

Nos. 1-10-2761 and 1-10-2763
(consolidated)

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IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	
v.)	09 CR 1267501
)	09 CR 1267502
CEDRIC PAYNE and TRAVIS PORTER,)	
)	Honorable
Defendant-Appellant.)	Garritt Howard,
)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

ORDER

¶ 1 HELD: (1) Where the trial court found the testimony of the complaining witness credible and the testimony of a co-defendant not credible, and the complaining witness testified that both defendants beat him with a stick, the evidence was sufficient to find both co-defendants guilty of aggravated battery; (2) where both defendants were represented by counsel, signed a jury waiver form, and told the trial court they were waiving their right to a jury trial, the waivers were valid; and (3) where both defendants have been convicted of a prior felony, the trial court erred in assessing the \$200 DNA fee and the trial court also erred in not applying defendants' presentence custody credit to offset their respective \$30 Child Advocacy Center fines.

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¶ 2 After a joint bench trial, defendants Cedric Payne and Travis Porter were ultimately each convicted of aggravated battery and sentenced to five years in prison. In a consolidated appeal, defendants contend that: (1) the evidence was insufficient to prove them guilty beyond a reasonable doubt; (2) they did not understandingly waive their right to a jury trial; and (3) the trial judge improperly assessed a \$200 DNA fee and failed to apply a presentence custody credit to offset defendants' \$30 Child Advocacy Center fines. We affirm defendants' convictions and sentences, and modify each defendant's fines and fees order.

¶ 3 Payne and Porter were charged with the aggravated battery and armed robbery of Michael Tripoli based on an incident that occurred on June 22, 2009. The record shows that both defendants were represented by counsel. On December 21, 2009, Porter's counsel indicated that they were ready to set the case for a bench trial. At the trial court's inquiry, Payne's counsel also stated that they wanted to set the case for a bench trial. The jury waivers were executed on February 11, 2010, after the trial court had the following exchange with defendants:

"THE COURT: Mr. Payne, does this form contain your signature, sir?

MR. PAYNE: Yes, sir.

THE COURT: By signing this form you are waiving your right to a jury trial?

MR. PAYNE: Yes.

THE COURT: Mr. Porter, does this form contain your signature?

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MR. PORTER: Yes.

THE COURT: You're waiving your right to a jury trial?

MR. PORTER: Yes.

THE COURT: Jury trials have been waived."

The record contains a signed jury waiver from each defendant, dated February 11, 2010.

¶ 4 Michael Tripoli testified that on June 22, 2009, he was living at Hilda's Shelter at 1458 Chicago Avenue in Evanston, Illinois, and had been for "between two and three weeks." That night, at about 5:10 p.m., Tripoli was walking down the steps toward the door of the shelter when he saw Payne "jump out of the bushes" swinging a stick at Tripoli. Porter jumped out of the bushes just after Payne and was standing next to him. Payne swung the stick at Tripoli's head. Tripoli "partially blocked" the stick with his left arm but the stick hit him in the forehead. At the time, Tripoli had been holding a bag which contained all of his belongings, but dropped the bag after the first swing. Tripoli moved to tackle Payne and as Tripoli grabbed Payne around the waist, Payne hit Tripoli on the head and back. Tripoli testified that Payne "was swinging home run baseball swings" using both hands. Tripoli and Payne fell to the ground, causing Payne to drop the stick. Porter then "grabbed the club and started beating [Tripoli] with it on the back, and on the head." Porter hit defendant with the club four times, on his head, arm, shoulder, and back. After the fourth hit, Tripoli moved off of Payne and "started lunging" at Porter. Porter dropped the club and Payne picked it up and hit Tripoli "three or four more times." Tripoli screamed for help as he was being hit. At the end, he was bleeding. Both Payne and Porter left, and Porter took Tripoli's bag. When the police arrived shortly after, Tripoli described defendants

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who he recognized from the shelter because Payne slept in the bunk beneath Tripoli's and Porter was "always" there. Tripoli identified Payne that night and identified Porter in a lineup the next day. Tripoli described his injuries as "[a] concussion, approximately 25 stitches, facial fracture on the left side, fractured left forearm, and just bumps and bruises all over ***." After being released from the hospital, Tripoli went to the police station and identified his bag and the stick defendants used to beat him.

¶ 5 On cross-examination, Tripoli admitted that he and Payne had argued a "couple days" before the beating. Tripoli had not seen Payne since the argument and did not strike at Payne first.

