

NOTICE
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2012 IL App (4th) 100710-U

Filed 1/23/12

NO. 4-10-0710

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
TRAVIONTE WILLIAMS,)	No. 09CF1862
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice Cook concurred in the judgment.

ORDER

¶ 1 *Held:* The court affirmed the trial court's judgment as modified, finding (1) defense counsel was not ineffective for failing to cross-examine one of the State's witnesses regarding a recently pending misdemeanor charge, (2) the fines imposed against defendant were calculated erroneously, and (3) defendant is entitled to a \$5 credit against his \$5 drug-court fee.

¶ 2 In June 2010, a jury convicted defendant, Travionte Williams, of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West Supp. 2009)). In July 2010, the trial court sentenced defendant to 18 years' imprisonment and imposed fines and fees. Defendant appeals, arguing (1) he received ineffective assistance of counsel where defense counsel failed to cross-examine the State's witness, Charles Arbour, regarding a recently dismissed criminal charge, (2) his violent-crime-victim's-assistance-fund (VCVA) fine was calculated incorrectly, and (3) he is entitled to \$5 credit against his \$5 drug-court fee for time he spent in pretrial custody. We affirm

the court's judgment as modified and remand with directions.

¶ 3

I. BACKGROUND

¶ 4 In November 2009, the State charged defendant by indictment with one count of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2008)), and one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West Supp. 2009)). Defendant pleaded not guilty, and the matter proceeded to jury trial. The evidence introduced at defendant's June 2010 jury trial showed the following.

¶ 5 Charles Arbour testified he purchased drugs from defendant, whom he knew as "Tray," approximately 10 times prior to the evening of October 30, 2009. Through their various transactions, Arbour accrued a \$50 debt to defendant. Prior to the evening in question, Arbour stated neither he nor defendant threatened the other or displayed a weapon. On October 30, 2009, Arbour arranged to purchase \$50 worth of marijuana from defendant and was told to meet defendant at an apartment complex to complete the transaction around 1 a.m. Arbour's friend Willie Jordan, whom he called "Pops," drove him to the arranged meeting place but stayed in the car while Arbour met with defendant.

¶ 6 Arbour stated he met defendant outside, and defendant handed him a bag of grass clippings, claiming it was marijuana. Arbour told defendant he would not pay for the grass clippings in the bag. Defendant told Arbour "he would be right back" and walked upstairs to the second level of the apartment complex, taking the grass clippings with him. When defendant returned, he was carrying a gun. Arbour testified defendant then said "give me the money or I'm gonna shoot 'ya." Arbour stated he was standing about four feet from defendant.

¶ 7 According to Arbour, defendant pointed the gun at him and pulled the trigger, but

the gun did not fire, causing defendant to "jack the hammer" to reload it. Arbour stated he "tried to get the gun down" and "knock the gun out of his hand or push it down" after the initial misfire. Arbour stated defendant then pointed the gun at him and pulled the trigger, striking Arbour with five bullets. Arbour further stated defendant continued firing shots at him when he fell to the ground after being struck in the shoulder by a bullet. Arbour testified he and defendant did not struggle over the gun prior to defendant shooting him.

¶ 8 Arbour testified he did not have a weapon on the night in question, did not initiate any contact with defendant, other than when he attempted to get the gun away from him, and did not threaten defendant. After the shooting, Arbour told Pops to get help. Before arriving at the hospital, Arbour spoke to a police officer about what happened, though he was not sure if the conversation occurred while he was being loaded into the ambulance or in the back of the ambulance on the way to the hospital. Arbour identified People's exhibit Nos. 1, 3, and 4 as photographs of the area outside the apartment building where he met defendant and stated they accurately depicted the area where he was shot.

¶ 9 During his testimony, Arbour admitted he had been convicted in Champaign County of misdemeanor assault in 1998, theft in 2004, and obstructing justice in 2005. The record also shows Arbour was charged with unlawful possession of drug paraphernalia in Champaign County case No. 09-CM-1351, but this charge was not disclosed to the jury. Though the record lists the charge as pending, the website for the Circuit Clerk of Champaign County shows the charge was dismissed on November 13, 2009, over six months prior to defendant's trial. See <http://www.cccircuitclerk.com> (visited January 6, 2012) (Champaign County Circuit Clerk's website).

¶ 10 On cross-examination, Arbour stated he did not tell officers about the bag of grass clippings when he was interviewed about a week after the shooting. Arbour further stated he might have initially told police defendant was holding a gun when he and defendant first met on the night in question. Finally, defendant stated he did not get into a physical altercation with defendant, and he did not see any people in the area that night other than Pops. Defense counsel did not cross-examine Arbour regarding his criminal history.

