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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of McHenry County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09—CM—1007
)	
FREDDY VILLAGOMEZ,)	Honorable
)	Robert K. Baderstadt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

Held: (1) Defense counsel was not ineffective for failing to object to prior consistent statements by the State's witness, as defendant failed to show prejudice; the trial court found the victim credible and the defendant not credible and in any event the statements were either conclusory or uncontroverted and thus did little to bolster the victim's credibility; (2) fines imposed by the clerk of the court were vacated and reimposed reducing the violent-crime-victims fine to \$4 because of the imposition of \$23 in other fines.

Following a bench trial, defendant, Freddy Villagomez, was convicted of one count of battery (720 ILCS 5/12—3(a)(2) (West 2008)) and one count of assault (720 ILCS 5/12—1(a) (West 2008)). The trial court sentenced defendant to one year of probation and 60 days in the county jail.

Defendant appeals, arguing that (1) he received ineffective assistance of counsel with respect to the battery conviction and (2) the Violent Crime Victims Assistance Fund fine of \$20 must be reduced to \$4. For the reasons that follow, we affirm defendant's conviction, but reduce the Violent Crime Victims Assistance Fund fine to \$4.

BACKGROUND

At trial, Carlos Contreras testified as follows. On the night in question, he and his younger brother, Juan Contreras, were walking from their home to the nearby train station when he saw a red Monte Carlo pass them. As Carlos and Juan passed a playground, the people who were in the car came running at them, yelling "Surenos" and "I'm going to beat your ass." Carlos yelled at Juan to run. Carlos recognized defendant by his voice, as Carlos and defendant went to school together and had been friends in the past. As Carlos was running, he looked behind him and saw defendant running after him. Defendant called Carlos a bitch and asked Carlos, "[W]hy you running, puto?" Carlos also saw another male running after him, but farther back than defendant. When Carlos turned back a second time to see where Juan was, defendant hit him in the chest with a baseball bat. Although he did not see the bat when he got hit, Carlos saw the bat when defendant and the other male exited the car and began running toward him. Carlos knew that it was defendant who struck him because he recognized defendant's voice and because defendant was the person closest to him. Defendant and the other male then returned to the car. Carlos went to his house and called the police. Because he was having a difficult time breathing, he was taken to the hospital by ambulance. Carlos did not suffer any injury as a result of the strike, nor was there any bruising, redness, or swelling.

Juan Contreras gave the following testimony. On the night at issue, he and Carlos were walking to the train station when a car pulled up near them. People got out of the car and began chasing Carlos. Carlos told Juan to run, which he did. While they were running, Juan recognized defendant's voice and heard defendant yelling at Carlos. Defendant yelled "why you running, bitch" at Carlos. Juan ran to a neighbor's house, and the neighbor called the police for him. After Juan left the neighbor's house, he headed back to his house. On the way there, he encountered Carlos speaking with the police. Juan asked Carlos what happened, and Carlos told him that he got hit with a bat. On direct examination, Juan testified that Carlos then stated that he believed it was defendant who hit him because he recognized defendant's voice. On cross-examination, Juan testified that Carlos simply stated that "they" hit him with a bat. Finally, on redirect examination, Juan testified that he thought Carlos told him that it was defendant who hit him.

Officer Brad Tomasheski of the Cary Police Department testified as follows. On the evening at issue, he was dispatched to a call involving Carlos. When he arrived on the scene, he observed Carlos out of breath. Carlos told him that he had been chased by two males, one of whom had a baseball bat. Carlos stated that the two males were riding in a red Monte Carlo and he identified one of the individuals as defendant. As Carlos continued to complain about chest pain, Officer Tomasheski examined his chest but was unable to see anything. Carlos was examined by paramedics and taken to the hospital for medical attention. He was found to have suffered no injuries.

The red Monte Carlo was subsequently located and defendant and Shain Richter were found with it. When Officer Tomasheski spoke with defendant, defendant admitted to chasing Carlos but denied hitting him with a bat. The bat was located after Officer Tomasheski interviewed Richter.

Defendant gave the following testimony. On the evening at issue, he was cruising with Richter and two others in Richter's maroon Monte Carlo. As they were driving, they spotted Carlos and Juan. As they passed the two, Juan and Carlos started flashing gang signs for the Latin Counts. Richter turned the car around and told defendant that he wanted to fight Juan and Carlos for flashing gang signs. Although defendant did not want to fight, he followed Richter out of the car. As he got out of the car, he saw Richter with the baseball bat. Richter chased after Juan, while defendant chased after Carlos. Defendant was unable to catch Carlos because he was too far away and because Carlos ran to his house. He did not hit Carlos, nor did he see Richter strike Carlos. He also did not yell anything at Carlos, except he once yelled, "[C]ome on then, don't run, you want to fight, let's fight."

Officer Tomasheski gave the following testimony on rebuttal. During his interview with Richter, Richter denied having the bat or hitting Carlos with it. When Officer Tomasheski told defendant about Richter's denial, defendant became "outraged" and told Officer Tomasheski that Richter was lying. Upon defendant's suggestion, Officer Tomasheski brought Richter and defendant together. Defendant told Richter to tell the truth about who had the bat. Richter then admitted that he had the bat. Both Richter and defendant maintained that they did not strike Carlos with the bat.

