2012 IL App (1st) 100351-U

FOURTH DIVISION
May 24, 2012

No. 1-10-0351

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07200535901
	)	
LARRY OLLINS,	)	The Honorable
	)	Callie Lynn Baird,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

HELD: Trial court did not commit error in prohibiting certain testimony that was irrelevant and redundant to the issues at hand, and State's comments during closing and rebuttal argument, though improper, did not amount to plain error requiring reversal. However, defendant's aggravated assault conviction did violate one-act, one-crime doctrine and must be vacated, and his fines and fees order, as well as his mittimus, require correction, which, under these circumstances, should be performed by the trial court upon remand.

¶ 1 Following a joint jury trial with codefendant Alexandria Alexander, defendant Larry Ollins (defendant) was convicted of resisting a peace officer and aggravated assault on a peace officer, both misdemeanors. He was sentenced to two concurrent terms of 46 days in jail, time considered served, and was ordered to pay various fines and fees in the amount of $290. He appeals, contending that the trial court erroneously prevented the jury from considering certain testimony and by prohibiting a certain witness from testifying *in toto*; that the State committed error in its closing and rebuttal closing arguments; that his convictions violate the one-act, one-crime rule; that his fines and fees order is incorrect; and that his mittimus reflects an improper conviction. He therefore asks that we reverse his convictions and remand for a new trial, that we vacate his aggravated assault conviction, and that we remand to correct the fines and fees order and his mittimus. For the following reasons, we affirm his conviction for resisting a peace officer, vacate his conviction for aggravated assault, and remand to correct the fines and fees order and his mittimus.

BACKGROUND

¶ 2 Defendant's conviction arose from incidents that took place on November 27, 2007 at Grossinger Toyota North, a car dealership located in Lincolnwood, Illinois, regarding defendant's purchase of an automobile.

¶ 3 Prior to trial, the State filed a motion *in limine* to exclude from trial any information that the check at issue in the case was legitimate and not fraudulent. During argument on the motion, the State explained that such information was irrelevant to the charged crimes, was not probative of the issues and would be prejudicial because it would insinuate to the jury that the police

officers involved had harassed the defendant unnecessarily. Defendant, meanwhile, argued that the fact that the check was valid was extremely probative and relevant because it went to the state of mind of the police officers when they arrived at the dealership. The trial court denied the State's motion, telling defendant that, as long as there was no hearsay, if he had "someone who can verify" that the check was legitimate, it "was not going to deny" defendant from introducing this evidence in support of his theory of defense.

¶ 4 At trial, Mark Krochmal, the dealership's general manager, testified that he met defendant and his girlfriend, codefendant Alexander, at the dealership while they were purchasing a car. Krochmal saw defendant move from the showroom floor into the office of Jacob Lubinski, a finance manager. Soon thereafter, Lubinski called Krochmal into his office, where Lubinski was trying to verify defendant's check. When the State asked him why this was occurring, Krochmal responded that he and Lubinski were told defendant's check was not valid. Defendant objected and a sidebar was had. In an offer of proof, the State told the court that, because the bank could not authenticate defendant's check, the bank told Lubinski and Krochmal to call police. Accordingly, explained the State, it asked this question of Krochmal with the limited purpose of establishing why the police were called to the dealership, not to extract information regarding the check's validity. Defendant continued his objection, pointing out that this was hearsay because the State would not be calling anyone from the bank to testify and arguing that this prejudiced the jury. The trial court told the parties that, because there was no proof of fraud in this case, the testimony must be limited to the statement that Krochmal and Lubinski believed they needed to verify the check and, because it could not be verified, they called the police.

¶ 5 Continuing with his testimony, Krochmal explained that the dealership has a policy of verifying any check from a customer with a credit score of 650 or less by calling the customer's bank. Krochmal testified that he and Lubinski together called TCF Bank to verify defendant's check, whereupon the bank told them to call the police. When the police arrived, Krochmal was at the sales desk, defendant was in the waiting area and Lubinski was in his office; the police went into Lubinski's office. Krochmal testified that, as the officers spoke to Lubinski, defendant went to the office and began pacing back and forth. Defendant then entered the office, whereupon Krochmal observed him speak to police and then shove one of the officers, a "lieutenant." Krochmal stated that while the officers then tried to restrain defendant, he was punching them with his fists and lifted a desk and pushed it away "out of anger." Krochmal further testified that codefendant "was jumping on the Lieutenant" and, after the officers "ended up" in a different office, she kicked the door frame of that office, damaging it extensively. More officers arrived and, eventually, defendant was escorted out of the dealership.

¶ 6 On cross-examination by defense counsel, Krochmal admitted that he never heard the officers tell defendant that he was under arrest. During her cross-examination, codefendant asked Krochmal if he remembered the name of the person from the bank he spoke to while in Lubinski's office; Krochmal replied that her name was Regina, whereupon the State objected. During a sidebar, the court reminded the parties that they had earlier agreed that the "sole purpose" of introducing evidence that Lubinski and Krochmal spoke to the bank was only to explain why the police came to the dealership. The court noted that codefendant's questioning would open the door to the State introducing that the check was believed to be fraudulent, which

was what defendant and codefendant had objected to earlier. Codefendant argued that she had only objected as to foundation, and that she wanted to pursue this line of questioning for credibility reasons, namely, to show that no conversation between Krochmal and the bank ever took place, of which she claimed to "have evidence" consisting of a human resource bank employee to testify that there was no employee named Regina working in the fraud response department at that time. Defendant and codefendant argued that this evidence was relevant to support their theory of defense that the entire incident (the call to the bank, the fight between them and police, etc.) had been fabricated. The trial court allowed them to cross-examine Krochmal regarding only if he made the phone call, if the name of the person was Regina, and if she worked in the bank's fraud department, and nothing about the substance of the conversation. It then warned defendant and codefendant to produce a witness to verify this, otherwise, the testimony would be stricken.

