2015 IL App (2d) 140719-U
No. 2-14-0719
Order filed July 20, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAY WALKER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 13-CM-662 Honorable William P. Brady, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly denied defendant's motion to dismiss his domestic-battery charges, as the victim's unsuccessful prosecution of an order-of-protection proceeding did not collaterally estop the State's prosecution of the charges; (2) the State proved defendant guilty beyond a reasonable doubt of domestic battery, as the trial court was entitled to credit the victim's testimony over defendant's.

¶ 2 Following a bench trial in the circuit court of De Kalb County, defendant, Jay Walker, was found guilty of domestic battery (720 ILCS 5/12-3.2(a) (West 2012)) and was sentenced to a term of conditional discharge. Defendant argues on appeal that, because a petition for an order of protection was resolved in his favor before trial, and that petition was based on the same

allegations as the criminal charges, the State was collaterally estopped from proceeding with the criminal prosecution. He further argues that the State failed to prove his guilt beyond a reasonable doubt. We affirm.

¶ 3 Defendant was charged by complaint on May 6, 2013, with two counts of domestic battery. The complaint alleged that defendant "knowingly caused bodily harm to Allison [R.W.], his son's mother, in that he pushed [her] to the ground with his hands." The complaint further alleged that, by pushing Allison to the ground, defendant "made contact of an insulting nature." A verified petition for an order of protection was filed along with the complaint. The petition named Allison as petitioner, bore her signature, and was supported by a handwritten statement that she prepared. Allison appeared before the court on May 6, 2013, and, after questioning her under oath, the trial court entered an emergency order of protection. The record does not indicate any appearance on behalf of the State at the hearing at which the emergency order of protection was entered.[1]

¶ 4 Defendant retained an attorney who entered her appearance on May 14, 2013. On that same date, defendant moved to transfer the proceedings on Allison's petition to the circuit court of Boone County and consolidate them with a pending case concerning custody of defendant's and Allison's son. Defendant contended that Allison's petition for an order of protection was an attempt to circumvent visitation orders entered in the Boone County proceedings. Allison was

[1] We do note that an unidentified female was present at the hearing. At one point the trial court inquired whether defendant could be ordered to relinquish his firearms. The unidentified female responded, "Okay, I'm not sure. We just listed them in there and the sheriff's office listed them." The unidentified female also advised the trial court of the return date on the petition.

represented by a private attorney at the hearing on defendant's motion. Neither Allison nor the State objected to the motion, and the trial court granted it. On August 14, 2013, defendant moved to dismiss the domestic battery charges. He noted that on July 9, 2013, the circuit court of Boone County conducted a hearing on the petition for an order of protection. At the conclusion of that hearing, the trial court found that Allison had failed to meet her burden of proving, by a preponderance of the evidence, that defendant had committed an act of abuse under the Illinois Domestic Violence Act of 1986. 750 ILCS 60/101 *et seq.* (West 2012). Defendant argued that that finding barred prosecution of the domestic battery charges. The trial court denied defendant's motion.

¶ 5 At trial, Allison testified that she had a nine-year-old daughter, Madeline, and a three-year-old son, Carter. Defendant was Carter's father. On May 5, 2013, Allison's children were staying with their fathers. Allison explained that she had been on a business trip to Canada and had returned the preceding Friday. On May 5, 2013, she went to Madeline's father's house and picked up Madeline. Then she traveled to defendant's house to pick up Carter. She went to the back of the house. At the back door, three concrete steps led down to a concrete stoop. There were concrete steps down to the ground on either side of the stoop. The back door had a screened outer door that opened outward.

