2015 IL App (4th) 140705-U

NO. 4-14-0705

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 11, 2015
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | McLean County |
| DANIEL R. BARRON, | ) | No. 12CF1056 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Robert L. Freitag, |
| | ) | Judge Presiding. |

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court declined to exercise its authority under Illinois Supreme Court Rule 615(b)(3) (eff. Aug. 27, 1999) to reduce the degree of the offense of which defendant was convicted.

¶ 2 In May 2014, a jury convicted defendant, Daniel R. Barron, of criminal sexual assault (720 ILCS 5/11-1.20(a)(2) (West 2010)). The jury acquitted defendant of a charge of residential burglary. The trial court sentenced defendant to the mandatory minimum sentence of four years' imprisonment. Defendant appeals, asking this court, under Illinois Supreme Court Rule 615(b)(3) (eff. Aug. 27, 1999), to reduce the degree of his offense to criminal sexual abuse. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Count I of the information charged defendant with aggravated criminal sexual assault, alleging defendant knowingly, during the commission of a residential burglary,

committed a criminal sexual assault against L.E.G. by inserting his finger into L.E.G.'s vagina while she was asleep and unable to give knowing consent. 720 ILCS 5/11-1.30(a)(4) (West 2010). Count II of the information charged defendant with residential burglary, alleging defendant entered L.E.G.'s dwelling without authority and with the intent to commit a theft therein. 720 ILCS 5/19-3(a) (West 2010). The charges arose from a September 2012 incident in Normal, Illinois.

¶ 5 A. Jury Trial

¶ 6 At the May 2014 jury trial, the State presented four witnesses: the victim, L.E.G., and three law-enforcement officers who participated in the investigation. L.E.G. testified she was a student at Illinois State University (ISU) in September 2012. At that time, L.E.G. shared a three-story on-campus house with four roommates. L.E.G. occupied the sole bedroom on the third floor.

¶ 7 On the evening of September 7, 2012, L.E.G. and her roommates went to another friend's on-campus apartment and then went out to the bars in Bloomington. L.E.G. testified she had consumed enough alcohol to preclude her from driving a vehicle but was not so intoxicated she could not remember the details of the night. L.E.G. and her friends took the "party bus" to and from Bloomington. L.E.G. carried a small wallet containing her identification card to get into the bars in Bloomington, her debit card, and approximately $60 in cash. L.E.G. testified she did not spend all $60. On cross-examination, L.E.G. acknowledged she paid for the "party bus" and spent some money on drinks at the bars, but she testified she did not know how much money she spent.

¶ 8 L.E.G. estimated she returned home at approximately 2:30 a.m. When she got home, L.E.G. went up to her bedroom, left the clothes she wore that night on the floor, and

changed into a T-shirt and underpants. After talking to her boyfriend on the phone, L.E.G. fell asleep on her bed with the lights on. L.E.G. testified she fell asleep on her left side and awoke to someone touching her along her underwear line on her buttocks. She shuffled around in her bed a bit, thought perhaps she was dreaming, and then began to fall back asleep. Just as she started to fall back asleep, the touching started again and L.E.G. felt fingers begin to penetrate her vagina. L.E.G. testified a finger had been inserted up to "a middle knuckle." Startled, L.E.G. sat up, "got up a little cautiously," and went to turn off the overhead light in her bedroom.

¶ 9 As L.E.G. flipped the light switch off, something caught the corner of her eye. L.E.G. flipped the light switch back on and saw someone, later identified as defendant, crouched in the corner of the room. L.E.G. approached the individual and asked several times who he was and what he was doing. L.E.G. testified the person held up his hands and said, "[P]lease don't call the cops. I am so sorry. I am so sorry. Please don't call the cops." The person headed for the stairs and L.E.G. pushed him down the stairs. L.E.G. waited until she heard the front door close before she went downstairs, checked on her roommates, locked their bedroom doors, locked the front door, and called her mother. On cross-examination, L.E.G. estimated these events occurred around 3:30 a.m. on September 8, 2012.

