

NOTICE

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2018 IL App (4th) 130875-UB

NO. 4-13-0875

FILED

March 2, 2018

Carla Bender

4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
JEREMY THOMASON,)	No. 12CF586
Defendant-Appellant.)	
)	Honorable
)	Craig H. DeArmond,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Harris and Justice Steigmann concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant failed to establish he was denied effective assistance of counsel, and the circuit court did not abuse its discretion by sentencing defendant to 30 years' imprisonment for armed robbery.
- ¶ 2 In December 2012, the State charged defendant, Jeremy Thomason, by information with one count of armed robbery (720 ILCS 5/18-2(a)(1) (West 2012)), one count of aggravated robbery (720 ILCS 5/18-5(a) (West 2010)), one count of unlawful restraint (720 ILCS 5/10-3(a) (West 2012)), two counts of battery (720 ILCS 5/12-3(a)(1), (a)(2) (West Supp. 2011)), and one count of aggravated battery (720 ILCS 5/12-3.05(a)(1) (West 2012)). After a June 2013 trial, a jury found defendant guilty of armed robbery and aggravated battery but not guilty of the other four charges. In July 2013, defendant filed a posttrial motion. At a joint August 2013 hearing, the Vermilion County circuit court denied defendant's posttrial motion and sentenced him to concurrent prison terms of 30 years for armed robbery and 5 years for

aggravated battery. Defendant filed a motion to reduce his sentence, which the court denied after an October 2013 hearing. On appeal, defendant asserted (1) he did not receive effective assistance of counsel because counsel failed to seek to exclude defendant's prior convictions as impeachment evidence and (2) his 30-year sentence for armed robbery is excessive.

¶ 3 Initially, this court declined to address defendant's ineffective assistance of counsel claim, finding the claim was better suited for postconviction proceedings where a complete record could be developed. Defendant filed a petition for leave to appeal to the Illinois Supreme Court. In denying defendant's petition for leave to appeal, the Illinois Supreme Court vacated our initial judgment in a September 27, 2017, supervisory order and directed this court to consider whether defendant's ineffective assistance of counsel claim can be properly considered on direct appeal in light of *People v. Veatch*, 2017 IL 120649, and determine if a different result is warranted. *People v. Thomason*, No. 120598 (Ill. Sept. 27, 2017) (nonprecedential supervisory order on denial of petition for leave to appeal). We now do so and again affirm the circuit court's judgment.

¶ 4 I. BACKGROUND

¶ 5 The charges in this case relate to an incident at the Georgetown, Illinois, home of Fred Mills in the early morning hours of December 12, 2012. All six charges were also brought against Albert Britt. The armed robbery charge alleged defendant, while armed with a dangerous weapon other than a firearm, took a debit card from the person or presence of Raymond Steward by the use of force or threatening the use of force. The aggravated battery charge alleged defendant, in committing a battery, other than by discharge of a firearm, knowingly caused great bodily harm or permanent disfigurement to Steward. Mills and Candice Steele, whom were both present during the incident, were the victims named in the other four charges. In exchange for

his testimony against defendant, codefendant Britt pleaded guilty to the aggravated-battery charge and was sentenced to five years' imprisonment.

¶ 6 In June 2013, the circuit court held defendant's trial on all six charges. The State presented the testimony of Steward, Steele, Britt, and Georgetown police chief Whitney Renaker. The State also presented numerous photographs of the crime scene and Steward's injuries and a video from the automated teller machine (ATM) at the First National Bank of Catlin's Georgetown branch. Defendant testified on his own behalf. In rebuttal, Heidi Fury, supervisor in the Vermilion County probation department, testified. The trial evidence relevant to the issues on appeal follows.

¶ 7 Britt, who also had an unrelated aggravated battery conviction, testified that, around 6:30 p.m. on December 11, 2012, he gave Steele and Mills \$250 worth of crack cocaine after Steele produced Steward's debit card and explained the card's limit had been reached for the day but they could get more money after midnight. After leaving Mills' home, Britt ended up at a bar with defendant, whom he had previously met in jail. When the bar closed at 2 a.m., defendant asked Britt for a ride home to Danville, Illinois, and Britt said he could give defendant one after he got his money from Steele and Mills. On their way to Mills' home, Britt asked defendant to help him if they tried to fight back.

