SECOND DIVISION
December 13, 2016

No. 1-14-2982

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 2975
	)	
DAVID CARR,	)	Honorable
	)	Noreen Valeria Love,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment affirmed over defendant's challenge to the sufficiency of the evidence to sustain his conviction for domestic battery. Fines, fees, costs order and *mittimus* corrected.

¶ 2 At the conclusion of a bench trial, the trial court found defendant David Carr guilty of the Class 3 felony of domestic battery (720 ILCS 5/12-3.2(a)(2), (b) (West 2014)), and sentenced Carr to four years' imprisonment, followed by four years of mandatory supervised release. On appeal, Carr maintains that the evidence was insufficient to prove him guilty of domestic battery beyond a reasonable doubt because the testimony of the State's two occurrence witnesses was

inherently unbelievable, uncorroborated, and conflicted. Carr further contends that, taking the testimony as true, the evidence was nevertheless insufficient to prove that he made insulting or provoking contact with a family or household member. Carr also raises several issues related to the order imposing fines and fees and he requests that this court correct the order.

¶ 3 We affirm on the merits, finding, on review in a light most favorable to the State, that the evidence presented was sufficient for a rational trier of fact to conclude Carr knowingly made contact of an insulting or provoking nature to a household member beyond a reasonable doubt. We also direct the clerk of the Circuit Court to correct the fines, fees, and costs order, as well as the *mittimus*.

¶ 4 Background

¶ 5 Carr was charged with one count of domestic battery for the January 13, 2014, battery of his former girlfriend. Before trial, the court granted the State's motion to amend the charging document to reflect that Carr was charged with a Class 3, not Class 4, felony based on three earlier convictions for domestic battery. 720 ILCS 5/12-3.2(b) (West 2014). The events giving rise to the charges occurred outside the home of the victim's grandmother in Westchester, Illinois, where the victim, her one-year-old daughter, and her daughter's father were living.

¶ 6 At trial, the victim testified that in early 2013, when she met Carr, who lived in the neighborhood, they "exchanged numbers and were talking." They began dating that summer, and the victim considered Carr to be her boyfriend. They dated for a couple of months before the relationship ended. Three or four weeks after they "broke up," Carr began "riding past [the victim's] house." Sometimes he drove past a couple of times a day; other times, it happened a

couple times a week. Carr's behavior made the victim uncomfortable, and on one occasion, she asked him to stop.

¶ 7 The victim returned home with her daughter and her daughter's father at around 2 p.m., on January 13, 2014. She brought her daughter inside and went back to the car for food. When she reached her front door, she heard loud music and saw Carr in a black Ford. After pulling in front of the house, Carr got out and began "juggling through some stuff" in his trunk. The victim felt nervous and began ringing the doorbell to get back in the house. Carr then raised his arm with a tire iron in his right hand, and started walking "very quickly" and "forcefully" towards the victim, stopping about 10 or 12 feet away.

¶ 8 Carr started yelling, "bitch," and told the victim "that he could get the thumper out on [her] and that he will hurt [her]." He had used the term "thumper" in her presence before and the victim knew Carr used it as a term for a gun. Carr told the victim not to "make him do it," and said, "[Y]ou see what kind of neighborhood we live in, but I'll still do it to you." The victim felt scared because she thought Carr was threatening to shoot her. Carr threw a snowball at the victim's head and stated, "[N]ext time it won't be a snowball, BITCH." The victim ducked and the snowball hit her shoulder. She felt threatened because she felt that Carr could "really hurt" her. After Carr returned to his car, he pulled closer to the house while "playing his music and bopping," and her grandmother "came out" to see if everything was all right. The victim responded that Carr was just leaving, The police were called and given Carr's license plate number "[r]ight as he was pulling off."

¶ 9 On cross-examination, the victim testified that her physical relationship with Carr lasted for two months and they had been "around each other for longer than that." While they dated,

Carr lived with his mother about one mile from where she lived. During their relationship, the victim loaned $150 to Carr's mother to help pay Carr's bond, and had asked Carr's mother to repay her, but the mother had not done so. The relationship with Carr ended "amicably." As for her daughter's father, he was on his way inside when Carr arrived, and she did not know what he was doing or whether he said anything because she was paying attention to Carr. During the encounter, Carr waved the tire iron with his right hand and did not let go. Regarding the snowball, Carr "reached down [in the snow] with his other hand and then was just balling it up, balling it up, and then he was waving it still talking and then that's when he just threw it." The snowball was solid, and hit "some type of winter thing [she was wearing] over [her] clothing."

