2018 IL App (1st) 161103-U

No. 1-16-1103

Order filed December 14, 2018

Fifth 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. 14 CR 14718
	)	
JAHAT EVELYN,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for domestic battery and the violation of an order of protection are affirmed over his contention that there was insufficient evidence that the incident actually occurred. Defendant's sentences affirmed over his contention that the trial court failed to consider the immigration consequences of defendant's sentences.

¶ 2 Following a bench trial, defendant Jahat Evelyn was found guilty of domestic battery and the violation of an order of protection. He was sentenced to two concurrent 18-month prison terms. On appeal, he contends that the evidence at trial was insufficient to prove, beyond a

reasonable doubt, that he was guilty of domestic battery and the violation of an order of protection. He further contends that the trial court abused its discretion when it failed to "adequately consider the hardship" that his 18-month prison sentences would have upon his family because the sentences exposed defendant, a permanent resident of the United States, to deportation. We affirm.

¶ 3 Defendant was charged by indictment with home invasion, residential burglary, aggravated domestic battery, domestic battery, and the violation of an order of protection following a July 4, 2014 incident with the victim, his wife Cyntillia Evelyn.

¶ 4 Prior to trial, the State filed a motion to admit proof of other crimes, and a motion to admit proof of a prior conviction pursuant to section 115-20(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-20(b) (West 2014)). The trial court granted both motions.

¶ 5 Cyntillia Evelyn testified that she and defendant had been married since 2009, and had two children. On April 30, 2014, Cyntillia was on the sofa with their children, when defendant pointed his middle finger at her face and began to "rant." He next grabbed her by the neck in a "choking fashion." When defendant stopped squeezing, Cyntillia told defendant she could not believe that he "did that in front of the kids" and sent the children to their room. Defendant followed the children and tried to lock himself and the children inside. When Cyntillia tried to push the door open, defendant grabbed her by her neck, pushed her away from the door and stated that he was going to "try to kill—he'll kill all of us." Cyntillia and defendant began to argue and she called 911. Defendant was arrested and an order of protection was subsequently entered. The order of protection stated, in pertinent part, that defendant should not enter Cyntillia's residence, was to stay away from Cyntillia and was to refrain from telephone calls.

Defendant was permitted to see the children, but only if a third party was available to get the children, that is, he was not to contact Cyntillia regarding visitation.

¶ 6 Shortly before midnight on July 4, 2014, defendant called and indicated that he wanted to come over to see the children and talk to her. Cyntillia initially agreed, as she was half-asleep. However, once she realized the time, she said no and hung up. Later, the doorbell rang. Cyntillia looked out the window and saw defendant. She went downstairs, opened the door and told defendant to leave. However, defendant pushed open the door, entered Cyntillia's apartment and locked the door. Although she told him to leave, defendant said he needed to tell her something and she needed to listen. Defendant then began to yell at Cyntillia and called her a whore. Cyntillia pulled out her phone and stated that if defendant did not leave, she would call the police. Defendant grabbed the phone, stated that it did not matter "what happens tonight" and that he was ready to go to jail and to die. Defendant proceeded to grab Cyntillia around the neck and squeeze. She could not breathe. After about ten seconds, defendant let go of her neck. Cyntillia again told defendant to leave. Defendant continued to yell and she ran into the kitchen where she tried to open the door.

¶ 7 Defendant followed her into the kitchen and pushed her hand away from the door. He then grabbed her neck and pushed her across the kitchen. Cyntillia felt pressure and "tightening" around her neck, and could not breathe normally. After around 15 seconds defendant let go of her neck. Cyntillia then screamed that he needed "to go" and ran to the living room. There, she tried to open the door. Defendant grabbed her around the neck for the third time and pushed her away from the door. Cyntillia went to the sofa and tried get her tablet, which had the 911 application. Defendant then tossed her phone at her and ran out the door. Cyntillia called 911.

As a result of this incident, she had pain and bruises. The bruises appeared two days later. She did not receive any medical treatment.

¶ 8 During cross-examination, Cyntillia testified that by April 30, 2014, her marriage to defendant was deteriorating, they were discussing divorce, and she was the family's sole breadwinner. She believed that she told police officers that she told defendant that he could not come over. She did not recall that a lamp was knocked over or that she told an officer that a lamp was knocked over. She also did not recall telling an officer that defendant slammed her tablet to the floor. During the fight, defendant yelled that Cyntillia had been cheating on him. Between April 30 and July 4, defendant saw the children twice. Each time, he contacted her to arrange the visit; she did not contact the police either time.

