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2016 IL App (3d) 130697-U

Order filed March 31, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0697
)	Circuit No. 13-CF-270
ROBERT C. NUNN, SR.,)	Honorable
Defendant-Appellant.)	Kevin Lyons, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice O'Brien and Justice Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) State presented sufficient evidence to convict defendant of harassing a witness where evidence demonstrated that defendant approached witness, pointed a handgun at him and chased him down the street.
(2) Court erred in denying defendant's motion *in limine* to preclude evidence that the victim had testified against defendant in a murder trial in which defendant was acquitted.
- ¶ 2 Defendant, Robert Nunn, Sr., was convicted of harassment of a witness (720 ILCS 5/32-4a(a)(2) (West 2012)) and sentenced to seven years in prison followed by two years of

mandatory supervised release. On appeal, he raises issues involving reasonable doubt, trial court error and the improper assessment of fines and fees at sentencing. We reverse on the issue of trial court error, finding that the court abused its discretion in allowing the State to introduce evidence that the victim had been a witness against defendant in a trial involving a "shooting death" without informing the jury that defendant had been acquitted. We reverse defendant's conviction and sentence and remand for a new trial.

¶ 3 Defendant was charged with harassing a witness following an encounter with the victim, Levi Conway. The indictment alleged that defendant directly communicated a threat of injury to Conway, who served as a witness in the State's previous case against defendant, with the intent to harass him.

¶ 4 The day before trial, defendant filed a motion *in limine* to preclude the State from informing the jury that its previous case involved a first-degree murder charge against defendant. Defense counsel noted that defendant was found not guilty in the previous case and argued that it would be prejudicial for the jury to hear that it was a murder case. In response, the State claimed that informing the jury that the previous case was a murder trial was relevant and probative because it established the victim's state of mind and defendant's motive. The State also informed the judge that it was not planning to reveal to the jury that defendant had been acquitted.

¶ 5 The trial judge concluded that the State could inform the jury that the previous case involved a "shooting death" but could not mention that defendant's prior trial involved a first-degree murder charge or that defendant had been acquitted:

"I may be just splitting the baby, but I think I'm okay with that because in the first case it involved a firearm. It involved a handgun. In the second case the

allegations involve a firearm, a handgun. The first case involves the same witness as the second case. And that I think to indicate that it was a death is helpful to the jury because it helps them to understand the gravity of the charge in this case as it applies to the victim or from the victim's viewpoint.

* * *

So again, my ruling will be we'll not mention it's an acquittal, unless the door is opened by the defense. And we'll not—we can say that the case reached disposition. The case was over. It had concluded. And the jury can draw its own conclusions with regard to the meeting up with [defendant] and Mr. Conway after that."

¶ 6 At trial, Conway testified that in January of 2013, he was a witness for the State in *People v. Robert Nunn, Sr.* He confirmed that he testified against defendant in the case and that "somebody was shot and they died." Conway explained that the next time he saw defendant was two months later, on March 16, 2013, around 11:15 a.m. Conway was walking up the street on his way to the store. He heard someone say, "Long time, no see. I bet you didn't think I was gonna catch up with you bitch ass." Conway recognized defendant's voice and assumed defendant's comments referred to his testimony a few months earlier. He turned around to find defendant standing behind him. Defendant reached into his waistband and pulled out a handgun. Conway turned and ran up the street. Defendant chased him for half of a block.

¶ 7 Conway admitted that he had 2010 and 2012 convictions for theft and a 2004 conviction for manufacture and delivery of a controlled substance. He received a deal from the State on a pending case in exchange for his testimony in this case. He also testified that he had known defendant for about five or six years.

¶ 8 Deon Riley testified as an alibi witness for defendant. He stated that he was with defendant and Harold Nunn at Gaylon Bailey's house at the time Conway claimed defendant was chasing him down the street. Riley admitted that he has a 2002 conviction for aggravated battery and a 2004 conviction for unlawful possession of a controlled substance. He has known defendant for 15 to 20 years.

¶ 9 Harold Nunn, defendant's brother, testified that he has a 2002 conviction for unlawful possession of a controlled substance and a 2008 conviction for manufacture and delivery of cannabis. According to Nunn, he and defendant were hanging out at Gaylon Bailey's house with Riley between 10 a.m. and 1 p.m. on March 16, 2013.