¶ 6 Linda Mallers testified that at about 5 p.m. on June 22, 2009, she parked her car in a parking garage and heard scuffling nearby. The back of the garage looked "up onto an alley" and she saw three men. One man, who she ultimately identified as Tripoli, was facing her and the other two were facing toward Tripoli. When she first saw them, Tripoli was standing "and then he was on the ground." One of the two men was raising a stick very high and "coming down on [Tripoli] repeatedly." Tripoli did not strike the other two men. "All he was doing was defending himself." Mallers saw Tripoli struck by the stick "four or five times" and heard Tripoli screaming for help. Mallers called 9-1-1 from the garage and saw the two men running away down the alley while she was on the phone. Mallers did not see the beginning of the scuffle and she never saw the faces of the attackers.

¶ 7 Fred Djirackor testified that he worked in the basement of the shelter on June 22, 2009. He identified Payne as a former resident of the shelter and said that Porter was not a resident but

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"was a regular" who participated in services offered at the shelter. Shortly after 5 p.m. on June 22, 2009, Djirackor heard someone "screaming for help." He went out the back door of the shelter and saw Tripoli sitting on the curb near the a stairway to the kitchen, around the corner from the shelter entrance. Tripoli was "bleeding heavily." Tripoli told Djirackor he had been attacked. Djirackor saw Payne and Porter "running south in the alley leading away from the shelter." Porter turned around when he was about "6 and a half, 7 feet" away from Djirackor. When Djirackor asked what happened, Porter said, "I didn't do anything." Both men ran into Raymond Park, across the street. Djirackor had no doubt about who he saw running.

¶ 8 On cross-examination, Djirackor said he could not recall if he had seen Porter at the shelter that day or the day before and he believed Porter had been incarcerated "[p]rior to that."

¶ 9 Detective Garner testified that on June 22, 2009, he was called to the shelter in response to a battery in progress. When he arrived, he spoke to Tripoli, who told Garner he had been attacked by two persons who also used the shelter and that his bag had been stolen by Payne. While still at the shelter, Garner learned that Payne, had been located in Raymond Park. Tripoli identified Payne as an offender. About 20 minutes later, Porter was located in the park. Tripoli identified Porter in a line-up at the police station the next day. Garner recovered a "3 foot large branch" from the alley near the shelter, which Tripoli identified as the stick used to beat him. Tripoli's bag was also recovered from near the end of the alley. Garner interviewed Porter, who told Garner that he had been drinking in the park and went to the alley behind the shelter where he saw two men fighting. Porter did not know either man. Payne told Garner that "he had no memory" of what happened on June 22, 2009.

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¶ 10 Defendants' motions for a directed finding were denied.

¶ 11 Cedric Payne testified that two weeks prior to June 22, 2009, he and Tripoli had argued and that, as a result, Tripoli had been asked to leave the shelter. On June 22, Payne saw Tripoli carrying a 50-gallon garbage can, walking toward the shelter's kitchen door. "Words were exchanged" between Payne and Tripoli and eventually they began "scruffing." Tripoli tackled Payne, and Payne "got up and punched" Tripoli once. Payne also hit Tripoli once with a stick he uses as a cane. No one else was involved. After the two hits, Payne went to the park where residents of the shelter usually "hang out." He did not intend to run away and never took a bag belonging to Tripoli. Payne also testified that Porter was released from prison on June 21, 2009, after serving a 30-day sentence, so Porter had not been around the shelter. Porter was there when Payne hit Tripoli, but he was not involved in the fight and was about "maybe 10 feet" away.

¶ 12 On cross-examination, Payne admitted that Tripoli never hit Payne with the stick and said that he "was way out of line for the way [he] reacted." He also admitted that Porter ran away when Payne ran away.

¶ 13 The trial court found both defendants guilty of armed robbery and aggravated battery. In doing so, the court stated that the case "comes down to a question of credibility" and that it had "closely listened to and observed the witnesses that testified." Specifically, the court found Tripoli credible and Payne not credible. The court said that "Payne told a preposterous story ***. Payne was not a credible witness at all. I did not believe his testimony."

¶ 14 Each defendant filed a motion for new trial arguing that he was not found guilty beyond a reasonable doubt and that Tripoli was not a credible witness. At the hearing on the motions for

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new trial, the defendants called Doctor Giovanni Giannotti, a trauma surgeon, who testified that he evaluated Tripoli on June 22, 2009. Tripoli's injuries included a five-centimeter laceration on his head with swelling and redness, which was closed with seven stitches. Giannotti also noted bruising, abrasions, and "a lot of tenderness along his back." The exam further showed Tripoli had "a lot of swelling along the forearm area with some bruising as well." There was no evidence of a concussion, a facial fracture, or a fracture on his arm. An X-ray showed an old fracture on Tripoli's arm, but nothing recent.

