2015 IL App (1st) 123146-U

FIFTH DIVISION
MAY 15, 2015

Nos. 1-12-3146, 1-14-1741 (cons.)

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.	)	No. 11 CR 14703
	)	
WALTER POWELL,	)	Honorable
	)	Mary C. Roberts,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Reyes concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Judgment entered on defendant's conviction for harassment of a witness affirmed over challenge to sufficiency of the evidence; remand for *Krankel* inquiry unnecessary.

¶ 2 Following a bench trial, defendant Walter Powell was found guilty of harassment of a witness and sentenced to 30 years in prison. On appeal, defendant contends that this court should reverse his conviction because the State failed to prove the element of "communication" beyond a reasonable doubt. In the alternative, he requests that his case be remanded for an inquiry into

his posttrial claim of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 3 The record shows that on August 20, 2011, defendant boarded a Chicago Transit Authority (CTA) Green Line train at the 63rd and Ashland station, which was operated by Tracy Calloway, a potential witness in a criminal case in which defendant had pleaded guilty. As a result of his conduct on the train, defendant was charged with harassing a witness by communicating directly with her, in that he "went to her place of employment, watched her and made gestures toward her in such a manner as to produce mental anguish or emotional distress."

¶ 4 At trial, Tracy Calloway testified that she worked for the CTA as a rail operator. About 11 a.m. on May 28, 2008, she was at the 63rd and Ashland station, assisting in the cleanup effort of a train which had derailed behind her own train. As she returned to her train, she observed defendant exiting from it wearing a full CTA uniform. He climbed off the train like a CTA worker, using the stirrups and pole beside the door, and she thought he was a CTA employee. When she entered the train, she noticed that the operating keys were missing, and she asked defendant if he had seen the keys or someone else on the train. Defendant denied both, then walked east down the tracks, toward the next station. After he left, Calloway discovered that her cell phone was also missing from her bag, which she had left in the operator's compartment, and informed her supervisor of the missing items.

¶ 5 On June 25, 2008, Calloway met with Chicago police detective Louis Vittori, and identified defendant in a lineup as the man she had observed on the train before her phone and CTA keys were missing. She agreed to prosecute the case involving the theft, but she did not ultimately have to testify as a result of defendant's plea of guilty. The record shows that on

October 1, 2008, defendant pleaded guilty to the charges stemming from that incident, as well as others filed in a separate burglary case, and was sentenced to six years in prison.

¶ 6 In July 2011, after receiving a call from Detective Vittori, Calloway called Sean Sherman, at the security department of the CTA, to inquire about a letter that defendant had written her from prison. Sherman read that letter to her over the phone.

¶ 7 About noon on August 20, 2011, she had a conversation with a coworker at the 63rd and Ashland Green Line station, where she was working. She then informed her supervisor that someone was looking for her at the station.

¶ 8 Later that afternoon, she was operating a southbound train towards the Roosevelt Road stop when defendant boarded the front car of the train. She was in the locked operator's compartment and through the back window, she observed defendant board the car and sit directly across from her. He then put his head up to the back window, which was about seven inches away from her face, made eye contact with her, and winked at her. Calloway contacted the control center of the CTA, and was instructed to drive the train at 15 miles per hour to the 35th Street station. Defendant kept his head in the window for about 25 minutes, *i.e.*, the duration of that trip, and when she arrived at the station, CTA managers boarded the train, removed defendant, and arrested him. Calloway testified that she was scared, nervous, and angry after that encounter, that she suffered from anxiety attacks, and that she went on "injured on duty" status for three months due to the stress.

¶ 9 Tomika Chatman testified that she and Calloway were coworkers at the CTA, and on August 17, 2011, she was working at the 63rd and Ashland Green Line station. That day, she and coworker Latoya Griffin were in the head car of a train, when defendant walked over the platform, approached them, and asked if they knew Tracy Calloway. When Chatman told him

that she was not there, defendant asked her location in a hostile manner, and she replied that she did not know it. She then asked defendant for his identity, and he told her not to worry about it, and walked away.

¶ 10 Griffin's testimony was substantially similar to that of Chatman. She also testified that when she subsequently observed Calloway at the station, she told her that someone was looking for her, and described defendant to her. Griffin informed the police about the encounter, and indentified defendant in a lineup on August 21, 2011.

