

No. 1-09-2196

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 08 MC6 17549 |
| |) | |
| ALICE WATKINS, |) | Honorable |
| |) | Martin E. McDonough, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justice Garcia concurred in the judgment.
Justice Robert E. Gordon dissented.

ORDER

- ¶ 1 *Held:* There was sufficient evidence that defendant violated an order of protection. Trial counsel did not render ineffective assistance by (1) not authenticating allegedly exculpatory telephone records, nor by (2) not impeaching the complaining witness with his criminal history. Trial court did not deprive defendant of a fair trial.
- ¶ 2 Following a bench trial, defendant Alice Watkins was found guilty of violation of an order of protection and sentenced to one year of supervision with 20 hours' community service. On appeal, she contends that there was insufficient evidence that she violated the order of

protection. She also contends that trial counsel rendered ineffective assistance by failing to (1) present testimony to authenticate telephone records that counsel claimed would prove her innocence, and (2) impeach the State's only witness with his criminal history. Lastly, she contends that the trial court deprived her of a fair trial by rushing the parties through trial, by denying counsel the right to fully question defendant and present a closing argument, and by assuming a prosecutorial role.

¶ 3 Defendant was charged with violation of an order of protection for phoning Bobby P. Peak and leaving him a message on or about December 7, 2008, in violation of an order of protection in case 08 D 640 (the Order). The Order was an emergency order of protection issued on November 20, 2008, and effective until a scheduled hearing on December 11, prohibiting defendant from harassment, interference with personal liberty, or stalking of Bobby Paris Peak II, including that defendant have "absolutely no contact with" him.

¶ 4 Defendant moved to dismiss the charge, stating that she had an order of protection against former husband Peak since October 16, 2008, before he obtained the Order. She alleged that Peak "made a series of phone calls" to her that prompted, and were intended by Peak to prompt, her call to Peak. Thus, she alleged, the Order and instant case were a malicious prosecution by Peak to "punish" her for her order of protection against him. Attached to the motion were copies of defendant's mobile phone bills from November 8, 2008, to January 7, 2009. Except for a handwritten notation on one bill that the phone number on an incoming call was that of Peak's dentist, neither the motion nor the bills specified which of the many phone numbers on the bills was Peak's telephone or represented his calls.

¶ 5 In argument on the motion to dismiss, defense counsel argued that Peak "is an ex-felon who has a history of creating situations that really don't exist" in order to induce a court "to get something done with reference to this defendant." The State asked the court to disregard

counsel's characterization of Peak as an ex-felon, arguing that it is irrelevant and "I don't believe there is any proof of that." Counsel replied that "I have records to show that." The State also argued that the phone bills in support of the motion are substantive evidence that should be considered at a trial rather than serve as grounds for dismissal. The court denied the motion. Counsel noted for the record that Peak was absent from the motion hearing and asserted that "he is currently incarcerated." However, Peak attended the next court date over a month later.

¶ 6 Just before trial, defense counsel told the court that "[w]e have phone records to show she never called." At trial, Peak testified that, contrary to the "no contact" provision of the Order in effect at the time, defendant called his home telephone on December 7, 2008, "harassing me with obscenities" and leaving a voicemail. Peak made a copy or recording of the voicemail and called the police that day, pursuant to which a police officer came to his home and listened to the voicemail. When the State sought to introduce the voicemail recording, counsel objected on foundational grounds that "the admissibility of a record without any establishment as to the date and time would" be improper, to which the court replied "I don't think it's going to be that hard" and stated that it would not exclude the recording "on a technicality." Counsel reiterated that "the only objection I have is foundation and the fact of authenticity," to which the court responded "[i]t's technical." The court asked Peak if "this is the call, you identified her as the person who made this tape? *** You made the tape, she made the call?" Peak replied "yes," and the tape was played for the court. Counsel noted that "we don't know the time, date, or anything," and the court noted that the content of the tape was unclear. The State argued that the content was irrelevant as the Order prohibited defendant from contacting Peak at all.

