

No. 1-08-3646

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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.)	07 CR 16573
)	
LEVAIL SMITH,)	Honorable
)	Sharon Sullivan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.*
Justices Neville and Salone concurred in the judgment.**

*Following Justice Frossard's retirement, Justice Pucinski delivered the judgment of the court. Justice Pucinski has reviewed all relevant materials, including the court's original order filed August 5, 2010, and the supervisory order issued by our supreme court on November 7, 2011.

**Pursuant to Justice O'Brien's retirement, Justice Salone has participated in the reconsideration of this case. Justice Salone has reviewed all relevant materials, including the

ORDER

HELD: Defendant's robbery conviction and sentence upheld as his guilt was proven beyond a reasonable doubt and he received effective assistance of trial counsel; however, the trial court's assessment of a Children's Advocacy Center fee and DNA- analysis fees are vacated because they were improperly imposed.

¶1 Following a bench trial, defendant LeVail Smith was convicted of robbery and sentenced to a 12-year prison term. On appeal, defendant contends that his guilt was not proven beyond a reasonable doubt. Alternatively, defendant seeks a new trial because the trial court did not understand the elements of robbery and because his trial counsel was ineffective. Finally, defendant challenges the imposition of a \$30 Children's Advocacy Center fee and a \$200 DNA analysis fine. On August 5, 2010, this court issued an order vacating defendant's Children's Advocacy Center fine but otherwise affirming the judgment of the circuit court. Thereafter, on November 7, 2011, our supreme court issued a supervisory order directing this court to vacate our prior disposition and reconsider defendant's claims in light of its recent decision in *People v. Marshall*, 242 Ill. 2d 285 (2011). On reconsideration, we again affirm defendant's conviction and sentence; however, we vacate defendant's fees.

¶2 I. BACKGROUND

¶3 The victim in this case was Nathaniel McCrary, a cable company sales representative. He testified that around 5 p.m. on July 30, 2007, he drove his company van into an alley off of North Hoyne Avenue in Chicago, where he encountered defendant Smith beside defendant's truck.

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Defendant told him he had run out of gas and asked the victim to obtain some gas for him. The victim drove to a gas station two blocks away, where he pumped gas into a can which defendant brought to the station. The victim then drove the gasoline back to the alley where, because defendant claimed to have a bad back, he began pouring the gas into defendant's vehicle. As the victim did so, he saw defendant get into his van without his permission and begin to rummage through his belongings. The victim told defendant to get out of his van and stop going through his belongings, but defendant refused, telling the victim to continue pouring the gas. Finally, defendant got out of the victim's van and approached the victim. As defendant approached, the victim heard the distinctive ring of his cell phone, coming from defendant. The victim demanded the return of his phone but instead defendant answered it and began swearing at the caller. Defendant ultimately returned the phone to the victim, but the victim testified that he was now nervous because of defendant's erratic behavior. Contributing to this feeling of nervousness was the fact that, according to the victim, defendant was several inches taller than him and "a lot bigger."

¶4 As the victim studied his phone to determine who had called, defendant "snatched" the phone back with one hand. In the other hand he was holding a pair of pliers. The phone rang again and defendant began swearing at this caller, saying "This motherfucker's playing with me." The victim demanded his phone back, but defendant refused. When the call ended, defendant began taunting the victim, holding the phone out and saying he could have it back, but then pulling it back. The victim described defendant's behavior as follows: "As I started to walk towards the phone, he kind of like pulled back. He had pliers in his hand, and he was a pretty big guy." The victim also said that when defendant pulled the phone back he held out his other hand toward the victim, pointing

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the head of the pliers toward him. The victim described these pliers as made of heavy metal, with the end of them coming “almost to a point.” Defendant’s tone became angry. The victim testified that he feared that defendant would hurt him with the pliers or his body, so he walked away about 10 or 15 feet and told defendant he could have the phone and the van. The victim walked around the corner, borrowed a phone and tried to call 911. But defendant came “speeding” around the corner in his truck and drove right up to the victim. The victim began to approach defendant, demanding his phone back, but defendant screamed at the victim “You fucked my wife.” The victim told him he did not know his wife or him, but defendant again screamed this accusation. The victim ran away, pursued by defendant in his truck. When the victim changed direction, defendant backed the car in his direction, continuing to scream the same accusation. Finally, defendant drove out of sight. The victim called the police and described defendant as a “huge” man, about six feet, six inches tall and weighing over 250 pounds. He also described defendant’s truck as red, with broken-out windows that had been taped. Defendant was apprehended in his truck shortly thereafter and taken to a police station, where the victim identified him as well as the pliers and the victim’s cell phone.

¶5 A coworker of the victim, Eldridge Watkins, testified that at the time in question he called the victim’s cell phone. Someone else answered, saying “This MF is playing with me” and also saying that he “didn’t hurt him.” The person hung up, but Watkins called the number again. This time he could hear the victim in the background, repeatedly saying “Will you give me my phone.”

