2016 IL App (1st) 131595-U

No. 1-13-1595

January 15, 2016

FIFTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. OGONNA SALLY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 11 CR 12126 The Honorable Joel L. Greenblatt, Judge presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

Held: Defendant's conviction is affirmed where the trial court did not abuse its discretion by admitting other-crimes evidence. However, the order of protection and fines and fees order are modified.

¶ 1 Following a jury trial, defendant, Ogonna Sally, was convicted of a felony violation of an order of protection (VOOP) and sentenced to two years in prison. He appeals, arguing (1) the

trial court erred by allowing the State to admit extensive evidence of uncharged offenses, (2) the order of protection issued during sentencing must be modified, and (3) his fines and fees order must be modified. For the reasons that follow, we affirm the trial court's judgment and modify both the order of protection and the fines and fees order.

¶ 2 I. BACKGROUND

¶ 3 A grand jury indicted defendant with VOOP in that on June 25, 2011, he entered the residence of his ex-wife, Linda McGowan-Sally, in Hoffman Estates, Illinois, after having been served with or otherwise acquiring actual knowledge of an order of protection which prohibited his entry to that address. Based on his prior domestic battery conviction, defendant's VOOP charge was elevated to a Class 4 felony.

¶ 4 Prior to trial, the State filed an amended motion in limine to admit evidence of other crimes. The State sought to introduce defendant's June 2011 VOOP conviction as well as evidence regarding uncharged offenses on March 21, 2011, and June 15, 2011. In the March 21 incident, Linda allegedly overheard defendant asking one of his children over the phone, "If I killed your mother, would you come and live with me?" In the June 15 incident, Linda purportedly confronted her son after finding defendant's clothes in her washing machine, and her son responded by punching the microwave and breaking it. When Linda told defendant that their son had broken the microwave, defendant allegedly responded, "well something else is going to be broke in a minute."

¶ 5 The State sought to introduce evidence of the uncharged offenses as propensity evidence under sections 115-7.4 and 115-20(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.4, 115-20(a) (West 2010)). In addition, the State argued that the prior incidents

were relevant to show defendant's knowledge of the order of protection and its contents, intent, state of mind, and dislike for and attitude toward Linda.

¶ 6 Defendant filed a response, arguing, *inter alia*, that section 115-7.4 of the Code did not apply, as he was not charged with domestic violence. Defendant also filed a motion to bar testimony regarding the nature of his arrest[1] and motion to bar the introduction of the underlying allegations in the petition for the order of protection, which related to an incident on December 31, 2010. In that incident, defendant purportedly pushed Linda, accused her of having a sexual relationship with another man, and demanded money.

¶ 7 Following a hearing, the trial court granted the State's motion to allow the admission of the other-crimes evidence, stating such evidence would "be allowed as propensity evidence and also to show defendant's intent, dislike for and attitude toward the victim, his state of mind and acknowledgment[2] of the existence of the order of protection." The court stated it had considered and weighed the prejudicial impact and probative value of the evidence and found the probative value far exceeded the prejudicial risk. The court also granted defendant's motion to bar testimony regarding the nature of his arrest but denied his motion to bar testimony regarding the underlying allegations in the petition for order of protection.

¶ 8 Thereafter, defendant's jury trial commenced, at which the parties presented the following evidence.

¶ 9 Robert McGowan, Linda's cousin, testified that he went to Linda's house to buy a car from her on June 25, 2011. McGowan parked his truck and trailer in Linda's driveway. Later that evening, Linda received a phone call from her sons, and they arrived home shortly thereafter.

[1] In his motion, defendant explained that he was arrested for the VOOP charge at the Rolling Meadows courthouse on July 1, 2011, after being sentenced on another offense.
[2] Presumably the court was referring to the defendant's knowledge of the existence of the order of protection.

When the boys entered the home, defendant followed. Defendant asked Linda whose truck was outside, and he and Linda discussed the fact that he was he not supposed to be at the house. Defendant then told McGowan that Linda let her daughter die and her daughter would still be alive if Linda had stayed home on the day she passed away. McGowan knew that Linda's daughter had passed away prior to June 2011. After defendant's "badgering" of Linda, Linda asked him to leave, and defendant complied.

¶ 10 The State then called three additional witnesses to testify: Linda, Officer Mike Barber, and Detective Kasia Cawley. Before each witness testified, the trial court admonished the jury that it would hear evidence of the defendant's involvement in conduct other than the conduct charged in his indictment, and such evidence was only to be considered on the issues of defendant's propensity, intent, dislike for and attitude toward the victim, state of mind, and acknowledgment of the existence of the order of protection.

¶ 11 Linda testified that she and defendant married in 1996, lived together until 2003, and divorced in 2008. They had three sons together: 17-year-old Ola.S., 15-year-old Olo.S., and 13-year-old Oli.S. Linda's three sons lived with her.