¶ 11 Sean Sherman testified that he was a security investigator for the CTA, and responsible for investigating crimes perpetrated on CTA lines. On June 19, 2008, the vice president of security, Dan Hall, forwarded him a voicemail. After listening to the voicemail with him, Sherman and his manager, James Higgins, set up a mock interview with defendant, who they believed had obtained CTA equipment and had been on CTA property illegally. Sherman testified that in the voicemail, defendant stated his name, a contact number, and expressed interest in employment with the CTA. He also stated that he knew train signals and how to couple and uncouple trains, that he had CTA equipment like helmets and vests, and that he had been to the Harrison tower. On June 25, 2008, Sherman and Hall conducted a mock employment interview with defendant in the CTA headquarters building, while Higgins stood outside the room.

¶ 12 During the 30 to 40 minute interview, defendant expressed his fascination with the CTA over the last decade. He explained that he knew hand signals on how to direct trains, and how to uncouple and couple trains, that he had been in some of the tower rooms, that he had friends in the CTA who taught him how to do certain things on the CTA rails, and also that he had CTA equipment like vests, helmets, and keys. Defendant then demonstrated some of the hand signals

used to inform train operators to stop or proceed, and also took out a skeleton key used to open train doors and enter them, and a 6-key, used to open service gates and employee washrooms. At that point, the police were informed, and as defendant was being arrested, he said in a belligerent manner that he would derail a train by putting a Green Line train onto a Red Line train, and "if we thought it was going to be the end of it, they would have to lock him up for the rest of his life." The two sets of keys were turned over to the police and CTA property was recovered from defendant's bedroom after his arrest.

¶ 13 Sherman further testified that in July 2011, he received a letter addressed to Calloway. Defense counsel filed a motion *in limine* to prevent the contents of the letter from being entered into evidence because defendant's authorship of the letter could not be authenticated, and its contents were more prejudicial than probative. The court, however, allowed the State to enter the letter and its envelope as evidence of intent, over the defense objection, finding that circumstantial evidence indicated that defendant was the author of the letter. The court also stated that it would later determine what weight, if any, should be assigned to it. The envelope was postmarked October 3, 2008, addressed to "CTA worker Tracie Calloway," and defendant is indicated as the return addressee, with his inmate address at the Cook County Department of Corrections.

¶ 14 The letter, which is unsigned and undated, reads as follows:

> "Dear Tracie Calloway
>
> You hear me Bitch. I will be back on the green line or any other line bitch. You better hope and pray that i dont never find you.

> I got somethin for your ass bitch. i will be out there again but even better. the first mistake you made is letting me live to see the streets again. baby i know the tracks and know how to stop the trains to pick me up. and i dont forget a face. but trust me you will forget mines. bitch. the best thing you need to do. is to leave your Job. and never again work on CtA trains. and i hope i see your bitch ass on the Englewood line because thats my hood. You fucked up bitch when you had picked me out of the line up.
>
> Trust me when i say this to you. CtA is in my Blood. and i know all about CtA trains and i know how to walk the tracks. and i will come up on CtA hard hats and CtA vest. and the CtA is going to pay for it
>
> see you
>
> bitch"

After reading the letter, Sherman contacted the investigating detective in defendant's 2008 case, then called Calloway and read the letter to her over the phone.

¶ 15 The testimony of James Higgins, chief investigator at the CTA, regarding the encounter with defendant in June 2008 was substantially consistent with that provided by Sherman. He also testified that he heard defendant say on the voicemail that "CTA is my life, CTA is my blood. CTA is everything. I know third rail. I know CTA trains"; however, defendant was not, and has never been a CTA employee, and he was not authorized to have possession of the CTA property found on his person and at his residence.

¶ 16 Chicago police detective Louis Vittori testified that he interviewed defendant on June 25, 2008, following his first arrest. After Detective Vittori advised defendant of his *Miranda* rights, defendant stated that he found the CTA keys on a train platform and knew that the number six key could open doors, CTA rooms, and janitor rooms, and the skeleton key could open tower doors and doors on trains. He also stated that he had friends that worked for the CTA, had a working knowledge of trains, would sometimes ride in the conductor's car, and knew CTA hand signals and the "lingo" of CTA employees so no one questioned him when he gained entry into the tower or other CTA facilities.

¶ 17 Detective Vittori further testified that on November 11, 2008, he interviewed defendant at the Stateville Correctional Facility regarding the letter addressed to Calloway, and defendant stated he had no knowledge of the letter and did not send it from there.

¶ 18 Chicago police detective Roger Murphy testified that he interviewed defendant following his second arrest in August 2011. After reading defendant his *Miranda* rights, Detective Murphy asked him if he had spoken to CTA employees and inquired about anyone named "Tracy." Defendant replied that "[he] never threatened anyone. [He] never asked about anyone named Tracy Calloway and [he] never went near her." When asked how he knew Calloway's last name, defendant responded that he knew it from police reports and court records from his 2008 criminal case.

