's questioning on cross-examination, was to answer the doubts raised by that cross-examination. In such situations, error cannot normally be claimed." *Id*. at 446, 841 N.E.2d at 911. Accordingly, the court found the State's questioning did not amount to reversible error, and thus plain error did not apply. *Id*. at 446-47, 841 N.E.2d at 912.

¶ 33 More recently, in *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 60, 41 N.E.3d 939, the First District considered whether the State improperly shifted the burden of proof by eliciting testimony from its expert witnesses that the defendant could have requested forensic testing on untested crime scene evidence. In that case, defense counsel, on cross-examination, extracted from two of the State's experts testimony that forensic testing had not been conducted on certain pieces of evidence which had been collected from the crime scene. *Id*. ¶¶ 35, 39. On redirect examination, the prosecutor elicited from both witnesses that the defense could have requested forensic testing on the items. *Id*. ¶¶ 36, 40. On appeal, the defendant attempted to distinguish *Patterson* on the ground that the testimony in *Patterson* concerned evidence which

had already been tested, while the evidence in *Kelley* concerned evidence which had not been tested at all. *Id*. ¶ 69. The First District concluded, however, that in both cases, the prosecutors' respective purposes in eliciting the relevant testimony "was to answer doubts raised by the cross-examination." *Id*.

¶ 34 In this case, we find the testimony elicited by the prosecutor during redirect examination, as well as his rebuttal closing argument, is more in line with the testimony elicited by the prosecutors in *Patterson* and *Kelley*. As noted, in *Beasley*, this court found the State had improperly shifted the burden of proof by insinuating that the defendant had a burden to have the evidence tested for fingerprints to prove his innocence. In this case, the prosecutor made no such inference. Rather, as in *Patterson* and *Kelley*, the prosecutor's questions and comments merely addressed evidentiary concerns which had been raised by the defense during cross-examination and closing argument. When viewed in the proper context, the prosecutor's questions and comments did not shift the burden of proof to defendant, and therefore, they do not constitute reversible error. As there is no reversible error, there is no plain error. Thus, defendant's forfeiture of this issue stands.

¶ 35 B. Whether a *Krankel* Inquiry Was Required

¶ 36 Defendant next argues that the trial court erred by failing to conduct a *Krankel* inquiry following his oral assertion that he "had an inadequate defense."

¶ 37 Pursuant to *Krankel*, 102 Ill. 2d at 189, 464 N.E.2d at 1049, and its progeny, when a defendant makes a *pro se* claim of ineffective assistance of counsel, the trial court must conduct an inquiry to determine the factual basis of the defendant's claim. If the court determines the defendant's claim has merit, it appoints new counsel for the defendant to present that claim to the court. *People v. Moore*, 207 Ill. 2d 68, 78, 797 N.E.2d 631, 637 (2003). If the

court determines the claim lacks merit or relates only to trial strategy, it denies the *pro se* motion without appointing new counsel. *Id*. While "[t]he pleading requirements for raising a *pro se* claim of ineffectiveness of counsel are somewhat relaxed, [a] defendant must still satisfy minimum requirements to trigger a *Krankel* inquiry by the trial court." *People v. Washington*, 2015 IL App (1st) 131023, ¶ 11, 36 N.E.3d 440. "A bald allegation of ineffective assistance is insufficient; rather, the defendant should raise specific claims with supporting facts before the trial court is required to consider the allegations." *People v. Walker*, 2011 IL App (1st) 072889-B, ¶ 34, 957 N.E.2d 531. "A defendant's allegations that are conclusory, misleading or legally immaterial, or do not identify a colorable claim of ineffective assistance of counsel would not require further inquiry by the trial court." *Id*. We review defendant's claim *de novo*. *People v. Taylor*, 237 Ill. 2d 68, 75, 927 N.E.2d 1172, 1176 (2010).

¶ 38 Here, defendant contends that he asserted his ineffective-assistance-of-counsel claim at sentencing. Specifically, during his statement in allocution, defendant stated that he was "pursuing to file an appeal due to the fact that [he] had an inadequate defense." According to defendant, this statement "clearly impl[ied] that his counsel was ineffective," and, therefore, warranted a *Krankel* hearing. We disagree.

¶ 39 Based on our review of the record, we find that defendant's assertion at sentencing did not raise an ineffective-assistance-of-counsel claim and, therefore, a *Krankel* hearing was not implicated. Defendant did not elaborate on the "inadequate defense" he believed he had received, and thus, even assuming, *arguendo*, that defendant's claim of an "inadequate defense" was actually a claim of ineffective assistance of counsel, defendant's statement was no more than a bald assertion of ineffective assistance and did not require further inquiry by the trial court.

¶ 40 C. Sentence Credit

¶ 41 Finally, defendant contends that he is entitled to an additional two days of sentence credit. Specifically, he maintains he is entitled to 87 days of sentence credit instead of the 85 days order by the court. The State concedes defendant is entitled to such credit. We accept the State's concession.

¶ 42 A defendant is entitled to credit "for the number of days spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2012). A defendant should receive credit against his sentence for any part of a day that he is in custody, excluding the day of sentencing in which he is remanded to the Department of Corrections. *People v. Compton*, 193 Ill. App. 3d 896, 904, 550 N.E.2d 640, 645 (1990); *People v. Foreman*, 361 Ill. App. 3d 136, 157, 836 N.E.2d 750, 768 (2005). We review *de novo* defendant's claim for additional sentence credit. *People v. Clark*, 2014 IL app (4th) 130331, ¶ 15, 15 N.E.3d 539.

¶ 43 The record shows that defendant was arrested on October 31, 2013, and remained in custody until November 27, 2013. Then, on April 15, 2014, he was remanded back into custody until his sentencing on June 13, 2014. Accordingly, excluding the date of sentencing, defendant spent 87 days in pretrial detention and he is therefore entitled to an additional two days of sentence credit. We remand for the issuance of an amended sentencing judgment to reflect this credit.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm in part and remand with directions for the issuance of an amended written sentencing judgment reflecting two additional days of credit toward defendant's sentence. As part of our judgment, since the State successfully defended a portion of this appeal, we award the State its $50 statutory assessment against defendant as costs

of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 46 Affirmed as modified; cause remanded with directions.