¶ 7 Lubinski testified that, on the day before the incident, defendant came to the dealership and picked out a specific car he wanted to purchase through financing. As the dealership financing manager, defendant spoke to Lubinski, who was able to obtained his credit information but not to secure financing for him on that day. Lubinski recounted, over defendant's multiple objections, that, as defendant left the dealership that day, he pulled out a chain from his pocket, which Lubinski believed looked like costume jewelry, and told Lubinski that it was worth $150,000 but that he was going to go sell it for $60,000. Lubinski further testified that, the next day, defendant returned with a cashier's check. In line with the dealership's credit policy, Lubinski attempted to verify the check and then called police. Lieutenant Meiners and officer

Rodriguez arrived and spoke to Lubinski in his office while defendant was "circling" outside. Lubinski stated that as he was speaking to the officers, he had Regina on the phone as well. At that moment, defendant "entered abruptly," screamed "[w]hat the f*ck is going on in here?," and then "jumped right on the two police officers," attacking Lieutenant Meiners. Lubinski described that the officers were able to pin defendant against a wall, but defendant "erupted" and, disengaging himself from the officers, went up to Lubinski and tried to rip his desk from its hinges. Lubinski testified that the officers were able to tackle defendant, whereupon Lubinski jumped over the desk and fled his office.

¶ 8 On cross-examination, defendant again asked Lubinski whether he was on the phone with Regina when defendant allegedly burst into his office; Lubinski answered affirmatively. Defendant then continued to elicit testimony from Lubinski that, when he entered the office, defendant was screaming at a high volume while everyone else was speaking in a normal tone. Lubinski also described that defendant immediately lunged at the officers, specifically Lieutenant Meiners, upon entering, jumping on them and attacking them.

¶ 9 Lieutenant Robert Meiners testified that he received a call to go to the dealership, whereupon he talked to Krochmal and Lubinski in Lubinski's office. Lubinski told Lieutenant Meiners that he was having trouble verifying funds on a check; Lieutenant Meiners told Lubinski to call the representative at the bank so he could speak to her personally. Officer Rodriguez then arrived and entered the office. Lieutenant Meiners averred that, before he could speak to the representative on the phone, defendant "barged" into the office and shouted "[w]hat the f*ck is going on here?" Lieutenant Meiners described that, after he asked defendant to sit down,

defendant "came at" him and chest-bumped him and used his hands on him in an attempt to leave the office. Lieutenant Meiners then told defendant he was under arrest and ordered him to put his hands on the wall. When he did not, Lieutenant Meiners, along with officer Rodriguez, attempted to get his hands behind his back, and defendant was "flailing" at both of them. Lieutenant Meiners heard officer Rodriguez warn defendant that if he did not calm down, he would be tased; when defendant did not, officer Rodriguez deployed the taser and defendant fell to the ground. However, defendant jumped right back up because one of the taser darts did not hit him. Lieutenant Meiners stated that defendant then attempted to flip the desk over. He further testified that, at some point, the office door opened and defendant ran out, but Lieutenant Meiners held onto him around his arms "so he couldn't flail." Then, he and officer Rodriguez were able to push defendant into another office, where they held him up against a wall, subduing him and taking him into custody. At the police station, defendant apologized to Lieutenant Meiners for his behavior and told him it was all a mistake. On cross-examination, Lieutenant Meiners stated that when defendant entered the office, he spoke in a raised voice and in a very loud and agitated manner.

¶ 10 Officer Rodriguez testified that, when he arrived at the dealership, he saw Lieutenant Meiners speaking to Lubinski, and the three of them went into Lubinski's office. Lieutenant Meiners was keeping communications open with dispatch, speaking to them via his police radio at various times. Officer Rodriguez averred that, as he, Lieutenant Meiners and Lubinski were talking, defendant "walked in" and asked in a loud voice what was going on; officer Rodriguez told him to sit down. Officer Rodriguez stated that defendant ignored him and then took out his

cell phone and started talking to someone. Officer Rodriguez again told defendant to sit down, but defendant refused in a loud tone and walked towards the door to exit the office. Officer Rodriguez averred that Lieutenant Meiners was standing at the door and defendant went up to him and "chest bumped him." At this point, Lieutenant Meiners told defendant to put his hands on the wall because he was under arrest, and officer Rodriguez attempted to assist him in restraining defendant. Officer Rodriguez described that defendant "started to swing his arms around and kick," becoming "combative physically," and he had to "dodge the fists" so he would not be hit. As they continued to try and restrain defendant, officer Rodriguez unholstered his taser and gave defendant three warnings; he then deployed the taser, whereupon defendant fell to the ground but resumed fighting as one of the prongs failed to attach. Officer Rodriguez further testified that he and Lieutenant Meiners were able to restrain defendant a while later in another office. At the police station, defendant explained to officer Rodriguez what had happened at the dealership and apologized for his behavior. On cross-examination, officer Rodriguez testified that defendant was yelling when he entered Lubinski's office and maintained a high voice level throughout the confrontation.

¶ 11 Following officer Rodriguez's testimony, the State rested. As part of its case-in-chief, defendant called John Knighten to testify. Knighten testified that, on the day before this incident, he was working as a salesman at the dealership when he met defendant, a customer. They spoke about defendant buying a particular automobile, and agreed on a price of $37,000. Knighten described that defendant agreed to put $20,000 down and to finance the remainder through the dealership. Knighten began the paperwork and brought it to the finance department. Knighten

then went with defendant to TCF Bank, where he witnessed defendant take a withdrawal slip, fill it out, wait in line and give it to the teller; after she issued him a check, the two left the bank.

¶ 12 At this point in Knighten's testimony, the State objected and a sidebar was had. The State asked the trial court to bar Knighten's testimony because it would "open the door" to the check's validity which, as it had argued earlier, was irrelevant. Defendant argued that this information was necessary to combat Lubinski's testimony, to which he previously had objected, that defendant told him he was going to sell the chain in his pocket, which defendant asserted portrayed him as a "schister doing something shady." Defendant further argued that he was not offering the testimony to prove the check's validity, but to show that defendant went to the bank and obtained a check "like a legitimate person would do." The trial court ordered defendant to make an offer of proof regarding the remainder of Knighten's testimony. Defendant explained that Knighten would testify that, after their time at the bank, he and defendant returned to the dealership and Knighten told Krochmal and Lubinski that he had gone to the bank with defendant and saw him get the cashier's check; defendant also stated that Knighten would testify that defendant never showed him a chain or discussed selling a chain. The trial court declared that this would be hearsay, even in light of defendant's response that this was Knighten's observation and he was present to testify to it; the court also concluded that any testimony about the chain was irrelevant and not prejudicial, since selling a chain is not, in and of itself, illegal. Defendant continued to argue that Knighten's testimony should be admissible to impeach Lubinski, in an effort to show he was not a credible witness. Ultimately, the trial court found that Knighten's testimony regarding his trip to the bank with defendant was not proper and struck it from the

record.