¶ 12 On December 10, 2010, Linda's daughter, Ebony, passed away in Linda's home from a heroin overdose. On December 31, 2010, defendant and Ola.S., who was staying with defendant for the weekend, entered Linda's home to pick up some items. Defendant asked for money for the obituaries he had printed for Ebony. When Linda refused, defendant shoved her from the family room into the back of her bedroom, threw her on the bed, and took her clothes out of the closet. Defendant accused Linda of "f-ing another man" and called her a whore. Ola.S. also held up a photograph and said, "Mom, are you f***ing this man?" Linda told defendant that she was

going to go to the police station. Defendant then put her clothes back in her closet, apologized, and left with Ola.S.

¶ 13 Thereafter, Linda went to the police station. On January 6, 2011, she obtained a 21-day emergency order of protection against defendant. On January 27, 2011, she obtained a two-year plenary order of protection. The order prohibited defendant from entering Linda's residence, harassing her, or having any contact with her other than to discuss their children.[3] Defendant was present in court when the plenary order was issued and was served with it in open court.

¶ 14 Linda further testified that on June 25, 2011, McGowan visited her to buy a car. He parked his truck and trailer in the driveway. Linda's sons were with defendant for the weekend. However, they returned that evening and knocked on Linda's door. When she opened the door, the boys entered and defendant followed. Linda reminded defendant that the order of protection prohibited him from being in the home. However, defendant "shooed" her off. Defendant then introduced himself to McGowan as the boys' dad and started talking about how "foul" Linda was to let her daughter die inside the home. About five or ten minutes later, defendant left. Linda and McGowan subsequently went to the police station to report the incident.

¶ 15 According to Linda, between March 16 and March 19, 2011, defendant called her 20 times a day. The calls started as early as 2:30 a.m. At around 11 a.m. on March 19, defendant called to tell Linda he did not want her to take the boys to a picnic. He said that he did not like Linda's friend Tina, who probably had a "man there" at the picnic "waiting on" Linda. At around 1 p.m. that day, defendant called Linda's cell phone and said he still loved her and wanted her to come back home. Linda told defendant that she had an order of protection and he should stop calling. Linda subsequently went to the picnic. When she returned home at 10:30 p.m., she

[3] The order also originally included Linda and defendant's three children; however, it was modified in April 2011 to allow defendant to be with the children.

received "a lot" of phone calls. She answered a few of the calls, and they were all from defendant. He again told her loved her and that they needed to bring their family back together.

¶ 16 Linda acknowledged that her children returned home at around 11 p.m. on the day of the picnic. She recalled defendant calling at around 1 a.m. but denied recalling whether one of her sons talked to him. Later, she testified that she "assume[d]" he spoke to his sons when he called between 11 p.m. and 1 a.m., but she "was not up at that time." She acknowledged that at defendant's hearing, she testified she did not answer when defendant called that night after 10:30 p.m. and that when defendant called between 11 p.m. and 1 a.m., he was "[p]robably" talking to her sons.

¶ 17 According to Linda, based on the phone calls, defendant was convicted of VOOP.

¶ 18 On March 21, 2011, Linda heard a conversation between defendant and her three sons over the speaker phone of one of her son's cell phones. During the conversation, defendant asked, "[I]f I kill your mom, would you come live with me?"

¶ 19 On June 15, 2011, Linda returned home and noticed clothes in the washing machine. When she transferred the clothes to the dryer, she saw that they belonged to defendant. Linda took them to the police station and made a report. Later, Linda asked her oldest son about the clothes. In response, he "burst out [her] microwave with his fist." Linda called the police, and Officer Michael Barber came to her home. While he was there, defendant called. Linda told defendant that their oldest son "burst out [her] microwave" and defendant told her "more than that is going to get broken." Linda gave her phone to Officer Barber. After Barber and defendant's conversation ended, defendant called several more times, threatening Linda that more things were going to get broken.

¶ 20 Linda acknowledged that she never actually saw anyone put clothes in the washing machine on June 15. She agreed that police did not file charges after that incident. Linda also acknowledged that defendant was the one who filed for divorce. According to Linda, defendant was "highly" involved in their sons' academics. After Ebony's death in December 2010, her sons told her they wanted to live with defendant. At the time of trial, Linda still had custody of her children; however, her oldest son, Ola.S., wanted to live with defendant.

¶ 21 Mike Barber testified that he was a police officer for the Village of Hoffman Estates. On June 15, 2011, Barber responded to a report of a domestic problem at Linda's residence. When he arrived, he observed the microwave's door was broken. As he was discussing the microwave with Linda, her cell phone started ringing. Linda answered one of the calls and told Barber, "That's him." From his distance about a foot or foot and a half away from Linda, Barber could hear the person on the phone say, "Something else is going to get broken too." Linda handed Barber the phone and said, "He just threatened me again." Barber then spoke to defendant, identifying himself as a police officer and explaining that defendant could be violating an order of protection. Defendant kept interrupting and controlling the conversation. Eventually, Barber hung up on defendant.

¶ 22 Barber remained at the home for another 30 minutes, during which time defendant made 5 to 10 additional phone calls. Linda answered one of the calls, and it sounded like defendant was yelling at her over the phone about the order of protection.

¶ 23 Kasia Cawley, a detective with the Hoffman Estates police department, testified that she was assigned to investigate the June 25 incident. After speaking to Linda and McGowan, Cawley arrested defendant.