¶ 15 On cross-examination, Giannotti admitted that Tripoli complained of neck pain and pain to his left forearm during his examination and that the injuries he observed were consistent with Tripoli having been beaten with a stick. Further, when Tripoli returned to have the stitches removed about a week later, he complained of aches and pains all over his body, which is consistent with someone having been beaten with a stick a week prior. Finally, the injury to Tripoli's left forearm was consistent with someone having put up that arm to defend himself.

¶ 16 In denying the motions for new trial, the trial court stated that Tripoli "did, in fact, exaggerate his injuries." Nonetheless, the court found that Giannotti's testimony was "consistent with the beating [Tripoli] described" and therefore Tripoli's "testimony at trial was credible []."

¶ 17 Payne and Porter both eventually filed motions to reconsider arguing, in pertinent part, that the evidence presented at trial was insufficient to prove either defendant guilty of armed robbery because the testimony was unclear as to who took Tripoli's bag. The trial court granted both motions and reversed the armed robbery convictions. Ultimately, each defendant was sentenced to five years in prison.

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¶ 18 Defendants first contend that the State's evidence was insufficient to convict them of aggravated battery.

¶ 19 The standard of review on a challenge to the sufficiency of the evidence is 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. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). Therefore, all reasonable inferences from the record must be allowed in favor of the State. *People v. Givens*, 237 Ill. 2d 311, 344 (2010). When considering a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant, it is for the trier of fact to determine the credibility of witnesses, weigh the evidence, draw reasonable inferences, and resolve any conflicts in the evidence. *Siguenza-Brito*, 235 Ill. 2d at 228. A reviewing court will reverse a conviction only where the evidence is so improbable or unsatisfactory as to create a reasonable doubt of a defendant's guilt. *Givens*, 237 Ill. 2d at 334.

¶ 20 A person commits the offense of battery if he: "intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3 (West 2008). That person commits aggravated battery when, in committing a battery, he uses a deadly weapon "other than by the discharge of a firearm." 720 ILCS 5/12-4(b)(1) (West 2008).

¶ 21 Here, defendants base their insufficiency argument on the assumption that Tripoli's testimony was completely incredible. However, the trial court specifically found that Tripoli was a credible witness, both at trial and at the hearing on defendants' motions for new trial. The trial

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court also said that "Payne told a preposterous story" and was not credible as a witness. Although defendants cite to authority suggesting that we are not bound by the findings of the trial court, they provide no further argument as to why we should disregard the trial court's credibility findings in the instant case. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and pages of the record relied on"). Rather, defendants seem to be asking that we substitute our judgment for that of the trial court with regard to witness credibility, which we may not do. *People v. McBride*, 2012 IL App (1st) 100375, ¶ 19 (citing *People v. Kotlarz*, 193 Ill. 2d 272, 298 (2000)). A trial court's credibility findings are given greater weight as the trial court saw and heard the witnesses. *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 51. Therefore, we will defer to the trial court's credibility findings.

¶ 22 We find that Tripoli's testimony was sufficient to show that defendants committed aggravated battery against him. Tripoli testified that Payne was the initial aggressor and hit him with a stick on his head. Tripoli tackled Payne, knocking Payne to the ground and forcing Payne to drop the stick. Porter picked up the stick and hit Tripoli with it on the head, back, and arm. Then, when Tripoli "lunged" for Porter, Payne used the stick to hit Tripoli "three or four more times." Furthermore, Tripoli was familiar with both Payne and Porter from the shelter and was able to identify them shortly after the crime. The testimony of a single, credible eye-witness is sufficient to uphold a conviction. *Siguenza-Brito*, 235 Ill. 2d at 228; see also *People v. Rincon*, 387 Ill. App. 3d 708, 722-24 (the court found the evidence was sufficient to convict the defendant of attempted arson beyond a reasonable doubt even where the State presented one

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eyewitness and no physical evidence, and the defendant presented two alibi witnesses and testified himself). Thus, a rational trier of fact could have found that Payne and Porter caused bodily injury to Tripoli using a deadly weapon solely based on Tripoli's credible testimony.