¶ 10 The grandmother testified that she was standing in the family room looking out of her window when she saw Carr rummage around in the trunk of a car and produce a tire iron. The victim was standing on the porch when Carr walked across the street toward her with the tire iron. Because of the layout of her house, she lost sight of Carr as he walked toward the victim. She moved closer to the telephone in case she needed to telephone the police. While she waited by the phone, she heard loud voices outside for about one minute. After she saw Carr walk back toward his car, her granddaughter came inside the house. She asked what had happened, and the police were called.

¶ 11 On cross-examination, the grandmother said she knew Carr to be "a friend" of her granddaughter's and had seen Carr drive by her house once. She could not remember the make or color of Carr's car, or what he was wearing. She did not see Carr throw the snowball.

¶ 12 The State submitted certified statements of prior convictions Carr received for domestic battery in 2008, 2010, and 2011.

¶ 13 After argument, the trial court found the grandmother corroborated the victim's testimony that Carr rummaged through his trunk and produced a tire iron. Regarding the grandmother's actions during the encounter, the trial court stated:

> "Now, I think it's absolutely rational that if my granddaughter is standing on the porch, some guy is coming up with a tire iron and now I can't see where he is, I think it's pretty rational that I'm going to go to where the phone is and call the police instead of standing there to see if they're saying things to each other so I can try and make out what the words are. Absolutely rational."

¶ 14 The trial court determined there was no evidence Carr was right-handed and noted that insulting and provoking contact was required to prove Carr guilty. Rejecting Carr's argument that the victim was angry at him over the $150 loan, the trial court noted that the victim loaned the money to Carr's mother, and she requested repayment from Carr's mother, not Carr. The trial court found Carr guilty of domestic battery of an insulting or provoking nature.

¶ 15 Carr filed a motion for a new trial, which the court denied.

¶ 16 The trial court sentenced Carr to four years' imprisonment to be followed by four years of mandatory supervised release. Carr filed a motion to reconsider his sentence, which the court denied.

¶ 17 Analysis

¶ 18 Challenge to Sufficiency of the Evidence

¶ 19 Carr maintains that no reasonable trier of fact could have found him guilty of domestic battery beyond a reasonable doubt because the victim's testimony was inherently unbelievable, uncorroborated, and contradicted by her grandmother's testimony. Even if the victim and the

grandmother were credible, Carr argues, the State failed to prove that the contact was insulting or provoking since Carr threw the snowball with his non-dominant hand and the victim had on winter clothing. Carr further argues that the State failed to prove Carr satisfied the statutory definition of a "family or household member" as no evidence indicated an exclusive relationship, but rather, a purely physical "summer fling."

¶ 20 Where, as here, a defendant challenges the sufficiency of the evidence to sustain a finding of guilt beyond a reasonable doubt, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009). The trier of fact determines the credibility of the witnesses, weighs the evidence, draws reasonable inferences therefrom, and resolves any conflicts in the evidence. *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 51. A reviewing court may not overturn a conviction based on insufficient evidence unless the proof is so unreasonable, improbable or unsatisfactory that a reasonable doubt exists. *People v. Belknap*, 2014 IL 117094, ¶ 67.

¶ 21 "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." 720 ILCS 5/12-3.2(a) (West 2014). Domestic battery under the "insulting or provoking contact" prong does not require that the contact injure the victim. *People v. DeRosario*, 397 Ill. App. 3d 332, 334 (2009). Contact can be insulting or provoking depending on the context and surrounding circumstances of the offense. *Id.*; *People v. Peck*, 260 Ill. App. 3d 812, 814-15 (1994). The Criminal Code's definition of "family or household members" includes "persons who have or

have had a dating or engagement relationship." 720 ILCS 5/12-0.1 (West 2014). Under section 12-0.1, "neither a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or social contexts shall be deemed to constitute a dating relationship." *Id*.

