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2013 IL App (3d) 110317-U

Order filed February 7, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Stark County, Illinois,
)	
v.)	Appeal No. 3-11-0317
)	Circuit No. 10-CF-23
)	
CRAIG D. REED,)	Honorable
)	Kevin R. Galley,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The evidence at trial was sufficient for a rational trier of fact to convict defendant of unlawful violation of an order of protection. (2) Trial counsel did not render ineffective assistance for failing to object to admission of defendant's prior conviction or file a motion to reconsider sentence.

¶ 2 Following a bench trial, defendant, Craig D. Reed, was convicted of aggravated battery of a peace officer (720 ILCS 5/12-4(b)(18) (West 2010)) and violation of an order of protection (720 ILCS 5/12-30(a) (West 2010)). Defendant was sentenced to concurrent terms of 4½ and 1½

years' imprisonment. Defendant appeals, arguing that: (1) he was not proven guilty beyond a reasonable doubt of unlawful violation of an order of protection; and (2) trial counsel was ineffective. We affirm.

¶ 3

FACTS

¶ 4 On November 23, 2010, defendant was charged with violating an order of protection. 720 ILCS 5/12-30(a) (West 2010). The charge alleged that on November 21, 2010, defendant sent text messages to Stacie Hansard-Reed in violation of the order of protection filed on September 24, 2010. The charge elevated the offense to a Class 4 felony based on defendant's prior conviction in January 2000 for violating an order of protection. See 720 ILCS 5/12-30(d) (West 2010). Due to defendant's actions following his arrest, he was also charged with aggravated battery of a peace officer. 720 ILCS 5/12-4(b)(18) (West 2010).

¶ 5 On March 16, 2011, the cause proceeded to a bench trial. The trial court first heard evidence regarding the aggravated battery count and ultimately found defendant guilty.

¶ 6 The trial then proceeded on the count alleging a violation of an order of protection. The State submitted into evidence the order of protection Stacie obtained against defendant. The order was filed and served on defendant on September 24, 2010, and was effective until September 24, 2012. The order prohibited defendant from having any contact, including text messaging, with Stacie. The order stated that only the court could modify or dismiss the order and the petitioner could not give legal permission to change the order. The order further stated that if defendant contacted the petitioner, even with her consent, he may be arrested. The State also submitted defendant's guilty plea and conviction from January 2000 for three counts of violating an order of protection obtained by Mary Wilkenson.

¶ 7 The State called Stacie, who testified that she had divorced defendant in November 2010. On November 21, 2010, Stacie received several text messages from defendant. Stacie further testified that on that date, the order of protection was still in effect, and that she had never gone to court to get the order vacated.

¶ 8 On cross-examination, Stacie acknowledged that she had contacted defendant two or three times through a third party, Allen Engstrom, after the order of protection was in effect. Stacie denied telling defendant that she dismissed the order of protection.

¶ 9 Defense counsel called Engstrom, who was a friend of defendant's and the father of Stacie's son. Engstrom testified that after the order of protection was in effect, Stacie contacted him between 60 and 70 times to get in touch with defendant. Engstrom also testified that Stacie and defendant met at Engstrom's house four or five times and that he, Stacie, Stacie's son, and defendant all went to the store together in November or December 2010. Engstrom testified that he knew the order of protection was in effect during these contacts and he never heard Stacie tell defendant the order was dismissed.

¶ 10 Defendant then testified on his own behalf. Defendant admitted that he was present in court when he received the order of protection on September 24, 2010. After the order was in effect, Stacie contacted him through Engstrom 60 or 70 times and also met him in person. Defendant testified that on November 16, 2010, Stacie told him that on the day of their divorce, November 19, 2010, she would dismiss the order of protection. After that date, the order was not discussed again. Defendant testified that after November 19, 2010, he did not know if the order was still in effect and even tried contacting the State's Attorney. Defendant further testified that Stacie continued to initiate contact with him, and based on this, he believed that contact between

them was allowed. Defendant admitted sending the text messages to Stacie on November 21, 2010.