¶ 9 The State then entered into evidence a certified copy of the order of protection in case number 14 DV 40722, and a certified copy of defendant's conviction for domestic battery in case number 14 DV 40722. The parties also stipulated to the May 1, 2014 transcript of defendant's guilty plea in case number 14 DV 40722.[1]

¶ 10 After the State rested, the defense made a motion for a directed verdict. The trial court denied the motion.

¶ 11 The parties stipulated that Bellwood police officer Ibarrientos would testify that on April 30, 2014, he met Cyntillia at her residence and did not "observe any signs of injury" to Cyntillia.

¶ 12 Defendant then presented the testimony of Bellwood police officer Cassius Pates who testified that when he spoke to Cyntillia, she told him that defendant choked her, that she had told defendant that defendant could see the children and that defendant slammed her tablet to the

[1] This transcript is not included in the record on appeal.

ground. She did not say that she told defendant he could not come over. Pates did not see any bruises on Cyntillia's neck. Pates testified that Cyntillia stated that she told defendant to leave multiple times and that defendant "strangled" her in the living room and kitchen. She also stated that she tried to call 911 from her tablet, but ultimately called 911 on her phone. Cyntillia complained about neck and back pain. Pates noticed some furniture disturbed around the home.

¶ 13 The trial court found defendant guilty of domestic battery, as it believed Cyntillia that defendant became "somewhat violent" and "put his hand around her neck at least on three different occasions." The court further stated that Cyntillia "testified clearly that *** defendant put his hands on her neck, [and] choked her" but that she was still able to breathe. The court then noted that the defense argued that Cyntillia's credibility was an issue and that the incident never happened. However, the court found that any impeachment was "minor at best." The court concluded that the fact Pates did not see an injury indicated that "while there was an injury, it was not as severe as a strangulation, but certainly could be determined to be a choking and a pushing *** from one room to another." In finding defendant guilty of the violation of an order of protection, the trial court stated that it had read the order of protection and that it was "pretty clear" to the court that defendant was not to go to the house or have contact with Cyntillia. The court further found that the order of protection was a "judge's order," and that defendant was "fully apprised of the order." Defendant then filed a motion for a new trial, which the trial court denied the motion.

¶ 14 On January 11, 2016, the trial court held a sentencing hearing. The State read Cyntillia's victim impact statement to the court in which she stated that she had undergone counseling and had to tell her children that a "real marriage" did not involve physical fighting followed by

hugging. The State also noted that at the time of the incident, defendant was on probation. The defense responded that defendant had been a stay-at-home parent, was a licensed pharmacy technician, and had strong family support. Additionally, from March to April 2014, defendant spent seven days as an inpatient at Riveredge Hospital. The defense argued that this was a "very isolated event" and asked that the court consider probation.

¶ 15 Defendant then stated that although "they" made it seem like he was an abuser, he was not a violent person. He further stated that this "situation actually never really happened" and that he never put his hands on Cyntillia. Defendant indicated that he took a "back seat" and raised the children because Cyntillia had a career and that it was only later that he went back to school. Defendant also stated that Cyntillia's building did not have a doorbell and that she did not own a tablet. Defendant concluded that this case had many inconsistencies and lies and asked the court give him another chance so that he could get back to being a pharmacy technician.

¶ 16 When the court asked defendant whether he was saying that "none" of this ever happened, either the instant case or other prior one, defendant responded that the only reason he entered a guilty plea in the first case was because it was the first time he was "locked up" and he did not want to go to jail. He did not know about the order of protection beforehand and was never told with what he was being charged. The court then stated that probation and domestic counseling would "really serve no purpose because you feel you have done nothing wrong." The court also took into consideration that defendant was on probation for domestic violence at the time of the offenses and had violated an order of protection. The court found that defendant was not a good candidate for probation and sentenced him to two concurrent 18-month prison terms.

¶ 17 On February 5, 2016, counsel filed a motion to reconsider sentence. On February 26, 2016, defendant's *pro se* notice of appeal, mailed February 1, 2016, was filed in the circuit court.

¶ 18 On April 13, 2016, counsel filed a supplemental motion to reconsider sentences, arguing that defendant's sentences were excessive in light of the immigration implications defendant faced as a result of being sentenced to 18 months in prison, and asking that defendant's sentences be reduced to less than a year in prison so that defendant could try to avoid deportation.

¶ 19 On April 26, 2016, defendant's *pro se* notice of appeal was filed in this court and assigned number 1-16-1103.