¶ 7 On cross-examination, counsel asked Peak if he used "various aliases." When the State objected, the court noted that "[i]t's cross examination." Defendant admitted that he used aliases, and was incarcerated, "when I was younger." The court overruled another State objection,

agreeing with defendant that the matter went to Peak's credibility. Peak denied calling defendant prior to her calls. When defendant sought to introduce telephone records to refute that testimony, the State objected that defendant "doesn't have anybody from the telephone company here to substantiate the records," and the court upheld the objection.

¶ 8 Defendant testified that she did not phone Peak on December 7, 2008. When defense counsel asked if she was "certain of all his background" when she married Peak in November 2007, the State objected. Defendant argued relevancy to Peak's credibility, but the court sustained the objection on the grounds that "[t]here's one issue, the call was made or it wasn't." On cross-examination, defendant admitted that it was her voice on the voicemail recording but denied that she left the voicemail on December 7. While she was uncertain when she left the voicemail, she believed that she did so in June or July.

¶ 9 Immediately after the State rested its cross-examination of defendant, the court stated that "[b]oth sides rest," then asked or stated "[w]aive argument," to which the State replied that it did. The court then stated that "[t]here's only one issue. It's very simple *** the call was made or it wasn't. The testimony of the complaining witness is supported and corroborated by the machine." The court found defendant guilty. Defense counsel argued that defendant admitted to leaving a voicemail but earlier than December 7, and the court reiterated its finding that "she violated the order by making the phone call."

¶ 10 The court sentenced defendant to one year of supervision, expiring July 15, 2010, with 20 hours of community service. Defendant unsuccessfully moved for reconsideration or vacatur of the supervision order, and this appeal timely followed.

¶ 11 On appeal, defendant first contends that there was insufficient evidence to find her guilty of violating the Order, in that Peak's testimony that the voicemail was sent on December 7, 2008, within the Order's ambit, was not corroborated by the voicemail recording as the court found.

¶ 12 When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). On review, we do not retry the defendant and we accept all reasonable inferences from the record in favor of the State. *Id.* The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly, the trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Beauchamp*, at 8.

¶ 13 Here, looking at the evidence in the light most favorable to the State as we must, we find sufficient evidence that defendant violated the Order by phoning Peak and leaving a voicemail on December 7, 2008, while the Order prohibiting contact was in effect. Peak testified that he received the voicemail on that day, and defendant admitted that it was her voice on the voicemail. Accepting *arguendo* that the voicemail itself does not corroborate that date, the voicemail partially corroborates Peak's testimony insofar as a voicemail from defendant to Peak existed. While defendant denied leaving the voicemail on that date, a rational trier of fact could believe Peak's testimony to the contrary.

¶ 14 Defendant also contends that trial counsel provided ineffective assistance by failing to: (1) present testimony to authenticate telephone records that counsel claimed would prove defendant's innocence, and (2) impeach Peak with his criminal history.

¶ 15 On a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced him; in other words, that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010).

¶ 16 Evidence of prior conviction is admissible to attack a witness's credibility if (1) the prior crime was punishable by death or imprisonment for more than one year, or involved dishonesty or false statement regardless of the punishment, (2) less than 10 years have passed since the date of conviction or the witness's release 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 (2011). However, evidence of arrests, indictments, charges, or the actual commission of a crime is inadmissible as impeachment. *People v. Bohn*, 362 Ill. App. 3d 485, 490 (2005).

¶ 17 Here, we cannot see prejudice from not introducing the telephone records because such records could not "show she never called," as trial counsel stated, in that they could not rule out that defendant phoned Peak on the day in question from a telephone other than her own. As to impeachment of Peak, given the limits on when a witness may be impeached with prior convictions – and not at all with mere arrests or charges – trial counsel's description of Peak as an "ex-felon" and assertion that he was incarcerated while this case was pending, and Peak's admission that he was incarcerated when he was "younger," are insufficient to support a claim that counsel had admissible impeachment evidence against Peak.