¶ 11 After hearing all the evidence, the trial court found defendant guilty of violating an order of protection. The court also noted that defendant's prior conviction for violating an order of protection elevated the instant offense to a Class 4 felony.

¶ 12 On April 15, 2011, the trial court denied defendant's motion for a new trial and proceeded to sentencing. Defendant's presentence investigation report (PSI) showed that from 1982 until 2000, defendant had been convicted of unlawful use of a weapon, burglary, theft, unlawful possession of a weapon by a felon, trespass, three counts of violating an order of protection, aggravated battery, and criminal damage to property. Defendant also had dispositions for numerous traffic offenses. In mitigation, defendant called his 87-year-old mother, Dorothy Reed. Dorothy testified that defendant moved in with her to assist her with daily activities and upkeep of her home.

¶ 13 After hearing all the evidence and reviewing the PSI, the trial court sentenced defendant to concurrent terms of 4½ and 1½ years' imprisonment. Defendant was also ordered to pay a \$200 deoxyribonucleic acid (DNA) analysis fee, a \$20 domestic violence abuser services fund fine, and a \$200 domestic violence surveillance fund fine. Defendant appeals.

¶ 14 ANALYSIS

¶ 15 I. Sufficiency of the Evidence

¶ 16 Defendant first argues that the evidence was insufficient to prove him guilty beyond a reasonable doubt of violating an order of protection.

¶ 17 When a defendant challenges the sufficiency of the evidence, we view the evidence in the

light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237 (1985); *People v. Beauchamp*, 241 Ill. 2d 1 (2011). It is not this court's function to retry a defendant who challenges the sufficiency of the evidence. *People v. Ross*, 229 Ill. 2d 255 (2008). The trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. *Id.* We will not set aside a defendant's conviction unless the evidence was so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *Beauchamp*, 241 Ill. 2d 1.

¶ 18 To prove a defendant guilty of violating an order of protection, the State must prove that defendant: (1) knowingly committed an act prohibited by an order of protection; and (2) such act occurred after he had been served notice of or otherwise acquired actual knowledge of the contents of the order. 720 ILCS 5/12-30(a) (West 2010); *People v. Stiles*, 334 Ill. App. 3d 953 (2002).

¶ 19 Defendant does not contest that he was served with and had notice of the contents of a valid order of protection and thereafter sent text messages to Stacie in violation of that order on November 21, 2010. Rather, defendant argues that he had a mistake of fact when he believed the order was no longer in place when he sent text messages to Stacie.

¶ 20 A person acts knowingly or with knowledge of the result of his conduct, described by the statute defining the offense, when he is consciously aware that his conduct is of such nature or that such circumstances exist. 720 ILCS 5/4-5(a) (West 2010). Knowledge of a material fact includes awareness of the substantial probability that such fact exists. *Id.* A mistake of fact

constitutes a valid defense if the mistake negates the requisite knowledge to commit the offense. See 720 ILCS 5/4-8(a) (West 2010); *People v. Nash*, 282 Ill. App. 3d 982 (1996).

¶ 21 Viewing the evidence in the light most favorable to the State, we find that the evidence was sufficient to prove beyond a reasonable doubt that defendant was aware of a substantial probability that the order of protection was in effect on November 21, 2010. See *Collins*, 106 Ill. 2d 237. Defendant testified that he did not know if the order was in effect at the time of the offense, but he pointed to numerous occasions where Stacie consented to him contacting her. Defendant alleges that based on these contacts, his belief that the order was no longer in place was reasonable. However, defendant does not dispute notice of the instant order, which stated that Stacie had no authority to modify or dismiss the order and that her consent to his contact would not preclude his arrest. Defendant also claimed that on one occasion Stacie told him she would dismiss the order; however, based on the order's language, defendant knew that only the court had the authority to dismiss it and the instant order was in effect until 2012.

