

2016 IL App (2d) 150071-U
No. 2-15-0071
Order filed May 12, 2016

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 12-CM-3623
)	
THOMAS CICINELLI,)	Honorable
)	John Noverini,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* (1)The trial court did not err in preventing defendant from refreshing the recollection of a witness during the State's case; (2) defendant forfeited various claims of trial court error by violating Supreme Court Rule 341(h) requirements; and (3) defendant was found guilty beyond a reasonable doubt.

¶ 2 After a jury trial, defendant, Thomas Cicinelli, was convicted of one count of violation of an order of protection (720 ILCS 5/12-30 (West 2012)) and was sentenced to one year of conditional discharge. Defendant now appeals, contending that: (1) the trial court erred in preventing defendant from refreshing the recollection of a witness; (2) the trial court, by various

rulings, violated his rights to present a defense and to be afforded a fair trial; and (3) he was not proved guilty beyond a reasonable doubt. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Michelle Cicinelli, defendant's wife, was granted an order of protection against defendant on June 6, 2012. This order issued during the course of their divorce proceedings. Attached to the order was a list of definitions pursuant to the Illinois Domestic Violence Act (750 ILCS 60/101 *et seq.* (West 2012)); number 10, the phrase "stay away" was defined to mean:

"respondent to refrain from both physical presence and nonphysical contact with the petitioner whether direct, indirect (including, but not limited to, telephone calls, mail, email, faxes, and written notes), or through third parties."

On June 14, the court entered an agreed order that modified various terms of the initial emergency order, including an amendment that allowed defendant and Michelle to "communicate with each other regarding issues affecting the children, including visitation and the same will not be considered a violation of the pending Order of Protection. Communication shall be via text message or electronic mail only." The court later extended the emergency order to July 23.

¶ 5 On August 21, Michelle filed a complaint alleging that, on July 13, defendant knowingly committed a violation of the order of protection, in that he contacted a family friend, Patrice Ghaderi, by telephone and demanded that she contact Michelle and tell her that defendant was going to tell the Internal Revenue Service that defendant and Michelle had lied on their income tax returns. The charge was later amended to read that defendant committed an act that was prohibited by the order of protection when he "contacted Michelle Cicinelli, petitioner, through a third party, Patrice Ghaderi, by telephone. Defendant told Patrice Ghaderi to tell Michelle

Cicinelli that Defendant was going to call the Internal Revenue Service (IRS) and tell the IRS that he and Michelle both lied on their tax returns.” A jury found defendant guilty of this single count, and this appeal followed.

¶ 6

II. ANALYSIS

¶ 7 Defendant first contends that the trial court improperly refused to allow defense counsel to refresh Ghaderi’s recollection with her own text messages.

¶ 8 Ghaderi had testified on direct examination that defendant had called her and left a message on July 13, 2012. She called him back that day and had a conversation that lasted over one hour. Ghaderi was aware of the order of protection and its prohibition of contact between defendant and Michelle, and at one point she asked defendant if he wanted to continue the conversation, as she felt “like he was starting to cross a fine line that I was uncomfortable being in [*sic*].” Ghaderi testified that, at one point, defendant:

“threatened that the cash and other situations they [defendant and Michelle] had with their business, he could go to the IRS and report them. He would turn them both in and they could be—he and his current wife at the time, they could be cellmates together.”

When asked if defendant said anything about “passing the message along,” Ghaderi responded:

“In so many words, throughout his conversation, it was words such as, she needs to know, someone needs to get her to understand, someone needs to tell her what could happen.”

When asked if she relayed this information to Michelle, Ghaderi responded:

“At the end of the conversation, I do recall asking him, what do you want me to do with this. Do you want Michelle to know that you called me. And he said, yes, she can know.”