¶ 10 Approximately 30 minutes after the intruder left her home, L.E.G. called the police. Normal police officer Melanie Crays came to L.E.G.'s home to take a report and informed L.E.G. an officer would contact her at a later time. After Crays left, L.E.G. went to sleep. When she woke up later that morning, L.E.G. noticed she had no cash left in her wallet. Nothing else was missing.

¶ 11 Based on the description L.E.G. gave Crays, Normal Detective Jake Zabukovec obtained video-surveillance footage from the ISU dormitories around the time of the incident.

Zabukovec showed L.E.G. video footage of a couple individuals and L.E.G. almost immediately ruled them out as suspects. After talking with L.E.G., Zabukovec adjusted the time frame of video footage he reviewed. He located another possible suspect and showed that video footage to L.E.G. L.E.G. indicated she was approximately 80% certain the individual in the footage was the intruder.

¶ 12 ISU police officer Derek Ronnfeldt testified he assisted Zabukovec in obtaining the dormitory surveillance videos. Ronnfeldt further testified the university security system requires students to swipe an identification card to enter the dormitories. Once swiped, the security system records the student's name, address, and their student identification number. After L.E.G. identified the intruder in the video footage, Zabukovec contacted Ronnfeldt to get the individual's name. Ronnfeldt checked with ISU housing services and informed Zabukovec defendant was the individual in the footage. After getting defendant's name, Zabukovec pulled up defendant's driver's license photograph. Based on that photograph, L.E.G. was 80% to 90% certain defendant was the intruder.

¶ 13 Zabukovec testified he made contact with defendant on October 8, 2012, and brought him to the Normal police department to interview him. A video of the interview, edited to remove dead time and irrelevant information, was published to the jury. During the course of Zabukovec's interview, defendant claimed a friend dared him to test the front door of L.E.G.'s house and go inside. Defendant said he went into the house, went upstairs, discovered a girl asleep on the bed, and pulled a sheet up to cover her. Eventually, defendant admitted touching the girl on her buttocks and along the edge of her underwear. Zabukovec briefly exited the interview room and when he returned he asked defendant if a rape kit would possibly reveal defendant's deoxyribonucleic acid (DNA) "from his skin" in or on L.E.G.'s vagina. Defendant

answered in the affirmative. Thereafter, defendant admitted he ran his fingers over or "through" L.E.G.'s vagina and it was possible that the tip of his finger entered her vagina. Defendant denied looking in L.E.G.'s wallet and denied taking any money.

¶ 14 Defendant testified on his own behalf. In August 2012, defendant began his freshman year at ISU. Prior to starting college, defendant had only been away from home once with a friend and his friend's father for a two-day fishing trip. At ISU, defendant shared a two-room dormitory suite with three roommates. Defendant testified his grandparents set up a fund for his college tuition and his parents paid for room and board. Defendant saved approximately $5,000 from miscellaneous jobs for spending money and books.

¶ 15 On the evening of September 7, 2012, defendant and some of his roommates had dinner at the ISU dining hall and returned to their dormitory living area. After dinner, defendant and his friends consumed Bacardi, a brand of rum, mixed with sodas. Around 10:30 p.m., defendant and a group of seven or eight others left the dormitory to go to a party at a nearby apartment. The group set off on foot with a case of beer; defendant had a glass pipe and some marijuana with him. As they were walking to the party, a group of men sitting on the front porch of a house invited defendant and his friends to smoke marijuana.

¶ 16 The group continued down the sidewalk and passed an apartment building. A man on the balcony of one of the apartments called out to ask the group if they were arriving for the party. The group decided to go up to that party instead of finding the party they originally set out for. Defendant testified he had three or four beers from a keg of beer at the apartment. At some point, defendant went outside to smoke a cigarette and thought about finding the house where the group of men on the porch had invited defendant to smoke marijuana. Defendant set off to find that house around 1 a.m. Defendant testified he moved into the dormitory three weeks

earlier and was not very familiar with the area. He walked a few blocks and found the group of men and asked if they wanted to smoke marijuana. The group used defendant's pipe and marijuana. After smoking and talking with the group for approximately 20 minutes, defendant returned to the party where his friends were and consumed more alcohol.