¶ 6 Allison testified that she knocked on the door and that when defendant answered she asked, " 'Can I have Carter's bag, his bike, and the rest of the child support for the month?' " According to Allison, defendant was irritated. He responded, " 'No bag, no bike, no money.' " Carter was standing at the threshold, between defendant and Allison. Allison bent down, picked Carter up, placed him against her right hip, and started to stand back up. As Allison was almost fully standing, with Carter on her hip, defendant pushed her with both hands. Allison leaned to

her left so that she would not fall backward. She ended up falling on her left hip and ankle. Defendant then slammed the door. Allison left with her children. She planned to drive back to her daughter's father's home. En route, she stopped and contacted the police. An officer met Allison at a school parking lot.

¶ 7 Allison did not seek medical attention until May 13, 2013. Asked why she waited so long, Allison stated as follows:

> "The first reason is the way my insurance works my employer pays for the first portion of the deductible so—I hold the insurance for both kids, so generally I try not to go unless I really need to, and then the second reason was I left that week to fly again to Minneapolis and so I couldn't go until I got back."

When she returned from her business trip, her ankle still hurt, so she visited an urgent-care facility where she was given an ankle brace and pain medication.

¶ 8 On cross-examination, Allison admitted that on April 30, 2013, she had left a voice message for defendant and sent him an e-mail referring to defendant as, *inter alia*, "sick and pathetic," "a complete asshole," a "compulsive liar," and a "fat mother f***ing loser." Allison accused defendant of refusing to let her have a video phone call with Carter during her business trip.

¶ 9 De Kalb County sheriff's deputy Ben Hiatt testified that on May 5, 2013, he spoke with defendant in response to a report of a domestic disturbance. Defendant indicated that he had called 911 because he had been in an argument with Allison. Defendant indicated that she had tried to gain entry into his home to retrieve a bicycle and a check. Defendant stated that he shut the door on Allison and she fell over. Hiatt testified that he had spoken with Allison before he

met with defendant. Allison was visibly upset. Hiatt noticed that she had some red marks and light bruising on her left leg.

¶ 10 Defendant testified that, when Allison came to pick up Carter, he opened the back door for her and she lifted Carter up against her left hip. Allison was standing on the first step in front of the door. Defendant handed Carter's security blanket to Allison. She took it with her right hand. Defendant then began to close the door. As he did so, Allison moved Carter from her left hip to her right hip. She put her left hand on the door and started to push it. Defendant resisted. Allison stated, in a confrontational tone, that she wanted Carter's bike, his bag, and a check. Defendant said "no bike, no bag, no check." Defendant explained that "[Allison] was referring to [Carter's] diaper bag, which she had left at the daycare provider, which I didn't have, the bicycle was a gift to me from my brother, so she had no right to it, and the check she was talking about was a child support check that she was going to have to wait just a few days." With respect to the child-support check, defendant added that he had had problems at the bank that were related to the theft of his credit-card information. Defendant testified that he "didn't really have a chance to talk with [Allison] about that because she was out there out of the gate." Defendant testified that he wanted to defuse the situation. Defendant continued to close the door, but Allison quickly stepped onto the threshold. At that point defendant "stopped" the door and Allison took two steps down and then fell straight to the ground. Defendant then closed the door and called the police.

¶ 11 We first consider defendant's argument that, once the petition for an order of protection was denied, the doctrine of collateral estoppel precluded a criminal conviction based on the conduct alleged in that petition. "Collateral estoppel bars the litigation of an issue that has been fairly and completely resolved in a prior proceeding." *People v. Anderson*, 2013 IL App (2d)

121346, ¶ 15. As we noted in *Anderson*, "[t]he prerequisites to applying collateral estoppel are (1) an identity of issues; (2) a final judgment on the merits in the prior proceeding; and (3) that the party against whom estoppel is asserted was a party, or is in privity with a party, in the prior proceeding." *Id.* Additionally, "collateral estoppel should not be applied unless it is clear that doing so would not be unfair to the party to be estopped." *Id.*

¶ 12 Defendant acknowledges that the State was not a party to the proceedings that took place in Boone County on the petition for an order of protection. However, defendant maintains that the State was in privity with the petitioner (*i.e.* Allison) and is therefore bound by the judgment in those proceedings. According to defendant, the State initiated the order-of-protection proceedings in De Kalb County and then ceded control of the proceedings to Allison's counsel, who adequately represented the State's interests in the proceedings in Boone County. Citing *Holzer v. Motorola Lighting, Inc.*, 295 Ill. App. 3d 963, 972-74 (1998), defendant contends that "[c]eding control of lawsuits is an aspect of privity and results in deeming the party who transferred authority to litigate as represented in the action."