¶ 24 Cawley also investigated the March 2011 incidents leading up to defendant's prior VOOP conviction, in which defendant allegedly called Linda numerous times. Cawley made contact with defendant on April 15, 2011. He was "very belligerent" but agreed to call the next day to arrange a meeting. However, defendant never did so. Cawley went to his residence but could not find him. She eventually reached him by telephone on May 4, 2011. Defendant was "very belligerent" again but indicated he would come speak with Cawley. Again, however, he did not do so.

¶ 25 On May 5, 2011, Cawley received a call from the front desk of the police station. When she went out to the lobby, she did not see anybody there. Outside in the parking lot, she saw defendant walking away. Cawley arrested defendant and took him back to the police station. After giving defendant his *Miranda* warnings, Cawley took him to the lockup area to be processed. While she was processing him, defendant stated, "I'll call my kids any time I want to call my kids and you can't stop me." Cawley told defendant he was calling his kids in the middle of the night when they were sleeping, and defendant screamed, "Damn right, I'll call my kids at one, two three in the morning and I'll continue to do it."

¶ 26 The trial court admitted into evidence a certified copy of defendant's prior VOOP conviction that resulted from these incidents.

¶ 27 Ola.S. testified on defendant's behalf. On December 31, 2010, Ola.S. went to Linda's house with his two younger brothers and defendant to pick up toothbrushes and clothes. While there, Ola.S. asked his mom about a picture he found under her mattress of another man. Ola.S. discovered the photograph while searching for pictures of Ebony for her funeral. Ola.S. denied that defendant pushed, dragged, or hit Linda that day.

¶ 28 Ola.S. further testified that on March 19, 2011, Linda went to a picnic and returned home at around 10:45 or 11:00 p.m., at which point she went to sleep. Ola.S. stayed up discussing a school project over the phone with his father until 2 or 3 a.m. The family computer was not working, so defendant was conducting research on his computer and Ola.S. was writing down the information defendant gave him.

¶ 29 On March 21, 2011,[4] Ola.S. and his brother were speaking to defendant via speaker phone. Earlier that day, all of the boys were supposed to go bowling. However, Ola.S. and Linda got into a fight. Linda told Ola.S. he could not go and Ola.S's youngest brother refused to go without Ola.S., so Ola.S.'s middle brother and Linda went bowling alone. When they returned that night, defendant explained to Ola.S.'s brother that Linda was trying to play favorites to make the boys agitated. Defendant said something like "what if I did this, would you come and do this with me, even though I just did something wrong, would you still go and have fun with me even though I did something wrong."

¶ 30 According to Ola.S., the scrubs that Linda discovered in their washing machine on June 15, 2011, belonged to him. He had borrowed the scrubs from defendant, who was a certified nurse assistant, for his internship at a nursing home. Ola.S. put the clothes in the washing machine. Later that day, Ola.S. punched the family's microwave and broke it. Linda yelled at him, smacked him in the head, and called the police.

¶ 31 On June 25, 2011, defendant dropped Ola.S. and his two brothers off at Linda's house at around 11 p.m. McGowan was sitting outside, smoking a cigarette by the driveway. Defendant remained in the vehicle, and Ola.S. told McGowan that defendant wanted to talk to him. Ola.S. and his brothers then went into the house. Eventually, McGowan came back into the house and

[4] Defense counsel asked Ola.S. about March 21, 2009, but apparently was referring to March 21, 2011.

sat on the couch, and Ola.S. went back into his bedroom. At no point did Ola.S. observe his father enter the home that night.

¶ 32 Ola.S. testified that he had wanted to live with defendant for several years, and defendant wanted Ola.S. to live with him. However, Ola.S. still lived with Linda. Ola.S. and his father talked over the phone ever day through the landline.

¶ 33 Following closing arguments, the jury found defendant guilty of VOOP. At a later hearing, the trial court sentenced defendant to two years in prison and four years of mandatory supervised release (MSR). The State requested that the order of protection "continue until two years after the date" of the termination of defendant's MSR term. The court granted the State's motion, stating as follows. "The order of protection heretofor issues. I believe it was issued in a different numbered case. If that is, in fact, true, that order shall terminate and you will prepare a new order of protection in this case, the same to expire two years after the expiration of the period of mandatory supervised release." The court also imposed various assessments.

¶ 34 This appeal followed.

¶ 35 II. ANALYSIS

¶ 36 On appeal, defendant argues that (1) the trial court erred by allowing the State to admit extensive evidence of uncharged offenses, (2) the order of protection imposed against him at sentencing must be modified, and (3) his fines and fees order must be modified. We address defendant's arguments in turn.

¶ 37 A. Evidence of Uncharged Crimes

¶ 38 Defendant first asserts that the trial court erred by allowing the State to admit evidence regarding the incidents on December 31, 2010; March 21, 2011; and June 15, 2011. Defendant maintains these incidents were inadmissible as propensity evidence under sections 115-7.4 or

115-20 of the Code. Furthermore, defendant contends, the incidents were irrelevant to any other issue in the case and more prejudicial than probative. Finally, he posits that even if the other-crimes evidence had some minimal probative value, the court erred by allowing such evidence to become the focus of his trial.