¶ 22 The issue before us concerns whether the State sufficiently proved Carr knowingly made physical contact of an insulting or provoking nature with a family or household member. The victim testified that she had considered Carr to be her boyfriend and their dating relationship had been physical for a couple of months. In the wake of their failed relationship, Carr had driven past her house as often as twice a day, and on January 13, 2014, parked in front of her house and retrieved a tire iron from his trunk, then raised it above his head as he walked "forcefully" toward the victim. He threatened to pull out a "thumper," told her not to "make him do it," and then hit her with a snowball threatening, "[N]ext time it won't be a snowball, BITCH." The trial court characterized the victim's testimony as unimpeached.

¶ 23 We find that this evidence, viewed in a light most favorable to the State, sufficient for a rational trier of fact to conclude that Carr knowingly made contact of an insulting or provoking nature to a household member beyond a reasonable doubt. See *Peck*, 260 Ill. App. 3d at 814-15 (finding defendant's spitting in face of police officer, under circumstances, amounted to insulting or provoking contact even though in certain other contexts spitting might not constitute insulting or provoking behavior).

¶ 24 While Carr contends that the testimony provided by the victim and her grandmother cannot support a finding of guilt, we defer credibility determinations to the trial court unless clearly erroneous. See *People v. Irvine*, 379 Ill. App. 3d 116, 122 (2008). Moreover, although the testimony of a single witness, if it is positive and credible, will convict, the State, presented

testimony from the grandmother who provided additional evidence as to whether the contact was insulting or provoking based on the surrounding circumstances. See *People v. Taher*, 329 Ill. App. 3d 1007, 1018 (2002) (sustaining defendant's conviction for domestic battery based solely on victim's testimony). The grandmother's positioning of herself by the phone in case the police were needed corroborated the victim's testimony that Carr advanced on the victim with a tire iron.

¶ 25 Carr contends that the State's failure to call the victim's daughter's father, as an occurrence witness who could have corroborated material facts, gave rise to an inference of a reasonable doubt. Citing *People v. Deskin*, 60 Ill. App. 3d 476, 480 (1978), Carr maintains that the absence of this testimony resulted in a presumption that it would have been unfavorable to the State, and created a reasonable doubt because the State did not rebut the presumption by explaining his absence. In *Deskin*, the State failed to call the victim but several other witnesses testified concerning the occurrence. *Id*. at 479-80. Although the absence of the victim's testimony could result in an inference of a reasonable doubt, the court ultimately held that the inference was not raised where at least one eyewitness gives clear and convincing testimony directly regarding the event. *Id*. at 480.

¶ 26 Since *Deskin*, this court has clarified that a negative inference occurs only in certain limited circumstances; for example, where the State fails to call a witness who possesses noncumulative information of a crucial, disputed issue of fact, or where the State has caused the absence of a material witness. *People v. Doll*, 371 Ill. App. 3d 1131, 1137 (2007). Moreover, "no negative inference is raised when the witness is also known and available to the defense yet is not called by it." *Id.*

¶ 27 The victim did testify directly to the event, and an additional witness, her grandmother, corroborated the testimony that Carr retrieved a tire iron from his trunk and walked toward the victim with it. The evidence does not establish that the father of the victim's daughter possessed noncumulative knowledge of the event or that he was unavailable for Carr to call as a witness. Further, while the absence of testimony *may* give rise to an inference that the testimony would have been unfavorable to the State (*People v. Smith*, 2015 IL App (1st) 132176, ¶ 43 (Hyman, J. dissenting)), the trial court was "not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt" (*People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009)). Accordingly, we are not persuaded by Carr's argument.

¶ 28 While, as Carr contends, he may have formed a snowball with his non-dominant hand at the time he retained his grip on the tire iron with the other; nevertheless, the victim testified that Carr "reached down [into the snow] with his other hand and then was just balling up, balling it up, and then he was waving it still talking and then that's when he just threw it." The trial court found that the victim's testimony was unimpeached and "the trier of fact is free to accept or reject as much or as little of a witness's testimony as it pleases." *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 22; *People v. Jackson*, 232 Ill. 2d 246, 281 (2009) (Sufficient if evidence taken together satisfies trier of fact of defendant's guilt beyond a reasonable doubt). Much of the victim's testimony was corroborated and, based on our close review of the record, we do not find that her testimony to be so implausible or unsatisfactory that we must substitute our judgment for the trial court's credibility finding.