¶ 13 Defendant's reliance on *Holzer* is misplaced. The underlying litigation in *Holzer* concerned rights to license certain lighting technology. One of the creators of the technology, Henri DeMere, had entered into an agreement with the defendant, Motorola Lighting, Inc. (MLI), to license the technology at issue. DeMere was not a party to the litigation, but the *Holzer* court concluded that he was in privity with MLI, inasmuch as his agreement with MLI authorized MLI to represent him in certain litigation related to the technology. The *Holzer* court noted that the agreement "[gave] MLI the 'right' to defend '*any* demand, suit or claim' by a third party 'based on an alleged infringement of a patent or *other right* as a result of the use of the rights granted' under the MLI agreement (emphases added)." *Id.* at 974. The *Holzer* court stressed that the

agreement gave DeMere the right to appoint his own attorney to cooperate in the defense of claims based on rights to the technology at issue. The court reasoned as follows:

> "Clearly, DeMere would be bound by the result if he exercised his right and appointed his own attorney to participate in the case. It appears also that should he waive that right, he would be allowing MLI to proceed on his behalf and should be bound ***." *Id.*

We find nothing in the record here to suggest any remotely similar agreement by the State to be bound by determinations in order-of-protection proceedings in which it was neither a party nor an active participant.

¶ 14 Even if the State was in privity with Allison or Allison otherwise adequately represented the State's interests, the defense of collateral estoppel would be unavailing. *People v. Wouk*, 317 Ill. App. 3d 33 (2000), is instructive. The *Wouk* court noted that in *People v. Krstic*, 292 Ill. App. 3d 720 (1997), the court had held that, because the State was not a party to proceedings on a *pro se* petition for an order of protection, the dismissal of the petition did not collaterally estop the State from prosecuting domestic battery charges. *Wouk*, 292 Ill. App. 3d at 34. The *Wouk* court "confront[ed] the question left unanswered in *Krstic*: Does collateral estoppel prevent the State from prosecuting a domestic battery charge after a hearing judge dismisses an order of protection petition brought and tried by the State?" *Id.* at 34-35. Even though the criminal trial in *Wouk* was "a virtual carbon copy" of the order-of-protection hearing (*id.* at 36) and the parties and the issues were the same in both proceedings (*id.* at 37-38), the *Wouk* court held that collateral estoppel did not apply. The court reasoned as follows:

> "Mindful of 'the practical realities of litigation,' we must balance our legal system's need for finality against the estopped party's right to fully present its case. [Citations.] Here,

the estopped party would be the State. To find estoppel, it must be 'clear that no unfairness will result' to the State. [Citation.]

As section 28 of the Second Restatement (Second) of Judgments instructs:

> 'Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action ***.' [Citation.]

Here, important public policy reasons exist to prevent the application of collateral estoppel.

The differences of purpose and goal in the civil and criminal procedures are 'very real.' [Citation.] The General Assembly identified several purposes underlying the [Illinois] Domestic Violence Act of 1986 (the Act), including to '[s]upport the efforts of victims of domestic violence to avoid further abuse by promptly entering and diligently enforcing court orders which prohibit abuse ***.' [Citation.]

In order-of-protection proceedings, the standard of proof is proof by a preponderance of the evidence [citation], and the respondent has no jury trial right [citation]. The Act provides for expedited service of process [citation], and '[a] petition for an order of protection shall be treated as an expedited proceeding" [citation].