¶ 17 Defendant and his friends took a different route home and eventually returned to the dormitory around 2:30 or 3 a.m. As defendant got ready for bed, he discovered his pipe and marijuana were missing. After looking for the items, defendant returned to the apartment party to see if he left the items there. He walked into that apartment, told the people there what he was looking for, and looked for his belongings. Unsuccessful, defendant then retraced his steps between the apartment party and the house where he smoked marijuana with the group of men.

¶ 18 Defendant had some difficulty but eventually thought he found the house around 4 a.m. Defendant looked on the porch for his pipe. The lights were on, so he knocked on the door but received no answer. Defendant testified, "I just decided the lights were on. I had talked to them earlier. I had met them. I walked inside to see if I could find somebody."

¶ 19 Defendant entered through the unlocked front door. Seeing no one in the first room, defendant called out, "hello." He heard a thump that sounded like a footstep upstairs. Assuming someone was coming to meet him, defendant started up the stairs. The second floor's lights were off, but defendant saw a stairway to the third floor, where the lights were on. Defendant took the stairs to the third floor and found himself in a bedroom.

¶ 20 Defendant testified he saw a girl wearing underwear and a hooded sweatshirt sleeping on the bed. Defendant further testified, "My first thought was that she didn't have the blanket on her, so I was going to go cover her up with the blanket." Instead, defendant touched her "[a]round the waistband [of her underwear] and then near like the bottom side of her

buttocks, like near her thigh." Defendant testified he did not touch the outside of her vagina because she was wearing underwear. He admitted he touched L.E.G. under her underwear on her buttocks, but denied penetrating her vagina with his finger. He touched L.E.G. for 30 seconds to a minute. He was no longer touching L.E.G. when she stirred and woke up.

¶ 21 After L.E.G. woke up, defendant testified she turned the lights off, then immediately turned the lights back on. She saw defendant and asked him who he was and what he was doing. Defendant testified L.E.G. tried to hit him once, which defendant blocked, but her second attempt hit defendant's head. Defendant headed for the stairs and testified he fell down the flight of stairs. Defendant testified he did not go into any other rooms in the house, did not take anything from the house, and did not take any money from the bedroom. Defendant eventually found his pipe and marijuana in his jacket pocket back in his dormitory.

¶ 22 Defendant acknowledged his changing story during the interview with Zabukovec. Defendant testified he was nervous and did not want to tell the police officer he was searching for his pipe and marijuana. Defendant testified he never actually told Zabukovec his finger penetrated L.E.G.'s vagina. Defendant testified the officer was "very persistent and coercive," and defendant was mentally exhausted when he conveyed his finger may have possibly entered L.E.G.'s vagina. On cross-examination, the State elicited testimony defendant had admitted to Zabukovec he had previously been arrested for marijuana possession. Following defendant's testimony, the defense rested.

¶ 23 During the instruction conference, defense counsel requested the court instruct the jury on the lesser-included offense of criminal sexual abuse. The trial court gave counsel the opportunity to present argument and case law on the question of whether the second element of criminal sexual abuse, sexual conduct done for the purpose of sexual gratification, could be

inferred. Ultimately, the court decided criminal sexual abuse was a lesser-included offense of aggravated criminal sexual assault in this case. The court based its decision on *People v. Kennebrew*, 2013 IL 113998, 990 N.E.2d 197, and *People v. Kolton*, 219 Ill. 2d 353, 848 N.E.2d 950 (2006). The court also ruled criminal sexual assault and aggravated criminal sexual abuse were lesser-included offenses. Accordingly, the jury was instructed on: (1) aggravated criminal sexual assault; (2) criminal sexual assault; (3) aggravated criminal sexual abuse; (4) criminal sexual abuse; and (5) residential burglary.