¶ 29 Statutory Definition of "Family or Household Member"

¶ 30 Next, Carr maintains the State failed to prove he satisfied the statutory definition of a "family or household member" because there was no evidence of an exclusive relationship that surpassed a purely physical "summer fling." To support his contention that a "dating relationship" must be "an established relationship with a significant romantic focus," Carr cites *People v. Howard*, 2012 IL App (3d) 100925, ¶ 10, and *People v. Young*, 362 Ill. App. 3d 843, 851 (2005). Both *Howard* and *Young* are distinguishable.

¶ 31 In *Howard*, the victim as well as the defendant testified that they were not dating. *Howard*, 2012 IL App (3d) 100925, ¶ 10. The evidence established the defendant and the victim were not exclusive. *Id.* The relationship consisted of random sexual encounters and did not contain any sort of shared expectation of growth. *Id.* The reviewing court held that, under those circumstances, no dating relationship existed as the established relationship lacked a significant romantic focus. *Id.* Unlike in *Howard*, the victim here testified that Carr was her boyfriend and nothing in the evidence suggests that their physical relationship was not exclusive.

¶ 32 In *Young*, the direct evidence of romantically oriented behavior was limited to the defendant's testimony that he was trying to kiss the victim after he knocked her down. *Young*, 362 Ill. App. 3d at 852. The evidence showed that the defendant accompanied the victim to the laundromat and the victim referred to their relationship as "social." *Id.* The reviewing court found that the indirect evidence of an established relationship was equally compatible with a nonromantic friendship and did not give rise to an inference that the relationship had been "consummated." *Id.*

¶ 33 The situation before us resembles that in *People v. Irvine*, 379 Ill. App. 3d 116 (2008), where the evidence established at least six weeks of a physical relationship and no evidence

indicated that physical intimacy was anything other than romantically focused. See *Irvine*, 379 Ill. App. 3d at 125 (finding six-week physical relationship neither casual acquaintanceship nor ordinary fraternization between two individuals in business or social context). Accordingly, Carr's attempt to characterize his relationship with the victim as a more casual "summer fling" is unpersuasive and we find that any reasonable trier of fact could conclude that the relationship satisfied the statutory definition of "family or household member."

¶ 34 Fines, Fees, and Costs Order

¶ 35 Finally, Carr raises several issues related to his fines and fees. Although Carr failed to challenge his fines and fees in the trial court, under Illinois Supreme Court Rule 615(b) (eff. Aug. 17, 1999), we may modify the fines and fees order without remanding the case to the circuit court. *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 45. A court's imposition of fines and fees raises a question of statutory interpretation, which we review *de novo*. *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 23.

¶ 36 Carr maintains, the State concedes, and we agree that the trial court improperly imposed the $5 Electronic Citation Fee, which "[s]hall be paid by the defendant in a traffic, misdemeanor, municipal ordinance, or conservation case." 705 ILCS 105/27.3e (West 2014). This is a domestic battery case, and does not involve a traffic, misdemeanor, municipal ordinance, or conservation offense.

¶ 37 Carr also contends that he is entitled to $119 worth of $5-per-day presentence custody credit against his fines. Under section 110-14(a) of the Code of Criminal procedure of 1963, an offender who has been assessed one or more fines is entitled to a $5-per-day credit for time spent in custody as a result of the offense for which the sentence was imposed. 725 ILCS 5/110-14(a)

(West 2014). It is well settled that the presentence custody credit applies only to reduce fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 599 (2006). Our supreme court has held that claims for $5-per-day credit may be raised at any time and stage of court proceedings, and that if the basis for granting the credit is clear and available from the record, an appellate court may grant the relief requested. *People v. Caballero*, 228 Ill. 2d 79, 88 (2008). Carr argues that certain costs assessed against him were erroneously characterized as "fees" that may not be offset by his $5-per-day presentence custody credit. "The central characteristic that separates a fee from a fine is that a 'fee' is intended to reimburse the state for a cost incurred in the defendant's prosecution, whereas a 'fine' is punitive in nature, and is part of the punishment for a conviction." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 63; see also *Jones*, 223 Ill. 2d at 599-601.