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> Here, the focus of an order-of-protection proceeding is the immediate protection of abused family or household members, not the guilt of the accused and the more general protection of society. [Citations.]
>
> ***
>
> In this case, it is unclear whether unfairness to the State would result from application of the collateral estoppel doctrine. For that reason, we decline to give preclusive effect to the finding made during the order of protection hearing." *Id.* at 39-41.

¶ 15 Noting that the result in *Wouk* "was based on the defense [*sic*] failure to demonstrate that the State would not be unfairly affected by the application of estoppel," defendant contends that "[b]y contrast, in the present case, the State agreed to the transfer of the hearing on the plenary order of protection *** and delegated its responsibility in that matter to private counsel." Even assuming, *arguendo*, that the State delegated responsibility to private counsel in the order-of-protection proceedings, we fail to see why it is any more fair to apply the collateral-estoppel doctrine in this case than it would have been if the State had tried the order-of-protection proceedings itself. In essence, defendant would have us hold that collateral estoppel applies where parties to successive proceedings are in privity, even though under otherwise similar circumstances collateral estoppel would not apply where the parties are identical. We see no sound basis for such a holding. To the contrary, we hold that the trial court correctly ruled that judgment on the petition for an order of protection did not bar the State from prosecuting the domestic battery charges.

¶ 16 We next consider defendant's argument that the State failed to prove his guilt beyond a reasonable doubt. Section 12-3.2(a) of the Criminal Code of 2012 (720 ILCS 5/12-3.2(a) (West 2012)) provides:

> (a) A person commits domestic battery if he or she knowingly without legal justification by any means:
>
> (1) Causes bodily harm to any family or household member;
>
> (2) Makes physical contact of an insulting or provoking nature with any family or household member."

" 'Family or household members' " include "persons who have or allegedly have a child in common[.]" 720 ILCS 5/12-0.1 (West 2012).

¶ 17 A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When we review a challenge to the sufficiency of the evidence, " 'the relevant question 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.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 18 Defendant argues that Allison's testimony was not credible given her animosity toward defendant, as reflected in her e-mails and voice messages. It was the trial court's function to determine the extent to which Allison's evident hostility toward defendant impaired the

credibility of her testimony. For that matter, the trial court was entitled to consider whether defendant might have shoved Allison because he was angry with her about the emails and voice message.

¶ 19 Defendant further argues that Allison's testimony that, although defendant pushed her backward, she fell to her side "defied the laws of physics." We find nothing implausible about Allison's testimony. It is reasonable to believe that she was able to shift her weight to avoid falling backward. Defendant also points to Allison's failure to seek medical attention for her injuries for more than a week after the incident and to produce any photographs of her injuries. Again, it was the trial court's responsibility, not ours, to consider whether these circumstances rendered Allison's testimony about her injuries unworthy of belief. We will not substitute our judgment for the trial court's.

¶ 20 Defendant contends that the trial court "failed to make a finding of a knowing mental state" and instead "focused on two factors wholly collateral to the issue in the case." The factors to which defendant refers are (1) his testimony that he was not angered by Allison's e-mails and voice message and (2) his evident lack of concern for Carter's wellbeing after Allison had fallen. The trial court considered these matters in assessing the credibility of defendant's testimony. Specifically, the trial court found that defendant's testimony that the e-mails and voice message did not anger him was not credible. The trial court further remarked:

> "[Defendant's] failure to even inquire as to whether or not his son was okay when his mother went down to the ground makes anything he testifies to not believable. That's not normal. That's not what a parent would do. He's going to ask the question, and he didn't. He went back into his house, ran back into his house, closed the door, and called the police."

It was reasonable for the trial court to conclude that defendant would not have behaved that way had he not been angry with Allison and had her fall been purely accidental.

¶ 21 For the foregoing reasons, the judgment of the circuit court of De Kalb County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 22 Affirmed.