Ghaderi “waited a day, a full 24 hours,” but did not know what to do. She felt that “the best thing for me to do was to share that with her so that I could kind of excuse myself from the situation and then it is between them”

¶ 9 On cross-examination, Ghaderi recalled that, on July 16 or 17, she had some text exchanges with defendant regarding the July 13 conversation. She texted defendant to tell him that she would not be taking anymore telephone calls from him after she heard from Michelle that the July 13 conversation had been brought up in a court proceeding. She did not recall if defendant specifically told her “that he did not tell her to tell” Michelle. When asked why she had the text conversations with defendant, she replied, “Probably stupidity on my part that I thought I could somehow still make a difference, that I could still help.” When asked if she remembered bringing up the subject of the IRS in the text exchanges, Ghaderi responded that she did not recall. She knew that she said that she “could not be a part of this,” but she could not recall “[w]hat the exchange was.” Ghaderi answered, “I don’t know” when asked if anything would refresh her memory; when asked if a transcript of the text exchanges would refresh her memory, she stated, “I can look at them. I don’t know if I will remember all of the details.”

¶ 10 The State objected on grounds of relevancy and hearsay. After a sidebar argument, the trial sustained the objection without stating its basis. Defense counsel then asked Ghaderi a series of questions about the text exchanges, including the following:

“Q. Do you ever remember asking Mr. Cicinelli in a form of a text question on July 17th, 2012 didn’t you tell me to tell Michelle about the IRS issues?

A. No, I don’t recall that.

Q. So then you don’t recall him telling you, replying back, I did not tell you to say that?

* * *

A. I don't recall those [*sic*] string of text. Did they occur? But do I recall the content, I do not.

Q. So is it your testimony here today that you don't recall a lot of the events back from July of 2012 surrounding the phone calls and the text messages?

A. The text messages, that is true. The phone call, I remember the highlights of that phone call.

¶ 11 A witness may refresh and assist her memory by the use of a written memorandum when she is unable to remember relevant facts. *People v. Van Dyk*, 40 Ill. App. 3d 275, 279 (1976). The memorandum need not have been made by the witness, nor must it be independently admissible into evidence, provided that, after inspecting it, the witness can speak to the facts from her own recollection. *Id.* A proper foundation must be laid in order to refresh a witness' recollection; it is fundamental that a witness' memory can be refreshed only after it has been established that the witness has no memory concerning the facts in question. *People v. Shatner*, 174 IOil. 2d 133, 153 (1996). If a witness has testified that her memory is exhausted, a written memorandum may then be used to refresh and assist his memory. *Id.* However, the manner and mode of refreshing the witness' memory, and the reliability of the means of doing so, rest largely within the trial court's discretion. *Van Dyk*, 40 Ill. App. 3d at 279.

¶ 12 Here, Ghaderi testified that she "could not recall" the contents of the text exchanges. Defendant wanted to refresh Ghaderi's recollection with transcripts of the exchanges or even the actual texts themselves. However, Ghaderi did not know if anything would refresh her memory and stated that, while she could look at the transcripts, she did not know if she would remember all of the details based on the transcripts. Defendant failed to establish that use of the transcript

or the text would refresh Ghaderi's recollection. We are aware of no authority wherein a party can force a witness to review a document to refresh her recollection, especially where the witness does not affirmatively state that such a document would refresh her recollection. The trial court never stated the basis on which it sustained the State's objection, and neither basis raised by the State appears to be appropriate. However, the absence of a proper foundation for refreshing Ghaderi's recollection is a sufficient basis for finding no error in the trial court's action.

¶ 13 Defendant further argues that, by not allowing him to refresh Ghaderi's recollection, it denied him the rights to present his defense and to a fair jury trial. We disagree. The trial court allowed defendant to bring in the substance of the purported Ghaderi texts in other ways. After the court sustained the State's objection to refreshing Ghaderi's recollection, the following questioning of Ghaderi took place:

“Q. Do you ever remember asking Mr. Cicinelli in a form of a text question on July 17th, 2012 didn't you tell me to tell Michelle about the IRS issues?