¶ 20 At a June 1, 2016, hearing on the motion and supplemental motion to reconsider sentences, counsel asked the court to reduce defendant's sentences to six months in jail and probation citing the substantial mitigation evidence presentenced at sentencing hearing. Counsel further noted that defendant was a legal permanent resident who had spent almost his entire life in the United States and that based upon the sentences imposed in this case defendant was facing deportation. Counsel stated that the fact that defendant was sentenced to more than a year in prison was what would trigger his deportation. Counsel further stated that if the court was to reduce defendant's sentences, he could petition for a discretionary waiver to try to avoid deportation. Counsel concluded that defendant's deportation would have a serious impact on his family and that his children would grow up without a father.

¶ 21 The court stated that it did not feel it was appropriate for it to vacate defendant's sentences and give him probation based upon "what going on with [his] deportation." Therefore, the court denied the motions. A second notice of appeal was filed on June 3, 2016. It was not assigned a new number.

¶ 22 On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt and that the trial court abused its discretion when it failed to "adequately" consider that his 18-month prison terms, which would trigger his deportation, would cause hardship to his family.

¶ 23 However, prior to considering the merits of defendant's arguments, we must consider our jurisdiction to hear defendant's appeal. "A reviewing court has an independent duty to consider issues of jurisdiction, regardless of whether either party has raised them." *People v. Smith*, 228 Ill. 2d 95, 104 (2008).

¶ 24 Illinois Supreme Court Rule 606(b) (eff. Dec. 11, 2014), states that "[w]hen a timely posttrial or postsentencing motion directed against the judgment has been filed *** any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court." The rule further provides that "[t]his rule applies whether the timely postjudgment motion was filed before or after the date on which the notice of appeal was filed." *Id.* Accordingly, when a timely posttrial or postsentencing motion directed against the judgment is filed, even after a notice of appeal is filed, the notice must be stricken. See *e.g.*, *People v. Rowe*, 291 Ill. App. 3d 1018, 1020 (1997) ("the timely filing of a postsentencing motion (*i.e.*, within 30 days of the judgment) acts as an implicit motion to dismiss the notice of appeal and renders the notice of appeal ineffectual").

¶ 25 The record reflects that in the case at bar, counsel filed a motion to reconsider sentence on February 5, 2016. The record also reflects that defendant mailed a *pro se* notice of appeal on February 1, 2016, which was received in the circuit court on February 26, 2016. Thus, pursuant to Supreme Court Rule 606(b), the *pro se* February 2016 notice of appeal was premature and without effect. However, the February 2016 notice of appeal was not struck; rather, it was

transmitted to this court and assigned appeal number 1-16-1103. The record also reflects that the trial court denied defendant's motions to reconsider sentences on June 1, 2016, and counsel filed a timely notice of appeal on June 3, 2016. As a result, this court has jurisdiction to consider the merits of defendant's appeal. See Ill. S. Ct. R. 606(b) (eff. Dec. 11, 2014) ("the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion"). We note that when the June 2016 notice of appeal was transmitted to this court, it was treated as a duplicate and not assigned its own appeal number. We now turn to the merits of defendant's appeal.

¶ 26 Defendant first contends that he was not proven guilty beyond a reasonable doubt when the evidence at trial was insufficient to establish that he committed domestic battery and the violation of an order of protection. He argues that Cyntillia was the sole witness and the State presented no physical or photographic evidence to corroborate her "story." He further notes that she was impeached by statements made to the responding officer shortly after the incident.

¶ 27 To prove that defendant committed the offense of domestic battery, the State must establish that defendant, knowingly without legal justification by any means, caused bodily harm to a family or household member. See 720 ILCS 5/12-3.2(a)(1) (West 2014). To prove that defendant violated an order of protection, the State must establish that defendant knowingly committed an act which was prohibited by a court in a valid order of protection and that such a violation occurred after defendant was served with notice of the contents of the order of protection or had otherwise acquired actual knowledge of the contents. See 720 ILCS 5/12-3.4(a) (West 2014). In the case at bar, defendant makes no argument regarding his knowledge of the

order of protection; rather, he argues on appeal that Cyntillia's testimony that the July 2014 incident occurred is incredible and uncorroborated.

¶ 28 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*.

¶ 29 Here, taking the evidence in the light most favorable to the State as we must (*Brown*, 2013 IL 114196, ¶ 48), there was evidence from which a rational trier of fact could have found that defendant committed domestic battery when Cyntillia testified that defendant choked her three different times during the course of their argument and that she suffered pain and bruises as a result. Moreover, a rational trier of fact could have found that defendant violated an order of protection when the order of protection stated that defendant should not enter Cyntillia's home or contact her regarding visitation, and Cyntillia testified that defendant called her asking to come over and then came to and entered her home.

¶ 30 Defendant, however, argues that Cyntillia's version of events is uncorroborated by either other witnesses or physical evidence, and notes that she was impeached by what she told one of

the responding officers. He further argues that she was motivated to "falsely accuse" defendant because of their "deteriorating relationship."