¶6 Chicago police officer Finneke testified that at the time in question he received a flash message describing a red vehicle with a broken back window being involved in a robbery. He saw

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defendant's vehicle and turned on his undercover vehicle's emergency lights and siren in order to stop the vehicle. Defendant did not stop for about a mile, until he drove up to a dead end. The officer recovered the victim's cell phone and a pair of pliers from the vehicle. When he asked defendant to get out of the vehicle, defendant said "I didn't take his cell phone. He's fucking my wife." Defendant was handcuffed after initially resisting.

¶7 The defense elicited the testimony of Chicago police detective Nicholas Forrestal, who took a statement about the incident from the victim on that same day. The detective testified that the victim only mentioned one phone call to his cell phone during the incident. The victim also told him that at some point during the incident he called his coworker, Eldridge Watkins, and told him he was all right. The detective did not recall the witness telling him that defendant had said something about the victim "fucking, playing" with him.

¶8 Defendant also presented the testimony of his wife, Cathlene Mari Smith. She asserted that she and her husband had gone out for drinks with the victim "a couple of times." The last time was several days before the incident. On this occasion, according to Smith, the victim made her feel uncomfortable by repeatedly asking for her telephone number. Smith also claimed that after the incident the victim called her and said he would make it worth her while if she met up with him. He also offered to drop the charges if she slept with him. Smith admitted on cross-examination that she had a drinking problem and had blacked out from drinking in the past. In rebuttal, the victim testified that he had never met Smith before defendant's arrest and had no contact with her. Based upon this evidence, the trial court convicted defendant of robbery and theft, subsequently found that the theft conviction merged with the robbery, and sentenced defendant to a mandatory Class X

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sentence of 12 years in prison. Defendant was subject to Class X sentencing because of prior convictions. This appeal ensued.

¶9

II. ANALYSIS

¶10 Defendant contends that his guilt was not proven beyond a reasonable doubt. In evaluating such a claim, our task is not to retry the defendant; instead we must examine the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v. McDonald*, 168 Ill. 2d 420, 433-34 (1995). A person commits a robbery when he takes property from another by force or by the threat of force. 520 ILCS 5/18-1 (West 2006). Defendant asserts that the State failed to prove the use of force element of this offense. This is simply erroneous. The victim testified that defendant grabbed his cell phone from his hand while defendant held in his other hand a heavy metal pair of pliers which came to a near point at the end. When the victim demanded his phone back, defendant taunted him by holding out the phone and then pulling it back, while simultaneously holding the pliers in front of him, pointed at the victim.

¶11 To constitute a robbery, the force threatened by a defendant must be such as would place the victim in sufficient fear to overcome his will. *People v. Williams*, 23 Ill. 2d 295, 301 (1961); *People v. Hay*, 362 Ill. App. 3d 459, 466 (2005). The victim testified that defendant was much bigger than he was. Defendant's tone became angry when he taunted the victim with the cell phone in one hand and the pliers in the other. The victim also testified that he feared defendant would hurt him with the pliers or with his body, so the victim walked away from defendant. The force or threat of force necessary for a taking of property to constitute robbery can be part of a series of acts which together

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form a single incident. *People v. Brooks*, 202 Ill. App. 3d 164, 169-170 (1990); *People v. Cooksey*, 309 Ill. App. 3d 839, 848-49 (1999). Thus in *Brooks*, the defendant took the victim's wallet without her realizing it, but when she tried to get it back, he pushed her and escaped. In affirming the defendant's conviction for robbery, the court held that the force used by the defendant against the victim immediately after he took her wallet, when she was trying to retrieve it, constituted the use of force in one incident. *Brooks*, 202 Ill. App. 3d at 170. Here, the threat of force used by defendant immediately after grabbing the cell phone, brandishing the pliers in a threatening manner at the victim as he taunted him, had the reasonable effect of preventing the victim from trying to retrieve his property from defendant and thus rendered this taking of property a robbery. Defendant seems to challenge this conclusion when he contends that the trial court erroneously believed that the threat of force could occur after the taking. Our analysis of the evidence has disposed of that contention. Force used immediately after a taking may suffice to establish a robbery. See *People v. Houston*, 151 Ill. App. 3d 718, 721 (1986).

¶12 Defendant also contends that the victim's story was an incredible one. However, it was actually defendant's version which the trial court specifically found to be incredible, including the testimony of defendant's wife, an admitted binge drinker, to some form of attempted seduction by the victim at a barroom encounter. The victim testified that this encounter never happened, and the trial court believed the victim. Defendant's behavior during this crime was bizarre, but it was its bizarre nature which added to the victim's fear of defendant. We find no reason for disturbing the trial court's findings of credibility in this case.