¶ 39 1. *Propensity*

¶ 40 We turn first to defendant's contention that the other-crimes evidence was inadmissible to demonstrate his propensity to commit VOOP.

¶ 41 "Other-crimes" evidence refers to misconduct or crimes that occurred either before or after the conduct for which the defendant is on trial. *People v. Spyres*, 359 Ill. App. 3d 1108, 1112 (2005). Generally, under common law, such evidence is admissible if relevant for any purpose other than to demonstrate a defendant's propensity to commit a crime. *People v. Chapman*, 2012 IL 111896, ¶ 19. We review the trial court's ruling as to admissibility of other-crimes evidence for an abuse of discretion. *Id.* We consider questions of statutory interpretation *de novo*. *In re Michael D.*, 2015 IL 119178, ¶ 9.

¶ 42 Section 115-7.4 of the Code partially abrogates the common-law rule by allowing other-crimes evidence on the issue of propensity in certain cases. *People v. Dabbs*, 239 Ill. 2d 277, 285 (2010). Specifically, section 115-7.4 of the Code provides, in relevant part, that "[i]n a criminal prosecution in which the defendant is accused of an offense of domestic violence as defined in paragraphs (1) and (3) of Section 103 of the Illinois Domestic Violence Act of 1986, *** evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant." 725

ILCS 5/115-7.4(a) (West 2010).[5] Section 103 of the Illinois Domestic Violence Act of 1986 (Act) Act defines "domestic violence" as "abuse." 750 ILCS 60/103(3) (West 2010). In turn, "abuse" is defined as, *inter alia*, "harassment" and "interference with personal liberty or willful deprivation." 750 ILCS 60/103(1) (West 2010).

¶ 43 The State argues that defendant was accused of both harassment and interference with personal liberty. We agree.

¶ 44 The Act defines "harassment" as "knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner." 750 ILCS 60/103(7) (West 2010). In other words, harassment occurs when a person engages in intentional acts that cause the victim to become worried, anxious, or uncomfortable. *People v. Zarebski*, 186 Ill. App. 3d 285, 294 (1989). "Interference with personal liberty" is defined as "committing or threatening physical abuse, harassment, intimidation or willful deprivation so as to compel another to engage in conduct from which she or he has a right to abstain or to refrain from conduct in which she or he has a right to engage." 750 ILCS 60/103(9) (West 2010).

¶ 45 As defendant notes, his indictment charged him with VOOP in that he "entered or remained" at Linda's residence. It did not charge him with VOOP in that he harassed Linda. However, the testimony surrounding the charged incident establishes that defendant's conduct on the day he entered Linda's home also amounted to harassment. At trial, Linda and McGowan testified that defendant entered the home and, once inside, asked Linda whose truck was outside.

[5] Based on our review of the transcript, it appears the trial admitted the other-crimes evidence pursuant to both sections 115-20 of the Code and 115-7.4 of the Code. Defendant argues that the evidence should not have been admitted under section 115-20 of the Code. In its brief, the State does not respond to defendant's argument regarding section 115-20 of the Code. Because we find the evidence was properly admitted under section 115-7.4 of the Code, we need not address section 115-20. Further, we note that even if the trial court did not admit the other-crimes evidence under section 115-7.4, "we may affirm the admission of evidence of any basis appearing in the record, regardless of whether it was relied on by the trial court." *People v. Gumila*, 2012 IL App (2d) 110761, ¶ 56.

McGowan described defendant as "badgering" Linda. Defendant told McGowan that Linda caused her daughter's death and that Ebony would not have died if Linda were home. While neither Linda nor McGowan explicitly testified that defendant's actions caused Linda emotional distress, one can reasonably infer and presume that when defendant entered Linda's home in violation of an order of protection, failed to leave after being told he was in violation, and then blamed her for the recent death of her daughter, such conduct would cause her such emotional distress.

¶ 46 Defendant notes that the Act sets forth certain activities that carry a presumption of causing emotional distress. See 750 ILCS 60/103(7) (West 2010). He maintains that these acts are all "more severe" than his act of entering Linda's home. However, defendant did not merely enter Linda's home. He also blamed her for the death of her child in front of her cousin. We cannot agree that such behavior was "less severe" than, for example, repeatedly telephoning a person or creating a disturbance at her place of employment or school. See 750 ILCS 60/103(7)(i), (ii) (West 2010). Nevertheless, while section 103(7) sets forth acts which presumptively cause emotional distress, this is not an exclusive list of acts that can cause such distress.

¶ 47 Defendant's reliance on *In re Marriage of Healy*, 263 Ill. App. 3d 596 (1994), does not convince us otherwise. There, the wife testified that her husband used "verbal cuss words" in front of the children, but the defendant "didn’t say it out loud." *Id.* at 597. The wife's response was to "walk away" because she "didn't want to be bothered." *Id.* In her petition, the wife said she was "extremely fearful" of her husband. *Id.* at 600. The *Healy* court found that although the wife made conclusory allegations that she was anxious and uncomfortable, the record contained no evidence that her husband engaged in knowing conduct that was "not necessary to accomplish

a purpose which was reasonable under the circumstances" and that "would have caused a reasonable person emotional distress." *Id.* at 600.