¶ 13 The court then addressed the admission of an audio recording. Defendant sought to introduce evidence consisting of Lieutenant Meiners' calls to dispatch while at the dealership in Lubinski's office. Defendant argued that this audio evidence was relevant as impeachment of Lubinski, Lieutenant Meiners and officer Rodriguez because, contrary to their testimony that defendant barged into Lubinski's office yelling at the time Lubinski was on the phone with the bank, the audio did not contain any of this, which otherwise would have been on there had it occurred. The trial court told defendant to first recall Lieutenant Meiners in order to lay a proper foundation for the audio's admission. During Lieutenant Meiners' testimony, defendant played a portion of the audio; Lieutenant Meiners was able to identify the dispatcher's voice and ring tones from a phone call. Defendant also recalled officer Rodriguez, who testified he saw Lieutenant Meiners make a phone call while in Lubinski's office. When defendant played a portion of the audio, officer Rodriguez was able to identify that there was another voice on the tape, speaking in a low or normal tone.

¶ 14 Michael Jackson, an employee of the dealership, testified that he met defendant the day before the incident when he was looking at a truck to purchase, and again on the day of the incident when he came to make that purchase with a cashier's check from the bank. Jackson stated that he saw defendant go to the finance office with the check. Jackson then went to the bathroom. He averred that, when he returned, he saw police entering Lubinski's office. He also recounted that, while they were all in that office, he saw defendant pick the check up from Lubinski's desk and, as he attempted to leave, the officers attacked him, grabbing him and tasing

him. Jackson described that prior to this, he did not hear defendant make any noise; he did not hear defendant yell, use profanity or make any other loud sounds. He further testified that he did not see defendant attack either officer, lunge toward them or punch them. Jackson then saw officers dragging defendant out of Lubinski's office handcuffed.

¶ 15 Michael Hersh, the senior human resource manager for TCF Bank, began to testify in this cause, but when he was asked if he reviewed employment records for anyone with the name "Regina" in the fraud and forgery division, the State objected and a sidebar was had. The State contended that defendant had not laid the proper foundation for this testimony; defendant argued that this testimony would impeach the credibility of Lubinski and Krochmal. After some discussion, the trial court concluded that a proper foundation for Hersh's testimony had not been laid and, thus, struck his testimony and barred him from testifying further.

¶ 16 Following the admission into evidence of the portion of the audio recording he had played previously, defendant rested his case. The State called Lieutenant Meiners as a rebuttal witness, asking him to identify photographs of Lubinski's office taken after the incident. Lieutenant Meiners identified a desk, a hanging keyboard, some debris and two chairs. Following defendant's closing argument, the State presented its closing argument, during which it commented that the audio recording played for the jury was only a portion thereof and "not the whole audiotape," and referred to the police officers as credible witnesses who would not "risk" their years on the police force "to come into this court and lie." The cause was then submitted to the jury, who returned a verdict of guilty of resisting a peace officer and aggravated assault on a peace officer. The trial court sentenced defendant to two concurrent terms of 46 days in jail, time

considered served, and $290 in fines and fees.

ANALYSIS

¶ 17 As noted earlier, defendant presents several contentions on review. We address each separately.

¶ 18 A. Trial Court's Prohibition of Testimony

¶ 19 Defendant's first contention on appeal is that his convictions must be reversed and his cause remanded because the trial court violated his right to present a defense. Citing the trial court's decisions to exclude a portion of Knighten's testimony and prohibit Hersh from testifying, defendant asserts these errors conveyed to the jury that defendant is a "huckster" who attempts to pass fraudulent checks, and that Lubinski and Krochmal had perfect memories regarding the events on the day in question. We disagree.

¶ 20 Defendant is correct that, like the right to confront witnesses and the right to an impartial jury, a defendant has a constitutional right to present a defense. See *People v. Johnson*, 238 Ill. 2d 478, 487 (2010). It is also true that all relevant evidence is admissible at trial, unless otherwise prohibited by law. See *People v. Peeples*, 155 Ill. 2d 422, 455 (1993). However, the rules regarding the admissibility of evidence, including witness testimony at trial, are well established. See *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007); *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). In determining whether to admit such evidence before a jury, a trial court must first ask whether that evidence fairly tends to prove or disprove the offense charged and whether that evidence is relevant in that it tends to make the question of the defendant's guilt more or less probable. See *People v. Dunmore*, 389 Ill. App. 3d 1095, 1105-06 (2009). Critically, the court

must evaluate whether the proffered evidence has "any tendency to make the existence of any fact in consequence to the determination of the action more or less probable than it would be without the evidence." *Peeples*, 155 Ill. 2d at 455-56. The trial court may reject the evidence, even if otherwise relevant, on the grounds that it has little probative value regarding the offense in question due to its remoteness, uncertainty or unfairly prejudicial nature. See *Harvey*, 211 Ill. 2d at 392; *People v. Figueroa*, 381 Ill. App. 3d 828, 840-41 (2008). Ultimately, the decision whether to admit the evidence lies within the trial court's discretion and will only be reversed where it is arbitrary, fanciful or unreasonable, or where no reasonable person would adopt the view of the court. See *Dunmore*, 389 Ill. App. 3d at 1105-06.

¶ 21 Based on our review of the record before us, we find no error on the part of the trial court in prohibiting the admission of the testimony defendant cites, as it clearly had no impact upon any fact that was consequential to the determination of his guilt or innocence regarding the crimes charged.

¶ 22 We turn first to Knighten. Knighten began his testimony by recounting that he, as a salesman at the dealership, met defendant, a customer, the day before the incident while he was looking to buy a particular automobile. Knighten described that, on that day, he negotiated the automobile's price with defendant and he then accompanied defendant to a local TCF Bank branch, where he saw defendant take a withdrawal slip, fill it out, wait in line and give it to the teller, who issued him a cashier's check. At this point in Knighten's testimony, the State objected; at a sidebar, it asked the court to bar Knighten's testimony because it brought into question the issue of the check's validity which was irrelevant. Defendant argued that Knighten's

testimony was necessary for two reasons: to impeach Lubinski's earlier testimony that defendant showed him a chain and told him he was going to sell it (which defendant insisted portrayed him as a "schister"), and not to prove that the check was valid but to show that he went to a bank to obtain it just as any legitimate person would do. The trial court asked for an offer of proof regarding Knighten's remaining testimony, to which defendant replied Knighten would testify that defendant never showed him a chain or discussed selling a chain. Following argument, the trial court found that Knighten's testimony on these points constituted hearsay and, regardless, was irrelevant.

