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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 Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CM-102
)	
TOMASZ S. KLIMCZYK,)	Honorable
)	Allen M. Anderson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Although defendant was on trial for the same offense, defense counsel was not ineffective for agreeing that the State could introduce for impeachment defendant's prior conviction of resisting a peace officer: counsel's decision was strategic, as the conviction was not necessarily inadmissible and by agreeing to admission counsel obtained the State's agreement not to introduce other convictions; in any event, defendant showed no prejudice, as in light of the evidence (including other impeachment evidence) the prior resisting conviction could not have been outcome-determinative; (2) defendant was entitled to a refund of a vacated trauma-center-fund fine and to full credit against his specialty-court fine.

¶ 2 Defendant, Tomasz S. Klimczyk, appeals his conviction for resisting a peace officer (720 ILCS 5/31-1 (West 2008)). He contends that his counsel was ineffective for agreeing to allow the State to impeach him with a prior conviction for resisting a peace officer. He also argues that he is entitled to a refund of a vacated Trauma Enter Fund fine and credit against a specialty court fine for time spent in presentence custody. We affirm, but we modify the mittimus to reflect that defendant is entitled to a refund of the vacated fine and a \$10 credit against the specialty court fine for time spent in presentence custody.

¶ 3 I. BACKGROUND

¶ 4 In January 2010, defendant was charged with resisting a peace officer and driving while his license was suspended (625 ILCS 5/6-303 (West 2008)). Before trial, the State filed a motion *in limine* seeking to impeach defendant's credibility with his prior conviction of aggravated battery as allowed by *People v. Montgomery*, 47 Ill. 2d 510 (1971). On December 6, 2011, the parties entered an agreed order that convictions from 38 previous cases were inadmissible, but that 2 convictions, from case numbers 09-CF-1137 and 11-CF-321, were admissible as impeachment evidence.

¶ 5 On December 6, 2011, a jury trial was held. Defendant has not provided a transcript of the proceedings. Instead, the parties have provided an agreed statement of facts covering the trial and other proceedings.

¶ 6 Officer Kolanowski of the Aurora police department testified that, on January 6, 2010, she ran the plates of defendant's vehicle and determined that he had a suspended license. Kolanowski initiated a traffic stop of the vehicle and, as she approached the vehicle, she noticed that defendant was speaking on his phone. Kolanowski repeatedly asked defendant to get off the phone, but he ignored her and did not acknowledge her presence. Other officers arrived, and defendant was

physically removed from the vehicle. A van arrived, and the officers attempted to move defendant to it, but defendant held his weight against the officers.

¶ 7 Officer Earwood of the Aurora police department corroborated Kolanowski's testimony, stating that he assisted in the arrest and that defendant refused to stand up. When officers physically lifted defendant into a standing position, he refused to move forward. During the arrest, defendant was belligerent and used vulgar language. Once defendant was at the van, he calmed down.

¶ 8 Defendant testified and denied that Kolanowski asked him to get off the phone. He said that the officers grabbed his shirt and pulled on it, choking him, and that they threw him to the ground. He said that an officer placed a knee on his back, causing pain and exacerbating a preexisting condition. Defendant said that he was using crutches at the time, which were in his vehicle. He denied that he struggled with the officers, and he said that they dragged him to the van and were moving too quickly for him to keep up with them. Defendant testified that he had previous experience with Earwood from when defendant protested at the Aurora Planned Parenthood and that Earwood was antagonistic toward him because of that.

¶ 9 In rebuttal, the State provided evidence that defendant was previously convicted of aggravated battery in case number 09-CF-1137 and "aggravated" resisting a peace officer¹ in case number 11-CF-321. The court admonished the jury that the convictions were for impeachment purposes only. Before deliberations, the jury was instructed that evidence of a previous conviction could be considered only as it affected defendant's believability and must not be considered evidence of his guilt of the offenses charged.

¹As Defendant notes, although the offense was enhanced to a felony, its name was still resisting a peace officer. 720 ILCS 5/31-1(a-7) (West 2010). This technical error was harmless.

¶ 10 Defendant was found guilty of both charges. His motion for a new trial was denied, and he was sentenced to 12 months of conditional discharge, 10 days in jail, and various costs and fines, including a \$100 Trauma Center Fund fine and \$10 specialty court fine, with credit for 5 days served in presentence custody. Defendant moved to reconsider the sentence, and the court awarded an additional day of credit and vacated the Trauma Center Fund fine as a scrivener's error. However, the fine was fully subtracted from a bond refund. Defendant appeals.

¶ 11

II. ANALYSIS

¶ 12 Defendant contends that his counsel was ineffective for agreeing to allow evidence of his prior conviction of resisting a peace officer, because it was of the same offense for which he was on trial. He argues that the agreement increased the likelihood that the jury would use the conviction as evidence that he was guilty because he has a propensity to commit that particular offense. Defendant fails to mention in his brief that the agreement included an agreed order that defendant's additional 38 prior convictions would be inadmissible. Remarkably, the State also fails to mention this fact in its brief. We remind counsel that a statement of facts "shall contain the facts necessary to an understanding of the case, stated *accurately and fairly* without argument or comment, and with appropriate references to the pages of the record on appeal ***." (Emphasis added.) Ill. S. Ct. Rule 341(h)(6) (eff. July 1, 2008).

¶ 13 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). "Effective assistance of counsel means competent, not perfect, representation." *People v. Rodriguez*, 364 Ill.