¶ 11 Carrie Miller was walking with her friend Jennifer Rosemier when she saw two men arguing outside an apartment complex just over half a block away. Though she could not hear the conversation, Miller believed she saw the two shove each other at one point, though she did not see any punches thrown. Miller then heard five or six gun shots and saw fire coming from the end of a gun in one of the person's hands. Miller stated she saw one of the people in the argument fall to the ground and then she ran from the scene. According to her testimony, the man Miller saw fall to the ground never pointed a weapon at the other man. Due to the distance and the poor lighting, Miller was unable to identify either of the people she saw arguing. Miller identified People's exhibit No. 1 as a photograph of the apartment complex where she saw the two people arguing on the morning in question and stated it accurately depicted the area.

¶ 12 Urbana police officer Angela Vogt responded to the apartment complex after someone reported hearing shots fired in the area. When she arrived at the scene, Vogt saw a man lying in the grass and called for an ambulance. The man lying in the grass was Arbour. Vogt rode in the ambulance to the hospital with Arbour. While in the back of the ambulance, Vogt asked Arbour who shot him, and Arbour told her "Tray" shot him. Vogt was unable to question Arbour further due to his injuries.

¶ 13 Urbana police officer Shannon Wolfe was dispatched to the area of the shooting in search of the suspected gunman. Though she did not locate the suspect, Wolfe came into contact with Miller, who informed Wolfe she had witnessed the shooting. Wolfe spoke with Miller alone and testified Miller appeared to be upset but did not appear to be under the influence of alcohol or drugs.

¶ 14 Urbana police officer Steven Scharf was also dispatched to the area of the shooting. At the scene, Scharf met with Officer Wolfe and the two searched for the suspected gunman. During their search, the officers came into contact with Miller and Rosemier, who informed them they witnessed the shooting. While Wolfe spoke with Miller separately, Scharf spoke with Rosemier. Scharf testified Rosemier was in shock but did not appear to be under the influence of alcohol or drugs.

¶ 15 The parties next entered a stipulation regarding the injuries Arbour sustained from the gunshots. The stipulation stated Kimberly Cradock, the trauma surgeon who treated Arbour's various injuries, would testify to the following: (1) Arbour suffered five gunshot wounds on October 30, 2009, (2) Arbour's injuries required a transfusion of over 45 pints of blood, (3) Arbour's injuries were life-threatening, and (4) Arbour remained in the hospital until November 25, 2009.

¶ 16 Rosemier testified she was walking to her boyfriend's house with Miller when they noticed people arguing. Rosemier could not make out what the people were arguing about but she saw "a little bit of shoving." One of the parties to the argument then raised his arm and fired at the other person, causing him to fall to the ground. Rosemier stated she heard about five shots and saw fire coming from the gun as the shots were fired. When the shots were fired, the

individual who was shot did not have a weapon and was not in physical contact with the individual firing the gun.

¶ 17 Urbana police sergeant Harley Rutledge was standing outside the police station when he heard gunshots coming from nearby. Rutledge stated he heard an initial group of four or five shots, there was a brief pause, and then he heard two more shots. Rutledge then drove to the crime scene, which was approximately 1.7 miles away from the police station by car but significantly closer in straight-line distance. At the scene, Rutledge saw a white male, later identified as Arbour, lying on the ground. Rutledge asked Arbour who shot him, and Arbour told him "Tray." After Arbour was placed in an ambulance, Rutledge secured the area and found six spent shell casings, though he did not find a weapon.

¶ 18 On cross-examination, Rutledge stated he could not be certain the two groups of shots were from the same gun or were fired in the exact same area, though he thought they all came from the same direction and sounded similar. The shell casings were fired from a semiautomatic handgun and their location and proximity to each other indicated the shooter did not move much while firing. Rutledge estimated all six shell casings were located within three to five feet of where Arbour had been found.

¶ 19 On re-direct-examination, Rutledge testified a person firing a semiautomatic weapon would typically have to pull the trigger once for each round fired.

¶ 20 Urbana police officer Dan Morgan worked as an investigations supervisor and responded to the crime scene. Morgan recovered the shell casings found by Rutledge and preserved them as evidence. The State introduced the shell casings as People's exhibit No. 6, and Morgan stated the casings were in the same condition as when he recovered them from the crime

scene.

¶ 21 Later in the day, Morgan returned to the crime scene with other officers and searched for a weapon but found none. While at the scene, Morgan made contact with defendant. Defendant told investigators his name was Cortez Davis and said his girlfriend lived in the apartment complex. Eventually, Morgan and other officers conducted a search of defendant's girlfriend's apartment but did not find a weapon.