¶ 18 Lastly, defendant contends that the trial court deprived her of a fair trial by rushing the parties through trial, by denying counsel the right to fully question defendant and present a closing argument, and by assuming a prosecutorial role.

¶ 19 A trial judge is presumed to be impartial, and the party alleging judicial bias or prejudice bears the burden of overcoming this presumption. *People v. Faria*, 402 Ill. App. 3d 475, 482 (2010). Allegations of judicial bias or prejudice must be viewed in context and should be evaluated in terms of the judge's specific reaction to the events taking place. *Id.* For example, a display of displeasure or irritation with an attorney's behavior is not necessarily evidence of bias against the defendant or his counsel. *Id.*

¶ 20 As the trial court has a responsibility to achieve prompt and convenient dispatch of its proceedings, the court is justified in questioning witnesses when the purpose is clarification of issues. *Faria*, at 479. The court's latitude to question witnesses on material issues is enhanced during a bench trial because the danger of prejudice to the defendant is reduced. *Id.* However, the court must remain impartial and cannot assume the role of an advocate. *Id.* The court has not acted as a prosecutor or advocate for the State merely because its questions solicit evidence material to the State's case. *People v. Harris*, 384 Ill. App. 3d 551, 561 (2008). Questioning by the court that establishes a foundation for the admission of evidence does not necessarily constitute advocacy, even when admissibility is contested on foundational grounds. *People v. Taylor*, 236 Ill. App. 3d 223, 229-31 (1992)(foundation for State expert witness objected by the defendant and established by judicial questioning during jury trial).

¶ 21 A defendant has a constitutional right to present a closing argument, and the court has a duty to be attentive, patient, and impartial towards that argument. However, the trial court has broad discretion in regards to limiting the argument. *Faria*, at 483.

¶ 22 Here, trial counsel did not object to the court's actions, either at trial or in a post-trial motion. Generally, this results in forfeiture of the claims. *Faria*, at 477. Forfeiture is relaxed where the basis for the objection is the trial court's own conduct, but only in the most compelling of situations, such as inappropriate remarks to the jury or in capital cases. *Id.* We conclude that

"defendant has not established that an extraordinary or compelling reason exists to relax application of the forfeiture rule. First, defendant's trial was a bench trial and not a jury trial. Therefore, there was no jury to hear or be influenced by the court's remarks." *Id.* at 478.

Secondly, trial counsel did not show undue deference to the court that would lead us to believe that his silence demonstrated mere resignation rather than waiver. After the court announced its finding of guilt, counsel argued the defense theory that defendant did not leave the voicemail on the date alleged but earlier.

¶ 23 Therefore, we must conduct a plain error analysis, under which we consider error affecting the substantial rights of a defendant when (1) the error is so serious that the defendant was denied a substantial right, or (2) the evidence is so closely balanced that the guilty finding may have resulted from the error rather than the evidence. *Faria*, at 478. However, the first step in a plain error analysis is determining whether there was error at all. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 24 Regarding the court's questioning of Peak to elicit the foundation for the voicemail recording, we do not find this to be an improper exercise of a prosecutorial role nor evidence that the court was prejudiced or biased against defendant. Peak had already testified that defendant called his home telephone on December 7, 2008, and left a voicemail, and that he had made a recording or copy of that voicemail. Under such circumstances, admissibility of the recording was indeed a simple matter as the court opined. Moreover, the court asking whether it was defendant's voice on the voicemail and that Peak himself made the recording copy of the voicemail was merely clarification of Peak's earlier testimony.