¶ 8 At Mills' home, Britt knocked on the door, and Steele let them in the home. Britt asked for the money, and Steele went to the bedroom where Steward was sleeping. Britt followed her and started shaking Steward to wake him. Britt then punched Steward in the chest. Steele then got "rowdy," and when she got in defendant's face, defendant punched her. Steele fell to the ground, and Britt directed defendant to calm down. Britt heard Steward offer to pay Steele's debts as Steward was putting on his shoes. He then saw defendant hit Steward on the

head with a lamp. At that point, Britt took Steele into the other bedroom because she said she wanted to get high. Britt then gave Mills and Steele more crack cocaine, so their debt would increase even more. Britt saw defendant take Steward to the living room and heard him demand Steward to pay the money. Britt denied asking defendant to enforce the debt. He also witnessed defendant hit Steward with his fists and objects. At one point, he saw defendant go toward Steward with what Britt thought was a knife. Both Britt and defendant asked for the pin number for the debit card, and Steward refused to tell them. Eventually, Steele indicated she knew the pin number, and Steward confirmed the number she said was correct. Thereafter, defendant, Britt, Mills, and Steele went to the ATM. Britt testified Steward was injured too badly to go with them. Britt described Steward as bleeding everywhere with blood all over his face and clothes. At the ATM, Steele withdrew \$500 from Steward's account, and Britt kept the money. He did not give any of it to defendant. Defendant's mother then picked defendant up at Casey's General Store (Casey's).

¶ 9 Steward testified he was sleeping in bed with Steele at Mills' home when a white man, whom he later identified as defendant, and a black man entered the bedroom. Steward did not recognize either man. The black man punched Steele in the face and was demanding money from her. Defendant was also yelling at her. The black man then started punching Steward in the face and broke Steward's nose. The men demanded money. Steward got dressed and went to the hallway where defendant began hitting him in the head with objects. Defendant continued to hit him with various objects for two hours. Steward testified he gave defendant his debit card but refused for a long time to give out his pin number. Steward tried to avoid defendant by walking around the living room, bathroom, and kitchen. On a couple of occasions, defendant would give him a towel and tell him to clean the blood off his face but then defendant would

resume beating him. Eventually, Steward gave them the pin number because he wanted the beating to stop. Steward also testified he passed out from the beating. When he awoke, he saw Steele and asked her to call an ambulance. Steward suffered an open skull fracture, two broken wrists, a broken nose, and an injury to his arm from the claw of a hammer. As a result of the attack, he was hospitalized for a month and must take seizure medication for the rest of his life. Steward admitted getting intoxicated from alcohol on December 11, 2012.

¶ 10 Steele, who had prior convictions for forgery and theft, testified that, after she went to bed, Britt came into the bedroom and told her to get up. Britt wanted her to wake up Steward, so he could go to the ATM. Britt had a “white kid” with him that she later identified in court as defendant. After she started to tell them off and cuss at them, defendant put a little knife to her throat and hit her. Defendant then went to the other side of the room, picked up a lamp, and struck Steward on the head with the lamp. After that, defendant jumped on the bed and started punching and kicking Steward. Eventually, defendant and Steward ended up in the living room, where defendant kept hitting Steward with objects. According to Steele, “he wouldn’t stop hitting him to even let him breathe.” Steele also testified the beating went on for two hours, and Steward’s bleeding did not stop.

¶ 11 Before defendant testified, the State sought permission to impeach defendant with his residential burglary conviction (People v. Thomason, No. 10-CF-77 (Cir. Ct. Vermilion Co.)) and his attempt (possession of methamphetamine manufacturing materials) conviction (People v. Thomason, No. 12-CF-96 (Cir. Ct. Vermilion Co.)). In response, defense counsel stated the following: “Yeah, we would acknowledge those convictions could be used for purposes of impeachment.” Early in his testimony, defendant admitted he had convictions for residential burglary and a methamphetamine-related offense. On cross-examination, defendant testified he

was on probation for residential burglary at the time of the offense at issue.

¶ 12 Defendant testified he went to Georgetown with some friends to celebrate a friend's twenty-first birthday. When the bar closed at 2 a.m., defendant learned his friends were not going to take him home to Danville, and defendant needed to return to Danville because he had a probation appointment. Defendant asked Britt, whom he had met before, if he could get a ride back to Danville. Britt agreed to give him a ride but noted they needed to go to a house first because some people owed Britt money. Defendant agreed to go with Britt because he could not afford to miss his probation appointment. Defendant had never been to the home before and did not know any of the occupants.