¶ 19 On behalf of the defense, Illinois Department of Corrections parole officer Tina Johnson testified that defendant was paroled on July 22, 2011. She also testified that she supervised his mandatory supervised release, and that he was not barred from contact with CTA personnel as a condition of his parole.

¶ 20 Defendant testified that he never met or contacted Calloway, nor asked other CTA employees about her, or knew what she looked like, and thought that his 2008 burglary plea was for taking CTA property from the station at 63rd Street and Martin Luther King Drive. On August 20, 2011, he boarded a Green Line train at one of the Wabash stations before being asked to leave the train by CTA personnel at 35th Street. He denied winking at anyone on the train, but admitted to stealing CTA property and operating CTA trains without permission, and stated that he still wanted a job with the CTA.

¶ 21 The State introduced two of defendant's prior burglary convictions as impeachment and closing arguments were presented by opposing counsel. After considering the evidence presented, the court found defendant guilty of harassment of a witness. In doing so, the court specifically found the testimony of Calloway and Chatman credible, and that of defendant incredible.

¶ 22 At the onset of the sentencing phase, defense counsel informed the court that defendant was receiving psychotropic medications, and requested a behavioral clinic examination to determine whether defendant was fit for sentencing. The court granted that request, and defendant was subsequently found fit for sentencing. On October 1, 2012, the State presented argument in aggravation, and set forth defendant's lengthy criminal history. Defense counsel presented argument in mitigation, and defendant exercised his right to allocution. He told the court, in relevant part, that he was not guilty, then stated:

> "Each year that I stay locked wrongfully, I want a million dollars for each year and this person it was his job to have the handwriting analysis in court. I want to put this motion in this ineffective assistance of counsel in violation of 6–and 14th Amendment, and

> then I want to put in the motion for a counsel to be appointed to be other than a Public Defender, and I got a motion right here for a free transcript."

¶ 23 The trial court noted defendant's increasing propensity toward violence, including a history of criminal damage to CTA property, aggravated battery to a child, domestic battery, battery of an employer, and burglaries, before the current conviction for harassment of a witness. The court also noted defendant's aggressive behavior during the pendency of the case, and the fact that it had five Cook County sheriffs in the courtroom for security because of that behavior. The court finally noted that defendant had not been able to conform his behavior to what was expected of him every time he was released from prison, and that he was a danger to society. The court then sentenced defendant as a Class X offender to 30 years in prison followed by three years of mandatory supervised release.

¶ 24 On October 17, 2012, defendant filed a series of *pro se* posttrial motions, including one entitled, "Defendant's claim of ineffective assistance of counsel in violation of the 6th and 14th Amendment," in which he argued that counsel was ineffective for failing to challenge the authenticity of the threatening letter received by the CTA, to file a motion *in limine* to have the letter found inadmissible, and to use a handwriting expert to prove that he had not written it. Defendant also filed a motion entitled "Petition for post-conviction relief," in which he made essentially the same arguments as the posttrial motion, and complained that his demands for trial transcripts had not been met.

¶ 25 When the case was called on October 26, 2012, the State pointed out that defendant was apparently filing a *pro* se request for relief under the Post-Conviction Hearing Act (725 ILCS

5/122-1 *et seq*. (West 2012), alleging that counsel did not advocate zealously enough for him in connection with the threatening letter. The court then noted:

> "I wanted to make clear that the defendant is indicating that counsel did not zealously advocate on his behalf in connection with the letter, and it's my impression that counsel did [z]ealously advocate. And in fact we spent a big part of the trial litigating the admissibility of this motion both orally and in writing. *** However, although there was a great amount of time dedicated to this letter, the weight that the Court assigned to this letter, I can state clearly on the record was very little."

¶ 26 Defense counsel clarified that the court was referring to the threatening letter, and the State then argued the *Krankel* aspects of the case. The court found that the motion lacked merit, and although defendant disagreed with counsel's work on his behalf, the court found that the matters related to trial strategy, and denied the motion.

¶ 27 Defendant filed a *pro se* notice of appeal on October 2, 2012 (No. 1-12-3146), several others thereafter, and a final one on November 16, 2012 (No. 1-14-1741). On June 20, 2014, this court allowed defendant's motion to consolidate the numbered appeals. Notwithstanding, we have a duty to independently consider our jurisdiction to hear an appeal (*People v. LaPointe*, 365 Ill. App. 3d 914, 919 (2006)), and having done so, we find that the consolidation was improperly granted.