¶ 22 Furthermore, Stacie and Engstrom's testimony contradicted defendant's assertion that Stacie was going to dismiss the order on November 19, 2010. It was for the trial court to determine the weight to be given to defendant's testimony and the reasonable inferences to be drawn from the evidence. See *Ross*, 229 Ill. 2d 255. Accordingly, the evidence presented at trial was not so improbable or unsatisfactory that it leaves any doubt of defendant's guilt.

¶ 23 II. Ineffective Assistance of Counsel

¶ 24 Next, defendant argues that his trial counsel was ineffective for failing to: (1) object to the admission of his prior conviction for violating an order of protection; and (2) file a motion to reconsider sentence.

¶ 25 To prevail on a claim of ineffective assistance of trial counsel, defendant must establish that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Manning*, 241 Ill. 2d 319 (2011). Defendant's failure to satisfy either prong defeats a claim of ineffective assistance. *People v. Graham*, 206 Ill. 2d 465 (2003). Thus, if the claim can be disposed of on the ground that defendant suffered no prejudice, the reviewing court need not determine whether counsel's performance was deficient. *Id.*

¶ 26 A. Admission of Prior Conviction

¶ 27 Defendant's first contention of error relates to admission of his prior conviction for violating an order of protection. Specifically, defendant claims that pursuant to section 115-20(a) of the Code of Criminal Procedure of 1963, the prior conviction was admissible only if the victim in both violations was the same person. See 725 ILCS 5/115-20(a) (West 2010).

¶ 28 We agree with defendant that the victims in both violations were not the same person; however, section 115-20(a) does not apply to the instant case. Section 115-20(a) relates to the admission of other-crimes evidence to show a defendant's propensity to commit the charged offense. 725 ILCS 5/115-20(a) (West 2010); *People v. Chambers*, 2011 IL App (3d) 090949. Here, the record suggests that defendant's prior conviction for violating an order of protection was not submitted to show his propensity, but instead was explicitly used by the trial court to elevate the instant offense from a Class A misdemeanor to a Class 4 felony. See 720 ILCS 5/12-30(d) (West 2010). Additionally, there is nothing in the record to suggest that the trial court improperly considered the conviction for anything other than to elevate defendant's offense to a

felony. Therefore, defendant is unable to show that trial counsel's performance was deficient for failing to object to the admission of defendant's prior conviction.

¶ 29

B. Motion to Reconsider

¶ 30 Defendant's next contention of error relates to counsel's failure to file a motion to reconsider, noting that he had three valid claims to raise. Upon our review of the record, even assuming that counsel's failure to file a motion to reconsider was objectively unreasonable, we find that defendant's claim must fail because he cannot show that he was prejudiced by counsel's alleged deficient performance.

¶ 31

1. DNA Analysis Fee

¶ 32 First, defendant claims his \$200 DNA analysis fee should be vacated. Section 5-4-3 of the Unified Code of Corrections mandates that all individuals convicted of an offense classified as a felony under Illinois law after January 1, 1998, submit to the taking, analyzing, and indexing of their DNA, and the payment of an analysis fee. 730 ILCS 5/5-4-3(a), (j) (West 2010).

However, a defendant is only required to submit and pay for a DNA assessment when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). A sentencing order imposing a duplicative DNA analysis fee is void and must be vacated, as it exceeds statutory authority. *Id.*

¶ 33 Here, defendant's PSI indicated that he had been convicted of a felony since 1998; however, defense counsel has not included the trial court order requiring him to provide a DNA sample and pay the DNA analysis fee for this prior conviction, or any documentation indicating that defendant's DNA is currently registered in the database. Without this information, we cannot say that trial counsel was ineffective or that the trial court erred in ordering defendant to

pay for a DNA assessment in connection with the instant conviction. See *People v. Hunt*, 234 Ill. 2d 49 (2009) (stating that any doubts stemming from an inadequate record will be construed against the appellant).