¶ 22 On October 30, 2009, Urbana police officer Matthew Quinley interviewed defendant at the Urbana police department. Initially, defendant denied knowing Arbour and told officers he was not involved in the shooting at his girlfriend's apartment complex. Eventually, defendant told investigators he had not been truthful with them and asked if he could "start over."

¶ 23 Quinley testified defendant admitted meeting with Arbour to sell him \$50 worth of marijuana but defendant said Arbour was not happy with what defendant offered him and refused to pay for it. Defendant then told Quinley Arbour started to walk away. Defendant reached for Arbour, a struggle ensued during which Arbour began hitting him, and he pulled out a handgun and shot Arbour. According to Quinley, defendant told investigators he pulled the gun out of his pocket, pointed it at Arbour, closed his eyes, and pulled the trigger. Defendant told investigators the gun had an unlimited trigger, meaning if the shooter pulled the trigger and held it down the gun would fire continuously until it was out of ammunition. Defendant told investigators he dropped the weapon and ran after he shot Arbour.

¶ 24 On cross-examination, Quinley stated it was possible for an automatic weapon to fire the type of ammunition recovered from the crime scene. Quinley also stated it was possible to modify a semiautomatic handgun to fire automatically.

¶ 25 Urbana police officer Duane Smith made contact with defendant at the crime scene, at which time defendant gave him a false name. Eventually, defendant gave Smith his real name and was taken into custody. After he was taken into custody, Smith and Quinley interviewed defendant at the police station. Defendant told Smith he started with the gun pointed down but after he pulled the trigger once, the gun kept firing and he raised it up with his eyes closed until it stopped firing.

¶ 26 The parties entered a stipulation stating People's exhibit No. 2 was a bullet removed from Arbour's right arm and the State rested its case.

¶ 27 Defendant testified he spoke to Arbour about five times between midnight and 1 a.m. on October 30, 2009, and eventually arranged to get marijuana for Arbour through a third party. When Arbour arrived at the apartment complex, defendant went to get the marijuana while Arbour waited in the parking lot. That evening defendant was carrying a handgun. After defendant returned with the marijuana and gave it to Arbour, Arbour insisted the substance in the bag was not marijuana. Defendant told Arbour to give him back the bag if he did not want it, but Arbour refused to return it.

¶ 28 Defendant testified he attempted to take the bag out of Arbour's hand and a struggle ensued. Arbour overpowered defendant, put him in a headlock, and started choking him. Arbour choked defendant for about 20 seconds, and defendant had trouble catching his breath. Defendant stated he felt the only way he could defend himself was by using the handgun he was carrying.

¶ 29 Defendant pulled the gun out of his right back pants pocket, closed his eyes, and began firing with the gun pointed at the ground. Though he claimed he only pulled the trigger

one time, defendant stated the gun fired multiple times. When defendant opened his eyes and looked up, he saw Arbour lying on the ground, dropped the gun, and ran. Defendant stated he did not intend to kill Arbour when he pulled the trigger but only intended to protect himself.

¶ 30 On cross-examination, defendant testified he sold drugs to Arbour on several occasions and he trusted Arbour to pay him in a timely manner. Defendant did not generally carry a gun when he met with Arbour but began carrying one after receiving threats from others. Defendant had never previously fired the gun. In addition, defendant stated while he and Arbour were struggling with each other he never saw a weapon in Arbour's hands, and Arbour never threatened him with a weapon. The prosecutor then asked defendant if he told the investigating officers Arbour had choked him, and defendant stated he told the officers Arbour choked him. Finally, after first insisting he fired the gun at the ground, defendant admitted he raised the gun up to shoulder height, though he insisted the kick from the gun caused his arm to raise up.

¶ 31 In rebuttal, Quinley testified defendant never told investigators (1) Arbour choked him, (2) he talked to Arbour about five times on the morning in question, or (3) Arbour put him in a headlock.

¶ 32 The jury found defendant not guilty of attempt (first degree murder) and guilty of aggravated battery with a firearm. In June 2010, defendant filed a motion for acquittal or a new trial. In July 2010, the trial court denied defendant's motion for acquittal or a new trial and sentenced him to 18 years' imprisonment, with credit for 265 days spent in pretrial custody. In addition to his prison sentence, the court imposed a \$5 drug-court fee, a \$25 VCVA fine, and a \$100 trauma-fund fine. In August 2010, defendant filed a motion to reconsider his sentence. In September 2010, the court denied defendant's motion to reconsider his sentence.