¶ 28 Pursuant to Illinois Supreme Court Rule 606(b) (eff. Dec. 11, 2014), the notices of appeal filed before the entry of the order disposing of all pending postjudgment motions, in this case, the order of October 26, 2012, had no effect, and should have been stricken by the trial court.

The motion filed on November 16, 2012, after the denial of defendant's posttrial motions, was timely filed and appellate jurisdiction was joined in appeal No. 1-14-1741.

¶ 29 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant question for the reviewing court is whether, after viewing 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. Jackson*, 232 Ill. 2d 246, 280 (2009). This standard recognizes the trier of fact's responsibility to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). In applying this standard, we allow all reasonable inferences from the record in favor of the prosecution (*People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)), and will not overturn a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of defendant's guilt (*People v. Wheeler*, 226 Ill. 2d 92, 115 (2007)).

¶ 30 Here, defendant was charged with harassment of a witness under section 32-4a(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/32-4a(a)(2) (West 2010)), which provides in relevant part:

> "A person who, with intent to harass or annoy one who *** was expected to serve as a witness but who did not serve as a witness because *** the defendant pleaded guilty to the charges against him or her, because of the *** potential testimony of the *** person who *** may have been expected to serve as a witness, communicates directly or indirectly with the *** person who ***

> may have been expected to serve as a witness, *** in such manner as to produce mental anguish or emotional distress *** commits a Class 2 felony." 720 ILCS 5/32-4a(a)(2) (West 2010).

The record shows that the victim, Calloway, identified defendant in a lineup and was expected to serve as a witness against him for the burglary charges stemming from the incident on the CTA in 2008, but she did not testify because he pleaded guilty to those offenses. The evidence also shows that shortly after being convicted in 2008, defendant sent the victim a threatening letter, in which he indicated that he would find her after his release and harm her, and the State introduced the letter as evidence of intent. Two State witnesses testified that following his release in 2011, defendant asked about Calloway at her workplace and behaved in a threatening manner when they told him that they did not know her whereabouts.

¶ 31 The evidence further shows that defendant boarded the CTA train the victim was operating, pressed his face up against the back window of the operating compartment where she was located, winked at her, and stared at her continuously for about 25 minutes before Calloway could stop at the next station and have defendant removed from the car. Following this encounter, Calloway suffered anxiety attacks, and went on injured on duty status for three months due to the stress. We find that this evidence was sufficient to prove the elements of harassment of a witness beyond a reasonable doubt. *People v. Butler*, 375 Ill. App. 3d 269, 275 (2007).

¶ 32 Defendant, however, takes issue with the adequacy of the evidence to prove the element of "communication" beyond a reasonable doubt. He maintains that his actions did not prove that he "communicate[d] directly or indirectly" with the victim, as required by the statute. We disagree.

¶ 33 Although the term "communicate" is not defined in the statute, this court has previously noted that "the common meaning [of communicate] is 'to convey knowledge of or information about,' 'make known,' or 'to reveal by clear signs.' " *People v. Cardamone*, 379 Ill. App. 3d 656, 669 (2008), *aff'd,* 232 Ill. 2d 504 (2009) (quoting Webster's Ninth New Collegiate Dictionary 266 (1988)). These definitions do not exclusively require oral or verbal communication, nor exclude behavior from the ambit of the statute. For example, we have found a defendant guilty of violating the witness harassment statute for making a false police report and causing the victim to be pulled over by the police resulting in emotional distress (*People v. Cardamone*, 232 Ill. 2d 504, 509-10 (2009)), and also considered a defendant's threat to the victim by putting a photograph of a tombstone under a rock outside the victim's place of business a "communication" (*People v. Libbra,* 268 Ill. App. 3d 194, 199-201 (1994)). Moreover, we have noted that since the witness harassment statute has provided for direct or indirect communication, "by its terms, the statute explicitly provides for all types of communication" (*Cardamone*, 379 Ill. App. 3d at 669), and encompasses nonverbal communication, as here. We thus find that the record in this case shows that defendant directly communicated with his victim through the use of gestures and actions in such a manner as to result in mental anguish or emotional distress, thereby violating the statute.