¶ 23 Defendant now argues that Knighten's testimony was necessary to his defense theory that, once it was discovered that the cashier's check was valid, a fabricated story (*i.e.*, that defendant attacked employees and the police) was required to justify his tasering and arrest. He points out that, because Knighten was present to testify regarding the bank trip, it was not hearsay and was instead essential to show his state of mind as an honest man who took his check back out of frustration when police arrived at the dealership. He further notes that Knighten's proffered testimony that he never saw defendant with a chain would have boosted his argument that he intended to make a legitimate purchase at the dealership.

¶ 24 Contrary to defendant's arguments, Knighten's testimony was properly barred because it was both collateral and irrelevant to the issues at hand. It was already part of the evidence for the jury to consider that defendant presented the dealership with a cashier's check; this was a fact at trial that was never in dispute. Accordingly, even without Knighten's testimony, the jury already knew that defendant had gone to a bank, waited in line and received a check from a teller–which

was all Knighten would have been able recount in this regard. Knighten's testimony added nothing; it did not prove the check's validity, nor did it somehow impeach Lubinski or Krochmal's testimony that the check still needed to be verified by the dealership due to defendant's low credit score. Moreover, Knighten's testimony would not have proved defendant's theory that he was an "honest man making an honest purchase." While Knighten may have observed defendant fill out a withdrawal slip and stand in line at the bank, he did not know how much money was in defendant's account, whether his account or the check were even in good standing, or the bank's policies regarding the issuance of cashier's checks. Furthermore, Knighten's proffered testimony that, contrary to Lubinski, he never saw defendant with a chain was also irrelevant. Not only is it not illegal to sell one's own property in exchange for money, but admittedly, Knighten was not with Lubinski and defendant when the incident regarding the chain allegedly took place. As defendant himself made clear in the proffer, Knighten only dealt with defendant as a salesman on the day before the incident. There was no evidence presented that Knighten ever saw defendant on the day the events occurred. In addition, after the bank trip, Knighten and defendant returned to the dealership where Knighten turned over defendant's sales file to the finance team of Krochmal and Lubinski, and his contact with defendant ended there. It was after that time, once defendant met with Lubinski and was told to return the next day, that, per Lubinski's testimony, defendant showed him the chain–a time when Knighten was no longer present.

¶ 25 Similarly, Hersh's testimony was properly barred as well. When Hersh took the stand, he was asked if he reviewed TCF Bank's employee records for anyone named "Regina" working in

November 2007 in the fraud and forgery division. Before he could answer, the State objected, a sidebar was had and, following argument, the trial court barred his testimony as collateral and without foundation. Defendant now argues that Hersh's testimony was necessary not only to assail Krochmal and Lubinski's credibility, but also to show their inability to perceive and recall events from that day. However, just as the court found, the name of the bank representative to whom Krochmal and Lubinski said they spoke was entirely irrelevant. It had nothing to do with whether, once police arrived at the dealership, defendant resisted arrest and assaulted officer Rodriguez during their interaction. That a person named "Regina" may or may not have been working for TCF Bank is considerably remote from the main issues in defendant's case. Moreover, defendant never provided any further evidence in response to the trial court's determination that he had not established a proper foundation for Hersh's testimony, nor does he argue that he did so now.

¶ 26 Ultimately, none of the cited testimony was relevant to defendant's case. Critically, none of what Knighten or Hersh would have testified to had anything to do with defendant's actions toward police on November 27, 2007, which comprised the only issue in this case–not what happened the day before, not to whom Krochmal and Lubinski spoke, and not what was defendant's state of mind. As such, their testimony had no impact on the question of defendant's guilt or innocence regarding whether he resisted arrest or assaulted officer Rodriguez. Rather, it had no bearing on any fact that was consequential to the determination of this case. Accordingly, it simply had little probative value regarding the offenses in question and, thus, the trial court did not err in barring it. And, even if the trial court did err, such an error amounted to nothing more

than harmless error under these circumstances, where the evidence, via the corroborative testimony of four witnesses present at the scene, overwhelmingly demonstrated that defendant became physically combative and resisted officer Rodriguez's attempts to subdue him after he was told he was under arrest. See *People v. Stechly*, 225 Ill. 2d 246, 304 (2007) (State may show harmless error by demonstrating that error in trial court's decision to bar evidence did not contribute to verdict); *People v. Becker*, 239 Ill. 2d 215, 240 (2010) (reviewing court may find error in trial court's decision to bar evidence to be harmless if remaining evidence was overwhelming or if evidence at issue merely duplicated other properly admitted evidence).

¶ 27 Based on all this, and for the reasons stated, we find that the trial court's decision to limit the testimony of Knighten and Hersh as it did was not an abuse of its discretion and, therefore, we will not reverse and remand defendant's convictions on this ground.

¶ 28 B. State's Closing Arguments

¶ 29 Defendant's next contention on review is that his convictions should be reversed and his cause remanded for a new trial due to several comments the State made during its closing and rebuttal closing arguments. First, he asserts that the State committed plain, reversible error when it vouched for its witnesses by suggesting that Lieutenant Meiners and officer Rodriguez would be risking their jobs, reputations and freedom if they made up evidence against him. Second, he asserts that the State improperly alluded that facts not in evidence would prove defendant guilty when it argued that the jurors had not heard "the whole audiotape" defendant had submitted into evidence. We disagree on both points.

¶ 30 As a threshold matter, we note that the State argues on appeal, and defendant concedes,

that he has forfeited these matters for review by failing to raise them in his posttrial motion and, in the instance regarding the audiotape, to object to the comment during trial. Defendant insists, however, that we should review his claims pursuant to plain error, arguing that the evidence here was closely balanced. It is well established that, in order to preserve a claim of error for appellate review, a defendant must both object to the alleged error in court and include it in his written posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186, (1988); see also *People v. Herron*, 215 Ill. 2d 167, 175 (2005). When he fails to meet these requirements, the issue is forfeited. See *People v. Reddick*, 123 Ill. 2d 184, 198 (1988). The plain error doctrine allows us to consider a forfeited error when either the evidence is close or when the error is of sufficient seriousness. See *Herron*, 215 Ill. 2d at 186-87. Under the first prong, which is the prong defendant relies upon herein, a defendant must prove prejudicial error, namely, that there was plain error and that the evidence was so closely balanced that this error alone severely threatened to tip the scales of justice against him.[1] See *Herron*, 215 Ill. 2d at 187. Based on the circumstances presented in the instant cause, defendant cannot meet his burden here.