A. No, I don't recall that.

Q. So then you don't recall him telling you, replying back, I did not tell you to say that?

* * *

A. I don't recall those [*sic*] string of text. Did they occur? But do I recall the content, I do not.

Q. So is it your testimony here today that you don't recall a lot of the events back from July of 2012 surrounding the phone calls and the text messages?

A. The text messages, that is true. The phone call, I remember the highlights of that phone call.

Q. But you don't recall the highlights of text messages you sent to Mr. Cicinelli regarding the same subject matter?

A. No, I do not.

Q. Did Mrs. Cicinelli instruct you to text Mr. Cicinelli in regards to the contents of the phone call?

A. No.

* * *

Q. Is it true that you can't remember these text conversations because you couldn't get Mr. Cicinelli to admit to the fact that he didn't demand?

A. No.

* * *

Q. Is it possible that you can't remember the text messages because they in fact deny your allegations to Tom that he demanded that you tell Michelle?

A. In other words, I am not remembering them because they didn't go along with what I was thinking?

Q. That's correct.

A. No."

¶In addition, when defendant testified in his own defense, he was allowed, over the State's objections, to testify to the contents of Ghaderi's text messages:

"THE WITNESS: She stated to me in the text message that I did what you had asked me to do was relay an [sic] information making demands to Michelle of what you wanted to say.

BY [DEFENSE COUNSEL]

Q. what was your response to that?

A. That that's a complete false [sic]. I never asked you to do anything of the kind.

* * *

Q. Further on into these text conversations with Patrice Ghaderi, on July 17th of 2012, did she make further attempts to indicate that you, that you told her to go to Michelle with what you told her?

A. Yes, she did.

Q. What did you tell her, again?

A. Absolutely not."

Thus, even if the trial court erred in preventing defendant from refreshing Ghaderi's recollection regarding her texts, the substance of her texts, the possible motivation behind them, and defendant's responses to the texts, were allowed into evidence. Defendant was not prevented from presenting his defense, and his right to a fair jury trial was not violated on this basis.

¶14 Defendant next contends that numerous other trial court rulings also prevented him from presenting his defense and violated his right to a fair jury trial. However, instead of providing page specific cites to the record, defendant repeatedly provides citations to large swaths of the reports of proceedings, several times citing to 184 pages of transcript in a single citation. In addition, the only citations to legal authority contained in this section of the brief are to general statements of law that a defendant has the right to present a defense and a single citation regarding the plain error analysis, which is not relevant to this case. Supreme Court Rule 341(h)(7) requires the Argument portion of an appellant's brief to "contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on." SCR 341(h)(7) (eff. Jan. 1, 2016). This portion of defendant's brief does not comply

with these requirements. Defendant has forfeited these contentions, and we will not consider the matters raised therein.

¶15 Defendant finally contends that the jury’s verdict was against the manifest weight of the evidence. When reviewing a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Maggette*, 195 Ill. 2d 336, 353 (2001). It is the responsibility of the fact-finder to determine the credibility of witnesses and the weight to be given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 239 (2001). We will not set aside a criminal conviction on grounds of insufficiency of the evidence unless the proof is so improbable or unsatisfactory that a reasonable doubt of the defendant’s guilt exists. *Maggette*, 195 Ill. 2d at 353.

¶16 In addition to the testimony of Ghadri and defendant that has been previously recounted, the jury heard from Michelle Cicinelli, who testified, in relevant part, that on a Saturday in mid-July 2012, Ghaderi told her that defendant had told her that he was going to call the IRS to report some activity related to himself and Michelle.

¶17 Defendant testified that he called Ghaderi and left a message asking her to call him so that he could tell her his side of the divorce proceedings. Ghadri eventually called him back, and they had a long phone conversation. He never demanded or directed Ghaderi to tell anyone about his side of the story, and he did not intend his call to Ghaderi as a way to harass Michelle. He described the relationship between Ghaderi and Michelle as “[b]eyond” close friends. He denied ever asking Ghaderi “to intervene and talk to Michelle” about the divorce or to making “any threats to Patrice Ghaderi and Michelle” that he was going to contact the IRS. On cross-

examination, he denied telling Ghaderi “that Michelle ought to know about this, the subject matter of [the] conversation.”