¶ 24 During deliberations, the jury requested to review a portion of defendant's videotaped interview with Zabukovec. Specifically, the jury wished to see the portion of the interview after Zabukovec asked defendant if a rape kit would possibly reveal defendant's DNA and defendant's subsequent admission he touched L.E.G.'s vagina and the tip of his finger possibly entered her vagina. The jury found defendant guilty of criminal sexual assault and not guilty of residential burglary. After the jury delivered the verdict, the State moved to hold defendant in custody until sentencing. Defense counsel objected and the trial court denied the State's motion, noting defendant's consistent appearances at court dates and finding defendant was "not likely to flee or pose a danger to anyone else in the community given the evidence in this case."

¶ 25 B. Sentencing

¶ 26 Defendant submitted eight character letters in mitigation. Defendant's boss, a former teacher, a neighbor, a therapist, a friend, and volunteer work supervisors all wrote letters on defendant's behalf. These letters document defendant's superior work ethic, service in his community, remorse over the events leading to his conviction, academic achievements at community college, and his kindness and selflessness. Additionally, defendant presented nine

mitigation witnesses: two family friends, his former nanny, his girlfriend, his aunt, his siblings, and his parents. These witnesses testified to defendant's caring nature, his genuine remorse, his aspirations for the future, his strong and supportive family ties, and how out of character defendant's actions were on the night of the incident. His mother also testified to defendant's shame and remorse regarding the incident, the anxiety and depression defendant has suffered as a result of his actions, and his youth (defendant was just four months past his eighteenth birthday at the time of the incident).

¶ 27 The State contended no aggravating circumstances existed beyond the crime itself, asked the trial court to take the victim-impact statement into consideration, and recommended the mandatory minimum sentence of four years' imprisonment. Defense counsel highlighted the substantial mitigation evidence, defendant's lack of criminal history, and how unlikely defendant was to commit another offense, and counsel also requested the court impose the minimum sentence. In his statement in allocution, defendant expressed his deep remorse and his fears for his physical and mental well-being in prison.

¶ 28 The trial court acknowledged the substantial and impressive evidence in mitigation of defendant's character and upbringing. The trial judge also stated:

> "I don't believe that you'll do this again, so the idea of deterrence and rehabilitation, they lose a lot of effect in a case that involves someone with your kind of character, but the unfortunate truth is I have to sentence you to the Department of Corrections, and I have to take into account the seriousness of this offense. Obviously, my decision today would be a lot more difficult if I had the option of probation, and I think it's only fair to tell you now that if I had that

option available to me, I do not think I would take that option because of the seriousness of this offense and the effect that it had on [L.E.G.]."

The court sentenced defendant to the mandatory minimum sentence of four years' imprisonment. The court denied defendant's motion to stay the sentence and declined to set bail pending appeal and defendant was taken into custody.

¶ 29 This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 On direct appeal, defendant asks this court to reduce the degree of his offense from criminal sexual assault to criminal sexual abuse pursuant to Illinois Supreme Court Rule 615(b)(3) (eff. Aug. 27, 1999). Defendant argues this court may reduce the degree of the offense when (1) there is an "evidentiary weakness" as to one of the elements of the greater offense; (2) the mandatory minimum sentence is unduly harsh; and (3) a lesser-included offense is available. The State contends the reviewing court may exercise the Rule 615(b)(3) power only where the evidence is insufficient to prove beyond a reasonable doubt an element of the greater offense but the evidence *is* sufficient to prove beyond a reasonable doubt the lesser-included offense. Neither party contends criminal sexual abuse is not a lesser-included offense of aggravated criminal sexual assault in this case. Defendant concedes the evidence would be sufficient to convict on the greater offense of criminal sexual assault under the traditional sufficiency-of-the-evidence test. Defendant argues that deferential test should not apply; rather, this court should adopt a broader view of the scope of Rule 615(b)(3) and, under *de novo* review, evaluate the alleged evidentiary weakness regarding whether defendant's finger penetrated L.E.G.'s vagina.

