

2018 IL App (1st) 151947-U

No. 1-15-1947

Order filed August 21, 2018

Second Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 14 CR 19569
)	
JOSE CORTES,)	Honorable
)	Colleen Ann Hyland,
Defendant-Appellant.)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Hyman and Walker concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for violation of an order of protection reversed, as the State failed to prove beyond a reasonable doubt defendant had been served with the modified order of protection or otherwise had actual knowledge of its contents.

¶ 2 Following a bench trial, defendant Jose Cortes was convicted of violation of an order of protection (720 ILCS 5/12-3.4(a) (West 2014)), and sentenced to 18 months' imprisonment. On appeal, Jose contends the State failed to prove him guilty beyond a reasonable doubt where it

failed to prove that he (1) had been served with the modified order of protection or otherwise had acquired knowledge of its contents, and (2) committed any “unlawful contact” prohibited by the order and as charged in the indictment. We reverse.

¶ 3 Jose and Claudia¹ were married when this matter began in 2013.

¶ 4 Because the chronology of events is important to an understanding of this appeal, we will detail it below:

¶ 5 On September 25, 2013, Menocal filed a petition for an order of protection against Jose in case number 13 DV 74705, and the State filed a misdemeanor complaint against Jose with leave of court. A summons and warrant were issued with a return date of October 16, 2013, and bail was set at \$25,000. On the same date, Judge Walowski entered an emergency order of protection prohibiting Jose from physical abuse, harassment, interference with personal liberty, intimidation of a dependent, and stalking. Judge Walowski also granted exclusive possession of 7250 South Shore Drive, #202, in Chicago, Illinois, to Menocal and ordered Jose to have no contact with Menocal by any means.

¶ 6 On September 27, 2013, the warrant had been executed and Jose, represented by the public defender, filed a speedy trial demand.

¶ 7 On October 7, 2013, Jose waived his right to a jury trial. Judge Walowski issued a sentencing order for 18 months probation with credit for 12 days in custody, ordered Jose to comply with the order of protection, and imposed a \$400 fine. Judge Walowski also entered a plenary order of protection, which prohibited physical abuse, harassment, interference with personal liberty, intimidation of a dependent, stalking, and granted exclusive possession of 7250

¹ At trial, Jose’s wife, Claudia Cortes, informed the court she preferred to be addressed by her maiden name, Menocal. We honor her request.

South Shore Drive, #202, in Chicago, Illinois, to Menocal. Judge Walowski further ordered Jose to stay away from Menocal and to have no contact by any means with her. Jose was served in open court with this plenary order of protection.

¶ 8 On April 4, 2014, Jose filed a motion to dismiss the plenary order of protection and a hearing was set for April 9.

¶ 9 On April 9, 2014, the plenary order of protection was modified to no unlawful contact, and Menocal's exclusive possession of 7250 South Shore Drive, #202 was removed. The court noted Jose's compliance with probation, set the probation termination date for April 5, 2015, and ordered the State to serve Jose with the modified order.

¶ 10 By October 2014, Menocal was six months pregnant with Jose's child. In addition, the couple had moved to a different apartment located at 6547 W. 111th Street.

¶ 11 There is nothing in the record to indicate that the State did, in fact, serve Jose with the modified order of April 9, 2014. The parties stipulated that a modified order was entered, but Jose did not stipulate that he had the modified order or any knowledge of it or its contents.

¶ 12 Following the incident on October 7, 2014, described below, Jose was arrested and charged with a felony complaint of "Aggravated Unlawful Violation of Order of Protection, having been served notice of the contents of an order of protection Number 13 DV 74705, issued on April 9, 2014, aggravated domestic battery and aggravated battery.

¶ 13 Menocal testified at trial that, on October 7, 2014, she had been married to Jose for four and one half years. They had one child at the time, and Menocal was six months pregnant with their second child. The family lived in an apartment at 6547 West 111th Street.

¶ 14 Around 4:00 p.m., Menocal arrived at her home with her son and a friend from church, Jaime Arrieta, who had given them a ride home. When they walked into the apartment, Jose ran out of a bedroom and began yelling at Arrieta for being with Menocal. Jose was “very aggressive and violent.” He verbally and physically attacked Arrieta, ultimately pushing Arrieta out of the front door of the apartment. Menocal repeatedly tried to leave, but Jose grabbed her by her arms “very strong” and pushed her into the apartment, telling her she was going to “pay dearly” and he would kill her. She was in pain from Jose grabbing her, and felt “very scared.” Jose pulled Menocal into the bedroom and started hugging her, caressing her back, and telling her that he loved her and wanted to fix things. Menocal testified that, at the time, she had an order of protection against Jose prohibiting all unlawful contact.

¶ 15 Jerry Moore, a property manager at the apartment complex, testified that he saw Jose hit Arrieta in the face and push him out of the apartment. He heard Jose yelling in Spanish “real mad” and Menocal speaking while crying. Moore called the police.