¶ 31 We begin by noting some general principles regarding closings and rebuttals. The State is allowed a great deal of latitude in closing argument. See *People v. Nieves*, 193 Ill. 2d 513, 532 (2000); accord *People v. Wiley*, 165 Ill. 2d 259, 294 (1995). The test for determining whether

[1]The second prong of the plain error doctrine examines the seriousness of the error, regardless of the closeness of the evidence. See *Herron*, 215 Ill. 2d at 187. The defendant must prove there was plain error and that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. See *Herron*, 215 Ill. 2d at 187. Again, defendant in the instant cause argues plain error only, and solely, under the first prong and, thus, we proceed accordingly.

there was reversible error because a remark resulted in substantial prejudice to a defendant is whether the remark was a material factor in his conviction, or whether the jury would have reached a different verdict had the State not made the remark. See *People v. Flax*, 255 Ill. App. 3d 103, 109 (1993); accord *Nieves*, 193 Ill. 2d at 533. We review the allegedly improper remark in light of all the evidence presented against the defendant (see *Flax*, 255 Ill. App. 3d at 109), as well as within the full context of the entire closing argument itself (see *People v. Cisewski*, 118 Ill. 2d 163, 176 (1987)). Ultimately, unless deliberate misconduct by the State during closing argument can be demonstrated, comments will be considered incidental and uncalculated and will not form the basis for reversal. See *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993). We further note that, when a defendant's own closing argument attacks the State's case, the State is entitled to respond thereto in its rebuttal closing argument, particularly when that response is invited; in such an instance, the defendant cannot then claim prejudice. See *Nieves*, 193 Ill. 2d at 534 (defendant cannot rely upon invited response by State during rebuttal closing argument as error on appeal); accord *People v. Reed*, 243 Ill. App. 3d 598, 606-07 (1993).

¶ 32 (1) Comments Regarding the Police Officers

¶ 33 Defendant first attacks the State's comments regarding its witnesses, namely, Lieutenant Meiners and officer Rodriguez. He cites the following specific comments: during closing, the State called the officers "both credible" and remarked that they "testified very credibly in this case;" and during rebuttal, it stated that defendant would like the jury to believe that officer Rodriguez would "risk eight years of a man on the force to come into this court and lie," and that Lieutenant Meiners "who has 31 and a half years on the job *** [would] come in here and

perjure himself."

¶ 34 As the parties point out, whether a prosecutor may properly make statements like those in the instant cause has divided our appellate court. Compare, *e.g.*, *People v. Fields*, 258 Ill. App. 3d 912, 920-21 (1994), with *People v. Bennett*, 304 Ill. App. 3d 69, 71-72 (1999). This is because there are several legal principles at play. For example, it is improper for a prosecutor to argue assumptions or facts not based upon evidence in the case. See *People v. Smith*, 141 Ill. 2d 40, 60 (1990). Nor can he vouch for the credibility of a witness (see *People v. Emmerson*, 122 Ill. 2d 411, 434 (1987)), or infer that a witness is more credible because he is a police officer (see *People v. Clark*, 186 Ill. App. 3d 109, 115-16 (1989)). At the same time, however, a prosecutor is free to comment on the evidence and any fair, reasonable and common sense inferences that can be gleaned therefrom (see *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005)), and, accordingly, may even comment on the credibility of a witness if that comment is based on or inferred from the evidence presented (see *People v. Flores*, 128 Ill. 2d 66, 94 (1989)).

¶ 35 In an effort to support their individual positions on the issue, the parties discuss at length the recent case of *People v. Adams*, 403 Ill. App. 3d 995 (2010). There, the defendant was indicted for unlawful possession of a controlled substance. During closing argument, the State commented to the jury that, very similar to what occurred in the instant cause, if it believed the defendant's case, it would have to believe that the two police officers involved were "risking [their] credibility, [their] job[s], and [their] freedom over 0.8 grams of cocaine." *Adams*, 403 Ill. App. 3d at 1000. The State repeated this during rebuttal, arguing again that believing the defendant required the jury to believe that "these officers are risking their jobs for this, over 0.8

grams of cocaine." *Adams*, 403 Ill. App. 3d at 1000. In addition, that State commented that one of the officers was an eight-and-a-half year veteran of the sheriff's department, and the other was a five year veteran of the forest preserve police. See *Adams*, 403 Ill. App. 3d at 1000. Following his conviction, the defendant appealed, arguing in part that, though he forfeited this issue, the State's comments constituted plain error and required reversal of his conviction because they were so prejudicial. The reviewing court agreed. Rebuking the comments as bolstering the police officers' testimony, the *Adams* court went on to conclude that, not only were they improper, but the comments amounted to plain error and merited reversal of the defendant's conviction. See *Adams*, 403 Ill. App. 3d at 1002-06 (noting the varied split in law among our appellate districts, and finding that the line of cases advocating reversal of conviction was proper avenue to take).

¶ 36 Not surprisingly, defendant here relies heavily on *Adams* for his proposition that his cause merits the same outcome, while the State attempts to distinguish *Adams* in the hope of proving it inapplicable to the case at bar. However, after the parties submitted their briefs on appeal to our Court, the Illinois Supreme Court reviewed *Adams* and reversed, reinstating the trial court's conviction of that defendant. See *People v. Adams*, 2012 IL 111168. Reviewing the prosecutor's comments regarding the police officers, the supreme court, too, acknowledged the split in authority, noting that it existed not only in our state courts but also in other jurisdictions, including the federal courts. See *Adams*, 2012 IL 111168, ¶ 19 (and cases cited therein). The supreme court concluded that the majority view holds that such comments are improper, and it agreed. See *Adams*, 2012 IL 111168, ¶ 20. Applying its reasoning to the defendant's case, it

found that the comments constituted impermissible speculation, since no evidence was introduced at trial from which it could be inferred that the officers would risk their careers if they testified falsely, and that they implied that the officers were more credible solely because they were police officers, thereby constituting impermissible vouching. See *Adams*, 2012 IL 111168, ¶ 20.