¶ 32 In pertinent part, Illinois Supreme Court Rule 615(b)(3) (eff. Aug. 27, 1999) reads: "the reviewing court may *** reduce the degree of the offense of which the appellant was convicted." Courts have applied Rule 615(b)(3) under different formulations. "Some courts have held Rule 615(b)(3) applies only where the evidence is insufficient to prove an element of the offense beyond a reasonable doubt." *People v. Jones*, 286 Ill. App. 3d 777, 781, 676 N.E.2d 1335, 1338 (1997) (First District, citing *People v. Kick*, 216 Ill. App. 3d 787, 576 N.E.2d 395 (1991) (Second District)). Other decisions have held Rule 615(b)(3) "extends beyond the general principle that a conviction will not be disturbed on appeal unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Jones*, 286 Ill. App. 3d at 783, 676 N.E.2d at 1339. See, *e.g.*, *People v. Plewka*, 27 Ill. App. 3d 553, 327 N.E.2d 457 (1975) (First District); *People v. Coleman*, 78 Ill. App. 3d 989, 398 N.E.2d 185 (1979) (Third District); *People v. Jackson*, 181 Ill. App. 3d 1048, 537 N.E.2d 1054 (1989) (Third District). The latter decisions have held the appellate court may reduce the degree of the offense, despite sufficient evidence to support a guilty verdict on the greater offense, "when there is (1) an evidentiary weakness in the State's case, (2) a mandatory minimum sentence that is unsatisfactorily harsh, and (3) a conviction for a lesser-included offense." *People v. Godfrey*, 382 Ill. App. 3d 511, 513, 888 N.E.2d 1230, 1233 (2008) (Third District). See also *People v. Hooker*, 249 Ill. App. 3d 394, 403, 618 N.E.2d 1074, 1081 (1993) (First District); *People v. Hernandez*, 229 Ill. App. 3d 546, 552, 593 N.E.2d 1123, 1128 (1992) (Third District). However, even under a broader view of Rule 615(b)(3), a court may not reduce the degree of the offense "solely out of merciful benevolence [because] there must be some evidentiary weakness before a reviewing court will act." *Jackson*, 181 Ill. App. 3d at 1051, 537 N.E.2d at 1056.

¶ 33 In this case, we need not decide which formulation of Rule 615(b)(3) prevails because defendant is not entitled to a reduction of the degree of his offense under either formulation. Even assuming the broader view of Rule 615(b)(3) applied, the "evidentiary weakness" in this case is not of the kind contemplated by the courts adopting this test. "Whatever 'evidentiary weakness' means, it has to be something that causes us to have grave concern about the reliability of the guilty verdict. Something is 'weak' when it is lacking or deficient in strength. [Citation.] There is little point in trying to frame a more precise definition of the 'evidentiary weakness' standard. We have to hope we will know it when we see it." *Jones*, 286 Ill. App. 3d at 784, 676 N.E.2d at 1340. A mere determination of witness credibility is not enough to qualify as an evidentiary weakness, and this court "must be aware of [its] obligation to give deference to the trier of fact." *Jones*, 286 Ill. App. 3d at 783, 676 N.E.2d at 1340.

¶ 34 In *Jackson*, the defendant was a handyman with keys to the victim's apartment. *Jackson*, 181 Ill. App. 3d at 1050, 537 N.E.2d at 1056. The victim had requested defendant fix her toilet. *Jackson*, 181 Ill. App. 3d at 1050, 537 N.E.2d at 1056. The defendant testified he entered the victim's apartment to fix the toilet and admitted he took $5 or $6 from a jar in the apartment. *Jackson*, 181 Ill. App. 3d at 1050, 537 N.E.2d at 1056. A detective testified the defendant told him he got hungry, entered the apartment, took the money, and went to buy food. *Jackson*, 181 Ill. App. 3d at 1050, 537 N.E.2d at 1056. Based on these facts, a jury convicted the defendant of residential burglary. *Jackson*, 181 Ill. App. 3d at 1050, 537 N.E.2d at 1056.