¶ 23 Moreover, Tripoli's testimony was supported by the testimony of Mallers and Djirackor. Mallers testified that she saw Tripoli on the ground defending himself as two men stood over him, one of whom "was coming down on" Tripoli with a stick. This is consistent with Tripoli's account that both Payne and Porter were involved and hit him with the stick one at a time. Djirackor heard Tripoli's cries for help and ran outside in time to see Payne and Porter, both of whom who he recognized from the shelter, running away from the shelter down the alley as Tripoli lay bleeding on the ground. Finally, even Doctor Giannotti's testimony at the motion hearing corroborated Tripoli's account of the attack. Giannotti testified that Tripoli had a laceration requiring stitches on his forehead, and bruises, redness, and tenderness on his head, back, and left forearm, consistent with Tripoli having been hit with the stick in the head, arm, and back, and having defended himself by holding up his left arm. In light of the trial court's credibility determinations, we cannot say that the evidence presented at trial was so improbable or unsatisfactory as to create reasonable doubt of defendants' guilt.

¶ 24 We are not persuaded by defendants' argument that the State failed to offer any credible testimony to rebut Payne's theory of self-defense. The only trial evidence presented in support of Payne's theory was his own testimony that Tripoli was the initial aggressor. However, Payne's testimony was rebutted by Tripoli's testimony that Payne "jump[ed] out of the bushes" swinging the stick at Tripoli. Though Payne claims that Tripoli was not a credible witness, as we

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previously noted, the trial court resolved the conflicting testimony in favor of Tripoli and we will continue to defer to that finding. See *McBride*, 2012 IL App (1st) 100375, ¶ 19 (the resolution of conflicting testimony is the duty of the trier of fact, and the reviewing court may not substitute its judgment for that of the trial court).

¶ 25 We are similarly unconvinced by defendants' claim that the State did not present credible evidence that Porter participated in the attack. Tripoli testified that when Payne dropped the stick, Porter picked it up and proceeded to hit Tripoli with the stick four times. The trial court found Tripoli credible and the testimony of a single, credible eye-witness is sufficient to uphold a conviction. *Siguenza-Brito*, 235 Ill. 2d at 228. Moreover, as we discussed above, the testimony of Mallers and Djirackor is not in conflict with Tripoli's account of the attack, and in fact actually supports it. Furthermore, although Mallers testified that she only saw one man hitting Tripoli with a stick, she also testified that she did not see the entire attack and saw two men standing over Tripoli. Therefore, her testimony does not preclude the possibility that Porter participated in the attack. In addition, Djirackor testified to seeing Porter running away from the shelter, which may be considered as evidence of a guilty conscience. *People v. Killingsworth*, 314 Ill. App. 3d 506, 511 (2000) (citing *People v. McDonald*, 168 Ill. 2d 420, 448 (1995)). Viewing all the evidence in the light most favorable to the State, as we must, and deferring to the trial court's determinations of credibility, we find that any rational trier of fact could have found both Payne and Porter guilty of aggravated battery against Tripoli beyond a reasonable doubt.

¶ 26 Defendants next contend that they did not understandingly waive their right to a jury trial. Specifically, defendants argue that the trial court's failure to ensure they understood the rights

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they were giving up rendered their signed waivers invalid.

¶ 27 Initially, the State claims that defendants have forfeited this issue on appeal. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (a contemporaneous objection and written posttrial motion are both required to preserve an error for review). Although defendants failed to properly preserve the issue, a defendant's failure to challenge the validity of the jury waiver in the trial court does not result in forfeiture of the issue on appeal. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004). As a defendant's right to a jury trial is fundamental, we will consider the issue of whether the waivers were made knowingly under the plain error doctrine. *In re R.A.B.*, 197 Ill. 2d 358, 363 (2001). To establish plain error, the defendant must first show a clear and obvious error occurred. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). Here, because the facts are not in dispute, the issue is a question of law and our review is *de novo*. *R.A.B.*, 197 Ill. 2d at 362.