¶ 13 After Steele let them into the home, defendant sat down on the couch in the living room while Britt went to the bedroom where Steele and Steward were. After hearing a lot of commotion in the bedroom, including Britt making demands for money, defendant went to see what was going on. Defendant saw Britt and Steward "tussling around" on the bed. Steele yelled at Britt to stop, and Britt punched her in the face. Britt and Steward continued "tussling" on the bed. At some point, Steward jumped up and went to swing at Britt but, instead, hit defendant in the jaw. Defendant reacted in self-defense and grabbed a hold of Steward. Steward pushed defendant off and struck him again. Defendant punched him back, and he and Steward continued to fight as Steele and Britt left the bedroom. Defendant described Steward as "real agitated and angry." Defendant also noted Steward was bigger than him as he was 6 feet tall and weighed 140 pounds and Steward appeared to be 5 feet 10 inches tall and 200 pounds. During the time that he and Steward fought, defendant stated the only thing he struck Steward with besides his fists was a lamp shade. Defendant explained he reached for a lamp because his fists were not defending him from Steward and the bottom half of the lamp fell off, so he struck

Steward twice with the lamp shade. After being struck, Steward fell down, and defendant borrowed Britt's cellular telephone to call his mother for a ride home. Defendant walked with Steele, Mills, and Britt to the ATM because he did not know how to get to Casey's, the place where his mother was picking him up.

¶ 14 Defendant denied being involved with drugs and noted he had to give urine samples at least once a month for his probation. He also denied having a gun or a knife during the incident. Moreover, defendant testified he received no money from the ATM.

¶ 15 At the conclusion of the trial, the jury found defendant guilty of only armed robbery and aggravated battery. Defendant filed a motion for judgment of acquittal, or alternatively, a new trial, contending the circuit court erred by (1) denying defendant's motion seeking to impeach Britt with a juvenile delinquency adjudication of theft; (2) permitting the prosecutor to ask leading questions to the State's witnesses; (3) allowing, over defendant's objections, the admission of the ATM video; (4) allowing, over defendant's objections, the admission of certain other exhibits of the State; and (5) allowing, over defendant's objections, Fury to testify about defendant's probation drug testing. Defendant also asserted the State's evidence was insufficient to prove him guilty beyond a reasonable doubt. On August 1, 2013, defendant's presentence investigation report was filed.

¶ 16 On August 6, 2013, the circuit court held a joint hearing on defendant's posttrial motion and sentencing. The court denied the posttrial motion and proceeded to sentencing. The State presented the presentence investigation report, and defendant presented the testimony, of (1) Megan Stites, who wrote the presentence investigation report; (2) Sally Thomason, defendant's mother; and (3) James Mitchell, defendant's cousin. Stites testified defendant had always cooperated with her and been very polite. She had never witnessed him lose his temper.

Sally testified defendant had been living with her and did not cause any problems in the home. To her knowledge, he was not using illegal drugs. At the time of his arrest, defendant was putting in job applications and working on taking the general educational development (GED) tests for a second time. Sally was willing to assist defendant when he is released from prison. Mitchell testified he worked at the Beef House Restaurant and had talked with defendant about defendant getting a job there.

¶ 17 During the parties' arguments, the prosecutor recommended defendant receive a 30-year prison sentence for armed robbery, and defense counsel contended a sentence of around 10 years' imprisonment was appropriate. After hearing all of the evidence and the parties' arguments, the court sentenced defendant to concurrent prison terms of 30 years for armed robbery and 5 years for aggravated battery.

¶ 18 On September 5, 2013, defendant filed a motion to reduce his sentence, arguing, *inter alia*, his sentences were excessive. After an October 7, 2013 hearing, the circuit court denied defendant's motion to reduce his sentence. On October 8, 2013, defendant filed a timely notice of appeal with some incorrect information. On October 10, 2013, defendant filed an amended notice of appeal with the correct information in accordance with Illinois Supreme Court Rules 606(c) (eff. Feb. 6, 2013) and 303(b)(5) (eff. May 30, 2008). Thus, this court had jurisdiction of defendant's appeal under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013). We again received jurisdiction of defendant's appeal when the supreme court exercised its supervisory authority and directed us to vacate our original judgment and consider the effect of the *Veatch* decision on whether defendant's ineffective assistance of counsel claim may be properly considered on direct appeal. *Thomason*, No. 120598 (Ill. Sept. 27, 2017) (nonprecedential supervisory order on denial of petition for leave to appeal).

¶ 19

II. ANALYSIS

¶ 20

A. Effective Assistance of Counsel

¶ 21

Defendant contended he did not receive effective assistance of counsel because his trial counsel did not make a motion *in limine* to bar the State's use of his prior felony convictions as impeachment evidence. The State first argued this court should not address the issue on direct appeal because the issue involves a matter of trial strategy and the record on appeal does not contain counsel's reasons for not filing a motion *in limine*. On the merits, the State asserted defense counsel's failure to file a motion *in limine* was a matter of reasonable trial strategy.

¶ 22

On remand to this court, the parties filed supplemental briefs. Defendant argues this court should address the merits of his ineffective assistance of counsel claim and find he was denied effective assistance of counsel because no conceivable trial strategy justified failing to file the motion *in limine*. The State continues to argue we should not address the merits of the argument due to the incomplete record but, if we do, defendant has failed to establish ineffective assistance of counsel. After reconsideration in light of *Veatch*, we find the record is sufficient to review defendant's claim.

¶ 23

This court evaluates ineffective assistance of counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on such a claim, a defendant must demonstrate (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's conduct, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 687. To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel"

guaranteed by the sixth amendment (U.S. Const., amend. VI). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64.

¶ 24 Here, defendant argues his counsel's failure to move to exclude his prior convictions was not a sound strategic or tactical decision as no tactical reason existed for counsel's failure to do so. He claims that, if counsel had done so, a reasonable probability exists the circuit court would have barred at least one of his two prior convictions under *People v. Montgomery*, 47 Ill. 2d 510, 268 N.E.2d 695 (1971). The State disagrees, asserting defense counsel's failure to exclude the prior convictions was reasonable trial strategy. Specifically, the motion would have been futile and defendant's convictions helped explain the reasons for some of his actions on the night of the incident. We agree with the State a motion *in limine* to bar defendant's prior conviction would have been unsuccessful.

¶ 25 In *Montgomery*, 47 Ill.2d at 516, 268 N.E.2d at 698, our supreme court held evidence of a witness's prior conviction is admissible to attack the witness's credibility where:

“(1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment; (2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice.”

People v. Mullins, 242 Ill. 2d 1, 14, 949 N.E.2d 611, 619 (2011).

The third factor requires the circuit court to conduct a balancing test, weighing the prior conviction's probative value against its potential prejudice. *Mullins*, 242 Ill. 2d at 14, 949 N.E.2d at 619. In performing the balancing test, the court should consider, *inter alia*, the following: "the nature of the prior conviction, the nearness or remoteness of that crime to the present charge, the subsequent career of the person, the length of the witness' criminal record, and whether the crime was similar to the one charged." *Mullins*, 242 Ill. 2d at 14-15, 949 N.E.2d at 619. In this case, both of defendant's convictions meet the first two prongs of the *Montgomery* test, and thus only the third prong is at issue.

¶ 26 In *People v. Atkinson*, 186 Ill. 2d 450, 461, 713 N.E.2d 532, 537 (1999), our supreme court found a circuit court did not abuse its discretion by holding the defendant's two prior burglary convictions could be admitted for purposes of impeachment during the defendant's burglary trial. As to the third prong of the *Montgomery* test, our supreme court noted defendant's testimony was his entire defense. *Atkinson*, 186 Ill. 2d at 461-62, 713 N.E.2d at 538. Thus, the defendant's credibility was a central issue, and his prior convictions were crucial in measuring the defendant's credibility. *Atkinson*, 186 Ill. 2d at 462, 713 N.E.2d at 538. The supreme court did emphasize circuit courts should be cautious in admitting prior convictions for the same crime as the crime charged. *Atkinson*, 186 Ill. 2d at 463, 713 N.E.2d at 538. However, "similarity alone does not mandate exclusion of the prior conviction." *Atkinson*, 186 Ill. 2d at 463, 713 N.E.2d at 538. Additionally, the supreme court noted the circuit court "strictly limited the use of the prior convictions by providing the jury with an instruction limiting their evidentiary use to impeachment." *Atkinson*, 186 Ill. 2d at 463, 713 N.E.2d at 538.

¶ 27 Like in *Atkinson*, defendant's testimony was his sole defense, and thus

defendant's prior convictions were crucial in measuring his credibility. See *Atkinson*, 186 Ill. 2d at 462, 713 N.E.2d at 538. Both convictions were close in time to the offenses at issue in this case. Additionally, both cases are of the type courts have found to indicate dishonesty or be probative of credibility. In *People v. Paul*, 304 Ill. App. 3d 404, 410, 710 N.E.2d 499, 503 (1999), the reviewing court noted burglary is considered a crime of dishonesty. In *Mullins*, 242 Ill. 2d at 17-18, 949 N.E.2d at 621, our supreme court recognized Illinois courts have repeatedly held a possession or delivery of controlled substance conviction is the type of conviction that is probative of credibility and constitutes a basis for impeachment. Moreover, defendant was not on trial for residential burglary or a drug-related felony. Even if residential burglary is considered similar to robbery, the circuit court gave the jury instruction, which stated defendant's prior convictions were to be considered only as to defendant's credibility and not as evidence of defendant's guilt of the charged offenses. Thus, we agree with the State a motion *in limine* to bar defendant's convictions would have been unsuccessful. Accordingly, defendant's claim of ineffective assistance of counsel fails since the motion *in limine* would have been futile. See *People v. Cordell*, 223 Ill. 2d 380, 392-93, 860 N.E.2d 323, 331 (2006).

¶ 29 B. Sentence

¶ 31 The Illinois Constitution mandates “[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.” Ill. Const. 1970, art. I, § 11. “ ‘In determining an appropriate sentence, a

defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed.' ” *People v. Hestand*, 362 Ill. App. 3d 272, 281, 838 N.E.2d 318, 326 (2005) (quoting *People v. Hernandez*, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001)). However, “the seriousness of an offense is considered the most important factor in determining a sentence.” *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 53, 23 N.E.3d 430.

¶ 32 With excessive-sentence claims, this court has explained appellate review of a defendant's sentence as follows:

“A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review. [Citation.] If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature

of the offense.” (Internal quotation marks omitted.) *People v. Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004)).

¶ 33 In this case, defendant challenges his 30-year prison term for armed robbery, which is a Class X felony (720 ILCS 5/18-2(b) (West 2012)). A person convicted of a Class X felony is subject to a sentencing range of 6 to 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2012). Thus, defendant’s 30-year sentence falls within the statutory range. However, defendant contends the circuit court improperly found no mitigating factors despite his family support and a short criminal history. He also contends the sentence was disproportionate to his offense.

¶ 34 First, defendant mischaracterizes his criminal history. As the circuit court pointed out, defendant, at the age of 23, had spent almost a third of his young life in the criminal justice system. Defendant had a juvenile adjudication of delinquency for burglary and obstructing justice. As an adult, he had misdemeanor convictions for possession of cannabis, unlawful use of a black jack knife, and domestic battery. In 2010, he pleaded guilty to residential burglary and was sentenced to five years’ probation, and thus he was on probation for residential burglary when he committed the offenses in this case. Moreover, two days before he committed the offenses in this case, he pleaded guilty to attempt (possession of methamphetamine manufacturing materials) and later received a sentence of three years’ imprisonment. Thus, we disagree defendant’s criminal history was a mitigating factor.

¶ 35 As to defendant’s family support, the presentence report documents how he did not follow directives in his juvenile case despite having family support. Based upon that information, the circuit court could have properly found his family support was not a mitigating

factor. Thus, we find no error with the circuit court's finding no mitigating factors existed in this case.

¶ 36 Regarding the seriousness of the offense, which is the most important factor (*Jackson*, 2014 IL App (1st) 123258, ¶ 53), the trial testimony painted a very violent and lengthy attack by defendant on Steward for no reason at all. For one to two hours, defendant repeatedly hit Steward on the head with various household items, including lamps and a hammer, to obtain Steward's pin number for his debit card. Photographs showed large amounts of blood all over the bathroom, kitchen, and living room of the home where the attack occurred. Defendant's attack resulted in Steward having an open skull injury and fractured wrists. Steward was in the hospital for a month and must take medicine to prevent seizures for the rest of his life.

Defendant was not high on drugs at the time and did not claim to be impaired by alcohol. While Steward's friend Steele owed Britt money, defendant did not even know Steward and was only getting a ride home from Britt. No evidence was presented Britt ordered defendant to commit the lengthy, violent attack on Steward. Additionally, defendant received no money from Steward after the attack. Defendant notes Steward testified Britt did hit Steward, resulting in Steward's broken nose. However, the State's evidence indicated that was the only harm Britt inflicted upon Steward. The lengthy attack, resulting in a serious injury, was predominately done by defendant. Thus, we disagree the serious nature of the offense did not warrant a 30-year prison term.

¶ 37 Accordingly, we find the circuit court did not abuse its discretion by sentencing defendant to 30 years' imprisonment for armed robbery.

38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the judgment of the Vermilion County circuit court. As part of our judgment, we award the State its \$50 statutory assessment against

defendant as costs of this appeal.

¶ 40 Affirmed.