¶ 33 This appeal followed.

¶ 34 II. ANALYSIS

¶ 35 On appeal, defendant argues (1) he received ineffective assistance from trial counsel where counsel failed to impeach Arbour by introducing evidence regarding his "pending case," (2) his \$25 VCVA fine must be reduced because the court imposed additional fines, and (3) he is entitled to \$5 credit against his drug-court fee for time he spent in pretrial custody. The State concedes (1) defendant's VCVA fine should be reduced from \$25 to \$12, and (2) defendant is due *per diem* credit of \$5 a day against his drug-court fee.

¶ 36 A. Defendant's Ineffective-Assistance-of-Counsel Claim

¶ 37 Defendant claims he received ineffective assistance of counsel when trial counsel failed to cross-examine Arbour about a "pending" criminal case. To establish the ineffectiveness of counsel, defendant must prove deficiency and prejudice. *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). "First, the defendant must prove that counsel made errors so serious, and that counsel's performance was so deficient, that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." *Id.* Deficiency is judged using an objective standard. *Id.* Next, "[t]he defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. Specifically, defendant must show "counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1164.

¶ 38 It is proper to impeach a witness by showing the witness has been arrested or charged with a crime if the arrest or charge would reasonably tend to show his testimony might

be influenced by interest, bias, or a motive to testify falsely. *People v. Lucas*, 151 Ill. 2d 461, 491-92, 603 N.E.2d 460, 474 (1992). Failure to impeach a key State witness when significant impeachment information is available can amount to ineffective assistance of counsel. See *People v. Vera*, 277 Ill. App. 3d 130, 140, 660 N.E.2d 9, 17 (1995).

¶ 39 Here, defendant argues trial counsel's failure to impeach defendant based on his "pending" charge for unlawful possession of drug paraphernalia in case No. 09-CM-1351 amounted to ineffective assistance of counsel. We disagree.

¶ 40 As we previously noted, evidence of an arrest or pending charge can be used to impeach a witness when the arrest or charge tends to show his testimony might be influenced. In this case, Arbour's charge was not pending; it was dismissed over six months before defendant's trial began. In addition, nothing in the record suggests case No. 09-CM-1351 was dismissed to induce Arbour to testify against defendant. In fact, Arbour's case was dismissed six days before the State indicted defendant in the present case, while Arbour was still in the hospital recovering from his injuries. Additionally, the jury was made aware Arbour had three criminal convictions. Based on the evidence in the record, we find defendant did not receive ineffective assistance of counsel based on counsel's failure to impeach Arbour with his arrest in case No. 09-CM-1351.

¶ 41 B. Defendant's \$25 VCVA Fine

¶ 42 Defendant next argues his \$25 VCVA fine was calculated improperly. The State concedes the issue.

¶ 43 Pursuant to section 10(c)(1) of the Violent Crime Victims Assistance Act (Act) (725 ILCS 240/10(c)(1) (West 2010)), an individual convicted of a crime of violence is subject to a \$25 fine if no other fine is imposed. If another fine is imposed, the individual is subject to "an

additional penalty of \$4 for each \$40, or fraction thereof, of fine imposed," pursuant to section 10(b) of the Act (725 ILCS 240/10(b) (West 2010)). Here, defendant's \$5 drug-court fee was actually a fine because defendant was not prosecuted on drug charges. *People v. Sulton*, 395 Ill. App. 3d 186, 192, 916 N.E.2d 642, 647 (2009). In addition, the trial court imposed a \$100 trauma-fund fine, making defendant's total fine amount \$115. Thus, defendant's total VCVA fine amount should have been \$12 ($115 / 40 = 3$; $3 \times 4 = 12$). We remand with directions to impose a VCVA fine of \$12.

¶ 44 *C. Per-Diem Credit Against Defendant's Fines*

¶ 45 Finally, defendant argues he is entitled to a \$5 credit against his drug-court fee based on time he spent in pretrial custody. The State concedes defendant is entitled to the credit.

¶ 46 "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14(a) (West 2010). Because defendant's \$5 drug-court fee was a fine, defendant is entitled to \$5 credit for time spent in pretrial custody. We remand with directions to apply \$5 credit against defendant's \$5 drug-court fee.

¶ 47 **III. CONCLUSION**

¶ 48 For the foregoing reasons, we affirm the trial court's judgment as modified and remand with directions to (1) amend defendant's \$25 VCVA fine to \$12, (2) apply \$5 in *per diem* credit to his \$5 drug-court fee, and (3) issue an amended sentencing judgment so reflecting. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 49 Affirmed and remanded with directions.