¶ 28 A defendant's waiver of his right to a jury trial is valid as long as it is made both understandingly and in open court. 725 ILCS 5/103-6 (West 2008); *People v. Turner*, 375 Ill. App. 3d 1101, 1108 (2007). The validity of a jury waiver turns on the particular facts and circumstances of each case. *Bracey*, 213 Ill. 2d at 269. A trial court is not required to give specific admonishments or advice to the defendant for a waiver to be valid. *Bracey* 213 Ill. 2d at 270. However, a court should ensure that the defendant's decision to waive his right to a jury trial was made understandingly by discussing it in open court. *Id.* That discussion should at least indicate to the defendant that his right to a jury trial is being waived. *People v. Rincon*, 387 Ill. App. 3d 708, 718 (2008). As a defendant generally acts through his counsel, a jury waiver is considered valid if it was made by defense counsel, in the defendant's presence, and without the

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defendant's objection. *Bracey*, 213 Ill. 2d at 269; *Turner*, 375 Ill. App. 3d at 1108. Although a signed jury waiver by itself is insufficient to show a defendant's understanding, the signed waiver "lessens the probability that the waiver was not made knowingly." *People v. Dockery*, 296 Ill. App. 3d 271, 276 (1998) (quoting *People v. Steiger*, 208 Ill. App. 3d 979, 982 (1991)).

¶ 29 Here, we find that both defendants validly waived their right to a jury trial. Payne and Porter were both represented by counsel and present when their attorneys requested a bench trial. Both defendants also signed a jury waiver form. More importantly, when the trial court executed the jury waivers, it was not defense counsel but each defendant himself who affirmatively informed the trial court that his respective waiver contained his own signature and that by signing the form he was waiving his right to a jury trial. Additionally, although the trial court did not extensively admonish defendants about their right to a jury trial, it did explicitly inquire whether defendants intended to waive their right to a jury trial by signing the jury waiver. We find this exchange, though brief, was sufficient to ensure defendants understood they were waiving their right to a jury trial. See *People v. Rincon*, 387 Ill. App. 3d 708, 718 (2008) (stating that, "[s]omething in the discussion must indicate to the defendant that his or her right to a jury trial is being waived").

¶ 30 Furthermore, the record shows that both Payne and Porter have had multiple prior felony convictions, demonstrating a familiarity with the criminal justice system and, more particularly, the right to a trial by jury. See *People v. Turner*, 375 Ill. App. 3d 1101, 1109 (2007) (the finding of a knowing jury trial waiver was additionally supported by the defendant's prior criminal and traffic convictions which showed "a familiarity with the criminal justice system, and thus, a

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familiarity with her right to a trial by jury and with the ramifications of waiving that right"); *People v. Johnson*, 347 Ill. App. 3d 442, 444-45 (the trial court found the defendant knowingly waived her jury trial right in part because she had several prior traffic convictions and one prior battery conviction, and was therefore "familiar with the criminal justice system"). Under these circumstances, we find that both Payne and Porter knowingly waived their right to a jury trial.

¶ 31 Finally, defendants contend that their respective fines and fees orders must be modified on two bases, and the State concedes on both points. First, defendants argue that the \$200 DNA analysis fee was improperly assessed because each previously submitted a DNA sample. A trial court only has the authority to order a defendant to submit a DNA sample and pay the DNA analysis fee once, when the defendant is not currently in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Here, defendants point to State Police DNA Indexing Laboratory Reports, of which we may take judicial notice (*People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010)). These reports show that each defendant submitted a DNA sample for analysis from which a profile was subsequently obtained, Porter based on a 2003 conviction and Payne based on a 2007 conviction. As both defendants were previously registered in the DNA database, the trial court was not authorized to impose the \$200 DNA analysis fee. *Marshall*, 242 Ill. 2d at 302.

¶ 32 Next, defendants argue that they are entitled to presentence incarceration credit of \$5 per day (725 ILCS 5/110-14(a) (West 2008)) against the \$30 Children's Advocacy Center fee (55 ILCS 5/5-1101(f-5) (West 2008)). The Children's Advocacy Center fee is considered a "fine," as it is mandatory for convicted defendants and is not intended to compensate the State for the costs of prosecution. *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009). A defendant may offset a fine

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using presentence incarceration credit, while a "fee," which does seek to recoup the expenses of prosecution, is not subject to presentence incarceration credit. *People v. Jones*, 223 Ill. 2d 569, 582 (2006). Therefore, defendants are entitled to having their respective presentence incarceration credits applied against their respective Children's Advocacy Center fees.

¶ 33 Accordingly, for both Payne and Porter, we vacate the \$200 DNA analysis fee pursuant to Supreme Court Rule 615(b)(2) (eff. Oct. 1, 1987), find that the \$30 Children's Advocacy fee has been offset by defendants' presentence incarceration credits and otherwise affirm the judgments of the trial court.

¶ 34 Affirmed in part; fines and fees orders modified.