¶13 Defendant also contends that his trial counsel was ineffective for failing to present evidence

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of prior erratic behavior by him which he asserts would have negated any criminal intent on his part in taking the victim's cell phone. To establish ineffective assistance of counsel a defendant must show not only that his counsel's performance was deficient, but he must establish that he was prejudiced by that deficient performance. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). The "evidence" of erratic behavior by defendant was presented through his unsworn representations at the hearing on his motion for a new trial, in which he chose to represent himself and asserted ineffective assistance of his trial counsel. Defendant alleged in his argument at this hearing that two months before the events at issue in this case, he had taken another man's cell phone from him, scrolled through numbers on it, accused the male owner of sleeping with his wife, and then returned the phone. Defendant asserted that he was charged with disorderly conduct for these actions. Defendant contends that trial counsel should have introduced this evidence of a prior offense committed by defendant to establish that when he took the victim's cell phone he did not intend to steal it but only to search for his wife's phone number on it. Even assuming it is proper for defendant to use this "evidence" in argument on direct appeal, we find it unavailing. Defense counsel was asked to address this contention by the court at the hearing on defendant's motion for a new trial. Defense counsel noted that he had defendant examined prior to trial and defendant was determined to be fit for trial. He also stated that he believed it would be harmful to defendant's case in which he was charged with robbery of a cell phone to adduce evidence that defendant had previously taken someone else's cell phone. Clearly defense counsel was exercising his prerogative as defendant's attorney in determining as a matter of trial strategy whether to adduce evidence of this prior offense and we find that this exercise of discretion does not support defendant's claim that

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defense counsel was ineffective in his representation. *People v. West*, 187 Ill. 2d 418, 432 (1999).

¶14 Defendant next challenges the court's imposition of a \$30 Children's Advocacy Center fine. The statute authorizing this fine was not effective until January 1, 2008. 55 ILCS 5/5-1101(f-5) (West 2008). The robbery at issue in this case occurred five months earlier, on July 30, 2007. As the State concedes, this fine should not have been imposed and therefore we vacate it.

¶15 Defendant next challenges the \$200 DNA analysis fee which the trial court imposed pursuant to section 5-4-3 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-4-3 (West 2006)). Defendant asserts that because he was previously convicted of other felonies he has already submitted a DNA sample and "would have paid" the \$200 analysis fee. Accordingly, defendant maintains that he cannot be assessed the DNA fee once again. Although we upheld the imposition of this fee in our original disposition, we find that a different result is warranted on rehearing in light of our supreme court's recent analysis in *People v. Marshall*, 242 Ill. 2d 285 (2011).

¶16 Section 5-4-3 of the Unified Code, in pertinent part, provides:

"Any person *** convicted or found guilty of any offense classified as a felony under Illinois law, *** shall regardless of the sentence or disposition imposed, be required to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police in accordance with the provisions of this Section, provided such person is: convicted or found guilty of any offense classified as a felony under Illinois law *** on or after August 22, 2002." 735 ILCS 5/5-4-3(a)(3.5) (West 2008).

The provision further provides that: "Any person required by subsection (a) to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police for analysis and categorization into

genetic marker grouping, in addition to any other disposition, penalty, or fine imposed, shall pay an analysis fee of \$200.” 730 ILCS 5/5-4-3(j) (West 2008). When our supreme court recently examined this provision in *People v. Marshall*, 242 Ill. 2d 285 (2011), it concluded that section 5-4-3 of the Unified Code “authorizes a trial court to order the taking, analysis and indexing of a qualifying offender’s DNA, and the payment of the analysis fee *only where that defendant is not currently registered in the DNA database.*” (Emphasis added.) *Marshall*, 242 Ill. 2d at 303. Accordingly, a defendant who is convicted of a felony and provides a DNA sample and pays the fee need not resubmit a sample and pay an additional fee for every subsequent felony conviction. *Id.* at 297, 303.

¶17 Here, the record reveals that defendant had previously been convicted of felonies before he was convicted of the offense in the case at bar. Indeed, defendant's criminal history includes a 1999 felony narcotics conviction under case number 1999 CR 04117 and a 1998 burglary conviction under case number 1998 CR 12615. Although the record does not indicate whether or not the DNA assessment fee was imposed in those cases, we note that this statutory provision was added to the Unified Code by amendment in 1997 (Pub. Act 90-130 (eff. Jan. 1, 1998) (amending 730-ILCS 5/5-4-3 (West 2006)), and thus the DNA assessment requirement was in effect when defendant was convicted of the two aforementioned felonies.¹ Because section 5-4-3 of the Unified Code mandates that a convicted felon submit a DNA sample and pay the analysis fee, we presume the circuit court followed the law and assessed the fee on defendant as part of either of the sentences

¹We observe that the record reflects that defendant was also convicted of additional felonies in 1994 and 1995; however, since these convictions preceded the 1997 amendment, they have no bearing on our analysis.

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imposed on his prior felony convictions. See *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996) (trial court is presumed to know and follow the law unless the record indicates otherwise). Therefore, we vacate the imposition of the \$200 DNA analysis fee.

¶18

III. CONCLUSION

¶19 For the reasons set forth in this order, we vacate the \$30 Children's Advocacy Center fine and the \$200 DNA analysis fee imposed on defendant but otherwise affirm the judgment of the circuit court. The cause is remanded for modification of the mittimus to accord with our holding regarding the imposition of the aforementioned monetary assessments.

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