¶ 48 Here, defendant entered into Linda's home in violation of an order of protection and blamed her for the recent death of her daughter. Thus, he engaged in knowing conduct which was unnecessary and would have caused a reasonable person emotional distress. *Healy* does not aid defendant.

¶ 49 In addition to harassment, defendant's actions of entering Linda's home, uninvited, and blaming her for her daughter's death also constituted "interference with personal liberty." Linda was entitled to enjoy the sanctity of her home, with whomever she pleased, without the presence of defendant and without having to listen to him berate her, especially in light of the fact that a court order prohibited his presence there. Again, *Healy* is distinguishable, as the wife there testified she was unable to sleep or eat; however, the record contained no evidence that the defendant compelled her to refrain from eating or drinking or did any act that would have led to that result. *Healy*, 263 Ill. App. 3d at 600. By contrast, here, defendant entered Linda's home, thereby clearly interfering with her right to enjoy the sanctity of her home.

¶ 50 In sum, the other-crimes evidence was properly admitted as propensity evidence under section 115-7.4 of the Code.

¶ 51 2. *Non-propensity Purposes*

¶ 52 In any event, if the trial court erred by admitting the other-crimes evidence for propensity purposes, such evidence was admissible to prove defendant's acknowledgment of the existence of the order of protection and dislike for and attitude toward Linda.

¶ 53 While other-crimes evidence is generally inadmissible to show a defendant's propensity under common law, such evidence is admissible if it is relevant for any other purpose, such as to

demonstrate motive or intent. *Chapman*, 2012 IL 111896, ¶ 19; Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Other-crimes evidence may also be admitted to demonstrate the defendant's dislike for, or attitude toward, the victim. *People v. Kimbrough*, 138 Ill. App. 3d 481, 485 (1985). Even where evidence is relevant, it should not be admitted if its prejudicial impact outweighs its probative value. *People v. Pikes*, 2013 IL 115171, ¶ 11. As previously stated, we will overturn a trial court's determination as to the admissibility of other-crimes evidence only where the court abuses its discretion. *Chapman*, 2012 IL 111896, ¶ 19.

¶ 54 To prove defendant guilty of VOOP, the State was required to show he knowingly committed an act that was prohibited by the court after having been served notice of, or acquiring actual knowledge of, the order's contents. 720 ILCS 5/12-30(a) (West 2010) (now 720 ILCS 5/12-3.4(a)); *People v. Hinton*, 402 Ill. App. 3d 181, 183 (2010).

¶ 55 The other-crimes evidence was properly admitted in this case to demonstrate defendant's motive based on the hostile nature of defendant and Linda's relationship. On December 31, 2010, defendant entered Linda's home, accused her of having a sexual relationship with another man, called her a whore, and pushed her. Afterward, Linda obtained an order of protection against defendant. On March 21, 2011, defendant mentioned killing Linda to his sons. On June 15, 2011, defendant threatened to "break" Linda. Taken together, these incidents established a pattern of threatening behavior on defendant's part in which he belittled her in front of others and engaged in controlling behavior. The fact that defendant and Linda had a contentious relationship and that he threatened and harassed her showed that he had a motive for entering her home and blaming her for the death of her daughter on June 25. See *People v. Nash*, 2013 IL App (1st) 113366, ¶ 18 ("[t]he principle that prior assaults against a victim of a crime that [a] defendant is charged with

committing is probative of intent or motive is well established."). Further, the evidence helped to provide context for the jury and explain defendant's actions on June 25.

¶ 56 In addition, the other-crimes evidence was clearly relevant to demonstrate defendant's knowledge of the order of protection. While defendant contends this element was "not at issue" because he did not dispute his knowledge of the order, the State was nonetheless required to prove his knowledge of the order as an element of VOOP. See 720 ILCS 5/12-30(a) (West 2010) (now 720 ILCS 5/12-3.4(a)). During the June 15 incident, Officer Mike Barber told defendant that he could be violating an order of protection. Barber's discussion thus bore directly on whether defendant knew of the order of protection. Accordingly, we find no abuse of discretion in the trial court's admission of the evidence.

¶ 57 Defendant contends that, even if the evidence was probative, the State had less prejudicial means by which to prove his attitude and knowledge. He relies on *People v. Thigpen*, 306 Ill. App. 3d 29, 36 (1999), for the proposition that "the trial judge should consider whether the evidence is actually necessary in light of the availability to the prosecution of other methods of establishing the facts at issue." He observes that Linda's, Detective Cawley's, and Ola.S.'s testimony all established that defendant and Linda did not get along.

¶ 58 Although other evidence was available to the State in this case as to defendant's knowledge and attitude, the trial court did not abuse its discretion by allowing the State to present the other-crimes evidence on those issues. "There is no rule that requires the State to present a watered-down version of events simply because otherwise highly probative evidence is unflattering to defendant." *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011). Without the evidence that defendant pushed Linda in front of her son and called her a whore, discussed killing her with his sons, and threatened to "break" her, the jury would not have understood the

extent of animosity that existed between defendant and Linda or how threatening defendant's prior behavior had been. Further, the fact that defendant had engaged in this type of behavior on numerous occasions bore on how hostile their relationship was and his motive to enter her home on the date in question.