¶ 10 Officer Rob McMillen testified as a rebuttal witness for the State. He testified that defendant originally told him that he was in jail on March 16, 2013. But when McMillen checked the jail records, he discovered that defendant had been released prior to March 16. When he questioned defendant again, defendant told McMillen that he was at Gaylon Bailey's house along with some friends named "Tyann, P.J., and Kenny."

¶ 11 The jury found defendant guilty of harassment. Defense counsel filed a motion for new trial, arguing that the trial court erred in refusing to allow testimony at trial that defendant was acquitted in the previous case. The trial court denied the posttrial motion. The court stated that telling the jury that defendant had been acquitted of murder would prejudice defendant because it would imply that he "had escaped some sort of accountability and that he was out for some sort of vengeance, which is why I chose to say that it was a case involving a death and a shooting because the gun, I thought, was relevant because there was a gun in this case." The trial court sentenced defendant to seven years in prison and two years of mandatory supervised release.

¶ 12

ANALYSIS

¶ 13

I

¶ 14

Defendant first claims that the State failed to prove him guilty of witness harassment beyond a reasonable doubt because there was no evidence demonstrating that he intended to harass Conway based on Conway's prior testimony against him.

¶ 15

A person committed witness harassment if, having the requisite intent, he or she (1) communicates with the witness, potential witness, or family member in such a manner as to produce mental anguish or emotional distress, or (2) conveys a threat of injury or damage to the person or property of the witness, potential witness, or family member. 720 ILCS 5/32-4a(a)(2) (West 2012). The State must prove that defendant possessed the requisite intent to harass or threaten. See *People v. Taylor*, 349 Ill. App. 3d 839, 843 (2004); *People v. Nix*, 131 Ill. App. 3d 973, 975 (1985). To establish intent, a defendant need not actually state to the victim that he or she is harassing them because the victim has, or will, testify against the defendant. *People v. Cardamone*, 232 Ill. 2d 504, 521-22 (2009). "The defendant is presumed to intend the natural and probable consequences of his acts." *People v. Terrell*, 132 Ill. 2d 178, 204 (1989). The jury can infer intent from the defendant's acts and the circumstances surrounding the commission of the offense. *People v. Butler*, 375 Ill. App. 3d 269, 275 (2007). A single threatening statement may support a conviction where the surrounding circumstances indicate that the defendant is likely to carry out the threat. *People v. Berg*, 224 Ill. App. 3d 859, 865 (1991).

¶ 16

When analyzing the sufficiency of the evidence, this court must review the evidence in the light most favorable to the prosecution and consider whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Howell*, 358 Ill. App. 3d 512, 528 (2005). It is not our function to retry the defendant or substitute our judgment for that of the trier of fact. *People v. Evans*, 209 Ill. 2d 194, 211 (2004). To reverse

the defendant's conviction, the evidence must be "so unsatisfactory, improbable or implausible to justify a reasonable doubt as to the defendant's guilt." *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 17 Here, Conway testified that when defendant approached him on March 16, 2013, he had not seen defendant since the previous trial. Defendant found Conway on the street near Conway's house and, while walking behind him, engaged in conversation. During the encounter, defendant taunted Conway and pointed a gun at him and then chased him down the street. The jury was free to infer that defendant's words and acts demonstrated intent to threaten and harass Conway because he testified against defendant two months earlier.

¶ 18 Defendant argues that his statement that he finally "caught up with" Conway could have referred to an earlier dispute that occurred before the January 2013 trial. However, no evidence in the record supports defendant's speculation. Moreover, nothing in the witness harassment statute states or implies that the threatening party must inform the victim that the threat is due to the victim's testimony or expected testimony against him. Viewing the evidence in a light most favorable to the State, the evidence presented at trial was sufficient to support defendant's conviction for harassment of a witness.

¶ 19 II

¶ 20 Defendant next contends that the trial court abused its discretion when it allowed the State to introduce prejudicial testimony that Conway had been a witness against defendant in a case involving a "shooting death." Defendant argues that referring to the prior trial as a "shooting death" case served no purpose other than to show his propensity to commit crimes while carrying a gun.

¶ 21 Other crimes evidence may be admitted to prove *modus operandi*, intent, identity, motive or absence of mistake. *People v. Robinson*, 167 Ill. 2d 53, 62-63 (1995). However, such evidence may only be admitted if it proves a material and relevant fact other than the defendant's propensity to commit a crime. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). "[A] trial court should carefully limit evidence of other crimes to that which is relevant for the purpose it was admitted." *Robinson*, 167 Ill. 2d at 66. Relevant other crimes evidence should be excluded where its prejudicial effect outweighs its probative value. *Donoho*, 204 Ill. 2d at 170. We review the trial court's admission of other-crimes evidence for an abuse of discretion. *People v. Ward*, 2011 IL 108690, ¶ 21.

¶ 22 In *People v. Ward*, 2011 IL 108690, the defendant was charged with criminal sexual assault. At trial, the court admitted evidence that the defendant had been previously involved in the sexual assault of another woman and charged with criminal sexual assault. When the defendant sought to admit evidence of his acquittal in the prior case, the trial court rejected his request. *Id.* ¶¶ 1-2

¶ 23 On appeal, the Illinois Supreme Court held that the trial court erred in admitting evidence of the earlier criminal sexual assault charge without admitting the acquittal. The supreme court conducted a balancing test of the probative value of the acquittal evidence against the undue prejudice to the defendant if the other crimes evidence was admitted without the admission of the acquittal and decided that:

"[d]ue to the inherently high, and often overly persuasive, probative value of such propensity evidence, the need to avoid unfair prejudice by providing a full context for the other-crimes testimony is readily apparent. Given the real possibility the jury would convict defendant based on his alleged prior bad acts alone, barring

the acquittal evidence further enhanced the already high danger of undue prejudice against him." *Id.* ¶ 46.

The court concluded that "barring the admission of the acquittal evidence was an abuse of the trial court's discretion" and that the ruling was "unreasonable under the facts and circumstances of this case." *Id.* ¶ 48.

¶ 24 We find that the analysis in *Ward* applies here. Prior to trial, defense counsel filed a motion *in limine* seeking to preclude the State from mentioning that defendant had been charged with first-degree murder in a previous case in which Conway testified as a witness. The trial court allowed the State to inform the jury the prior case involved a "shooting death" but barred the State from indicating defendant was acquitted "unless that door [was] opened by the defense."

¶ 25 At trial, Conway testified that he was a witness in defendant's previous trial in which someone was shot and died. He also testified that defendant approached him on the street after he testified in the earlier trial and displayed a hand gun. The trial court determined that the presence of a gun in both offenses provided a similarity sufficient for the motive and intent exceptions to the preclusion of other crimes evidence to apply. However, defendant's motive was inherent in the crime of witness harassment, where the crime is based on harassing a witness for testifying against the defendant. Moreover, even if the evidence was relevant as to defendant's motive and intent, there was no need for the jury to be informed that the prior case involved a shooting death. The witness harassment statute is not limited to harassing witnesses who testified in specific felony cases. The jury only needed to know that the charges in the present case emanated from Conway's testimony at another trial. Thus, the evidence had minimal probative value.

¶ 26 The prejudicial effect, however, was significant. The admission that the previous trial involved a shooting death could have easily persuaded the jury that defendant was a bad person who used guns while committing crimes without the benefit of the knowledge that defendant was acquitted of the prior crime. The jury might have inferred that defendant committed the instant offense based on his prior bad act alone. Thus, the prejudicial effect of the other crimes evidence, without the admission of the acquittal, outweighed any probative value it provided. Accordingly, the trial court abused its discretion in allowing the State to refer to the previous case as a "shooting death" case without also admitting the acquittal evidence.

¶ 27 We reverse the trial court's order denying defendant's motion *in limine* and remand for a new trial. In light of our decision, we need not consider defendant's remaining argument regarding the imposition of sentencing fines and fees.

¶ 28 CONCLUSION

¶ 29 The judgment of the circuit court of Peoria County is reversed, and the cause is remanded for a new trial.

¶ 30 Reversed and remanded.