¶ 38 The fines, fees, and costs order reflects four of the charges Carr argues are fines were in fact assessed as fines that may be offset by Carr's $5-per-day credit. The four correctly characterized fines are the $5 Drug Court fine (55 ILCS 5/5-1101(f) (West 2014)); the $5 Youth Diversion/Peer Court fine (55 ILCS 5/5-1101(e) (West 2014)); the $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2014)); and the $10 Mental Health Court fine (55 ILCS 5/5-1101(d-5) (West 2014)). See *People v. Graves*, 235 Ill. 2d 244, 251-52 (2009).

¶ 39 Carr further contends, the State concedes, and we agree that the $50 Court System fee ((55 ILCS 5/5-1101(c) (West 2014)) and the $15 State Police Operations fee (705 ILCS 105/27.3a-1.5 (West 2014)) also are fines subject to Carr's presentence incarceration credit, despite the order's designation that they are fees that may not be offset. See *People v. Ackerman*, 2014 IL App (3d) 120585, ¶¶ 28-30 (court system "fee" was a "fine"); see also *Millsap*, 2012 IL

App (4th) 110668, ¶ 31 (despite statutory label of State Police Operations cost as a "fee," it does not reimburse State for costs incurred in defendant's prosecution).

¶ 40 Carr also maintains that the $2 Public Defender Records Automation fee (55 ILCS 5/3-4012 (West 2014)), and the $2 State's Attorney Records Automation fee (55 ILCS 5/4-2002.1(c) (West 2014)), are fines because they do not compensate the State for prosecution of any particular defendant, but rather they finance records keeping systems. The State argues that they are both fees intended to compensate the State for expenses that the State incurred as a result of Carr's prosecution. Although this court has held that the Public Defender and State's Attorney records automation charges are both fees, Carr maintains that these cases were wrongly decided. See e.g., *People v. Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17; *Bowen*, 2015 IL App (1st) 132046, ¶¶ 63, 65. We agree.

¶ 41 In *People v. Camacho*, 2016 IL App (1st) 140604, we recognized that the published decisions on the matter have taken the State's position. *Camacho*, 2016 IL App (1st) 140604, ¶ 52. But, after an independent analysis of the relevant statutes, we held that State's Attorney and Public Defender records automation assessments do not compensate the State for the costs associated in prosecuting a particular defendant and cannot be considered fees. *Camacho*, 2016 IL App (1st) 140604, ¶¶ 52-56. In keeping with our analysis in *Camacho*, we find that the $2 Public Defender Records Automation fee and the $2 State's Attorney Records Automation fee are fines, which are subject to Carr's presentence credit.

¶ 42 Under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), a reviewing court may "modify the judgment or order from which the appeal is taken" without remand. *Bowen*, 2015 IL App (1st) 132046, ¶ 68. Accordingly, we direct the clerk of the circuit court to correct the order

assessing fines, fees, and costs to reflect that the $5 Electronic Citation Fee is vacated. We further order that the fines, fees, and costs order be corrected to reflect that Carr is entitled to $119 worth of $5-per-day presentencing credit against the imposed fines.

¶ 43 *Mittimus*

¶ 44 Although not raised by the parties, we observe that before trial, the court granted the State's motion to amend the charging document to reflect that Carr was charged with a Class 3, not Class 4, felony based on his three prior convictions for domestic battery. At sentencing, the court's oral pronouncement indicates that Carr was being sentenced for the Class 3 felony. But, the *mittimus* reflects a sentence under Count 1 to a Class 4 felony. Where a conflict arises between the court's oral pronouncement and a written order, the oral pronouncement controls. *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 87 (2016); *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007) (ordering corrected *mittimus* where it did not conform to the court's oral pronouncement). Accordingly, under Rule 615(b)(1) we direct the clerk of the court to amend the *mittimus* to reflect Carr's Class 3 felony conviction for domestic battery (720 ILCS 5/12-3.2(a)(2), (b) (West 2014)).

¶ 45 We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 46 Affirmed; fines, fees, and costs order corrected; mittimus corrected.