¶ 59 Finally, we note that defendant argues that because he did not admit to entering Linda's home but contend that he did so unknowingly or unintentionally, the other-crimes evidence should not have been admitted on the issues of his intent and state of mind. However, because we have concluded the other-crimes evidence was properly admitted under other exceptions in this case, we need not address defendant's remaining arguments. See *Spyres*, 359 Ill. App. 3d at 1113 (where the appellate court agreed that the court properly admitted other-crimes evidence under the common-design exception, it did not need to address the admissibility of the evidence under the intent and knowledge exceptions).

¶ 60 3. *Whether The Evidence Resulted in a "Mini-Trial"*

¶ 61 Defendant next posits that even if the other-crimes evidence carried some minimal probative value, the trial court erred by allowing such evidence to become the focal point of his trial. He observes that the State referred to the other-crimes evidence in its opening statement and closing argument and introduced into evidence a certified copy of his prior VOOP conviction. Further, he posits, two of the State's witnesses testified solely regarding the other-crimes evidence, and the majority of Linda's testimony concerned the other-crimes evidence. Defendant contends that McGowan's and Linda's direct examination testimony about the charged incident spanned only 24 total pages, while Linda's direct examination testimony about the other-crimes evidence spanned 22 pages.

¶ 62 Even where other-crimes evidence is relevant, it should not become the focal point of a trial. *People v. Hale*, 2012 IL App (1st) 103537, ¶ 24. A court should avoid "a 'mini-trial of a collateral offense." (Internal quotation marks omitted.) *Id.* However, "relevant, detailed evidence of the other crimes is admissible to the extent necessary to fulfill the purpose for which the evidence is being admitted." *People v. Colin*, 344 Ill. App. 3d 119, 130 (2003).

¶ 63 Here, the State presented no more evidence than was necessary to fulfill the purposes for which that evidence was properly admitted, *i.e.*, to demonstrate defendant's propensity, motive based on his attitude toward Linda, and knowledge of the order of protection. Two of the State's witnesses testified about the June 25 incident for which defendant was on trial. As to the other-crimes evidence, Linda was the sole State witness to testify regarding the December 31 and March 21 incidents. She did not go into lengthy detail about those incidents. Further, while Officer Barber provided testimony regarding defendant's June 15 threat to "break" Linda, Barber's testimony was not merely cumulative of Linda's testimony; instead, he provided additional testimony regarding his conversation with defendant that bore on defendant's knowledge of the order of protection. Detective Cawley's testimony regarding her interactions with defendant also was not cumulative of the other evidence presented and further illuminated defendant's propensity, and motive based on his attitude toward Linda. While defendant points to the number of pages in the transcript that related to other-crimes evidence, our analysis of whether such evidence resulted in a "mini-trial" is not a purely mathematical equation. We have thoroughly reviewed the record and do not find the other-crimes evidence was "overkill" or became the focal point of the trial.

¶ 64 Because it is distinguishable, we are not persuaded by defendant's reliance on *People v. Nunley*, 271 Ill. App. 3d 427 (1995). There, the appellate agreed that some evidence of the

defendant's actions on the date he confessed was necessary to establish the voluntariness of his confession. *Id.* at 432. However, the appellate court found the State could have established the voluntariness of the defendant's confession with one witness's testimony. *Id.* Instead, the State called three witnesses. *Id.* The *Nunley* court found that "the detailed and repetitive manner in which the evidence was presented greatly exceeded what was required to accomplish" the purpose of establishing the voluntariness of the defendant's confession and subjected the "defendant to a mini-trial over conduct far more grotesque than that for which he was on trial." *Id.*

¶ 65 Here, the State presented no more evidence than was necessary to accomplish its purposes. Unlike the evidence in *Nunley*, the evidence here was not repetitive. Further, the evidence regarding the other-crimes did not go into extensive detail. Thus, we find no abuse of discretion in the trial court's admission of this evidence.

¶ 66 4. *Whether Any Purported Error Was Harmless*

¶ 67 Finally, even if we were to conclude the trial court erred by admitting the other-crimes evidence, reversal would not be warranted in light of the overwhelming evidence against defendant.

¶ 68 The erroneous admission of other-crimes evidence ordinarily calls for reversal, as it carries a high risk of prejudice. *People v. Cortes*, 181 Ill. 2d 249, 285 (1998). However, the "improper introduction of other-crimes evidence is harmless error when a defendant is neither prejudiced nor denied a fair trial based upon its admission." *People v. Nieves*, 193 Ill. 2d 513, 530 (2000). Evidence is "so prejudicial as to deny the defendant a fair trial" when it is a "material factor in his conviction such that without the evidence the verdict likely would have been

different." *Cortes*, 181 Ill. 2d at 285. Where the error is unlikely to have influenced the jury, reversal is not required. *Id.*

¶ 69 Here, the outcome of defendant's trial would not have been different if the trial court had excluded the other-crimes evidence. At trial, Linda and McGowan testified consistently with one another that defendant entered Linda's home on the date in question. Defendant contends his case "boiled down to a credibility contest" between McGowan and Linda, who had an incentive to testify falsely, and Ola.S. However, defendant overlooks that the trial court also admitted as propensity evidence his earlier VOOP conviction, as well as Cawley's testimony regarding that conviction. Defendant does not dispute that this prior conviction was properly admitted for propensity purposes.

