

NOTICE

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2014 IL App (4th) 130104-U

NO. 4-13-0104

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

July 24, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
JeMARIUS J. FORMAN,)	No. 09CF350
Defendant-Appellant.)	
)	Honorable
)	Michael D. Clary,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* (1) Defendant's conviction for aggravated battery is affirmed where the trial court did not improperly admit other-crimes evidence at defendant's trial and the prosecutor's comments during opening statements regarding such evidence did not constitute reversible error.

(2) All fines imposed against defendant by the circuit clerk rather than the trial court are vacated and the cause remanded to the trial court with directions that it impose the mandatory fines applicable to defendant and authorized at the time of the offense, and apply statutory credit toward defendant's fines where appropriate.

¶ 2 Following a jury trial, defendant, JeMarius J. Forman, was convicted of aggravated battery (720 ILCS 5/12-4(a) (West 2008)) and sentenced to three years in prison. He appeals, arguing the trial court erred in admitting highly prejudicial other-crimes evidence at his trial. Defendant also challenges various fines imposed against him, arguing (1) the fines were impermissibly imposed by the circuit clerk rather than the trial court, (2) certain imposed fines

were not authorized by statute either at the time the offense was committed or based upon the sentence he received, and (3) statutory *per diem* credits to which he was entitled were not applied to his fines. We affirm in part, vacate in part, and remand with directions

¶ 3

I. BACKGROUND

¶ 4

The State charged defendant with aggravated battery (720 ILCS 5/12-4(a) (West 2008)), alleging, on or about July 16, 2009, he knowingly and without lawful justification caused great bodily harm to Troy L. Tinder. The charge was based on allegations that a disagreement arose between defendant and Tinder regarding payment for car repairs Tinder performed for defendant and, as a result of that dispute, defendant punched Tinder in the face multiple times, breaking Tinder's jaw.

¶ 5

On September 14, 2010, defendant filed a motion *in limine*, seeking to bar testimony at trial from Tinder that, the day following the alleged offense, defendant raised a handgun at Tinder while Tinder was driving. He argued such conduct was uncharged, highly prejudicial, and without any probative value. During a hearing on the motion, the State asserted Tinder's wife, Norma Tinder, also observed defendant raise a handgun at Tinder and defendant's counsel asserted defendant's motion *in limine* also sought to bar any such testimony from Norma. Following the parties' arguments, the trial court denied the motion. It found the probative value of the evidence outweighed its prejudicial effect where (1) Tinder reported that he did not call the police immediately after the alleged battery because he believed defendant carried a weapon and (2) the incident with the weapon occurred the day after, and close in time, to the alleged offense.

¶ 6

On September 15 and 16, 2010, the trial court conducted defendant's jury trial.

During his opening statement, the prosecutor informed the jury that it would hear testimony from Norma that, the day following the alleged offense, she drove Tinder to the hospital, saw defendant following their vehicle, and observed defendant "pointing a weapon in such a fashion that they [could] see the gun in the car."

¶ 7 During the trial, the State presented evidence that, in 2009, Tinder occasionally performed auto mechanic work for a detail shop called Complete Customs and worked on vehicles owned by defendant, defendant's brother, and defendant's mother. In July 2009, a dispute arose between Tinder and defendant regarding payment for repairs Tinder performed on defendant's mother's vehicle. Tinder testified he charged \$150 for the repairs but was never paid. He stated defendant offered to pay him with marijuana, which Tinder initially accepted. However, he denied that the marijuana represented full payment for the repairs he performed and stated defendant continued to owe him \$100. Tinder also testified that the marijuana defendant gave him "wasn't good enough payment for the price" and he threw it away. Ultimately, Tinder told defendant he was "done with him" to make him go away and "end all friendship."

¶ 8 On July 16, 2009, Tinder was at Complete Customs with Norma and their two children. Defendant and several other individuals were also present. Tinder testified defendant called out to him but Tinder avoided him, telling defendant "I don't want to fuck with you no more" and to "leave me alone." According to Tinder, defendant then approached him from behind while Tinder was washing a car and "knocked the daylights out of [him]." Tinder stated defendant first hit him on the right side of the jaw from underneath and punched him a total of two or three times. Tinder denied that he swung at defendant first.

¶ 9 Although Norma called the police after the incident, Tinder did not make a

complaint against defendant at that time. Tinder testified he was threatened, stating Martez Coley, the co-owner of Complete Customs, an individual named Onterrio, and an unidentified man told him he "would pay for it" if he reported the incident to the police. Tinder believed some type of relationship existed between Coley and defendant. Also, he asserted he saw weapons in defendant's brother's vehicle when he arrived at the shop and observed the "butt of a Glock" stuffed in another individual's pants. Tinder testified weapons were always around the shop but he was not aware that defendant had a gun on the day of the incident.

¶ 10 Ultimately, Tinder went to the hospital for medical treatment. He testified his jaw was broken and he had to have it "plated" in three places. Tinder's jaw was also wired shut for 3 1/2 months. Initially, Tinder testified he did not recall whether he went to the hospital the same day he was injured or another day; however, on cross-examination, he testified he went to the hospital the day following the incident and, while in the emergency room, spoke with a police officer about what had occurred. Tinder did not testify that defendant displayed a gun to him at any time after the alleged offense.

¶ 11 The State also presented the testimony of Norma and Tinder's son Daniel, who each testified similarly to Tinder. Both asserted defendant attempted to talk to Tinder at Complete Customs but Tinder refused. According to Norma and Daniel, defendant approached Tinder from behind while Tinder was working on a car and punched him a total of three times.

¶ 12 Additionally, Norma denied that Tinder swung at defendant. She also testified that three individuals at the shop stated her "best bet was not to call the cops or tell the cops who did it *** because there would be retaliation on [her] family." Therefore, although Norma initially called the police after the incident, she informed the arriving officers that that they

decided to "drop it." Norma further testified that three days after the incident, she talked Tinder into going to the hospital and on the way they saw defendant driving by. At the request of defendant's attorney, an off-the-record bench conference was conducted. Norma then continued testifying. She described Tinder's medical treatment and testified that she and Tinder ultimately reported the incident to police. Norma did not testify that defendant displayed a weapon to her and Tinder after the alleged offense.

¶ 13 Outside the jury's presence, the trial court made a record of the conference that occurred during Norma's testimony. It stated as follows:

"After [Norma] testified that the victim *** went to the hospital three days after the incident, [defendant's counsel] wanted to object based upon the first motion *in limine* that he filed which the court had previously denied; and that had to do with any testimony that the victim and his wife saw the defendant driving and raised his hand with a gun in it as they passed or saw him in a vehicle, and that that was alleged to have occurred July 17th, the day after the incident.

And after hearing that testimony, I did reverse my ruling on the first motion *in limine* and indicate that I would grant that motion *in limine* essentially and prohibit that testimony."

The court then agreed with the State that Norma subsequently changed her story and discussed being at the hospital the day following the incident. However, it stated it based its ruling on the fact that "it could have been as far away as three days after the incident."

¶ 14 Defendant testified on his own behalf and presented the testimony of Coley, Trae Tinsley, and Lathesia Cross. Coley testified, in July 2009, he operated Complete Customs. On July 16, 2009, he observed an altercation between defendant and Tinder. Coley testified Tinder provoked defendant. He observed Tinder approach defendant while defendant was sitting inside a vehicle, get in defendant's face, curse at defendant, and swing at defendant. Coley saw defendant get out of the vehicle to confront Tinder but then Coley turned away and returned to work. He testified he did not see defendant swing back at Tinder or approach Tinder from behind. Coley told both Tinder and defendant to get out of his shop. Also, he denied that Tinder's wife and children were present at the time of the incident.

¶ 15 Tinsley testified he was defendant's brother and observed the incident between defendant and Tinder on July 16, 2009. He stated defendant attempted to speak with Tinder but Tinder cursed at defendant. Defendant then approached Tinder inside the shop and Tinder swung toward defendant's face, grazing him. Tinsley testified defendant hit Tinder back and then Coley broke up the fight and asked them to leave. He denied that Tinder's wife and children were present at the time of the incident.

¶ 16 Cross testified she was defendant's fiancé and witnessed the July 2009 incident between defendant and Tinder. She observed defendant attempt to speak to Tinder who became upset and cursed and swung at defendant. Defendant swung back at Tinder once. Coley then asked everyone to leave. Cross testified the altercation occurred outside the vehicle and denied that Tinder's wife and children were present. She also stated Tinder later called defendant, defendant placed the call on speaker, and she heard Tinder apologize.

¶ 17 Defendant testified Tinder performed some repairs on his mother's car. He

asserted the cost for the repairs was \$80 and he paid that amount to Tinder in advance of the repairs. Later, Tinder wanted \$70 more but defendant refused. On July 16, 2009, defendant went to Complete Customs to have his vehicle detailed. While at the shop, he greeted Tinder, who responded by cursing at defendant and giving him the finger. Defendant stepped out of his vehicle and tried to get Tinder to speak with him. He testified Tinder swung at him and grazed him "up top." Defendant stated he then swung, hit Tinder one time, and the fight was over. He testified he swung at Tinder to defend himself. Coley then broke up the fight and asked them to leave. Defendant denied that he paid Tinder with cannabis or that Tinder's family was present during their altercation. Further, he testified Tinder later called him and apologized for swinging at him and for the way he acted in front of defendant's family.

¶ 18 At the conclusion of defendant's trial, the jury was instructed that the evidence it should consider consisted "only of the testimony of the witnesses and exhibits which the court ha[d] received." Also, jurors were instructed that opening statements were made "to acquaint them with the facts" the parties expected to prove, that neither opening statements nor closing arguments were evidence, and that they should disregard "any statement or argument made by the attorneys which [was] not based on the evidence." Following deliberations, the jury found defendant guilty of the charged offense.

¶ 19 On November 8, 2010, defendant filed a motion for judgment notwithstanding the verdict or, in the alternative a new trial. Relevant to this appeal, he argued as follows:

"The defendant filed a First Motion *in Limine* arguing that ***
Tinder should not be able to testify regarding any mention of a
hand gun [*sic*] or weapon regarding intimidation as it was [an]

uncharged act solely for the purpose of showing the defendant's propensity to commit a crime. The court denied this Motion. The alleged victim, *** Tinder, testified at trial in regards to a hand gun [*sic*] or weapon being brandished several days after this alleged incident. This factor contributed to a highly prejudicial result in the finding of the guilty verdict by the jury and the type of evidence was highly prejudicial and substantially outweighed any probative value."

Following a hearing on December 2, 2010, the trial court denied defendant's posttrial motion. On January 7, 2013, the court sentenced defendant to three years in prison.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant first argues the trial court "erred in admitting highly prejudicial other crimes evidence that [defendant] displayed a gun days after the charged crime." He contends the evidence was completely irrelevant and its prejudicial effect far exceeded its probative value.

¶ 23 Other-crimes evidence "is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crime." *People v. Pikes*, 2013 IL 115171, ¶ 11, 998 N.E.2d 1247. Specifically, such evidence may be used "to show *modus operandi*, intent, motive, identity, or absence of mistake with respect to the crime with which the defendant is charged." *Pikes*, 2013 IL 115171, ¶ 11, 998 N.E.2d 1247. "However, even where relevant, the evidence should not be admitted if its probative value is substantially outweighed by its prejudicial effect."

Pikes, 2013 IL 115171, ¶ 11, 998 N.E.2d 1247.

¶ 24 Here, although defendant characterizes his claim on appeal as a challenge to the trial court's admittance of prejudicial other-crimes evidence, he is actually challenging comments made by the State during its opening statement. Defendant points out that, prior to trial, he moved to exclude evidence from his trial that he "displayed a weapon to the Tinders after the charged event." During pretrial proceedings, the court denied the motion, noting the alleged gun incident occurred close in time to the charged offense (the day after) and was relevant to show why Tinder did not immediately report the incident to police. At trial, the State commented during opening statements that it expected Norma to testify that, the day following the charged offense, she drove Tinder to the hospital, saw defendant following their vehicle, and observed him pointing a gun. While testifying Norma inconsistently asserted Tinder went to the hospital three days after the charged offense and that he was in the hospital the day after the charged offense. Based upon her testimony, the court reversed its earlier ruling on defendant's motion and prohibited evidence that defendant displayed a gun to the Tinders after the charged offense.

¶ 25 The record, in fact, fails to reflect any evidence was admitted at defendant's trial that *defendant* displayed a gun to the Tinders either before, during, or after the offense at issue. The only gun-related evidence admitted at trial was testimony from Tinder that he saw weapons in defendant's brother's vehicle when he arrived at the shop prior to the altercation with defendant and observed the "butt of a Glock" stuffed in another individual's pants. Tinder specifically testified he was not aware that defendant had a gun on the day in question. We note "the concerns underlying the admission of other-crimes evidence are not present when the uncharged crime or bad act was not committed by the defendant." *Pikes*, 2013 IL 115171, ¶ 16,

998 N.E.2d 1247. Thus, while defendant repeatedly asserts on appeal that the court erred in allowing other-crimes evidence, the record actually shows the court rejected the evidence defendant sought to exclude and, ultimately, ruled in his favor. Other-crimes *evidence* was not admitted at defendant's trial.

¶ 26 As stated, defendant's real complaint is with the prosecutor's comments during opening statements. Initially, we note the State argues defendant forfeited this issue on appeal by failing to object to the prosecutor's comments at trial or raise the issue in a posttrial motion. "It is well established that to preserve an alleged error for review, a party must object at trial and include the issue in a written posttrial motion." *People v. Nelson*, 235 Ill. 2d 386, 436, 922 N.E.2d 1056, 1083 (2009). However, forfeiture based on a party's failure to raise an issue with the trial court "limits the parties' ability to raise an argument and not this court's right to entertain an argument." *People v. Kliner*, 185 Ill. 2d 81, 127, 705 N.E.2d 850, 874 (1998).

¶ 27 Here, we decline to apply forfeiture. We note, at the time of the prosecutor's opening remarks, the trial court had denied defendant's pretrial motion to exclude evidence that defendant displayed a gun to the Tinders after the offense. Additionally, although defendant's posttrial motion did not challenge the prosecutor's opening statement remarks, he did consistently raise challenges to the admission of the gun-related evidence throughout the proceedings, including prior to trial, during trial, and in his posttrial motion. (However, we note the record does not support defendant's contention in his posttrial motion that Tinder testified that a handgun or weapon was "brandished several days after" the charged offense.) Given the circumstances presented, we address defendant's challenge to the prosecutor's opening statement.

¶ 28 "The purpose of an opening statement is to apprise the jury of what each party

expects the evidence to prove" and it "may include a discussion of the expected evidence and reasonable inferences from the evidence." *Kliner*, 185 Ill. 2d at 127, 705 N.E.2d at 874. "No statement may be made in opening which counsel does not intend to prove or cannot prove." *Kliner*, 185 Ill. 2d at 127, 705 N.E.2d at 874. "As such, it is improper for counsel to make opening statements about testimony to be introduced at trial and then fail to produce that evidence." *Kliner*, 185 Ill. 2d at 127, 705 N.E.2d at 874. "Nevertheless, it is not always grounds for reversal when an opening statement refers to evidence which later turns out to be inadmissible" and "[r]eversible error occurs only where the prosecutor's opening comments are attributable to deliberate misconduct of the prosecutor *and* result in substantial prejudice to the defendant." (Emphasis in original.) *Kliner*, 185 Ill. 2d at 127, 705 N.E.2d at 874.

¶ 29 First, the record does not support a finding that the prosecutor's comments were attributable to deliberate misconduct. As discussed, during opening statements, the prosecutor commented on what he expected the evidence to show, including that Norma observed defendant displaying a gun as she drove Tinder to the hospital on the day after the charged offense. Although the evidence was later ruled inadmissible due to Norma's conflicting trial testimony, the prosecutor's opening remarks were based on admissible evidence when made. Notably, there had been an express ruling in the State's favor as to the admissibility of the evidence upon which the offending comments were based.

¶ 30 Second, we find defendant did not suffer "substantial prejudice" as a result of the prosecutor's comments. The record reflects the jury was instructed that the evidence it should consider consisted "only of the testimony of the witnesses and exhibits which the court ha[d] received." Further, the trial court informed the jury that opening statements did not constitute

evidence and it should disregard attorney's statements that were not based on the evidence. The prosecutor's comments as to Norma's testimony and the gun evidence were isolated and the remaining gun-related evidence pertained to other individuals present at the scene on the day of the incident and not to defendant. We find no reversible error.

¶ 31 On appeal, defendant also challenges the imposition of fines against him. He argues (1) the fines were impermissibly imposed by the circuit clerk rather than the trial court, (2) certain imposed fines were not authorized by statute either at the time the offense was committed or based upon the sentence he received, and (3) statutory *per diem* credits to which he was entitled were not applied to creditable fines (725 ILCS 5/110-14 (West 2008)). Defendant asks that this court remand the matter to the trial court for the proper imposition of fines and application of credit. The State concedes this issue and agrees fines imposed by the circuit clerk should be vacated. Additionally, the State contends the matter should be remanded to the trial court with directions that it reimpose mandatory fines authorized at the time of the offense and allow defendant the appropriate amount of statutory credit against fines imposed.

¶ 32 It is well established that "the circuit clerk does not have the power to impose fines." *People v. Montag*, 2014 IL App (4th) 120993, ¶ 37, 5 N.E.3d 246. "[F]ines imposed by the circuit clerk are void from their inception." *People v. Larue*, 2014 IL App (4th) 120595, ¶ 56, 10 N.E.3d 959. Additionally, "the imposition of a fine that does not become effective until after a defendant commits an offense violates *ex post facto* principles." *People v. Devine*, 2012 IL App (4th) 101028, ¶ 10, 976 N.E.2d 624. Further, "[a]ny 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." 725 ILCS 5/110-14(a) (West

2008).

¶ 33 Here, the record supports defendant's contention, and the State's concession, that the circuit clerk, rather than the trial court, imposed fines against defendant. Such action by the clerk was improper and we vacate those fines and remand with directions that the trial court reimpose the mandatory fines applicable to defendant and authorized at the time of the offense, and apply the statutory *per diem* credit toward creditable fines.

¶ 34

III. CONCLUSION

¶ 35 For the reasons stated, we affirm in part, vacate in part, and remand with directions. Specifically, we affirm defendant's aggravated battery conviction, finding no improper admission of other-crimes evidence and no reversible error with respect to the prosecutor's comments during opening statements. However, we vacate all of the fines imposed by the circuit clerk and remand with directions that the trial court (1) impose the mandatory fines applicable to defendant and authorized at the time of the offense and (2) apply statutory credit toward defendant's fines where appropriate. We direct the clerk of this court to provide a copy of this decision to the Vermilion County circuit clerk for his review, and the parties to provide copies of their briefs on appeal to the trial court to assist in the proper imposition of fines. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 36 Affirmed in part and vacated in part; cause remanded with directions.