Following closing arguments, the trial court found defendant guilty of both battery and assault. It sentenced defendant to one year of probation and 60 days in the county jail. Defendant then brought this timely appeal.

ANALYSIS

On appeal, defendant contends that trial counsel was ineffective for failing to object to the admission of Carlos's prior consistent statements to Juan and Officer Tomasheski. According to

defendant, trial counsel failed to object (or object on the ground of prior consistent statement) when Juan testified that Carlos told him that defendant was the person who had hit him with a baseball bat and when Officer Tomasheski testified regarding Carlos's recitation of events on the night of the incident. According to defendant, had it not been for trial counsel's failure to object, defendant would not have been convicted of battery. A claim of ineffective assistance of counsel requires a defendant to establish that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Defendant has failed to establish that, but for counsel's alleged error, the result of the proceeding would have been different, as the trial court's decision was based upon a credibility assessment independent of the prior consistent statements, and the prior consistent statements did not bolster Carlos's credibility.

First, although this case did revolve around the credibility of the witnesses, the trial court found defendant guilty not because it found Carlos's credibility to be bolstered by the prior consistent statements, but instead because of its assessment of the credibility of the witnesses. The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence, and this court will not substitute its judgment for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). In its ruling, the trial court made no mention of the prior consistent statements. Although the trial court did state that it found the State's witnesses credible, it in no way indicated that its credibility assessment of Carlos was based on the prior consistent statements. Moreover, the trial court specifically stated that it found defendant's testimony to be incredible. From this, we

conclude that the trial court found Carlos to be more credible, and thus convicted defendant, not because of the prior consistent statements, but because of its own assessment of the credibility of the witnesses and the weight to be given to their testimony.

In addition, the prior consistent statements were not very strong evidence and did little to bolster Carlos's testimony. Carlos's statement to Juan that defendant was the person who hit him was conclusory and did not offer any explanation of how Carlos knew that defendant was the person who hit him. On the other hand, Carlos's trial testimony specifically explained why he believed defendant was the person who hit him; Carlos testified that he saw the baseball bat when defendant and the other male got out of the car, defendant was closest to him when he was hit, and defendant was yelling things at him while chasing him and he recognized defendant's voice. Carlos's statement to Officer Tomasheski, in which he recited the events of the evening, but did not identify defendant as the one who hit him, did little more than establish that defendant was present, that he exited the vehicle, and that he chased after Carlos. Defendant admitted as much in his own testimony.

Given the trial court's independent finding that defendant's testimony was incredible and the little value the prior consistent statements held for bolstering Carlos's credibility, defendant has failed to establish a reasonable probability that, but for trial counsel's alleged error, the result of the trial would have been different. Accordingly, we affirm defendant's conviction.

Defendant also contends that the Violent Crime Victims Assistance Fund fine of \$20 imposed on him must be reduced to \$4, because he was also assessed a drug court-mental health court fee of \$10 and a Child Advocacy Center fee of \$13. The State agrees, but also contends that the clerk of the court lacked the authority to impose the Violent Crime Victims Assistance Fund fine,

the drug court-mental health court fee, and the Child Advocacy Center fee. Although referred to as fees, the drug court-mental health court fee and the Child Advocacy Center fee are fines. See *People v. Graves*, 235 Ill. 2d 244, 255 (2009); *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009). Although the trial court failed to impose these fines, the clerk of the court lacked the authority to impose them on the trial court's behalf. See *People v. Scott*, 152 Ill. App. 3d 868, 873 (1987) (“The clerk of a court is a nonjudicial member of the court and, as such, has no power to *** levy fines, including mandatory ones.”). Thus, we vacate these fines imposed by the clerk, and we reimpose them ourselves. See Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994) (reviewing court may “make any order that ought to have been given or made”).

The Violent Crime Victims Assistance Fund fine, however, must be limited to \$4. The \$20 alternate fine is to be imposed only when “no other fine is imposed.” 725 ILCS 240/10(c) (West 2008). Because the drug court-mental health court fee and the Child Advocacy Center fee are also fines, there are other fines imposed, and thus subsection (c) is no longer applicable. Rather, defendant's fine must be calculated pursuant to subsection (b), which provides that the court shall assess “an additional penalty of \$4 for each \$40, or fraction thereof, of fine imposed.” 725 ILCS 240/10(b) (West 2008). Here, where the other fines total \$23, under the statute defendant's Violent Crime Victims Assistance Fund fine should be \$4.

CONCLUSION

For the reasons stated, we affirm defendant's convictions, vacate the clerk's fine for the drug court-mental health court and impose a fine of \$10 for that fund, vacate the clerk's fine for the Child Advocacy Center and impose a fine of \$13 for that fund, and vacate the clerk's fine for the Violent Crime Victims Assistance Fund and impose a fine of \$4 for that fund.

No. 2—09—0880

Affirmed as modified.