¶ 16 Jaime Arrieta testified that, when he and Menocal arrived at her apartment, Jose assaulted him and pushed him outside the apartment. He saw Jose grab Menocal by the arm and push her into the apartment. Arrieta told Jose he needed to leave the apartment because there was an order of protection. We note this information was incorrect as the only Order of Protection in effect on that date was the modified Order of Protection entered on April 9, 2014, which provided for no unlawful contact with Menocal and did not give her exclusive possession of any residence. When police arrived, Arrieta told them that Jose grabbed Menocal by the arm, screamed at her, and pushed her.

¶ 17 The parties stipulated that Jose was convicted of domestic battery in case number 07 CM 4718 and that “there was a valid order of protection for no unlawful contact” in case number 13 DV 74705. This order of protection is not in the record and the report of proceedings does not show that the order was submitted into evidence.

¶ 18 The court granted Jose’s motion for a directed finding on the domestic battery charge, noting that the State did not prove that there was any bodily harm, and denied the motion on the remaining two counts.

¶ 19 Jose testified that he had an argument with Arrieta, pushed him in the chest, and eventually pushed him out of the apartment. Jose denied putting his hands on or grabbing Menocal. He said they argued and the only physical contact he had with Menocal was when he sat on the bed and hugged her while she was standing. Jose denied preventing Menocal from calling the police or leaving the apartment. Jose conceded he was angry at the time of the offense, but stated that he was not loud and that his tone of voice was the same as he was using at trial. The State asked Jose if it was his “angry voice.” Jose responded, “my angry voice?” and then said yes.

¶ 20 The parties stipulated that, if called, Village of Worth police officer Boynton would have testified that he interviewed Arrieta and Menocal. Arrieta never told Boynton that he witnessed Jose grab Menocal’s arm and push her. Menocal never told Boynton that Jose threatened to kill her. Menocal declined medical attention, and Boynton did not see any visible signs of injury to her.

¶ 21 On or about October 7, 2014, a Grand Jury returned indictments for Domestic Battery, Aggravated Battery and Violation of An Order of Protection, “in that he knowingly or

intentionally committed an act which was prohibited by the Circuit Court of Cook County *** in a valid Order of Protection under case 13 DV 74705 *** after the defendant had been served with notice of the contents of the Order of Protection or had otherwise acquired actual knowledge of the contents of the order.”

¶ 22 We note that the felony complaint itemized the modified Order of Protection from April 9, 2014 but does not indicate that it was modified on April 9, 2014 and therefore the original Order of Protection was no longer in effect.

¶ 23 We also note that the Grand Jury indictment does not reference which Order of Protection the defendant was alleged to have violated, the original one, which was no longer in effect, or the modified one which did not give Menocal exclusive possession of any residence, and replace "no contact by any means" with "no unlawful contact."

¶ 24 We further note that there is no evidence in the record that the defendant was served with or had knowledge of the modified order of protection. We also note that there is no evidence that the State introduced or had the subject order of protection entered into evidence, and while the court's "half sheet" in the underlying Order of Protection case specifically reflects a court order for the state to notify the defendant of the Modified Order of Protection, there is nothing in the record to indicate that defendant was actually notified. The stipulation that an Order of Protection for no unlawful contact was in existence does not adequately demonstrate that the defendant was ever served with the "Modified Order of Protection," that he had notice of all of its contents, or that he had acquired actual knowledge of its actual contents.

¶ 25 The trial court found Jose not guilty of aggravated battery, noting that the contact between Jose and Menocal did not "rise to the level of an aggravated battery." It found Jose

guilty of violating of an order of protection, finding that Jose had unlawful contact with Menocal. It found that there was “some lack of credibility” in Jose’s testimony regarding his tone of voice because Jose “was speaking in a very calm manner today and I question whether that was the manner he was speaking to either Mr. Arrieta or the victim in this case. There is no question in my mind that he was much more upset and angry and there was an altercation and that it led to contact between him and the victim.”

¶ 26 The court denied Jose’s motion for a new trial, explaining Jose grabbed Menocal and pulled on her and “there is nothing in the law that justifies that action.” The court sentenced Jose to 18 months’ imprisonment and 4 years’ mandatory supervised release and issued an order of protection for Menocal and her children. This appeal followed.

¶ 27 Jose argues the State failed to prove him guilty beyond a reasonable doubt as there was no evidence presented to show that he had been served with the modified order of protection or otherwise had acquired knowledge of its contents and the State failed to prove he committed any “unlawful contact” prohibited by that order and charged in the indictment. We agree with Jose.

¶ 28 When presented with a challenge to the sufficiency of the evidence, we must determine 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 proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. The reviewing court will not substitute its judgment for that of the trier of fact on issues pertaining to the credibility of witnesses or the weight of the evidence. *Id.* The trier of fact is not required to disregard inferences that normally flow from the evidence or to seek out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). Despite this deference,

a conviction will be reversed if the evidence is so improbable or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 29 To sustain defendant's conviction for violation of the order of protection as charged, the State was required to prove, in relevant part, that defendant (1) had been served notice of, or otherwise had acquired actual knowledge of, the contents of the order and (2) had unlawful contact with Menocal. 720 ILCS 5/12-3.4(a) (West 2014); *People v. Hinton*, 402 Ill. App. 3d 181, 184 (2010).

¶ 30 To be guilty of violating an order of protection, a defendant must have " 'actual knowledge' that his acts were prohibited." *People v. Hoffman*, 2012 IL App (2d) 110462, ¶ 13 (quoting *Hinton*, 402 Ill. App. 3d at 183-84). "[A]ctual knowledge can be shown by service, notice, or '[b]y other means demonstrating actual knowledge of the contents of the order.' " *Hinton*, 402 Ill. App. 3d at 183 (quoting 750 ILCS 60/223(d)(4) (West 2006)). Although actual knowledge of the entire contents of the order of protection is not necessary to put a defendant on notice of what conduct is prohibited, a defendant must have knowledge of the provisions of the order that he is charged with violating. *People v. Brzowski*, 2015 IL App (3d) 120376, ¶ 31.

¶ 31 Actual knowledge is often proven by circumstantial evidence. *Hinton*, 402 Ill. App. 3d at 185. Circumstantial evidence is proof of facts or circumstances that give rise to reasonable inferences of a defendant's guilt or innocence. *Id.* However, the inference of knowledge must be based on established facts and not merely based upon an intervening inference. *Id.* Proof of a defendant's actual knowledge "cannot be based on circumstances that give rise only to conjecture and suspicion." *Id.*

¶ 32 The evidence was insufficient to convict Jose because the State did not produce evidence that Jose was served with or had actual knowledge of the contents of the modified order of protection. While the parties stipulated to the order's existence, they did not stipulate to Jose's knowledge of it - a vital element of the offense. *People v. Harris*, 394 Ill. App. 3d 28, 37 (2009) (a stipulation to a fact does not constitute the statutory requirement of knowledge of an offense). Menocal testified that she had an order of protection that was active on October 7, 2014, but did not testify that Jose knew of it. Arrieta testified that he told Jose he needed to leave because of the protective order, but again, this does not show Jose had knowledge of its contents. And, to make matters worse, the modified order of protection did not give Menocal exclusive possession so Arrieta telling Jose he had to leave was incorrect. Though Jose testified, the State did not ask him about his knowledge of the order nor did the State move for the admission of a copy of the order into evidence. The State's showing, regarding the modified order of protection, that it was "valid," in no way demonstrates Jose's actual knowledge of the contents of the order. It was the State's burden to prove Jose's *mens rea*, his *knowing* unlawful contact with Menocal in violation of the order, and it failed to do so. 720 ILCS 5/12-3.4(a) (West 2014).

¶ 33 Even assuming, *arguendo*, that the stipulation was sufficient to establish that Jose was aware of the modified order of protection and its contents - that he was to have no unlawful contact with Menocal - his conviction still would not stand. The trial court granted a directed finding to Jose on the domestic battery charge, finding no evidence of bodily harm.² It found Jose not guilty of the aggravated battery charge, finding that the State did not prove Jose made

² To prove domestic battery (720 ILCS 5/12-3.2 (a)(1) (West 2014)) as charged, the State had to prove defendant intentionally or knowingly and without legal justification by any means caused bodily harm to his wife, Claudia Cortes, to wit: grabbed and pulled her arm.

insulting or provoking physical contact with Menocal knowing she was pregnant.³ Accordingly, the trial court necessarily found Jose guilty of violating the order of protection based solely on its finding that Jose’s assertion that his “angry voice” was the same as his tone of voice at trial, and that was incredible because he must have been very angry. Yelling at someone is not “unlawful *contact*.” Thus, based on the court’s own findings that the two battery charges were not proven, the violation of the order of protection charge cannot stand.

¶ 34 On this record, the State did not provide sufficient evidence to prove beyond a reasonable doubt that Jose was served with, had knowledge of, or violated the modified order of protection. Thus, his conviction is reversed. Given this determination, we need not address Jose’s remaining arguments.

¶ 35 For the foregoing reasons, the judgment of the trial court is reversed.

¶ 36 Reversed.

³ To prove aggravated battery (720 ILCS 5/12-3.05(d)(2) (West 2014)) as charged, it had to prove defendant, other than by discharge of a firearm, knowingly made physical contact of an insulting or provoking nature with Cortes, to wit: grabbed and pulled Cortes, and defendant knew Cortes was pregnant.