App. 3d 304, 312 (2006). To succeed on a claim of ineffective assistance, a defendant must overcome a strong presumption that counsel's conduct was the result of strategic choices rather than incompetence. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). "To overcome this presumption, a defendant must show that trial counsel's action was so irrational and unreasonable that no reasonably effective attorney would pursue that strategy under similar circumstances." *People v. Salcedo*, 2011 IL App (1st) 083148, ¶ 50.

¶ 14 Further, "in order to succeed on a sixth amendment claim of ineffective assistance of counsel, the defendant must not only show that counsel's performance was deficient, he must also establish that he was prejudiced by the deficient performance." *People v. Rosemond*, 339 Ill. App. 3d 51, 66 (2003). As noted, "[i]n order to satisfy this second prong of the *Strickland* test, defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* "A reasonable probability means a probability sufficient to undermine confidence in the outcome." *Id.* "The question is not whether defendant would more likely than not have received a different result without counsel's professional errors, but whether, with their presence, he received a fair trial, a trial resulting in a verdict worthy of confidence." *Id.*

¶ 15 "[E]vidence of a prior conviction may be introduced if the prior conviction is for a crime punishable by imprisonment in excess of one year, and less than 10 years have passed since the conviction or the witness' release from confinement." *People v. Rixie*, 190 Ill. App 3d 818, 826 (1989). "Once it is established that the prior conviction falls within the class of convictions outlined above, the court must weigh the prejudicial effect of admitting evidence of the prior conviction against the probative value." *Id.* (citing *Montgomery*, 47 Ill. 2d at 517). "Factors for consideration by the trial court are the nature of the crime, the nearness in time of the prior conviction to the

present trial, the subsequent career of the defendant, and the similarity of the crimes.” *Id.* “The trial court is to exercise its discretion in admitting evidence of a prior conviction for the purpose of impeaching a witness’ credibility.” *Id.* “If the conviction is admitted, the impeached party is entitled to a limiting instruction admonishing the jury to consider the conviction only as it affects the witness’s credibility.” *People v. Medreno*, 99 Ill. App. 3d 449, 451 (1981).

¶ 16 “Clearly, courts should be particularly wary of admitting similar prior convictions because they tend to suggest not only that the defendant had general propensity to commit crimes, but that his propensity runs toward the crime charged at present.” *Id.* at 453-54. “On the other hand, the law in Illinois is well established that similarity alone does not demand exclusion.” *Id.* at 454. “The fact that the prior conviction and the present charge are similar does not prohibit the prior conviction from being admitted of impeachment purposes.” *Rixie*, 190 Ill. App. 3d at 826. “[A] serious felony conviction evinces a disrespect for societal order and thus adversely affects [the defendant’s] veracity.” *People v. Saunders*, 122 Ill. App. 3d 922, 938 (1984) (quoting *Medreno*, 99 Ill. App. 3d at 452). “The more important a witness’ credibility is to the determination of the truth, the more compelling is the argument against exclusion of the impeachment.” *People v. Marron*, 145 Ill. App. 3d 975, 984 (1986). Thus, we have allowed a conviction of the same crime as the offense charged to be used as impeachment. *Id.*

¶ 17 Here defendant’s counsel was not ineffective when he agreed to allow the State to impeach defendant with his prior conviction of resisting a peace officer. First, defendant has not overcome the strong presumption that the decision was a matter of trial strategy. As noted, the conviction was not necessarily inadmissible, and yet, in exchange for agreeing to its admission, counsel obtained the State’s agreement that convictions in 38 other cases were not admissible. Further, even if error

could be found, defendant has not shown prejudice. The trial court gave a limiting instruction to the jury and, given the strong evidence against him at trial, including the impeachment from the aggravated battery conviction, it cannot be said that, had the resisting conviction not been introduced, the result of the proceeding might have been different.

¶ 18 Defendant next argues that he is entitled to a refund of the \$100 Trauma Center Fund fine that was vacated by the trial court. The record shows that the fine was vacated but yet was taken from defendant's bond refund. The State agrees that defendant is entitled to a refund of the fine. Accordingly, we modify the mittimus to reflect that defendant is entitled to a refund of the fine.

¶ 19 Finally defendant argues that he is entitled to credit against the \$10 specialty court fine for time spent in presentence custody.

¶ 20 Section 110-14(a) of the Code of Criminal Procedure of 1963 provides:

“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. However, in no case shall the amount so allowed or credited exceed the amount of the fine.” 725 ILCS 5/110-14(a) (West 2010).

¶ 21 A defendant may apply for the credit for the first time on appeal. *People v. Caballero*, 228 Ill. 2d 79, 88 (2008). The trial court ordered defendant to pay a \$10 specialty court “fee” (55 ILCS 5/5-1101(d-5) (West 2010)). Although this item is statutorily designated as a fee, it is properly categorized as a fine. *People v. Graves*, 235 Ill. 2d 244, 255 (2009). It is also undisputed that defendant spent six days in custody. Thus, the State concedes that defendant is entitled to the credit. Accordingly, we modify the mittimus to reflect that defendant is entitled to a \$10 credit against the fine.

¶ 22

III. CONCLUSION

¶ 23 Defendant's counsel was not ineffective. Accordingly, the judgment of the circuit court of Kane County is affirmed. However, we modify the mittimus to reflect that defendant is entitled to a refund of the Trauma Center Fund fine and a \$10 credit against the specialty court fine.

¶ 24 Affirmed as modified.