¶ 34 Contrary to defendant's contention, the State did not allege that defendant "caused emotional distress by his mere physical presence," and the evidence does not show that he was simply "standing in a train car and looking at someone." Rather, Calloway's testimony, which was found credible, demonstrated that defendant was a few inches from her face when he approached the back window of the enclosed compartment from which she was operating the

train, winked at her, and stared at her for the next 25 minutes. Given that Calloway had identified defendant in a lineup in 2008, and he inquired of her through coworkers upon his release, defendant's conduct may not be described as the innocuous actions of a bystander, but rather was properly interpreted by the court as an attempt to send a threatening message to the victim "in such a manner as to produce mental anguish or emotional distress," which he succeeded in doing.

¶ 35 We also reject defendant's contention that his conviction was based on the 2008 letter he wrote to the victim. When considering defendant's postjudgment motion, the court indicated that although much time was given to whether the letter was admissible or not, it gave "very little" weight to the letter in finding defendant guilty. The court's statement indicates that it focused on defendant's nonverbal communication with the victim in reaching its decision. Accordingly, after viewing the evidence in the light most favorable to the State, we find that defendant was proven guilty of harassment of a witness beyond a reasonable doubt. *Butler*, 375 Ill. App. 3d at 275.

¶ 36 Defendant contends in the alternative, that the trial court failed to conduct a preliminary inquiry into his allegations of ineffective assistance of counsel, which he made during allocution, as required by *People v. Krankel*, 102 Ill. 2d 181 (1984). He maintains that defense counsel was required to examine the authenticity and authorship of the letter, and that the trial court failed to make a record of counsel's conduct in regards to the letter.

¶ 37 Under *Krankel,* and its progeny, where a defendant makes a *pro se* posttrial allegation of ineffective assistance of counsel, the trial court must conduct an adequate inquiry into the factual basis of the claim. *People v. Moore,* 207 Ill. 2d 68, 79 (2003). A trial court may conduct this preliminary inquiry by: (1) questioning trial counsel about the facts and circumstances surrounding defendant's allegations; (2) requesting more specific information from defendant; or (3) relying on its own knowledge of defense counsel's performance at trial and the insufficiency

of defendant's allegations on their face. *Moore,* 207 Ill. 2d at 78-79. If, following an inquiry, the court finds possible neglect of the case, new counsel should be appointed; however, if the court determines that the claim lacks merit, or pertains solely to trial strategy, it need not appoint counsel and may deny defendant's motion. *Moore,* 207 Ill. 2d at 78. If a court fails to conduct an inquiry or make a ruling, the reviewing court may remand for the limited purpose of allowing the trial court to do so. *People v. Willis*, 2013 IL App (1st) 110233, ¶ 74.

¶ 38 On appeal, the standard of review depends on whether the trial court determined the merits of defendant's *pro se* posttrial claims of ineffective assistance of counsel; if the trial court made no determination on the merits, then our standard of review is *de novo*, but, if a trial court has reached a determination on the merits of a defendant's ineffective assistance of counsel claim, we will reverse only if the trial court's action was manifestly erroneous, *i.e.*, error that is clearly plain, evident, and indisputable. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 39 In this case, defendant raised a concern about counsel's performance during allocution, when he stated that "it was [counsel's] job to have the handwriting analysis in court. I want to put this motion in this ineffective assistance of counsel." Although the court did not address his statement at that time, it did address his complaints about counsel which were contained in the *pro se* posttrial motion subsequently filed by defendant. Since the trial court determined the merits of defendant's ineffective assistance of counsel claim at that time, we review that determination for manifest error. *Tolefree*, 2011 IL App (1st) 100689, ¶ 26.

¶ 40 The record shows that defendant elaborated on his complaints about counsel's performance in his *pro se* posttrial motion, and the trial court addressed his allegations in detail and found that they lacked merit. The court specifically noted that counsel zealously advocated on defendant's behalf in connection with the letter, and that in any event, the court assigned very

little weight to it in reaching its decision. Thus, relying on its knowledge of counsel's performance at trial, the court found counsel's decisions in the matter pertained solely to trial strategy, and denied defendant's motion. *Moore,* 207 Ill. 2d at 78.

¶ 41 We find that the court's determination is supported by the record, which shows that defense counsel filed a motion *in limine* to bar the letter from being admitted into evidence because it could not be authenticated. The record also shows that extensive argument was had on the motion, after which the court commended both parties on their excellent briefing. The court ultimately decided that circumstantial evidence showed that the letter was written by defendant, and would be admitted into evidence, but that it would later determine what weight, if any, would be given to it. On this record, we find the court's inquiry sufficient, and no manifest error in its decision requiring further inquiry. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 42 Accordingly, we affirm the circuit court of Cook County in appeal No. 1-14-1741, and dismiss appeal No. 1-12-3146.