¶ 34 In an effort to promote judicial economy by ending further proceedings over this matter (*Cf. People v. Williams*, 2011 IL App (3d) 100142), we allow defense counsel, should she so choose, to supplement the record, within 30 days after issuance of this order, with evidence that defendant was previously assessed a DNA fee relating to a prior felony or evidence from the Illinois State Police showing that defendant's DNA is currently registered in the database. If counsel provides some evidence that the portion of the sentencing order directing defendant to submit to DNA testing and pay the fee was duplicative, we shall vacate it, as a void sentencing order can be corrected at any time. See *Marshall*, 242 Ill. 2d 285.

¶ 35 2. \$5 Per Day Credit

¶ 36 Second, defendant claims he is entitled to a \$5 per day credit against his \$20 domestic violence abusers services fund and \$200 domestic violence surveillance fund fines. A defendant who is assessed a fine is allowed a credit of \$5 for each day spent in custody on a bailable offense for which he did not post bail. 725 ILCS 5/110-14 (West 2010).

¶ 37 Defendant is not entitled to credit against the \$20 fine because the statute explicitly excludes this fine from the credit provision of section 110-14. 730 ILCS 5/5-9-1.11(a) (West 2010). Additionally, defendant is also not entitled to credit against his \$200 fee because section 110-14 operates only to offset fines, not fees. See *People v. Johnson*, 2011 IL 111817. A fine is part of the punishment for a conviction, whereas a fee seeks to recoup expenses incurred by the State in prosecuting the defendant. *People v. Jones*, 223 Ill. 2d 569 (2006). The \$200 fee in this

case served to fund the domestic violence surveillance program by covering the costs of the equipment and additional supervision, not as a punishment for defendant's conviction. See 730 ILCS 5/5-9-1.16 (West 2010). Furthermore, defendant cites to no authority to suggest that this charge is a fine for purposes of presentence incarceration credit.

¶ 38

3. Excessive Sentence

¶ 39 Lastly, defendant argues that his sentence was excessive. The Illinois Constitution mandates that all penalties 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. However, the determination and imposition of a sentence involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find that the court abused its discretion. *People v. Alexander*, 239 Ill. 2d 205 (2010). A trial court is in a far better position than an appellate court to fashion an appropriate sentence, based upon firsthand consideration of factors such as defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Streit*, 142 Ill. 2d 13 (1991). Therefore, we will not substitute our judgment for that of the trial court just because we may have balanced the sentencing factors differently. *Id.*

¶ 40 Here, defendant was convicted of aggravated battery, which is a Class 2 felony (720 ILCS 5/12-4 (West 2010)) punishable by a term of three to seven years' imprisonment (730 ILCS 5/5-4.5-35(a) (West 2010)). Defendant was also convicted of violating an order of protection, which is a Class 4 felony (720 ILCS 5/12-30(d) (West 2010)) punishable by a term of one to three years' imprisonment (730 ILCS 5/5-4.5-45(a) (West 2010)). The trial court sentenced defendant to 4½ years for aggravated battery and a concurrent term of 1½ years for violating an order of

protection. A sentence that falls within the statutory range is not an abuse of discretion unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill. 2d 203 (2000).

¶ 41 Defendant argues that the trial court did not properly weigh his criminal history, his mother's testimony, or that the instant offenses did not involve serious injury. The record demonstrates that the court made its determination after considering the appropriate sentencing factors, and we cannot substitute our judgment for that of the trial court merely because we would have weighed the factors differently. See *Alexander*, 239 Ill. 2d 205. In light of defendant's lengthy criminal history and the nature and circumstances of the offenses, we cannot say that the court abused its discretion when it weighed the factors and found that concurrent sentences near the mid-point of the sentencing range were appropriate. See *Alexander*, 239 Ill. 2d 205; *Stacey*, 193 Ill. 2d 203.

¶ 42 Accordingly, defendant has failed to establish both prongs of *Strickland* for any of the alleged errors raised on appeal; therefore, he cannot establish a claim for ineffective assistance of trial counsel.

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, the judgment of the circuit court of Stark County is affirmed. Defendant is granted 30 days to supplement the record on appeal.

¶ 45 Affirmed.