¶ 35 The Third District reduced the degree of his conviction pursuant to Rule 615(b)(3). *Jackson*, 181 Ill. App. 3d at 1052, 537 N.E.2d at 1057. The court noted the relevant factors for this decision "are whether an evidentiary weakness exists and whether the trial judge expressed dissatisfaction with imposing the mandatory sentence." *Jackson*, 181 Ill. App. 3d at

1051, 537 N.E.2d at 1056. As to the evidentiary weakness, the court noted the victim did not testify as to whether the defendant was working on her toilet and the detective could not recall whether defendant stated he was in the apartment to fix the toilet. Given this evidence as to intent, the court stated:

> "The evidence at issue here is not fatally weak to the State's case, since intent may be proved circumstantially by inferences drawn from the defendant's conduct [citation], and since the issue of whether the requisite intent existed is a question for the trier of fact [citation]. We note, however, that the evidence is nevertheless weak. Furthermore, the evidentiary weakness is not the result of conflicting accounts of the incident by the State's witnesses on the one side and the defendant on the other. In other words, we are not dealing with a mere issue of credibility. Rather, the State's evidence showed little inconsistency with the defendant's testimony that he formulated the requisite intent after he entered the apartment to perform maintenance work." *Jackson*, 181 Ill. App. 3d at 1051-52, 537 N.E.2d at 1057.

Evaluating the evidence in light of the trial court's expression of dissatisfaction with the mandatory minimum sentence, the Third District reduced the degree of the defendant's offense to criminal trespass, relying on Rule 615(b)(3).

¶ 36 In the case at bar, defendant admitted during his interview with Zabukovec his finger possibly penetrated L.E.G.'s vagina. At trial, he testified his finger did not penetrate L.E.G.'s vagina. Defendant further testified he never actually said his finger penetrated L.E.G.'s

vagina during the interview with the detective. However, L.E.G. testified she was "really startled" and woke up when she felt a finger penetrating her vagina up to "a middle knuckle." Defendant argues L.E.G.'s testimony constitutes weak evidence because she was asleep when the touching began, thought she was dreaming or perhaps her boyfriend was in bed with her, and was "hazy" upon waking up.

¶ 37 The fact that L.E.G. did not wake from her slumber with instant alacrity does not render the evidence weak. Rather, it speaks to the credibility of her testimony. The jury heard L.E.G.'s testimony regarding the issue of penetration, it heard defendant's conflicting account, and it had the opportunity to review defendant's videotaped interview. The credibility of witness testimony is an issue for the trier of fact and defendant's argument relies on this court making credibility determinations in order to find an evidentiary weakness—something the *Jackson* court properly recognized would be inappropriate. *Jackson*, 181 Ill. App. 3d at 1051-52, 537 N.E.2d at 1057. A witness's credibility is not the sort of evidentiary weakness recognized by those cases applying the broader formulation of Rule 615(b)(3).

¶ 38 Defendant concedes the sufficiency of the evidence to convict on criminal sexual assault under the tradition sufficiency-of-the-evidence test. We agree. After viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of criminal sexual assault beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 117-18, 871 N.E.2d 728, 742 (2007). In order to convict defendant of criminal sexual assault in this case, the State must prove (1) sexual penetration, however slight; and (2) defendant knew L.E.G. could not give knowing consent. 720 ILCS 5/11-0.1, 11-1.20(a)(2) (West 2010). In this case, the testimonial evidence as to the former is not so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of defendant's guilt. *People v.*

*Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008). Further, L.E.G. was asleep at the time of the sexual penetration and was unable to give knowing consent. See, *e.g.*, *People v. Lloyd*, 2013 IL 113510, ¶ 40, 987 N.E.2d 386.

¶ 39 To summarize, we leave for another day the question of whether Rule 615(b)(3) authorizes this court to reduce the degree of an offense only when the evidence is insufficient to prove an element of the greater offense or if the authority provided by the rule is broader in scope because defendant is unsuccessful under either formulation. This case presents no evidentiary weakness as contemplated by the decisions employing the broader formulation of the rule; here, defendant raises a mere question of witness credibility and we defer to the trier of fact. *Jones*, 286 Ill. App. 3d at 783, 676 N.E.2d at 1340. Further, any rational trier of fact could have found the evidence proved the elements of criminal sexual assault beyond a reasonable doubt. Thus, we decline to reduce the degree of defendant's conviction from criminal sexual assault to criminal sexual abuse.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed.