2018 IL App (1st) 160925-U

No. 1-16-0925

Order filed December 6, 2018

Fourth Division

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. 15 CR 00024
	)	
DEMARCO BELL,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's convictions for harassment of a witness and intimidation when the evidence at trial established each element of the offenses beyond a reasonable doubt. Defendant's fines and fees order must be corrected.

¶ 2 Following a bench trial, defendant DeMarco Bell was found guilty of one count of harassment of a witness (720 ILCS 5/32-4a(a)(2) (West 2014)), and two counts of intimidation (720 ILCS 5/12-6(a)(1) (West 2014)). The trial court merged the guilty findings and sentenced defendant to five years in prison for harassment. On appeal, defendant contends the State failed

to prove him guilty beyond a reasonable doubt as it presented no evidence that he intended to harass or intimidate the complainant or that he communicated or conveyed a threat of injury. Defendant also challenges the imposition of certain fines and fees. We affirm, and correct the fines and fees order.

¶ 3 Defendant and co-defendants Royale Rambert, Antonio Baker, and Demario Lowry were charged with harassment of a witness and two counts of intimidation and their cases proceeded to simultaneous bench trials.[1] The harassment count alleged that they, with the intent to harass Devonte Scott, who was expected to testify as a witness in *People v. Timberlake*, case number 13 CR 16426, communicated indirectly with Scott the threat of injury, "to wit: to shoot" Scott, because of his potential testimony. 720 ILCS 5/32-4a(a)(2) (West 2014). The intimidation counts alleged that defendants, with the intent to cause Scott "to omit" testifying in court, communicated to him "indirectly by any means" a threat to inflict physical harm on him or another person, specifically to shoot him or another person on East Bowen Avenue, Chicago. 720 ILCS 5/12-6(a)(1) (West 2014).[2]

¶ 4 Devonte Scott testified that on July 16, 2013, he and Demarco Holmes were robbed and carjacked by two men outside Scott's residence on East Bowen Avenue. He later identified one of the offenders, Dwayne Timberlake in a photographic array and in a physical line-up. Scott was subpoenaed to appear and testify at Timberlake's trial on December 12, 2014.

[1] Lowry was also found guilty, and on appeal we affirmed his convictions. See *People v. Lowry*, 2017 IL App (1st) 160599-U. Baker and Rambert were found not guilty.

[2] Defendant was also charged with unlawful use or possession of a weapon by a felon and aggravated unlawful use of a weapon. These charges were severed. At sentencing, the State *nolle prossed* "all outstanding charges."

¶ 5 On November 27, 2014, Scott's "godbrother" Ronald Richardson was shot in the hand outside Scott's residence on East Bowen Avenue, and the police were contacted. On November 29, Scott's father, Arthur, who worked installing surveillance cameras, installed a surveillance system at the East Bowen Avenue house. That night, Scott was watching the surveillance cameras when he observed his mother, Ocie Seay, exit a vehicle and duck behind it as a Chevy Impala "rolled around and slowed down." Scott also observed his aunt Shonda Seay move behind the automobile. Scott testified that the Impala was "driving suspicious."

¶ 6 Scott then watched on the surveillance system as the Impala slowed down and parked at "the back of the alley." Two people exited the vehicle and walked around the gangway "with their hoods on." They then walked to "kind of to the side" of the house, looked at the house, turned around, and the men entered into the vehicle. He noticed a handgun hanging out of one of the individual's "front left pocket." The Impala then drove away. Scott testified that he was able to download clips from the surveillance system and give them to the police. He later identified co-defendant Baker as one of the individuals who robbed him and Holmes in July 2013.

¶ 7 Ronald Richardson, who also lived at the East Bowen Avenue residence, testified that as he exited the house on November 27, 2014, he heard "a gun cock." He turned around and observed two men in the gangway. When Richardson heard gunshots, he began running. He did not see the shooters' faces. Richardson suffered a gunshot wound to the left hand.