¶ 70 Thus, even absent the disputed other-crimes evidence, the jury still would have heard that defendant was previously convicted VOOP by calling Linda numerous times, during which he told her he did not want her to go to a picnic and that he wanted the family back together. The jury would also have been instructed that it could consider defendant's prior VOOP conviction for propensity purposes. In addition, the jury would have heard Cawley's testimony surrounding defendant's prior VOOP conviction, which included testimony that defendant was belligerent and made the following statement: "Damn right, I'll call my kids at one, two three in the morning and I'll continue to do it." In light of all of this evidence, we cannot say that the jury's verdict would have been different absent the other-crimes evidence.

¶ 71 B. The Order of Protection

¶ 72 Defendant next argues, and the State concedes, that his order of protection must be modified to accurately reflect the trial court's oral pronouncements regarding its expiration date. We accept the State's concession and agree.

¶ 73 At defendant's sentencing hearing, the State asked the trial court to extend defendant's order of protection to expire two years after defendant completed his MSR term. The court stated as follows. "The order of protection heretofor issues. I believe it was issued in a different numbered case. If that is, in fact, true, that order shall terminate and you will prepare a new order of protection in this case, the same to expire two years after the expiration of the period of mandatory supervised release."

¶ 74 The written order of protection accurately states that it shall remain in effect until the expiration of the period of MSR, plus two years. However, it also includes a termination date of November 28, 2020. Defendant's current inmate status report shows his MSR is scheduled to terminate on January 12, 2017.[6] See *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 47 (the appellate court "may take judicial notice of the Illinois Department of Correction's records because they are public documents."). Two years after January 12, 2017, is January 12, 2019. Accordingly, the November 28, 2020, date must be removed from defendant's order of protection, as it conflicts with the court's verbal pronouncement that the order shall terminate two years after the conclusion of defendant's MSR term. See *People v. Montag*, 2014 IL App (4th) 120993, ¶ 39 (where the oral pronouncement of the court and the written order conflict, the court's oral pronouncement controls). Further, the written order currently conflicts with section 5/112A-20(b)(3) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/112A-20(b)(3) (West 2010)). That portion of the Code states that a plenary order of protection entered in conjunction with a prosecution shall remain in effect until the expiration of any MSR term and for an additional period of time thereafter not exceeding two years. 725 ILCS 5/112A-20(b)(3) (West 2010).

[6] Defendant attached to his brief an Illinois Department of Corrections inmate status report showing his projected discharge date was August 19, 2017. Since the filing of his brief, defendant's projected discharge date has evidently been modified.

¶ 75 Accordingly, as the written order of protection conflicts with the trial court's oral pronouncements and violates section 5/112A-20(b)(3) of the Code, we modify it to remove the November 28, 2020, expiration date.

¶ 76 C. Fines And Fees And Sentencing Credit

¶ 77 Defendant next challenges the amount of sentencing credit he received as well as various assessments imposed against him.

¶ 78 First, defendant argues, and the State concedes, that he is entitled to monetary credit for presentence custody against the $200 Domestic Violence Fine and the $200 Protective Order Violation Fee that were imposed in this case. A defendant is entitled to a $5 credit for each day he spends in custody prior to sentencing, not to exceed the amount of the fine assessed against him. 725 ILCS 5/110-14(a) (West 2010). Such credit may only be applied to offset eligible fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 580 (2006). Waiver does not apply to a defendant's request to receive credit for time spent in custody. *People v. Woodard*, 175 Ill. 2d 435, 457 (1997).

¶ 79 Here, the trial court awarded defendant 99 days' credit for time spent in presentence custody. Accordingly, defendant is entitled to an available credit of up to $495 ($5 per day for 99 days) to apply against any eligible fines assessed against him. As the parties correctly agree, the domestic violence fine is subject to *per diem* credit. See *People v. Crow*, 403 Ill. App. 3d 698, 706 (2010) (applying *per diem* credit to the defendant's domestic violence fine). Thus, defendant may apply his available credit to offset the $200 domestic violence fine.

¶ 80 Defendant was also assessed a $200 protective order violation fee. Despite its label, defendant contends, and the State concedes, that the protective order violation assessment is actually a fine. We agree. An assessment "is a fee if and only if it is intended to reimburse the

state for some cost incurred in [the] defendant's prosecution." (Internal quotation marks omitted). *People v. Graves*, 235 Ill. 2d 244, 250 (2009). The protective order violation fee is used to fund the domestic violence surveillance program. 730 ILCS 5/5-9-1.16(b), (c) (West 2010). As it does not reimburse for a cost incurred in defendant's prosecution, we agree with the parties that the protective order violation fee is a fine to which defendant is entitled to apply his *per diem* credit. Thus, defendant's $495 *per diem* credit should be applied to (1) the $200 domestic violence fine, (2) the $200 protective order violation fee, and (3) a $14 "[o]ther as ordered by the court" fine, which the parties both agree is subject to offset by *per diem* sentencing credit.