¶ 25 As to the absence of a redirect examination of defendant, trial counsel did not indicate his intent to conduct redirect. Moreover, once the State had asked the only viable followup to defendant's testimony that she left the voicemail but not on December 7, and elicited that she was

1-09-2196

unsure when she left the voicemail but may have done so in June or July, the court could reasonably conclude that counsel had no questions. Under such circumstances, we also shall not presume that counsel intended to conduct a redirect examination. Regarding closing argument, though the court was precipitously hasty in announcing its findings, trial counsel was able to make his argument to the court that defendant did not call Peak and leave the voicemail on December 7 as charged. It would have been preferable that the court ask counsel if he had any questions on redirect, and the court should have waited for counsel to either make or expressly waive closing argument before announcing its findings. However, a defendant is entitled to a fair trial rather than a perfect trial. *Faria*, at 482. We conclude that defendant received a fair trial.

¶ 26 Accordingly, the judgment of the circuit court is affirmed.

¶ 27 Affirmed.

¶ 28 JUSTICE R. GORDON, dissenting:

¶ 29 For the reasons explained below, I would find ineffectiveness of trial counsel, and therefore I must respectfully dissent.

¶ 30 In the case at bar, defendant was convicted of violating an order of protection by making one telephone call on December 7, 2008, to the subject of the protective order. The order was in effect from November 20, 2008, until December 11, 2008. The only issue at trial was whether defendant made this one call on December 7.

¶ 31 Defense counsel stated several times, both before and during trial, that he had telephone records that would show that his client did not make the call. The defense also claimed that, in fact, it was the subject of the protective order who had called defendant repeatedly. However, during trial, when counsel attempted to introduce the records into evidence, he completely failed. The State objected on the ground that defendant "doesn't have anybody from the telephone company here to substantiate the records," and the trial court sustained the objection. The records never came in.

¶ 32 On appeal, defendant claims that her trial counsel was ineffective because her counsel did not know how to introduce a business record into evidence. I would agree that, at a very bare minimum, an attorney must know how to lay a foundation for an exhibit to go into evidence. At a very bare minimum, an attorney must show some awareness of the basic rules of evidence, such as the business record exception to the hearsay rule. Ill. R. Evid. 803(6). Thus, I would find that counsel's performance fell below an objective standard of reasonableness, and therefore satisfied the first prong of the *Strickland* test.

¶ 33 As for the second or prejudice prong, the majority finds that there was no prejudice because defendant could have called from a telephone other than her own.

¶ 34 However, this overlooks the fact that repeated telephone calls by the subject to defendant's cellular telephone would have corroborated defendant's testimony that, to the extent there was any harassment, it was flowing the other way – from the subject to the defendant, not the other way around.

¶ 35 This trial was a simple credibility test: she said she did not call on December 7; and he said that she did. The State was able to introduce evidence that partially corroborated its witness, while defense counsel utterly failed to lay a foundation for any business records to be received into evidence to support his client's testimony. As a result, at the end of the bench trial, the trial judge ruled in favor of the witness that had some corroboration. In finding defendant guilty, the trial judge specifically stated the importance of corroboration to his holding, as explained below.

¶ 36 At the trial, the State partially corroborated the subject's testimony by introducing a taperecording of a voicemail message that defendant had left on the subject's telephone. Defendant admitted leaving the message but testified that the message was left much earlier, sometime in the summer. The recording itself contained no date information, and the trial judge stated that he could not understand the content of the message.

¶ 37 However, at the end of the bench trial, the trial judge explained that he found defendant guilty because the subject's testimony was "corroborated by the machine." In finding defendant guilty, the trial judge did not make any specific credibility determinations regarding either witness. The trial court's ruling is stated in full, below:

"There's only one issue. It's very simple – the call was made or it wasn't. The testimony of the complaining witness is supported and corroborated by the machine. Finding of guilty on the making of the call."

1-09-2196

Thus, the partial corroboration on one side, and the complete lack of it on the other, affected the outcome.

¶ 38 As a result, I would find that both prongs of *Strickland*, both the deficient performance and the prejudice prongs, are satisfied; and I must respectfully dissent.