¶ 8 Ocie Seay, Scott's mother, testified that she was at the East Bowen Avenue residence on the evening of November 27 when she heard gunshots. When she looked out the window, she observed two men in the gangway shooting in Richardson's direction. After the shooting, she had surveillance cameras installed at the house. On the evening of November 29, when Seay and

her sister returned home and exited their vehicle, she noticed a silver Impala. The Impala slowed down and "stayed right there." Seay grabbed her sister and the women "ducked down." Seay, an officer with the Cook County Department of Corrections, then pulled out her service weapon. She normally did not carry her weapon when she was off-duty, but had begun to do so after "the incident" on November 27. The women ultimately went inside and the police were contacted. Seay testified that when she entered the house, Scott told her to come and look at the live footage from the surveillance system. She observed two people in the gangway looking up at the house.

¶ 9 Officer Veronica Negron testified that she responded to a call regarding the East Bowen Avenue residence, and curbed a grey Impala. The occupants of the vehicle were subsequently identified as defendant, Lowry, Rambert, and Baker. Rambert was in the driver's seat, defendant was in the front passenger seat and Baker and Lowry were in the backseat. Negron noticed defendant making "fugitive [*sic*]" movements toward the floor under the front passenger seat. As Negron attempted to remove the vehicle's occupants, defendant opened his door and ran. He was apprehended by another officer. Negron recovered a Smith & Wesson 9-millimeter containing 16 live rounds from underneath the Impala's front passenger seat.

¶ 10 Detectives Paul Galiardo and Dewilda Gordon interviewed the witnesses from the incident at East Bowen Avenue and reviewed the surveillance video. At trial, the video was entered into evidence and then published to the court without objection. The video is not included in the record on appeal.[3]

[3] In their briefs, the parties acknowledge that the video is not included in the record on appeal. The parties believe that the video is included in codefendant Lowry's record on appeal and the State Appellate Defender states that it has submitted a request to the clerk of the circuit court requesting that a copy of the video be made so that the instant record on appeal may be supplemented. The records of this court reveal that codefendant Lowry's record on appeal was returned to the circuit court on April 6, 2018. Defendant's record on appeal has not been supplemented with the video.

¶ 11 The parties stipulated that Illinois State Police forensic scientist Kurt Murray tested 10 spent cartridges recovered from the scene of the Richardson shooting. Murray concluded that, within a reasonable degree of scientific certainty, 6 of the 10 cartridges came from the 9-millimeter weapon recovered from the Impala. Additionally, the parties stipulated that, between December 18, 2013, and November 19, 2014, Rambert visited the incarcerated Timberlake 34 times and Baker visited him 5 times.

¶ 12 In finding defendant guilty, the court noted that the weapon recovered from underneath defendant's seat in the Impala was the same weapon that was used to shoot Richardson and that defendant "took off running" when Officer Negron curbed the vehicle. The court also noted that the video corroborated that the person in the front passenger seat of the Impala exited the automobile and walked along the west gangway of the residence. Considering the totality of the circumstances, the court found defendant guilty of one count of harassment of a witness, and two counts of intimidation. The trial court merged its guilty findings, and sentenced defendant to five years in prison for harassment.

¶ 13 On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that he intended to harass or intimidate Scott.

¶ 14 Before reaching the merits of defendant's appeal, we again note that the surveillance video is not included in the record on appeal. It is defendant's burden, as the appellant, to provide a sufficiently complete record so that this court has an adequate basis for reviewing the trial court's judgment. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156-57 (2005). If any doubts arise due to the absence of a complete record on appeal, we will resolve those doubts against the appellant and in favor of the validity of the trial court's rulings. *Foutch v. O'Bryant*,

99 Ill. 2d 389, 391-92 (1984). See also *People v. Fernandez*, 344 Ill. App. 3d 152, 160 (2003) ("any doubts arising from the incompleteness of the record will be construed against defendant, whose responsibility it was as appellant to present a complete record on review").

¶ 15 When reviewing a challenge to the sufficiency of the evidence, the relevant question 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 crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *People v. Bradford*, 2016 IL 118674, ¶ 12. A reviewing court will not substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. *Id*. This court reverses a defendant's conviction only where the evidence is so unreasonable, improbable or unsatisfactory that a reasonable doubt of his guilt remains. *Id*.

¶ 16 Defendant contends the State failed to prove he had the requisite intent to harass Scott. Defendant admits that he "simply got out of a car, went to the gangway, briefly looked around, and then returned to the car, of his own volition, before driving away." However, he argues that these actions, in and of themselves, do not support the conclusion that he "intended" to threaten Scott, when there was no evidence of verbal communication or personal contact with Scott and no evidence that he knew that Scott was inside the house. He concludes that the State's arguments at trial were "unsupported and unproven assumptions" about his intent.

¶ 17 To prove defendant guilty of harassment of a witness as charged, the State had to prove that he, with intent, harassed future witness Scott and conveyed a threat of injury to Scott, specifically, to shoot him. See 720 ILCS 5/32-4a(a)(2) (West 2014).

¶ 18 The statute does not define "harass," and giving the term its common meaning in this statutory context, "to harass" means "to create an unpleasant or hostile situation for[,] especially by uninvited and unwelcome verbal or physical conduct." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/harass (last visited Oct. 14, 2018). A trier of fact can infer intent from the defendant's actions and the circumstances surrounding the commission of the offense. *People v. Butler*, 375 Ill. App. 3d 269, 275 (2007). A defendant is presumed to intend the natural and probable consequences of his actions. *People v. Terrell*, 132 Ill. 2d 178, 204 (1989).

¶ 19 Intent to harass can be inferred from the surrounding circumstances (*People v. Berg*, 224 Ill. App. 3d 859, 862 (1991)), and we find the court's determination that defendant intended to harass Scott because of his future testimony against Timberlake to be a reasonable inference from the evidence presented at trial. Here, defendant does not contest that he was present in a vehicle with Lowry, Rambert, and Baker or that he walked through the gangway next to Scott's home before leaving. Moreover, the evidence at trial established that defendant was in the front passenger seat when the vehicle was pulled over and that the handgun used to shoot Richardson was recovered from under that seat. It is a reasonable inference that, since defendant came to Scott's home in the company of Timberlake's associates Baker and Rambert, he was there in connection with Scott's testimony against Timberlake. *Id.* We cannot say that no rational trier of fact could have found that defendant was outside Scott's home with the intent to harass him because of his future testimony against Timberlake. See *Brown*, 2013 IL 114196, ¶ 48.

¶ 20 The evidence is also sufficient to demonstrate that defendant conveyed a threat to shoot Scott. If, as in the case at bar, a defendant has the requisite intent, then the witness-harassment

statute provides for two alternative bases for liability: (1) direct or indirect communication with the witness that produces mental anguish or emotional distress; or (2) conveyance of a threat of injury or damage to the person or property of the witness. 720 ILCS 5/32-4a(a)(2) (West 2014). Defendant was charged and convicted on the second basis.

¶ 21 We find defendant's presence in a car driving past Scott's house, his entry into the gangway, and the fact that one of the men in the gangway had what appeared to be a firearm, just two days after Richardson was shot, was sufficient to convey the threat that Scott similarly would be shot. It is a reasonable inference that the gun that Scott testified that he saw on the video was the loaded firearm recovered from under defendant's seat in the Impala, that is, the same firearm that was fired at Richardson.

¶ 22 Defendant contends, however, that his mere presence in the gangway does not give rise to the essential element of communicating a threat to Scott. Defendant asserts that the evidence presented was insufficient to establish that he had personal contact with Scott or that he knew Scott was present in the house watching on the video feed. We disagree. There is no requirement that defendant directly convey the threat to Scott or that he intend to convey a threat. The only requirement is that a threat be conveyed. See 720 ILCS 5/32-4a(a)(2) (West 2014). The threat here was conveyed, as Scott and Ocie observed the nighttime drive-by and the two hooded men entering the gangway, that is, the same place where the men shooting at Richardson were located. Additionally, Scott testified that he noticed a handgun in the pocket of one of the individuals in the alley. Based on the evidence produced at trial, we affirm the conviction for harassment of a witness as we do not find the evidence so unreasonable, improbable, or unsatisfactory that no rational trier of fact could find that defendant, with the intent to harass

future witness Scott because of his potential testimony in the case against Timberlake, conveyed a threat to shoot Scott. *Bradford*, 2016 IL 118674, ¶ 12.

¶ 23 Defendant further argues the State did not meet its evidentiary burden to prove that he intended to intimidate Scott because the State failed to present any evidence establishing that he knew Scott or Timberlake, that he knew about the trial or that he knew that Scott was watching on the surveillance system. He concludes that his convictions are based upon nothing more than a "wild theory" and "pure conjecture."

¶ 24 To prove intimidation as charged, the State had to prove that defendant, with the intent to cause Scott "to omit the performance of any act" communicated to Scott "indirectly by any means, a threat to perform without lawful authority" the infliction of physical harm to Scott or any other person, *i.e.*, to shoot Scott or someone else at the residence. 720 ILCS 5/12-6(a)(1) (West 2014).

¶ 25 Intimidation requires that a threat be communicated with the specific intent to coerce someone else to do something against his will. *People v. Casciaro*, 2015 IL App (2d) 131291, ¶ 84. Specifically, it "requires proof of a threat of physical harm at some time, possibly in the future." although the means or method by which the threat is communicated is not an essential element. *Id.* ¶ 85. A "threat" implicitly requires "that the expression, in its context, has a reasonable tendency to create apprehension that its originator will act according to its tenor." *People v. Byrd*, 285 Ill. App. 3d 641, 647 (1996). In other words, the victim must fear that the maker of the threat will carry out the threat. *Casciaro*, 2015 IL App (2d) 131291, ¶ 84. The specific intent at issue in the offense is the intent to coerce, to cause someone to act or not act, rather than the intent to carry out the threat. *Byrd*, 285 Ill. App. 3d at 648. The intent to coerce

the victim can be inferred from the defendant's statements and surrounding circumstances. *Casciaro*, 2015 IL App (2d) 131291, ¶ 84.

¶ 26 To the extent that defendant argues that the motivation behind his actions was "unclear," we disagree. As discussed above, defendant's actions were sufficient to communicate the threat that Scott would be shot. The drive-by and presence of two hooded individuals, one of whom had a firearm, in Scott's gangway occurred just two days after Richardson was shot by men in the same gangway. From this, the trial court could clearly find that defendant's actions had a reasonable tendency, under the circumstances, to place Scott in fear that one of the men would shoot him or someone else in the residence. Moreover, defendant committed these acts in the company of Timberlake's associates Rambert and Baker, and Scott was slated to testify as the complaining witness at Timberlake's trial. The trial court could, therefore, come to the reasonable conclusion that defendant communicated the threat to shoot Scott or someone else in his home with the specific intent to coerce Scott, specifically to deter or prevent him, against his will, from testifying against Timberlake. Taken together, in a light most favorable to the State, the evidence was not so improbable or unsatisfactory that no rational trier of fact could find defendant, with the intent to cause Scott "to omit the performance of" testifying against Timberlake in court, communicated to Scott a threat to shoot Scott or another person at the East Bowen Avenue residence. See *Bradford*, 2016 IL 118674, ¶ 12.

¶ 27 Defendant next contests the imposition of certain fines and fees. In setting forth his argument, defendant acknowledges that he did not object to the imposition of the fines and fees at the time of sentencing nor was the issue preserved in his motion to reconsider sentence. As such, defendant is raising the issue for the first time on direct appeal. In doing so, defendant

acknowledges that the issue has been forfeited but suggests that we review the matter under the second prong of the plain error doctrine or under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999).

¶ 28 The State does not argue that the issue has been forfeited, but instead argues the merits. Accordingly, the State has forfeited the claim that the issues raised by defendant are forfeited. See *People v. Whitfield*, 228 Ill. 2d 502, 509 (2007) (the State may forfeit the claim that an issue defendant raises is forfeited if the State does not argue forfeiture on appeal). We review the imposition of fines and fees *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 29 Defendant first contends, and the State agrees, that that the $5 court system fee (55 ILCS 5/5-1101(a) (West 2014)), must be vacated as that assessment only applies to violations of the Illinois Vehicle Code. Here, defendant was not convicted of a violation of the Vehicle Code. We therefore vacate the $5 court system fee.

¶ 30 Similarly, the parties agree, and we concur, that the $20 probable cause hearing fee must be vacated because defendant was charged by way of indictment, and did not have a preliminary hearing to determine whether probable cause existed. See 55 ILCS 5/4-2002.1(a) (West 2014); *People v. Smith*, 236 Ill. 2d 162, 174 (2010) (where a probable cause hearing was not held, a defendant cannot be assessed a "preliminary examination" fee). We therefore vacate the $20 probable cause hearing fee.

¶ 31 Defendant next contends that he is entitled to offset the fines assessed against him with his presentence custody credit. See 725 ILCS 5/110-14(a) (West 2014). Here, defendant accumulated 409 days of presentence custody credit, and, therefore, he is potentially entitled to $2045 of credit toward his eligible fines.

¶ 32 Here, defendant contends, and the State agrees, that the $5 youth diversion/peer court assessment, the $5 drug court fee, the $10 mental health court assessment, the $15 State Police operations charge, the $30 children's advocacy center assessment, and the $50 court system fee imposed by the trial court are fines subject to offset by presentence custody credit. We agree. See *People v. Price*, 375 Ill. App. 3d 684, 698-701 (2007) (finding both the $10 mental health court fee and the $5 youth diversion/peer court assessment are fines); *People v. Unander*, 404 Ill. App. 3d 884, 886 (2010) (finding the $5 drug court assessment "is a fine"); *People v. Brown*, 2017 IL App (1st) 150146, ¶ 36 (finding the State Police operations assessment is a fine); *People v. Jones*, 397 Ill. App. 3d 651, 660-61 (2009) (holding that the children's advocacy center assessment "is a fine rather than a fee"); *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 17 (the $50 court system fee "is imposed upon every defendant who is found guilty in a felony case, regardless of what transpired in the defendant's case, *** and, as a penalty, it is subject to the $5-per-day credit"). Accordingly these assessments are subject to offset by defendant's presentence custody credit.

¶ 33 Defendant finally contends that he is entitled to credit against the $2 State's Attorney records automation fee, the $2 Public Defender records automation fee, the $190 felony complaint filed fee, the $15 automation fee, and the $15 document storage fee.[4] We disagree.

¶ 34 In *People v. Brown*, 2017 IL App (1st) 142877, ¶¶ 76-78, this court determined that the $2 State's Attorney records automation fee and the $2 Public Defender records automation fee assessments are fees. We acknowledge that *People v. Camacho*, 2016 IL App (1st) 140604,

[4] Whether the felony complaint filed, automation, document storage, Public Defender records automation, and State's Attorney records automation assessments are fees or fines is currently pending before the Illinois Supreme Court in *People v. Clark*, 2017 IL App (1st) 150740-U, *pet. for leave to appeal granted*, No. 122495 (Sept. 27, 2017).

¶¶ 47-56, concluded that these charges are fines. However, we follow *Brown* and the weight of authority cited therein and conclude that these assessments are fees and not fines. They are not subject to offset.

¶ 35 Similarly, this court has previously determined that the $190 felony complaint filed fee, the $15 automation fee, and the $15 document storage fee are fees, not fines, and therefore, not subject to presentence incarceration credit. See *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006); *Brown*, 2017 IL App (1st) 142877, ¶ 81 (finding that the document storage fee and automation fee are fees not subject to offset by presentence incarceration credit); *People v. Heller*, 2017 IL App (4th) 140658, ¶ 74 (citing *Tolliver* and finding the automation and document storage fees are fees rather than fines). We adhere to the reasoning in our prior decisions and find that these assessments are fees, and, therefore, defendant is not entitled to offset them with his presentence custody credit.

¶ 36 For the foregoing reasons, we affirm defendant's conviction. We further order the clerk of the circuit court to correct defendant's fines and fees order to reflect the vacation of the $5 court system fee and the $20 probable cause hearing fee.

¶ 37 Affirmed; fines and fees order corrected.