¶18 Defendant first argues that a list of questions sent by the jury to the trial court during deliberations showed that the jury was confused and “did not understand the elements of the crime.” A note from the jury, entitled “First Proposition Questions,” asked the following:

“Please define third-party contact requirement with respect to the order of protection

- 1) Is direction (and or intent) of the third-party to contact the petitioner [sic] of the order of protection by the recipient needed for a violation?
- 2) The mere fact that Thomas talked to Patrice—Is it a violation?
- 3) Was Patrice’s decision to forward any [undecipherable] about the phone call to Michelle a violation of the order?
- 4) If Thomas told Patrice to tell Michelle about the conversation that they had—Does that constitute a violation of the order of protection?”

The trial court, with no objection from either defendant or the State, responded, “You have received all the evidence and law in this case. Please continue to deliberate.”

¶19 Defendant did not object to the trial court’s response that directed the jury to continue deliberating according to the law and evidence that it had received, nor does he object that the jury instructions that stated the law were incorrect. Where a defendant acquiesces in a trial court’s answer to a question from the jury, he cannot later complain that the trial court erred in its response. *People v. Love*, 377 Ill. App. 3d 306, 316 (2007). Much of defendant’s argument here is nothing more than speculation as to what the jury thought.

¶20 Defendant next attacks Ghaderi's credibility, arguing that her lack of recall "should lead to a significant suspicion as to the reliability to [sic] any of her testimony." However, the trier of fact is in a superior position to a reviewing court to observe witnesses while testifying, assess credibility, and determine the weight that testimony should receive. *People v. Tara*, 367 Ill. App. 3d 479, 483 (2006). We are not allowed to substitute our judgment for that of the fact finder on questions of the weight of evidence or the credibility of witnesses. *People v. Lofton*, 303 Ill. App. 3d 501, 505 (1999).

¶21 Defendant also argues that the only basis for the finding of guilt in this case was that the jury found that the intent to communicate and contact Michelle "was not that of the Defendant/Appellant but that of the third party, Patrice Ghaderi;" thus, defendant was not guilty as a result of his own mental state, "but rather that of another over which he had no control."

¶22 Defendant contacted Ghaderi, whom defendant himself described as "[b]eyond" close friends with Michelle. According to Ghaderi, the conversation, which was littered with phrases such as "she needs to know," "someone needs to get her to understand," and "someone needs to tell her what could happen," even began to make her uncomfortable, especially in light of the order of protection. When Ghaderi asked defendant if he wanted Michelle to know that he called her, defendant answered, "Yes, she can know;" thus, according to Ghaderi, defendant wanted Michelle to know that he called Ghaderi. Although defendant denied telling Ghaderi "that Michelle ought to know about this, the subject matter of [the] conversation," there was evidence that defendant wanted Ghaderi to contact Michelle and tell her about the telephone call. Again, we will not substitute our judgment for that of the fact finder on questions of the weight of evidence or the credibility of witnesses (*Lofton*, 303 Ill. App. 3d at 505), and we conclude that a reasonable jury could have found defendant guilty in this case.

¶23 Defendant fails to understand that Ghaderi's failure to recollect was not as to whether defendant sent text messages. Rather, her failure to recollect was an effective denial that defendant's self-serving texts accurately portrayed the content of the phone conversation. Defendant would have this court conclude that there was a reasonable doubt as to his guilt by claiming that his texts were accurate and truthful accounts of what transpired during the phone conversation. Defendant was allowed to present his claim of innocence to the jury, and the jury decided that Ghaderi was the more credible witness.

¶23 III. CONCLUSION

¶24 For these reasons, the judgment of the circuit court of Kane County is affirmed.

¶25 Affirmed.