¶ 31 Although defendant is correct that Cyntillia's testimony was not corroborated by other witnesses or photographs of her injuries, the testimony of a single witness, if it is positive and the witness is credible, is sufficient to convict a defendant. See *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Moreover, the impeachment that defendant relies on related to collateral matters, *i.e.*, whether she told Officer Pates that she told defendant not to come over and whether defendant smashed her tablet, not whether defendant entered the apartment and repeatedly choked her. Here, the trial court found Cyntillia to be credible and noted that she "testified clearly that *** defendant put his hands on her neck, [and] choked her." The court also stated that any impeachment was "minor at best" and rejected the defense's argument that the incident did not happen. Defendant's arguments on appeal amount to a request that we substitute our judgment for that of the trial court as to Cyntillia's credibility and the weight afforded her testimony. We decline, as it is the responsibility of the trier of fact, in this case the trial court, to determine a witness's credibility, to resolve conflicts in the testimony, and to weigh the evidence presented at trial. *Bradford*, 2016 IL 118674, ¶ 12.

¶ 32 Ultimately, the trial court was not required to disregard inferences that flow normally from the evidence, seek all possible explanations consistent with innocence and elevate them to reasonable doubt, or find a witness incredible merely because defendant says she was. See *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. This court reverses a defendant's conviction only where the evidence is so improbable or unsatisfactory that a reasonable doubt of his guilt remains; this

is not one of those cases. See *Bradford*, 2016 IL 118674, ¶ 12. Accordingly, we affirm defendant's convictions for domestic battery and the violation of an order of protection.

¶ 33 Defendant next contends that the trial court abused its discretion when it failed to take into consideration the fact that his deportation would be a great hardship to his family and reduce his sentences accordingly.

¶ 34 "A reviewing court may not alter a defendant's sentence absent an abuse of discretion by the trial court." *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). This broad discretion means that this court cannot substitute our judgment simply because we may weigh the sentencing factors differently. *Id.* at 212-13. A trial court abuses its discretion in determining a sentence where the sentence is greatly at variance with the spirit and purpose of the law or if it is manifestly disproportionate to the nature of the offense. *Id*. at 212.

¶ 35 When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, *inter alia*, a defendant's age, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010). The trial court does not need to expressly outline its reasoning when crafting a sentence, and we presume that the court considered all mitigating factors absent some affirmative indication to the contrary other than the sentence itself. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the severity of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Id.* In the absence of evidence to the

contrary, we presume that the sentencing court considered the mitigating evidence presented. *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 51.

¶ 36 Here, defendant was found guilty of the class 4 felonies of domestic battery and the violation of an order of protection. See 720 ILCS 5/12-3.2(b) (West 2014); 720 ILCS 5/12-3.4(d) (West 2014). The sentencing range for a class 4 felony is between one and three years in prison. See 730 ILCS 5/5-4.5-45(a) (West 2014).

¶ 37 The record reveals that at sentencing the parties presented evidence in aggravation and mitigation, including that defendant had a pharmacy technician degree, was an involved parent, and had family support, as well the fact that Cyntillia was in counseling and that defendant was on probation when he committed the instant offenses. Defendant also told the court that the "situation actually never really happened," that there were many inconsistencies and lies in the case, and asked for another chance so that he could go back to work. In sentencing defendant, the court noted that defendant felt like he had "done nothing wrong," and was on probation for a prior domestic violence conviction at the time of the instant offenses. We find that sentences of 18 months were not "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense[s]." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 38 Defendant however contends that the trial court did not adequately consider the hardship that his deportation would have on his family, and essentially asks this court to reduce his sentences so that he may petition to halt his deportation. However, that is not a proper exercise for a court of review as "the mere fact that a reviewing court might have weighed the factors differently than the trial court does not justify an altered sentence." *Raymond*, 404 Ill. App. 3d at 1069. Moreover, it is presumed that the court properly considered the mitigating factors

presented at sentencing and it is the defendant's burden to show otherwise. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). Here, defendant cannot meet that burden, as the trial court specifically addressed defendant's possible deportation when denying his motions to reduce sentences. The court stated that it remembered the facts of the case and Cyntillia's testimony and did not feel it was appropriate to vacate defendant's sentences and give him probation based upon "what going on with [his] deportation." The mere fact that the trial court did not afford the same weight to defendant's potential deportation as defendant thinks the court should have does not amount to an abuse of discretion and his argument must fail. See *Jones*, 2014 IL App (1st) 120927, ¶ 55 (because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the severity of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence).

¶ 39 For the foregoing reasons we affirm the judgment of the circuit court of Cook County.

¶ 40 Affirmed.