¶ 81 Defendant also contends, and the State concedes, that the trial court improperly imposed a $20 Violent Crime Victims Assistance (VCVA) assessment under section 240/10(c)(2) of the Code, which authorizes the imposition of such a charge when "no other fine is imposed." 725 ILCS 240/10(c) (West 2010). As defendant was charged other fines in this case, we agree with the parties that the VCVA assessment should not have been imposed under section 240/10(c)(2) of the Code. Accordingly, pursuant to our authority under Illinois Supreme Court Rule 615(b), we vacate the assessment.

¶ 82 Defendant was also assessed a VCVA fine under section 240/10(b) of the Code (725 ILCS 240/10(b) (West 2010). Section 240/10(b) of the Code authorizes a penalty of $4 for every $40, or fraction thereof, of any fine imposed. 725 ILCS 240/10(b) (West 2010). The State argues that as defendant was assessed $434 worth of fines, the VCVA fine imposed under section 240/10(b) should have been $44, not $40.

¶ 83 Recently, our supreme court issued its decision in *People v. Castleberry*, 2015 IL 116916, in which it discussed the limitations on the State's ability to appeal a defendant's sentencing order. There, the defendant was convicted of two counts of aggravated criminal

sexual assault, and, in sentencing the defendant, the trial court added a 15-year sentencing enhancement to one of his counts. *Id.* ¶ 3. Defendant appealed his conviction arguing, *inter alia*, that the 15-year sentencing enhancement was unconstitutional. *Id.* ¶ 5. The appellate court rejected the defendant's argument and, in response to an argument raised by the State, it also held the 15-year enhancement had to be added to both of the defendant's convictions. *Id.* ¶ 6. The appellate court held that because the defendant's sentence did not conform to statutory requirements, it was void. *Id.*

¶ 84 The supreme court in *Castleberry* abolished the "void sentence rule," concluding it was constitutionally unsound. *Id.* ¶ 19. It then considered whether, absent the void sentencing rule, the appellate court could increase the defendant's sentence at the State's request. *Id.* ¶ 20. The supreme court noted that Illinois Supreme Court Rule 604(a), which sets forth the instances in which the State may appeal a criminal case, does not permit the State to appeal a sentencing order. *Id.* ¶ 21. Thus, the State could not have cross-appealed in the appellate court on that issue, as "a reviewing court acquires no greater jurisdiction on cross-appeal than it could on appeal." (Internal quotation marks omitted.) *Id.* In addition, the supreme court rejected the State's contention that it was merely responding to the defendant's claim that his sentence was unauthorized. *Id.* ¶ 22. The *Castleberry* court explained that as the appellee in the appellate court, the State could "raise any argument of record in support of the circuit court's judgment" without filing a cross-appeal. *Id.* However, it could not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *Id.* Given that the State's argument regarding the 15-year sentencing enhancement "was not brought to sustain the judgment of the circuit court" and was instead a new issue brought with a view to "lessening the

rights" of the defendant, it was a "*de facto* cross-appeal challenging [the] defendant's sentence and, as such, was impermissible." *Id.* ¶ 23.

¶ 85 Finally, the supreme court rejected the State's argument that Rule 615(b)(1) authorized the court to increase the defendant's sentence, as the authority granted under that rule was limited to "reduc[ing] the punishment imposed by the trial court." *Id.* ¶ 24 (quoting Ill. S. Ct. R. 615(b)(4)). Thus, Rule 615(b) did not grant the appellate court plenary power to increase criminal sentences. *Id.* ¶ 24. The *Castleberry* court explained that the State could seek relief under appropriate circumstances through a writ of *mandamus*; however, the State had not done so. *Id.* ¶¶ 26-27.

¶ 86 Here, as in *Castleberry*, the State has not filed a writ of *mandamus* regarding the VCVA fine, nor has it filed a cross-appeal. As the appellee, the State is entitled to "raise any argument of record in support of the circuit court's judgment." *Id.* ¶ 22. It cannot, however, "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *Id.* ¶ 23. Thus, the State lacks authority to seek an increase in the defendant's VCVA fine, which is part of his sentence. See *Graves*, 235 Ill. 2d at 250 (A fine is "a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense." (Internal quotation marks omitted.)). Accordingly, we reject the State's request to increase defendant's VCVA fine under section 240/10(b) of the Code.

¶ 87 Finally, defendant asks that we modify the fines and fees order to not only account for the adjustments made to his fines and fees and sentencing credit, but also to remove an erroneous $25 calculation. We do not agree that the original fines and fees order contained a $25 miscalculation. Our calculation after removing the $20 VCVA fine shows that defendant owes

$1,239, less the $414 that he has available in *per diem* credit; thus, the total amount defendant owes is $825.

¶ 88 III. CONCLUSION

¶ 89 For the reasons stated, we affirm the trial court's judgment, modify the order of protection, and modify the fines and fees order.

¶ 90 Affirmed as modified.

¶ 91