¶ 37 However, while it agreed that the comments were improper, the supreme court disagreed with the appellate court's further conclusion that the comments amounted to plain error. See *Adams*, 2012 IL 111168, ¶ 21. The supreme court reviewed the evidence in the cause and determined that it was not closely balanced; it also noted that the jury had been properly instructed that counsels' arguments were not evidence and that they were the judges of the witnesses' credibility. See *Adams*, 2012 IL 111168, ¶ 22, 23. Therefore, the supreme court concluded that, though improper, the prosecutor's comments were not inflammatory enough to have threatened to tip the scales of justice against the defendant. See *Adams*, 2012 IL 111168, ¶ 23.[2]

¶ 38 Finding that *Adams* is on point with the instant cause, there is no reason for us to depart from its timely and well reasoned decision. As our supreme court did, we, too, emphasize that we do not condone the State's comments made during closing argument and rebuttal at trial here. They were, undoubtedly, improper and we strongly urge the State to instill in its prosecutors that

[2]The supreme court also addressed the fundamental fairness prong of plain error in this context, concluding that any error in the prosecutor's comments did not rise to the level of affecting the fairness of the defendant's trial and the integrity of the judicial process. See *Adams*, 2012 IL 111168, ¶ 24.

such comments must be, at all cost, avoided in the future in an effort to preserve the integrity of our system and to ensure fair and unmitigated trials. However, again, just as our supreme court, upon an examination of the evidence presented, we cannot conclude that defendant has met his burden under the plain-error test. In this case, Krochmal testified that, after Lieutenant Meiners and officer Rodriguez arrived at the dealership and went to Lubinski's office, defendant barged in and began yelling; when the officers tried to restrain him, Krochmal saw defendant shove and punch them in an effort to get away. Similarly, Lubinski testified in detail in the same respect, stating that defendant "entered abruptly" screaming profanities, and "jumped right on the two police officers." In addition, both Lieutenant Meiners and officer Rodriguez recounted how they had to dodge defendant's "flailing" arms and fists as they tried to restrain him, struggling to subdue him. These four witnesses testified consistently and in corroboration, and in direct contradiction to Jackson, defendant's only witness, who, admittedly, was not in Lubinski's office where the incident took place and had left the dealership floor at one point to go to the bathroom. This evidence is simply too strongly weighted against defendant. Furthermore, just as our supreme court in *Adams*, we, too, take note that the jury here was properly instructed that counsels' arguments were not evidence and that only they were the judges of witness credibility. In addition, the prosecutor's comments here, though, again, improper, were not of a nature to inflame the passions of the jury.

¶ 39 Based on all this, we cannot conclude that the State's improper comments during closing, alone, severely threatened to tip the scales of justice against him so as to satisfy plain error

review.[3]

¶ 40 (2) Comment Regarding Audiotape

¶ 41 Defendant's second attack on the State's closing argument focuses on its comment regarding the audiotape defendant submitted into evidence. During its rebuttal, the prosecutor stated:

> "Additionally, counsel brings up the evidence. So the so-called only [*sic*] in this case is that one minute or less than one minute portion of an audiotape. That's not the whole audiotape. That's a portion that counsel played for you."

Defendant argues that, via this comment, the State improperly alluded that facts not in evidence would prove defendant guilty.

¶ 42 We find, however, based on the record before us that these comments constituted a proper, invited response. See *Nieves*, 193 Ill. 2d at 534 (when defendant's closing attacks State's case, State is entitled to respond); accord *Reed*, 243 Ill. App. 3d at 606-07 (defendant cannot claim prejudice on appeal for invited response by State during rebuttal closing argument). Prior to the State's comment, defendant, during his closing argument, played that portion of the audiotape some four times. In between, he emphasized to the jury what it could, and could not, hear on the tape. He then went on to refer to the tape a multitude of times during the remainder of his closing argument. Throughout, defendant argued that, if anything occurred that day at the

[3]Again, for the record, defendant only raised the first prong of the plain error analysis in relation to his cause on appeal. Accordingly, it was under this prong only that we reviewed his case. However, even were we to consider the second prong of fundamental fairness, we would conclude, as our supreme court in *Adams* did, that the State's comments here still did not amount to plain error because they did not rise to the level of affecting the fairness of defendant's trial.

dealership between the officers and defendant, it had to have occurred during that portion of the tape it played for the jury and, conversely, because there was nothing of such nature on that portion of the tape, then nothing must have occurred.

¶ 43 Defendant's argument clearly invited a response from the State, which, in the comment at issue, simply informed the jury that the one-minute portion of the audiotape it heard did not constitute the entire amount of time during which the police and defendant interacted on that day at the dealership. The State did not assert or imply that there were other portions of the tape, or other facts not in evidence, that proved defendant's guilt but, rather, only that the tape as played reflected a minute or less of defendant's contact with Lieutenant Meiners and officer Rodriguez. Again, while the State cannot argue facts not based upon evidence, it can comment on the evidence presented and draw any fair, reasonable and common sense inference therefrom. See *Nicholas*, 218 Ill. 2d at 121. Here, the State's comment falls under the latter category–it was merely commenting that the portion of the audiotape played recorded only a portion of what had occurred during the entire time defendant and the officers interacted. We find nothing improper in this respect and, in light of our previous discussion regarding the lack of closeness of the evidence in the plain error context, we do not find that any error surrounding this comment, if error even exists, would merit the reversal of defendant's convictions on this ground.

¶ 44 C. One-Act, One-Crime

¶ 45 Defendant's third contention on appeal is that his aggravated assault conviction violates the one-act, one-crime rule and should be vacated. He argues that both his convictions for resisting a peace officer and for aggravated assault were based on the same physical act–swinging

arms and elbows at officer Rodriguez. In this instance, we agree.

¶ 46 Again, as a threshold matter, the State argues that defendant has forfeited this argument for review. We have examined defendant's posttrial motion and note that he failed to raise this issue therein. See *Enoch*, 122 Ill. 2d at 186. However, not only do we have the discretion to entertain an argument that is otherwise technically waived (see *People v. Kliner*, 185 Ill. 2d 81, 127 (1998)), but a violation of the one-act, one-crime doctrine affects the integrity of the judicial process, thereby satisfying the second prong of the plain error analysis and justifying our consideration (see *Harvey*, 211 Ill. 2d at 389).

¶ 47 Turning, then, to the merits of this issue, we begin by noting that our state supreme court set forth the one-act, one-crime doctrine in *People v. King*, 66 Ill. 2d 551 (1977). Briefly, that case concluded that:

> "Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts." *King*, 66 Ill. 2d at 566.

¶ 48 Following *King*, our courts have explained that the one-act, one-crime doctrine involves a two-step analysis. See *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). First, it must be determined whether the defendant's conduct at issue

involved multiple acts or a single act. See *Miller*, 238 Ill. 2d at 165; *Rodriguez*, 169 Ill. 2d at 186. Multiple convictions are improper if they are based on precisely the same physical act. See *Miller*, 238 Ill. 2d at 165. In other words, a defendant may not be convicted of multiple offenses based on the same act. See *People v. Johnson*, 237 Ill. 2d 81, 97 (2010); accord *People v. Alvarado*, 2011 IL App (1st) 082957, ¶ 23 (when a defendant is convicted of two offenses based on the same act, the court must vacate the less serious offense because multiple convictions are improper if they arise out of the same act); *People v. Burney*, 2011 IL App (4th) 100343, ¶ 86 (where a single act is involved, multiple convictions are improper). Second, and only after it has been determined that the conduct involved multiple (not a single) acts, it must then be determined whether any of the offenses are lesser-included offenses. See *Miller*, 238 Ill. 2d at 165. If an offense is a lesser-included offense, then multiple convictions, too, are improper under the one-act, one-crime doctrine. See *Miller*, 238 Ill. 2d at 165; *Rodriguez*, 169 Ill. 2d at 186.

¶ 49 In line with this analysis, we must first determine whether defendant's conduct at the dealership involved multiple acts or a single act. In making such a determination, several factors are to be considered, including prosecutorial intent, *i.e.*, whether the charging instrument indicates that the State intended to treat the defendant's conduct as a single act or separate acts. See *People v. Arbo*, 213 Ill. App. 3d 828, 835 (1991); People *v. Varela*, 194 Ill. App. 3d 357, 361 (1990). Along with this, we are to take into account the time interval between successive parts of the defendant's conduct, the existence of an intervening act or event, and whether the conduct occurred at the same location. See *People v. Keefer*, 229 Ill. App. 3d 582, 584 (1992); *Varela*, 194 Ill. App. 3d at 361.

¶ 50 For example, in *People v. Crespo*, 203 Ill. 2d 335 (2010), the defendant was convicted of, in part, armed violence and aggravated battery. On appeal to our supreme court, he argued that his aggravated battery conviction must be vacated because it stemmed from the same physical act which formed the basis of the armed violence charge: three stab wounds to the victim. See *Crespo*, 203 Ill. App. 3d at 340. Meanwhile, the State countered by arguing that the three stab wounds constitute three separate acts, thereby justifying the multiple convictions. See *Crespo*, 203 Ill. App. 3d at 340. In agreeing with the defendant and reversing his aggravated battery conviction, our supreme court noted that its inquiry fell under the first part of the one-act, one-crime test, namely, whether the defendant's conduct involved a single act or multiple acts. See *Crespo*, 203 Ill. 2d at 340. After carefully examining the record, the theory under which the State had charged the defendant, the counts in the indictments, and the State's arguments to the jury throughout the trial, the supreme court held that the State had pursued the defendant for the same conduct under different theories of criminal culpability. See *Crespo*, 203 Ill. 2d at 342-43. That is, instead of arguing that only one of the three stab wounds would have been sufficient to sustain the aggravated battery conviction, the State chose to argue that the three stab wounds together constituted great bodily harm, as required for that conviction. See *Crespo*, 203 Ill. 2d at 343-44. Having chosen this route toward conviction, rather than arguing and charging the defendant in the former manner, meant that the State could not then be allowed to change its theory on appeal to support the aggravated battery conviction. See *Crespo*, 203 Ill. 2d at 344. See also *In re Samantha V.*, 234 Ill. 2d 359, 376-78 (2009) (finding violation of one-act, one-crime rule after examination of charging instruments, State's failure to elicit any testimony at trial to support

multiple instead of single act, and State's references during closing argument); *Varela*, 194 Ill. App. 3d at 362 (finding violation of one-act, one-crime rule upon examination of charging instrument, State's strategy during trial, and factual factors including that conduct lasted only two to three minutes, there was no intervening event, conduct occurred all in same place, both counts referred to same act, and language in charging instruments was "virtually identical"); see, *e.g.*, *Keefer*, 229 Ill. App. 3d at 584-85 (vacating conviction for resisting peace officer as violative of one-act, one-crime doctrine).

¶ 51 The instant cause is directly in line with *Crespo* and merits the same result. The State here argues that both convictions are justified because, pursuant to its trial theory, defendant engaged in more than one physical act when he " 'chest bumped' or pushed" Lieutenant Meiners and then "swung his arms" when he and officer Rodriguez tried to restrain him, and then when defendant "continued to avoid handcuffing" after defendant "bolted out of one office" and the officers "chased him into a second office." However, upon a careful review of the indictments here, we note that the first, charging defendant with aggravated assault, states that he "knowingly swung his elbows and arms" at officer Rodriguez. In incredibly similar language, the second indictment charging defendant with resisting a peace officer states that he knowingly "pushed, shoved, and flailed his arms and elbows" at officer Rodriguez. Accordingly, it is clear that these counts charge defendant with the same conduct under different theories of criminal culpability.

¶ 52 In addition, throughout trial, the State argued repeatedly, and consistently elicited testimony from several witnesses, that defendant used his hands on and "chest bumped" Lieutenant Meiners. In fact, Lubinski testified that, when defendant entered his office, he

jumped on both officers but particularly attacked Lieutenant Meiners. Lubinski further testified in detail that defendant had lunged at Lieutenant Meiners. Likewise, Krochmal testified that defendant became physical with Lieutenant Meiners. Similarly, Lieutenant Meiners testified that defendant came at him, chest-bumping him and using his hands, and officer Rodriguez also testified that defendant did this to Lieutenant Meiners. However, and quite glaringly, there was no testimony or evidence that this conduct or these actions were directed at officer Rodriguez–the only victim identified in the indictments. Therefore, whatever occurred between defendant and Lieutenant Meiners is irrelevant here, as the State chose not to pursue charges related to it. Moreover, what is quite interesting is that both Lieutenant Meiners and officer Rodriguez testified that defendant did not begin to become physical or start swinging his arms until after Lieutenant Meiners told him he was under arrest. Thus, the only "swinging" or "flailing" that occurred here involving the victim, officer Rodriguez, was that which occurred during defendant's arrest and not at any other point of interaction. Finally, based on our review of the record before us, we find that defendant's conduct against officer Rodriguez cannot be broken up into separate acts. To the contrary, the testimony, arguments and evidence at trial favor the finding of one physical act. That is, not only do both counts refer to the same act, but the entire incident lasted less than a few minutes, there was no intervening event, the conduct all took place in the dealership's finance offices, and, again, the language of the charging instruments is virtually identical.

¶ 53 We note for the record that the State relies heavily on *Miller* and, in its brief on appeal, principally argues that both convictions can stand because they are not lesser included offenses of

each other. Accordingly, it outlines the elements of both aggravated assault and resisting a peace officer and then attempts to void *Crespo* by stating that it no longer applies because it used the "charging instrument" approach to resolve the one-act, one crime issue while the more recent decision in *Miller* "adopted the exclusive use of the 'abstract elements' approach."

¶ 54 Yet, it is the State's argument, and not defendant's, that is misplaced. The State is entirely correct that *Miller*, wherein our supreme court refused to declare one crime the lesser-included offense of another for purposes of finding a one-act, one-crime violation, has solidified the use of the abstract elements approach over the charging instrument approach. See *Miller*, 238 Ill. 2d at 173-75. However, what the State neglects to mention is that this is true and applicable *only* when a court is required to reach a determination regarding whether the offenses for which the defendant is charged are lesser included offenses of each other, *i.e.*, *after* it has already determined that the defendant's conduct involved multiple acts and not a single act. As we noted earlier, the one-act, one-crime doctrine involves a two-step analysis. See *Miller*, 238 Ill. 2d at 165; *Rodriguez*, 169 Ill. 2d at 186. The first looks at whether the defendant's conduct involves multiple acts or a single act; if it is a single act, our analysis stops there, as it is improper to base more than one conviction on only one act. See *Miller*, 238 Ill. 2d at 165; *Rodriguez*, 169 Ill. 2d at 186. We only reach the second step in the analysis if the conduct involves multiple acts; then, and only then, do we examine whether the offenses charged are lesser included offenses of each other. See *Miller*, 238 Ill. 2d at 165; *Rodriguez*, 169 Ill. 2d at 186. It is at that point, and only that point, that the propositions established in *Miller*, namely, the abolition of the charging instrument approach in favor of the abstract elements approach, have any relevance. *Miller* itself

repeatedly emphasized this point when the court, at the outset of its opinion, clearly stated that its analysis therein "concerned solely *** the second step of the *King* analysis and whether retail theft is a lesser-included offense of burglary," and again later when it stated "we find no reason to apply the charging instrument approach when a defendant is charged with multiple offenses and the issue is whether, under *King*, one offense is a lesser-included offense of the other." *Miller*, 238 Ill. 2d at 165, 173. Otherwise, *Miller* changes nothing; where, as here, the issue focuses on the first part of the one-act, one crime test and whether the conduct at issue involves a single or multiple acts, there is no legal principle, contrary to the State's insistence, mandating the abstract elements approach, nor is there one that prohibits our consideration of the factors established in *Crespo* and its progeny, which we have discussed and applied herein.

¶ 55 Having found that defendant's conduct involved only a single act, we conclude that his multiple convictions based thereon are improper. Accordingly, and as his convictions for aggravated assault and resisting a peace officer were both Class A misdemeanors,[4] we vacate his aggravated assault conviction as violative of the one-act, one-crime doctrine.

¶ 56 D. Fines and Fees and Mittimus

¶ 57 Defendant's final contentions on appeal concern the fines and fees order assessed to him by the trial court following his convictions, as well as his mittimus. He claims that, for their respective reasons, both of these were in error and must be amended. Regarding the former, the

[4]Defendant's mittimus reflects that he was convicted of resisting a peace officer under 720 ILCS 5/31-1(a) (West 2008), and of aggravated assault under 720 ILCS 5/12-2(a)(15) (West 2008). The State concedes on appeal, however, that this latter conviction was actually pursuant to 720 ILCS 5/12-2(a)(6) (West 2008), thereby making both crimes Class A misdemeanors.

record reflects that defendant was ordered to pay $290 in fines, fees and costs. This included $30 for the Children's Advocacy Center, $10 for mental health court, $5 for youth diversion/peer court, $5 for a drug court fine, and $20 for the Violent Crime Victim Assistance (VCVA) fund. Defendant argues, first, that the imposition of the $30 Children's Advocacy Center fine violates the *ex post facto* law because that fine was enacted after the incidents in this case; second, that, because he spent time in presentence custody, he is entitled to a $5 *per diem* to be applied against his fines; and, third, the fine assessed for the VCVA fund was incorrect based on the amount of other fines he was ordered to pay. In addition, defendant argues that his aggravated assault conviction fell under section 12-2(a)(6) of the Illinois Criminal Code, a misdemeanor, rather than section 12-2(a)(15), a Class 4 felony dealing with assault to a correctional employee, which currently appears on his mittimus. Compare 720 ILCS 5/12-2(a)(6) (West 2008) with 720 ILCS 5/12-2(a)(15) (West 2008).

¶ 58 The State, for its part, concedes in principle to each of defendant's arguments. First, though it makes a calculation error regarding the VCVA fine,[5] it agrees that the Children's Advocacy Center fine violates the *ex post facto* law, that defendant is entitled to a credit, and that the fine assessed under the VCVA was incorrect. The State also agrees, as we have noted earlier, that defendant was convicted of misdemeanor aggravated assault under section 12-2(a)(6), and not of felony aggravated assault under section 12-2(a)(15).

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[5]At one point in making its concessions, the State writes in its brief that "the trial court imposed other [*sic*] $40 in other fines, specifically, the $30 Children's Advocacy Center Fine, the $10 for mental health court, the $5 youth/peer court assessment and the $5 drug court assessment." However, these numbers add up to $50, not $40, in fines.

¶ 59 However, rather than invoking our powers to correct these errors, we choose to remand for the issuance of an amended judgment of sentence in this cause. We do this in the instant cause because, based on our review, we have reversed and vacated defendant's conviction for aggravated assault pursuant to the one-act, one-crime doctrine. How this affects defendant's fines and fees order, as well as his mittimus, is better left to the trial court to calculate and resolve as a whole, in line with our decision herein.

CONCLUSION

¶ 60 Accordingly, for all the foregoing reasons, we affirm defendant's conviction for resisting a peace officer, vacate his conviction for aggravated assault as violative of the one-act, one-crime doctrine, and remand for an amended judgment of sentence to reflect a corrected fines and fees order and mittimus.